

# HB2539 HD2

Measure Title: RELATING TO INSURANCE.

Report Title: Health Savings Account Program; Insurance

Description: Authorizes the establishment of health savings accounts in conjunction with group accident and health or sickness insurance policies, group hospital and medical service plan contracts, and health maintenance organization plans in the State. (HB2539 HD2)

Companion:

Package: None

Current Referral: CPH, WAM

Introducer(s): MCKELVEY, Souki



DAVID Y. IGE  
GOVERNOR  
SHAN S. TSUTSUI  
LT. GOVERNOR

STATE OF HAWAII  
OFFICE OF THE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
335 MERCHANT STREET, ROOM 310  
P.O. Box 541  
HONOLULU, HAWAII 96809  
Phone Number: 586-2850  
Fax Number: 586-2856  
[www.hawaii.gov/dcca](http://www.hawaii.gov/dcca)

CATHERINE P. AWAKUNI COLÓN  
DIRECTOR  
JO ANN M. UCHIDA TAKEUCHI  
DEPUTY DIRECTOR

TO THE SENATE COMMITTEE ON  
COMMERCE, CONSUMER PROTECTION, AND HEALTH

TWENTY-EIGHTH LEGISLATURE  
Regular Session of 2016

Wednesday, March 16, 2016  
9:00 a.m.

**TESTIMONY ON HOUSE BILL NO. 2539, H.D. 2 – RELATING TO INSURANCE.**

TO THE HONORABLE ROSALYN H. BAKER, 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 purpose of this bill is to establish optional health savings account programs for employees who are part of, or will be part of, their respective employers’ group policies. The Department submits the following comments.

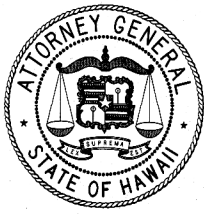
Currently, high deductible health insurance policies associated with tax-preferred savings accounts are available in the market. These accounts are not all the same and vary by their purposes and how they’re set up but essentially operate in the same manner: by having moneys in savings accounts available to policyholders to pay for their out-of-pocket health care costs.

The Department supports the intent of having employers offering their employees opportunities to choose health savings account programs as alternatives to being part of group policies. We understand that employees’ lifestyles may dictate better matches with health savings account programs rather than enrolling in group plans and the

Department encourages policyholders becoming better familiarized with their healthcare needs and coverages.

We note that this bill requires employers contribute the entire annual amount to employees' health savings accounts prior to the first day of employees being covered and that unused funds in the accounts become the property of the respective employees at the end of the taxable year. Because of the fluidity of members in Hawai'i's workforce, situations may arise where employees' health savings accounts are filled at the beginning by employers only to see these same employees move on to other work opportunities before the year's conclusion. This potential situation, of employers not realizing the full value of their expended costs, may cause employers to rethink their offering of these health savings accounts to their employees.

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



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-EIGHTH LEGISLATURE, 2016**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 2539, H.D. 2, RELATING TO INSURANCE.

**BEFORE THE:**

SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

**DATE:** Wednesday, March 16, 2016

**TIME:** 9:00 a.m.

**LOCATION:** State Capitol, Room 229

**TESTIFIER(S):** Douglas S. Chin, Attorney General, or  
Daniel K. Jacob, Deputy Attorney General, or  
Bryan C. Yee, Deputy Attorney General

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Chair Baker and Members of the Committee:

The Department of the Attorney General provides comments regarding legal concerns that this bill might be preempted by the federal Employee Retirement Income Security Act (ERISA).

The purpose of this bill is to authorize employers to establish health savings accounts in conjunction with group accident and health or sickness insurance policies, group hospital and medical service plan contracts, and Health Maintenance Organization plans.

We believe this bill might be subject to an ERISA preemption challenge. ERISA is a comprehensive federal legislative scheme that regulates the administration of private employee benefit and pension plans and establishes standards relating to the administration of these plans. In enacting ERISA, Congress included a sweeping preemption provision that provides in relevant part, 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).<sup>1</sup> This bill relates to an employee benefit

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<sup>1</sup> 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(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

plan because it mandates that, when an employer offers health care coverage with a health savings account, on the election of the employee, the employer shall administer the plan in specific manners, including but not limited to: requiring employers to contribute annual amounts, providing declarations of understanding from the insurer to the employees, and immediately removing any employees and dependents from the program if the employer knows the program is not in compliance with the law. Accordingly, this bill's attempt to regulate employer provided benefit plans likely subjects it to ERISA's preemption.

