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LEGISLATIVE Digest

HAWAII EMPLOYERS COUNCIL

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2011 Legislative Session: Highlights of Introduced Bills

The 2011 Legislative Session began on January 19, 2011 with a battle over the House Speaker position, a change in Senate leadership, and a new Governor implementing his "New Day in Hawaii" plan. These changes, however, have not translated into different kinds of employment-related legislation introduced at the Legislature. In fact, many bills introduced this session are those we have seen before and are not current law primarily because former Governor Lingle vetoed them. Many of these pro-employee measures are anticipated to make their way to Governor Abercrombie's desk and it will be interesting to see whether our "new day" brings new employer mandates in this fiscally challenging time or whether such bills are vetoed.

Bills of major areas of interest for human resource professionals include a prohibition on sick leave discrimination and gender identity discrimination, successor employer mandates, workers' compensation amendments, domestic violence victim protection, and an expansion of family leave. Measures directly affecting employers from a financial standpoint include unemployment insurance ("UI") tax assessments for the interest on the State's UI federal loan, minimum wage adjustments, and repealing the sunset provision in the Prepaid Health Care Act. The following description of bills explains employment legislation that may receive the most attention during this legislative session.

Sick Leave Discrimination

This year, unlike last year, there has been no legislation introduced *requiring* employers to provide sick leave. However, there are proposed measures that place limitations on implementation of sick leave benefits for employers that choose to offer this benefit. SB 1076 and HB 341 HD1 prohibit employment discrimination "solely because the employee uses accrued and available sick leave." The House version clarifies that employers have a right to ask employees for verification of their sick leave. The Senate Judiciary and Labor ("JDL") committee is scheduled to hear SB 1076 on February 8. HB 341 HD1 has already received approval from its first committee assignment in the House (joint Labor ("LAB") and Economic Revitalization & Business ("ERB") committees) and must now pass through the Judiciary ("JUD") and Finance ("FIN") committees before crossing over to the Senate.

Gender Identity or Expression Discrimination

Currently, Hawaii Civil Rights Commission ("HCRC") views gender identity or expression discrimination as prohibited employment discrimination as form of sex discrimination. HB 546 seeks to codify HCRC's position by prohibiting employment discrimination based on a person's "gender identity or expression." The bill defines "gender identity or expression" as including "a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that

gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth."

HB 546 does not detail how employers must accommodate employees with gender identity or expression concerns. For instance, it does not address which restroom employees undergoing a sex change must use nor does it discuss reasonable accommodation issues surrounding dress code enforcement for customer service positions.

This measure sailed through its first hearing in the House LAB committee with no employers testifying about any concerns about the measure. It has passed its second reading and is waiting to be scheduled for a hearing in the House JUD committee.

Successor Employer

The successor employer bill is back. HB 1166 HD1 requires employers with 100 or more employees in a divestiture to hire all incumbent non-supervisory and non-confidential employees. Successor employers are allowed to do criminal history record checks and drug screenings, but are prohibited from requiring employees to submit employment applications. Successor employers can avoid hiring 100% of the employees if it changes the business "substantially," or if fewer employees are needed, successor employers can reduce the retention rate accordingly. To make the measure more palatable to employers, the House joint LAB and ERB committees inserted a tax credit (amount currently unspecified) to retain workers for 1 year. The bill now moves onto the FIN committee for hearing.

Employers have opposed this measure in the past out of concern that it would make it more difficult to find a buyer for a flailing company. Would a buyer really want to take all of the seller's employees? There is, after all, a reason why the seller could not operate to achieve its desired profit. Employers have also previously testified that it may lead to discouragement of outside investment in Hawaii companies and more business shutdowns to avoid the successor employer bill's mandates.

Unions, on the other hand, have enthusiastically supported this measure and have much to gain from its passage since recognition of a union in a successor employer hinges in part upon how many employees of the seller-employer is employed by the buyer-employer. If the new employer hires a majority of employees in the bargaining unit which the union previously represented, the new employer may be required by federal law to recognize and bargain with the union. This measure helps unions maintain their membership, even after the sale of a business.

Dislocated Workers Act

Violations under the Dislocated Workers Act ("DWA") are now required to be pursued by private citizens. There is no government enforcement of wrongdoings under the DWA. SB 1089 SD1 and HB 465 HD1 propose to revise this enforcement mechanism by authorizing the DLIR to enforce the DWA. Although the original versions of these bills proposed to expand the

DWA to apply to employers of *all* sizes, the Senate JDL and the House joint LAB and ERB committees have both amended the measures to avoid changing the minimum employee threshold so that DWA continues to apply only to employers with 50 or more employees,.

