

HB347 HD1 SD1

Measure Title: RELATING TO EMPLOYMENT SECURITY.

Report Title: Employment Security; Independent Contractor; Guidelines;
Department of Labor and Industrial Relations

Description: Clarifies Hawaii's employment security law for independent contractors by requiring the consideration of twenty factors by the Department of Labor Industrial Relations when determining whether an individual is considered an independent contractor. Requires the Director of Labor and Industrial Relations to report to the Legislature prior to the Regular Session of 2018 regarding guidelines developed by the unemployment insurance coverage committee. Requires an annual report to the Legislature regarding covered employment determinations. Takes effect 1/7/2059. (SD1)

Companion: [SB345](#)

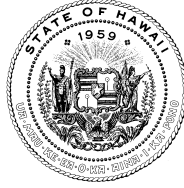
Package: None

Current Referral: JDL, CPH

Introducer(s): SOUKI, JOHANSON, MCKELVEY

DAVID Y. IGE
GOVERNOR

SHAN S. TSUTSUI
LIEUTENANT GOVERNOR



LINDA CHU TAKAYAMA
DIRECTOR

LEONARD HOSHIJO
DEPUTY DIRECTOR

**STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS**

830 PUNCHBOWL STREET, ROOM 321
HONOLULU, HAWAII 96813

www.labor.hawaii.gov
Phone: (808) 586-8844 / Fax: (808) 586-9099
Email: dlir.director@hawaii.gov

March 24, 2017

To: The Honorable Rosalyn H. Baker, Chair
The Honorable Clarence Nishihara, Vice Chair, and
Members of the Senate Committee on Commerce, Consumer Protection, and
Health

Date: Tuesday, April 4, 2017
Time: 9:30 a.m.
Place: Conference Room 229

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

Re: H.B. No. 347 HD2 SD1 Relating to Employment Security

I. OVERVIEW OF PROPOSED LEGISLATION

HB347 HD2SD1 proposes to amend section 383-6, Hawaii Revised Statutes (HRS), by codifying the 20 factors, currently contained in Hawaii Administrative Rules (HAR) 12-5-2, to require a “preponderance” of these criteria shall be considered by the department to indicate whether an individual an independent contractor.

DLIR opposes this measure that, by specifying that a “preponderance” of the 20 factors be met to adjudicate independent contractor status may add more confusion to an already complex determination process. The bill as written may not serve the purpose of clarifying the distinction between employment and self-employment, possibly aggravating worker misclassification issues.

DLIR notes that one problem it has been confronting is employers falsely identifying employees as independent contractors, which occurred in the Ewa Wing of the Ala Moana Center and the Maile Sky Court Hotel investigations, thereby avoiding workers’ compensation, temporary disability and health care insurance to their workers, and also avoiding payment of unemployment insurance contributions, federal unemployment taxes, social security and other taxes.

After an adverse court ruling a few years ago, the Department took steps to address statutory requirements, investigative procedures, and ongoing training, which resulted

in significant improvements in evidentiary findings and quality of audit 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. 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/>.

II. CURRENT LAW

The IRS applies the common-law rule for Federal Unemployment Tax Act (FUTA) purposes and developed the 20 point criteria as a guide to gather and evaluate 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, §383-6 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:

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

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, master-servant criterion. Section 12-5-2 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

DLIR has concerns regarding HB347 HD2 SD1 as the measure creates contradictions in statutory interpretation, which would delay decision-making and may encourage more appeals. One problematic issue in this measure is the inclusion of “preponderance” without defining the term and how it should be applied. The potential ambiguity of this new standard of proof, as applied to the Wage and Hour context, may make it open to interpretation and result in capricious and inconsistent determinations.

The amendments proposed in Section 2 create conflicts by effectively requiring the application of **two separate** tests to determine employee-employer relationship:

1. The ABC test in subsection (a);
2. The preponderance of 20 factors in subsections (a) and (b).

The IRS developed the 20 point criteria as a guide to apply the common-law rule to determine employment for Federal Unemployment Tax Act (FUTA) purposes. However, the Legislature expressed its intent for broader coverage of workers than FUTA in section 383-6, HRS, FUTA by clearly enunciating that “irrespective of whether the common law relationship of master and servant exists...” all three prongs of the ABC test must be satisfied to render an independent contractor ruling under state law. Therefore, including a preponderance of the 20 factors and the ABC test in subsection (a) is superfluous. Further, since §383-92 provides that UI rules and regulations have the force and effect of law, codifying HAR §12-5-2 is redundant.

