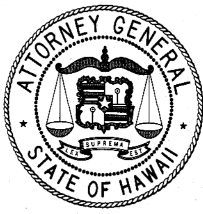

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016

ON THE FOLLOWING MEASURE:
S.B. NO. 2694, S.D. 1, RELATING TO EMPLOYMENT SECURITY.

BEFORE THE:
HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT

DATE: Friday, March 11, 2016 **TIME:** 10:30 a.m.

LOCATION: State Capitol, Room 309

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Robyn M. Kuwabe, Deputy Attorney General

Chair Nakashima and Members of the Committee:

The Department of the Attorney General provides comments about this bill.

The purpose of this bill is to clarify Hawaii's employment security law, regarding the tests to be used in determining whether an individual is an independent contractor.

This bill modifies what is commonly referred to as the "ABC Test," found in section 383-6, Hawaii Revised Statutes (HRS), by deleting the word "customarily" from section 383-6(a)(3) and adds a revamped version of the common-law twenty factor test. The common-law twenty factor test is currently found in the Department of Labor and Industrial Relations' administrative rules, section 12-5-2(b), Hawaii Administrative Rules (HAR). Because the two tests are already in the statute and administrative rules, this bill may not be necessary.

In addition, the bill includes on page 6, lines 3-12, a definition of "independent contractor," which creates an internal conflict. The definition is not consistent with the ABC and the common-law tests provided in the bill for determining if an individual is an independent contractor because the definition does not incorporate all the requirements of the two tests.

To the extent that the bill seeks to inform the public of the criteria used by the Department of Labor and Industrial Relations when determining if an individual is an employee or independent contractor, the Department suggests that section 12-5-2, HAR, be codified in lieu of the proposed revamped version of the twenty factor test as that will avoid the problem with the independent contractor definition. In addition, the Department suggests that the deletion of "customarily" in section 383-6(a)(3) may not be necessary if the independent contractor definition is deleted.

We respectfully request that the bill be amended as suggested above.

DAVID Y. IGE
GOVERNOR

SHAN S. TSUTSUI
LIEUTENANT GOVERNOR

LINDA CHU TAKAYAMA
DIRECTOR

LEONARD HOSHIJO
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
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HONOLULU, HAWAII 96813
www.labor.hawaii.gov
Phone: (808) 586-8844 / Fax: (808) 586-9099
Email: dlir.director@hawaii.gov

March 10, 2016

To: The Honorable Mark M. Nakashima, Chair,
The Honorable Jarrett Keohokalole, Vice Chair, and
Members of the House Committee on Labor & Public Employment

Date: Friday, March 11, 2016
Time: 10:30 am
Place: Conference Room 309, State Capitol

From: Linda Chu Takayama, Director
Department of Labor and Industrial Relations (DLIR)

Re: S.B. No. 2694 SD1 Relating to Employment Security

I. OVERVIEW OF PROPOSED LEGISLATION

SB2694 SD1 amends section 383-6, Hawaii Revised Statutes (HRS), by adding a second criterion to the ABC test to determine the existence of an employee-employer relationship. A new subsection codifies an altered version of the Internal Revenue Service (IRS) twenty common law factors, though not applied as the IRS does, and requires that both the ABC test and the twenty common law factors have been met to determine independent contractor status. The measure also deletes "customarily" from the C of the ABC test.

It is unclear to DLIR if the Legislature's intent is to relax the distinction between employee and independent contractor. If that is the intent, then that involves a different conversation regarding the impact to workers who have relatively unequal power to assert employee status.

DLIR supports sections 3 and 4 that would provide greater transparency regarding coverage determinations and information to the Legislature on the steps the department has taken to insure staff makes determinations using solid guidelines after rigorous training to prevent erroneous rulings. For example: DLIR Unemployment Insurance Division conducted extensive training on the matter of coverage determinations and implemented additional reviews of determinations, during 2015.

