

September 19, 2016

Trinette Furtado
342 Kulike Road
Haiku, HI 96708

(via U.S. Mail and e-mail)

Linda Chu Takayama
Director
Department of Labor and Industrial Relations
Keelikolani Building
830 Punchbowl Street
Honolulu, HI 96813

Re: Widespread Violations of Hawaii's Labor Laws in the Longline Fishing Industry

Dear Director Takayama,

I write to you today to complain about widespread violations of Hawaii's labor laws within the longline fishing industry. Unlike reputable native Hawaiian and other local fishing outfits, these labor violations oppress workers, deceive consumers and undercut competition within the market.

These practices also violate the Kānāwai Māmalahoe, the Law of the Splintered Paddle, which has been adopted at Article IX, Section 10 of the Hawai'i State Constitution. The Kānāwai Māmalahoe specifically states that all people have the freedom of movement “a moe i ke ala, ‘a‘ohe mea nāna e ho‘opilikia.” [and to sleep by the road without fear of problem/harm]. These unfair and illegal labor practices violate this ancient Hawaiian law protecting the rights of the common person, specifically the vulnerable foreign workers that are exploited by the longline fishing industry.

The longline fishing industry is composed of fishing vessels which engage in fishing and fishing related activities including transportation of products and housing of foreign fish workers with the territorial waters of the State of Hawai'i, use of state resources managed by the Department of Land and Natural Resource and Harbors Division of the Department of Transportation's controlled and operated state harbors. They unload their products in Honolulu where they are sold and enter into the Hawai'i market and beyond.

As has been reported previously and recently in the press, many longline fishing boat

owners use labor recruiters to recruit fish workers from Third World countries. These workers come from subsistence or other impoverished backgrounds and typically have no formal training as seafarers and are not merchant marines. They also have no familiarity with Hawai'i wage and other labor laws. For this reason, they are generally ineligible to admission into the United States under the non-immigrant provisions of the federal Immigration and Naturalization Act, even for a short period of time. Instead, using an obscure practice of the Department of Homeland Security, employers obtain standard deportation forms from Homeland Security which require that these workers be "detained-on-board" by the boat owner and/or captain. The Harbor Master of the O'ahu Division, under the Department of Transportation, has provided a guidance document for boat owners/employers regarding how those with "detained-on-board" designation are to be handled at the various piers that have the infrastructure to comply with Homeland Security's protocols.

Individuals employed in these enterprises generally are told they will be paid \$300/month for a twenty-four month term. For some boats, these contracts are written, in others, they are oral. However, in this general example, \$100/month is deducted to give the labor recruiter and the remainder is kept by the boat owner until the end of the term, many deducting meal and other expenses from the amounts. Some boat owners claim to remit a nominal sum to the worker's family at monthly or other intervals. We have come across no evidence that these workers are paid weekly or bi-weekly and that they are not given any documentation on a regular basis regarding their wages and deductions. Many only receive a breakdown when they are terminated or they return home at the end of the term.

These employers discriminate against workers on the basis of race/national origin. They do not contribute to unemployment insurance and do not provide mandatory prepaid health care insurance.

Every boat owner and captain is required to obtain a commercial marine license from the Division of Aquatic Resources of the Department of Land and Natural Resources. Additionally the Harbor Master of the O'ahu Division in its "Harbor Master's Notice, Oahu District, HMN-O-02-12" dated November 1, 2012 entitled "Relating to Pier 16-18 and Piers 36-38 Compliance with Federal, State and County Laws" indicated that it was adopting certain security measures to "ensure that persons identified by DHS as "Detained-on-board (DOB)" remain onboard the

vessel and authorized areas of the pier at all times without exception” The Division of Aquatic Resource has historically provided boat owners and captains with the DHS deportation form blanks and is provided copies of the forms when they have been approved by DHS.

These documents we are providing are not inclusive of every boat that has engaged in this scheme of failing to comply with Hawaii's wage laws. However, it is our contention based upon experience working with survivors of human trafficking in this industry that every boat that obtains “detained-on-board” deportation papers for its workers is not compliant with Hawaii's wage laws based upon nearly identical facts described above.

