

SUMMARY OF PROPOSED FLOOR DRAFT:

**Bill 80 (2020)
RELATING TO THE RIGHT OF RECALL.**

The **PROPOSED FD1** makes the following amendments (Section references are to Sections of the Revised Ordinances of Honolulu proposed in the proposed FD-1):

- A. Amends the proposed Section __-1.1 ("Findings and purpose") by replacing references to the "State" with references to the "City and County of Honolulu."
- B. Amends the proposed Section __-1.2 ("Definitions") by adding new definitions for "Functional departments" and "Operational departments," and amends the definition of "Enterprise" by replacing the reference to the "State" with a reference to the "City and County of Honolulu."
- C. Amends the proposed Section __-1.3 ("Return to work") by clarifying in subsection (a) that, as a hotel employer restarts its operations, the hotel employer shall first recall to active employment, in the respective operational or functional departments that are being restarted, the same number of employees in substantially the same classifications as the hotel employer's active workforce on March 1, 2020, adjusted by the ratio the occupancy of the hotel bears to 100 percent; provided that, a hotel employer shall not be required to recall employees for operational or functional departments that are not yet being restarted.
- D. Further amends the proposed subsection (a) of Section __-1.3, by moving to a new subsection (b) the requirement that a hotel employer must clean and sanitize every occupied guest room daily and must employ a sufficient number of housekeeping employees to ensure that this standard is met, and adding an exception that the cleaning and sanitizing requirement shall not apply when a guest declines such services and provided that no public accommodation facility may incentivize or advise guests that they should decline daily in-room housekeeping services.
- E. Amends the proposed subsection (c) of Section __-1.3 by adding the provision in the last paragraph that an employer may make simultaneous, conditional offers of employment to laid-off employees, with the final offer of employment conditioned on application of the qualifications set forth in subsection (c).
- F. Renumbers the remaining subsections in Section __-1.3.
- G. Makes miscellaneous technical and nonsubstantive amendments.



A BILL FOR AN ORDINANCE

RELATING TO THE RIGHT OF RECALL.

BE IT ORDAINED by the People of the City and County of Honolulu:

SECTION 1. Purpose. The purpose of this ordinance is to establish a right of recall for employees to return to their former place of employment.

SECTION 2. The Revised Ordinances of Honolulu 1990, is amended by adding a new chapter to be appropriately designated by the Revisor of Ordinances and to read as follows:

"Chapter ____.

RIGHT OF RECALL

Article 1. General Provisions

Sec. __-1.1 Findings and purpose.

The SARS-CoV-2 (severe acute respiratory syndrome coronavirus 2) pandemic caused widespread economic dislocation in the State due to interruptions of normal enterprise activity through voluntary and government-ordered cutbacks and closures. Hundreds of thousands of workers in Hawaii were unable to continue in their occupations during this time, particularly in our dominant hospitality industry. Although many received income from public and private sources to carry them through this crisis and prevent widespread destitution, these measures have necessarily been only temporary. What matters most for the recovery of workers and their families and for the City and County of Honolulu's economy as a whole is that they get back to work as they were before the crisis hit.

City and County of Honolulu hospitality-industry employers are required to bring back the same workers as before the pandemic, as their enterprises resume operation and restore their workforces as they are able. Some enterprises have been transferred to new ownership or relocated after employees were laid off. These changes should not defeat the right of employees to return to their former work.



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Sec. __-1.2 Definitions.

The following words and terms shall have the following meanings, unless the context indicates a different meaning or intent:

"Compensation" means an employee's average weekly earnings for the 12-month period immediately preceding the employee's last day of active employment with an employer, including wages or salary, payments to an employee while on vacation or on leave, allocated or declared tip income, bonuses or commissions, contributions or premiums paid by the employer for fringe benefits, overtime or other premium payments, and allowances for expenses, uniforms, travel, or education.

"Employer" means any person, including a corporate officer or executive, who directly or indirectly or through an agent or any other person, including through the services of a temporary service, staffing agency, or similar entity, conducts an enterprise and employs or exercises control over the wages, hours, or working conditions of any employee.

"Employment site" means the principal physical place where a laid-off employee performed the predominance of the worker's duties prior to being laid off.

