

## **ADMINISTRATIVE INITIATIVE DISCLAIMER**

This Administrative Initiative is designed to provide general information in regard to current initiatives, opinions, policies, and/or guidelines of the Hawaii Department of Labor and Industrial Relations. It is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable in all situations. This Administrative Initiative does not replace applicable Hawaii Revised Statutes or Hawaii Administrative Rules. If additional clarification is required, the applicable division or agency administrator should be consulted.

### **A. Purpose**

This Administrative Initiative provides guidance on how the State of Hawaii's Division of Occupational Safety and Health ("HIOSH") assesses whether an occupational safety and health citation is subject to an affirmative defense employers may assert, often referred to as "unpreventable employee misconduct," "isolated occurrence," "isolated incident," or "isolated misconduct." This Administrative Initiative will simply refer to the defense as the "employee misconduct defense."

### **B. Analytical Framework**

The underlying premise of an employee misconduct defense is that it would be unfair to cite an employer for conditions that were unpreventable and unlikely to recur. It relies on an assessment that an employee's violation of a work rule was idiosyncratic, aberrant, and not reasonably foreseeable, thus making it unfair and unlikely to promote safety and health to cite the employee's employer.

To succeed in establishing an employee misconduct defense, an employer must prove it has met each of the following four requirements:

- (1) It established an effective work rule designed to prevent the violation being cited;
- (2) It effectively communicated its work rule to all its employees;
- (3) It took reasonable steps to discover violations of its work rule; and
- (4) It effectively enforced its work rule whenever violations occurred consistent with any disciplinary policy it had or implemented.

If an employer fails to meet even one of these requirements, the employee misconduct defense will not apply. In other words, unless an employer can prove it has met all four requirements, its employee misconduct defense will fail.

**1. Establishing An "Effective Work Rule."**

The effective work rule requirement means an employer must establish a work rule that requires or prohibits certain conduct. It also means an employer must clearly communicate the work rule to its employees so that its mandatory nature is plain and its scope is clearly understood.

To be effective, the work rule must not only prohibit the impermissible conduct but also be as strict as HIOSH's safety and health standards. Stated another way, the work rule must be clear and specific enough to prevent violations of HIOSH's safety and health standards. If strict compliance with the literal terms of a work rule gives employees less protection than HIOSH's safety and health standards, the work rule will be insufficient and ineffective.

Some employers, based on the type and size of their contracts and number of employees they have, are not required to have written safety and health rules. Not having a written work rule, however, makes it harder for an employer to prove it had an effective work rule in place. An unwritten work rule naturally raises questions about its specificity and effectiveness.

In contrast, having an clear, effective, and well-written work rule helps to reduce or remove such questions, thereby allowing an employer to show it properly established and communicated an effective work rule to its employees.

**2. An Effectively Communicated Work Rule.**

Whether a work rule has been effectively communicated depends on an employer's overall safety and health training, work instructions, and hazard warnings for all employees, including supervisors.

Effective communication means the work rule has been given to all employees, including, but not limited to, managers, supervisors, foremen, crew leaders, current employees and new hires.

It also means all employees have been trained on the work rule and fully understand its meaning and scope. Simply giving employees a written safety and health manual without ensuring they actually read and understand its contents is not enough.

Instead, an employer must train and confirm its employees actually understand its work rule. In this regard, records should be kept showing the type of training provided, who provided it, when it was conducted, and the names of all employees who received the training. Well-documented training records help to show an employer's work rules were effectively communicated to its employees.

Training must also be provided in a manner consistent with an employer's policies and procedures for such. For example, if an employer's policies and procedures require monthly training but the employer only trains its employees twice a year, effective communication will be hard to prove. Once an employer establishes a training schedule for employees, the schedule should be diligently followed, not ignored or bypassed.

Employees must also be retrained if violations of a work rule persist, repeatedly occur, or show that employees are likely to disregard the work rule. Retraining should also be provided where a supervisory employee commits or allows violations of a work rule. Such conduct by a supervisory employee tends to show the work rule has not been effectively communicated or implemented. As discussed below, such supervisory conduct may also show enforcement is either non-existent or lax.

### **3. Reasonable Steps to Discover Violations.**

Apart from establishing a work rule and communicating it to employees, an employer must also make reasonable and diligent efforts to discover and stop violations of its work rule.

Simply expecting or relying on employees to follow a work rule is not enough. An employer must try to discover violations and ensure its employees are complying with its work rule. Not taking such proactive steps may negate an employee misconduct defense even if an employer has no actual knowledge that a violation exists.

How much an employer must do to show it has used reasonable diligence to discover and correct violations will depend, in part, on its working practices and the conduct of its employees.

Some factors to consider include the following:

- Does the employer have a monitoring policy to ensure employees comply with its work rules?
- Does the employer routinely follow its monitoring policy or regularly observe its employees to ensure compliance with its work rules?
- How often does the employer monitor its employees?
- Who does the monitoring? Is this person qualified to monitor employees? Does this person understand the employer's work rules?
- Is the monitoring documented or recorded?
- Are monitoring checklists used?
- Does the employer make unscheduled checks to ensure employees are not violating its work rules?
- Have employees generally complied with the work rules or do violations periodically occur?
- If violations have occurred: How often? How many instances? By how many employees? Were any supervisory employees involved? How long did the violations persist? Were the violations

in plain view or easily discoverable? When did the violations last occur?

Whether an employer can show it exercised reasonable diligence to discover violations of its work rule will often depend on these and other factors.

#### **4. Effective Enforcement.**

The effective enforcement requirement focuses on an employer's efforts to enforce its work rules. It includes an assessment of an employer's disciplinary plan and its response to work rule violations in light of that plan.

Effective enforcement will be hard, if not impossible, to prove where an employer ignores violations of its work rule, fails to discipline non-complying employees, does not have a disciplinary plan, or fails to follow the disciplinary plan it has. Generally, effective enforcement also requires the existence of a progressive disciplinary plan, consisting of increasingly harsh measures.

Factors relevant to assess whether an employer has effectively enforced its work rule include the following:

- Has the employer consistently enforced its work rule by immediately correcting all violations it finds?
- Is there proof of actual enforcement?
- Does the employer document its disciplinary actions?
- How has employer responded to prior violations of the work rule?
- Has the employer been previously cited for the violation in question?
- Does the violation involve a single employee or a group of employees?

- Have violations been committed by supervisory employees?
- Have all violations resulted in discipline or has the employer occasionally ignored infractions?
- Has the employer used a progressive disciplinary plan with increasingly harsh measures or does it simply issue verbal warnings for all violations including repeats?
- If the employer has a disciplinary plan, has it consistently followed this plan to correct violations?

Other factors may also be relevant in determining whether an employer has effectively enforced its work rule. The outcome will depend on whether an employer has effectively responded to all violations of its work rules and consistently enforced them by sanctioning or disciplining all non-complying employees.

### **C. CONCLUSION**

By now it should be fairly evident that the employee misconduct defense is not easy to prove. It will only apply to an employer who earnestly tries to create and maintain safe and healthy work place. Moreover, it will not apply unless an employer can prove compliance with the following four requirements: it has established an effective work rule; it has effectively communicated the work rule to all its employees; it has taken reasonable step to discover violations of the work rule; and it has effectively and consistently enforced the work rule whenever violations occurred. An employer must prove it has met each of the four requirements. Absent such proof, the employee misconduct defense will not apply.