

**"CHAPTER 392  
TEMPORARY DISABILITY INSURANCE**

Part I. Short Title; Purpose; Definitions

Section

- 392-1 Short title
- 392-2 Findings and purpose
- 392-3 Definitions generally
- 392-4 Place of performance
- 392-5 Excluded services
- 392-6 Individual in current employment
- 392-7 Average weekly wage

Part II. Temporary Disability Benefits

- 392-21 Establishment of temporary disability benefits
- 392-21.5 Proceedings to determine employment and coverage
- 392-22 Weekly benefit amount
- 392-23 Duration of benefit payments
- 392-24 Waiting period
- 392-25 Eligibility for benefits
- 392-26 Care by physician or equivalent required
- 392-27 Ineligibility in certain cases
- 392-28 Duplication of benefits not permitted
- 392-29 No assignment of benefits; exemptions from attachment, etc.

Part III. Provision for Temporary Disability Insurance Benefits

- 392-41 Provision for payment of benefits
- 392-42 Notice of insurance
- 392-42.5 Insurer's requirements; failure to maintain a claims service office; penalty; injunction
- 392-43 Authority to withhold contributions, rate of contribution, maximum weekly wage base
- 392-43.5 Payments of premium for ineligible employees not permitted
- 392-44 Payment of disability benefits
- 392-44.5 Notice of denial
- 392-45 Subrogation rights if employee entitled to workers' compensation benefits or indemnity under employers' liability acts
- 392-46 Subrogation rights against third parties
- 392-47 Failure to give security for payment of benefits; penalty; injunction
- 392-48 The insurance contract
- 392-49 Insolvency of employer not to release insurer
- 392-50 Cancellation of insurance contracts

- 392-51 Failure to submit timely wage and employment information
- 392-52 Disposition of accrued benefits where insurer is unable to locate employee

#### Part IV. Trust Fund for Disability Benefits

- 392-61 Establishment of trust fund for disability benefits
- 392-62 Management of the fund
- 392-63 Disbursements from the fund
- 392-64 Investment of moneys
- 392-65 Temporary disability benefits to be paid from the trust fund for disability benefits; recovery of disability benefits
- 392-66 Disability while unemployed
- 392-67 Assessments for the trust fund for disability benefits
- 392-68 Failure to pay assessments
- 392-69 Request for wage and employment information

#### Part V. Determinations

##### A. Appeal Procedure

- 392-71 Appeal tribunal
- 392-72 Appeals, filing and hearing
- 392-73 Procedure
- 392-74 Conclusiveness of determinations and decisions
- 392-75 Judicial review
- 392-76 Representation
- 392-77 Payment of benefits
- 392-78 Recovery of benefits paid; individual's liability to repay benefits; insurer's appeal rights
- 392-79 Reconsideration
- 392-80 Appeal pending when reconsideration issued
- 392-81 Notice of reconsideration

##### B. Determinations Relating to Wage Withholding

- 392-86 Disputes between employers and employees relating to withholding of wages

#### Part VI. Enforcement

- 392-91 Enforcement by the director
- 392-92 Penalties

#### Part VII. Miscellaneous Provisions

- 392-101 Limitation of fees

## Attorney General Opinions

Where department essentially has two TDI plans (full-time teachers are covered by a plan approved by DLIR pursuant to §392-41(a)(5), and department's A+ and other employees are paid benefits in accordance with TDI law found in this chapter), if an individual is employed by department as both a full-time teacher and an A+ employee and the individual becomes disabled for both jobs, the department must pay the individual under both TDI plans. Att. Gen. Op. 97-9.

### "PART I. SHORT TITLE; PURPOSE; DEFINITIONS

**[§392-1] Short title.** This chapter shall be known as the "Hawaii Temporary Disability Insurance Law". [L 1969, c 148, pt of §1]

" **[§392-2] Findings and purpose.** A large portion of the labor force of this State annually is disabled from pursuing gainful employment by reason of nonoccupational sickness or accident and as a result suffers serious loss of income. In approximately ten per cent of the cases such sickness or accident can be expected to cause disability of more than one week's duration. More than two-fifths of the employees in private employment have either no fixed legal protection against wage loss from disabling nonoccupational sickness or accident, or only protection for a period of one workweek or less; more than one-third of the workers covered by formal sick leave plans are not protected against disability extending beyond two workweeks. Since the hardship for workers and their families mounts with the extension of the duration of the disability from whatever cause, there is a need to fill the existing gaps in protection and to provide benefits to individuals in current employment that will afford to them reasonable compensation for wage loss caused by disabling nonoccupational sickness or accident where the disability is temporary in nature and exceeds the period of one workweek. This legislation is designed not to impede the growth of voluntary plans which afford additional protection.

This chapter shall be liberally construed in the light of the stated reasons for its enactment and its declared purpose. [L 1969, c 148, pt of §1]

## Attorney General Opinions

Where department has a TDI plan for its full-time teachers and a TDI plan for A+ employees, and an individual is employed by

department as both a full-time teacher and an A+ employee and becomes disabled for both jobs, allowing department to pay only under one TDI plan would produce a harsh result that is contrary to the legislative intent to provide benefits commensurate with wage loss from all employments and this section's command to construe the statute "liberally ... in the light of the stated reasons for its enactment". Att. Gen. Op. 97-9.

### Case Notes

Cited: 73 H. 403, 833 P.2d 890 (1992).

" **§392-3 Definitions generally.** As used in this chapter, unless the context clearly requires otherwise:

"Benefit year" with respect to any individual means the one-year period beginning with the first day of the first week of disability with respect to which the individual first files a valid claim for temporary disability benefits. A subsequent benefit year is the one-year period following a preceding benefit year, beginning either with the first:

- (1) Day of the first week of disability with respect to which the individual files a subsequent claim for temporary disability benefits; or
- (2) Workday following the expiration of the preceding benefit year if a disability for which temporary disability benefits are payable during the last week of the preceding benefit year continues and the individual is eligible for further benefit payments.

"Contributions" means the amounts of money authorized by this chapter to be withheld from employees' wages for the payment of temporary disability benefits.

"Department" means the department of labor and industrial relations.

"Director" means the director of labor and industrial relations.

"Disability" means total inability of an employee to perform the duties of the employee's employment caused by sickness, pregnancy, termination of pregnancy, organ donation, or accident other than a work injury as defined in section 386-3.

"Employer" means any individual or type of organization, including the State, any of its political subdivisions, any instrumentality of the State or its political subdivisions, any partnership, association, trust, estate, joint stock company, insurance company, or corporation, whether domestic or foreign, or receiver or trustee in bankruptcy, or the legal

representative of a deceased person, who has one or more individuals in employment during any day or portion of a day.

"Employment" and "employed" means service, including service in interstate commerce, performed for wages under any contract of hire, written or oral, express or implied, with an employer, except as otherwise provided in sections 392-4 and 392-5.

"Recipient of social service payments" includes:

- (1) A person who is an eligible recipient of social services such as attendant care and day care services; and
- (2) A corporation or private agency that contracts directly with the department of human services to provide attendant care and day care services authorized under the Social Security Act, as amended.

"Wages" means all remuneration for services from whatever source, including commissions, bonuses, tips or gratuities received in the course of employment from others than the employer to the extent that they are customary and expected in that type of employment and reported to the employer for payroll tax deduction purposes, and the cash value of all remuneration in any medium other than cash.

The director may issue regulations for the reasonable determination of the cash value of remuneration in any medium other than cash.

Wages do not include the amount of any payment specified in section 383-11.

"Weekly benefit amount" means the amount payable under this chapter for a period of continuous disability throughout a calendar week. If the period of disability or the initial or terminal portion thereof is shorter than a calendar week, the benefit amount payable for that portion shall be the weekly benefit amount multiplied by a factor consisting of a quotient having the number of workdays lost during the portion of the week for the numerator and the number of regular workdays of the employee during a calendar week for the denominator. [L 1969, c 148, pt of §1; am L 1973, c 61, §1; am L 1980, c 32, §1; gen ch 1993; am L 2007, c 259, §4; am L 2014, c 160, §1; am L 2016, c 55, §15]

#### **Revision Note**

Numeric designations deleted pursuant to §23G-15.