The Division of Aquatic Resources and the Harbors Division should be able to readily identify every boat/employer, beyond those named in the documents enclosed, that maintains a presence in Hawai'i waters and at Hawai'i harbors that has on board persons who have been designated as “detained-on-board.”

Hawaii Wage and Hour Law

We believe that the Wage Standards Division has jurisdiction over these matters. State wage laws which provide workers with more protections do not conflict and are not preempted by federal law or maritime law for workers that work within the territorial waters of a state or the high seas adjacent to the state's coast. See *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409 (9th Cir.1990), cert. denied, 504 U.S. 979 (1992)

These boat owners are “employers” within the meaning of HRS 387-1(6) and the workers on these ships are “employees” within the meaning of HRS 387-1(5).¹ These workers are being

¹ The Hawaii Labor Standards Act was first adopted during the 1941 Special Session, as Act 66. Then employee exemption category no. 6 (now exemption no. 7) was patterned from the original exemption of Section 209(b)(14) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Public Law 75-718, 52 Stat. 1060) which exempted individuals as well as officers and crew members of fishing vessels. However, the territorial legislature omitted the language that included crew members of a fishing vessel. They were instead covered under employee exemption category no. 8. In 1941, the common definition of “seaman” included all those employees working on a fishing vessel.

“It is directed to extension not to restriction. There are many employees aboard vessels in navigation whose status has not been judicially defined by the courts. Modern passenger liners carry elevators operators, beauticians, cruise directors, printers, entertainers, etc., who do their share in keeping the business of a large vessel going and who are

paid less than the minimum wages required by HRS 387-2. These workers are working more than the maximum hours without being compensated at one and one-half times their regular rate and therefore less than one and one half times the minimum wages required by HRS 387-3. These workers who are of foreign national origin are paid different wages than workers on the same boat as American citizen and a different race, practices in violation of HRS 378-2 and 387-4.

undoubtedly engaged in commerce. The test of whether one is a seaman lies in the answers to these questions: (a) is the vessel in navigation; (b) is there more or less permanent connection with the vessel, as distinguished from a visitor or a passenger; and (c) are the services rendered maritime in character.” *Uravic v. F. Jarka Co*, 282 U.S. 234 (1931)

“If they show that the appellant was a fisherman, they do not controvert that he was a seaman... A seaman is one whose occupation is to navigate vessels upon the sea. The term includes all those on board whose labor contributes to the accomplishment of the main object in which the vessel is engaged.” *Osland v. Star Fish & Oyster Co*, 107 F.2d 113 (5th Cir, 1939)

“As presently employed, a seaman is not a mariner in the full sense of the word — a person "who can hand, reef, and steer." Changing conditions, and necessities for changes, extended the term to include all persons employed in a vessel to assist in the main purpose of the voyage. Clearly, the main purpose of the voyage was to pack and salt fish.” *The Z R-3*, 18 F.2d 122 (W.D. Wash., 1927)

Comparing the language of the former exemption no. 6 (now exemption no. 7) with exemption no. 8, it is clear that those working on land involved in fishing were exempted under no.6 while those working on fishing boats were intended to be covered by exemption no. 8. “[W]e must assume that the legislature would not enact superfluous language[.]” *Heatherly v. Hilton Hawaiian Village Joint Venture*, 78 Haw. 351, 893 P.2d 779 (1995) See also *In re Water Use Permit Applications*, 94 Haw. 97, 151, 9 P.3d 409, 463 (2000) (explaining that “where the legislature includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislature acts intentionally and purposely in the disparate inclusion or exclusion.”)

In 2005, the legislature passed Act 240 which narrowed class of employees exempted in exemption no. 8 from “as a seaman” to “as an employee on a ship or vessel who has a Merchant Mariners Document issued by the United States Coast Guard” clarifying, in non-gender specific language – that the only “seamen” which were entitled to the exemption from the wage standards law were bona fide merchant marines. Hse. Stand. Comm. Rep. No. 1182 in 2005 House Journal at 1504.