"Enterprise" means any hotel, apartment hotel, motel, restaurant, institutional food service, or event center where food is provided, in the City and County of Honolulu which employs five or more employees.

"Functional departments" mean the internal divisions or sections of a hotel that are used to classify employees into working groups to undertake the in-service tasks of the hotel, which may include by way of example, departments for marketing, human resources, accounting and finance, and purchasing.

"Hotel employer" means an employer that operates any hotel, apartment hotel, or motel.

"Laid-off employee" means any employee who was employed by the employer for six months or more in the 12 months preceding March 21, 2020, and whose most recent separation from active service occurred after March 21, 2020, and was due to one or more of the Proclamations related to the COVID-19 emergency by the Governor of Hawaii.

"Length of service" means the total of all periods of time during which an employee has been in active service, including periods of time when the employee was on leave or on vacation.



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"Occupancy" means rooms sold, including rooms which are occupied but for which the guest is not charged, divided by rooms available for sale.

"Operational departments" mean the internal divisions or sections of a hotel that are used to classify employees into working groups to undertake the operations of the hotel, which may include by way of example, departments for housekeeping, food production including kitchen and catering, food and beverage service including restaurants, pool and snack bars, banquets and special events, security, spa services, and front office operations.

"Person" means any natural person, joint venture, joint stock company, partnership, association, club, company, corporation, business trust, limited liability company, or organization of any kind.

Sec. ___-1.3. Return to work.

- (a) As a hotel employer restarts its operations, the hotel employer shall first recall to active employment, in the respective operational or functional departments that are being restarted, the same number of employees in substantially the same classifications as the hotel employer's active workforce on March 1, 2020, adjusted by the ratio the occupancy of the hotel bears to 100 percent; provided that a hotel employer shall not be required to recall employees for operational or functional departments that are not yet being restarted.
- (b) A hotel employer must clean and sanitize every occupied guest room daily and must employ a sufficient number of housekeeping employees to ensure that this standard is met; except when a guest declines such services and provided that no public accommodation facility may incentivize or advise guests that they should decline daily in-room housekeeping services.
- (c) An employer shall offer its laid-off employees in writing, to their last known physical address, email address, and text number all job positions which become available after this section's effective date for which the laid-off employees are qualified. A laid-off employee is qualified for a position if the employee:
 - (1) Held the same or similar position at the enterprise at the time of the employee's most recent separation from active service with the employer;
or
 - (2) Is or can be qualified for the position with the same training that would be provided to a new employee hired into that position.



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The employer shall offer positions to laid-off employees in an order of preference corresponding to categories (1) and then (2) in the preceding sentence. An employer may make simultaneous, conditional offers of employment to laid-off employees, with the final offer of employment conditioned on application of the qualifications set forth above. Where more than one employee is entitled to preference for a position, the employer shall offer the position to the employee with the greatest length of service at the employment site.

- (d) To qualify as a recall under this section, a laid-off employee must be offered a position in the same classification or job title with substantially the same employment site (subject to relocation as provided in subsection (g)), duties, compensation, benefits and working conditions as applied to the laid off employee immediately before March 21, 2020.
- (e) A laid-off employee who is offered a position pursuant to this section shall be given no less than 10 days in which to accept or decline the offer.
- (f) An employer that declines to recall a laid-off employee on the grounds of lack of qualifications and instead hires someone other than a laid-off employee shall provide the laid-off employee a written notice within 30 days identifying those hired in lieu of such recall, along with all reasons for such decision and all demographic data the employer has about such new hires and the laid-off employees rejected.
- (g) The requirements of this section also apply in the following circumstances:
 - (1) The ownership of the employer changed after a laid-off employee was laid off but the enterprise is conducting the same or similar operations as before March 21, 2020;
 - (2) The form of organization of the employer changed after March 21, 2020;
 - (3) Substantially all of the assets of the employer were acquired by another entity which conducts the same or similar operations using substantially the same assets;
 - (4) The employer relocates the operations at which a laid-off employee was employed before March 21, 2020, to a different employment site within 25 miles of the original employment site; and
 - (5) Any combination of the circumstances described in paragraphs (1) through (4).



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Sec. __-1.4 No retaliation.

