



# Hawaii Employers Council

March 3, 2009

## Workers Compensation Bills Fast-Tracked, Card Check and Successor Employer Bills Moving

In spite of the current economic crisis, the Hawaii Legislature is considering a number of bills which are likely to have negative consequences for Hawaii employers. The following bills have been proposed (and in some cases, passed by the Legislature) in prior years, and have been consistently opposed by the business community (for good reason). They have been chosen for this article because they appear to be moving quickly through the Legislature, and employers should be aware of their rapid progress.

### Workers' Compensation Bills

Two workers compensation bills, SB 62 and SB 695, have been "fast tracked" at the Legislature. The first bill, **SB 62 SD1**, will require that both a workers' compensation claimant and the employer reach mutual agreement when selecting a physician to conduct an independent medical examination ("IME") of the claimant. If the parties cannot reach agreement on the IME physician, either party may request the Director of the DLIR to select one for them. In the current version of the bill, the Director of the DLIR will then have 7 days to select the IME physician from a list of physicians licensed in the state (unless the claimant is residing outside the state). The maximum physician fee to be paid will be the complex consultation charge under the workers' compensation medical fee schedule.

SB 62 is opposed by employers and insurers for a number of reasons. In many specialties, it is difficult to schedule a physician's exam in a timely manner, so that unnecessary medical benefits or TTD benefits are not paid out in the meantime. The bill will prevent employers from selecting a physician who may be best qualified to examine the claimant, and can examine the claimant quickly so as to avoid improper medical treatment. The bill has also been viewed as unnecessary, because in the majority of cases, claimants and employers are able to agree on an IME physician. The bill also prohibits the DLIR or a court from ordering more than one employer-requested IME unless "valid reasons exist with regard to the medical progress of the employee's treatment," which means that after an IME is performed, an employer cannot request a subsequent IME if it has new grounds for challenging an employee's receipt of benefits.

**SB 695 SD1** is a workers' compensation bill which will require employers to continue to pay for medical services prescribed by a claimant's physician unless the Director of the DLIR conducts a hearing and determines that medical services should be discontinued. Under the current version of the bill, the Director must issue a decision within 30 days after an employer files a dispute

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regarding medical services. If the Director determines that the employer/insurer has already paid for unnecessary or inappropriate medical services, the employer/insurer cannot obtain reimbursement from the employee, but may only attempt to get reimbursement from the health care provider performing the services, or from an occupational or non-occupational insurer covering the employee. Employers and insurers are opposing the bill because it is unlikely that an employer who has paid for services deemed to be inappropriate or unnecessary will be able to recover the amounts from the claimant's health care provider without undue cost and expense. In addition, to the extent that group plans such as HMSA or Kaiser must then pay for the unnecessary medical services, the bill will drive up the cost of health coverage for all employers.

SB 62 and SB 695 are scheduled to be heard by the House Labor Committee on March 3, 2009 at 10:00 a.m. in Rm 319. Interested employers may submit testimony of 5 pages or less by emailing the Committee at [LABtestimony@Capitol.hawaii.gov](mailto:LABtestimony@Capitol.hawaii.gov).

### **Card Check**

The "Card Check" Bill, **SB 1621 SD2**, has already been passed by the Senate Labor and Judiciary Committees, and will cross over to the House for consideration. Although part of SB 1622 will primarily affect agricultural employers, the bill also contains provisions which are detrimental to all Hawaii employers.

The provisions of SB 1621 relating to union organizing and initial collective bargaining contracts mirrors the federal Employee Free Choice Act ("EFCA"). The bill will eliminate secret ballot elections in union organizing by allowing a union to organize an employer if a majority of the business's non-supervisory employees sign cards authorizing the union to represent them. Under current law, an employer who is presented with a demand for union recognition may request a secret ballot election to determine whether a majority of employees truly want union representation. The secret ballot election allows employees to make their choice without undue coercion or peer pressure.

SB 1621 also provides that when an employer and a newly certified union bargain for an initial collective bargaining agreement, if the parties are unable to reach agreement within 120 days through negotiation or mediation, the matter will then be referred to an arbitration panel. The arbitration panel will have the authority to establish all terms of the parties' collective bargaining agreement for a period of not more than 2 years. These "card check" and submission to arbitration provisions will only apply to agricultural employers and others not covered by the federal National Labor Relations Act.

