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TO THE SENATE COMMITTEE ON WAYS AND MEANS

TWENTY-EIGHTH LEGISLATURE
Regular Session of 2016

Monday, April 4, 2016
2:00 p.m.

WRITTEN TESTIMONY ONLY

TESTIMONY ON HOUSE BILL NO. 2539, H.D. 2, S.D. 1 – RELATING TO INSURANCE.

TO THE HONORABLE JILL N. TOKUDA, CHAIR, AND MEMBERS OF THE COMMITTEE:

My name is Gordon Ito, State Insurance Commissioner ("Commissioner"), testifying on behalf of the Department of Commerce and Consumer Affairs ("Department").

The purpose of this proposed bill is to establish optional high deductible health plans in conjunction with health savings account programs for insurers who are subject to regulation by the Commissioner and the Director of Labor. The Department submits the following comments.

The Department supports the intent of having employers offering their employees opportunities to choose health savings account programs as alternatives to being part of group policies. We understand that employees' lifestyles may dictate better matches with health savings account programs rather than enrolling in group plans and the Department encourages policyholders becoming better familiarized with their healthcare needs and coverages.

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

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April 4, 2016

To: The Honorable Jill N. Tokuda, Chair,
The Honorable Donovan M. Dela Cruz, Vice Chair, and
Members of the Senate Committee on Ways and Means

Date: Monday, April 4, 2016
Time: 2:00 p.m.
Place: Conference Room 211, State Capitol

From: Linda Chu Takayama, Director
Department of Labor and Industrial Relations (DLIR)

Re: H.B. No. 2539 HD 2 SD 1 Relating to Insurance

I. OVERVIEW OF PROPOSED LEGISLATION

This proposal attempts to authorize the establishment of health savings accounts (HSAs) in conjunction with group accident and health or sickness insurance policies, group hospital and medical service plan contracts, and health maintenance organization plans in the State by permitting these organizations to offer, sell, or renew, on or after January 1, 2017, a high deductible health plan in conjunction with a health savings account to an employer subject to the Prepaid Health Care Act (PHC; chapter 393) alongside a prepaid health care policy that has been sold to the employer.

This measure also appears to substantively amend the Prepaid Health Care Act by disregarding the number of subscribers of high deductible health plans in conjunction with a HSA when determining the prevalent plan under chapter 393. Although the measure precludes the high-deductible plan from being the State's prevalent plan, the amendment made to the PHC Act may be substantive enough to violate the provisions of the ERISA exemption and thus preempt the PHC Act in its entirety.

The department offers comments on this measure.

II. CURRENT LAW

Section 393-11, HRS, requires that an employer provide an eligible employee with a health insurance by a PHC plan qualifying under section 393-7, HRS. The Prepaid Health Care Advisory Council reviews these plans and makes a recommendation to the Director of Labor and Industrial Relations for approval or disapproval.

III. COMMENTS ON THE HOUSE BILL

The department offers these comments concerning the proposal:

- The PHC (PHC) Act requires that all eligible employees are provided coverage by a PHC plan. The PHC Act, however, does not require an employer to offer more than one approved plan to its employees. This measure requires an insurer that offers a HSA program to also offer a non-HSA plan. The measure cannot, however, require an employer to offer a non-HSA plan to employees, due to ERISA.

- As the PHC Act only requires an employer to offer one approved health plan, the department will be unable to enforce the requirement that the employer offer a second, conventional, non-HSA PHC plan. DLIR is uncertain as to what entity would enforce this provision.

- Although the measure precludes the high-deductible plan from being the State's prevalent plan, the amendment made to the PHC Act may be substantive enough to violate the provisions of the ERISA exemption and thus preempt the PHC Act in its entirety. If the PHC Act cannot be amended and the high-deductible plan becomes the State's prevalent plan, the out-of-pocket maximum that employees pay per year could rise from the current level of $1,000.00 per year to $6,550.00 per year.

- Allowing employers to offer high deductible plans may adversely affect employees financially who select the currently approved PHC Act compliant plan. Under section 12-12-12, Hawaii Administrative Rules, an employer is only responsible for the cost of the least expensive plan. Any cost differential may be borne by the employee selecting the more expensive plan. As the cost of a high deductible plan is less than an approved PHC Act plan, the employee may be responsible for paying not only 1.5% of the employee's wage as permitted by current law, but also the difference in the cost of the two plans.

- The SD1 dropped provisions that unused funds become the property of the HSA holder (employee) at the end of the year. Employer contributions to the HSA are intended to be used by the employee to pay for qualified medical expenses. If the employee uses that money for non-medical purposes, the employee may face federal tax penalties (currently 20% and

withdrawn money is taxable income) and the money will not be available for its intended use when a medical need arises.

