

**SB 775**



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

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February 24, 2011

To: The Honorable David Ige, Chair  
and Members of the Senate Committee on Ways and Means (WAM)

Date: Thursday, February 24, 2011

Time: 9:00 a.m.

Place: Conference Room 211, State Capitol

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

**S.B. No. 775 SD1 Relating to Construction Sites**

**I. OVERVIEW OF PROPOSED LEGISLATION**

Senate Bill 775 proposes to: continue the work of the Construction Site Inspection Task Force ("Task Force"), established pursuant to Act 121, Session Laws of Hawaii 2010, for an additional year in order to support the findings of the small business working group. SD1 narrows the purpose of the Task Force to focus on issues of deterring unlicensed activity and enforcing existing requirements for licensure.

**II. CURRENT LAW**

Not specifically applicable.

**III. SENATE BILL**

The Department of Labor and Industrial Relations (DLIR) supports the original intent of Act 121, Regular Session 2010. Legitimate business owners who pay their fair share of taxes and comply with all laws are being penalized by the "underground economy" of unlicensed businesses -- those who do not pay their fair share of taxes; who fail to provide necessary unemployment, workers' compensation, and other required insurance for workers; and those who ignore workplace safety laws. Concern is also apparent for Hawaii's workers who lose their jobs or are paid lower wages due to competition from undocumented workers.

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The department requests the committee consider amending the measure by deleting the participation of the Disability Compensation Division, the Unemployment Insurance Division and the Occupational Safety and Health Division of the DLIR in the Task Force. The amended bill narrows the purpose of the Task Force to focus on unlicensed activity and enforcing existing requirements for licensure. DLIR will continue to cooperate with DCCA and other agencies with regards to unlicensed contractors within the current limits of the law.



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REGULATED INDUSTRIES COMPLAINTS OFFICE

TO THE SENATE COMMITTEE ON  
WAYS AND MEANS

TWENTY-SIXTH STATE LEGISLATURE  
REGULAR SESSION, 2011

THURSDAY, FEBRUARY 24, 2011  
9:00 A.M.

WRITTEN TESTIMONY ONLY  
ON SENATE BILL NO. 775 S.D.1  
RELATING TO CONSTRUCTION SITES

TO THE HONORABLE DAVID Y. IGE, CHAIR,  
AND TO THE HONORABLE MICHELLE KIDANI, VICE CHAIR,  
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify on Senate Bill No. 775 S.D.1, Relating To Construction Sites. My name is Jo Ann Uchida of the Department's Regulated Industries Complaints Office ("RICO"). RICO does not support the bill in its current form.

Senate Bill No. 775 S.D.1 extends the Construction Site Inspection Task Force ("CSITF"), created by Act 121, Session Laws of Hawaii 2010, for one year;

narrows the focus of the CSITF to deter unlicensed contracting activities; adds three industry representatives to the CSITF; adds a \$10 surcharge for each application and renewal to offset the costs of the CSITF; requires that all proceedings of the CSITF are public and subject to Chapter 92F, Hawaii Revised Statutes ("HRS"); exempts certain CSITF discussions from the requirements of Chapter 92, HRS; requires a final CSITF report; and appropriates monies to fund the work of the CSITF.

The Department, pursuant to Act 121, convened the CSITF last year. The Act had an effective date of July 1, 2010, and required a report to be submitted to the Legislature no later than 60 days prior to the 2011 regular session. The report was submitted to the legislature on November 24, 2010. A copy of the report is available electronically at [http://hawaii.gov/dcca/reports/dcca\\_reports](http://hawaii.gov/dcca/reports/dcca_reports).

The report included nine (9) findings and ten (10) recommendations, and the Department has begun implementation on some of its recommendations. For example, CSITF members now have a shared contact list that has already proved useful in a recent case involving an unlicensed contractor who has a large outstanding tax obligation.

The Department does not support the Senate Draft 1 for the following reasons:

1. The Senate Draft 1 continues the CSITF for another year, limits the focus of the CSITF to unlicensed activity, adds a reference to criminal sanctions, adds three industry members, but does not otherwise change the function of the CSITF. Given the considerable expenditure of government

time and resources from four different State departments, as well as industry participation, that would be required to implement this bill, and given that a CSITF report has already been completed, the Department believes that this Committee should consider alternatives to a continuation of the CSITF, including, but not limited, to encouraging stakeholders to develop strategies to bring unlicensed, cash-based contractors into compliance with all relevant state laws. In particular, the Department supports efforts to strengthen criminal law enforcement where civil enforcement and the assessment of fines are ineffective in deterring unlicensed contracting activity.

2. If this Committee is inclined to retain a task force, the Department suggests that a new task force be created instead of continuing the CSITF. This will allow CSITF members to work on the 2010 CSITF initiatives independently, while a newly created task force can work on its separate tasks.

3. The bill in section 1 misstates the findings and recommendations of the CSITF. For purposes of clarification, an excerpt of the CSITF report that contains the CSITF findings and recommendations is attached to this testimony.

4. The bill in sections 2 and 3 recommends the assessment of a \$10 fee on all new contractor license applications and on all renewals. There are currently 10,787 active contractor licensees, which would translate to \$107,870 biennially or around \$54,000 per year. The bill provides that the revenue would be used to offset costs incurred by the CSITF created

pursuant to Act 121. The Department does not believe that this expenditure of funds for this narrow purpose would be necessary or appropriate.

5. Also, Senate Bill No. 775 S.D.1 provides that CSITF proceedings are public subject to Chapter 92F, HRS. It is unclear what this means since Chapter 92F, HRS, concerns the disclosure of government records.

6. In addition, the bill requires the CSITF to submit a final report to the Legislature sixty days prior to the 2012 legislative session. Given that the bill, if enacted, is effective on July 1, 2011, and to allow for additional time, RICO requests that any report be due twenty days prior to the 2012 legislative session.

Thank you for this opportunity to testify on Senate Bill No. 775 S.D.1. I will be happy to answer any questions that the members of the Committee may have.

**ATTACHMENT**  
**Excerpts of Findings and Recommendations**  
**CSITF Report**

situations will necessarily vary, the enforcement agencies could develop a shared contact list to facilitate prompt discussion of relevant enforcement issues.

Members were particularly interested in the extent to which joint interviews of witnesses could be conducted, in order to ensure that witnesses are taking consistent positions with all enforcement agencies. Collaboration prior to any site inspection would be critical in determining which agencies had jurisdiction, what each agency's role would be, and which agencies could participate in a site inspection.

## **V. SPECIFIC FINDINGS**

### **1. Underground economy enforcement should model California EEEC.**

Act 121 established the CSITF to analyze the feasibility and potential complications of implementing a task force to investigate and inspect construction sites for unlicensed contractors, undocumented workers, and workplace safety violations. Act 121 also particularly emphasized a concern over Hawaii's growing underground economy.

If the focus of the task force is to combat the underground economy, California's EEEC model should be considered, provided that sufficient resources are allocated to implement the initiative. Subsuming underground economy enforcement into existing programs would be problematic: 1) due to the current shortage of agency staff and budget; 2) because existing programs must address violations by both underground and established entities; and 3) because prosecutions based on cash transactions will be time-consuming and require specialized training and expertise. Also, to the extent underground economy issues, such as undocumented workers, extend across different industries, the jurisdiction of the task force should be more general in scope, rather than focused only on the contractor industry, in a manner similar to California's EEEC.

In addition, while state agencies can investigate reports of undocumented workers in connection with possible state law violations, the cooperation of and partnerships with federal agencies, such as ICE, would be critical to any strategic effort to address undocumented workers.

### **2. Unlicensed contracting, undocumented workers, and worker safety violations occur at one construction site infrequently.**

The CSITF discussed each member's core responsibilities and how those responsibilities related to the issues of unlicensed contracting, undocumented workers, and worker safety. The CSITF found that the instances in which violations involving unlicensed contracting, undocumented workers, and workplace safety all take place at one jobsite do not occur



regularly and that the creation of a specific task force to address this combination of violations is not necessary.

3. Advantages/Disadvantages of Information Sharing and Ways to Improve Interagency Coordination.

CSITF members discussed the merits of having UID, HIOSH, DCD, and DOTax report to RICO labor and tax law violations that may have been committed by contractor licensees, in a manner similar to the California model. CSITF members raised concerns that referrals and aggressive prosecution (i.e., suspension) of contractor licensees for a variety of state law violations in a manner similar to California would disproportionately impact contractor licensees without addressing concerns regarding "underground economy" contractors or unlicensed contractors.

While there is no question that licensees operating in violation of state law should be prosecuted, the paradoxical result of suspending contractor licenses for all types of state law violations is that the number of unlicensed contractors will be increased rather than reduced. On the other hand, licensees may be willing to pay delinquent fines, penalties, and taxes to the state in order to preserve their licenses, which may increase revenues to the State.

While there appear to be disadvantages to certain types of case referrals, there also are obvious advantages, from an enforcement perspective, in information sharing and collaboration. Act 121 has been the catalyst for discussions among state and county enforcement agencies. For instance, RICO invited CSITF members to its annual staff training in September 2010. CSITF members from DLIR, DOTax, and DPP-HNL attended and spoke about their agency work and functions. These discussions have led to a better understanding of each agency's jurisdiction and enforcement authority and have opened avenues for future collaboration.

As another example of the benefits of agency collaboration, information about who a contractor lists as an employee for DCD, unemployment, and withholding purposes could assist RICO in distinguishing licensee employees from unlicensed contractors. Conversely, detailed information about a business' license structure may assist UID, HIOSH, DCD, and DOTax in identifying bonafide employees versus independent contractors for purposes of compliance with worker safety, labor, and tax laws.

CSITF members support the creation and maintenance of a shared contact list to facilitate proactive, strategic discussions on an ad hoc basis. In addition, because staff turnover and/or reassignment is inevitable, CSITF recommends that enforcement agencies adopt policies that support sustained interaction, cross-training, networking, and information sharing. Networking opportunities can be implemented with little cost to the participating agencies and could be the foundation for future collaborative enforcement activity.

CSITF members discussed the possibility of a shared automated information database system with common case numbers and a centralized debt collection system. Because agencies such as UID, HIOSH, and DOTax are governed by both state and federal law, and are subject to

specific confidentiality requirements, the challenges in implementing such a system appear to outweigh the benefits at this time. CSITF members did, however, examine the benefits of receiving more detailed building permit information from the county building departments, including possible programming enhancements that would provide agencies such as RICO with more detailed information about contractors and subcontractors.

4. Ways to pool, focus, and target the enforcement resources of the participating agencies to deter tax evasion, unlicensed contractor activity, and workplace safety violations and to maximize recovery of penalties for violations of laws and rules. Ways to reduce enforcement costs by eliminating duplicative audits and investigations.

As noted above, most of the CSITF member agencies are governed by certain statutory confidentiality provisions that restrict or prevent sharing of information with other agencies. RICO currently receives some limited information from UID based upon an MOU, however, it appears that the MOU should be revised to allow for a broader range of information and RICO will be preparing and proposing MOU revisions.

The DPP-HNL has attempted to coordinate services with other state agencies, most recently with DOTax. DOTax and UID send information to the CLB, which forwards the information to RICO, as necessary. These existing channels of information sharing should be maintained and expanded to the extent feasible.

HIOSH is prohibited by Haw. Rev. Stat. 396-14 from disclosing records to civil litigants and by Haw. Rev. Stat. 396-8(f) from disclosing the names of complainants and witnesses. HIOSH does not disclose copies of its investigation records, even to law enforcement agencies per Haw. Rev. Stat. 92F-19. However, when the requirements of Haw. Rev. Stat. 396-14 and Haw. Rev. Stat. 396-8(f) are met and a final order is entered, HIOSH does disclose redacted copies of its records pursuant to Chapter 92F, Hawaii Revised Statutes.

CSITF members will be exploring the feasibility of providing for greater sharing of investigative information as part of the group's collective law enforcement responsibilities. Detailed information about particular events or workplace incidents that can be shared with other agencies will assist those agencies in preparing stronger cases against violators and in obtaining higher fines, penalties, and other sanctions.

Several CSITF members expressed interest in conducting joint witness interviews, to the extent feasible, in cases involving multi-agency jurisdiction. Joint interviews could deter witnesses from fashioning their statements to suit the particular agency, a witness would have to be located once rather than several times, and interviewers would have the benefit of listening to the questions and answers concerning related, but separate enforcement matters.

5. Scope of potential cases of violations and noncompliance with tax laws that could be identified, audited, investigated, prosecuted through civil action, or referred for criminal prosecution.

As noted above, DOTax Special Enforcement Unit investigates persons or entities that may be in violation of state tax laws, particularly with regard to Hawaii's "underground economy." However, DOTax is governed by strict confidentiality laws that preclude it from sharing information about its ongoing investigations. DOTax CSITF members encouraged tips from other enforcement agencies regarding unreported or underreported income.

6. Actions and authority needed by the task force to undertake and publicize its activities; potential procedures, including but not limited to an advertised telephone hotline for soliciting from the public referrals of suspected violations.

CSITF members recognize the importance of consumer and industry education regarding enforcement initiatives as a deterrent to violators and to prevent consumers from being victimized. Such initiatives to educate consumers and industry should be included in any comprehensive enforcement proposal. However, given the current budget and staffing restrictions in place, funding publicity or educational initiatives is not a priority.

7. Recommendations for any legislation needed to accomplish the goals and to implement the recommendations of the CSITF, e.g.: eliminating barriers to interagency information sharing; improving the ability of the participating agencies to audit, investigate, and prosecute violations; deterring violations and improving voluntary compliance; establishing centralized, automated data collection services for the participating agencies; and emphasizing civil penalties instead of criminal ones whenever possible.

The CSITF discussed the need for legislation in the context of information sharing, improving agency efforts to prosecute and deter violators, establishing centralized data collection services for members, and civil and criminal penalties. As noted above, CSITF members recognize the value in sharing information and support agency collaboration on an ad hoc basis. However, given the existing comprehensive state and federal statutory provisions, including confidentiality provisions, that currently govern CSITF member agencies, the CSITF found that additional legislation was premature at the present time and could unintentionally compromise core functions.

The CSITF also found that 1) civil enforcement alone is not sufficient to deter or control unlicensed activity; and 2) extensive discussions with criminal law enforcement agencies are necessary before any legislation to strengthen criminal penalties can be proposed.

In California, enforcement of unlicensed contracting is addressed primarily through the use of criminal laws. Under California law, unlicensed contracting is a misdemeanor. A person who commits a second violation receives mandatory jail time. Some CSLB investigators are peace officers or have authority to issue summons to appear.

In Hawaii, unlicensed contracting is generally prosecuted through the civil courts and results in an injunction and a fine. It is also a misdemeanor, but criminal law enforcement authorities are reluctant to prosecute unless the crime includes a more serious additional violation, such as theft. As a result, few criminal prosecutions occur.

As an example of the need for both civil and criminal enforcement measures, RICO cited and obtained numerous civil judgments against Tevita Ungounga for unlicensed contracting. Mr. Ungounga was also convicted in an action by the Department of the Attorney General for failure to file tax returns and is currently facing additional charges. In October 2010, Mr. Ungounga was held in contempt for continuing to engage in unlicensed activity while enjoined from doing so. For chronic violators such as Mr. Ungounga, civil judgments and injunctions do not sufficiently deter unlicensed activity.

8. The need for the authority to enter at reasonable times and without prior notice, any property, public or private, for the purpose of investigating and inspecting the condition or operation of a construction site.

Most CSITF members reported that court orders were used in those instances in which access to private property was refused. For instance, DPP-HNL investigations usually do not occur during regular work hours and permission to access a building site is required, in the absence of a search warrant. CSITF members acknowledged the difficulty and time involved in obtaining a court order, but did not consider the process to be problematic. RICO noted that if additional emphasis is placed on criminal prosecution, the feasibility of access to jobsites without a court order should be discussed with criminal law enforcement authorities.

9. Funding streams and estimated expenditures needed in order to fully implement CSITF recommendations.

CSITF members reported numerous staff shortages and budgetary constraints in meeting day-to-day agency responsibilities. Consumer education budgets are reduced or non-existent and most CSITF member agencies utilize cost-effective methods, such as their respective websites, to promote services and educate consumers. Given these personnel and fiscal limitations, existing funding sources for joint enforcement initiatives are not available. As a result, CSITF members support planned, strategic collaboration on an ad hoc basis, including joint interviews of witnesses, as an economical joint enforcement initiative.

## **VI. RECOMMENDATIONS**

1. While a task force may be appropriate to address the broader issue of the "underground economy," the creation of a task force that would specifically address unlicensed contracting activity, undocumented workers, and worker safety violations is not necessary at this time because collaborative enforcement can occur on an as-needed basis without the creation of a special task force. The instances in which all three types of violations occur at one jobsite do not occur with enough frequency to warrant the creation of a dedicated task force and will divert resources from the core functions of the participating agencies. However, more frequent information sharing and proactive, strategic discussion of problematic jobsites can and should occur.

2. The CSITF recommends the creation and maintenance of a shared contact list to facilitate strategic discussions on an ad hoc basis. The CSITF also recommends that enforcement agencies adopt policies that support sustained interaction, cross-training,

networking, and information sharing. For instance, RICO invited CSITF members to its annual staff training in September 2010, where CSITF members from DLIR, DOTax, and DPP-HNL spoke about their agency work and functions. At a minimum, opportunities for ongoing inter-agency discussion and collaboration should be encouraged.

3. CSITF member agencies are governed by both state and federal law and are subject to specific confidentiality restrictions. As a result, implementing a shared automated information database system with common case numbers and a centralized debt collection system is not feasible at the present time. Confidentiality restrictions in applicable state and federal laws should continue to be examined and an MOU that facilitates the exchange of information should be pursued, where appropriate.

4. To the extent feasible, the CSITF recommends joint witness interviews in cases involving multi-agency jurisdiction.

5. Given existing state and federal statutory provisions that govern CSITF member agencies, any new legislation is premature at the present time. Legislation may be necessary in the future if interagency MOUs do not result in meaningful information sharing.

6. Although Act 121 sought the use of civil sanctions in lieu of criminal sanctions wherever possible, the CSITF recommends a combination of civil and criminal enforcement measures to address unlicensed contracting violations. Civil enforcement alone is not sufficient to deter or control unlicensed activity. The CSITF also recommends more extensive discussions between affected CSITF member agencies and criminal law enforcement agencies to bolster criminal enforcement efforts.

7. Issues and problems relating to PEOs/employee leasing in the contracting context should be monitored and appropriate restraints should be implemented to limit the use of employee leasing by owner-builders.

8. The CSITF recommends that agencies with an interest in specific building permit information initiate discussions with DPP-HNL on possible database enhancements to facilitate receipt of this information. Until database enhancements can be implemented, the CSITF recommends continued discussions with the various county planning departments responsible for permitting to obtain information as needed.

9. The CSITF recommends continued discussions between RICO and CSLB to obtain more detailed information about site inspections conducted by that agency.

10. If further examination of joint enforcement is contemplated by the Legislature, a discussion forum that is not governed by Chapter 92, Hawaii Revised Statutes, should be considered. Discussions relating to law enforcement targets and techniques were difficult to conduct in a public forum.