“[Wage Standards Acts have been] designed to extend the frontiers of social progress by

The employers do not keep records on these boats required by HRS 387-6(a) and do not post notices required by HRS 387-6(b) and 388-7(4). As described above, many employees do not receive a legible notice, written or electronic, describing the breakdown of gross and net pay as required by HRS 387-6(c).

The employers withhold wages that are not required to be withheld by federal or state statute or by court process and have in some instances included fines, penalties or replace costs for breakage in violation of HRS 388-6. Employers do not notify employees in writing and the time of hiring or by posting notice in a place accessible to employees or any changes thereafter the rate of pay along with the day, hour and place of payment, policies regarding vacation and sick leave required by HRS 388-7(1)-(3).

These recruiters constitute “employment agenc[ies]” as defined by HRS 373-1 but are not licensed as required by HRS 373-2. From the face of the contracts we are providing, it appears that the employers are aware that they are withholding wages in violation of multiple subsections of HRS 373-11 in addition to HRS 388-6.

insuring to all our able-bodied working men and women a fair day's pay for a fair day's work. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of [the legislature]. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people. *Phillips v. Walling*, 324 U.S. 490 (1945) (citations omitted)

See also *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290 (1959) “It is well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed.”) In short, it is not customary in the fishing industry for a vessel to have two crews, one engaged in fishing and one to operate the boat. The original 1941 modification of the FLSA exemption language for fishing activities was not intended to cover seamen.

Looking at the broader fisherfolk and fishing vessel crew exemption in FLSA, two amendments were proposed to exempt the “fishery industry” as a whole from the original FLSA (83 Cong. Rec. 7408 and 7421-23). Those amendments were defeated and in its place were specific persons. (83 Cong. Rec. 7443) Federal courts and the Department of Labor see the fisherfolk exemption as depending upon “the employment of the particular employee in the specified activities.” Hawaii's exemptions were narrow and with the 2005 amendment have further narrowed.

Hawaii Employment Security Law

The boat owners are employers/”employing units” within the meaning of HRS 383-1, the work performed by the workers is “employment” as defined by HRS 383-2 and their work is not excluded from the definition of employment under HRS 383-7. Based upon information and belief, employers do not make contribution as required by HRS 383-61. These employers do not keep work records and does not report any new employees hired and does not furnish your Department with wage information for each employee as required by HRS 383-94. Contributions are required to be made regardless of whether the Unemployment Insurance Division determines later that particular employees are ineligible to work. HRS 383-3 (“Notwithstanding any other provisions of this section, the term employment also includes all service performed after June 30, 1946, by an officer or member of the crew of an American vessel on or in connection with such vessel, provided that the operating office from which the operations of the vessel operating on navigable waters within or within and without the United States is ordinarily and regularly supervised, managed, directed, and controlled, is within this State.”)

Hawaii Prepaid Health Care Law

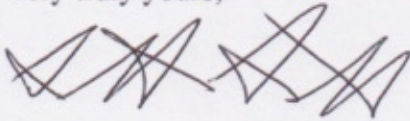
The boat owners are employers within the meaning of HRS 393-3, the work performed by the workers is “employment” as defined by HRS 393-3 and not excepted by HRS 393-4, 393-5 or 393-17. Because the employers unlawfully pay their workers less than the minimum hourly wages required under Chapter 387, HRS, and for which they are not otherwise exempted, they are subject to the mandate to cover their regular employees pursuant to HRS 393-11 and any evasion of the requirement due to unlawful payment of wages below the minimum wages requirement does not defeat the mandate.

We therefore request that the department's Wage Standards Division, Unemployment Insurance Division, Disability Compensation Division and Hawaii Civil Rights Commission investigate the allegations made herein pertinent to their respective jurisdictions. I am also copying the Regulated Industries Complaints Office because of the clear involvement of unlicensed employment agencies involved in this scheme.