The proposal applies an altered version of the twenty common law factors and in a different manner than does the IRS or the Hawaii Administrative Rulrs, stating that they shall be guidelines for determining whether an individual could be deemed and independent contractor. New definitions of "client" and "independent contractor" are added.

DLIR opposes the proposed application of the ABC test and the altered twenty factors in section 383-6. Should the Committee decide that that added factors are preferred, DLIR suggests and would support inserting the IRS twenty common factors and the method of application of those factors from the HAR. This would recognize that each case is different and dependent on a unique set of facts. DLIR also opposes deletion of "customarily" in 383-6(3).

DLIR also supports the amendment of "Master and servant" to "Employer and employee. DLIR notes that while "master and servant" may be archaic, it does denote the unequal distribution of power in the modern employer – employee relationship. An employer is in the position to require an employee to accept independent contractor status much more than the employee is in the position to insist on employee status.

It is difficult to detect employers who misclassify employees as independent contractors in order to compete unfairly by avoiding the cost of taxes, insurance, social security and/or overtime, particularly when those doing the work are not listed on any record of employees. The U.S Department of Labor has recognized it as a growing national problem and has placed a priority on addressing it.

II. CURRENT LAW

Conformity with FUTA taxing provisions in State statutes is critical for employers who pay state UI contributions to receive offset credit against their federal payroll tax.

The ABC standard requires that each of the following conditions be met in the conjunctive for an individual to be considered an independent contractor:

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.

Section 12-5-2, Hawaii Administrative Rules, which implement section 383-6, HRS, includes the IRS 20 factors as an analytic tool in determining whether direction and control exists in an employment relationship and to what degree. The rule clearly enunciates that the degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. This has served over the years to ensure conformity with FUTA taxing provisions, which is critical for employers to receive an offset credit against their payroll tax, and for the funding of the State's Unemployment Insurance Division.

III. COMMENTS ON THE SENATE BILL

The Department raises offers the following comments and recommendations:

1. Subsection (b) (page 3, line 3) effectively replaces the 20 factors contained in the HAR and assumes that these factors "shall be guidelines for determining whether an individual could be deemed an independent contractor." This reasoning, in conjunction with the definition of "independent contractor" in subsection (c) which limits its focus to prong C, neither includes the conjunctive ABC test, nor fully addresses all aspects of the ABC test.

   DLIR recommends using the language of section 12-5-2, HAR, in lieu of the new statutory amendments proposed in this bill. The twenty factors should be used as guidance in applying the first prong of the ABC test, not as an added, possibly freestanding "test" to determine employee status. Further, DLIR recommends reinserting "customarily" in 383-6(3).

2. Subsection (c) includes new "client" and "independent contractor" definitions that have no other references in chapter 383, HRS. The rationale of restricting these terms to section 383-6, when their applicability should be integrated and compatible with established definitions of "employer" or "employing unit" is unclear. Additionally, "independent contractor" is defined by circular reasoning, which undercuts the basic premise of the Hawaii Employment Security Law that a determination of independent contractor is conditioned on satisfying the three prongs of the ABC test, irrespective of whether a common law relationship exists.
   DLIR recommends that these definitions be deleted because they add more confusion than clarity to the coverage determination process.

3. DLIR suggests changing the title of 383-6 in the measure to "Common law employer and employee relationship, not required when".

4. Rather than making clearer as to what determines employee status or independent contractor status, the addition of the 20 factors into statute may make it harder to understand for both potential employers, contractors and workers and generate delays in the process.

As discussed above, the department supports sections 3 and 4 contained in the measure, which would provide greater transparency regarding coverage determinations and information to the Legislature on the steps the department has taken to insure staff receives solid guidelines and training to help prevent erroneous rulings.

Equal Opportunity Employer/Program
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TDD/TTY Dial 711 then ask for (808) 586-8866

The Twenty-Eighth Legislature
Regular Session of 2016

HOUSE OF REPRESENTATIVES
Committee on Labor & Public Employment
Rep. Mark M. Nakashima, Chair
Rep. Jarrett Keohokalole, Vice Chair
State Capitol, Conference Room 309
Friday, March 11, 2016; 10:30 a.m.

