



STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

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The Honorable Clayton Hee, Chair
and Members of the Senate Committee on Judiciary and Labor

Date: Thursday, April 7, 2011
Time: 9:30 a.m.
Place: Conference Room 016, State Capitol
From: **Dwight Y. Takamine**, Director
Department of Labor and Industrial Relations

Re: H.B. No. 341, H. D. 2 Relating to Employment Practices

I. OVERVIEW OF PROPOSED LEGISLATION

H.B. 341, H.D. 2 proposes to add a new protected class of workers under the Unlawful Suspension or Discharge Law, Chapter 378-Part III, by adding a new section making it unlawful for employers and labor organizations to bar, discharge from employment, withhold pay from, or demote an employee because an employee used accrued and available sick leave provided by the employer. Allows employers to require a doctor's note when employees are absent more than three days.

This law will take effect on July 1, 2030.

II. CURRENT LAW

There is currently no provision in the law that requires employers to provide sick leave outside Temporary Disability Laws.

Chapter 378, HRS, Part III, prohibits employers from unlawfully suspending, discharging or discriminating against an employee for four things: 1) solely because the employer was summoned as a garnishee in an employee's proceedings under Chapter XIII of the Bankruptcy Act; 2) solely because the employee suffered a work injury that was compensable under the Workers Compensation Law, Chapter 386, HRS, 3) because the employee testified or was subpoenaed to testify in a proceeding under Part III, or 4) because an employee tested positive for the presence of drugs, alcohol, or the metabolites of drugs in a substance abuse on-site screening test conducted in accordance with section 329B-5.5.

III. HOUSE BILL

While the DLIR supports the intent of this measure, the department has the following concerns:

1. The Department recommends that the wording of "withholding pay from" be deleted from Section 378-32(c) on page 3, line 10. The Department is concerned with the Legislative intent in allowing employers and labor organizations from "withholding pay from" employees while the Department must also enforce Chapter 388, HRS, Payment of Wages and Other Compensation, which requires employers to pay all earned wages.
2. It is unclear how the workload of the hearings branch can handle this additional responsibility with the limited resources currently in the Division. The added burden of an additional protected area without additional personnel may cause hearings on the issue to be delayed and untimely to achieve an appropriate remedy. However, should the legislature pass this measure the Department will do its best to carry out the responsibilities required by the law.
3. The Department suggests consideration be given to the provisions in SB 1076 which provides additional clarification and protections for compliance with Hawaii's Family Leave and Temporary Disability Laws.

Testimony before the Senate Committee on Judiciary and Labor

on

H.B. 341, HD4, Relating to Employment Practices

Thursday, April 7, 2011

9:30 a.m.

Conference Room 016, State Capitol

By **Sherri-Ann Loo**, Manager
Hawaiian Electric Company

Chair Hee, Vice Chair Shimabukuro, and Members of the Committee:

I am Sherri-Ann Loo, Manager, Human Resources Programs and Strategies at Hawaiian Electric Company, Inc. I represent Hawaiian Electric Company, Inc. and its subsidiaries, Hawaii Electric Light Company, Inc. and Maui Electric Company, Limited (collectively "HECO") consisting of 2300 employees.

We respectfully oppose House Bill 341, House Draft 4.

House Draft 4 diminishes an employer's right to manage sick leave abuse, unfairly punishes companies with generous sick leave benefits, and is unnecessary and duplicative of current rights and laws, and may even result in preemption of state law. It also unfairly targets our utility as a company that must conform to this proposal even though we have not done anything to warrant this measure.

