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LATE

February 7, 2017

To: The Honorable Angus L.K. McKelvey, Chair
The Honorable Linda Ichiyama, Vice Chair, and
Members of the House Committee on Consumer Protection & Commerce

Date: Tuesday, February 7, 2017
Time: 2:00pm
Place: Conference Room 329

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

Re: H.B. No. 347 HD1 Relating to Employment Security

I. OVERVIEW OF PROPOSED LEGISLATION

HB347 HD1 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 a non-conforming version of the IRS 20 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 under common-law standards. However, HB347 HD1 includes a third version of the 20 elements and adds definitions of "client and "independent contractor," ostensibly to simplify and facilitate the self-employment determination process. These are three different versions of the 20 factors.

DLIR strongly opposes section 2 of the proposal as it relaxes the distinction between employee and independent contractor. DLIR notes that the problem it has been confronting is employers' falsely identifying employees as independent contractors, which occurred at the Ewa Wing of the Ala Moana Center and the Maile Sky Court Hotel that have recently been in the local media.

DLIR supports sections 3 and 4 that would provide greater transparency regarding coverage determinations and information to the Legislature. DLIR has begun posting coverage determinations on the Referee's website at .
<http://labor.hawaii.gov/esaro/main/master-and-servant-appeals-383-6-hrs/>.

The department has taken steps to insure that staff conduct thorough, fact-intensive investigations and apply solid guidelines in rendering determinations. Extensive training was conducted in 2015, followed up with continuous monitoring and review of auditor decisions to prevent erroneous rulings. Complete documentation of evidence and compilation of appeal records have been stressed to support auditors' findings in the event of appeals or judicial reviews. More information pertaining to employment coverage decisions is provided in the comments section below.

II. CURRENT LAW

The IRS applies the common-law standard for Federal Unemployment Tax Act (FUTA) purposes and developed the 20 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 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 chapter 383, HRS, irrespective of whether the common law relationship of master and servant exists, unless it is shown to the department that each of the following criteria have been met:

- 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 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.

HAR section 12-5-2 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 the common law standard. 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. While these 20 elements are normally relied upon, it is not an exhaustive list and other factors may be relevant.

III. COMMENTS ON THE HOUSE BILL

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

The Department raises the following concerns regarding HB347 HD1:

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” but is unclear as to which Master and Servant Appeals 383-6 HRS criteria is determinative: the definition of “independent contractor” in subsection (c) or the 20 point test in subsection (b). Please find attached a comparison of the three similar versions of the 20-part test.

In either case, the result is not conclusive of an independent contractor ruling because, with respect to the ABC test:

- 1) The 20 factors are only relevant to the A (control) test in the common-law rules.
 - 2) The “independent contractor” definition is limited to the C test; and
 - 3) The basic premise of §383-6 is the presumption of employment irrespective of the common-law relationship, unless the three prongs of the ABC test are met in the conjunctive.
2. Subsection (c) includes new “client” and “independent contractor” definitions that have no similar references in chapter 383, HRS. The rationale of restricting these terms to §383-6, when their applicability has broader implications in UI statutes, is unclear. If the “purpose of this Act is to provide greater clarity in Hawaii’s employment security law to those individuals choosing to become entrepreneurs by setting forth in greater detail the criteria used to determine independent contractor status” this measure, as drafted, defeats that goal.

In fact, the measure as drafted would result in a greater lack of clarity to the extent that it would be more burdensome for businesses to apply the ABC **and** common law tests when hiring individuals. Moreover, any problematic language increases administrative problems, delaying an already time-intensive coverage determination process and encouraging legal challenges of the final decisions.

3. This measure was introduced to address a situation whereby DLIR made a determination of employment that was later corrected by a ruling in circuit court. As mentioned above, DLIR has taken steps to address statutory requirements, investigative procedures and ongoing training, which has resulted in significant improvements in evidentiary findings and quality of audit determinations.

DLIR offers the following information for the Committee's consideration:

- DLIR made 397 determinations of employee or independent contractor status in 2016.
- DLIR determined 313 were covered employment decisions involving 574 individuals.
- DLIR determined 84 were independent contractors involving 169 individuals.

Please find attached the services DLIR determined were either covered employment or independent contractors in 2016.