" **[§392-4] Place of performance.** (a) "Employment" includes an individual's entire service, performed within or both within and without this State if:

- (1) The service is localized in this State; or
- (2) The service is not localized in any state but some of the service is performed in this State and[:]
  - (A) The individual's base of operation, or, if there is no base of operation, the place from which such service is directed or controlled, is in this State; or
  - (B) The individual's base of operation or place from which the service is directed or controlled is not in any state in which some part of the service is performed but the individual's residence is in this State.

(b) The term "employment" also includes all service performed by an officer or member of the crew of an American vessel on or in connection with such vessel; provided that the operating office from which the operations of the vessel operating on navigable waters within or within and without the United States is ordinarily and regularly supervised, managed, directed, and controlled is within this State. [L 1969, c 148, pt of §1]

#### **Revision Note**

In subsection (a)(2), (A) and (B) reformatted as subparagraphs (A) and (B) pursuant to §23G-15.

" **§392-5 Excluded services.** "Employment" as defined in section 392-3 shall not include:

- (1) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority, performed in any calendar quarter by an individual if the cash remuneration paid by the employer for such service is less than \$225;
- (2) Service not in the course of the employer's trade or business performed in any calendar quarter by an individual, unless the cash remuneration paid for the service is \$50 or more and the service is performed by an individual who is regularly employed by the employer to perform the service. An individual shall be deemed to be regularly employed to perform service not in the course of the employer's trade or business during a calendar quarter only if:
  - (A) On each of some twenty-four days during the quarter the individual performs the service for some portion of the day; or
  - (B) The individual was regularly employed, as determined under subparagraph (A), by the

- employer in the performance of the service during the preceding calendar quarter;
- (3) Service performed on or in connection with a vessel not an American vessel, if the individual performing the service is employed on and in connection with the vessel when outside the United States;
  - (4) Service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including service performed as an ordinary incident thereto, except:
    - (A) The service performed in connection with a vessel of more than ten net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States);
    - (B) The service performed in connection with a vessel of ten net tons or less (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States) by an individual who is employed by an employer who, for some portion in each of twenty different calendar weeks in either the current or preceding calendar year, had in the employer's employ one or more persons performing the service, whether or not the weeks were consecutive and whether or not the same individuals performed the service in each week; and
    - (C) The service performed in connection with the catching or taking of salmon or halibut for commercial purposes;
  - (5) Service performed by an individual in the employ of the individual's son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of the child's father or mother;
  - (6) Service performed in the employ of the United States government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by this chapter;
  - (7) Service performed in the employ of any other state, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing that is wholly owned by one or more such states or

political subdivisions; and any service performed in the employ of any instrumentality of one or more other states or their political subdivisions to the extent that the instrumentality is, with respect to such service, exempt from the tax imposed by section 3301 of the Internal Revenue Code;

- (8) Service with respect to which temporary disability compensation is payable for sickness under a temporary disability insurance system established by an act of Congress;
- (9) Service performed in any calendar quarter in the employ of any nonprofit organization exempt from income tax under section 501 of the Internal Revenue Code, if:
  - (A) The remuneration for such service is less than \$50;
  - (B) The service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university;
  - (C) The service is performed by a duly ordained, commissioned, or licensed minister or licensed minister of a church in the exercise of the minister's ministry or by a member of a religious order in the exercise of nonsecular duties required by the order; or
  - (D) The service is performed for a church by an employee who fails to meet the eligibility requirements of section 392-25;
- (10) Service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of the association or their dependents, if:
  - (A) No part of its net earnings inures (other than through such payments) to the benefit of any private shareholder or individual; and
  - (B) Eighty-five per cent or more of its income consists of amounts collected from members and amounts contributed by the employer of the members for the sole purpose of making such payments and meeting expenses;
- (11) Service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of the association or their dependents or their designated beneficiaries, if:



- (A) Admission to membership in the association is limited to individuals who are officers or employees of the United States government; and
  - (B) No part of the net earnings of the association inures (other than through such payments) to the benefit of any private shareholder or individual;
- (12) Service performed in the employ of a school, college, or university, not exempt from income tax under section 501 of the Internal Revenue Code, if the service is performed by a student who is enrolled and is regularly attending classes at the school, college, or university;
- (13) Service performed in the employ of any instrumentality wholly owned by a foreign government, if:
- (A) The service is of a character similar to that performed in foreign countries by employees of the United States government or of an instrumentality thereof; and
  - (B) The United States Secretary of State has certified or certifies to the United States Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States government and of instrumentalities thereof;
- (14) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law; and service performed as an intern in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to state law;
- (15) Service performed by an individual for an employer as an insurance producer, if all such service performed by the individual for the employer is performed for remuneration solely by way of commission;
- (16) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;
- (17) Service covered by an arrangement between the department and the agency charged with the

administration of any other state or federal unemployment compensation law pursuant to which all services performed by an individual for an employer during the period covered by the employer's duly approved election, are deemed to be performed entirely within the agency's state;

- (18) Service performed by an individual who, pursuant to the federal Economic Opportunity Act of 1964, is not subject to the federal laws relating to unemployment compensation;
- (19) Domestic in-home and community-based services for persons with developmental and intellectual disabilities under the medicaid home and community-based services program pursuant to title 42 Code of Federal Regulations sections 440.180 and 441.300, and title 42 Code of Federal Regulations, part 434, subpart A, as amended, or when provided through state funded medical assistance to individuals ineligible for medicaid, and identified as chore, personal assistance and habilitation, residential habilitation, supported employment, respite, and skilled nursing services, as the terms are defined by the department of human services, performed by an individual whose services are contracted by a recipient of social service payments and who voluntarily agrees in writing to be an independent contractor of the recipient of social service payments;
- (20) Domestic services, which include attendant care, and day care services authorized by the department of human services under the Social Security Act, as amended, or when provided through state-funded medical assistance to individuals ineligible for medicaid, when performed by an individual in the employ of a recipient of social service payments. For the purposes of this paragraph only, a "recipient of social service payments" is a person who is an eligible recipient of social services such as attendant care or day care services;
- (21) Service performed by a vacuum cleaner salesperson for an employing unit, if all such services performed by the individual for such employing unit are performed for remuneration solely by way of commission;
- (22) Service performed by an individual for an employer as a real estate salesperson or as a real estate broker, if all the service performed by the individual for the employer is performed for remuneration solely by way of commission;

- (23) Service performed by an individual for a corporation if the individual owns at least fifty per cent of the corporation; provided that no employer shall require an employee to incorporate as a condition of employment;
- (24) Service performed by a member of a limited liability company if the member is an individual and has a distributional interest, as defined in section 428-101, of not less than fifty per cent in the company; provided that no employer shall require an employee to form a limited liability company as a condition of employment;
- (25) Service performed by a partner of a partnership, as defined in section 425-101, if the partner is an individual; provided that no employer shall require an employee to become a partner or form a partnership as a condition of employment;
- (26) Service performed by a partner of a limited liability partnership if the partner is an individual and has a transferable interest as described in section 425-127 in the partnership of not less than fifty per cent; provided that no employer shall require an employee to form a limited liability partnership as a condition of employment; or
- (27) Service performed by a sole proprietor. [L 1969, c 148, pt of §1; am L 1973, c 108, §1; am L 1978, c 110, §5; am L 1982, c 194, §3; gen ch 1985; am L 1987, c 339, §4 and c 345, §4; am L 1988, c 141, §35; am L 1990, c 321, §3; gen ch 1993; am L 1996, c 94, §4; am L 2003, c 212, §6; am L 2007, c 259, §8; am L 2011, c 220, §15; am L 2012, c 157, §2 and c 158, §3; am L 2016, c 187, §6]

