# Public comments received in 2024

Monday, November 4, 2024

To: Dr. William Puette, Chair
Jon K. Matsuoka, Arsima Muller, and Jo-Ann Adams, Comissioners of the Hawai‘i Civil Rights Commission

From: Bill Hoshijo

**Public Hearing - HCRC**

For 26 years, until my retirement in March 2023, I had the honor of serving as the Executive Director of the Hawai‘i Civil Rights Commission (HCRC). For all those years I worked with HAR Title 12, Chapter 46, on a daily basis, so I am familiar with the rules.

Engaging in rulemaking is one of the most important of the Commission's powers, as the rules provide controlling guidance to enforcement staff and the public, including businesses, employers, landlords, attorneys, the courts, and those who complain of unlawful discrimination.

Our administrative rules have the full force and effect of law.

HRS § 368-3(9) authorizes the Commission to adopt rules under chapter 91, the Hawai‘i Administrative Procedures Act (HAPA).

The procedure for adoption of rules is governed by HRS § 91-3.

Att. Gen. Op. 72-5 opines:

> [W]e believe that Section 91-3, Hawaii Revised Statutes, is limited in its applicability to rules "having the force and effect of law." To put it another way Section 91-3 is limited in its applicability to rules adopted, amended or repealed pursuant to a valid delegation of legislative power, **which rules, when adopted in accordance with**

> **the procedures set forth in the HAPA, have the force and effect of law.**

"Generally, administrative rules and regulations promulgated pursuant to statutory authority have the force and effect of law." *State v. Kimball*, 54 Haw. 83 at 89 (1972).

And,

> **Administrative rules, like statutes, have the force and effect of law.** *State v. Kirn,* 70 Haw. 206, 208, 767 P.2d 1238, 1239–40 (1989) (citing *Abramson v. Board of Regents, University of Hawaii,* 56 Haw. 680, 548 P.2d 253 (1976), and *Aguiar v. Hawaii Hous. Auth.,* 55 Haw. 478, 522 P.2d 1255 (1974)); *Baldeviso v. Thompson,* 54 Haw. 125, 129, 504 P.2d 1217, 1221 (1972) (citing *State v. Kimball,* 54 Haw. 83, 503 P.2d 176 (1972)). Kotis has not alleged any infirmity in the promulgation of HAR § 11–175–45(b)(3). Accordingly, inasmuch as we discern no conflict between HRS § 11–175–45(b)(3) and the governing statutes, Kotis's argument that the circuit court acted without authority fails.
>
> *State v. Kotis*, 91 Haw. 319 at 331 (1999). (emphasis added).

## COMMENTS

The Proposed Rules Make a number of changes, some "housekeeping" in nature, some updating the rules to clarify standards. I offer comments on two proposed changes: 1) amendment of the §12-46-1 definition of employment; and 2) amendment of §12-46-187 to add a reference to reasonable accommodation for registered medical cannabis users with a disability,

### Amendment of the §12-46-1 definition of employment

The proposed rule amendment reads:

> §12-46-1 Definitions.
>
> * * * * *

"Employment" shall be as defined in section 378 1, HRS[-], and includes services performed by an individual for wages or under any contract of hire regardless of whether the common-law relationship of master and servant exists unless it is shown that: (l) The individual has been and will continue to be free from control or direction over the performance of the service, both under the individual's contract of hire and in fact; (2) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service.

The threshold jurisdictional issue of whether a complainant in a case alleging a violation of HRS chapter 378, part I, is an employee or an independent contractor remains a confounding one. The proposed rule adopts a known standard, commonly known as the ABC test. The ABC test is used by Hawai‘i state Unemployment Insurance (UI), Temporary Disability Insurance (TDI), and Prepaid Health Care (PHC) to determine whether an employment relationship exists.

The HCRC determination of whether a person is an independent contractor, not an employee, currently applies an impossibly complicated test adopted by the Commission in *Santiago vs. Iolani Swim Club, D.R. 92-007 (1993). Santiago* incorporates factors from the common law, hybrid and economic realities tests, without any one factor controlling.

