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DEPUTY DIRECTOR

STATE OF HAWAIʻI
KA MOKUʻĀINA O HAWAIʻI
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
KA ʻOIHANA PONO LIMAHANA

February 12, 2024

To: The Honorable Henry J. C. Aquino, Chair,
The Honorable Sharon Moriwaki, Vice Chair, and
Members of the Senate Labor and Technology

The Honorable Joy A. San Buenaventura, Chair,
The Honorable Henry J. C. Aquino, Vice Chair, and
Members of the Senate Committee on Health and Human Services

Date: Monday, February 12, 2024
Time: 3:00 p.m.
Place: Conference Room 224, State Capitol

From: Jade T. Butay, Director
Department of Labor and Industrial Relations (DLIR)

Re: S.B. 3215 RELATING TO INSURANCE

I. OVERVIEW OF PROPOSED LEGISLATION

The **DLIR strongly opposes** SB3215. A substantive change in the provision of Prepaid Health Care would risk the revocation of the exemption provided to Prepaid under the federal Employee Retirement Income Security Act of 1974 (ERISA). This could lead to the invalidation of the Prepaid Health Care Law and the loss of this groundbreaking healthcare law enacted in 1974 and a forerunner of the Affordable Care Act (ACA).

This measure authorizes insurers, mutual benefit societies, and health maintenance organizations to offer, sell, or renew a high deductible health plan with health savings account to employers that are subject to Chapter 393, Hawaii Revised Statutes (HRS), if the health care plan provider also sells the employers a Prepaid Health Care plan that is not a high deductible health plan.

The health care plan provider must give the Insurance Commissioner the plan provider's educational and marketing materials regarding the high deductible health plan and health savings account. The Insurance Commissioner shall receive complaints related to the educational and marketing materials from employees. The employer that provides a high deductible health plan and health savings account must contribute an undetermined amount into the employee's health saving account each pay period.

II. CURRENT LAW

Chapter 393, HRS, (Prepaid Health Care Law) is an employer-based healthcare mandate.

§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 (PHCAC) reviews these plans and makes a recommendation to the DLIR Director for approval or disapproval.

§393-11, HRS, requires the employer provide a health care plan, not a choice of health care plans to eligible employees.

§12-12-11, Hawaii Administrative Rules (HAR), permits an employer to provide more than one approved plan to employees. If the employer offers more than one plan, the employer is liable for the cost of the least expensive plan.

III. COMMENTS ON THE SENATE BILL

The department offers the following comments.

- Hawaii's Prepaid Health Care Act (Chapter 393, HRS) was enacted in 1974. This long-standing law has protected Hawaii's employees with sound healthcare benefits and financial protection by limiting deductibles and out-of-pocket maximums. High deductible health plans have at least a $1,300 deductible for individual and $2,600 for a family, which is significantly more than the $100 and $0 deductibles on the PHC plans with the largest number of subscribers in Hawaii. In the event of an injury or illness, an employee would need to satisfy the deductible prior to receiving plan benefits (Section 223(c)(2)(c), Internal Revenue Code), which may be financially difficult for many, especially low-income earners, to afford.

- Although the measure requires the health care plan provider to sell two plans to the employer, the DLIR is not able to require the employer to offer more than one plan to the employee. As the PHC Act requires an employer to offer only one health plan, the employer will be compliant with the PHC requirements if the employer offers to employees one of the approved health care plans that the health care plan provider sold to the employer.

- The high standards of the current prevalent plans may be eroded if a high deductible plan becomes the plan with the most subscribers.

- Allowing employers to offer high deductible plans may have adverse financial effects on employees who select the plans without a high deductible. §12-12-12, HAR, states that an employer is responsible for the cost of the least expensive plan. Any cost differential between the plans

may be borne by the employee selecting a more expensive plan. As the cost of a high deductible plan would likely be less than a traditional plan, the employee may be responsible for paying not only 1.5% maximum allowed by Chapter 393 of the employee's wage but also the difference in the cost of the two plans.

- The employer must contribute an undetermined percentage into the health savings account. It is unclear whether the percentage is based on the employee's wages in the pay period, the total amount of the annual funding into the health savings account, or some other amount.

- The health savings account must be fully funded when the benefit year begins or when the employee joins a high deductible benefit plan. Otherwise, the employee may not be able to draw on the health savings account to reduce the amount the employee pays towards the deductible. If the employee has large medical expenses, the employee will need to be able to pay the high deductible out of the employee's own funds. Employees who are not able to pay the large deductible may delay medical services.

- Federal law may disqualify some employees (e.g., Medicare enrollees) from being eligible for a health savings account.

