

July 13, 2005

The Honorable Robert Bunda, President
and Members of the Senate
Twenty-Third State Legislature
State Capitol, Room 003
Honolulu, Hawaii 96813

Dear Mr. President and Members of the Senate:

Re: House Bill No. 325 SD2 CD1

On July 12, 2005, House Bill No. 325, entitled "Relating to Employment Practices" became law without my signature, pursuant to Section 16 of Article III of the State Constitution.

This bill authorizes employees to use temporary disability insurance benefits in excess of the statutory three week minimum for family leave purposes.

While granting employees the ability to use excess temporary disability insurance leave for family leave purposes is laudable, a concern arises that codifying such use may have unintended consequences. For example, employers who now offer benefits greater than the statutory minimum and who, by this bill, would be mandated to permit employees to use some accrued and available temporary disability insurance leave for family leave purposes, might seek to control costs by resubmitting temporary disability insurance plans that only provide for the statutory minimum, thereby reducing the benefits that are currently afforded to their employees.

Further, this bill amends the exclusions to the definition of sick leave by deleting "any benefit provided under an employee welfare benefit plan subject to the federal Employee Retirement Income Security Act of 1974" (ERISA), and clarifying that sick leave does not include unemployment compensation due to illness.

The exclusion of benefits provided pursuant to an ERISA plan raises concerns about ERISA preemption because ERISA preempts state law that regulates, except in certain specific situations, employee welfare benefit plans, such as sick leave. However, ERISA does not supersede any other law of the United States or rule or regulation issued pursuant to any such federal law.

The Honorable Robert Bunda, President
and Members of the Senate
July 13, 2005
Page 2

The federal Family Medical Leave Act of 1993 (FMLA) recognized and encouraged states to adopt state family leave laws that provided greater rights than the FMLA. 29 U.S.C. 2651(b) (2005).

Based upon the interplay between ERISA and the FMLA and a review of recent federal court ERISA opinions, ERISA is a complex area of the law and how a court may actually rule on this issue is not certain. Thus, this bill could open the State to additional legal challenges.

Finally, it should be pointed out because this measure amends HRS 398-1, it only applies to employers with 100 or more employees. It also will not immediately impact unionized employees because their benefits are set in collective bargaining agreements. Finally, it does not apply to State employees because the State is covered under the State's Temporary Disability Benefits Plan.

Therefore, I allowed House Bill No. No. 325 SD2 CD1 to become law as Act 243, effective July 12, 2005, without my signature.

Sincerely,

LINDA LINGLE