

TESTIMONY

HB332 HD2

PROPOSED

SD1

LINDA LINGLE
GOVERNOR



DARWIN L.D. CHING
DIRECTOR

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**STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS**

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March 31, 2009

To: The Honorable Dwight Takamine, Chair
and Members of the Senate Committee on Labor, and

The Honorable Suzanne Chun Oakland, Chair
and Members of the Senate Committee on Human Services

Date: Thursday, April 2, 2009
Time: 1:45 p.m.
Place: Conference Room 016, State Capitol

From: Darwin L.D. Ching, Director
Department of Labor and Industrial Relations

**Testimony in Strong Opposition to
H.B. 332, H.D. 2, S.D. 1, Relating to Employment Security**

I. OVERVIEW OF PROPOSED LEGISLATION

H.B. 332, HD 2, SD1, proposes to amend Chapter 349B of the Hawaii Revised Statutes (HRS) by requiring certain employers to retain employees who would be displaced from an employer by divestiture through a transfer of a covered establishment to a new employer. The following requirements would apply to all incumbent nonsupervisory and nonconfidential employees:

- A. Shall hire all incumbent nonsupervisory and nonconfidential employees;
- B. Shall not require such employees to file employment applications with the successor employer to be considered for hire unless the existing files are incomplete;

- C. May conduct pre-hire screening of the employees not prohibited by law, including criminal history record checks and drug screening;
- D. If the human resource needs of the successor employer are reduced, resulting in the reduction of employees needed, provided that the number of employees to be dislocated shall be in direct proportion to the reduction in the total human resource needs of the successor employer; and
- E. May retain less than one hundred percent of incumbent employees if the successor employer is substantially dissimilar to the former employer's business; or the human resource needs of the successor employer is reduced resulting in the reduction of employees needed, provided that the number of employees to be dislocated shall be indirect proportion to the reduction in the total human resource needs of the successor employer.

II. CURRENT LAW

Chapter 394B, HRS, provides employment and training assistance for workers who are faced with termination due to a sudden closure or partial closing as a result of a sale, transfer, merger, bankruptcy or other business transactions by:

- Requiring employers with fifty or more employees in the State of Hawaii to provide advance notification to the Department of Labor and Industrial Relations and to all affected employees;
- Requiring employers to provide Dislocated Worker Allowance (the difference between the employee's average weekly wage and the weekly unemployment compensation benefit) to affected employees who apply for and are found eligible for unemployment compensation; and
- Requiring employers to provide prompt payment of wages and benefits on the effective date of closing to each employee.

The law was amended in June, 2001 to extend the advance notification period from forty-five (45) to sixty (60) days, and in July 2007 to include a definition of "divestiture", amend the definition of "closing", include penalties for non-compliance, and allow for an extension of the sixty day period under certain circumstances.

The definition of a "divestiture" is the transfer of any covered establishment from one employer to another because of the sale, transfer, merger, bankruptcy or other business takeover or transaction of business interests that causes the covered establishment's employees to become dislocated workers.

III. HOUSE BILL

The Department of Labor and Industrial Relations strongly opposes this bill for the following reasons:

- A. This legislation will damage Hawaii's fragile economy and send a negative message to individuals seeking to do business in our State. State government cannot dictate the terms and conditions for prospective employers looking to invest money in a business. It makes no sense to require a prospective employer to take on the failed business strategy of the current employer and retain all employees.
- B. The requirement in this bill will have an adverse effect on the selling employer's current employees. If the company in question is being sold due to a financial crisis, possible successor companies will choose not to purchase the existing company, ensuring a greater likelihood that the company will go bankrupt and all the employees will become unemployed.
- C. Requiring a successor employer in a divestiture to retain all of the incumbent employees of an affected establishment, or a number proportionate to total human resource needs, seems overly prescriptive because it would not allow the successor employer to bring its own employees except for supervisory or confidential workers.
- D. Additionally, the bill is vague on how to measure human resource needs. For example, a successor employer retains only 200 of 300 employees because the business can be successfully operated at that lower staffing amount. How would the employer (or Department) verify that the human resource needs of the company merited the release of 100 employees?
- E. If the employer is found in violation, he is responsible for compensation to affected workers. Why should an employer compensate persons who were not their employees?

