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February 23, 2017

To: The Honorable Sylvia Luke, Chair,
The Honorable Ty J.K. Cullen, Vice Chair, and
Members of the House Committee on Finance

Date: Thursday, February 23, 2017
Time: 1:00 p.m.
Place: Conference Room 308, State Capitol

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

Re: H.B. No. 1114 HD1 Relating to Occupational Safety and Health Penalties

I. OVERVIEW OF PROPOSED LEGISLATION

HB1114 HD1 proposes to increase fines for employers who violate the Hawaii Occupational and Safety rules pursuant to federal law. The civil penalties adjustments will bring the State into compliance with the federal Occupational Safety and Health Administration (OSHA) requirement that state standards and enforcement must be "at least as effective as federal OSHA's standards and enforcement program."

HB1114 HD1 will also allow the DLIR Director to adjust penalties on or about December 15 of each year and effective the following January of each year, using the guidance of the Office of Management and Budget pursuant to the 2015 Inflation Adjustment Act, section 701 of Public Law 114-74.

Staying in conformity with OSHA standards helps ensure federal funding for the Hawaii Occupational Safety and Health Division (HIOSH). Federal funding for HIOSH is \$1,937,700 in the current Fiscal Year 2016-2017. DLIR reported the budget ceiling at \$2,089,716 to the Labor Committee.

The Department strongly supports HB1114 HD1 to maintain conformity to federal law.

II. CURRENT LAW

The federal Occupational Safety and Health Administration (OSHA) was exempt from Congress's 1990 law directing agencies to adjust their civil monetary penalties to keep up with inflation, so the agency's penalties have not increased since 1990.

On November 2, 2015 Congress passed the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Inflation Adjustment Act) as part of the Bipartisan Budget Act of 2015. The new law directs agencies to adjust their civil monetary penalties for inflation every year.

III. COMMENTS ON THE HOUSE BILL

DLIR strongly supports HB1114 HD1 to maintain conformity with federal law.

Congress passed the Inflation Adjustment Act in 2015 to begin annually adjusting penalties and directs agencies across the federal government to determine the last time their penalties were increased (other than under the prior inflation act) and to adjust their penalties for inflation from that date.

OSHA's penalties – which had not been raised since 1990 – increased by 78 per cent, with its top penalty for serious violations rising from \$7,000 to \$12,471 and its top penalty for willful or repeated violations rising from \$70,000 to \$124,709.

HB1114 HD1 will improve the Department's ability to promote compliance with workplace safety and health standards by increasing monetary penalties, which have been recognized to be an effective deterrent. The public and workers will also continue to benefit from adequate enforcement of workplace safety and health laws. Moreover, greater compliance with workplace safety and health standards will reduce costly injuries and fatalities and therefore reduce Workers' Compensation costs for employers.

DLIR received a letter (attached) on July 1, 2016, from federal OSHA regarding the requirement for states to adopt OSHA's maximum penalty levels and thereafter increase maximum penalties based on inflation.

These penalties are the statutory maximum penalties, although HIOSH almost always negotiates penalties that are significantly lower after application of penalty adjustment factors for size, good faith, history and other factors.

§396-10(j) states:

The director shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity

of the violation, the good faith of the employer, and the history of previous violations

The penalty structure in section 396-10 of the Hawaii Occupational Safety and Health Law (chapter 396, Hawaii Revised Statutes) is designed *primarily to provide an incentive for preventing or correcting violations voluntarily*, not only to the cited employer, but also to other employers. While penalties are not designed as punishment for violations, it is desired that the penalty amounts should be sufficient to serve as an effective deterrent to violations.

Both Federal OSHA and the Hawaii Occupational Safety and Health Division (HIOSH) detail the methodology of deriving penalty amounts through Field Operations Manuals (FOM). The following materials are taken from the HIOSH FOM.

For violations, the Gravity-Based Penalty is assigned as follows:

GRAVITY (Serious)		
Severity	Probability	Gravity Based Penalty – (before apply reductions)
High	Greater	\$12,471
Medium	Greater	\$10,689
Low	Greater	\$8,908
High	Lesser	\$8,908
Medium	Lesser	\$7,126
Low	Lesser	\$5,345
GRAVITY (Other than Serious)		
Minimal	Greater	\$1,000-\$12,471
Minimal	Lesser	\$0

The size, good faith, and history adjustment factors would then be applied to the gravity adjusted base penalty.