20 FACTOR TEST COMPARISON

IRS Rev. Rul. 87-41	HAR §12-5-2	HB 347, HD 1
<p>1</p> <p>INSTRUCTIONS. A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the RIGHT to require compliance with instructions.</p>	<p>The employer for whom services are being performed requires the individual to comply with instructions regarding when, where, and how services are performed;</p>	<p>Controls how the work results are achieved, although the client may provide job specifications;</p>
<p>2</p> <p>TRAINING. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.</p>	<p>The employer for whom services are being performed requires particular training for the individual performing services;</p>	<p>Uses the individual's own methods and does not receive client-provided training;</p>
<p>3</p> <p>INTEGRATION. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.</p>	<p>The services provided by the individual are part of the regular business of the employer for whom services are being performed;</p>	<p>Performs work that is not part of the client's regular line of business;</p>

20 FACTOR TEST COMPARISON

4	<p>SERVICES RENDERED PERSONALLY. If the Services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.</p>	<p>The employer for whom services are being performed requires the services be performed by the individual;</p>	<p>Is engaged to provide a result and may hire others to achieve that result;</p>
5	<p>HIRING, SUPERVISING, AND PAYING ASSISTANTS. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.</p>	<p>The employer for whom services are being performed hires, supervises or pays wages of the individual performing services;</p>	<p>Retains control and responsibility over the hiring, paying, and supervising of the individual's assistants;</p>
6	<p>CONTINUING RELATIONSHIP. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.</p>	<p>The existence of a continuing relationship between the employer for whom services are being performed with the individual performing services which contemplates continuing or recurring work, even if not full-time;</p>	<p>Does not maintain a continuing relationship with the client;</p>
7	<p>SET HOURS OF WORK. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.</p>	<p>The employer for whom services are being performed requires set hours during which services are to be performed;</p>	<p>Has flexibility of schedule and sets the individual's own work hours;</p>

20 FACTOR TEST COMPARISON

8	<p>FULL TIME REQUIRED. If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor on the other hand, is free to work when and for whom he or she chooses.</p>	<p>The employer for whom services are being performed requires the individual to devote substantially full-time to its business;</p>	<p>Has the ability to choose when and for whom the individual works;</p>
9	<p>DOING WORK ON EMPLOYER'S PREMISES. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.</p>	<p>The employer for whom services are being performed requires the individual to perform work on its premises;</p>	<p>Controls the job location and is not required to work on a client's premises;</p>

20 FACTOR TEST COMPARISON

10	<p>ORDER OR SEQUENCE SET. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.</p>	<p>The employer for whom services are being performed requires the individual to follow a set order or sequence of work;</p>	<p>Sets the order and sequence of work to be performed;</p>
11	<p>ORAL OR WRITTEN REPORTS. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.</p>	<p>The employer for whom services are being performed requires the individual to make oral or written progress reports;</p>	<p>Provides final results, as specified in the contract;</p>
12	<p>PAYMENT BY HOUR, WEEK, MONTH. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.</p>	<p>The employer for whom services are being performed pays the individual on a regular basis such as hourly, weekly or monthly;</p>	<p>Is paid by the job for results;</p>

20 FACTOR TEST COMPARISON

13	<p>PAYMENT OF BUSINESS AND/OR TRAVELING EXPENSES. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employee, to be able to control expenses, generally retains the right to regular and direct the worker's business activities.</p>	<p>The employer for whom services are being performed pays expenses for the individual performing services;</p>	<p>Is responsible for the individual's incidental business expenses;</p>
14	<p>FURNISHING OF TOOLS AND MATERIALS. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.</p>	<p>The employer for whom services are being performed furnishes tools, materials, and other equipment for use by the individual;</p>	<p>Furnishes the individual's own tools and materials;</p>
15	<p>SIGNIFICANT INVESTMENT. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship.</p>	<p>There is a lack of investment in the facilities used to perform services by the individual;</p>	<p>May invest in and maintain the individual's own work facilities that the contractor may use to perform services for clients;</p>

20 FACTOR TEST COMPARISON

16	<p>REALIZATION OF PROFIT OR LOSS. A worker who can realize a profit or suffer a loss as a result of a worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as a salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.</p>	<p>There is a lack of profit or loss to the individual as a result of the performance of such services;</p>	<p>Can realize a profit or suffer a loss as a result of the individual's services;</p>
17	<p>WORKING FOR MORE THAN ONE FIRM AT A TIME. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.</p>	<p>The individual is not performing services for a number of employers at the same time;</p>	<p>Is able to simultaneously provide services to multiple unrelated clients;</p>