It must be remembered that the workers on these boats do not have lawful travel documents and are not lawfully permitted to enter the United States while they are held on board the ships they are employed in, at the secured piers. Their employers have obtained deportation documents from the Department of Homeland Security that require that they be deported should they leave their ship. They lack a personal ability to report these violations to your Department and in many instances have tremendous pressures on them not to report violations.

Please do not hesitate to contact me if you have any additional questions.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Trinette Furtado', with a stylized, cursive script.

TRINETTE FURTADO

enclosures

- c: Pamela Martin, Administrator, Wage Standards Division (via e-mail)
Linda Uesato, Administrator Unemployment Insurance Division (via e-mail)
William D. Hoshijo, Executive Director, Hawaii Civil Rights Commission (via e-mail)
Nadine Yokomichi-Teramae, Investigation Unit, Disability Compensation (via e-mail)
Daria A. Loy-Goto, Complaints and Enforcement Officer, RICO (via e-mail)

The following is a list of names of boats, employer, captains and unlicensed employment agencies:

Boats

F/V QUYNH VY
F/V CAPT KENNETH
F/V CAPT MILLIONS
LADY MOCHA II
FV JAXONT
FV CAPT VINCENT
F/V HAWAII POWER

Employer

QUYNH VY CORP
REAGAN NGUYEN
THANH H NGUYEN
BRIAN NGUYEN
VAK FISHERIES LLC
NANCY TAM NGUYEN
NGA VAN LE
KHANG DANG

Captain

LUONG THIEN VIET
DENNIS PAUL CRAWFORD
ABRAHAM CARROL
REAGAN NGUYEN

Unlicensed Employment Agency

LAVINIA TEEM
JACOB TEEM
DOJIN SHIPPING AGENCY

**HARBOR MASTER'S NOTICE
OAHU DISTRICT
HMN-O-02-12
1 November 2012**

RELATING TO PIER 16-18 AND PIERS 36-38
COMPLIANCE WITH FEDERAL, STATE AND COUNTY LAWS

In coordination and partnership with the U.S. Department of Homeland Security (DHS), the Department of Transportation, Harbors Division (DOTH) will implement security measures to control access into and out of Piers 16-18 and Piers 36-38. The security measures are deployed to:

- Ensure that persons identified by DHS as “detained-on-board (DOB)” pursuant to *8CFR 252.1g* remain onboard the vessel and authorized areas of the pier at all times without exception.
- Ensure compliance with Hawaii Administrative Rules (HAR), Chapter 19-42 and 19-43.

A person designated by DHS as a DOB and leaves the U.S. flagged vessel without DHS authorization places the vessel’s Captain and Owner at risk and liable for the actions of their crew and subject to DHS penalties and fines for the actions of their crew. DOTH recognize the unauthorized action and into the community is a security risk. The DOTH provides notice that only persons authorized by the Vessel Captain or Vessel Owner with a legitimate business reason to service their vessels and/or vehicles with permits to park in marked stalls shall be allowed to enter the authorized area.

In addition, securing the facility deters illegal dumping of environmental hazardous waste, white goods (e.g. stoves and refrigerators), and improperly disposed pollutants from entering its waste bins, water and land areas around Piers 16-18 and Piers 36-38.

In the judgment and authority of the HARBOR MASTER, this Notice is necessary to ensure compliance with the following HAR at the commercial harbor facilities:

- *Chapter 42, Rules Relating to Vessel and Harbor Controls*
 - *Subchapter 1, General Provisions, §19-42-15, Compliance with federal, state, and county laws, ordinance and rules, 19-42-14, Inspection of vessels, 19-42-18, Requirement for a local, 24-hour point of contact;*
 - *Subchapter 2, Small Craft and Smaller Commercial Vessels, §19-42-50, Inspection; and,*
 - *Subchapter 4, Safety, Cleanliness, and Use of Facilities §19-42-101 through 141, as appropriate.*
- *Chapter 43, rules Relating to Motor Vehicles*
 - *Subchapter 1, General Controls, §19-43-2, Jurisdiction of harbor master over vehicles, §19-43-3, Licensing, safety inspection and insurance, §19-43-4, Operation of Vehicles, §19-43-5, Traffic Controls, and §19-43-8, Ground Transportation,*
 - *Subchapter 2, Parking, §19-43-23, Reserved parking stall.*