ILWU supports SB 1089 SD1 and HB 465 HD1, but the DLIR disagrees with assigning DWA enforcement to DLIR. DLIR prefers a more proactive approach to help the newly displaced employees, rather than using limited resources to penalize employers. DLIR has also expressed concern over the additional resources that would be necessary to implement this measure.

Another Senate measure amending DWA is SB 91, which requires employers actively seeking a buyer for a sale, transfer, or merger to give notice of potential layoffs, even before a binding agreement is finalized. Currently, the notice requirement only attaches after the agreement is finalized, not during the active search for a successor. SB 91 also requires employers who are going through bankruptcy proceedings to give DWA notice before the bankruptcy proceedings have concluded. The measure does not define at what point a search for a successor becomes an "active" one or when a company is deemed to be "entering" bankruptcy proceedings, so this measure seems vague and ambiguous as currently drafted. Employers seeking a buyer would also likely have concerns over the measure since successor searches are often not openly broadcasted, especially for privately owned companies, but the bill proposes to make the search and possibly the private organization's financial troubles public. SB 91 has not yet been scheduled for a hearing.

Family Leave

Legislators are proposing to expand the Hawaii Family Leave Law ("HFLL") in two ways. First, they seek to recognize military leave for qualifying exigencies as defined by the federal Family Leave Act ("FMLA") regulations. Employers who are covered by the HFLL (i.e., employers with 100 or more employees) are simultaneously covered by FMLA (i.e., employers with 50 or more employees) so these employers already have a good understanding of qualifying exigency leave requirements, which FMLA mandated since 2008. However, passage of SB 889 and HB 1109 would mean that such benefits would attach earlier under HFLL, which only requires employees to work 6 consecutive months before becoming eligible for benefits, which is much shorter than the 12-month eligibility requirement under FMLA.

Second, through HB 884 HD1, legislators want to add siblings as other persons for whom an employee can care under HFLL. The bill defines siblings as a blood or adopted brother or sister. "Hanai" siblings are not covered under this bill. HB 884 HD1 must be approved by the House FIN committee before crossing over to the Senate.

Domestic Violence Victims

Recognizing the some challenges faced by domestic violence victims, legislators propose to offer additional protections and benefits to such workers. SB 229 and HB 134 both prohibit employers from discriminating against an individual because his or her domestic abuse victim

status, if the victim provides proper notification to the employer. Although these measures have not yet been heard, concerns raised in the past about similar legislation include additional funding necessary for enforcement, limits on how long domestic violence victims are protected after an incident occurs (e.g., months, years, no limit), and identifying employers' reasonable accommodation requirements.

The Legislature previously expressly recognized domestic or sexual violence as good cause for voluntarily leaving employment for purposes of qualifying for UI benefits. Now, legislators seek to expand on this idea by making it good cause for declining offered work while receiving UI benefits. Under SB 90, HB 574 HD1, and HB 748, such individuals could decline available work if the individual reasonably believes that the employment would subject the individual, the individual's minor child, or other individuals in the workplace to an unreasonable risk of violence. To be eligible for the continued UI benefits under these measures, the victim must have sought "appropriate assistance in responding to the domestic or sexual violence" by filing a police report, obtaining help from a victim services organization, or taking other legal action. Employers' UI experience rating would likely rise given that former employees who are victims of domestic or sexual violence could use the UI benefits for a longer period than without this measure. SB 90 has not been scheduled for a hearing. However, the House LAB committee is hearing HB 574 HD1 and HB 748 on February 8.

Collective Bargaining

In 2009, the Legislature overrode Governor Lingle's veto to require employers who are subject to the Hawaii Labor Relations Act ("HLRA") with gross annual revenues of $5,000,000 or more to recognize unions through the card check process. Because most employers fall under the federal National Relations Act's jurisdiction and not under the HLRA, only a small number of employers were affected by this amendment. The 2009 measure primarily affected larger agriculture businesses operating in Hawaii. While that measure was meant to make it easier to unionize these large agriculture organizations, unions have encountered difficulty because many of these targeted agriculture businesses do not sell their products in Hawaii and instead ship them to their mainland departments. Thus, these large agriculture businesses do not meet the annual gross revenue threshold and unions are unable to organize them through card check.

To remedy this "problem," SB 618 was introduced to eliminate the $5,000,000 cutoff so that the card check process would apply to employers of any size. All employers in the agriculture industry would likely be concerned about this proposal, which makes them a prime target for unionization. SB 618 has not yet been scheduled for a hearing in the Senate JDL committee, its only committee assignment.

