

LEGISLATIVE Digest



HAWAII
EMPLOYERS
COUNCIL

April 13, 2010

2010 Legislative Session: Highlights of Bills After the Second Crossover

Many bills fell by the wayside as of April 8, 2010, the Second Crossover deadline. Notably, the following measures failed to meet the April 8th deadline and are now considered dead: [SB 2341](#), which would have prohibited employers from discriminating against someone because of his or her domestic victim status; [HB 1390](#), which would have eliminated the good cause extension when an employer submits its report to substantiate why it denied compensability of a workers' compensation claim; and [HB 2877](#), which would have increased the general excise tax by 1%.

The rest of this article describes bills that are of general interest to employers. Except for Act 002 (the unemployment insurance tax bill), all remaining bills must pass through a conference committee before final approval by the entire Legislature. A full list of all bills that Hawaii Employers Council is tracking may be viewed on our Legislative Digest.

Unemployment Insurance

Governor Lingle signed [HB 2169 HD2](#) into law as Act 002. Act 002 reduced the unemployment insurance ("UI") tax for two years and changed the law by:

- Amending employers' contribution schedule for 2010 to schedule D (previously, schedule F) and for 2011 to schedule F (previously, 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).

Employers should have already felt the impact of Act 002 since the Department of Labor and Industrial Relations ("DLIR") sent out its first quarter UI tax assessment to employers on March 12, 2010. How much relief Act 002 gave a particular employer depends upon how high are its employees' wages, which affect the taxable wage base, and the employer's experience rating, which is affected by how many claimants have recently drawn from the employer's UI account. The following table generally describes the range of how an employer might be affected, however the DLIR has analyzed the issue in more detail on its website: http://hawaii.gov/labor/reports/ui_tax_2-24-10.pdf

Legislative Digest

2010 Legislative Session – Highlights of Bills After the Second 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

Changes to the UI tax may be revisited in future legislative sessions since [SB 2324 SD2 HD2](#) requires DLIR to study how much it would cost for the DLIR to replace its once-a-year calculation for UI taxes to twice per year. Representative Yamashita believes that a more frequent calculation permits the State to respond quicker to economic changes and would result in less severe fluctuation of UI tax bills for employers as compared to the situation employers are currently facing.

Representative Yamashita has advocated requiring the DLIR to study and 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.” It appears that Representative Yamashita favors increasing the maximum contribution rates so that employers with higher experiences (i.e., have experienced more unemployment) pay a higher tax rate.

SB 2324 SD2 HD2 also allows claimants who have been receiving “partial unemployment” benefits to continue receiving benefits even after separating from a part-time job if the claimant is still attached to a regular employer that is not offering work. Currently, such claimants would be denied their “partial unemployment” benefits if they lost the part-time job involuntarily for good cause or if they resigned without good cause. The measure would change the law so that the claimants would continue to receive UI benefits from the regular employer regardless of the reason they couldn’t keep their subsequent part-time job.

Finally, SB [2323 HD2](#) allows a UI claimant to register for work availability by filling out a paper or online form. Currently, UI claimants are required to post their work availability online. Proponents of the measure argue that the current online requirement places UI claimants without computer/internet access or knowledge at a disadvantage. The DLIR already assists UI claimants who are unable to complete the form online by inputting the information online for the claimants. Thus, the DLIR believes that SB 2323 HD2 essentially codifies its current process.

Legislative Digest

2010 Legislative Session – Highlights of Bills After the Second Crossover

Page 3

Sick Leave Discrimination

[SB 2883 SD1 HD2](#) prohibits employers from discriminating against an employee solely because the employee legitimately used accrued and available sick leave pursuant to a negotiated sick leave policy. Employers may, however, continue to discriminate against employees who abuse sick leave. The measure would only affect employers who have collective bargaining agreements and who have 100 or more employees.

At first glance, the bill appears to apply only to collectively bargained agreements. However, a literal reading of the bill reveals that the measure possibly extends beyond employees covered by collectively bargained agreements. The bill arguably applies to individually negotiated contracts, perhaps for high-level employees, with unionized companies with 100 or more employees.

For instance, a hospital recognizing a union representing its registered nurses may hire physicians subject to a separate employment contract. The sick leave policy within the physician's individual employment contract may arguably be "negotiated" under SB 2883 SD1 HD2 and the hospital would be unable to discriminate against the physician for taking sick leave. Thus, if the hospital implemented a no-fault attendance policy, which imposes discipline after a certain number of absence occurrences regardless of the reason for the absence, it could not apply such policy upon the physician with the individually negotiated contract.

Workers Compensation

[SB 2566 HD2](#) permits 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. Proponents of the measure argue that it helps to get injured workers back to work quicker by getting injured claimants appropriate treatments faster. However, opponents of the bill believe that it takes away the employer's right to contest the one-time consultation and may lead to higher workers' compensation costs by encouraging more claimants to obtain the subspecialty diagnostic evaluation/treatment.

Insurers are concerned that the bill allows physicians to refer claimants to an organization in which the physician has a financial interest. This, insurers believe, would be a conflict of interest and should be prohibited. Despite insurers' protests, Legislators have not banned referrals where there is a financial interest because such conflict of interest may be unavoidable or unduly burdensome upon the patient. For instance, if a claimant goes to Straub for treatment, they believe that the Straub physician should be able to refer the claimant to another doctor within Straub and that the patient shouldn't have to go to another organization such as Queens for the specialized diagnostic evaluation and treatment.

Hawaii Civil Rights Commission

Last year, the Legislature required the Hawaii Civil Rights Commission ("HCRC") to adopt rules to conform the state disability discrimination law with the ADA Amendments Act of 2008 ("ADAAA") by December 31, 2010. However, because ADAAA rules have not been finalized, the HCRC seeks an extension of the end-of-the-year deadline through [SB 2565 SD1 HD1](#). The measure gives HCRC twelve

Legislative Digest

2010 Legislative Session – Highlights of Bills After the Second Crossover

Page 4

months following Equal Employment Opportunity Commission's ("EEOC") publication of ADAAA's final rules to finalize Hawaii's disability discrimination rules.

SB2565 SD1 HD1 also prohibits a complainant and respondent from giving a "confidential witness statement." Current confidentiality provisions of Chapter 368 prohibit disclosure and use of confidential factual records obtained during the HCRC investigation. Under current law, some respondents have asserted that their statements are confidential, which results in increased litigation to enforce subpoenas requiring respondents' cooperation. Such litigation costs the HCRC time and money. In order to avoid the litigation expenses over whether a respondent should be entitled to confidentiality for their statements, which are necessary in order to investigate discrimination claims, the HCRC seeks to make clear that respondents are not entitled to such protection through passage of this measure.

Professional Employer Organizations

Currently, Professional Employer Organizations ("PEOs") are unregulated. [SB 1062 SD1 HD1](#) 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, temporary disability insurance, 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 bond, the amount of which has yet to be determined.

The conference committee on this measure will likely address which State agency is best suited to regulate PEOs. The DCCA testified that it cannot regulate PEOs unless a sunrise study on this measure is completed in accordance with HRS § 26H-6 and that completion of the sunrise study would delay implementation of the bill. Additionally, the DCCA and the DLIR both testified that the DLIR would be more appropriate to oversee PEOs given the DLIR's familiarity with State labor laws.

[SB 2402 SD1 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. If PEOs pass on the 1% tax to its clients, the cost of contracting with PEOs would substantially increase.