LEGAL NOTICE
Notice of Proposed Rulemaking
Public Hearing

Pursuant to Chapter 91, Hawaii Revised Statutes (HRS), notice is hereby given that the Department of Labor and Industrial Relations (DLIR), Hawai'i Civil Rights Commission (HCRC), will hold a public hearing to amend Title 12-46, Subchapter 9, Hawaii Administrative Rules (HAR) relating to disability discrimination in employment. The hearing will be held on the following date, time and location:

HONOLULU, OAHU	November 22, 2011 4:00 – 6:00 p.m. Keelikolani Building 830 Punchbowl Street Rooms 310, 313 and 314 Honolulu, Hawai'i 96813

The proposed amendments to HAR 12-46 Subchapter 9 are to minimally conform state law protections against disability discrimination in employment to the federal Americans with Disabilities Act Amendments Act of 2008, P.L. 110-325 (ADAAA) and its implementing regulations, 29 C.F.R. Part 1630, issued by the Equal Employment Opportunities Commission (EEOC). Pursuant to Act 30, Sp. 2009 and Act 139, L. 2010, the legislature directed the HCRC to minimally conform its administrative rules to the ADAAA within one year after the EEOC publishes its final regulations interpreting the ADAAA. The EEOC issued its final regulations on March 25, 2011.

The ADAAA was enacted to correct certain U.S. Supreme Court decisions that narrowly construed the definition of "disability" under the Americans with Disabilities Act (ADA). Therefore, the purpose of the ADAAA was to clarify certain terms used to define "disability" so that the determination of whether a person has a disability would not demand extensive analysis, and to make it easier for people with a wide range of impairments to establish coverage under the act. This shifts the focus of cases brought under the ADA from whether a person meets the definition of "disability" to whether covered entities have complied with their obligations and whether discrimination has occurred. The key terms revised in the ADAAA were: "physical or mental impairment", "being regarded as having such an impairment", "major life activities", and "substantially limits". Changes were also made to provisions regarding reasonable accommodations, permitted activities, and defenses.

Accordingly, the proposed Hawaii Administrative Rule changes also amend certain terms used to define "disability" under H.A.R. §12-46-182 and certain provisions regarding disability discrimination, failure to make reasonable accommodation, permitted activities, and defenses under H.A.R. §§12-46-183, -187, -192 and -193.

The proposal rule changes will affect small businesses that have less than 15 employees who would otherwise not be subject to the requirements of the ADAAA. The main burden will be on small businesses to engage in an interactive process to determine whether they can make accommodations requested by an applicant or employee with a disability, or whether the accommodations pose an undue hardship on the operation of their businesses

The proposed changes to HAR 12-46 Subchapter 9 include the following:

1. General provisions

Section 12-46-181 is amended to reflect that Acts 30 and 139 were passed in 2009 and 2010, respectively, to minimally conform state law to the ADAAA and to direct the HCRC to amend its administrative rules accordingly

2. Definition of "being regarded as having such an impairment"

The definition of "being regarded as having such an impairment" in H.A.R. §12-46-182 is amended so that it no longer requires a showing that an employer perceived the person to be substantially limited in a major life activity. Therefore an applicant or employee who is subjected to a prohibited action because of any actual or perceived impairment that is not transitory and minor will meet the "regarded as" definition of disability. "Transitory" is defined as lasting or expected to last six months or less. Two new examples are also provided.

3. Definition of "disability"

The definition of "disability" in H.A.R. §12-46-182 is amended to reflect the above mentioned change in the "regarded as" prong of the definition.

4. Definition of "major life activities"

The definition of "major life activities" in H.A.R. §12-46-182 is expanded to include two non-exhaustive lists covering basic activities that most people in the general population can perform as well as major bodily functions

5. Definition of "physical or mental impairment"

The definition of "physical or mental impairment" in H.A.R. §12-46-182 is expanded to include certain impairments listed in the ADAAA and EEOC regulations that were not in the rules and to clarify that pregnancy-related impairments that substantially limit a major life activity or are covered under the "record" or "regarded as" prongs may be disabilities.

