



STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
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February 6, 2015

To: The Honorable Gilbert S.C. Keith-Agaran, Chair,
The Honorable Maile S.L. Shimabukuro, Vice Chair, and
Members of the Senate Committee on Judiciary and Labor

Date: Monday, February 9, 2015
Time: 9:30 a.m.
Place: Conference Room 016, State Capitol

From: Elaine N. Young, Acting Director
Department of Labor and Industrial Relations (DLIR)

Re: S.B. No. 1219 Relating to Employment Security

I. OVERVIEW OF PROPOSED LEGISLATION

SB 1219 proposes to replace the criteria commonly referred to as the "ABC test" in section 383-6, Hawaii Revised Statutes (HRS), with a new definition of "independent contractor." Services performed for remuneration are considered to be in employment under section 383-2, HRS, unless and until the three prongs of the test are met in the conjunctive. The ABC test, a statutory requirement since the beginning of the Unemployment Insurance (UI) program in 1939, has been an essential in determining whether a worker is an employee or self-employed as an independent contractor.

The department strongly opposes the measure because enactment of the provisions raises conformity issues with several federal laws that could result in the loss of federal funding (\$14,000,000) used to operate the Unemployment Insurance program and subject employers' to the full 6% of the Federal Unemployment Tax Act (FUTA) payroll tax.

II. CURRENT LAW

Section 383-6, HRS, provides services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists unless it is shown to the department the following criteria have been met:

1. The individual has been and will continue to be free from control or direction over the performance of such service, both under the individual's contract of hire and in fact; and
2. The service is either outside the usual course of the business for which the service performed or that the service is performed outside all the places of business of the enterprise for which the service is performed; and
3. The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service.

III. COMMENTS ON THE HOUSE BILL

The Department strongly opposes SB 1219 for these major reasons:

1. Increased Federal Unemployment Tax Act (FUTA) payroll taxes for employers and loss of certification for UI administrative grants to operate Hawaii's UI program if state law is not consistent with federal law with respect to coverage.

The Internal Revenue Service (IRS) applies the common law test in determining whether services are subject to the FUTA tax and specifies which exclusions from coverage are permissible. To be consistent with the requirements of Federal law, states may not use a test for an independent contractor that is less rigorous than the IRS test when determining coverage of services.

While HRS 383-6, in its current form satisfies this requirement, if the application of the provisions of SB1219 results in a determination of independent contractor status without a test that is comparable to the common-law standard and does not provide coverage to individuals in accordance with FUTA law, a conformity issue may be raised with the USDOL. The sanction for non-conformity is severe: all employers will be liable for the full 6.0% FUTA tax and Hawaii may jeopardize over \$14 million in federal funds for the UI program.

2. Subsection (d) of the bill provides "If a certified contractor files a claim for unemployment insurance benefits against the customer pursuant to this chapter, the burden shall be on the certified independent contract to prove that an employer-employee relationship exists." However, Section 303(a)(1) of the Social Security Act requires state law provide for "such methods of

administration... as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due.” The USDOL has long interpreted this provision to require states to take the initiative in discovering information regarding the circumstances surrounding an individual’s unemployment and to obtain all the facts necessary to make a determination. As a result, the department has the responsibility to make the determination and cannot be shifted to the individual who files a claim for benefits. The ABC exists so as to allow the department to make such a determination. Non-compliance with 303(a)(1), SSA may result in the loss UI administrative grants to operate the UI program, which effectively shuts down all local offices statewide and precludes jobless workers from filing for UI compensation.

3. While subsection (c) of the bill requires that the department shall be responsible for certifying the individual who meets the requirements of an independent contractor and issuing written certifications, it is questionable if such activity is an authorized expenditure of UI administrative grant funds. State general revenues must be appropriated to satisfy the certification process should the USDOL disapprove use of federal monies for this purpose.



**Testimony to the Senate Committee on Judiciary and Labor
Monday, February 9, 2015 at 9:30 A.M.
Conference Room 016, State Capitol**

RE: SENATE BILL 1219 RELATING TO EMPLOYMENT SECURITY

Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee:

The Chamber of Commerce of Hawaii ("The Chamber") **supports** SB 1219, which allows the department of labor and industrial relations to set criteria for independent contractor status and establishes criteria for when the department shall presume an individual is an independent contractor. Further requires the department to certify independent contractors and requires the independent contractors to provide a written copy of certification to each customer. Also places 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.

The Chamber is the largest business organization in Hawaii, representing over 1,000 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

The Chamber believes it is necessary for independent contractors to be defined. There is too much left to interpretation in the current law as to who qualifies as an independent contractor vs. an employee of a company. As more independent contracts are emerging in the ever-changing economic environment, clarification of who qualifies as an independent contractor would offer proper protection to legitimate independent contractors and the business that they contract with.

Thank you for the opportunity to testify.



HEARING BEFORE THE
SENATE COMMITTEE ON JUDICIARY & LABOR

TESTIMONY IN STRONG SUPPORT OF SB1219 RELATING TO EMPLOYMENT SECURITY

February 9, 2015
State Capitol, Conference Room 016
9:30 AM

Aloha Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee:

I am writing to share our strong support of SB1219 to help clarify who qualifies as an independent contractor. This clarification will protect legitimate independent contractors and those that hire them.

Over the years we have seen numerous rulings where the Department of Labor and Industrial Relations (DLIR) made determinations against employers, classifying people as employees for unemployment benefits through discretionary calls and misapplication of the 3-way test and the subsequent testing built into the rules. We have worked to address this issue with and on behalf of our members for years, but many businesses, particularly small businesses, do not have the time or money to take on the state, so many poor rulings stand.

Last year one of our members, Envisions Entertainment, received a determination from the DLIR that a musician and sole proprietor they hired twice in 18 months to perform music for two events was considered by the DLIR to be employee, not an independent contractor, even though this individual had a full-time position elsewhere, said he was an independent contractor who occasionally provided services to Envisions Entertainment, had a registered business in our state, had a general excise tax license, and signed an independent contractor agreement. The DLIR determination was made before interviewing the company and doing any fact finding. Further, it is important to note that the DLIR's ruling against Envisions Entertainment did not provide any additional benefits to the musician and not garner the state any more in taxes. The determination merely shifted some of the unemployment benefits burden from the man's full-time employer to Envisions Entertainment. Therefore, the company made the decision to fight the ruling as they regularly need to hire independent contractors in their course of business and the ruling could devastate their company.

Many who read the department's determination, including several lawyers, called it "ridiculous" and we have to agree. So, we spoke with legislators last year about this and were encouraged to first work through the Administration and Department, which we and Envisions Entertainment did.

MAUI CHAMBER OF COMMERCE TESTIMONY IN STRONG SUPPORT OF SB1219
February 9, 2015, State Capitol, Conference Room 016, 9:30 AM
Page 2.

We met with and helped educate the Lt. Governor and department on the issue in the hopes of garnering an administrative fix to avoid a costly legal battle on both sides. However, the former DLIR Director stood by the department's incorrect ruling. During that meeting, the former Director told us that they do sometimes rule in favor of employers and that he would send us 20 redacted copies of rulings in favor of employers as proof. After several months, working through the Lt. Governor's office who worked with DLIR to obtain those copies, they could not send us even 1 ruling, which further illustrates the prevalence of this problem.

Envisions Entertainment had to and did take their case to court. It was an expensive battle (over \$60,000), but the company won! Not only did they win, but the judge's ruling showcased how inappropriate the department's behavior was and created a new precedent. And, while that is helpful, there is still too much leeway for "interpretation" in the law and DLIR has a history of broad and poor interpretations against employers. This is not just an Envisions Entertainment issue or a Maui issue, this is a state issue that affects individuals, businesses and industries who hire independent contractors to perform specific services.

Given the good intentions of the current law, we felt a better route was to simply clarify who qualifies as an independent contractor as more and more entrepreneurs are doing business as independent contractors in this changing economic environment. Therefore, SB1219 seeks to make it clear as to who qualifies as an independent contractor to remove ambiguity and incorrect determinations against independent contractors and companies that hire them.

This clarification in no way affects employees. Instead, it recognizes that more and more people are operating as independent contractors in a new economy and clarifies in state statutes who is an independent contractor under the law. This will avoid discretionary determinations by the DLIR, which will save both businesses and the state a great deal in terms of time, money, and headaches.

Mahalo nui loa for the opportunity to provide testimony on this bill. We ask for your strong support of SB1219 to rectify an ongoing problem.

Sincerely,

Pamela Tumpap
President



Hawai'i Island Chamber of Commerce

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February 6, 2015

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William Walter
Noreen Yamane

Re: Testimony in support of SB 1219 Relating to Employment Security

Aloha Members of the Senate Committee on Judiciary and Labor:

My name is Chuck Erskine and I am the President of the Hawai'i Island Chamber of Commerce. With more than 270 member businesses and professionals including over 600 member representatives, the Chamber serves as an important voice of business in Hawai'i.

Our Chamber joins the Maui Chamber of Commerce and other organizations who strongly support SB 1219 which will help clarify who qualifies as an independent contractor to remove ambiguity and incorrect determinations against legitimate independent contractors and those individuals, businesses and industries who hire them to perform specific services.

With more and more people operating as independent contractors, SB 1219 will clarify in state statutes who is an independent contractor under the law.

Thank you for the opportunity to provide testimony on this bill.

Sincerely,

Chuck Erskine, President

THE SENATE

Committee on Judiciary and Labor
Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair
State Capitol, Conference Room 016
Monday, February 9, 2015; 9:30 a.m.

**STATEMENT OF THE ILWU LOCAL 142 ON S.B. 1219
RELATING TO EMPLOYMENT SECURITY**

The ILWU Local 142 **opposes** S.B. 1219, which allows the Department of Labor and Industrial Relations to set criteria for independent contractor status and certify them, requires the independent contractor to provide the certification to each customer, and places the burden of proof of an employer-employee relationship on the certified independent contractor when filing an unemployment insurance claim.

Rules for determining whether an independent contractor already exist and have been publicized by the Department of Labor and Industrial Relations. The criteria are available for review in the Department's Handbook for Employers on Unemployment Insurance (December 2012). Page four of that handbook states that to be considered an independent contractor, the "ABC test" must be satisfied:

- A. Individual must be free from control or direction;
- B. Service must be performed outside the usual course of business or place of business; and
- C. Individual must be customarily engaged in an independent occupation, trade, profession or business of the same nature as that involved in the contract of service.

It is completely unrealistic, unworkable and unproductive to require the Department to certify individuals as independent contractors since an individual's status as an independent contractor depends on the facts of the relationship between the contractor and customer. In some circumstances, an employer-employee relationship will be formed where there is sufficient control, the service rendered is part of the customer's usual business, and the individual is not customarily engaged in an independent profession or business. However, it is simply impossible to determine and certify in advance that a particular relationship is or is not an employment or independent contractor relationship. If the circumstances of the relationship change, what begins as an independent contractor relationship may evolve into an employment relationship and vice versa. A single, all-encompassing determination of independent contractor status is simply not possible.