20 FACTOR TEST COMPARISON

18	<p>MAKING SERVICE AVAILABLE TO GENERAL PUBLIC. The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.</p>	<p>The individual does not make such services available to the general public;</p>	<p>Makes services available to the general public on a regular and consistent basis, in at least one of the following ways: having an office and assistants; having business signs; having a general excise tax license; listing services in a business directory; or advertising services;</p>
19	<p>RIGHT TO DISCHARGE. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is the employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.</p>	<p>The employer for whom services are being performed has a right to discharge the individual;</p>	<p>Cannot be discharged; provided that the individual produces a result that meets contract specifications; and</p>
20	<p>RIGHT TO TERMINATE. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.</p>	<p>The individual has the right to end the relationship with the employer for whom services are being performed without incurring liability pursuant to an employment contract or agreement.</p>	<p>Agrees to satisfactorily complete a specific job and cannot terminate services without liability, except as provided under the contract.</p>

2016 Independent Contractor Determinations

<u>Branch</u>	<u>Services</u>	<u># IC</u>
Maui	Photography and web design	1
Oahu	Family Engagement Specialist	1
Oahu	CPA, Web Programmer, copywriter	3
Hawaii	Paving, Payroll, Landscape Maintenance	3
Oahu	Administrative	1
Hawaii	Maintenance, attorney	2
Oahu	Information technology consultant	1
Maui	Carpet Installer	1
Oahu	Singer	1
Maui	Babysitter	1
Maui	Landscaping/Maintenance	1
Oahu	Legal messenger	1
Oahu	Attorney; seminar solicitor	2
Oahu	Counselor	1
Hawaii	Construction worker, handyman, Draftsman, architect, special duty officer	12
Hawaii	Scanner; computer maintenance	2
Maui	Bookkeeper	1
Oahu	Event Coordinator	1
Oahu	Cultural Monitor	1
Oahu	Electrician; plumber	3

Oahu	Singer	1
Hawaii	Website maintenance; IT services; legal Services	4
Hawaii	Towing; Repossessing cars	5
Maui	Consultant	1
Maui	Handyman	1
Maui	Cleaning business	1
Oahu	Counselor	1
Oahu	Bookkeeper	1
Oahu	Graphic designer	1
Oahu	Media Production	1
Hawaii	Medical Billing	1
Hawaii	Drone repairman; magician	2
Maui	Maintenance	2
Oahu	Handyman	1
Oahu	Consultant	1
Oahu	Painter, demolition, electrician	
	Drywall framing, sheet metal work	11
Oahu	Design & drafting	3
Oahu	Consultant	1
Maui	Tile setter; painter; consultant	3
Oahu	Marketing consultant	1
Oahu	Program facilitator	1
Maui	Grant writer	1

Maui	Computer repair	1
Oahu	Window washing	1
Hawaii	Security installation; cleaner	2
Hawaii	Accountant; handyman	5
Hawaii	Auto body repair; cleaner; graphic designer; handyman; towing service	7
Oahu	Hula instructor	1
Oahu	Computer file conversion	1
Oahu	Graphic designer; product demonstrators; Sales representatives	6
Oahu	CPA	1
Hawaii	Cleaner; computer repair	2
Oahu	Mortgage specialist	1
Maui	Crystal Rainbows LLC	2
Maui	Sales	1
Maui	Construction	1
Maui	Hair straightener	1
Oahu	Cultural Consultant	1
Oahu	Computer maintenance	1
Hawaii	Musicians; accountant; marketing Consultant; bookkeeper; handyman	9
Hawaii	Landscaper	1
Oahu	CPA	1
Oahu	Contractor	1

Maui	Property manager	1
Maui	Clothing sales	1
Maui	Travel consultant	1
Maui	Private tour guide	1
Maui	Real estate consultant	1
Hawaii	Bookkeeper	1
Hawaii	Payroll service provider	1
Oahu	Construction	1
Oahu	Photographer	1
Maui	Auto repair; drywall subcontractor	3
Oahu	Cleaner	1
Oahu	Interior designer; transaction coordinator; Handyman; photographer	4
Oahu	Consultant	1
Hawaii	Bookkeeper; painters	3
Hawaii	Accountant; attorney; graphic designer; Maintenance	6
Hawaii	AC repair; drywall installer; binder designer; tile installer; pool repair; IT service; rock wall builder; carpet installers; concrete worker	10

2016 Covered Worker Determinations

<u>Branch</u>	<u>Services</u>	<u># Covered</u>
Maui	Construction	2
Maui	Ukulele Instructor	1
Maui	Laborer	37
Maui	Skills Trainer	1
Maui	Sales	4
Maui	Grant Developer	1
Maui	Embroiderer	1
Maui	Billing Clerk	1
Maui	Office manager	2
Maui	Realtor assistant	1
Maui	Tour Driver	2
Maui	Remodeling services	1
Maui	Massage Therapist	14
Maui	Installation/design	1
Maui	Registrar	1
Maui	CAD Designer	1
Maui	Caretaker	1
Maui	Fundraiser	1
Maui	Baker	1
Maui	Tilesetter	1
Maui	Doctor	1

