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2016 Hawaii Legislature Enacts Five Insurance Related Bills



By Tred R. Eyerly

The 2016 session of the Hawaii legislature passed five insurance-related bills. The new measures are as follows:

HB 2084 – In contrast to the controversy all across the mainland over transgender rights, the Hawaii legislature passed a transgender-friendly bill for the second session in a row. In 2015, the legislature ensured that transgender people would be able to change their birth certificates to reflect their correct name and gender without expensive and invasive obstacles. The law allowed a transgender person to produce a sworn statement from a licensed medical or mental health provider, verifying that the person's birth certificate did not align with their gender identity and that, in their professional opinion, the registrant's sex designation should be changed. The 2015 law also allowed transgender individuals to receive newly issued birth certificates that did not indicate that their name or gender marker had been amended to help ensure privacy.

This year, in **HB 2084**, the legislature extended the rights of transgender persons with respect to health insurance. The bill's preamble notes that many health insurance policies exclude transgender people from accessing care. Consequently, transgender people routinely experience serious and life-threatening discrimination. The legislature noted that the practice of denying health insurance coverage to a person based on gender identity or gender expression is against public policy.

Therefore, the bill ensures that all insurers are prohibited from discriminating with respect to participation and coverage under a policy, contract, plan, or agreement against any person on the basis of a person's actual gender identity or perceived gender identity.

HB 1897 - This bill addresses insurance coverage for sexually transmitted disease screening. The legislature found that early detection of sexually transmitted diseases is paramount to proper health care and prevention of further transmission. Certain health care providers failed to screen specifically for some sexually transmitted diseases, including human immunodeficiency virus and acquired immunodeficiency syndrome, at annual screenings, even though the federal Protection and Affordable Care Act requires health insurance to cover those screenings without any patients having to share the costs.

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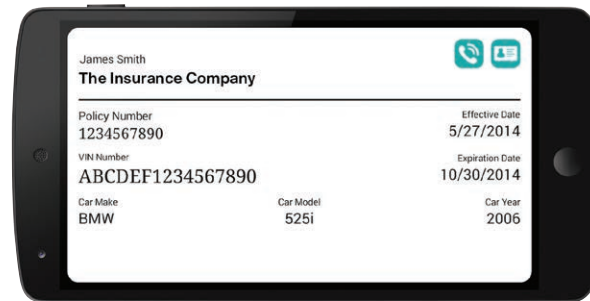
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Accordingly, the purpose of the act is to ensure that all insurers in the State provide insurance coverage for sexually transmitted disease screenings, including screenings for human immunodeficiency virus and acquired immunodeficiency syndrome.

SB 2851 – Haw. Rev. Stat. § 431:21-119 was amended by granting the Insurance Commissioner authority to determine whether residential property insurance is unavailable due to a moratorium on insurance policies in a lava zone during a state of emergency. If insurance is unavailable and a state of emergency exists, the Hawaii property Insurance Association is to remove its moratorium. The Association must then offer new policies and may provide a waiting period of no longer than six months for the policy coverage to take effect. The bill has been signed by the Governor.

HB 1705 – Carrying electronic insurance cards in a vehicle, in addition to paper cards, is permitted by the bill. The card serves as electronic proof of insurance for motor vehicles and is to be carried in the vehicle at all times. The legislature found that proof of coverage gives drivers a convenient, paperless way to display up-to-date insurance information. Currently, thirty-seven states permit drivers to use an electronic copy of their insurance card as valid proof of insurance.



Under the bill, upon demand, the driver may display the electronic motor vehicle insurance identification card on a mobile electronic device. An officer may only view the electronic motor vehicle insurance identification card and is otherwise prohibited from viewing any other content on the device.

HB 260 – The legislature noted concerns about potential gaps in motor vehicle insurance coverage associated with transportation network companies. Transportation network companies are entities that use a digital network or software application service to connect passengers with transportation network company drivers, i.e., Uber. The purpose of the act is to close the insurance gaps by establishing insurance requirements for transportation network companies and transportation network company drivers.

Therefore, the bill establishes insurance requirements for transportation network companies and drivers to take effect on September 1, 2016. The Insurance Commissioner is directed to examine the effects of this measure on personal motor vehicle insurance policy rates in the State and submit an annual report to the Legislature. The bill will sunset on September 1, 2021.

