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A LIMITED LIABILITY LAW PARTNERSHIP

Labor and Employment Law

Some Non-Pandemic News – Key Changes to Hawaii Employment Laws

The Hawaii legislature passed three key employment-related laws during its last session, which were signed by Governor Ige on September 15, 2020.

1. Sexual Harassment and Sexual Assault Nondisclosure Agreements Prohibited (HB 2054)

Hawaii is not immune to the #MeToo movement, which spurred legislation across the country to prohibit Nondisclosure Agreements (NDAs) in cases of sexual assault, harassment and/or discrimination, including Congress' disallowance of federal tax deductions for settlements or payments related to sexual harassment and abuse that are subject to NDAs. Hawaii's Act addresses similar concerns that have been expressed nationally: that NDAs silence victims of sexual harassment and assault and, in some cases, enable harassers to continue to harass other employees; and that many victims do not report sexual harassment or assault out of fear of retaliation.

HB 2054 expands Hawaii Revised Statutes (HRS) Chapter 378 to prohibit an employer from requiring an employee, as a condition of employment, to sign an NDA that would prevent an employee "from disclosing or discussing sexual harassment or sexual assault occurring in the workplace, at work—related events, between employees, or between an employer and an employee." The new law further prohibits employers from retaliating against an employee for "disclosing or discussing sexual harassment or sexual assault."

There are three limited exceptions to the law: (1) Human Resources (HR) professionals who are acting in their official duties during an investigation, (2) employees requested to maintain confidentiality during an ongoing HR investigation, and (3) proceedings pursuant to HRS § 624-25.5 (relating to proceedings and records of peer review committees and quality assurance committees).

The Act is effective upon approval.

Practice Tip: Employers can still require confidentiality during an *ongoing* investigation of sexual harassment and/or sexual assault at the workplace,¹ but otherwise are prohibited from requiring confidentiality.

¹ This is consistent with current federal labor law that allows employers to require confidentiality during open investigations, but more closely scrutinizes whether confidentiality is justified after an employer completes the investigation.

2. Expansion and Clarification of Hawaii Family Leave Law (HB 2148)

Recognizing that there are a growing number of grandparents who are the primary caregivers of their grandchildren, the Hawaii Family Leave Law, HRS § 398-3(a)(2), and § 398-6(c), was expanded to allow employees to use HFLL to care for “grandchildren” with a serious health condition.

The Act further added the definition of a “sibling” (which was added as a covered family member in 2017) to mean “an individual who is a biological, adopted, or foster brother or sister; or a stepbrother or stepsister of an employee.”

The Act provides for an effective date of July 1, 2020.

Practice Tip: Employers who are subject to the HFLL should update their handbooks or applicable policies to reflect the changes to the HFLL.

3. Shortening the Lookback Period for Conviction Checks (SB 2193)

Concerned that Hawaii’s current arrest and court records law – with its 10-year lookback period – allows for adverse decisions from “unconscious biases” and continues to facilitate employment discrimination “against individuals who have a criminal history, but who have long since paid their debt to society and pose little to no risk to an employer or the public,” HRS § 378-2.5 was revised to shorten the lookback period to the most recent 7 years for felony convictions and the most recent 5 years for misdemeanor convictions, excluding periods of incarceration.

The revisions are reflected in HRS §§ 378-2.5(c) and (d). Section 378-2.5 otherwise remains unchanged.

The Act is effective upon approval.

Practice Tip: Employers who are subject to HRS § 378-2.5 should revise any post-offer documentation regarding conviction checks, both written and electronic, to reflect the shortened lookback period and ensure that employees responsible for conducting conviction checks only consider convictions within the shortened periods.

Our attorneys are available to assist with your questions and issues.