Maui	Maintenance	2
Maui	Kite Repairer	1
Maui	Service Workers	39
Maui	Corporate officer	4
Maui	Executive Director	1
Maui	Babysitter	1
Maui	Surf Instructor	1
Maui	Real estate sales	1
Maui	Conference Assistant	1
Maui	Bookkeeper/Accountant	1
Maui	Restaurant service worker	1
Maui	Chef	1

Oahu	Outreach Specialist	1
Oahu	Draftsman	1
Oahu	Dentist	1
Oahu	Maintenance	2
Oahu	Cleaner	9
Oahu	Massage Therapist	6
Oahu	Drivers	51
Oahu	Bookkeepers	12
Oahu	Veterinarian	2
Oahu	Graphic Designer	1
Oahu	Sales	11
Oahu	Car detailer	1
Oahu	Translator	2
Oahu	Demonstrator	7
Oahu	Home sewer	1
Oahu	Product Demonstrator	2
Oahu	Truck Driver	1
Oahu	Software developer	1
Oahu	Laborer	4
Oahu	ice cream maker	1
Oahu	Planner	1
Oahu	Administrator	1
Oahu	Videographer	2

Oahu	Project manager	2
Oahu	Paralegal	1
Oahu	Pharmacist	1
Oahu	Mechanic	1
Oahu	Massage therapist	3
Oahu	Manicurist	2
Oahu	Administrative Asst	3
Oahu	Marketing Representative	2
Oahu	DJ	1
Oahu	Teacher	2
Oahu	Summer intern	1
Oahu	Trainer	2
Oahu	Innkeeper	1
Oahu	Cashier	1
Oahu	Service workers	4
Oahu	Electrician/helper	8
Oahu	Archeologist	1
Oahu	Caregiver	4
Oahu	Drywall; carpenter	5
Oahu	Doctor	14
Oahu	Transcriber	1
Oahu	Surfboard repair	1
Oahu	Sonar Operator	1
Oahu	Esthetician	5

Oahu	Auto painter	1
Oahu	Fisherman	28
Oahu	Computer technology	1
Oahu	Tour Driver	3
Oahu	Camp Worker	1
Oahu	Yoga Instructor	1
Oahu	Pharmaceutical Representative	1
Oahu	Medical billing clerk	1
Oahu	Counter help	1
Oahu	Musician	7
Oahu	Field Surveyor	1
Oahu	Appliance Repairer	1
Oahu	Consultant	2
Oahu	Medical services	9
Oahu	Diving Instructor	1
Oahu	Carpenter/Helper	4
Oahu	Imu Preparer	1
Oahu	Secretary	1
Oahu	Nurse Educator	1
Oahu	Painter	17
Oahu	Landscaper	1
Oahu	Tree trimmer	1
Oahu	Insurance Specialist	1
Oahu	Screenwriter/video editor	2

Oahu	Events Coordinator	4
Oahu	Projects Manager	1
Oahu	Technical Writer	1
Oahu	Merchandiser	1
Oahu	Cruise ship workers	17
Oahu	Surf Instructor	1
Oahu	Phlebotomist	1
Oahu	Vending machine repairman	1
Oahu	Bus chaperone	1
Oahu	Instructor	1
Oahu	DMV Helper	1
Oahu	Draftsman	1
Oahu	Tattoo artist	1
Oahu	Waitress	20
Oahu	Repair/maintenance	10
Oahu	Chorus performers	20
Oahu	Optometrist	1
Oahu	Kitchen helper	1
Oahu	Janitor	1
Oahu	Location manager	1
Oahu	Laborer	4
Oahu	Office helper	1
Oahu	Emissions tester	1
Oahu	Tile setter	1

Oahu	Phone sales	1
Oahu	Lab Director	1
Oahu	Researcher; administrator	2
Oahu	Nurse	1
Oahu	Engagement Specialist	1
Oahu	Domestic Services	2
Oahu	Tour guide	1
Oahu	Marketing/PR	2
Oahu	Telecom Installer	1
Oahu	Clerical	1
Oahu	Marine services	1
Oahu	Contractor	1
Oahu	Scientist	1
Oahu	Account Manager	1
Oahu	Blinds Installer	1
Oahu	Reservations manager	1
Oahu	Supervisor	1
Oahu	Bike Rider	1
Oahu	Program Coordinator	1
Oahu	Model	1
Oahu	Web programmer	1
Oahu	Hair stylists	9
Oahu	Administrative services	1
Oahu	CAD draftsman	1

