

HB 1114

**RELATING TO OCCUPATIONAL SAFETY AND
HEALTH PENALTIES.**

LAB, FIN

HB1114



Submit Testimony

Measure Title: RELATING TO OCCUPATIONAL SAFETY AND HEALTH PENALTIES.
Report Title: Occupational Safety and Health Penalties
Description: Increases fines for Hawaii Occupational and Safety violations pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015, Section 701 of P.L. 114-74.
Companion: [SB980](#)
Package: Governor
Current Referral: LAB, FIN
Introducer(s): SOUKI (Introduced by request of another party)

Sort by Date		Status Text
1/23/2017	H	Pending introduction.
1/25/2017	H	Pass First Reading
1/27/2017	H	Referred to LAB, FIN, referral sheet 5
2/6/2017	H	Bill scheduled to be heard by LAB on Thursday, 02-09-17 10:00AM in House conference room 309.

S = Senate | **H** = House | **D** = Data Systems | **\$** = Appropriation measure | **ConAm** = Constitutional Amendment
Some of the above items require Adobe Acrobat Reader. Please visit [Adobe's download page](#) for detailed instructions.

A BILL FOR AN ACT

RELATING TO OCCUPATIONAL SAFETY AND HEALTH PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 396-10, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "**§396-10 Violations and penalties.** (a) Any employer who
4 violates this chapter, or any occupational safety and health
5 standard promulgated hereunder or any rule [~~or regulation~~]
6 issued under the authority of this chapter, or who violates or
7 fails to comply with any citation, notice, or order made under
8 or by virtue of this chapter or under or by virtue of any rule
9 [~~or regulation~~] of the department, or who defaces, displaces,
10 destroys, damages, or removes without the authority of the
11 department any safety device, safeguards, notice, or warning
12 required by this chapter or any rule [~~or regulation~~] of the
13 department may be assessed a civil penalty as specified in this
14 chapter.

15 (b) Any employer who has received an order or citation for
16 a serious violation of any standard or rule adopted pursuant to
17 this chapter shall be assessed a civil penalty of not more than
18 [~~\$7,700~~] \$12,471 for each violation.

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1 (c) Any employer who has received an order or citation for
2 a violation of any standard or rule adopted pursuant to this
3 chapter, and the violation is specifically determined not to be
4 of a serious nature, may be assessed a civil penalty of up to
5 [~~\$7,700~~] \$12,471 for each violation.

6 (d) Each day a violation continues shall constitute a
7 separate violation except that during an abatement period only,
8 no additional penalty shall be levied against the employer.

9 (e) Any employer who violates any of the posting
10 requirements prescribed under this chapter shall be assessed a
11 civil penalty of up to [~~\$7,700~~] \$12,471 for each violation.

12 (f) Any employer who wilfully or repeatedly violates this
13 chapter, or any standard, rule, citation, or order issued under
14 the authority of this chapter, shall be assessed a civil penalty
15 of not less than [~~\$5,500~~] \$8,908 nor more than [~~\$77,000~~]
16 \$124,709 for each violation.

17 (g) Any employer convicted of wilful or repeated
18 violations of any standard, rule, citation, or order issued
19 under the authority of this chapter resulting in the death of an
20 employee shall be punished by a fine of not more than [~~\$77,000~~]
21 \$124,709 or by imprisonment for not more than six months, or
22 both, except that if the conviction is for a violation committed

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1 after a first conviction, punishment shall be by a fine of not
2 more than [~~\$77,000~~] \$124,709 or by imprisonment for not more
3 than one year, or both. Failure to correct a violation for
4 which an order or citation of arrest has been issued shall be
5 evidence of wilful conduct.

6 (h) Any employer who has received an order for violation
7 under section 396-8(e) may be assessed a civil penalty of not
8 more than [~~\$1,100~~] \$8,908 for each violation.

