

**SB 63**

LINDA LINGLE  
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February 27, 2009

SENATE COMMITTEE ON WAYS AND MEANS  
For Hearing on Monday, March 2, 2009  
9:30 a.m., Conference Room 211

BY

MARIE C. LADERTA, DIRECTOR

WRITTEN TESTIMONY ONLY

**Senate Bill No. 63, S.D. 1  
Relating to Workers' Compensation**

TO DONNA MERCADO KIM AND MEMBERS OF THE COMMITTEE:

The purpose of S.B. No. 63, S.D. 1, is to amend Section 386-31(b), Hawaii Revised Statutes, including but not limited to: (1) requiring an employer to pay temporary total disability benefits promptly regardless of whether the employer controverts the right to those benefits; (2) specifying that benefits shall continue until ordered by the director or if the employee's treating physician determines that the employee is able to resume work and that the employer has made a bona fide offer of suitable work within the employee's medical restrictions; (3) allowing an employer to make a written request to the director for a credit for the amount of temporary total disability benefits paid after the date that the director had determined should have been the last date of payment; and (4) entitling an injured employee to receive a weekly benefit equal to 70% of the injured employee's average weekly wages subject to certain provisions. **The Department of Human Resources Development is strongly opposed to this bill.**

Requiring an employer to pay benefits when the right to those benefits is being denied would cause irreparable harm in cases where it was determined that a claim was not compensable. Furthermore, this amendment is unnecessary as there is already a mechanism in place for an injured worker to present rebuttal evidence that his or her claim is, indeed, compensable.

As drafted, it isn't clear how the credit, if allowed by the director, would be applied, and the bill is totally silent as to how an employer would recover benefits paid to an individual where it is ultimately determined that the injury or illness claimed did not arise out of or in the course of employment.

It would be a fairly simple process if the employee was awarded permanent partial disability benefits. However, if those benefits were inadequate to cover the credit or if no permanent partial disability benefits were awarded, then the employer would, once again, suffer irreparable harm. The bill is totally silent as to how an employer would recover benefits paid to an individual where it is ultimately determined that the injury or illness claimed did not arise out of or in the course of employment.

The amendment allowing for the assessment of attorney's fees and costs for the enforcement of the section is totally unnecessary as Section 386-93, Hawaii Revised Statutes, already provides for such an assessment if it is determined that proceedings under Chapter 386, Hawaii Revised Statutes, are brought, prosecuted, or defended without reasonable grounds.

Lastly, the amendment provides for the payment of 70% of an injured employee's average wage, on a weekly basis, where a work injury causes temporary total disability if compensation is not paid within thirty days of the date of the injury; and if the employee's average weekly wages are less than the maximum weekly benefit rate, then they will be paid at the rate of one hundred per cent of their average weekly wages. Section 386-82, Hawaii Revised Statutes, provides that a written claim must be made within two years after the date at which the effects of the injury for which the employee is entitled to compensation have become manifest and within five years after the date of the accident or occurrence which caused the injury. As written, this would penalize an employer for something over which they have no control. Furthermore, workers' compensation benefits are not taxable income by the State or the Federal government. Compensating injured employees, who make less than \$725.00 per week in 2009, at one hundred per cent of their average weekly wage would result in them receiving benefits far in excess of the net income that they would receive while working. This would create an enormous disincentive for returning to work as soon as recovery permitted and result in increased costs for every employer in the State.

# **BIA-HAWAII**

**BUILDING INDUSTRY ASSOCIATION**

March 2, 2009

Honorable Donna Mercado Kim, Chair  
Committee on Ways and Means  
State Capitol, Room 211  
Honolulu, Hawaii 96813

## **Comments on SB 63, SD1 "Relating to Workers Compensation"**

Dear Chair Kim and Members of the Committee on Ways and Means:

BIA-Hawaii strongly opposes SB63, SD1 "Relating to Workers Compensation". As we testified in an earlier hearing in the Senate Labor Committee, BIA-Hawaii opposes this bill because we believe it isn't fair to require employers to continue TTD payments when they do not believe these payments should be continued. We further object to the provision that gives the employee's physician the right to determine when the employee is able to return to work.

BIA-Hawaii also objects to the amended version which establishes a working group to address the concerns and resolve any of the concerns raised by the Act. If the working group cannot come to a resolution, the Act becomes effective on July 1, 2010. It would then behoove the employee groups not to come to any resolution, then reverting to enactment of SB 63, SD1.

For these reasons, we ask that the measure be held.

Thank you for the opportunity to comment on this bill.



