



TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2011

LATE TESTIMONY

ON THE FOLLOWING MEASURE:

S.B. NO. 41, RELATING TO THE HAWAII PREPAID HEALTH CARE ACT.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Tuesday, March 1, 2011 TIME: 9:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): David M. Louie, Attorney General, or
Gary S. Ige, Deputy Attorney General

Chair Hee and Members of the Committee:

The Attorney General is not opposed to the intent of the bill, but has legal concerns that the proposed repeal would likely be preempted by the Employee Retirement Income and Security Act ("ERISA"). However, since there is no case on point, should the repeal be challenged on preemption grounds, the outcome cannot be predicted with certainty.

The bill amends chapter 393, Hawaii Revised Statutes (HRS), also known as the Hawaii Prepaid Health Care Act ("PHCA"), by repealing section 393-51, HRS. Section 393-51, HRS, provides that the "chapter shall terminate upon the effective date of federal legislation that provides for voluntary prepaid health care for the people of Hawaii in a manner at least as favorable as the health care provided by this chapter, or upon the effective date of federal legislation that provides for mandatory prepaid health care for the people of Hawaii." The bill will also repeal Act 99, passed by the Legislature in 1994, which repeals chapter 393, part V, HRS, (part V consists of section 393-51, HRS, the termination provision quoted above), and which becomes effective "upon the effective date of any federal act permitting the amendment of the Hawaii Prepaid

Health Care Act." We note that to date, no such amendment has been enacted by Congress.

We recognize that failing to take any action regarding the termination provision could result in the eventual repeal of the entire PHCA and that this bill is an attempt to address that concern. Nonetheless, we believe that the amendments made by the bill would likely be preempted by ERISA. ERISA regulates pension and benefit plans and establishes standards for the administration of such plans. ERISA has a sweeping preemption provision that provides in relevant part that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C.A. § 1144(a). The subsection, in full, provides as follows:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(b) of this title. This section shall take effect on January 1, 1975.

There is a narrow exemption from ERISA preemption for the Hawaii PHCA. 29 U.S.C.A. § 1144(b)(5)(A) provides as follows:

Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).

That exemption applies only to the PHCA as it existed on September 2, 1974. 29 U.S.C.A. § 1144(b)(5)(B)(ii) provides as follows:

Nothing in this subparagraph (A) shall be construed to exempt from subsection (a) of this section-
(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it

provides for more than the effective administration of such Act as in effect on such date.

In other words, the ERISA preemption provision applies to any amendments to the PHCA "to the extent it provides for more than the effective administration" of the PHCA. Any substantive amendment to the PHCA would go beyond the allowable exemption of amendments only for the "effective administration" of the PHCA and would, therefore, be subject to preemption. *Council of Hawaii Hotels v. Agsalud*, 594 F. Supp. 449 (D. Haw. 1984) (amendment to require plans negotiated through collective bargaining to contain the required minimum benefits constituted a substantive change and was preempted).

The plain meaning of the word "administration" is the "performance of executive duties : management." *Merriam-Webster's Collegiate Dictionary* 15 (10th ed. 1993). In *Council of Hawaii Hotels v. Agsalud*, the court commented on the meaning of "effective administration" as follows:

Finally, the legislative history of the ERISA Amendment indicates that Congress intended the term "effective administration" to be construed strictly. It is clear that Congress intended to adhere to *Standard Oil*, preempting the Act's drug and alcohol abuse treatment provisions. State officials had lobbied to restore state regulation of prepaid health care plans, and the accommodation reached was that the Hawaii Act would be given effect, but only as to its substantive provisions in effect on September 2, 1974. Any subsequently enacted substantive change would succumb to "the broad scope of ERISA preemption." The ERISA Amendment thus was to "operate only as a narrow exception."

Id. at 455 (footnotes omitted).

The Attorney General believes that the repeal of the termination provision of the PHCA, section 393-51, HRS, as proposed in this bill, is not an amendment that provides for the

effective administration of the PHCA because it does not merely address the performance of executive duties, but goes to the substance of whether Hawaii's PHCA continues in force or not. Therefore, we believe the amendment would likely be subject to preemption by ERISA.

