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LEGISLATIVE REFERENCE BUREAU  
State of Hawaii  
State Capitol, Room 446  
415 S. Beretania Street  
Honolulu, Hawaii 96813

## Written Comments

### HCR85

# **REQUESTING THE LEGISLATIVE REFERENCE BUREAU TO CONDUCT A STUDY RELATING TO THE STATE'S AUTHORITY TO ALLOW COLLECTIVE NEGOTIATION BETWEEN PHYSICIANS AND HEALTH CARE INSURERS IN HAWAII TO RESTRAIN OR BALANCE THE MONOPSONISTIC MARKET POWER OF HEALTH CARE INSURERS OVER INDEPENDENT PHYSICIANS**

Charlotte A. Carter-Yamauchi, Director  
Legislative Reference Bureau

Presented to the House Committee on Health, Human Services, & Homelessness

Tuesday, March 23, 2021, 9:00 a.m.  
Conference Room 329

Chair Yamane and Members of the Committee:

Good morning, Chair Yamane and members of the Committee. My name is Charlotte Carter-Yamauchi, and I am the Director of the Legislative Reference Bureau. Thank you for providing the opportunity to submit written comments on H.C.R. No. 85, Requesting the Legislative Reference Bureau to Conduct a Study Relating to the State's Authority to Allow Collective Negotiation Between Physicians and Health Care Insurers in Hawaii to Restrain or Balance the Monopsonistic Market Power of Health Care Insurers Over Independent Physicians.

The purpose of this measure is to request the Legislative Reference Bureau to conduct a study relating to the State's authority to allow collective negotiation between physicians and health care insurers in Hawaii to restrain or balance the monopsonistic market power of health care insurers over independent physicians. The measure also requests that the study include an examination of the Alaska law authorizing collective negotiation by physicians, the Parker immunity doctrine and its current legal status, the extent of any statutory or policy implementation by other states relating to collective negotiation by physicians, and whether and how enacting a law similar to Alaska's law on collective

negotiation by physicians would impact the State's Prepaid Health Care Act exemption from the federal Employee Retirement Income Security Act of 1974.

The measure further requests the Legislative Reference Bureau submit a report to the Legislature of its findings and recommendations, including any proposed legislation to allow collective negotiation between physicians and health care insurers in Hawaii, no later than twenty days prior to the convening of the Regular Session of 2022.

The Bureau takes no position on the merits of this measure but submits the following comments for your consideration.

Generally speaking, we note that Hawaii is the only state in the nation that possesses an explicit exemption from the federal Employee Retirement Income Security Act of 1974 (ERISA), for its Prepaid Health Care Act (PHCA), which is codified as Chapter 393, Hawaii Revised Statutes. As I am sure you are aware, ERISA is a federal law that sets minimum standards for most voluntarily established retirement and health plans in private industry to provide protection for individuals in these plans.

The Bureau has no specific expertise regarding antitrust law, the PHCA, or how enacting state action immunity legislation could impact the State's ERISA exemption for its PHCA. Furthermore, if the study is to include an analysis of whether and how enacting a law similar to Alaska's law on collective negotiation by physicians would impact the State's PHCA exemption from the federal Employee Retirement Income Security Act of 1974, then the Bureau would need to contract the services of an entity that specializes in such analyses, since the Bureau does not employ any experts in the PHCA. However, the Bureau's current budget does not contain any funding to allow us to contract for those services.

We also note that the 1983 federal legislation that provided the State of Hawaii with the ERISA exemption for the PHCA had the effect of "freezing" the provisions of that Act by invalidating "any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date." 29 U.S.C. 1144(b)(5)(B)(ii). We further note that some legal scholars have emphasized that the Hawaii U.S. District Court, in *Council of Hotels v. Aagsalud*, 594 F. Supp. 449 (D. Hawaii 1984), strictly construed the ERISA exemption provision, ruling that a collective bargaining-related PHCA amendment enacted after September 2, 1974, was preempted since it was deemed a substantive change and therefore exceeded the narrow exemption provided under 29 U.S.C. § 1144(b) (5) (A) & (B) (ii).