We strongly believe that it would not be in the best interest of the general public for the Legislature to dictate to private companies on who they should hire and terminate under these circumstances.

THE SENATE

Committee on Labor

Sen. Dwight Y. Takamine, Chair

Sen. Brian T. Taniguchi, Vice Chair

Committee on Human Services

Sen. Suzanne Chun Oakland, Chair

Sen. Les Ihara, Jr., Vice Chair

State Capitol, Conference Room 016

Thursday, April 2, 2009; 1:45 p.m.

**STATEMENT OF THE ILWU LOCAL 142 ON H.B. 332, SD1
RELATING TO EMPLOYMENT SECURITY**

The ILWU Local 142 strongly supports H.B. 332, SD1, which establishes job security requirements upon the divestiture of a covered establishment.

As is the rest of the country and the world, Hawaii is going through some very tough economic times with businesses experiencing challenges as never before. In this climate, it is likely that some companies will be up for sale, allowing others seeking to take advantage of an opportunity to purchase a business.

H.B. 332, SD1 is intended to minimize disruption in such sales, particularly for the employees. The bill calls for all incumbent workers to be retained by the new employer while permitting pre-hire screening not prohibited by law and allowing employers to retain management rights. If the business is substantially changed, however, the new employer may retain fewer employees, commensurate with the reduction in business. If the employer fails to comply with the law, the employer is obligated to compensate the dislocated worker the difference between his salary under the former employer and his unemployment insurance benefits.

The bill would prevent fewer layoffs due to the sale of a business. This objective is in keeping with the State's desire to keep people employed, thus allowing them the ability to purchase goods and services which would help to stimulate the economy. Instead of job creation, which has been government's mantra these past several months, H.B. 332, SD1 is designed for job preservation. Management will retain the right to evaluate employees and assess their ability to meet the company's objectives. But the initial changeover of business will be as seamless as possible and minimize disruption under this law.

Most companies concede that such seamless transition is important to continuity of business. For example, when an Outrigger affiliate took over management of Pacific Beach Hotel in January 2007, no one was displaced and business continued uninterrupted. However, when the owner of the hotel, HTH Corporation, cancelled the management contract with Outrigger and decided to operate the hotel again, everyone had to reapply for their old jobs and 32 were terminated. In the Pacific Beach Hotel situation, other issues were in play, but if worker retention was law, the workers may be faring far better than they are today.

Another example is Hawaii Naniloa Resort. In 2006, the owner lost its State land lease to another

bidder, which required all employees to reapply for their jobs. The result was that some 100 workers were laid off and only 20 retained. Many of the workers, especially those with years of seniority, were out of work for a long time. Some of them tried occupational training for a new career, others had to drive from Hilo to the Kohala Coast for work. For most of them, their lives were irrevocably disrupted by the new employer's actions.

H.B. 332, SD1 makes good business sense. When a business is taken over by a successor employer, the requirement to retain incumbent employees will provide for an orderly transition from one employer to another. The employees, their families and the community can be spared needless disruption and distress resulting from the mass layoff. The employer will retain management rights and can be assured of productivity and loyalty from an experienced and skilled incumbent workforce. We think it's a win-win situation by any standard.

And to those who would argue that a prospective buyer would not want to inherit the employees of a failing business, we counter that a new employer would be much more concerned about retaining the previous owner's management and supervisory staff, who may have had a direct hand in the failure of the business. H.B. 332, SD1 specifically excludes these personnel from the retention requirement. It is the ordinary hourly workers who have no authority to influence a business and should be protected when a business is sold.

The ILWU urges strongly passage of H.B. 332, SD1. Thank you for the opportunity to share our views and concerns.