STATEMENT OF THE ILWU LOCAL 142 ON S.B. 2694, SD1
RELATING TO EMPLOYMENT SECURITY

The ILWU Local 142 **opposes** S.B. 2694, SD1, which clarifies Hawaii's employment security law for independent contractors to include 20 factors to be used as guidelines when determining whether an individual could be an independent contractor. The bill retains the ability of the Department of Labor and Industrial Relations to determine if an individual is an independent contractor and requires DLIR to report to the Legislature prior to the regular session of 2017 regarding guidelines developed by the Unemployment Insurance Coverage Committee and requires annual reports to the Legislature regarding covered employment determinations.

We believe this bill is unnecessary and will further muddy the waters regarding independent contractor status. The Employment Security law (HRS 383) is clear . According to HRS 383-6, a "master-servant"—or employer-employee—relationship exists unless and until it is shown to the satisfaction of DLIR that the "ABC test" applies, namely that:

(A) 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

(B) the service is either outside the usual course of the business for which the service performed or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and

(C) 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.

Furthermore, the Administrative Rules (12-5-2) are clear and clarify the law. They spell out 20 factors which may be used as guides to determine if an individual is an employee. These 20 factors need not be included in the law as they are "guidelines," as the bill states, the same as is stated in the Administrative Rules.

This bill appears to have been introduced in response to a misapplication of the guidelines in the unemployment insurance claim of an individual contracted for work by a Maui employer, who subsequently prevailed in Circuit Court to have two earlier decisions vacated. The Court's decision recognized that application of the test for "control and direction" should determine independent contractor status. That the guidelines and law were not strictly applied in one instance should <u>not</u> justify changing the law. This bill does nothing to make a bad situation better. In fact, it will make matters worse.

Although the issue of conformity with federal law seems to have been addressed, amending the law must be carefully thought through to ensure no unintended consequences. However, we firmly believe there is **no need to amend the law**.

The ILWU respectfully urges that S.B. 2694, SD1 be HELD. Thank you for considering our views and concerns.

HAWAII STATE AFL-CIO

345 Queen Street, Suite 500 • Honolulu, Hawaii 96813

Randy Perreira
President

Telephone: (808) 597-1441
Fax: (808) 593-2149

The Twenty-Eighth Legislature, State of Hawaii
Hawaii State House of Representatives
Committee on Labor and Public Employment

Testimony by
Hawaii State AFL-CIO
March 11, 2016

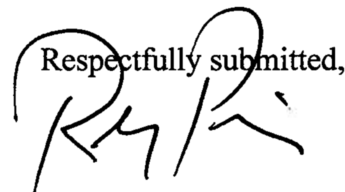
S.B. 2694, S.D.1 – RELATING TO EMPLOYMENT SECURITY

The Hawaii State AFL-CIO opposes S.B. 2694, S.D.1, which clarifies Hawaii's employment security law for independent contractors and includes twenty (20) factors to be used as guidelines when determining whether an individual could be an independent contractor and retains the ability of the Department of Labor and Industrial Relations to determine if an individual is an independent contractor.

The Hawaii State AFL-CIO is concerned changing the independent contractor law could be detrimental to a number of workers in the State of Hawaii. Independent contractors have several disadvantages such as not having the ability to collect unemployment insurance or claim workers' compensation. As a result, the Hawaii State AFL-CIO strongly urges the Committee on Labor and Public Employment to defer S.B. 2694, S.D.1 indefinitely.

Thank you for the opportunity to testify.