**Amendment of §12-46-187 to add a reference to reasonable accommodation for registered medical cannabis users with a disability**

The proposed rule amendment reads:

§12-46-187 Failure to make reasonable accommodation. (a) It is unlawful for an employer or other covered entity not to make reasonable accommodation to the known physical or mental limitations of an applicant or employee with a disability who is otherwise qualified, unless such employer or entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business. An employee does not have to specifically

request a "reasonable accommodation", but must only let the employer know that some adjustment or change **to the employer's workspace or the employer's policies, such as leave, zero tolerance, or drug testing policies, including but not limited to tests for medical cannabis,** is needed by the employee to do a job because of limitations caused by a disability**. Nothing in this subsection shall be construed to require the employer to make an accommodation for the possession or use of drugs prohibited under state law.**

(b) To determine the appropriate reasonable accommodation, it shall be necessary for an employer or other covered entity to initiate an interactive process, after a request for an accommodation, with the person with a disability in need of the accommodation. A request for a reasonable accommodation may be made by a third-party, such as a healthcare professional, acting on behalf of the individual in need of an accommodation. This process shall identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(c) It is unlawful for an employer or other covered entity to deny employment opportunities to an applicant or employee with a disability based on the need of such employer or entity to make reasonable accommodation to such person's physical or mental impairments.

(d) A person with a disability is not required to accept an accommodation, aid, service, opportunity, or benefit which such qualified person chooses not to accept. However, if such person, after notice by the employer or other covered entity of the possible consequences of rejecting, rejects a reasonable accommodation, aid, service, opportunity, or benefit that enables the person to perform the essential functions of the position held or desired and cannot, as a result of that rejection, perform the essential functions of the position, the person will not be considered qualified.

(e) An employer or other covered entity is not required to make a reasonable accommodation to a person who meets the definition of disability solely under the "regarded as" prong.

The HCRC does not enforce the rights of registered medical cannabis users generally. The HCRC's interest is focused on the rights of persons with a disability. The H.R.S. § 329-122 definition of "debilitating medical condition" is not identical to the H.R.S. § 378-1 and H.A.R. § 12-46-182 definition of

"disability," so not every registered qualifying medical cannabis patient will necessarily be a person with a disability entitled to a reasonable accommodation.

The HCRC has a civil rights interest in protecting the rights of persons with disabilities against discrimination in employment, including the right to a reasonable accommodation required to enable a person with a disability to be considered for a job, to perform the essential functions of a job, or to enjoy the same or equal benefits of employment as are enjoyed by similarly situated employees without disabilities.

State fair employment law does not preclude an employer from establishing a drug policy or a drug testing policy that imposes disciplinary action for a positive drug test, up to and including termination. However, an employer might have to modify the drug testing policy as reasonable modification for a person with a disability who is a registered qualified medical cannabis patient who tests positive for the use of (medical) cannabis.

Such reasonable accommodation does not include cannabis use or intoxication at work. HAR § 12-46-192(A)(1)-(3) expressly permits an employer to prohibit use of illegal drugs and engaging in the use of illegal drugs in the workplace, and to hold an employee who uses illegal drugs to the same performance and behavior standards as other employees. HRS § 329-122(c), expressly excludes use in the workplace from application of the medical cannabis law.

**CONCLUSION**

It is timely and appropriate for the Commission to engage in rulemaking to adopt the ABC test for determining whether a complainant is a covered employee or an independent contractor and to incorporate by reference the right of a person with a disability who is a registered medical cannabis user to request a reasonable accommodation, This avoids the alternative, waiting for years for a contested case raising these issues to be docketed and wind its way through the judicial review and appellate process. Again, this is an appropriate exercise of the Commission's rulemaking authority.