The amendments proposed in subsection (a) and (b) in Section 2 regarding the preponderance of the 20 factors are internally conflicting. Whereas subsection (a) requires preponderance of the 20 factors **and** the ABC test to overcome the presumption of employment, subsection (b) specifies that **only** a preponderance of the 20 factors shall be considered to indicate whether an individual is an independent contractor.

There should be a single standard -- the ABC test-- in §383-6 to determine employment relationships. That an individual is deemed to be an “independent contractor” is a factual conclusion reached upon meeting all conditions of the ABC test taken together, not just when applying the 20 factors alone, with or without the preponderance criterion.

If this concept is not clear to employers, who are responsible for determining whether an individual is in employment or self-employment, they may apply the wrong test with the result that their workers may be misclassified as independent contractors. Should this occur, employers may be subject to retroactive federal (FUTA, FICA) and state unemployment insurance (UI) taxes as well as assessment of penalties.

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.

LEGISLATIVE INTENT

In 1932, in the midst of the Great Depression, Wisconsin became the first state in the U.S. to enact an unemployment insurance law. On August 14, 1935, President Franklin Delano Roosevelt signed into law the Social Security Act, which contained provisions for old age insurance, welfare, and unemployment insurance.

In May 1937, the Supreme Court upheld the Social Security Act as constitutional and by August 1937, the 48 states, Alaska, Hawaii, and the District of Columbia had enacted their own Unemployment Insurance laws.¹

Consistent with the Social Security Act of 1935, Hawaii's Unemployment Insurance (UI) law was enacted as remedial social legislation with the overall purpose to avoid economic insecurity caused by unemployment. While UI law was established in 1937, the ABC test was included in 1939 to broadly define and interpret "employment" to effectuate the underlying intent of the statute. In 1941, the Legislature added "irrespective of whether the common-law relationship of master and servant exists..." to the presumption of employment, unless ABC provisions applied.

In 1935, Wisconsin included the ABC test in their UI law. When states were in the process of drafting their UI statutes, the Committee on Legal Affairs of the Interstate Conference of Unemployment Compensation Agencies unanimously agreed that the test of coverage should not be restricted to the master-servant relationship, which might allow creation of legal entities to evade coverage. The Committee recommended Wisconsin's ABC test for all state laws.

DLIR notes that nearly 80 years of legislative history and UI philosophy serve to provide a wealth of case law and interpretation on which to rely.

¹ <https://www.dol.gov/ocia/pdf/75th-anniversary-summary-final.pdf>

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

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



**Testimony to the Senate Committee on Consumer Protection and Health
Tuesday, April 4, 2017 at 9:30 A.M.
Conference Room 229, State Capitol**

RE: HOUSE BILL 347 HD2 SD1 RELATING TO EMPLOYMENT SECURITY

Chair Baker, Vice Chair Nishihara, and Members of the Committee:

The Chamber of Commerce Hawaii ("The Chamber") **supports the intent** of HB 347 HD2 SD1, which clarifies Hawaii's employment security law for independent contractors by requiring the consideration of twenty factors by the Department of Labor Industrial Relations when determining whether an individual is considered an independent contractor; requires the Director of Labor and Industrial Relations to report to the Legislature prior to the Regular Session of 2018 regarding guidelines developed by the unemployment insurance coverage committee; requires an annual report to the Legislature regarding covered employment determinations.

The Chamber is Hawaii's leading statewide business advocacy organization, representing approximately 1,600+ businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

The Chamber believes independent contractors are an important part of Hawaii's business community and economy. We have seen too much of a broad interpretation in the current law as to who qualifies as an independent contractor vs. an employee of a company. We do have some concerns about the present draft of the bill and support the efforts of the Maui Chamber of Commerce and others to offer suggestions to improve this bill. For example, we believe that if the 20 point test is going to be the standard, then the "ABC" test in the immediate prior section be removed.

While we have some concerns, we ask that the bill be passed for further discussion. Thank you for the opportunity to testify.



MAUI

CHAMBER OF COMMERCE

VOICE OF BUSINESS

**HEARING BEFORE THE SENATE COMMITTEE ON
COMMERCE, CONSUMER PROTECT, & HEALTH
HAWAII STATE CAPITOL, SENATE CONFERENCE ROOM 229
TUESDAY, APRIL 4, 2017 AT 9:30AM**

To The Honorable Rosalyn H. Baker, Chair;
The Honorable Clarence K. Nishihara, Vice Chair; and
Members of the Commerce, Consumer Protection, & Health

**TESTIMONY IN STRONG SUPPORT FOR HB 347 HD2 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, HD2, SD1.

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 ABC test and the subsequent testing built into the rules. We are seeking relief because this is a long-standing issue and not a one-time issue focused on Envisions Entertainment as the DLIR and others try and paint it. Over a decade, we have found that we hear between 7-10 issues like this per year. Most small businesses don't have the time or resources to fight the state and don't want to be flagged by the DLIR. Therefore, they don't fight the rulings, which is why good statistics on this problem do not exist. We would also like to note that this was particularly problematic during the recession when many people lost their other jobs. While Envisions Entertainment, a micro business by national standards, was hurt to the tune of \$75,000, their court case gave us the details to highlight how extreme the DLIR's rulings have been.