Chair, Senator Dwight Takamine
Vice-Chair, Senator Brian Taniguchi
Committee: Labor

Chair, Senator Suzanne Chun Oakland
Vice-Chair, Senator Les Ihara, Jr.
Committee: Human Services

Society for Human Resource Management (SHRM) Hawaii
Testimony date: Thursday, April 2, 2009

Opposition to HB332 HD2 Relating to Employment Security

SHRM Hawaii is the local chapter of a National professional organization of Human Resource professionals. Our 1,200+ Hawaii membership includes those from small and large companies, local, mainland or internationally owned - tasked with meeting the needs of employees and employers in a balanced manner, and ensuring compliance with laws affecting the workplace. We (HR Professionals) are the people that implement the legislation you pass, on a day-to-day front line level.

SHRM Hawaii strongly opposes House Bill 332 HD2, which seeks to establish job security requirements upon the divestiture of a covered establishment. We are concerned about the additional financial and administrative burden this will put on our members.

SHRM Hawaii respectfully urges the committee to kill House Bill 332 HD2.

Thank you for the opportunity to testify. SHRM Hawaii offers the assistance of the Legislative Committee in discussing this matter further.



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION

AFSCME Local 152, AFL-CIO

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The Twenty-Fifth Legislature, State of Hawaii
Hawaii State Senate
Committee on Labor
Committee on Human Services

Testimony by
Hawaii Government Employees Association
April 2, 2009

H.B. 332, H.D. 2, PROPOSED S.D. 1 –
RELATING TO EMPLOYMENT SECURITY

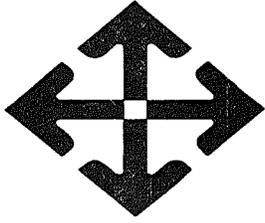
The Hawaii Government Employees Association **strongly supports** the purpose and intent of H.B. 332, H.D. 2, Proposed S.D. 1, which establishes job security requirements upon the divestiture of a covered establishment.

The measure establishes a fair and dignified transition for employees in what is surely a disruptive and distressing circumstance. The bill will benefit the employees, their families and our community as a whole.

Thank you for the opportunity to testify in support of H.B. 332, H.D. 2, Proposed S.D. 1.

Respectfully submitted,

Nora A. Nomura
Deputy Executive Director



The Hawaii Business League

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April 2, 2009

Testimony To: Senate Committee on Labor
Senator Dwight Y. Takamine, Chair

Senate Committee on Human Services
Senator Suzanne Chun Oakland, Chair

Presented By: Tim Lyons
President

Subject: H.B. 332, HD 2, Proposed SD 1 – RELATING TO EMPLOYMENT SECURITY

Chair Takamine, Chair Chun Oakland and Members of the Joint Committees:

I am Tim Lyons, President of the Hawaii Business League, a small business service organization.

We are opposed to this bill.

As we have testified previously, when one employer buys out the business of another employer it is typical that one of the reasons they are doing so is because they think they can run it better and more efficiently but, in almost every case, differently. To confine the parameters in which the new employer can operate by dictating limitations on their human resource needs, we believe, is to spell out a remedy for failure. The new employer needs to have all the flexibility that they can in order to consider the purchase of such a business. With the limitations

imposed in this bill we think it will have a "chilling" effect on the potential purchasing power of the seller and, therefore, have negative effects on the employer who is trying to sell the business.

We also object to (a)(2) regarding information for employment applications. It may be that the new employer's method of operation extracts basically the same type of information but in a different format or with slightly different information needs and we think that it is not proper to restrict the gathering of that information.

We also have a problem with 4b which talks about the human resources needs of the successor employer. We have no idea how to define that or how one employer can validate their needs for a reduction or an increase.

Lastly, we understand the concern by employees that when a new employer comes along they may become dislocated however, we also think it is important to note that if the employer cannot have this kind of authority the employees may find themselves in a business that just goes out of business, period and, there is no successor.

Based on the above, we cannot concur with this bill and do not support its passage.

Thank you.



