

JAN 19 2007

S.B. NO. 749

A BILL FOR AN ACT

RELATING TO LABOR.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The Hawaii Revised Statutes is amended by
2 adding a new chapter to be appropriately designated and to read
3 as follows:

4 "CHAPTER

5 EMPLOYEE SIGNATURE AUTHORIZATION

6 § -1 Legislative findings and declarations. (a) In the
7 course of managing real property that it owns, or in otherwise
8 carrying out its functions in the public interest, the State and
9 counties occasionally participate in real property development
10 as a landlord, a proprietor, a lender, or a guarantor, facing
11 the same risks and liabilities as other business entities
12 participating in these ventures. For example, the State and
13 counties sometimes invest or pledge their resources in real
14 estate development projects as a landlord, a lender, or a
15 guarantor, in which case the State or counties have an ongoing
16 proprietary interest in that development, and, thus, have a
17 direct interest in its performance.



1 (b) In these situations, the State and counties must make
2 prudent business decisions, as does any private business entity,
3 to ensure efficient and cost-effective management of their
4 business concerns, and to maximize benefit and minimize risk.
5 One of those risks is the possibility of labor-management
6 conflict arising out of labor union organizing campaigns. This
7 type of conflict can adversely affect the State's or a county's
8 investment in real estate developments or other circumstances in
9 which it has a proprietary business interest by causing delay in
10 the completion of projects, or by reducing revenues or
11 increasing costs of the project when they are completed.

12 (c) These risks are heightened in certain industries, such
13 as the hotel and restaurant industry, because they are so
14 closely related to tourism, which continues to be a mainstay of
15 the State's economy. Labor strife in hotel or restaurant
16 projects in which the State or a county is an investor or other
17 economic participant can jeopardize the operation of related
18 tourist and commercial facilities, as well as the State's
19 national reputation as a tourist and convention destination.

20 To minimize that risk in circumstances where costly labor-
21 management conflict has arisen in the past, the purpose of this
22 chapter is to require that certain specified employers in



1 development projects, as a condition of the State's or a
2 county's economic involvement in a project, shall agree to
3 nonconfrontational and expeditious procedures by which their
4 workers can register their preference regarding union
5 representation.

6 (d) A major potential source of labor-management conflict
7 that threatens the economic interests of the State and counties
8 as a participant in development projects is the possibility of
9 economic action taken by labor unions against employers in those
10 developments when labor unions seek to organize their workers
11 over employer opposition to unionization. Experience of
12 municipal and other investors has demonstrated that organizing
13 drives pursuant to formal and adversarial union certification
14 processes often deteriorate into protracted and acrimonious
15 labor-management conflict. That conflict potentially can result
16 in construction delays, work stoppages, picketing, strikes, and
17 consumer boycotts or other forms of "corporate campaigns" that
18 can generate negative publicity and reduced revenues that
19 threaten the interests not only of the immediate target of these
20 tactics, i.e., the employer, but of other investors in the
21 development, and also the State's and counties' special
22 interests identified in this section.



1 (e) These risks of potential labor-management conflict are
2 particularly acute when labor unions seek to organize workers in
3 certain industries in which labor relations may be contentious
4 and result in protests, boycotts, and other activities which
5 disrupt the business of that industry.

6 (f) In view of these concerns, the legislature deems it
7 necessary to approach with great caution any economic
8 participation in a development project if the State or a county
9 retains a proprietary interest, either as a landlord, a lender,
10 or a guarantor. The legislature finds such a cautious approach
11 to be particularly appropriate given other possible factors
12 present in these developments, such as the State's or a county's
13 sometimes special proprietary interests or other special
14 concerns identified in this section, or their complex financing
15 schemes, the possible use of scarce land resources, as well as
16 the dependence of these projects on public "good will" and the
17 special vulnerability of these projects to consumer boycotts and
18 other actions.

19 (g) One way to reduce the State's and counties' risks
20 where they have a proprietary interest in a project is to
21 require, as a condition of their investment or other economic
22 participation, that employers operating in the project agree to



1 a lawful, nonconfrontational alternative process for resolving a
2 union organizing campaign. That alternative process is a so-
3 called "crosscheck", also known as "card check", wherein
4 employee preference regarding whether or not to be represented
5 by a labor union to act as their exclusive collective bargaining
6 representative is determined based on signed authorization
7 cards. Private employers are authorized under existing federal
8 law to agree voluntarily to use this procedure in lieu of
9 National Labor Relations Board-supervised election procedures.