It is also unnecessary, as S.B. 1219 proposes, to require an individual to prove an employee-employer relationship exists for unemployment benefit purposes. An employer is always free to object to the payment of unemployment insurance on the basis that the claimant was not an employee but merely an independent contractor. However, once the Legislature begins to enact laws that affect the eligibility for unemployment insurance, it begins to enter the area where the federal government has outlined broad criteria to states to whom it provides unemployment insurance funding. Before any bill like S.B. 1219 is entertained, its proponents must provide a careful analysis of how their attempt to affect employee eligibility are within federal mandates and how legislative action would not conflict with federal requirements and would not endanger federal support for Hawaii's unemployment program.

This bill may have been motivated by a situation where an individual hired as an independent contractor subsequently applied for and received unemployment benefits, claiming an employer-employee relationship existed. Rather than redefining independent contractor status, the simplest course of action to avoid such situations would be to ask the proposed independent contractor the following: (1) does he have a general excise tax license; (2) does he have workers' compensation insurance; (3) is he incorporated as a separate business; and (3) does he have other clients besides the customer. Requiring the Department to certify all independent contractors would be burdensome, unnecessary, and a waste of time and resources.

For these reasons, the ILWU respectfully requests that S.B. 1219 be held. Thank you for the opportunity to provide testimony on this matter.

From: mailinglist@capitol.hawaii.gov
To: [JDL Testimony](#)
Cc: jkealoha@ilwulocal142.org
Subject: Submitted testimony for SB1219 on Feb 9, 2015 09:30AM
Date: Sunday, February 08, 2015 4:04:03 PM
Attachments: [2015 SB 1219 independent contractor.doc](#)

SB1219

Submitted on: 2/8/2015

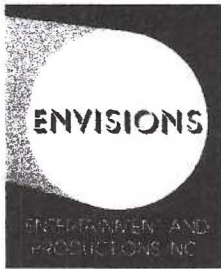
Testimony for JDL on Feb 9, 2015 09:30AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Joanne Kealoha	ILWU Local 142	Oppose	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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February 7, 2015

To: The Honorable Gilbert S.C. Keith-Agaran, Chair
The Honorable Maile S.L. Shimabukuro, Vice Chair
Members of the Committee on Judiciary and Labor

Date: Monday, February 9, 2015
Time: 9:30 am
Place: State Capitol, Conference Room 016

From: Wayne Hikiji, President
Envisions Entertainment & Productions, Inc.

RE: S.B. 1219 Relating to Employment Security

TESTIMONY IN SUPPORT OF S.B. 1219

INTRODUCTION. My name is Wayne Hikiji and I am the president of *Envisions Entertainment & Productions, Inc.*, an event production company based in Kihei, Maui. We have been in business since 1995, producing events for corporate functions, weddings and special events state-wide.

IMPETUS FOR S.B. 1219. The impetus for S.B. 1219 and companion House Bill 1213 is the DLIR's unfavorable determination in 2013 against my company based on its extreme interpretation of H.R.S. Section 383. (A copy of the Circuit Court Decision is attached).

The clear intent of H.R.S. 383 is to protect individuals again unscrupulous employers who intentionally misclassify them as independent contractors to avoid the cost of employment benefits. On the other hand, H.R.S. 383 is not intended to force self-employed business owners to change their self-elected business status to that of an employee solely because the DLIR feels it is. Clearly, where an individual unequivocally elects to be an independent contractor, the DLIR should recognize this free choice.

Unfortunately, as I discovered in my company's case, even if an individual wants to be considered an independent contractor, there is no guarantee the DLIR will agree.

This is why S.B. 1219 is less about changing the letter of this well-intended law as embodied in H.R.S. 383-6 (commonly referred to as the "ABC" Test), than it is about addressing the DLIR's

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extreme interpretation of the law which takes the definition of "employment" to its logical absurdity. My company's case is a clear example of this long-standing problem which affects not just my company, but all business in all industries state-wide.

In our case, the DLIR ruled that a self-employed musician we booked on occasion for private events was our employee, not an independent contractor, even though this individual:

- filed a claim against his full-time "day-time" employer who terminated him, not *Envisions Entertainment*;
- had a registered business in our State and a current General Excise Tax License for his services as a musician;
- insisted, during the intake interview with the UI Auditor, that he was a self-employed musician who was hired periodically by my company and other event and wedding companies, and never intended or wanted to be an employee of *Envisions Entertainment* or the many other companies who hired him as a musician; and
- signed our company's Independent Contractor Agreement voluntarily and willfully.

Based on this determination of "employee status," the DLIR also charge my company's UI reserve account for a percentage of the benefits payable to this musician.

On appeal to the Circuit Court, Judge Cahill reversed the DLIR's entitlement and benefits decisions on the grounds that the DLIR's and the appeals referees' findings were not supported by the clearly probative and substantial evidence, and therefore, were "clearly erroneous." Judge Cahill found that the DLIR blatantly ignored the factors of independent contractor status which it was bound to consider, including the 20-factor test which the DLIR itself promulgated in Hawaii Administrative Rules, Section 12-5-2.

Despite this favorable ruling, the take away from this process is sadly a "no win" proposition for all parties involved:

- **neither the individual nor the State benefitted financially from this case**
 - Regardless of the outcome, the individual would not have received any more benefits and the State would not have received any more in taxes. The benefits determination merely shifted some of the unemployment benefits burden from the musician's full-time employer to my company
 - On the other hand, I'm certain the cost to the State, and ultimately the tax payers, for litigating this case was significant.

- **The legal cost to *Envisions Entertainment* was substantial and yet, any change in the DLIR's interpretation of the law in future cases remains to be seen**
 - To keep this in proper context, the DLIR's unsubstantiated decision forced us to appeal this case to the Circuit Court only to prove what the musician had insisted all along – that he was a self-employed independent contractor.
 - This legal victory came at a significant cost to my company of approx. \$70,000.00. Because the law does not allow for the recovery of attorneys' fees to a prevailing party in appeals from Administrative Decisions, we are without recourse to re-coup this unnecessary expenditure, monies we could have otherwise invested in our company and employees.
 - Regrettably, the legal precedent of our case provides no assurance that the DLIR will change its overly-broad interpretation of H.R.S. 383-6 in future cases. Because each case must be decided on its own merits, cases involving legitimate ICs will continue to be litigated at much expense to all parties involved unless and until the DLIR changes its over-zealous view of H.R.S. 383-6.
- **The DLIR's skewed interpretation of the law will have a detrimental impact on business in Hawaii.** Given the DLIR's extreme interpretation of the law, the high cost of litigation, and the high risk associated with this type of litigation, businesses are becoming increasingly reluctant to contract with self-employed individuals. This is especially problematic since current business trends show more and more individuals choosing to go into business for themselves.

RATIONALE BEHIND S.B. 1219 & H.B. 1213

Recognizing these legal pitfalls and its unintended consequences, House Speaker Joe Souki and Senator Roz Baker introduced companion bills H.B. 1213 and S.B. 1219, respectively. Both bills would do three things:

1. Require the DLIR to adhere to Hawaii Administrative Rules Section 12-5-2, which the department has already promulgated;
2. Require self-employed individuals (whether they are sole proprietors, limited liability companies or corporations) to register with the DLIR and receive "certification" from the DLIR that they are qualified to do business as "independent contractors;" and
3. In the event a "certified independent contractor" should file a claim for unemployment insurance benefits, then he/she would have the burden to prove that the business relationship with the company who hired them should actually be that of an employment situation.

S.B. 1219 also has several advantages. If enacted, the law would:

- Clarify the criteria for determining independent contractor status and eliminate unnecessary, expensive litigation which discourages businesses from dealing with self-employed persons;
- Incentivize taxpayers to do business only with "legitimate" independent contractors who have been certified by the DLIR;
- Indirectly encourage self-employed persons to properly register with the DCCA, DoTax and the DLIR to do business and pay their general excise taxes; and
- Reduce the workload of the Unemployment Insurance Division so it can focus its attention on cases involving real abuse.

REBUTTAL TO H.B. 1213 TESTIMONY IN OPPOSITION.

DLIR: The DLIR asserts that its responsibility to investigate circumstances surrounding an individual's unemployment and make determinations cannot be shifted to the individual filing a claim. This position is misleading because it incorrectly confuses its role as a fact-finder and decision-maker with the separate and distinct evidentiary burden of proof required of the parties involved. One has nothing to do with the other.

Under S.B. 1219, the burden of proof remains on the taxpayer company in contested cases where an individual believes he/she should be an employee, not an independent contractor, of the company he/she works for. The burden of proof only shifts to the individual when he/she freely elects to be in an independent contractor relationship, but believes, for example, that his/her business relationship has evolved into an employee situation which the company refuses to recognize.

ILWU: The ILWU would have you believe that it is impossible to certify an individual as an independent contractor. It suggests that if circumstances change, what begins as an independent contractor relationship may evolve into an employment relationship. S.B. 1219 addresses this precise issue in sub-section (d) which provides recourse to certified independent contractors in such situations.

The ILWU also believes there is no reason to amend H.R.S. 383 because an employer is always free to object to the payment of unemployment insurance once a claim is filed. Again, the purpose of S.B. 1219 is to clarify independent contractor status up front to prevent unnecessary litigation of this issue years later.

The ILWU's position that S.B. 1219 will affect the eligibility for unemployment insurance benefits is misplaced. Clearly, eligibility is a non-issue when an individual elects to be an independent contractor who, by definition, is not entitled to collect unemployment benefits.

Finally, the ILWU asserts that, rather than redefine independent contractor status, the simplest course of action to avoid such situations would be to ask the individual if he/she has a GET

license, is properly in business for himself/herself, and has other clients besides the taxpayer company.

To be clear, neither H.B. 1213, nor S.B. 1219 attempts to redefine independent contractor status. It, quite simply, codifies the real-world criteria the DLIR continues to ignore.

Regarding the ILWU's view of independent contractor status, we couldn't agree more. Unfortunately, the DLIR's extreme interpretation of H.R.S. 383-6 would make virtually every individual an employee. The criteria set forth in S.B. 1219 sub-section (b) are essentially what the ILWU suggests to prevent this extreme and unfair interpretation of the law.

Hawaii Association of Realtors (HAR): HAR's opposition is premised on what they characterize as a consistent, predictable and well-established legal standard. HAR's objection misses the point. While the ABC Test has been the legal standard since 1939, the DLIR's extreme interpretation of the law has not. The DLIR's incorrect statutory interpretation is precisely why H.B. 1213 and S.B. 1219 have been introduced.

