



**TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2009**

ON THE FOLLOWING MEASURE:

H.B. NO. 643, H.D. 1, RELATING TO CONTRACTORS.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Thursday, February 12, 2009 **TIME:** 2:05 PM

LOCATION: State Capitol, Room 325

TESTIFIER(S): Mark J. Bennett, Attorney General
or Gary S. Ige, Deputy Attorney General

Chair Karamatsu and Members of the Committee:

The Department of the Attorney General has legal concerns with this bill.

This bill adds a new chapter to the Hawaii Revised Statutes (HRS) to address the employment of ineligible workers by licensed contractors. The bill requires contractors to employ only persons who are eligible to work in the United States. A contractor is required to verify that an employee working in its employ on a public works contract is eligible to work in the United States as part of the certification required under section 103-55.5, HRS. The certification of the eligibility of employees to work in the United States shall be presumed to have been conducted in good faith if the contractor uses E-verify, a federal online system operated jointly by the Department of Homeland Security and the Social Security Administration, to verify the status of an employee in question.

This bill requires the Director of Labor and Industrial Relations to investigate complaints about contractors employing ineligible workers. If, after investigation, it is determined that the complaint is not frivolous, the Director shall notify the United States Immigration and Customs Enforcement agency, the county law enforcement agency of the ineligible worker, and the Attorney General for purposes

of bringing a civil action and imposing fines against the contractor for violating the provisions of this bill.

An imposition of civil or criminal penalties, except for licensing purposes, is preempted by the United States Immigration Reform and Control Act of 1986 (IRCA), specifically, 8 U.S.C. § 1324a. The IRCA makes it unlawful for a person or entity to hire or continue to employ an alien knowing the alien is an unauthorized alien with respect to employment. Section 1324a(h)(2) states, "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." Thus, we believe that sections of the bill calling for the assessment of civil fines against contractors hiring ineligible workers are preempted by federal law.

For example, section -6 of the new chapter (page 3, line 16) calls for the imposition of civil fines. In addition, section -5 of the new chapter (page 3, line 13) should be deleted as the civil penalty provision in section -6 of the new chapter are preempted by federal law as discussed above. Other sections of the bill referencing civil fines would similarly need to be deleted.

We also note that section -4(b)(2) of the new chapter (page 3, line 7) requires that the Director notify the county law enforcement agency regarding the ineligible worker. There is no indication as to what the county law enforcement agency is required to do with the information.

Because of the preemption concerns discussed, we suggest the new chapter and the proposed amendment in section 3 of the bill be deleted and, instead, chapter 444, HRS, be amended to make the hiring of ineligible workers a basis for acting upon the issuance and revocation of a contractor's license.

LINDA LINGLE
GOVERNOR



DARWIN L.D. CHING
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

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February 11, 2009

To: The Honorable Jon Riki Karamatsu, Chair
and Members of the House Committee on Judiciary

Date: Thursday, February 12, 2009

Time: 2:05 p.m.

Place: Conference Room 325
State Capitol

From: Darwin L.D. Ching, Director
Department of Labor and Industrial Relations

Re: H.B. No. 643, H.D. 1 - Relating to Contractors

I. OVERVIEW OF PROPOSED LEGISLATION

H.B. No. 643, H.D. 1 establishes a new chapter in the Hawaii Revised Statutes (“HRS”) that requires the Department of Labor and Industrial Relations (“DLIR”) to police the construction industry’s hiring of ineligible workers. Defines “ineligible worker” as a person who is “not eligible to work in the United States, provided by federal law.”

H.D. 1 changed the employer’s responsibility from “intentionally or knowingly employs” to requiring a certification of eligibility under public works. H.D.1 also added that a contractor shows good-faith if using E-verify to determine the status of employees.

The new chapter imposes a \$1,000 civil penalty for each ineligible worker employed by the contractor to be deposited into the contractors enforcement special fund created in the measure.

It also requires the DLIR to notify the Department of Commerce and Consumer Affairs (“DCCA”) of violations so that the DCCA can suspend or revoke the violator’s contractor’s license.

Provisions are added to the procurement code that requires workers on public works to be eligible to work in the United States.

This bill is effective August 1, 2009.

II. CURRENT LAW

There is no requirement for the DLIR to check eligibility of employees to work in the United States.