" **§392-6 Individual in current employment.** "Individual in current employment" means:

- (1) An individual who performed regular service in employment immediately or not longer than two weeks prior to the onset of the sickness or to the accident causing disability and who would have continued in or resumed employment except for such disability.
- (2) An individual who performed regular service in employment immediately or not longer than two weeks prior to becoming totally disabled from performing the duties of her employment because of pregnancy or termination of pregnancy and who would have continued in or resumed such employment except for such

disability. [L 1969, c 148, pt of §1; am L 1973, c 61, §2]

" **[§392-7] Average weekly wage.** The "average weekly wage" for the purpose of computing the weekly benefit amount shall be based upon the wages that the employee would receive from the employee's employer except for the employee's disability. In the case of salaried employees the "average weekly wage" shall be the weekly salary of the employee in the last week prior to the commencement of disability. [L 1969, c 148, pt of §1; gen ch 1985]

## **"PART II. TEMPORARY DISABILITY BENEFITS**

### **§392-21 Establishment of temporary disability benefits.**

(a) Any individual in current employment who suffers disability resulting from accident, sickness, pregnancy, termination of pregnancy, or organ donation, except accident or disease connected with or resulting from employment as defined in section 386-3 or any other applicable workers' compensation law, shall be entitled to receive temporary disability benefits in the amount and manner provided in this chapter.

(b) It is the policy of this chapter that the computation and distribution of benefit payments shall correspond to the greatest extent feasible, to the employee's wage loss due to the employee's disability; that an employee shall not be entitled to temporary disability benefits for periods of disability during which the employee would not have earned wages from employment according to the schedule of operations of the employee's employer, and that an employee is entitled to benefits only for periods of disability during which, but for the disability, the employee would have earned wages from employment. This policy, however, shall not be applied to terminate the benefits of an employee who is receiving benefits under this chapter for a disability that commenced while the employee was in current employment, nor shall it be applied to deny benefits under this chapter if a disability that commenced while the employee was in current employment continues into a period during which the employee would earn wages but for the disability. [L 1969, c 148, pt of §1; am L 1973, c 61, §3; am L 1975, c 41, §1; gen ch 1985; am L 1991, c 83, §1; am L 2014, c 160, §2]

### **Attorney General Opinions**

If an individual is employed by department as both a full-time teacher and an A+ employee and the individual becomes disabled for both jobs, department must pay the individual under both the

full-time teacher TDI plan and the A+ TDI plan in order to compensate the individual for lost wages from both full-time teacher and A+ employments, because subsection (b) states that "the computation and distribution of benefit payments shall correspond to the greatest extent feasible, to the employee's wage loss due to the employee's disability". Att. Gen. Op. 97-9.

" **§392-21.5 Proceedings to determine employment and coverage.** The director of labor and industrial relations shall have original jurisdiction over all controversies and disputes over employment and coverage under this chapter. Except in cases where services are specifically and expressly excluded from "employment" under section 392-5, it shall be presumed that coverage applies unless the party seeking exclusion is able to establish under both the control test and the relative nature of the work test that coverage is not appropriate under this chapter. There shall be a right of appeal from decisions of the director to the circuit court and thence to the intermediate appellate court, subject to chapter 602. [L 1996, c 94, §2; am L 2004, c 202, §46; am L 2006, c 94, §1; am L 2010, c 109, §1]

" **§392-22 Weekly benefit amount.** Benefits shall be computed as weekly amounts in the manner provided in this section:

- (1) If the average weekly wage of the employee is less than \$26, the weekly benefit amount shall be equal to the average weekly wage but not more than \$14;
- (2) If the average weekly wage of the employee is \$26 or more the weekly benefit amount shall be fifty-eight per cent of the average weekly wage rounded off, if not a multiple of \$1, to the next higher multiple of \$1;
- (3) If the average weekly earnings of the employee exceed an amount equal to one fifty-second of the product obtained by multiplying the amount of the average annual wage in Hawaii, as determined pursuant to section 383-22(b), by the factor of 1.21, such excess shall not be included in the computation of the weekly benefit amount; and
- (4) In no case shall the weekly benefit amount exceed the maximum weekly benefit specified in section 386-31. [L 1969, c 148, pt of §1; am L 1971, c 109, §1(a); am L 1992, c 31, §1]

" **[§392-23] Duration of benefit payments.** Temporary disability benefits shall be payable for any period of

disability following the expiration of the waiting period required in section 392-24.

The duration of benefit payments shall not exceed twenty-six weeks for any period of disability or during any benefit year. [L 1969, c 148, pt of §1]

" **[§392-24] Waiting period.** No temporary disability benefits shall be payable during the first seven consecutive days of any period of disability. Consecutive periods of disability due to the same or related cause and not separated by an interval of more than two weeks shall be considered as a single period of disability. [L 1969, c 148, pt of §1]

" **§392-25 Eligibility for benefits.** An individual is eligible to receive temporary disability benefits if the individual has been in employment for at least fourteen weeks during each of which the individual has received remuneration in any form for twenty or more hours and earned wages of at least \$400, during the fifty-two weeks immediately preceding the first day of disability. [L 1969, c 148, pt of §1; gen ch 1985; am L 1999, c 30, §1]

" **§392-26 Care by physician or equivalent required.** (a) An individual shall be ineligible to receive temporary disability benefits with respect to any period during which the individual is not under the care of a person duly licensed to practice medicine, surgery, dentistry, chiropractic, osteopathy, or naturopathic medicine, who shall certify, in the form and manner specified by regulation of the director, the disability of the claimant, the probable duration thereof, and such other medical facts within the person's knowledge as required by regulation.

(b) This section shall not apply to an individual who, pursuant to the teachings, faith, or belief of any group, depends for healing upon prayer or other spiritual means. In that case the disability, the probable duration thereof, and any other pertinent facts required to be certified by regulation of the director shall be certified, in the form and manner specified by the regulation, by a duly authorized or accredited practitioner of such group.

(c) The proof of disability duly certified by a person licensed to practice medicine, surgery, dentistry, chiropractic, osteopathy, or naturopathic medicine, or an authorized or accredited practitioner of any group which depends for healing upon prayer or other spiritual means shall be submitted by such certifying person to the disabled employee within seven working days after the date on which the employee was examined and found disabled. If the certifying person fails to submit the required

proof within seven working days, the director, upon notification by the insurer, may levy a penalty of \$25 for each delinquent certification where the certifying person fails to show good cause for the person's failure to file on time. [L 1969, c 148, pt of §1; am L 1971, c 109, §1(b); am L 1973, c 172, §1; am L 1974, c 154, §1; am L 1979, c 105, §41; gen ch 1985; L Sp 2009, c 22, §11(2)]

" **§392-27 Ineligibility in certain cases.** An individual shall not be eligible to receive temporary disability benefits:

- (1) For any period of disability during which the individual would be disqualified from receiving benefits under the Hawaii employment security law by reason of unemployment due to a stoppage of work existing because of a labor dispute for the duration of such disqualification.
- (2) If the director finds that the individual has knowingly made a false statement or representation of a fact or knowingly failed to disclose a material fact in order to obtain benefits under this chapter to which the individual is not otherwise entitled. The ineligibility shall be for a period determined by the director, but shall not exceed the period of disability with respect to which the false statement or representation was made or the nondisclosure occurred.
- (3) For any period of disability due to wilfully and intentionally self-inflicted injury or to injury sustained in the commission of a criminal offense specified in title 37.
- (4) For any day of disability during which the employee performed work for remuneration or profit, except that, if an employee returning to work suffers a relapse after performing work for less than a full day, the employee shall be paid benefits or be given waiting period credit, provided the employee's wages for the partial day's work did not equal or exceed the prorated disability benefits to which the employee is entitled. The amount of the benefit payable is derived by subtracting the gross wages received for performing less than a full day's work, from the prorated disability benefits to which the employee is entitled.
- (5) Unless the claim for disability benefits is filed within ninety days after the commencement of the period of disability or as soon thereafter as is reasonably possible. [L 1969, c 148, pt of §1; am L