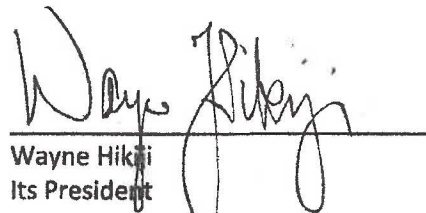
Finally, HAR asserts that this Bill imposes legal standards that directly conflict with real estate law. Their position ignores the very reason why Realtors are statutorily exempt under H.R.S. 383. It is precisely because the definition of employment is incongruous with real estate law prohibiting real estate agents from practicing as separate entities, that this exemption was enacted. If not for this exemption, real estate agents would, almost certainly, be considered employees of the licensed broker by the DLIR based on their interpretation of H.R.S. 383-6.

CLOSING. We are not asking this Committee to dilute the protection afforded the "protected class" of individuals who legitimately should be employees. Rather, the intent of this Bill is to clarify who are legitimate independent contractors at the outset of a business relationship, not years later. In doing so, S.B. 1219 eliminates incorrect determinations by the DLIR and the senseless legal cost incurred in litigating this issue when an individual unequivocally elects to be an independent contractor.

For all of the foregoing reasons, I urge you to please support S.B. 1219. Thank you for the opportunity to testify and for your thoughtful consideration of this vitally important issue.

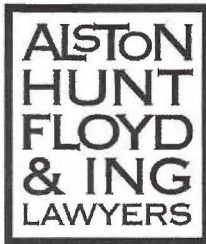
Respectfully submitted,

ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC.



Wayne Hikiji
Its President

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MEMORANDUM

To: Wayne Hikiji

DATE: February 8, 2015

FROM: Anna Elento-Sneed, Esq.

RE: **S.B. 1219 – RELATING TO EMPLOYMENT SECURITY**

This is in response to your request for a summary of the current state law and regulations governing independent contractor status under Hawai'i's Employment Security Law, HRS Chapter 383, and a summary of how HB 1213 would change the current law and regulations. You have also asked whether:

- H.B. 1213 would interfere with the real estate licensing law by requiring real estate licensees to register as a separate business entity with the DCCA;
- H.B. 1213 would conflict with the independent contractor test used by the Internal Revenue Service ("IRS"); and
- Subsection (d) of H.B. 1213 would deprive the Department of Labor and Industrial Relations ("DLIR") of the authority to render decisions on whether an individual meets the independent contractor test; and
- A significant allocation of state general revenues must be appropriated in order to implement the certification process.

My comments are as follows.

I. SUMMARY OF CURRENT LAW

A. Registering As A Business In Hawaii

“Independent contractor” is a term used to describe an individual who is self-employed and provides services to other businesses.¹ In Hawaii, individuals who want to go into business for themselves must: (1) register with the Internal Revenue Service (IRS) as a business; (2) register with the Hawaii Department of Commerce and Consumer Affairs (DCCA) as a business; and (3) register with the Hawaii Department of Taxation (DoTax) and obtain a general excise tax number.² The entire state registration process can be accomplished by filing a single form – the BB-1 – with the DCCA.³

Note, however, that businesses are not required to register with the Department of Labor and Industrial Relations (DLIR) unless they employ one or more persons.⁴ Furthermore, businesses that only employ family members who each own at least 50% of the shares issued for the company, need not register either.⁵

As a result of these exceptions, individuals who are self-employed do not register with the DLIR are not scrutinized until they become the subject of an Unemployment Insurance Division audit or they file a claim for unemployment insurance benefits. At that point, the Unemployment Insurance Division will initiate an investigation to determine if the individual meets the test for independent contractor status under Employment Security Law.⁶

B. Determining Independent Contractor Status

The test for independent contractor status under the Employment Security Law is set forth in HRS 383-6 which states:

Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists unless and until it is shown to the

¹ See <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independent-Contractor-Self-Employed-or-Employee>.

² Under state law, individuals who are sole proprietors need not register with the DCCA, but individuals who incorporate or create a limited liability company must register with the DCCA. See <http://cca.hawaii.gov/breg/registration/>. All self-employed individuals must register with DoTax. See HRS Section 237-9.

³ See <https://hbe.ehawaii.gov/BizEx/home.eb>.

⁴ See Hawaii Administrative Rules Section 12-5-17(a).

⁵ See HRS Section 383-7(a)(20).

⁶ See HRS 383-70.

satisfaction of the Department of Labor and Industrial Relations that:

- (1) The individual has been and will continue to be free from control or direction over the performance of such service, both under the individual's contract of hire and in fact; and
- (2) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and
- (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service.⁷

Because independent contractor cases normally arise when unemployment benefit claims are filed by individuals who assert they were "employed" by a business (referred to as the "taxpayer"), the DLIR places the burden on the taxpayer (the alleged employer) to prove that the individual qualifies as an "independent contractor."

The DLIR enacted regulations which provide guidelines for determining whether an individual is an employee or an independent contractor.⁸ However, as you discovered in your own case, *In the Matter of Envisions Entertainment & Productions, Inc. v. Dwight Takamine, Director, Department of Labor and Industrial Relations, State of Hawai'i*, Civil No. 13-1-0931(2), in the Circuit Court of the Second Circuit, State of Hawai'i (2014), the DLIR does not believe it is bound by the regulations. In fact, even if an individual wants to be considered an independent contractor, there is no guarantee the DLIR will agree. This is because the DLIR believes it must have unfettered discretion to determine if an individual should be classified as an employee for his or her own "protection."⁹ Judge Cahill did not agree with the DLIR's position and ruled in Envisions' favor.¹⁰ Whether other state judges will agree with the approach taken by Judge Cahill remains to be seen.

⁷ This test is commonly referred to as the "ABC" test.

⁸ See Hawaii Administrative Rules Section 12-5-2.

⁹ See DLIR brief attached.

¹⁰ See Judge Cahill's Order attached.

C. The Current Situation

Independent contractor cases continue to be litigated before the DLIR and in the state courts. Each case must be decided on its own merits, and because the DLIR does not believe it should be bound by the regulations it promulgated, there is no way for a self-employed individual and his/her customer to determine whether their business relationship will be declared – ex post facto – an employer/employee relationship.

Given the high cost of litigation and the high risks associated with this type of litigation, businesses are increasingly reluctant to contract with self-employed persons. This is problematic since current business trends show more and more individuals choosing to go into business for themselves.

II. SUMMARY OF H.B. 1213

H.B. 1213 would do three things:

- A. Require the DLIR to adhere to Hawaii Administrative Rules Section 12-5-2, which the department has already promulgated;
- B. Require self-employed individuals (whether they are sole proprietors, limited liability companies or corporations) to register with the DLIR¹¹ and receive “certification” from the DLIR¹² that they are doing business as “independent contractors;” and
- C. In the event a “certified independent contractor” should file a claim for unemployment insurance benefits, then he/she would have the burden to prove that the business relationship with the taxpayer was actually an employment relationship.

H.B. 1213 also has several advantages. If enacted, the law would:

- Clarify the criteria for determining independent contractor status and eliminate unnecessary, expensive litigation which discourages businesses from dealing with self-employed persons;
- Incentivize taxpayers to do business only with “legitimate” independent contractors who have been certified by the DLIR;

¹¹ This can be done by modifying the form UC-1 and requiring self-employed individuals to complete and submit the form to the DLIR.

¹² The DLIR can require the self-employed individual to affirm that they meet the guidelines under Hawaii Administrative Rules Section 12-5-2.

- Indirectly encourage self-employed persons to properly register with the DCCA, DoTax and the DLIR to do business and pay their general excise taxes; and
- Reduce the workload of the Unemployment Insurance Division and focus their attention on cases involving real abuse.

III. H.B. 1213 WILL NOT INTERFERE WITH THE REAL ESTATE LICENSING LAWS

HRS Chapter 383 only applies to individuals providing services to entities that are considered “employing units” under the law.¹³ However, certain types of services performed by individuals are excluded from coverage under HRS Chapter 383.¹⁴ Services performed by real estate salespersons are *excluded* from coverage.¹⁵

H.B. 1213 only applies to individuals who do not fall within one of the blanket exclusions set forth in HRS Section 383-7. Accordingly, H.B. 1213 will not impact real estate salespersons or any of the other individuals listed in HRS Section 383-7.

IV. H.B. 1213 DOES NOT CONFLICT WITH THE IRS TEST FOR INDEPENDENT CONTRACTOR STATUS

First, it should be noted that H.B. 1213 does not eliminate the state’s test for independent contractor status. It simply requires the DLIR to follow the regulations it promulgated to guide determinations on independent contractor status.¹⁶

Second, the DLIR’s regulations are based on the IRS’ original test for independent contractor status – called the “20-Factor Test.”¹⁷ Under the IRS test, the following factors were relevant in determining whether an individual could be classified as an independent contractor: (1) instructions — or control factor; (2) integration; (3) employer’s right to discharge; (4) employee’s right to terminate; (5) services rendered personally or right to delegate; (6) hiring, supervising, and paying assistants; (7) training; (8) payment by hour, week, month; (9) payment of business and/or traveling expenses; (10) continuing relationship; (11) set hours of work; (12) full time required; (13) working for more than one firm at a time; (14) making service available to general public; (15) furnishing of tools and materials; (16) doing work on employer’s premises; (17) order or sequence set; (18) oral or written reports; (19) significant investment; and (20) realization of profit or loss. There were also a number of other factors the IRS looked at, in addition to the above factors (i.e., intent, industry practice,

¹³ See HRS Section 383-1.

¹⁴ See HRS Section 383-7.

¹⁵ See HRS Section 383-7(a) (17).

¹⁶ See Hawaii Administrative Rules Section 12-5-2.

¹⁷ See IRS Rev Rule 87-41. Compare IRS Rev Rule 87-41 with Hawaii Administrative Rules Section 12-5-2(b).

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governmental or regulatory rules, benefits, insurance, etc.).¹⁸ As you can see, these are the same factors in the DLIR's regulations.

In short, requiring the DLIR to adhere to its own regulations will not result in a conflict with the IRS or the U.S. Department of labor ("USDOL"). If anything, it will *promote* conformity.

V. SUBSECTION (d) of H.B. 1213 DOES NOT REMOVE THE DLIR'S AUTHORITY TO RENDER DECISIONS ON UNEMPLOYMENT INSURANCE CLAIMS

Under the Federal Unemployment Tax Act, the U.S. Secretary of Labor is required to review and approve all state laws governing unemployment insurance benefits as a condition to release of unemployment insurance funds to the states.¹⁹ Section 303(a) of the Social Security Act sets general guidelines the Secretary of Labor must use in his/her review and approval of state programs.²⁰

The Social Security Act does not prohibit state agencies from establishing burdens of proof in evidentiary hearings concerning unemployment insurance benefit. The federal law only requires that the Secretary of Labor ensure the state law provides an "[o]ppportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied..."²¹

Hawai'i's fair hearing procedures for unemployment compensation claims are set forth in HRS Sections 383-32 through 383-41. H.B. 1213 does not amend those provisions. Rather, Subsection (d) of H.B. 1213 simply places the burden of proof on a "certified independent contractor" if he/she should choose to file a claim for unemployment compensation benefits.

