

**"CHAPTER 396  
OCCUPATIONAL SAFETY AND HEALTH**

Section

- 396-1 Short title
- 396-2 Findings and purpose
- 396-3 Definitions
- 396-4 Powers and duties of department
- 396-4.5 Certification of safety and health professionals
- 396-5 Repealed
- 396-5.1 Fees
- 396-5.5 Repealed
- 396-6 Employer responsibility: safe place of employment;  
safety devices and safeguards
- 396-7 Toxic materials
- 396-8 Employee responsibility and rights
- 396-9 Explosives
- 396-10 Violations and penalties
- 396-11 Review
- 396-11.5 Appeals board
- 396-12 Judicial review
- 396-13 Trade secrets
- 396-14 Evidence
- 396-15 Exception to liability
- 396-16 Exception for federal jurisdiction
- 396-17 Repealed
- 396-18 Safety and health programs for contractors bidding  
on state construction jobs
- 396-19 Hoisting machine operators advisory board
- 396-20 Hoisting machine operators' certification revolving  
fund

## Note

Hoisting machine operators advisory board; report to 2017 legislature on state law and federal Occupational Safety and Health Administration rules and regulations pertaining to hoisting machine operators; certification of hoisting machine operators. L 2016, c 74, §3.

## Cross References

Fireworks control law, see chapter 132D.

## Case Notes

Company was properly served with, and received, safety violation citation, and mailing the citation to local company representative's residence did not violate company's due process rights where representative was served with the citation by certified mail delivered with return receipt in compliance with Hawaii administrative rule §12-51-15(a), and the mailing was to the "employer" who, under rule §12-50-2, included the representative, who had control over company's employees and was in charge of company's business within the State. 120 H. 135 (App.), 202 P.3d 596 (2009).

Discussed: 87 H. 71, 951 P.2d 934 (1998).

" **[§396-1] Short title.** This chapter shall be known as the "Hawaii Occupational Safety and Health Law". [L 1972, c 57, pt of §1]

" **§396-2 Findings and purpose.** Through years of research and study, Congress has found that the number of industrial accidents that take place in the United States can be reduced if certain minimum standards are established and enforced.

Congress has also found that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments. The overall congressional findings would definitely be applicable to Hawaii. There is a need to assure so far as possible, every working man and woman in the State safe and healthful working conditions. This legislation is also designed to permit and encourage employer and employee efforts to reduce injury and disease arising out of employment, and to stimulate them to institute new programs and to perfect existing programs for providing safe and healthful

working environments. [L 1972, c 57, pt of §1; am L 1976, c 95, §2]

### Case Notes

Cited: 59 H. 53, 575 P.2d 1299 (1978).

" **§396-3 Definitions.** When used in this chapter:

"Aggravating character" means circumstances and behavior that increase the seriousness or outrageousness of contemptuous conduct.

"Appeals board" means the Hawaii labor relations board.

"Certified safety professional" means an individual who is certified by the board of certified safety professionals.

"Dealer" means, for the purpose of the section concerning explosives, any person, corporation, partnership, association, association of dealers, or other form of business enterprise engaged in the business of buying and selling explosives.

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

"Director" means the director of labor and industrial relations or the director's designee.

"Employee" means every natural person who is required or directed or permitted or suffered by any employer to engage in any employment, or to go to work or be at any time in any place of employment.

"Employee of the State" includes officers and employees of the department of labor and industrial relations, and persons acting in behalf of the department in an official capacity, whether temporarily or with or without compensation.

"Employer" means:

- (1) The State and every state agency;
- (2) Each county and all public and quasi-public corporations and public agencies therein;
- (3) Every person which has any natural person in service;
- (4) The legal representative of any deceased employer;
- (5) Every person having direction, management, control, or custody of any employment, place of employment, or any employee.

"Employment" includes the carrying on of any trade, business, occupation, or work, including all excavation, demolition, and construction work, or any process or operation in any way related thereto, in which any person is engaged to work for hire except domestic service in or about a private home.

"Hoisting machine" means a machine with a hoist line, sling, or hydraulic lifting mechanism used in construction, demolition, or excavation work.

"Hoisting machine operator" means any individual who operates a hoisting machine in the State.

"Occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

"Place of employment" means any place, and the premises appurtenant thereto, where employment is carried on.

"Safe" and "safety" as applied to an employment or place of employment mean such freedom from danger to employees as the nature of the employment reasonably permits.

"Safety device" and "safeguard" shall be given a broad interpretation so as to include any practicable method of mitigating or preventing a specific danger.

"Serious violation" means a violation that carries with it a substantial probability that death or serious physical harm could result from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use, in a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, have known of the presence of the violation.