1971, c 109, §1(c); am imp L 1972, c 9, §1; am L 1983, c 205, §1]

" **§392-28 Duplication of benefits not permitted.** No temporary disability benefits shall be payable for any period of disability for which the employee is entitled to receive:

- (1) Weekly benefits under the Employment Security Law or similar laws of this State or of any other state or of the United States, or under any temporary disability benefits law of any other state or of the United States except as provided in section 392-66.
- (2) Weekly disability insurance benefits under 42 United States Code Annotated [section] 423.
- (3) Weekly benefits for total disability under the Workers' Compensation Law of this State or any other state or of the United States, except benefits for permanent partial or permanent total disability previously incurred. If the claimant does not receive benefits under such workers' compensation law and the claimant's entitlement to such benefits is seriously disputed, the employee, if otherwise eligible, shall receive temporary disability benefits under this chapter, but any insurer or employer or the trust fund for disability benefits providing such benefits shall be subrogated, as hereinafter provided, to the employee's right to benefits under the workers' compensation law for the period of disability for which the employee received benefits under this chapter to the extent of the benefits so received.
- (4) Indemnity payments for wage loss under any applicable employers' liability law of this State, or of any other state or of the United States. If an employee has received benefits under this chapter for a period of disability for which the employee is entitled to such indemnity payments, any insurer or employer or the trust fund for disability benefits providing such benefits shall be subrogated to the employee's right to such indemnity payments in the amount of the benefits paid under this chapter as hereinafter provided. [L 1969, c 148, pt of §1; am L 1975, c 41, §1; gen ch 1985; am L 2013, c 100, §8]

" **[§392-29] No assignment of benefits; exemptions from attachment, etc.** No assignment, pledge, or encumbrance of any right to benefits which are or may become due or payable under this chapter shall be valid; and such rights to benefits shall be exempt from levy, execution, attachment, garnishment, or any



other remedy whatsoever provided for the collection of debt. No waiver of any exemption provided for in this section shall be valid. [L 1969, c 148, pt of §1]

**"PART III. PROVISION FOR TEMPORARY DISABILITY  
INSURANCE BENEFITS**

**§392-41 Provision for payment of benefits.** (a) An employer or an association of employers shall secure temporary disability benefits for their employees in one or more of the following ways:

- (1) By insuring and keeping insured the payment of temporary disability benefits with any stock, mutual, reciprocal or other insurer authorized to transact the business of disability insurance in the State;
- (2) By depositing and maintaining with the state director of finance, securities, or the bond of a surety company authorized to transact business in the State, as are satisfactory to the director securing the payment by the employer of temporary disability benefits according to the terms of this chapter;
- (3) Upon furnishing satisfactory proof to the director of the employer's or its solvency and financial ability to pay the temporary disability benefits herein provided, no insurance or security or surety bond shall be required, and the employer shall make payments directly to the employer's employees, as they may become entitled to receive the same under the terms and conditions of this chapter;
- (4) By a plan, entitling employees to cash benefits or wages during a period of disability, in existence on the effective date of this chapter.
  - (A) If the employees of an employer or any class or classes of such employees are entitled to receive disability benefits under a plan or agreement which remains in effect on January 1, 1970, the employer, subject to the requirements of this section, shall be relieved of responsibility for making provision for benefit payments required under this chapter until the earliest date, determined by the director for the purposes of this chapter, upon which the employer has the right to discontinue the plan or agreement or to discontinue the employer's contributions toward the cost of the temporary disability benefits. Any plan or agreement referred to in this subparagraph may be extended, with or without

modification, by agreement or collective bargaining between the employer or employers or an association of employers and an association of employees; provided the benefits under the plan or agreement, as extended or modified, are found by the director to be at least as favorable as the disability benefits required by this chapter.

- (B) Any other plan or agreement in existence on January 1, 1970, which the employer may, by the employer's sole act, terminate at any time, or with respect to which the employer is not obligated to continue for any period to make contributions, may be accepted by the director as satisfying the obligation to provide for the payment of benefits under this chapter if the plan or agreement provides benefits at least as favorable as the disability benefits required by this chapter and does not require contributions of any employee or of any class or classes of employees in excess of the amount authorized in section 392-43, except by agreement and provided the contribution is reasonably related to the value of the benefits as determined by the director. The director may require the employer to enter into an agreement in writing with the director that until the employer shall have filed written notice with the director of the employer's election to terminate such plan or agreement or to discontinue making necessary contributions toward the cost of providing benefits under the plan or agreement, the employer will continue to provide for the payment of the disability benefits under the plan or agreement. Any plan or agreement referred to in this subparagraph may be extended, with or without modification; provided the benefits under the plan or agreement, as extended or modified, are found by the director to be at least as favorable as the disability benefits required by this chapter; or
- (5) By a new plan or agreement. On or after January 1, 1970, a new plan or agreement with an insurer may be accepted by the director as satisfying the obligation to provide for the payment of benefits under this chapter if the plan or agreement provides benefits at least as favorable as the disability benefits required by this chapter and does not require contributions of

any employee or of any class or classes of employees in excess of the amount authorized in section 392-43, except by agreement and provided the contribution is reasonably related to the value of the benefits as determined by the director. Any such plan or agreement shall continue until written notice is filed with the director of intention to terminate the plan or agreement, and any modification of the plan or agreement shall be subject to the written approval of the director.

(b) During any period in which any plan or agreement or extension or modification thereof authorized under subsection (a)(4) or (5) provides for payments of benefits under this chapter, the responsibility of the employer and the obligations and benefits of the employees shall be as provided in the plan or agreement or its extension or modification rather than as required under this chapter; provided that:

- (1) The employer or insurer has agreed in writing with the director to pay the assessments imposed by section 392-67; and
- (2) If the benefits provided by the plan or agreement or extension or modification thereof include benefits falling within the definition of "sick leave" as defined in section 398-1, any amount in excess of the minimum statutory equivalent, as determined by the department, may be used for the purposes of chapter 398.

(c) If any plan or agreement authorized under subsection (a)(4) or (5) covers less than all of the employees of a covered employer, the requirements of this chapter shall apply with respect to the employer's remaining employees not covered under the plan or agreement.

(d) As used in subsection (a)(4) or (5), "benefits at least as favorable as the disability benefits required by this chapter" means the temporary disability benefits under any plan or agreement, in whole or in part, whose component parts (waiting period for illness, waiting period for accident, duration of benefits, and percentage of wage loss replaced) add in total to cash benefits or wages that are determined by the director to be at least as favorable as the disability benefits required by this chapter. The insurance commissioner shall establish a set of tables showing the relative value of different types of cash benefits and wages to assist the director in determining whether the cash benefits and wages under a plan are at least as favorable as the temporary disability benefits required by this chapter.

(e) Any decision of the director rendered pursuant to this section with respect to the amount of security required, refusing to permit security to be given or refusing to accept a plan or agreement as satisfying the obligation to provide for the payment of benefits under this chapter shall be subject to review on appeal in conformity with the provisions of this chapter.

(f) In order to provide the coverage required by this chapter for employers otherwise unable to obtain or provide such coverage, the insurance commissioner may, after consultation with the insurers licensed to transact the business of disability insurance in this State, approve a reasonable plan or plans for the equitable apportionment among such insurers of employer applicants for such insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods and, when such a plan has been approved, all such insurers shall subscribe thereto and participate therein; provided, however, that the commissioner shall not, for insurance issued or in connection with any such plan or plans, require or allow the use of premium rates which are either inadequate or excessive in relation to the benefits to be provided. Any employer applying for such insurance or any insured under such plan and any insurer affected may appeal to the commissioner from any ruling or decision of the manager or committee designated to operate such plan. All orders of the commissioner in connection with any such plan shall be subject to judicial review as provided in chapter 91.