9 (i) Any person who gives advance notice of any inspection
10 to be conducted under this chapter, without authority from the
11 director or the director's designees shall, upon conviction, be
12 punished by a fine of not more than [~~\$1,100~~] \$8,908 or by
13 imprisonment for not more than six months, or by both.

14 (j) The director shall have authority to assess all civil
15 penalties provided in this section, giving due consideration to
16 the appropriateness of the penalty with respect to the size of
17 the business of the employer being charged, the gravity of the
18 violation, the good faith of the employer, and the history of
19 previous violations.

20 (k) Civil penalties imposed under this chapter shall be
21 paid to the department and may be recovered by civil action in
22 the name of the department and the State brought in the district

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1 or circuit court for the circuit where the violation is alleged
2 to have occurred or where the employer has its principal office.

3 (l) When an alleged violation of any provision of this
4 chapter or any standard, rule, or order made thereunder has
5 occurred, the department shall promptly issue a written
6 citation, order, or notice thereof to the employer who shall be
7 required to post the citation, order, or notice. The citation,
8 order, or notice thereof shall include the abatement
9 requirements and within a reasonable time the employer shall be
10 advised of the proposed sanctions, including proposed penalties.
11 Whenever reference is made to posting of any citation, order,
12 notice, petition, decision, or any other type of document issued
13 by the director under this chapter and rules adopted pursuant to
14 this chapter, the employer shall post copies of the document at
15 the work site involved or affected and at the place or places
16 where notices to the employees involved are normally posted.
17 Where posting starts the time for notice of action to or for
18 appeal by employees under this chapter and rules adopted under
19 this chapter, the document shall be posted by the employer upon
20 receipt or on the next business day following receipt.

21 (m) Whoever knowingly makes any false statement,
22 representation, or certification in any application, record,

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1 report, plan, or other document filed or required to be
2 maintained pursuant to this chapter shall, upon conviction, be
3 punished by a fine of not more than \$11,000, or by imprisonment
4 for not more than six months, or by both.

5 (n) Criminal offenses committed against any employee of
6 the State acting within the scope of the employee's office,
7 employment, or authority under this chapter shall be subject to
8 the penalties set forth in the Hawaii Penal Code; provided that:

9 (1) Ten years shall be added to the maximum term of
10 imprisonment (unless life imprisonment is imposed) and
11 \$55,000 shall be added to the maximum fine imposed for
12 conviction of a class A felony;

13 (2) Five years shall be added to the maximum term of
14 imprisonment and \$27,500 shall be added to the maximum
15 fine imposed for conviction of a class B felony;

16 (3) Three years shall be added to the maximum term of
17 imprisonment and \$11,000 shall be added to the maximum
18 fine for conviction of a class C felony;

19 (4) One year shall be added to the maximum term of
20 imprisonment and \$2,200 shall be added to the maximum
21 fine for conviction of a misdemeanor; and
22

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1 (5) The maximum term of imprisonment and maximum fines
2 prescribed for misdemeanors under the Hawaii Penal
3 Code shall apply to convictions of a petty
4 misdemeanor.

5 (o) The director shall adjust penalties pursuant to the
6 Federal Civil Penalties Inflation Adjustment Act Improvement Act
7 of 2015, Section 701 of P.L. 114-74, by December 15, 2017, and
8 each year thereafter. The director shall adjust penalty levels
9 using the guidance of the Office of Management and Budget issued
10 by December 15 of each year. The new penalties shall take
11 effect the following January 15 of each year."

12 SECTION 2. Statutory material to be repealed is bracketed
13 and stricken. New statutory material is underscored.

14 SECTION 3. This Act shall take effect upon its approval.

15

16

INTRODUCED BY: _____



BY REQUEST

JAN 23 2017

17

H.B. NO. 1114

Report Title:

Occupational Safety and Health Penalties

Description:

Increases fines for Hawaii Occupational and Safety violations pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015, Section 701 of P.L. 114-74.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

JUSTIFICATION SHEET

DEPARTMENT: Labor and Industrial Relations

TITLE: A BILL FOR AN ACT RELATING TO OCCUPATIONAL SAFETY AND HEALTH PENALTIES.

