



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-NINTH LEGISLATURE, 2017**

ON THE FOLLOWING MEASURE:

H.B. NO. 407, RELATING TO INSURANCE.

BEFORE THE:

HOUSE COMMITTEES ON HEALTH AND ON INTERSTATE COMMERCE

DATE: Tuesday, February 14, 2017 **TIME:** 8:30 a.m.

LOCATION: State Capitol, Room 329

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Daniel K. Jacob, Deputy Attorney General

Chairs Belatti and Ohno and Members of the Committees:

The Department of the Attorney General provides the following comments regarding legal concerns about this bill.

The purpose of this bill is to facilitate the establishment of health plans that qualify as high deductible health plans in Hawaii, which may be purchased for use with a health savings account and which allow the labor force to receive contributions to health savings accounts. Initially, we note that the terms "stand-alone high deductible plan" and "stand-alone health savings account," as found on Page 2, lines 20-21, are unclear and should be defined.

Perhaps more importantly, we want to advise the Legislature that this bill may be subject to an Employee Retirement Income Security Act (ERISA) preemption challenge. Subsection (b), of the new section being added to article 10A, chapter 431, Hawaii Revised Statutes, by section 2 of the bill on page 2, lines 10-15, on its face appears directed at insurance entities and is placed within the insurance code. However, it may be interpreted as requiring an employer to offer an employee two plans, which may fall outside ERISA's insurance savings clause.

Furthermore, the risk of an ERISA preemption challenge may arise because the purpose of the bill as provided on Page 1, lines 1-5, indicates an attempt to regulate employee welfare benefit plans by providing, "[t]he purpose of this Act is to facilitate the establishment of health plans that qualify as high deductible health plans in Hawaii and may be purchased for use with a health savings account and allow the *labor force* to

receive contributions to health savings accounts." (Emphasis added.) In addition, the purpose of the bill as provided on Page 1, lines 10-13, also provides that, the "Act shall be liberally construed to allow *employers and employees* to receive maximum tax benefits provided in federal or state law through use of a high deductible health plan." (Emphasis added.)

ERISA is a comprehensive federal legislative scheme that "supersede[s] 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 Because the stated purpose of the bill appears to be directed to employee welfare benefit plans and laws relating to employee welfare benefit plans would be preempted by ERISA, this bill could be preempted by ERISA. This bill, however, may be saved through the insurance savings clause found within ERISA that permits states to regulate the business of insurance, regardless of its direct or indirect effect on employee benefit plans. 29 U.S.C. § 1144(b)(2)(A). See *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 342 (2003).

Our comments above equally apply to section 3 of the bill starting on Page 4.

Although we are not recommending that this bill be held on legal grounds, we want the committee to be informed of the possible legal risk.

Thank you for the opportunity to comment.

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.

DAVID Y. IGE
GOVERNOR

SHAN S. TSUTSUI
LIEUTENANT GOVERNOR



LINDA CHU TAKAYAMA
DIRECTOR

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February 14, 2017

To: The Honorable Della Au Belatti, Chair,
The Honorable Bertrand Kobayashi, Vice Chair, and
Members of the House Committee on Health

The Honorable Takashi Ohno, Chair,
The Honorable Isaac W. Choy, Vice Chair, and
Members of the House Committee on Intrastate Commerce

Date: Monday, February 14, 2017
Time: 8:30 a.m.
Place: Conference Room 329, State Capitol

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

Re: H.B. No. 407 Relating to Insurance

I. OVERVIEW OF PROPOSED LEGISLATION

This proposal permits insurers, mutual benefit societies, and health maintenance organizations to offer, sell, or renew, on or after January 1, 2018, a high deductible health plan in combination with a health savings account (HSA) to an employer subject to the PHC Act, chapter 393, Hawaii Revised Statutes (HRS) together with a prepaid health care insurance policy.

The Department offers comments on the measure below.