However, other portions of SB 1621 will affect all employers. These new provisions were not in the prior version of the card check bill which was passed by the Legislature in 2008 and vetoed by Governor Lingle. One new provision immunizes union representatives and employees from being prosecuted for criminal trespass and breach of the peace if they are involved in a "labor

dispute,” which includes any dispute regarding terms and conditions of employment. Accordingly, employees and union representatives will be free to enter an employer’s property at any time and be immune from prosecution for trespass when they engage in picketing, handbilling, or attempts to organize employees. The bill will essentially give union representatives and disgruntled employees unlimited access to an employer’s premises, so long as the reason for the entry is a matter relating to work issues. This immunity from criminal prosecution is unprecedented, and should be a matter of grave concern to all employers.

In addition, SB 1621 creates a new “representational privilege” covering information provided to or by a union, or communications involving a union representative, which are “made for the purpose of facilitating the rendition of union representational services to employees.” Under this new privilege, courts, public agencies, arbitrators, and even legislative committees may not compel individuals to disclose information or communications with union representatives which may relate to collective bargaining negotiations, grievances, union representation, or exhaustion of internal union procedures and union issues. Moreover, the union controls the privilege and is the only entity who can waive the privilege, and unions may therefore prevent third parties (such as employees) from testifying regarding union activities. The only exception to the privilege is that it may not be raised if the union either knew or should know that the union representational services were used to commit or plan to commit a crime or fraud.

The effect of the privilege in SB 1621 will be to frustrate employers’ attempts to obtain information in connection with a grievance, or the filing of unfair labor practice charges or civil suits against a union. The bill will also make it difficult for union members to file charges of breach of the duty of fair representation against their own union. Moreover, if an employee decides to sue or file a charge against his/her employer for harassment, discrimination, whistleblowing, etc., the privilege will prohibit courts and public agencies from compelling union representatives as well as employees to provide testimony or disclose information relating to the claim, so long as the union can show that the information is somehow related to its representational activities.

SB 1621 will soon be crossing over to the House for committee hearings. Employers should consider testifying regarding the bill. Employers can track the progress of the bill at this link: [http://www.capitol.hawaii.gov/session2009/lists/measure\\_indiv.aspx?billtype=SB&billnumber=1621](http://www.capitol.hawaii.gov/session2009/lists/measure_indiv.aspx?billtype=SB&billnumber=1621)

### **Successor Employer Bill:**

The Successor Employer bill, SB 1622 SD1, is similar but not identical to bills proposed in prior sessions. The bill (in its current version) will affect employers who have 50 or more employees and are covered by the Hawaii Dislocated Workers Act. In the event of a merger or purchase of a business, the successor employer will be required to retain all non-exempt employees of the business for a 90-day “transition period.” The successor employer will also be required to

“provide a similar level of products or services, or both, as the products and services provided by the existing employer” for an indefinite period of time (i.e., so long as the successor is in business).

In addition, SB 1622 limits a successor employer’s ability to reduce the level of work or services provided by the previously-existing employer. It can only reduce its workforce if it “determines that fewer employees are required to perform the level of work or services than were required by the existing employer.” Moreover, during the 90 day “transition period,” the successor employer cannot discharge any of the non-exempt employees it has been required to retain except for “cause,” which is not defined by the bill. Employees who were terminated in contravention of the statute would be entitled to lost wages and benefits, and the bill provides for civil penalties of \$500 for each day the successor employer is in violation.

In many cases, businesses are sold because they are faltering, and the purchaser believes it can reinvigorate the business by downsizing, or by changing the direction of the business, or by bringing in more qualified employees or those with new or different skills. This bill would prevent such changes by a purchaser. The bill will clearly discourage the purchase or merger of an existing business in Hawaii, and will probably cause the closure of many businesses that could have been purchased if the buyer were allowed to make necessary personnel changes. Moreover, HEC’s research has failed to uncover the existence of a similar law anywhere else in the United States. At a time when Hawaii desperately needs more work opportunity and more business investment in the state, it is surprising that many legislators believe SB 1622 will help, rather than harm, employees.

Like the card check bill, the successor employer bill is poised to pass the Senate very soon, and will be moving for consideration by the House. The status of the bill can be checked at this link: [http://www.capitol.hawaii.gov/session2009/lists/measure\\_indiv.aspx?billtype=SB&billnumber=1622](http://www.capitol.hawaii.gov/session2009/lists/measure_indiv.aspx?billtype=SB&billnumber=1622)