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Testimony of the Department of Commerce and Consumer Affairs

Office of Consumer Protection

Before the
House Committee on Labor
Thursday, March 13, 2025
9:00 AM

Conference Room 309 & Videoconference
State Capitol
415 South Beretania Street

On the following measure:
S.B. 1287, S.D. 2, RELATING TO TRANSPARENCY

Chair Sayama, Vice Chair Lee, and Members of the Committee:

My name is Emma Olsen, and I am an Enforcement Attorney at the Department of Commerce and Consumer Affairs' (Department) Office of Consumer Protection (OCP). The Department offers the following comments.

The purpose of this bill is to require food, beverage, and service establishments that accept tips and employ tipped employees to post signs that include certain language explaining their tip allocation practices and the contact information for the Wage Standards Division of the Department of Labor and Industrial Relations and the Wage and Hour Division of the United States Department of Labor.

We read S.B. No. 1287, S.D. 2 as a measure intended to protect tipped employees and combat tip theft. The Senate Standing Committee on Labor and Technology found

that S.B. No. 1287 “protects tipped employees and their earnings by requiring the posting of signage explaining the tip allocation process to customers and employees and listing the contact information to report violations.” [Senate Stand. Com. Rep. No. 352](#). The Senate Standing Committee on Commerce and Consumer Protection noted that S.B. No. 1287, S.D. 1, “is primarily intended to address the labor practices of employers toward their tipped employees.” [Senate Stand. Com. Rep. No. 847](#).

The Senate Standing Committee on Commerce and Consumer Protection amended S.B. No. 1287, S.D. 1, by creating a new section in chapter 388, Hawaii Revised Statutes, which relates to wages of employees, rather than creating a new section in chapter 481B, Hawaii Revised Statutes, which relates to deceptive practices against consumers.

We respectfully ask this Committee to avoid placing the provisions of this bill in chapter 481B, Hawaii Revised Statutes, or any other consumer protection statute. Following this approach will guard against confusion about the remedies available to tipped employees when they bring suit to enforce the act. Tipped employees are not consumers, as defined by law, and they may not be able to obtain the pre-existing legal remedies provided by a consumer protection statute.

Twenty-five years ago, the Hawaii State Legislature passed Act 16 (SLH 2000) to protect tipped workers and address concerns about tip theft. In what would prove to be a fateful choice, the act’s employee protections were codified at section 481B-14, Hawaii Revised Statutes. Tipped employees brought suit to enforce the act on multiple occasions. Two trips to the Hawaii Supreme Court ensued.¹ Presented with a conflict, the Hawaii Supreme Court determined that no consumer remedies were available to tipped employees, who were not consumers after all. To make the tipped employees whole for violations committed by their employers, the Court judicially crafted a remedy of back wages and penalties based on sections 388-6 and 388-10, Hawaii Revised Statutes, and not found in section 481B-14, Hawaii Revised Statutes.²

¹ Davis v. Four Seasons Hotel Ltd., 122 Haw. 423, 446, 228 P.3d 303, 326 (2010); Villon v. Marriott Hotel Servs., Inc., 130 Haw. 130, 141, 306 P.3d 175, 186 (2013).

² Villon, 130 Haw. at 135, 141.

We believe that in its amended form, S.B. No. 1287, S.D. 2, guards against the confusion that led to the *Davis* and *Villon* litigation by creating a new section in chapter 388, Hawaii Revised Statutes, rather than a new section in chapter 481B, Hawaii Revised Statutes. We respectfully submit that the proper placement of this bill is not chapter 481B, Hawaii Revised Statutes, or any other statute enacted primarily for the purpose of protecting consumers.

Thank you for the opportunity to testify on this bill.



STATE OF HAWAII
KA MOKU'ĀINA O HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
KA 'OIHANA PONO LIMAHANA

March 13, 2025

To: The Honorable Jackson D. Sayama, Chair,
The Honorable Mike Lee, Vice Chair, and
Members of the House Committee on Labor

Date: Thursday, March 13, 2025
Time: 9:00 a.m.
Place: Conference Room 309, State Capitol

From: **REVISED TESTIMONY By**, Jade T. Butay, Director
Department of Labor and Industrial Relations (DLIR)

Re: S.B. 1287 S.D.2 RELATING TO TRANSPARENCY

I. OVERVIEW OF PROPOSED LEGISLATION

The DLIR **appreciates the intent** of this measure but has significant reservations as some provisions conflict with Federal and State Law. Notably, the cases mentioned in the preamble were prosecuted by the U.S. DOL.

SB1287 SD2 proposes to establish under HRS § 388 tip allocation disclosure requirements for food, beverage and service establishments that accept tips and employs tipped employees subject to Title 29 Code of Federal Regulations section 531.50 et seq., or a tipped employee as defined in section HRS § 387-1. The proposal includes two signs, with the first one for the public and the second one for employees to include the language contained in the first sign plus additional information including contact information for the U.S. DOL and the Wage Standards Division (WSD).

The measure also provides employees remedies including back wages and penalties for back wages in the amount the employee should have earned if all tips had been paid directly to the employee, and action by an employee for back wages and unpaid tips may be maintained in any court of competent jurisdiction.