SIZE REDUCTION	
Employees	Percent Reduction
1 – 10 (new level added by OSHA)	70%
11- 25	60%
26-100	30%
101-250	10%
251 or more	None

GOOD FAITH REDUCTION – Up to a maximum of 25%
A 25% reduction normally requires a written safety and health management system. In exceptional cases, an inspector may recommend a full 25% reduction for employers with 1-25 employees who have implemented an effective safety and health management system, but have not documented it in writing.
A 15% reduction is normally given for an employer with a documented and effective safety and health management system with only a few incidental deficiencies.
HISTORY REDUCTION – 10%
A reduction of 10% is given to employers who have been inspected by OSHA nationwide, or by any State Plan, and employers were found to be in compliance or not issued any Serious violations in the last five years.

The penalty adjustments are applied serially for each factor to the gravity-based amount in the following sequence: history, good faith and then size.

Example

Gravity Based Penalty – High Severity, Lesser Probability (A frayed electric cord that could cause electric shock or death to worker)	Adjustment	\$8,908
History (no serious, willful, repeat in past)	10%	-\$891
Good Faith (effective written S & H program)	25%	-\$2,004
Employment Size = 25	60%	-\$3,608
Final Penalty		\$2,405

HIOSH staff can only inspect a fraction of all the covered employers annually for the safety and health well-being of their employees.

Employer population (including Government)*:	37,128
Number of employees (including Government)*:	626,330
(*2014 data)	
HIOSH inspection staff (range due to turnover):	11 to 17
Inspections per year (FY2016):	430
Violations citations (FY2016):	1333
➤ Serious:	965
➤ Other than Serious:	321
➤ Repeat:	41
➤ Willful:	1

The proposed penalties in HB1114 HD1 reflect both minimum and maximum amounts whereby phrases such as “up to” and “not more than” are repeatedly noted in the narrative. The following table provides the minimum and maximum penalties:

Penalty	Minimum	Maximum
Willful	\$8,908	\$124,709
Repeat	\$0 to \$891	\$124,709
Serious	\$891	\$12,471
Other than Serious	\$0	\$12,471



JUL 01 2016

Ms. Linda Chu Takayama
Director
Hawaii Department of Labor
and Industrial Relations
830 Punchbowl Street – Room 321
Honolulu, Hawaii 96813-0000

Dear Ms. Takayama:

In 2015, Congress passed the Bipartisan Budget Act of 2015, which amended the Federal Civil Penalties Adjustment Act of 1990 (FCPAA), and made the FCPAA applicable to the Occupational Safety and Health Administration (OSHA). The FCPAA requires OSHA to increase its maximum penalties by the cost-of-living adjustment (according to the CPI-U) since the penalty levels were last adjusted in 1990.

As directed, the Department of Labor, on July 1, 2016, published an Interim Final Rule in the Federal Register initiating implementation of this penalty increase. The new penalties will take effect after August 1, 2016. In each subsequent year, maximum penalties will be increased by the cost-of-living adjustment by January 15th. These penalties are the statutory maximum penalties, although OSHA often proposes penalties that are significantly lower after application of penalty adjustment factors for size, good faith, history and other factors.

OSHA-approved State Plans must have penalty levels that are at least as effective as federal OSHA's per Section 18 (c)(2) of the OSH Act; 29 C.F.R. 1902.37(b)(12). All State Plans will be expected to adopt OSHA's new maximum penalty levels and thereafter increase this maximum each year based on inflation.

We expect states to adopt the changes within six months as specified in 29CFR1953.4(b)(3). We recognize, however, that some State Plans have varied legislative calendars that may impact timely adoption. If you would like to discuss existing legal or legislative barriers that may prevent you from adopting this structure on the timeline specified above, please contact Douglas Kalinowski, Director, Directorate of Cooperative and State Programs at (202) 693-2200 as soon as possible.

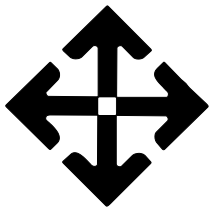
As always, we will assist you any way that we can to make these statutorily required changes occur. We look forward to working with you on this very important issue.