Additionally, while addressing this issue we were shocked to learn that the terms master and servant still existed in our Hawaii Revised Statute. We also thought to remedy that language since slavery was abolished in 1865 and most states have replaced such language.

However, the real issue is that the gig economy is and will continue to change the business landscape and we will continue to see more and more independent contractors in the future. More people are choosing to be independent contractors, where they can exercise their own methods and control and choose which job they take or do not take. Based on US Census data, we see that the number of non-employer businesses is on the rise and the number of business people is declining both in Maui County and on a statewide basis with the state non-employer number going from 93,704 in 2008 to 102,544 in 2014. Many industries are also already exempt from employment classifications including real estate agents, travel agents, industry producers on commission only, subcontractors, student nurses, etc. As this is a growing issue, we can either deal with it now with the proposed legislation or if we cannot move forward with this statute in the comprehensive year, we would want to have other industries exempt including wedding planners, photographers, AV crews,

Testimony to the Senate Committee on Judiciary and Labor

April 4, 2017

Page 2.

We have worked with many different groups to come up with a winning solution. Attached are the language changes we are proposing. This should be consistent with the DLIR Director's concerns that she included in her testimony to the CPC Committee on February 7th, 2017 that, "it would be more burdensome for businesses to apply the ABC and common law tests when hiring individuals" and that "any problematic language increases administrative problems". Therefore, this new proposed language eliminates that issue. We feel given the many factors that are being included, this bill will be consistent with what they are already used to using with just a minor tweak in the law. Though change is always hard and requires new thinking and training, we feel the DLIR should be able to easily understand and move forward with the implications of this bill.

While much of the union opposition testimony just states they are simply against the bill, the previous testimony from the Musicians' Association of Hawaii is one we have discussed in depth. We believe their argument comes down to the issue of what services are integral to a business and/or production. It was explained to me that they believe a musician is integral to a wedding (as an example specifically mentioned), however we question whether the wedding would not occur if the musician would not show up and whether the business who was required to provide the musician would close or have significant hardship as a result. We feel the standard they are putting forward goes above and beyond what is reasonable. However, the process outlined in this bill with proposed language changes should also work for them should their assertions be true in certain instances.

This bill, with proposed language changes, goes a long way in protecting legitimate Independent Contractors and those that hire them from erroneous rulings by DLIR, where legitimate Independent Contractors have been determined to be employees. Further, it also addresses an ongoing problem that will continue to be an issue with the growing gig economy. Therefore, we stand in strong support of this bill with the proposed language changes and strongly urge that this bill pass out of committee and move forward.

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.

A BILL FOR AN ACT

RELATING TO EMPLOYMENT SECURITY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that the economy is
2 changing and increasing numbers of individuals are facing
3 decisions on whether to choose to become entrepreneurs and go
4 into business for themselves or remain in employment
5 relationships and maintain the protections afforded by various
6 labor laws, including Hawaii's employment security law. The
7 legislature further finds that many of these individuals may not
8 be aware of the criteria used by the department of labor and
9 industrial relations when making determinations as to whether an
10 individual is in an employment relationship or is a bona fide
11 independent contractor.

12 Accordingly, the purpose of this Act is to provide greater
13 clarity in Hawaii's employment security law to those individuals
14 choosing to become entrepreneurs by setting forth in greater
15 detail the criteria used to determine independent contractor
16 status.

1 SECTION 2. Section 383-6, Hawaii Revised Statutes, is
 2 amended to read as follows:
 3 ~~“§383-6 [Master and servant relationship, not required~~
 4 ~~when] Independent contractor.~~ (a) Services performed
 5 by an individual for wages or under any contract of hire shall be
 6 deemed to be employment subject to this chapter irrespective of
 7 whether the common law relationship of [~~master and servant~~]
 8 employer and employee exists unless and until it is shown to the
 9 satisfaction of the department [of labor and industrial
 10 relations] that~~[7] in the department's determination, a~~
 11 ~~preponderance of the factors set forth in subsection (b) has~~
 12 ~~been met and that:~~

- 12 (1) The individual has been and will continue to be free
- 13 from control or direction over the performance of such
- 14 service, both under the individual's contract of hire
- 15 and in fact;
- 16 (2) The service is either outside the usual course of the
- 17 business for which the service is performed or that
- 18 the service is performed outside of all the places of
- 19 business of the enterprise for which the service is
- 20 performed; and



1 (3) The individual is customarily engaged in an
 2 independently established trade, occupation,
 3 profession, or business of the same nature as that
 4 involved in the contract of service.

