CAI Hawaii
COMMUNITY ASSOCIATIONS INSTITUTE

NEWSLETTER

HAWAII CHAPTER community ASSOCIATIONS INSTITUTE

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IN THIS ISSUE

Roofing Outlook for 2023

By Guy Akasaki, President & CEO

With the onset of the IRA (Inflation Reduction Act), you will begin to see innovations in the roofing and solar industry, which will begin to wrap and integrate around the solar industry.

There are now elevated photovoltaic systems that are raised above the roofing assembly, the AC and the ventilation systems that allow maintenance of the roof. When the time comes for a roof restoration, a roof system that can offer a high solar reflectivity to optimize a new generation of bifacial photovoltaic modules would be ideal. Roofing assemblies that can be installed in these applications would include single ply systems such as TPOs which have a longer term high solar reflectance which can be harvested to the bifacial underside of the solar photovoltaic panels. This type of installation also allows an insulation component to be integrated into the assembly which helps in reducing the overall energy consumption of the building. A total integration that incorporates optimized energy generation, reduced energy consumption, and sustainability to maximize the life cycle cost of the total roof assembly can be captured and supported through a data driven roof management program.

The trend in low slope roofs have been increasing in single ply membranes for commercial and industrial applications due to its high emissivity and high solar reflectance. There are also technological advances in development for self-adhered single-ply roofing assemblies that *require no adhesive or glue to adhere them to the substrate.* This type of system would be beneficial for buildings which have a complex ventilation environment for intake and exhaust of air throughout the building. Membrane adhesives typically have active volatiles and solvents which can be harmful when inhaled if accidentally drawn into the building.

On the mainland there are "cold roof" assemblies which are designed to harvest and retain the absorption of heat and not solar reflectance or low emissivity to reduce energy consumption in this era of rising energy prices due to the volatility of the global oil market as well as national energy policies.

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The Hawaii Community Associations newsletter is published for association leaders and other related professionals of CAI. Authors are encouraged to submit articles for publishing consideration.

This publication is designed to provide accurate and authoritative information regarding the subject matter covered. It is issued with the understanding that the publisher is not engaged in rendering legal, accounting or other professional services.

CAI Hawaii Community Associations newsletter provides an opportunity for information and/or comment.

Articles do not necessarily reflect the viewpoint of the Chapter. The reader should not act on information contained herein without seeking more specific professional advice.

President's Message

I want to start off this President's Message with a major shout out to the individuals who make this newsletter possible. Our newsletter committee is led by Co-Chairs, Chris Porter and Mike Ayson, and our Editor is Terry Schulze. I want to send them a special MAHALO for being the leading force in the preparation and compilation of our newsletter. Our goal is to bring you current, relevant, and important information that will assist you in your role as board member, community manager, building manager, homeowner, and business partner. We do our best to ensure article content is robust with current laws, policies, tips, and more. If you have suggestions for future newsletter content, please email our Chapter Executive Director, Lindsay Green at caihawaii@hawaiiantel.net.

This edition features an information batch of article content, including a Q&A article from Dorvin D. Leis Co., Inc. and the National Fire Sprinkler Association, *The Voice of the Fire Sprinkler Industry*, Joel Meskin's article regarding *Managing Risks Associated with Data Security and Cyber Liability*, a great read regarding tech, cyber-crime, and ways in which to combat it. We also have an article from Cathy Chin, a retired Air Force Colonel, *An Independent Investigator's Tips for Workplace Investigations*. Commercial Roofing and Waterproofing provided an article regarding, *Roofing Outlook*. Another great article from employment attorney, John Knorek, regarding Employment Law Liability in Terminations, and John Mackey, *Navigating the Hazards of Hiring*. We also have articles about *common employee exposures and mitigation techniques for condo associations, Reasonable Accommodations*, and Real Estate Commission's March 2023 column. In addition to the articles about employment law, we also have an article about *An Employer's Duty to Prohibit Discrimination, Harassment, and Retaliation.*

Our Chapter recorded our first in-person program and it's available for viewing. Please email Chapter Executive Director, Lindsay Green at caihawaii@hawaiiantel.net to purchase the link to the recording. It is important to note that Jeffrey Owens, the lead speaker, was recently inducted to the Virtual Speakers Hall of Fame.

The CAI Hawaii Board, through its committee, is working on creating a *Manager's Forum* and will provide more information soon. If you wish to

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Roofing Outlook for 2023

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Data driven roof and photovoltaic asset management programs will become a 2023 trend where optimizing the integration of these systems and increasing the life cycle would allow for maximized longevity and managing Capex costs. In the past, roof and PV systems were independent of each other – like the Motorola brick phone only capable of a phone call, today maintenance programs can integrate portals and building controls to optimize value in the overall assets. Another simple example is utilizing robot to clean the photovoltaic panels, thus maximizing power generation.

In the residential arena, there are multiple manufacturers making solar roof shingles that can be installed in a shingle-like fashion. GAF has manufactured an innovative solar shingle, which installs like a shingle, can be walked on and is covered a by a single source watertight and performance generation warranty. Again, keep in mind, time has a way of testing performance periods on new products.

About the Author:
Guy Akasaki is the President & CEO of Commercial Roofing & Waterproofing Hawaii, Inc. bringing to the table over 40 years of roofing and construction experience to Hawaii. His knowledge covers the full spectrum of the roofing and waterproofing industry and he served 3 terms on the Hawaii Contractors Licensing Board. His contributions to the industry for the advancement of roofing technology in Hawaii keeps him at the forefront of the roofing industry and continues to spur him on towards advocating sound business practices. CRW's Service Division offers proactive roof maintenance programs giving clients a streamlined and simplified way to best manage their roof assets. For more info on a customized solution for your building, contact service@commercialroofinginc.com.

President's Message

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volunteer topics and content for this forum dedicated to community managers only, please email Chapter Executive Director, Lindsay Green at caihawaii@hawaiiantel.net.

Please be on the lookout for information about our next Condorama X, scheduled for April 29, 2023.

Mahalo to seminar co-chairs and presenters for executing the seminars completed to date, including *What's New in the World of Condominium and Planned Community Associations*, and *Owners' and Board Members' Rights and Wrongs – Bringing Peace to the Promised Land*. Our March 9, 2023 seminar, *Fortifying the Fortress*, was held in-person at the 2023 Hawaii Buildings, Facilities & Property Management Expo. It was nice to see all of you in-person at a seminar and all of you that came by our CAI booth to say hello. We sure missed you and look forward to seeing you all again in-person at future events.

Mahalo for your continued support,
Kanani Kaopua, PCAM®
CAI Hawaii Chapter President

Automated Clearing House (ACH) Basics

By Steven Isobe

Many condo association unit owners utilize ACH services to simplify their finances. Whether it is paying their maintenance fees or collecting rent from renters, ACH can help to make the process faster and simpler. However, with ACH services there can be risks associated with it if you don't understand how it works. This article will help to understand what ACH is, and to be aware of some considerations when utilizing it.

What is ACH?

Automated Clearing House (ACH) transactions are electronic deposits or withdrawals in which a company credits or debits funds to or from another person's or company's bank account. The ACH Network is a processing system that distributes and settles electronic credits and debits among financial institutions, developed in response to the huge growth in check payments and provides an efficient, electronic alternative to paper checks.

The governing board that oversees the ACH Network is the National Automated Clearing House Association (NACHA)

ACH is a batch processing system. What this means is that financial institutions store transactions received then processes them later as a batch during set time periods.

What are common examples of ACH Credits or Debits?

ACH Credits:

- Payroll (Direct Deposit)
- Interest or Dividend Payments
- Annuity Payments
- Social Security Payments
- Company to Company Payments

ACH Debits:

- Mortgage and installment loan payments
- Utility Payments
- Insurance Payments
- Association/club dues
- Tuition Payments

What are the benefits of ACH?

ACH Credits

- Convenience for recipients - No trips to the bank to deposit or cash checks.
- Mitigates exposure to check fraud – checking account information can be compromised due to lost or stolen checks. No control over your check and account information once it leaves your possession.
- Timely payment of bills – No mailing delays.
- Resource savings because they are electronic – No need to write/print paper checks, process for review and signing, then mailing (postage costs). Especially valuable when dealing with high volume recurring payments. Electronic templates minimize volume of data entry and exposure to errors.

ACH Debits

- Improves funds availability with faster inflows – No waiting for "checks in the mail".
- Saves time and expense of manually processing check deposits – No opening mailed payments, researching remittance information, filling out deposit slips or trips to the bank to make deposits.

ACH Credits & Debits

- Ensures security through dual controls and other safeguards – One person prepares but someone else reviews and approves before submission.
- Safe, secure, and not dependent on the delivery of mail.
- More accurate prediction of cash flow – when funds will be credited to or debited from an account is known.
- Reduces banking costs – ACH is the most cost effective payments system.

Who should consider ACH?

- Companies wanting to save time and effort in disbursing high volume recurring payments.
- Companies interested in reducing disbursement costs and improving management of cash flows.
- Business Types: Insurance Companies, Payroll Companies, Property Management Companies, Non-Profit Organizations.

What are some considerations when utilizing ACH?

- Your financial institution may require ACH credit transactions to be pre-funded. For example, if a company sends an ACH credit file to their institution on a Monday, for payment to your vendor's account on a Friday, the institution may place a hold on the funds until the Friday payment date.
- Debit transactions are subject to return and charge back for an extended time after the transaction posts.
  - ➢ACH Rules allow a financial institution to return a consumer ACH debit transaction up to 60 days after the transaction posts.
  - ➢Regulation E allows consumers to dispute electronic transactions for a period of 60 days following their account statement date.

