

October 25, 2002

TO: EUTF Board of Trustees
FROM: Charles K. Y. Khim, Esq. – Member of the Public
RE: Proposed EUTF Administrative Rules

Thank you for this opportunity to provide comment from the public regarding the proposed Administrative Rules of the EUTF (herein, Administrative Rules). Hereinafter, please find my comments regarding these Rules.

The whole procedure by which the EUTF Board of Trustees is adopting the present Administrative Rules is illegal because it violates HRS, §87A-26(a). This statutory provision states as follows:

“§87A-26 Rules; policies, standards, and procedures.

“(a) The board may adopt rules for the purposes of this chapter. Rules shall be adopted without regard to chapter 91. Rule-making procedures shall be adopted by the board and shall minimally provide for:

- (1) Consultation with employers and affected Employee organizations with regard to proposed rules;
- (2) Adoption of rules at open meetings that permit the attendance of any interested persons;
- (3) Approval of rules by the governor; and
- (4) Filing of rules with the lieutenant governor.”

The EUTF Board of Trustees’ current rule making procedures are set forth in the EUTF Board of Trustees’ Operating Rules, in paragraphs 7 and 8 therein. The aforesaid current rule making procedures of the EUTF Board of Trustees does not provide for the statutorially mandated procedures set forth in HRS, §87A-26(a)(2)(3) and (4).

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Since the EUTF Board's rule making procedures violate HRS, §87A-26(a), and said illegal rule making procedure is being utilized by the EUTF Board to promulgate Administrative Rules, any Administrative Rules that are promulgated by the EUTF Board are illegal.

It is my suggestion to the EUTF Board that it immediately cease and desist from this illegal conduct, adopt rule making procedures that comply with the statutorially mandated rule making procedures set forth in HRS, §87A-26(a), and after adopting a rule making procedure that complies with the aforesaid statutory provision, commence making rules anew under the legal rule making procedure.

Assuming that the EUTF Board will ignore the above-mentioned illegality in their rule making procedure and continue their rule making activity, hereinafter are my comments concerning the following sections of the proposed rules.

Regarding Section 1.02, Definitions, several definitions are contrary to law and should be therefore amended.

The definition of "administrator" should not include a person who is "the duly authorized representative of the administrator." There is nothing in HRS, Chapter 87A or the other provisions of the proposed EUTF Administrative Rules that allows the administrator to delegate his job duties as administrator to a duly authorized representative.

The definition of "benefit plan" is deficient because the statute refers to a "health benefits plan" whereas the Rule referred to a "health benefit plan". Moreover, this definition is deficient because it requires a group life insurance plan to be subject to Section 79 of the Internal Revenue Code. The foregoing reference implies that the group life insurance plan is limited to the \$50,000.00 benefits limit in IRC, §79, where in fact HRS, Chapter 87A has no such limitation on benefits.

The definition of "child" contained in the Rules is discriminatory against persons of Hawaiian ancestry and their cultural practices because it excludes children who are adopted under the "hanai" Hawaiian cultural practice. Furthermore, it is contrary to other provisions in the Hawaii Revised Statutes which recognize within the definition of "child" a "hanai" child for the purpose of obtaining statutory benefits, e.g., HRS, §386-2 (hanai child entitled to benefits under workers' compensation law, see, HRS, §386-42(a)).

The definition of “part-time, temporary and seasonal or casual employee” is incorrect because it is contrary to the statutory definition of that time of employee. Said definition in the Rules is as follows:

“Part-time, Temporary, and Seasonal or Casual Employees’ means a person: (a) who is employed for fewer than three months, or (b) whose employment is less than one-half of a full-time equivalent position.”

The foregoing definition in the Rules is contrary to the statutory definition. The statutory of that type of employee is set forth in HRS, §87A-1, and states as follows:

“Part-time, Temporary, and Seasonal or Casual Employee’ means a person employed for fewer than three months and whose employment is less than one-half of a full-time equivalent position.”

The foregoing difference is critical to determining who and “employee” is under HRS, Chapter 87A.

The Rules correctly define the term “employee” as having the same meaning as set forth in HRS, §87A-1. That statutory provision defines an “employee” as follows:

“Employee” means an employee or officer of the State, county, or legislature.

- (1) Including:
 - (A) An elective officer;
 - (B) A per diem employee;
 - (C) An officer or employee under an authorized leave of absence;
 - (D) An employee of the Hawaii national guard although paid from federal funds;
 - (E) A retired member of the employees’ retirement system; the county pension system; or the police, firefighters, or

bandsmen pension system of the State or county;

- (F) A salaried and full-time member of a board, commission, or agency appointed by the governor or the mayor of a county; and
- (G) A person employed by contract for a period not exceeding one year, where the director of human resources development, personnel services, or civil service has certified that the service is essential or needed in the public interest and that, because of circumstances surrounding its fulfillment, personnel to perform the service cannot be obtained through normal civil service recruitment procedures.

(2) But excluding:

- (A) A designated beneficiary of a retired member of the employees' retirement system; the county pension system; or the police, firefighters, or bandsmen pension system of the State or county;
- (B) Except as allowed under paragraph (1)(G), a person employed temporarily on a fee or contract basis; and
- (C) A part-time, temporary, and seasonal or casual employee."

It becomes clear from the aforesaid statutory provisions that all other employees, including regular part-time employees, *i.e.*, employees who do not meet the definition of "part-time, temporary, seasonal and/or casual employees" as defined in HRS, §87A-1, are

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entitled to be classified as an employee within the meaning of HRS, Chapter 87A, even those regular part-time employees whose employment is less than one-half of a full-time equivalent position.

In the Administrative Rules, the EUTF Board's changing of the conjunction (the word "and") in the statutory definition of "part-time, temporary, seasonal and/or casual employee", and replacing said conjunction with a disjunction (the word "or") deprives regular part-time employees who are employed for three months or more and whose employment is less than one-half time of a full-time equivalent position, to be deemed to be an employee who is entitled to regular health benefits and group life insurance benefits under HRS, Chapter 87A. This deprivation of statutory rights affects many employees, including substitute teachers, part-time University of Hawaii part-time lecturers, and many other part-time employees within the State of Hawaii. This is especially discriminatory to substitute teachers because they work a full day's worth of work and must come to work on often times less than 24 hours notice.

Therefore, the EUTF Board should cease and desist from its illegal amending of the definition of the term "Part-time, Temporary, and Seasonal or Casual Employee" and return to the legal, statutory definition of that term.

Regarding the Administrative Rules definition section, the definition of the term "spouse" should be added, with that term including the homosexual or heterosexual unmarried domestic partner of an employee. This amendment will be in accord with the EUTF Board's recent resolution regarding domestic partners, and is necessary in order to avoid a violation of the equal protection clause of the State Constitution and HRS, Chapter 378.

Due to the short length of time that has been given to the public to comment on these rules, I have not had the opportunity to review and comment on the rest of the Rules, but said comments shall be forthcoming shortly.

Thank you for your attention to this matter. If you have any questions, please feel free to contact me.