Chief Executive Officer  
BIA-Hawaii

GOODSILL ANDERSON QUINN & STIFEL

A LIMITED LIABILITY LAW PARTNERSHIP LLP

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**MEMORANDUM**

**TO:** Senator Donna Mercado Kim  
Chair, Senate Committee on Ways and Means  
Via e-mail: [WAMTestimony@Capitol.hawaii.gov](mailto:WAMTestimony@Capitol.hawaii.gov)

**FROM:** Anne Horiuchi

**DATE:** February 27, 2009

**RE:** **S.B. 63, SD1 Relating to Workers' Compensation**  
**Decision making: Monday, March 2, 2009 at 9:30 a.m., Room 211**

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Dear Chair Kim and Members of the Committee on Ways and Means:

I am Anne Horiuchi, writing on behalf of the American Insurance Association (AIA). AIA represents approximately 350 major insurance companies that provide all lines of property and casualty insurance and write more than \$123 billion annually in premiums. AIA members supply 23 percent of the property/casualty insurance sold in Hawaii. The association is headquartered in Washington, D.C. and has representatives in every state. All AIA news releases are available at [www.aiadc.org](http://www.aiadc.org).

S.B. 63, SD1 requires an employer to pay temporary total disability benefits regardless of whether the employer controverts the right to benefits. The measure also specifies that the employee's ability to return to work is to be decided by the employee's treating physician. S.B. 63, SD1 convenes a working group to address and make recommendations to resolve any concerns relating to the substance of this measure. S.B. 63, SD1's provisions relating to the working group will be effective upon approval, while the balance of S.B. 63, SD1 will take effect on July 1, 2010 if the working group fails to reach a consensus.

Where a claim is controverted, employers and their insurers should not be required to pay benefits that they do not believe are owed. AIA opposes S.B. 63, SD1 and respectfully requests that it be held.

Thank you very much for the opportunity to submit comments on this measure.



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**Alison Powers**  
Executive Director

## TESTIMONY OF ALISON POWERS

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SENATE COMMITTEE ON WAYS AND MEANS  
Senator Donna Mercado Kim, Chair  
Senator Shan S. Tsutsui, Vice Chair

Monday, March 2, 2009  
9:30 a.m.

### **SB 63, SD1**

Chair Kim, Vice Chair Tsutsui, and members of the Committee, my name is Alison Powers, Executive Director of Hawaii Insurers Council. Hawaii Insurers Council is a non-profit trade association of property and casualty insurance companies licensed to do business in Hawaii. Member companies underwrite approximately 60% of all property and casualty insurance premiums in the state.

Hawaii Insurers Council **opposes** S.B. 63, SD1, which mandates temporary total disability (TTD) benefits to continue until the Director issues a decision.

Workers' compensation costs loss cost filings have reflected decreases of 54% in recent years. Our members believe this bill will deteriorate these savings and substantially increase workers' compensation costs, which will translate into a higher cost of doing business, limiting business' ability to compete, adversely affect employees by limiting job availability, pay, and benefits and ultimately find its way into the costs of goods and services in Hawaii.

The current system allows employers to deny a claim pending completion of an investigation. The employer should be allowed to investigate a claim to determine whether the alleged injury is work related. This investigation includes obtaining the

employee's medical records and an Independent Medical Examination. Under this bill, if the employee does not provide authorization for medical providers to release their medical records, the investigation could be delayed for months while TTD is being paid. It is unfair for the employer to pay benefits when the employee is uncooperative. The bill encourages abuse by allowing the employee to stymie the employer's ability to investigate the claim while the employee receives TTD benefits, perhaps without merit.

Currently, when the injured worker is released to modified duty and the employer is able to accommodate the physical restrictions, the employee is paid Temporary *Partial* Disability benefits if the employee's average weekly wage is less than what was received prior to the industrial injury (subject to the minimum and maximum). In many situations, an injured worker is released to modified duty and receives the same weekly wage as what was paid prior to the injury. It is unreasonable to require the employer to continue TTD payments until the Director is able to review the case and issue a decision. The bill encourages malingering, promotes an adversarial environment for transitioning an employee back into the workforce, and creates an undue financial burden on the employer. The provision in the bill requires position papers to be filed 14 days after the employee requests a review by the Director. The Director then has 30 days in which to render a decision which is a total of 44 days just for the process. The process itself and whatever TTD was paid without justification are unnecessary costs that are built into this new law.

The bill provides no recoupment mechanism in which to receive a credit for TTD paid without justification. If the Director determines that the claim is not work related or if there is no permanent total or permanent partial settlement, there is nothing from which to recoup against and the employer will have lost any TTD paid without merit.

S.B. 63, SD1 also provides a new sanction for employers/insurers who do not comply with this section of the law to include attorneys fees and costs. In addition to any

existing fines for noncompliance that the Director may impose on insurers, this provision again, adds to the cost of coverage.

Another provision in the bill provides for an increase in the weekly benefit amount to seventy percent of the injured employee's average weekly wage, subject to the limitations prescribed in subsection (a), if TTD and payment of compensation due under this chapter does not begin within thirty days of the date of injury. This will promote late reporting by employees in order to obtain a higher weekly benefit rate and unfairly penalizes the employer. Late reporting may also delay appropriate care and consequently exacerbate an injury and prolong healing.

Finally, S.B. 63, SD1 calls for a working group chaired by the Director and comprised of members of his choosing to come up with a compromise to language in the current bill or it will become effective July 1, 2010. There are many different interests in the workers' compensation system and it will only take one to stall a compromise, thereby forcing the existing language in the bill to be enacted. This provision does not take into account that the current process may be the best achievable system that attempts to provide no-fault benefits while keeping in place some cost containment measures.