Sincerely,

A handwritten signature in blue ink, appearing to read "David Michaels".

David Michaels, PhD, MPH

16 JUL 14 PM 12:01 MRR/MSH



The Hawaii Business League

1188 Bishop St., Ste. 1003, Honolulu, Hawaii 96813

Phone: (808) 533-6819 Facsimile: (808) 533-2739

February 23, 2017

Testimony To: House Committee on Finance
Representative Sylvia Luke, Chair

Presented By: Tim Lyons
President

Subject: H.B. 1114, HD 1 – RELATING TO OCCUPATIONAL SAFETY AND
HEALTH PENALTIES

Chair Luke and Members of the Committee:

I am Tim Lyons, President of the Hawaii Business League, a small business service organization. We oppose this bill.

The original took the penalties for a serious violation from \$7,700 to \$12,471 and for repeat violations from \$77,000 to \$124,709. This bill is blank but we assume its purpose still is to increase penalties.

Additionally, the bill allows the Director to adjust penalties from henceforth without any real legislative oversight; only an “after the fact” report to the legislature. We object to that provision as well.

There is no doubt HIOSH (OSHA) serves an excellent purpose. There are unfortunately, some employers that do not have as much concern for their employee's safety as they should. There are however the majority of employers who are concerned about their employees safety, if for no other reason but for lost time on the job and employee relations and their welfare.

It is been said that the increase in fines is necessary in order to provide a deterrent. We would suggest to you that a \$77,000 fine is about as much as a deterrent that a small business could possibly need and if it is not, then there is no amount of money beyond that that would serve to act as a deterrent. We are aware that HIOSH has a formula for helping to reduce that penalty based on the severity, the history of that employer and the size of that employer however, just the fact that they are able to exercise the discretionary authority of going to this extent (\$77,000 to \$124,709) is enough to put many small employers out of business. One has to remember that the penalty payment that a small business will have to make comes strictly out of the bottom line; that is, it has to be after all other expenses, payroll, rents and other fees are already paid. In most cases if a small business had an extra \$124,709 sitting around, they would have found something more useful to do with it.

Please note that on page 2, Section 396-10 (e) sets up a (maximum) fine for failing to put up a piece of paper and in the original bill this was \$12,471.

Again, we are not opposed to increased penalties and we are not opposed to adding deterrents to repeat employers who ignore safety rules and regulations. We are however opposed to penalties that are so huge that they cause employers to go out of business and cease to provide any further job opportunities or tax revenues.

Based on the above we would respectfully request this Committee to moderate the increases suggested in the original bill and if it is determined that some sort of increase is needed that it be the most minimal increase that can be assessed and still satisfy the intent of this bill.

Thank you.

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 21, 2017 11:59 PM
To: FINTestimony
Cc: office@statetermitehawaii.com
Subject: Submitted testimony for HB1114 on Feb 23, 2017 13:00PM

HB1114

Submitted on: 2/21/2017

Testimony for FIN on Feb 23, 2017 13:00PM in Conference Room 308

Submitted By	Organization	Testifier Position	Present at Hearing
ALVIN F. FUKUYAMA	STATE TERMITE & PEST CONTROL, INC.	Oppose	No

Comments: Chair Johanson, Vice-chair Holt and members of committee, As a small business owner, safety is of the utmost importance for our employees. The penalties are already high. A business like mines would suffer greatly with the current penalties. please reconsider the percentage of increase to a more reasonable amount or no change at all. Thank you.

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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From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, February 22, 2017 3:01 PM
To: FINTestimony
Cc: warren@abbeycarpetofmaui.com
Subject: Submitted testimony for HB1114 on Feb 23, 2017 13:00PM

HB1114

Submitted on: 2/22/2017

Testimony for FIN on Feb 23, 2017 13:00PM in Conference Room 308

Submitted By	Organization	Testifier Position	Present at Hearing
Warren K. Orikasa	Abbey Carpet of Maui	Oppose	No

Comments: Increasing the fine schedule will not increase compliance. Even after a half day of meeting with the OSHA consultant, I was told that we only had surveyed the major items and that any inspector could find violations if he/she wanted to. Education and assistance would yield far greater positive results. Mahalo!