Respectfully submitted,



Randy Perreira
President

March 10, 2016

To: The Honorable Mark Nakashima, Chair
The Honorable Jarrett Keohokalole, Vice Chair
Members of the Committee on Labor & Public Employment
Date: Friday, March 11, 2016
Time: 10:30 am
Place: State Capitol, House Conference Room 309
415 South Beretania Street

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

RE: S.B. 2694, SD1 Relating to Employment Security

TESTIMONY IN SUPPORT OF S.B. 2694, SD1

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

IMPETUS FOR S.B. 2694, SD1. The impetus for SB2694, SD1 ("SD1") is the Department of Labor and Industrial Relations' ("DLIR") incorrect interpretation of H.R.S. Section 383-6 ("383-6"), commonly referred to as the "ABC Test" in a 2013 case against my company. We appealed the DLIR's Decision to the Circuit Court of the 2nd Circuit which found that the DLIR erroneously interpreted 383-6 and failed to consider all twenty factors of Hawaii Administrative Rules 12-5-2 ("HAR 12-5-2") in the context of the undisputed facts of our case in its analysis of the ABC Test (the Circuit Court's Decision is attached).

I am, therefore, writing in strong support of SD1 because it provides much-needed statutory clarification in independent contractor ("IC") determinations for (i) individuals who chose to be self-employed entrepreneurs, (ii) companies that hire them, and (iii) the DLIR which is charged to correctly and consistently interpret and apply the ABC Test.

SUMMARY OF SUPPORT FOR S.B. 2694, SD1: We appreciate all of you who understand this is not an isolated case, but a wide-spread and long-standing issue. Therefore, I urge you to support SD1 for the following reasons:

- SD1 correctly states the clear purpose of providing greater clarity to determine <u>independent contractor status</u> rather than <u>employee status</u>. While this statement of legislative intent may seem innocuous, we believe it sets the proper tone for the entire Bill and makes it clear what this Bill is intended to address.

36 Pa'a Street, Kahului, Hawaii 96732 * Office: (808) 874-1000 * Fax: (808) 879-0720
INFO@EnvisionsEntertainment.com

- SD1 appropriately replaces the archaic "Master Servant" title of 383-6 with "Independent Contractor" which codifies the Bill's clear purpose.

- Given the DLIR's missteps in our case, SD1 codifies the 20 factors to require the DLIR to document its analysis of all 20 factors in its coverage determinations. The IRS factors are used to address any US DOL's federal conformity concerns.

- 383-1 defines "employer" and "employee." For purposes of 383-6, the SD1 likewise defines "Client" and "Independent Contractor" to draw a fundamental legal distinction of control that is currently absent in 383-6 and HAR 12-5-2. It is well-established that an IC has the right to control the manner and means used to perform the contracted service. On the other hand, a client has the absolute right to control the result of the individual's work to ensure the desire outcome of the project. We believe this essential legal distinction, which the Circuit Court in our case relied on, must be included in the law.

- Finally, we are pleased that SD1 includes Sections 3 & 4 to 383-6. It establishes a workable mechanism of accountability which requires the DLIR to demonstrate to the Legislature that its auditors and appeals officers are correctly and consistently interpreting and applying the ABC Test in each case.

REBUTTAL TO OPPOSING TESTIMONY:
SD1 does not change the ABC Test in any way as the DLIR would have you believe. All three prongs remain intact and must still be met in the conjunctive. What SD1 does do is make the law more comprehensive by including the twenty factors the DLIR is mandated to consider and adding definitions of "independent contractor" and "client" to juxtapose the "employee" and "employer" definitions in 383-1.

The DLIR misconstrues Subsection (b). Nothing in SD1 suggests that the twenty factors is an "additional," "freestanding," or "preferred" test replace or supersede the ABC Test. All twenty factors are still considered guidelines to aid in determining the control prong of the ABC Test, and the DLIR retains its discretion to give each factor its proper weight based on the facts of each case.

Codifying the twenty factors also serves two important purposes: First, it requires the DLIR to consider all 20 factors which the Circuit Court chastised the DLIR for not doing in the Envisions case. Second, since 383-6 makes no reference to HAR 12-5-2, Subsection (b) provides employers, clients, and individuals with the very factors the DLIR considers in the statute itself rather in the HAR where a lay person may not know to look.