"Wilful violation" means a voluntary act or omission by the employer, as distinguished from an accidental act or omission, that is done with intentional disregard of, or plain indifference to, any standard, rule, citation, or order issued under the authority of this chapter. A wilful violation does not require a showing of malicious intent or bad motive. [L 1972, c 57, pt of §1; am L 1974, c 152, §1; am L 1975, c 50, §1; am L 1976, c 95, §1; am L 1977, c 179, §1; gen ch 1985; am L 1993, c 175, §1; am L 1997, c 347, §1; am L 1998, c 165, §3 and c 259, §§1, 2; am L 2002, c 104, §2; am L 2013, c 96, §2]

### **Case Notes**

Employer must provide a safe place to work to whomever the employer requires or permits to perform work on the employer's premises, including an employee of an independent contractor. 59 H. 53, 575 P.2d 1299 (1978).

" **§396-4 Powers and duties of department.** (a) Administration. The department shall be responsible for administering occupational safety and health standards throughout the State.

- (1) The department shall prescribe and enforce rules under chapter 91 as may be necessary for carrying out the purposes and provisions of this chapter. The department shall make reports to the Secretary of Labor in the form and containing the information that the Secretary from time to time shall require pursuant to federal law;
- (2) The department shall adopt, amend, or repeal occupational safety and health standards in the manner prescribed by rules adopted hereunder. Emergency temporary standards may be adopted without conforming to chapter 91 and without hearings to take immediate effect upon giving a statewide public notice of the emergency temporary standard or upon any other date that may be specified in the notice. An emergency temporary standard may be adopted if the director determines:
  - (A) That employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards; and
  - (B) That the emergency standard is necessary to protect employees from danger.The emergency temporary standard shall be effective until superseded by a standard adopted in accordance with the procedures set forth in chapter 91, but in any case shall be effective no longer than six months;
- (3) Variances from occupational safety and health standards adopted under this chapter may be granted upon application of an employer or employers. Application for variances must correspond to procedures set forth in the rules of this chapter. The director may issue an order for variance if the director determines that the proponent of the variance has demonstrated that the conditions, practices, means, methods, operations, or processes used or proposed to be used by the employer will provide employment and places of employment to the employer's employees which are as safe and healthful as those which would prevail if the employer complied with the standard. The employer shall also notify the employer's employees upon each application for variance and the employees shall be given an opportunity to request and participate in hearings or other proceedings relating to applications for variance. No inference of admission of violation of a

standard shall be made against the employer by reason of the employer's application for variance;

- (4) The department, upon the application of any employer or other person affected thereby, may grant any time that may reasonably be necessary for compliance with any order. Any person affected by an order may petition the department for an extension of time, which may be granted if the department finds it necessary; and
- (5) The department shall regulate hoisting machines and shall certify their operators.
- (b) Inspection and investigation.
  - (1) Authorized representatives of the director shall have the right to enter without delay any place of employment during regular working hours and at other reasonable times;
  - (2) The department shall inspect places of employment and machines, devices, apparatus, and equipment for the purpose of insuring adequate protection to the life, safety and health of workers;
  - (3) The department shall inspect construction activities for the purpose of protecting the health and safety of employees and the general public. A construction activity includes any activity related to the erection, construction, alteration, demolition or maintenance of buildings, structures, bridges, highways, roadways, dams, tunnels, sewers, underground buildings or structures, underground pipelines or ducts, and any other construction project or facility;
  - (4) The department may investigate the cause of all industrial injuries resulting in disability or death which occur in any employment, or place of employment, and may make reasonable orders and recommendations with respect to the cause of the injuries;
  - (5) The department shall have the right to question privately any employer, owner, operator, agent or employee in investigation, enforcement and inspection activities;
  - (6) There shall be a prohibition against advance notice of inspection except that written exception may be expressly authorized by the director in the director's discretion and pursuant to the rules and regulations promulgated under this chapter. Those inspections requiring advance notice for preparation or for other purposes of inspection as further defined in the rules and regulations promulgated under this chapter shall

not be included in the prohibition against advance notice; and

- (7) An employee of the State acting within the scope of the employee's office, employment, or authority under this chapter shall not be liable in or made a party to any civil action growing out of the administration or enforcement of this chapter.
- (c) Education and training.
    - (1) The department may disseminate through exhibitions, moving pictures, lectures, pamphlets, and any other method of publicity, information to employers, employees and the general public regarding the causes and prevention of industrial accidents and injuries; and
    - (2) Where appropriate, the department shall undertake programs in training and consultation with employers and employees as a means of encouraging voluntary compliance.
  - (d) Enforcement.
    - (1) Whenever right of entry or inspection is refused to an authorized representative of the director, the department may apply to the circuit court of the circuit where such place of employment exists for a search warrant providing on its face that the wilful interference with its lawful execution may be punished as a contempt of court;
    - (2) Whenever the department finds that any employment or place of employment or the operation of any machine, device, apparatus, or equipment is not safe, or that any practice, means, method, operation, or process employed or used in connection therewith is unsafe or does not afford adequate protection to the life, safety and health of employees in the employment, the department shall make a citation or an order relative thereto which is necessary to render the employment or place of employment safe and protect the life and safety of employees therein and deliver the same to the employer. The department may in the citation or order direct that, in the manner and within a time specified, such additions, repairs, improvements, or changes be made and such safety devices and safeguards be furnished, provided and used as are reasonably required to render the employment or place of employment safe. The employer shall obey and observe all citations or safety orders and post said citation or order at or near the place where the violation, referred to in the citation or order occurred;