Although exemptions from ERISA's expansive preemption exist, we cannot conclude that this bill falls within any of them. Of these exemptions, the insurance savings clause is most noteworthy for the purpose of this discussion. The insurance savings clause found within ERISA permits states to regulate the business of insurance, regardless of its direct or indirect effect on employer benefit plans. 29 U.S.C. § 1144(b)(2)(A). In order to be deemed a law that regulates insurance and be saved from preemption, the law "must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. Second, the state law must substantially affect the risk pooling arrangement between the insurer and the insured." *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 342 (2003). The proposals in this bill, although embedded in the insurance code, are not specifically directed towards entities engaged in insurance. As discussed above, this bill, in multiple sections, mandates that an employer administer an employee benefit plan in specific manners. Accordingly, this bill is not specifically directed at entities engaged in insurance and fails the first requirement. Therefore, it may not be saved from ERISA preemption under the insurance savings clause.

Additionally, although Hawaii's Prepaid Health Care Act (PHCA) relates to an employee benefit plan, it is not preempted because Congress amended ERISA to exempt Hawaii's PHCA from preemption. The exemption, however, is narrow and applies only to the PHCA as it existed on September 2, 1974, and not to amendments to the PHCA "to the extent it provides for more than the effective administration" of the PHCA. 29 U.S.C.A. § 1144(b)(5)(B)(ii).<sup>2</sup> This bill may

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<sup>2</sup> 29 U.S.C.A. § 1144(b)(5)(B)(ii) provides as follows:

Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section -

fall outside of that exemption because it creates an alternative to comply with Hawaii's PHCA, and, therefore, appears to provide for more than the effective administration of the PHCA.

For the foregoing reasons we respectfully request that this bill be held.

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(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.



An Independent Licensee of the Blue Cross and Blue Shield Association

March 16, 2016

The Honorable Rosalyn H. Baker, Chair  
The Honorable Michelle N. Kidani, Vice Chair  
Senate Committee on Commerce, Consumer Protection, and Health

Re: HB 2539, HD2 – Relating to Insurance

Dear Chair Baker, Vice Chair Kidani, and Members of the Committee:

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify on HB 2539, HD2, which establishes health savings accounts in conjunction with health insurance plans. HMSA supports the intent of this Bill, but we have a concern with the Bill as drafted and offer an amendment.

Health savings accounts (HSAs) are authorized under federal law and afford employees and their families, who also have a high-deductible health plan, a tax-advantaged medical savings account. The HSA is not subject to federal income tax at the time of deposit, and it is portable – unspent balances continue to accumulate over time and follow the employee, should the employee change jobs. The monies in an HSA only may be used for qualified medical expenses.

HSAs offer a significant incentive for employees to save for their own healthcare care needs and the needs of their families.

While HMSA is appreciative and supportive of the concept of an HSA, we are concerned that HB 2539, HD2, provides for the health plan to serve as the primary custodian or trustee of the HSA. We believe that responsibility more appropriately would lie with a financial institution, selected by the employer, that is more accustomed to managing trust accounts. Such an institution more readily and expeditiously could accommodate the trust account provisions of this legislation.

The Committee may wish to consider the following amendment to the similar provisions appearing in Sections 2 and 3 of HB 259, HD2, as follows:

*(b) An employer subject to chapter 393 may offer a health savings account program to employees in addition to the group accident and health or sickness insurance policy provided by an insurer. An employer offering a health savings account program shall be subject to the following limitations. The employer shall:*

*(1) Provide the program to employees only as an alternative option to a group accident and health or sickness insurance policy, in which both the program and the group accident and health or sickness insurance policy provide aggregate benefits that are determined pursuant to chapter 393 to be equivalent and meet the qualifications in either section 393-7(a) or (b);*

*(2) Establish a health savings account in a state or federally chartered financial institution for an employee who wishes to participate in the health savings account program, and [Make] make an annual employer contribution to the health savings*



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account of an employee enrolled in the program, and upon enrollment of a new employee that enrolls in the program;...

Thank you for allowing us to testify on HB 2539, HD2, and your consideration of our suggested amendment is appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "JD", with a long horizontal flourish extending to the right.

Jennifer Diesman  
Vice President, Government Relations



Testimony of  
John M. Kirimitsu  
Legal and Government Relations Consultant

Before:  
Senate Committee on Commerce, Consumer Protection and Health  
The Honorable Rosalyn H. Baker, Chair  
The Honorable Michelle N. Kidani, Vice Chair

March 16, 2016  
9:00 am  
Conference Room 229

**Re: HB 2539 HD2 Relating to Insurance**

Chair, Vice Chair, and committee members, thank you for this opportunity to provide testimony on HB 2539 HD2 relating to the establishment of health savings accounts (“HSA”) in conjunction with high deductible health plans (“HDHP”).

