

# FREQUENTLY ASKED QUESTIONS ON THE HAWAII FAMILY LEAVE LAW

## Chapter 398, Hawaii Revised Statutes Including Act 44 Amendments

DLIR	- Department of Labor and Industrial Relations
FMLA	- Family and Medical Leave Act (Federal law)
HFLA	- Hawaii Family Leave Law (State law)
TDI	- Temporary Disability Insurance

### Coverage

1. Q: How does an employer count employees in order to determine coverage under the HFLA?

A: The law applies to an employer who employs **one hundred or more** employees for each working day during each of twenty or more calendar weeks in the current or preceding calendar year.

- The employee count to determine “one hundred or more” includes all workers or employees on the payroll who work within the State of Hawaii, including:
  - (1) Employees at all locations of an employer within the State of Hawaii;
  - (2) All employees maintained on the payroll, including part-time, temporary or intermittent employees, regardless of their months of service or eligibility for the employer's benefit plan;
  - (3) Employees on paid or unpaid leaves of absence, including family leave or disciplinary suspension.
- The count does not include:
  - (1) Employees who are laid off, whether temporarily, indefinite or long-term; or
  - (2) Employees at mainland or international locations who do not work in the State of Hawaii.
- Employers include any individual or organization, including any instrumentality of the State or its political subdivisions, any partnership, association, trust, estate, joint stock company, insurance company, domestic or foreign corporation, receiver or trustee in a bankruptcy, or the legal representative of a deceased person.

2. Q: What employees are eligible for HFLA?

A: An employee is a person who performs services for at least **six consecutive months** for wages under any contract of hire, written or oral, expressed or implied, with an employer, including a full-time, part-time, temporary, casual, on-call or intermittent worker. Unlike the federal Family and Medical Leave Act, there is no requirement in the HFLA that an employee work a minimum number of hours within the six-month period.

Consecutive employment means continuous employment with no break in service, such as by resignation, termination or layoff. Paid periods of leave or authorized unpaid leaves of absence are not considered breaks in service.

3. Q: What happens to an employee who began his/her family leave in June 2003 and continued on leave into July? Does the requirement for paid sick leave apply only to those leaves that began after June 30, 2003?

A: Any family leave taken prior to July 1, 2003 would be subject to the law that was in effect before Act 44; i.e., no substitution of accrued and available sick leave unless: (1) sick leave is granted for family leave purposes by employer policy or practice; or (2) upon mutual agreement by the employer and employee.

Act 44 requirements would not be applied retroactively to family leave taken prior to July 1, 2003. It would apply only to the portion of family leave taken **from** July 1, 2003, so the employee could apply up to 10 days of accrued and available sick leave for family leave for this period.

#### **Benefits/Entitlement:**

4. Q: Is an employer who does not provide sick leave now required to have a sick leave policy?

A: Act 44 does not require employers to create a sick leave plan if they do not currently provide sick leave to employees. Further, if an employer does not provide paid sick leave to certain employees, such as on-call or part-time workers, the employer is not required to extend paid sick leave to those employees.

5. Q: If an employer's sick leave plan provides less than 10 days of paid benefits, is the employer required to add additional sick leave days for employees to use for family leave purposes?

A: No. Only the amount of sick leave benefits that are accrued and available for employees to use for their own sickness must be allowed to be used for paid family leave.

6. Q: If an employee is eligible under the HFLL (six months of employment), but not under TDI or the employer's sick leave plan, are paid family leave benefits required?

A: If the employee has no accrued and available sick leave, and the employer provides no other paid leave, such as vacation, then the family leave would be unpaid leave.

7. Q: If an employee uses all of his/her sick leave for his/her own disability, must an employer later provide additional days for him/her to use for family leave purposes?

A: No. There is no requirement to provide more sick leave than what the employee is entitled to under the employer's sick leave plan.

