

DAVID Y. IGE  
GOVERNOR

JOSH GREEN  
LT. GOVERNOR

**STATE OF HAWAII  
OFFICE OF THE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS**

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**Testimony of the Department of Commerce and Consumer Affairs**

**Before the  
House Committee on Health**

**Thursday, March 12, 2020**

**9:00 a.m.**

**State Capitol, Capitol Auditorium**

**On the following measure:**

**S.B. 2586, S.D. 1, RELATING TO MEDICAL CANNABIS**

Chair Mizuno, and Members of the Committee:

My name is Colin Hayashida, and I am the Insurance Commissioner of the Department of Commerce and Consumer Affairs' (Department) Insurance Division. The Department offers comments on this bill.

The purpose of this bill is to permit qualifying patients to be reimbursed by health insurers, mutual benefit societies, and health maintenance organizations for amounts spent on medical cannabis and manufactured cannabis products and to limit the monthly amount of reimbursement.

Section 2 of the bill on page 2, line 18 to page 3, line 14; section 3 of the bill on page 4, line 8 to page 5, line 4; and section 4 of the bill on page 5, line 18 to page 6, line 14 require qualifying patients who acquire medical cannabis to be eligible for reimbursement.

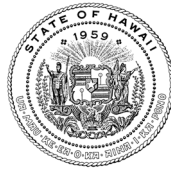
The Department is in communication with the federal Department of Health and Human Services (HHS) to seek guidance on state-required benefits. The HHS recently proposed rulemaking to the Patient Protection and Affordable Care Act (PPACA) that addresses states' defrayment and obligations. The HHS proposed rule would require states to annually report to HHS "any state-required benefits applicable to the individual and/or small group market that are considered in addition to [the essential health benefits.]"<sup>1</sup>

Thank you for the opportunity to testify on this bill.

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<sup>1</sup> See Notice of Benefit and Payment Parameters for 2021; Notice Requirement for Non-Federal Governmental Plans (HHS Notice). This document was published on February 6, 2020 and had a comment period that ended on March 2, 2020. The PDF version is available at: <https://www.federalregister.gov/documents/2020/02/06/2020-02021/benefit-and-payment-parameters-notice-requirement-for-non-federal-governmental-plans>.

DAVID Y. IGE  
GOVERNOR



**STATE OF HAWAII**  
**HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND**  
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TESTIMONY BY DEREK MIZUNO  
ADMINISTRATOR, HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND  
DEPARTMENT OF BUDGET AND FINANCE  
STATE OF HAWAII  
TO THE HOUSE COMMITTEE ON HEALTH  
ON SENATE BILL NO. 2586 S.D. 1

**March 12, 2020**  
**9:00 a.m.**  
**Capitol Auditorium**

RELATING TO MEDICAL CANNABIS

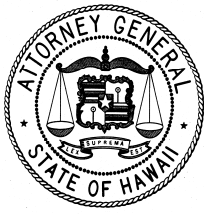
Chair Mizuno, Vice Chair Kobayashi, and Members of the Committees:

The Hawaii Employer-Union Health Benefits Trust Fund (EUTF) Board of Trustees has not taken a position on this bill. The EUTF staff has concerns how medical cannabis costs will legally be reimbursed, even under a paper claim process, by the insurers, pharmacy benefit managers and payors since cannabis even for medical purposes is considered a controlled substance under federal law. We are not aware of any other state that has mandated that health plans cover medical cannabis. Additionally, there will be added costs to the EUTF which cannot be quantified because coverage has not been specified and usage is unknown. These added costs will result in higher premiums for the State and counties, employees and retirees and will increase the State's OPEB unfunded liability.

Thank you for the opportunity to testify.

**EUTF's Mission:** We care for the health and well being of our beneficiaries by striving to provide quality benefit plans that are affordable, reliable, and meet their changing needs. We provide informed service that is excellent, courteous, and compassionate.

City Financial Tower, 201 Merchant Street, Suite 1700, Honolulu, Hawaii 96813



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
THIRTIETH LEGISLATURE, 2020**

**LATE**

**ON THE FOLLOWING MEASURE:**

S.B. NO. 2586, S.D. 1, RELATING TO MEDICAL CANNABIS.

**BEFORE THE:**

HOUSE COMMITTEE ON HEALTH

**DATE:** Thursday, March 12, 2020 **TIME:** 9:00 a.m.

**LOCATION:** State Capitol, Capitol Auditorium

**TESTIFIER(S):** Clare E. Connors, Attorney General, or  
Daniel K. Jacob, Deputy Attorney General

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Chair Mizuno and Members of the Committee:

The Department of the Attorney General makes the following comments. The purpose of this bill is to require insurance companies to reimburse for amounts spent on medical cannabis and manufactured cannabis products. This bill may be subject to preemption because compliance with both federal and state law may be impossible. *Wyeth v. Levine*, 555 U.S. 555, 568, S. Ct. 1187, 1196 (2009).