An increasing number of Hawaii entrepreneurs are choosing to go into business for themselves as ICs. Therefore, SD1 was drafted to keep up with the times to determine who qualifies as an IC, rather than perpetuate the confusing inverse logic of the current law which determines who is not an employee. To be consistent and clear, the 20 factors of subsection (b) were framed precisely with this perspective in mind.

We support the deletion of "customarily" in 383-6(3) because many individuals seek part-time, casual work as ICs to supplement their income from their primary jobs. It would, therefore, be unfair to those individuals if they are required to be "customarily engaged" in an established independent business to be classified as an IC for these one-off projects.

The DLIR's unscrupulous employer assertion is misplaced as there are statutory remedies to file a UI claim to address misclassification concerns. The DLIR's webpage clearly designates a "For Employees" section for those who feel they should be one. Furthermore, the DLIR's concern that individuals are unaware of these remedies requires (i) proactive measures by the DLIR to ensure that these classes of individuals are aware of their rights, and (ii) the creation of safeguards to discourage employers from misclassifying employees at the outset. To skip this important step only to focus on invoking 383-6 after the harm is done is a reactive approach at best.

We applaud the DILR's assertion that they have conducted extensive training and implemented additional review protocols to improve the coverage determination process. Moving forward, I hope this training includes protocols at the Claims level to determine if an individual is an IC on his/her own free will to avoid the unnecessary, time-consuming and costly process of litigating uncontested cases like the Envisions case.

Finally, the Envisions case is not an isolated case as the ILWU would suggest. The Chambers of Commerce on all islands have made it clear that the misclassification of ICs as employees is a long-standing and wide-spread problem that affects every sector of the business population in Hawaii. The fact that companies choose not to contest the DLIR's erroneous determinations for fear of exposing themselves to an otherwise unwinnable situation is yet another reason SD1 is necessary.

Given the foregoing, we humbly ask that you support S.B. 2694, SD1.

Respectfully submitted,

ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC.

Wayne Hikiji
Its President

36 Pa'a Street, Kahului, Hawaii 96732 * Office: (808) 874-1000 * Fax: (808) 879-0720
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Attorneys for Taxpayer-Appellant
ENVISIONS ENTERTAINMENT &
PRODUCTIONS, INC.

FILED
2014 SEP -3 AM 9:57
N. MARTINS, CLERK
SECOND CIRCUIT COURT

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI`I

In the Matter of

ENVISIONS ENTERTAINMENT &
PRODUCTIONS, INC.,

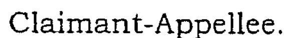
Taxpayer-Appellant,

vs.

DWIGHT TAKAMINE, DIRECTOR,
DEPARTMENT OF LABOR AND
INDUSTRIAL RELATIONS, STATE OF
HAWAI`I; and DEPARTMENT OF
LABOR AND INDUSTRIAL RELATIONS,
STATE OF HAWAI`I,

Appellees,

and



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

902139v2

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 [redacted] 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 [redacted]

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

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

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

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

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

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

[redacted] cancelled at the last minute, Envisions was responsible for finding a replacement.

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

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

e. At no time did Envisions provide [redacted] with any training with respect to his saxophone performance skills, nor did it supervise any aspect of [redacted] performance.

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

g. [redacted] filled out an IRS Form W-9. He received an IRS Form 1099 from Envisions.

7. In 2012, [redacted] 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 [redacted] executed an independent contractor agreement to govern [redacted] provision of those services.

Procedural History

8. On January 7, 2013, [redacted] 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 [redacted] 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 [redacted] 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, [redacted] was not free from control or direction over the performance of his services; and, as to "Clause 2" of HRS §383-6, [redacted] 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 [redacted] 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 [redacted]

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 [redacted].

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 [redacted] provided his services, and thus, Envisions would have been responsible for finding a replacement if [redacted] cancelled at the last minute. The record also shows that Envisions collected event fees from its clients and paid [redacted] 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 [redacted] 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. [redacted] 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 with respect to his saxophone performance skills or supervise any aspect of his performance. 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 .