Oahu	Dock workers	3
Oahu	Boat repair/maintenance	6

Hawaii	Laborer	1
Hawaii	Receptionist/Insurance research	2
Hawaii	Receptionist	3
Hawaii	Automation engineer	1
Hawaii	Internet servicer	1
Hawaii	Production Assistant	1
Hawaii	Transcriber	1
Hawaii	Mobile Road Service	1
Hawaii	Sales;photography;laborer	12
Hawaii	Farm supply workers	5
Hawaii	Tax preparer	1
Hawaii	Teacher's Aide	1
Hawaii	Consultant	1
Hawaii	Janitor	1



LATE

February 6, 2017

To: The Honorable Angus L.K. McKelvey, Chair
The Honorable Linda Ichiyama, Vice Chair
Members of the Committee on Consumer Protection & Commerce

Date: Tuesday, February 7, 2017

Time: 2:00 pm

Place: State Capitol, House Conference Room 329
415 South Beretania Street

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

RE: H.B. 347, HD1 Relating to Employment Security

TESTIMONY IN SUPPORT OF H.B. 347, HD1

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 H.B. 347. The impetus for HB 347, HD1 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 its analysis of the ABC Test based on the undisputed facts of our case (the Circuit Court's Decision is attached).

I am, therefore, writing in strong support of HD 347, HD1 because it provides much-needed statutory clarification in independent contractor ("IC") determinations for (i) individuals who choose 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 H.B. 347, HD1: 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 HB 347, HD1 for the following reasons:

- HB 347, HD1 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.
- HB 347, HD1 appropriately replaces the archaic "Master Servant" title of 383-6 with "Independent Contractor" which codifies the Bill's clear purpose.

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- HB 347, HD1 does not change the ABC Test in any way as the DLIR would have you believe. Nor does it transform the 20 factors into a new test. All three prongs of the ABC Test remain intact and must still be met in the conjunctive. The 20 factors are still considered guidelines to aid in determining the control prong of the ABC Test, and the DLIR still retains its discretion to give each factor its proper weight based on the facts of each case.
- However, given the DLIR's missteps in the Envisions case, HB 347 (b) codifies the 20 factors to require the DLIR to analyze all factors in its coverage determinations. By doing so, HB 347 (c) would effectively replace the 20 factors of HAR 12-5-2 so there is no confusion as to which 20 factors to consider. Since 383-6 currently makes no reference to HAR 12-5-2, Subsection (b) makes these factors readily available to employers, clients, and individuals so they know at the outset what "control" means in the context of HRS 383-6.
- 383-1 defines "employer" and "employee." Accordingly, HB 347, HD1 adds a definition of "independent contractor" and "client" to clarify and juxtapose both "employee" and "employer" definitions. More importantly, HB 347, HD1 draws 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 desired outcome of the project. We believe this critical legal distinction, which the DLIR failed to acknowledge and which the Circuit Court relied on in our case, must be included in the law.
- 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.
- Finally, we are pleased that HB 347, HD1 adds 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.

THE "GIG ECONOMY" MANDATES A REVISION OF ARCHAIC LAW:

An increasing number of Hawaii entrepreneurs are choosing to go into business for themselves as ICs. Therefore, HB 347, HD1 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.

Envisions Entertainment & Productions, Inc.
CPC Hearing – February 7, 2017
Written Testimony in Support of HB347, HD1
February 6, 2017
Page 3 of 3


CLOSING:

To reiterate, the Envisions case is not an isolated situation. 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 that chose to hire ICs do not contest the DLIR's erroneous determinations of employee status for fear of exposing themselves to an otherwise unwinnable situation at a considerable financial price is a compelling reason HB 347 is necessary.

Given the foregoing, I humbly ask that you support HB 347, HD1 with an effective date of June 1, 2017.

Respectfully submitted,

ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC.


Wayne Hikiji
Its President

Enclosure

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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 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



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 [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,

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. [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.

Waiuku
DATED: Honolulu, Hawaii, 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*



Randy Perreira
President

HAWAII STATE AFL-CIO

345 Queen Street, Suite 500 • Honolulu, Hawaii 96813

LATE

Telephone: (808) 597-1441
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The Twenty-Ninth Legislature, State of Hawaii
Hawaii State House of Representatives
Committee on Consumer Protection and Commerce

Testimony by
Hawaii State AFL-CIO
February 7, 2017

H.B. 347, H.D.1 – RELATING TO
EMPLOYMENT SECURITY

The Hawaii State AFL-CIO strongly opposes H.B. 347, H.D.1 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 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 Consumer Protection and Commerce to defer H.B. 347, H.D.1 indefinitely.