**From:** Kelvin Kohatsu <director@htahawaii.org>
**Sent:** Monday, November 4, 2024 9:13 AM
**To:** DLIR.HCRC.INFOR <dlir.hcrc.infor@hawaii.gov>
**Subject:** [EXTERNAL] 12-46-187 Failure to make reasonable accomodation.

Good morning,

My name is Kelvin Kohatsu, residing in Hilo, Hawaii. I'm the Managing Director of the Hawaii Transportation Association (contact info enclosed).

We do not support this section (12-46-187 Failure to make reasonable accommodation), as Commercial Motor Vehicle Drivers-Commercial Drivers License, persons are prohibited from operating Commercial Motor Vehicles when tested positive for Federal Schedule 1 drugs, which marijuana is.

This section should be removed, or an accommodation be included stating, ***"Any person testing positive for any Federal Schedule 1 drug, holding a Commercial Driver's License/Commercial Motor Vehicle License, shall be prohibited from operating a Commercial Motor Vehicle, in the interest of Public Safety".***

Thank you for accepting our testimony on this most important Public Safety subject.

Kelvin Kohatsu – Managing Director, Hawaii Transportation Association

Chamber of Commerce HAWAII

Re: Oral & Written Testimony, HCRC Public Hearing on 11/4/2024

Sent via email to: Constance.m.yonashiro@hawaii.gov

By including adjustments or changes to employers' drug testing policies as a "reasonable accommodation," the HCRC fails to note the distinction between providing reasonable accommodation to individuals with disabilities who have a 329 card and requiring employers to allow applicants and employees to actively use a Schedule I drug.

While the HCRC has the authority to enforce Hawaii's anti-discrimination laws, in so doing the Commission must also recognize that many Hawaii employers are subject to federal obligations , such as the federal Drug-Free Workplace Act for federal contractors, DOT regulations for employers who have employees in safety-sensitive positions, and certain federal licensing requirements. Requiring employers to modify their drug-free workplace policies, including their policies and procedures on testing for marijuana use, may also interfere with the employer's ability to comply with applicable federal laws.

The prior version of the proposed amendments in 2023 (which we discussed extensively with prior HCRC Chief Counsel Robin Wurtzel) included a carve-out provision for employers complying with federal licensing requirements or federal regulations, or employers who could lose federal contracts or funding if required to comply with the amended administrative rule. However, the most recent version of the proposed amendments does not include these exceptions, raising a question of how the HCRC expects employers to balance their state and federal obligations.

Therefore, we recommend the HCRC amend the last sentence of §12-46-187(a) to read, "Nothing in this subsection shall be construed to require the employer to make an accommodation for the possession or use of drugs prohibited under state law, or if such accommodation would cause the employer to violate federal licensing requirements or federal regulations, or to lose a federal contract or funding."

Employers will also struggle to comply with their obligation under the Occupational Safety and Health Act to provide a workplace free from recognized hazards, particularly the recognized hazard of allowing employees who may be impaired by marijuana use to perform their job duties that may jeopardize the safety of the employee or others. Employees may be impaired by their marijuana use without showing typical physical indicia of recent use. In such cases, without the ability to rely on a positive drug test, an employer may not be aware an employee is impaired by marijuana use until it is too late, subjecting the employee and the public to potential injury or loss and exposing the employer to potential liability.

Sherry Menor-McNamara

President & CEO, Chamber of Commerce Hawaii

**From:** Ken M. Nakasone <knakasone@ksglaw.com>
**Sent:** Monday, November 4, 2024 11:47 AM
**To:** DLIR.HCRC.INFOR <dlir.hcrc.infor@hawaii.gov>
**Subject:** [EXTERNAL] Public Hearing – HCRC.

Dear HCRC;

I am a private practice attorney who primarily represents employers. I am writing to express my concern regarding the proposed amendments to HAR §12-46-187 - "Failure to make reasonable accommodation".