H.B. 341, House Draft 4 is objectionable for the following reasons:

1. Although House Draft 4 gives employers the right to require medical certification in cases of sick leave of three or more consecutive days, this single requirement is insufficient to guard against abuses of sick leave and undermines the right of an employer to manage abuses of sick leave.
2. All regular full-time employees of HECO have a benefit schedule of sick leave ranging from a minimum of 40 hours full pay from date of hire to a maximum of 384 hours full pay after 10 years of service. Employees with serious illnesses are allowed to draw upon a bank of unused sick leave. The intent of our benefit is to provide income security in the event of serious illness or injury. There will be a negative impact to productivity should all employees be allowed to use their full balance of sick leave with restricted controls in place to prevent the misuse of the system or avenues to address excessive absenteeism by employees with "a non-chronic condition of a short-term nature." HECO (and possibly other companies) would have to seriously reconsider the amount of sick leave benefit it provides.
3. House Draft 4 also prohibits an employer from discharging or demoting an employee until all accrued and available sick leave is exhausted even if the employee can no longer fulfill the essential job functions of the position. This is punitive to companies

with generous sick leave benefits such as ours. It could also result in providing job protection longer than currently required under the Family and Medical Leave Act and Hawaii Leave Law. As such it is not only duplicative of job protection laws such as these, it can for companies with generous sick leave policies extend the protection beyond that currently required.

4. This bill is applicable only to employers with collective bargaining agreements and with workforces of one hundred or more employees. Collective bargaining provides its own set of remedies, including the right to grieve and challenge disciplinary action, including that related to sick leave usage. As such, this bill is unnecessary and duplicative. Further, this bill would create a severe situation for companies that are large and therefore covered by the bill, but have small offices located in various parts of the island. As written, the bill would allow each employee to use the full bank of sick leave credits and potentially leave an employer without any employees to run remote offices and operations.
5. This bill also gives the State Department of Labor and Industrial Relations the authority to find an employer in violation of state law with regard to actions taken regarding granting or denial of sick leave under policies under a collective bargaining agreement. To the extent that the Labor Management Relations Act of 1947 applies, current case law indicates that the bill may cause preemption of state law if such action requires interpretation of the meaning of the collective bargaining agreement. See *Lingle vs. Norge*, 486 U.S. 399.

We therefore ask the Committee to hold H.B. 341, HD 4.

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



LATE TESTIMONY

To: Senate Committee on Judiciary and Labor

Hearing: Thursday, April 7, 2011, 9:30 A.M.
Conference Room 016

Re: **HB 341, HD 4: Relating to Employment Practices**

From: Society for Human Resource Management - Hawaii Chapter

The **Society for Human Resource Management** – Hawaii Chapter (“SHRM Hawaii”) represents more than 1,000 human resource professionals in the State of Hawaii. On behalf of our members, we would like to thank the Committee for giving us an opportunity to comment on HB 341, HD 4: Relating to Employment Practices.

We are **opposed** to HB 341, HD 4 which makes it unlawful for an employer or a labor organization with 100 or more employees and a collective bargaining agreement to bar or discharge from employment, withhold pay from, or demote an employee because the employee uses accrued and available sick leave as well as allows an employer or labor organization to require written verification of sick leave in certain situations (effective July 1, 2030).

We are concerned HB 341, HD 4 has the potential to conflict with other leave requirements and policies on the local, state and federal levels including, but not limited to the Hawaii Family Leave Law, the Family Medical Leave Act, the National Defense Authorization Act Amendments, the Americans with Disabilities Act, workers’ compensation and temporary disability insurance.

Moreover, we are concerned HB 341, HD 4 will have the unintended consequence of employers seeking to implement a Paid Time Off policy rather than maintaining separate vacation and sick leave policies. Employees may lose the flexibility they currently have as employers will be more likely to impose and enforce strict requirements for use of sick leave such as requiring a doctor’s visit/note and/or that sick leave shall be used solely for the employee’s illness and not that of a family member such as a child.

SHRM Hawaii, like SHRM, the national organization of which it is an affiliate, believes that employers, not the government, are in the best position to address workplace needs and know the benefit preferences of their employees which may include other types of leave policies. HR professionals have decades of experience in designing and implementing programs that work for both employers and employees. We’re eager to share this expertise with policymakers and welcome a positive dialogue on workplace flexibility policy, rather than a mandate.

Once again, thank you for this opportunity to provide you with this input.