5 ~~(b) The department shall consider whether a preponderance~~
 6 ~~of the following factors indicates whether an individual is an~~
 7 ~~independent contractor:~~ In the department's determination under
 subsection (a), the department shall determine whether a
 preponderance of the following factors has been met:

8 (1) The employer for whom services are being performed
 9 requires the individual to comply with instructions
 10 regarding when, where, and how services are performed;

11 (2) The employer for whom services are being performed
 12 requires particular training for the individual
 13 performing services;

14 (3) The services provided by the individual are part of
 15 the regular business of the employer for whom services
 16 are being performed;

17 (4) The employer for whom services are being performed
 18 requires the services to be performed by the
 19 individual;



- 1 (5) The employer for whom services are being performed
2 hires, supervises, or pays the wages of the individual
3 performing services;
- 4 (6) The existence of a continuing relationship between the
5 employer for whom services are being performed with
6 the individual performing services which contemplates
7 continuing or recurring work, even if not full-time;
- 8 (7) The employer for whom services are being performed
9 requires set hours during which services are to be
10 performed;
- 11 (8) The employer for whom services are being performed
12 requires the individual to devote substantially full-
13 time to its business;
- 14 (9) The employer for whom services are being performed
15 requires the individual to perform work on its
16 premises;
- 17 (10) The employer for whom services are being performed
18 requires the individual to follow a set order or
19 sequence of work;



1 (11) The employer for whom services are being performed
2 requires the individual to make oral or written
3 progress reports;

4 (12) The employer for whom services are being performed
5 pays the individual on a regular basis such as hourly,
6 weekly, or monthly;

7 (13) The employer for whom services are being performed
8 pays expenses for the individual performing services;

9 (14) The employer for whom services are being performed
10 furnishes tools, materials, and other equipment for
11 use by the individual;

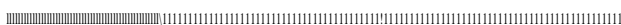
12 (15) There is a lack of investment in the facilities used
13 to perform services by the individual;

14 (16) There is a lack of profit or loss to the individual as
15 a result of the performance of such services;

16 (17) The individual is not performing services for a number
17 of employers at the same time;

18 (18) The individual does not make such services available
19 to the general public;

20 (19) The employer for whom services are being performed has
21 a right to discharge the individual; and



1 (20) The individual has the right to end the relationship
2 with the employer for whom services are being
3 performed without incurring liability pursuant to an
4 employment contract or agreement.

5 The degree of importance of each factor may vary, depending on
6 the occupation and the individual facts of each case as
7 determined by the department."

8 SECTION 3. The director of labor and industrial relations
9 shall submit' a report to the legislature no later than twenty
10 days prior to the convening of the regular session of 2018 on
11 the guidelines developed.by the unemployment insurance coverage
12 committee to assist auditors in applying section 383-6, Hawaii
13 Revised Statutes, during the auditor's investigations.

14 SECTION 4. The director of labor and industrial relations
15 shall submit a report to the legislature no later than twenty
16 days prior to the convening of each regular session regarding
17 the number of determinations applying section 383-6, Hawaii
18 Revised Statutes, rendered by the department of labor and
19 industrial relations' unemployment insurance division and
20 employment security appeals referee's office finding both
21 independent contractor and covered employment status.



1 SECTION 5. Statutory material to be repealed is bracketed
2 and stricken. New statutory material is underscored.

3 SECTION 6. This Act shall take effect on January 7, 2059.

4



Report Title:

Employment Security; Independent Contractor; Guidelines;
Department of Labor and Industrial Relations

Description:

Clarifies Hawaii's employment security law for independent contractors by requiring the consideration of twenty factors by the Department of Labor Industrial Relations when determining whether an individual is considered an independent contractor. Requires the Director of Labor and Industrial Relations to report to the Legislature prior to the Regular Session of 2018 regarding guidelines developed by the unemployment insurance coverage committee. Requires an annual report to the Legislature regarding covered employment determinations. Takes effect 1/7/2059. (SD1)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.





HAWAII REGIONAL COUNCIL OF CARPENTERS

April 4, 2017
House Committee on Finance
Chair Rosalyn Baker
Vice Chair Clarence Nishihara

Dear Chair Baker, Vice Chair Nishihara, and Members of the Senate Committee on Commerce, Consumer Protection, and Health:

The Hawaii Regional Council of Carpenters **STRONGLY OPPOSES** HB 347, H.D 2, S.D. 1 Relating to Employment Security, specifically section II.