SB 3053 – This is one insurance-related measure that did not pass. The legislation would have extended the statute of limitations for a victim of child abuse to file suit against the alleged abuser. Many insurers have been called upon to defend and indemnify religious orders and other organizations that employed alleged abusers as far back as the 1950's. In 2012, the legislature enacted Haw. Rev. Stat. § 657-1.8, which allowed a victim to file suit for a period of two years after April 24, 2012. The statute was amended in 2014 to extend the period in which to file suit to four years after April 24, 2012. S.B. 3053 would have extended the suit limitation period in Haw. Rev. Stat. § 657-1.8 to six years after April 24, 2012.

Nevertheless, with five bills that did pass, it was a relatively active legislative session for insurance-related matters.

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A Revocable Living Trust: A Useful Tool to Transition the Family Business to Your Family

If you own a business, you have committed countless hours and resources to get it up and running, and hopefully you have been able to enjoy the fruits of your labor. Have you taken the time to plan for the transition of your business? Careful planning and preparation is invaluable to the success of your business in the years to come.

Let's say your business is worth about 50% of your estate. You are married and have three grown children. One child lives in Hawaii and works with you in the business and two children live on the mainland and are busy with their own careers. You want to be certain that your spouse, who will probably outlive you, will be financially secure when you are gone, and you also hope to pass on the business to your child in Hawaii who shows great enthusiasm in carrying it forward. Your estate is not quite large enough to give the "business participating" child the company shares, while splitting the non-company assets between your other two children, but you would like to treat them all equally in regard to their inheritances.



By Megan L. M. Lim

A trust can help you direct succession of ownership

One planning technique that could be very helpful to address these issues is a revocable living trust. Establishing a trust to own your company shares could allow your spouse to benefit from the shares for life, while still allowing the child who works in the business to control the company decisions (more on this below). Upon your spouse's passing, the shares could then be split among the children as needed, with the majority of the shares going to your business-participating child. As the shares are transferred to the next generation you can also plan for them to be held in trust to eventually benefit your grandchildren.

Owning your company shares individually can leave a gap in control

A trust can also be critical in helping you plan in the event of incapacity and death, and provide flexibility for tax planning if needed. If you own your business in your individual name, then upon your incapacity or death, it is possible that there is no one who will automatically have the authority to run the business. This void of authority can be stressful for your family and potentially detrimental to the business. If you executed a financial power of attorney to appoint an agent to act on your behalf, your agent can make business decisions for you, but his or her authority will terminate upon your death. Additionally, when you pass away, your shares may need to be probated through the court system which requires time and expense.



A trust can help your business survive an unexpected change of events

If you create a revocable living trust and transfer your company shares to your trust, then as the trustee of your trust, you will continue to control and benefit from your business. You can also appoint a successor trustee to take over for you in the event of your incapacity or death, and your business participating child may be a great person for this role. If you own multiple assets in your trust including non-company assets that you want your spouse to control, you can carve out company assets within your trust to be managed by your child and your spouse can be the successor trustee of your general trust.

A successful plan should coordinate your business succession goals and your estate planning goals

A trust can be utilized along with other planning tools to facilitate the transition of your business. For example, a well drafted buy-sell agreement can address and minimize potential conflicts that may arise when shares are sold among family members. Integrating various disability and life insurance policies can also play a critical role in the larger picture, and it will always be important to review company by-laws and operating agreements for provisions that can impact your plans. Each family is different, and every business is unique. Setting aside the time to create a plan that fits your situation will be a meaningful investment for you and your family.

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DUIs and Visa Revocation: How the State Department's Policy Changes May Impact Your Business or Your Stay in the U.S.

The State Department released to the public on March 14, 2016 its new policy on nonimmigrant visa revocations. This policy change instructs consular officers to prudentially revoke the visas of nonimmigrant visa-holders with a DUI arrest that occurred within the past five years, unless that arrest had been addressed within the context of a visa application.

The Visa Office implemented this requirement for consular officers to prudentially revoke nonimmigrant visas for DUI arrests subsequent to visa issuance because driving under the influence may indicate a possible visa ineligibility under Section 212(a)(1)(A)(iii) of the Immigration and Nationality Act for a possible physical or mental disorder associated with harmful behavior. This requires consular officers to refer any nonimmigrant visa applicant with one alcohol related arrest in the last five years or two or more in the last ten years to the panel physician for a medical examination prior to visa issuance to rule out a medical ineligibility.

Prior to this policy change, there was no consequence for DUI arrests subsequent to visa issuances until the time of the next visa application, which could take up to ten years. The State Department began instructing its consular officers from November 5, 2015 to prioritize nonimmigrant visa holders with DUI arrests and to prudentially revoke visas if an arrest occurred within the past five years, unless the arrest had been addressed within the context of a previous visa application. The State Department is taking DUI arrests seriously as it poses a potential public safety issue as well as possible visa ineligibility.

