

**CHAPTER 481B**  
**UNFAIR AND DECEPTIVE PRACTICES**

Part I. Miscellaneous Provisions

Section

- 481B-1 Unsolicited goods, etc., unconditional gift
- 481B-1.5 Same, commercial mail order buying clubs
- 481B-1.6 Offers of gifts or prizes; unlawful
- 481B-2 Aid to handicapped, misrepresentation as to
- 481B-3 Certificate
- 481B-4 Remedies
- 481B-5 Repealed
- 481B-5.5 Returns for refunds, merchandise credits, and exchanges
- 481B-6 Sale of solar energy devices; disclosure requirements
- 481B-7 Sale of computers; disclosure requirements
- 481B-11 Sensitivity-awareness group seminars
- 481B-12 Credit repair organizations
- 481B-13 Gift certificates
- 481B-14 Hotel or restaurant service charge; hotel portorage service charge; disposition
- 481B-15 Ticket brokers; fees; cancellation
- 481B-16 Protection of military; lending practices

Part II. Cybersquatting

- 481B-21 Definitions
- 481B-22 Cybersquatting and cyber piracy prohibited
- 481B-23 Determining bad faith intent
- 481B-24 Exceptions
- 481B-25 Damages and remedies

## Cross References

Additional penalties for fraud committed against elders, see §480-13.5.

Financial institution name fraud, see §412:2-606.5.

Tour activity providers and activity desks, see chapter 468M.

### "PART I. MISCELLANEOUS PROVISIONS

#### Note

Part I designation added by L 2001, c 281, §2.

**§481B-1 Unsolicited goods, etc., unconditional gift.** No person, firm, partnership, association, or corporation, or agent or employee thereof, shall, in any manner, or by any means, offer for sale goods, property, or merchandise, where the offer includes the voluntary and unsolicited sending of goods, property, or merchandise not actually ordered or requested by the recipient, either orally or in writing. The receipt of any such unsolicited goods, property, or merchandise shall for all purposes be deemed an unconditional gift to the recipient who may use or dispose of the same in any manner the recipient sees fit without any obligation on the recipient's part to the sender. [L 1969, c 84, §1; gen ch 1985; am L 1996, c 59, §3]

" **§481B-1.5 Same, commercial mail order buying clubs.** (a) Any person who is regularly engaged in the business of selling or offering for sale goods, property, or merchandise through a mail order scheme whereby the purchaser contracts or promises to buy a certain quantity of such goods, property, or merchandise periodically over a certain period of time with an option to make certain purchases or to choose alternative goods, property, or merchandise shall, for each separate order and before delivery of any item, supply the purchaser with an order form stating the various options available to the purchaser. No such person shall send to any purchaser such goods, property, or merchandise except pursuant to an order duly made by the purchaser on such an order form.

(b) The receipt of any goods, property, or merchandise sent in violation of subsection (a) shall for all purposes be deemed an unconditional gift to the recipient who may use or dispose of the same in any manner the recipient sees fit without any obligation on the recipient's part to the sender. Violation of subsection (a) is unlawful and shall be subject to the penalty provided in section 481B-4. [L 1974, c 255, §1; gen ch 1985]

" **§481B-1.6 Offers of gifts or prizes; unlawful.** (a) It shall be an unlawful practice under this chapter for any person to enforce or attempt to enforce an agreement to purchase, lease, or rent a consumer product if the offer to sell, lease, or rent was conducted in a manner not in compliance with the requirements of this chapter.

(b) It shall be an unlawful practice under this chapter for any person to offer a gift, prize, or award by means of written notice sent through the mail or by telephone with the intent to sell, lease, or rent a consumer product, or to initiate the sale, lease, or rental of a consumer product when, at the time of the offer, the consumer product and all the material terms of the sale, lease, or rental transaction, including the price, handling, shipping, delivery, or any other fee, are not clearly and conspicuously disclosed.

(c) It shall be an unlawful practice for any person to offer a gift, prize, or award by means of written notice sent through the mail or by telephone with the intent to receive a payment of any money when, at the time of the offer, all of the material terms of the transaction, including handling, shipping, delivery, or any other fee, are not clearly and conspicuously disclosed and the consumer is requested to:

- (1) Further the transaction by calling a 900 number or "pay per call"; or
- (2) Send payment of any money to receive or redeem the prize.

