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2018 Legislative Update for Hawaii businesses and property owners

A. EMPLOYMENT

- **Salary history inquiry or consideration prohibited during job application or offer process; enforced wage secrecy and retaliation or discrimination prohibited**

Act 108 – SB2351 (effective 1/1/2019)

Inquiring about or relying on the salary history of a job applicant is now prohibited during the hiring process, including the negotiation of an employment contract, provided that this does not apply to internal transfer or promotion with current employer.

An employer shall not retaliate or discriminate against an employee for, nor prohibit an employee from, disclosing his or her wages, discussing and inquiring about the wages of others, or aiding or encouraging other employees to exercise their rights to do so.

- **Paid Family Leave; Legislative Reference Bureau**

Act 109 – SB2990 (effective 7/1/18)

Sunrise Analysis report of the impacts of and best framework for the establishment of paid family leave to be submitted to legislature by 9/1/2019

Status Quo: FMLA (12 weeks of unpaid leave for employer with 50 or more employees) Hawaii (4 week extension of unpaid leave to employer with more than 100 employees)

- **Workers' Compensation controverted claims; improved firefighters' access to coverage**

Act 107 – HB1778 (effective 7/5/18)

In the event of a controverted claim, the injured employee's private health care plan shall pay for or provide medical care, services, and supplies in accordance with the private health care contract. When the claim is accepted or determined to be compensable, the employer shall reimburse the private health care plan and the injured employee in amounts as authorized.

- **TDI; increased penalty for employers' failure to timely submit wage/job info**

Act 162 – HB2375 (effective 7/10/18)

Permits advanced practice registered nurses to certify an employee's disability. Increases the penalty an employer is assessed for failing to submit timely wage and employment information. Permits filing of an appeal of a decision related to temporary disability insurance at the various offices of the Department of Labor and Industrial Relations throughout the State. Allows the department to send notices of hearing electronically or by first-class mail. Clarifies that when the notice of hearing cannot be delivered to a party in the appeal, the notice may be given by online posting on the department's webpage. Allows the parties to a hearing to appear in person, via telephone, or by other communication devices.

B. CONFIDENTIAL PERSONAL INFORMATION

- **“Confidential personal information” redefined.**

Act 101 – SB2745 (effective 7/5/18)

With respect to criminal offense of the authorized possession of confidential information, confidential personal information means information in which an individual has a significant privacy interest, including one’s entire driver license No. or SSN, the entire ID number of a depository, investment, or credit account; an entire credit card number or a username and password that, when used in conjunction, provide access to an individual’s credit card account, medical records, or depository, investment or credit account.

- **Certain DHHL records shall not be required to be publicly disclosed or made open to inspection**

Act 29 – HB2318 (effective 7/1/18)

Such protected records include: loan applications, loan approval docs, underwriting findings, and financial assessments, consents to release personal info, designation of successors to a lease or application rights for a homestead lease, requests to succeed a homestead lease and request to succeed to application rights.

- **Found Electronic Devices shall be sanitized by information privacy and security council to ensure removal of personal info prior to returning the device to finder**

Act 92 – SB2738 (effective 6/29/18)

- **The New EU Data Privacy Rules – General Data Protection Regulation (GDPR)**

(effective 5/25/18)

C. LIQUOR LICENSES

- **Repeal of federal tax clearance requirement for liquor license applications, renewals and transfers**

Act 25 – SB2945 (effective 7/1/18)

- **New Class 2 “restaurant” liquor license**

Act 90 – SB2613 (effective 6/29/18)

Authorizes the county liquor commissions to issue new class 2 restaurant licenses before restaurants commence operation. Clarifies that class 2 restaurant licenses are transferrable. Requires an applicant for a new class 2 restaurant license or a transferee to certify that the applicant or transferee intends to and shall derive no less than thirty per cent of the establishment’s gross revenue from the sale of foods.

- **Class 10 Special License; Fundraising Events; Social Clubs**

Act 91 – SB2612 (effective 6/29/18)

Allows social clubs granted federal tax-exempt status to sell wine from the social club’s inventory to club members for off-premises consumption. Waives certain requirements for the issuance of class 10 special licenses. Enables class 10 special licensees to auction off liquor in sealed or covered containers or services that provide liquor.