PURPOSE: To increase fines for Hawaii Occupational and Safety violations as required by federal law.

MEANS: Amend section 396-10, Hawaii Revised Statutes (HRS).

JUSTIFICATION: This proposal will increase fines for employers who violate the Hawaii Occupational and Safety rules pursuant to federal law and to account for inflation. 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."

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 to account for inflation every year.

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.

This proposal will bring the State into compliance with the federal law. Staying in conformity with OSHA standards helps ensure federal funding for HIOSH. In fiscal year

2016-2017, federal funding amounted to \$2,089,716.00.

This proposal will also allow the Director of Labor and Industrial Relations to adjust penalties on or about December 15 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.

Impact on the public: This measure is intended to improve compliance with workplace safety and health standards by increasing the sanctions for non-compliance. The public will continue to benefit from 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.

Impact on the department and other agencies: This proposal 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.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION: LBR143.

OTHER AFFECTED
AGENCIES: None.

EFFECTIVE DATE: Upon approval.

DAVID Y. IGE
GOVERNOR

SHAN S. TSUTSUI
LIEUTENANT GOVERNOR



LINDA CHU TAKAYAMA
DIRECTOR

LEONARD HOSHIJO
DEPUTY DIRECTOR

STATE OF HAWAII
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February 9, 2017

To: The Honorable Aaron Ling Johanson, Chair,
The Honorable Daniel Holt, Vice Chair, and
Members of the House Committee on Labor & Public Employment

Date: Thursday, February 9, 2017
Time: 10:00 a.m.
Place: Conference Room 309, State Capitol

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

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

I. OVERVIEW OF PROPOSED LEGISLATION

This proposal will 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."

This proposal 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 \$2,089,716 in the current Fiscal Year 2016-2017.

The Department strongly supports this measure.

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 this measure to maintain conformity with federal law.

These penalties have not been raised for decades to keep up with inflation. Congress passed a law in 1990 directing agencies to adjust their civil monetary penalties to keep up with inflation, but OSHA was exempt from the 1990 law, so the agency's penalties have not increased since 1990.

Congress passed the Inflation Adjustment Act in 2015 to begin annually adjusting penalties and directs each 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.

This bill 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.

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210



JUL 01 2016

16 JUL 14 PM 12:01 MLR/HDSH

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.

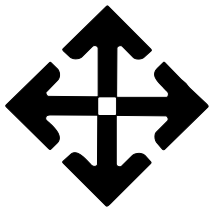
We expect states to adopt the changes within six months as specified in 29CFR1953.4(b)(3). We recognize, however, that some State Plans have varied legislative calendars that may impact timely adoption. If you would like to discuss existing legal or legislative barriers that may prevent you from adopting 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 black ink, appearing to read "David Michaels".

David Michaels, PhD, MPH



The Hawaii Business League

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

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

February 9, 2017

Testimony To: House Committee on Labor & Public Employment
Representative Aaron Ling Johanson, Chair

Presented By: Tim Lyons
President

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

Chair Johanson and Members of the Committee:

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

As noted, this bill takes the penalties for a serious violation from \$7,700 to \$12,471 and for repeat violations from \$77,000 to \$124,709.

Additionally, the bill allows the Director to adjust penalties from henceforth without any legislative oversight using the guidance of the Office of Management and Budget. 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 of \$12,471 for failing to put up a piece of paper!

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 contained in this 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.

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**Testimony to the House Committee on Labor & Public Employment
February 9, 2017
10:00 am
Conference Room 309**

RE: HB 1114 – Relating to Occupational Safety and Health Penalties

Chair Johanson, Vice-Chair Holt, and members of the committee:

My name is Gladys Quinto Marrone, CEO of the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, the Building Industry Association of Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii.

