



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

ON THE FOLLOWING MEASURE:
H.B. NO. 2539, RELATING TO INSURANCE.

BEFORE THE:
HOUSE COMMITTEE ON HEALTH

DATE: Monday, February 8, 2016 **TIME:** 1:45 p.m.
LOCATION: State Capitol, Room 329
TESTIFIER(S): Douglas S. Chin, Attorney General, or
Daniel K. Jacob, Deputy Attorney General

Chair Belatti 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).¹ This bill relates to an employee benefit 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

¹ 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.

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).² This bill may

² 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 -

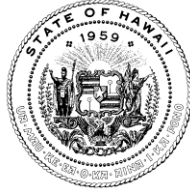
(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

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.

DAVID Y. IGE
GOVERNOR

SHAN S. TSUTSUI
LIEUTENANT GOVERNOR



LINDA CHU TAKAYAMA
DIRECTOR

LEONARD HOSHIO
DEPUTY DIRECTOR

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

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February 6, 2016

To: The Honorable Della Au Belatti, Chair,
The Honorable Richard P. Creagan, Vice Chair, and
Members of the House Committee on Health

Date: Monday, February 8, 2016
Time: 1:45 p.m.
Place: Conference Room 329, State Capitol

From: Linda Chu Takayama, Director
Department of Labor and Industrial Relations (DLIR)

Re: H.B. No. 2539 Relating to Insurance

I. OVERVIEW OF PROPOSED LEGISLATION

This proposal permits employers to offer a high deductible health plan with a health savings account (HSA) in addition to group accident and health or sickness insurance policies, group hospital and medical service plan contracts, and Health Maintenance Organization (HMO) plans. The proposal allows this option as long as the benefits provided in aggregate by the HSA program and the insurance coverage are equivalent and meet the requirements of chapter 393, Hawaii Revised Statutes (HRS)—Prepaid Health Care (PHC).

The department offers comments on this measure.

II. CURRENT LAW

Section 393-11, HRS, requires that an employer provide an eligible employee with health insurance by a PHC plan qualifying under section 393-7, HRS. The Prepaid Health Care Advisory Council reviews these plans and makes a recommendation to the Director of Labor and Industrial Relations for approval or disapproval.

III. COMMENTS ON THE HOUSE BILL

The department offers these comments concerning the proposal:

- The PHC Act requires that an employer provide an approved plan. The Act does not require an employer to offer more than one approved plan to its employees. This measure requires an employer who offers a Health Savings Account (HSA) program to also have a non-HSA plan, thereby adding a requirement to the PHC Act.
- Allowing Employers to offer high deductible plans will likely adversely affect employees who select the currently approved PHC Act compliant plan in the amount the employee will have to pay for coverage. Under section 12-12-12, Hawaii Administrative Rules, an employer is only responsible for the cost of the least expensive plan. Because the cost of a high deductible plan is less than currently approved PHC Act plans, the employee would have to pay not only 1.5% of the employee's wage as permitted by current law, but also the difference in the cost of the two plans.
- The measure includes provisions that unused funds become the property of the HSA holder (employee) at the end of the year. However, employer contributions to the HSA are intended to be used by the employee to pay for qualified medical expenses. If the employee uses that money for non-medical purposes, the employee may face federal tax penalties (currently 20% and withdrawn money is taxable income) regardless of whether the funds are the property of the HSA holder.



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

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

TO THE HOUSE COMMITTEE ON HEALTH

TWENTY-EIGHTH LEGISLATURE
Regular Session of 2016

Monday, February 8, 2016
1:45 p.m.

TESTIMONY ON HOUSE BILL NO. 2539 – RELATING TO INSURANCE.

TO THE HONORABLE DELLA AU BELATTI, 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.

February 5, 2016

The Honorable Della Au Belatti, Chair
The Honorable Richard P. Creagan, Vice Chair
House Committee on Health

Re: HB 2539 – Relating to Insurance

Dear Chair Au Belatti, Vice Chair Creagan and Members of the Committee:

My name is Howard Lee and I am President and Chief Executive Officer of University Health Alliance (UHA), a Hawaii mutual benefit society.

UHA appreciates the opportunity to testify in support of HB 2539, which would give employers in the state the opportunity to offer and for the labor force to receive contributions to health savings accounts (HSA). The intent of an HSA is its funds can be used to pay or reimburse qualified medical expenses, and that the contributions can be accumulated over the years or distributed on a tax-free basis.

We would respectfully request the Committee see fit to pass this measure. Thank you for the opportunity to testify today.

Sincerely,



Howard Lee
President and CEO

**HB 2539
RELATING TO INSURANCE**

**DR. CHARLES KELLEY
CHAIR OF THE BOARD OF DIRECTORS
OUTRIGGER ENTERPRISES, INC.**

February 8, 2016

Chair Belatti and Members of the House of Representatives Committee on Health:

Aloha. I am Dr. Charles Kelley, submitting this testimony in strong support of HB 2539, which facilitates the establishment health savings accounts in Hawaii.