- Employers choosing to use HSA accounts must fully understand the financial commitment required, although the SD1 does not include the upfront annual expense to fund the account. Funding for HSAs normally occurs prior to the first day of enrollment of a participant and immediately becomes the property of the HSA holder. If an employer is not required to fund the HSA upfront annually, then DLIR predicts that disputes over HSA funding could potentially be numerous. Further, with Hawaii's transitory nature of employment, the employer may not realize the impacts on the HSA program from the employee turnover.

- This bill may violate federal ERISA as it imposes requirements on employers. Further, an individual, or an individual's spouse, generally cannot have any other health coverage that is not a high deductible health plan, unless the individual's spouse has a non-high deductible health plan as long as that individual is not covered by that plan. The ability of that individual to have additional benefits is quite narrow: only for workers' compensation laws, tort liabilities, or liabilities related to property ownership or usage; a specific disease or illness, or a fixed amount per day (or other period) for hospitalization.

- On May 4, 2015, the IRS released calendar year 2016 out-of-pocket (OOP) maximum limits and minimum deductible amounts for high deductible health plans.

  For calendar year 2016, the OOP maximum limits will be:

  - $6,550 for self-only coverage (up from $6,450 in 2015)
  - $13,100 for family coverage (up from $12,900 in 2015)

  There is no change to the high deductible health plan minimum deductible levels for calendar year 2016:

  - $1,300 for self-only coverage
  - $2,600 for family coverage

  The annual HSA contribution limitations for calendar year 2016:

  - $3,350 annual contribution limit for self-only coverage
  - $6,750 annual contribution limit for family coverage

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016

ON THE FOLLOWING MEASURE:
H.B. NO. 2539, H.D. 2, S.D. 1, RELATING TO INSURANCE.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Monday, April 4, 2016 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.** For more information contact Daniel Jacob, Deputy Attorney General, or Bryan Yee, Deputy Attorney General, at 586-1180.

Chair Tokuda and Members of the Committee:

The Department of the Attorney General provides comments regarding legal concerns about this bill.

The purpose of this bill is to facilitate the establishment of health plans that qualify as high deductible health plans in Hawaii and may be purchased for use with a health savings account and allow the labor force to receive contributions to health savings accounts.

The Employee Retirement Income Security Act (ERISA) is a comprehensive federal legislative scheme that regulates the administration of private employee benefit and pension plans and establishes standards relating to the administration of these plans. In enacting ERISA, Congress included a sweeping preemption provision that provides in relevant part, 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).[1] Although exemptions from ERISA's expansive preemption exist, we do not believe that all of the provisions of this bill fall within an exemption.

Of these exemptions, the insurance saving clause is most noteworthy for the purpose of this discussion. The insurance saving clause found within ERISA permits states to regulate the

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[1] 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(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

business of insurance, regardless of its direct or indirect effect on employee welfare benefit plans. 29 U.S.C. § 1144(b)(2)(A). In order to be deemed a law that regulates insurance and be saved from preemption, the law "must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. Second, the state law must substantially affect the risk pooling arrangement between the insurer and the insured." *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 342 (2003).

Additionally, although Hawaii's Prepaid Health Care Act (PHCA) relates to an employee benefit plan, it is not preempted because Congress amended ERISA to exempt Hawaii's PHCA from preemption. The exemption, however, is narrow and applies only to the PHCA as it existed on September 2, 1974, and not to amendments to the PHCA "to the extent it provides for more than the effective administration" of the PHCA. 29 U.S.C.A. § 1144(b)(5)(B)(ii).[2]

This bill, in subsection (f), on page 3, lines 10-14, provides that the number of subscribers of high deductible health plans sold in conjunction with a health savings account pursuant to this section shall be disregarded when determining the largest numbers of subscribers in the state for purposes of chapter 393, Hawaii Revised Statutes (HRS). This wording is not saved from preemption pursuant to the insurance savings clause because, although placed in the insurance code, it is not directed at insurers. Furthermore, subsection (f) effectively amends the way a prevalent plan is determined pursuant to section 393-7(a), HRS. This "amendment" goes beyond the permissible scope of the ERISA exemption the PHCA enjoys, and is therefore subject to preemption.

Second, subsection (b), on page 2, lines 8-13, on its face appears directed at insurance entities and is placed within the insurance code. However, it effectively requires an employer to offer an employee two plans, which may fall outside ERISA's insurance saving clause.