10 (h) The legislature finds that compliance with these
11 procedures will help to reduce the possibility of labor-
12 management conflict jeopardizing the State's or a county's
13 proprietary interest in a development project. To ensure that
14 crosscheck procedures are required only to the extent necessary
15 to ensure the goal of minimizing labor-management conflict, an
16 employer who agrees to these procedures and performs its
17 obligations under a crosscheck agreement will be relieved of
18 further obligation to abide by those procedures if a labor
19 organization engages in economic action such as striking,
20 picketing, or boycotting the employer in the course of an
21 organizing drive and at a site covered by this chapter.



1 (i) The sole purpose of this chapter is to protect the
2 State's and counties' proprietary interest in development
3 projects covered by this chapter. This chapter is not enacted
4 to favor any particular outcome in the determination of employer
5 preference regarding union representation, nor to skew the
6 procedures in such a determination to favor or hinder any party
7 to such a determination. Likewise, this chapter is not intended
8 to enact or express any generally applicable policy regarding
9 labor-management relations, or to regulate those relations in
10 any way, but is intended only to protect the State's and
11 counties' proprietary interest in certain narrowly prescribed
12 circumstances where the State or a county commits its economic
13 resources and its related interests are put at risk by certain
14 forms of labor-management conflict.

15 § -2 **Definitions.** As used in this chapter, unless the
16 context clearly requires otherwise:

17 "Collective bargaining agreement" means an agreement
18 between an employer and a labor organization regarding wages,
19 hours, and other terms and conditions of employment of the
20 employer's employees. For purposes of this chapter, a
21 collective bargaining agreement does not include a crosscheck
22 agreement.



1 "Crosscheck agreement" means a written agreement between an
2 employer and a labor organization providing a procedure for
3 determining employee preference on the subject of whether to be
4 represented by a labor organization for collective bargaining,
5 and if so, by which labor organization to be represented. The
6 agreement shall provide, at a minimum, the following:

- 7 (1) Employee preference regarding union representation is
8 determined by a crosscheck procedure conducted by a
9 neutral third party in lieu of a formal election;
- 10 (2) All disputes over interpretation or application of the
11 parties' crosscheck agreement, and over issues
12 regarding how to carry out the crosscheck process or
13 specific crosscheck procedures, shall be submitted to
14 binding arbitration;
- 15 (3) The labor organization forbears from taking economic
16 action against the employer at the worksite of an
17 organizing drive covered by this chapter, and in
18 relation to an organizing campaign only (not to the
19 terms of a collective bargaining agreement), so long
20 as the employer complies with the terms of the
21 crosscheck agreement; and



1 (4) Language and procedures prohibiting the labor
2 organization or the employer from coercing or
3 intimidating employees, explicitly or implicitly, in
4 selecting or not selecting a bargaining
5 representative.

6 "Developer" means any person, corporation, association,
7 general or limited partnership, limited liability company, joint
8 venture, or other entity which does or which proposes to
9 purchase, lease, develop, build, remodel, or otherwise establish
10 a development project.

11 "Development project", "development", or "project" means
12 any artificial change to real property that requires a grading
13 or building permit as appropriate, including construction,
14 reconstruction, demolition, expansion, enlargement, alteration,
15 or erection of buildings or structures, in which the State or a
16 county has a proprietary interest.

17 "Economic action" means concerted action initiated or
18 conducted by a labor union or employees acting in concert
19 therewith, to bring economic pressure to bear against an
20 employer, as part of a campaign to organize employees or
21 prospective employees of that employer, including such



1 activities as striking, picketing, or boycotting. A lawsuit to
2 enforce this chapter is not "economic action".

3 "Employer" means any developer, manager/operator, or
4 subcontractor who employs individuals in a development project.

5 "Labor organization" means any organization of any kind, or
6 any agency or employee representation committee or plan in which
7 employees participate, and which exists for the purpose, in
8 whole or in part, of dealing with employers concerning
9 grievances, labor disputes, wages, rates of pay, hours of
10 employment, or conditions of work.