¹⁸ The IRS has modernized its independent contractor test by grouping the 20 factors into three categories: (1) behavioral control; (2) financial control; and (3) the relationship of the parties. "Behavioral control" focuses on whether the supposed independent contractor receives extensive instructions on how work is to be done (i.e. how, when or where to do the work; what tools or equipment to use; what assistants to hire or help with work; where to purchase supplies and services) or training on the procedures and methods to be used in performing the work. "Financial control" focuses on the whether the supposed independent contractor has made a significant investment in his/her business, obtains reimbursement for some or all of his/her business expenses, and whether he/she has an opportunity for profit or loss. "Relationship of the parties" focuses on whether the supposed independent contractor receives employee benefits and whether the parties have entered into a written contract specifying the terms of the relationship. See IRS Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, and Internal Revenue Manual 4.23.5.3.

¹⁹ See 26 U.S.C. Section 3304(a).

²⁰ See 42 U.S.C. Section 503(a).

²¹ 42 U.S.C. Section 503(a)(3).

It should be noted that while the current Hawai`i law and regulations do not expressly state that the alleged employer has the burden of proof in all "independent contractor" cases,²² the DLIR places that burden, in all cases, on the alleged employer.²³ If enacted, H.B. 1213 would place the burden of proof in contested cases:

- On the taxpayer (i.e. the alleged employer) if the taxpayer retains an individual who is not certified as an independent contractor; and
- On the certified independent contractor if he/she contracts with the taxpayer as an independent contractor and subsequently files a claim for unemployment compensation benefits against that same taxpayer.

In either situation, the authority and responsibility to review the evidence presented, apply the law and the applicable regulations, and then render a determination would still lie with the Unemployment Insurance Division pursuant to HRS Section 383-33, and with the Employment Security Appeals Referees Office under HRS Sections 383-37 through 383-40. Since the determination and appeals procedures have been previously reviewed and approved by the U.S. Secretary of Labor, and nothing in H.B. 1213 would change those provisions, there should be no conflict with the Social Security Act.

VI. H.B. 1213 SHOULD NOT REQUIRE A SIGNIFICANT ALLOCATION OF STATE REVENUES TO IMPLEMENT

As noted in my previous memorandum, the DLIR already has a form – UC-1 – which is completed by businesses in conjunction with the form BB-1 (which is used by the Department of Commerce and Consumer Affairs to register businesses, and by the Department of Taxation to issue general excise tax license numbers). Both the UC-1 and the BB-1 are available online as a PDF document.

It should not be difficult for the DLIR to instruct an individual registering with the DCCA and obtaining a GET license, to: (1) submit the UC-1 and indicate he/she intends to operate as an independent contractor; and (2) "check a box" on the UC-1 to affirm that he/she has read and understands the statute and regulations pertaining to independent contractors. If the individual completes and submits the form, the DLIR can then issue an "independent contractor" number to the individual, similar to the number they assign to employers. Since

²² See HRS Section 383-6 and Hawaii Administrative Rules Section 12-5-2.

²³ See DLIR brief in *In the Matter of Envisions Entertainment & Productions, Inc. v. Dwight Takamine, Director, Department of Labor and Industrial Relations, State of Hawai`i*, civil No. 13-11-0931(2), in the Circuit Court of the Second Circuit, State of Hawai`i (2014).

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the form, the procedure and the personnel are already in place, this minimal change in the form and procedure should not entail significant costs.

If you have any questions or need further information, please let me know.

1ST CIRCUIT COURT
STATE OF HAWAII
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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

In the Matter of)	CIVIL NO. 13-1-0931(2)
)	(Agency Appeal)
ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC.,)	
)	
Taxpayer-Appellant,)	APPELLEE DIRECTOR OF LABOR AND
)	INDUSTRIAL RELATIONS' ANSWERING
vs.)	BRIEF; CERTIFICATE OF SERVICE
)	
DWIGHT TAKAMINE, DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; and DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII,)	
)	
Appellees,)	
)	
and)	ORAL ARGUMENT
)	DATE: May 30, 2014
PAUL BUNUAN,)	TIME: 9:00 a.m.
)	JUDGE: The Honorable Peter T. Cahill
Claimant-Appellee.)	
)	

**APPELLEE DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS'
ANSWERING BRIEF**

I. Introduction

The question to be answered in this case is whether Claimant-Appellee PAUL BUNUAN (Appellee), an individual who worked as a saxophone player is an employee of Taxpayer-Appellant ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC. (Taxpayer). The Director believes Claimant is an employee.

This is an appeal of a decision of the Employment Security Appeals Office (Appeals Office), Decision 1300760, dated August 20, 2013. (Record on Appeal [R] at 63-67). The issue before the appeals officer was whether the services performed by Claimant for Taxpayer constituted employment; thus, subjecting Claimant's wages paid by Taxpayer to unemployment taxes under Hawaii Revised Statutes (HRS) chapter 383. (R at 63). The appeals officer affirmed the determination of the Director, finding that the services performed by Claimant for Taxpayer constituted employment and thus, that remuneration paid to Claimant was subject to chapter 383, HRS. (R at 63).

Taxpayer filed a notice of appeal on September 19, 2013. This Court has jurisdiction to entertain this appeal pursuant to HRS §§ 91-14 and 383-41 and the Hawaii Rules of Civil Procedure ("HRCPP"), Rule 72.¹

II. Statement of the Case

The Department of Labor and Industrial Relations' auditor determined that the saxophone services performed by Claimant for Taxpayer constituted employment and thus, the

¹ Taxpayer also appealed Appeals Office Decision 1300751 charging Employer's reserve account for a portion of the unemployment benefits paid to Claimant. The determination of the charge appeal is dependent on the current tax appeal. Thus, if Employer prevails on the current tax appeal, the charge will be reversed by the Unemployment Division. However, if Taxpayer loses the tax appeal, the charge appeal should also be affirmed.

remuneration paid was subject to chapter 383, HRS, in the absence of substantial evidence to show that the three clauses of section 383-6, HRS, were met. On appeal to the Employment Security Appeals Office, the Appeals Officer affirmed the auditor's decision, as to the first two clauses, but reversed on the third clause.

II. Standards of Review

The applicable standards of review for decisions issued by administrative agencies are supplied by section 91-14(g), HRS, see Medeiros v. Dep't of Labor and Indus. Relations, 108 Haw. 258, 264-65, 118 P.3d 1201, 1207-08 (2005); Hardin v. Akiba, 84 Haw. 305, 933 P.2d 1339 (1997); Univ. of Hawai'i Prof'l Assembly v. Tomasu, 79 Haw. 154, 157, 900 P.2d 161, 164 (1995), which provides as follows:

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"Under the clearly erroneous standard, the reviewing court will overturn an agency's findings of fact only if the court is left with a 'definite and firm conviction that a mistake has been made.'" Ipsen v. Akiba, 80 Haw. 481, 485, 911 P.2d 116, 120 (Ct. App. 1996);

Agsalud v. Lee, 66 Haw. 425, 428, 664 P.2d 734, 737 (1983). "[T]he issue of credibility is within the primary responsibility of the state agency as fact finder, and its determination will not be disturbed lightly." In re Kauai Elec. Div. of Citizens Util. Co., 60 Haw. 166, 188, 590 P.2d 524, 539 (1978). "On the other hand, an agency's legal conclusions are freely reviewable." Ipsen v. Akiba, 80 Haw. at 485, 911 P.2d at 120.

And while courts are "free to reverse the agency's decision if affected by an error of law," the Hawaii Supreme Court has said "Where both mixed questions of fact and law are presented, deference will be given to the agency's expertise and experience in the particular field and the court should not substitute its own judgment for that of the agency. Camara, 67 Haw. at 216, 685 P.2d at 797." Dole Hawaii Div.-Castle & Cooke, Inc. v. Ramil, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990).

IV. Question Presented

1. Whether the Appeals Officer correctly concluded that Claimant performed saxophone services for Taxpayer for wages under a contract of hire.
2. Whether the Appeals Officer correctly concluded that Taxpayer failed to rebut the statutory presumption that the saxophone services provided by Claimant for wages was employment pursuant to section 383-6, HRS.

V. Argument

The Hawaii Supreme Court in Bailey's Bakery v. Tax Comm'r, 38 Haw. 16 (1948), emphasized the remedial purpose of the employment security law which necessitates liberally interpreting its statutory provisions:

It should be emphasized at the outset that the unemployment compensation law was enacted by the legislature for the relief of workers under the stress of unemployment occasioned through no fault of their own; that in construing the provisions of the law designed to effect that purpose they should be liberally construed "in the light of the mischief to be corrected and the end to be

attained." . . .

Id. 38 Haw. at 27-28.

Fifty-two years later, in Dole Hawaii Div.-Castle & Cooke, Inc. v. Ramil, 71

Haw. at 428, 794 P.2d at 1120, the Court echoed the same sentiment, stating,

[T]he unemployment compensation statute was enacted for the beneficent and humane purpose of relieving the stress of economic insecurity due to unemployment. It should therefore be liberally construed to promote the intended legislative policy.

Id. 71 Haw. at 428, 794 P.2d at 1120.

A. The Appeals Officer correctly concluded that Claimant performed saxophone services for Taxpayer for wages under a contract of hire.

In this case, the appeals officer found and Taxpayer has not contested that "[C]laimant provided services as a musician at events planned by Taxpayer for its clients" for wages. (R at 65). Once the determination is made that there were services performed by an individual for wages, such service is "deemed to be employment" subject to chapter 383, HRS, unless Taxpayer can rebut the statutory presumption.

B. The Appeals Officer correctly concluded that Taxpayer failed to rebut the statutory presumption that the services provided by Claimant for wages was employment pursuant to section 383-6, HRS.

1. Hawaii's employment security laws' coverage of individuals is not limited to individuals in a common law master-servant relationship.

The precursor to section 383-6, HRS, was known as the ABC² Test and adopted

² Section 4207 provided:

(5) Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this Act unless and until it is shown to the satisfaction of the board that,

(A) such individual has been and will continue to be free from the control or direction over the performance of such services, both under his contract of service and in

in 1939. See In re Century Metalcraft Corp., 41 Haw. 508, 514 (1957). The Century Metalcraft

Court explained the rationale for the adoption of the ABC test:

The provision was contained in the draft act recommended for adoption by the Social Security Board. It was taken from the pioneer Wisconsin law. The Social Security Board in incorporating such provision in the draft act, followed the unanimous recommendation of the Committee on Legislative Affairs of the Interstate Conference of Unemployment Compensation Agencies that a definition of employment similar to that contained in Wisconsin law be incorporated in state laws "as the basis for extending their coverage beyond the master and servant relationship." The Committee made the recommendation on the belief that the restriction of coverage to "the technical legal relationship of master and servant constitutes an obvious avenue of evading coverage by creating different legal relationships, for example, independent contractor relationship."

Century Metalcraft Corp., 41 Haw. at 514 (emphases added). Thus, even in 1939, there was concern that attempts would be made to structure employment relationships as independent contractor relationships to avoid the reach of the employment security laws. By enacting the ABC Test, the Legislature sought to thwart such attempts.

