

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 1, 2017

To: The Honorable Sylvia Luke, Chair
The Honorable Ty J.K. Cullen, Vice Chair, and
Members of the House Committee on Finance

Date: Wednesday, March 1, 2017
Time: 1:00pm
Place: Conference Room 308

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

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

I. OVERVIEW OF PROPOSED LEGISLATION

HB347 HD2 proposes to amend section 383-6, Hawaii Revised Statutes (HRS), by adding definitions and codifying the 20 factors, currently contained in Hawaii Administrative Rule (HAR) 12-5-2, to require that these criteria “shall be used by the department for determining whether an individual could be deemed an independent contractor.”

DLIR strongly opposes section 2 of this measure that, by specifying that a “preponderance” of the 20 factors be met to adjudicate independent contractor status and by defining “client” and “independent contractor,” adds more confusion to a complex determination process. The bill as written may defeat the purpose of clarifying the distinction between employment and self-employment, possibly aggravating worker misclassification issues and denying more individuals and families protection.

DLIR notes that one problem it has been confronting is employers’ falsely identifying employees as independent contractors, which occurred in recent investigations at the Ewa Wing of the Ala Moana Center and the Maile Sky Court Hotel, thereby denying 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.

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 educate staff on statutory requirements, investigative procedures and ongoing training, which has 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.

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, section 383-6, HRS, requires that all three prongs of the ABC Test 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 performed or that the service is performed outside all the places of business of the enterprise for which the service is performed; **and**
3. The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service.

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 serious concerns regarding HB347 HD2 as the measure creates contradictions in statutory interpretation, which would delay decision-making and may encourage more appeals.

The amendments proposed in Section 2 create conflicts by effectively requiring the application of **three 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);
3. The definition of “independent contractor” in subsection (c).

Including the new definitions and the preponderance standard are superfluous in that the ABC test encompasses the 20 factors in the A test of control and the substance of the “independent contractor” definition in the C test.

The additional requirements as proposed may confuse the application of the ABC test. The additional requirements—the proposed new twenty factors, a preponderance of the new factors, new definitions of independent contractor and client—in addition to the ABC test will likely result in more confusion rather than greater clarity. Employers are responsible for determining whether a worker is an independent contractor or an employee at the time of hire under the ABC test under the current law. If employers misclassify workers as independent contractors, retroactive federal (FUTA, FICA) and state unemployment insurance taxes as well as penalties may be assessed.

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

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 would be reversed for reasons that are unclear.

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



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION

AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

The Twenty-Ninth Legislature, State of Hawaii
House of Representatives
Committee on Finance

Testimony by
Hawaii Government Employees Association

March 1, 2017

H.B. 347, H.D. 2 - RELATING TO
EMPLOYMENT SECURITY

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO opposes the purpose and intent of H.B. 347, H.D. 2 which changes the employment security law for independent contractors by requiring the use of twenty factors by the Department of Labor Industrial Relations. Independent contractors do not have the ability to claim for workers compensation nor can they collect unemployment insurance. Passage of this legislation will adversely affect many workers and we respectfully request the Committee to defer this measure.

Thank you for the opportunity to testify in opposition of the above legislation.

Respectfully submitted,

Randy Perreira
Executive Director



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 House of Representatives
Committee on Finance

Testimony by
Hawaii State AFL-CIO
March 1, 2017

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

The Hawaii State AFL-CIO strongly opposes H.B. 347, H.D. 2 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 Finance to defer H.B. 347, H.D. 2 indefinitely.

Thank you for the opportunity to testify.