24. Ignoring the independent contractor relationship in this particular case may have a detrimental effect on provision of saxophone services. In effect, Envisions is an agent that simply directs business to . Without that ability, 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.

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 was in total control as to whether or not he accepted any particular performance. If were to reject the engagement, it was Envisions' responsibility, not , to find an alternate saxophonist from

its list. Even after [redacted] services were engaged, with or through Envisions, [redacted] 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 [redacted] 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 [redacted] was merely as to the result to be accomplished by [redacted] 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 [redacted] 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 [redacted] 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, [redacted] 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. It 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 [redacted] services were not incidental and not outside Envisions' usual course of business.

34. The services provided by [redacted] were limited to the playing of the saxophone, and the playing of the saxophone by [redacted] 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 [redacted] services were not

available to Envisions, and there were no other saxophone players of [redacted] competence, that Envisions' business would fail.

36. The record clearly indicates that [redacted] services were provided only two times during the period under investigation, for a grand total of five hours in all of 2012.

37. Given these facts, the Court finds that [redacted] saxophone services were incidental rather than integral to Envisions' business.

38. Based on the foregoing facts, the Court finds the DLIR's determination and the appeals referee's decision were clearly erroneous in view of the reliable, probative and substantial evidence in the record as a whole.

ORDER

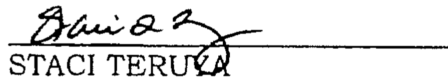
Based on the foregoing, the Court reverses the UID Decision and Notice of Assessment, DOL# 0003018601, dated February 4, 2013, and ESARO Decisions 1300760 and 1300751, dated August 20, 2013 and October 7, 2013 respectively.

DATED: Honolulu [Wailuku], Hawaii, SEP - 2 2014.

/S/ PETER T. CAHILL (SEAL)

Judge of the Above-Entitled Court

APPROVED AS TO FORM:



STACI TERUYA
Attorney for Appellees DWIGHT TAKAMINE and
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

Envisions Entertainment & Productions, Inc. v. Dwight Takamine, Director, Department Of Labor and Industrial Relations, State of Hawai`i, et al.; Civil No. 13-1-0931(2) (Consolidated); PERTINENT FACTS, CONCLUSIONS OF LAW, AND ORDER

Chamber of Commerce HAWAII
The Voice of Business

Testimony to the Senate Committee on Labor & Public Employment and Committee on Higher Education
Friday, March 11, 2016 at 10:30 A.M.
Conference Room 309, State Capitol

RE: SENATE BILL 2694 SD 1 RELATING TO EMPLOYMENT SECURITY

Chairs Nakashima and Choy, Vice Chairs Keohokalole and Ichiyama, and Members of the Committees:

The Chamber of Commerce Hawaii ("The Chamber") **supports the intent** of SB 2694 SD 1, which clarifies Hawaii's employment security law for independent contractors and includes twenty factors to be used as guidelines when determining whether an individual could be an independent contractor. Also retains the ability of the department of labor and industrial relations to determine if an individual is an independent contractor and requires the director of labor and industrial relations to report to the legislature prior to the regular session of 2017 regarding guidelines developed by the unemployment insurance coverage committee.

The Chamber is Hawaii's leading statewide business advocacy organization, representing about 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 independent contractors are an important part of Hawaii's business community and economy. We have seen too much of a broad 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.

1132 Bishop Street, Suite 2105 • Honolulu, Hawaii 96813 • Phone: (808) 545-4300 • Facsimile: (808) 545-4369

TO: Members of the Committees on Labor and Public Employment

FROM: Natalie Iwasa, CPA, CFE
Honolulu, HI 96825
808-395-3233

HEARING: 10:30 a.m. Friday, March 11, 2016

SUBJECT: SB2694, SD1 Relating to Employment Security
Defining Independent Contractors - COMMENT

Aloha Chairs and Committee Members,

Thank you for allowing me to provide testimony on SB 2694, SD1, which provides a 20-factor test and definition of independent contractor. The definition for "client" states that the client "***does not have the right*** *to control or direct the manner or means used by an independent contractor to accomplish the result."*

This definition may result in unintended consequences, as there may be situations in which the business owner has to direct the manner in which a service is provided. Please remove the phrase "right to control" from the definition.