(d) Any offer of a prize made by means of written notice sent through the mail or by telephone shall include:

- (1) Information on the odds of being able to receive the prize or if the odds are not calculable in advance, the factors used in calculating the odds;
- (2) A statement that no purchase or payment is required to win a prize or to participate in a prize promotion; and
- (3) Instructions on how to participate without purchase or payment including an address or toll-free telephone number to which a consumer may write or call for information on how to participate.

(e) It shall be an unlawful practice and a violation of this chapter for any person, in any contest or sweepstakes in which the winning entry or entries are to be determined by a drawing or some other method based on an element of chance to:

- (1) Promote a contest or sweepstakes in which some or all of the prizes may not be awarded, or to fail to award all prizes or awards offered, unless the person makes the following disclosures to each offeree in writing

and in a conspicuous manner prior to the acceptance of the offeree's entry:

- (A) That some or all of the prizes may not be awarded; and
  - (B) The date or dates on which a determination of winners will be made; or
- (2) Offer a prize of real property unless the offeror files and maintains with the director of commerce and consumer affairs a bond in a sum not less than \$10,000, executed by the offeror, and naming the director as the obligee and a surety company authorized to do business in the State as surety. The bond shall be continuous in form and conditioned upon the award of the real property to an eligible participant. The bond shall run to the State for the benefit of any person who failed to receive the real property due to the failure of the offeror to award the real property pursuant to the terms of the offer. The surety may cancel the bond by giving sixty days' notice in writing to the director of commerce and consumer affairs. Upon cancellation or expiration of the bond, the surety shall remain liable for any claims against the bond for a period of one year; provided that the claim arose while the bond was in effect and the director of commerce and consumer affairs notifies the surety of any claims within ninety days of discovery of the claim. [L 1996, c 64, §1; am L 1999, c 239, §1; am L 2008, c 19, §12]

" **[\$481B-2] Aid to handicapped, misrepresentation as to.**

- (a) It shall be unlawful for any person engaging in business for profit or the person's agents to represent that proceeds from the sale or services by such person or the person's agent are for the benefit of individuals on account of their being disabled or handicapped when, in fact, the proceeds will not be so used.
- (b) A disabled or handicapped person who solicits sales of goods or services by telephone and who represents that the person is a disabled or handicapped person shall disclose:
- (1) The person's name and vocational rehabilitation certificate number.
  - (2) Who the person's employer is.
  - (3) The amount of remuneration or commission the person will receive from the sale of the goods or services.
  - (4) That the person represents a business for profit which is owned by persons who are not disabled or

handicapped if such is the fact. [L 1969, c 213, pt of §1; gen ch 1985]

" **§481B-3 Certificate.** The vocational rehabilitation section of the department of human services shall issue a numbered certificate to a disabled or handicapped person who will engage in the solicitation of goods or services by telephone.

The certificate shall certify that the applicant is a handicapped or disabled person, with a handicap or disability which constitutes a substantial permanent or semi-permanent handicap to employment. The certificate shall be good for one year and may be renewed.

No person in soliciting the sale of goods or services by telephone shall represent that the person is a disabled or handicapped person if the person does not have a certificate from the vocational rehabilitation section of the department of human services. [L 1969, c 213, pt of §1; am L 1970, c 105, §5; gen ch 1985; am L 1987, c 339, §4]

" **§481B-4 Remedies.** Any person who violates this chapter shall be deemed to have engaged in an unfair method of competition and unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of section 480-2. [L 1969, c 213, §4; am L 1974, c 255, §2; am L 1996, c 59, §4; am L 2008, c 19, §13]

#### Case Notes

Plaintiff hotel employees' claim, brought pursuant to §§480-2 and 481B-14 and this section, was not preempted by §301 of the Labor Management Relations Act, 29 U.S.C. §185(a), because plaintiffs were not enforcing a right conferred only by the collective bargaining agreement (agreement) but rather an independent right conferred by state law; resolution of plaintiffs' state law claim was not dependent on any provision contained in the agreement and did not require interpretation of the agreement. 835 F. Supp. 2d 914 (2011).

