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LEGISLATIVE Digest

HAWAII EMPLOYERS COUNCIL

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2010 Legislative Session: Highlights of Introduced Bills

Much of this year's legislation addresses Hawaii's economic challenges. Bills directly affecting employers from a financial standpoint include unemployment insurance tax help for employers, minimum wage adjustments, and tax credits. Other major areas of interest for human resource professionals include sick leave mandates/discrimination, workers' compensation, domestic violence, and paid family leave. The following description of bills explains employment legislation that may receive the most attention during this legislative session.

Unemployment Insurance Tax

The most time-sensitive issue for employers in the 2010 legislative session is the looming unemployment insurance ("UI") tax. Under current law, employers are set to pay an average of $1,070 per employee in 2010 and $1,520 per employee in 2011. Given that the average tax per employee was $90 in 2009, the drastic rise in the UI tax has struck fear, or at least a concern, in many employers, especially those with a higher experience rating and higher paid employees. In order to change employers' contribution rate this year, the Department of Labor and Industrial Relations ("DLIR") asserted that legislation must be passed by March 12, 2010, more than six weeks before the close of the legislative session.

As background, Act 110 (2007) gave a temporary tax holiday to employers by lowering the taxable wage base to $13,000 and adjusting the tax contribution schedule to A. It also raised the amount of maximum weekly benefits from 70% to 75% of the average weekly wage until the end of 2010. Many employers question whether they now would be subject to a similar tax hike if Act 110 had not been implemented. According to the DLIR, employers would still be liable for the same unemployment contributions in 2010 even if Act 110 had not been enacted. Under both scenarios, the current law and if Act 110 had not passed, employers would still be set to pay $1,070 on average per employee in 2010. See DLIR's Alternatives to Unemployment Tax Increase, 2/4/10 Update, Slide 10a, available at http://hawaii.gov/labor/reports/ui_tax_2-5-10.pdf (last visited Feb. 6, 2010). This result is due to the unexpectedly high withdrawal rate from the unemployment trust fund.

Legislators and Governor Lingle have acceded to employers' requests for relief by introducing numerous bills to temporarily reduce the tax hike. Representative Rhoads, Chair of the House Labor committee, introduced HB 2169. Vice Chair of the House Labor Committee, Representative Yamashita, introduced HB 2207 and HB 2702. SB 2370 and HB 2201 were introduced on behalf of the Chamber of Commerce. SB 2732 and HB 2579 were introduced by the Governor.[1] The House Labor Committee declared its commitment to "fast track" passage of a bill providing some kind of tax relief to employers to meet the administration's internal deadline of March 12, 2010.

On January 26, 2010, the House Labor committee passed Chair Rhoads' bill, HB 2169 HD1, and the full House of Representatives approved its second reading on February 2, 2010.[2] This bill decreases

[1] Other unemployment insurance tax bills were introduced, but are unlikely to be scheduled for a hearing.
[2] Before a bill can be approved by the Legislature and sent to the Governor for approval or veto, a bill must pass three readings in both the Senate and House of Representatives.

employer contributions by amending employers' contribution schedule for 2010 to schedule D (currently, schedule F) and for 2011 to schedule G (currently, schedule F). The taxable wage base would be lowered to 90% for 2010 and the maximum weekly benefit amount would be set at 75% average weekly wage. The adequate reserve rate would be 1.25% (instead of 1.5%). Because the bill would result in federal loans to pay for the unemployment fund deficit, the bill also authorizes special assessments upon employers to pay the interest costs for those federal loans. To avoid a repeat of this dramatic UI tax upon employers, HB 2169 HD1 also requires DLIR to calculate employers' contribution rates twice per year, instead of the current once per year mandate. Rep. Rhoads hopes that this semiannual calculation schedule would help the State respond quicker to a changing economy. Under these amendments, Rep. Rhoads estimates that the employer would pay $630 on average (instead of $1,070) for 2010 and $1,290 (instead of $1,520) for 2011. On Friday, February 5, 2010, the House Finance committee held a hearing on HB 2169 HD1, indicated concerns about fairly allocating tax increases/savings based on a businesses' experience level, and deferred decisionmaking to Tuesday, February 9, 2010 at 1:30pm. The Finance committee is also working with DLIR in drafting language on the details of how the State would assess employers for the interest cost of borrowing federal funds.

While HB 2169 HD1 provides some immediate relief for employers, it does not provide as much help to employers as the Governor's bills, HB 2579 and SB 2732. The Governor's bills have not been scheduled for a hearing. HB 2579 and SB 2732 reduce employers' UI tax liability by:

- Adjusting the tax schedule for 2010 to schedule E (currently schedule F), for 2011 to schedule E (currently, schedule H), and for 2012 to schedule F (currently, schedule G).
- Setting the taxable wage base to 70% for 2010 and 80% for 2011 and beyond.
- Reducing the adequate reserve to 1 times the benefit cost rate times total remuneration (currently, 1.5 times).