March 10, 2016

Aloha, I am writing in support of SB2694.

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 us. 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 SB2694 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 SB2694.

Thank you for the opportunity to provide testimony and please support SB2694.

Sincerely,

Catherine D. Berry

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, March 10, 2016 2:20 PM
To: LABtestimony
Cc: MISSYAGUILAR615@GMAIL.COM
Subject: Submitted testimony for SB2694 on Mar 11, 2016 10:30AM

SB2694
Submitted on: 3/10/2016
Testimony for LAB on Mar 11, 2016 10:30AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
Charlene Aguilar	Individual	Support	No

Comments: I support this bill because I freely choose to be an Independent Contractor and have been for over 25 years. Mahalo nui loa.

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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From:	mailinglist@capitol.hawaii.gov
Sent:	Thursday, March 10, 2016 10:19 AM
To:	LABtestimony
Cc:	luly.unemori2@hawaiiantel.net
Subject:	Submitted testimony for SB2694 on Mar 11, 2016 10:30AM

SB2694
Submitted on: 3/10/2016
Testimony for LAB on Mar 11, 2016 10:30AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
Luly Unemori	Individual	Support	No

Comments: Aloha Honorable Representatives, I am a self-employed, one-person business and often work as an independent contractor for various clients. I chose to leave my former job and the employee benefits that went with it in order to work as an independent, and have never regretted my decision. I support SB2964 because it offers greater clarity and protection for independent contractors like me. Under current law, there is a process I can follow should I ever feel that I am being taken advantage of by an unethical customer. SB2964 provides additional protection for the opposite case – when an independent contractor is incorrectly declared as an employee and as a very small business, lacks the resources to contest it. I imagine there are thousands of other people like me in the state, earning or supplementing their daily bread by working as an independent contractor. Please support small businesses and support this bill. Mahalo!

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LATE

HEARING BEFORE THE
HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
State Capitol, Room 309
March 11, 2016
10:30 AM

TESTIMONY IN STRONG SUPPORT OFSB2694SD1
RELATING TO EMPLOYMENT SECURITY

Aloha Chair Nakashima, Vice Chair Keohokalole, and Members of the Committee:

I am writing share our **strong support of SB2694SD1** which clarifies Hawaii's employment security law for Independent Contractors; includes twenty factors to be used as guidelines when determining whether an individual could be an Independent Contractor, retains the ability of the department of labor and industrial relations to determine if an individual is an Independent Contractor; requires the Director of Labor and Industrial Relations to report to the legislature prior to the regular session of 2017 regarding guidelines developed by the unemployment insurance coverage committee; and requires an annual report to the legislature regarding covered employment determinations. This bill goes a long way toward protecting legitimate Independent Contractors and those that hire them from erroneous rulings by the Department of Labor and Industrial Relations (DLIR), where legitimate Independent Contractors have been determined to be employees.

First, I would like to thank this committee for its help last year it taking matter up. We appreciate that members of this committee took time to learn more about the Envisions Entertainment case and Judge Cahill's ruling and that many recognized that this is not an isolated incident as some would portray it to be.

Over the years we, other Chambers, and business organizations across the state have seen numerous rulings where the DLIR has 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 they simply chose not to fight it and many poor rulings stand.

As we shared last year, a great deal of effort was made on our part and on the part of Envisions Entertainment to address the problem before seeking legislative relief. 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 and said they do sometimes rule in favor of employers and that he would send us 20 redacted copies of rulings 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. This further illustrates the prevalence of this problem.