Note: In both cases, the consumer must attest that the electronic transaction is incorrect or unauthorized by signing a written affidavit.

What this means is that funds credited to an ACH Debit Originator's account may be charged back in the case of a dispute. This could result in overdrafts and the need for alternate collection efforts.

- Corporate Account Takeover
  - ➢Business Identity Theft - Cybercriminals use malware or social engineering methods to go after business online banking users and steal online banking credentials to create unauthorized ACH files to steal from the business's bank accounts
  - ➢Some steps businesses can take to reduce the chances of theft:
    - o Institution of strong computer security policies, including use of anti-malware, anti-virus, anti-spyware, firewalls, prompt management of security updates and patches.
    - o Limit administrative online banking rights.
    - o Remove employees' access and rights when no longer needed.
    - o Use of multi-factor authentications such as Security Tokens and Biometrics.
    - o Prompt reconciliation/ monitoring of deposit accounts.
    - o Setup online banking alerts/notifications.

Understanding and being aware of potential risk of ACH services along with actively monitoring your bank account activity via online access and monthly statements will help reduce your risk of any issues. ACH can be a great tool to help simplify your finances and improve cash flow for your property, but still requires owners to be vigilant for any potential issues.

About the Author:

Steve Isobe works in Bank of Hawaii's Pearlridge Commercial Banking Center. He has more than 12 years of banking experience, serving as a Business Banking Officer, Branch Manager, and is currently a Commercial Banking Officer. He is responsible for assisting a portfolio of commercial clients with all of their banking needs, and for generating growth in BOH's loan and deposit portfolios. He also worked for Xerox Corporation as a Services Support Manager, and the State of Hawaii DOE Procurement & Contracts Branch as a Procurement Specialist.

Common Employee Exposures And Mitigation Techniques For Condo Associations

By Courtney Rosengartner, CPCU, ARM

Condominium associations employ a variety of personnel to manage and perform their operations. Types of job functions may include office administration, janitorial, groundskeeping, and maintenance. Therefore, job risk assessments and employee injury or illness exposure must be considered. The following employee exposures and mitigation techniques do not cover all possible causes of loss within a condo association's business. Therefore, it is important to perform job hazard analyses to implement safety controls that may help to avoid incidents. A job hazard analysis guide (https://www.osha.gov/publications/bytopic/job-safety-and-health) is available through the Occupational Safety and Health Administration (OSHA) for assistance.

Office administration

Administrative duties performed by a condominium association include clerical duties within an office environment. As a result, employees may be exposed to several potential injuries typical of an office, including strains and sprains, slips and falls, and workplace violence.

Ergonomics should be considered when employees are required to work at a computer. An assessment should be made to determine if workstations are set up correctly for the individual. Computer screens should be just at or below eye level, hands resting comfortably, and forearms should be in line. Elbows should be close to the body, and feet flat on the floor. The individual's head and neck should be balanced with their torso. Checklists (https://www.osha.gov/etools/computer-workstations/checklists/evaluation) are available from OSHA to conduct evaluations of employee workstations to mitigate injuries, specifically repetitive motion injuries.

Proper housekeeping is essential to mitigating the risk of slips, trips, and falls. Items should be stored off the floor and away from walkways. Spills should also be cleaned immediately, and proper signage should be utilized when floors are wet. Be aware of potential trip hazards, such as doormats and electrical wires. Additionally, inspect outside walkways for fall risks, such as uneven sidewalks and obstructed paths.

Office personnel must know that working alone and with the public can put them at risk for violent acts, including verbal altercations and physical assault. Set expectations that individuals should not work alone and the public should not be escorted independently without notifying someone working alongside an individual. Security or law enforcement should be notified if anyone is threatened. For additional information on warning signs and risks of workplace violence, please visit OSHA's site (https://www.osha.gov/workplace-violence).

Janitorial, maintenance, and groundskeeping

Condo associations may also employ individuals to remove trash and maintain shared facilities, such as pools, gyms, and sports courts. Employees may also perform lawn care, minor repairs, interior remodeling, and painting, amongst other duties. These job tasks come with various injury potentials, like working from heights, chemical handling, electrical shock, equipment injuries, heat illness, animal and insect bites or stings, respiratory illness, and hand tool injuries.

Manual material handling considerations should be made for all job duties that require lifting. Training on proper lifting techniques should be given to avoid back and muscle strains. The focus should be on lifting with the legs and keeping the back straight.

Slips, trips, and falls can be mitigated by staff outside of the office by maintaining proper housekeeping at the property and removing trip hazards. Near-miss incidents that do not result in injury should be reported to management to ensure future incidents do not occur.

Lacerations may occur when handling trash containing sharps or using hand tools and lawn equipment. A fully stocked first aid kit should be readily available. Training on basic first aid should be provided to employees. Inspection of hand tools and maintenance equipment should be regularly completed. Inadequate tools should be discarded.

Falls from heights could also occur when employees are performing minor maintenance, painting duties, and changing light bulbs. Therefore, training on ladder safety is imperative. In addition, faulty ladders should be placed out of service and marked as such.

Employees may be required to handle chemicals, including lawn fertilizers, pesticides, and pool chemicals, like chlorine. A hazard communication program is required, and safety data sheets (SDS) should be readily available. Information on chemical safety in the workplace and meeting OSHA standards can be found on their site (https://www.osha.gov/hazcom).

Other possible injuries related to working outdoors include heat illness and injuries from animals or insects. Training on working in high temperatures is vital to employee health and safety. Rest, shade, and hydration must be available. It is also helpful to wear light colored, loose fitted clothing if possible. A heat illness prevention program should be developed and communicated to staff. For information on requirements, visit OSHA's Heat Illness Prevention Campaign (https://www.osha.gov/heat/). Management should also consider that employees may be exposed to insect bites and stings. Individuals allergic to bees should have epinephrine readily available. In addition, stocked first aid kits should be available to treat these ailments.

Safety programs

Not only can implementing a formal workplace safety and health program improve a business's safety and health performance, but it can help save money and improve employee morale. Therefore, it is essential for management to display thought leadership and commitment to safety by providing resources, leading by example, and communicating safe work practices.

Elements of an effective workplace safety program include management commitment, assignment of responsibilities, safety communication with employees, employee compliance with safe work practices, scheduled inspections, accident investigation, procedures for correcting unsafe conditions, training, and recordkeeping.

Sources:
https://www.osha.gov/etools/computer-workstations

https://www.osha.gov/workplace-violence

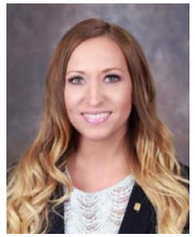
https://www.osha.gov/hazcom

https://www.osha.gov/heat/

OSHA FatalFacts Insect Sting (2021)

https://www.osha.gov/sites/default/files/publications/OSHA4137.pdf

https://www.osha.gov/safeandsound/safety-and-health-programs



About the Author: *Courtney Rosengartner, CPCU, ARM, is a Senior Risk Solutions Specialist with Markel Corporation. She has worked in insurance and risk management for 20 years. Her primary focus is small and medium sized business within a workers' compensation, property, and general liability perspective. courtney.rosengartner@markel.com*

An Employer's Duty To Prohibit Discrimination, Harassment & Retaliation

By Anna Elento-Sneed

Condominium and homeowner associations often employ a handful of workers to assist them with administrative, maintenance, and other similar tasks. Once an Association becomes an employer, it is legally obligated to comply with a host of federal and state employment laws. These laws require employers, among other things, to ensure that employees are provided a work environment free of discrimination, harassment, and retaliation (referred to as "equal employment opportunity" or "EEO" obligations). Failure to comply can result in significant liability for the Association, as well as individuals found to have engaged in discrimination, harassment, and/or retaliation of the employees.

Fortunately, the Equal Employment Opportunity Commission (EEOC), the Hawaii Civil Rights Commission (HCRC), and the courts have set out guidelines for employers to follow when implementing policies and procedures to meet their EEO obligations. The following article summarizes these guidelines.

1. Adopt a written policy prohibiting discrimination, harassment, and retaliation in the workplace. Employers should adopt a policy and procedure which includes the following:

- Definitions and examples of discrimination, harassment, and retaliation;
- Designation of at least two management level persons who will be responsible for receiving complaints of discrimination, harassment, and/or retaliation and either (a) investigating the complaints for the Association or (b) arranging for an impartial, outside investigator to conduct the investigation;
- A specific procedure for investigating complaints of discrimination, harassment, and/or retaliation by supervisory employees, co-workers, and/or outsiders (which can include complaints about owners, residents, vendors, and visitors); and
- Provisions for discipline and other remedial actions if violations are found; and
- A prohibition against retaliation.

The written policy should be distributed to all of the Association's employees and ideally, the employees should be asked to sign and return an acknowledgment form verifying they have received a copy of the policy.

2. Train your managers, supervisors, and employees on how to follow your EEO policy. The EEOC, the HCRC, and the courts require managers and supervisors to receive training on the employer's EEO policy and procedures. For Associations, this often includes the Board of Directors (since most Boards exercise supervisory control of some or all of the Association's employees). Failure to provide management-level training may result in employer liability for a hostile work environment. Consequently, make sure the training covers:

- The definitions and examples of discrimination, harassment, and retaliation; and
- An explanation of the Association's EEO policies; and
- An overview of the procedures for filing and investigation complaints.