In general, I am concerned that such changes to provide reasonable accommodations for medical marijuana use including the prohibition on testing for such use will lead to marijuana impairment at work and create dangerous situations leading to serious injuries and death. I am also concerned that these changes create conflicts between this law and federal law. Some of my concerns are more particularly described below:

- Without being able to rely on positive test results in their decision-making, employers will struggle to comply with their obligation under the Occupational Safety and Health Act to provide a workplace free from recognized hazards, including allowing employees who may be impaired by marijuana use to operate heavy machinery or otherwise work in potentially hazardous conditions.
- Employees with a medical cannabis card may come to work impaired as it would be permissible to use medical cannabis so long as the employee is not using while on employer's property. Additionally, employees may be impaired by their marijuana use without showing typical physical indicia of recent use. In such cases, without the ability to rely on a positive drug test, an employer may not be aware an employee is impaired by marijuana use until it is too late. It's not just about laws, costs, and liability – many of Hawaii's employers genuinely care about the safety of their employees and the public and endeavor to prioritize safety in the workplace by avoiding risks inherent in allowing employees to use marijuana even for medicinal purposes outside work hours.
- Many Hawaii businesses receive federal contracts and grants that subject them to the federal Drug-Free Workplace Act of 1988. Their status as contractors require them to maintain a drug-free workplace or face potentially losing current and future contracts.
- Many Hawaii businesses across a broad range of industries including manufacturing, retail, tourism, and technology, employ commercial truck drivers or other safety-sensitive positions as defined by the U.S. Department of Transportation. These positions are subject to certain drug testing requirements, including marijuana. Requiring employers to allow employees with disabilities who are registered medical cannabis users to continue working despite testing positive for marijuana or to exempt such employees from the company's normal drug testing policies may put the employer in violation of federal regulations.
- The prior version of the proposed amendments included carve outs for employers who would be at risk of losing federal funding or violating federal licensing requirements or other federal regulations; however the July 2024 remove these exceptions from the proposed version.
- If employers are required to allow employees with disabilities who are registered medical cannabis users to continue working despite testing positive for marijuana or to exempt such employees from the company's normal drug testing policies, many will incur significant expense

and changes to their operations to provide training to managers and supervisors to be able to monitor for and identify physical indicia of potential impairment; however, employers would be afraid to remove these employees from performing their job duties (to ensure a safe work environment) for fear that they would be accused of disability discrimination and/or retaliation for changing/altering the terms and conditions of their employment. As a result, employers may be exposing itself to potential liability for allowing those with medical cannabis cards to continue to work in either safety-sensitive positions or positions that may put others' safety at risk.

Accordingly, I request that the proposed changes to HAR §12-46-187 not be made. Thank you for your time and consideration.

Aloha,
Kenneth M. Nakasone

JN GROUP

JN Group, Inc.
888 Kapiolani Blvd. | Honolulu, HI 96813
808-593-8888 | www.jngroupinc.com

November 4, 2024

To Whom It May Concern,

On behalf of JN Group, Inc. ("JN"), I submit written testimony with respect to the proposed revised definition of the term "drug" under Hawaii Administrative Rules ("HAR") §12-46-182 and the proposed amendment to HAR §12-46-187 - "Failure to make reasonable accommodation".

JN, an automotive dealership, employs individuals in sales, service and other positions that require driving company and/or customer vehicles. As written, the proposed regulations will allow employees with medical cannabis cards to come to work impaired and drive vehicles while under the influence of medical marijuana so long as the employees are not using medical cannabis while on the employer's premises. As a result, the impairment could lead to safety and health concerns to not only the employee using medical cannabis, but other employees, customers and the public as well.

In addition, if employers are prohibited from relying on positive test results in their decision-making, employers will struggle to comply with their obligations under the Occupational Safety and Health Act which require employers to provide a safe workplace free from recognized hazards. The proposed amendment would allow employees who may be impaired by medical cannabis use to operate vehicles and other apparatuses in potentially hazardous conditions.