The consular officer may not revoke your visa while you are in the United States. As part of the revised policy changes, the consular officer may not revoke the visa of an individual believed to physically be in the United States. This means that you may continue to stay in the United States so long as your authorized stay is still valid.



By Kelly Y. Morikone

Once a nonimmigrant visa holder has been arrested for a DUI, the State Department will receive a prudential revocation request from interagency partners or overseas posts. These requests will be reviewed by a visa analyst who will make a preliminary recommendation as to whether the visa should be prudentially revoked and which potential ineligibilities the visa holder may face. This recommendation will be reviewed by the revocations attorney advisor and the final decision will be made by an authorized State Department official. The State Department's prudential revocations do not involve visa eligibility determinations, factual or legal findings; they will only reflect that after the visa was issued, information has surfaced questioning the individual's continued eligibility for a visa.

Once you leave the United States, you may receive notice that your visa has been revoked. This will mean that you will need to apply for a new visa with the consular post and also receive a medical examination by a panel physician to rule out medical ineligibility. Depending on how long this may take, you may not be able to return to the United States right away. You may need to consider who will be operating your business in your absence or how your delay may impact your studies.



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Damon Key Welcomes Megan Lim

New Associate Joins the Firm's Estate Planning & Probate Practice Group

When Megan Lim graduated from Claremont McKenna College in California, she knew she would eventually return to and settle down in Hawaii. But, like so many who grow up in the islands, she desired to experience more of the country before that time came. So, Megan and her husband, Jeremy decided to move to Seattle. Not only is the city vibrant and picturesque, but it is also home to one of a handful of universities that offered the dual degree program she sought.

Inspired during a volunteer stint in college where she saw first-hand how attorneys could play an important role in helping people transition from despair to hope, Megan set her sights on obtaining both a law degree and a concurrent Master in Public Administration degree from the University of Washington School of Law and the Daniel J. Evans School of Public Affairs.

While at law school, Megan worked in the Children and Youth Advocacy Clinic and the Refugee and Immigrant Advocacy Project through the University of Washington Clinical Law Program. She was also a summer intern at a Hawaii law firm and a non-profit management intern with United Way of King County in Washington state. Following law school, she served as a law clerk and bailiff to the Honorable Carol A. Schapira, King County (Seattle) Superior Court and a pro bono attorney with the Northwest Immigrant Rights Project.

As her return to Hawaii neared, Megan decided to refocus her legal career in the area of estate planning and returned to law school for additional coursework in taxation. Soon after, Megan relocated to Hawaii with her husband and three young sons and worked in the Tax, Estate Planning, and Wealth Management practice group at a Honolulu law firm. She joined Damon Key in February 2016.

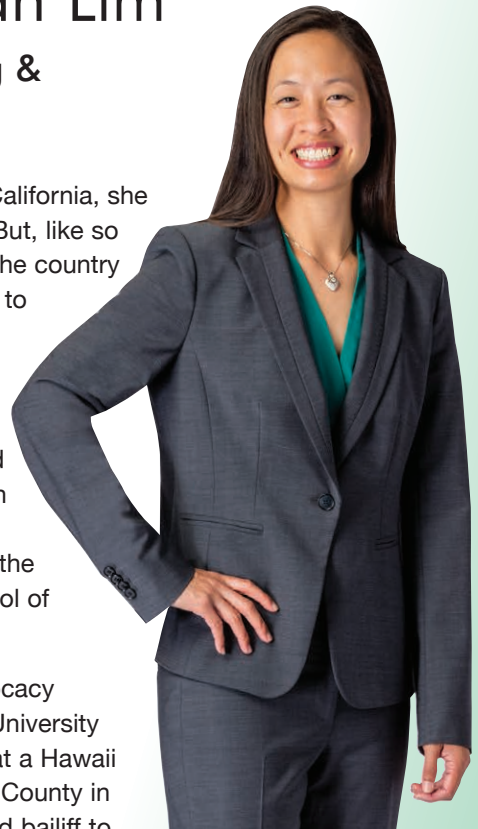
"Estate planning allows me to meet and work with individuals and families around issues that are personal, challenging, and important. It is also an area of law that is relevant to anyone and everyone," said Megan.

"My very first client as an attorney taught me that I could make a difference in someone else's life through my profession. I treasured the personal interactions that we had throughout the duration of the representation when I combined my advocacy skills, law license, and personality to impact my client's life in a positive way. I look forward to assisting Damon Key clients and helping them navigate through challenges and the tough seasons of life," she added.