- (3) Whenever in the opinion of the department the condition of any employment or place of employment, or the operation of any machine, device, apparatus, or equipment, or any practice, means, method, operation, or process employed or used, is in an unsafe condition or is not properly guarded or is dangerously placed, the use thereof may be prohibited by the department, and a citation or order to that effect shall be posted prominently in the working place. The citation or order shall be removed:
- (A) When a determination has been made by the department that the place of employment, machine, device, apparatus, or equipment is made safe and the required safeguards or safety devices are provided for; and
  - (B) By an authorized representative of the department;
- (4) Whenever in the opinion of the department the condition of any employment or place of employment, or the operation of any machine, device, apparatus, or equipment, or any practice, means, method, operation, or process employed or used constitutes an imminent hazard to the life or safety of any person, the department may apply to the circuit court of the circuit in which such place of employment, machine, device, apparatus, or equipment is situated or such practice, means, method, operation, or process is employed for an injunction restraining the use or operation thereof until the use or operation is made safe.

The application to the circuit court accompanied by an affidavit showing that the use or operation exists in violation of a standard, rule, regulation, citation or order of the department and constitutes an imminent hazard to the life or safety of any employee, and accompanied by a copy of the standard, rule, regulation, citation or order applicable thereto, shall warrant, in the discretion of the court, the immediate granting of a temporary restraining order. If the department arbitrarily or capriciously fails to seek relief under this section, any employee who may be injured by reason of such failure or a representative of said employee may bring an action against the department in the circuit court of the circuit in which the imminent hazard is alleged to exist for a writ of mandamus to compel the department to seek such an order and for such further relief as



may be appropriate. No bond shall be required from the department as a prerequisite to the granting of a restraining order;

- (5) The director and the director's authorized agents shall have the same powers respecting the administering of oaths, compelling the attendance of witnesses, the production of documentary evidence, and examining or causing to be examined witnesses as are possessed by a court, and may take depositions and certify to official acts. The circuit court of any circuit upon application by the director shall have power to enforce by proper proceedings the attendance and testimony of any witness so subpoenaed. Subpoena and witness fees and mileage in such cases shall be the same as in criminal cases in the circuit courts. Necessary expenses of or in connection with any such hearings or investigations shall be payable from the funds appropriated for expenses of administration of the department.

No person shall be excused from attending or testifying or producing material, books, paper, correspondence, memoranda, and other records before the director or in obedience to subpoena on the grounds that the testimony or evidence, documentary or otherwise, required of the person may tend to incriminate the person or subject the person to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which the individual is compelled, after having claimed the individual's privilege against self-incrimination, to testify or produce evidence, documentary, or otherwise, except that such individuals so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying;

- (6) Where a condition or practice in a place of employment could reasonably be expected to cause death or serious physical harm, the department shall have the right, independent of any other enforcement powers under this chapter, to:
- (A) Immediately inform the employees and employers of such hazard by meeting, posted notice, or otherwise;
  - (B) Take steps to obtain immediate abatement of the hazard by the employer and where appropriate to

- initiate necessary legal proceedings to require such abatement; and
- (7) The department may prosecute, defend, and maintain actions in the name of the department for the enforcement of the provisions of this chapter, including the enforcement of any order issued by it, the appeal of any administrative or court decision, and other actions necessary to enforce this chapter. [L 1972, c 57, pt of §1; am L 1974, c 152, §2; am L 1975, c 50, §2; am L 1976, c 95, §§3 to 5; am L 1980, c 19, §2; gen ch 1985; am L 1994, c 130, §§2, 4; am L Sp 1995, c 12, §§1, 2; am L 1997, c 347, §2; am L 1998, c 2, §95; am L 1999, c 28, §§1, 2]

### **Revision Note**

Pursuant to §23G-15, in:

- (1) Subsection (a)(3), "and" deleted;
- (2) Subsection (b)(6), "and" added after ending punctuation;
- (3) Subsection (c)(1), punctuation changed and "and" added after ending punctuation;
- (4) Subsection (d)(1) and (2), punctuation changed;
- (5) Subsection (d)(3), (A) and (B) reformatted as subparagraphs (A) and (B);
- (6) Subsection (d)(3)(B), punctuation changed;
- (7) Subsection (d)(4) and (5), punctuation changed;
- (8) Subsection (d)(6), (A) and (B) reformatted as subparagraphs (A) and (B); and
- (9) Subsection (d)(6)(B), punctuation changed, and "and" added after ending punctuation.