- Lastly, SB3215 inserts the DLIR Director or the department into chapters under Title 24, HRS, and gives the director/department regulatory powers. The feasibility of giving the director/department regulatory functions under a different title under the Hawaii Revised Statutes is unclear to the DLIR.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA ʻOIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2024

ON THE FOLLOWING MEASURE:
S.B. NO. 3215, RELATING TO INSURANCE.

BEFORE THE:
SENATE COMMITTEES ON LABOR AND TECHNOLOGY AND ON HEALTH AND HUMAN SERVICES

DATE: Monday, February 12, 2024 **TIME:** 3:00 p.m.

LOCATION: State Capitol, Room 224 and Videoconference

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Andrew I. Kim or Bryan C. Yee, Deputy Attorneys General

Chairs Aquino and San Buenaventura and Members of the Committees:

The Department of the Attorney General provides the following comments.

The purpose of this bill is to facilitate the availability of high deductible health plans that may be purchased by members of the labor force for use with a health savings account.

This bill may be subject to an Employee Retirement Income Security Act (ERISA) preemption challenge. ERISA is a comprehensive federal legislative scheme that regulates the administration of private employee benefit and pension plans and establishes standards relating to the administration of these plans. In enacting ERISA, Congress included a sweeping preemption provision that provides in relevant part, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). "A law relate[s] to a covered employee benefit plan for purposes of [29 U.S.C. § 1144(a)] if it [1] has a connection with or [2] reference to such a plan." *California Div. of Labor Standards Enf't v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 324 (1997) (citation and internal quotations omitted). Because the stated purpose of the bill appears to be directed to employee benefit plans, this bill could be subject to challenge on the grounds that it is preempted by ERISA.

This concern, however, may be addressed 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). To be deemed a law that regulates insurance and be excepted from preemption, the law must satisfy two requirements: (1) the state law must be specifically directed toward entities engaged in insurance; and (2) the state law must substantially affect the risk pooling arrangement between the insurer and the insured. *See Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 342 (2003). We believe that not all the provisions of this bill meet the requirements of the insurance savings clause.

First, subsection (a), on page 2, lines 4-8, provides:

> [A]n insurer may offer, sell, or renew a high deductible health plan to employers that are subject to chapter 393; provided that the insurer shall also sell the employer a prepaid health care plan group accident and health or sickness insurance policy that is not a high deductible health plan.

(Emphasis added.) Under this provision, an insurer is required to sell an insurance policy that is not a high deductible health plan if the insurer offers, sells, or renews a high deductible health plan to certain employers. If the insurer must sell a policy that is not a high deductible health plan to the employers, it follows that the employers will have to buy the policy. A court may find that this law is not specifically directed toward the entities engaged in insurance (i.e. the insurer or insured) and fails the first requirement under *Miller*. *See Howard v. Gleason Corp.*, 901 F.2d 1154, 1158 (2d Cir. 1990) ("To the extent the law regulates the notice that an employer must provide to its employees concerning a conversion privilege, it is not directed toward the insurance industry at all, much less 'specifically.'"). To mitigate the risk of preemption, "sell" on page 2, line 6, could be replaced with "offer"; however, this would not require the employer to provide an insurance policy that is not a high deductible health plan.

Second, subsection (b), on page 2, line 19, through page 3, line 4, provides that an employer who provides a high deductible health plan must contribute to the employee's health savings account. This provision would not be saved from preemption pursuant to the insurance savings clause because, although placed in the insurance

code, it is not directed at insurers and fails the first requirement under *Miller*. Accordingly, we recommend that the provision on page 2, line 19, through page 3, line 4, be deleted.

Third, subsection (c) on page 3, lines 5-14, requires an insurer to file with the Insurance Commissioner a report containing the insurer's educational information and marketing materials regarding the health plan and health savings account to ensure that the employees are voluntarily electing to choose a high deductible health plan and requires the Insurance Commissioner to receive any related complaints from employees. The provisions in subsection (c) may be found to relate to an employee benefit plan because they reference an employee benefit plan and appear to "govern[] . . . a central matter of plan administration." *See Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 326-27 (2016) (holding that (1) recordkeeping and reporting were central to plan administration, and (2) allowing different states to impose different requirements on federally regulated ERISA plans would hinder the goal of uniform plan administration). Additionally, subsection (c) fails the second requirement under *Miller* because it does not affect risk pooling between the insurer and the insured. Accordingly, we recommend that this subsection (c) on page 3, lines 5-14, be deleted.

