

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

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LATE TESTIMONY

February 16, 2016

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: Tuesday, February 16, 2016
Time: 9:00 a.m.
Place: Conference Room 016, State Capitol

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

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

I. OVERVIEW OF PROPOSED LEGISLATION

SB 2694 amends section 383-6, Hawaii Revised Statutes (HRS), by adding a second criterion that must be met to determine the existence of an employee-employer relationship. A new subsection codifies the Internal Revenue Service (IRS) twenty common-law factors and requires that both a preponderance of these elements and the ABC test must be considered in the adjudication of independent contractor status.

Section 12-5-2, Hawaii Administrative Rules (HAR), currently identifies 20 factors to be used as a guide in deciding whether sufficient control or direction is present to establish employment. However, SB 2694 includes an alternative version of the 20 elements and adds definitions of "client and "independent contractor," ostensibly to simplify and facilitate the self-employment determination process.

DLIR opposes the measure and suggests amendments if the Committee chooses to move the measure.

II. CURRENT LAW

Act 219, Session Laws of Hawaii (SLH, 1939) created the Unemployment Insurance Program in Hawaii in response to federal action taken under the Social Security Act of 1935. The provisions amended in the proposal were incorporated

into Hawaii's law via Act 219 (SLH,1939):

The IRS applies the common-law standard for Federal Unemployment Tax Act (FUTA) purposes and developed the twenty point criteria to weigh facts relevant to an employer's right to control and direct an individual who performs services, whether that right is exercised or not. Whereas only part "A" of the ABC test must be passed to meet federal unemployment conformity requirements, section 383-6, HRS, requires that all three prongs be satisfied to render an independent contractor ruling under state law.

Section 383-6, HRS, provides that, "Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to 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 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, HAR, defines terms used in the ABC test and includes the 20 factors intended to be used as a guide in determining whether an individual is an employee under common law rules. 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, without requiring a "preponderance of factors."

III. COMMENTS ON THE SENATE BILL

The measure as written creates conflicts in statutory interpretation that would delay decision-making and likely encourage more appeals of coverage determinations.

The Department raises the following concerns regarding SB 2694:

1. Subsection (b) 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 and “preponderance of factors” tests, nor fully addresses all aspects of the ABC test.

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.
3. 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 the common law relationship of master and servant exists.

The stated intent of this measure is to provide greater clarity and detail for the determination of coverage under the law i.e. employee vs. independent contractor. However, as drafted, the measure could be more burdensome for businesses because they would have to apply the ABC test and find a preponderance of the twenty factors of the common-law test to determine independent contractor status. Currently, the twenty factors are only a guide to determine control. As drafted, the measure would require quantifying how many of the factors are present to determine preponderance thereby creating a new standard.

To avoid ambiguity if this concept is to be adopted, the department recommends that the 20 factors in section 12-5-2, HAR, be codified in lieu of the proposed twenty factor test in the measure with the preponderance standard. Further, the department recommends deletion of 1) the presumption that an individual may be an independent contractor based on the preponderance of the twenty factors test because the measure would require that test in addition to the ABC test, and 2) the definitions of “client and “independent contractor” due to the concerns discussed above.

LATE TESTIMONY

From: mailinglist@capitol.hawaii.gov
To: [JDL Testimony](#)
Cc: office@mauichamber.com
Subject: Submitted testimony for SB2694 on Feb 16, 2016 09:00AM
Date: Tuesday, February 16, 2016 8:34:56 AM
Attachments: [Circuit Court Decision - Pertinent Facts, Conclusions of Law, and Order - Envisions Entertainment \(1\).PDF](#)

SB2694

Submitted on: 2/16/2016

Testimony for JDL on Feb 16, 2016 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Pamela Tumpap	Maui Chamber of Commerce	Comments Only	Yes

Comments: Please see the attached Circuit Court Decision in reference to SB2694.

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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FILED
2014 SEP -3 AM 9:57

N. MARTINS, CLERK
SECOND CIRCUIT COURT
STATE OF HAWAII

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

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.

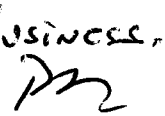
20. Envisions points to evidence in the record showing that it had an obligation to its clients to provide saxophone services during the events at which Bunuan provided his services, and thus, Envisions would have been responsible for finding a replacement if Bunuan cancelled at the last minute. The 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. 