### **Cross References**

Depositions, see chapter 624.

Oaths, subpoenas, see §§1-21, 603-21.9, 621-1, and 621-12.

### **Rules of Court**

Injunctions, see HRCF rule 65.

#### **" [§396-4.5] Certification of safety and health**

**professionals.** (a) Only individuals receiving certification from the department as safety and health professionals shall be qualified to certify that an employer:

- (1) Has an effective safety and health program; and
- (2) Qualifies for a reduction in workers' compensation insurance premiums under section 431:14-103(b).

(b) Certification as a safety and health professional shall be:

- (1) Issued to an individual only; and
- (2) Renewable.

(c) Certificates issued under this section may be revoked or suspended by the director on any grounds specified in rules adopted under this chapter. [L 1995, c 234, §3]

" **§396-5 REPEALED.** L 1980, c 19, §3.

" **§396-5.1 Fees.** (a) The director may establish fees pursuant to chapter 91 to be charged for the following:

- (1) Any aspect relating to the issuance of permits, certificates, or licenses required by this chapter or rule adopted by the director;
- (2) Searching, reviewing, segregating, and providing records pursuant to chapter 92F requests where such fees are not provided for under rules adopted by the office of information practices;
- (3) The costs of training materials used in department sponsored workshops; and
- (4) The costs of public notices required for variances, and public requests for adoption, amendment, or repeal of rules.

(b) Fees received pursuant to subsection (a) shall be deposited into the general fund. [L 1996, c 156, §1]

" **§396-5.5 REPEALED.** L 1980, c 19, §4.

" **§396-6 Employer responsibility: safe place of employment; safety devices and safeguards.** (a) Every employer shall furnish to each of the employer's employees employment and a place of employment which are safe as well as free from recognized hazards. No employer shall require or direct or permit or suffer any employee to go or be in any employment or place of employment which is not free from recognized hazards that are causing or likely to cause death or serious physical harm to employees or which does not comply with occupational safety and health standards, rules, regulations, citations, or orders made pursuant to this chapter except for the specific purpose of abating said hazard.

(b) Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe.

(c) No employer shall construct or cause to be constructed any place of employment that is not safe, and no employer shall occupy or maintain any unsafe place of employment.

(d) Every employer shall make such reports as the Secretary of Labor may require pursuant to Public Law 91596 section 8(c).

(e) Each employer shall make, keep and preserve and make available to the department such records regarding the employer's activities relating to this chapter as the department may prescribe by regulation as necessary or appropriate for the enforcement of this chapter or for developing information regarding the causes and prevention of occupational accidents and illnesses.

The department shall prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on work related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

(f) All employers shall be required to post prominently in the working place all posters and information provided by the department for posting as well as notices informing employees of their rights and obligations under this chapter. [L 1972, c 57, pt of §1; am L 1974, c 152, §3; am L 1976, c 95, §6; gen ch 1985]

### Case Notes

Statute recognizes limited exception relating to employees permitted on premises to abate specific hazard. 59 H. 53, 575 P.2d 1299 (1978).

" **[§396-7] Toxic materials.** (a) The department shall issue regulations requiring employers to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured as prescribed under the rules and regulations.

(b) All employers shall prominently post information regarding hazards in the employer's workplace including information about suitable precautions, relevant symptoms, and emergency treatment in case of exposure, and where appropriate, medical examination at no cost to employees with the results of such medical examinations being furnished only to appropriate state officials, and if the employee so requests, to the employee's own physician. Where possible, said information shall additionally be posted or labeled on or near said hazard. Where suitable protective equipment is available, all employers

shall provide information concerning their availability and use to the affected employees including control or technological procedures with respect to such hazards including monitoring or measuring exposure.

(c) No employee shall be permitted regular exposure to any substance which may materially impair the employee's health or functional capacity.

(d) All employers shall provide prompt information to employees when they have been or are being exposed to toxic materials and harmful physical agents in concentrations or at levels in excess of those prescribed in the applicable safety and health standards. This information may be fulfilled by:

- (1) Observation by employees of the monitoring or measuring of such materials or agents;
- (2) Employee access to the records of such monitoring or measuring after notice of exposure, and explanation of said monitoring or measuring procedures where necessary;
- (3) In addition to the above, information shall be provided to the employees of corrective action being taken. [L 1972, c 57, pt of §1; gen ch 1985]

" **§396-8 Employee responsibility and rights.** (a) Employee compliance. Each employee shall comply with occupational safety and health standards and all rules, regulations and orders issued under this chapter which are applicable to the employee's own actions and conduct.

(b) Complaints to the department. Complaints may be made to the department and where reasonable grounds exist for the department to believe there may be a hazard, there shall be an inspection in response to the complaint.

