



## Hawaii Employers Council

May 8, 2009

### **Card Check, Credit History Discrimination, Workers Compensation, and Health Insurance Head List of Bills Passed by 2009 Legislature**

The close of the 2009 legislative session brings some bad news for employers – but it could have been much worse. Bills which will allow unions to organize agricultural employers without a secret ballot election, require employers to pay disputed workers compensation benefits, and prohibit companies from discriminating against job applicants based on their credit history were passed by the Legislature. On the brighter side of things, the “successor employer” bill, which would have required a business purchaser to hire 100% of the employees of the seller, died in conference committee.

Because these bills were passed at the end of session, Governor Lingle will have until June 30, 2009 to issue a veto message. If vetoed, the Legislature may attempt to override the Governor’s veto by obtaining a 2/3 majority vote in both the House and Senate. In prior years, Governor Lingle has vetoed similar bills which were likely to have negative effects on employers.

The following are some of the more significant employment-related measures passed by the 2009 Legislature:

**HB 952 CD1** (the “card check” bill): This bill amends the Hawaii Labor Relations Act to require an employer to recognize a union as the bargaining representative of its employees if it is presented with union authorization cards signed by a majority of employees in an appropriate bargaining unit. Currently, an employer presented with such a request can demand a secret ballot election so that employees may vote for or against the union in a private and supervised election. Because the federal National Labor Relations Act (“NLRA”) preempts contrary state law and governs most union activity in the private sector, this state card check bill can only affect those employers (such as agricultural employers and certain small businesses) which are outside the coverage of the NLRA. The bill is effective July 1, 2009.

The final version of the bill limits the card check provision to employers with annual gross revenues of \$5 million dollars or more. Thus that provision will primarily affect larger agricultural employers in Hawaii. In addition to its elimination of the secret ballot, the bill provides that if an employer and union negotiating for an initial contract do not reach agreement within 110 days through bargaining or mediation, they shall be referred to an arbitration panel who will establish the terms of the parties’ collective bargaining agreement for a period of up to two years. Finally, the bill includes new penalties of up to \$10,000 for unfair labor practices

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committed by employers, unions, or employees. These final two provisions appear to apply to all agricultural employers and others not covered by the NLRA, regardless of gross revenue.

This bill mimics the proposed federal Employee Free Choice Act (“EFCA”) which has been introduced in Congress. The Hawaii legislature passed a similar card check bill in 2008, but the bill was vetoed by Governor Lingle and not overridden. The reason this bill should be of concern to all employers is that it establishes an undesirable legal precedent by infringing upon the rights of employees to vote for or against unionization in a secret ballot election. A secret ballot election allows both the union and the employer to present their views for and against union representation, and enables employees to cast their vote without peer pressure or intimidation. Concerned employers should write to the Governor to support a veto, and voice their objections regarding the bill to their legislators.

**HB 31 CD1** (credit history discrimination): HB 31 amends the Hawaii employment discrimination law in Chapter 372 to prohibit employers from refusing to hire, discharging, or otherwise discriminating against persons in their employment because of a “credit history or credit report,” unless the credit history or credit report relates to a bona fide occupational qualification (“BFOQ”). The bill further provides that an employer is prohibited from making any inquiry into an individual’s credit history and from obtaining a credit report until after it makes a conditional offer of employment, and the offer may only be withdrawn if information in the credit history or credit report relates to a BFOQ. The bill is effective July 1, 2009.

The bill was opposed by financial institutions and other employers who use credit reports in making hiring, promotion, and other personnel decisions. As a compromise measure, the bill carves out 3 exceptions:

- the bill does not apply to employers who are expressly permitted or required by state or federal law to inquire into an individual’s credit history for employment purposes;
- credit history information may be used to hire, fire, or altering the terms of employment for managerial or supervisory employees (using the “supervisor” definition taken from the National Labor Relations Act); and
- banks and credit unions whose deposits are insured by the FDIC, FCUA, or other federal agency are exempt.

Interestingly, the first exception may make the bill difficult to enforce. The federal Fair Credit Reporting Act (“FCRA”) expressly permits employers to inquire into employee’s credit history so long as certain authorization, disclosure, and procedural requirements are followed. *See* 15 U.S.C. 1681b(b)(2) & (3). Accordingly, the exception may swallow the rule.

**SB 695 CD1** (medical benefits in workers compensation cases): This bill will require employers to continue to provide “essential” medical services in workers compensation cases even if

compensability is denied, or a dispute arises as to whether medical services are reasonable and necessary, until the Director of the DLIR conducts a hearing and determines that medical services should be stopped.

Under the bill, after an employer/insurer files a request to terminate medical services, the Director will have 30 days to issue a decision. If the Director finds that the medical services should have been discontinued after a specific date, an employer may seek reimbursement for the cost of inappropriate services from the treating physician or an “appropriate” occupational or non-occupational insurer. SB 695 was generally opposed by employers because of the likelihood that it would lead to increased workers’ compensation costs, and the fact that an employer or insurer is unlikely to be able to recoup the costs of unreasonable or inappropriate medical services. Moreover, to the extent that the cost of inappropriate treatment must be paid by the employer’s group health plan, the bill may result in increased health insurance costs.

The Hawaii legislature passed bills similar to SB 695 in the 2006 and 2007 legislative sessions, and in both cases, the bills were vetoed by Governor Lingle and not overridden.

[HB 690 CD1](#) (insurers obligated to make health insurance available to part-time workers). This bill is directed to insurance companies, mutual benefit societies (such as HMSA), HMO’s, and fraternal benefit societies which provide health insurance plans for employers. HB 960 requires such entities providing health insurance to the full-time employees of an employer to make the same health insurance available to “part-time” employees, who are defined as persons employed at least 15 but less than 20 hours per week, and have been employed by the employer for at least 18 continuous months. The cost of the insurance is to be borne by the employee.

Under the bill, insurers may impose a minimum 30 day period of enrollment, and may also impose a one-year waiting period for any part-time employee who terminates health coverage. This waiting period is designed to discourage employees from only enrolling in the health plan to cover temporary illnesses and injuries.

HB 690 was opposed by insurers and HMOs because it may increase the cost of health insurance for employers. Because part-time employees may opt in and out of coverage, there will be a tendency for them to obtain coverage only when they anticipate heavy use of medical services, and to drop coverage when they anticipate low use of medical services, creating an adverse selection problem.

Moreover, the bill requires insurers (rather than employers) to be responsible for determining employee eligibility and administering the plan. Insurers have pointed out that it will be impossible for them to administer the plan without substantial assistance from the employer. By imposing responsibilities on insurers (rather than employers), HB 690 attempts to avoid potential ERISA preemption.

HB 690 is effective July 1, 2009, but sunsets on July 1, 2014.

Employers concerned about the foregoing bills should consider writing to the Governor to support a veto, and to their legislators to express concerns about the bills. If any of the above bills are vetoed, the Legislature must convene in special session in July to override the vetoes. In the meantime, employers should familiarize themselves with the bills and determine how they affect current practices and policies.

For further information on these and other employment-related bills, please contact Clayton Kamida ([ckamida@hecouncil.org](mailto:ckamida@hecouncil.org)) or Sheri Lau Clark ([sclark@hecouncil.org](mailto:sclark@hecouncil.org)).