8. Q: If the employee uses up all of his/her sick leave for family leave purposes, and then the employee later becomes sick, must the employer provide additional sick days for the employee's illness?

A: No, unless the employer has an "equivalent sick leave plan" under the TDI Law.

9. Q: If an employer's sick leave plan allows an employee to receive paid sick leave benefits for the employee's own illness without a doctor's certificate, can the employer require medical certification for the employee to use paid sick leave for family leave purposes?

A: Yes, the HFLL allows employers to require certification from the employee for the employee's request for family leave to care for a family member with serious health condition.

10. Q: If the employer's sick leave policy includes an unpaid waiting period before sick leave benefits are payable for an employee's illness, can the employer use the same waiting period for sick leave benefits to be payable for family leave purposes?

A: If the employer's policy or collective bargaining agreement provides for a waiting period, Act 44 does not alter this arrangement.

11. Q: If an employer's sick leave policy provides that employees must exhaust any accrued **vacation** *before* using their **sick** leave, would this practice be allowed for an employee taking family leave?

A: If this is the employer's sick leave policy, Act 44 does not alter this arrangement. See #12 also.

12. Q: An employer's family leave policy requires that an employee first exhaust his/her **vacation** *before* using accrued and available **sick** leave for **family** leave. **However**, the employer's sick leave policy does not require an employee to exhaust his/her vacation or other paid leave before using sick leave for his/her own illness. Is this employer practice allowed?

A: No. Act 44 specifies that an employer must permit an employee to use up to 10 days of accrued and available sick leave for family leave purposes. If the employer's policy has no similar requirement for the use of sick leave for the employee's own illness, the sick leave is considered "accrued and available", and the employer must permit the employee to use the sick leave for family leave. The HFLL also provides that the employer, except for the ten days provided at the election of the employee by Act 44, or the employee may substitute *other* paid leaves, such as vacation, for any part of the four-week period of family leave.

13. Q: If a company has a paid time-off plan (PTO), which can be used for any purpose including sick leave, and which must be used before an extended sick leave bank becomes available, what is the employer obligated to provide to the employee?

A: If the PTO can be used for any purpose, it would fall within the definition of sick leave under Act 44, and the employer would be required to permit an employee to use up to 10 days of PTO for family leave. The employer's requirement to use PTO before an extended sick leave bank becomes available would not be a violation of the HFLL.

14. Q: If a collective bargaining agreement states that sick leave is to be used only for the employee's own illness, does Act 44 supersede the agreement?

A: In general, Act 44 will prevail.

15. Q: Is paid sick leave under Act 44 available to an employee for the birth of the employee's child who does not have a serious health condition?

A: Yes. The new law specifies that the use of accrued and available sick leave is "for family leave purposes," which includes the birth or adoption of a child.

16. Q: If an employee does not request paid sick leave for family leave, does an employer have to notify the employee of the right to use sick leave for family leave?

A: DLIR believes that an employer who provides paid sick leave should notify its employees of their right to use up to 10 days of sick leave for family leave so that employees are aware of that option.

#### **Relationship to Federal Family and Medical Leave Act (FMLA):**

17. Q: Can a parent take family leave to care for a child over the age of 18 with a serious health condition?

A: Yes. Employees may take family leave to care for a child of any age, not just a minor.

18. Q: Does the HFLL allow for intermittent leave?

A: Yes, HFLL [Section 398-3(b), HRS] allows family leave to be taken intermittently, including for birth or adoption.

19. Q: Are a husband and wife both permitted to use accrued and available sick leave for the same family leave purpose at the same time?

A: Yes. Unlike the FMLA, the HFLL does not restrict either a husband or wife from using family leave, and does not require that they share the four-week period of family leave. Act 44 further requires an employer who provides sick leave for employees to permit **any** qualifying employee, including husbands and wives, to use their own accrued and available sick leave for family leave purposes.