So, Envisions Entertainment had to and did take their case to court. It was an expensive battle (over $70,000), 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. Just specifying time and place is problematic.

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. Two bills were introduced last legislative session for this purpose – HB1213 and SB1219. They in no way affected employees. Instead, they recognized that more and more people are operating as Independent Contractors, even when they have a full time job, in a new economy. HB1213 died during the process and SB1219 did not make it out of Conference Committee.

Through last year’s process, many Senators and Representatives well understood the issue and had stories of their own of people who had been negatively impacted by erroneous rulings as well, providing even more validation that this is a bigger problem than most know. Further, the Chair and other law makers saw the need for more transparency on this issue, which we deeply appreciate and agree with.

So, we are back to continue the discussion and work to fix this problem. Despite this being year two, we are not hearing any assurance from the DLIR that Judge Cahill’s ruling has changed how they interpret the law. There has been a lot of mention of training, which we understand was conducted over 3 days for UI staff and included the AG’s staff for 1 day. While the training conducted covered Judge Cahill’s ruling, along with practices in other areas and more, DLIR reported that they felt the ruling came about because they had insufficient documentation of the facts. This leaves us questioning whether they got what Judge Cahill said with respect to an “erroneous ruling” and “abuse of discretionary power.” Further, the Envisions Entertainment case was an uncontested case where the Independent Contractor told the DLIR he was an Independent Contractor.

Therefore, with no assurance from DLIR that they will view this situation differently, we must continue to pursue and remedy and ask for your support of SB2694 SD1. This bill:

- Recognizes that more individuals are doing business as Independent Contractors and that they may still have other jobs outside of their business;
- Provides greater clarity in Hawaii’s employment security law for those who choose to be Independent Contractors;
- Gets rid of that old and inappropriate “Master and Servant” language;
- Provides better guidelines for determinations by codifying the 20 factors to require the DLIR to document its analysis of all 20 factors in its coverage determinations;
- Takes out the word “customarily” which is beneficial as many Independent Contracts may only work as an Independent Contractors part time and someone then say they were not and Independent Contractor as this work was not done “customarily; and
- Requires reporting and more transparency from the DLIR.

We ask for your strong support of SB2694 SD1 to rectify an ongoing statewide problem.

Mahalo nui loa for the opportunity to provide testimony.

Sincerely,

Pamela Tumpap
President

LATE

From: mailinglist@capitol.hawaii.gov
Sent: Friday, March 11, 2016 8:52 AM
To: LABtestimony
Cc: teresa@waldorfmaui.org
Subject: *Submitted testimony for SB2694 on Mar 11, 2016 10:30AM*

Follow Up Flag: Follow up
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SB2694
Submitted on: 3/11/2016
Testimony for LAB on Mar 11, 2016 10:30AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
Teresa Rizzo	Individual	Support	No

Comments:

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LATE

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Sent: Friday, March 11, 2016 9:03 AM
To: LABtestimony
Cc: mauioma@maui.net
Subject: Submitted testimony for SB2694 on Mar 11, 2016 10:30AM

SB2694
Submitted on: 3/11/2016
Testimony for LAB on Mar 11, 2016 10:30AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
David Gridley	Individual	Support	No

Comments: STRONGLY SUPPORT

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Sent:	Friday, March 11, 2016 9:42 AM
To:	LABtestimony
Cc:	south246@gmail.com
Subject:	Submitted testimony for SB2694 on Mar 11, 2016 10:30AM

SB2694
Submitted on: 3/11/2016
Testimony for LAB on Mar 11, 2016 10:30AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
roger simonot	Individual	Support	No

Comments: Please pass this bill to help clarify the status of IC. State has historically classified IC as employees even when employees themselves indicate to them that they are in fact IC. Too much power in DLIR in making determinations - forcing classifications upon IC and employers in contrast to what both have indicated to DLIR. I personally have been party to this as can speak to the improper classification of IC the state pushed down our throats and resulted in loosing the position. Please support this bill

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