Plaintiffs' claim pursuant to §§481B-14 and 480-2 and this section dismissed because (1) they had not alleged harm to competition; (2) merely alleging competition between hotels that result in lower prices did not give rise to antitrust injury; (3) no authority to support plaintiffs "competing" with defendant for tips, that there was a competitive market that defendant was a part of for tips, or that defendant's actions regarding service charges had a negative effect on that market; and (4) statements that their injuries were "inextricably

intertwined" with defendant's acts did not establish that defendant caused any negative effect on competition. 835 F. Supp. 2d 914 (2011).

" **§481B-5 REPEALED.** L 1997, c 79, §2.

" **§481B-5.5 Returns for refunds, merchandise credits, and exchanges.** (a) As used in this section, unless the context otherwise requires:

"Ancillary charges" includes all charges paid to the merchant that are necessary for the use of the goods for their purchased purpose and all sums paid for agreements for service, warranty, or replacement.

"Conspicuous sign" means a sign posted in the merchant's place of business in a location reasonably calculated to bring the sign to the attention of purchasers before a purchaser makes a purchase.

"Exchange" means a transaction between a merchant and a purchaser in which a previously purchased item is exchanged for another item.

"Full amount of the payment" includes the amount paid for the returned goods, including any ancillary charges or taxes incident to the purchase of the returned goods, and without any deduction for restocking of the merchant's inventory, or for administration of the refund, exchange, or merchandise credit.

"Merchandise credit" means the crediting to the purchaser of the full amount of the payment upon return of the goods and allowing the purchaser to purchase goods from the merchant with the merchandise credit, or applying to the purchaser's credit account with the merchant, in the amount of the merchandise credit.

"Merchant" means any person engaged in the business of offering goods for sale to purchasers at retail.

"Proof of purchase" means a sales slip, receipt, credit card slip, or any other documentation that substantiates the sale of the goods from the merchant and the amount of payment.

"Purchaser" means a natural person who is returning goods that were purchased or received primarily for personal, family, or household purposes.

"Refund" means the return to the purchaser of the full amount of the payment upon return of the goods, in accordance with this section.

"Repacking and transportation charges" means the charges for repacking, pick up, and transportation of goods previously delivered, unpacked, and set up by the merchant at the direction of the purchaser.

"Return" or "return of goods" means the acceptance by the merchant of goods from a purchaser, whether for refund, merchandise credit, or exchange, and includes the cancellation of a custom or special order before the merchant is obligated to make payment on the order and the cancellation of a layaway.

(b) Except as provided in this section, all merchants shall accept the return of goods for refund, merchandise credit, or exchange, giving purchasers rights that are no less than those provided in this section. The merchant may:

(1) Choose one of the following policies by posting a conspicuous sign notifying purchasers of any one of the following limitations:

- (A) Refunds only;
  - (B) Refunds or merchandise credit only;
  - (C) Exchanges or merchandise credit only; or
  - (D) No refunds, merchandise credits, or exchanges;
- and

(2) Place specific limitations on the policy adopted by posting a conspicuous sign notifying the purchasers of any limitations allowed by subsections (c), (d), (e), and (f).

(c) Any merchant who does not accept the return of goods shall post conspicuous signs bearing the words "All sales final", or "No returns for refunds, merchandise credits, or exchanges", or words or phrases of similar import, to inform customers that no return of goods shall be accepted.

(d) Any merchant who limits the period during which goods may be returned to less than sixty days after the date of purchase or delivery shall post conspicuous signs informing purchasers of the limitation of the period during which the return of goods shall be accepted.

(e) Any merchant who excludes a certain category or type of goods from its return policy shall post one or more conspicuous signs identifying that type of goods.

(f) Any merchant who excludes custom or specially ordered goods from its return policy shall post conspicuous signs, or otherwise notify the purchaser, with the purchaser's written acknowledgment, of the return policy. For custom or specially ordered goods, the policy may allow the merchant to accept the return of the goods and to charge the purchaser for the cost of shipping if the charge is disclosed prior to the purchase.

(g) Any person engaged in the business of offering goods for sale at retail who fails to post a conspicuous sign as required by this section shall accept the return of goods from purchasers and make refunds in accordance with subsection (h).