Accordingly, the Bureau respectfully requests that the Committee amend the measure to remove the requested analysis of whether and how enacting a law similar to Alaska's law to allow collective negotiation between physicians and health care insurers would impact the State's Prepaid Health Care Act exemption from the federal Employee Retirement Income Security Act of 1974. As the issue is outside of the Bureau's scope of expertise, we believe it would be best undertaken by either another agency or a contracted entity having specific

expertise in the subject matters and the requisite professional services to perform the analysis and make recommendations.

As to the remaining issues delineated in the measure, the Bureau believes that conducting a study that examines: the Alaska law authorizing collective negotiation by physicians; the Parker immunity doctrine and its current legal status; and the extent of any statutory or policy implementation by other states relating to collective negotiation by physicians, would probably be manageable.

In closing, if the scope of the measure is amended as described above, the Bureau believes that the services requested under the measure would be manageable, provided that the Bureau's interim workload is not adversely impacted by too many additional responsibilities such as conducting additional studies, writing or finalizing other reports, drafting legislation, or any combination of these for the Legislature or for other state agencies, task forces, or working groups that may be requested or required by other legislative measures.

Thank you again for the opportunity to submit written comments.



March 23, 2021

The Honorable Ryan I. Yamane, Chair  
The Honorable Adrian K. Tam, Vice Chair  
House Committee on Health, Human Services, & Homelessness

Re: HCR85 – Requesting the Legislative Reference Bureau to conduct a study relating to the State’s authority to allow collective negotiation between physicians and health care insurers in Hawaii to restrain or balance the monopsonistic market power of health care insurers over independent physicians

Dear Chair Yamane, Vice Chair Tam, and Members of the Committees:

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify expressing our serious concerns on HCR85.

HMSA respectfully opposes this resolution. The intent of the study is to evaluate allowing physicians who are not part of a group practice to share information about contractual terms and rates with insurance companies in order to collectively bargain. We believe this premise would presume to allow physicians to engage in price fixing which is against federal antitrust laws. The concern with price fixing and collusion among physicians is that it will lead to artificially increased reimbursements resulting in increased and unsustainable health care costs and premiums for our members.

The Federal Trade Commission (FTC) has weighed in on active state legislation in the past and found that similar attempts to circumvent federal antitrust law would not improve patient care, but instead would likely raise health care costs and decrease access to care.

We respectfully ask that this measure be deferred. Should this measure move forward, we respectfully recommend that the legislature request the FTC to weigh in on this concept.

Thank you for the opportunity to testify on this measure. Your consideration of our concerns is greatly appreciated.

Sincerely,

Matthew W. Sasaki  
Director, Government Relations

**HCR-85**

Submitted on: 3/20/2021 6:16:00 PM

Testimony for HHH on 3/23/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Scott Grosskreutz, M.D.	Hawaii Physician Shortage Crisis Task	Support	No

Comments:

Dr. Kelley Withy predicted a decade ago that Hawaii's physician shortage would double or triple in 10 years, in a Star Advertiser article from 2011. Sadly this has proven accurate, with the Neighbor Islands now suffering a higher mortality, lower life expectancy and higher death rate from trauma, stroke, cancer and heart attack compared with Oahu, due to a lack of access to healthcare .

Hawaii's healthcare providers have served on the front lines of this worldwide pandemic. With the second oldest physician workforce in America, many doctors, who should have sheltered in place at home per federal recommendations, have risked their personal health to deliver babies, perform surgery and provide face to face care to patients.

Many of the one third of Big Island doctors who are over age 65 are working 60-70 hours a week to provide patient care. We desperately need new younger doctors to join the workforce. The high costs of providing medical services in Hawai'i, high levels of taxation, and low reimbursements from HMSA, Medicare and other payers make almost impossible to retain and recruit new doctors.

After years of documenting Hawai'i's access to healthcare crisis, members of our Hawai'i Physician Shortage Crisis Task Force are frankly in a state of shock. The physician shortages are now 53% on Hawai'i Island, 42% on Maui and 33% on Kauai. Tax policies like SB56 would euthanize private medical practices in our state, and even make it difficult for hospitals and nonprofits exempt from Hawai'i's unique and punitive GET on healthcare to recruit.

Hawaii's older physicians simply cannot carry on much longer. Working 6-7 days a week is expected when one is an intern in your 20's but more difficult in your 60's and

70's. Please pass this resolution and take the needed actions to prevent "the collapse of the healthcare system" on the Neighbor Islands, in the words of Mayor Harry Kim.