11 "Manager/operator" means any person, corporation,
12 association, limited or general partnership, joint venture, or
13 other entity (including a developer) that operates or manages a
14 facility in a development project, including a hotel or
15 restaurant, or provides any material portion of the services
16 provided by that facility in the project, whether by subcontract
17 or state or county contract.

18 "Proprietary interest" means any nonregulatory arrangement
19 or circumstance in which the financial or other nonregulatory
20 interests of the State or a county in a development project
21 could be adversely affected by labor-management conflict or



1 consumer boycotts potentially resulting from a union organizing
2 campaign, in the following circumstances:

3 (1) The State or county receives significant ongoing
4 revenue, such as rent payments, under a lease of real
5 property owned by the State or county for the
6 development of a project, excluding government fees or
7 tax or assessment revenues, or the like, except for
8 tax revenues under the circumstances specified in
9 paragraph (2);

10 (2) The State or county receives ongoing revenue from a
11 project to pay debt service on bonds or loans provided
12 by the State or county to assist the project,
13 (including incremental tax revenues generated by the
14 project, directly or indirectly, to pay debt service
15 on bonds or to repay a loan by the State or county
16 where the proceeds are used for development of that
17 project); or

18 (3) The State or county has agreed to underwrite or
19 guarantee the development or operation of a project,
20 or loans related thereto.

21 In addition to the circumstances described in paragraphs
22 (1) to (3), the State or county shall be deemed to have a



1 proprietary interest in a project if the State or county
2 determines or an interested party demonstrates prior to the
3 effective date of the subcontract or state or county contract
4 that there is a significant risk that the State's or a county's
5 financial or other nonregulatory interest in a project could be
6 adversely affected by labor-management conflict or consumer
7 boycotts potentially resulting from a union organizing campaign,
8 except that no circumstance or arrangement shall be considered
9 "financial or non-regulatory" under this definition if it arises
10 from the exercise of regulatory or police powers, such as
11 taxation (except as provided in paragraph (2)), zoning, or the
12 issuance of permits and licenses.

13 "State or county contract" means a lease, management
14 agreement, service agreement, loan, bond, guarantee, or other
15 similar agreement to which the State or a county is a party and
16 in which the State or a county has a proprietary interest.

17 "Subcontract" means any lease, sublease, management
18 agreement, or other similar agreement between a developer or a
19 manager/operator and a subcontractor that contemplates or
20 permits the subcontractor to operate or manage all or a portion
21 of a project.



1 "Subcontractor" means any person, corporation, association,
2 limited or general partnership, limited liability company, joint
3 venture, or other entity that enters into a subcontract with a
4 developer or manager/operator.

5 § -3 Policy; requirements and procedures to minimize
6 labor/management conflict when State or county has proprietary
7 interest. (a) The State declares as a matter of general policy
8 that when the State or a county retains or acquires a
9 proprietary interest in a development project, it is essential
10 for the protection of the State's or county's investment and
11 business interests to require that employers operating a project
12 agree to abide by crosscheck procedures for determining employee
13 preference on the subject of labor union representation, as
14 specified in this chapter.

15 (b) Pursuant to the policy stated in subsection (a), the
16 following requirements are imposed, except no employer,
17 developer, or manager/operator shall be responsible for
18 obligations under this chapter if that person or entity is
19 otherwise exempt from those obligations pursuant to
20 section -4(b), or if the State or county does not have a
21 proprietary interest in the project:

22 (1) An employer of employees working in a project shall:



- 1 (A) Enter into a crosscheck agreement, as specified
2 in this chapter, with a labor organization that
3 requests such an agreement for the purpose of
4 seeking to represent those employees before
5 executing the subcontract or state or county
6 contract pursuant to which it will operate a
7 project;
- 8 (B) If the parties are unable to agree to the terms
9 of a crosscheck agreement within sixty days of
10 the commencement of the negotiations, they shall
11 enter into expedited binding arbitration in which
12 the terms of a crosscheck agreement will be
13 imposed by an arbitrator. In those proceedings,
14 to be conducted by an experienced labor
15 arbitrator selected as provided by the rules of
16 the American Arbitration Association or
17 equivalent organization, the arbitrator shall
18 consider any model crosscheck agreement provided
19 by the State or county and prevailing practices
20 and the terms of crosscheck agreements in the
21 same or similar industries, except that the
22 crosscheck agreement shall include the mandatory