(g) All insurers shall in form prescribed by the director notify employer applicants who are unable to procure the required insurance through ordinary methods, the availability of the plan described in [subsection] (f) above. [L 1969, c 148, pt of §1; am L 1971, c 109, §1(d); am L 1978, c 200, §1; gen ch 1985; am L 2005, c 243, §1]

#### **Revision Note**

In subsection (a)(1), (2), and (3), "or" deleted pursuant to §23G-15.

#### **Attorney General Opinions**

Where department essentially has two TDI plans (full-time teachers are covered by a plan approved by DLIR pursuant to subsection (a)(5), and department's A+ and other employees are paid benefits in accordance with TDI law found in chapter 392), if an individual is employed by department as both a full-time teacher and an A+ employee and the individual becomes disabled

for both jobs, the department must pay the individual under both TDI plans. Att. Gen. Op. 97-9.

" **§392-42 Notice of insurance.** If payment of disability benefits is provided for in whole or in part by insurance pursuant to section 392-41(a)(1), (4), or (5), the employer or insurer shall forthwith file with the director in form prescribed by the director a notice of the employer's or insurer's insurance together with a statement of benefits provided by the policy. If an employer or insurer fails to file the notice of insurance within thirty days after purchase of insurance, the director may levy a penalty of not more than \$10 for each delinquent notice, unless good cause for failure to file can be shown by the employer or insurer. [L 1969, c 148, pt of §1; am L 1971, c 109, §1(e); gen ch 1985]

" **§392-42.5 Insurer's requirements; failure to maintain a claims service office; penalty; injunction.** (a) Each insurer shall maintain a complete claims service office or engage an independent claims adjusting service as its claims agent in this State with draft authority for the processing of temporary disability insurance payments.

(b) If an insurer fails to comply with subsection (a), the insurer shall be subject to a civil penalty of not less than \$2,500 or \$100 for every day during which such failure continues, whichever sum is greater, to be recovered in an action brought by the director in the name of the State, and the amount so collected shall be paid into the trust fund created by section 392-61. The director, in the director's discretion, for good cause shown, may remit all or any part of the penalty in excess of \$2,500, if the insurer in default forthwith complies with subsection (a). With respect to such actions, the attorney general shall enforce this subsection if so requested by the director.

(c) If any insurer violates subsection (a) for a period of thirty days, the insurer may be enjoined by the circuit court from carrying on the insurer's business any place in the State so long as the violation continues. The action for injunction shall be commenced by the attorney general if so requested by the director. [L 1991, c 113, §1; am L 2013, c 100, §8]

" **§392-43 Authority to withhold contributions, rate of contribution, maximum weekly wage base.** (a) Subject to the limitation set forth in subsection (b) an employer may deduct and withhold contributions, from each employee of one-half the cost but not more than .5 per cent of the weekly wages earned by the employee in employment and the employer shall provide for

the balance of the cost of providing temporary disability benefits under this chapter over the amount of contributions of the employer's employees. Unless a different rule is prescribed by regulation of the director, the withholding period shall be equal to the pay period of the respective employee.

(b) Weekly wages for the purposes of this section shall not include:

- (1) Wages earned by an employee in employment during any payroll period unless, during the fifty-two weeks immediately preceding such payroll period, the employee has earned wages of at least \$400 and has been in employment for at least fourteen weeks during each of which the employee has received remuneration in any form for twenty or more hours; and
- (2) Remuneration in excess of one fifty-second of the average annual wage in the State as determined for the preceding year pursuant to section 383-61(b) multiplied by the factor 1.21, which amount the director shall cause to be published annually prior to the first day of January following the determination.

(c) The contributions of the employees deducted and withheld from their wages by their employer shall be held in a separate fund or be paid to insurance carriers as premiums, for the purpose of providing benefits required by this chapter.

(d) The director shall have authority to prescribe by regulation the reports and information necessary to determine the cost of providing temporary disability benefits under this chapter, especially in the case of employers or employer associations providing such benefits by means of self-insurance, and to determine the procedures for the determination of such cost.

(e) An employee from whose wages amounts greater than those authorized by this chapter have been withheld by the employee's employer shall be entitled to a refund or credit of the excess as prescribed by regulation of the director.

(f) The contributions of employees deducted and withheld in amounts greater than those authorized by this chapter, shall be deposited in the trust fund for disability benefits if such employees are no longer with the employer and cannot be located. A refund of the excess shall be paid from the trust fund for disability benefits to the employees when they are located or if such employees remain unlocated for a period of two years from the date of deposit, such moneys shall become a part of the trust fund.

(g) If an employer fails to provide coverage for the employer's employees after deducting and withholding contributions from the employer's employees as prescribed by

this chapter, the employer shall deposit such contributions in the [trust fund for disability benefits]. [L 1969, c 148, pt of §1; am L 1971, c 109, §1(f); gen ch 1985; am L 1999, c 30, §2; am L 2013, c 100, §8]

" **§392-43.5 Payments of premium for ineligible employees not permitted.** An insurer providing benefits for the employees of an employer or an association of employers, shall not require the payment of premiums from such employer or association of employers for employees who do not meet the eligibility requirements of section 392-25. However, in the case of employees who concurrently work for more than one employer and are deemed eligible to receive benefits by combining the wages earned and hours worked of the two or more employments, the insurer shall require the payment of premiums in accordance with section 392-43. The employers or association of employers shall ensure that eligible employees with concurrent employments are provided the required coverage. [L 1977, c 88, §1]

" **§392-44 Payment of disability benefits.** Benefits provided under this chapter shall be paid periodically and promptly and, except as to a contested period of disability, without any decision by the director. The first payment of benefits shall be paid within ten days, exclusive of Saturdays, Sundays and holidays, after the filing of required proof of claim. Thereafter, benefits shall be due and payable every two weeks. The director may determine that benefits may be paid monthly or semi-monthly if wages were so paid, and may authorize deviation from the foregoing requirements to facilitate prompt payment of benefits. If an employer or insurer fails to make the first payment of benefits within ten days, exclusive of Saturdays, Sundays and holidays, after the filing of required proof of claim, the director shall, unless good cause can be shown, require the employer or insurer to pay such benefits plus an additional ten per cent of the benefits due and payable to the employee. [L 1969, c 148, pt of §1; am L 1971, c 109, §1(g)]

" **[§392-44.5] Notice of denial.** No employer or insurer shall deny disability benefits to an employee without first submitting a copy of the notice of denial to the department. The department shall review the denial within ten days of the receipt of the notice. If the department finds the denial erroneous, without proper legal basis, or without sufficient evidence to support it, the department shall request the employer or insurer to reconsider its action in denying disability benefits. If upon reconsideration the employer or insurer again decides to deny disability benefits, the employee

and the department shall be so notified. The employee shall have the right to appeal the denial of disability benefits. [L 1972, c 120, §1]

" **§392-45 Subrogation rights if employee entitled to workers' compensation benefits or indemnity under employers' liability acts.** (a) If an individual has received temporary disability benefits under this chapter during a period of disability for which benefits for any disability under the Workers' Compensation Law of this State or of any other state or of the United States are subsequently awarded or accepted in any agreement or compromise, the employer, the association of employers, the insurer, or the trust fund for disability benefits, as the case may be, providing such temporary disability benefits shall be subrogated to the individual's right to such benefits in the amount of the benefits paid under this chapter.

In the event more than one employer or insurer have subrogation rights to the employee's workers' compensation benefits, such benefits shall be divided proportionately among the employers or insurers according to the amount of benefits each employer or insurer paid under this chapter. Should the subrogated amount of either one or both employers or insurers total less than the amount of benefits that such employers or insurers paid under this chapter, neither the employee nor the trust fund for disability benefits nor any other source shall be required to make up the difference.