II. CURRENT LAW

The Fair Labor Standards Act (FLSA) covers employers with annual gross sales of \$500,000 or more or involved in interstate commerce, which the U.S. DOL has construed liberally. HRS Chapter 387 in part applies to all those establishments not covered under the FLSA and all establishments for the purpose of minimum

wages as the FLSA requires that where both Federal and State laws apply the law with the higher standard prevails. The vast majority of establishments in Hawaii fall under federal jurisdiction.

§12-20-11 Hawaii Administrative Rules (HAR) pertains to tip-splitting, tip-pooling, and additional tip credit requirements and makes clear that when employees practice tip-splitting each employee is considered tipped by their proportionate share, or when the employer facilitates tip-pooling it is only on a basis mutually agreed upon by the employees.

The definition of “wage” in §387-1 does not include tips or gratuities of any kind, except for the purposes of the last sentence of §387-2, which relates to the requirements for using the tip credit.

The definition of “wages” in §388-1 does not include tips or gratuities of any kind, except for the purposes of §388-6, which relates to withholding of wages or illegal deductions wherein “wages” shall include tips or gratuities of any kind.

III. COMMENTS ON THE SENATE BILL

This measure proposes to include tip allocation disclosure requirements in State law; however, illegal tip allocation practices have been primarily occurring in business establishments that are subject to the federal FLSA. It is unclear how the U.S. DOL would enforce a posting required only under state law.

The DLIR notes that the proposed (C) on page 3, Lines 17-20 may violate the FLSA as only those employees directly tipped and who “customarily and regularly” receive tips may participate in tip-pooling arrangements.

Under §388-9.5 when the department’s investigation reveals a violation has been committed and not corrected, it issues an Order of Wage Payment Violation (OWPV) to the employer in violation and the employer is assessed the back wages and penalties as provided under §388-10(a). Alternatively, pursuant to §388-11, the employee may seek their own legal action in court to recover unpaid wages.

The DLIR notes that the proposed remedies on page 5, Lines 1-16 overlap with the penalties and remedies already contained in §388-10(a) and §388-11.

Moreover, the proposal gives liability to an employer for merely failing to post the required notice. If the employees receive tips lawfully but the employers fail to post the notice there is no back wages or unpaid tips in which to use to calculate the employer’s liability, therefore, in such cases the proposed section (b) on Page 5 would be unenforceable.

If enacted, this measure would lead to separate investigations for most

establishments in Hawaii by the U.S. DOL involving wage and tip matters and the department for the posting requirements. If the state violation only entailed a posting violation the remedy would be incalculable as no back wages would be due. If back wages were due and a posting violation occurred, then the remedy would conflict with penalties and remedies in §388 10(a) and §388 11.

The department suggests favorable support for its request for two additional Labor Law Enforcement Specialists in the budget to increase enforcement of Hawaii's wage-related laws.



HAWAII WORKERS CENTER

LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.

Defending and Respecting the workers of
Hawaii'i

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March 12, 2025

Hawaii State House of Representatives
House Committee on Labor
Chair Rep. Jackson D. Sayama

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Sergio Alcubilla III, Esq.

RE: SUPPORT for SB1287 SD2 RELATING TO TRANSPARENCY.

Dear Chair Rep. Sayama:

The Hawaii Workers Center (HWC) envisions a Hawaii in which all workers are empowered to exercise their right to organize for their social, economic and political well-being. It is a resource of information, education, training and organizing for Hawaii's workers.

The HWC stands in support of SB 1287 SD2 which requires under the State's wage compensation laws that food, beverage, and service establishments that accept tips and employ tipped employees post signs that include language explaining their tip allocation practices and the contact information for the Wage Standards Division of the Department of Labor and Industrial Relations and the Wage and Hours Division of the United States Department of Labor.

Wage theft for tipped employees continues to be a major issue here in Hawaii as employers with tipped employees continues to run afoul of the proper wages and tips to pay its employees. As an example, Section 387-2, HRS, provides that an "employer may pay tipped employees less than the applicable minimum wage if the tipped employee customarily and regularly receives more than \$20 a month in tips and the combined amount of wages and tips is more than the applicable minimum wage as shown in the table below." Thus, employers are left to calculate the proper tip credit and employees must trust that their calculations are correct. Moreover, for many establishments, a system exists where tips are shared with workers in a tip pool. In practice, many employees our organization has spoken to are actually unsure how tips are split and wages calculated. This lack of transparency provides fertile ground for wage theft to occur.

With the plethora of tipping requests, the generosity and appreciation consumers wish to convey by leaving a tip must simply trust that the employees will actually receive it. This bill is common sense. If a point of sale asks for a tip, consumers should be assured that the tip will actually make its way to the employees pockets and not the business' bottom line. A simple poster stating the tip policy for the establishment will at least give some assurance and provide some uniformity in how tips and wages are properly calculated. It benefits the consumer and the employee while not heavily burdening the employer as employers are already required to post certain labor law posters in their establishment.

Thank you for hearing SB 1287 SD2 and ask that you please support this measure.

Respectfully,

Sergio Alcubilla
Executive Director