Another collective bargaining bill is HB 385 HD1, which was introduced to permit Legislature employees to unionize through the card check process. Although the bill successfully passed its first hearing in the House LAB committee, some Democratic legislators expressed concern and some even voted against the measure that would allow their own workers to unionize, citing reasons such as card check not being workable for them because they can't foresee the kinds of

challenges that may arise during session and that because of fiscal challenges it is too difficult to unionize their workplace. The House Legislative Management and FIN committees must approve this measure before the Senate can consider it.

Wage and Hour

There are various proposals to raise minimum wage. SB 610 requires a universal living wage based on the fair market rent of a one-bedroom apartment. SB 613 establishes a new minimum wage (amount not yet specified) for 2012 and then pegs minimum wage to inflation. HB 1391 increases minimum wage to $7.75 per hour beginning on July 1, 2011 and then increases minimum wage based on inflation thereafter. SB 1037 and HB 168 also pegs minimum wage to inflation beginning 2013, but sets minimum wage to $8.50 per hour beginning July 1, 2011. The Senate JDL committee will hear SB 1037 on February 8.

Related to minimum wage, changes to the tip credit have also been introduced. SB 844 increases the tip credit from 25¢ per hour to 50¢ per hour. In SB 759, the tip credit is increased to 25% of hourly tips claimed by the employee as income, with the minimum hourly rate actually paid to the tipped employee set at $5 per hour. SB 844 and SB 759 have not been set for hearing.

The final wage and hour issue likely to receive much attention this legislative session is the meal break proposal. SB 1202 and SB 1405 require a 30-minute meal break after 5 hours of continuous work, unless a collective bargaining agreement expressly provides for meal breaks. The House joint LAB and ERB committees have already decided to defer the House version of the measure (HB 1316), but SB 1405 is being considered in the Senate JDL committee on February 8.

Workers Compensation

SB 279 and HB 463 HD1 are companion measures that revive a bill vetoed last year. The two measures 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. The doctor referring the patient may have a financial interest in the medical facility in which the physician referred to works. Under current law, such diagnostic testing/consultation is 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 should these measures pass, these bills would likely increase workers' compensation costs and deny insurers/employers the opportunity to challenge services that may not be medically necessary. HB 463 HD1 has already been approved by its first of three committee referrals. SB 279 faces its first of two Senate committee referrals on February 9.

SB 280 and HB 464 HD1 prohibit employers from any extensions when submitting its written report denying compensability or indicating that compensability will not be accepted. Currently, extensions are frequently granted to obtain medical reports and second opinions concerning the claim and insurers/employers often encounter difficulty in getting this feedback within a 30-day period. The measures, however, would deny any opportunity for extensions to wait for this medical feedback and would force employers to make determinations without sufficient evidence. Ultimately, this may lead to increased appeals and additional delays in the workers' compensation process.

Because of the delay in sometimes getting insurer approval for certain treatments in workers' compensation cases as well as in motor vehicle accident cases, SB 963 requires an injured person's accident and health or sickness insurer ("health insurer") to cover the injury so the injured person can quickly obtain treatment with limited out-of-pocket expenses. The measure permits health insurers to obtain reimbursement from the workers' compensation insurer or automobile insurer, if applicable. The proposed method could lead to increased litigation within the insurance industry since insurers must argue coverage amongst themselves, higher experience ratings for an employer's health insurance, and increased health insurance premiums.

The independent medical examination bill has again returned this legislative session in SB 1118 and HB 466. Under the current process, injured workers choose their own treating physician to make an initial determination of the injury and then employers have the opportunity to select an independent medical examiner ("IME") to then evaluate the injury or treatment. The parties essentially each have the opportunity to select their own doctor. SB 1118 and HB 466, however, takes away the employers' opportunity to choose a physician by requiring mutual agreement for the selection of independent medical examinations and permanent impairment rating examinations. If the parties are unable to mutually agree, then the Director of DLIR will assign the IME from a pre-approved list of physicians. Supporters of the measure believe that mutual agreement would eliminate the perception that IMEs are essentially employer-biased doctors that lengthen disputes and delay workers' compensation payments. Employers/insurers, however, view the measures as undermining their ability to obtain an unbiased evaluation of the claimant's injury. The DLIR in the past has also expressed concern about finding a sufficient number of qualified doctors willing to be placed on the potential list for workers' compensation treatment. Already, many physicians decline to treat workers' compensation patients due to cost concerns and finding specialists in certain practice areas (e.g., orthopedic surgeons) is challenging. Although SB 1118 has not yet been scheduled for a hearing, the House joint LAB and ERB committees will hear HB 466 on February 8.

Unemployment Insurance

There are three proposed UI changes that may be of interest to employers.