Thank you for the opportunity to testify.

Respectfully submitted,

Randy Perreira
President

LATE

From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 6, 2017 11:12 PM
To: CPCtestimony
Cc: dwight.takamine@ilwulocal142.org
Subject: *Submitted testimony for HB347 on Feb 7, 2017 14:00PM*

HB347

Submitted on: 2/6/2017

Testimony for CPC on Feb 7, 2017 14:00PM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
Dwight Takamine	ILWU Local 142	Oppose	Yes

Comments:

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

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

LATE



HEARING BEFORE THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

HAWAII STATE CAPITOL, HOUSE CONFERENCE ROOM 329

TUESDAY, FEBRUARY 7, 2017 AT 2:00PM

To The Honorable Angus L.K. McKelvey, Chair;

The Honorable Linda Ichiyama, Vice Chair; and

Members of the Committee on Consumer Protection & Commerce

TESTIMONY IN STRONG SUPPORT FOR HB 347 HD 1 TO PROTECT LEGITIMATE INDEPENDENT
CONTRACTORS AND THOSE THAT HIRE THEM

My name is Joeylene Dang and I own a small business. Manutea Nui E LLC manuteanuie@gmail.com.
We supply Entertainment for Maui Weddings and Conventions

My business started off as a Costume shop in 2007 and shifted towards entertainment in 2010. I have grown my business to a full service production booking "Independent Contractors" from musicians, dancers, chanters, drummers, officiants etc. All of the talent that I work with have their GE license and choose to be Independent Contractors, and most of them have day jobs. Most of them are working on a P/T – Casual basis for me.

I looked into the cost to switch over and have the talent as employees, but the cost to do so would force me to increase my prices. That could potentially put us out of business, because no one will be able to afford our services. We as Independents pay for our own Medical, Dental and we understand that we are responsible for ourselves. This is our choice. It is unfair that someone else can dictate to us if we are Independent or an employee. If we all agree that we are Independent then why isn't that enough? We all pay our taxes and most of us are pursuing other business endeavors. Being Independents allows us to be involved in multiple businesses. This is what we need to do to survive here.

I am praying that BILL HB347-D1 passes and we can all continue on with our dreams of having a life here on Maui. It is no secret that the cost of living has become out of reach for most and so many locals are continuing to move away. I choose to stay and to raise my family where I was born and raised. My business is the only way that dream will stay alive. Please consider us when making your decision.

Mahalo for your kind consideration!

Joeylene Kehaunani Dang



MAUI
CHAMBER OF COMMERCE
VOICE OF BUSINESS

LATE

**HEARING BEFORE THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE
HAWAII STATE CAPITOL, HOUSE CONFERENCE ROOM 329
TUESDAY, FEBRUARY 7, 2017 AT 2:00PM**

To The Honorable Angus L.K. McKelvey, Chair;
The Honorable Linda Ichiyama, Vice Chair; and
Members of the Committee on Consumer Protection & Commerce

**TESTIMONY IN STRONG SUPPORT FOR HB 347 HD 1 TO PROTECT LEGITIMATE
INDEPENDENT CONTRACTORS AND THOSE THAT HIRE THEM**

Aloha, my name is Pamela Tumpap and I am the President of the Maui Chamber of Commerce, serving in this role for over a decade. I am writing share our strong support of HB 347 HD1.

Over the years we have seen numerous rulings where the Department of Labor & Industrial Relations (DLIR) has made determinations against employers, classifying Independent Contractors 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 these issues with and on behalf of our members for years, but most businesses, particularly small businesses, do not have the time or money to take on the state, so they simply choose not to fight and the poor rulings stand. Given this, there are no records of how many businesses have been hurt by this practice.

Then, a few years ago, one of our members, Envisions Entertainment, received a determination from the DLIR that a musician and sole proprietor they hired twice in 18 months to perform music for two events was considered by the DLIR to be employee, not an Independent Contractor, even though this individual had a full-time position elsewhere, said he was an Independent Contractor who occasionally provided services to Envisions Entertainment and others, had a registered business in our state, had a general excise tax license, and signed an Independent Contractor Agreement. The DLIR determination was made before interviewing the company and doing any fact finding. Further, it is important to note that the DLIR's ruling against Envisions Entertainment was in an UNCONTESTED CASE (as the individual claimed he was an Independent Contractor) and did not provide any additional benefits to the musician or garner the state any more in taxes. The determination merely shifted some of the unemployment benefits burden from the man's full-time employer to Envisions Entertainment. Given that Envisions Entertainment's business model requires the use of Independent Contractors, they had to fight the ruling because if they let it stand, they would be audited backwards and forwards, which would devastate their company.