Cannabis is a Schedule I controlled substance that is illegal to produce, possess, sell, or use according to the federal government and the Controlled Substances Act (CSA), 21 U.S.C. §§ 801-904. The legalization of cannabis under state law, however, does not prevent the enforcement or validity of the federal prohibition. *Gonzales v. Raich*, 545 U.S. 1, 3, 125 S. Ct. 2195, 2198, 162 L. Ed. 2d 1 (2005)

At least two states have reached opposite conclusions on the issue of preemption. We have not found a federal case directly addressing this issue.

In *Bourgoin v. Twin Rivers Paper Company, LLC*, 187 A.3d 10 (Me 2018), the Maine Supreme Court ruled that the CSA preempted the Maine Medical Use of Marijuana Act (MMUMA) when used by a hearings officer “as a basis for requiring an employer to reimburse an employee for the cost of medical marijuana.” *Id.* at 21. The *Bourgoin* court stated, “[a]s invoked against [employer], the MMUMA requires what federal law forbids, and the authority ostensibly provided by the Maine law is ‘without effect.’” *Id.* at 21. *See also Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225 (D.N.M. 2016) (CSA preempted interpretation of state acts as requiring employer to

accommodate employee's use of medical marijuana); *Washburn v. Columbia Forest Prods., Inc.*, 340 Or. 469, 134 P.3d 161, 167-68 (Or. 2006) (Kistler, J., concurring) (stating that "the fact the state may choose to exempt medical marijuana users from the reach of the state criminal law does not mean that the state can affirmatively require employers to accommodate what federal law specifically prohibits").

On the other hand, we note that the Superior Court of New Jersey, Appellate Division, reached an opposite conclusion from the *Bourgoin* Court, finding that a workers' compensation judge's order requiring an employer to reimburse its employee for the employee's use of cannabis was not preempted because of a conflict with federal law. *Hager v. M & K Constr.*, No. A-0102-18T3, 2020 WL 218390, at \*1 (N.J. Super. Ct. App. Div. Jan. 13, 2020). The *Hager* court determined that the workers' compensation judge's order did not conflict with federal law because the order did not require the employer to possess, manufacture, or distribute cannabis in violation of the CSA, and that the employer's compliance with the order did not establish the specific intent element of an aiding and abetting offense under federal law. *Id.* at 8.

Because a federal court has not issued a decision regarding on this matter, it is unclear whether or not a federal court would find a statute mandating insurers to reimburse insureds for amounts spent on medical cannabis would be found to be preempted due to conflict with federal law. We do note, however, that the United States District Court for the District of Hawaii has found that a private insurance contract for reimbursement of cannabis is unenforceable because the contract is contrary to federal law and public policy as provided in the CSA. See *Tracy v. USSA Cas. Ins. Co.*, Civil No. 11-00487 LEK-KSC, 2012 WL 928186 (Mar. 16, 2012) (Unreported).

In the event the State is authorized to require insurers to reimburse their insureds for amounts spent on medical cannabis and manufactured cannabis products, it may constitute a new mandate. Under section 1311(d)(3)(B) of the Affordable Care Act and 45 C.F.R. section 155.170, a state may only require a Qualified Health Plan to add benefits if the state defrays the cost of the additional benefits, unless the proposed new benefit is directly attributable to State compliance with Federal requirements to provide Essential Health Benefits after December 31, 2011.

This bill would require qualified health plans to provide coverage for reimbursement of amounts spent on medical cannabis or manufactured cannabis products. Because this benefit was neither mandated by state law prior to December 31, 2011, nor directly attributable to compliance with Federal requirements after December 31, 2011, it may be considered an additional mandate and the State would be required to defray the cost.

At this time, our department is unaware of a state that has been subjected to the obligation to defray the cost for additional benefits. Therefore, there are no prior examples of how the State would meet its obligation and what specific procedures would be necessary to fulfill the obligation. Our department's best understanding is that after the Qualified Health Plan issuer submits the issuer's costs attributable to the additional mandate, the Legislature would need to appropriate the money during the following legislative session and propose a mechanism to distribute the money.

Thank you for the opportunity to comment.

# MCCORRISTON MILLER MUKAI MACKINNON LLP

ATTORNEYS AT LAW

March 10, 2020

Honorable John M. Mizuno, Chair  
Honorable Bertrand Kobayashi, Vice Chair  
Committee on Health  
House of Representatives  
State Capitol  
415 South Beretania Street  
Honolulu, Hawai'i 96813

Re: S.B. NO. 2586, S.D.1, RELATING TO MEDICAL CANNABIS

Dear Chair Mizuno, Vice Chair Kobayashi and Committee Members:

On behalf of the American Family Life Assurance Company of Columbus (AFLAC), we respectfully submit the following comments on Senate Bill No. 2586, Senate Draft 1, relating to medical cannabis, which is to be heard by your Committee on Health on March 12, 2020.

Section 2 of Senate Bill No. 2586, Senate Draft 1, requires that "health insurers" provide reimbursement to qualifying patients for medical cannabis.