II. CURRENT LAW

Chapter 393, HRS, the Prepaid Law is an employer-based healthcare mandate. Section 393-11, HRS, requires that an employer provide an eligible employee with health insurance by a prepaid health care (PHC) plan qualifying under section 393-7, HRS. The Prepaid Health Care Advisory Council reviews these plans and makes a recommendation to the DLIR Director for approval or disapproval.

III. COMMENTS ON THE SENATE BILL

§393-7 Required health care benefits establish the criteria by which employer-provided healthcare insurance plans are evaluated by the Prepaid Health Care Advisory Council that reviews these plans and makes a recommendation to the DLIR Director for approval or disapproval. §393-7 provides two different methods for employers to comply with providing healthcare insurance coverage under paragraphs (a) and (b).

§393-7(a) reads in part, "A prepaid health care plan shall qualify as a plan providing the mandatory health care benefits required under this chapter if it provides for health care benefits equal to, or medically reasonably substitutable for, the benefits provided by prepaid health plans of the same type, as specified in section 393-12(a)(1) or (2), which have the largest numbers of subscribers in the State. This applies to the types and quantity of benefits as well as to limitations on reimbursability, including deductibles, and to required amounts of co-insurance.

§393-7(b) reads, "A prepaid group health care plan shall also qualify for the mandatory health care benefits required under this chapter if it is demonstrated by the health care plan contractor offering such coverage to the satisfaction of the director after advice by the prepaid health care advisory council that the plan provides for sound basic hospital, surgical, medical, and other health care benefits at a premium commensurate with the benefits included taking proper account of the limitations, co-insurance features, and deductibles specified in such plan. Coverage under a plan which provides aggregate benefits that are more limited than those provided by plans qualifying under subsection (a) shall be in compliance with section 393-11 only if the employer contributes at least half of the cost of the coverage of dependents under such plan.

The cost of the coverage to the employee under §393-7(a) and (b) is subject to limits on the amount of the employee portion for the coverage pursuant to §393-13, which reads in part, "Unless an applicable collective bargaining agreement specifies differently every employer shall contribute at least one-half of the premium for the coverage required by this chapter and the employee shall contribute the balance; provided that in no case shall the employee contribute more than 1.5 per cent of the employee's wages; and provided that if the amount of the employee's contribution is less than one-half of the premium, the employer shall be liable for the whole remaining portion of the premium.

The question as to whether a high-deductible health plan in tandem with a Health Savings Account could potentially qualify as a Prepaid plan as recommended by the Prepaid Council and approved by the Director is yes, but only under §393-7(b) because high-deductible plans with HSAs have higher deductible amounts and higher out-of-pocket ceilings than would be allowed under §393-7(a).

However, the potential approval of such a plan would require that the benefits,

including limitations, co-insurance and deductibles satisfy §393-7(b) and be approved by the Director. Thus, whether high-deductible health plans and medical savings accounts can satisfy the Act will depend upon the package an employer presents to the Director.



An Independent Licensee of the Blue Cross and Blue Shield Association

February 14, 2017

The Honorable Della Au Belatti, Chair
The Honorable Bertrand Kobayashi, Vice Chair
House Committee on Health

The Honorable Takashi Ohno, Chair
The Honorable Isaac Choy, Vice Chair
House Committee on Intrastate Commerce

Re: HB 407 – Relating to Insurance

Dear Chair Belatti, Chair Ohno, Vice Chair Kobayashi, Vice Chair Choy, and Committee Members:

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify on HB 407, which authorizes insurers, mutual benefit societies, and health maintenance organizations to offer, sell, or renew, on or after January 1, 2018, a high deductible health plan in conjunction with a health savings account (HSA). HMSA has serious concerns with this Bill and offers the following comments.

HSAs are authorized under federal law and afford employees and their families, who also have a high-deductible health plan, a tax-advantaged medical savings account. The HSA is not subject to federal income tax at the time of deposit, and it is portable – unspent balances continue to accumulate over time and follow the employee, should the employee change jobs. The monies deposited in an HSA may only be used for qualified medical expenses.

