

LEGISLATIVE Digest



HAWAII
EMPLOYERS
COUNCIL

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Summary of Significant Bills Passed by the 2010 Legislature

In terms of labor and employment law changes, the 2010 legislative session was not as contentious and not as harmful to employers as many prior sessions. Because the Legislature's focus was on the budget crisis, and on issues such as furloughs and civil unions, there were not as many employment-related bills considered as in prior sessions.

One bright spot for employers is the reduction in the unemployment insurance contribution schedule in Act 002. However, two other bills (SB 2883 -regarding sick leave discrimination, and SB 2566 - regarding specialist referrals in workers compensation cases), are likely to result in higher costs for employers. Employers concerned about these two bills should contact the Governor and their legislators. Governor Lingle has until July 6, 2010 to make a final veto determination, and the Legislature must then convene in special session for any veto override.

One surprise on the final day of sessions was the passage of the civil union bill, HB 444, which appeared to have been held by the House. The effective date of the civil union bill is January 1, 2010, meaning it is apparently retroactive.

Act 002: Reduction of Unemployment Insurance Contribution Rate

At the end of 2009, Hawaii employers were faced with a huge potential increase in unemployment insurance contributions beginning in 2010. Because the Unemployment Insurance Fund was projected to fall to a negative balance in December 2010, the temporary contribution reduction created by Act 110 in 2007 automatically lapsed at the end of 2009. As a result, the Department of Labor and Industrial Relations ("DLIR") predicted that the average employer contribution would rise from a 2009 average of \$90 per employee per year to \$1,070 per employee per year in 2010. The projection for 2011 was even more dire, with an average contribution per employee of \$1480.

Act 002, signed by the Governor on March 11, 2010 lowers employer contribution rates by adjusting the UI tax schedule downward, and amends the taxable wage base to 90% (rather than 100%) of the statewide average annual wage. It also decreases the adequate reserve required to be maintained by the Unemployment Insurance Fund to 12 months of the highest payout in the prior 10 years, rather than 18 months. However, because the state of Hawaii will be required to take out federal loans to keep the UI fund solvent, Act 002 also authorizes a special assessment on employers to pay for the interest on the federal loans. Hawaii employers are anticipated to pay an average annual contribution of \$630 per employee in 2010 and \$970 in 2011, instead of the \$1,070 and \$1480 which would have been required if the unemployment laws had not been amended.

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SB 2324: Unemployment Benefits – Limits on Disqualification Due to Part-Time Work

When a claimant is terminated from employment and is eligible for unemployment benefits, he or she can still obtain partial unemployment benefits if he/she subsequently obtains part-time work. The partial UI benefit received by such a claimant is the difference between his/her unemployment weekly benefit amount minus the weekly gross earnings from part-time work. In addition, the first \$150 earned per week in part-time employment is disregarded when calculating partial unemployment benefits.

However, under current law, if a claimant receiving partial unemployment benefits either voluntarily quits the part-time work, or is discharged from the part-time work for willful misconduct, then all unemployment benefits cease. Accordingly, proponents of SB 2324 claim that current law creates a disincentive to part-time employment, and the bill remedies this disincentive.

SB 2883: Sick Leave Discrimination

SB 2883 prohibits employers and labor organizations from terminating, withholding pay from, or demoting an employee solely because the employee “legitimately uses accrued and available negotiated sick leave in accordance with the employer’s attendant and negotiated sick leave policies, except for abuse of sick leave.” The restriction on discipline for use of sick leave only applies to employers having a collective bargaining agreement and employing 100 or more employees. Similar bills prohibiting discrimination based on use of sick leave have been introduced in a number of past legislative sessions. The prohibition on sick leave discrimination is incorporated in HRS 378-32, which means claimants will be required to file an administrative charge with the Department of Labor and Industrial Relations.

The bill only applies to “negotiated” sick leave and “negotiated” sick leave policies, and only to employers having a collective bargaining agreement. Accordingly, it is likely that the bill is subject to federal preemption under Section 301 of the Labor Management Relations Act Section 301, because the statute would require a fact-finder to interpret the applicable collective bargaining agreement to determine whether an employee used accrued and available sick leave in accordance with the negotiated sick leave policy.

SB 2565: Hawaii Civil Rights Commission; Promulgation of Disability Rules and New Confidential Witness Requirements

SB 2565 has two parts. The first part relates to new disability law regulations. The federal Equal Employment Opportunity Commission (“EEOC”) is currently in the process of publishing final rules implementing the Americans with Disabilities Act Amendments of 2008 (“ADAA”). The first part of SB 2565 provides that within 12 months after the EEOC has published its final rules implementing the ADAA, the Hawaii Civil Rights Commission (“HCRC”) will publish disability discrimination regulations which conform Hawaii discrimination law to the federal rule changes.

The second part of SB 2565 relates to confidential witnesses in HCRC investigations. The bill allows the HCRC to determine that the identity of witnesses, as well as their statements, may be kept confidential and not subject to disclosure to opposing parties (or to third parties), upon the witness’s request, where there is a reasonable fear that the witness may be subject to bodily or economic harm, retaliation, or

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termination of employment. The bill also prohibits complainants and respondents from claiming confidentiality for their witness statements to the HCRC.

SB 2566: Workers Compensation – Specialist Referrals

Currently, in workers' compensation cases, a treating physician's referral of the claimant to a sub-specialist may be challenged by the employer or insurer, although as a practical matter, challenges rarely occur. SB 2566 provides that a treating physician may (1) conduct diagnostic testing or (2) engage in a one-time consultation for subspecialty diagnosis and treatment recommendations from a sub-specialist, without being challenged. The bill also specifically allows the treating physician to make a referral to a medical facility in which a treating physician has a financial interest.

