



**STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS**

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February 8, 2011

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

Date: Tuesday, February 8, 2011

Time: 10:00 a.m.

Place: Conference Room 016, State Capitol

From: Dwight Y. Takamine, Interim Director
Department of Labor and Industrial Relations

Re: S.B. No. 1040 Relating to the Hawaii Occupational Safety and Health Law

I. OVERVIEW OF PROPOSED LEGISLATION

Senate Bill 1040 proposes to increase the penalties for violations of the Hawaii Occupational Safety and Health Law by an unspecified amount. The department supports this measure.

II. CURRENT LAW

The current law imposes maximum penalties of up to \$7,000 per item for most violations of the Hawaii Occupational Safety and Health Law. Willful violations carry penalties of up to \$70,000 with a minimum of \$5,000 per item violated. Violations of §396-8(e), the discrimination or "whistleblower" law, has a maximum civil penalty of not more than \$1,000 for each violation. Providing advance notice of an upcoming inspection also warrants penalties of not more than \$1,000, but may also include imprisonment for not more than six months.

The current penalties were increased in 1992, more than 18 years ago, under a Congressional mandate following a chicken processing plant fire which resulted in the death of 25 women, when they were trapped in the burning building because the employer locked all fire exits. At that time, the maximum penalty was \$1,000.

III. SENATE BILL 1040

The department supports this measure for the following reasons:

1. Congressional and state legislative intent is for penalties to be sufficient as deterrence to employers who choose to disregard their obligations to provide a safe and healthful workplace in accordance with the Hawaii Occupational Safety and Health Law. The penalties have not increased in over 18 years.
2. While OSHA and the Hawaii Occupational Safety and Health Division (HIOSH) have adopted various directives to separate out those employers who want to comply but perhaps do not have the resources from those who repeatedly choose to disregard safety and health and who consider accidents to be the cost of doing business, these tools must still be used within the confines of the statutory limits. Although, they can be effective, these modifications to the penalty calculation are often ineffective when dealing with employers new to the state, such as out-of-state contractors, who have not built up an inspection history with our program.

The department agrees that actions contributing to a worker fatality should warrant penalties greater than a few hundred dollars. The penalty for harassing wild horses and burros is \$10,000. A human life is certainly worth more than that, and penalties to deter those who allow unsafe conditions or acts to continue should be high enough to be a true deterrence. However, although we support the increase to the maximum penalty after 18 years of no increase, we urge caution in not setting the maximum penalties too high.

The overwhelming majority of employers in this state really values their workers and wants to do what is right. But they may not have the resources – either the know-how, or the money during these trying economic times. The mission of the Hawaii Occupational Safety and Health Division is to prevent workplace accidents through a mix of incentives and disincentives. Strict enforcement without offering assistance to employers, especially small employers who do not have the resources to readily come into compliance, is counterproductive to voluntary compliance and accident prevention. We need to achieve a balance of compliance assistance and enforcement for Hawaii's employers.

HIOSH procedures currently provides significant penalty reductions of up to 95% for employers that are small, act in good faith to provide worker protections, and have no adverse past inspection history. 72% of HIOSH serious penalties were less than \$1,000 after the credits were applied. See attached information sheet.

We also offer free on-site consultation assistance to help small businesses reduce workers' compensation costs and comply with OSHA/HIOSH laws.

We are working to rebuild our program to be able to provide that balance of carrot and stick.

SB 1040
February 8, 2011
Page 3

With the legislature's help and the input and partnerships we are building with all of our stakeholders, we should be able to once again offer meaningful assistance and effective deterrence to help our workers and their families build a better Hawaii.

Therefore we support this measure, with a recommendation for a modest increase at this time.

**INFORMATION ON HIOSH PENALTIES
HB166**

Federal Fiscal Year 2011 (October 1, 2009 to September 30, 2010)

INSPECTION DATA:

	Number	Percent
Total Inspections	323	
With Violations ¹	195	60.4%
Without Violations	128	39.6%

VIOLATION1/PENALTY DATA:

Violations, Total	686		Penalty Max ²	Actual Range
Serious ³	418	60.9%	\$7,000	\$100 to \$5,000
Wilful ⁴	9	1.3%	\$ 70,000 (min is \$5,000)	\$10,500 to \$70,000
Repeat	7	1.0%	\$ 70,000	\$ 2,000 - \$12,500
Other ⁵	252	36.7%	\$ 7,000	\$ 0 to \$ 5,000

Penalty Distribution for Serious Penalties:

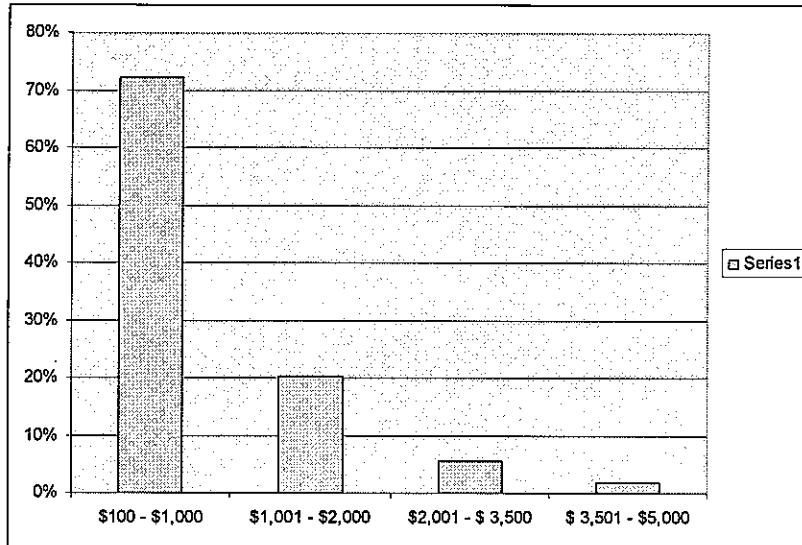
1 A violation is a single standard or rule that was not in compliance. A violation can have multiple instances.

