

TESTIMONY

HB2461 HD2

LATE

TESTIMONY BY GEORGINA K. KAWAMURA
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE SENATE COMMITTEES ON LABOR, HUMAN SERVICES, AND HEALTH
ON
HOUSE BILL NO. 2461, H.D. 2

March 15, 2010

RELATING TO INSURANCE

House Bill No. 2461, H.D. 2, requires the Employer-Union Health Benefits Trust Fund plans to allow enrollees to continue the same prescription drug coverage for current enrollees, and applies this provision retroactively to the 2009 Employer-Union Health Benefits Trust Fund open enrollment period. The bill also prohibits the Department of Human Services from requiring its approval for a Medicaid or QUEST health plan to deliver services through telehealth, and from requiring in-person health care visits to qualify telehealth services for coverage under these health plans.

We oppose the bill as the amendments in Section 87A-16(c) will restrict the Employer-Union Health Benefits Trust Fund's ability to contract and/or bargain for the most cost-effective plans for its members.



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MEMORANDUM

TO: Mr. Howard Lee
Chief Operating Officer
University Health Alliance
President of Hawaii Association of Health Plans

DATE: March 12, 2010

FROM: Ellen Godbey Carson, Esq. 

RE: **SB 2494/HB2461 - Drug Plan Portability: Legal Deficiencies**

You asked us to provide a short memorandum describing our concerns regarding SB2494 and HB2461, which propose to require insurers in Hawai'i who provide coverage for prescription drug benefits, to accept and continue to offer, drug plan benefits for an insured identical to the coverage offered to the insured under the insured's previous health plan.

In my opinion, SB2494 and HB2461 are invalid as a matter of law.

First, the Employees' Retirement and Income Security Act ("ERISA"), 29 USC § 1144(a), supersedes and preempts any State law insofar as it "relates to any employee benefit plan regulated by ERISA." Employee benefits plans are the predominant form of health insurance in Hawai'i, by virtue of the Prepaid Health Care Act. A law "relates to" an employee benefit plan and is governed by ERISA if it has a "connection with or reference to" the plan. *California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A., Inc.*, 519 U.S. 316, 324 (1997). Congress crafted ERISA's broad preemption provision to ensure uniformity in benefits laws and to minimize administrative and financial burdens created by conflicting state regulations. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990).

The Hawai'i Supreme Court has unanimously held that ERISA applies to Hawai'i's prepaid health care plans and that ERISA preempts State laws which are inconsistent with the ERISA statutory scheme. In *Hawaii Management Alliance Association v. Insurance Commissioner of the State of Hawai'i*, 106 Haw. 21 (2004), the Hawai'i Supreme Court held ERISA preempted Hawai'i's external appeal law for health plan benefit disputes, so that law cannot apply to Hawai'i's prepaid health care plans. See also *Standard Oil. v. Agsalud*, 454 U.S. 801 (1981) (ERISA preempts Hawai'i's Prepaid Health Care Act) (the Act has been saved only because of a Congressional amendment to ERISA, but ERISA still governs Hawai'i laws).

Second, ERISA requires employee benefit plans to provide the same benefits to all members of the plan via a summary plan description that accurately describes the benefits, conditions, and terms applicable to all members of the plan. See, e.g., 29 U.S.C. § 1021-1029, 29 CFR § 2520.102-3. Hawai'i law also requires insurers of any managed care plan to provide members a complete description of the plan's benefits, services and copayments. HRS § 4323E-7(a)(2). Similarly, COBRA requires employee benefit plans to provide continuation coverage to qualifying plan participants, to consist of the same set of benefits offered under the group plan. See 29 U.S.C. § 1161-1168. SB2494 and HB2461 make it impossible for an insurer to provide a summary plan description that accurately describes benefits available to plan members, because SB2494 and HB2461 require discriminatory treatment and different benefits among various group members based on drug plans they may have had with a prior insurer. SB2494 and HB2461 also make it impossible for an insurer to use the same means of plan administration for all plan members because they require use of drug benefits, drug co-payments, utilization management requirements, and related drug-related claims administration procedures of another insurer. The Federal courts have held ERISA preempts State laws that affect employee benefit structures, disclosures, and administration. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Inc. Co.*, 514 U.S. 645, 657-658; *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1121-1122 (9th Cir. 2008); *Admin Comm. of Wal-Mart Stores, inc. v. Varco*, 338 F.2d 680 (7th Cir. 2003).

