



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2011**

ON THE FOLLOWING MEASURE:

H.B. NO. 1134, H.D. 1, RELATING TO PREPAID HEALTH CARE.

BEFORE THE:

HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

DATE: Wednesday, February 23, 2011 TIME: 2:05 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Gary S. Ige, Deputy Attorney General

Chair Herkes and Members of the Committee:

The Attorney General is opposed to the bill because the proposed changes are likely preempted by the Employee Retirement Income Security Act of 1974 ("ERISA").

The bill amends chapter 393, Hawaii Revised Statutes ("HRS"), also known as the Hawaii Prepaid Health Care Act ("PHCA"), by repealing chapter 393, part V, HRS, (part V consists of section 393-51, HRS, the termination provision quoted below). Section 393-51, HRS, provides that the "chapter shall terminate upon the effective date of federal legislation that provides for voluntary prepaid health care for the people of Hawaii in a manner at least as favorable as the health care provided by this chapter, or upon the effective date of federal legislation that provides for mandatory prepaid health care for the people of Hawaii." The bill will also repeal Act 99, passed by the Legislature in 1994, which repeals chapter 393, part V, HRS, and which becomes effective "upon the effective date of any federal act permitting the amendment of the Hawaii Prepaid Health Care Act." We note that to date, no such amendment has been enacted by Congress.

The Attorney General believes that the amendments made by the bill are preempted by ERISA. ERISA regulates pension and benefit plans and establishes standards for the administration of such plans. ERISA has a sweeping preemption provision that provides in relevant part that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C.A. § 1144(a). The subsection, in full, provides as follows:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(b) of this title. This section shall take effect on January 1, 1975.

There is a narrow exemption from ERISA preemption for the Hawaii PHCA. 29 U.S.C.A. § 1144(b)(5)(A) provides as follows:

Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).

That exemption applies only to the PHCA as it existed on September 2, 1974. 29 U.S.C.A. § 1144(b)(5)(B)(ii) provides as follows:

Nothing in this subparagraph (A) shall be construed to exempt from subsection (a) of this section-
(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

In other words, the ERISA preemption provision applies to any amendments to the PHCA "to the extent it provides for more than the effective administration" of the PHCA. Any substantive

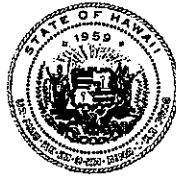
amendment to the PHCA would go beyond the allowable exemption of amendments only for the "effective administration" of the PHCA and would, therefore, be subject to preemption. *Council of Hawaii Hotels v. Agsalud*, 594 F. Supp. 449 (D. Haw. 1984) (amendment to require plans negotiated through collective bargaining to contain the required minimum benefits constituted a substantive change and was preempted).

The plain meaning of the word "administration" is the "performance of executive duties : management." *Merriam-Webster's Collegiate Dictionary* 15 (10th ed. 1993). In *Council of Hawaii Hotels v. Agsalud*, *supra*, the court commented on the meaning of "effective administration" as follows:

Finally, the legislative history of the ERISA Amendment indicates that Congress intended the term "effective administration" to be construed strictly. It is clear that Congress intended to adhere to *Standard Oil*, preempting the Act's drug and alcohol abuse treatment provisions. State officials had lobbied to restore state regulation of prepaid health care plans, and the accommodation reached was that the Hawaii Act would be given effect, but only as to its substantive provisions in effect on September 2, 1974. Any subsequently enacted substantive change would succumb to "the broad scope of ERISA preemption." The ERISA Amendment thus was to "operate only as a narrow exception." *Id.* At 455 (footnotes omitted).

The Attorney General believes that the repeal of the termination provision of the PHCA, section 393-51, HRS, as proposed in this bill, is not an amendment that provides for the effective administration of the PHCA because it does not merely address the performance of executive duties, but goes to the substance of whether Hawaii's PHCA continues in force or not. Therefore, we believe the amendment is subject to preemption by ERISA.

We respectfully request that this bill be deferred.



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

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February 23, 2011

To: The Honorable Robert N. Herkes, Chair
and Members of the Committee on Consumer Protection & Commerce

Date: Tuesday, February 23, 2011
Time: 2:05 p.m.
Place: Conference Room 325, State Capitol

From: Dwight Y. Takamine, Director
Department of Labor and Industrial Relations

Testimony in Support of
Re: H.B. No. 1134, HD1 Relating to the Hawaii Prepaid Health Care

I. OVERVIEW OF PROPOSED LEGISLATION

Current federal legislation mandating national health care coverage for all legal residents by January 1, 2014 is still undergoing Congressional review with possible further amendment. Although this national discussion may result in better health care, the program has yet to prove itself, whereas Hawaii's Prepaid Health Care law has been in effect for almost four decades and the better health enjoyed by its citizenry ably validates it as a successful social welfare program. To ensure the program continues to thrive regardless of the probable changes in the federal legislation, the proposed bill seeks to delete from the statute Section 393-51 that allows for the termination of the Prepaid Health Care Act upon the effective date of federal legislation for health care. The bill also seeks to repeal the 1994 Act 99, which also provided for the repeal of Section 393-51 but bore conflictive language.