To protect its subrogation rights to benefits payable under the Workers' Compensation Law of this State, the employer, the association of employers, the insurer, or the trust fund for disability benefits, providing temporary disability benefits shall file a claim with the division of workers' compensation in the department and notify the insurer for workers' compensation or the employer, if self-insured, of its claim and thereupon the employer, the association of employers, the insurer, or the trust fund for disability benefits, providing temporary disability benefits shall have a lien against the amounts payable as benefits for disability under the Workers' Compensation Law in the amount of the benefits paid under this chapter during the period for which benefits for disability under the Workers' Compensation Law have been accepted or awarded as payable. The agreement or award shall include a provision setting forth the existence and amount of such lien.

(b) If an individual has received benefits under this chapter during a period of disability for which the individual is entitled to receive indemnity payments for wage loss under any applicable employers' liability law of this State or of any



other state or of the United States, the employer, the association of employers, the insurer, or the trust fund for disability benefits, providing temporary disability benefits shall be subrogated to the individual's right to such indemnity in the amount of the benefits paid under this chapter and may assert its subrogation rights in any manner appropriate under such acts or any rule of law. [L 1969, c 148, pt of §1; am L 1971, c 109, §1(h); am L 1975, c 41, §1; gen ch 1985; am L 2013, c 100, §8]

" **§392-46 Subrogation rights against third parties.** If any individual who has received benefits under this chapter is entitled to recover damages from a third person who is responsible for the sickness or accident causing the disability, the employer, the association of employers, the insurer, or the trust fund for disability benefits, providing disability benefits shall be subrogated to, and have a lien upon, the rights of the individual against the third party to the extent that the damages include wage loss during the period of disability for which temporary disability benefits were received in the amount of such benefits.

If the individual commences an action against such third party, the individual shall notify the individual's employer, or the director if the individual is unemployed, of the action and the court in which it is pending. The employer, the association of employers, the insurer, or the trust fund for disability benefits, providing disability benefits may join as party plaintiff or claim a lien on the amount of any judgment recovered by the individual in such action to the extent of its subrogation rights. If the individual does not commence the action within nine months after the commencement of the sickness or the date of the accident causing the disability, the employer, the association of employers, the insurer, or the trust fund for disability benefits, providing temporary disability benefits may commence such action, but the individual shall be entitled to join the action and be entitled to any surplus over the amount to which the employers, the association of employers, the insurer, or the trust fund for disability benefits is subrogated. [L 1969, c 148, pt of §1; gen ch 1985; am L 2013, c 100, §8]

#### Case Notes

Temporary disability insurance carrier is not entitled to full reimbursement of benefits from its insured's employee under section's subrogation and lien rights when employee receives a

"general damages only" settlement from tortfeasor. 73 H. 403, 833 P.2d 890 (1992).

" **§392-47 Failure to give security for payment of benefits; penalty; injunction.** If an employer fails to comply with section 392-41 the employer shall be subject to a penalty of not less than \$500 or of \$100 for each employee for every day during which such failure continues, whichever sum is greater, to be recovered in an action brought in the discretion of the director and the amount so collected shall be paid into the trust fund for disability benefits created by section 392-61. The director may, however, in the director's discretion, for good cause shown, remit all or any part of the penalty in excess of \$500; provided that the employer in default complies with section 392-41.

Furthermore, if any employer is in default under section 392-41, for a period of thirty days, the employer may be enjoined by the circuit court of the circuit in which the employer's principal place of business is located from carrying on the employer's business any place in the State so long as the default continues, such action for injunction to be prosecuted by the attorney general or any county attorney if so requested by the director. [L 1969, c 148, pt of §1; am L 1971, c 109, §1(i); gen ch 1985; am L 2013, c 100, §8; am L 2016, c 187, §7]

### **Rules of Court**

Injunctions, see HRCP rule 65.

" **[§392-48] The insurance contract.** Every policy of insurance issued by an insurer of an employer pursuant to this chapter which covers the liability of the employer for temporary disability benefits shall cover the entire liability of the employer to the employer's employees covered by the policy or contract, and also shall contain a provision setting forth the right of the employees to enforce in their own names either by filing a separate claim or by making the insurer a party to the original claim, the liability of the insurer in whole or in part for the payment of the disability benefits. Payment in whole or in part of disability benefits by either the employer or the insurer shall, to the extent thereof, be a bar to the recovery against the other of the amount so paid.

All insurance policies shall be approved by the insurance commissioner of the State. [L 1969, c 148, pt of §1; gen ch 1985]

" **[§392-49] Insolvency of employer not to release insurer.** Every policy and contract of insurance issued for the purposes of this chapter shall contain a provision to the effect that the insolvency or bankruptcy of the employer and the employer's discharge therein shall not relieve the insurer from the payment of temporary disability benefits during the life of the policy or contract. [L 1969, c 148, pt of §1; gen ch 1985]

" **[§392-50] Cancellation of insurance contracts.** No policy or contract of insurance issued by a stock company or mutual association against liability arising under this chapter shall be canceled within the time limited in the contract for its expiration until at least ten days after notice of intention to cancel such contract, on a date specified in the notice, has been filed with and served on the director of labor and industrial relations and the employer. [L 1969, c 148, pt of §1]

" **[§392-51] Failure to submit timely wage and employment information.** An employer to whom an insurer has sent a request for information on wages, hours, and duration of employment regarding an employee claiming disability benefits shall complete and submit such information within seven days from the date the request was received. If the employer fails to submit such information within seven days, the director upon notification by the insurer shall levy a penalty of \$10 for each delinquent request where the employer fails to show good cause for failure to file on time. [L 1973, c 9, §1]

" **§392-52 Disposition of accrued benefits where insurer is unable to locate employee.** An insurer who is unable to pay benefits to an employee because the employee cannot be located, shall deposit the accrued benefits into the trust fund for disability benefits. Upon locating the employee, the director shall pay from the trust fund to the employee an amount equal to but not more than the amount paid into the fund by the employer. If the employee cannot be located for a period of two years from the date of deposit, the employee's unpaid benefits shall escheat to the trust fund for disability benefits. [L 1981, c 115, §1; gen ch 1985; am L 2013, c 100, §8]

#### "PART IV. TRUST FUND FOR DISABILITY BENEFITS

##### Note

Part heading amended by L 2013, c 100, §8.

**§392-61 Establishment of trust fund for disability**

**benefits.** There is established in the treasury of the State, separate and apart from all public moneys or funds of the State, a trust fund for disability benefits which shall be administered by the director exclusively for the purposes of this chapter; and for the establishment and maintenance of a family leave data collection system under section 398-9.5. All contributions pursuant to this part shall be paid into the fund and all benefits payable under this part shall be paid from the fund. The fund shall consist of[:]

- (1) All contributions collected pursuant to this part, together with any interest thereon;
- (2) All fines and penalties for the fund pursuant to this chapter;
- (3) All moneys collected by way of subrogation;
- (4) Interest earned on any moneys in the fund;
- (5) Any property or securities acquired through the use of moneys belonging to the fund;
- (6) All earnings of such property and securities; and
- (7) All other moneys received for the fund from any source. [L 1969, c 148, pt of §1; am L Sp 2009, c 7, §3; am L 2013, c 100, §6]

**Revision Note**

In the last sentence, (1) to (7) reformatted as paragraphs (1) to (7) pursuant to §23G-15.