As you are aware, misclassification of workers and other activities of the Underground Economy are of the upmost concern to our organization on both local and national fronts. In our own backyard, we recently found employers falsely identifying employees as independent contractors, which occurred at the Ewa Wing of the Ala Moana Center and the Maile Sky Court Hotel. Those employers were fined and held accountable thanks to the current laws related to employment security.

We oppose HB 347 because it attempts to legislate an issue that can be managed within the current law. The proponents of the bill are requesting amendments that are not necessary, and respectfully, are an overreaction to a misguided determination by the Department, which was later corrected by a ruling of the Circuit Court regarding the classification of musicians as independent contractors.

In conclusion, we feel confident in the Department of Labor's efforts to clear up this confusion regarding entertainers with more training of their staff and we should allow them to work through these issues before changing a law which is working very well.

STATE HEADQUARTERS & BUSINESS OFFICES

OAHU: 1311 Houghtailing Street, Honolulu, Hawaii 96817-2712 • Ph. (808) 847-5761 Fax (808) 841-0300

HILO OFFICE: 525 Kilauea Avenue, Room 205, Hilo, Hawaii 96720-3050 • Ph. (808) 935-8575 Fax (808) 935-8576

KONA OFFICE: 75-126 Lunapule Road, Kailua-Kona, Hawaii 96740-2106 • Ph. (808) 329-7355 Fax (808) 326-9376

MAUI OFFICE: 330 Hookahi Street, Wailuku, Maui 96793-1449 • Ph. (808) 242-6891 Fax (808) 242-5961

KAUAI OFFICE: Kuhio Medical Ctr. Bldg., 3-3295 Kuhio Hwy., Suite 201, Lihue, Kauai 96766-1040 • Ph. (808) 245-8511 Fax (808) 245-8911

The Twenty-Ninth Legislature
Regular Session of 2017

THE STATE SENATE

Committee on Commerce, Consumer Protection, and Health

Senator Rosalyn H. Baker, Chair

Senator Clarence K. Nishihara, Vice Chair

State Capitol, Conference Room 229

Tuesday, April 4, 2017; 9:30 a.m.

**STATEMENT OF THE ILWU LOCAL 142 ON H.B. 347 HD 2 SD 1
RELATING TO EMPLOYMENT SECURITY**

The ILWU Local 142 strongly opposes H.B. 347 HD 2 SD 1 which amends Hawaii's employment security law for independent contractors by requiring the use of twenty factors by the department of labor and industrial relations when determining whether an individual is considered an independent contractor. H.B. 347 HD 2 SD 1 also requires the Director of Labor and Industrial Relations to report to the Legislature prior to the Regular Session of 2018, regarding guidelines developed by the unemployment insurance committee.

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 performed outside of all 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.

It should not be forgotten that it is not only unemployment insurance protection that is lost if there is an independent contractor status found. In addition workers' compensation, and temporary disability insurance, and prepaid health benefits are all dependent on there being an employer – employee relationship. Therefore, the falsehoods used by employers who fraudulently claimed their employees were independent contractors in the Ala Moana Center and the Maile Sky Court Hotel investigations recently done by the Department of Labor and Industrial Relations, through false allegations, could have eliminated all of these protections and benefits.

Finally, an employee's right to become a member of a union and be entitled to all of the benefits and protections included in the collective bargaining agreement would have been eliminated also, if the employers' falsehoods had not been discovered.

We feel that the changes in section two of the bill, further raises federal concerns regarding conformity. 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 H.B. 347, HD 2 SD 1 be HELD. Thank you for considering our views and concerns on this matter.



Randy Perreira
President

HAWAII STATE AFL-CIO

345 Queen Street, Suite 500 • Honolulu, Hawaii 96813

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

The Twenty-Ninth Legislature, State of Hawaii
Hawaii State Senate
Committee on Commerce, Consumer Protection, and Health

Testimony by
Hawaii State AFL-CIO
April 4, 2017

H.B. 347, H.D. 2, S.D.1 – RELATING TO
EMPLOYMENT SECURITY

The Hawaii State AFL-CIO strongly opposes H.B. 347, H.D. 2, S.D.1 which clarifies Hawaii's employment security law for independent contractors by requiring the use of twenty factors by the Department of Labor Industrial Relations when determining whether an individual is considered an independent contractor and requires the Director of Labor and Industrial Relations to report to the Legislature prior to the Regular Session of 2018 regarding guidelines developed by the unemployment insurance coverage committee.