The HARBOR MASTER lawfully orders the following to be effective Thursday 0900, November 1, 2012:

HARBOR MASTER ORDERS

All persons, crew or master of a vessel within the jurisdiction of the HARBOR MASTER pursuant with Title 19, Chapter 42 and persons servicing the vessels and operating a vehicle pursuant to Title 19, Chapter 43, shall comply with the lawful order, notice, signal or direction of the State Security Guard and State Law Enforcement Officer (Harbor Police) as provided herein:

1. **COMPLIANCE WITH FEDERAL, STATE, AND COUNTY LAWS, ORDINANCES AND RULES.** Use of state harbors and harbor facilities is subject to compliance with all applicable federal, state or county laws, ordinances, rules, and regulations (§19-42-15, HAR). *8CFR 252.1g* requires crewman not properly documented be detained on board the vessel. Compliance with *8CFR 252.1g* will be enforced.
2. **INSPECTION OF VESSELS.** Vessels using state facilities may be inspected for the purposes of either ascertaining the kind and quantity of cargo thereupon or to insure the safety, welfare, and health of the general public (§19-42-14, HAR) and at any time where necessary and proper for the purpose of enforcing these rules (§19-42-50, HAR). Inspections may be conducted to enforce Subchapter 4 (§19-42-101 through 141, HAR, as appropriate)
3. **REQUIREMENT FOR A LOCAL, 24-HOUR POINT OF CONTACT.** For purposes of verifying persons and vehicles having a legitimate business purpose and to provide access without undue delay to Piers 16-18 and Piers 36-38, Vessel Captains and Vessel owners shall provide a 24-hour point of contact (§19-42-18, HAR). Vehicles or persons will not be allowed access into Piers 16-18 and Piers 36-38 without authorization from the Vessel's Captain or Vessel owner. The DOTH is not responsible for any costs or delays in vessel operations due to delays in receiving authorization from the Vessel's Captain, Vessel owner or designated 24-hour point of contact for access into Piers 16-18 and Piers 36-38.
4. **JURISDICTION OF HARBOR MASTER OVER VEHICLES.** Vessel Captains and Vessel owners are notified that only vehicles and vehicle operators properly licensed, permitted, or registered to operate on the public roads and the DOTH commercial harbors pursuant to federal, state, and county laws and ordinances (§19-43-2, Jurisdiction, §19-43-3, §19-43-4 , §19-43-5, §19-43-8, §19-43-22 through §19-43-26, HAR) and authorized shall be allowed access into Piers 16-18 and Piers 36-38.
 - *Vehicles may be issued a permit to park in marked stalls as authorized in writing by the Harbors Division, only as necessary and or verified by Captain or Vessel owner.*
 - *Any and all vehicles that park on piers 16-18 must display a parking permit without exception.*
 - *Personnel may park their vehicles in marked stalls, on a space available basis, not to exceed 12 hours.*
 - *If no space is available, the vehicle shall exit the facility.*
 - *Vehicles with a Special Permit Parking ("X" decal) is authorized to park next to vessels for active loading and unloading only and not to exceed one hour. Times of entry into the pier will be logged by the gate sentry.*
 - *Vehicles with proper work permits may be authorized to park beyond 1 hour as provided in the work permit only as necessary to complete the contracted work.*
 - *No overnight parking is allowed.*

5. Violators of the above state rules may be a) issued a citation with the notice of appeal to the District Court; or have the privilege of parking removed not to exceed one year.

Your cooperation in complying with the above access control procedure and federal, state, and county laws is requested. This notice is applicable to Piers 16-18 and Piers 36-38.



October 30, 2012

DAVIS K. YOGI

Date

Harbor Administrator/Acting Oahu District Manager