While it is easy to understand the importance of training investigators and management employees, many employers are reluctant to "educate" employees about discrimination, harassment and/or retaliation for fear of increased complaints. While training employees does increase sensitivity to the problem, the advantages of training far outweigh the risks. For example, employees subjected to harassment frequently "suffer in silence" until the stress is so overwhelming they are compelled to file a workers' compensation stress claim or a discrimination charge. Defending these administrative proceedings and lawsuits are more costly to an employer than an internal investigation.

If employees know the Association has a procedure for addressing the problem, they may ask for assistance before the situation becomes intolerable. Also, some harassers/discriminators (particularly those who engage in horseplay) may not be aware that their conduct could be unlawful. Training may encourage these individuals to stop their inappropriate behavior.

Once the training is completed, have the attendees sign an acknowledgement form that they have received a copy of and been trained on the policies and procedures. The acknowledgement form is the best evidence that you have "affirmatively raised" the EEO issues with your employees. These forms should be kept with your HR files and/or placed in each employee's personnel file.

3. Take immediate action to investigate complaints of discrimination, harassment, and/or retaliation. Federal and state law requires an employer to take "immediate action" to investigate once a report or complaint is received. Board members, managers, and supervisors cannot ignore a problem because the complainant in question is not under their direct supervision. The Association has a duty to the investigate the minute their agents (Board members, managers, and supervisors) know or should know of the problem.

Sometimes complainants will not report their concerns to the designated managers and may say to another manager things like "I am telling you this off the record" or "I am not making a formal complaint". There is no such thing as "off the record" or "informal complaints". The employer is deemed to have constructive knowledge of information possessed by all of its management employees. Consequently, whenever a Board member, manager, or supervisor observes conduct which may constitute discrimination, harassment and/or retaliation; or receives information of a possible problem; or receives a complaint of discrimination, harassment and/or retaliation; he/she should report the information immediately to a designated investigator because the duty to investigate has been triggered.

4. The Association may need to separate parties pending completion of the investigation, and they must try to keep the investigation confidential as much as possible. The Hawaii Supreme Court suggested that it may be appropriate, pending completion of an investigation, for an employer to separate the accused person from the alleged victim. Consequently, Associations should consider whether to take such actions – particularly if there is a risk of retaliation.

Federal and state guidelines also strongly recommend that these investigations be kept confidential as much as possible, in order to prevent retaliation. Everyone involved (complainants, accused persons, witnesses, Board members, managers, and supervisors) should be instructed not to discuss the situation with others. Discussion or rumors about the situation can result in claims for retaliation, invasion of privacy, defamation, negligence, and/or infliction of emotional distress.

5. If discrimination, harassment or retaliation is found, you must take "effective remedial action". If the investigation confirms that discrimination, harassment, and/or retaliation occurred, the Association must take immediate steps to effectively end the unlawful conduct. This means doing whatever is necessary to: (a) end the discrimination, harassment and/or retaliation; and (b) make the victim "whole" by restoring any benefits or opportunities lost because of the unlawful conduct, and preventing the misconduct from recurring. According to the courts, discipline is the appropriate sanction for the offender and "corrective action should reflect the severity of the conduct." Follow¬-up is also considered necessary to ensure that the discrimination and/or harassment has not reoccurred, and the victim has not suffered retaliation.

In Hawaii, remedial action requires employers to take other factors into account to determine whether the employer's total response was reasonable under the circumstances as then existed. Factors that Hawaii courts will consider in determining the "reasonableness" of the remedial action are:

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An Employer's Duty To Prohibit Discrimination, Harassment & Retaliation

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- Whether the remedy has the ability to stop the harassment by the harasser and persuade potential harassers to refrain from unlawful conduct;
- Whether the employer intervened promptly;
- The "remorse" shown by the harasser; and
- Whether the remedial measure includes some form of disciplinary action which is proportionate to the seriousness of the conduct.

6. Communicate the determination to the accused and the alleged victim. If the determination is that discrimination, harassment, or retaliation occurred, the guilty party should be informed of the determination and the disciplinary action being imposed. The victim should also be told the same information, and efforts should be made to assist the employee in his/her/their "recovery".

If the determination is that no discrimination, harassment, or retaliation occurred, this decision should be communicated to the accused and the alleged victim. In many cases, this can be more difficult to handle than a finding of unlawful conduct. This is because individuals involved in the investigations often develop negative feelings about "the other side", which increases the risks of post-investigation retaliation. The Association will have to monitor the situation and work on ways to resolve any other problems between them which were identified in the investigation.

7. Remind everyone about confidentiality and the policy against retaliation, document everything, and periodically check on people. It is important to remind everyone, about the importance of keeping the investigation confidential and the policy prohibiting retaliation against persons who complain of discrimination, harassment or retaliation or who participate in investigations. Individuals should be instructed to report any suspected incidents of retaliation to the investigators immediately.

All documents regarding the investigation, the investigation report, and documents regarding remedial actions taken and post-decision communications should be kept in confidential Association files. These documents will be needed if a lawsuit is filed.

If the determination was that discrimination, harassment or retaliation occurred, it is important to regularly check with the guilty party to see if he/she/they is abiding by any conditions set forth in his/her/their disciplinary action. It is also important to regularly check with the victim to see if he/she/they are recovering.

If the determination was that discrimination, harassment, or retaliation did not occur, the Association should also check with the parties to make sure that they are abiding by whatever adjustments were made to their working relationship.

In summary, the procedures are long and time-consuming. But complying with the federal and state guidelines will be much cheaper and faster than having to defend a lawsuit.

About the Author:
Anna Elento-Sneed is the President and Founding Director of ES&A, Inc., a law firm advising employers on labor & employment, employee benefits, government contracts, and business strategy, including corporate governance, IP rights, and technology and cybersecurity. She is an active member of the Employment Law Alliance, a global network of labor and employment attorneys. AES@esandalaw.com

Good Evidence, Bad Evidence or No Evidence: Employment Law Liability in Terminations

By John L. Knorek, Torkildson Katz

Associations have a choice in preventing claims of wrongful discharge when it becomes necessary to part ways with an employee. Understanding the potential claims can help defend and hopefully prevent legal liability by creating good evidence of a legitimate business reason for ending the employment relationship.

Handbooks

First, at-will employment will not protect your Association form liability under both common law tort and statutory discrimination or whistleblower claims. At-will is merely a contractual concept that states there is no contractual limitation on ending the relationship. This principle should be stated boldly in all handbooks and employment agreements with managers. Boards must be sure the employee handbook also clearly disclaims it is a contract or legally binding. The Hawaii Supreme Court has enforced provisions in handbooks as contractually binding without such a disclaimer.

Your Handbook should also clearly state your policy forbidding discrimination and retaliation for whistleblowing and set forth a clear process for raising complaints of discrimination, harassment, or retaliation that promises to address such concerns promptly and effectively. Employees who fail to use the policy without a good reason may have their claims dismissed.

Under both federal and state law, an employer is liable for harassment perpetrated by coworkers or third parties (owners, guests or contrcators) if (1) the employer either knew or reasonably should have been aware of the harassment; and (2) failed to take prompt and effective remedial action calculated to end the harassment and prevent its reoccurrence. However, Associations are strictly liable for sex or ancestry harassment by a supervisor, requiring extra steps to avoid liability. Lales v. Wholesale Motors Co. (2014).

An at-will statement will not protect you to claims of detrimental reliance if promises of future benefits or employment are made and broken. Hawaii law will enforce verbal promise if they are relied upon to the detriment of the employee, uch as giving up another job in reliance on the promise.

Performance Evaluations

Good evidence includes an objective, job related performance evaluation. No special form is required; however, all evaluations should start with an understanding of what the job requires. A well-crafted job description can be used as a guide to assessing employees' performance. Identifying core and essential job duties, and relying on performance issues related to those central responsibilities can avoid discrimination claims. Adams v. CDM, 135 Haw. 1 (Haw. 2015); Shimose v. Hawai'i Health Systems Corporation, 134 Hawai`i 479 (2015).

Consistency is golden. Train yourselves and supervisors on managing employees' performance. Be objective; state facts and observations not judgments. E.g., "untimely completion of projects" not "lazy". Monitor improvement . . . and regression. Use a Performance Improveent Plan (PIP) not "probation". Set a date to review and evaluate.

Negative performance reviews after history of previous positive reviews could be deemed adverse employment action. Nikolova v. Univ. of Texas at Austin (W.D. Tex. 2022). Keep performance appraisals confidential. If disseminated or made public, it could be the basis for a claim. Kortan v. Cal. Youth Auth. (9th Cir. 2000)

Some behaviors require immediate attention. Address problems early – Extinguish embers, not fires. Document (formally or informally): who, what, where, and when…. Cite the job duties in the job description or written rules of conduct in your handbook. Take appropriate Remedial Action, i.e., written counseling, disciplinary action, performance improvement plan (PIP), etc. Pineda v. Abbot Labs. Inc. (9th Cir. 2020).

Some Performance management options that **do not** work include:

- Checking Boxes that Employee is Performing Satisfactorily
- Forcing employees into a Hobson's Choice: "If you won't quit, I'll make you quit!"
- Singling out an underperforming employee without documentation could be deemed harassment, discriminatory, or retaliatory.
- Reorganization, Layoff, and Job Elimination when the real reason is performance. Employees can dispute layoff as pretext or claim decision has disparate impact, especially when the work they performed is done by someone else.