**Kaiser Permanente Hawaii supports the intent of this bill but would like to offer an amendment.**

Kaiser Permanente supports consumer choice through the establishment of HSAs, and recognizes the advantages of allowing employers to choose a lower premium (higher deductible) health plan, while allowing consumers to choose how to spend his or her health care expenses (presumably also making consumers more responsible for health care choices by funding their own health care expenses).

To get the benefits of a HSA, the law requires that the savings account be combined with a qualified HDHP. Although an HSA works in conjunction with a HDHP, both are recognized as separate components under the law.

Distinguishing the two separate components, an HSA is the financial component (essentially a bank account that allows you to save and pay for eligible health care expenses) sponsored by the employer group. Meanwhile, the HDHP is the insurance component which requires health insurers to offer a qualified high deductible plan to use with an HSA. This high deductible health plan is designed to offer a lower monthly premium in turn for more shared health care costs by the member. In short, you must be enrolled in an HDHP to have an HSA.

Accordingly, health insurers are not involved in any aspect of the HSA, which is entirely separate from the insurance component. The only service that health insurers provide is offering the HDHP, nothing more. Therefore, any HSA program information required under this bill should be the responsibility of the employer group, who sponsors the HSA plan and is privy to its information, and not the health insurers. Therefore, Kaiser Permanente requests the following amendment:

On Page 4, paragraph (c), lines 7-19, remove the “insurer” reference and instead replace with “employer”. This section should be amended as follows:

- 7           (c)     Every ~~insurer~~ [employer] that offers, ~~sells, or renews a group~~  
8 ~~—accident and health or sickness insurance policy with~~ an option  
9     for a health savings account program shall:
- 10           (1)    Include the employer limitations in this section in  
11                     any policy, contract, certificate, or agreement,  
12                     regardless of form; and
- 13           (2)    Encourage informed decisions by providing ~~employers~~ [employees] a  
14                     one-page, double-sided declaration of understanding,  
15                     to be included with any program application that  
16                     explains in plain and simple language certain terms of  
17                     the program, including covered services, applicable  
18                     deductibles, claims processing, and the effective use  
19                     of the program for favorable tax treatment.

On Page 9, paragraph (c), lines 13-21, continued to Page 10, lines 1-4, remove the “mutual benefit society” reference and replace with “employer”. This section should be amended as follows:

- 13 (c) Every ~~mutual benefit society~~ [employer]  
14 ~~that offers -sells, or~~  
15 ~~renews a group hospital and medical service plan contract with~~  
16 an option for a health savings account program shall:
- 17 (1) Include the employer limitations in this section in  
18 any policy, contract, certificate, or agreement,  
19 regardless of form; and
- 20 (2) Encourage informed decisions by providing ~~employers~~ [employees] a  
21 one-page, double-sided declaration of understanding,  
22 to be included with any program application that  
23 explains in plain and simple language certain terms of  
24 the program, including covered services, applicable  
25 deductibles, claims processing, and the effective use  
26 of the program for favorable tax treatment.

Lastly, Kaiser Permanente requests an effective date of January 1, 2017 to allow health insurers adequate time to implement the HDHP program with its employer groups and also seek pre-approval from the Prepaid Healthcare Council for this new benefit plan option.

Thank you for your consideration.

**HB 2539 HD2  
RELATING TO INSURANCE**

**PAUL T. OSHIRO  
MANAGER – GOVERNMENT RELATIONS  
ALEXANDER & BALDWIN, INC.**

**MARCH 16, 2016**

Chair Baker and Members of the Senate Committee on Commerce, Consumer Protection & Health:

I am Paul Oshiro, testifying on behalf of Alexander & Baldwin (A&B) on HB 2539 HD2, “A BILL FOR AN ACT RELATING TO INSURANCE.” We support this bill.

The purpose of this bill is to facilitate the establishment of health savings account programs in Hawaii.

We understand that Health Savings Account Programs consist of high deductible health plans with a Health Savings Account approved pursuant to HRS Chapter 393. These programs generally allow employers and employees to fund a Health Savings Account to finance current or future out of pocket health costs. Contributions to Health Savings Accounts are tax advantaged, with all distributions from the account tax free. Funds are property of the employee as soon as the funds are placed into the Health Savings Account and any unused employer and/or employee funds remain in the account for the life of the enrolled employee.

We support this bill as we believe that it will provide an additional health insurance option for both employers and employees. The tax advantaged deposits and

expenditures from the Health Savings Account for medical expenses are envisioned to be an attractive benefit for employees. In addition, the personal control that one would have in expending funds from this account may also be a desirable alternative to other health plans.

Based on the aforementioned, we respectfully request your favorable consideration on this bill.