III. HOUSE BILL

The Department opposes H.B. 643, H.D. 1 for the following reasons:

1. The Department defers to the testimony of the Attorney General and understands that federal law preempts the Department's authority to enforce the violations proposed by this measure.
2. This measure is targeting contractors who employ illegal aliens. Requiring the DLIR to make preliminary investigations and then making referrals to the Immigration and Customs enforcement agency ("ICE") will frustrate the purpose of the investigation by tipping off any potential violators and facilitate their opportunity to evade detection by those with authority to take any action.
3. This measure applies to both private and public construction, yet new provisions requiring certification added in H.D. 1, appear to only apply to public works.
4. The DLIR defers to the DCCA on the issues related to the licensing of the contractors.
5. The Department's policy is to ensure that all workers get paid what they are due. There is no distinction that workers are eligible to work in the United States. This policy works to protect workers from unscrupulous employers who may take advantage of individuals who may have other concerns that would keep them from reaching out for assistance.



HAWAI`I CIVIL RIGHTS COMMISSION

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February 12, 2009
Rm. 325, 2:05 p.m.

To: The Honorable Jon Riki Karamatsu, Chair, and Members of the House Committee on Judiciary

From: Coral Wong Pietsch, Chair, and the Commissioners of the Hawai`i Civil Rights Commission

RE: H.B. No. 643, H.D. 1

The Hawai`i Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawai`i's laws prohibiting discrimination in employment, housing, public accommodations, and access to State and State-funded services. The HCRC carries out the Hawai`i constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sect. 5.

The HCRC opposes H.B. No. 624, H.D. 1 which would create a new chapter in the Hawai`i Revised Statutes, prohibiting contractors from employing workers who are not eligible to work in the United States. The bill proposes penalties for contractors who violate the new prohibition in the form of disqualification from state public works projects, fines, and loss of license.

The reasons for HCRC opposition to H.B. 643, H.D. 1, are two-fold:

- 1) Under the U.S. Constitution, enforcement of immigration laws is exclusively within the authority of the federal government, and state intrusions into this area are preempted. With regard to immigration law and policy, including authorization to work and employer sanctions, there should be only one national

standard – the federal law. The proposed statutes would result in inappropriate applications of federal law standards in state law contexts, requiring state agencies and courts to interpret complex federal laws that are better left to the appropriate federal agencies for enforcement.

- 2) The proposed prohibition and penalties create a likelihood of increased ancestry / national origin discrimination in employment. If contractors face the serious penalties under state law as proposed in addition to the sanctions faced under federal law, affecting their eligibility for public works contracts, contractors' licenses and livelihood, it will encourage them to avoid the potential penalties by not hiring workers who appear to be non-native, foreign-born, or immigrant. This will result in unlawful discrimination against those whose language, accent, or other characteristics are not typically "American," creating a climate of discrimination against immigrant workers.

The HCRC opposes H.B. No. 643, H.D. 1, and urges the Committee to hold this measure.

Hawaii Immigrant Justice Center

(Formerly known as Na Loio)

Serving Hawaii's Immigrant Families and Children

Testimony Opposing HB 643

The Hawaii Immigrant Justice Center ("Justice Center"), formerly known as Na Loio, opposes HB 643.

The Justice Center is a non-profit that defends and protects the rights of immigrants, especially victims of domestic violence, sexual assault, major crimes, and human trafficking. We provide free legal services, case management, community education, and advocacy in the public interest for indigent immigrants, refugees, and other vulnerable persons in Hawaii. In the past year, the Justice Center helped over 1,400 individuals in immigrant-related matters.

HB 643 requires all contractors of public works projects to ensure that their employees are eligible to work in the United States. This requirement is redundant of the Federal requirement for all employees to complete and submit an I-9 Employment Verification Form. Because eligibility is already mandated, HB 643 only expresses an anti-immigrant sentiment that insults this State's rich tradition that is rooted in the immigrant experience. Please reconsider passing this bill.

Thank you for your consideration and time.

Very truly yours,

Robin Kobayashi
Chief Executive Officer
Hawaii Immigrant Justice Center
536-8826

BIA-HAWAII
BUILDING INDUSTRY ASSOCIATION

February 12, 2009

Honorable Jon Riki Karamatsu, Chair
Committee on Judiciary
State Capitol, Room 325
Honolulu, Hawaii 96813

RE: HB 643, HD1 "Relating to Contractors"; Employment of Ineligible Workers

Chair Karamatsu and Members of the Committee on Judiciary:

I am Karen Nakamura, Executive Vice President & Chief Executive Officer of the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, the Building Industry Association of Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii.

BIA-Hawaii is opposed to HB 643, HD1 as currently drafted. The original bill included a provision under § -3 (a) requiring that a "contractor intentionally or knowingly employ an ineligible worker" before it became a violation. This was an important provision to BIA-Hawaii whose members expressed concern that any contractor might be in violation of the law, even if he/she **did not intentionally or knowingly employ** an ineligible worker. BIA-Hawaii was informed by the proponents of the bill that this phrase was a safeguard for contractors. **At the very minimum, we would want that provision reinserted.**

The present version of the bill applies only to licensed contractors and makes them subject to a civil complaint even if the employer has followed the requirements for the completion of the Federal Form I-9 and has no knowledge that the Form I-9 documentation provided may have been falsified. HB 643, HD1 forces a contractor to perform immigration functions that he/she is ill-equipped to handle as the contractor must determine that the documents presented to them are authentic and belong to that employee. BIA-Hawaii believes that this bill is unnecessary because the Immigration and Nationality Act already requires all employers to verify employment eligibility of employees.