In addition, the Attorney General believes that should the Legislature pass this bill and repeal section 393-51, HRS, and a court subsequently determines that the repeal is preempted by ERISA, such a ruling would not affect the Hawaii Prepaid Health Care Act as it exists today; only this amendment would be preempted, and the balance of the Act would remain.

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

State Capitol, Conference Room 016
Tuesday, March 1, 2011; 9:00 a.m.

**STATEMENT OF THE ILWU LOCAL 142 ON S.B. 41
RELATING TO THE HAWAII PREPAID HEALTH CARE ACT**

The ILWU Local 142 supports S.B. 41, which repeals the sunset provision enacted in 1994 of the Hawaii Prepaid Health Care Act. The sunset was included to allow the chapter to terminate when federal legislation provides for voluntary prepaid health care for Hawaii residents "in a manner at least as favorable as the health care provided by this chapter" or when federal law provides "for mandatory prepaid health care."

Although federal health care reform legislation has been adopted by Congress and the President, it is still far from what the Hawaii law provides. In Hawaii, all employers must provide health plan coverage to employees who work more than 20 hours a week for four consecutive weeks. The law also provides a standard for the coverage provided. Federal health care reform provides for individual mandates, not employer mandates, and the coverage standard is well below what Hawaii requires.

S.B. 41 will remove the sunset provision from the Hawaii Prepaid Health Care Act and remain silent on any federal legislation. We think this is a prudent measure because no one can deny that the Hawaii law is superior to federal health care reform enacted thus far. For federal law to accomplish what Hawaii law has done is likely to take a while, especially in light of the opposition being mounted by Republicans and several states.

In the event that federal legislation is enacted that exceeds the coverage that Hawaii law provides, we are confident that Hawaii's congressional delegation will ensure that Hawaii residents will not be shortchanged.

The ILWU urges passage of S.B. 41. Thank you for the opportunity to share our views on this issue.

LATE TESTIMONY

Cory Lee
Andrew



SENATE COMMITTEE ON JUDICIARY AND LABOR
Senator Clayton Hee., Chair

Conference Room 229
Jan. 28, 2011 at 2:45 p.m.

Commenting on SB 41.

The Healthcare Association of Hawaii advocates for its member organizations that span the entire spectrum of health care, including all acute care hospitals, as well as long term care facilities, home care agencies, and hospices. Our members employ more than 40,000 people, delivering quality care to the people of Hawaii. The Healthcare Association would like to comment on SB 41, which repeals the sunset clause of the Prepaid Health Care Act (PHCA).

The Healthcare Association does not sit before this committee to speak in opposition to the PHCA. In Hawaii, the PHCA has been responsible for reducing the uninsured rate and maintaining one of the lowest uninsured rates in the nation for nearly 30 years. It is understandable that there is an interest in preserving it.

Last year the Affordable Care Act (ACA) was signed into law. Its stated goal is to cover 95% to 97% of our residents. Although the law has been enacted, many of the rules have not yet been written. The ACA will become operational in stages, taking several years before it becomes fully effective, so the specifics of the ACA are still undefined. From the perspective of the ACA, passage of SB 41 in its current form would be premature.

In addition, the Attorney General submitted testimony to the House Committee on Consumer Protection and Commerce, which held a hearing on Feb. 23, 2011 on HB 1134 HD 1, which also repeals the sunset clause of the PHCA. The Attorney General opposed the bill because the proposed changes would likely be preempted by the Employee Retirement Income Security Act of 1974 (ERISA).

Thank you for this opportunity to comment on SB 41.



LATE TESTIMONY

The Official Sponsor of Birthdays

February 27, 2011

Committee on Judiciary and Labor
Senator Clayton Hee, Chair
Senator Maile Shimabukuro, Vice Chair

Hearing:

March 1, 2011, 9:00 a.m.
Hawaii State Capitol, Conference Rm. 016

RE: SB 41 – Relating to Hawaii Prepaid Health Care Act

Testimony in Support

Chair Hee, Vice Chair Shimabukuro and members of the Committee on Judiciary and Labor, my name is **George Massengale**. I am the Director of Government Relations for the American Cancer Society Hawaii Pacific Inc. Thank you for the opportunity to offer this testimony in support of SB 41 which would repeal the sunset provision of the Hawaii's Prepaid Health Care Act (PHCA).