LATE TESTIMONY

Before the Senate Committee on Judiciary and Labor

DATE: Thursday, April 7, 2011

TIME: 9:30 A.M.

PLACE: Conference Room 016

Re: HB 341, HD 4 Relating to Employment Practices

Testimony of Melissa Pavlicek for NFIB Hawaii

We are testifying on behalf of the National Federation of Independent Business (NFIB) in **opposition** to HB 341, HD 4, relating to employment practices.

HB 341, HD 4 makes it an unlawful practice for an employer or labor organization with 100 or more employees and a collective bargaining agreement to bar or discharge from employment, withhold pay from, or demote an employee because the employee uses accrued and available sick leave and also allows an employer or labor organization to require written verification of sick leave in certain situations (effective July 1, 2030).

NFIB believes government mandates take away small employers' and employees' freedom to negotiate the benefits package that best meets their mutual needs. While we do not oppose employees' legitimate use of accrued and available sick leave, small employers must have the ability to address an employee's violation of company policies or inappropriate use of sick leave when necessary. During Hawaii's depressed economic growth period, NFIB believes that government must not impose additional burdens upon small businesses.

NFIB is the nation's largest advocacy organization representing small and independent businesses in Washington, D.C. and all 50 state capitols, with more than 1,000 members in Hawaii and 600,000 members nationally. NFIB members are a diverse group consisting of high-tech manufacturers, retailers, farmers, professional service providers and many more.

We welcome the opportunity to engage with legislators on this and other issues during this session.

HB 341 HD 4

RELATING TO EMPLOYMENT PRACTICES

HAWAIIAN TELCOM

April 7, 2011

Chair Hee and members of the Senate Judiciary and Labor Committee:

Hawaiian Telcom is opposed to HB 341 HD 4 - "RELATING TO EMPLOYMENT PRACTICES."

Hawaiian Telcom believes that this bill is unnecessary and therefore as a matter of public policy should not be a subject for legislative action. Hawaiian Telcom already provides a very generous package of employee sick leave, disability, and family leave benefits. For example, the current collective bargaining agreement provides for up to 52-weeks of company paid employee sick leave depending on the years of service.

It is widely acknowledged that the company is one of the few or maybe the only business in Hawaii that provides up to a whole year of paid sick leave. In addition to this negotiated employee benefit, Hawaiian Telcom fully complies with the Federal Family Medical Leave Act (up to 480-hours of leave a year) and the Hawaii Family Medical Leave Act (an additional 160-hours of leave a year).

Hawaiian Telcom is not mandated by law to provide additional sick leave benefits. It is a voluntary benefit that is provided as somewhat of an "insurance policy" for employees should they become sick to ensure they have the time and financial means to fully recuperate and recover before returning back to work. It is inconceivable that the company should be expected to sanction sick leave abuse by allowing employees unrestricted absenteeism without the means to curb highly

questionable or excessive absences. Condoning unrestricted absenteeism will severely hamper Hawaiian Telcom's ability to provide the same high level of telecommunication services that its customers expect and deserve.

In addition, HRS Chapter 269 requires Hawaiian Telcom to meet certain customer and service benchmarks or face administrative fines or other penalties. The company utilizes an attendance policy that is both fair to employees while recognizing that regular scheduled work attendance is essential in order to satisfy these mandated customer service quality requirements.

If issues arise involving Hawaiian Telcom's negotiated sick leave policy, the company believes that as a matter of public policy the proper venue for resolution is through the collective bargaining process and not by legislation. The legislature in its wisdom established the collective bargaining process to allow parties to resolve employment issues without the need to draft a bill for every dispute that arises. This measure attempts to undermine the integrity of this well-established process by legislating the optional employer-provided benefit of sick leave. Sick leave is part of a negotiated contract between employer and employee and is best resolved through the collective bargaining process.

For all of the reasons set forth above, Hawaiian Telcom opposes HB 341 HD 4 and respectfully requests this measure be tabled this session.

Thank you for the opportunity to provide comments.