BIA-Hawaii is in opposition to HB 1114. This bill would increase the fines for Hawaii Occupational and Safety (HIOSH) violations from \$7,700 to \$12,471. This increase is sizeable, and could be devastating to small businesses.

Education may be the easiest, fairest route to take in ensuring the safety of workers. The effort to create a deterrence for non-compliance to the OSHA standards must include education, awareness, consultation, training and other efforts.

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

holt1 - Joyleanne

From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 6, 2017 5:29 PM
To: LABtestimony
Cc: mendezj@hawaii.edu
Subject: *Submitted testimony for HB1114 on Feb 9, 2017 10:00AM*

HB1114

Submitted on: 2/6/2017

Testimony for LAB on Feb 9, 2017 10:00AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
Javier Mendez-Alvarez	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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TESTIMONY FROM WALTER CHUN, PhD, CSP, CHSP, CHST

RE: Testimony Regarding HB 1114

This testimony is provided by, Walter Chun PhD a safety engineer and safety and health management professional with over 45 years of experience. He is a Certified Safety Professional, Certified Healthcare Safety Professional and Construction Health and Safety Technician. His background of over 45 years includes: Shipyard Safety Director; U.S. DOL OSHA Area Director; ES&H Director for Raytheon and Bechtel, and independent safety & Health and Environmental consulting.

The Hawaii State Plan was approved by OSHA and continues in accordance with the laws and regulations. **The state plan is intended to be unique and specific to the needs and responsibilities of the state.** This one element of the state plan is the expressed desire of Congress. The Congressional purpose for the state plans is described in Section 2(b)(11) of the OSHAct (Public Law 91-596).

2(b)(11) by encouraging the States to assume the fullest responsibility for administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

The proposed bill, HB1114, to increase the HIOSH penalties for violations of the safety and health standards at workplaces must be reconsidered because the impact of this increase has not been evaluated in sufficient detail. The Assistant Secretary from the USDOL, OSHA stated that the 78% increase in OSHA penalties is needed to create "deterrence" for non-compliance with the OSHA standards and change in workplace behavior. Hawaii has an approved state plan that is funded by the USDOL OSHA and matched/shared by State funds. The proposed bill does NOT provide any measure(s) or means to determine the effectiveness of the increased penalties, i.e., how will increasing the penalties by 78% cause deterrence for all employers and change the workplace behavior? And how will this be determined?

The recent increase in OSHA penalties was implemented on August 1, 2016. The Hawaii State Plan was notified and a plan change is required. The specific requirement or demand from OSHA is provided on page I-6 of the OSHA Field Operations Manual. This manual provides the requirements for State Plans to develop formal written policies, procedures, etc.:

*"Federal Program Change – Notice of Intent and Equivalency Required. This instruction describes a Federal Program Change which consolidates and updates OSHA's field enforcement policies and procedures. States must have, as a part of their State Plan, formal written policies and procedures on all aspects of their compliance program, including inspections, targeting, citations, penalties, and post citation processes, which are at least as effective as the procedures in this revised Field Operations Manual (FOM). **State Plans have the option of adopting identical or different, but at least as effective, enforcement policies as those contained in this FOM, and in doing so, State Plans must address each chapter and/or policy area in this manual.**"¹*

The "as effective as" performance measure is a federal regulatory requirement that is subjective. As shown above it requires the state to develop and implement their own safety and health program to meet local needs. Recently OSHA decided to use a 78% penalty increase and passed this on to the state. The state NEED NOT simply adopt the penalty increase presented by OSHA.

