TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-NINTH LEGISLATURE, 2017

LATE

ON THE FOLLOWING MEASURE:
H.B. NO. 407, H.D. 1, RELATING TO INSURANCE.

BEFORE THE:
HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

DATE: Wednesday, February 22, 2017 **TIME:** 2:01 p.m.

LOCATION: State Capitol, Room 329

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

Chair McKelvey and Members of the Committee:

The Department of the Attorney General submits comments and proposes amendments on this bill.

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

The additions made in H.D. 1 create a significant risk of a preemption challenge under the Employee Retirement Income Security Act (ERISA). 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] On page 2, line 15, through page 3, line 2, this bill mandates

[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.

that when an employer offers health care coverage in the form of a high deductible plan, the employer shall contract with a third party to offer and manage a health savings account and shall deposit funds in an amount equal to the applicable deductible amount in each health savings account. Accordingly, this bill requires the employer to provide certain benefits to an employee. Because this bill directly relates to an employee benefit plan, it is subject to ERISA preemption.

Although exemptions from ERISA's expansive preemption exist, we cannot conclude that the amendments made in H.D. 1 of this bill fall within any of them. Of these exemptions, the insurance savings clause is most noteworthy for the purpose of this discussion. The insurance savings clause found within ERISA 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). 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). The proposals in this bill, although embedded in the insurance code, are not specifically directed towards entities engaged in insurance. As discussed above, this bill mandates that an employer offer an employee benefit plan. Accordingly, the amendments made in H.D. 1 are not specifically directed at entities engaged in insurance and fail the first requirement. Therefore, it may not be saved from ERISA preemption under the insurance savings clause.

This risk is increased because other wording may also be interpreted as requiring employers to provide an employee benefit plan. On page 2, lines 11-14, the insurer is required to ensure that a traditionally compliant prepaid health care plan is offered to each insured. Although directed to an insurer, the wording may be interpreted as

requiring an employer to offer an employee two plans, which may fall outside ERISA's insurance savings clause.

Furthermore, the purpose of the bill as provided on page 1, lines 1-4, indicates an attempt to regulate employee welfare benefit plans by stating, "[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 11-14, 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 report from the Committees on Health and Intrastate Commerce describe the purpose of this bill as "to authorize the issuance of employer-sponsored high deductible health plans and corresponding health savings accounts under the Prepaid Health Care Act."

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

For the foregoing reasons we respectfully urge that paragraphs (3) and (4) of the new section being added to article 10H of chapter 431, Hawaii Revised Statutes (HRS), by section 2 of the bill on page 2, line 15, through page 3, line 2, and paragraphs (3) and (4) of the new section being added to article 1 of chapter 432, HRS, by section 3 of the bill on page 5, lines 7-14, be deleted, and the following paragraph be substituted in their place:

> (3) The insurer shall ensure that in conjunction with the high deductible plan, a health savings account is also offered to each eligible insured.

If you conclude that these paragraphs should not be deleted on policy grounds, then we respectfully recommend that the bill be held in committee.

We also recommend that the terms "stand-alone high deductible plan" and "stand-alone health savings account" be defined.

Thank you for the opportunity to comment.

DAVID Y. IGE
GOVERNOR

SHAN S. TSUTSUI
LIEUTENANT GOVERNOR

LINDA CHU TAKAYAMA
DIRECTOR

LEONARD HOSHIJO
DEPUTY DIRECTOR

LATE

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
830 PUNCHBOWL STREET, ROOM 321
HONOLULU, HAWAII 96813
www.labor.hawaii.gov
Phone: (808) 586-8844 / Fax: (808) 586-9099
Email: dlir.director@hawaii.gov

February 22, 2017

To: The Honorable Angus L.K. McKelvey, Chair,
The Honorable Linda Ichiyama, Vice Chair, and
Members of the House Committee on Consumer Protection & Commerce

Date: Wednesday, February 22, 2017
Time: 2:01 p.m.
Place: Conference Room 329, State Capitol

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

Re: H.B. No. 407 HD1 Relating to Insurance

I. OVERVIEW OF PROPOSED LEGISLATION

This proposal permits insurers, mutual benefit societies, and health maintenance organizations to offer, sell, or renew, on or after January 1, 2018, a high deductible health plan in conjunction with a health savings account (HSA) to an employer subject to the Prepaid Health Care (PHC) Act, chapter 393, Hawaii Revised Statutes (HRS) together with a prepaid health care insurance policy provided the employer contracts with a third party to offer and manage the HSA and the employer deposits into the HSA the amount equal to the deductible.

The Department offers comments on the measure below.

