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March 14, 2017

To: The Honorable Gilbert S.C. Keith-Agaran, Chair,
The Honorable Karl Rhoads, Vice Chair, and
Members of the Senate Committee on Judiciary & Labor

Date: Tuesday, March 14, 2017
Time: 9:00 a.m.
Place: Conference Room 016, 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 and offers an amendment to help alleviate the increasing legal expenses of the Division.

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

DLIR notes that it is encountering budgetary challenges due to both the increase in citations issued and the resulting increase in litigation costs involved in securing those settlements. DLIR notes that over the past three fiscal years, \$3,560,000 in penalties have been deposited in the general fund. The department is seeking \$275,000 to help alleviate the corresponding increase in legal costs:

FY2014 = \$1.0 Million
FY2015 = \$1.3 Million
FY2016 = \$1.26 Million

Therefore, DLIR offers the following language creating a limited special fund to help alleviate the budgetary problems caused by the increased legal expenses.

SECTION X. Chapter 396, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§396- Workplace safety and health special fund. (a)

There is established in the state treasury the workplace safety and health special fund into which shall be deposited:

- (1) All penalties collected pursuant to this chapter;
- (2) All interest and earnings accruing from the investment of moneys in the fund; and
- (3) Appropriations made by the legislature to the fund;

provided that of all penalties received by the State each fiscal year, the sum representing the first \$275,000 of those moneys shall first be deposited in the state treasury in each fiscal year to the credit of the workplace safety and health special fund. Any amounts over \$275,000 shall be deposited to the credit of the state general fund. The workplace safety and health special fund shall be administered by the department.

(b) The workplace safety and health special fund shall be used to pay for legal expenses incurred by the department in the administration and enforcement of this chapter.

(c) All unencumbered and unexpended moneys in excess of \$412,500 remaining on balance in the workplace safety and health special fund on June 30 of each year shall lapse to the credit of the state general fund."

SECTION X. There is appropriated out of the workplace safety and health special fund a sum not to exceed \$275,000 or so much thereof as may be necessary for fiscal year 2017-2018 and the same sum or so much thereof as may be necessary for fiscal year 2018-2019 for legal costs incurred in the administration of chapter 396.

The sum appropriated shall be expended by the department of labor and industrial relations for the purposes of this Act.

The Twenty-Ninth Legislature
Regular Session of 2017

THE SENATE

Committee on Judiciary and Labor

Senator Gilbert S.C. Keith-Agaran, Chair

Senator Karl Rhoads, Vice Chair

State Capitol, Conference Room 016

Tuesday, March 14, 2017; 9:00 a.m.

**STATEMENT OF THE ILWU LOCAL 142 ON H.B. 1114 HD 1
RELATING TO OCCUPATIONAL SAFETY AND HEALTH PENALTIES**

The ILWU Local 142 supports H.B. 1114 HD 1, which 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. The bill also requires the Director of Labor and Industrial Relations to report to the Legislature each year.

The Hawaii Revised Statutes explicitly provides in Chapter 396, that all employers in the State of Hawaii have a duty to provide their employees with a safe and healthy worksite. The statute provides that if this responsibility is violated fines can be assessed against the employer. Since 1990, the federal Occupational Safety and Health Administration has not increased its fines and neither has the State of Hawaii.

Most employers obey the law and out of concern for their employees, will take the steps necessary to maintain a safe and healthy environment at their worksites. However, for those employers who believe only in maximizing their bottom line, a financial deterrent is an important tool for enforcing compliance with the law.

For over two decades the fine amounts for violations of the Occupational Safety and Health Laws have not changed. During that same period of time, the effectiveness of those fines have lessened. Therefore, H.B. 1114 HD 1 will restore maximum effectiveness of the economic deterrents, and allow the Department of Labor and Industrial Relations to make best use of these tools when necessary to carry out the intent of the law.

This makes sense in the context of the federal law, passed in 2015, which directs agencies to adjust their civil monetary penalties for inflation every year. We feel that H.B. 1114 HD 1 will position the Depart of Labor to most effectively administer compliance with the law, and lead to saving many lives and preventing serious injuries. Prevention of these deaths and injuries at the worksite, will also decrease employers' costs for workers' compensation insurance.

The ILWU Local 142 urges passage of H.B. 1114 HD 1. Thank you for the opportunity to share our views on this matter.

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HB1114

Submitted on: 3/13/2017

Testimony for JDL on Mar 14, 2017 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Jeffrey Masatsugu	Carpet Linoleum and Soft Tile Local Union 1926 Market Recovery Trust Fund	Support	No

Comments:

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HB1114

Submitted on: 3/13/2017

Testimony for JDL on Mar 14, 2017 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Jeffrey Masatsugu	Hawaii Glaziers Architectural Metal Glassworkers Local Union 1889 AFL-CIO Stabilization Trust Fund	Support	No

Comments:

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HB1114

Submitted on: 3/13/2017

Testimony for JDL on Mar 14, 2017 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Jeffrey Masatsugu	Hawaii Tapers Market Recovery Trust Fund	Support	No

Comments:

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