The state always has the extensive opportunity to study, evaluate, develop, and implement any action(s) that will be "as effective as" OSHA's actions. Before jumping on the OSHA penalty increase the state must study and evaluate the many considerations that affect(s) non-compliance with the OSHA standards. Some of these considerations are provided as examples:

- The HIOSH efforts were stifled and lagged behind for over a decade with outstanding vacancies, lack of funding, failure to address comparable salaries, etc. The present Bill simply hits businesses with a significant increase without considering the impacts of the failures for over a decade. What are the issues, what is the corrective action(s), and how effective are these actions?
- Over 90% of our businesses are small businesses and the impacts of these increases are severe. The economic impacts of the increases must be evaluated and considered. Is a nation-wide cost of living determination, as used by OSHA, applicable to increasing the penalties in Hawaii? Hawaii's large small business population as well as the fact that Hawaii's salaries are one of the lowest in the nation presents only the tip of the iceberg. Where is the economic impact of these penalties? How do the penalties affect compliance or non-compliance?
- The process to conduct inspections, issue citations and assess penalties is a one sided and unfair process. Citations that are issued improperly, e.g., without justification, lacking sufficient evidence/documentation, etc. are addressed by giving the employer a choice. This choice is to accept a

¹ OSHA CPL-02-00-160, Field Operations Manual, Effective Date: 8/2/2016.
https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-160.pdf

- slightly lower reduction or to hire an attorney and to contest the case before the Hawaii Labor Board. The cost of litigation drives employers to accept improper citations and only creates an atmosphere of fear from retaliation. The acceptance of these kinds of cases means the employer now has a history that can be used against them with repeat or willful violations. Why is there no informal process that is fair? How is this part of the process monitored and evaluated?
- HIOSH officers are not consistent and they are not held accountable for improper inspections, citations and penalties. Consider these real life examples:
 - A homeowner is constructing a deck with family members and friends. There are no employees at their home when HIOSH conducts and inspection. The compliance officer alleges that one of the friends stated that they were paid to be there. At the informal conference the homeowner offers a written/signed statement from his friends that declares they were helping the homeowner. The compliance officer did not have a written/signed statement of their interview as required by their operations manual. HIOSH did not have authority or jurisdiction over the work performed by the homeowner and friends, there was no employer-employee relationship. The homeowner was offered reduced penalties or given the choice to hire an attorney and contest. This inspection, citation and penalties should have been thrown out and the compliance officer counseled.
 - A very small hotel is not required to have a bloodborne pathogens program, but they are cited by HIOSH for not having one. At the informal conference the HIOSH official informs the hotel owner that they believe all housekeepers should be in a bloodborne pathogens program. The HIOSH official decided to implement a policy that is NOT consistent with compliance with the regulations. Using the inspection, citation and penalty process to implement policy is inappropriate. The HIOSH official should be counseled and this practice immediately ceased.

Does the State of Hawaii have to adopt the high penalty increase as requested by OSHA? The short answer is no. The criteria for monitoring the State Plan performance is described in the OSHAct and is the “as effective as” criteria. (See Section 18). The state plan can implement changes that are identical to the OSHA changes or they can “...*modify or supplement the requirements contained in its plan, and may implement such requirements under State law, without prior approval of the plan change by Federal OSHA.*” The requirements and process for the State to implement changes and modifications that they determine to be “as effective as” the OSHA changes are discussed in 29 CFR 1953, excerpts are provided:

- **1953.3(a) Effectiveness of State plan changes under State law.** Federal OSHA approval of a State plan under section 18(b) of the OSH Act in effect removes the barrier of Federal preemption, and permits the State to adopt and enforce State standards and other requirements regarding occupational safety or health issues regulated by OSHA. A State with an approved plan may modify or supplement the requirements contained in its plan, and may implement such requirements under State law, without prior approval of the plan change by Federal OSHA. Changes to approved State plans are subject to subsequent OSHA review. If OSHA finds reason to reject a State plan change, and this determination is upheld after an adjudicatory proceeding, the plan change would then be excluded from the State's Federally-approved plan.
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- The OSHA EFAME report on the HIOSH activities reflects weaknesses in the program. The enforcement and the consultation/training programs

and efforts must be at the top of their game before it is assumed that employers are non-compliant and require a deterrent to influence their behavior. BEFORE any effort is made to increase the penalties an independent and extensive evaluation of the enforcement, consultation and training programs, which are funded by the State of Hawaii and OSHA, must be completed. This evaluation is critical to identifying the means and methods for determining the level of deterrence that is being addressed by high penalties.