Respectfully submitted,

Randy Perreira
President



HAWAII REGIONAL COUNCIL OF CARPENTERS

Wednesday, March 1, 2017
House Committee on Finance
Chair Sylvia Luke
Vice Chair Ty Cullen

Dear Chair Luke, Vice Chair Cullen, and Members of the House Finance Committee:

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

As you are aware, misclassification of workers and other activities of the Underground Economy are of the utmost 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 water down a law that is working. 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



HOUSE OF REPRESENTATIVES
The Twenty-Ninth Legislature
Regular Session of 2017

COMMITTEE ON FINANCE
Rep. Sylvia Luke, Chair
Rep. Ty J.K. Cullen, Vice Chair

RE: HB 347 - RELATING TO EMPLOYMENT SECURITY

Date:	Wednesday, March 1, 2017
Time:	1:00 P.M.
Conference Room 308 State Capitol 415 South Beretania Street	

Aloha Chair Luke, Vice Chair Cullen 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 performers, crew, musicians and drivers in Hawaii.

We **strongly 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 and the Fair Labor Standards 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.

In July 2015, the U.S. Department of Labor issued [new guidelines](#) on the misclassification of employees as independent contractors:

“ A worker who is economically dependent on an employer is suffered or permitted to work by the employer. Thus, applying the economic realities test in view of the expansive definition of “employee” under the Act, most workers are employees under the [Fair Labor Standards Act](#). ”



“ ...the economic realities of the relationship, and not the label an employer gives it, are **determinative**. Thus, an agreement between an employer and a worker designating or labeling the worker as an independent contractor is not indicative of the economic realities of the working relationship and is not relevant to the analysis of the worker’s status. ”

Providing clarity to both employers and workers would be welcomed, however we believe that this could be achieved through education, outreach, and enforcement of current laws 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



February 28, 2017

To: The Honorable Sylvia Luke, Chair
The Honorable Ty J.K. Cullen, Vice Chair
Members of the Committee on Finance

Date: Tuesday, February 28, 2017

Time: 1:00 pm

Place: State Capitol, House Conference Room 308
415 South Beretania Street

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

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

TESTIMONY IN SUPPORT OF H.B. 347, HD2

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, HD2 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. The individual in our case had filed unemployment against a music store that fired him, not Envisions. The individual repeatedly insisted to the DLIR auditor that he was a self-employed musician who worked for many customers and was neither our employee, nor desired to be. Despite his insistence and representations to the auditor that he had a valid GET License, paid his GE taxes, received 1099s from his customers, and signed Envisions' Independent Contractor Agreement, the DLIR determined that he was our employee under its interpretation of the ABC Test.

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 which showed, beyond the preponderance of the evidence, that there was a consensual independent contractor relationship between the individual and Envisions (the Circuit Court's Decision is attached).

I am, therefore, writing in strong support of HD 347, HD2 because it provides much-needed statutory clarification in uncontested independent contractor ("IC") situations for (i) individuals who choose to be self-employed entrepreneurs, (ii) companies that hire them, and (iii) the DLIR who is charged to correctly and consistently interpret and apply the ABC Test.

SUPPORT FOR H.B. 347, HD2: We appreciate all of you who understand this is not an isolated case, but a wide-spread and long-standing issue that is generating more and more political attention with the advent of the quickly growing “gig economy.” Therefore, I urge you to support HB 347, HD2 for the following reasons:

- HB 347, HD2 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.
- An increasing number of Hawaii entrepreneurs are choosing to go into business for themselves as ICs. Therefore, HB 347, HD2 appropriately replaces the archaic “Master Servant” title of 383-6 with “Independent Contractor” 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.
- HB 347, HD2 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 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.
- 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) also logically list these factors immediately following the ABC Test in Subsection (a) so the general public has access to the law in one comprehensive statute.
- 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 independent contractor status. Following the DLIR’s logic, the same could be true of the employer and employee definitions. Clearly, the definitions in 383-1 are simply meant 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. 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, HD2 adds Sections 3 & 4 to 383-6. It establishes a workable mechanism of accountability which would require 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.