In spite of the adoption of the ABC Test, some courts in other jurisdictions continued to limit coverage to situations in which the common-law master and servant relationship existed. Century Metalcraft, 41 Haw. at 514. Hawaii's "legislature took positive

fact; and

- (B) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- (C) such individual is customarily engaged in an independently established trade, occupation, profession, or business.

In re Century Metalcraft Corp., 41 Haw. at 513-14.

action to prevent any such limitation by judicial decision. By Act 304 of the Session Laws of 1941 it amended the provision quoted above³ by inserting in the first sentence thereof the words 'irrespective of whether the common-law relationship of master and servant exists.' The Act also added to clause C the words 'of the same nature as that involved in the contract of service.'" Century Metalcraft, 41 Haw. at 515 (footnote and emphasis added). In enacting this provision, "the legislature made a studied effort to avoid limitation upon the class to be benefited by rejecting standards that might restrict it exclusively to workers sustaining a master-servant relationship, as understood at common law and to include all workers whom the law was socially designed to protect." Century Metalcraft Corp., 41 Haw. at 515 (citing Bailey's Bakery v. Tax Comm'), 38 Haw. 16, 18 (1948)) (emphases added).

Section 383-6, HRS, currently provides:

Master and servant relationship, not required when. Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists unless and until it is shown to the satisfaction of the department of labor and industrial relations that:

- (1) The individual has been and will continue to be free from control or direction over the performance of such service, both under the individual's contract of hire and in fact; and
- (2) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprise for which the services is performed; and
- (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service.

HRS § 383-6 (emphases added).

Under section 383-6, HRS, because Claimant performed services for wages, his

³ The prior law is quoted in footnote 5.

services are presumed to be employment subject to chapter 383. The presumption can only be overcome if Taxpayer satisfies requirements (1), (2), **and** (3) to the satisfaction of the Department. See Century Metalcraft Corp., 41 Haw. at 515-16 ("The burden is on taxpayer to overcome such presumption. . . . The requirements of clauses A, B, and C [now known as (1), (2), & (3)] are in the conjunctive. It is not enough to satisfy one clause only. All three of the clauses must be satisfied."). See Dep't of Labor v. Med. Placement Serv., Inc., 457 .2d at 384 ("[S]tates with similar, if not identical statutes [enacting the ABC test] have allocated the burden of proof to the party seeking the benefit of the statutory exemption."). And to the extent that Taxpayer is claiming an exemption from coverage, the rule that "[e]xemption provisions are strictly construed against the one claiming the exemption," applies. Ross v. Cummins, 131 N.E.2d at 523 (taxpayer failed to prove services of estimators services were free of taxpayer's control, outside taxpayers business, and independent).

"In determining the existence of an employer-employee relationship for the purpose of establishing liability for contributions under a state unemployment compensation statute, a contract purporting to establish a worker's status as an independent contractor is not dispositive of the issue." 76 Am. Jur. 2d § 31 (2005); see Dep't of Labor v. Med. Placement Serv., Inc., 457 A.2d at 384 ("Notwithstanding any contract or understanding between the parties, a Court must look to the actual circumstances of employment to discover whether it falls within the ambit of the § 3302(9)(k) [ABC test] exclusion.").

The appeals officer's determinations are based on findings which are "presumptively correct, and cannot be set aside on appeal unless they are shown to be 'clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.'" Dedman v. Bd. of Land & Natural Res., 69 Haw. 255, 266, 740 P.2d 28, 35 (1987) cert. denied

485 U.S. 1020 (1988).

2. **The Appeals Officer correctly found that Taxpayer did not prove the first prong of the test, that is, that Claimant was free of Taxpayer's control or direction over the performance of such service, both under Claimant's contract or hire and in fact.**

Rule 12-5-2, HAR, defines "Control or direction over the performance of such service" to mean "general control and need not extend to all details of the performance of service. The employer need not actually exercise control; it is sufficient that there is a right to do so." HAR 12-5-2 (a)(2); Homes Consultant Co. v. Aagsalud, 2 Haw. App. 421, 425, 633 P.2d 564, 568 (1981) (Control contemplated by HRS § 383-6(1) was "a general control and need not extend to all the details of the performance of service.")

Regarding clause (1), the appeals officer found that Taxpayer did not prove that Claimant was free from Taxpayer's control:

In the instance case, Taxpayer has failed to establish that [C]laimant performed his services free from Taxpayer's control or direction. Pursuant to its contracts with its clients, Taxpayer was ultimately responsible for ensuring that its clients' entertainment needs were met at each event. Taxpayer collected event fees from its clients and paid claimant for his services. Taxpayer provided [C]laimant with direction as to when and where to perform his services and established guidelines as to the general type of music [C]laimant was to perform. Although [C]laimant provided his own instrument, attire, and playlist, and thus had some degree of autonomy in the performance of his services, this is not sufficient to establish that [C]laimant performed his services free from Taxpayer's direction and control. Regardless of whether Taxpayer contracted with [C]laimant on an independent contractor basis, Taxpayer has failed to establish that Clause (1) of the three-part test is satisfied.

(R. at 161).

According to the record, Taxpayer had general control over Claimant. Taxpayer had an obligation to its clients to provide saxophone services to its clients during the events at which Claimant provided his services. (R. at 27). As such, Taxpayer is responsible for

Claimant's service such that if Claimant cancels at the last minute, Taxpayer is responsible to find a replacement. (R. at 30). In addition, although Taxpayer did not provide Claimant with his attire, he was provided with guidelines. (R. at 32).

Thus, Taxpayer failed to prove that Claimant was free from Taxpayer's general control.

3. The Appeals Officer correctly found that Taxpayer did not prove that Claimant's service was either outside Taxpayer's usual course of business or the service was performed outside of all places of business of the enterprise for which services is performed.

Rule 12-5-2, HAR, which was passed pursuant to the Director's rule making authority in section 383-92, HRS, defines the terms contained in section 383-6(2) as follows:

- (A) "Outside the usual course of business" refers to services that do not promote or advance the business of the employer, or services that are merely incidental to, and not an integral part of, that business.
- (B) "Outside of all the places of business of the enterprise" refers to places other than the business's home office, headquarters or territory in which the business operates;

Regarding clause (2), the appeals officer found that Taxpayer did not prove that the services were outside Taxpayer's usual business nor outside of all places where Taxpayer does business:

In this case, [C]laimant's services as musician for Taxpayer's events were integral to Taxpayer's event production business. Further, although [C]laimant did not perform his services at Taxpayer's office or warehouse, Taxpayer had a contractual obligation with its clients to provide for their events and the event locations therefore became extensions of Taxpayer's place of business. In view of the foregoing, Clause (2) of the test has not been met.

(R. at 67).

Taxpayer is an event production company that provides event services for various

events such as conventions, weddings and other special events. (R. at 26) Its services include "props, decoration, . . .entertainment, pyrotechnics, audio visual and so forth." Id. Contrary to Taxpayer's arguments that Claimant's services were not an integral part of Taxpayer's business, Taxpayer testified that it provided entertainment and in fact Taxpayer's contracts with its clients specifically required a saxophone player at the events at which Claimant provided his services. (R. at 184).

Thus, because Taxpayer was required to provide saxophone services at the event in question, and offered the services of musicians to its clients, the provision of those services are not incidental and therefore Taxpayer did not meet its burden to prove that Claimant's services were outside of Taxpayer's usual course of business.

Additionally, Taxpayer failed to prove that the saxophone services were outside of all the places of business of Taxpayer's enterprise. Taxpayer testified that it provides event services statewide. (R. at 37). Thus, Taxpayer provides its services and therefore performs its business at events statewide.

In interpreting identical wording, the court in Dep't of Labor v. Med. Placement Serv., Inc., 457 A.2d at 386 cogently observed:

The phrase correctly reads "all the places of business of the *enterprise* for which the service is performed." (Emphasis supplied). The nature of the [taxpayer] is such that business cannot be transpired on its premises; the enterprise in which [taxpayer] is engaged involves supplying technicians *to medical facilities and private homes*. Therefore, the latter locations are necessarily included within the enterprise and are, thus, subsumed within "place of business" as contemplated by § 3302(9)(k)(ii) [prong B of the ABC test].

See In re Bargain Busters, Inc., 287 A.2d 554, 558-59 (Vt. 1972) ("We do not construe 'outside the usual course of business' or 'outside of all places of business' to mean simply the home office or headquarters of the company. The places of business include these but also as well the

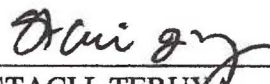
business territory within which it operated."); Inst. of Cmty. Involvement, Inc. v. Dep't of Employment Sec., 436 A.2d 765, 767-68 (Vt. 1981) ("An employer's place of business includes not only the location of its offices, but also the entire area in which it conducts the business, in this instance, the educating of the students. The services performed by the College's faculty are conducted within the appellant's place of business for the purpose of Title 21 [Vermont's ABC Test]." In that case, the courses were taught in localities away from employer's home office.).

As discussed above, Taxpayer contracted for saxophone services to be performed at various events; that made the event locations a place of business of the enterprise. Thus, Taxpayer failed to prove that Claimant's services were outside Taxpayer's usual course of business or outside all the places of the business of the enterprise for which the services was performed.

VI. Conclusion

Under these circumstances and based on all the foregoing reasons, arguments, and authorities, the Director respectfully requests the Court to affirm the decision of the appeals officer, finding the services performed by Claimant for Taxpayer constitute employment and that the remuneration paid to Claimant for such service is subject to chapter 383, HRS..

DATED: Honolulu, Hawaii, APR 25 2014 .



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of Labor and Industrial Relations

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

In the Matter of) Civil No. 13-1-1026(2)
) (Agency Appeal)
ENVISIONS ENTERTAINMENT &)
PRODUCTIONS, INC.,) CERTIFICATE OF SERVICE
)
Taxpayer-Appellant,)
)
vs.)
)
DWIGHT TAKAMINE, DIRECTOR,)
DEPARTMENT OF LABOR AND)
INDUSTRIAL RELATIONS, STATE OF)
HAWAII, et al.,)
)
Appellees,)
)
and)
)
PAUL BUNUAN,)
)
Claimant-Appellee.)
_____)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following party listed below by U.S. Mail, first-class, postage prepaid, at his last-known address:

ANNA ELENTO-SNEED, ESQ.
CHRISTY P. GRAY, ESQ.
1001 Bishop St., Ste 1800
Honolulu, HI 96813

Attorney for Taxpayer-Appellant

//
//
//

PAUL BUNUAN
160-A Manini Pl.
Kihei, HI 96753-8949

Claimant-Appellee – pro se

DATED: Honolulu, Hawaii, APR 25 2014.


STACI I. TERUYA
Deputy Attorney General

Attorney for Appellee Director
of Labor and Industrial
Relations

Of Counsel:
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Attorneys for Taxpayer-Appellant
ENVISIONS ENTERTAINMENT &
PRODUCTIONS, INC.