I testify as Chair of the Board of Directors of Outrigger Enterprises, Inc. Our locally founded, owned and operated hospitality company currently employs almost 2,200 hosts throughout Hawai'i and spends over \$20 million every year on medical, dental and vision benefits for them and their families. We are proud to offer our employees outstanding health care insurance coverage which substantially exceeds the minimum employer requirements under the Prepaid Health Care Act.

I also testify as a medical doctor who practiced internal and occupational medicine in Hawai'i for over a decade before joining Outrigger. I know firsthand from my practice that there is great diversity throughout Hawaii's workforce in health care needs, delivery and financial circumstance.

In both capacities I have long supported health savings accounts for the basic reason that I believe strongly Hawaii citizens including employees and their families should have greater options in how they save and pay for their health care needs to match the diversity in their own circumstances. I also believe strongly that better mechanisms are needed to assist Hawaii's workers to save in their working years to pay for health care needs in retirement that are not covered by Medicare or Medicaid.

As I talk with Outrigger's employees, I encounter many who, after twenty, thirty or more years of employment are clearly ready to retire. And I ask them: "Why don't you retire now if you're ready and enjoy your retirement years?" A common response to my question is: "I need to continue my medical insurance, which I cannot afford on my own."

What a shame. If those employees had been in an employer supported and subsidized HAS plan for even a portion of their working years, many of them would have built up an account balance large enough to pay for their health needs in retirement.

The employer-based insurance programs that we have today are a “use it or lose it” system. In other words, the employer pays the insurance premium and if the employee does not use those funds for health care costs, they “lose it” at the end of the year. Nothing accumulates.

On the other hand, an HSA combined with a High-Deductible Health Care Plan is a “use it if you need it, or save it if you don’t” plan. Individual tax-advantaged payroll deductions contributed to an HSA can accumulate over the years to provide a comfortable retirement nest egg. I believe employees should have this option if it works best for their own situations.

Our health care system is complicated and there are a lot of details to consider. The advantages of HSAs have proven themselves in other states and they will work here in Hawaii. They are not for every employee and we would like to offer our employees the choice of either one of the currently approved health care plans or a Health Savings Account combined with a High Deductible Health Care Plan. During our annual enrollment period we will educate our employees on the pros and cons of each type of plan and help them choose the option that makes the most sense for their personal situation. Both options offer the same protective coverage for catastrophic medical illness.

Health savings plans are not something new. They have been around for a long time elsewhere in our country, have proven advantageous for many employees, and, whether or not employees choose them, they like having the choice. Because they also encourage greater individual decision making toward preventive healthcare and treatment options, they offer a valuable contribution to our overall nationwide effort to control rising health care costs for employers and employees alike.

Let’s move forward and make them possible here in Hawai’i. At Outrigger we are dedicated to working with you, the administration and the community to fashion legislation that achieves that goal in a way that is fully consistent with the commitments we have made to each other under the Prepaid Health Care Act.



Monday February 8, 2016
1:45 PM.
Capitol Rm. 329

To: HOUSE COMMITTEE ON HEALTH
Rep. Della Au Belatti, Chair
Rep. Richard Creagan, Vice Chair

From: Hawaii Medical Association
Dr. Scott McCaffrey, MD, President
Dr. Linda Rasmussen, MD, Legislative Co-Chair
Dr. Ronald Keinitz, MD, Legislative Co-Chair
Dr. Christopher Flanders, DO, Executive Director
Lauren Zirbel, Community and Government Relations

Re: HB 2539 – RELATING TO INSURANCE

IN SUPPORT

Chair, Vice Chair, and Committee Members:

The Hawaii Medical Association strongly supports HB2539. As a longtime supporter of Health Savings Accounts, the HMA feels this is an important step in strengthening the patient-physician relationship and allowing patients to establish a measure of control in the level and costs of their care.

Although HSAs typically have a high deductible, the component of allowing a pre-tax savings account offsets this expense. Medical care is covered by insurance after the deductible is satisfied, many times at 100%. The deductible is paid from this account. The savings are accessed through a debit account which the patient controls. This establishes a sense of fiscal responsibility on the part of patients. This vested interest stimulates patients to seek out lower cost providers and treatment regimens, creating a degree of medical cost transparency. Guidelines are set as to the items/services for which the funds may be legally used.

Thank you for the opportunity to provide this testimony.

OFFICERS

PRESIDENT – D. SCOTT MCCAFFREY, MD, PRESIDENT ELECT – BERNARD ROBINSON, MD
IMMEDIATE PAST PRESIDENT – ROBERT SLOAN, MD, SECRETARY - THOMAS KOSASA, MD,
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**HB 2539
RELATING TO INSURANCE**

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

FEBRUARY 8, 2016

Chair Belatti and Members of the House Committee on Health:

I am Paul Oshiro, testifying on behalf of Alexander & Baldwin (A&B) on HB 2539, “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.

From: mailinglist@capitol.hawaii.gov
Sent: Saturday, February 06, 2016 3:31 PM
To: HLTtestimony
Cc: dylanarm@hawaii.edu
Subject: *Submitted testimony for HB2539 on Feb 8, 2016 13:45PM*

HB2539

Submitted on: 2/6/2016

Testimony for HLT on Feb 8, 2016 13:45PM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
Dylan Armstrong	Individual	Support	No

Comments:

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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