CLOSING:

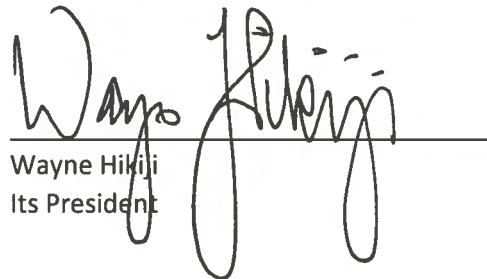
During the 3 years that we’ve been lobbying for clarity in the law, the DLIR has stubbornly referred to examples of unscrupulous employer cases like the Ala Moana Center and Maile Sky Court Hotel cases to defend the status quo. In doing so, the DLIR and those who oppose this measure miss the fundamental 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 legitimate ICs and good faith companies that hire them. SB347, HD2 is meant to do just that.

Given the foregoing, I humbly ask that you pass through HB 347, HD2.

Respectfully submitted,

ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC.



Wayne Hiki
Its President

Enclosure

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.

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

FILED

2014 SEP -3 AM 9:57

N. MARTINS, CLERK
SECOND CIRCUIT COURT

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 [REDACTED] provided his services, and thus, Envisions would have been responsible for finding a replacement if [REDACTED] cancelled at the last minute. The record also shows that Envisions collected event fees from its clients and paid [REDACTED] for its services. Contrary to the DLIR's argument, the Court finds these factors as indicative of and establishing Envisions' lack of general control, not an exercise of general control.

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

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

choose his own music selection within these parameters, and he provided his own instrument as well as his own attire. At no time did Envisions provide him with tools, equipment, or uniform. At no time did Envisions train [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,} *PM* 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

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

Testimony relating to HB 347 H.D. 2

Though I am submitting this testimony as an individual I am a member in good standing of the Musicians' Association of Hawaii, American Federation of Musicians, Local 677. I wished to comment on the proposed bill as someone who has earned his living as a musician his whole life, and has had the privilege of working with some of the world's greatest performing artists in a variety of concert settings.

After examining the bill draft I am concerned about the encroaching use of the term 'Independent Contractor' to define the duties of performing artists in the workplace. I rehearse and perform with my colleagues under very intense and stressful conditions trying to work up very difficult pieces of music in a very short time, and to such a high level the public is willing to pay (sometimes a lot!) to hear us perform. I am comforted by the knowledge that my status as an employee offers certain protections under state labor law such as workplace safety which I otherwise would not have if I offered my services for a fee. It's difficult enough to play my instrument well without having to worry if I injure myself on the job I could be out of work for along time, and my employer would bear no responsibility.

I urge our respected Representatives to not only vote No on this House Bill, but rather focus on strengthening the definition of 'employee' - something which would ultimately benefit all of Hawaii's working citizens. Thank you.

Jay Scott Janusch
1452 Liholiho St., Unit 601
Honolulu, HI 96822
(808)223-7825



Chamber of Commerce HAWAII
The Voice of Business

LATE

**Testimony to the House Committee on Finance
Wednesday, March 1, 2017 at 1:00 P.M.
Conference Room 308, State Capitol**

RE: HOUSE BILL 347 HD2 RELATING TO EMPLOYMENT SECURITY

Chair Luke, Vice Chair Cullen, and Members of the Committee:

The Chamber of Commerce Hawaii ("The Chamber") would like to **provide comments** regarding HB 347 HD2, 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; 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. However, we do have some concerns and ask that the following subsections be deleted from Section 2:

- (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;
- (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.

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

LATE

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, March 1, 2017 9:43 AM
To: FINTestimony
Cc: kkahaloa@kona-kohala.com
Subject: *Submitted testimony for HB347 on Mar 1, 2017 13:00PM*

HB347

Submitted on: 3/1/2017

Testimony for FIN on Mar 1, 2017 13:00PM in Conference Room 308

Submitted By	Organization	Testifier Position	Present at Hearing
Kirstin Kahaloa	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



LATE

Testimony to the Finance Committee
March 1, 2017 at 1:00 p.m.
State Capitol - Conference Room 308

RE: HB 347 HD2, Relating to Employment Security

Aloha Chair Luke, Vice Chair Cullen and members of the committee:

We are John Knorek and Cara Heilmann, the Legislative Committee co-chairs for the Society for Human Resource Management – Hawaii Chapter (“SHRM Hawaii”). SHRM Hawaii represents nearly 800 human resource professionals in the State of Hawaii.