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 Commerce, Consumer Protection, and Health to defer H.B. 347, H.D. 2, S.D.1 indefinitely.

Thank you for the opportunity to testify.

Respectfully submitted,

Randy Perreira
President



April 3, 2017

To: The Honorable Rosalyn H. Baker, Chair
The Honorable Clarence K. Nishihara, Vice Chair
Members of the Committee on Commerce, Consumer Protection, and Health

Date: Tuesday, April 4, 2017

Time: 9:30 am

Place: State Capitol, Senate Conference Room 229
415 South Beretania Street

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

RE: H.B. 347, HD2, SD1 Relating to Employment Security

TESTIMONY IN SUPPORT OF H.B. 347, HD2, SD1 (with proposed amendments)

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 is the Department of Labor and Industrial Relations' ("DLIR") incorrect interpretation of H.R.S. Section 383-6, commonly referred to as the "ABC Test," in a 2013 case against my company. The individual in our case had filed for unemployment benefits because he was fired by a music store, not Envisions. When questioned by the auditor about other income he received, he mentioned Envisions as one of several event companies and wedding planners who contracted his services as a saxophonist. When the Auditor told him he is also an employee of Envisions, the individual insisted that he was a self-employed musician, and that he was not and did not desire to be an employee of Envisions. He also told the Auditor that he had a valid GET License, paid his GE taxes, and received 1099s from his customers, but the DLIR still determined that he was our employee without further investigation.

We appealed the DLIR's Decision to the Circuit Court of the 2nd Circuit. Judge Cahil found that the DLIR erroneously interpreted 383-6, specifically the "control" and "outside the usual course of business" prongs of the ABC Test. Judge Cahill also found that the DLIR relied solely on two (2) of the twenty (20) factors of Hawaii Administrative Rules 12-5-2 ("HAR 12-5-2") (e.g. where and when) to find for employment. Judge Cahill stated that the DLIR should have, but failed to, consider the twenty (20) factors in light of the undisputed facts. Had it done so, the DLIR would have found substantial evidence of a legitimate independent contractor ("IC") relationship.

While the Envisions case highlights the DLIR's extreme ruling in that case, HB 347 is not about just one case as the DLIR contends. As the Maui Chamber of Commerce validates, this Bill represents the numerous adverse rulings over the years against companies who do not challenge the DLIR for fear of being flagged or because of the high cost of litigating these types of cases.

I am, therefore, writing in strong support of HD 347, HD2, SD1 because it provides much-needed statutory clarification to this 78 year old law, especially in uncontested, consensual IC situations.

BILL SUMMARY, REBUTTAL & PROPOSED CHANGES

HB347 does not substantively change the law. It simply provides statutory safeguards to prevent erroneous DLIR rulings in the future. Contrary to what the opponents of this Bill contend, here is what HB347 does and does not do:

- HB347 does not change the ABC Test in any way as the DLIR, ILWU, HGEA, and the AFL-CIO would have you believe. All three prongs of the ABC Test in subsection (a) remain intact and must still be met in the conjunctive.
- Subsection (b) simply codifies the 20 factors of HAR 12-5-2 which the DLIR quoted in its entirety in the Envisions Decisions and which, I must assume, it relies on in its interpretation of the ABC Test in other cases as well.
- The 20 factors are still considered guidelines in applying the ABC Test, and the DLIR still retains its discretion to give each factor its proper weight based on the facts of each case.
- Subsection (b) does require the DLIR to determine, by a preponderance of the factors, whether an individual is an employee or independent contractor. The DLIR contends that this "preponderance of the factors" standard is "superfluous" and unnecessary. We believe that, absent an explicit standard of proof, the DLIR, whose Director changes with each new administration, could arguably take the position that all 20 factors have to be proven to find for IC status, or as it did in the Envisions case, "cherry pick" a few factors to find for employment against the greater weight of the evidence.
- Codifying the 20 factors would effectively replace HAR 12-5-2 so there is no redundancy or confusion. Since HRS 383-6 currently makes no reference to HAR 12-5-2, Subsection (b) lists these factors immediately following the ABC Test so that 383-6 is a comprehensive statute.
- Finally, the attached changes noted in red make clear that the 20 factors of section (b) is not intended to add another test to HRS 383-6 as the DLIR contends, but simply aids in the DLIR's determination of the ABC Test under subsection (a) as it always has under HAR 12-5-2.

I urge this Committee to also reconsider the following language of HB 347, HD2:

- 383-1 defines "employer" and "employee." Accordingly, HB 347, HD2 adds a definition of "independent contractor" and "client" to clarify and juxtapose both "employee" and "employer" definitions in HRS 383-1. The DLIR contends that these definitions are circular and create additional tests in determining IC status. Following the DLIR's logic, the same could hold true for the employer and employee definitions. Clearly, the definitions in 383-1 are intended to help understand the nature of the terms it defines, nothing more.

