



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

830 PUNCHBOWL STREET, ROOM 321
HONOLULU, HAWAII 96813
www.hawaii.gov/labor
Phone: (808) 586-8842 / Fax: (808) 586-9099
Email: dilir.director@hawaii.gov

April 4, 2011

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

Date: Monday, April 4, 2011
Time: 2:00 p.m.
Place: Conference Room 325, State Capitol

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

Testimony in Support of
Re: S.B. No. 41 S.D. 1 Relating to the Hawaii Prepaid Health Care Act

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. SENATE 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 substantive changes to the Hawaii Prepaid Health Care Act are subject to preemption by the federal Employee Retirement Income Security Act (ERISA).



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

ON THE FOLLOWING MEASURE:

S.B. NO. 41, S.D. 1, RELATING TO THE HAWAII PREPAID HEALTH CARE ACT.

BEFORE THE:

HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

DATE: Monday, April 4, 2011 **TIME:** 2:00 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 not opposed to the intent of the bill, but has legal concerns that the proposed repeal would likely be preempted by the Employee Retirement Income and Security Act ("ERISA"). However, since there is no case on point, should the repeal be challenged on preemption grounds, the outcome cannot be predicted with certainty.

The bill amends chapter 393, Hawaii Revised Statutes (HRS), also known as the Hawaii Prepaid Health Care Act ("PHCA"), by repealing part V of the chapter (part V consists of section 393-51, HRS, the termination provision). 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 part V of chapter 393, HRS, but only 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.

We recognize that failing to take any action regarding the termination provision could result in the eventual repeal of the entire PHCA and that this bill is an attempt to address that concern. Nonetheless, we believe that the amendments made by the bill would likely be 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*, the court commented on the meaning of "effective administration" as follows:

Finally, the legislative history of the ERISA 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 would likely be subject to preemption by ERISA.

In addition, the Attorney General believes that should the Legislature pass this bill and repeal section 393-51, HRS, and a court subsequently determines that the repeal is preempted by ERISA, such a ruling would not affect the Hawaii Prepaid Health Care Act as it exists today; only this amendment would be preempted, and the balance of the Act would remain.



NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
335 MERCHANT STREET, ROOM 310
P.O. Box 541
HONOLULU, HAWAII 96809
Phone Number: 586-2850
Fax Number: 586-2856
www.hawaii.gov/dcca

KEALI'I S. LOPEZ
DIRECTOR

EVERETT KANESHIGE
DEPUTY DIRECTOR

TO THE HOUSE COMMITTEE ON
CONSUMER PROTECTION & COMMERCE

TWENTY-SIXTH LEGISLATURE
Regular Session of 2011

Monday, April 4, 2011
2 p.m.

WRITTEN TESTIMONY ONLY

**TESTIMONY ON SENATE BILL NO. 41, S.D. 1 – RELATING TO THE HAWAII
PREPAID HEALTH CARE ACT.**

TO THE HONORABLE ROBERT N. HERKES, CHAIR, AND MEMBERS OF THE
COMMITTEE:

My name is Gordon Ito, State Insurance Commissioner, testifying on behalf of the Department of Commerce and Consumer Affairs ("Department"). The Department defers to the Department of Labor and Industrial Relations on this bill, which repeals the sunset provision in the Hawaii Prepaid Health Care Act.

We thank this Committee for the opportunity to present testimony on this matter.



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

Conference Room 325
April 4, 2011 at 2:00 p.m.

Commenting on SB 41 SD 1.

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. Our members employ more than 40,000 people statewide, delivering quality care to the people of Hawaii. The Healthcare Association takes no position on SB 41 SD 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 SB 41 SD 1 in its current form would be premature, although we support continued dialog and are simply providing comments on the bill.



The Official Sponsor of Birthdays

April 2, 2011

Committee on Consumer Protection & Commerce
Representative Robert Herkes, Chair
Representative Ryan Yamane, Vice Chair

Hearing:

April 4, 2011, 2:00 p.m.
Hawaii State Capitol, Conference Rm. 325

RE: SB41, SD1 – Relating to Hawaii Prepaid Health Care Act

Testimony in Support

Chair Herkes, Vice Chair Yamane, and members of the committee. I am here today on behalf of the American Cancer Society Hawaii Pacific Inc. Thank you for the opportunity to offer these comments on SB 41, SD1, which would repeal the sunset provision of the Hawaii's Prepaid Health Care Act (PHCA).