The bill is anticipated to drive up the cost of workers' compensation claims. Although initial referrals by treating physicians to sub-specialists are rarely challenged, the establishment of an uncontestable initial referral creates a situation open to abuse. Moreover, the bill can be interpreted to allow a claimant's treating physician to conduct unlimited diagnostic testing without any scrutiny or oversight.

SB 2840: Employment of Hawaii Residents on Public Works Projects

SB 2840 requires that public works construction projects utilize Hawaii residents for at least 80% of the workforce employed under a contract. Contractors who are awarded a public works contract must ensure that the 80% resident requirement is met. The bill was supported by Hawaii unions, and opposed by the state. The Attorney General's office opined that because the bill discriminates against out-of-state workers and companies, it violates the Privileges and Immunities Clause of the United States Constitution. However, this interpretation was contested by Professor Jon Van Dyke of the UH Law School, who submitted testimony arguing that the bill would withstand a constitutional challenge.

HB 444 – Civil Unions

HB 444 recognizes civil unions, which have privileges and obligations under state law identical to the marital relationship. The statute also provides that civil unions and similar relationships entered into in jurisdictions outside Hawaii will be granted civil union status in Hawaii, so long as the participants meet the eligibility requirements for a Hawaii civil union. The effective date of the bill is January 1, 2010, which was the effective date given to the bill when it was originally introduced in the House in January 2009. Due to the tactical maneuvers surrounding this controversial bill, the effective date was not amended when it was resurrected by the House and passed by floor vote on the final day of session.

Except for its retroactive effective date, the bill is not anticipated to have significant consequences for Hawaii employers. The federal employment and tax law implications are negligible, due to the federal Defense of Marriage Act ("DOMA"). DOMA provides that for purposes of federal law, "marriage" is defined as a "legal union between a man and a woman." As a result, for example, although the federal Family Medical Leave Act ("FMLA") requires that employees be given leave to care for a spouse with a serious health condition, the statute does not require employers to provide leave to care for a civil union partner. Similarly, although COBRA provides health insurance continuation coverage for "spouses" of covered employees, such coverage does not extend to civil union partners. Other provisions of federal

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law creating protections or obligations relating to “spouses” will not apply to partners in a civil union, because of DOMA.

For purposes of Hawaii law, HB 444 provides that all rights, benefits, protections, and responsibilities afforded to married individuals shall apply to civil union partners. Accordingly, any references in Hawaii law to married persons, spouses, and family members, shall apply to civil union partners. Although it is difficult to assess the entire impact of HB 444, the major changes which HEC has initially identified on Hawaii law are as follows:

1. Hawaii Family Leave Law: Eligible employees of employers with 100 or more employees will be able to take up to 4 weeks of Hawaii Family Leave per year to care for a civil union partner.
2. Workers’ Compensation Law: Hawaii’s Workers’ Compensation law contains a number of provisions regarding the payment of benefits to spouses of deceased employees. Those benefits would apply under HB 444 to surviving partners in civil unions.
3. Family Medical Coverage: Nothing in Hawaii’s Prepaid Healthcare Law requires employers to provide coverage for spouses or dependents. Hawaii insurance law defines “family coverage” as a policy that “insures, originally or upon subsequent amendment, an adult member of a family who shall be deemed the policyholder and any two or more eligible members of that family, including a spouse, dependent children or any children under a specified age which shall not exceed nineteen years, and any other person dependent upon the policyholder.” It is likely that as a result of HB 444, private insurers offering family medical coverage may be required to cover civil union partners under the same terms as opposite-sex spouses.
4. Wages of Deceased Employees: Under HRS 388-4, employees may pay the final wages due to a deceased employee up to \$2000 to the surviving spouse, reciprocal beneficiary, or adult child of the deceased, with a supporting affidavit of relationship. This provision would apply to civil union partners under HB 444.
5. Victims Leave: The victims leave law allows persons who are victims of domestic or sexual abuse to take protected leave. In turn, “domestic or sexual abuse” includes threats of violence or harm made to an individual or to his/her spouse, parent, or child, and would now also include threats made to a civil union partner.
6. Unemployment Insurance: Hawaii’s unemployment law allow individuals to obtain benefits if they voluntarily separate from employment for “compelling family reasons,” which includes the spouse’s transfer in employment to a location from which it is impractical for the individual to commute to work. This exception would now apply to a relocation due to the geographic job transfer of a civil union partner.
7. Exclusion of Family Members from Unemployment Insurance, TDI, and State Minimum Wage Laws: Hawaii’s unemployment insurance, TDI, and state minimum wage laws exclude certain services performed by family members from the definition of “employment.” Those exclusions would apply to services performed by a partner in a civil union, because HB 444 includes civil union partners within the definition of “family members.”

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The retroactivity of the bill is somewhat troubling. The Governor has not yet stated whether she will veto the bill, and whether it will be enacted is unclear. If the bill is vetoed, the Legislature may convene on July 6, 2010 for a veto override.

For purposes of compliance with Hawaii state law, employers may have to immediately recognize and apply HB 444 to civil unions or same-sex marriages lawfully entered into in other states or in foreign countries. For example, employers may want to grant Hawaii Family Leave if requested by an employee based on a civil union or same-sex marriage legalized in another state or foreign country. However, because no civil unions can be licensed in Hawaii until HB 444 is enacted, only civil unions which have already been granted in other jurisdictions may need to be recognized immediately.