- More importantly, the definition of “client” draws a fundamental and necessary 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. However, 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 Judge Cahill relied on in our case, should be included in the law. (See: Circuit Court Decision, page 7-9).
- 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.

CLOSING:

During the 3 years that we’ve been lobbying for clarity in the law, the DLIR has referred to examples of unscrupulous employer cases like the Ala Moana Center and Maile Sky Court Hotel cases to defend the status quo. In doing so, the DLIR and those who oppose this measure miss the fundamental point.

We all agree that the ABC Test is meant to protect against nefarious employers who falsely misclassify legitimate employees. On the other hand, as we’ve been saying all along, the DLIR is also duty bound to protect and respect the consensual relationship of legitimate ICs and good faith companies that hire them. HB347, HD2, SD1 is meant to ensure this equitable application of the law.

Given the foregoing, I humbly ask that you pass through HB347, HD2, SD1 with the clarifying language in the attached Bill and included in HB347, HD2.

Respectfully submitted,

ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC.



Wayne Hikiji
Its President

Enclosures

A BILL FOR AN ACT

RELATING TO EMPLOYMENT SECURITY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that the economy is
2 changing and increasing numbers of individuals are facing
3 decisions on whether to choose to become entrepreneurs and go
4 into business for themselves or remain in employment
5 relationships and maintain the protections afforded by various
6 labor laws, including Hawaii's employment security law. The
7 legislature further finds that many of these individuals may not
8 be aware of the criteria used by the department of labor and
9 industrial relations when making determinations as to whether an
10 individual is in an employment relationship or is a bona fide
11 independent contractor.

12 Accordingly, the purpose of this Act is to provide greater
13 clarity in Hawaii's employment security law to those individuals
14 choosing to become entrepreneurs by setting forth in greater
15 detail the criteria used to determine independent contractor
16 status.

1 SECTION 2. Section 383-6, Hawaii Revised Statutes, is
 2 amended to read as follows:
 3 ~~“§383-6 [Master and servant relationship, not required~~
 4 ~~when] Independent contractor. (a) Services performed~~
 5 ~~by an individual for wages or under any contract of hire shall be~~
 6 ~~deemed to be employment subject to this chapter irrespective of~~
 7 ~~whether the common law relationship of [master and servant]~~
 8 ~~employer and employee exists unless and until it is shown to the~~
 9 ~~satisfaction of the department [of labor and industrial~~
 10 ~~relations] that [7] in the department's determination, a~~
 11 ~~preponderance of the factors set forth in subsection (b) has~~
 12 ~~been met and that:~~

- 12 (1) The individual has been and will continue to be free
- 13 from control or direction over the performance of such
- 14 service, both under the individual's contract of hire
- 15 and in fact;
- 16 (2) The service is either outside the usual course of the
- 17 business for which the service is performed or that
- 18 the service is performed outside of all the places of
- 19 business of the enterprise for which the service is
- 20 performed; and



1 (3) The individual is customarily engaged in an
2 independently established trade, occupation,
3 profession, or business of the same nature as that
4 involved in the contract of service.

5 ~~(b) The department shall consider whether a preponderance~~
6 ~~of the following factors indicates whether an individual is an~~
7 ~~independent contractor:~~ In the department's determination under
subsection (a), the department shall determine whether a
preponderance of the following factors has been met:

8 (1) The employer for whom services are being performed
9 requires the individual to comply with instructions
10 regarding when, where, and how services are performed;

11 (2) The employer for whom services are being performed
12 requires particular training for the individual
13 performing services;

14 (3) The services provided by the individual are part of
15 the regular business of the employer for whom services
16 are being performed;

17 (4) The employer for whom services are being performed
18 requires the services to be performed by the
19 individual;



- 1 (5) The employer for whom services are being performed
2 hires, supervises, or pays the wages of the individual
3 performing services;
- 4 (6) The existence of a continuing relationship between the
5 employer for whom services are being performed with
6 the individual performing services which contemplates
7 continuing or recurring work, even if not full-time;
- 8 (7) The employer for whom services are being performed
9 requires set hours during which services are to be
10 performed;
- 11 (8) The employer for whom services are being performed
12 requires the individual to devote substantially full-
13 time to its business;
- 14 (9) The employer for whom services are being performed
15 requires the individual to perform work on its
16 premises;
- 17 (10) The employer for whom services are being performed
18 requires the individual to follow a set order or
19 sequence of work;