For over 60 years, the American Cancer Society in Hawaii has led the fight against cancer in Hawaii, which takes the lives of almost 6,700 of our family members, friends, and co-workers each year. Nationally, approximately 1.5 million people will die of cancer this year. For this and other reasons, the American Cancer Society supported legislation that would offer meaningful improvements to the health care system for cancer patients, survivors, and their caregivers. Now that the Affordable Care Act is law, the Society is working to ensure that it is implemented as strongly as possible for people with cancer and their families. Making the health care system work for cancer patients will not only save lives, but will create a better health care system for all of Hawaii's residents.

When passed in 1974, Hawaii became the first state to enact laws creating a near universal health care coverage system. This system became the gold standard for the nation, and many of its provisions served as a blueprint for the healthcare reform and passage of the Patient Protection and Affordable Care Act (ACA).

In passing the ACA, Congress granted Hawaii a waiver keeping our Prepaid Health Care Act intact:

(b) Rule of Construction Regarding Hawai'i's Prepaid Health Care Act.- - Nothing in this title (or an amendment made by this title) shall be construed to modify or limit the application of the exemption for Hawai'i Prepaid Health Care Act (Haw. Rev. Stat. 393-1 et seq.) as provided for under section 514(b)(5) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1144(b)(5)).

Also in 1974, Congress passed The Employee Retirement Income Security Act (ERISA). In doing so, Congress preempted the states from passing any law or making any rule to change any provision of ERISA, meaning that only Congress can act to make changes.

Hawaii's Prepaid Health Care Act – Termination Clause:

[§393-51 Termination of chapter.] This 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. [L 1974, c 210, pt of §2].

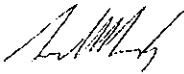
During this bill's journey through the Senate, we offered many comments regarding a number of concerns that had been raised about the impact that the sunset would have. These questions included; if nothing is done, when exactly does our prepaid health care sunset - upon passage of the health care reform last year or in 2014, when various health insurance mandates kick in? Also, will removing the sunset provisions void the law in its entirety? Is it considered a substantive change? If so, what are the implications for Hawaii's people and the business community? Finally, does the waiver language in the ACA constitute Congress' intent to allow the State of Hawaii to make changes to ERISA provisions in Hawaii?

To help answer these and other questions we relied heavily on guidance from our policy office in Washington DC. We now feel comfortable in supporting the repeal of the sunset provision of the prepaid health care act, and believe it is in the best interest of our constituency and for all the insured in Hawaii.

In Hawaii, we are fortunate as we have the advantage of our Prepaid Health Care Act, which, because of the exemption granted to it, should allow us to mix and match benefits and provisions, harmonizing the best of both into one. By utilizing the best of both, we believe that Hawaii can maintain its predominance of having the best health insurance coverage and health delivery system in the United States.

Thank you for the opportunity to offer this testimony here today.

Respectfully,



George S. Massengale, JD
Director of Government Relations

CPCtestimony

From: mailinglist@capitol.hawaii.gov
Sent: Sunday, April 03, 2011 2:35 PM
To: CPCtestimony
Cc: thirr33@gmail.com
Subject: Testimony for SB41 on 4/4/2011 2:00:00 PM

Testimony for CPC 4/4/2011 2:00:00 PM SB41

Conference room: 325
Testifier position: support
Testifier will be present: No
Submitted by: Arvid Youngquist
Organization: The Sky Ohana
Address:
Phone:
E-mail: thirr33@gmail.com
Submitted on: 4/3/2011

Comments:
Chair, CPC Committee
Honorable Members of the CPC Committee

We support SB 41 SD1 Relating to the Hawaii Prepaid Health care Act.

This measure will repeal the sunset date.

Mahalo,

Arvid Youngquist
Founder/Editor
The Sky Ohana
Kalihi Valley resident



**Testimony to the House Committee on Consumer Protection and Commerce
Monday, April 4, 2011
2:00 p.m.
Conference Room 325, State Capitol**

**RE: SENATE BILL NO. 41 SD1 RELATING THE HAWAII PREPAID
HEALTH CARE ACT**

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

My name is Jim Tollefson and I am the President and CEO of The Chamber of Commerce of Hawaii ("The Chamber"). The Chamber would like to provide comments on SB 41 SD1 relating to the Hawaii Prepaid Health Care Act.

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 repeals the sunset provision of the Hawaii Prepaid Health Care Act and repeals Act 99, Session Laws of Hawaii 1994, which repealed the sunset provision of the Hawaii Prepaid Health Care Act effective upon certain federal law.