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

In the Matter of

ENVISIONS ENTERTAINMENT &
PRODUCTIONS, INC.,

Taxpayer-Appellant,

vs.

DWIGHT TAKAMINE, DIRECTOR,
DEPARTMENT OF LABOR AND
INDUSTRIAL RELATIONS, STATE OF
HAWAII; and DEPARTMENT OF
LABOR AND INDUSTRIAL RELATIONS,
STATE OF HAWAII,

Appellees,

and

PAUL BUNUAN,

Claimant-Appellee.

Civil No. 13-1-0931(2)
(Consolidated)

**PERTINENT FACTS, CONCLUSIONS
OF LAW, AND ORDER**

ORAL ARGUMENT

Date: May 30, 2014

Time: 9:00 a.m.

Judge: The Honorable Peter T.
Cahill

FILED

2014 SEP -3 AM 9:57

N. MARTINS, CLERK
SECOND CIRCUIT COURT
STATE OF HAWAII

PERTINENT FACTS, CONCLUSIONS OF LAW, AND ORDER

On May 30, 2014, Taxpayer-Appellant Envisions Entertainment & Productions, Inc.'s ("Envisions") appeal of the Department of Labor and Industrial Relations Employment Security Appeals Referees' Office ("ESARO") Decisions 1300760 and 1300751, dated August 20, 2013 and October 7, 2013 respectively (the "Appeal")¹ was heard by the Honorable Peter T. Cahill in his courtroom. Anna Elento-Sneed, Esq. of Alston Hunt Floyd & Ing appeared on behalf of Appellant Envisions. Staci Teruya, Esq., Deputy Attorney General, appeared on behalf of Appellees Dwight Takamine, Director, Department of Labor and Industrial Relations, State of Hawai'i and Department of Labor and Industrial Relations, State of Hawai'i ("DLIR"). Appellee Paul Bunuan ("Bunuan") made no appearance.

The Court, having heard and considered the briefs filed by the parties, the arguments of counsel, the files and records on appeal herein, hereby finds and concludes as follows:

PERTINENT FACTS

Envisions and Bunuan

1. Envisions is a Maui-based event production company that provides event planning and organization services for conventions, wedding,

¹ ESARO Decision 1300760 affirmed the Decision and Notice of Assessment issued by the DLIR Unemployment Insurance Division ("UID") dated February 4, 2013 that found that Bunuan was an employee of Envisions under HRS Chapter 383. ESARO Decision 1300751 affirmed the Decision issued by the UID dated February 15, 2013 that found that 5.963 percent of the benefits payable to Bunuan were chargeable to Envisions' reserve account.

and special events in the State of Hawai'i. Envisions provides its clients with supplies and services for these events that include tents, chairs, dance floors, stages, props, floral arrangements, audio/visual systems and entertainment.

2. While Envisions owns some event supplies (such as certain event props, decorations, dance floors and chairs), it contracts with outside vendors for the other required event services and supplies (such as live entertainment).

3. Envisions collects payment for the entire event from its client and distributes payment to the separate individuals and businesses that provided services and supplies for the event.

4. Bunuan is a professional musician who advertises his services through websites and social media where he identifies himself as an "entertainment professional."

5. Bunuan entered into his first independent contractor agreement with Envisions to perform saxophone services in 2006.

6. Bunuan and Envisions contemplated an independent contractor type of relationship with one another.

a. Envisions notified Bunuan of the date, time and place of the events. The date, time and place of events where Bunuan was to perform his services were determined by Envisions' clients.

b. If Bunuan rejected an engagement, it was Envisions' responsibility, not Bunuan's, to find an alternate saxophonist for the event. If

Bunuan cancelled at the last minute, Envisions was responsible for finding a replacement.

c. Envisions notified Bunuan of the general type of music performance requested by its clients for these events, but Bunuan was free to choose his own music selection within those parameters.

d. Bunuan provided his own instrument, as well as his own attire. At no time did Envisions provide Bunuan with tools, equipment or a uniform.

e. At no time did Envisions provide Bunuan with any training with respect to his saxophone performance skills, nor did it supervise any aspect of Bunuan's performance.

f. Bunuan set his own billing rate. Envisions paid Bunuan for his services from the event fees it collected from its clients.

g. Bunuan filled out an IRS Form W-9. He received an IRS Form 1099 from Envisions.

7. In 2012, Bunuan contracted with Envisions to provide live saxophone music at two separate events organized by Envisions, for a grand total of five (5) hours. Envisions and Bunuan executed an independent contractor agreement to govern Bunuan's provision of those services.

Procedural History

8. On January 7, 2013, Bunuan filed an unemployment benefits claim after he was laid off from employment with an unrelated third-party employer.

9. On February 4, 2013, the DLIR's UID auditor issued an employment determination and a benefits determination, finding that the saxophone services performed by Bunuan constituted employment, and thus, the remuneration paid to him by Envisions was subject to HRS Chapter 383. Envisions appealed.

10. On July 24, 2013, ESARO conducted a hearing in the appeal of the employment determination.

11. On August 20, 2013, the ESARO appeals referee ruled that Bunuan ran an independently established business so that "Clause 3" of HRS §383-6 had been met. However, the appeals referee also ruled that: as to "Clause 1" of HRS §383-6, Bunuan was not free from control or direction over the performance of his services; and, as to "Clause 2" of HRS §383-6, Bunuan's services were not outside the usual course of Envisions' business or outside all of Envisions' places of business.

12. The ESARO appeals referee concluded that because only a single clause of the three-part test under HRS §383-6 had been satisfied, the services performed by Bunuan constituted employment, and thus, payments made to him were wages subject to HRS Chapter 386.

13. On September 23, 2014, the ESARO conducted a separate hearing regarding UID Decision 1300751, charging Employer's reserve account for a percentage of benefits payable to Bunuan.

14. On October 7, 2014, the ESARO appeals referee affirmed UID Decision 1300751, charging Employer's reserve account for a percentage of benefits payable to Bunuan.

15. Envisions file a notice of appeal for each ESARO decision. The two appeals were consolidated into the Appeal herein.

CONCLUSIONS OF LAW

Issues on Appeal

16. The statute in question is HRS §383-6, which presumes that all services performed by an individual for a taxpayer are employment. To determine if an individual is an independent contractor pursuant to HRS §383-6, the taxpayer must establish all three clauses of the independent contractor test set forth in the statute.

17. In the present case, the ESARO appeals officer determined that Envisions satisfied "Clause 3" of the test, but failed to establish "Clause 1" and "Clause 2" of the test.

"Clause 1"

18. Under Clause 1, it must be shown that the individual has been and will continue to be free from control or direction over the performance of such service, both under the individual's contract of hire and in fact. Hawaii Administrative Rules ("HAR") §12-5-2(a) provides that control or direction means general control, and need not extend to all details of the performance of service. Furthermore, general control does not mean actual control necessarily, but only that there is a right to exercise control.

19. HAR §12-5-2 provides a twenty-part test that serves as guidelines the DLIR uses, or should be using, to determine whether a person is within the employer-employee relationship. However, there is nothing in the appeals referee's decision to indicate that she went through the guidelines set forth in HAR §12-5-2 and analyzed any of the evidence submitted by Envisions or the testimony of its president, Wayne Hikiji.

20. Envisions points to evidence in the record showing that it had an obligation to its clients to provide saxophone services during the events at which Bunuan provided his services, and thus, Envisions would have been responsible for finding a replacement if Bunuan cancelled at the last minute. The record also shows that Envisions collected event fees from its clients and paid Bunuan for its services. Contrary to the DLIR's argument, the Court finds these factors as indicative of and establishing Envisions' lack of general control, not an exercise of general control.

21. The Ninth Circuit, in analyzing what constitutes an employer/employee relationship under similar federal regulations, determined that if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and method for accomplishing the result, the individual is an independent contractor. *Flemming v. Huycke*, 284 F. 2d 546, 547-548 (9th Cir. 1960).

22. Here, Envisions notified Bunuan of the date, time and place of the events as determined by the clients, as well as the general type of music performance requested by its clients for these events. Bunuan was free to

choose his own music selection within these parameters, and he provided his own instrument as well as his own attire. At no time did Envisions provide him with tools, equipment, or uniform. At no time did Envisions train Bunuan with respect to his saxophone performance skills or supervise any aspect of his performance. Bunuan set his own billing rate throughout the matter, filled out an IRS Form W-9, and received an IRS Form 1099.

23. The facts presented in the record on appeal clearly indicate the parties contemplated an independent contractor relationship with one another, and there are advantages to both parties that the independent contractor relationship exist. However, there is nothing in the record that indicates the DLIR or the appeals referee considered any of these factors or the benefits that accrued to Bunuan.

24. Ignoring the independent contractor relationship in this particular case may have a detrimental effect on Bunuan's provision of saxophone services. In effect, Envisions is an agent that simply directs business to Bunuan. Without that ability, Bunuan has the potential to lose ^{business,} The DLIR's and the appeals referees' failure to consider this factor in this particular case was clearly erroneous. *PM*

25. Most important, the record does not reflect any consideration by the DLIR or the appeals referee of the issue of control. The record shows that Bunuan was in total control as to whether or not he accepted any particular performance. If Bunuan were to reject the engagement, it was Envisions' responsibility, not Bunuan's, to find an alternate saxophonist from

its list. Even after Bunuan's services were engaged, with or through Envisions, Bunuan maintained complete control as to whether or not he would show up at a performance. Looking at this situation and the facts in the record, it is Bunuan who had total and complete control at all times as to whether or not he would allow his services to be engaged.

26. Taken as a whole, it is evident that the control Envisions exercised over Bunuan was merely as to the result to be accomplished by Bunuan's work and not as to the means and method accomplishing the result.

27. Upon careful review of the entire record on appeal, the Court finds that Bunuan was free from control or direction by Envisions over the performance of his services. Consequently, as to Clause 1 of HRS §383-6, the Court concludes that the DLIR's and the appeals referees' findings were not supported by clearly probative and substantial evidence and, therefore, were clearly erroneous.

"Clause 2"

28. Clause 2 of HRS §383-6 requires Envisions to prove that Bunuan's services were either performed outside of Envisions' usual course of business, or performed outside of all of Envisions' places of business.

29. HAR §12-5-2 (3), which describes the standard to be applied, specifies that the term "outside the usual course of the business" refers to services that do not provide or enhance the business of the taxpayer, or services that are merely incidental to, and not an integral part of, the taxpayer's business.

30. In this case, the appeals referee found that Envisions did not prove the services were outside of its usual business, stating, "In this case, Mr. Bunuan's services as musician for Envisions' events were integral to Envisions' event production business." The record indicates that this finding was based on a statement made by the UID auditor at the hearing on the appeal of the employment determination. The UID auditor based her statement on the opinions and experience of her supervisor.

31. The opinions and experience of the UID auditor's supervisor is not evidence, it is simply an opinion. Accordingly, the Court holds that the statement made by the UID auditor should not have been considered by the appeals referee.