Should employers be required to allow registered medical cannabis users to be exempt from the company's drug testing policies or continue to work despite a positive test result for marijuana use, employers may be hesitant to remove employees from performing their safety sensitive job duties out of fear that they will be accused of disability discrimination and/or retaliation. As a result, companies may be exposed to potential liability for allowing those with medical cannabis cards to continue working in safety-sensitive positions.

Accordingly, for all the above reasons, JN respectfully requests that the proposed changes to the term "drug" under Hawaii Administrative Rules ("HAR") §12-46-182 and the proposed amendment to HAR §12-46-187 - "Failure to make reasonable accommodation" not be made. Thank you for your consideration in this matter.

Sincerely,

Brad Nicolai
President

**Testimony to the**
**HAWAIʻI CIVIL RIGHTS COMMISSION**
**KOMIKINA PONO KĪWILA O HAWAIʻI**

**Thursday, May 2, 2024 at 2 PM**
**Commission Meeting**

**Agenda Item 4.b. Update on Public Hearing on Proposed Rule Amendments to Hawaiʻi Administrative Rule 12-46**

As a longtime resident of the State of Hawaiʻi, student, and community advocate, I appreciate the Commission's dedication and diligence to comply with Hawaii Revised Statutes (HRS) Chapter 91 with respect to amending the Hawaiʻi Administrative Rules (HAR) Title 12 Chapter 46 as it relates to the Hawaiʻi Civil Rights Commission in order to continue safeguarding and advancing the rights of marginalized individuals and communities as well as prevent discrimination in all forms. With the evolving discourse of society, it is important that the implementation and enforcement of civil rights and policies are upheld as the Commission plays a pivotal role in holding institutions and individuals accountable for their actions.

While the Commission has yet to determine the logistical information for Notice and Comment, HRS 91-3, I acknowledge that the draft of the proposed amendments to HAR 12-46 has been accessible via hardcopy and online PDF since at least July 10, 2023, giving members of the public, stakeholders, and other interested parties the opportunity to review the proposed rule and submit comments expressing their support, opposition, or suggestions for improvement. I appreciate the Commission's amendments to HAR-12-46-108, Leave due to Pregnancy, Childbirth, or Other Related Medical Conditions to be in compliance with the recently passed Pregnant Workers Fairness Act (PWFA), which requires a covered employer to provide reasonable

accommodations to a qualified employee or applicant to provide the layer of protection for affected employees experiencing this type of discrimination within their worksites.

I look forward to the Commission's hearings on the final proposed amendments to HAR 12-46. Mahalo for this opportunity to provide comments.

# (Comments received in 2023)

(*Note: proposed rules were revised in 2024 to address some of the comments)*

Chamber of Commerce HAWAII
*The Voice of Business*

July 3, 2023

Robin Wurtzel
Chief Counsel
Hawaii Civil Rights Commission
Komikina Pono Kīwila O Hawai'i
830 Punchbowl Street, Room 411
Honolulu, Hawaii 96813

**Re: Proposed Rule Changes by the Hawaii Civil Rights Commission, HAR Title 12, Chapter 46**

Aloha Chief Counsel Wurtzel,

Thank you for the opportunity to provide comments regarding the proposed changes to HAR Title 12, Chapter 46. We reviewed the proposed changes and would like to offer comments regarding the following items:

1. §12-46-1 Definitions. The proposed definitions of the words "employment," "harassment," "legitimate nondiscriminatory reason," and "ancestry" may conflict with Hawaii administrative rules, state statute and federal law. The proposed revisions may exceed statutory authority of the Hawaii Civil Rights Commission.
2. 12-46-107 Hiring, retention, and accommodation of pregnant females. Removes reference to disability and clarifies that it is based on pregnancy. The proposed changes may conflict with the mandates of the Pregnant Workers Fairness Act.
3. Other miscellaneous and non-substantive changes.

As discussed on June 30, 2023, we look forward to scheduling some time to meet and review these items with you and your team over the coming weeks. Thank you for your willingness to collaborate with the business community.