20. Q: If an employee uses 10 days of accrued and available sick leave under the HFLL to care for a grandparent-in-law with a serious health condition, is the employee entitled to an additional 12 weeks of FMLA for the serious health condition of a spouse?

A: For interpretation of the FMLA, we recommend contacting the USDOL, Wage and Hour Division at 541-1361 or at <http://www.dol.gov/dol/compliance/comp-fmla.htm>. Because the definition of "parent" under the Hawaii law may be broader than under the FMLA, the family leave taken for a grandparent-in-law may not offset the 12-week FMLA entitlement (similar response for grandparents, parents-in-law, and reciprocal beneficiaries who may not be eligible under FMLA).

**Family Leave Questions Relating to the Temporary Disability Insurance Law (TDI)**

21. Q: The employer currently provides TDI coverage for employees through an authorized TDI carrier. Additionally, the employer provides sick leave benefits to these employees. Are the sick leave benefits subject to Act 44?

A: Yes, the employer must permit an employee to use the employee's accrued and available sick leave benefits for the purposes of the Hawaii Family Leave Law, not to exceed 10 days, if the sick leave amount is above the TDI requirement.

22. Q: The employer has an approved self-insured TDI plan that provides increasing benefits based on years of service. Benefits range from three weeks to a maximum of 26 weeks of benefits, based on the number of years that the employee worked. Can the employee use these benefits under Act 44?

A: No. Employers who are self-insured must pay TDI benefits to a disabled employee in accordance with the actual plan that was filed and approved by DLIR. Act 44 does not provide that an employer diminish an employee's accrued and available sick leave below the amount required under its TDI plan.

23. Q: The employer has an approved self-insured TDI plan that provides benefits at 100% for three weeks (15 days) with no waiting period per benefit year. For each year of service this employer gives their employees 15 days of sick leave. However, only 5 days can be carried over to the next year to a maximum accumulation of 35 days. Can the employees use these sick leave benefits under Act 44?

A: Yes, any accrued and available sick leave benefits in excess of the 15 days that are provided in the employer's approved TDI self-insured plan can be used for family leave purposes, not to exceed 10 days unless the employer's plan provides for greater benefits.

24. Q: The employer's TDI plan provides for a combined sick leave and statutory TDI policy that provides benefits through an authorized TDI carrier upon exhaustion of the employee's sick leave benefits. The employer has filed this TDI plan with the DLIR and received approval of this partially self-insured plan. Can the employee utilize his/her sick leave benefits for his/her family members?

A: No, the employer filed and received approval for the employer's combined self-insured and insured statutory TDI policy. Thus, the benefits provided are used to comply with the TDI law and are not available for family leave purposes.

25. Q: An employer only has an approved self-insured plan that provides statutory TDI benefits. Can an employee apply for family leave utilizing the statutory TDI benefits?

A: No, benefits under a statutory TDI plan can only be used for the employee's own illness.

26. Q: The employer and union have entered into a collectively bargained agreement whereby an employee must exhaust sick leave benefits before statutory TDI benefits commences with an authorized TDI carrier. However, no union agreement was filed with DLIR. Only a statutory TDI policy is filed with DLIR covering all employees. Can the union employee file under Act 44?

A: In general, the employee should be able to use his/her accrued and available sick leave because DLIR files reflect that employer is covered under a statutory TDI policy.

27. Q: The employer and union have entered into a collectively bargained agreement whereby the agreement states that an employee is entitled to statutory TDI benefits upon exhaustion of sick leave benefits. The agreement does not specify the number of sick leave days to which an employee is entitled. Agreements were filed and approved by DLIR. Can the union employee use his/her sick leave benefits for family leave under Act 44?

A: In general, the employee can utilize accrued and available sick leave benefits for family leave purposes since this employee is entitled to statutory TDI benefits.



*The foregoing information is provided for reference purposes only. A determination on the applicability of the statute to a particular situation will be based on the actual facts of the case.*