Megan was born in California, raised on Oahu and attended Punahou School. She grew up in a large extended family and was inspired to focus her law practice in the area of estate planning by the admiration she had for her grandparents who thoughtfully extended their vision, values, and love toward all generations of the family and the community.

Megan earned a B.A. in Government, *magna cum laude*, at Claremont McKenna College. While there, she was the student director of the English as a Second Language Program, providing tutoring sessions for campus employees. She also studied in Thailand through an international education exchange program.

Today, Megan resides in Kailua with her family. She is a member of the Hawaii Estate Planning Council.



Hawaii's 2016 Election – Hanging by a Chad?



By Loren A. Seehase

A case that is about the printing and delivery of ballots and could impact the right to vote is now pending in the Hawaii Supreme Court. The upcoming 2016 election is currently in the justices' hands, after oral arguments in May. Given the fundamental disparity between the presidential candidates, every American is passionate about which direction our country should take and every voice should be heard. Preserving the core of America's greatness—every citizen's constitutionally protected fundamental right to vote—is of the utmost importance.

It started in 2012 when the State of Hawaii Elections Office decided before the general election that the number of ballots printed for each precinct would be based on a percentage of registered voter turnout from prior years, rather than the statutorily-prescribed number of ballots for all registered voters and some additional in case of spoilage. Haw. Rev. Stat. § 11-119(d). The fallout from this decision led to widespread (and well-publicized) deficiencies on election day: seventy calls to the State from fifty-one precincts requesting more ballots, delays several hours long waiting for additional ballots, voters using ballots in other languages, two precincts' ballots were even switched—which resulted in fifty-seven voters' ballots being invalid—and an undetermined number of people left the polls without voting. It also resulted in a lawsuit.

Brought in 2012 by the Green Party of Hawaii, this case has taken nearly an entire election cycle for it to make its way to the Hawaii Supreme Court. *Green Party of Haw. v. Nago*, 137 Haw. 58, 365 P.3d 987 (2015), cert. granted, 2016 Haw. LEXIS 64 (Mar. 10, 2016). The Circuit Court ruled against the Green Party and the Intermediate Court of Appeals affirmed that decision.

But on May 18, 2016, the Hawaii Supreme Court heard oral arguments. The case centers on whether the State wrongly created rules without following the proper procedure required by Hawaii's Administrative Procedure Act, specifically public notice and participation in the creation

of administrative rules. The challengers claim that the State illegally created rules regarding: (1) the method used to determine the number of ballots to be printed; (2) the procedure a precinct is to use

to request more ballots when it runs low and/or runs out of ballots; and (3) the procedure to rectify the situation in the event a precinct receives the wrong ballots and a voter votes on an incorrect ballot. The state claims that its standards for printing and distributing the ballots were merely one-time actions, did not establish policy, and were really internal agency guidelines not rules of general applicability.

In the Supreme Court oral arguments, the State admitted that unfortunate "mistakes were made," and insisted that not printing enough ballots did not infringe on anyone's right to vote. It also promised that these errors would not recur. The State likened its decision to regulate the number of ballots printed to the managerial task of ordering staples for the office. These arguments appeared to not sway the Supreme Court. Despite this promise to do better next time, if left undisturbed by the Hawaii Supreme Court, the lower courts' rulings would not actually require the State to do anything different. Moreover, the infringement of the constitutionally protected fundamental right to vote is not a managerial matter that should be left to the unfettered discretion of public officials without public input. Left unchecked, an agency with unbridled decision-making is ripe for abuse of power and discrimination.

Based on the incessant peppering of questions and the tongue-lashing the State received, it seems unlikely that our highest court will rule in favor of the State. The question is when and how will it rule. Will the decision come in time for this election? If so, what relief will be granted and will it be anything that can help rectify the admitted wrongdoing in time for the November election.



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Commercial Lease: To Assign, Or Not To Assign, That Is NOT The Question



By Megumi Honami

When looking at the panoramic view of the city of Honolulu from our downtown office, I see a forest of cranes and half-built construction. It is no secret that Honolulu's real estate market is hot and commercial leasing is no exception. In the midst of such an upward trend in the real estate market, prospective tenants, especially, should negotiate their commercial leases with caution.

If you are a prospective tenant negotiating a commercial lease with a landlord, prematurely terminating the lease is probably not one of the anticipated events you have in mind. You may be thinking about a laundry list of other important terms for your new venture such as the rent price, duration, restrictions, and option to renew, etc. However, as much as you wish your venture to successfully continue in perpetuity, it is also a reality that there could be any number of circumstances where you as a commercial tenant may have to leave the leased premises before the expiration of the lease. Tenants can minimize the risk of prematurely terminating the lease by ensuring their right to assign the lease or sublease.