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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To our Legislative Body,

I would like to stand in opposition of the penalty increases proposed for OSHA penalties. My industry is largely made up of small local business, who are trying to make a living for themselves and their employees. While we all value the safety of our workers and we make every effort possible to ensure their safety, arming OSHA with the ability to levy such a large fine, should they use it, would most certainly shut most of us down.

For most of us, we operate on thin margins roughly 10%-13% on average (based on National Pest Management Association surveys), and increasing fines from **\$7,700 to \$12, 471** for minor issues, and **\$77,000 to \$124,709** for major issues, would most certainly shut most of us down.

The current penalties are more than sufficient to deter unsafe practices as they aren't insignificant amounts. The only thing that raising the penalties would do is assure that one mistake could cost more than just the monetary amount, but also the future of the business and all the families under its umbrella.

We didn't bring Termites and Pests to our state or island, but we have taken up the banner to help protect Hawaii's homes, families, food supplies, and our generally pest free way of life from them. Please don't make it harder for us to continue to offer these services by authorizing fines that won't make anyone safer, won't protect anyone, or achieve any of the desired goals the penalties are designed for.

I / we hold already the highest regard for our people and their safety, they are our brothers, sisters, aunties, uncles, our families. More money won't make their lives and safety more valuable than it already is.

Best Regards,

Ian Mateo,
President

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, February 22, 2017 12:52 PM
To: FINTestimony
Cc: roofworkshawaii@hawaii.rr.com
Subject: Submitted testimony for HB1114 on Feb 23, 2017 13:00PM

HB1114

Submitted on: 2/22/2017

Testimony for FIN on Feb 23, 2017 13:00PM in Conference Room 308

Submitted By	Organization	Testifier Position	Present at Hearing
Rick	Individual	Oppose	No

Comments: Aloha, WE in the construction industry support the utmost safety. with the regards to HB 1114 of raising the penalties from the current to an astronomically amount, we oppose. the reason is we feel that the current amounts hits the contractor hard enough to make them aware of safety issues, I am in agreement to make the contractor go through steps through education and should the contractor not comply then fine them with for the violation. if the contractor continues to neglect, stop all operation till in compliance. over regulations and extreme fines will put contracting out of business thus less taxes paid to the SOH.

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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Website: www.gcawhawaii.org



GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

LATE

Uploaded via Capitol Website

February 23, 2017

TO: HONORABLE SYLVIA LUKE, CHAIR, HONORABLE TY CULLEN, VICE CHAIR, COMMITTEE ON FINANCE

SUBJECT: **COMMENTS REGARDING TO H.B. 1114, HD1 RELATING TO OCCUPATIONAL SAFETY AND HEALTH PENALTIES.** Amends fines for Hawaii Occupational Safety and Health violations and requires the Director of Labor and Industrial Relations to adjust the penalties each year pursuant to federal law. Requires the Director of Labor and Industrial Relations to report to the Legislature each year. (HB1114 HD1)

HEARING

DATE: February 23, 2017
TIME: 1:00 p.m.
PLACE: Conference Room 309

Dear Chair Luke, Vice Chair Cullen and Committee Members,

The General Contractors Association of Hawaii (GCA) is an organization comprised of over five hundred general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. The GCA's mission is to represent its members in all matters related to the construction industry, while improving the quality of construction and protecting the public interest.

GCA has **comments** regarding H.B. 1114, Relating to Hawaii Occupational Safety and Health Penalties, which proposes to adopt the federal scale of penalties for federal compliance purposes. Further the measure would allow for automatic increases by the Director of Labor and Industrial Relations based on the Office of Management and Business. While we understand that the State Department of Labor and Industrial Relations (DLIR) proposed this measure to meet federal standards and to bring the State into compliance with federal OSHA requirement. Federal provisions indicate that the state OSHA standards and enforcement must be "at least as effective as" federal OSHA's standards and enforcement program."

For your information, the federal OSHA's penalties were increased by 78 percent with its top penalty for serious violations rising from \$7,000 to \$12,471 – the previous draft proposed language to suggest that Hawaii's penalties could mirror those dollar amounts. Therefore, many small businesses are concerned that such a single violation could have a significant impact on their company, not only financially but with regard to a company's abilities to continue working.

Thank you for the opportunity to present our views on this matter.