1 terms identified in the definition of "crosscheck
2 agreement" under section -2;

3 (C) Comply with the terms of that crosscheck
4 agreement and this chapter; and

5 (D) Include in any subcontract which contemplates or
6 permits a subcontractor to operate or manage a
7 project, or to provide a service essential to the
8 operation of the project, a provision requiring
9 that subcontractor to comply with the
10 requirements provided in this chapter. This
11 subparagraph shall be a material and mandatory
12 term of the subcontract, binding on all
13 successors and assigns, and shall state (modified
14 as necessary to accommodate particular
15 circumstances):

16 "The State Legislature has enacted chapter
17 , Hawaii Revised Statutes, commencing at
18 section -1, which law may apply to
19 [Subcontractor]. Its terms are expressly
20 incorporated by reference hereto. To the extent
21 [Subcontractor] or its successors or assigns
22 employs employees in [this facility] within the



1 scope of that law, [Subcontractor] hereby agrees
2 as a material condition of this [Subcontract] to
3 enter into and abide by a crosscheck agreement
4 with a labor organization or organizations
5 seeking to represent [Subcontractor's] employees,
6 if and as required by that chapter, and to
7 otherwise fully comply with the requirements of
8 that chapter. [Subcontractor] recognizes that,
9 as required by that chapter, it must enter into a
10 crosscheck agreement with a labor organization or
11 organizations as specified by that chapter before
12 executing this [Subcontract], and that being
13 party to such a crosscheck agreement is a
14 condition precedent of rights or obligations
15 under this [Subcontract]."

16 Notwithstanding the requirements provided in
17 subparagraphs (A) to (D), any employer who has in good
18 faith fully complied with those requirements shall be
19 excused from further compliance as to a labor
20 organization which has taken economic action against
21 that employer at that site in furtherance of a
22 campaign to organize that employer's employees at that



1 site for collective bargaining. This paragraph shall
2 not be interpreted, however, to apply to economic
3 action against an employer at other locations where
4 that employer does business, or at any location for
5 purposes other than organizing the employer's
6 employees; nor shall economic action by one labor
7 organization excuse an employer from the obligations
8 of this chapter or a crosscheck agreement as to a
9 different labor organization;

10 (2) Any developer or manager/operator of a project shall:

11 (A) To the extent it employs employees in a hotel or
12 restaurant in a hotel or restaurant project,
13 abide by the requirements stated in this
14 subsection;

15 (B) Include the provision specified in paragraph
16 (1)(D) in any subcontract, modified as necessary
17 to accommodate the circumstances of that
18 particular subcontract;

19 (C) Refrain from executing a subcontract by which an
20 employer subject to paragraph (1) is authorized
21 or permitted to operate a project until that
22 employer has agreed to enter into any crosscheck



1 agreement with a labor organization required by
2 paragraph (1);

3 (D) Notify local labor councils and any employers
4 that will operate a project that may be subject
5 to the requirements of paragraph (1), as soon as
6 the developer or manager/operator identifies that
7 project or employer, but in no event later than
8 twenty-one days before requiring an employer to
9 sign a subcontract. This notification
10 requirement applies only where the State's or
11 county's proprietary interest is based on a
12 lease, loan, or guarantee;

13 (E) Inform any prospective subcontractor that if the
14 subcontractor acts as an employer subject to the
15 requirements of paragraph (1), it must agree to
16 enter into a crosscheck agreement pursuant to
17 this chapter before it may execute the
18 subcontract, and as a condition precedent to any
19 rights or obligations under that document;

20 (F) Take reasonable steps to enforce the terms of any
21 subcontract requiring compliance with this
22 chapter. To the extent a developer or



1 manager/operator is found to have intentionally
2 aided, abetted, or encouraged a subcontractor's
3 failure to comply with a provision or the terms
4 of this chapter, either by action or inaction,
5 that developer or manager/operator shall be
6 jointly and severally liable for all damages
7 awarded pursuant to section -5; and