March 23, 2021

To: House Committee on Health, Human Services, and Homelessness  
Representative Ryan I. Yamane, Chair  
Representative Adrian K. Tam, Vice Chair  
Members of the Committee on Health Human Services, and Homelessness

Re: HCR85: REQUESTING THE LEGISLATIVE REFERENCE BUREAU TO  
CONDUCT A STUDY RELATING TO THE STATE'S AUTHORITY TO  
ALLOW COLLECTIVE NEGOTIATION BETWEEN PHYSICIANS AND  
HEATH CARE INSURERS IN HAWAII TO RESTRAIN OR BALANCE THE  
MONOPOSONIC MARKET POWER OF HEALTH CARE INSURERS OVER  
INDEPENDENT PHYSICIANS

Hearing: Tuesday, March 23, 2021, 9:00 a.m. Room 329, via videoconference

Position: **STRONG SUPPORT**

Aloha, Chair Yamane, Vice Chair Tam, and Members of the Committee on Health, Human Services, and Homelessness:

The Health Committee of the Democratic Party of Hawai'i strongly supports this resolution, which details the serious underlying factors that make the practice of medicine both financial and professionally very difficult in the State of Hawaii at the present time.

This Resolution merely calls for a study. However, the evidence to support the statements laid out in the Resolution is already ample. We trust that the Legislative Reference Bureau will have little difficulty collecting and presenting to the Legislature detailed background material to justify remedial legislation. The Health Committee of the Democratic Party hopes very much that the Legislature will pass, and that the Governor will approve such legislation, early next year.



March 23, 2021

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Thank you very much for the opportunity to testify on this key issue.

Melodie Aduja  
Chair, Health Committee  
Democratic Party of Hawaii  
[Legislativepriorities@gmail.com](mailto:Legislativepriorities@gmail.com)  
(808) 258-8889



**HCR-85**

Submitted on: 3/22/2021 7:32:20 AM

Testimony for HHH on 3/23/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Matthew Dykema	Joyful Living, LLC	Support	No

Comments:

I support this Bill. As it stands, Insurance companies as big Companies (namely HMSA) can do whatever they want to to individual physicians and practices. The healthcare shortage is a community problem and individual physicians must be able to come together to create a solution with the insurance company and this means being able to have collective negotiation.

Thank you for our service to our community and comittment to ensuring the this generation and the next have physicians available to care for them.

Matthew Dykema,

Family Medicine Physician - Hilo, HI



## HAWAII MEDICAL ASSOCIATION

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### HOUSE COMMITTEE ON HEALTH, HUMAN SERVICES, AND HOMELESSNESS

Rep. Ryan Yamane, Chair

Rep. Adrian Tam, Vice Chair

Date: March 23, 2020

Time: 9:00 a.m.

Place: Conference Room 329

From: Hawaii Medical Association

Elizabeth A. Ignacio, MD, Chair, Legislative Committee

Thomas Kosasa, Executive Director

**Re: HCR85 REQUESTING THE LEGISLATIVE REFERENCE BUREAU TO CONDUCT A STUDY RELATING TO THE STATE'S AUTHORITY TO ALLOW COLLECTIVE NEGOTIATION BETWEEN PHYSICIANS AND HEALTH CARE INSURERS IN HAWAII TO RESTRAIN OR BALANCE THE MONOPSONISTIC MARKET POWER OF HEALTH CARE INSURERS OVER INDEPENDENT PHYSICIANS.**

#### **Position: STRONG SUPPORT**

In the current national market it is important that clear lines of communication are open between insurers and providers. Under federal antitrust law, independent physicians cannot negotiate collectively with health insurers. This imbalance in relative size leaves most physicians with a weak bargaining position relative to commercial payers. Excessive use of market power harms the state in both quality and access to health care.

An exception to this negotiation exclusion is the “State Action Doctrine” based upon the Supreme Court case Parker v. Brown (1943). The State of Alaska passed legislation in 2009 to allow physicians and insurers to collectively convene for discussion of fee schedules and work rules under an exemption to federal antitrust statute.