As presently written, the amendment to HRS § 444-17 provided for in HB643, HD1 provides for the revocation, suspension or non-renewal of a contractor's license even if the contractor **inadvertently hires** any employee who turns out to be ineligible for employment under the Immigration and Nationality Act. HB 643, HD1 does not include a "safe harbor" provision that can be followed by a contractor who is honestly attempting to comply with the law.

Thank you for the opportunity to share our views with you.

To: COMMITTEE ON JUDICIARY
Time: Thursday, February 12, 2009 at 2:05 p.m.
Place Conference Room 325

Re: HB 643 HD1 Relating to Contractors; Employment of Ineligible Workers

Chair Jon Riki Karamatsu; Vice Chair Ken Ito and members of the Committee on Judiciary

My name is Roy Ogawa and I am a lawyer; small business person and taxpayer. I am strongly opposed to HB 643 HD1 for the following reasons:

1. The bill is unnecessary as the Immigration and Nationality Act already requires all employers to verify employment eligibility of employees.
2. The present Bill applies only to licensed Contractors and makes them subject to a civil complaint even if the employer has followed the requirements for the completion of the Federal Form I-9 and has no knowledge that the Form I-9 documentation provided may have been falsified. As written, HB 643 HD1 forces a contractor to perform immigration functions that it is ill equipped to handle as they must determine that the documents that are presented to them are authentic and belong to that employee. Unlike prevailing wage provisions that a Contractor may have control over, the statute makes the Contractor strictly liable for determining legal status and subjects the Contractor not only to suspension from public works projects but also makes the Contractor subject to the suspension or revocation of its contractor's license even if it is not engaged in a Public Works project. **HD1 deleted the original provision in § -3 (a) requiring that a "contractor intentionally or knowingly employ an ineligible worker" before it became a violation. That provision should be reinserted.**
3. § -3 (b) and (c) have been added in HD1 relating to certification of the eligibility of employees under the Procurement Code for Public Works projects under HRS Chapter 103. However, as written, *it does not apply to the general prohibition against the hiring of ineligible workers under the provision of § -3 (a) which is a strict liability provision.*

At a minimum there should be a general E-Verify provision inserted to provide as follows:

"An Employer's participation in E-Verify creates a rebuttable presumption that the Employer has not violated the Immigration and Nationality Act with respect to the hiring of any individual if it obtains confirmation of the identity and employment eligibility of the individual in compliance with the terms and conditions of E-Verify."

This rebuttable presumption is addressed in the E-Verify Program Memorandum of Understanding (“MOU”).

4. Although helpful, the Federal E-Verify Program is not perfect as it incorporates certain restrictions that would not allow an employer to determine the eligibility of all employees and severely limits the use of the information. .

a) An employer (except a Federal Contractor) can only use E-Verify for new hires and is ***not allowed to verify the eligibility of any employees hired before it enters the E-Verify Program.***

b) An employer cannot use E-Verify to prescreen employees. The Employer is prohibited from initiating the verification procedures before the employee has been hired and the Form I-9 is completed.

c) ***The information obtained cannot be disseminated to “any person other than employees of the Employer who are authorized to perform the Employer’s responsibilities except as specifically authorized in advance by the Social Security Administration (“SSA”) and the Department of Homeland Security)”DHS***). It is uncertain if the information can be disclosed to county law enforcement or the attorney general.

d) ***The information the Employer receives from SSA is governed by the Privacy Act (5USC § 552(a)(i)(1) and (3)) and the Social Security Act (42 USC §1306(a), and any person who uses the information obtained for any purpose other than as provided for in the Memorandum of Understanding agreed to by the Employer in enrolling in the E-Verify Program may be subject to criminal penalties.***

See E-Verify MOU at www.dhs.gov/E-Verify.

5. As presently written, the amendment to HRS § 444-17 provided for in HB 643 HD1 provides for the revocation, suspension or non-renewal of a Contractor’s license even if it ***inadvertently hires any employee*** that turns out to be ineligible for employment under the Immigration and Nationality Act. HB 643 HD1 does not include a “mens rea” requirement or a “safe harbor” provision that can be followed by a contractor who is honestly attempting to comply with the law.

Thank you for the opportunity to provide my views on this Bill.

/s/ Roy T. Ogawa