As they shared the challenge with us, we offered our help because the ruling seemed absurd. Many who read the department's determination, including several lawyers, called it "ridiculous". So, we spoke with legislators about this and were encouraged to first work through the Administration and Department, which we and Envisions Entertainment did.

We met with Lt. Governor Shan Tsutsui and the 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 in favor of employers that hired Independent Contractors, which further illustrates the prevalence of this problem.

Ultimately, 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 findings were and created a new precedent. And, while that is helpful, Envisions Entertainment is still out over \$70,000 as there is no recourse against the state, there is still too much leeway for "interpretation" in the law, DLIR has a history of broad and poor interpretations against employers, and DLIR is not changing their practices given Judge Cahill's ruling.

So, the Maui Chamber of Commerce and Envisions Entertainment have been trying to obtain a legislative fix to protect legitimate Independent Contractors and the companies that hire them from erroneous rulings in UNCONTESTED CASES to address a problem that affects individuals and businesses statewide.

This is our third year at the legislature seeking such a fix. While we initially heard about "unscrupulous employers" and stories of how companies "might try to have their employees become Independent Contractors to save money" from DLIR (which would then be a CONTESTED CASE where we strongly support a DLIR review and determination), more and more legislators are sharing personal stories and one's they have heard from constituents that further illustrate false findings. Legislators are telling us they are more aware of the issue and relate to the depth of the problem.

Additionally, our employment law and DLIR practices and procedures have not kept up with the times and our changing economy. While other states long ago eliminated "master and servant" language from their employment law, our laws still include it. This bill seeks to remedy that too.

It also recognize that more and more individuals are becoming Independent Contractors. Looking at data from the US Census from 2008-2014 below, we see that the number of non-employer businesses is on the rise and the number of businesses that employ people is declining both in Maui County and on a statewide basis.

STATE	2008	2010	2012	2014
Business	32,904	31,939	31,496	31,801
Non-Employer	93,704	92,126	97,151	102,544
MAUI COUNTY	2008	2010	2012	2014
Business	4,564	4,332	4,343	4,499
Non-Employer	14,954	14,345	15,073	15,867

Testimony to the House Committee on Consumer Protection & Commerce
February 7, 2017
Page 3.

The time has come for a new model. HB347 is important to our state for a number of reasons as it:

- Removes inappropriate and archaic “master and servant” language;
- Recognizes a changing economy where more individuals prefer the benefits of being an Independent Contractor over employment or want the freedom to do both;
- Provides statutory clarification in Independent Contractor determinations;
- Codifies 20 factors in the determination process and requires DLIR to consider all 20 factors in its determinations;
- Does not change the ABC test, which should help to avoid opposition by DLIR and unions who were previously concerned about changes to the ABC test;
- Defines “Client” and Independent Contractor” which are important definitions given changing dynamics and how one looks at “control”; and
- Provides much needed accountability by requiring that DLIR demonstrate to the legislature that it is correctly and consistently interpreting and applying the ABC Test in each case.

This bill goes a long way toward protecting legitimate Independent Contractors and those that hire them from erroneous rulings by DLIR, where legitimate Independent Contractors have been later determined to be employees. We, therefore, stand in strong support of this bill.

We are also open to modifications or other ideas that would achieve the same level of protections for Independent Contractors and those that hire them. A simple certification process was proposed in the past with the thought that if an individual had a General Excise Tax License and certified they were an Independent Contractor, then DLIR should deem them as such in UNCONTESTED CASES. This would save DLIR time and money and allow them to focus on CONTESTED CASES. For some, the certification may be a preferable option.

What we pledge to you is that we are here to help come up with a winning solution. The problem is not going away and we cannot deny Hawaii’s substantial and growing gig economy where many are engaged in short-term contracts or freelance work as opposed to permanent jobs or to supplement them. We are confident that a remedy can be enacted this year and look forward to working with you toward that end.

Sincerely,



Pamela Tumpap
President

To advance and promote a healthy economic environment for business, advocating for a responsive government and quality education, while preserving Maui’s unique community characteristics.