8 (3) (A) Any state or county contract executed under the
9 authority of any commission, department,
10 authority, or officer of the State or county,
11 which contemplates the use or operation of a
12 development project shall include a provision
13 requiring that any developer or manager/operator
14 of a project pursuant to that state or county
15 contract, and any employers operating in the
16 project, agree to comply with the requirements
17 imposed in paragraphs (1) and (2), as essential
18 consideration for the State or county entering
19 into the contract;

20 (B) To facilitate the requirements imposed by this
21 section, the attorney general may provide a model
22 recommended crosscheck agreement that includes



1 the mandatory terms identified in the definition
2 of "crosscheck agreement" in section -2 and
3 that provides the maximum protection against
4 labor-management conflict arising out of an
5 organizing drive, and make the model recommended
6 agreement available to parties required to enter
7 into the agreement. The State or county may also
8 prepare guidelines establishing standards and
9 procedures related to this chapter.

10 Notwithstanding this subparagraph regarding the
11 preparation of a model crosscheck agreement or
12 related guidelines, this chapter shall be self-
13 executing and shall apply in all circumstances
14 and to the extent provided in this chapter, in
15 the absence of or regardless of a model
16 crosscheck agreement or guidelines; and

17 (C) Any commission, department, authority, or officer
18 of the State or county that issues a request for
19 proposals, invitation to bid, or similar document
20 regarding development of state or county property
21 that could result in a proposal contemplating
22 operation of a project after the effective date



1 of this chapter shall include in that document a
2 summary description of and reference to the
3 policy and requirements of this chapter. Failure
4 to include a description or reference to this
5 chapter in a request for proposals or similar
6 document shall not exempt any developer,
7 manager/operator, or employer from the
8 requirements of this chapter.

9 (c) The policy and obligations established in this section
10 shall apply to particular developers, manager/operators, and
11 employers whenever the State or county has a proprietary
12 interest in a project, except as otherwise provided in this
13 chapter. The determination whether or not the State or county
14 has a proprietary interest in a project, and if so, whether an
15 exemption applies under section -4(b), shall be made on a
16 case-by-case basis by the attorney general on behalf of the
17 State or the corporation counsel or county attorney on behalf of
18 the county, by applying the standards and principles described
19 in this chapter and any standards and principles provided in
20 guidelines distributed pursuant to this chapter. Any party
21 otherwise subject to the terms of this chapter because the State
22 or county has a proprietary interest in a project, that claims



1 an exemption from the terms of this chapter under section -4,
2 shall have the burden of demonstrating that the basis for the
3 exemption is clearly present.

4 § -4 **Scope and exemptions.** (a) The requirements of
5 this chapter apply only to the procedures for determining
6 employee preference regarding whether to be represented by a
7 labor organization for purposes of collective bargaining, or by
8 which labor organization to be represented. This chapter does
9 not apply to the process of collective bargaining in the event a
10 labor organization has been recognized as the bargaining
11 representative for employees of employers subject to this
12 chapter. Nothing in this chapter requires an employer or other
13 entity subject to this chapter to recognize a particular labor
14 organization; nor does this chapter require that a collective
15 bargaining agreement be entered into with any labor
16 organization, or that an employer submit to arbitration
17 regarding the terms of a collective bargaining agreement.

- 18 (b) The requirements of this chapter shall not apply to:
19 (1) Employers employing fewer than the equivalent of fifty
20 full-time or part-time employees;
21 (2) Employers commencing operation in a project before the
22 effective date of this chapter, or a project under any



1 subcontract or state or county contract entered into
2 before the effective date of this chapter
3 (hereinafter, a "pre-existing agreement"). This
4 exemption applies to an employer and to the employer's
5 family for the duration of the pre-existing agreement,
6 unless it is amended during its term resulting in a
7 substantial amendment. This exemption shall apply
8 beyond the expiration of the pre-existing agreement if
9 it is renewed or extended without a change in
10 ownership of the employer, and without changes
11 resulting in a substantial amendment. For purposes of
12 this exemption:

13 "Change in ownership" means a change in
14 ownership, from the effective date of this chapter, of
15 twenty-five per cent or more, unless the change is
16 among members of the same family.

17 "Substantial amendment" to a pre-existing
18 agreement means an amendment to or renewal or
19 extension of a pre-existing agreement that provides
20 for or permits a change in use within the scope of
21 this chapter, or an increase in square footage,
22 seating, or rooms of more than twenty-five per cent.