If you have any questions, please contact Eliza Talbot, VP of Business Advocacy and Community Relations at (808) 380-2605 or etalbot@cochawaii.org.

Chamber of Commerce HAWAII
*The Voice of Business*

Sincerely,

Sherry Menor-McNamara
President and CEO
Chamber of Commerce Hawaii

| | |
|---|---|
| **From:** | WURTZEL, ROBIN |
| **To:** | Robin Wurtzel (robinwurtzel@gmail.com) |
| **Subject:** | FW: HCRC Proposed Rule Amendments |
| **Date:** | Monday, July 3, 2023 4:56:00 PM |
| **Attachments:** | Locations_ Inc. v. Hawai_i Dep_t of Labor Indus. Rela.docx<br>Nelson v University of Hawaii.rtf<br>Shoppe v Gucci America Inc.rtf |

---

**From:** Christopher Cole <ccole@marrjones.com>
**Sent:** Thursday, June 29, 2023 3:39 PM
**To:** DLIR.Workforce.Develop <dlir.workforce.develop@hawaii.gov>; WURTZEL, ROBIN <robin.wurtzel@hawaii.gov>
**Subject:** [EXTERNAL] HCRC Proposed Rule Amendments

Hawai`i Civil Rights Commission
c/o Robin Wurtzel
Robin.Wurtzel@hawaii.gov
Dlir.Workforce.Develop@hawaii.gov

Aloha Ms. Wurtzel,

Thank you for the opportunity to comment on your agency's proposed new rules. As indicated above, I am sending this to you at two email addresses, the one in your name set forth in the notice inviting public comments, and the one ("Dlir.Workforce.Develop") that I was automatically directed to when I followed the hyperlink attached to your name.

Please give due consideration to the following comments on your proposed rule amendments, as follows.

**12-46-1 (definitions)**

**Definition of "employment."** OPPOSE. It would be unwise to revise the existing rule as proposed. First, the revision is unnecessary, as "employment" is already defined in the statute. Second, the proposed revision adopts a disfavored "nature of the work" test "emphatically" and "explicitly" rejected by the Hawai`i Supreme Court in a nearly identical statutory definition (in the workers compensation law, HRS Ch. 386), in *Locations, Inc. v. Hawai`i Dept. of Labor & Ind. Rels.*, 79 Haw. 208, 212 (S. Ct. 1995). *See attached.* Third, although *Locations* rejected this legal test in the context of a different statute (workers compensation, not discrimination), the Hawai`i Legislature has directed as a mandatory rule of statutory construction that "laws in pari material, or upon the same subject matter, shall be construed with reference to each other." Haw. Rev. Stat. § 1-16. Both laws regulate the same subject matter (employment). Both are remedial. Both define the very subject matter ("employment") central to both statutes' coverage. It is unreasonable – and violates this cardinal statutory construction rule mandated by law – to conclude that the Hawai`i Legislature would intend the same words they chose to define "employment" to mean one thing for purposes of workers compensation (HRS § 386-1), yet have a different meaning for discrimination purposes (HRS

§ 378-1). Finally, the proposed revision incorrectly implies it would be the employer's burden to prove that an individual is *not* an employee in contested cases before the HCRC, when the statute that the HCRC is required to follow (HRS Ch. 91) mandates the opposite. To wit, the burden of proof (production *and* persuasion) generally falls on the party who initiates the proceeding, i.e. an aggrieved Charging Party who files a charge of discrimination with the HCRC asserting a statutory violation under HRS Ch. 378. HRS § 91-10(5). The exception to this default burden of proof allocation ("Except as otherwise provided by law"), HRS § 91-10(5), does not apply. No law says an employer bears the burden of proof if that issue is in dispute. In fact, HCRC's existing rules implicitly recognize that complainants bear the burden of proof under 91-10(5) in HAR § 12-46-7, which follows traditional order of presentation that allows the bearer of the burden of proof the privilege of going first and having a chance for rebuttal.