32. The record shows that Envisions is an event production company. Its services are in planning and organizing events for its clients.

33. The DLIR argues that Envisions' testimony that it provided entertainment for its clients, and the fact that Envisions' client contracts specifically required a saxophone player at events, constitutes dispositive evidence that Bunuan's services were not incidental and not outside Envisions' usual course of business.

34. The services provided by Bunuan were limited to the playing of the saxophone, and the playing of the saxophone by Bunuan was not integral to Envisions' business.

35. "Integral" means a foundation aspect of Envisions' business. There is nothing in the record that indicates that if Bunuan's services were not

Whalers Realty Management Company Inc.

2580 Kekaa Drive Suite 118

Lahaina, Hawaii 96761

February 6, 2015

Aloha,

I am writing on behalf of Whalers Realty Management Company Inc. in support of SB1219.

Our company has periodically hired Independent Contractors to perform specific services over a defined period of time. Thank you for helping clear any confusion concerning this very important matter.

Thank you for the opportunity to provide testimony. I Support of SB1219.

Sincerely,

Teresa J. Cartwright

Secretary/Vice President and Principal Broker

Tess Cartwright RB -13987

Whalers Realty Management Company Inc.

STAR GAZE HAWAII

A DIVISION OF SOUND COMPUTER CENTER, INC.

P.O. Box 788, Kealahou, HI 96750-0788

PHONE: (808) 323-3481 FAX: (808) 323-9516

Aloha, I am writing in support of SB1219.

I currently choose to perform Commercial Stargazing services as an independent contractor under the name Star Gaze Hawaii. Through this business, I serve multiple clients in a given tax year and am not an employee of my customers. I realize this means that I do not receive employment benefits and that I am required to have my own materials and equipment, insurance, health coverage, etc.

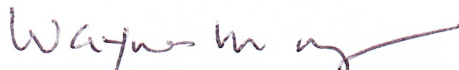
In a changing economic environment, being an independent contractor allows me to:

1. Innovate and develop new ways to view Astronomical Objects to attract market share including Visual, Photographic and Video means.
2. Purchase, customize, calibrate and maintain telescope equipment to very high standards to produce high quality visual stargazing entertainment for guests.
3. Take original Astronomy Photographs of Deep Space Objects and sell the images or use them to promote my business.
4. Set my own hours which very often run far past midnight to observe the sky and take photographs of stars, galaxies, planets, and nebulae.
5. Contract with all of the Hotels, local and international entertainment companies and destination management companies that perform on the Big Island of Hawaii.
6. Set my own Fees for different stargazing options on "per telescope" or "per person" basis depending on the custom program.
7. Research the history and produce lectures on Astronomy in general and the specific contributions of Hawaii to Astronomy to Hotel Guests.

Therefore, I support SB1219 to make it clear that I am an Independent Contractor to the clients who are interested in hiring me, as well as the state.

Thank you for the opportunity to provide testimony and please support SB1219.

Sincerely,



Wayne M. Fukunaga, President



FEED MY SHEEP

February, 6, 2015

Aloha, I am writing on behalf of the Hawaii non-profit, Feed My Sheep, Inc. in support of SB1219.

Our company has in the past and may in the future periodically hire Independent Contractors to perform specific services over a defined period of time. Therefore, we appreciate this opportunity to clarify who qualifies as an Independent Contractor with the state as more and more individuals are seeking contracts as sole proprietors and past rulings by the Department of Labor & Industrial Relations make it unclear as to how sole proprietors will be treated.

By passing this bill, all parties can move forward with the relationship knowing where they stand.

Thank you for the opportunity to provide testimony and please support SB1219.

Sincerely,

Joyce Kawakami, CEO
Feed My Sheep, Inc.
PO Box 847
Pu`unene, HI 96784



February 6, 2015

Aloha, I am writing on behalf of Wailea Golf LLC in support of SB1219.

Our company has periodically hired Independent Contractors to perform specific services over a defined period of time. Therefore, we appreciate this opportunity to clarify who qualifies as an Independent Contractor with the state as more and more individuals are seeking contracts as sole proprietors and past rulings by the Department of Labor & Industrial Relations make it unclear as to how sole proprietors will be treated.

By passing this bill, all parties can move forward with the relationship knowing where they stand.

Thank you for the opportunity to provide testimony and please support SB1219

Sincerely,

Paul Y. Hiranaga
Controller

Kika, Inc.

1021 Pueo St.
Honolulu, HI 96816
Phone (808) 735-2088
Fax (808) 737-7999

Feb. 6, 2015

To Whom It May Concern:

I am writing in support of your bill SB1219. Independent contractors that work for my company periodically want to be classified as such not as employees. They have their own business's licence and pay their taxes. We appreciate this opportunity to clarify who qualifies as an Independent Contractor with the state as more and more individuals are seeking contracts as sole proprietors and past rulings by the Department of Labor & Industrial Relations make it unclear as to how sole proprietors will be treated.

Please pass this bill so that all parties can move forward with the relationship knowing where they stand.

Thank you,

C. Kika T. Matsumoto

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc: [REDACTED]
Subject: Submitted testimony for SB1219 on Feb 9, 2015 09:30AM
Date: Friday, February 06, 2015 1:39:12 PM

SB1219

Submitted on: 2/6/2015

Testimony for JDL on Feb 9, 2015 09:30AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Nelson T. Okumura	VIP Foodservice	Support	No

Comments: Aloha, I am writing on behalf of VIP Foodservice in support of SB1219. Our company (has or may) periodically hire Independent Contractors to perform specific services over a defined period of time. Therefore, we appreciate this opportunity to clarify who qualifies as an Independent Contractor with the state as more and more individuals are seeking contracts as sole proprietors and past rulings by the Department of Labor & Industrial Relations make it unclear as to how sole proprietors will be treated. By passing this bill, all parties can move forward with the relationship knowing where they stand. Thank you for the opportunity to provide testimony and please support SB1219. Sincerely, Nelson T. Okumura President

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

Aloha, I am writing on behalf of Melanie Turner Landscape Maintenance LLC in support of SB1219.

Our company May periodically hire Independent Contractors to perform specific services over a defined period of time. Therefore, we appreciate this opportunity to clarify who qualifies as an Independent Contractor with the state as more and more individuals are seeking contracts as sole proprietors and past rulings by the Department of Labor & Industrial Relations make it unclear as to how sole proprietors will be treated.

By passing this bill, all parties can move forward with the relationship knowing where they stand.

Thank you for the opportunity to provide testimony and please support SB1219.

Sincerely,

Melanie A. Turner

February 6, 2015

Aloha, I am writing in behalf of The Maui Closet Company in support of SB 1219.

Our company may periodically fire Independent Contractors to perform specific services over a defined period of time. This is an important part of our business occasionally to provide extra service and care to our clients. It would be beneficial to have clarification on the Independent Contractor, sole proprietors, and their role as to how to be treated in occasional use.

By passing this bill it will clarify with all parties, and progress in a positive manner will be accomplished.

Thank you for the opportunity to provide testimony in support of SB 1219

Aloha,
Debra Finkiewicz
President,
The Maui Closet Company

February 6, 2015

Aloha, I am writing on behalf of The Wright Company, LLC in support of SB1219.

Our company has periodically hire Independent Contractors to perform specific services over a defined period of time. Therefore, we appreciate this opportunity to clarify who qualifies as an Independent Contractor with the state as more and more individuals are seeking contracts as sole proprietors and past rulings by the Department of Labor & Industrial Relations make it unclear as to how sole proprietors will be treated.

By passing this bill, all parties can move forward with the relationship knowing where they stand.

Thank you for the opportunity to provide testimony and please support SB1219.

Sincerely,

Kurt R. Wright

Aloha, I am writing in support of SB1219.

I currently choose to perform music performance services as an independent contractor under the name Kit Okazaki and Goofyfoot Records LLC. Through this business, I serve multiple clients in a given tax year and am not an employee of my customers. I realize this means that I do not receive employment benefits and that I am required to have my own materials and equipment, insurance, health coverage, etc.

In a changing economic environment, being an independent contractor allows me to the ability to be your own boss, have flexibility in your schedule, work on a part-time basis, work for multiple companies, and earn more money.

Therefore, I support SB1219 to make it clear that I am an Independent Contractor to the clients who are interested in hiring me, as well as the state.

Thank you for the opportunity to provide testimony and please support SB1219.

Sincerely,

Kit K Okazaki

TO: Members of the Committee on Judiciary and Labor

FROM: Natalie Iwasa
Honolulu, HI 96825

HEARING: 9:30 a.m. Monday, February 9, 2015

SUBJECT: HB1219 Relating to Employment Security - **OPPOSED**

Aloha Chair and Committee Members,

Thank you for allowing me the opportunity to provide testimony on SB1219, which would add another layer of bureaucracy for small business owners who are independent contractors. Hawaii is consistently noted as one of the worst states in the U.S. to do business, and this bill would add to the reasons for that determination.

Currently, a sole proprietor who runs a legitimate business is not required to obtain a federal ID number nor is he or she required to register with the Department of Commerce and Consumer Affairs (DCCA). Registration with the DCCA requires an annual fee and therefore unnecessarily drives up the cost of doing business. While there is no fee for obtaining a federal ID number, it would add to the paperwork required to do business.

In addition, providing a copy of certification to each customer for whom services are provided would also drive up the cost of doing business. Small business owners are already drowning in paperwork.

The Hawaii Department of Taxation provides a search for general excise tax (GET) licenses at <https://dotax.ehawaii.gov/tls/app>. Any customer who is concerned about the status of an independent contractor can easily check to see if that person has a license.

Please do not make it harder for small businesses to operate in Hawaii. Vote "NO" on this bill.

February 4, 2015

To Whom It May Concern:

My name is Jill Holley and I am the Director of the National Kidney Foundation of Hawaii – Maui Branch. I am making this testimony as an individual although I direct a nonprofit in Maui. I feel that the Department of Labor & Industrial Relations is reaching and extending their boundaries by trying to classify legitimate Independent Contractors (IC) as employees for unemployment benefits, even when the IC says they are an IC, has a registered business in the state, has a general excise tax license, and has signed an independent contractor agreement. The burden should not fall on the business to prove; rather it should be the other way around. There is still too much room for discretion in the law and I strongly urge you to look for a legislative fix to address this challenge for businesses and ICs statewide by clarifying who qualifies as an independent contractor.

If I can provide any additional information, please do not hesitate to contact me.