For over 60 years, the American Cancer Society in Hawaii has led the fight against cancer in Hawaii, which takes the lives of almost 6,700 of our family members, friends, and co-workers each year. Nationally, approximately 1.5 million people will die of cancer this year. For this and other reasons, the American Cancer Society supported legislation that would offer meaningful improvements to the health care system for cancer patients, survivors, and their caregivers. Now that the Affordable Care Act is law, the Society is working to ensure that it is implemented as strongly as possible for people with cancer and their families. Making the health care system work for cancer patients will save lives.

When passed in 1974, Hawaii became the first state to enact laws creating a near universal health care coverage system. This system became the gold standard for the nation, and many of its provisions served as a blueprint for the healthcare reform and passage of the Patient Protection and Affordable Care Act (ACA).

In passing the ACA, Congress granted Hawaii a waiver keeping our Prepaid Health Care Act intact:

(b) Rule of Construction Regarding Hawai'i's Prepaid Health Care Act.- - Nothing in this title (or an amendment made by this title) shall be construed to modify or limit the application of the exemption for Hawai'i Prepaid Health Care Act (Haw. Rev. Stat. 393-1 et seq.) as provided for under section 514(b)(5) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1144(b)(5)).

Also in 1974, Congress passed The Employee Retirement Income Security Act (ERISA). In doing so, Congress preempted the states from passing any law or making any rule to change any provision of ERISA, meaning that only Congress can act to make changes.

Hawaii's Prepaid Health Care Act – Termination Clause:

[§393-51 Termination of chapter.] This chapter shall terminate upon the effective date of federal legislation that provides for voluntary prepaid health care for the people of Hawaii in a manner at least as favorable as the health care provided by this chapter, or upon the effective date of federal legislation that provides for mandatory prepaid health care for the people of Hawaii. [L 1974, c 210, pt of §2].

Since passage of the Affordable Care Act, there has been much discussion as to, if and when our prepaid health care would sunset - upon passage last year or in 2014, when various health insurance mandates kick in? Also, will removing the sunset provisions void the law in its entirety? Is it considered a substantive change? If so, what are the implications for Hawaii's people and the business community? Finally, does the waiver language in the ACA constitute Congress' intent to allow the State of Hawaii to make changes to the ERISA provisions in Hawaii?

Having stated above, the American Cancer Society supports the repeal of the sunset provision; however, we believe that the questions noted above need to be carefully considered before final passage of this bill.

As we move forward, the Society will continue to work with our law makers at both the federal and state level, to ensure that key provisions of the ACA are implemented as strongly as possible for people with cancer and their families.

In Hawaii, we have the advantage of our Prepaid Health Care Act, which, because of the exemption granted to it, should allow us to mix and match benefits and provisions, incorporating the best of both, as we address the myriad of implementation issues. By utilizing the best of both, we believe that Hawaii can maintain its predominance of having the best health insurance coverage and health delivery system in the United States.

Thank you for the opportunity to testify today.

Respectfully,



George S. Massengale, JD
Director of Government Relations

From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 28, 2011 3:12 PM
To: JDLTestimony
Cc: cyoung@dcca.hawaii.gov
Subject: Testimony for SB41 on 3/1/2011 9:00:00 AM

Testimony for JDL 3/1/2011 9:00:00 AM SB41

Conference room: 016
Testifier position:
Testifier will be present: No
Submitted by: Chris Young
Organization: DCCA - Insurance Division
Address:
Phone:
E-mail: cyoung@dcca.hawaii.gov
Submitted on: 2/28/2011

Comments:

February 28, 2010

LATE TESTIMONY

Committee on Health
Senator Josh Green, MD, Chair
Senator Clarence K. Nishihara, Vice Chair
State Capitol
415 South Beretania St.
Honolulu HI, 96813

Re: State Senate Bill 41 – Relating to the Hawai`i Prepaid Health Care Act

Dear Senators:

My name is Sara Keala Tateishi; I am a public health student and resident in the state of Hawai`i. I strongly support Senate Bill 41, Relating to the Hawai`i Prepaid Health Care Act (PHCA). Due to the enactment of the PHCA, Hawai`i is the only state with an exemption from the Employee Retirement Income Security Act (ERISA); therefore, the only state with the ability to mandate employer-based insurance.