1 This chapter shall not be interpreted to impair
2 the obligations of any pre-existing agreement to which
3 the State or county is a party, unless the pre-
4 existing agreement has been substantially amended
5 after the effective date of this chapter;

6 (3) Any employer who is a signatory to a valid and binding
7 collective bargaining agreement covering the terms and
8 conditions of employment for its employees at that
9 project, or who has entered into a crosscheck
10 agreement with a labor organization regarding those
11 employees, which provides at least equal protection
12 from labor-management conflict as provided by the
13 minimum terms provided in the definition of
14 "crosscheck agreement" in section -2;

15 (4) Any project where the attorney general on behalf of
16 the State, or the corporation counsel or county
17 attorney on behalf of the county, determines that the
18 risk to the State's or county's financial or other
19 nonregulatory interest resulting from labor-management
20 conflict is so minimal or speculative as not to
21 warrant concern for the State's or county's
22 proprietary interest;



1 (5) Any project where the developer, manager/operator, or
2 employer, is an agency of the federal government or a
3 statewide agency or entity ("public agency") and that
4 public agency would prohibit application of this
5 chapter; or

6 (6) Any project where the requirements of this chapter
7 would violate or be inconsistent with the terms or
8 conditions of a grant, subvention, or agreement with a
9 public agency related to that project, or any related
10 rules.

11 § -5 **Enforcement.** (a) The requirement that employers
12 enter into and comply with crosscheck agreements with labor
13 organizations in the circumstances provided in this chapter, and
14 the requirement that developers and manager/operators
15 contractually obligate their successors, assigns, or
16 subcontractors to be bound by the crosscheck agreement
17 requirement, are deemed essential consideration for the State's
18 or county's agreement to any state or county contract containing
19 the crosscheck agreement requirement.

20 (b) The State or county shall investigate complaints that
21 this chapter has been violated or that a crosscheck provision
22 included in a state or county contract or subcontract pursuant



1 to this chapter has been breached, and may take any action
2 necessary to enforce compliance, including instituting a civil
3 action for an injunction and specific performance.

4 (c) In the event the State or county brings a civil
5 enforcement action for a violation of this chapter, any taxpayer
6 or any person or association with a direct interest in
7 compliance with this chapter may join in that enforcement action
8 as a real party in interest. In the event the State or county
9 declines to institute a civil enforcement action for a violation
10 of this chapter, a taxpayer or directly interested person or
11 association may bring a civil proceeding on its own behalf and
12 on behalf of the State or county against that employer and seek
13 all remedies available for a violation of this chapter and
14 breach of a crosscheck agreement required by this chapter
15 available under state law, including monetary, injunctive, and
16 declaratory relief. In view of the difficulty of determining
17 actual damages incurred by such a violation, liquidated damages
18 may be awarded at the rate of \$1,000 per day of violation, to be
19 distributed equally between a private plaintiff, if any, and the
20 general fund of the State or county, unless the liquidated
21 damages award is found to be so excessive in relation to the
22 violator's resources as to constitute a penalty.



1 (d) Any action challenging the applicability of this
2 chapter to a particular employer may be brought only after first
3 seeking an exemption pursuant to section -4, and shall be
4 commenced within sixty days after notification that the
5 exemption has been denied by the State or county.

6 (e) In no event shall the remedy for a breach of the terms
7 of this chapter include termination of any such state or county
8 contract or subcontract, nor shall any such breach defeat or
9 render invalid or affect in any manner whatsoever the status or
10 priority of the lien of any mortgage, deed of trust, or other
11 security interest made for value and encumbering any property
12 affected by the subcontract or state or county contract,
13 including, without limitation, any leasehold estate or other
14 interest in the property or improvements on the property."

15 SECTION 2. If any provision of this Act, or the
16 application thereof to any person or circumstance is held
17 invalid, the invalidity does not affect other provisions or
18 applications of the Act, which can be given effect without the
19 invalid provision or application, and to this end the provisions
20 of this Act are severable.



1 SECTION 3. This Act shall take effect upon its approval.

2

INTRODUCED BY:

Ray L. Hoan



Report Title:

Crosscheck Requirements; Labor Representation

Description:

Establishes labor representation procedures in developments in which the State or counties have an ongoing proprietary interest.