Third, SB2494 and HB2461 would require insurers to cover drugs under plans from all around the world, even if the drugs were illegal to market and dispense in this country, or even if drugs on the other plans' benefit schedules were recalled or replaced by more effective or safer drugs.

Finally, SB2494 and HB2461 would require an insurer to provide as part of its plan, a package of drug benefits for which the insurer had not performed underwriting nor obtained rate approval. Hawai'i's Health Insurance Rate Law, HRS Chapter 431 Article 14G, requires that managed care plans obtain advance approval of the rates used for plan benefits, so the Insurance Commissioner can determine whether the rates are "excessive, inadequate, or unfairly discriminatory *in relation to the costs of the benefits provided.*" (emphasis added). HRS § 431: 14G-103(a), 14G-105(a). By requiring managed care plans to cover an insured's drug benefits from *another* insurer's plan, without underwriting for those benefits or obtaining rate approval based on those benefits, circumvents the entire regulatory process and intent of the Rate Law. Insurers would be forced to cover prescription drug coverage that could be vastly different from their own, for the premium amount the insurer charges for its own drug coverage. An insurer's own rate may become "excessive" or "inadequate" when the insurer is forced to accept *different* drug coverage for the same premium charged for its *own* drug coverage. Moreover, SB2494 and HB2461 would cause premium rates to be "discriminatory" between members within a plan because while all members would pay the same premium, some would have more narrow drug coverage (in reasonable relationship to a low premium rate), while others may get "richer" drug coverage (by importing drug benefits from another insurer).

In summary, it is my opinion based on the reasons above, that SB2494 and HB2461 are legally invalid and should not be approved.

This memorandum is not a exhaustive analysis or recitation of law, but merely a summary of key concerns based on our preliminary legal analysis. Our analysis may be affected by further research and analysis, as well as by subsequent case law developments, amendments to SB2494 and HB2461, or rules or procedures used in implementation of such bills should they be passed into law. SB2494 and HB2461 have not been judicially challenged and there is no guarantee as to the outcome of any particular judicial proceeding. If you would like us to conduct any further research or analysis in this regard, please let me know.



Hawaii Association of Health Plans

March 15, 2010

The Honorable Dwight Takamine, Chair
The Honorable Suzanne Chun Oakland, Chair
The Honorable David Ige, Chair
Senate Committees on Labor, Human Services and Health

Re: HB 2461 HD2 – Relating to Insurance

Dear Chair Takamine, Chair Chun Oakland, Chair Ige and Members of the Committees:

My name is **Howard Lee and I am President of the Hawaii Association of Health Plans** (“HAHP”). HAHP is a non-profit organization consisting of seven (7) member organizations:

AlohaCare
Hawaii Medical Assurance Association
HMSA
Hawaii-Western Management Group, Inc.

MDX Hawai‘i
University Health Alliance
UnitedHealthcare

Our mission is to promote initiatives aimed at improving the overall health of Hawaii. We are also active participants in the legislative process. Before providing any testimony at a Legislative hearing, all HAHP member organizations must be in unanimous agreement of the statement or position.

HAHP appreciates the opportunity to **testify in opposition to HB 2461 HD1** Part I which would allow EUTF members to receive prescription drug benefits which are identical to those offered by their previous prescription drug plan. HAHP health plans support the initiative being proposed in Part II of this measure to allow QUEST plans expand on the types of telehealth services they may currently provide.

Although this amended version of HB 2461 HD2 Part I of this bill only applies to EUTF members, we believe that passage of this measure would be precedent setting and pave the way for similar requirements of health plans in private business as well. We are attaching a legal memo which points out many of the problems with HB 2461 HD2 Part I.

This bill would put a tremendous burden on the EUTF since they will end up with multiple drug plans, different premium rates, and different benefit coverage for their employees. We also feel that this would put a tremendous cost burden on a health plan’s ability to determine the benefits offered by the member’s previous plan (which is often not readily

available). It is likely that accounting for the different coverage being offered would also be a tremendous administrative burden, ultimately causing premium rates to increase.

For the reasons above we would respectfully request the Committee see fit to defer Part I of this measure. Thank you for the opportunity to testify today.

Sincerely,

A handwritten signature in black ink that reads "Howard Lee". The signature is written in a cursive, flowing style.

Howard Lee
President

LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LT. GOVERNOR



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SENATE COMMITTEES ON LABOR,
HUMAN SERVICES, AND HEALTH
TESTIMONY REGARDING HB 2461 HD 2
RELATING TO INSURANCE

TESTIFIER: STANLEY SHIRAKI OR DESIGNEE
DATE: MARCH 15, 2010
TIME: 2:50 PM
ROOM: 016

Section 1 of House Bill No. 2461, H.D. 2, proposes to require the Employer-Union Health Benefits Trust Fund (EUTF) to provide all beneficiaries prescription drug benefits coverage that is identical to the coverage provided under plans in effect prior to the 2009 open periods.

I am testifying today as an Employer Trustee of the EUTF. The EUTF's Employer Trustees are opposed to the proposed amendments to Section 87A, Hawaii Revised Statutes (HRS). We believe that these amendments are contrary to the intent and purpose of Act 88, Session Laws Hawaii (SLH) 2001. In a bold move to reduce the increasing cost of health benefits for public employees and employers, the Legislature created the EUTF. Act 88 requirements differed from the previous Chapter 87, HRS, that governed the Public Employees Health Fund (HF). Differences include the composition of the Board of Trustees, requirements for quorum and voting actions, and authority for administration of the fund. Act 88 also specified that *"health and other benefit plans shall be provided at a cost affordable to both the public employers and the public employees."* To meet these requirements, the law gave greater authority to the Board and does not provide specified levels or services as this proposed Bill does.

Generally, Employer Trustees do not believe that specific benefits and level of benefits should be addressed by law. For example, as currently written the proposed amendment would require that prescription drug coverage be identical, including cost, to those provided under the current plan, backdated to before the 2009 open period. Such specific language would not allow for changes in medical needs and new drugs or treatments. It would also not be possible provide identical benefits at the same cost.

Testimony of
Greg Buscetto, informedRx

Before the Senate Committees on
Labor
Human Services
Health

Monday, March 15, 2010
2:50 PM
State Capitol, Conference Room 016

In consideration of
HOUSE BILL 2461 HD2
RELATING TO INSURANCE

Thank you for the opportunity to provide **comments on House bill HB2461 HD2.** My name is **Greg Buscetto,** **Senior Vice President, Sales & Account Management of informedRx.** I periodically visit Hawaii to work with the EUTF and to attend the EUTF Board meetings. My most recent visit was in November 2009 where I provided updates on the performance of the programs that were implemented earlier in the year.

informedRx has concerns about the impact on employers and employees of the EUTF if House bill 2461 should pass as written. We commend the EUTF board for taking innovative approaches to address the difficult budgetary constraints faced by the State of Hawaii and employers nationwide. Where as other large mainland employers have taken the approach to reduce benefits, increase co-pays, or both, the EUTF has implemented programs which reduce cost for both the employers and the participants.

Thank you,

Greg Buscetto
Sr. Vice President, Account Management & Sales
informedRx

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