The first change addresses the assessment employers must pay toward the interest on the federal loan that was necessary to cover the State's insolvent UI fund, which went into the red in December 2010. The federal loan's interest is anticipated to be about $1 million and is due in

September 2011. SB 1304 and HB 1077 HD1 authorize the Director of the DLIR to increase the amount of Employment and Training Fund ("E&T") assessments in increments of 0.01% retroactive to January 1, 2011. This 0.01% assessment would be charged to all employers, including those with minimum and maximum tax rates of 0% and 5.4%. The assessment is based on the taxable wage base. The current maximum taxable wage base is $34,200. Thus, an employer with 10 employees earning $34,200 or more (i.e., the current maximum taxable wage base) would be paying $3.42 ($34,200 x 0.01%) per employee for this year for a total of $342 ($3.42 x 10) for the entire staff for the year. This is a one-time only assessment. If the collected assessments exceed the required interest payment, HB 1077 HD1 requires DLIR to refund employers the overpayment.

The second proposal, HB 169 HD1, implements automatic UI extended benefits when Hawaii's unemployment rate hits certain benchmarks. An unemployment rate of 6.5% would trigger 13 weeks of extended benefits and an unemployment rate of 8% would trigger 20 weeks of extended UI benefits. These extended benefits are only available when 100% federal sharing is available, which is currently applicable only for payment of extended benefit claims filed by January 7, 2012 with a phase out to the week ending June 9, 2012, and the most recent 3-month average total unemployment rate in the State equals or exceeds 110% of the total unemployment rates for either or both of the corresponding 3-month periods in the preceding two calendar years. In a recent hearing, DLIR supported the intent of the measure but expressed concerns about the $145,000 cost to create and $20,000 per month maintenance fee to support a program that only applies to extended UI benefit claims that are filed by June 9, 2012. The House LAB and ERB committees approved the bill and referred it to the FIN committee.

The third UI legislation is similar to one that the Legislature passed last year but was vetoed by Governor Lingle. SB 1088 SD1 and HB 837 HD1 affect claimants receiving UI 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 while working part-time jobs. Should those claimants who have part-time jobs quit their part-time jobs without good cause or are terminated from their part-time jobs for 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 1088 SD1[1] and HB 837 HD1 address this issue by permitting continuance of UI benefits in certain situations. HB 837 HD1 permits continued UI benefits when separation from the part-time employment is for "good cause" which is recognized as:

- Loss of full-time work with a regular employer made it economically unfeasible to continue part-time employment;
- The part-time employment was outside of the individual's customary occupation and would not have been considered suitable work under HAR § 12-5-55 (c) at the time that the individual accepted the part-time employment;
- The employer failed to provide sufficient advance notice of a work schedule change;
- There was a work schedule conflict with the regular full-time employer; or
- Any other factor relevant to a determination of good cause.

SB 1088 SD1 and HB 837 HD1 must pass through Senate Ways and Means ("WAM") and House FIN committees, respectively, before crossover.

Prepaid Health Care Act

The Prepaid Health Care Act ("PHCA") has a sunset provision that terminates the PHCA upon certain triggers, including "upon the effective date of federal legislation that provides for mandatory prepaid health care for the people of Hawaii." In 1994, in anticipation of national healthcare laws that never materialized, the Legislature passed Act 99 which repealed the sunset provision "upon the effective date of any federal act permitting the amendment of the Hawaii Prepaid Health Care Act." Congress never amended the Employee Retirement Income Security Act ("ERISA") to permit Act 99's repeal of the PHCA's sunset provision to take effect. In sum, the PHCA is still scheduled to sunset when federal law mandates prepaid health care for Hawaii residents.

Now, in anticipation of certain mandates in the Patient Protection and Affordable Care Act ("PPACA") that take effect in 2014, the Legislature is again concerned that federal national health care will trigger the automatic repeal of PHCA, and has responded by introducing companion bills SB 41 and HB 1134. These measures repeal PHCA's sunset provision and Act 99 so the PHCA can continue despite national health care under PPACA.

There is a legal difference in opinion regarding whether the repeal would jeopardize the PHCA in its entirety because it is a "substantive" change. Some attorneys argue that repealing the PHCA's sunset provision is a substantive change that would trigger the loss of our ERISA exemption for PHCA. Others, however, believe that the repeal of the sunset provision is not substantive and may be done without congressional amendments to ERISA to authorize this change. Despite this legal debate, the legislators are moving forward with the repeal of PHCA's

[1] SB 1088 SD1 had not been published at the time this article was drafted.

sunset provision. SB 41 has successfully passed through the Senate HTH committee and HB 1134 is set for hearing on February 8 in the House Health committee.