Since the passing of the Patient Protection and Affordable Care Act of 2010 (PPACA), arguments have arisen stating that the federal mandate effectively sunsets Hawaii's PHCA. If SB 41 is not passed, our state's ability to mandate employer-based health insurance through the PHCA will be jeopardized.

If the PHCA is not protected by SB 41 and is repealed by the PPACA, it is likely that uninsured rates will rise and the economy as a whole will suffer. One of the main issues with repealing the PHCA is that the benefits and coverage currently mandated by the state exceeds those that are included in the federal PPACA. Also, if the state's ERISA exemption is removed, national companies will be able self insure across state lines and will be allowed to bypass state requirements that establish minimum benefits and employee contributions (i.e., 1.5% maximum contribution employees pay for individual plans). Companies such as Walmart, Target, Macys, Burger King, Marriott, McDonalds, Sheraton and other national chains that self-insure in other states will be able to do the same in Hawaii. This could lead to less health insurance being offered to employees in general or to the development of self-insured plans that provide less benefits and consumer protections than currently exist. A study conducted in 1994 demonstrated that only 6.7% of Hawaii's establishments self-insure for their employees and 17.1% employees work in these companies. If the Hawaii PHCA is repealed, this will likely increase.

Additionally, there are benefits for employers if the state's PHCA is maintained and mandated in conjunction with the federal PPACA. Small business employers that are already required to provide insurance through the Hawai`i PHCA will receive a tax credit through the federal PPACA. This would provide an automatic economic stimulus for small businesses in the state.

In conclusion, while large national employers may incur financial benefits from repealing the PHCA, small business owners and employee consumers serve to benefit from the federal mandate serving as a support and reinforcement of existing state regulations already in place through the PHCA. In order to maintain low uninsured rates

and existing employee benefits the people of Hawaii should fight to uphold the PHCA and their right to accessible health care. As a public health student and a life-long resident of the state, I stand in strong support of passing SB 41.

Sincerely,

Sara Keala Tateishi
University of Hawaii, MPH Candidate
Tufts University, BA
saramkt@hawaii.edu

HMSA



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LATE TESTIMONY

March 1, 2011

The Honorable Clayton Hee, Chair
The Honorable Maile S. L. Shimabukuro, Vice Chair
Senate Committee on Judiciary and Labor

Re: SB 41 – Relating to the Hawaii Prepaid Health Care Act

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

The Hawaii Medical Service Association (HMSA) supports SB 41 which would repeal Section 393-51, Hawaii Revised Statutes, the termination provision in the State's Prepaid Health Care Act (PHCA). This Bill also repeals Act 99, Session Laws of Hawaii 1994, which would repeal that statutory termination upon specific federal action.

Through a federal exemption from the Employee Retirement Income Security Act (ERISA), residents in Hawaii have benefitted from expanded health care coverage under a unique and successful employer health care mandate that has been in place for more than 30 years – the PHCA. The overall impact of the law since 1974 has been the maintenance of relatively robust private benefit plans, low rates of uninsured, and some of the lowest premiums in the country. While Hawaii suffers from some of the same issues relative to access, quality and cost as states across the country, the PHCA has been the backbone over the years ensuring system stability and moderation of problems in health care delivery and finance.

Although the current ERISA exemption has been preserved in the Affordable Care Act (ACA), it may unintentionally be jeopardized without further federal- and state-level legislative fixes prior to the implementation of the mandated health insurance exchange. As with all other states, save Alaska, the Legislature is considering other measures to create Hawaii's health exchange, the entity through which individuals may shop for an appropriate health plan. But, while the states scramble to address the ACA, the shift in the balance of power in Washington confounds those efforts and confuses what health care reform eventually will cover.

