



# Hawaii Employers Council

April 3, 2009

## Bills to Watch After Second Lateral

With the 2009 Legislative session only a month away from concluding, a number of employment bills are still actively moving towards passage. Most of the significant bills, such as those relating to “card check”, “successor employers,” and workers compensation, are familiar because similar bills have repeatedly been introduced in prior sessions. Although these bills are actively being opposed by businesses, they have strong support from unions and other stakeholders. They are likely to be vetoed by the Governor, and the question in the minds of many business observers is whether proponents of the bills will garner enough votes to override the Governor’s veto.

**“Card Check”:** HB 952 HD1 SD1 and SB 1621 SD2 HD1 are bills which will deny employees the right to vote on the issue of union representation by substituting a procedure in which a union will be certified as the employees’ bargaining representative if it obtains a majority of signed authorization cards. The bills also provide that once a union is newly certified as a collective bargaining representative, the parties must reach agreement on all terms of an initial contract within 120 days. If the parties fail to reach agreement during this period, the matter is subject to binding arbitration before an arbitration panel, and that panel will be authorized to determine employees’ wage rates, hours of work, benefits, and other terms and conditions of employment.

In addition to the provisions eliminating the secret ballot and mandating arbitration, Senate Bill 1621 in its most recent draft (HD1) provides that “[a]ny person engaged in union organization activities, shall have the right to take part in such activities including holding placards, and passing out literature, on the pathways, sidewalks, and areas adjacent to the entry ways or exits used by customers or employees, including on private property.” The bill expressly authorizes organizing activity on private property, even if the labor dispute does not involve the property owner. (A prior version of the bill went so far as to provide immunity from criminal prosecution for trespass and breach of the peace for union representatives and employees involved in a labor dispute.) Both bills also provide new penalties of up to \$20,000 for unfair labor practice violations.

HB 952 has had its final committee hearing in the Senate and will soon have its third reading. SB 1621 is being heard on Friday, April 3<sup>rd</sup>.

The Hawaii “card check” bills are modeled on the federal Employee Free Choice Act, which was introduced in Congress on March 10, 2009. Although the Hawaii card check bills will primarily affect agricultural employees and others not within the jurisdiction of the National Labor

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Relations Act, all Hawaii employers should be concerned about the unions' attempts to tilt the balance of power in their favor and eliminate significant worker protections such as the secret ballot election.

**“Successor Employer” Bills:** These bills have been referred to as the “guaranteed bankruptcy bills” by some pundits. HB 332 HD2 SD1 and SB 688 HD2 will require that whenever a Hawaii business is purchased or merged, the purchaser or successor entity must retain 100% of the non-supervisory employees of the seller. These bills are bad news for faltering businesses. Unless a business is highly profitable, a purchaser will be hesitant in taking over a business if it is prevented from making necessary or desirable personnel changes. Certainly business purchasers who have a choice between prospective businesses in other states as well as Hawaii are extremely unlikely to select the Hawaii business, because no other state has a similar statute.

As a result, many faltering business who could otherwise be revived by the right purchaser are “guaranteed” to file for bankruptcy, resulting in increase job losses in Hawaii. The bill is not designed to retain jobs in Hawaii, but to ensure that unionized businesses retain their union status in the event of a sale or merger, because a purchased or merged business retains its unionized status so long as a majority of the employees in the bargaining unit are retained after the sale or merger.

HB 332 originally started this session as a bill relating to unemployment benefits, but after the bill crossed over from the House to the Senate, the bill was “gutted” by the Senate Labor Committee, chaired by Senator Dwight Takamine, and changed to its current form. HB 332 allows a successor employer to retain less than 100% of the seller's non-supervisory employees only if (1) the business of the successor is “substantially dissimilar” to the prior business, or (2) the human resource needs of the successor are reduced, and the workforce reduction is “in direct proportion” to the successor's reduction in human resource needs. The bill's ambiguous language creates a huge risk of litigation for business purchasers. HB 332 was referred to the Senate Labor and Human Services Committees, was passed by the Labor Committee, and is awaiting decisionmaking by the Human Services Committee.

SB 688 is similar to HB 332, with two notable differences. First, SB 688 in its current (HD2) form only applies to business having 100 or more employees at the time of the sale or merger. Second, the HD2 draft, in order to make the bill more palatable, exempts the purchasing entity from the payment of gross excise taxes (“GET”) for a period of one year following the sale. Given the Legislature's general unwillingness to reduce business taxes, it would be surprising if this GET exemption remains in the bill as it moves forward. The bill is awaiting its final hearing before the House Finance committee.

### **Workers Compensation**

**Selection of IME Physicians:** SB 62 SD1 HD1 is a bill which was passed by the Legislature in previous incarnations in prior years but vetoed by Governor Lingle. The bill will require that physicians performing independent medical exams (“IMEs”) be mutually agreed upon by the employer and the claimant, and if the parties cannot agree, the IME physician will be chosen by

the Department of Labor and Industrial Relations. SB 62 has passed its final committee in the House, and is coming up for final reading. This bill was fast-tracked, and is virtually certain to be passed by the Legislature.

**Non-termination of TTD Benefits:** SB 63 SD2 HD1 will require employers to continue to pay temporary total disability benefits (“TTD benefits”) to workers’ compensation claimants, regardless of whether such benefits are controverted by the employer, until a hearing is held and the Director of the DLIR determines that TTD benefits should be stopped. Under current law, if an employer has a reasonable basis for believing that TTD benefits are no longer appropriate, it can terminate benefits with prior notice to the claimant. The claimant must then request a hearing to determine whether the cessation of benefits was justified. Prior versions of this bill were passed in previous legislative sessions, but vetoed by Governor Lingle. This bill is currently awaiting its final House committee hearing before the House Finance Committee.

**Non-termination of Medical Benefits:** SB 695 SD1 will require employers to continue to pay medical benefits despite the existence of a dispute as to whether treatment methods are appropriate or whether treatment should be continued, unless the Director of the DLIR holds a hearing and concludes that medical benefits should be stopped. As with SB 62 and SB 63, similar bills were passed in previous years by the Legislature and vetoed by the Governor. Like SB 63, this bill is awaiting its final House committee hearing before the House Finance Committee. If it is not amended by the House Finance Committee, it need not go to conference committee, and could be passed immediately by the Legislature.

### **Other Bills of Interest**

HB 31 – Prohibits employers from discriminating against an employee based on the employee’s credit history or information in a credit report, unless the information relates to a bona fide occupational qualification.

SB 1183 SD2 HD1 – Conforms Hawaii disability law to the federal Americans With Disabilities Amendments Act of 2008 by requiring the Hawaii Civil Rights Commission to amend its current definitions of “major life activities”; “being regarded as having such an impairment”; “disability”; and “substantially limits” under the disability regulations.

HB 690 HD2 SD1 – Requires health care insurers to employers to provide coverage to part-time employees on the same terms as coverage is provided to full-time employees, with the premiums to be paid by the part-time employees.

SB 1568 SD2- Extends unemployment benefits to individuals who are merely seeking part-time (rather than full-time) work and to workers who voluntarily separate from employment for a compelling family reason.

SB 1205 SD2 HD2 – Provides temporary health insurance for individuals who have lost their health insurance as a result of a furlough, layoff, reduced work hours, or termination of employment.