Assignment v. Sublease

There are clear distinctions between assignment and sublease. An assignment of a lease is the transfer by a lessee of its entire unexpired term of the leasehold interest to a third party. See *Bush v. Watson* (Haw. 1996). In assignment, an assignee of a lease (a succeeding lessee) will step in the shoes of an assignor (an original lessee) and will be liable directly to the landlord under the existing terms and conditions of the lease. A sublease is a lease executed by the lessee to a third person, conveying the same interest which the lessee enjoys for a shorter term than that of the lessee's. See *id.* Under the sublease, the lessee continues to be directly liable to the landlord, while the sublessee is directly liable to the lessee and to some extent the landlord.

Restraints on Assignability

Under the common law rule, a lease is freely assignable absent an express provision to the contrary. Because leases are freely assignable by default, landlords almost always should include a provision in the lease to restrict assignment and sublease by tenants, by mandating the landlord's consent. Such restraints on the tenant's right to assign or sublease have been subject to close scrutiny by courts. Traditionally, provisions limiting the right to assign a lease are deemed "restraints which courts do not favor. They are construed with the utmost jealousy." *Rowe v. Great Atl. & Pac. Tea Co.*, (N.Y. 1978). Hawaii courts will give effect to a covenant by the lessee not to assign the lease or sublet the premises subject to strict construction. *Food Pantry v. Waikiki Bus. Plaza* (Haw. 1978).



It is a common practice to require the landlord's prior consent to assignment or sublease by the lessee. Often the assignment provision also includes a language restricting the landlord from *unreasonably* withholding its consent. However, what is *unreasonable* must be determined based on relevant facts under the circumstance and is open to the court's interpretation. Because of the ambiguity of the term "unreasonable" along with a lack of Hawaii case laws discussing what constitutes "unreasonable", it is advised to include specific conditions that the lessee must meet in order to obtain the landlord's consent in the assignment clause. Having a carefully-drafted assignment clause will help reduce potential disputes in case the lessee decides to assign the lease to a third-party.

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Legal Alert is published periodically by Damon Key Leong Kupchak Hastert to inform clients of legal matters of general interest. It is not intended to provide legal advice or opinion.

Attorneys in the News



Kumau Pineda-Akiona was selected by the Hawaii State Bar Association to be a 2016 Leadership Institute Fellow. The HSBA Leadership Institute is designed to identify and develop leaders in Hawaii's legal community. The Institute specifically recruits and targets attorneys with 3-15 years of practice who have an interest in expanding their talents and services to the bar and community at large.

Tred R. Eyerly was profiled in *Coverage Opinions*, a monthly insurance coverage newsletter that reports and provides commentary on just-released decisions.

Clare Hanusz is featured in the Spring 2016 issue of the *University of Hawaii, A Magazine for Alumni and Friends*. Clare was interviewed on kids, compassion and controversy in immigration to Hawaii.

Megumi Honami, has started a Japanese-language law blog, "Hawaii Bengoshi," which focuses on legal issues of interest to the Japanese-speaking community. Check it out at: <http://ameblo.jp/808bengoshi>

Christine A. Kubota, was in Tokyo with the HSBA presenting a seminar to the Tokyo Daiichi Bar Association. She presented the best album award at the Na Hoku Hanohano Awards as

the Chair of the Pan Pacific Festival. As Chair of the festival, she opened the three day event on June 10th through June 12th. Christine will be inaugurated as Chair of the Japanese Cultural Center of Hawaii replacing Brennon Morioka starting on July 1st for a two-year term.

Kelly Y. Morikone was elected to serve as Secretary of the American Immigration Lawyers Association, Hawaii Chapter for the 2016-2017 term.

Robert H. Thomas was interviewed by Hawaii News Now on June 2nd on the Thirty Meter Telescope. He was also interviewed by the *Star-Advertiser* for its report "New law could speed process for Thirty Meter Telescope" (May 16, 2016). This reports on a new bill adopted by the Hawaii Legislature which puts certain cases on the appellate fast-track. The bill mandates that in certain cases, any administrative appeals skip the usual first two steps (circuit court, Intermediate Court of Appeals), and go straight from the agency to the Hawaii Supreme Court. The *Star-Advertiser* reported, "Robert H. Thomas, a veteran Honolulu land use and appellate lawyer, said he sees the new law shaving off a year or more of legal sparring on the way to the state's highest court." Read the full story on-line here: <http://bit.ly/1Oxy6l6>.