(h) All merchants, except as provided in subsection (c), shall handle returns for refunds in the following manner:

- (1) If payment was made in cash, the refund shall be made in cash at the time of the return of goods, except that if the amount to be returned exceeds \$25, cash refunds may be made by check issued within ten days of the date of the return;
- (2) If payment was made by check, the refund shall be made in cash upon acceptance of the returned goods by the merchant, or by check issued within ten days of the acceptance of the returned goods by the merchant, except that if the purchaser's check has not cleared the bank on which it was drawn, the refund may be delayed for no more than ten days after the date the purchaser's check has cleared; provided that the merchant shall have complied with this provision if the check is mailed to the purchaser at the address provided by the purchaser within the ten-day period;
- (3) If payment was made by credit card, the refund shall be made by credit to the purchaser's credit card account; provided that the merchant shall initiate the submittal of the charge card credit memo or other appropriate documentation to the merchant's financial institution within five banking business days after the return of goods or, at the merchant's option, the refund may be made in cash at the time of the return of the goods or by check issued and mailed within ten days of the acceptance of the returned goods; or
- (4) If payment was made by charging a credit account administered by the merchant, the refund shall be made by credit to the purchaser's credit account initiated at the time of the return of the goods.
  - (i) All merchants, except as provided in subsection (c), shall handle returns for merchandise credit in the following manner:
    - (1) If the purchaser does not select goods in exchange for the returned goods within thirty days of the return, the merchant shall make a full refund to the purchaser in cash or in accordance with subsection (h). The merchant shall not be required to return cash in exchange for a merchandise credit issued pursuant to this paragraph if the merchant posts a conspicuous sign to notify purchasers that the merchandise credit cannot be turned into cash;
    - (2) The merchandise credit shall be valid for a minimum of two years; and
    - (3) Before exchanging the merchandise credit for cash or, in the case of a purchaser selecting goods in exchange costing less than the amount of the merchandise



credit, refunding the difference in cash, the merchant may require proof of purchase and require the surrender of the credit memo.

(j) All merchants, except as provided in subsection (c), shall handle returns for exchanges in the following manner:

- (1) If the exchange involves an exchange for only size or color, the exchange shall be made without regard to the full amount of payment; provided that the merchant may make an appropriate adjustment if the differing size or color normally sells at a different price; and
- (2) If the exchange does not involve an exchange for only size or color, then if the full amount of the payment for the goods received in exchange is less than the full amount of the payment for the returned goods, the merchant shall issue a refund or merchandise credit in the amount of the difference.

(k) In determining the full amount of the payment for returns for reasons other than damaged or defective goods, a deduction for repacking and transportation charges may be made from the full amount of the payment, if the deduction is disclosed to the purchaser prior to the purchase.

(l) Any return policies adopted by the merchant pursuant to this section that limits the purchaser's ability to obtain a refund shall not apply if the goods were damaged or defective prior to the time of sale, unless the merchant was aware of the damage or defect and notified the purchaser of the damage or defect in writing prior to the time of sale.

(m) A merchant is not required to accept a return if:

- (1) There is no proof of purchase, by sales slips, receipts, or other evidence of purchase of the goods returned;
- (2) The purchaser has retained the goods in excess of sixty days after the purchase;
- (3) The goods have been used or damaged after sale, or altered by the purchaser at the time of or after the sale; or
- (4) The goods are of a type which are unsuitable for resale, pursuant to any applicable law.

(n) The following constitute unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce under section 480-2:

- (1) Any violation of this section; and
- (2) Any act or policy that causes a compromise of the purchaser's rights and protections established by this section. [L 1997, c 79, §1; am L 2008, c 19, §14]

" **§481B-6 Sale of solar energy devices; disclosure requirements.** (a) No person shall advertise, offer to sell, or sell a solar energy device unless the person clearly discloses separately the following information concerning the sale price of the solar energy device to the consumer:

- (1) The cost of the solar energy device and accessories related to the operation of the solar energy device and for their installation; and
- (2) The cost of items unrelated to the operation of the solar energy device, including but not limited to, "free gifts", offers to pay electric bills, rebates, and other incentives designed to promote the sale of the solar device.

(b) As used in this section, "solar energy device" means any new identifiable facility, equipment, apparatus, or the like which makes use of solar energy for heating, cooling, or reducing the use of other types of energy dependent upon fossil fuel for its generation. [L 1980, c 177, §1; am L 1996, c 59, §5; am L 2008, c 19, §15]

" **§481B-7 Sale of computers; disclosure requirements.** No person shall advertise, offer to sell, or sell a computer, if the person has removed or replaced or had removed or replaced any computer part or component from the computer as received from the manufacturer, unless the person conspicuously discloses in type of no less than eight point size, all parts removed or replaced in writing to the consumer.