" **§392-62 Management of the fund.** The director of finance shall be the treasurer and custodian of the trust fund for disability benefits and shall administer the fund in accordance with the directions of the director of labor and industrial relations. All moneys in the fund shall be held in trust for the purposes of this part only and shall not be expended, released, or appropriated or otherwise disposed of for any other purpose. Moneys in the fund may be deposited in any depository bank in which general funds of the State may be deposited but such moneys shall not be commingled with other state funds and shall be maintained in separate accounts on the books of the depository bank. Such moneys shall be secured by the depository bank to the same extent and in the same manner as required by the general depository law of the State; and collateral pledged for this purpose shall be kept separate and distinct from any other collateral pledged to secure other funds of the State. The director of finance shall be liable for the performance of the director of finance's duties under this section as provided

in chapter 37. [L 1969, c 148, pt of §1; gen ch 1985; am L 2013, c 100, §8]

" **§392-63 Disbursements from the fund.** Expenditures of moneys in the trust fund for disability benefits shall not be subject to any provisions of law requiring specific appropriations or other formal release by state officers of money in their custody. All benefits shall be paid from the fund upon warrants drawn upon the director of finance by the comptroller of the State supported by vouchers approved by the director. [L 1969, c 148, pt of §1; am L 2013, c 100, §8]

" **§392-64 Investment of moneys.** With the approval of the department the director of finance may, from time to time, invest such moneys in the trust fund for disability benefits as are in excess of the amount deemed necessary for the payment of benefits for a reasonable future period. Such moneys may be invested in bonds of any political or municipal corporation or subdivision of the State, or any of the outstanding bonds of the State, or invested in bonds or interest-bearing notes or obligations of the State (including state director of finance's warrant notes issued pursuant to chapter 40), or of the United States, or those for which the faith and credit of the United States, are pledged for the payment of principal and interest, or in federal land bank bonds or joint stock farm loan bonds. The investments shall at all times be so made that all the assets of the fund shall always be readily convertible into cash when needed for the payment of benefits. The director of finance shall dispose of securities or other properties belonging to the fund only under the direction of the director of labor and industrial relations. [L 1969, c 148, pt of §1; am L 2013, c 100, §8]

" **§392-65 Temporary disability benefits to be paid from the trust fund for disability benefits; recovery of disability benefits.** Temporary disability benefits shall be paid from the trust fund for disability benefits to individuals who become disabled when unemployed and who subsequently become ineligible for benefits under chapter 383. Benefits shall also be paid from this fund to an employee who is entitled to receive temporary disability benefits but cannot receive such benefits because of the bankruptcy of the employee's employer or because the employee's employer is not in compliance with this chapter. Benefits paid from the trust fund to such employee may be recovered from the employee's bankrupt or noncomplying employer. The director shall institute administrative and legal actions, as provided in section 392-47, to effect recovery of such

benefits. [L 1969, c 148, pt of §1; am L 1971, c 109, §1(j); gen ch 1985; am L 1986, c 339, §61; am L 2013, c 100, §8]

" **§392-66 Disability while unemployed.** (a) An employee whose employment with a covered employer is terminated and who during a period of unemployment within twenty-six weeks immediately following such termination of employment becomes ineligible for benefits claimed under chapter 383 solely because of disability commencing on or after January 1, 1970, and who on the day the disability commences is not employed and is not then otherwise eligible for benefits under this chapter, shall be entitled to receive disability benefits as hereinafter provided for each week of such disability for which week the employee would have received unemployment insurance benefits if the employee were not so disabled.

(b) The weekly benefits payable to the disabled unemployed shall be the same as the benefits to which the individual would be entitled under chapter 383 except for the individual's disability; provided that in a case of a disabled unemployed who is performing some form of less than full-time work as referred to in the definition of unemployment in section 383-1 at the time the disability arises, the individual shall receive benefits which the individual would have been entitled to had the individual not been performing less than full-time work; provided further that benefits payable under this section shall not be payable for a period longer than twenty-six weeks from the time the above unemployed commences to receive unemployment benefits payable under chapter 383.

(c) The benefits payable under this section shall be paid by the director out of any assets in the fund created by section 392-61. The payments shall be made through employment offices, as this term is defined and used in chapter 383. The director may require an employee claiming benefits under this section to file proofs of disability and other proofs reasonably necessary for the director to make a determination of eligibility and benefit rights under this section. The director may establish reasonable procedures for determining pro rata benefits payable with respect to disability periods of less than one week. Any employee claiming benefits under this section whose claim is rejected in whole or in part by the director shall be entitled to request review and shall have all the rights with respect to disputed claims provided in this chapter. [L 1969, c 148, pt of §1; am L 1971, c 94, §1; gen ch 1985; am L 1986, c 162, §9 and c 339, §62]

" **§392-67 Assessments for the trust fund for disability benefits.** (a) Each employer shall, from July 1, 1969, to

December 31, 1969, contribute to the establishment of the trust fund for disability benefits at the rate of .2 per cent of covered wages as defined in section 392-43. The employer shall pay such contributions to the director for a given month on or before the thirtieth day of the next succeeding month.

(b) When the balance of the trust fund for disability benefits falls below \$500,000 as of December 31 of any year after 1969, a levy shall be assessed and collected in the next calendar year from insurers of employers insured under section 392-41 and from all other employers not insured under section 392-41.

Each year the director shall determine the amount of the levy to be paid by each insurer or employer and shall give notice of the levy to each such insurer or employer on or before May 1 of the year in which the levy is assessed. The amount of the levy shall be paid on or before June 30 following notification.

The amount of the levy against each insurer or employer shall be determined as the product of the wages paid by the employer multiplied by a factor which is the ratio of the amount by which the balance in the [trust fund for disability benefits] was less than \$500,000 on the preceding December 31 to total covered wages paid by all employers. For the purposes of this paragraph, "covered wages" means wages paid by employers during the preceding calendar year but not including wages paid to any employee in excess of the limit contained in section 392-43(b). [L 1969, c 148, pt of §1; am L 2013, c 100, §8]

" **[§392-68] Failure to pay assessments.** If an employer or insurer fails to pay the assessment required by section 392-67(a) or section 392-67(b) within thirty days after the end of the month or quarter for which payment was due, the director shall levy a penalty of at least \$10 but no more than ten per cent of the assessment due against such employer or insurer, unless the nonpayment is excused by the director after a showing by such employer or insurer that the payment of the assessment could not be made on the date prescribed therefor owing to conditions over which the employer or insurer had no control and such employer or insurer forthwith complies. [L 1971, c 109, §1(k); gen ch 1985]

" **§392-69 Request for wage and employment information.** An employer to whom the department has sent a request for wage and employment information for an employee claiming benefits against the trust fund for disability benefits, shall complete and file such information within seven days from date the request was sent. If an employer fails to file such information in seven

days, the director shall levy a penalty of not more than \$10 for each delinquent request, unless the failure to file such information is excused by the director after a showing by such employer that such filing could not be made on the prescribed date therefor owing to conditions over which the employer had no control. [L 1971, c 109, §1(1); gen ch 1985; am L 2013, c 100, §8]

## "PART V. DETERMINATIONS

### A. Appeal Procedure

**[§392-71] Appeal tribunal.** Appeals shall be heard by an impartial referee for temporary disability benefits appeals who shall be appointed by the director and who shall serve as the appeal tribunal. [L 1969, c 148, pt of §1]

" **§392-72 Appeals, filing and hearing.** (a) If a person disputes the amount of benefits, paid under part III or part IV, or the denial of benefits, the claimant may file an appeal, in the form and manner prescribed by regulation of the director, at the office of the department in the county in which the claimant resides or in the county in which the claimant was employed prior to the claimant's disability, within twenty days after the date of payment of such disputed benefits or the denial thereof. Notice of the appeal shall be served upon the employer or insurer or the trust fund for disability benefits in the form and manner prescribed by regulation of the director.