While HMSA is appreciative of the concept of an HSA, we are concerned that HB 407 inappropriately places the administration of an HSA with health plans. An HSA is a benefit that an employer affords an employee, and it is not a product that a plan offers or administers. While the plan has the option of offering a high deductible product, along with a product that is compliant with the Prepaid Healthcare Act, the plan should not serve as the primary custodian or trustee of the HSA. We believe that responsibility more appropriately lies with a financial institution, selected by the employer that is more accustomed to managing trust accounts. Such an institution more readily and expeditiously could accommodate the trust account provisions of this legislation.

Thank you for the opportunity to testify on HB 407. Your consideration of our concerns is appreciated.

Sincerely,

Mark K. Oto
Director, Government Relations

Testimony of
Jonathan Ching
Government Relations Specialist

Before:
House Committee on Health
The Honorable Della Au Belatti, Chair
The Honorable Bertrand Kobayashi, Vice Chair

House Committee on Intrastate Commerce
The Honorable Takashi Ohno, Chair
The Honorable Isaac W. Choy, Vice-Chair

February 14, 2017
8:30 a.m.
Conference Room 329

Re: HB407 Relating to Insurance

Chairs, Vice Chairs, and committee members, thank you for this opportunity to provide testimony on HB407, which authorizes insurers, mutual benefit societies, and health maintenance organizations to offer, sell, or renew a high deductible health plan (“HDHP”) in conjunction with a health savings account (“HSA”) to an employer subject to the Prepaid Health Care Act together with a prepaid health care plan insurance policy.

Kaiser Permanente Hawaii supports the intent and offers the following COMMENTS on HB407.

Kaiser Permanente Hawaii supports consumer choice through the establishment of HSAs, and recognizes the advantages of allowing employers to choose a lower premium (higher deductible) health plan, while allowing consumer to choose how to spend his or her health care expenses, which presumably makes consumers more responsible for health care choices by funding their own health care expenses.

To receive the benefits of an HSA, the law requires that the HSA be combined with a qualified HDHP. Although an HSA works in conjunction with a HDHP, both are recognized as *separate* components under the law. An HSA is the *financial component* (essentially a bank account that allows you to save and pay for eligible health care expenses), which is sponsored by the employer group. Meanwhile, the HDHP is the *insurance component*, which requires health insurers to offer a qualified high deductible health plan to use with an HSA. This HDHP is

designed to offer a lower monthly premium in turn for more shared health care costs by the member.

With this in mind, Kaiser Permanente Hawaii seeks clarification on the following provisions of HB407:

1. On page 2, lines 5, 11; page 4, lines 10-11, 16; and page 6, line 21 to page 7, line 1: We seek clarification on what “in conjunction with a health savings account” means? Does this mean an employer’s *only obligation* is to “offer” a prepaid plan but an employer does not need to mandate those prepaid benefits to the employee? It is our understanding that a HDHP/HSA works when employers are mandated to sell a prepaid plan and give employees the full prepaid benefits *but also* layer on top of the prepaid rules a HSA qualified deductible sponsored by the employer.
2. We note that the HB407 does not include language that requires the employer to subsidize the amount greater than the prepaid limit. We seek clarification if HB407 should stipulate “minimum HDHP requirements”?
3. On page 3, line 1-4 and page 5, line 7-10: We seek clarification on the following provision, “[i]f this section or any provision of this section conflicts with any federal law, then the federal law shall prevail and this section [. . .] shall become invalid and void.”

Mahalo for the opportunity to testify on HB407. Your consideration our comments is appreciated.

February 13, 2017

The Honorable Della Au Belatti, Chair
The Honorable Bertrand Kobayashi, Vice Chair

Re: HB 407 – Relating to Insurance

Dear Chair Belatti, Vice Chair Kobayashi 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 407. This bill would give employers in the state an option to offer, in addition to the current plans they offer their employees, a Hawaii version of a health savings account (HSA). For those employees that select this Hawaii HSA, the employees would receive employer contributions to their HSAs. The HSA funds can then be used on a tax-free basis to pay or reimburse qualified medical expenses, and the contributions can be accumulated over the years tax-free.