- 1 (11) The employer for whom services are being performed
2 requires the individual to make oral or written
3 progress reports;
- 4 (12) The employer for whom services are being performed
5 pays the individual on a regular basis such as hourly,
6 weekly, or monthly;
- 7 (13) The employer for whom services are being performed
8 pays expenses for the individual performing services;
- 9 (14) The employer for whom services are being performed
10 furnishes tools, materials, and other equipment for
11 use by the individual;
- 12 (15) There is a lack of investment in the facilities used
13 to perform services by the individual;
- 14 (16) There is a lack of profit or loss to the individual as
15 a result of the performance of such services;
- 16 (17) The individual is not performing services for a number
17 of employers at the same time;
- 18 (18) The individual does not make such services available
19 to the general public;
- 20 (19) The employer for whom services are being performed has
21 a right to discharge the individual; and



1 (20) The individual has the right to end the relationship
2 with the employer for whom services are being
3 performed without incurring liability pursuant to an
4 employment contract or agreement.

5 The degree of importance of each factor may vary, depending on
6 the occupation and the individual facts of each case as
7 determined by the department."

8 SECTION 3. The director of labor and industrial relations
9 shall submit'a report to the legislature no later than twenty
10 days prior to the convening of the regular session of 2018 on
11 the guidelines developed.by the unemployment insurance coverage
12 committee to assist auditors in applying section 383-6, Hawaii
13 Revised Statutes, during the auditor's investigations.

14 SECTION 4. The director of labor and industrial relations
15 shall submit a report to the legislature no later than twenty
16 days prior to the convening of each regular session regarding
17 the number of determinations applying section 383-6, Hawaii
18 Revised Statutes, rendered by the department of labor and
19 industrial relations' unemployment insurance division and
20 employment security appeals referee's office finding both
21 independent contractor and covered employment status.

1 SECTION 5. Statutory material to be repealed is bracketed
2 and stricken. New statutory material is underscored.

3 SECTION 6. This Act shall take effect on January 7, 2059.

4



Report Title:

Employment Security; Independent Contractor; Guidelines;
Department of Labor and Industrial Relations

Description:

Clarifies Hawaii's employment security law for independent contractors by requiring the consideration of twenty factors by the Department of Labor Industrial Relations when determining whether an individual is considered an independent contractor. Requires the Director of Labor and Industrial Relations to report to the Legislature prior to the Regular Session of 2018 regarding guidelines developed by the unemployment insurance coverage committee. Requires an annual report to the Legislature regarding covered employment determinations. Takes effect 1/7/2059. (SD1)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



Of Counsel:
ALSTON HUNT FLOYD & ING
Attorneys at Law
A Law Corporation

ANNA ELENTO-SNEED 3412-0
CHRISTY GRAY 9715-0
1001 Bishop Street, Suite 1800
Honolulu, Hawai'i 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
E-mail: aes@ahfi.com
cgray@ahfi.com

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

FILED
2014 SEP -3 AM 9:57

N. MARTINS, CLERK
SECOND CIRCUIT COURT

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF 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.

DATED: Honolulu, Hawaii, ^{Waikuku} 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*

From: mailinglist@capitol.hawaii.gov
Sent: Monday, April 3, 2017 10:28 AM
To: CPH Testimony
Cc: josh@desilvadmc.com
Subject: Submitted testimony for HB347 on Apr 4, 2017 09:30AM

HB347

Submitted on: 4/3/2017

Testimony for CPH on Apr 4, 2017 09:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Joshua DeSilva	DeSilva Meeting Consultants	Support	No

Comments: Further clarification and reasonable considerations need to be addressed regarding who is considered an independent contractor. Current laws, criteria and policies have too much gray area and can be interpreted in various ways. Let's fix this.

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

From: mailinglist@capitol.hawaii.gov
Sent: Monday, April 3, 2017 3:49 AM
To: CPH Testimony
Cc: south246@gmail.com
Subject: Submitted testimony for HB347 on Apr 4, 2017 09:30AM

HB347

Submitted on: 4/3/2017

Testimony for CPH on Apr 4, 2017 09:30AM in Conference Room 229

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

Comments: Choices - we periodically use IC and its a decision between two businesses.

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

From: mailinglist@capitol.hawaii.gov
Sent: Sunday, April 2, 2017 12:42 PM
To: CPH Testimony
Cc: luly.unemori2@hawaiiantel.net
Subject: *Submitted testimony for HB347 on Apr 4, 2017 09:30AM*

HB347

Submitted on: 4/2/2017

Testimony for CPH on Apr 4, 2017 09:30AM in Conference Room 229

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

Comments:

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

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