LATE

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

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

BEFORE THE:

SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

DATE: Friday, March 18, 2016 **TIME:** 9:45 a.m.

LOCATION: State Capitol, Room 229

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Daniel K. Jacob, Deputy Attorney General, or
Bryan C. Yee, Deputy Attorney General

Chair Baker and Members of the Committee:

The Department of the Attorney General provides the following comments regarding legal concerns found within the bill.

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

We offer the following comments: first, we recommend that the committee report should reflect that section 2 of this bill only codifies current permitted activity. Section 2 permits an insurer to offer, sell, or renew high deductible plans in conjunction with health savings accounts to employers subject to chapter 393, Hawaii Revised Statutes (HRS). This wording only codifies currently permitted activity because insurers may already offer, sell, or renew high deductible plans in conjunction with health savings accounts to employers subject to chapter 393, HRS; provided that the Department of Labor and Industrial Relations has approved the plan pursuant to Hawaii's Prepaid Health Care Act.

Second, we recommend adding the following italicized wording to page 2, lines 5-6, for the purpose of clarification,

> An insurer, subject to regulation by the commissioner and the department of labor and industrial relations, may offer, sell, or renew, on or after July 1, 2016, a high deductible health plan in conjunction with a health savings account to employers subject to chapter 393 *together with* a prepaid health care plan group accident

> and health or sickness insurance policy, *which is not a high deductible plan*, that has been sold to an employer subject to chapter 393.

Third, the terms "stand-alone high deductible plan" and "stand-alone health savings account," as found on page 2, line 11, are unclear and should be defined.

The three concerns addressed above are equally applicable to section 3 of the bill regarding mutual benefit societies.

Finally, this bill still may be subject to an ERISA preemption challenge. The purpose of 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 Hawai'i 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 act 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.)

ERISA is a comprehensive federal legislative scheme that supersedes 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] Because the stated purpose of the bill appears to be directed to employee welfare benefit plans, and law relating to employee welfare benefit plans would be preempted by ERISA, this bill poses difficult legal questions. This bill, however, may be saved through the insurance savings clause found within ERISA that permits states to regulate the business of insurance, regardless of its direct or indirect effect on employer benefit plans. 29 U.S.C. § 1144(b)(2)(A). *See Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 342 (2003).

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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.

At this time, we no longer recommend that this bill be held. We wanted to ensure, however, that the Committee was informed of the possible risk.

Thank you for the opportunity to comment.

hmsa

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LATE

March 18, 2016

The Honorable Rosalyn H. Baker, Chair
The Honorable Michelle N. Kidani, Vice Chair
Senate Committee on Commerce, Consumer Protection, and Health

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

Dear Chair Baker, Vice Chair Kidani, and Members of the Committee:

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

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.

While HMSA appreciates the potential value of an HSA, we are concerned that HB 2539, HD2, Proposed SD1 embeds the responsibility for the HSA program with the health plans. This would require a plan to have the fiduciary responsibility of being the primary custodian or trustee of the HSA accounts . We believe that responsibility more appropriately would lie with a financial institution, selected by the employer, that is more accustomed to managing trust accounts. Such an institution more readily and expeditiously could accommodate the trust account provisions of this legislation

Many employers offer their employees optional plans offered by different issuers. If, during open enrollment, an employee that already is covered by an HSA plan decides to select a plan offered by another issuer, the issuers will be required to established a secured system of transferring trust accounts. Similarly, if the employee transfers to a new job, the issuers would be faced with the similar trust account transfer problem.

We have discussed our concerns with the proponent of the Bill, and they indicated they appreciated our concern and expressed a willingness to work with us on addressing the concerns we raised should the Committee move the Bill forward.

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

Sincerely,

Jennifer Diesman
Vice President, Government Relations

LATE

The Twenty-Eighth Legislature
Regular Session of 2016

THE SENATE
Committee on Commerce, Consumer Protection, and Health
Senator Rosalyn H. Baker, Chair
Senator Michelle N. Kidani, Vice Chair
State Capitol, Conference Room 229
Friday, March 18, 2016; 9:45 a.m.

STATEMENT OF THE ILWU LOCAL 142 ON H.B. 2539, HD2, PROPOSED SD1 RELATING TO INSURANCE

The ILWU Local 142 **opposes** H.B. 2539, HD2, proposed SD1, which authorizes insurers, mutual benefit societies, and health maintenance organization to offer, sell, or renew, on or after July 1, 2016, a high deductible health plan in conjunction with a health savings account to an employer subject to the Prepaid Health Care Act alongside a prepaid health care plan insurance policy that has been sold to the employer.

As we understand this bill, the proposed SD1 will allow employers to offer health savings accounts coupled with high-deductible health plans to employees as an option to other health plan offerings. With the potential for the entire amount paid into the HSA by the employer to become the property of the employee, the HSA/high deductible plan option is attractive to employees who are healthy and not likely to need medical services. But for employees who are not so healthy and need medical care for chronic conditions, the HSA/high deductible plan is not a viable option and will result in "creaming" that will leave the employee, who is unable to take advantage of the HSA/high deductible option, in the employer-sponsored plan which may end up being more costly because of adverse selection.

The impact on the prevalent plan under the Prepaid Health Care Act is also a consideration. The concept of the prevalent plan is based on identifying the plan with the greatest number of enrolled individuals. If fewer people enroll in the plan with better benefits, the standard will be eroded and the prevalent plan may become one with lesser benefits.

Furthermore, while high-deductible plans mean lower premiums, the unintended consequence is that fewer people will access health care services, resulting in greater costs when a person is finally forced to seek treatment. What could have meant lower-costing treatment for a condition detected early may mean catastrophic costs for delayed treatment due to a high deductible.

The ILWU urges that H.B. 2539, proposed SD1 be HELD. Thank you for the opportunity to share our views and concerns.

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March 18, 2016

To: The Honorable Rosalyn H. Baker, Chair,
The Honorable Michelle N. Kidani, Vice Chair, and
Members of the Senate Committee on Commerce, Consumer Protection, and Health

Date: Friday, March 18, 2016
Time: 9:45 a.m.
Place: Conference Room 229, State Capitol

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

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

I. OVERVIEW OF PROPOSED LEGISLATION

This proposal permits employers to offer a high deductible health plan with a health savings account (HSA) in addition to group accident and health or sickness insurance policies, group hospital and medical service plan contracts, and Health Maintenance Organization (HMO) plans. The proposal allows this option as long as the benefits provided in aggregate by the HSA program and the insurance coverage are equivalent and meet the requirements of chapter 393, Hawaii Revised Statutes (HRS)—Prepaid Health Care (PHC).

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 explore the demand that the employer offer a second, conventional, non-HSA PHC plan to cover employees who are ineligible for an HSA plan (e.g. Medicare enrollees, individuals claimed as a dependent on the prior year's taxes, individuals covered by another policy).

- If an employer offers only the high deductible HSA program plan to all employees eligible for it (thereby forcing all eligible employees to choose the HSA program plan), it may become the prevalent plan, the standard-bearing plan for the state. If the HSA program plan were to become the 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 measure includes provisions that unused funds become the property of the HSA holder (employee) at the end of the year. Employer contributions to the HSA, however, 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 including the upfront annual expense to fund the account. Funding occurs prior to the first day of enrollment of a participant and immediately becomes the property of the HSA holder. 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