We do not believe that this requirement is intended to apply to limited benefit health insurance, as described in section 431:10A-607, Hawaii Revised Statutes, which generally are not reimbursement policies. However, because Section 2 of Senate Bill No. 2586, Senate Draft 1, refers to "health insurers," rather than "health insurance," there may be some ambiguity as to whether the carve-out in section 431:10A-607, Hawaii Revised Statutes, applies.

We therefore respectfully request that the new provision to be added to chapter 431:10A, Hawaii Revised Statutes, be amended to specifically exclude limited benefit insurance as described in section 431:10A-607, Hawaii Revised Statutes, as follows:

SECTION 2. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to article 10A to be appropriately designated and to read as follows:

**"§431:10A- Medical cannabis; manufactured cannabis products; qualifying patients; reimbursement; limits.** (a) A qualifying patient who obtains medical cannabis or manufactured cannabis products pursuant to part IX of chapter 329 and chapter 329D shall be eligible for reimbursement as follows:

- (1) A qualifying patient shall be eligible for a dollar-for-dollar reimbursement on any amount between \$            and \$            that is spent per month on medical cannabis or manufactured cannabis products, for a maximum monthly reimbursement of \$            ;

(2) Monthly amounts in excess of \$ \_\_\_\_\_ that are spent by a qualifying patient on medical cannabis or manufactured cannabis products shall be covered entirely by the patient and shall not be eligible for reimbursement under this section; and

(3) A qualifying patient shall be limited to a yearly maximum of \$ \_\_\_\_\_ in reimbursements.

(b) Health insurers shall establish a system to reimburse qualifying patients pursuant to this section on at least a quarterly basis.

(c) For purposes of this section:

"Manufactured cannabis product" shall have the same meaning as in section 329D-1.

"Medical cannabis" shall have the same meaning as in section 329-121.

"Qualifying patient" shall have the same meaning as in section 329-121.

**(d) This section shall not apply to policies that provide coverage for specified diseases or other limited benefit health insurance coverage, as provided pursuant to section 431:10A-607.**"

(Additional language underscored and bolded.)

Thank you for your consideration of the foregoing.

Very truly yours,

MCCORRISTON MILLER MUKAI MACKINNON LLP



Peter J. Hamasaki

PJH:fk



**SB-2586-SD-1**

Submitted on: 3/10/2020 2:42:31 PM

Testimony for HLT on 3/12/2020 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Tai Cheng	Aloha Green Holdings Inc.	Support	No

Comments:

Patient access is key to a successful program.

**SB-2586-SD-1**

Submitted on: 3/11/2020 7:33:07 AM

Testimony for HLT on 3/12/2020 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Miles W. Tuttle	Kush Hawai'i	Support	No

Comments:

# HAWAI'I CANNABIS INDUSTRY ASSOCIATION

March 12, 2020

TO: Representative John M. Mizuno, Chair  
Representative Bertrand Kobayashi, Vice Chair  
Members of the House Committee on Health

FR: Teri Freitas Gorman, 2020 Chair, Hawai'i Cannabis Industry Association (HICIA)

RE: **SB2586 SD1 RELATING TO MEDICAL CANNABIS. - SUPPORT**

Permits qualifying patients to be reimbursed by health insurers, mutual benefit societies, and health maintenance organizations for amounts spent on medical cannabis and manufactured cannabis products. Limits the monthly amount of reimbursement. Effective 7/1/2050. (SD1)

The Hawai'i Cannabis Industry Association, formerly known as the Hawai'i Educational Association for Therapeutic Health (HEALTH), represents all eight of the state's licensed medical cannabis dispensaries plus associate members. We submit testimony today in support of SB2586 SD1, a bill that will improve patient access by permitting reimbursement for legal medical cannabis.

Through its legal medical cannabis program, the State of Hawaii and its constituents acknowledge the benefits of cannabis for use by registered patients for fifteen qualifying debilitating medical conditions and symptoms. There is strong evidence that the benefits of legal cannabis also include reduced public spending on prescription drugs, less deaths from prescription drug abuse, and better quality of life for patients. These are not just patient benefits, but public benefits. However, currently, patients and caregivers are responsible for 100% of the out-of-pocket costs. The State and its stakeholders have a responsibility to continue to explore insurance reimbursement for medical cannabis in conjunction with its wider public health goals.

Several states and local courts have already acknowledged the net benefit of medical cannabis for qualifying patients. New Mexico was the first state to pass laws and rules to allow for medical cannabis reimbursement under the Workers' Compensation Administration, a program that has been active now for four years. In 2019, New Hampshire's Supreme Court ruled that a medical cannabis patient should receive workers' comp reimbursement because cannabis was a "reasonable and necessary" medical treatment and reduced the claimant's dependence on opiates.

To date, five other states have authorized reimbursement in workers' compensation cases on the grounds that medical cannabis was deemed a "reasonable and necessary" treatment for pain, and that federal law did not preclude the state's medical cannabis laws.

Mahalo for the opportunity to provide our testimony and for your consideration to move this bill forward on behalf of the state's 27,152 registered medical cannabis patients.