(c) Opportunity for employees to participate in inspections. At the time and place of inspections under section 396-4(b)(2), (3), and (4), an opportunity shall be provided for employees and their representatives to bring possible violations to the attention of the authorized representative of the director conducting said inspection in order to aid inspections. This requirement may be fulfilled by allowing a representative of the employees and a representative of the employer to accompany the director's authorized representative during the physical inspection of the workplace, or in absence of the employees' representative, there shall be a consultation with a reasonable number of employees.

(d) Notice of nonaction to employees. The department shall notify the employees when the department decides not to take compliance action as a result of violations alleged by any employee or any representative of the employees. This notice

shall state the decision not to take compliance action, the reasons therefor, and the procedures for informal review of such decision.

(e) Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:

- (1) No person shall discharge, suspend or otherwise discriminate in terms and conditions of employment against any employee by reason of:
  - (A) The employee's failure or refusal to operate or handle any machine, device, apparatus, or equipment which is in any unsafe condition; or
  - (B) The employee's failure or refusal to engage in unsafe practices in violation of this chapter or of any standard, rule, regulation, citation or order issued under the authority of this chapter;
- (2) Upon discretion of the director or request, names of complainants may be withheld from the employer;
- (3) No person shall discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or intends to testify in any such proceeding, or acting to exercise or exercised on behalf of the employee or others any right afforded by this chapter;
- (4) Any employee who believes that there has been a discharge or discrimination against the employee by any person in violation of this subsection may, within sixty days after the violation occurs, file a complaint with the director alleging unlawful discharge or discrimination and setting forth the circumstances thereof;
- (5) Upon receipt of the complaint, the director shall investigate to determine if a discharge or discrimination in violation of this subsection has occurred;
- (6) If upon investigation the director determines that the provisions of this subsection have been violated, the director shall order the employer to provide all appropriate relief to the employee, including rehiring or reinstating the employee to the former position with back pay and restoration of seniority;
- (7) Within ninety days of receipt of a complaint filed under this subsection, unless extended by the director, the director shall notify the employee of

the final determination and any subsequent action the department will take to resolve the complaint; and

- (8) Nothing in this subsection shall preclude any employee or representative of an employee from simultaneously pursuing a cause of action for injunctive relief or any other remedy provided by law.

(f) Except for those complainants alleging violations under subsection (e) above, names of all complainants and witnesses shall be withheld from the employer unless prior permission is given by the complainant or witness to release the complainant's or witness' name. [L 1972, c 57, pt of §1; am L 1974, c 152, §4; am L 1976, c 95, §7; am L 1977, c 179, §2; gen ch 1985; am L 1993, c 204, §1]

" **§396-9 Explosives.** (a) No person shall use, store, or deal in explosives unless the person has first obtained a certificate of fitness. A certificate of fitness shall only be issued to an individual and shall set forth the individual's competency and provide for the individual's positive identification. Certificates of fitness may be limited as to types or kinds of explosives or to the use of explosives for specific purposes.

(b) No dealer shall sell or deliver explosives to any person who does not hold a certificate of fitness.

(c) It shall be unlawful for any person to use or possess any explosives unless the person has a certificate of fitness or is using the explosives under the immediate supervision and direction of a holder of the certificate.

Any person who violates this section shall be subject to arrest and upon conviction, shall be fined not more than \$1,000 or imprisoned not more than one year, or both, provided that an employer or an employee acting within the scope of employment shall not be deemed to be in violation of this section.

(d) Any certificate of fitness issued under this section may be revoked or suspended by the director on any ground specified in the rules adopted under this chapter, or for any violation of this section.

(e) Any certificate issued under this section, during any time of national emergency or crisis, may be suspended or canceled by the director. A national emergency or crisis shall be deemed to exist when it has been so determined under section 134-34.

(f) This section shall not apply to the armed forces of the United States, to employees of the United States, or the state or county police or fire departments who are authorized to handle explosives. [L 1972, c 57, pt of §1; am L 1975, c 50, §3; gen ch 1985; am L 1998, c 259, §3]

" **§396-10 Violations and penalties.** (a) Any employer who violates this chapter, or any occupational safety and health standard promulgated hereunder or any rule or regulation issued under the authority of this chapter, or who violates or fails to comply with any citation, notice or order made under or by virtue of this chapter or under or by virtue of any rule or regulation of the department, or who defaces, displaces, destroys, damages, or removes without the authority of the department any safety device, safeguards, notice or warning required by this chapter or any rule or regulation of the department may be assessed a civil penalty as specified in this chapter.

(b) Any employer who has received an order or citation for a serious violation of any standard or rule adopted pursuant to this chapter shall be assessed a civil penalty of not more than \$7,700 for each violation.

(c) Any employer who has received an order or citation for a violation of any standard or rule adopted pursuant to this chapter, and the violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to \$7,700 for each violation.

(d) Each day a violation continues shall constitute a separate violation except that during an abatement period only, no additional penalty shall be levied against the employer.

(e) Any employer who violates any of the posting requirements prescribed under this chapter shall be assessed a civil penalty of up to \$7,700 for each violation.

