

LEGISLATIVE Digest



HAWAII
EMPLOYERS
COUNCIL

March 5, 2010

2010 Legislative Session: Highlights of Bills after the First Crossover

March 4, 2010 marked the First Crossover date whereby bills introduced this session had to crossover to the other house in order to remain alive. This article highlights some bills that are of general interest to employers. A full list of all bills that Hawaii Employers Council is tracking may be viewed on our Legislative Digest.

Unemployment Insurance Tax

The Legislature has responded to employers' outcry for help with their unemployment insurance ("UI") tax contributions by fast tracking [HB 2169 HD2](#), which gives employers two years of reduced UI tax contributions. Both the Senate and House passed HB 2169 HD2, which now awaits Governor Lingle's approval. The bill will automatically become law unless the Governor vetoes the bill by the end of March 17, 2010. The early passage of this bill allows the Department of Labor and Industrial Relations ("DLIR") to calculate employer contribution amounts in accordance with the legislation before they mail employers their 2010 UI tax bills. Although Governor Lingle prefers her own proposals to reduce the UI taxes, which gave employers four years of lower UI taxes, many believe the Governor would likely allow HB 2169 HD2 to become law. After all, she recognized that, "We have to pass some kind of relief for businesses and a little relief is better than no relief."

HB 2169 HD2 impacts unemployment insurance by:

- Amending employers' contribution schedule for 2010 to schedule D (currently, schedule F) and for 2011 to schedule F (currently, schedule H).
- Lowering the taxable wage base to 90% for 2010 and 2011.
- Decreasing the adequate reserve rate to the amount that is *equal* to the benefit cost rate multiplied by the total remuneration (instead of 1.5 times this amount).
- Extending the 75% maximum weekly benefit amount through the end of 2011 (instead of reverting back to 70% in 2011).

The following table illustrates HB 2169 HD2's impact on employers' UI taxes. A more detailed analysis can be found on the DLIR's website at http://hawaii.gov/labor/reports/ui_tax_2-24-10.pdf.

Legislative Digest

2010 Legislative Session – Highlights of Bills After the First Crossover

Page 2

	Year	Tax Schedule	Taxable Wage Base	Annual Taxes per Employee			Annual Tax Cut per Employee		
				Min.	Ave.	Max.	Min.	Ave.	Max.
Current Law	2010	F	\$38,800	\$180	\$1,070	\$2,100			
	2011	H	\$39,100	\$360	\$1,520	\$2,110			
	2012	G	\$40,100	\$270	\$1,320	\$2,170	N/A	N/A	N/A
	2013	F	\$41,000	\$180	\$1,130	\$2,210			
	2014	E	\$42,000	\$90	\$920	\$2,270			
HB 2169 HD2	2010	D	\$34,900	\$30	\$630	\$1,880	\$150	\$440	\$220
	2011	F	\$35,200	\$180	\$970	\$1,900	\$180	\$550	\$210
	2012	H	\$40,100	\$360	\$1,560	\$2,170	(\$90)	(\$240)	\$0
	2013	H	\$41,000	\$360	\$1,600	\$2,210	(\$180)	(\$470)	\$0
	2014	E	\$42,000	\$90	\$920	\$2,270	\$0	\$0	\$0

Employers should note that the legislation does not completely relieve employers from replenishing the UI trust fund, which DLIR anticipates becoming insolvent in September of this year. Rather, HB 2169 HD2 just defers payment so that employers will not have to pay as much taxes in 2010 and 2011 as they would have if the law had remained unamended. However, during 2012 and 2013, employers are scheduled to pay on average \$240 and \$470 respectively more per employee as compared to current law. Employers should therefore brace themselves and budget appropriately for an average \$1,560 and \$1,600 tax bill for 2012 and 2013, respectively.