- **Temporary Liquor License; Nonprofit Organizations; Fundraising Events**

Act 92 – HB2414 (effective 7/5/18)

Requires the county liquor commissions to reduce submission requirements for the issuance of temporary licenses for the sale of liquor for a period not to exceed one day for fundraising events by nonprofit organizations. Permits nonprofit organizations that have been issued a temporary liquor license for a fundraising event the ability to auction off, at a live or silent auction, liquor in sealed or covered containers or services that provide liquor. Defines “nonprofit corporation” to mean charitable 501(c)(3) organizations.

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D. ELECTRONIC FILING OF TAX RETURNS

Act 66 – HB2395 (effective 6/29/18)

Allows the Department of Taxation to require electronic filing of any tax return, application, report, or other document required for specific taxpayers. Establishes penalties.

Act 66 allows the Tax Department to require electronic filing for the following taxpayers:

- (1) For withholding tax filings by employers whose total tax liability exceeds \$40,000 for the calendar or fiscal year;
- (2) For income tax filings by taxpayers who are subject to tax under Tax on Corporations, Alternative Tax for Corporations or Corporations carrying on business in partnership.
- (3) For general excise tax filings by taxpayers whose total tax liability for the calendar or fiscal year exceeds \$4,000;
- (4) For transient accommodations tax filings by operators and plan managers whose total tax liability for the calendar or fiscal year exceeds \$4,000;
- (5) For filings by all taxpayers subject to tax under the Estate and generation-skipping transfer tax, Public Service company tax law, Taxation of banks and other financial corporations, fuel tax law, liquor tax law, cigarette tax and tobacco tax law, rental motor vehicle, tour vehicle and car-sharing surcharge tax.

E. REAL ESTATE

- **Occupancy of residential real property by sellers after closing of sale excluded from the Landlord-Tenant Code**

Act 194 – HB1869 (effective 11/1/18)

Buyers who take early occupancy of residential property prior to closing were already excluded from the Landlord-Tenant code prior to this new Act.

- **Consumer Credit Reporting Agencies**

Act 22 – HB2342 (effective 7/1/18)

Expands the methods (address, telephone or website) by which a consumer may request a security freeze. Specifies that a consumer credit reporting agency shall not charge a fee for placing, lifting, or removing a security freeze on a consumer's credit report or for placing or removing a security freeze on a protected consumer's credit report or records.

- **Transient Accommodations Tax**

Act 211 – SB2868 (effective 7/1/18)

Imposes registration requirements and the transient accommodations tax on transient accommodations brokers, travel agencies, and tour packagers that enter into arrangements to furnish transient accommodations at noncommissioned negotiated contract rates on their share of the proceeds. Applies to taxable years beginning after 12/31/18.

- **HARPTA Withholding**

Act 122 – SB508 (effective 9/15/18)

Amends the taxes withheld on the amount realized by nonresidents from the disposition of Hawaii real property from 5% to 7.25%. This withholding is often referred to as HARPTA, an acronym for Hawaii Real Property Tax Act. Applies to real estate dispositions that occur on or after 9/15/2018.

E. REAL ESTATE *continued*

- **“Cure of default” clarified for condominium nonjudicial foreclosure; priority of payment policy abolished; “pay first, dispute later” principle severely undermined**

Act 195 – HB1873 (effective 7/1/2018, sunset on 6/30/2020)

This new Act clarifies that the parties’ mere agreement on a payment plan is not considered a cure of default in an association’s nonjudicial foreclosure. So the association does not need to rescind and release the recorded notice of default and intention to foreclose until the payment plan is completed according to its terms or the owner pays off the delinquency.

A payment plan agreement will lead to a hold on the foreclosure process. If the owner defaults on the payment plan, the association can resume the proceeding to foreclose on its lien. However, unpaid fines the association imposes on the owner during the payment plan period shall not be deemed a default under the plan.

Board adopted and distributed priority of payment policy is no longer permissible, i.e., you cannot apply a portion of the common expense payment from an owner to first cover unpaid late fees, interest, fines or legal fees.

The “pay first, dispute later” principle is now limited to common expense assessments only. A unit owner may demand mediation contesting any fines, late fee, legal fees or other charges, except common expense assessments, prior to paying those charges.

A delinquent unit owner should request a clear written statement from the Association’s managing agent verifying the itemized amounts owed. The owner has 30 days from the date of such a statement to file for mediation. If the owner misses this deadline, the association may proceed with collection of all amounts owed. In contrast, if the owner timely requests for mediation, the association is obligated to cease collection and participate in the mediation, provided that if the mediation cannot be completed within 60 days or the parties are unable to resolve the dispute by mediation, the association can then proceed with collection of any and all amounts due from the owner.