6. Definition of "qualified"

The definition of "qualified" in H.A.R. § 12-46-182 is slightly amended to eliminate use of the term "qualified individual with a disability" consistent with the ADAAA and EEOC regulations that eliminate that term.

7. Definition of "reasonable accommodation"

The definition of "reasonable accommodation" in H.A.R. §12-46-182 is amended to include modifications or adjustments for employees with impairments that no longer substantially limit major life activities to attend follow-up or monitoring appointments.

8. Definition of "substantially limits"

The definition of "substantially limits" in H.A.R. §12-46-182 is amended to clarify that a limitation need not significantly or severely restrict a major life activity and to clarify the terms "condition", "manner" or "duration" which may be considered. The definition is also amended to include consideration of non-ameliorative effects of mitigating measures, impairments that are episodic or in remission if they would substantially limit a major life activity when active, and multiple impairments that combine to substantially limit a major life activity.

9. Discrimination prohibited

H.A.R. §12-46-183 is slightly amended to delete the language "qualified person with a disability" consistent with the ADAAA and EEOC regulations that eliminate that term.

10. Reasonable accommodations

H.A.R. §12-46-187 is amended to delete the term "qualified person with a disability" and to clarify that a covered entity is not required to make a reasonable accommodation to a person who is solely regarded as having a disability.

11. Specific activities permitted

H.A.R. § 12-46-192 is amended to add the provision clarifying that while religious institutions may give preference in employment to individuals of that religion, or may make a selection calculated to promote the religious principles of that institution, these entities may not discriminate on the basis of disability against an individual who meets such religious criteria.

12. Defenses

H.A.R. §12-46-193 is amended to include the defense to a person claiming coverage under the "regarded as" definition of disability that the impairment is or would be transitory and minor.

A copy of the proposed rule amendments will be made available for public viewing from the first working day that the legal notice appears in the Honolulu Star-Advertiser, Hawaii Tribune-Herald, West Hawaii Today, The Maui News and The Garden Island, through the day the public hearing is held, from Monday – Friday between the hours of 8:00 a.m. – 4:00 p.m. at the Hawai'i Civil Rights Commission, 830 Punchbowl Street, room 411, Honolulu, Hawai'i 96813.

A copy of the proposed rules may also be viewed at: http://hawaii.gov/labor/hcrc. Copies can also be mailed to any interested party, upon written request to the Hawai'i Civil Rights Commission, 830 Punchbowl Street, room 411, Honolulu, Hawai'i 96813. Please enclose a self-addressed stamped 9-1/2" x 4-1/8" (size 10) envelope with $0.64 postage.

Interested persons may present written or oral testimony at the time of the public hearing. All persons wishing to submit written testimony are requested to submit 7 copies of their written testimony before the public hearing to the Hawai'i Civil Rights Commission, 830 Punchbowl Street, room 411, Honolulu, Hawai'i 96813, or 7 copies may be submitted to the presiding officer at the public hearing. The public hearing will be continued, if necessary, to a later time, date, and/or place announced at the scheduled hearing.

Interested persons unable to attend the public hearing shall submit 7 copies of their written testimony before the public hearing to the Hawai'i Civil Rights Commission, 830 Punchbowl Street, room 411, Honolulu, Hawai'i 96813. All submissions for the record must be received at or prior to the scheduled public hearing.

The public hearing is accessible for individuals with disabilities. Auxiliary aids and services are available upon request by calling the Hawai'i Civil Rights Commission offices at: (808) 586-8659 (voice), (808) 586-8692 (TDD). A request for an auxiliary aid or service should be made no later than 10 working days prior to the public hearing.

Dated: September 20, 2011

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DWIGHT TAKAMINE
Director
Department of Labor and Industrial Relations