

Honolulu, Hawaii

MAR 06 2015

RE: S.B. No. 1219
S.D. 2

Honorable Donna Mercado Kim
President of the Senate
Twenty-Eighth State Legislature
Regular Session of 2015
State of Hawaii

Madam:

Your Committee on Commerce and Consumer Protection, to which was referred S.B. No. 1219, S.D. 1, entitled:

"A BILL FOR AN ACT RELATING TO EMPLOYMENT SECURITY,"

begs leave to report as follows:

The purpose and intent of this measure is to:

- (1) Allow the Department of Labor and Industrial Relations to set criteria for independent contractor status by rule;
- (2) Establish criteria for when the Department of Labor and Industrial Relations shall presume an individual is an independent contractor;
- (3) Enable the Department of Labor and Industrial Relations to certify independent contractors and permitting independent contractors to provide a written copy of that certification to each customer; and
- (4) Place the burden of proving an employer-employee relationship exists on the certified independent contractor if the contractor files an unemployment insurance benefits claim against a customer.

Your Committee received testimony in support of this measure from the National Federation of Independent Business; Chamber of Commerce Hawaii; Society for Human Resources Management, Hawaii



Chapter; The Wright Company, LLC; Marry Me Maui Wedding Planners; and four individuals. Your Committee received testimony in opposition to this measure from the Department of Labor and Industrial Relations; International Longshore and Warehouse Union, Local 142; Hawaii Regional Council of Carpenters; Hawaii State AFL-CIO; and one individual. Your Committee received comments on this measure from the Department of the Attorney General; Maui Chamber of Commerce; Hawai'i Association of REALTORS; Whalers Realty Management Company, Inc.; Synergy Asia Pacific; Melanie Turner Landscape Maintenance LLC; T.M.C. General Contracting, Inc.; Star Gaze Hawaii; Envisions Entertainment & Productions, Inc.; Von Baron Music LLC; Kika, Inc.; The Maui Closet Company; Whalers Realty Inc.; and thirteen individuals.

Your Committee finds that increasing numbers of individuals face decisions regarding whether to choose to become entrepreneurs and go into business for themselves or remain in employment relationships and maintain the protections afforded by various labor laws, including Hawaii's employment security law. Your Committee further finds that many of these individuals may not be aware of the criteria used by the Department of Labor and Industrial Relations when making determinations as to whether an individual is in an employment relationship or is a bona fide independent contractor. Your Committee notes that unlike an employee in a traditional employer-employee relationship, independent contractors have no expectation of benefits that would normally accrue from an employer-employee relationship. Independent contractors must also obtain a current general excise tax license and pay all applicable taxes.

Your Committee has heard the concerns that this measure replaces the criteria commonly referred to as the "ABC test" in section 383-6, Hawaii Revised Statutes, with new criteria for independent contractor certification, including certification as an independent contractor from the Department of Labor and Industrial Relations. Your Committee has also heard the concerns that this measure places the burden of proof on workers to establish that they are employees and not independent contractors if the workers file for unemployment benefits, which does not conform to certain provisions of the federal Social Security Act.

Your Committee concludes that amendments to this measure are necessary to address certain conformity issues raised in testimony and to provide better guidance and clarity regarding the criteria used to determine independent contractor status, while also



preserving the Department of Labor and Industrial Relations' discretion to make employment coverage determinations.

Accordingly, your Committee has amended this measure by:

- (1) Restoring existing language under section 383-6, Hawaii Revised Statutes, relating to the three-pronged set of criteria commonly known as the "ABC test";
- (2) Clarifying that an employer and employee relationship exists unless and until it is shown to the satisfaction of the Department of Labor and Industrial Relations that, in the Department's determination, a preponderance of twenty factors has been met;
- (3) Replacing the criteria that, if met, would require the Department of Labor and Industrial Relations to presume an individual is an independent contractor with twenty factors to serve as guidelines for determining whether an individual could be deemed an independent contractor, noting that the degree of importance of each factor may vary depending on the occupation and the individual facts of each case, as determined by the Department of Labor and Industrial Relations, and noting that a preponderance of the factors may indicate a worker is an independent contractor;
- (4) Inserting a definition of "client";
- (5) Inserting a definition of "independent contractor" and noting that an independent contractor has no expectation of benefits that would normally accrue from an employer-employee relationship and is responsible for obtaining a current general excise tax license and paying all applicable taxes;
- (6) Deleting language that would have enabled the Department of Labor and Industrial Relations to certify independent contractors and allowed independent contractors to provide a written copy of that certification to each customer;
- (7) Deleting language that would have placed the burden of proving an employer-employee relationship on the certified independent contractor if the contractor files



an unemployment insurance benefits claim against a customer;

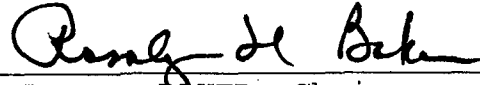
- (8) Requiring the Director of Labor and Industrial Relations to report to the Legislature prior to the Regular Session of 2016 regarding guidelines developed by the Unemployment Insurance Coverage Committee;
- (9) Requiring the Director of Labor and Industrial Relations to submit an annual report to the Legislature regarding covered employment determinations;
- (10) Inserting a purpose section; and
- (11) Making technical, nonsubstantive amendments for the purposes of clarity and consistency.

Your Committee notes that this amended measure maintains the Department of Labor and Industrial Relations' discretion to determine whether an individual is an employee in an employer-employee relationship or an independent contractor for purposes of unemployment insurance coverage while also providing better clarity to those individuals choosing to become entrepreneurs by setting forth in greater detail the criteria used to determine independent contractor status. Your Committee notes that this amended measure is a work in progress that attempts to represent a balanced approach regarding independent contractors in Hawaii and acknowledges that further discussion may be warranted as this measure moves through the legislative process.

As affirmed by the record of votes of the members of your Committee on Commerce and Consumer Protection that is attached to this report, your Committee is in accord with the intent and purpose of S.B. No. 1219, S.D. 1, as amended herein, and recommends that it pass Third Reading in the form attached hereto as S.B. No. 1219, S.D. 2.



Respectfully submitted on
behalf of the members of the
Committee on Commerce and
Consumer Protection,




ROSALYN H. BAKER, Chair



The Senate
 Twenty-Eighth Legislature
 State of Hawai'i

Record of Votes
Committee on Commerce and Consumer Protection
CPN

Bill / Resolution No.:*	Committee Referral:	Date:		
SB 1219 SDI	JDL, CPN	3/4/15		
<input type="checkbox"/> The Committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: _____				
The Recommendation is: <input type="checkbox"/> Pass, unamended 2312 <input checked="" type="checkbox"/> Pass, with amendments 2311 <input type="checkbox"/> Hold 2310 <input type="checkbox"/> Recommit 2313				
Members	Aye	Aye (WR)	Nay	Excused
BAKER, Rosalyn H. (C)	✓			
TANIGUCHI, Brian T. (VC)		✓		
KAHELE, Gilbert				✓
KIDANI, Michelle N.	✓			
NISHIHARA, Clarence K.				✓
WAKAI, Glenn	✓			
SLOM, Sam				✓
TOTAL	3	1	0	3
Recommendation: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted				
Chair's or Designee's Signature: 				
Distribution: Original Yellow Pink Goldenrod File with Committee Report Clerk's Office Drafting Agency Committee File Copy				

*Only one measure per Record of Votes