(f) Any employer who wilfully or repeatedly violates this chapter, or any standard, rule, citation, or order issued under the authority of this chapter, shall be assessed a civil penalty of not less than \$5,500 nor more than \$77,000 for each violation.

(g) Any employer convicted of wilful or repeated violations of any standard, rule, citation, or order issued under the authority of this chapter resulting in the death of an employee shall be punished by a fine of not more than \$77,000 or by imprisonment for not more than six months, or both, except that if the conviction is for a violation committed after a first conviction, punishment shall be by a fine of not more than \$77,000 or by imprisonment for not more than one year, or both. Failure to correct a violation for which an order or citation of arrest has been issued shall be evidence of wilful conduct.

(h) Any employer who has received an order for violation under section 396-8(e) may be assessed a civil penalty of not more than \$1,100 for each violation.



(i) Any person who gives advance notice of any inspection to be conducted under this chapter, without authority from the director or the director's designees shall, upon conviction, be punished by a fine of not more than \$1,100 or by imprisonment for not more than six months, or by both.

(j) The director shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(k) Civil penalties imposed under this chapter shall be paid to the department and may be recovered by civil action in the name of the department and the State brought in the district or circuit court for the circuit where the violation is alleged to have occurred or where the employer has its principal office.

(l) When an alleged violation of any provision of this chapter or any standard, rule, or order made thereunder has occurred, the department shall promptly issue a written citation, order, or notice thereof to the employer who shall be required to post the citation, order, or notice. The citation, order, or notice thereof shall include the abatement requirements and within a reasonable time the employer shall be advised of the proposed sanctions, including proposed penalties. Whenever reference is made to posting of any citation, order, notice, petition, decision, or any other type of document issued by the director under this chapter and rules adopted pursuant to this chapter, the employer shall post copies of the document at the work site involved or affected and at the place or places where notices to the employees involved are normally posted. Where posting starts the time for notice of action to or for appeal by employees under this chapter and rules adopted under this chapter, the document shall be posted by the employer upon receipt or on the next business day following receipt.

(m) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than \$11,000, or by imprisonment for not more than six months, or by both.

(n) Criminal offenses committed against any employee of the State acting within the scope of the employee's office, employment, or authority under this chapter shall be subject to the penalties set forth in the Hawaii Penal Code; provided that:

(1) Ten years shall be added to the maximum term of imprisonment (unless life imprisonment is imposed) and

- \$55,000 shall be added to the maximum fine imposed for conviction of a class A felony;
- (2) Five years shall be added to the maximum term of imprisonment and \$27,500 shall be added to the maximum fine imposed for conviction of a class B felony;
  - (3) Three years shall be added to the maximum term of imprisonment and \$11,000 shall be added to the maximum fine for conviction of a class C felony;
  - (4) One year shall be added to the maximum term of imprisonment and \$2,200 shall be added to the maximum fine for conviction of a misdemeanor; and
  - (5) The maximum term of imprisonment and maximum fines prescribed for misdemeanors under the Hawaii Penal Code shall apply to convictions of a petty misdemeanor. [L 1972, c 57, pt of §1; am L 1974, c 152, §5; am L 1975, c 50, §4; am L 1976, c 95, §8; am L 1977, c 179, §3; gen ch 1985; am L 1992, c 94, §§1 to 3; am L 1993, c 175, §2; am L 2011, c 123, §1]

" **§396-11 Review.** (a) Any citation, proposed penalty, or order of the director shall be final and conclusive against the employer unless the employer files with the director a written notice of contest of the citation, the abatement period stated in the citation, the proposed penalty, or order within twenty days after receipt of the citation, proposed penalty, or order.

(b) The employer may petition the director for modification of the abatement requirements in a citation; provided the employer shall file the petition no later than the close of the next business day following the date on which abatement is required, or under exceptional circumstances and for good cause shown, at a later date. The petition for modification may be filed after the twenty-day period for contesting the citation has expired if the initial abatement period stated in the citation expires after the twenty-day period for filing a notice of contest has run.

(c) The director shall issue an order either affirming or modifying the abatement requirement. The director may issue an order modifying the abatement requirement upon a showing by the employer of a good faith effort to comply with the abatement requirements of a citation and that abatement has not been completed because of factors beyond the employer's reasonable control.

(d) Any employee or representative of employees may file with the director a written notice of contest of the initial abatement period stated in a citation or order alleging that the period of time fixed for abatement is unreasonable; provided the notice is filed within twenty days after the citation or order

has been posted. Any employee or representative of employees may also file a written notice of contest of an order granting modification of the abatement period; provided the notice shall be filed within ten days of the posting of the order.

(e) Any employee or representative of employees may file a notice of contest of an order of the director denying a complaint of discrimination filed by an employee pursuant to section 396-8(e); provided that in each case the notice is filed within twenty days after receipt of the order by the employee.