As used in this section "computer" has the same meaning as defined in section 708-890. [L 1987, c 74, §1]

" **§481B-11 Sensitivity-awareness group seminars.** Any person who deposits any money to attend a sensitivity-awareness group seminar and before the first day of the seminar, requests to cancel his or her right to attend and requests a refund of moneys deposited or paid, shall be refunded in full less identifiable nonrecoverable costs not to exceed the lesser of \$50 or twenty per cent of the price of the course, by the sensitivity-awareness group. Any person who while attending or after completing a sensitivity-awareness seminar, deposits any money to attend subsequent seminars of a sensitivity-awareness group and within five days of making the deposit or before the first day of the subsequent seminar, whichever occurs later, requests to cancel his or her right to attend and requests a refund of moneys deposited or paid, shall be refunded in full less identifiable nonrecoverable costs not to exceed the lesser of \$50 or twenty per cent of the price of the course, by the sensitivity-awareness group. Any offering of a sensitivity-

awareness group seminar by a representative of the sensitivity-awareness group sponsoring the sensitivity-awareness group seminar shall disclose to the offeree these rights of refund.

For purposes of this section, "sensitivity-awareness groups" includes any individual, associated group of persons, or organizations which advertise or assert that attendance by persons at seminars, meetings, training sessions, therapy sessions, or the like sponsored by the individual, group, or organization, will help the persons attending have greater self-awareness or awareness of others, greater self-understanding or understanding of others, or greater capacity for life adjustment or success in life; provided that psychological or psychotherapeutic techniques are used as part of the individual's, group's, or organization's methodology at the seminars, meetings, training sessions, therapy sessions, or the like. The term "sensitivity-awareness groups" does not include licensed psychologists, or psychologists with a temporary permit, in accordance with chapter 465, or a psychiatrist licensed in accordance with chapter 453, who teach, direct, administer, conduct, preside over, or are similarly involved in seminars, meetings, training sessions, therapy sessions, or the like.

"Sensitivity-awareness group seminars" means any seminar, meeting, training session, therapy session, or the like sponsored by a sensitivity-awareness group for which monetary compensation is required from persons to attend. [L 1982, c 150, §2; am L 1985, c 115, §17; am L 1996, c 59, §6; am L 2008, c 19, §16]

" **[§481B-12] Credit repair organizations.** (a) No person shall:

- (1) Solicit or induce a consumer to pay money or other valuable consideration based on false representations that the person can erase, correct, repair, alter, or otherwise modify an accurately reported consumer credit history;
- (2) Solicit or induce a consumer to pay money or other valuable consideration for the referral of a consumer to a credit granting entity, if that person knows or has reason to know that the consumer will be granted credit, if at all, by the entity on substantially the same terms as those available to the general public;
- (3) Make or counsel or advise a consumer to make any statement which is untrue or misleading or that the person should know by the exercise of reasonable care to be untrue or misleading, to a credit reporting agency or to any credit granting entity with respect

to that customer's creditworthiness, credit standing, or credit capacity; or

(4) Provide advice or assistance with regard to any of the foregoing activities.

(b) For the purposes of this section, "consumer" means a natural person acting in his or her own personal capacity.

(c) Any violation of this section shall constitute an unfair or deceptive act or practice in the conduct of trade or commerce under section 480-2. [L 1989, c 152, §1]

" **§481B-13 Gift certificates.** (a) Any restaurant or person engaged in the business of offering services or goods for sale at retail may allow customers to purchase gift certificates. A certificate issuer shall not charge a service fee, including but not limited to a service fee for dormancy or inactivity. Any activation or issuance fee charged shall not exceed the lesser of ten per cent of the face value of the certificate or \$5.

(b) The date of issuance and the expiration date shall be clearly identified on the face of the gift certificate, or, if an electronic card with a banked dollar value, clearly printed upon a sales receipt transferred to the purchaser of the electronic card upon the completed transaction. The expiration date shall be not less than five years after the date of issuance; provided that the expiration date of certificates issued only in paper form shall be not less than two years after the date of issuance. If the gift certificate does not have an expiration date, it shall be valid in perpetuity.

(c) Gift certificates that are issued as part of an awards, loyalty, or promotional program, or to a not-for-profit charity organization, where no money or anything of value is given to the issuer by the consumer in exchange for the gift certificate, are exempt from this section; provided that the expiration date, if any, appears on the gift certificate or accompanying printed receipt.

(d) Any violation of this section shall constitute an unfair or deceptive act or practice in the conduct of trade or commerce within the meaning of section 480-2.

(e) As used in this section, unless the context requires otherwise:

"Certificate issuer" or "issuer" means a restaurant or a person engaged in the business of offering services or goods for sale at retail who sells gift certificates to customers.

"Gift certificate" or "certificate" includes any electronic card with a banked dollar value where the issuer has received payment for the full banked dollar value for the future purchase or delivery of goods or services, any certificate where the issuer has received payment for the full face value of the

certificate for future purchases or delivery of goods or services, and any other medium that evidences the giving of consideration in exchange for the right to redeem the certificate, electronic card, or other medium for goods, food, or services of at least an equal value. "Gift certificate" or "certificate" does not include a card, certificate, or other medium that is:

- (1) Used solely for telephone services;
- (2) Reloadable and not marketed or labeled as a gift card, gift certificate, or certificate;
- (3) A loyalty, award, or promotional gift card;
- (4) Not marketed to the general public; or
- (5) Redeemable solely for admission to events or venues at a particular location or group of affiliated locations, which may also include services or goods obtainable:
  - (A) At the event or venue after admission; or
  - (B) In conjunction with admission to such events or venues, at specific locations affiliated with and in geographic proximity to the event or venue.

"Service fee" means a periodic fee, charge, or penalty for holding or use of a gift certificate, but does not include a one-time initial activation or issuance fee. [L 1992, c 83, §1; am L 1996, c 11, §1; am L 2004, c 136, §1; am L 2008, c 19, §17; am L 2010, c 195, §2]

**" §481B-14 Hotel or restaurant service charge; hotel portage service charge; disposition.** (a) Any:

- (1) Hotel or restaurant that applies a service charge for the sale of food or beverage services; or
- (2) Hotel that applies a service charge for portage services;

shall distribute the service charge directly to its employees as tip income or clearly disclose to the purchaser of the services that the service charge is being used to pay for costs or expenses other than wages and tips of employees.

(b) As used in this section, unless the context requires otherwise, "portage" means the act of moving luggage, bags, or parcels between a guest room and a lobby, front desk, or any area with vehicular access at a hotel, hotel-condominium, or condominium-hotel, as defined in section 486K-1. [L 2000, c 16, §2; am L 2015, c 137, §2]

### **Case Notes**

This section is not preempted by the federal Fair Labor Standards Act regulations; further, this section is not

unconstitutionally vague in violation of due process; moreover, this section did not deny defendant hotel and resort employer due process because it did not automatically transform the service charges in question into the property of plaintiff hotel employees, who sought unpaid wages, because it permitted defendant the option of disclosing to customers that the service charges would not be paid to employees. 810 F. Supp. 2d 1145 (2011).

This section requires hotels and restaurants to pay service charges to employees as tip income if they do not disclose their contrary practice to customers; to the extent that the legislative history of this section is relevant to the question of whether employees may sue for unpaid wages under §388-6 based on violations of this section, that legislative history, as interpreted by the Hawaii supreme court, provides support for the idea that employees may do so. 810 F. Supp. 2d 1145 (2011).

Defendant resort's motion to dismiss plaintiff resort employees' claim that defendant violated this section, brought under §480-2(a), granted where plaintiffs' allegations did not show the nature of the competition or demonstrate that plaintiffs have suffered an antitrust injury; Hawaii's requirement that a plaintiff assert the nature of the competition was designed to serve the same purpose as the federal requirement that a plaintiff assert an antitrust injury. 818 F. Supp. 2d 1240 (2010).

Plaintiff resort employees' claim, brought under §480-2(a), that defendant resort violated this section was not preempted by §301 of the Labor Management Relations Act, 29 U.S.C. §185(a), because the claim regarding this section was a statutory claim that was independent from any obligations created under the collective bargaining agreement (agreement) between defendant and plaintiffs; further, resolution of the claim did not require interpretation of the agreement and there was no clear and explicit waiver of plaintiffs' rights under this section in the agreement. 818 F. Supp. 2d 1240 (2010).