- The extensive outreach and the strong development of a community relationship with business and employee organizations/associations is needed to work on the needs and the efforts to improve compliance. The decision to increase penalties based on the cost of living increase and NOT to consider the impact and input from the community should not be made in a vacuum or simply by an OSHA request. The Congressional purpose was to ensure the State Plans would ***“...develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith...”***

Some options:

- Consider a worker safety and health training bill, e.g., Nevada has a requirement that all construction workers must be trained in the OSHA 10 hour class.
- Development of no-cost workshops to teach employers how to meet the requirements for a small business safety and health programs.
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- Develop performance measures to reflect the level of compliance rather than using inspections, citations/penalties as a measure of non-compliance. Use of programs like SHARP has not been used because it was not readily supported by the Dept, i.e., lack of manpower, etc. and is clouded by the potential conflict between enforcement and consultation.
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creative in looking at the development of a council or other similar panel to review a case, at no cost, that is presented by an employer and their representatives BEFORE any costly litigation is needed.

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Walter Chun, PhD, CSP, CHSP, CHST

February 7, 2017

TESTIMONY FROM WALTER CHUN, PhD, CSP, CHSP, CHST

RE: Testimony Regarding HB 1114

This testimony is provided by, Walter Chun PhD a safety engineer and safety and health management professional with over 45 years of experience. He is a Certified Safety Professional, Certified Healthcare Safety Professional and Construction Health and Safety Technician. His background of over 45 years includes: Shipyard Safety Director; U.S. DOL OSHA Area Director; ES&H Director for Raytheon and Bechtel, and independent safety & Health and Environmental consulting.

The Hawaii State Plan was approved by OSHA and continues in accordance with the laws and regulations. **The state plan is intended to be unique and specific to the needs and responsibilities of the state.** This one element of the state plan is the expressed desire of Congress. The Congressional purpose for the state plans is described in Section 2(b)(11) of the OSHAct (Public Law 91-596).

2(b)(11) by encouraging the States to assume the fullest responsibility for administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

The proposed bill, HB1114, to increase the HIOSH penalties for violations of the safety and health standards at workplaces must be reconsidered because the impact of this increase has not been evaluated in sufficient detail. The Assistant Secretary from the USDOL, OSHA stated that the 78% increase in OSHA penalties is needed to create "deterrence" for non-compliance with the OSHA standards and change in workplace behavior. Hawaii has an approved state plan that is funded by the USDOL OSHA and matched/shared by State funds. The proposed bill does NOT provide any measure(s) or means to determine the effectiveness of the increased penalties, i.e., how will increasing the penalties by 78% cause deterrence for all employers and change the workplace behavior? And how will this be determined?

The recent increase in OSHA penalties was implemented on August 1, 2016. The Hawaii State Plan was notified and a plan change is required. The specific requirement or demand from OSHA is provided on page I-6 of the OSHA Field Operations Manual. This manual provides the requirements for State Plans to develop formal written policies, procedures, etc.:

*"Federal Program Change – Notice of Intent and Equivalency Required. This instruction describes a Federal Program Change which consolidates and updates OSHA's field enforcement policies and procedures. States must have, as a part of their State Plan, formal written policies and procedures on all aspects of their compliance program, including inspections, targeting, citations, penalties, and post citation processes, which are at least as effective as the procedures in this revised Field Operations Manual (FOM). **State Plans have the option of adopting identical or different, but at least as effective, enforcement policies as those contained in this FOM, and in doing so, State Plans must address each chapter and/or policy area in this manual.**"¹*

The "as effective as" performance measure is a federal regulatory requirement that is subjective. As shown above it requires the state to develop and implement their own safety and health program to meet local needs. Recently OSHA decided to use a 78% penalty increase and passed this on to the state. The state NEED NOT simply adopt the penalty increase presented by OSHA.