Hawaii's prepaid system is established and proven to be effective. There must be coordination of PHCA and the ACA, specifically with respect to how PHCA will work in tandem with the exchange. Resolution of this uncertainty would ensure that Hawaii's businesses, insurers, and residents understand the way in which they should invest their limited resources. The provisions of SB 41 offer a simple, single step to maintain the premium health care that the majority of people in Hawaii already enjoy.

We are informed that there are concerns about the impact of the provisions of this Bill on Hawaii's ERISA exemption. We are advised that, even if the provisions of this Bill were to be found to be preempted by ERISA, the remainder of PHCA would remain intact, and the immunity given to PHCA from ERISA would continue to apply. We are continuing to dialogue with the State Attorney General and his staff on this legislation and certainly appreciate their willingness to consider the importance of this issue.

Thank you for the opportunity to testify on SB 41, and we ask for your favorable consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'JDiesman'.

Jennifer Diesman
Vice President
Government Relations

Hawaii Medical Service Association

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LATE TESTIMONY

NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR

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TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR

TWENTY-SIXTH LEGISLATURE
Regular Session of 2011

Tuesday, March 1, 2011
9 a.m.

WRITTEN TESTIMONY ONLY

TESTIMONY ON **SENATE BILL NO. 41** – RELATING TO THE HAWAII PREPAID
HEALTH CARE ACT.

TO THE HONORABLE CLAYTON HEE, CHAIR, AND MEMBERS OF THE
COMMITTEE:

My name is **Gordon Ito**, State Insurance Commissioner, testifying on behalf of the Department of Commerce and Consumer Affairs ("Department"). The Department defers to the Department of Labor and Industrial Relations on this bill, which repeals the sunset provision in the Hawaii Prepaid Health Care Act.

We thank this Committee for the opportunity to present testimony on this matter.



STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

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LATE TESTIMONY

March 1, 2011

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

Date: Tuesday, March 1, 2011
Time: 9:00 a.m.
Place: Conference Room 016, State Capitol

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

Testimony in Support of
Re: S.B. No. 41, Relating to the Hawaii Prepaid Health Care Act

I. OVERVIEW OF PROPOSED LEGISLATION

Current federal legislation mandating national health care coverage for all legal residents by January 1, 2014 is still undergoing Congressional review with possible further amendment. Although this national discussion may result in better health care, the program has yet to prove itself, whereas Hawaii's Prepaid Health Care law has been in effect for almost four decades and the better health enjoyed by its citizenry ably validates it as a successful social welfare program. To ensure the program continues to thrive regardless of the probable changes in the federal legislation, the proposed bill seeks to delete from the statute Section 393-51 that allows for the termination of the Prepaid Health Care Act upon the effective date of federal legislation for health care. The bill also seeks to repeal the 1994 Act 99, which also provided for the repeal of Section 393-51 but bore conflictive language.

II. CURRENT LAW

The 1974 legislation of Act 210 effective January 1, 1975, provided the working uninsured with quality mandated health care benefits and maintained the prevailing standards for those employees already fortunate to have medical coverage. The law requires employers to insure their workers upon attainment of eligibility. As a result of the reform, Hawaii's workers and their families constitute one of the healthiest

populations in the nation today. In anticipation of national health care reform that would presumably provide greater federal protections, Act 210 included a sunset provision to be implemented upon the effective date of the federal legislation. Subsequently, discussions on the implementation and costs of a national health program raised the question as to whether the high quality of medical benefits enjoyed by Hawaii's workers were in jeopardy. In 1994, the Prepaid Health Care Act was amended with Act 99 repealing the statute's termination provision. However, the repeal was made subject to a requisite amendment of the federal Employee Retirement Income Security Act of 1974 (ERISA) that would allow for the "substantive" change to the Hawaii law. There has been no federal legislation to amend ERISA.

III. SENATE BILL

The Department supports the intent to maintain the integrity of the Prepaid Health Care Act. Congressional review of the federal legislation appears imminent with further amendment very possible, and such amendment may not preserve the level of high quality health care currently enjoyed by Hawaii's citizens.

The Department notes, however, that substantive changes to the Hawaii Prepaid Health Care Act would be pre-empted by the federal Employee Retirement Income Security Act (ERISA).