Job Descriptions

In crafting job descriptions be sure to include the non-physical job requirements. Ability to work under pressure, ability to remain calm when confronted with unhappy owners, ability to manage multiple projects on time, ability to communicate clearly to Board members, etc…

It is also important to identify the essential versus the marginal functions of a job under disability law. In short, essential functions are the reason the job exists. Marginal functions are extra duties that are nice to have done, but not the main reason for the job. Associations are required to reasonably accommodate employees to perform essential job functions, and if there is no reasonable accommodation to enable that employee to perform the essential job function, that worker can be transferred, or if no vacancy can accommodate the limitations of a disability, then termination is acceptable. Associations cannot terminate employees because they cannot perform a marginal function due to a disability. That marginal function, however, can be exchanged for other duties the disabled employee can perform.

Associations lose cases because Supervisors:

Do Not Document

Lie or Cover Up . . . because they did not document

Give Wrong or Shifting Reasons for Termination (can be seen as pretext) . . .because they might not remember . . .

Lack objective performance criteria.

The employer's judgment will be given credit by the courts in most cases over the employee's subjective beliefs. Employee's feelings of competence and confidence in her skills were "subjective personal judgments." Schuler v. Chronicle Broad. Co., Inc. (9th Cir. 1986). Plaintiff's and coworker's testimony of satisfactory performance not relevant; it is "perception of the decision maker which is relevant." Melendez-Ortiz v. Wyeth Pharm. (D.P.R. 2011).

Creating good evidence is a skill that must be practiced. It cannot be accomplished without understanding the risk of liability and creating good evidence to support the employment decisions. Lack of knowledge can also lead to bad evidence such as explicitly relying on protected characteristic or protected leaves of absence to terminate an employee. With this guidance, and consultation with experienced employment law counsel, most claims of wrongful discharge can be avoided or defeated.

About the Author:

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An Independent Investigator's Tips for Workplace Investigations

By Cathy Chin

According to the Association of Workplace Investigators, an impartial investigation should be conducted when there are contested allegations affecting the workplace that involve a potential violation of the employer's policies, standards, ethics, or the law. Examples include complaints of discrimination, harassment, bullying, and other serious allegations.

Sometimes these situations can be handled through an internal investigation by Human Resources or company managers. However, in cases when the allegations include accusations of serious misconduct, the stakes are high, there is a need for impartiality or if there is anticipated litigation, it may be necessary to hire an external investigator to conduct a formal investigation.

When hiring an external investigator, Hawaii employers have three options:

If the allegations are complicated or serious enough, you may want to hire an attorney-investigator. An advantage of an attorney-investigator is maintaining attorney-client privilege. A second option is to hire an investigator working under the direction of an attorney, which can also extend attorney-client privilege. A third option is to hire an external HR professional who conducts workplace investigations.

Some resources to find independent investigators include Labor Attorneys, the Hawaii Association of Workplace Investigators https://www.awi.org/page/Membership_Directory, the Lawyer Referral Information Service of the Hawaii State Bar Association LRIS Brochure (hsba.org) (https://hsba.org/images/hsba/LRIS/LRIS%20brochure.pdf) and SHRM Society for Human Resource Management Hawaii Chapter - Home Page (shrmhawaii.org). (https://shrmhawaii.org/)

Once an organization has decided to hire an external investigator, there are several important actions they can take to help provide a fair and impartial investigative process:

1. Investigate promptly. Investigations should begin promptly after a complaint is received and should be completed in a timely manner. In serious cases, the employer should also determine whether to immediately remove the respondent from the workplace pending the outcome of the investigation.

2. Provide a clear scope of the investigation. It is critical that employers discuss the scope at the start of the investigation to ensure the investigator understands what to investigate. Let the investigator know to whom they should report. Establish a clear line of communication with the investigator for them to communicate back to the employer any new allegations. If the investigator uncovers any new issues beyond the initial scope of the investigation, they should notify the employer to determine whether they should be addressed in the investigation or if the company needs to take other appropriate action.

3. Provide the investigator with the necessary documentation to assist them in conducting the investigation. Examples include the complaint, other evidence, company policies, an organizational chart, etc.

4. Discuss the admonitions to be communicated to witnesses with the investigator in advance of the investigation to ensure they are consistent with organizational policies. Examples of admonitions include the prohibition of retaliation, the requirement to cooperate, to maintain appropriate confidentiality, and to be truthful in interviews.

5. Provide a point of contact to assist with contacting witnesses, logistics, etc. It is important that this should be an impartial party, usually HR or Legal, and also someone who is not a witness to or a part of the issue being investigated.

6. Define when and how status updates should occur; however, the investigator should avoid sharing factual findings before the investigation is complete. This is important to ensure the employer is not perceived as guiding/influencing the investigation.

7. Let the investigator know whether you want the Report of Investigation to include fact finding only, determine whether there was a violation of policy, or provide conclusions and/or recommendations. Additionally, decide what form the report should take (written, oral, or both). Finally, advise the investigator if you do not want them to retain any of the investigative materials.

8. State any time constraints while understanding that there are many factors that can delay completion and investigations cannot be "rushed."

There are many important factors to consider when conducting an internal or external investigation. However, following these basic guidelines will give investigators the tools to conduct a fair, thorough, and appropriate investigation.

About the Author:
Cathy Chin (Colonel, Retired) served in the Air Force for 25 years. She held positions ranging from Command to Legislative Liaison, advising the Secretary of the Air Force at the Pentagon. Prior to retirement, she was the Director of Personnel for Air Forces Africa. She started Chin Consulting, LLC in 2017, specializing in Change Management, Leadership Coaching and Workplace investigations. cathy@chinconsultinghawaii.com

Managing Risks Associated with Data Security, Cyber Space, Technology and the Internet of things:

Can't Live with Evolving Technology and can't live without it.

By Joel W. Meskin, Esq., CIRMS, MLIS, CCAL Fellow, Managing Director, McGowan Program Administrators

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Introduction

A few things that everyone can agree upon is that the Internet of Things ("IoT"), Cyber Liability, Data Breach, Cyber Crime and Technology are touching everyone's life, both positively and negatively. Most people agree that all their devices, systems including the required software and hardware are expanding, changing and growing faster than any of us can keep up with or understand. Most everyone communicates using smart phones and/or other smart devices. More and more, new homes are built as smart homes or existing homes are transitioned into smart homes. Many of us yearn for times gone by.

Community Associations are not immune to the intended and unintended consequences of this brave new world that has been changing more and more, and faster and faster. Community Association Boards, Community Association Managers and Business Partners acknowledge the changing world and many know this while many others come from the position that why fix something that they do not perceive as broken. However, at the same time, a vast majority of the community association industry is ready to pursue the necessary elements of the requisite Risk Management of these new technologies. (see Wired, 2018 Survey of Cybersecurity in Community associations)

Community Associations, whether condo, coop, Single Family HOA or other common interest development (hereafter referred collectively as "Association(s).") are managed by boards elected by the unit owners. The key obligation of Board is to Protect, Preserve and Enhance their community association. To comply with their obligation, boards must put the interest of the association ahead of their own and those of the unit owner members. Their duty is to the "entity."

The issues addressed here involve risk management, both insurance and non-insurance resources: (1) Proactive Non-Insurance Risk Management tools to eliminate or minimize consequential damage from a cyber event, a data breach event, on-line theft, phishing, social engineering, hacking, ransomware and extortion, amongst others; and, (2) what insurance products are available and what should the policy include to proactively minimize insurance claims and covered losses and perils.

The goal of this article is to convince community association Boards, CAMs and Business Partners to put the Risk Management and insurance for these exposures toward the top of the board's agenda. In this

Brave New World, these issues are different from prior board issues. In the past, boards had more breathing room for them to see how claims play out to determine their cost benefit level of risk. Boards, CAMs and Business Partners hear about, read about and experience potential cyber, data, technology and the IoT. As most of us know, it is far cheaper to address and fix issues sooner than later. Although the issue is not identical, the timing issue is. The board and unit owners of Champlain Towers South in Surfside Florida received an engineering report in 2018 clearly identifying the significant infra structure issues that were critical and needed to be addressed. The unit owners voted not to pursue any of the necessary work (approximately $9 million) per unit. Many of the board members

at the time resigned due to the vote. Sometime approximately two years later, unit owners voted to pursue the changes which were now estimated at $16 million. Unfortunately, had they been proactive, and had they chosen not to "defer maintenance" in 2018, there may be 98 individuals still alive and a beautiful building overlooking the ocean standing. (I speculate that the fixes and improvements been completed, the unit values would have dwarfed the cost). Admonition: it is imperative that you have your insurance professional meet with your board to evaluate this issue for your association to help identify the issues and to explain the potential insurance solutions. In addition, you should have a similar meeting with your CAM(s) to discuss a strategy for non-insurance protected matters.

Associations hear about all the cyber, data, IoT and Technology issues every day but do not see them occurring in community associations. First, earlier this year there was a Ransomware attack in a high-rise Boston association. I do not have permission to disclose that insured, but I bet you good money that they were happy to obtain the Cyber Liability/ Data Breach coverage. Associations are living with a false sense of security. Hackers and cyber criminals no longer only look to large targets. Rather, they are looking at small and soft targets who may not result in a large hit, but are simple and quick hits. At the end of the day, the issue is not "if" a hack or event will occur, but "when" it will occur.

When I speak to boards and association professionals on this topic, I am often asked what can we do? Although it is a bit tongue in cheek, I advise them to remove all technology in the management of the association.