(f) Any employee or representative of employees may file a notice of contest of an order granting an employer's application for a variance under section 396-4(a)(3); provided the notice is filed within twenty days after the posting of a final order or decision of the director.

(g) Upon receipt, the director shall advise the appeals board of any notice of contest.

(h) The appeals board shall afford an opportunity for a de novo hearing on any notice of contest except where rules require a prior formal hearing at the department level, the proceedings of which are required to be transcribed, in which case review before the appeals board shall be confined to the record only.

(i) The appeals board may affirm, modify, or vacate the citation, the abatement requirement therein, or the proposed penalty or order or continue the matter upon terms and conditions as may be deemed necessary, or remand the case to the director with instructions for further proceedings, or direct other relief as may be appropriate.

(j) The affected employees or representatives of affected employees shall be provided an opportunity to participate as parties to hearings under this section.

(k) The director shall submit annual reports to the legislature on the number of contests filed pursuant to this section, the disposition of each, and information indicating whether the issue involved an employee or employees of the department who failed to act within the scope of their office, employment, or authority under this chapter. [L 1972, c 57, pt of §1; am L 1974, c 152, §6; am L 1975, c 50, §5; am L 1976, c 95, §9; am L 1977, c 179, §4; gen ch 1985; am L 1992, c 94, §4]

### **Case Notes**

As transmission of facsimile copies was not specifically allowed by any applicable statute or rule, including Hawaii administrative rule §12-51-19, faxing a notice of contest to the occupational safety and health office did not satisfy the filing requirement under subsection (a). 120 H. 135 (App.), 202 P.3d 596 (2009).

Where company mailed an original notice of contest to the director that was postmarked within the twenty-day deadline under Hawaii administrative rule §12-51-19, company timely filed its notice of contest under subsection (a) and the Hawaii labor relations board and the circuit court had jurisdiction to decide the merits of the company's challenge to the safety violation citation. 120 H. 135 (App.), 202 P.3d 596 (2009).

" **[§396-11.5] Appeals board.** (a) In any hearing conducted by the appeals board under this chapter and pursuant to chapter 91, notwithstanding section 91-9.5, all parties shall be given written notice of hearing by first class mail at least fifteen days before the hearing.

(b) In all hearings before the appeals board, each board member shall have the same powers as possessed by the circuit courts respecting the administering of oaths; issuing subpoenas; compelling the attendance of witnesses, the production of documentary evidence, and the taking of depositions; and examining or causing to be examined witnesses. The circuit court of any circuit, upon application by the appeals board or a party, shall have power to enforce, by proper proceedings, the attendance and testimony of any witness subpoenaed. Subpoena and witness fees and mileage in these cases shall be the same as in criminal cases in the circuit courts and paid by the party calling the witness.

No person shall be excused from attending, testifying, or producing material, books, paper, correspondence, memoranda, and other records before the appeals board or in compliance with a subpoena on the grounds that the testimony or evidence, documentary or otherwise, required of the person may tend to incriminate the person or subject the person to a penalty or forfeiture; provided that no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which the person is compelled, after having claimed the privilege against self-incrimination, to testify or produce evidence, documentary, or otherwise, except that such persons testifying shall not be exempt from prosecution and punishment for perjury committed in testifying.

Pursuant to chapter 91, the appeals board may adopt rules of the Hawaii rules of civil procedure and other rules in conducting any hearing.

(c) Contemptuous conduct at any hearing shall be grounds for summary exclusion from the hearing. Such misconduct, if of an aggravating character and engaged in by an attorney or other representative of a party, shall be grounds for suspension or disbarment from further practice before the appeals board after

due notice and hearing. The appeals board may impose other sanctions for contemptuous conduct, including dismissal of the appeal. Any action taken by the appeals board shall be by a simple majority.

(d) As used in this section, "contemptuous conduct" includes the following conduct by a person appearing before the appeals board:

- (1) Failure or refusal to appear in compliance with a subpoena or, having appeared, failure or refusal to testify under oath or affirmation;
- (2) Failure or refusal to answer any relevant question or failure or refusal to furnish any relevant book, paper, or other document subpoenaed by or on behalf of the appeals board; and
- (3) The commission of any other act that is disrespectful or interferes with the administration of justice. [L 2013, c 96, §1]

" **§396-12 Judicial review.** Except where an order has already become final for failure to contest, the decision and order of the appeals board shall be final and conclusive unless the director or any party to the proceedings before the appeals board obtains a review thereof in the manner provided in chapter 91 by instituting proceedings in the circuit court of the circuit in which the place of employment, machine, device, apparatus, or equipment is situated or such practice, means, method, operation, or process is employed. The hearing on review shall be on the record and the department shall be deemed a party to any such proceedings. The court shall give precedence to such proceedings over all other civil cases. [L 1972, c 57, pt of §1; am L 1975, c 50, §6; am L 1976, c 95, §10]