**HAWAII HOTEL & LODGING
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(Always the 3rd Saturday in May)
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**TESTIMONY OF MURRAY TOWILL
PRESIDENT
HAWAII HOTEL & LODGING ASSOCIATION**

April 2, 2009

RE: HB 332 HD 2 SD1 (proposed) Relating to Employment Security

Good afternoon Chairs Takamine & Oakland and members of the Senate Committees on Labor and Human Services. I am Murray Towill, President of the Hawaii Hotel & Lodging Association.

The Hawaii Hotel & Lodging Association is a statewide association of hotels, condominiums, timeshare companies, management firms, suppliers, and other related firms and individuals. Our membership includes over 170 hotels representing over 47,300 rooms. Our hotel members range from the 2,680 rooms of the Hilton Hawaiian Village to the 4 rooms of the Bougainvillea Bed & Breakfast on the Big Island.

The Hawaii Hotel & Lodging Association **opposes HB 1622 HD2 SD1 (proposed)** Relating to Employment Security.

We do not believe mandating a purchaser of a business to retain all incumbent employees is an appropriate role for government. A business owner should be entitled to hire or retain employees who can help make the business successful.

The net effect of mandates of this type will be to discourage investment in Hawaii. Investors whether local or from out of State, may be reluctant to invest in Hawaii businesses if confronted with legislation like this.

Finally, when examining concepts like the ones in these bills, it is important to realize that the economy runs in cycles. While the last few years have been very good in the visitor industry, we are facing a major economic crisis. The investments that have occurred in recent years have led to dramatic reinvestments and improvements in our visitor plant. This reinvestment will help us weather the problems we are currently facing.

Given the global competition in tourism and investment capital, we urge you not to support measures that may discourage investment.

Again, mahalo for this opportunity to testify.

Testimony to the Senate Committees on Labor and Human Services
Thursday, April 2, 2009
1:45 p.m.
State Capitol - Conference Room 016

RE: HOUSE BILL NO. 332 HD1 PROPOSED SD1 RELATING TO EMPLOYMENT

Chairs Takamine and Chun Oakland, Vice Chairs Taniguchi and Ihara, and members of the committees:

My name is Jim Tollefson and I am the President and CEO of The Chamber of Commerce of Hawaii ("The Chamber"). I am here to state **The Chamber's opposition to Senate Bill No. 332 HD1, Proposed SD1 relating to Employment.** This bill, which has been gutted and inserted with language from SB 688, will undermine economic revitalization at a time when our state needs it most. It's a disincentive for investment, which could possibly result in further job loss than jobs saved, thereby increasing unemployment claims. **Essentially, this bill will result in "guaranteed bankruptcies."**

The Chamber is the largest business organization in Hawaii, representing more than 1,100 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of its members, which employ more than 200,000 individuals, to improve the state's economic climate and to foster positive action on issues of common concern.

This measure establishes job security requirements upon the divestiture of a covered establishment.

The Chamber well recognizes the hardship that business failures and ownership changes place on employees. However, The Chamber does not believe that House Bill 332 is an appropriate measure in addressing this issue. The following is a list of some of the reasons why this bill should be held:

- 1) This bill interferes with the basic principles of doing business. This measure removes the purchasing employer's rights to select employees appropriate for its goals and objectives. As a result, it may have the adverse consequence of discouraging capital investment in Hawaii because purchasers will be more reluctant to acquire companies due to the stringent requirements and mandates. This will send a negative message to the nation and further undermine Hawaii's efforts in saving and creating jobs during this tough economic period.

Also, the bill places a mandate on the new business to retain a proportion of the incumbent employees if the human resources needs of the successor employer are reduced. There is no understanding that a change in human resource needs may change

the nature of the skills and abilities of those employees needed to operate the new business. Saddling a new business with the predecessor's employees may undermine the livelihood and continued employment of other employees.

- 2) This bill will have the reverse effect, and in turn, cost jobs. The measure may have the unintended consequences of hurting local businesses, which otherwise would have had an opportunity to sell their business to a successor company.

In many cases, businesses are sold because the seller is losing money. In order to turn the business around, a buyer needs the flexibility to change or reduce staff to increase efficiency, or to bring in better qualified or more skilled employees, or to bring in employees with different skill sets.