II. CURRENT LAW

Chapter 393, HRS, the Prepaid Law is an employer-based healthcare mandate. Section 393-11, HRS, requires that an employer provide an eligible employee with health insurance by a prepaid health care (PHC) plan qualifying under section 393-7, HRS. The Prepaid Health Care Advisory Council reviews these plans and makes a recommendation to the DLIR Director for approval or disapproval.

III. COMMENTS ON THE HOUSE BILL

§393-7 Required health care benefits establishes the criteria by which employer-

provided healthcare insurance plans are evaluated by the Prepaid Health Care Advisory Council that reviews these plans and makes a recommendation to the DLIR Director for approval or disapproval. §393-7 provides two different methods for employers to comply with providing healthcare insurance coverage under paragraphs (a) and (b).

§393-7(a) reads in part, "A prepaid health care plan shall qualify as a plan providing the mandatory health care benefits required under this chapter if it provides for health care benefits equal to, or medically reasonably substitutable for, the benefits provided by prepaid health plans of the same type, as specified in section 393-12(a)(1) or (2), which have the largest numbers of subscribers in the State. This applies to the types and quantity of benefits as well as to limitations on reimbursability, including deductibles, and to required amounts of co-insurance.

§393-7(b) reads, "A prepaid group health care plan shall also qualify for the mandatory health care benefits required under this chapter if it is demonstrated by the health care plan contractor offering such coverage to the satisfaction of the director after advice by the prepaid health care advisory council that the plan provides for sound basic hospital, surgical, medical, and other health care benefits at a premium commensurate with the benefits included taking proper account of the limitations, co-insurance features, and deductibles specified in such plan. Coverage under a plan which provides aggregate benefits that are more limited than those provided by plans qualifying under subsection (a) shall be in compliance with section 393-11 only if the employer contributes at least half of the cost of the coverage of dependents under such plan.

The cost of the coverage to the employee under §393-7(a) and (b) is subject to limits on the amount of the employee portion for he coverage pursuant to §393-13, which reads in part, "Unless an applicable collective bargaining agreement specifies differently every employer shall contribute at least one-half of the premium for the coverage required by this chapter and the employee shall contribute the balance; provided that in no case shall the employee contribute more than 1.5 per cent of the employee's wages; and provided that if the amount of the employee's contribution is less than one-half of the premium, the employer shall be liable for the whole remaining portion of the premium."

A high-deductible plan in tandem with a HSA could potentially qualify as a Prepaid plan as recommended by the Prepaid Health Care Advisory Council and approved by the Director, but only under §393-7(b) because high-deductible plans with HSAs have higher deductible amounts and higher out-of-pocket ceilings than would be allowed under §393-7(a).

However, the potential approval of such a plan would require that the benefits including limitations, co-insurance, and deductibles satisfy §393-7(b) and be approved by the Director. Thus, whether high-deductible health plans and health savings accounts can satisfy the Act will depend upon the package an employer

presents to the Director.

To the extent that the proposal requires employers to offer additional plans to employees, it may be preempted by ERISA, which supersedes State laws that relate to employee benefit plans. DLIR defers to the Department of the Attorney General regarding the legal issue about a pre-emption by ERISA that may fall outside of the narrow insurance savings clause of ERISA.

hmsa

An Independent Licensee of the Blue Cross and Blue Shield Association

LATE

February 22, 2017

The Honorable Angus L. K. McKelvey, Chair
The Honorable Linda Ichiyama, Vice Chair
House Committee on Consumer Protection and Commerce

Re: HB 407, HD1 – Relating to Insurance

Dear Chair McKelvey, Vice Chair Ichiyama, Members of the Committee:

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify on HB 407, HD1, which authorizes health plans to offer a high deductible health plan in conjunction with a health savings account (HSA) that is administered by an employer. HMSA offers comments.

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 deposited in an HSA may only be used for qualified medical expenses.

While HMSA is appreciative of the concept of an HSA, we offer an observation. If employees of a firm are offered an HSA as an option, the employer may split the company's risk pool. That ultimately may result in higher costs for both the employer and the employee.

Thank you for the opportunity to comment on HB 407, HD1.

Sincerely,

Mark K. Oto
Director, Government Relations

UHA
HEALTH INSURANCE *Better Health • Better Life*

LATE

February 21, 2017

The Honorable Angus L.K. McKelvey, Chair
The Honorable Linda Ichiyama, Vice Chair

Re: HB407 HD1 – Relating to Insurance

Dear Chair McKelvey, Vice Chair Ichiyama and Members of the Committee:

My name is Howard Lee, and I am President and Chief Executive Officer of University Health Alliance (UHA), a Hawaii mutual benefit society.