2 In accordance with §396-10, HRS

3 A Serious violation is one capable of causing death or serious physical harm

4 A Wilful violation is a voluntary act or omission by the employer that is done with intentional disregard of, or plain indifference to, any standard, rule, citation, or order.

5 An "Other" violation is one that is "other-than-serious" – not capable of causing death or serious physical harm.



Average Penalty per Inspection: \$ 1,270 (due to willful penalties)
 Average Serious Penalty \$ 1,195

Average number of willful violations in past year was one. In FY 2010 increased to 9 due to Fall Protection campaign as a result of numerous fall fatalities on construction sites in late 2009, early 2010. Since prior Fall Protection Campaign was only a few years before – the willful violations were based on repeated citation(s) for the same condition.

Total Penalties Assessed in FY 2010: \$ 870,916

While the maximum penalty by statute is \$7,000, by practice (Field Operations Manual), penalties are initially proposed at no more than \$5,000, reserving the \$7,000 for special circumstances such as fatality investigations or egregious violations. Penalties are gravity based, i.e. the more serious the injury or illness, and the greater the probability of the accident – the greater the initial proposed penalty:

Severity	Probability	Gravity Based Penalty (Before reductions)
High	Greater	\$ 5,000
Medium	Greater	\$ 3,500
Low	Greater	\$ 2,500
High	Lesser	\$ 2,500
Medium	Lesser	\$ 2,000
Low	Lesser	\$ 1,500

Once the gravity-based penalty is determined, the employer gets reductions based on employment size, good faith and history. Thus, a small employer with no more than 25 employees, an effective written safety and health program, and no past history of willful, serious or repeat violations could get a 95% reduction in the gravity-based penalty.

Example as follows:

Gravity Based Penalty - High Severity, Lesser Probability (A frayed electric cord that could cause electric shock or death to worker)	\$ 2,500
Employment Size = 25	- 60%
Good Faith (Effective S&H Program)	- 25%
History (no serious, willful, repeat, in past)	- 10%
Total Reduction	- 95%
Final Penalty	\$ 125

EMPLOYEE MISCONDUCT DEFENSE:

(Sample of 26 cases randomly selected from cases with violations in FY 2010)

Inspections Reviewed	26	
No. of Serious Violations	60	
No. of Other	30	
Total Original Penalties	\$ 68,500	
Total Final Penalties	\$ 60,758	

No of Possible Employee Misconduct defenses (citations due to failure of employee to act)	6	
Number sustained (violations not cited for employee misconduct defense)	0	
Reasons for not sustaining:	Supervisor6	No

6 Supervisor was either the employee that was not in compliance or was with the employee and

LATE TESTIMONY

From: Alfred Lardizabal [lardizabal@local368.org]
Sent: Monday, February 07, 2011 2:43 PM
To: JDLTestimony
Subject: SB1040 Relating to HIOSH Law

Senate Committee on Judiciary and Labor
SB1040 Relating to HIOSH Law
Tuesday, February 8, 2011
Room O16, 10:00 a.m.
State Capitol

February 7, 2010

Senator Clayton Hee, Chair; and Senator Maile S.L. Shimabukuro, Vice Chair, Senate Judiciary and Labor:

The Hawaii Laborers' Union fully supports SB1040 which increases fines for OSHA/HIOSH violations.

We understand that the fines have not been changed for a few decades. We believe that violations resulting in death of workers should have the most impact on the practices of employers by an appropriate amount of fines. Current levels of fines serve little or no deterrent.

Thank you for the opportunity to submit this testimony.

Al Lardizabal, Director
Government Relations
Hawaii Laborers' Union

The Twenty-Sixth Legislature
Regular Session of 2011

THE SENATE
Committee on Judiciary and Labor
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

LATE TESTIMONY

State Capitol, Conference Room 016
Tuesday, February 8, 2011; 10:00 a.m.

STATEMENT OF THE ILWU LOCAL 142 ON S.B. 1040 RELATING TO THE HAWAII OCCUPATIONAL SAFETY AND HEALTH LAW

The ILWU Local 142 supports S.B. 1040, which raises the civil penalty amounts and additional criminal fines for violations of the Hawaii Occupational Safety and Health Law.

If an employer has violated the occupational health and safety law, especially when such violation has resulted in serious injury or death, the civil penalty should be more than the \$7,000 provided by in the current law. Civil and criminal penalties must be severe enough to serve as a deterrent and encourage employers to abide by the law and provide a safe and healthful work environment.

On behalf of our working members, the ILWU urges passage of S.B. 1040. Thank you for allowing us to testify on this matter.