LATE

House of Representatives
The Twenty-Ninth Legislature
Regular Session of 2017

Committee on Consumer Protection & Commerce
Rep. Angus L.K. McKelvey, Chair
Rep. Linda Ichiyama, Vice Chair

RE: HB 347 - RELATING TO EMPLOYMENT SECURITY

Date:	Tuesday, February 7, 2017
Time:	2:00 PM
Conference Room 329 State Capitol, 415 South Beretania Street, Honolulu, HI	

Aloha Chair McKelvey, Vice Chair Ichiyama and Members of the Committee,

We are the representatives of the film and entertainment industry unions, Brenda Ching, SAG-AFTRA Hawaii Local, Irish Barber, I.A.T.S.E. Local 665, Steve Pearson, American Federation of Musicians' Local 677 and Wayne Kaululaau, Hawaii Teamsters & Allied Workers Local 996. Collectively, we represent over 1700 members who work in film, television, music and new media productions as actors, crew, musicians and drivers in Hawaii.

We **oppose** HB 347 which proposes to modify §383-6 of the Hawaii Revised Statutes. Many workers would likely be negatively affected by this measure, particularly those who work in the creative fields. Many creative professionals work in different locations and situations and are regularly misclassified as independent contractors. This not only tends to suppress the wages in these areas, but also places an increased tax burden on those workers while denying them protections granted by the National Labor Relations Act. We feel this proposal would only serve to muddle the definition of employee rather than clarify it.

In a recent example, orchestral musicians in three states were misclassified by management as independent contractors. This classification was made primarily to [prevent the musicians from organizing](#). After initially being dismissed, the [NLRB ruled](#) that they were employees, not contractors. The case eventually made its way to the US Court of Appeals and the [D.C. Circuit Court ruled in favor of the musicians](#) last year.

On a larger scale, this proposal has the potential to run afoul of Federal Labor Laws by developing a new test for employment in the state. This outcome would not be in the best interests of either workers or the State and could possibly end up in court.

Providing clarity to both employers and workers would be welcomed, however this could be achieved through education and outreach versus amending the State Statues.

We appreciate the legislature's strong support of the industry and Hawaii's creative professionals. Thank you for giving us the opportunity to offer testimony on this measure.

Brenda Ching
SAG-AFTRA Hawaii

Irish Barber
I.A.T.S.E. Local 665

Steve Pearson
A.F.M. Local 677

Wayne Kaululaau
Teamsters Local 996

LATE

From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 6, 2017 11:08 AM
To: CPCtestimony
Cc: pluta@maui.net
Subject: Submitted testimony for HB347 on Feb 7, 2017 14:00PM

HB347

Submitted on: 2/6/2017

Testimony for CPC on Feb 7, 2017 14:00PM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
Joseph D Pluta	Individual	Support	No

Comments: STRONG SUPPORT FOR THIS BILL! HAWAII BUSINESS OWNER FOR OVER 38 Years and Wholly familiar with sorely needed changes addressed by this Bill. HB347 is important to our state for a number of reasons as it: Removes inappropriate and archaic “master and servant” language; Recognizes a changing economy where more individuals prefer the benefits of being an Independent Contractor over employment or want the freedom to do both; Provides statutory clarification in Independent Contractor determinations; Codifies 20 factors in the determination process and requires DLIR to consider all 20 factors in its determinations; Does not change the ABC test, which should help to avoid opposition by DLIR and unions who were previously concerned about changes to the ABC test; Defines “Client” and Independent Contractor” which are important definitions given changing dynamics and how one looks at “control”; and Provides much needed accountability by requiring that DLIR demonstrate to the legislature that it is correctly and consistently interpreting and applying the ABC Test in each case. This bill goes a long way toward protecting legitimate Independent Contractors and those that hire them from erroneous rulings by DLIR, where legitimate Independent Contractors have been later determined to be employees. We, therefore, stand in strong support of this bill. We are also open to modifications or other ideas that would achieve the same level of protections for Independent Contractors and those that hire them. A simple certification process was proposed in the past with the thought that if an individual had a General Excise Tax License and certified they were an Independent Contractor, then DLIR should deem them as such in UNCONTESTED CASES. This would save DLIR time and money and allow them to focus on CONTESTED CASES. For some, the certification may be a preferable option.

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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LATE

From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 6, 2017 3:00 PM
To: CPCtestimony
Cc: allan@crhmaui.com
Subject: *Submitted testimony for HB347 on Feb 7, 2017 14:00PM*

HB347

Submitted on: 2/6/2017

Testimony for CPC on Feb 7, 2017 14:00PM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
Allan Raikes	Individual	Support	No

Comments:

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