II. CURRENT LAW

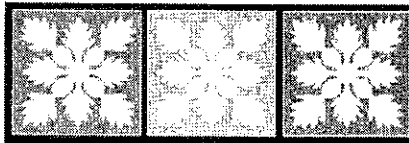
The 1974 legislation of Act 210 effective January 1, 1975, provided the working uninsured with quality mandated health care benefits and maintained the prevailing standards for those employees already fortunate to have medical coverage. The law requires employers to insure their workers upon attainment of eligibility. As a result of the reform, Hawaii's workers and their families constitute one of the healthiest

populations in the nation today. In anticipation of national health care reform that would presumably provide greater federal protections, Act 210 included a sunset provision to be implemented upon the effective date of the federal legislation. Subsequently, discussions on the implementation and costs of a national health program raised the question as to whether the high quality of medical benefits enjoyed by Hawaii's workers were in jeopardy. In 1994, the Prepaid Health Care Act was amended with Act 99 repealing the statute's termination provision. However, the repeal was made subject to a requisite amendment of the federal Employee Retirement Income Security Act of 1974 (ERISA) that would allow for the "substantive" change to the Hawaii law. There has been no federal legislation to amend ERISA.

III. HOUSE BILL

The Department supports the intent to maintain the integrity of the Prepaid Health Care Act. Congressional review of the federal legislation appears imminent with further amendment very possible, and such amendment may not preserve the level of high quality health care currently enjoyed by Hawaii's citizens.

The Department notes, however, that changes to the Hawaii Prepaid Health Care Act would be pre-empted by the federal Employee Retirement Income Security Act (ERISA).



Hawaii Association of Health Plans

February 23, 2011

The Honorable Robert Herkes, Chair
The Honorable Ryan Yamane, Vice Chair

House Committee on Consumer Protection and Commerce

Re: HB 1134 HD1 – Relating to Prepaid Health Care

Dear Chair Herkes, Vice Chair Yamane and Members of the Committee:

My name is Howard Lee and I am President of the Hawaii Association of Health Plans (“HAHP”). HAHP is a non-profit organization consisting of eight (8) member organizations:

AlohaCare	Kaiser Permanente
Hawaii Medical Assurance Association	MDX Hawai‘i
HMSA	University Health Alliance
Hawaii-Western Management Group, Inc.	UnitedHealthcare

Our mission is to promote initiatives aimed at improving the overall health of Hawaii. We are also active participants in the legislative process. Before providing any testimony at a Legislative hearing, all HAHP member organizations must be in unanimous agreement of the statement or position.

HAHP appreciates the opportunity to provide testimony in support of HB 1134 HD1 which would repeal the sunset clause from Hawaii’s Prepaid Health Care Act (PHCA).

Hawaii is unique in the nation when it comes to the provision of health care. Under the PHCA, the state enjoys a lower uninsured rate than most of the country, experiences lower premiums on average and provides for comprehensive benefits for those receiving employer-based coverage. Despite passage of federal health care reform known as the Affordable Care Act (ACA), there are many in the community who believe that the PHCA should remain intact, as its provisions, in many regards are stronger than those required by the ACA.

We believe that removing the sunset provision from the PHCA will assist in its preservation and therefore we respectfully urge the Committee to support this measure.

Sincerely,

Howard Lee
President

• AlohaCare • HMAA • HMSA • HWMG • Kaiser Permanente • MDX Hawaii • UHA • UnitedHealthcare •
HAHP c/o Howard Lee, UHA, 700 Bishop Street, Suite 300 Honolulu 96813
www.hahp.org

Commenting on HB 1134 HD 1.

myadao@hah.org [myadao@hah.org]

Sent: Tuesday, February 22, 2011 1:38 PM

To: CPCtestimony

Attachments: HB 1134 HD 1 CPC.pdf (54 KB)

Aloha,

Please see attached. Mr. George Greene, President and CEO of HAH, will be the testifier. If you have any questions, comments, or concerns please feel free to contact us.

Mahalo,
Michael Yadao
Communications Specialist
Healthcare Association of Hawaii
(808) 521-8961



HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE
Rep. Robert N. Herkes, Chair

Conference Room 325
Feb. 23, 2011 at 2:05 p.m.

Commenting on HB 1134 HD 1.

Comments

The Healthcare Association of Hawaii advocates for its member organizations that span the entire spectrum of health care, including all acute care hospitals, as well as long term care facilities, home care agencies, and hospices. In their efforts to provide quality care to all of Hawaii's residents, our members employ over 40,000 people. The Healthcare Association takes no position on HB 1134 HD 1, which repeals the sunset clause of the Prepaid Health Care Act (PHCA), and appreciates this opportunity to comment on it.