We are writing to support HB 347 HD2, relating to employment security. This bill seeks to clarify 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. It 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 coverage committee and requires an annual report to the legislature regarding covered employment determinations. We believe this measure is a good step toward clarifying the determination of whether an independent contractor will be recognized as such.

Human resource professionals are attuned to the needs of employers and employees. We are the frontline professionals responsible for businesses’ most valuable asset: human capital. We truly have our employers’ and employees’ interests at heart. We will continue to review this bill and, if it advances, request to be a part of the dialogue concerning it.

Thank you for the opportunity to testify.





MAUI
CHAMBER OF COMMERCE
VOICE OF BUSINESS

LATE

**HEARING BEFORE THE HOUSE COMMITTEE ON FINANCE
HAWAII STATE CAPITOL, HOUSE CONFERENCE ROOM 308
WEDNESDAY, MARCH 1, 2017 AT 1:00PM**

To The Honorable Sylvia Luke, Chair;
The Honorable Ty J.K. Cullen, Vice Chair; and
Members of the Finance Committee

**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.

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 an 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 recognizes 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 Finance Committee
March 1, 2017
Page 3.

The time has come for a new model. HB347 HD2 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.

In listening to the DLIR’s testimony and their concerns over what could arise over consistency issues, the new draft now incorporates the HRS 20 point test, which the DLIR says they are using already. The bill now merely codifies that they must use all 20 factors and find a preponderance of factors in their determination. Therefore, we feel this gives great consistency to the DLIR and see no reason for opposition since the ABC test and 20 factors remain the same. However, there are some that feel just the 20 factor test should suffice. We ask that you allow for this bill to be moved forward so we can continue to work on this.

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

The Twenty-Ninth Legislature
Regular Session of 2017

THE HOUSE OF REPRESENTATIVES

Committee on Finance

Representative Sylvia Luke, Chair

Representative Ty J.K. Cullen, Vice Chair

State Capitol, Conference Room 308

Wednesday, March 1, 2017; 1:00 p.m.

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

The ILWU Local 142 strongly opposes H.B. 347 HD 2 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 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, could have eliminated all of these protections.

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 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, HD2 be HELD. Thank you for considering our views and concerns.

LATE

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 28, 2017 8:24 PM
To: FINTestimony
Cc: jamesfmoffitt@gmail.com
Subject: Submitted testimony for HB347 on Mar 1, 2017 13:00PM

HB347

Submitted on: 2/28/2017

Testimony for FIN on Mar 1, 2017 13:00PM in Conference Room 308

Submitted By	Organization	Testifier Position	Present at Hearing
James Moffitt	Individual	Oppose	No

Comments: Hello, I strongly oppose HB 347. I, and many workers, especially those in creative fields would likely be negatively impacted by this measure. Misclassifying creative professionals as independent contractors leads to suppression of wages. It also places an undue tax burden on them while denying them protections granted by the National Labor Relations Act and the Fair Labor Standards Act. Rather than clarifying the definition of employee, proposals such as HB 347 tend to make that definition less clear. There is also the possibility that this proposal could violate Federal Labor Laws. Thank you the opportunity to submit testimony on this measure. James Moffitt musician jamesfmoffitt@gmail.com

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

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, March 1, 2017 7:30 AM
To: FINTestimony
Cc: cooksynergy@gmail.com
Subject: Submitted testimony for HB347 on Mar 1, 2017 13:00PM

HB347

Submitted on: 3/1/2017

Testimony for FIN on Mar 1, 2017 13:00PM in Conference Room 308

Submitted By	Organization	Testifier Position	Present at Hearing
Thomas Cook	Individual	Support	No

Comments: Please pass this measure. We need this so Department of Labor does not waste time on people who are not employees. We need our people to be able to work. To narrow an interpretation by DOL is hurting people and business. Thank you very much Tom Cook Maui

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