- **Voluntary binding arbitration subsidized by the condo education trust fund; incentive for more mandatory evaluative mediation and less court action**

Act 196 – HB1874 (effective 1/2/2019, to be repealed & reenacted on 6/30/2023 subject to exceptions)

If you have attempted the subsidized evaluative mediation but are unable to resolve the dispute, you should consider proceeding to a voluntary binding arbitration; as such arbitration will be subsidized by the condo education trust fund under this new law. There is a \$6,000 cap on the subsidy per arbitration, but you may include additional issues and parties as long as all parties agree to that.

If one party requests for evaluative mediation, the other party cannot choose to do facilitative mediation instead, as that would be treated as a rejection to mediate.

Legislators imposed conditions and a \$1,500 ceiling on award of legal fees and costs to discourage parties from prematurely filing court action to compel for mediation.

This Act also clarifies that each party shall bear its own attorney’s fees and costs incurred in mediation, unless the parties agree otherwise in writing or obtains a court order or arbitration award providing otherwise for legal fees and costs.

There is a \$3,000 cap on the subsidy per mediation, but you may include additional issues and parties as long as all parties agree to that.

The court or arbitrator now has discretion to stay any action or proceeding for a period up to 90 days and refer the matter to mediation.

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E. REAL ESTATE *continued*

- **Civil penalty for knowingly misrepresenting an animal as a service animal**

Act 217 – SB2461 (effective 1/1/2019)

A person knowingly misrepresents an animal as a service animal will be subject to a civil penalty (1st violation - \$100 to \$250 fine; 2nd violation - \$500 fine or more).

A service animal is defined to be a dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.

- **Service of summons made easier in cases involving real property**

Act 094 – HB2033 (Effective 7/1/2018)

In an action where the real property owned by a defendant is not a resident of State of Hawaii, this new Act allows a plaintiff to serve the summons by certified, registered, or express mail with return receipt to the address of the defendant with the real property assessment office. Even if the defendant refuses to sign and return the receipt, service is completed upon delivery of the summons and complaint to the defendant.

- **Surcharge to Increase Funding for Public Education**

Proposed Constitutional Amendment; SB2922 (effective upon approval by the electorate)

Proposes amendments to the Constitution of the State of Hawaii to authorize the Legislature to establish, as provided by law, a surcharge on investment real property (for which the owner does not qualify for a homeowners exemption) to support public education.

- **Recording the deed and getting a new Certificate of Title number assigned are not equivalent to an entry of a certificate of title, even if it takes four years to get one.**

Wells Fargo Bank, N.A. vs. Omiya et al., SCWC-13-0000133 (Haw. 2018)

In this case, AOA Olikai Apt. Bldg. completed a non-judicial foreclosure sale at which Omiya purchased a unit for \$15,000. The AOA executed a quitclaim deed to Omiya and recorded the deed in the Land Court and obtained a Certificate of Title number. The mortgagee Wells Fargo filed a complaint against Omiya and the AOA in the Circuit Court, alleging that the sale of the property was not conducted legally because Omiya did not pay reasonable value and seeking cancellation of the new transfer Certificate of Title number. The Circuit Court granted summary judgment against Wells Fargo in favor of Omiya. On appeal, the Intermediate Court of Appeals upheld the Circuit Court's decision.

Due to the processing delay and backlog of land court recordings and registration in the State of Hawaii, the Assistant Registrar of the Land Court was nearly four years behind in physically producing and certifying a new certificate of title in the registration book for properties registered in the Land Court system.

HRS § 501-118 precludes a mortgagor or other person in interest from impeaching foreclosure proceedings after the entry of a new certificate of title for land court properties.

Our Supreme Court reversed the ICA's decision and held that assignment of a new certificate of title number is not the statutory equivalent of an entry of a certificate of title.