- (a) No employer shall terminate, reduce in compensation, refuse to employ, or otherwise take any adverse action against any person for seeking to enforce his or her rights under this chapter by any lawful means, for participating in proceedings related to this section, for opposing any practice proscribed by this section, or for otherwise asserting rights under this chapter. This section shall also apply to any employee who mistakenly, but in good faith, alleges noncompliance with this chapter.
- (b) An employer refusing to employ, terminating, or taking any other adverse action against any employee who has engaged in any of the foregoing activities within 60 days preceding the refusal, termination, or other adverse action shall provide to the employee at or before the time of the refusal, termination, or other adverse action a detailed written statement of the reason or reasons for the refusal, termination, or other adverse action, including all the facts substantiating the reason or reasons and all facts known to the person that contradict the substantiating facts. If it is established that a laid-off employee exercised rights under this section or alleged in good faith that the employer was not complying with this section, and the employer thereafter refused to employ, terminated, demoted, or otherwise took adverse action against the employee, and that action took place within 60 days after such exercise, then a rebuttable presumption shall arise that the employer's action was taken in violation of subsection (a). The employer must prove that the true and entire reason for the action was a legitimate business reason. The plaintiff may rebut the employer's asserted legitimate business reason by showing that it was, in fact, a pretext.

Sec. __-1.5 Enforcement.

- (a) This chapter may be enforced in a civil action in any court of competent jurisdiction brought by one or more employees for and in behalf of oneself or themselves and other employees similarly situated, or the employee or employees may designate an agent or representative to maintain an action for and in behalf of all employees similarly situated, or brought in the name of the people of the City and County of Honolulu by the corporation counsel or the prosecuting attorney of the City and County of Honolulu.
- (b) If the court finds that the employer has violated this chapter, the court may enjoin the employer from engaging in such violation, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay including fringe benefits, or any



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other equitable relief as the court deems appropriate. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. Before interim earnings are deducted from lost wages, there shall be deducted from the interim earnings any reasonable amounts expended by the employee in searching for, obtaining, or relocating to new employment. The court may also order compensatory and punitive damages if the court finds that the employer engaged in the violation with malice or with reckless indifference to the requirements of this chapter, and treble damages on behalf of an employee terminated in violation of Section ___-1.4.

- (c) If the plaintiff prevails in any legal action taken pursuant to this chapter, the court shall award reasonable attorney's fees, expert witness fees and costs as part of the costs recoverable.

Sec. ___-1.6 Relationship to employment contracts and agreements.

This chapter applies to all employees as defined herein regardless whether they are represented for purposes of collective bargaining or are covered by a collective bargaining agreement. Nothing in this chapter shall be construed to invalidate or limit the rights, remedies, and procedures of any contract or agreement that provides greater or equal protection for employees than are afforded by this chapter.

Sec. ___-1.7 Waiver against public policy.

Any waiver by an employee of any or all of the provisions of this chapter shall be deemed contrary to public policy and shall be void and unenforceable. Any attempt by an employer to have an employee waive rights given by this chapter shall constitute a violation of this chapter. In order to protect the public welfare from the adverse effects of long-term mass unemployment and underemployment, this chapter may be enforced regardless of any waiver or release executed by an employee prior to enactment of this chapter unless barred from doing so by another provision of law. Any private agreement by which an intended layoff or termination for economic reasons is relabeled as a resignation or quitting shall be disregarded under this section to the fullest extent permitted by law.



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Sec. __-1.8 Coexistence with other available relief for deprivations of protected rights.

The provisions of this chapter shall not be construed as limiting any person's right to obtain any other relief to which he or she may be entitled at law or in equity. Any standards relating to recall to work established by any applicable federal, state, or local law or ordinance, or any rule or regulation issued thereunder, which are more favorable to employees than the minimum standards applicable under this chapter, or any rule or regulation issued hereunder, shall not be affected by this chapter and such other laws, or rules or regulations, shall be in full force and effect and may be enforced as provided by law."



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SECTION 3. This ordinance takes effect upon its approval.

INTRODUCED BY:

Tommy Waters (br)

DATE OF INTRODUCTION:

October 1, 2020
Honolulu, Hawaii

Councilmembers

APPROVED AS TO FORM AND LEGALITY:

Deputy Corporation Counsel

APPROVED this _____ day of _____, 20 _____.

KIRK CALDWELL, Mayor
City and County of Honolulu