Those businesses which would normally be sold to a buyer which can make necessary changes will simply go out of business and the employees will lose their jobs. Or the assets of the business will be sold off and the employees will lose their jobs.

- 3) The term, "substantially dissimilar" is ambiguous. Although HB 332 recognizes that the new business may be substantially dissimilar to the former business, this term is difficult to define, and will result in litigation in most cases. Once again, employees will lose their jobs due to potential overwhelming litigation costs that could impact the employer.
- 4) Although the bill allows employers to apply substance abuse testing and criminal records check standards it fails to understand that a new employer may have different requirements such as conflict of interest policies or anti-nepotism rules that may not have been applied by the former employer. The bill also fails to recognize that an application form may contain other information important to a new employer that is missing or outdated on the predecessor employer's records.

Overall, the measure is a disincentive for investment, which could possibly have a reverse effect and result in further job loss than jobs saved, thereby increasing unemployment claims.

In sum, House Bill 332 HD1 Proposed SD1, while well-intended, will pose negative consequences for Hawaii's future. We cannot afford to pass legislation that will have this kind of result. Hawaii should be cultivating the soil to help our local establishments thrive, so that jobs can be saved and created, especially as Hawaii weathers this tough economic storm.

Thus, The Chamber respectfully requests HB 332 HD1, Proposed SD1 be held.

Thank you for the opportunity to testify.



**Before the Senate Committee on Labor
and Senate Committee on Human Services**

DATE: April 2, 2009

TIME: 1:45 p.m.

PLACE: Conference Room 016

**Re: HB332 HD2
Relating to Employment Security
Testimony of Melissa Pavlicek for NFIB Hawaii**

Thank you for the opportunity to testify. On behalf of the business owners who make up the membership of the National Federation of Independent Businesses in Hawaii, we ask that you reject HB332 HD2 which would establish job security requirements upon the divestiture of a covered establishment. **NFIB opposes this measure in its current form.**

The National Federation of Independent Business is the largest advocacy organization representing small and independent businesses in Washington, D.C., and all 50 state capitals. In Hawaii, NFIB represents more than 1,000 members. NFIB's purpose is to impact public policy at the state and federal level and be a key business resource for small and independent business in America. NFIB also provides timely information designed to help small businesses succeed.

HB332 HD2 is impracticable and anti-business and has the potential to hasten the demise of struggling businesses, ultimately hurting Hawaii's economy. We respectfully ask that you reject HB332 HD2.



Senator Dwight Takamine, Chair
Senator Brian Taniguchi, Vice Chair
Committee on Labor

Senator Suzanne Chun Oakland, Chair
Senator Les Ihara, Jr., Vice Chair
Committee on Human Services

HEARING Thursday, April 02, 2009
 1:45 pm
 Conference Room 016
 State Capitol, Honolulu, Hawaii 96813

RE: HB 332, HD2, Proposed SD1, Relating to Employment Security

Chairs Takamine and Chun Oakland, Vice Chairs Taniguchi and Ihara, and Members of the Committees:

Retail Merchants of Hawaii (RMH) is a not-for-profit trade organization representing 200 members and over 2,000 storefronts, and is committed to support the retail industry and business in general in Hawaii.

RMH strongly opposes the Proposed SD1, which essentially requires successor employers to retain certain incumbent employees upon the divestiture of a covered establishment.

This bill is an infringement on the basic rights of ownership that seriously impacts the value of a business and the ability of an owner to divest, sell or transfer that business operation. It further discourages investment in Hawaii by severely restricting the options for potential new owners by dissuading any development and/or diversification possibilities. At a time when Hawaii should be encouraging new enterprise in our state to accelerate economic recovery, this bill is a giant step in the opposite direction and could have the undesirable result of more companies just closing their doors for lack of viable alternatives.

The members of the Retail Merchants of Hawaii respectfully request that you do not move forward with the SD1. Thank you for your consideration and for the opportunity to comment on this measure.

Carol Pregill, President