The first thing you need to do is an audit of your Association's use of any of the following, including what exposures board members and CAMs may have on their personal or business devices. For example, does your Association Board Members, Employees, CAMs or other business partners use any of the following in the management of the Association? Any positive answers to the following warrant cyber liability/data breach coverage.

- FOBs, key cards, remote controls
- Building automation system
- Computers
- Virtual board meetings (Zoom, WebEx, Facebook)
- Email, texting, Facebook or other social media
- Management Software
- Laptops, smart phones, or other smart devices
- Website
- On line banking
- Wire transfer capability
- Access to the internet
- Maintain applicant or unit owner applications, ESA/ADA request,
- Elevators
- Security Cameras
- On line card payment capability
- Any documents/records that are save and stored after the requirement for maintaining them has expired.

Admonition: it is important for board members to understand that there is no board member privilege. Therefore, their personal e-mails are not protected from discovery in litigation. Do you want to have your personal devices and/or your business/work data requested in litigation? The only possible protection for this is to either eliminate all email between and amongst board members or to create an intranet type email where the BOD must log into the website BOD section and the email is shared and goes to all BOD members.

IS YOUR ASSOCIATION'S RISK MANAGEMENT PLAN PREPARED TO RESPOND TO THE FOLLOWING CLAIM SCENARIOS?

- Unit owner information being stolen by a hacker or disgruntled employee?
- An order from a governmental agency to **notify** current and past unit owners and tenants for whom information has been kept, but is subject to a data breach, and pay any fines or penalties? [see Mass.Gen.aws 93H, Sec. 1]. All 50 states and the DC have Data Breach Laws]
- To pay costs for credit monitoring for unit owners, tenants employees and anyone else where the Association still store personally identifiable information?

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- A laptop or Thumb Drive being lost or misplaced with Unit owner information (personally identifiable information" on it?
- A hacker encrypting your computer locking it down and demanding a ransom payable in Bitcoin to unlock the computer.
- Deal with your computer being invaded by a virus and compromising your entry key cards for your building, front gate, clubhouse, elevator and/or pool?

DO YOU KNOW WHO TO CALL IF THE ASSOCIATION INCURS ANY OF THE SCENARIOS ABOVE?

- Do you know who to call if any of the scenarios listed above occur? Time is critical!
- Do you have someone to call if the computer has been compromised? Time is critical !
- Do you have access to education, webinars and proactive risk management services available for the BOD?
- Do you have someone to defend the Association against claims by governmental agencies, or civil lawsuits (at someone else's expense)?

Tip: There is one coverage under the cyber liability/ data breach policy that in and of itself is worth its weight in gold and a sufficient reason to purchase the coverage. The data breach response services materials include a number to call if any of the scenarios above occur. What is provided is a coach or claim coordinator to assist you with the claim. Most policies provides a booklet outlining the services approved and listing approved Computer Forensic Experts, Forensic Accountants, Attorneys and other principals to assist with various Claim issues within their expertise.

THE COST BENEFIT ANALYSIS OF THE STRATEGY TO MANAGE RISK OF CYBER EVENTS, DATA SECURITY AND CYBER CRIME

Community association insurance professionals ("brokers") have been proposing cyber liability and data breach coverage for many years. Under a Cost Benefit Analysis, this is no longer an optional coverage for the BOD fiduciaries. This should be part of every association's insurance portfolio. Board members must understand, their primary obligation is to protect the association's assets, tangible and intangible, and should heed the professional's advice regarding the proposed insurance. Failure to obtain this coverage can result in draconian costs. Just Goggle Cyber Liability and Data Breach claim costs.

The "cost" to obtain a cyber liability/data breach response policy is relatively inexpensive and provides a great deal of both protection and access to extensive risk management information, data breach coaches, forensic computer experts, and training videos.

The first excuse from Boards and CAMs is "cost." Cost is actually the main concern of the majority of Boards everywhere for all insurance. The typical policy is roughly between $500 and $2,500. The following two policies in Massachusetts are $809 for a $1 MM limit, $902 for a $250K limit, $2,139 for a $500K limit, and $2,669 for a $1MM limit. The key underwriting rating factors are: (a) location, (b) limit of liability requested (c) and the Association's annual revenue (for the purpose of or underwriting, would be the total of all assessment and special assessments in the upcoming budget year, not capital or improvement or reserve funds). The second excuse is why do we need these coverages in the first place. Boards say: "we have not seen any claims for cyber liability or data breach in associations." Boards say "associations are small fish, why would the hacker or cybercriminal spend his or her time on associations"? "Associations are not like Target, hospitals, law firms, insurance agencies, oil companies, large financial institutions." What is happening is that the large targets are getting smart, significantly upgrading security measures and are doing significant training for all their employees. Hackers and cybercriminals are lazy and go for the easy score.

The underwriting of these policies is not very rigorous. Sometimes the key is learning the basic sections of the policy and determine what is covered. Most BODs understand that they are insured for any type of risk, injury or damage. However, the question is, are they self-insured or insured by an insurance policy. If it is the former, the insured will have to pay any attorney fees, settlements or judgments out of its own assets. In most states, fiens and penalties are not covered.

WHAT INSURANCE AND RESPONSE COVERAGE DOES THE ASSOCIATION NEED?

In the normal course, the insurance coverage purchased by Associations includes two categories of benefits, "defense" of claims, governmental proceedings and civil lawsuits, and "indemnity" for settlements and judgments that the insured becomes liable. In addition, there is generally no coverage for fees, penalties ordered by regulatory entities or remedial measures. However, fines, penalties and remedial measures are covered to one degree or anotherIn the cyber liability/Data Breach Response Services policies.

CONCLUSION

The insurers that provide this coverage has videos, articles and trainings, generally at no additionaol cost. This does not need to be an "all or nothing" strategy. Simple things such as putting limitations on websites, requiring dual authorization to most IoT devices, and be a minimalist with respect to what you maintain.

In addition, insurance should be obtained. Below is a chart of Insurance Solutions for various risks that Associations may in fact experience and the various insurance policies that may respond. The challenge is that contrary to many other types of policies, the insurers have not developed standard terminology, or standard coverages. In addition, not all policies providing cyber liability/data breach response services are not bundled in the same way with the same coverage.

About the Author:

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Insurance Solutions for

The Internet of Things - Technology, Cyber Liability, and Data Breach

Joel W. Meskin © 2022

Risk	Cyber Liability Cyber Crime	Data Breach Response Services	Directors & Officers	Fidelity/ Crime	General Liability
Information Security failure Liability	X		X*		
Regulatory Defense & Penalties		X			
Defamation	X		X*		X*
Media Liability - Copyright and Trademark Infringement, Invasion of Right of Privacy	X		X*		
Data Breach (Electronic and or hard copy data breach)	X				
Data Breach Unit Owner Notification Expense		X			
Credit Monitoring Expense		X			
Restoration Expenses		X			
Cyber Extortion/Ransomware Demands		X			
Crisis Management/Public Relation Costs		X			
Security Incident Investigations.		X			
Anti-fraud protection for unit owners		X			
Social Engineering/False Pretense/Phishing		X*		X***	
Forensic Expenses – computer forensic		X			
Compliance Assessment Fees		X			
Hacking Association Bank Account - and illicit wire transfer	X			X****	
Drones (crash/invasion of privacy)	X		X*		X
Unauthorized board meetings (i.e. Web Ex)			X*		
Misplaced Laptop with Personally Identifiable Information	X	X	X*		
Manipulation of computer programs by employees and outside third parties	X	X		X**	
Challenged decision of board due to unauthorized use of technology			X		
Cyber Bullying	X		X*		
CAM created exposure due to breach of CAM system		X			

*If the Association D&O or GL policy is silent regarding alleged cyber liability wrongful acts or occurrences, there may be coverage, primarily a defense obligation.

* Some Cyber Liability/Data Breach response are including Cyber Crime

**Some court cases have found coverage available under the computer fraud portion of the Fidelity/Crime Policy.

*** The Fidelity (Employee Theft)/Crime policy must specifically include Social Engineering/False Pretense Coverage

**** The Fidelity/Crime policy must include Wire Transfer Fraud aka Funds Transfer Fraud

Navigating the Hazards of Hiring

By John S. Mackey

We all understand that it is unlawful to discriminate on certain bases in hiring. But did you know that just saying the wrong thing in a job ad or application, or asking the wrong question in an interview, can itself be illegal?

"When did you graduate high school?" "Where are you from?" "Where does your spouse work?" "Have you ever been arrested, or convicted of a felony?" "Have you had a prior work injury?" "Seeking recent college graduates." "Provide a photo with your application." Any of these and many more can land employers in hot water with the Hawaii Civil Rights Commission – *even if the questions or answers do not result in a decision not to hire* (the HCRC maintains a publication listing lawful and unlawful pre-employment inquiries, available here: https://labor.hawaii.gov/hcrc/publications/).

Inquiries are unlawful when they tend to illicit information about "protected categories." The protected categories applicable in Hawaii are an ever-expanding list found in both federal and Hawaii non-discrimination laws, and currently include:

- Race
- Color
- Religion
- Sex (including pregnancy) (also including gender identity or expression)
- Sexual orientation
- National origin, ancestry and citizenship
- Age
- Disability (including perceived disability)
- Genetic information
- Past, current, or prospective military service
- Marital status
- Arrest and court record
- Credit history
- Domestic or sexual violence victim status
- Reproductive health decision

Also, employers understand that their hiring decisions can be challenged in court or with agencies like the Equal Employment Opportunity Commission or the HCRC. But employers may not be prepared for the level of scrutiny they should expect such decisions to receive. In recent years the Hawaii Supreme Court has taken the lead in putting employer decision making under the microscope, by repeatedly reversing lower court victories for employers.

