TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015

ON THE FOLLOWING MEASURE:
S.B. NO. 232, RELATING TO EMPLOYMENT AGREEMENTS.

BEFORE THE:

SENATE COMMITTEES ON HEALTH AND ON
COMMERCE AND CONSUMER PROTECTION

DATE: Tuesday, February 10, 2015 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 229

TESTIFIER(S): RUSSELL A. SUZUKI, Attorney General, or
RODNEY I. KIMURA, Deputy Attorney General

Chairs Green and Baker and Members of the Committees:

The Attorney General submits comments to alert the committees that the new subsection proposed by the bill could foment a legal challenge.

This bill proposes to add a new subsection (d) to section 480-4, Haw. Rev. Stat., to prohibit restrictive covenants in employment agreements that forbid post-employment competition by licensed physicians. We have concerns with the wording in the new subsection stating that it will apply to "all amendments adding or amending noncompete and nonsolicit clauses in existing written agreements created prior to July 1, 2015."

By virtue of the quoted wording in the new subsection (d), any noncompete or nonsolicit clause in an existing physician employment agreement will be prohibited. This prohibition raises the issue of whether the new subsection could be challenged and thereby determined to violate the federal constitutional prohibition against impairment of contracts set forth in Article I, section 10, clause 1, of the U.S. Constitution.

Though the key phrase in clause 1 states "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." the phrase is not absolute in its application. The United States Supreme Court has articulated a stepped analysis with which to assess whether a state law unconstitutionally impairs an existing contract.

The threshold inquiry is whether the state law has, in fact, operated as to cause a substantial impairment of a contractual relationship.

If the state law does effect a substantial impairment, the State, in justification, must advance a significant and legitimate public purpose behind the state law.

Once such a purpose has been identified, the statutory adjustment of the contracting parties' rights and responsibilities must be assessed to determine if it is based upon reasonable conditions and of a character appropriate to the public purpose justifying the legislation's adoption. *Energy Reserves Group, Inc. v. Kansas Power and Light Co*., 459 U.S. 400, 411-413 (1983).

Courts typically defer to legislative judgment as regards the necessity and reasonableness of the statute. For this reason, a legislative record articulating and supporting the existence of a significant and legitimate public purpose behind the law is important.

At this time, we are not in a position to opine on whether such a challenge might be successful since we do not have information on a myriad of factors needed to assess whether and to what extent the subsection substantially impairs existing contracts, including, for example the extent to which noncompete or nonsolicit clauses are in use, the provisions in such clauses, the intent of the contracting parties, the employment relationship and the significance of such clauses to the relationship, the extent of the impairment of the contractual relationship caused by the new subsection, etc.

We reiterate that the legislative history of this measure setting forth the public purpose to be served will be considered by a reviewing court and weighed against any assessment of the significance of the impact on existing contractual relationships. The Legislature should therefore clearly and thoroughly document its conclusions regarding the need for the application of this bill to all amendments adding or amending noncompete and nonsolicit clauses in existing written agreements created prior to July 1, 2015.

Thank you for the opportunity to testify on this measure.

HPCA
HAWAI'I PRIMARY CARE ASSOCIATION

Senate Committee on Commerce and Consumer Protection
The Hon. Rosalyn H. Baker, Chair
The Hon. Brian T. Taniguchi, Vice Chair

Testimony on Senate Bill 232

Relating to Employment Agreements
Submitted by Robert Hirokawa, Chief Executive Officer
February 10, 2015, 9:00 am, Room 229

The Hawaii Primary Care Association (HPCA), which represents the federally qualified community health centers in Hawaii, would like to offer comments on Senate Bill 232, seeking to prohibit non-compete clauses and restrictive covenants.

The HPCA has concerns with the bill as written, as community health centers in Hawaii have had difficulties with larger providers in their respective regions hiring away skilled physicians. Non-compete clauses help to protect existing workforce from being pulled away.

Thank you for the opportunity to testify.

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