UHA appreciates the opportunity to testify in support of HB407 HD1. This bill would give employers in the state an option to offer, in addition to the current plans they offer their employees, a Hawaii version of a health savings account (HSA). But if an employer does not want to give their employees an optional Hawaii HSA, they do not have to.

If an employer does offer their employees a Hawaii HSA and an employee enrolls in the Hawaii HSA, the employees would receive employer contributions to their HSAs. The HSA funds can then be used on a tax-free basis to pay or reimburse qualified medical expenses, and the contributions can be accumulated over the years tax-free. Or, if an employee prefers not to join the Hawaii HSA then the employee can remain in the employer's current plan.

Some employers want to offer their employees the tax savings benefits of a Hawaii HSA, similar to how employers offer 401Ks. This bill simply gives those employers that want to offer their employees more tax-free health insurance alternatives, the opportunity to do so. Under this bill, no employer has to offer their employees a Hawaii HSA and no employee has to join.

We would respectfully request the Committee see fit to pass this measure. Thank you for the opportunity to testify today.

Sincerely,

Howard Lee
President and CEO

Topa Financial Center
Bishop Street Tower
700 Bishop Street, Suite 300
Honolulu, Hawaii 96813-4100
T 808.532.4000
800.458.4600
F 808.522.8894
uhahealth.com

LATE

The Twenty-Ninth Legislature
Regular Session of 2017

HOUSE OF REPRESENTATIVES
Committee on Consumer Protection & Commerce
Rep. Angus L.K. McKelvey, Chair
Rep. Linda Ichiyama, Vice Chair
State Capitol, Conference Room 329
Wednesday, February 22, 2017; 2:01 p.m.

STATEMENT OF THE ILWU LOCAL 142 ON H.B. 407, HD1
RELATING TO INSURANCE

The ILWU Local 142 **opposes** H.B. 407, HD1, which authorizes the issuance of employer-sponsored high deductible health plans together with required health savings accounts (HSAs). The bill further requires the employer to fund deductible costs and specifies that employers and insurers that buy or sell high deductible health plans remain subject to the Prepaid Health Care Act.

The two committees which earlier heard the bill made two important amendments to H.B. 407: (1) requiring employers to deposit an amount equal to the applicable deductible for each health savings account paired with a high deductible plan; and (2) clarifying that employers must contract with a third party to offer and manage the HSAs.

Despite these amendments in response to concerns raised by testifiers, **the ILWU continues to OBJECT to the bill for the following reasons**.

First, regardless of the amount of money available in an HSA, a high deductible plan still means the patient must pay for all services up to the deductible amount before the plan pays anything. That could easily lead an employee to forgo necessary medical services because of the required out-of-pocket costs. Even if the HSA has ample funds (provided by the employer, according to this bill) to cover the deductible, many individuals may be reluctant to tap into the HSA, thinking to reserve HSA funds for catastrophic needs rather than routine medical care. In addition, the employer contribution into the HSA of "an amount equal to the applicable deductible amount" appears to be a one-time contribution while the deductible is applied each year.

Second, forgoing preventive services or routine check-ups could result in a patient waiting to have a condition checked or treated until it becomes catastrophic. Early intervention is always preferred. Delayed treatment usually means higher health care costs in the long run and less satisfactory outcomes for the patient.

Third, if both a high deductible plan and a Prepaid Health Care plan are offered, adverse selection is likely to occur. Healthier employees, who do not need medical services, may be lured by the prospect of HSA tax savings as well as funds deposited into the HSA by the employer and will enroll in a high deductible plan while their not-so-healthy co-workers will have no choice but to remain in the employer's Prepaid Health Care plan, which may very likely cost more.

Fourth, the high deductible plan may have an impact on the prevalent plan under the Prepaid Health Care Act. 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 (i.e., no deductible), the standard will be eroded and the prevalent plan will become the one with lesser benefits (i.e., high deductible).

Fifth, in its prior testimony, the Department of the Attorney General raised a concern about a possible ERISA preemption challenge. Any risk to Hawaii's ERISA preemption should be avoided.

Sixth, consumer education is vital for this program to work and for employees to make informed decisions. However, employees may disregard the education (or may not understand it, especially given Hawaii's multi-lingual, multi-cultural population) and see only the money that can accumulate in an HSA and potential tax advantages.

We see very few, if any, positives and so many negatives to this proposal. The ILWU urges that H.B. 407, HD1 be **HELD**. Thank you for the opportunity to share our views and concerns.