For example, in one 2015 decision the Hawaii Supreme Court held that an employer's claim that it declined to hire a 59-year-old applicant for a sales position due to her lack of "recent sales experience" was not a legitimate explanation because "recent sales experience" was not a required qualification indicated on the job posting and because the company touted its sales training. The lower court had dismissed the case and the Intermediate Court of Appeals had upheld that ruling.

In another 2015 decision the Hawaii Supreme Court held that Hilo Medical Center had failed to demonstrate an individual convicted of possession with intent to distribute crystal meth was unqualified to work as a radiological technician. HMC claimed there was a risk he could get his hands on controlled substances at the hospital. The applicant disputed that, claiming HMC kept the drugs well-secured. The Hawaii Supreme Court sided with the individual. But only after the Hawaii Civil Rights Commission had dismissed the case, determining that HMC could lawfully consider the conviction. A lower court similarly dismissed the case and the ICA affirmed that decision, before the individual, litigating pro se (as his own lawyer!) won at the State's highest court.

Failing to hire someone is hardly the only potential legal pitfall. Hiring or retaining the **wrong** person can be even worse. When applicants or employees sue it commonly involves the drama and trauma of discrimination, harassment, retaliation, unpaid wages, and the like. But cases involving negligent hiring and retention can be true horror stories, including rape and murder. And the litigation can result in verdicts that deal a financial death blow to an employer. Just last year a Texas jury returned a $7 ***billion*** verdict

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Navigating the Hazards of Hiring

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against Charter Communications. That case involved a field technician who made a service call to the home of 83-year-old Betty Thomas one day in December 2019, then returned to rob and murder her the next day. Charter was alleged to have hired the field technician in spite of his being untruthful about his work history, and to have retained him even though he had acknowledged financial difficulties and had a history of stealing credit card and personal finance information from elderly female customers. Of course, hiring the wrong person also has more mundane costs, such as increased turnover, and the need to recruit and train all over again.

So, what's an employer to do to avoid stepping on the many landmines?

Update job descriptions to ensure they accurately state duties and needed skills and qualifications. Ensure job advertisements do the same and are not discriminatory. This includes not limiting advertising to resources that arguably exclude certain protected categories, *e.g.*, publications focused on a specific racial, gender, or age demographic. Try to have a diverse panel of interviewers if possible. Try to ask candidates a consistent set of questions that are related to their ability to do the job. Don't allow interviews to become casual 'get to know you' conversations that may stray into the topics of ordinary conversation that can illicit protected category information. Take notes in interviews to reflect the non-discriminatory reasons that may be relied upon in making a decision or distinguishing one candidate from another. These may become critical evidence if needed to defend a claim, so keep them for at least a year after hiring for the position is completed. Ensure decisions are based on documented criteria related to ability to do the job.

Also, require applicants to complete and sign a job application (in addition to simply submitting a resume). The application should have the employee affirm that the content is true and inform the applicant that misstatements may lead to rejection or termination whenever discovered. Ask about gaps in employment. Request and check references. The best predictor of future job performance is past job performance – humans are not like the stock market! Don't overlook serious negative information simply because you need someone, anyone, to fill a position.

Employers are often tempted to Google applicants or search their social media. This is not unlawful per se, but such a search can expose a decision maker to all manner of problematic information about an applicant such as race, sexual orientation, disability, etc. On the other hand, it may also reveal an applicant who is openly posting their racist or supremacist ideology, or other information or behavior that may pose a threat to the employer's workplace or reputation. What's the best approach? Have someone who is not a decision maker do the search and serve as a filter. Make sure they are trained on what should and what should not be considered by those who are making the decision.

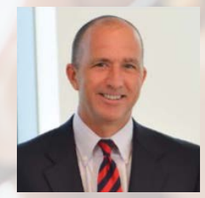
Know the right way to check criminal history. Inquiries into conviction history are allowed only **after** making a conditional offer of employment. An employer can rescind a conditional offer based on a conviction that is rationally related to the duties and responsibilities of the position, if the conviction occurred within the preceding 7 years for a felony or 5 years for a misdemeanor (excluding periods of incarceration). How do you determine whether a particular conviction is "rationally related" to the job? Identify the statutory provision violated. This may be included on a criminal history report from a background check provider or it may be necessary to obtain a copy of the judgment of conviction (for Hawaii convictions such court records can generally be obtained online). Then compare the elements of the criminal offense as stated in the law with the duties of the job. If you are not sure whether there is a "rational relationship", ask an employment lawyer.

Finally, if you are wondering, "Why have employees at all? Let's only hire Independent Contractors! Problem solved!" Not so fast.

Simply designating an individual as a contractor or consultant and paying on a 1099 basis will NOT be conclusive if a court or agency determines the nature of the relationship is in fact one of employment under the terms of whatever law applies. Multiple Hawaii employment laws apply a version of the "ABC" test which presumes an employment relationship unless the "employer" can prove three elements to the contrary. Workers' compensation law, discrimination law, and wage and hour law (minimum wage and overtime) each have their own distinct tests for determining who is and who is not an employee.

And while the parties' agreement may be a consideration, it will not ever be the sole determinant.

This is by no means a comprehensive coverage of employment or even hiring law and guidance. Nor is this legal advice, or a substitute for legal advice. If you have questions, concerns or need guidance, consult an attorney with expertise in employment law. Stay safe!



About the Author: *John represents and advises employers in various areas of employment law. He defends employers in court and in agency proceedings and investigations involving allegations of harassment, discrimination, failure to accommodate disabilities, wage and hour violations, unfair labor practices and breach of contract restricting post-employment competition or misappropriation of trade secrets. Hawai'i employers trust John's advice on issues relating to terminating employees, providing leaves of absence, properly classifying employees and conducting internal investigations. https://www.goodsill.com/attorney/mackey-john-s/*

Q&A with The Voice of the Fire Sprinkler Industry

A National Perspective on Fire Sprinkler Retrofits

Questions by: Dorvin D. Leis co., inc.
Answers by: NFSA (National Fire Sprinkler Association)

1. Q: What is the National Fire Sprinkler Association (NFSA)? And, how does NFSA work with our local authorities in regard to fire life safety?

A: The National Fire Sprinkler Association (NFSA) was founded in 1905 and serves members that are fire sprinkler manufacturers, suppliers, contractors, professionals (architects, engineers, designers, insurance agents, lawyers, etc.), Authorities Having Jurisdiction (AHJs), which are fire officials, building officials, as well as any elected and appointed officials. NFSA works with all persons and companies interested in fire & life safety. NFSA works with federal, state, and local officials to ensure the best possible fire protection possible in accordance with the latest national codes and standards that are applicable to the built environment. NFSA is proud to have served members for 117+ years, and loves bringing people together to "protect lives and property from fire through the widespread acceptance of the fire sprinkler concept."

2. Q: Are there any advocacy efforts or opportunities in the 2023 legislative session for federal funding and/or incentives for fire sprinkler retrofits?

A: Yes! NFSA remains engaged at the local, state and federal level with advocacy and outreach efforts. Current federal legislation includes the High-Rise Fire Sprinkler Incentive Act which will include tax incentives for building owners to retrofit high-rise residential occupancies (current legislation provides this for high-rise commercial buildings and small businesses). NFSA is also supportive at the federal level of efforts that include HUD, and the Public Housing Fire Safety Act, which will provide retrofit funding for HUD housing.

3. Q: What can we do locally to help with federal (or local) advocacy for tax incentives and/or other funding assistance?

A: Participate with NFSA by engaging our national staff with programs and projects in the community that educates building owners, occupants, and government officials on the live and property saving benefits of fire sprinklers. NFSA works with state and local governments to offer incentives for fire sprinklers. Many communities across the country have offered incentives from homes to high-rises for the installation of fire sprinkler systems, in both new construction and existing construction. This includes a percentage of cost tax rebate, waiving permit fees, low interest loans, etc. Many communities offered incentives to retrofit buildings with fire sprinklers in historical districts because they realize it's not truly preserved until it's protected. Be involved by tracking current advocacy opportunities at www.nfsa.org/advocacy. You can also participate in NFSA Chapter meetings, our annual conference and regional conferences that occur throughout the year.

4. Q: With the recent one-year anniversaries since the tragic January 25, 2022, Philadelphia public housing rowhouse fire that left twelve dead and the January 29, 2022 Bronx fire that left nineteen dead and sixty-three injured, has there been any changes in those cities or counties related to fire life safety ordinances?

A: Those cities did take action to strengthen fire safety laws, however, they both stopped short of incentivizing and/or requiring fire sprinklers in existing high-rises or public housing. NFSA was honored to travel along with US Fire Administrator Dr. Lori Moore-Merrell during the anniversary week of these fires. Dr. Lori has unified the nation's fire service organizations to speak with "One Fire Service Voice" and has assembled a great team to share the current realities of fire and also the solutions (fire sprinklers being a prime one).

5. Q: NFSA has used Marco Polo as a case study for many years. Are there any insights NFSA can provide our Honolulu County residents based on studying the Marco Polo fire as well as others across the nation?