JILL HOLLEY | Maui Director

National Kidney Foundation of a Hawaii

T: 808.986.1900 | F: 808.986.1901 | C: 530.545.3000

353 Ano Street | Kahului, HI 96732

jill@kidneyhi.org | www.kidneyhi.org



LOVE YOUR KIDNEYS

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc: [REDACTED]
Subject: Submitted testimony for SB1219 on Feb 9, 2015 09:30AM
Date: Friday, February 06, 2015 1:36:12 PM

SB1219

Submitted on: 2/6/2015

Testimony for JDL on Feb 9, 2015 09:30AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Robert J Cartwright	Whalers Realty Inc	Support	No

Comments: Aloha, I am writing on behalf of Whalers Realty Inc in support of SB1219. Our company has periodically hires Independent Contractors to perform specific services over a defined period of time. Therefore, we appreciate this opportunity to clarify who qualifies as an Independent Contractor with the state as more and more individuals are seeking contracts as sole proprietors and past rulings by the Department of Labor & Industrial Relations make it unclear as to how sole proprietors will be treated. By passing this bill, all parties can move forward with the relationship knowing where they stand. Thank you for the opportunity to provide testimony and please support SB1219. Sincerely, Robert J Cartwright

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

Marilyn Chapman
535 Kaiolohia Street
Kihei, HI 96753

February 6, 2015

State of Hawaii – Senate
Committee of the Judiciary and Labor
Capitol Building
Honolulu, HI

Aloha, I am writing on behalf of many small companies on Maui, in support of SB1219 introduced by Senator Roz Baker.

From time to time, many small and large companies hire Independent Contractors to perform many different types of services. Therefore, we appreciate this opportunity to clarify who qualifies as an Independent Contractor with the state as more and more individuals are seeking contracts as sole proprietors and past rulings by the Department of Labor & Industrial Relations make it unclear as to how sole proprietors will be treated.

By passing this bill, we eliminate the need for discretionary determinations by the DLIR, which saves both businesses and the state in terms of time and hassles.

Thank you for the opportunity to provide testimony and please support SB1219.

Sincerely,


Marilyn Chapman

Aloha, I am writing in support of SB1219.

I currently choose to perform entertainment services in the form of Mobile DJ, karaoke, MC etc.. as an independent contractor under the name The Force Enterprises. Through this business, I serve multiple clients in a given tax year and am not an employee of my customers. I realize this means that I do not receive employment benefits and that I am required to have my own materials and equipment, insurance, health coverage, etc.

In a changing economic environment, being an independent contractor allows me to have my own business in which I am contracted by multiple booking companies, Hotels, DMC's throughout the islands.

Therefore, I support SB1219 to make it clear that I am an Independent Contractor to the clients who are interested in hiring me, as well as the state.

Thank you for the opportunity to provide testimony and please support SB1219.

Sincerely,

Edward C. Geer

Aloha, I am writing in support of SB1219.

I am an independent fire dancer/performer. Through this business, I serve multiple clients in a given tax year and am not an employee of my customers. I realize this means that I do not receive employment benefits and that I am required to have my own materials and equipment, insurance, health coverage, etc.

I am very passionate about dancing, but it isn't enough to survive on. Working as an independent contractor allows me to perform part-time, while have flexibility in my schedule for a full-time day job.

Performing is a very important part of my life. Therefore, I support SB1219 to make it clear that I am an Independent Contractor to the clients who are interested in hiring me, as well as the state.

Thank you for the opportunity to provide testimony and please support SB1219.

Sincerely,

Elizabeth Davis Rademacher

Aloha, I am writing in support of SB1219.

I currently choose to perform musical, speaking, and other services as an independent contractor under the name Dan Del Negro Productions, Inc. Through this business, I serve multiple clients in a given tax year and am not an employee of my customers. I realize this means that I do not receive employment benefits and that I am required to have my own materials and equipment, insurance, health coverage, etc.

In a changing economic environment, being an independent contractor allows me to be my own boss, have flexibility in my schedule, work on a part-time basis, work for multiple companies, earn more money, etc. In addition, I prefer to pay withholding taxes, unemployment insurance, etc., through my corporation on a (currently) quarterly basis, rather than having my customers deduct these payments from every paycheck (most of which are for 1 days' work at a time).

Therefore, I support SB1219 to make it clear that I am an Independent Contractor to the clients who are interested in hiring me, as well as the state.

Thank you for the opportunity to provide testimony and please support SB1219.

Sincerely,

A handwritten signature in black ink, appearing to be 'Daniel J. Del Negro', written over a light blue horizontal line.

Daniel J. Del Negro

President, Dan Del Negro Productions, Inc.

Aloha,

I am writing in support of ^{SB/219}~~HB1213~~.

I currently choose to perform musician and performance services as an independent contractor under the name Kristine Snyder/Maui Harps. Through this business, I serve multiple clients in a given tax year and am not an employee of my customers. I realize this means that I do not receive employment benefits and that I am required to have my own materials and equipment, insurance, health coverage, etc.

In a changing economic environment, being an independent contractor allows me to work for multiple companies, work flexible hours, run my own business.

Therefore, I support ^{SB/219}~~HB1213~~ to make it clear that I am an Independent Contractor to the clients who are interested in hiring me, as well as the state.

Thank you for the opportunity to provide testimony and please support ^{SB/219}~~HB1213~~.

Sincerely,

Kristine Snyder

Aloha, I am writing in support of SB1219.

I currently choose to perform interactive entertainment services as an independent contractor under the name Gwen K. McEnaney. Through this business, I serve multiple clients in a given tax year and am not an employee of my customers. I realize this means that I do not receive employment benefits and that I am required to have my own materials and equipment, insurance, health coverage, etc.

In a changing economic environment, being an independent contractor allows me to offer my services to multiple companies, ability to decide which events I am interested in providing services and create my own hours while earning additional income.

Therefore, I support SB1219 to make it clear that I am an Independent Contractor to the clients who are interested in hiring me, as well as the state.

Thank you for the opportunity to provide testimony and please support SB1219.

Sincerely,

Kim McEnaney

Aloha, my name is Laura Bollinger, and I am writing in support of SB1219.

I currently choose to perform (name services) services as an independent contractor under the name Encore Talent. Through this business, I serve multiple clients in a given tax year and am not an employee of my customers. I realize this means that I do not receive employment benefits and that I am required to have my own materials and equipment, insurance, health coverage, etc.

In a changing economic environment, being an independent contractor allows me to work as often or as little as I need, to be responsible for my own destiny and income (dependant on my own performance and energy) and to work for whomever I want.

Therefore, I support SB1219 to make it clear that I am an Independent Contractor to the clients who are interested in hiring me, as well as the state.

Thank you for the opportunity to provide testimony and please support SB1219.

Sincerely,
Laura Bollinger

February 8, 2015

Aloha, I am writing in support of SB1219.

As a small business owner in Maui County our business employs the services of independent contractors. These individuals are certified to perform unique professional skill. These independent contractors serve many clients who are in direct competition of our business. Specific service contracts are provided for each professional being contracted with. These individuals are responsible for providing their own materials and equipment, insurance, health coverage, etc.

In a changing economic environment, many professionals in our line of work are choosing to become independent contractors because it allows them to have more control over their schedule which directly impacts their ability to set and earn an income to support themselves. In addition, as independent contractors they can be more creative in the programs and their client outcomes.

By having SB1219 in place it will make it clear that as an employer I am contracting with an state recognized Independent Contractor. Therefore I am in support of 2B1219.

Thank you for the opportunity to provide testimony and please support SB1219.

Sincerely,

Catherine D. Berry

Aloha, I am writing in support of ^{SB1219} ~~HB1213~~.

February 5, 2015

I currently choose to perform Entertainment services as an independent contractor under the name Henry K. Makua. Through this business, I serve multiple clients in a given tax year and am not an employee of my customers. I realize this means that I do not receive employment benefits and that I am required to have my own materials and equipment, insurance, health coverage, etc.

In a changing economic environment, being an independent contractor allows me the ability to be my own boss, have great flexibility in my schedule, work on a part-time basis, work for multiple companies, and earn more money.

Therefore, I support ^{SB1219} ~~HB1213~~ to make it clear that I am an Independent Contractor to the clients who are interested in hiring me, as well as the state.

Thank you for the opportunity to provide testimony and please support ^{SB1219} ~~HB1213~~.

Sincerely,

Henry K. Makua

Aloha, I am writing in support of ^{SB1219}~~HB1213~~.

I currently choose to perform services as an independent contractor. Through this business I serve multiple clients in a given tax year and am not an employee of my customers. I realize this means that I do not receive employment benefits and that I am required to have my own materials and equipment, health coverage, etc.

Being an independent contractor allows me to be my own boss and create a flexible schedule. Therefore, I support HB1213 to make it clear that I am an Independent Contractor to the clients who are interested in hiring me, as well as the state.

Thank you for the opportunity to provide testimony and please support ~~HB1213~~ SB1219.

Sincerely,

Chris Murphy

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc: [REDACTED]
Subject: Submitted testimony for SB1219 on Feb 9, 2015 09:30AM
Date: Friday, February 06, 2015 7:04:52 PM

SB1219

Submitted on: 2/6/2015

Testimony for JDL on Feb 9, 2015 09:30AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Lorraine Barrie	Individual	Support	No

Comments: Aloha, I am writing in support of SB1219. I currently perform as an individual independent contractor under the name of Lorraine Barrie (artist and entertainer). I run my own business, submit my own taxes, pay for my own insurance (business, medical, auto, et.al.), purchase my own supplies, and cover all of my own costs. I receive no benefits whatsoever from Envisions Entertainment. I am not classified as an employee, nor have I been required to submit tax forms to that effect. I receive a 1099-MISC from Envisions per my IC status. Over the last 20 years I have worked as an independent contractor for many vendors. The idea of classifying independent contractors as employees is by definition totally ungrounded, and perhaps illegal. The tax system defines the difference. Thank you for the opportunity to provide testimony to support SB1219. Sincerely, Lorraine Barrie

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SB1219

Submitted on: 2/6/2015

Testimony for JDL on Feb 9, 2015 09:30AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
robert	Individual	Support	No

Comments: Testimony Aloha, I am writing in support of SB1219. I currently choose to perform musical services as an independent contractor under the name Robert Shinoda. Through this business, I serve multiple clients in a given tax year and am not an employee of my customers. I realize this means that I do not receive employment benefits and that I am required to have my own materials and equipment, insurance, health coverage, etc. In a changing economic environment, being an independent contractor allows me to be my own boss, determine a work schedule most effective and productive for me, work for multiple companies, earn more money, etc.). Therefore, I support SB1213 to make it clear that I am an Independent Contractor to the clients who are interested in hiring me, as well as the state. Thank you for the opportunity to provide testimony and please support SB1213. Sincerely, Robert Shinoda

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SB1219

Submitted on: 2/6/2015

Testimony for JDL on Feb 9, 2015 09:30AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Kirby Keough	Individual	Support	No

Comments:

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Subject: Submitted testimony for SB1219 on Feb 9, 2015 09:30AM
Date: Sunday, February 08, 2015 1:37:18 PM

SB1219

Submitted on: 2/8/2015

Testimony for JDL on Feb 9, 2015 09:30AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Mark Bridgeford	Hang Ten Rigging LLC	Support	No

Comments: I have employees and also hire subcontractors. I really need a quick and easy way to verify subcontractors. Thanks, Mark Bridgeford

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