The Hawaii Legislature recognized in 1994 that it does not have the authority to substantively amend the Prepaid Health Care Act. This bill is a well meaning attempt to undo what was done, but like its predecessor cannot have any legal effect based on the narrow exception to the Employee Retirement Income Security Act (ERISA) granted Hawaii's law.

The Chamber believes the people of Hawaii need time to understand the benefits of the Affordable Care Act (ACA) passed last year before determining which model will hold down costs. When the Prepaid Health Care Act was passed, employees were expected to share equally in the cost of premiums capped at 1.5% of their income. We all recognize that health care costs exceed that percentage across the country and in Hawaii the differential is borne by businesses small and large. The extra costs could be alleviated partially under the ACA. However, as a community we need to have an open debate on whether the Prepaid Health Care Act or ACA is preferred.

The Chamber of Commerce is in favor of any measures that will foster that debate and serious discussion. Thank you for the opportunity to submit comments.



To: House Committee on Consumer Protection & Commerce
Representative Robert N. Herkes, Chair

Date: April 4, 2011, Conference Room 325, 2:00 p.m.

Re: **SB 41, SD1 – RELATING TO THE HAWAII PREPAID HEALTH CARE ACT**

Chair Herkes and Committee Members:

My name is Barbara Kim Stanton, State Director of AARP Hawaii. AARP is a membership organization of people 50 and older with nearly 150,000 members in Hawaii. We are committed to championing access to affordable, quality health care for all generations, providing the tools needed to save for retirement, and serving as a reliable information source on issues critical to Americans age 50+.

AARP **supports SB 41, SD1** which would repeal the sunset provision of the Hawaii Prepaid Health Care Act (PHCA) and Act 99, Session Laws of Hawaii 1994.

The Hawaii PHCA includes a provision repealing the law:

§ 393-51 Termination of Chapter. This 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 Legislature also enacted Act 99, Session Laws of Hawaii 1994, which repeals the sunset provision of the Hawaii PHCA upon the enactment of certain federal law.

The federal government enacted the Patient Protection and Affordable Care Act in 2010 which may cause the termination of the Hawaii PHCA due to the sunset provision in the law. However, it is vital that Hawaii's PHCA should remain in place while the federal laws are fully enacted. The Hawaii PHCA contains many provisions which were groundbreaking and should be used as the minimum "floor" for any federal legislation. Furthermore, as the federal Patient Protection and Affordable Care Act is implemented and potentially revised, the Hawaii PHCA provides the state with assurance that baseline provisions will continue, and not be prematurely terminated.

AARP strongly supports the implementation of the Patient Protection and Affordable Care. However, until it is fully implemented we feel that it is in Hawaii's best interest to continue and take advantage of the provisions in Hawaii's PHCA that has resulted in a near universal health care coverage system in Hawaii. AARP therefore strongly supports SB 41, SD1.

Thank you for the opportunity to testify.

HMSA



An Independent Licensee of the Blue Cross and Blue Shield Association April 4, 2011

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

Re: SB 41 SD1 – Relating to the Hawaii Prepaid Health Care Act

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

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify on SB 41 SD1, 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. HMSA supports this measure, but we suggest the Committee consider providing for the Bill's immediate approval.

Through a federal exemption from the Employee Retirement Income Security Act (ERISA), 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 ERISA exemption has been preserved in the Affordable Care Act (ACA), it may unintentionally be jeopardized without further federal- and state-level legislative fixes prior to the implementation of the mandated health insurance exchange. As with other state legislatures, this Committee previously passed HB 1201 and currently has before it SB 1348 - measures to create Hawaii's health exchange, the entity through which individuals may shop for an appropriate health plan. 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 limited resources. The provisions of SB 41 SD 1 offer a simple, single step to maintain Hawaii's premier health care system. Given the criticality and timeliness of this matter, we ask that the Committee consider allowing this Bill to become effective immediately upon the Governor's approval.

We are informed that there are concerns about the impact of the provisions of this Bill on Hawaii's ERISA exemption. We are advised that, even if the provisions of this Bill were to be preempted by ERISA, the remainder of PHCA would remain intact, and the immunity given to PHCA from ERISA would continue to apply. We are continuing to dialogue with the State Attorney General and his staff on this legislation and certainly appreciate their willingness to consider the importance of this issue.

Thank you for the opportunity to testify on SB 41 SD1, and we ask for your favorable consideration.

Sincerely,

Jennifer Diesman
Vice President, Government Relations

Hawaii Medical Service Association

818 Keeaumoku St. • P.O. Box 860
Honolulu, HI 96808-0860

(808) 948-5110

Branch offices located on
Hawaii, Kauai and Maui

Internet address
www.HMSA.com