(b) The appeal shall be heard in the county in which the appeal is filed; provided that the director may by regulation provide for good cause for the holding of a hearing in another county and may provide for the taking of depositions. Unless the appeal is withdrawn with the permission of the referee, the referee after affording the parties reasonable opportunity for a fair hearing shall make findings and conclusions and on the basis thereof affirm, modify, or deny the disputed benefits. All parties shall be promptly notified of the decision of the referee and shall be furnished with a copy of the decision and the findings and conclusions in support thereof and the decision shall be final and shall be binding unless a proceeding for judicial review is initiated pursuant to section 392-75; provided that within the time provided for taking an appeal and prior to the filing of a notice of appeal, the referee may reopen the matter, upon application of the director or any party, or upon the referee's own motion, and thereupon may take further evidence or may modify the referee's decision, findings, or conclusions. In the event the matter is reopened, the



referee shall render a further decision in the matter, either reaffirming or modifying the referee's original decision, and notice shall be given thereof in the manner hereinbefore provided. The time to initiate judicial review shall run from the notice of such further decision if the matter has been reopened. [L 1969, c 148, pt of §1; am L 1973, c 62, §1; gen ch 1985; am L 2013, c 100, §8]

" **[§392-73] Procedure.** The referee shall not be bound by common law or statutory rules of evidence or by technical rules of procedure, but any hearing or appeal before the same shall be conducted in such manner as to ascertain the substantial rights of the parties. No person shall participate on behalf of the director in any case in which that person has a direct or indirect interest. A record shall be kept of all testimony and proceedings in connection with an appeal, but the testimony need not be transcribed unless further review is initiated. Witnesses subpoenaed pursuant to this section shall be allowed fees at a rate fixed by the department and such fees shall be deemed part of the expenses of administering this chapter. [L 1969, c 148, pt of §1]

" **[§392-74] Conclusiveness of determinations and decisions.** Except insofar as reconsideration is had under section 392-79, any right, fact, or matter in issue, directly passed upon or necessarily involved in an appeal which has become final, shall be conclusive for all the purposes of this chapter. [L 1969, c 148, pt of §1]

" **§392-75 Judicial review.** Any party or the director may obtain judicial review of the decision of the referee in the manner provided in chapter 91, by instituting proceedings in the circuit court of the circuit in which the claimant resides or in which the claimant was last employed. The proceedings shall be heard in a summary manner and shall be given precedence over all other civil cases except proceedings arising under the Employment Security Law and the Workers' Compensation Law of the State. Proceedings for review by the intermediate appellate court, subject to chapter 602, may be taken and had in the same manner as is provided for a review of a judgment of a circuit court. No bond shall be required as a condition of initiating a proceeding for judicial review or initiating proceedings for review by the intermediate appellate court. Upon the final termination of any judicial proceeding, the referee shall enter an order in accordance with the mandate of the court. [L 1969, c 148, pt of §1; am L 1975, c 41, §1; am L 2004, c 202, §47; am L 2006, c 94, §1; am L 2010, c 109, §1]

" **§392-76 Representation.** In any proceeding for judicial review pursuant to section 392-75, the director may be represented by the attorney general or by any qualified attorney who is employed by the department for that purpose in conformity with section 28-8.3. [L 1969, c 148, pt of §1; am L Sp 1993, c 8, §53; am L 2015, c 35, §38]

" **[§392-77] Payment of benefits.** Benefits shall be paid promptly in accordance with the decision. If an application for reconsideration is duly made or if judicial review is duly filed, benefits with respect to weeks of disability not in dispute and benefits payable in any amount not in dispute shall be paid promptly regardless of any reconsideration or appeal. [L 1969, c 148, pt of §1]

" **§392-78 Recovery of benefits paid; individual's liability to repay benefits; insurer's appeal rights.** (a) Any person who has received any amount as benefits under this chapter to which the person was not entitled shall be liable for such amount unless the overpayment was received without fault on the part of the recipient and its recovery would be against equity and good conscience. Notice of a reconsideration under section 392-79 in such cases shall specify that the person is liable to repay the amount of overpaid benefits, the basis of the overpayment, and the week or weeks for which such benefits were paid.

(b) The person liable shall, in the discretion of the referee, either repay such amount or have the amount deducted from any future benefits payable under this chapter within two years after the date of mailing of the notice of reconsideration or the final decision on an appeal from such reconsideration.

(c) In any case in which under this section an individual is liable to repay any amount, the amount shall be payable without interest.

(d) In accordance with sections 392-71 and 392-72, an insurer, self-insured employer or the trust fund for disability benefits shall have a right to appeal for the recovery of disability benefits which were overpaid an employee. Subsections (a) through (c) shall be applicable in the recovery of overpaid benefits. [L 1969, c 148, pt of §1; am L 1981, c 14, §1; gen ch 1985; am L 2013, c 100, §8]

" **[§392-79] Reconsideration.** (a) At any time within one year from the date of a final decision with respect to wages upon which benefits are computed, the director on the director's own motion may reopen the decision if the director finds that wages of the claimant pertinent to the decision but not

considered in connection therewith have been newly discovered or that benefits have been allowed or denied or the amount of benefits have been fixed on the basis of a nondisclosure or misrepresentation of a material fact.

(b) At any time within two years from the end of any week with respect to which a final decision allowing or denying benefits has been made, the director on the director's own motion may reopen the decision if the director finds that the benefits were allowed or denied as a result of nondisclosure or misrepresentation of a material fact.

(c) At any time within one year from the end of any week with respect to which a final decision allowing or denying benefits has been made, the director on the director's own motion may reopen the decision if the director finds that an overpayment, due to reasons other than fraud, has occurred.

(d) In any case in which the director is authorized by this section to reopen any final decision rendered by a referee or court, the director may petition the referee or court to issue a revised decision. [L 1969, c 148, pt of §1; gen ch 1985]

#### **Rules of Court**

Applicability of Hawaii Rules of Civil Procedure, see HRCP rule 81(b)(12).

" **[\$392-80] Appeal pending when reconsideration issued.** In the event that an appeal is pending as of the date a reconsideration thereof is issued, the appeal, unless withdrawn, shall be treated as an appeal from the reconsideration. [L 1969, c 148, pt of §1]

#### **Rules of Court**

Applicability of Hawaii Rules of Civil Procedure, see HRCP rule 81(b)(12).

" **[\$392-81] Notice of reconsideration.** Notice of a reconsideration upon a claim shall be promptly given to the parties by delivery thereof or by mailing the notice to the last known address of each party. [L 1969, c 148, pt of §1]

#### **"B. Determinations Relating to Wage Withholding**

**[\$392-86] Disputes between employers and employees relating to withholding of wages.** In the case that there is a dispute between the employee and the employer relating to the

withholding of wages as contributions for temporary disability benefits, either party may file with the director a petition for determination of the amount to be withheld.

The matter shall be determined by an officer of the department. If either party is dissatisfied with the determination, the party may petition for redetermination and thereupon the petition shall be transferred to the referee. [L 1969, c 148, pt of §1; gen ch 1985]

## "PART VI. ENFORCEMENT

**[§392-91] Enforcement by the director.** The director shall enforce the provisions of this chapter. The director may appoint such assistants and such clerical, stenographic and other help as may be necessary for the proper enforcement of this chapter subject to any civil service act relating to state employees. The salaries of all the foregoing appointees and employees shall be as fixed by law.

The director may adopt, amend, or repeal such rules and regulations as the director deems necessary or suitable for the proper enforcement of this chapter. [L 1969, c 148, pt of §1; gen ch 1985]

### Cross References

Civil service law, see chapter 76.

Classification law, see §76-13.5.

Rulemaking, see chapter 91.

" **§392-92 Penalties.** (a) Any person who, after twenty-one days written notice and the opportunity to be heard by the director, is found to have violated any provision of this chapter or rule adopted thereunder for which no penalty is otherwise provided, shall be fined not more than \$250 for each offense.

(b) All fines collected pursuant to this chapter shall be deposited into the trust fund for disability benefits created by section 392-61. [L 1991, c 107, §2; am L 2013, c 100, §8]

## "PART VII. MISCELLANEOUS PROVISIONS

**[§392-101] Limitation of fees.** Any individual claiming benefits in any proceeding before the department or the referee may be represented by counsel or other duly authorized agent; but no such counsel or agent shall either charge or receive for such services more than an amount approved by the department or referee, and such amount shall in no case exceed ten per cent of

the total amount of benefits received as a result of such proceeding. Any person who violates this section shall, for each such offense, be fined not less than \$50 nor more than \$500 or imprisoned not more than six months, or both. [L 1971, c 109, §1(m)]

#### **Cross References**

Classification of offense and authorized punishment, see §§701-107, 706-640, and 706-663.