The state always has the extensive opportunity to study, evaluate, develop, and implement any action(s) that will be "as effective as" OSHA's actions. Before jumping on the OSHA penalty increase the state must study and evaluate the many considerations that affect(s) non-compliance with the OSHA standards. Some of these considerations are provided as examples:

- The HIOSH efforts were stifled and lagged behind for over a decade with outstanding vacancies, lack of funding, failure to address comparable salaries, etc. The present Bill simply hits businesses with a significant increase without considering the impacts of the failures for over a decade. What are the issues, what is the corrective action(s), and how effective are these actions?
- Over 90% of our businesses are small businesses and the impacts of these increases are severe. The economic impacts of the increases must be evaluated and considered. Is a nation-wide cost of living determination, as used by OSHA, applicable to increasing the penalties in Hawaii? Hawaii's large small business population as well as the fact that Hawaii's salaries are one of the lowest in the nation presents only the tip of the iceberg. Where is the economic impact of these penalties? How do the penalties affect compliance or non-compliance?
- The process to conduct inspections, issue citations and assess penalties is a one sided and unfair process. Citations that are issued improperly, e.g., without justification, lacking sufficient evidence/documentation, etc. are addressed by giving the employer a choice. This choice is to accept a

¹ OSHA CPL-02-00-160, Field Operations Manual, Effective Date: 8/2/2016.
https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-160.pdf

- slightly lower reduction or to hire an attorney and to contest the case before the Hawaii Labor Board. The cost of litigation drives employers to accept improper citations and only creates an atmosphere of fear from retaliation. The acceptance of these kinds of cases means the employer now has a history that can be used against them with repeat or willful violations. Why is there no informal process that is fair? How is this part of the process monitored and evaluated?
- HIOSH officers are not consistent and they are not held accountable for improper inspections, citations and penalties. Consider these real life examples:
 - A homeowner is constructing a deck with family members and friends. There are no employees at their home when HIOSH conducts and inspection. The compliance officer alleges that one of the friends stated that they were paid to be there. At the informal conference the homeowner offers a written/signed statement from his friends that declares they were helping the homeowner. The compliance officer did not have a written/signed statement of their interview as required by their operations manual. HIOSH did not have authority or jurisdiction over the work performed by the homeowner and friends, there was no employer-employee relationship. The homeowner was offered reduced penalties or given the choice to hire an attorney and contest. This inspection, citation and penalties should have been thrown out and the compliance officer counseled.
 - A very small hotel is not required to have a bloodborne pathogens program, but they are cited by HIOSH for not having one. At the informal conference the HIOSH official informs the hotel owner that they believe all housekeepers should be in a bloodborne pathogens program. The HIOSH official decided to implement a policy that is NOT consistent with compliance with the regulations. Using the inspection, citation and penalty process to implement policy is inappropriate. The HIOSH official should be counseled and this practice immediately ceased.

Does the State of Hawaii have to adopt the high penalty increase as requested by OSHA? The short answer is no. The criteria for monitoring the State Plan performance is described in the OSHAct and is the “as effective as” criteria. (See Section 18). The state plan can implement changes that are identical to the OSHA changes or they can “...*modify or supplement the requirements contained in its plan, and may implement such requirements under State law, without prior approval of the plan change by Federal OSHA.*” The requirements and process for the State to implement changes and modifications that they determine to be “as effective as” the OSHA changes are discussed in 29 CFR 1953, excerpts are provided:

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Walter Chun, PhD, CSP, CHSP, CHST