Furthermore, the risk of an ERISA preemption challenge may rise because the purpose of

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[2] 29 U.S.C.A. § 1144(b)(5)(B)(ii) provides as follows:

> Nothing in 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.

the bill as provided on page 1, lines 1-13, clearly indicates its attempt to regulate employee welfare benefit plans by providing, "[t]he purpose of this Act is to facilitate the establishment of health plans that qualify as high deductible health plans in Hawaii and may be purchased for use with a health savings account and allow the *labor force* to receive contributions to health savings accounts." (Emphasis added.) In addition, the purpose of the bill as provided on page 1, lines 1-13, also provides that, the "act shall be liberally construed to allow *employers and employees* to receive maximum tax benefits provided in federal or state law through use of a high deductible health plan." (Emphasis added.)

Finally, the terms "stand-alone high deductible plan" and "stand-alone health savings account," as found on page 2, lines 18-19, and page 5, lines 5-6, are unclear and should be defined.

Our comments above equally apply to section 3 of the bill starting on page 4.

For the foregoing reasons we respectfully request that these concerns be addressed, particularly with respect to subsection (f) on page 3, lines 10-14, or that this bill be held.

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HB 2539 SD1
RELATING TO INSURANCE

PAUL T. OSHIRO
MANAGER – GOVERNMENT RELATIONS
ALEXANDER & BALDWIN, INC.

APRIL 4, 2016

Chair Tokuda and Members of the Senate Committee on Ways & Means:

I am Paul Oshiro, testifying on behalf of Alexander & Baldwin (A&B) on HB 2539 SD1, "A BILL FOR AN ACT RELATING TO INSURANCE." We support this bill.

The purpose of this bill is to facilitate the establishment of health savings account programs in Hawaii.

We understand that Health Savings Account Programs consist of high deductible health plans with a Health Savings Account approved pursuant to HRS Chapter 393. These programs generally allow employers and employees to fund a Health Savings Account to finance current or future out of pocket health costs. Contributions to Health Savings Accounts are tax advantaged, with all distributions from the account tax free. Funds are property of the employee as soon as the funds are placed into the Health Savings Account and any unused employer and/or employee funds remain in the account for the life of the enrolled employee.

We support this bill as we believe that it will provide an additional health insurance option for both employers and employees. The tax advantaged deposits and expenditures from the Health Savings Account for medical expenses are envisioned to

be an attractive benefit for employees. In addition, the personal control that one would have in expending funds from this account may also be a desirable alternative to other health plans.

Based on the aforementioned, we respectfully request your favorable consideration on this bill.

An Independent Licensee of the Blue Cross and Blue Shield Association

April 4, 2016

The Honorable Jill N. Tokuda, Chair
The Honorable Donovan M. Dela Cruz, Vice Chair
Senate Committee on Ways and Means

Re: HB 2539, HD2, SD1– Relating to Insurance

Dear Chair Tokuda, Vice Chair Dela Cruz, and Members of the Committee:

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify on HB 2539, HD2, SD1,which establishes health savings accounts in conjunction with health insurance plans. While we appreciate the intent of this legislation, we have a concern with the Bill as drafted, and we offer an amendment.

Health savings accounts (HSAs) are authorized under federal law and afford employees and their families, who also have a high-deductible health plan, a tax-advantaged medical savings account. The HSA is not subject to federal income tax at the time of deposit, and it is portable – unspent balances continue to accumulate over time and follow the employee, should the employee change jobs. The monies in an HSA only may be used for qualified medical expenses.

HSAs offer a significant incentive for employees to save for their own healthcare care needs and the needs of their families.

HMSA has appreciated the efforts of the Bill's proponents to help alleviate some of the concerns we had with previous drafts of the legislation. That said, we have a remaining concern as it relates two similar provisions found in Section 2 of the Bill, with respect to §431:10A-_(b) and §432:1-_(b). These provisions hold the insurer and mutual benefit society responsible for offering a non-high deductible plan to each employee. We believe that responsibility more appropriately lies with the employer.

It is the employer who establishes an HSA program for the employee. That employer works with an issuer to design and contract for both a high deductible plan and for a Prepaid-compliant plan that are made available for each employee who decides to participate in the HSA program. It is incumbent on the employer to ensure he offers a Prepaid-compliant to the employee.

To address this concern, the Committee may wish to consider the following amendment to §432:1-_b):

> (b) When a high deductible health plan is offered, sold, or renewed in conjunction with a health savings account pursuant to subsection (a), the **[~~mutual benefit society~~] employer** shall ensure that a prepaid health care plan group hospital and medical service plan, which is not a high deductible health plan, is also offered to each eligible member.

An Independent Licensee of the Blue Cross and Blue Shield Association

A comparable amendment should be made to §431:10A_(b), replacing "insurer" with "employer."

We are willing to continue working with the proponent of the Bill and hope we may address our concern during the remainder of the legislative session.

Thank you for allowing us to testify on HB 2539, HD2, SD1, and your consideration of our concern is appreciated.

Sincerely,

Jennifer Diesman
Vice President, Government Relations