Furthermore, the following wording in the preamble of the bill may possibly indicate that the bill attempts to regulate employee benefit plans and may heighten the risk of an ERISA preemption challenge: "[t]he purpose of this Act is to facilitate within the State the availability of high deductible health plans that may be purchased by members of the labor force for use with a health savings account[]" (page 1, lines 1-4) and "[the] Act shall be liberally construed to allow employers and employees to receive maximum tax benefits provided in federal or state law through the use of a high deductible health plan[]" (page 1, lines 11-14) (emphasis added). We recommend revising the preamble to address this issue.

Although Hawaii's Prepaid Health Care Act (PHCA) relates to an employee benefit plan, it is not preempted because Congress amended ERISA to exempt Hawaii's PHCA from preemption. The exemption, however, is narrow and applies only to the PHCA as it existed on September 2, 1974, and not to amendments to the PHCA "to the

extent it provides for more than the effective administration" of the PHCA. 29 U.S.C. § 1144(b)(5)(B)(ii). There is a risk that this bill amends the PHCA beyond the effective administration of the PHCA.

Our comments and suggestions above equally apply to section 3 of the bill on page 5, line 7, page 5, line 21, through page 6, line 5, and page 6, lines 6-15, and section 4 of the bill on page 8, line 10, page 9, lines 2-7, and page 9, lines 8-18.

The Department is more than happy to work with the Legislature to address these issues. For the foregoing reasons we respectfully request that these concerns be addressed or that this bill be held.

Thank you for the opportunity to present this testimony.

SB-3215
Submitted on: 2/9/2024 10:24:34 PM
Testimony for LBT on 2/12/2024 3:00:00 PM

Submitted By	Organization	Testifier Position	Testify
dennis b miller	Testifying for Medicare For All Hawaii	Oppose	Remotely Via Zoom

Comments:

All high deductible health insurance plans are scams benefiting the insurance company and perhaps an employer who is able to have a less expensive health insurance option which still complies with PrePaid.

Yes, health insurance premiums are unaffordable.

The solution is not to allow junk plans which offer unaffordable healthcare for the person who has a high deductible plan.

Instead, all you have to do is to finally fund the HRS322H The Hawaii Health Authority and let it design administratively simple private health insurance regulations for Hawaii. Contrary to the completely misleading statements of Judy Mohr Peterson and Dr. Mark Mugiishi, yes health insurance administration can be simplified. Remember that their increase in adminstrative complexity paralleled the trend of Hawaii physicians quitting private practice due to the increased administrative costs.

When considering admin costs, please do what our insurance officials don't and include both the providers admin costs as well as the insurance companies costs. Provider admin costs are determined by the decisions made by health insurance officials. Next, it is necessary to parse the "non medical classified as medical" costs to reveal the extent to which non medical admin is distorting Mrs. Peterson's favorite argument against the HHA.

Please request a hearing on how to simplify the administration of health insurance which includes policy experts who are not employed by health insurance companies.

The former members of the HHA have attempted to submit updated reports to the HHA, but the then head of the department overseeing the HHA would not allow them to submit any recent reports. However, those reports are readily available by request.

Dennis B Miller

(808) 227 8241

singlepayerhawaii@gmail.com

Waikiki

UNITE HERE!
Cade Watanabe, Financial Secretary-Treasurer Gemma G. Weinstein, President Eric W. Gill, Senior Vice-President

February 11, 2024

Committee On Labor And Technology
Senator Henry J.C. Aquino, Chair
Senator Sharon Y. Moriwaki, Vice Chair

Committee On Health And Human Services
Senator Joy A. San Buenaventura, Chair
Senator Henry J.C. Aquino, Vice Chair

Testimony in Opposition to SB3215

Chairs Aquino and San Buenaventura, Vice Chair Moriwaki, and Members of the Committee,

UNITE HERE Local 5 represents 10,000 working people in the health care, hotel, and food service industries across Hawaii. **We are in opposition to SB3215**, which would allow for high-deductible health insurance plans combined with health savings accounts.

It is fundamental to the nature of health care that individuals often do not know and cannot anticipate what they will need and when they will need it. Individuals have almost no ability to control costs for the care they receive. When faced with unanticipated costs, people self-ration health care. Even when self-rationing does not lead to disastrous outcomes, which it often does, it means people not getting the health care they need; having to live and work with health care problems they cannot afford to fix.

Other developed countries do not experience this. The U.S. is unique among developed countries for both its high cost of health care and inferior outcomes. The system of private health insurance has been broken for a long time; this necessitated Hawaii's Prepaid Health Care Act, which thankfully this bill would leave intact. However, the provisions of the PPHCA do not address family coverage, and they only apply to people who are employed by employers subject to it. In the absence of universal or single payer health care, health insurance is ostensibly meant to provide for people's needs through the contributions of large pools of people, under the idea that some people will need to use it more than others.