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

The Twenty-Ninth Legislature
Regular Session of 2017



HOUSE OF REPRESENTATIVES

Committee on Health

Rep. Della Au Belatti, Chair

Rep. Bertrand Kobayashi, Vice Chair

Committee on Intrastate Commerce

Rep. Takashi Ohno, Chair

Rep. Isaac W. Choy, Vice Chair

State Capitol, Conference Room 329
Tuesday, February 14, 2017; 8:30 a.m.

**STATEMENT OF THE ILWU LOCAL 142 ON H.B. 407
RELATING TO INSURANCE**

The ILWU Local 142 **opposes** H.B. 407, which authorizes insurers, mutual benefit societies, and health maintenance organizations to offer, sell, or renew, on or after January 1, 2018, a high deductible health plan in conjunction with a Health Savings Account to an employer subject to the Prepaid Health Care Act together with a prepaid health care plan insurance policy.

As we understand this bill, H.B. 407 proposes to allow high-deductible health plans with Health Savings Accounts (HSAs) to be offered, sold or renewed to employers as long as Prepaid Health Care plans are also made available. We **OBJECT** to this proposal for the following reasons.

First, regardless of the amount of money available in an HSA, a high deductible plan still means the patient must pay for all services up to the deductible amount before the plan pays anything. That could easily lead an employee to forgo necessary medical services because of the required out-of-pocket costs. Even if the HSA has ample funds to cover the deductible, many may be reluctant to tap into the HSA, thinking that the HSA should be reserved for catastrophic needs rather than routine medical care.

Second, forgoing preventive services or routine check-ups could result in a patient waiting to have a condition checked or treated until it does become catastrophic. Delayed treatment usually means higher health care costs in the long run and less satisfactory outcomes for the patient.

Third, if both a high deductible plan and a Prepaid Health Care plan are offered, adverse selection is likely to occur. Healthier employees, who do not need medical services, may be lured by the prospect of tax savings with HSAs and enroll in a high deductible plan while their not-so-healthy coworkers will have no choice but to stay with the employer's Prepaid Health Care plan, which will very likely cost more.

Fourth, the high deductible plan may have an impact on the prevalent plan under the Prepaid Health Care Act. The prevalent plan is based on identifying the plan with the greatest number of enrolled individuals. If fewer people enroll in the plan with better benefits (i.e., no deductible), the standard will be eroded and the prevalent plan will become the one with lesser benefits (i.e., high deductible).

Fifth, the bill is unclear as to who would make contributions to the HSA. If the employer contributes, then more employees may want to sign up for the high deductible plan, which may ultimately be an unwise decision for the reasons given above. If the employee contributes, a high deductible plan has very little value other than possible tax savings.

Sixth, consumer education is vital for this program to work and for employees to make informed decisions. However, employees may disregard the education (or not understand what is shared, especially given Hawaii's multi-lingual, multi-cultural population) and see only the money that can accumulate in an HSA and potential tax advantages.

We see very few, if any, positives and so many negatives to this proposal. The ILWU urges that H.B. 407 be **HELD**. Thank you for the opportunity to share our views and concerns.



HAWAII REGIONAL COUNCIL OF CARPENTERS

LATE

February 14, 2017

STATEMENT OF THE HAWAII REGIONAL COUNCIL OF CARPENTERS IN OPPOSITION TO HB407

Dear Chair and Members of the Committee:

We would like to express our concerns with HB 407, Relating to Insurance. We believe that Health Savings Account (HSA) Plans would have unintended consequences on workers. Here are a few of our concerns with HSA plans:

- Puts the burden on the employee to budget enough to meet the need of an illness in the future. Illnesses can be unpredictable, as is cost for treatment;
- Older and sicker workers may have additional barriers such as lack of adequate time to save a sufficient amount in their account;
- Reluctance to deplete a HSA fund may cause workers to forgo medical treatment all together;
- The ability to take money out of a HSA for unrestricted non-medical use would cause a tax burden and leave the employee with nothing in a HSA in the event of an unexpected illness.

Thank you for the opportunity to voice our concerns.

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