A: First and foremost, NFSA applauds those involved in the Marco Polo retrofit. This is a great example of leading, being proactive, and turning tragedy into advocacy. While one never wants to make the headlines due to a tragic fire, this shows that people can come together to make their community a safer place to live. The retrofit of fire sprinkler systems in existing high-rise buildings is accomplished without shutting down the building or removing people from their homes. Once the project is complete the building is safer for the occupants and their pets, safer for the firefighters, and safer for any visitors to the buildings. The more high-rise buildings with fire sprinklers the better it is on the entire community and the environment should a fire occur.

For more information on NFSA visit www.nfsa.org. For a local resource you can visit www.leisinc.com or contact Jordan Holley, Dorvin D. Leis co. Fire Sprinkler Division Manager, at JordanH@leisinc.com.

Finding a Way Forward:

Navigating Employee Requests for Reasonable Accommodations after COVID-19

By Jacob T. Tokunaga, Torkildson Katz

While communities and businesses fought through the pandemic, laws governing the workplace found new relevance. Government agencies enforcing those laws published an abundance of guidance to assist employers with novel issues, but that guidance also benefitted employees. Employers used the guidance to create and implement new policies that would resolve issues brought about by COVID-19. Meanwhile, employees became more aware their qualifying disabilities or religious beliefs could justify requesting exemption from requirements like mandatory vaccination, compulsory testing, or even in-office work.

Employers in all industries are therefore best advised to review their legal obligations under laws like Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), and Chapter 378 of the Hawai'i Revised Statutes (HRS). To inform that review, the following serves as a cursory summary of employee rights to reasonable accommodations based on disability or religious belief. This summary focuses on employee rights but employers should know job applicants have similar rights to reasonable accommodations as well. This article will also discuss some lesser-known rights to accommodation under Hawai'i law and a new federal law to take effect this year.

This summary does not constitute comprehensive legal advice concerning discrimination, retaliation, or reasonable accommodation at work. Housing associations employing any number of employees are therefore encouraged to contact legal counsel about any questions they may have regarding Title VII, the ADA, HRS Chapter 378, or the content of this article.

Reasonable accommodation requests generally

Under Title VII, the ADA, and state law, employees have rights to reasonable accommodations where their qualifying disability and/or sincerely held religious belief(s) prevent or impede performance of essential job functions or other employment requirements. Hawai'i law in this area mirrors the requirements under federal law. Note, Title VII and the ADA cover only employers with 15 or more employees, but state law requiring reasonable accommodations apply to employers with even just a single employee.

Reasonable accommodation requests based on an employee's disability

Under the ADA and HRS Chapter 378, employers must provide reasonable accommodations to individuals with qualifying disabilities. Where an employee requests a disability-based accommodation, a qualifying disability can be (1) a mental or physical impairment that substantially limits one or more major life activities; or (2) a record of that impairment. Both state and federal law only provide this protection to qualified individuals. Disabled job applicants or employees are qualified if they can perform a position's essential job functions with or without reasonable accommodation.

Essential job functions encompass a range of duties depending on the nature and purpose of any employment position. Particularly relevant for housing associations, an employee's regular on-site presence may be an essential function when an employee's position requires teamwork with other staff, face-to-face interaction, and access to equipment found only at the workplace. If an employee's position requires these elements but a requested accommodation prevents regular on-site presence, the employee may not be qualified or protected under the law.

Once an employer becomes aware of an employee's disability and need for accommodation, employers must engage the employee in what the law calls an "interactive process." During this process, *both* employer and employee mutually exchange information to determine what accommodations are needed to enable the employee to perform essential job functions. The touchstone of the interactive process is a mutual effort by employer and employee to identify reasonable and effective accommodations. Any inquiries about an employee's disability and/or impairment during this process must be limited to situations of business necessity and must be restricted to evaluating the employee's ability to perform job-related functions.

When an employer or employee fails to participate in the interactive process, the process may break down. If an employer is responsible for the breakdown, the employer will only be held liable if a reasonable accommodation was available. Employees must also participate during the interactive process to preserve their right to reasonable accommodation.

Under the ADA and state law, employers only need to provide an accommodation that is both effective and reasonable. An accommodation is effective if it enables a disabled job applicant to be considered for the position or a disabled employee to perform a position's essential job functions. Next, a disability accommodation is *un*reasonable if it imposes an undue hardship on the employer providing the accommodation. An undue hardship is one that causes significant difficulty or expense. Government agencies and courts define undue hardship by applying a set of factors to the facts of each situation. Factors include, but are not limited to, the nature and cost of the accommodation, the overall financial resources of the entity providing the accommodation, size of the business, and the employer's number of employees.

Once an employer identifies a reasonable accommodation that will assist the requesting employee, the employer must provide the accommodation. If the accommodation proves ineffective, the employer and employee should again engage in the interactive process to assess alternatives. Alternative accommodations must still be both effective and reasonable.

Importantly, an employer does not need to grant a job applicant's or employee's *preferred* accommodation; the law only requires some reasonable accommodation be provided. If an employer cannot provide *any* effective accommodation without incurring an undue hardship, the request for a disability accommodation can lawfully be denied.

Some courts have held that leaves of absence, including extended medical leaves, can be reasonable accommodations if they do not impose an undue hardship on the employer. Some courts, however, have recognized leaves of absence of an indeterminate length may not be reasonable in certain situations.

Reasonable accommodation requests based on an employee's religious belief

As seen during the pandemic, employees may also request accommodations based on their religious beliefs. Requests for religious accommodations in the workplace differ significantly from requests for disability accommodations.

First, accommodations based on an employee's religious belief are protected under Title VII while disability accommodations fall under the ADA. This difference results in slightly different legal definitions. Another notable difference, then, is in how the two laws define reasonable accommodations. Accommodations under the ADA are reasonable if they do not impose an undue hardship, that is, significant difficulty or expense. The law under Title VII is less demanding. Title VII deems a religious accommodation reasonable if it does not impose more than a *de minimis* hardship on the employer. A *de minimis* hardship occurs when the accommodation's cost to the employer or impact on co-workers is more than negligible or causes more than a "trivial" burden. Examples include where a requested accommodation reduces employee efficiency,

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Navigating Employee Requests for Reasonable Accommodations after COVID-19

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violates other employees' rights or entitlement to benefits, creates safety issues, necessitates hiring of more employees, or requires coworkers to carry heavier workloads. When a requested religious accommodation does not impose more than a de minimis hardship, employers may be required to provide the requested accommodation.

In addition, Title VII and comparable state law require reasonable accommodations for an employee's sincerely held religious belief while the ADA and similar state law protects employees with qualifying disabilities. Notably, courts are hesitant to question the sincerity or religious nature of an employee's religious belief. Unless employees present an objective reason for questioning the nature or sincerity of their belief, employers should therefore focus on determining whether a reasonable accommodation for that belief is possible without more than a de minimis hardship.

Additional circumstances where accommodations may be required

Victims of domestic or sexual violence

In accordance with state law, employers are also required to reasonably accommodate employees who are, or have minor children who are, victims of domestic or sexual violence. By law, required accommodations include, but may not be limited to, changing the employee's work location, installing locks and other security devices, restructuring job functions, and allowing the employee to work flexible hours. Employers are not required to provide any of these accommodations if they cause undue hardship on the employer's operations, i.e., significant difficulty or expense. In all cases, however, employers must provide a qualifying employee 5-30 days of victims' leave under HRS § 378-72. The required length of victims' leave depends on the size of the employer (measured by number of employees).

Pregnancy-related accommodations

Under Congress's recently passed Pregnant Workers Fairness Act (PWFA), employers with 15 or more employees will be required under federal law to provide reasonable accommodations to pregnant employees and pregnant job applicants. Similar protections already existed under state law (for employers with one or more employees) and in limited form under both Title VII's Pregnancy Discrimination Act and the ADA (for employers with 15 or more employees).

The PWFA goes into effect on June 27, 2023. Under the new law, reasonable accommodations for pregnant employees or job applicants will only be required if the accommodation does not cause significant difficulty or expense. Employers responding to requests for pregnancy-based accommodations after the PWFA takes effect should therefore evaluate the reasonableness of the requested accommodation as it would for one requested under the ADA's higher standard.

Employers should also note state law requires providing as much leave as is deemed reasonable by a pregnant employee's physician, whether with or without pay. This can extend beyond the twelve weeks per year provided for under the Family and Medical Leave Act. When the pregnant employee's leave ends, an employer must reinstate the employee to the original job held or to a position of comparable status and pay without any reduction in service or privileges.

For more information on the PWFA, visit the Equal Employment Opportunity Commission's website discussing the new law at https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act. Any questions you have concerning applicants or employees who are pregnant and/or victims of domestic or sexual violence should be directed to legal counsel.

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New to Your Condo or Community Board?

Information & Tips for Productivity and Success!

Are you a newly-elected director on a condo or community association board? Here are some simple tips for successful and productive service to your association.

Always Be Prepared. The board meeting is your opportunity to make decisions on issues that pertain to your property, so it is important that you be prepared for those meetings.

Become familiar with your association's documents. To begin with, you should familiarize yourself with your association's documents - the articles, bylaws and CC&R's, which stand for Covenants, Conditions and Restrictions. These documents are like the "constitution" of your property, and all board actions must be in line with these important documents.

Read Your Board Packet. About one week before every meeting, your managing agent will mail a board meeting packet to the board members and on-site building manager. Please take the time to read the material, take some notes on the issues, and be ready to discuss and vote on issues at the meeting.