**Definition of "harassment."** OPPOSE. This definition is both unnecessary and inaccurate. Unnecessary because there are already definitions in other subject matter rules that area already in existence, e.g. sexual harassment, as well as in reported state and federal case law. Inaccurate – and the proposed revision needs further work – as it does not accurately state the required elements of proof well-established in decades of state and federal jurisprudence. For example, the catch-all element #3 in the proposed definition, "otherwise adversely affects an individual's employment opportunity," especially when phrased in the disjunctive "or" (as if it provides a stand-alone separate basis to find harassment), violates well-established principles requiring subjective and objective severity and/or pervasiveness on a sliding scale. *See Nelson v. Univ. of Hawaii*, 97 Haw. 376, 390 (S. Ct. 2001). *See attached.*

**Definition of "legitimate nondiscriminatory reason."** OPPOSE. This is not a statutory phrase. Unhelpful and unnecessary, as the burden shifting paradigms that courts use in some instances when reviewing circumstantial proof of discrimination are well established by decades of case law. They do not use words like "compelling" or "standing alone would have resulted in the same practice, policy, or action" to describe what is, instead, an employer's burden to "articulate," not "establish," (employee always carries the burden of persuasion) the employer's reason for taking an action in such a way that "would support a finding that unlawful discrimination was not the cause of the challenged employment action," so it is also an inaccurate statement of well-accepted judicial principles that courts have found helpful to resolve some (not all) cases, frequently in a summary judgment context. *See Shoppe v. Gucci America, Inc.*, 94 Haw. 368, 378-9 (S. Ct. 2000) (reaffirmed and quoted extensively in *Adams v. CDM Media USA, Inc.*, 135 Haw. 1, 28 (2015)). *See attached.* *Adams* did expand on the well-established *Shoppe* analysis to add the requirement that a reason relate to an employee's ability to do the work in question to be "legitimate," so that part is consistent with existing case law, but the other parts are inconsistent and inaccurate for the reasons described above, and the entire endeavor to wade into these waters is not necessary since the Hawaii Supreme Court already weighed in on that issue.

**Sex Discrimination (12-46-101, et seq.)**

PARTIALLY OPPOSE, PARTIALLY SUPPORT

I understand – and support – the intent behind these proposed revisions to conform the rules to the

expanded protected bases of "gender identity and expression" in HRS § 378-1, or to expand the protections to both women *and men* in regards to pregnancy, maternity leaves, etc., but the phrase "without regard to sex" is an awkward way to achieve this. In short, the proposed revisions illogically "neuter" sex discrimination, when the legislature had a different idea of not neutering sex discrimination, but expanding the concept of what "sex" discrimination means. It is odd to say that something is sex discrimination "without regard to sex." I believe that the concept behind the proposed revision is to accommodate and protect individuals whose gender identity or expression is different from their biological (at birth) gender, or stereotypical ideas of what their gender "should be," but at bottom the very concept of sex discrimination involves people being treated differently based on (not "without regard to") their sex, whether that be the sex they were assigned at birth or the sex the individual wants to express or identify with. I think the Hawaii legislature defined it well. I support expanding the rules accordingly, but suggest that HCRC find a better phrase to effectuate this intent, perhaps along the lines of the actual statutory language.

**Marijuana user accommodation – 12-46-187(f)**

OPPOSE. This potentially runs the risk of federal preemption, and would be better left to the legislature to enact after a rigorous committee vetting and DAG review process.

Thank you once again for the opportunity to comment.

Best regards,

***Christopher J. Cole, Esq.***
*Marr Jones & Wang*
*A Limited Liability Law Partnership*
*Pauahi Tower*
*1003 Bishop Street, Suite 1500*
*Honolulu, Hawaii 96813*
*Telephone: (808) 536-4900*
*Facsimile: (808) 536-6700*
*Email: ccole@marrjones.com*