Under the Governor's proposals, employers would pay on average $600 in 2010, $690 in 2011, $880 in 2012, and $900 in 2013. The unemployment tax would be lower in the Governor's plan than in HB 2169 HD1, but employers would be responsible for the interest on the federal loans necessary to pay for the unemployment benefits in 2011, 2012, and 2013. The DLIR estimates that interest would cost employers about $7 per employee per year that the interest must be paid.

For more information about the different UI contribution amendments, please view slide 14 of DLIR's Alternatives to Unemployment Tax Increase.

Unemployment Insurance Benefits

The decrease in UI contributions is not the only UI issue at the Capitol. Bills have also been introduced to give UI claimants easier access to benefits. HB 1913 HD1 permits UI claimants to continue to collect UI benefits if, while they are collecting UI benefits, they refuse otherwise suitable, available work due to fear of domestic or sexual violence. HB 1913 HD1 successfully passed through the first of three House committees and has passed its second reading in the House.

SB 2324 and HB 2257 HD1 affect UI claimants who are receiving partial unemployment benefits because they have been separated from a regular employer that is not offering work and are exempt from work

search and registration requirements to obtain UI benefits. Under current law, laid off employees who are still attached to a regular employer that does not currently have any work for those employees may collect unemployment benefits. If those laid off workers obtain part-time employment, their unemployment benefits are offset by wages earned from the part-time employment. Should those claimants who have part-time jobs quit their part time jobs without good cause ("PT Claimants"), they would lose unemployment benefits derived from their full-time job.

However, similarly laid off employees who are still attached to a regular employer who did not obtain part time employment would still be entitled to UI benefits ("Jobless Claimants"). In other words, the application of current law results in a loss of UI benefits for claimants who obtained and lost part-time employment (the PT Claimants) while their laid off counterparts who did not obtain a part-time job would still be eligible for UI benefits (the Jobless Claimants).

SB 2324 and HB 2257 HD1 address this issue by making part-time work irrelevant for purposes of determining eligibility for those claimants who receive UI benefits due to separation for their regular employer that is not offering work and are exempt from work search and registration for work requirements. In other words, under SB 2324 and HB 2257 HD1, the PT Claimants would still be eligible for UI benefits regardless of whether they quit their part-time job for good cause. SB 2324 and HB 2257 HD1 have each had a hearing in the respective labor committees.

Minimum Wage

SB 2244, HB 2099, and SB 2476 all seek to increase minimum wage. Companion bills SB 2244 and HB 2099 raise minimum wage to $8.50 per hour from July 1, 2010 to December 31, 2011 and then set minimum wage to the consumer price index for urban wage earners and clerical workers beginning January 1, 2012. The increase in SB 2476 is not as dramatic, but it does increase minimum wage to $7.75 per hour. Although HB 2099 and SB 2476 have not been scheduled for a hearing, SB 2244 will be heard by the Senate Labor committee on Monday, February 9, 2010.

Tax Credits

Companion bills SB 2248 and HB 2842 create a tax credit for employers who fund continuing education for full-time employees who have been employed for twelve (12) consecutive months. The education must be directly associated with the employee's job and must enable the employee to obtain a higher paying position with the employer or increase the employee's level of productivity. The tax credit would only be available to employers of a certain size, although the size of the employer and the amount of the tax credit has yet to be determined. The Senate Labor committee has scheduled a hearing for SB 2248 on February 9, 2010. However, HB 2842 has not yet been assigned a hearing date.

Governor Lingle proposed SB 2711 and HB 2558, which establish tax credits for employers who create full-time jobs for employees working at least thirty five (35) hours per week or 1,680 hours per year. The credit would be available for the hiring of new full-time employees who were hired during calendar years 2010, 2011, and 2012. To be considered a new position, the position cannot have existed ninety (90) days prior to be filled by the employer and the employer must have more employees at the time of hire than compared to the effective date of the bill. The amount of the tax credit would be equal to the amount of the new full-time employee's wages actually withheld by the employer. Employers who receive the tax credit must commit to maintaining substantial operations in Hawaii for two (2) years after receiving the

tax credit, or would face recapture of fifty percent (50%) of the tax credit. The Democratic controlled Legislature has not scheduled either of the Governor's bills for a hearing.

HB 1954 provides a tax credit to employers if they have a ten percent (10%) increase in employees in 2010 as compared to 2009 and increased total wages in 2010 as compared to 2009. The tax credit is unavailable to new employers beginning business in 2010. The amount of the tax credit would be equal to 10% of the increase of total wages in 2010 as compared with 2009. The maximum tax credit would be $50,000. HB 1954 has not been scheduled for a hearing.

Sick Leave Discrimination/Mandatory Sick Leave

Like in recent years, sick leave discrimination and mandatory sick leave is again a hot topic at the Legislature. SB 2241, SB 2883, and HB 2935 HD1 prohibit employers who offer sick leave from discriminating against employees who use accrued and available sick leave. None of these bills require employers to provide sick leave. Although SB 2241 has not yet been scheduled for a hearing, the Senate Labor committee has already held a hearing on SB 2883 and is likely to pass out the bill onto the Senate Judiciary committee. HB 2935 HD1 is also successfully moving through the House. On February 3, 2010, it passed its second reading in the House and was referred to the Judiciary committee.