The Healthcare Association does not sit before this committee to speak in opposition to the PHCA. In Hawaii, the PHCA has been responsible for reducing the uninsured rate and maintaining one of the lowest uninsured rates in the nation for nearly 30 years. It is understandable that there is an interest in preserving it.

Last year the Affordable Care Act (ACA) was signed into law. Its stated goal is to cover 95% to 97% of our residents. Although the law has been enacted, many of the rules have not yet been written. The ACA will become operational in stages, taking several years before it becomes fully effective.

Since there are so many specifics yet to be defined as the ACA becomes implemented, we believe that passage of HB 1134 HD 1 in its current form would be premature, although we support continued dialog and are simply providing comments on the bill.



HAWAII MEDICAL ASSOCIATION

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Wednesday, February 23, 2011; 2:05 PM Conference Room 325

To: COMMITTEE ON CONSUMER PROTECTION & COMMERCE
Rep. Robert N. Herkes, Chair
Rep. Ryan Yamane, Vice Chair

From: Hawaii Medical Association
Dr. Morris Mitsunaga, MD, President
Linda Rasmussen, MD, Legislative Co-Chair
Dr. Joseph Zodian, MD, Legislative Co-Chair
Dr. Christopher Flanders, DO, Executive Director
Lauren Zirbel, Community and Government Relations

Re: HB 1134 HD 1 RELATING TO THE HAWAII PREPAID HEALTH CARE ACT

Chairs & Committee Members:

Comments

Hawaii Medical Association supports universal access to health care.

We have a real dilemma in that our Prepaid Health Care law (PHCA) ensures better benefits than those required for the insurance exchanges under PPACA. From that point of view, the PHCA should be extended. However, the PHCA does not cover those who are not eligible for employer-based health insurance, and we need to do something about that population to comply with the PPACA.

HMA would like to participate in a task force to compare options and decide what direction we want to go, and then deal with the PHCA extension issue accordingly. This task force needs representation from the Abercrombie administration, DHS, DOH, and the legislature, as well as from the health care provider community (doctors, advanced practice nurses and hospitals).

Thank you for the opportunity to testify.

OFFICERS

PRESIDENT - MORRIS MITSUNAGA, MD PRESIDENT-ELECT - ROGER KIMURA, MD
SECRETARY - THOMAS KOSASA, MD IMMEDIATE PAST PRESIDENT - DR. ROBERT C. MARVIT, MD TREASURER
- STEPHEN KEMBLE, MD EXECUTIVE DIRECTOR - CHRISTOPHER FLANDERS, DO

HMSA



Blue Cross
Blue Shield
of Hawaii

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February 23, 2011

The Honorable Robert N. Herkes, Chair
The Honorable Ryan I. Yamane, Vice Chair
House Committee on Consumer Protection and Commerce

Re: HB 1134 HD1 – Relating to Prepaid Health Care

Dear Chair Herkes, Vice Chair Yamane and Members of the Committee:

The Hawaii Medical Service Association (HMSA) supports HB 1134 HD1, which would repeal Section 393-51, Hawaii Revised Statutes, the termination provision in the State's Prepaid Health Care Act (PHCA). This Bill also repeals Act 99, Session Laws of Hawaii 1994, which would repeal that statutory termination upon specific federal action.

Residents in Hawaii have benefitted from expanded health care coverage under a unique and successful employer health care mandate that has been in place for more than 30 years – the PHCA. The overall impact of the law since 1974 has been the maintenance of relatively robust private benefit plans, low rates of uninsured, and some of the lowest premiums in the country. While Hawaii suffers from some of the same issues relative to access, quality and cost as states across the country, the PHCA has been the backbone over the years ensuring system stability and moderation of problems in health care delivery and finance.

Although the current system has been preserved through legislative language included by Hawaii's Congressional Delegation in the federal health care reform law, the Affordable Care Act (ACA), it may unintentionally be jeopardized without further federal- and state-level legislative fixes prior to the implementation of a newly mandated health insurance exchange in 2014.

Work to create Hawaii's health exchange, through which individuals may shop for an appropriate health plan, has just begun. This Legislature will consider legislation to do just that. But, while the states scramble to address the ACA, the shift in the balance of power in Washington confounds those efforts and confuses what health care reform eventually will cover.

Hawaii's prepaid system is established and proven to be effective.

There must be coordination of PHCA and the ACA, specifically with respect to how PHCA will work in tandem with the exchange. Resolution of this uncertainty would ensure that Hawaii's businesses, insurers, and residents understand the way in which they should invest their appreciable yet limited resources, particularly if they must radically change the way health care is done in Hawaii. The provisions of HB 1134 HD1 offer a simple, single step to maintain the premium health care that the majority of people in Hawaii already enjoy.

Sincerely,

A handwritten signature in black ink, appearing to read 'JD' followed by a flourish.

Jennifer Diesman
Vice President
Government Relations