Employers should further note that the amounts listed in the above table exclude the cost of borrowing from the federal government to cover the State’s UI claims after the fund runs out of money. HB 2169 HD2 allows the DLIR to assess employers for the principal and interest costs of the loan, but the details of how much employers must pay have not yet been worked out and will not likely be fleshed out this session. The bill only mandates that DLIR assess employers in a “fair and equitable manner.” Based on legislators’ comments in hearings, this may mean that employers with high experience ratings should pay more for the federal loan than those with low experience ratings.

Indeed, legislators are so concerned that employers pay their fair share of the UI tax burden that they propose in [HB 2702 HD1](#) to require the DLIR to review the fairness and equitability of the contribution rate schedule and to reassess the auditor’s recommendations in the 1983 study entitled “Study of the Financing of the Unemployment Compensation Fund of the State of Hawaii.” The consultants of the 1983 study recommended raising the maximum employer contribution rate to 7.5% in order “to reduce the subsidization of poor experience employers by good experience employers.” HB 2702 HD1 also requires the DLIR to evaluate the cost and feasibility of changing from an annual determination of

Legislative Digest

2010 Legislative Session – Highlights of Bills After the First Crossover

Page 3

employer contribution rates to a semi-annual determination. DLIR estimated that they would need \$23 million to implement this change.

In addition to requiring various studies, HB 2702 HD1 also lowers UI contributions of new employers who begin operations during the 2010 calendar year. The bill assigns new employers a reserve ratio rate of 0.0800 to 0.0899 (instead of 0.000) for 2010 and 2011. The Senate has not yet scheduled a hearing for HB 2702 HD1.

Unemployment Insurance Benefits

Under current law, UI claimants who are “partially unemployed” because they were full-time employees who are attached to a regular employer that is not offering work or are earning less than the individual’s weekly benefit amount are not required to search for work to be eligible for partial unemployment benefits, unlike regular UI claimants. UI claimants who successfully find a part-time job while collecting partial UI benefits may lose their partial UI benefits if they lose that part time job due to their own misconduct (i.e., fired for good cause) or if they quit without good cause.

[SB 2324 SD2](#) and [HB 2257 HD2](#) seek to allow “partially unemployed” claimants to collect UI benefits without regard for the reason their part-time employment ends. SB 2324 SD2 amends HRS § 383-29.6 concerning the eligibility for partial unemployment benefits and HB 2257 HD2 amends HRS § 383-30 regarding disqualification for benefits. SB 2324 SD2 ensures that the part-time employer cannot be charged for any UI benefits paid on the claimant’s current and subsequent UI claim. Both bills have not yet been scheduled for a hearing.

Sick Leave Discrimination/Mandatory Sick Leave

[SB 2883 SD1](#) and [HB 2935 HD3](#) prohibit employers who offer sick leave from discriminating against employees who use accrued and available sick leave. SB 2883 SD1 amends the temporary disability insurance (“TDI”) law to ensure the sick leave policy provisions stated in the collective bargaining agreement prevails in case of conflict with the employer’s sick leave benefits or policies. HB 2935 HD3 amends Chapter 378 to prohibit discrimination against an employee *solely* because the employee legitimately uses accrued and available negotiated sick leave policies. HB 2935 HD3 makes clear that employers are permitted to discipline employees who are unable to fulfill the individual’s essential job functions. Both bills apply only to employers with collective bargaining agreements. However, HB 2935 HD3 only affects employers who have 100 or more employees while SB 2883 SD1 does not have a size limitation. SB 2883 SD1 and HB 2935 HD3 have no scheduled hearing dates.