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

available to Envisions, and there were no other saxophone players of Bunuan's competence, that Envisions' business would fail.

36. The record clearly indicates that Bunuan's 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 Bunuan's 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

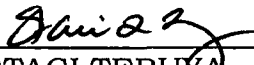
Based on the foregoing, the Court reverses the UID Decision and Notice of Assessment, DOL# 0003018601, dated February 4, 2013, and ESARO Decisions 1300760 and 1300751, dated August 20, 2013 and October 7, 2013 respectively.

DATED: Honolulu, 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

THE SENATE

Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair
State Capitol, Conference Room 016
Tuesday, February 16, 2016; 9:00 a.m.

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

The ILWU Local 142 **opposes** S.B. 2694, 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 not 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 be HELD. Thank you for considering our views and concerns.



LATE TESTIMONY

February 15, 2016

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: Tuesday, February 16, 2016
Time: 9:00 am
Place: State Capitol, Conference Room 016
415 South Beretania Street

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

RE: **S.B. 2694 Relating to Employment Security**

TESTIMONY IN SUPPORT OF S.B. 2694

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. 2694. The impetus for S.B. 2694 is the Department of Labor and Industrial Relations' ("DLIR") extreme 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 undisputed facts in its analysis of the ABC Test (the Circuit Court's Decision is attached).

I am, therefore, writing in strong support of S.B.2694 because it provides much-needed statutory clarification of independent contractor status 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.

We appreciate all of you who understand this wide-spread and long-standing issue and urge you to support SB 2694 for the following reasons:

- SB 2694 correctly states the clear purpose of providing greater clarity to determine independent contractor status rather than employee status. 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.
- SB 2694 appropriately replaces the archaic "Master Servant" title of 383-6 with "Independent Contractor" which codifies the Bill's clear purpose.

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INFO@EnvisionsEntertainment.com

Envisions Entertainment & Productions, Inc.

Comments in Support of SB2694

February 15, 2016

Page 2 of 2

- SB 2694 codifies the IRS 20-factor test to address any US DOL's federal conformity concerns. Unlike in our case, SB 2694 would require the DLIR to document its analysis of all 20 factors in its determination AND render its determination only upon a showing of a "preponderance of the factors" for or against independent contractor status.
- SB 2694 includes the definitions of "Client" and "Independent Contractor" which codifies a fundamental legal distinction of control that is currently absent in 383-6 and Hawaii Administrative Rules 12-5-2. It is well-established that a client does not have the right to control the manner and means used by an individual to perform the contracted service. On the other hand, it has the absolute right to control the result of the individual's work to ensure the desired 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 SB 2694 adds Sections 3 & 4 to 383-6. It establishes a workable mechanism of accountability that requires the DLIR to show the Legislature that its auditors and appeals officers are correctly and consistently interpreting and applying the ABC Test in each case.

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

Respectfully submitted,

ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC.


Wayne Hikiji
Its President

Of Counsel:
ALSTON HUNT FLOYD & ING
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Attorneys for Taxpayer-Appellant
ENVISIONS ENTERTAINMENT &
PRODUCTIONS, INC.

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

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LABOR AND INDUSTRIAL RELATIONS,
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Appellees,

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

ORAL ARGUMENT

Date: May 30, 2014

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Judge: The Honorable Peter T.
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2014 SEP -3 AM 9:57

N. MARTINS, CLERK
SECOND CIRCUIT COURT

PERTINENT FACTS, CONCLUSIONS OF LAW, AND ORDER

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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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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.

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

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

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

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

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

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

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

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

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

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

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

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

Procedural History

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

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

24. Ignoring the independent contractor relationship in this particular case may have a detrimental effect on [REDACTED] provision of saxophone services. In effect, Envisions is an agent that simply directs business to [REDACTED]. Without that ability, [REDACTED] has the potential to lose *business.*
DM
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 [REDACTED] was in total control as to whether or not he accepted any particular performance. If [REDACTED] were to reject the engagement, it was Envisions' responsibility, not [REDACTED] 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. 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 [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, Hawaii, *Waialuku* SEP - 2 2014

/S/ PETER T. CAHILL (SEAL)

Judge of the Above-Entitled Court

APPROVED AS TO FORM:

Staci Teruya
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