Plaintiff resort employees' claim that defendant resort violated this section was not preempted by the National Labor Relations Act pursuant to the Machinists doctrine because it is not the type of statute that the Machinists doctrine was intended to preempt as it does not present the types of concerns enunciated by the United States Supreme Court in Machinists; further, this section had no comparable effect on the bargaining process; moreover, this section provides a minimum protection for employees as well as consumer protection. 818 F. Supp. 2d 1240 (2010).

Plaintiff hotel employees' claim, brought pursuant to §§480-2 and 481B-4 and this section, was not preempted by §301 of the

Labor Management Relations Act, 29 U.S.C. §185(a) because plaintiffs were not enforcing a right conferred only by the collective bargaining agreement (agreement), but rather an independent right conferred by state law; resolution of plaintiffs' state law claim was not dependent on any provision contained in the agreement and did not require interpretation of the agreement. 835 F. Supp. 2d 914 (2011).

Plaintiffs' claim pursuant to §§481B-4 and 480-2 and this section dismissed because (1) they had not alleged harm to competition; (2) merely alleging competition between hotels that result in lower prices did not give rise to antitrust injury; (3) no authority to support plaintiffs "competing" with defendant for tips, that there was a competitive market that defendant was a part of for tips, or that defendant's actions regarding service charges had a negative effect on that market; and (4) statements that their injuries were "inextricably intertwined" with defendant's acts did not establish that defendant caused any negative effect on competition. 835 F. Supp. 2d 914 (2011).

The legislative history of this section, as interpreted by the Hawaii supreme court in Davis, allows plaintiff hotel employees to recover for unpaid service charges imposed without the requisite disclosure set forth in this section, through a claim brought pursuant to §§388-6, 388-10, and 388-11. 835 F. Supp. 2d 914 (2011).

This section was a law of general applicability which creates a minimum standard related to service charges for the entire hotel and restaurant industry; consequently, this section did not encourage or discourage employees in the promotion of their interest collectively, and was not the type of statute that the U.S. Supreme Court in Machinists ("Machinists doctrine") intended to preempt. 835 F. Supp. 2d 914 (2011).

Employees are "any persons" within the meaning of §§480-1 and 480-2(e) and are within the category of plaintiffs who have standing to bring a claim under §480-2(e) for a violation of this section; however, based on the allegations contained in employees' amended complaint, employees did not sufficiently allege the "nature of the competition" to bring a claim for damages against employer under §§480-2(e) and 480-13(a) for a violation of this section. 122 H. 423, 228 P.3d 303 (2010).

When a hotel or restaurant applying a service charge for the sale of food or beverage services allegedly violates this section by: (1) not distributing the full service charge directly to its employees as "tip income" (in other words, as "wages and tips of employees"); and (2) failing to disclose this practice to the purchaser of the services, the employees may bring an action under §§388-6, 388-10, and 388-11 to enforce the

employees' rights and seek remedies. 130 H. 130, 306 P.3d 175 (2013).

" **[\$481B-15] Ticket brokers; fees; cancellation.** (a) No ticket broker shall charge a fee for the use of a credit card to purchase tickets without first disclosing that a fee will be charged.

(b) A ticket broker shall refund any and all service fees charged for the purchase of a ticket when the public exhibition, game, contest, or performance for which the ticket was purchased is canceled.

(c) For the purposes of this section, "ticket broker" means any person engaged in the business of selling tickets of admission or any other evidence of right of entry to a theater, place of amusement or entertainment, or other place where public exhibitions, games, contests, or performances are held, at a price greater than the price printed on the ticket. [L 2007, c 185, §1]

" **[\$481B-16] Protection of military; lending practices.** (a) The director of commerce and consumer affairs may enforce title 10 United States Code section 987, (section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law No. 109-364), and federal regulations promulgated thereunder, including but not limited to title 32 Code of Federal Regulations part 232.

(b) The director of commerce and consumer affairs may enter into an agreement with the United States Federal Trade Commission to allow the director to access the Military Sentinel Network maintained by the Federal Trade Commission for the purpose of enforcing subsection (a). [L 2012, c 249, §2]

## " [PART II.] CYBERSQUATTING

**[\$481B-21] Definitions.** As used in this part, unless the context otherwise requires:

"Claimant" means the person alleging a violation of this part.

"Domain name" means any alphanumeric designation that is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet.

"Mark" includes "trademarks", "trade names", and "service marks" as defined in [section] 481A-2.

"Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, association,



joint venture, public corporation, unincorporated association, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity.

"Traffics in" refers to transactions that include, but are not limited to, sales, purchases, loans, pledges, licenses, exchanges of currency, or any other transfer for consideration or receipt in exchange for consideration. [L 2001, c 281, pt of §1]

" **[§481B-22] Cybersquatting and cyber piracy prohibited.**

(a) A person shall be liable in a civil action by the owner of any distinctive mark registered and used in Hawaii, without regard to the goods or services of the parties, if that person in bad faith: registers, traffics in, or uses a domain name that is identical or confusingly similar to that mark.

(b) Any person who in bad faith registers a domain name that consists of the name of another living person, or a name substantially and confusingly similar thereto, without that person's consent, shall be liable in a civil action by the person.

(c) A person shall be liable for using a domain name under [subsection (a)] only if that person is the domain name registrant or the registrant's authorized licensee. [L 2001, c 281, pt of §1]

" **[§481B-23] Determining bad faith intent.** (a) In any action brought pursuant to this part, it shall be the claimant's burden to prove by a preponderance of the evidence the person's bad faith intent. In determining whether there is bad faith intent pursuant to section 481B-22, a court may consider factors, including, but not limited to, the following:

- (1) The trademark or other intellectual property rights of the person, if any, in the domain name;
- (2) The person's prior use, if any, of the domain name in connection with the bona fide offering of any goods or services;
- (3) The person's bona fide noncommercial or fair use of the mark in a site accessible under the domain name;
- (4) The person's intent to divert users from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;

- (5) The extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify the person;
- (6) The person's offer to transfer, sell, or otherwise assign the domain name for financial gain without having used or having an intent to use, the domain name in the bona fide offering of any goods or services or the person's prior conduct indicating a pattern of such conduct;
- (7) The person's provision of material and misleading false contact information when applying for the registration of the domain name, the person's intentional failure to maintain accurate contact information, or the person's prior conduct indicating a pattern of such conduct;
- (8) The person's registration or acquisition of multiple domain names that the person knew were identical or confusingly similar to marks of others that were distinctive at the time of registration of the domain names, without regard to the goods or services of the parties;
- (9) The person's registration or acquisition of multiple domain names that the person knew were identical or confusingly similar to the name of another living person, without the person's consent; and
- (10) The person sought or obtained consent from the rightful owner to register, traffic in, or use the domain name.

(b) Bad faith intent described in subsection (a) shall not be found in any case in which the court determines that the person alleged to be in violation of this part believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful. [L 2001, c 281, pt of §1]

" **[\$481B-24] Exceptions.** (a) A person who in good faith registers a domain name consisting of the name of another living person, or a name substantially and confusingly similar thereto, shall not be liable under section 481B-22 if the name is used in, affiliated with, or related to a work of authorship protected under Title 17, United States Code, including a work made for hire as defined in section 101 of Title 17, United States Code, and if the person registering the domain name is the copyright owner or licensee of the work, the person intends to sell the domain name in conjunction with the lawful exploitation of the work, and the registration is not prohibited by a contract between the registrant and the named person. The exception under this subsection shall apply only to a civil

action brought under this part and shall in no manner limit the protections afforded under the Trademark Act of 1946 (15 U.S.C. 1051 et seq.) or other federal or state law.

(b) The domain name registrar or registry or other domain name authority shall not be liable for damages or other remedies under section 481B-25 for the registration or maintenance of a domain name for another, regardless of whether the domain name is finally determined to infringe the mark. [L 2001, c 281, pt of §1]

" **[\$481B-25] Damages and remedies.** (a) Any persons whose rights under section 481B-22 have been violated may bring a civil action against the person responsible for the violation.

(b) In any civil action brought under this part, if the court finds a violation of section 481B-22, the court may award:

- (1) Injunctive relief, including the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark;
- (2) Equitable relief;
- (3) Compensatory damages;
- (4) Punitive damages;
- (5) Costs of the action; and
- (6) Reasonable attorney's fees.

(c) A claimant who files suit under this part, prior to the commencement of trial, may elect to recover, instead of compensatory and punitive damages, an award of statutory damages in an amount of not less than \$1,000 or threefold damages by the claimant sustained, whichever sum is the greater, and reasonable attorney's fees together with the costs of the suit. [L 2001, c 281, pt of §1]