What Happens at the Meeting? The board meeting is for information dissemination and discussion, and will normally include discussion of the previous meeting's minutes, monthly financials, committee and building manager reports, unfinished and new business, and executive session items which pertain to delinquencies, legal and personnel matters, and on occasion contracts.

Decision Making: The board makes decisions and establishes policies, while your management team (your on-site manager and managing agent) will implement your decisions. It's important to remember that you, as a director, also have an important fiduciary responsibility to do what is in the best interest of the association, meaning all of the owners. Other than the monthly board meeting, the board is not involved in day-to-day implementation of your decisions—the on-site manager and managing agent will take care of that for you.

Importance of Meeting Attendance: Board meeting attendance is important, and you will need a specific number of board members to reach a quorum. If you do not have a quorum, no business can be conducted, thus the meeting is postponed to another date.

The Role of Your Managing Agent: Your managing agent will provide your property with a management executive who will serve as a valuable resource. His or her job is to help guide the board to make decisions that are in the best interest of the property and all of its owners. Your management executive is there to provide information on any pertinent property issues, past practices or decisions of the board. He or she can offer an objective perspective, which can assist the board's analysis of the issue at hand. Working on behalf of the board, the management executive encourages the board to think not only about obvious items, but also about things that are not readily apparent, or may occur before they make a decision. In every respect, your management executive is intent on helping the board be successful. If he or she offers a different point-of-view from you or another board member, it is only for the purpose of giving you additional information to consider, and assist the board to make the best decision possible. Any decisions, however, are ultimately made by the board of directors.

Educate Yourself. Professional organizations like the Community Associations Institute (CAI) provide classes and seminars to help board members understand their responsibilities and successfully carry out their duties. Hawaiiana Management Company also holds regular educational seminars as a service to board members.

For more information on Hawaiiana's services, please contact: Mele Heresa, CCIM®, CPM®, RB# 21752, at meleh@hmcmgt.com or (808) 593-6827.

Condominium Association Registration 2023-2025

It's that time again folks. The biennial condominium association registration for the 2023-2025 period is going live at the Real Estate Branch registration website, www.aouo.ehawaii.gov on April 1, 2023. The registration of condominium associations is a biennial event required pursuant to the Hawai'i condominium law. The requirements are contained in HRS § 514B-103, and condominium associations containing 6 or more units are required to register every two years.

There are some exceptions to registration. Exceptions apply to condominiums (1) where all units are restricted to nonresidential uses or (2) condominiums containing no more than five units **and** are not subject to any continuing development rights. Additionally, the exception to registration must be provided for in the declaration or bylaws of condominiums claiming the statutory exemption. HRS § 514B-101.

In addition to paying application fees, including the Condominium Education Trust Fund per unit contributions, registration requirements include providing proof of a fidelity bond, i.e., crime or dishonesty insurance coverage protecting association funds. The fidelity bond must cover the managing agent and its employees and any employees of the association. Exemptions to the fidelity bond requirement exist for certain condominiums associations. These exemptions are for associations with a sole owner, associations that are used 100% for commercial purposes and those associations with 20 or fewer units.

The registration form is just two pages with 10 items to be completed. Certain items on the registration form are statutorily required to be included in the registration process. The registration application asks for basic information such as the name and positions of the officers of the association; the name of the managing agent, if any; the street and postal address of the condominium; and the name and contact information of a designated officer who may be contacted directly.

Other questions ask about the association's reserve funding status; the percentage of units in the condominium that are owner-occupied; and whether mediation or arbitration was utilized to resolve disputes.

While required by law, there are certain benefits to registering. Owners of registered condominiums are eligible for subsidized mediation and binding arbitration through private dispute resolution providers. Financial institutions and mortgage companies check on the registration status of associations for their own purposes when an association applies for a loan. It is not unusual for these companies to call the REB to confirm an association's registration status.

Because the AOUO registration form is posted on the REB website for public viewing, members of the public are free to review this information. This is a good place for prospective owners to begin their research into how an association they may be considering buying into is run. For example, what is the percentage of owner-occupants to non-resident owners and what is the percentage of reserve funding set aside by the association? Owner-occupants may demand a level of care to the association property that owners who reside elsewhere care less about simply because they don't live on the property, while knowing the current level of reserve funding can give prospective purchasers an indication of whether special assessments may be in an owner's future.

An association's registration status can also influence pending litigation. HRS § 514B-103 (b) provides that any association that fails to register as required by law shall not have standing to **maintain** any action or proceeding in the courts of Hawai'i until it registers. The failure to register does not however impair the validity of any contract nor does it prevent an association from **defending** any action or proceeding against it. The REB is aware of at least one case that was thrown out upon motion by the defendant because the complaining party association was not registered as required by law. This case was brought to our attention by the defendant's attorney who checked with the REB on the registration status of the complainant AOUO.

For all self-managed associations out there, it is a part of the board members' fiduciary duty to assure compliance with the many aspects of the condominium law, including assuring that their association is properly registered with the REB. It is the broker's responsibility too, as a condominium managing agent, to ensure the associations it manages are in full compliance with all applicable laws, including being properly registered.

So, make sure your condo association is registered. It's the law. Register early!

The REB is located at 335 Merchant Street in the downtown Post Office building, Room 333. We can be reached during business hours at 808.586.2644. If you're planning to visit our office, please call prior to your visit to confirm the current COVID protocols in place for entering the building. Our website address is www.hawaii.gov/hirec.

**The REB does not support or endorse any of the advertisers in this newsletter. The material in this space is for informational purposes only. It is not meant to suffice for legal advice. For legal advice you are urged to seek the professional services of an attorney licensed to practice law in Hawai'i.*

Save Employees & Save Money

By Jeff Byxbe

Every organization values its employees and its finances. Executives do not want to see their employees get hurt, and they also do not want to lose any money. Fortunately, these two things can often be accomplished at the same time.

One strategy is to comply with OSHA regulations. There is the obvious way of saving money by avoiding agency fines following inspections. In addition, it has often been said that OSHA violations are written in blood. That is to say that any written standard exists because someone was hurt in this fashion before. If this is the case, it stands to reason that being compliant with OSHA regulations will make it much less likely that employees get hurt on the job.

Top OSHA Violations for 2021 (General Industry)

1. Respiratory Protection
2. Hazard Communication
3. Lockout/Tagout
4. Powered Industrial Trucks
5. Machinery and Machine Guarding

Compliance can be accomplished by following the specific standards that often include having written safety policies/procedures and documented employee training. It will also help to create a positive safety culture where workers understand what is expected of them and participate in trying to make the workplace as safe as possible.

A second strategy is to consider the most common hazards that employees regularly face. Strangely, some of the frequent ways employees get hurt are not covered by specific OSHA regulations, yet workplace injuries can still be very costly to the bottom line. The table below lists some of those hazards found in the condo/apartment industry, and it includes several ways to reduce the risk of anyone getting hurt from these hazards.

Slips, Trips, and Falls

- Keep aisles, hallways, and other walkways free of clutter and debris
- Regularly inspect floors and floor coverings, making repairs as needed
- Avoid running cords across walkways; if needed, cover these cords with mats
- Ensure stairways are well-lit; steps should be covered with non-slip material
- Inspect ladders prior to use for any defects or damage
- Clean up any spills and wet floors immediately; utilize “wet floor” signs

Lifting

- Present instruction and training to employees on safe lifting techniques
- Provide mechanical aids such as forklifts, pallet jacks, and hand carts

Conflicts with Animals, Tenants

- Contact tenants prior to entering so animals can be appropriately restrained
- Address contentious issues by email or phone to avoid physical altercations
- Consider including law enforcement in eviction proceedings

Any organization that combines (1) OSHA compliance with (2) addressing the most common hazards found in the industry will be in good position to avoid employee injuries and save money at the same time.

About the Author:

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2023 Calendar of Events

January 26*
What's New in the World of Condominiums and Planned Community Associations
Anne Anderson, Bernie Briones, Co-Chairs

February 15*
Owners' and Board Members' Rights and Wrongs—Bringing Peace to the Promised Land
Kanani Kaopua, Carol Rosenberg, Co-Chairs

March 9*
Fortifying the Fortress—including security, preparing for the elderly, privacy—
Jennifer Landon and Milton Motooka, Co-Chairs

April 13
Managers' Forum

April 29
Condorama X - Free Program of the Hawaii Real Estate Commission
Krystyn Weeks, Milton Motooka, Co-Chairs

May 18*
Finances—including budgets and reserves, inflation, insurance
Deborah Balmilero, Josh German, Co-Chairs

June 17, 24*
Board Leadership Development Course
Melanie Oyama, Keven Whalen, Co-Chairs

July 13
Managers' Forum

July 27
Legislative Update 2023
presented by the Legislative Action Committee

August 10
Cyber Threats
Richard Ekimoto, Steve Glanstein, Co-Chairs

September 7
Managers' Forum

September 20
Short Term Rentals
Mike Ayson, John Morris, Seminar Co-Chairs

October 25
Community Association Law for Dummies
Lance Fujisaki, Melanie Oyama, Co-Chairs

November 3
Annual Membership Meeting

December 7
Managers' Forum

*This seminar or educational presentation is entirely or partly funded by funds from the Condominium Education Trust Fund (CETF), for condominium unit owners whose associations are registered with the Real Estate Commission. The CETF is administered by the Real Estate Commission which is attached to the Department of Commerce and Consumer Affairs, State of Hawaii, through the Professional and Vocational Licensing Division.

Dates and topics subject to change.