" **§396-13 Trade secrets.** Information obtained by the department containing or revealing a trade secret shall be held confidential and access shall be limited to authorized representatives of the director concerned with carrying out this chapter or when relevant in any proceeding under this chapter. In such proceeding the director, the appeals board, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets. [L 1972, c 57, pt of §1; am L 1974, c 152, §7; am L 1975, c 50, §7]

" **§396-14 Evidence.** No record or determination of any administrative proceeding under this chapter or any statement or report of any kind obtained, received, or prepared in connection with the administration or enforcement of this chapter shall be admitted or used, whether as evidence or as discovery, in any

civil action growing out of any matter mentioned in the record, determination, statement, or report other than an action for enforcement or review under this chapter. [L 1972, c 57, pt of §1; am L 1987, c 42, §1]

### **Attorney General Opinions**

This section prohibits disclosure of information relating to the identification of witnesses and information given by them in an accident investigation. Att. Gen. Op. 76-3.

" **[\$396-15] Exception to liability.** Any employee who is required by the regulations under this chapter to be trained and certified in first aid, and consequently renders first aid care as provided by this chapter, shall not be liable for any civil damages resulting from the employee's acts or omissions, except for such damages as may result from the employee's gross negligence or wanton acts or omissions. [L 1976, c 155, §1; gen ch 1985]

" **[\$396-16] Exception for federal jurisdiction.** Nothing in this chapter shall apply to working conditions of employees with respect to which any federal agency exercises statutory authority to prescribe and enforce standards or regulations affecting occupational safety or health. [L 1977, c 179, §5]

" **§396-17 REPEALED.** L 1999, c 28, §2.

" **[\$396-18] Safety and health programs for contractors bidding on state construction jobs.** (a) All bids and proposals in excess of \$100,000 for state construction jobs as defined in section 103D-104 shall include a signed certification from the bidder or offerer that a written safety and health plan for the job will be available and implemented by the notice to proceed date of the project. The written safety and health plan shall include:

- (1) A safety and health policy statement reflecting management commitment;
- (2) A description of the safety and health responsibilities of all levels of management and supervisors on the job and a statement of accountability appropriate to each;
- (3) The details of:
  - (A) The mechanism for employee involvement in job hazard analysis;
  - (B) Hazard identification, including periodic inspections and hazard correction and control;

- (C) Accident and "near-miss" investigations; and
  - (D) Evaluations of employee training programs;
  - (4) A plan to encourage employees to report hazards to management as soon as possible and to require management to address these hazards promptly; and
  - (5) A certification by a senior corporate or company manager that the plan is true and correct.
- (b) Failure to submit the required certification may be grounds for disqualification of the bid or proposal.
- (c) Failure to have available on site or failure to implement the written safety and health plan by the project's notice to proceed date shall be considered wilful noncompliance and be sufficient grounds to disqualify the award and terminate the contract. [L 1995, c 199, §2]

" **§396-19 Hoisting machine operators advisory board.** (a) There is created a hoisting machine operators advisory board, which shall be placed in the department for administrative purposes, to be composed of five members to serve without compensation and without reimbursement for expenses. Members shall be appointed by the governor under section 26-34.

The board shall adopt rules pursuant to chapter 91 for the certification of hoisting machine operators.

(b) The hoisting machine operators advisory board may employ a 0.5 full-time equivalent office assistant, without regard to chapters 76 and 89 and may dismiss such person as it finds necessary for the performance of its function and duties. The board shall have the authority to fix the office assistant's compensation. [L 1998, c 165, pt of §2; am L 2002, c 222, §2; am L 2016, c 74, §1]

#### **Note**

Report to 2017 legislature on state law and federal Occupational Safety and Health Administration rules and regulations pertaining to hoisting machine operators; certification of hoisting machine operators. L 2016, c 74, §3.

" **§396-20 Hoisting machine operators' certification revolving fund.** (a) There is established in the state treasury a revolving fund to be known as the hoisting machine operators' certification revolving fund into which shall be deposited all fees, penalties, fines, and interest collected from:

- (1) Certification of hoisting machine operators;
- (2) Interest and investment moneys earned on any moneys in the fund; and
- (3) All moneys received for the fund from any source.

The moneys in the fund may be used to carry out the purposes of this section. The director of finance shall disburse the moneys in the fund in accordance with instructions from the director.

(b) The fund may be used for:

- (1) Personnel and operating expenses, including consultants as necessary, for the hoisting machine operators advisory board;
- (2) All necessary board costs and reimbursements;
- (3) Preparation and dissemination of public information on hoisting machine operators' certification and training;
- (4) Preparation of annual reports on certification program activities and accomplishments and on the fund; and
- (5) Any reimbursements to the state general fund for funds appropriated by the legislature to establish the revolving fund.

(c) The director shall submit an annual report to the legislature on the status of the fund, including expenditures and program results, not less than twenty days prior to the convening of each regular session. [L 1998, c 165, pt of §2; am L 2016, c 74, §2]