However, a carryover bill from the 2009 session, HB 1687 HD1 not only prohibits discrimination against using sick leave, but also requires employers of all sizes to provide sick leave. Under the bill, employees would accrue one (1) hour of sick leave for every thirty (30) hours worked. The maximum sick leave accrual amount depends upon size of the employer. Employers of less than fifty (50) employees would have to permit employees to accrue a minimum of forty (40) hours of sick leave. Employers of fifty or more employees would have to allow employees to accrue seventy two (72) hours of sick leave. Not only does HB 1687 HD1 mandate sick leave, but it also requires employers to allow sick leave to be used to care for other persons with an illness such as a spouse, parent, child, sibling, grandparent, grandchild, domestic partner, other designated partner. HB 1687 HD1 has successfully passed its first of three House committee hearings. On February 3, 2010, it passed its second reading in the House and was referred to the Judiciary committee.

Workers Compensation

Companion bills SB 2336 and HB 2079 require the Director of DLIR to make a workers' compensation decision within sixty (60) days. Currently, the parties can agree to an extension of the decision due date for good cause. The DLIR testified that out of 1,579 workers' compensation cases, only twenty two (22) have been extended and all with both parties' consent. Mutual consent is a prerequisite for the extension under current law. If both parties don't agree to the extension, the case is appealed and then sent back down for a hearing. Cases that have been extended have often dealt with complex issues where written testimony is necessary or where a pro se claimant needed more time to understand the situation. Essentially, those who support the bills prefer a postponed hearing date and those who oppose the bill prefer to suspend decisionmaking until all necessary information is before the Director to make a decision. The Senate Labor committee held a hearing on SB 2336 and is scheduled to make a decision on the bill on February 9, 2010. HB 2079 has moved out of the House Labor Committee and is pending a second reading and referral to the House Finance committee.

SB 2566 and HB 2637 are identical bills that 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. Under current law, such diagnostic testing/consultation is currently available to claimants if the insurer/employer agree to the test/consultation or if DLIR orders it. A claimant may also obtain the test/consultation without insurer/employer consent if the claimant obtains a DLIR order, which of course, takes time. These bills essentially give a blanket approval for the diagnostic test or one-time consultation, without the claimant's need for DLIR approval. Because claimants would likely obtain more tests/consultations under SB 2566 and HB 2637 than under current law, these bills would drive up the cost of workers' compensation.

Companion bills SB 2608 and HB 2493 propose to put time limits on vocational rehabilitation ("VR") and permit the DLIR to create a fee schedule for VR. The bills were introduced to address insurers' and employers' concerns that they have no recourse to object to the cost of VR, which may be lengthy and expensive. However, Senator Takamine indefinitely deferred SB 2608 because VR only accounts for a small 2% portion of workers' compensation costs and because the workers' compensation premium rates have decreased by about 64% in the past five (5) years. Representative Rhoads and the House Labor committee revised HB 2493 by deleting the time limits and fee schedule language of the bill. As of Sunday, February 7, 2010, a revised draft of HB 2493 had not yet been published.

Domestic Violence Discrimination

SB 2341, SB 2369, and HB 2353 are intended to protect victims of domestic violence from employment discrimination. SB 2369 and HB 2353 also require the unemployment compensation staff to be trained on domestic violence so they can properly identify and adjudicate those cases. They further extend Hawaii Victims Leave Act ("HVLA") to require all employers regardless of size to provide thirty (30) days of leave within a twelve-month period. Currently, only employers with fifty (50) or more employees must provide thirty (30) days of leave and employers with less than fifty (50) employees must only provide five (5) days of leave. SB 2369 and HB 2353 would prohibit employers from requiring employees to use paid leave for HVLA-protected reasons. Under these bills, it would be the employee's choice whether to use paid time off for HVLA leave purposes. Additionally, SB 2369 and HB 2353 create "emergency leave" benefits that may be obtained from the department of human services for those taking HVLA leave. Although SB 2341 and HB 2353 have not yet been scheduled for a hearing, SB 2369 is scheduled to be heard by the Senate Labor and Human Services Committee on February 9, 2010.

Paid Family Leave

Companion bills SB 2392 and HB 2258 HD1 add a new section under the workers' compensation law to create a "family leave insurance fund." After a one-week waiting period, employees may claim a maximum of $250 per week from the fund. SB 2392 requires every employer and employee to each contribute 1¢ per hour into the family leave insurance fund up to a maximum of $2000/year for each employee. HB 2258 HD1 clarifies that only employers and employees who are covered under the Hawaii Family Leave Law must make such contributions, rather than all employers and employees in Hawaii. The Senate Labor committee is scheduled to hear SB 2392 on February 9, 2010. HB 2258 HD1 has passed its second reading in the House and has moved on from the Labor committee to the Finance committee.