February 7, 2017

HB 1114

Late testimony

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Honolulu, HI 96819
Phone: 808-833-1681 FAX: 839-4167
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Website: www.gcawhawaii.org



GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

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LATE

LATE

February 9, 2017

TO: HONORABLE AARON JOHANSON, CHAIR HONORABLE DANIEL HOLT,
VICE CHAIR AND MEMBERS OF THE HOUSE COMMITTEE ON LABOR
AND EMPLOYMENT

SUBJECT: **COMMENTS REGARDING TO H.B. 1114, RELATING TO
OCCUPATIONAL SAFETY AND HEALTH PENALTIES.** Increases fines
for Hawaii Occupational and Safety violations pursuant to the Federal Civil
Penalties Inflation Adjustment Act Improvement Act of 2015, Section 701 of P.L.
114-74.

LATE

HEARING

DATE: February 9, 2017
TIME: 10:00 a.m.
PLACE: Conference Room 309

Dear Chair Johanson, Vice Chair Holt 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 to be increased by 78 percent with its top penalty for serious violations rising from \$7,000 to \$12,471 -- with the adoption of this measure Hawaii's penalties would mirror that amount. 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.

LATE

LATE



LATE

**Testimony to the House Committee on Labor & Public Employment
February 9, 2017
10:00 am
Conference Room 309
RE: HB 1114 – Relating to Occupational Safety and Health Penalties**

Chair Johanson, Vice-Chair Holt, and members of the committee:

My name is Brian K. Adachi, President of BKA Builders Inc. a small General Contractor in the State of Hawaii since 1990. I am also a Past President of the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, the Building Industry Association of Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates.

I am in opposition to HB 1114. This bill would increase the fines for Hawaii Occupational and Safety (HIOSH) violations from \$7,700 to \$12,471 per violation. This increase is sizeable, and could be devastating to small businesses. Four or more serious violations are not uncommon.

Education may be the easiest route to take in ensuring the safety of workers. The effort to create a deterrence for non-compliance to the OSHA standards must include education, awareness, consultation, training and other efforts.

Just keeping up with the OSHA standards puts a substantial burden on many small Business Owners who struggle to meet the daily responsibilities of keeping a small business afloat in ultra-competitive markets. In addition, they are required to keep up with the myriad Rules and Regulations imposed by the Government along with ever-changing Safety Standards. Most small Business Owners just do not have the funds to invest in a Safety Officer or even to pay for the increasing premiums and time commitment required to take the educational classes offered to gain a working knowledge of these rules and educate and monitor their Employees.

Meanwhile there are published examples everywhere that show unsafe work practices. From TV Commercials showing Tapers in residential construction walking on stilts to apply drywall mud to ceilings, and a carpenter holding 2/2x 4s in the air with his left arm while nailing them together with a pneumatic nailer. To TV news reports showing workers tossing construction debris from the third floor of a building to a dumpster below. And even pictures in print media showing workers without adequate fall protection. How can a small Business enforce all the required Safety Regulations when there are constant examples of unsafe/illegal practices appearing regularly in both print and visual media?

I strongly believe that a warning system is the fairest way to go. Inspect and give the establishment a reasonable grace period to correct the defects. If the defects are not corrected on the second visit, a fine is the more than justified along with remedial training.

Thank you for the opportunity to provide comments.

LATE

LATE

LATE

From: mailinglist@capitol.hawaii.gov
 Sent: Wednesday, February 8, 2017 9:44 PM
 To: LABtestimony
 Cc: lucaspar@hawaii.edu
 Subject: Submitted testimony for HB1114 on Feb 9, 2017 10:00AM

HB1114

Submitted on: 2/8/2017

Testimony for LAB on Feb 9, 2017 10:00AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
Kamuela Park	Individual	Oppose	No

Comments: STOP TRYING TO TAKE AWAY OUR RIGHTS TO DUE PROCESS. I AM STRONGLY AGAINST THIS BILL

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.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov