SB2939

LATE TESTIMONY

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February 10, 2014

To: The Honorable Clayton Hee, Chair
The Honorable Maile S.L. Shimabukuro, Vice Chair
and Members of the House Committee on Judiciary & Labor

Date: Tuesday, February 11, 2014
Time: 10:30 a.m.
Place: Conference Room 016, State Capitol

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

Re: S.B. No. 2939, Relating to Employment Practices

I. DISCUSSION

S.B. 2939 proposes to delete the provision relating to the need to have a collective bargaining agreement for section 378-32(b) making it unlawful for employers and labor organizations to bar, discharge from employment, withhold pay from, or demote an employee solely because an employee used accrued and available sick leave provided by the employer. This provision would now apply to any employer who has 100 or more employees.

The DLIR strongly supports the proposal that remedies a recent court ruling.

II. CURRENT LAW

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. COMMENTS ON THE SENATE BILL

Hawaii Pacific Health, et. al. v. Dwight Takamine, Director of the Department of Labor and Industrial Relations was a declaratory action initiated by Plaintiffs seeking orders to declare that Hawaii Revised Statutes (HRS) § 378-32(b) is preempted by the National Labor Relations Act (NLRA) and is unconstitutional under the Equal Protection Clause.

The action was taken in response to Act 118 (SLH, 2011) that made it unlawful for any employer or labor organization with more than one hundred 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.

The court concluded that HRS § 378-32(b) was preempted by the NLRA. There are two different types of preemption under the NLRA: Garmon preemption and Machinists preemption. This case involved the Machinists preemption which forbids both the National Labor Relations Board and states from regulating conduct that Congress intended to be unregulated and left to he control of economic forces.

There is an exception to the Machinists preemption: States may enact laws involving minimum state labor standards. Minimum state labor standards include laws regulating child labor, minimum wage, and occupational safety and health. A minimum state labor standard 1) affects union and nonunion employees equally; and 2) neither encourages or discourages the collective bargaining process that is the subject of the NLRA.

The court concluded that although the statute draws no express distinction between unionized and nonunionized employees working for the same employer, it clearly applied only to employees working for employers that are parties to collective bargaining agreements. Thus HRS § 378-32(b) was not a minimum state labor standard because it does not affect union and nonunion employees equally.

By restricting the law to only employers with collective bargaining agreements, the law impermissibly favored unionized employees over employers. In turn, this favoring impermissibly interfered with collective bargaining under the NLRA.

The court also concluded that HRS § 378-32(b) failed the rational basis test and therefore violated Plaintiffs' equal protection rights. The court found that there was no legitimate government purpose in applying the statute to only employers with collective bargaining agreements.

The court permanently enjoined the enforcement of HRS § 378-32(b).

The proposal, if enacted, remedies the issue without violating the preemption of the NLRA or the equal protection rights as having a threshold number in labor law has numerous precedents.

For this reason, the department supports the proposal.

The Twenty-Seventh Legislature
Regular Session of 2014

THE SENATE
Committee on Judiciary and Labor
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair
State Capitol, Conference Room 016
Tuesday, February 11, 2014; 10:30 a.m.

STATEMENT OF THE ILWU LOCAL 142 ON S.B. 2939
RELATING TO EMPLOYMENT PRACTICES

The ILWU Local 142 **supports** S.B. 2939, which repeals the condition that employers have a collective bargaining agreement with their employees in order for HRS Section 378-32(b) to apply.

Two years ago, a bill was enacted making it "an unlawful practice for any employer or labor organization to bar or discharge from employment, withhold pay from, or demote an employee because the employee uses accrued and available sick leave." After the bill was passed and signed into law, several employers brought a lawsuit in federal court challenging the law. In her decision, Federal Judge Susan Oki Mollway permanently enjoined the enforcement of Section 378-32(b) because of preemption by the National Labor Relations Act and violation of the Equal Protection Clause of the U.S. Constitution. The basis for her decision was that Section 378-32(b) singled out for application of the new law only employers with 100 or more employees and a collective bargaining agreement.

S.B. 2939 seeks to remedy the condition that Judge Mollway used to render her decision. By removing language specifying that Section 378-32(b) only applies to employees under a collective bargaining agreement with employers who employ 100 or more employees, the objections that Judge Mollway referenced will have been addressed.

The bill itself in 2011 addressed the issue of discrimination against employees who were subject to discipline for use of accrued and available sick leave. Through so-called "no-fault" attendance policies, employers would tally absences as "incidents" and, irrespective of the reason for the absence (i.e., "no-fault"), apply progressive discipline up to and including discharge. An employee absent with a legitimate, verifiable illness could be suspended or discharged if the number of incidents met the prescribed threshold.

These "no-fault" attendance policies effectively penalize workers for using sick leave or TDI benefits that are required by law. While we understand employers' concern that sick leave may be abused if no mechanism exists to curb the abuse, no-fault attendance policies are counter-intuitive and not the answer.

The ILWU urges passage of S.B. 2939 to apply Section 378-32(b) to all employers with 100 or more employees. Thank you for considering our testimony.

SB 2939

RELATING TO EMPLOYMENT PRACTICES

HAWAIIAN TELCOM

February 11, 2014

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

Hawaiian Telcom is opposed to SB 2939 - "RELATING TO EMPLOYMENT PRACTICES."

The purpose of this bill is to prohibit an employer from discharging, withholding pay from, or demoting an employee because the employee uses accrued and available sick leave. While well intended, passage of this measure will severely hamper Hawaiian Telcom's ability to curb chronic sick leave abuse and fulfill our regulatory staffing obligations.

For the record, our company is an industry leader in providing a generous package of employee sick leave (26 weeks), disability, and family leave benefits. If an employee is legitimately sick, we do our best to ensure he/she has the time and financial means to recuperate before returning back to work. Of course, if an employee is suspected of sick leave abuse our company also has a duty to our customers as well as to the Public Utilities Commission to investigate and take appropriate steps to limit unrestricted absenteeism.

Under HRS Chapter 269, Hawaiian Telcom is required to maintain adequate staffing levels in order to meet specific customer and service quality benchmarks or face administrative fines and/or other penalties. We encourage the committee to support a framework that is both fair to employees while at the same time allows our company to

fulfill its regulatory obligations and provide the best customer experience that our customers expect and deserve.

For all of the reasons set forth above, Hawaiian Telcom opposes SB 2939 and respectfully requests this measure be deferred indefinitely.

Thank you for the opportunity to provide testimony.

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc: geesey@hawaii.edu
Subject: Submitted testimony for SB2939 on Feb 11, 2014 10:30AM
Date: Monday, February 10, 2014 8:18:01 PM

SB2939
Submitted on: 2/10/2014
Testimony for JDL on Feb 11, 2014 10:30AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Yvonne Geesey	Individual	Comments Only	No

Comments: Aloha Committee Members; Please consider including advanced practice registered nurses as persons able to verify that employees and/or union members were sick when they called in ill. Not certain of the intent of this law but it results in many workers missing work and using our healthcare system unnecessarily! They are well and come in asking us to certify they were ill after the fact or coming into the healthcare system because they need a note--not because they need health care. In many instances the best thing would be to stay home and get well. Abolishing this provision would be advisable. mahalo! Yvonne Geesey, JD Advanced Practice Registered Nurse

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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