Workers Compensation

[SB 2339 SD1](#) imposes a 30-day deadline, with no opportunity for extensions, on employers to submit a written report to the Director of DLIR and the Claimant when the employer denies compensability or indicates that compensability is not accepted. The report must describe the employer’s internal investigation and give details substantiating the employer’s denial of compensability. Current law, Haw. Admin. R. § 12-10-73(a), similarly requires employers to give the Director and the Claimant a report supporting its denial of compensability, but allows for extensions for filing the report for good cause. The strict 30-day deadline provided in SB 2339 SD1 may be extremely difficult for employers to meet due to the time involved in subpoenaing medical records, scheduling independent medical examinations, and

Legislative Digest

2010 Legislative Session – Highlights of Bills After the First Crossover

Page 4

awaiting the independent medical examiner's reports. SB 2339 SD1 is scheduled for its first of three House committee hearings on March 9, 2010.

Companion bills [SB 2566](#) and [HB 2637 HD1](#) permit a physician or surgeon to conduct diagnostic testing or engage in a one-time consultation for a subspecialty diagnostic evaluation and treatment recommendations from a board certified or licensed specialist without consent from the employer/insurer or the DLIR, as required under current law. These bills may lead to more claimants obtaining the subspecialty diagnostic evaluation/treatment and ultimately higher workers' compensation costs. The House Labor committee is hearing SB 2566 on Tuesday, March 9, 2010. HB 2637 HD1 has been assigned to be heard jointly by the Senate Labor and Health committees, which have not yet scheduled a hearing for this measure.

Domestic Violence Discrimination

[SB 2341 SD1](#) and [SB 2369 SD2](#) are both intended to protect victims of domestic violence from employment discrimination. SB 2341 SD2 only amends Chapter 378-2 to prohibit discrimination against someone because of his or her "domestic victim status."

SB 2369 SD2 not only protects domestic violence victims, but also extends protection to victims of sexual violence. It further requires employers to provide a "reasonable safety accommodation" requested by the victim, unless an undue hardship exists. Employers may require individuals claiming this protection to provide certification that the individual is a domestic or sexual violence victim by providing a police report, protective order, or other documentation from an attorney, law enforcement office, health care professional, licensed mental health professional or counselor, member of the clergy or victim services provider that the individual was or is undergoing treatment or counseling, obtaining services, or relocating as a result of domestic or sexual violence or stalking.

SB 2369 SD2 also amends the Hawaii Victims Leave Act ("HVLA") to require all employers, regardless of size, to provide 30 days of leave within a twelve-month period. Small employers with less than 50 employees should be especially interested in this amendment because such employers currently only must provide 5 days of leave. HVLA would be further amended under this bill to prohibit employers from requiring employees to use paid leave for HVLA-protected reasons. Under this measure, it would be the employee's choice whether to use paid time off for HVLA leave purposes. Employees who take HVLA leave would also be eligible for "emergency leave" benefits that may be obtained from the department of human services from the spouse and child abuse special account.

Both measures, SB 2341 SD1 and SB 2369 SD2, have not yet been scheduled for a hearing in the House.

Professional Employer Organizations

Currently, Professional Employer Organizations ("PEOs") are unregulated. [SB 1062 SD1](#) seeks to regulate the industry by creating a new chapter and requiring PEOs to register with the Department of Commerce and Consumer Affairs ("DCCA") various information, including but not limited to management information and financial condition of the company, its eligibility to do business in Hawaii, and compliance with relevant insurance laws such as workers' compensation, TDI, prepaid health care act, and UI. To ensure clients have recourse against PEOs who fail to perform its contracted obligations, the bill also requires PEOs to post a \$1 million bond. The House Labor and Economic Revitalization,

Legislative Digest

2010 Legislative Session – Highlights of Bills After the First Crossover

Page 5

Business & Military Affairs committees have scheduled a joint hearing for SB 1062 SD1 on Tuesday, March 9, 2010.

[HB 2877 HD1](#) temporarily suspends from July 1, 2010 through June 30, 2015 the tax exemption for many businesses, including but not limited to PEOs. The measure imposes a 1% tax upon PEOs for all amounts received by the PEO from client companies and disbursed for employee benefits and compensation. Such “pass-through” amounts are currently not taxed. The Senate has not yet scheduled a hearing for this bill.