- **Condominium associations must have power of sale specified in their declarations or bylaws in order to nonjudicially foreclose on a unit. The foreclose statutes do not create the power of sale.**

Sakal v. AOA Hawaiian Monarch et al., CAAP-15-0000529 & CAAP-15-0000573 (Hawaii Intermediate Court of Appeals, 7/26/2018)

E. REAL ESTATE *continued*

- **Condo association assessments that become due after a debtor has filed for bankruptcy under Chapter 13 are dischargeable under 11 USC § 1328(a).**

Goudelock vs. Sixty-01 Association of Apartment Owners, Case No. 16-35384 (9th Cir. 2018)

Our 9th Circuit adopted the 7th Circuit's lines of reasoning as stated in *Matter of Rosteck*, 899 F.2d 694 (7th Cir. 1990), and held that post-petition condominium association assessments are dischargeable, when the owner surrenders the property in the Chapter 13 bankruptcy, as the obligation to pay association assessments is an unmatured contingent debt under the Bankruptcy Code that arose pre-petition (when the debtors purchased the property) and that merely became mature when the assessments became due post-petition. The Court commented that this is consistent with the Bankruptcy Code's goal of providing debtors a fresh start.

The 9th Circuit disagreed with the 4th Circuit's opposite view in *In re Rosenfeld*, 23 F.3d 833 (4th Cir. 1994) that the obligation to pay association assessments ran with the land and arose each month from the debtor's continued post-petition ownership of the property.

- **The sale of a corporation's stock by the corporation's shareholders, even if it constitutes a controlling interest thereof, is not an assignment of the corporation's lease unless the lease explicitly provides the contrary.**
Coggins et al. v. Kona Seaside, Inc., CAAP-15-0000904 (Hawaii Intermediate Court of Appeals, 8/13/18)
- **Vacation rental home is a "public accommodation", and owner cannot discriminate based on sexual orientation of guests, even if owner has religious objection.**
Cervelli v. Bufford, CAAP-13-0000896 (Hawaii Intermediate Court of Appeals, 2/23/18)
- **Consumer sustains damages and has standing to sue hotels and restaurants which breach their duty to either distribute the entirety of the service charge directly to non-management employees who served the consumers as "tip-income" or to disclose its practice of withholding the service charge.**
Kawakami v. Kahala Hotel Investors, LLC, SCWC-11-0000594 (Hawaii Supreme Court, 6/29/18)
- **Honolulu: Fire Sprinkler Retrofit and Life Safety Evaluation in High Rise Residential Buildings**
Ordinance 18-14 – Bill 69 (2017) (Effective 5/3/2018)

Buildings with exterior corridors and buildings less than 10 floors are exempt.

This ordinance updates the fire code to require fire sprinkler retrofitting in high-rise residential buildings; existing buildings not protected by an automatic fire sprinkler system shall be subject to a life safety evaluation code assessments (16-item score recording matrix), which needs to be conducted by a licensed design professional within 3 years from May 3, 2018. Buildings shall comply by passing the building fire and life safety evaluation within 6 years from May 3, 2018. An extension may be granted if automatic fire sprinkler systems are used to achieve compliance. All buildings must continue to maintain a passing status on their respective building fire and life safety evaluation code assessments.

A condominium association or cooperative housing corporation may opt out of the automatic fire sprinkler system requirement, provided that a majority of unit owners or shareholders vote to opt out within 3 years of the completion of the building fire and life safety evaluation at a regularly scheduled or special meeting of the association or corporation, as long as the building receives a passing score through the implementation of alternative fire prevention and fire safety systems. However, buildings that have opted out shall provide verifiable public disclosure of its action to all current and future owners and residents, including sign posted in the building's public notification areas and real estate sales disclosures.

Each building owner shall file a written statement of its intent to comply with this new law with the Authority Having Jurisdiction for approval within 180 days from May 3, 2018.



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E. REAL ESTATE *continued*

Compliance with the automatic fire sprinkler system throughout the building or alternative fire prevention and fire safety systems shall be achieved as follows:

Common areas for building 20 floors or higher – within 8 years from May 3, 2018

Common areas for building 10 to 19 floors – within 10 years from May 3, 2018

All buildings regardless of the number of floors – within 12 years from May 3, 2018

An extension to 15 years from May 3, 2018 may be approved if compliance using an automatic fire sprinkler system in the common areas related to building egress path has been achieved.

- **Honolulu “monster house” moratorium**

Ordinance 18-6, Bill 110 (2017), CD2, FD1 (effective 3/13/2018)

For further information on the new legislation you are interested in, please visit <https://www.capitol.hawaii.gov/> or stay tuned for our firm’s next Legal Alert newsletter by visiting our website at www.hawaiilawyer.com.

If you have any further questions or want to request for a copy of this handout, please feel free to contact the author, Na Lan, at (808) 526-3617 or nl@hawaiilawyer.com.