**The purpose of HCR85 is to task the Hawaii Legislative Reference Bureau with the examination of the Alaska statute and the ability and logistics of implementation of similar statute in Hawaii**, with report back to the legislature for review in advance of the 2022 legislative session. The Hawaii Medical Association is willing and ready to assist in any way the LRB might deem necessary.

Thank you for allowing the Hawaii Medical Association to testify on this issue.

#### **HMA OFFICERS**

President – Michael Champion, MD President-Elect – Angela Pratt, MD Secretary – Thomas Kosasa, MD

Immediate Past President – Jerry Van Meter, MD Treasurer – Elizabeth A. Ignacio, MD

Executive Director – Thomas Kosasa, MD

**HCR-85**

Submitted on: 3/20/2021 5:34:07 PM

Testimony for HHH on 3/23/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Frank R Baum	Individual	Support	No

Comments:

Please pass this legislation to gain more knowledge in how to support individual medical doctors and our attempt to provide care to Hawaii's population without the stranglehold of health insurance control. Medical care should be between the physician and the patient, without the influences of the health insurance industry.

Thank you for your consideration. I have been providing pediatric care on Maui for 36 years. When I finally give up my practice there is currently no pediatrician that can handle my 3000 active patients. Who will care for them, the health insurance companies? We need young doctors to come to Hawaii, the insurance companies are hindering this from happening by the imbalance of their influence.

Frank R. Baum, MD

**HCR-85**

Submitted on: 3/20/2021 6:29:25 PM

Testimony for HHH on 3/23/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Charles Parente	Individual	Support	No

Comments:

This measure will help Hawaii physicians provide better care for the patients they serve.

**HCR-85**

Submitted on: 3/20/2021 6:42:38 PM

Testimony for HHH on 3/23/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Stephen Smith	Individual	Support	No

Comments:

Our Hawaii physicians must have the ability to participate in discussions with health benefit plans on contract terms and conditions that impact our delivery of healthcare to our patient ohana. This resolution is an essential step in educating Hawaii healthcare leaders, administrators, providers and lawmakers regarding allowable crucial conversations between payors and providers.

Please support HCR85

**HCR-85**

Submitted on: 3/21/2021 8:08:22 PM

Testimony for HHH on 3/23/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Jeffrey Akaka, MD	Individual	Support	No

Comments:

2021\_3\_22

Re: HCR85

Study on Collective Negotiation Between Physicians and Health Care Insurers in Hawaii.

Dear Chair Ryan Yamane and Members of the House Committee on Health, Human Services and Homelessness,

People leave intolerable circumstances they cannot change nor influence.

Tragically, in the United States, physicians in a number equal to an entire medical school class leave practice, and their families and communities, by suicide every year.

How many leave because of insurance company policies that make their practices, and lives, intolerable, that they can neither change nor influence?

Shouldn't we find out?

Please pass HCR85

Mahalo,

Jeffrey Akaka, MD

**HCR-85**

Submitted on: 3/21/2021 9:28:39 PM

Testimony for HHH on 3/23/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Laeton J Pang	Individual	Support	No

Comments:

I'm writing in support of HCR85 as a concerned physician having practiced in Hawaii for 27 years. I have watched with alarm as the physician shortage in Hawaii and particularly on the neighbor islands has gotten worse and now is in danger of collapse.

**HCR-85**

Submitted on: 3/21/2021 10:23:11 PM

Testimony for HHH on 3/23/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
joann sarubbi md	Individual	Support	No

Comments:

Hawaii is in a state of a severe physician shortage which will be worsening due to the hostile climate they are forced to work in.



**HCR-85**

Submitted on: 3/22/2021 8:58:07 AM

Testimony for HHH on 3/23/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Stephanie Yan	Individual	Support	No

Comments:

Dear Honorable Representatives,

Our Hawaii physicians must have the ability to participate in discussions with health benefit plans on contract terms and conditions that impact our delivery of healthcare to our patient ohana. This resolution is an essential step in educating Hawaii healthcare leaders, administrators, providers and lawmakers regarding allowable crucial conversations between payors and providers.

Mahalo.

Sincerely,

Dr. Stephanie Yan

**HCR-85**

Submitted on: 3/22/2021 3:04:56 PM

Testimony for HHH on 3/23/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Julienne Aulwes, M.D.	Individual	Support	No

Comments:

SUPPORT