There will be an increase in indemnity costs if this bill is enacted because there is an automatic additional 44 days of TTD just to comply with the process and then if TTD was paid without merit, those costs are added in on top. These costs will be passed on to businesses and consumers in the form of rate increases. The National Council on Compensation Insurance (NCCI), in their analysis dated February 29, 2008 of the same bill from last session (HB 2386), states in part,

“NCCI estimates that Hawaii's overall workers' compensation system costs could be impacted by three specific portions of House Bill (HB) 2386 as follows:



- TTD benefits commence immediately +0.0% to +3.3%
- Ability to terminate benefits +0.0% to +0.7%
- Higher disability for some workers +0.1%

Under the scenarios we have considered, the combined overall impact of just these three portions of HB 2386 could range from **an increase of +0.1%(\$1 million) to 4.1%(\$22 million)**. Any potential cost impacts due to other provisions contained in HB 2386 would be realized through future loss experience and reflected in subsequent loss cost filings. This estimate does not contemplate any change in the timing of claims reporting.” (emphasis added)

For these reasons, we respectfully request that S.B. 63, SD1 be held.

Thank you for the opportunity to testify.



## **Before the Senate Committee on Ways and Means**

DATE: March 2, 2009

TIME: 9:30 a.m.

PLACE: Conference Room 211

### **Re: SB 63 SD1 Relating to Workers' Compensation Testimony of Melissa Pavlicek for NFIB Hawaii**

Thank you for the opportunity to testify. On behalf of the business owners who make up the membership of the National Federation of Independent Businesses in Hawaii, we ask that you reject SB 63 SD1. NFIB opposes this measure in its current form.

The National Federation of Independent Business is the largest advocacy organization representing small and independent businesses in Washington, D.C., and all 50 state capitals. In Hawaii, NFIB represents more than 1,000 members. NFIB's purpose is to impact public policy at the state and federal level and be a key business resource for small and independent business in America. NFIB also provides timely information designed to help small businesses succeed.

We are concerned about the possible unintended consequences of mandating employers to continue temporary total disability benefits regardless of whether the employer controverts the right to benefits, especially during such challenging economic times. We believe that such legislation will add costs to business which ultimately hurts employees and the economy as a whole.



Senator Donna Mercado Kim, Chair  
Senator Shan Tsutsui, Vice Chair  
Committee on Ways and Means

HEARING      Monday, March 2, 2009  
                  9:30 am  
                  Conference Room 211  
                  State Capitol, Honolulu, Hawaii 96813

RE:    **SB63, HD1, Relating to Workers' Compensation**

Chair Kim, Vice Chair Tsutsui, and Members of the Committee:

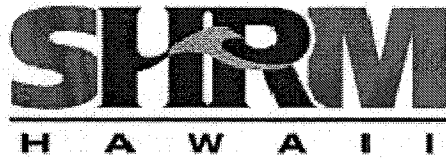
Retail Merchants of Hawaii (RMH) is a not-for-profit trade organization representing about 200 members and over 2,000 storefronts, and is committed to support the retail industry and business in general in Hawaii.

**RMH opposes SB63, HD1**, which requires an employer to pay temporary total disability benefits regardless of whether the employer controverts the right to benefits. While the provision convening a working group had merit and could provide opportunity for open dialogue, the automatic enactment of these changes to §386-31, Hawaii Revised Statutes, is problematic.

We do not dispute that an injured worker should receive quality and appropriate medical care as long as required. However, to compel an employer to continue TTD benefits essentially until the employee decides to return to work is unreasonable. This measure is an affront, both to an employer's rights and to his ability to control business costs. In this current economy, employers are struggling to maintain their workforce and avoid layoffs. It is incumbent upon us to not heap further expense on our businesses.

The members of the Retail Merchants of Hawaii respectfully request that you hold SB63, HD1. Thank you for your consideration and for the opportunity to comment on this measure.

Carol Pregill, President



AFFILIATE OF



SOCIETY FOR HUMAN  
RESOURCE MANAGEMENT

Chair, Senator Donna Mercado Kim  
Vice-chair, Representative Shan Tsutsui  
Committee: Ways and Means  
Society for Human Resource Management (SHRM) Hawaii  
Testimony date: Monday, March 2, 2009

### Opposition to SB63 SD1

SHRM Hawaii is the local chapter of a National professional organization of Human Resource professionals. Our 1,200+ Hawaii membership includes those from small and large companies, local, mainland or internationally owned - tasked with meeting the needs of employees and employers in a balanced manner, and ensuring compliance with laws affecting the workplace. We (HR Professionals) are the people that implement the legislation you pass, on a day-to-day front line level.

SHRM Hawaii strongly opposes Senate Bill 63 SD1, which would require an employer to pay temporary total disability benefits regardless of whether the employer controverts the right to benefits. We are concerned about the additional administrative burden this will put on our members.

SHRM Hawaii respectfully urges the committee to kill Senate Bill 63 SD1.

Thank you for the opportunity to testify. SHRM Hawaii offers the assistance of the Legislative Committee in discussing this matter further.