Health savings accounts are the opposite of collective coverage. They put massive risks onto individuals; the risk of impossible-to-cover costs incurred at random times. Even when paired with high-deductible insurance coverage, the practical result is that people will not be able to afford the care they need. The system will continue to get more expensive and outcomes will continue to get worse.

High-deductible insurance plans are problematic too: why should people pay so much money each month for insurance they may never get to tap into? For many people, the barriers to getting to the point of coverage are so high that they will be economically limited from paying for health care costs long before coverage could kick in and help them.

The move from defined benefit pension plans to defined contribution plans has significantly cut down on Americans' retirement savings to what will soon be recognized as crisis levels of poverty among older adults. This is already pushing many to return to the workforce or stay working long after age 65, with no real prospect of income security in retirement despite a lifetime of hard work. High-deductible health insurance combined with health savings accounts operate on the same principal: they offload health care costs onto individuals, particularly those least able to afford

them. Even more so than retirement, individuals will be unable to predict what their needs will be; but even if they could, many people would find it impossible to save the amount of money they could conceivably need to cover health care costs up to their high deductibles. Meanwhile, they would still be paying for insurance, without the benefit of insurance actually doing anything for them.

In addition to hurting working families, having a large population with unmet health care needs is not good for our economy or for society. If there is some short-term benefit to be had by this system, we feel the benefit will accrue to employers at the expense of employees. Health care problems include communicable diseases – we should not be enacting policies that force people to go to work sick and potentially infect their coworkers and others they come in contact with.

SB3215 is a bad idea and should be completely rejected.

Thank you for your consideration.

SB-3215
Submitted on: 2/8/2024 1:11:07 PM
Testimony for LBT on 2/12/2024 3:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Betsy Scolnik	Individual	Support	Written Testimony Only

Comments:

in support

LATE

SB-3215
Submitted on: 2/12/2024 9:44:03 AM
Testimony for LBT on 2/12/2024 3:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Regina Gregory	Individual	Oppose	Written Testimony Only

Comments:

oppose

LATE

SB-3215
Submitted on: 2/12/2024 9:39:37 AM
Testimony for LBT on 2/12/2024 3:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Shannon Rudolph	Individual	Oppose	Written Testimony Only

Comments:

STRONGLY OPPOSE

SB-3215
Submitted on: 2/12/2024 11:03:07 AM
Testimony for LBT on 2/12/2024 3:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Jade DeCosta	Individual	Support	Written Testimony Only

Comments:

February 12, 2024

RE: SB3215 – Relating to Insurance

Dear Members of the Committee:

I appreciate the opportunity to testify in support of SB3215 which authorizes insurers, to offer, sell, or renew, on or after January 1, 2025, a high deductible health plan in conjunction with a health savings account (HSA).

HSAs are authorized under federal law and afford employees and their families, who also have a high-deductible health plan (HDHP), a tax-advantaged medical savings account. This type of savings account is one of the best savings and/or retirement vehicles to have access to in that it is triple tax advantaged:

1. HSA contributions are not subject to federal income tax and can be made as a pre-tax payroll contribution.
2. HSAs, if invested, would grow tax free over time much like an employee's 401k or other types of retirement accounts.
3. HSA distributions are not subject to tax if the funds are used to cover qualified medical expenses, which included over-the-counter medications and menstrual products.

Other benefits of HSAs are that they are portable, meaning unspent balances continue to accumulate over time and follow an employee if the employee changes jobs as they are not tied to any specific employer or insurer. The employee has full domain over their HSA for the life of the HSA and can even change their HSA provider should they separate from an employer.

An HSA can not only provide short-term funding for current medical expenses (including an annual deductible) but can also provide long-term financial security for one's use in retirement. Therefore, it is imperative to allow state residents access to this type of account should they want to take advantage of this kind of tax-advantaged saving vehicle. As we age, we generally have a greater need for medical attention and with that comes an increase medical expense, therefore having an HSA in retirement can mean the difference between affording one's life in later years or having to rely on others (i.e., government and/or other welfare programs).

To date, it has been unfortunate that the residents of the State of Hawaii have not been allowed access any Health Savings Accounts and I am extremely grateful that this committee is re-evaluating that position. I do not believe allowing residents the opportunity to choose a HDHP (so that they may have an associated HSA) would infringe on the rights of others who may prefer to select a non-HDHP if they so desired. In my view, this measure would simply widen the health plan choices available to Hawaii residents. I truly appreciate that this measure is being discussed and I hope that you will see the value in allowing the residents of the state to have access to this valuable type of savings account.

Thank you for the opportunity to testify on SB3215. Your consideration of our concerns is appreciated.

Sincerely,

Jade DeCosta