LATE TESTIMONY

MAUI
CHAMBER OF COMMERCE
VOICE OF BUSINESS

HEARING BEFORE THE SENATE COMMITTEE ON JUDICIARY AND LABOR
HAWAII STATE CAPITOL, SENATE CONFERENCE ROOM 016
TUESDAY, MARCH 14, 2017 AT 9:00AM

To The Honorable Gil S.C. Keith-Agaran, Chair;
The Honorable Karl Rhoads, Vice Chair; and
Members of the Judiciary and Labor 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

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

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 TESTIMONY

The Twenty-Ninth Legislature
Regular Session of 2017

THE STATE SENATE
Committee on Judiciary and Labor
Senator Gilbert S.C. Keith-Agaran, Chair
Senator Karl Rhoads, Vice Chair
State Capitol, Conference Room 016
Tuesday, March 14, 2017; 9:00 a.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, through false allegations, 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 TESTIMONY

envisions
creative event production

March14, 2017

To: The Honorable Gilbert S.C. Keith-Agaran, Chair
The Honorable Karl Rhoads, Vice Chair
Members of the Committee on Judiciary & Labor
Date: Tuesday, March 14, 2017
Time: 9:00 am
Place: State Capitol, Senate Conference Room 016
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 repeated 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.

36 Pa'a Street, Kahului, Hawaii 96732 * Office: (808) 874-1000 * Fax: (808) 879-0720
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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 <u>also</u> 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 Hikiji
Its President

Enclosure

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ENVISIONS ENTERTAINMENT &
PRODUCTIONS, INC.

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI`I

In the Matter of

ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC.,

Taxpayer-Appellant,

vs.

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

Appellees,

and

[redacted]

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

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

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

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

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

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

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

7. In 2012, [redacted] contracted with Envisions to provide live saxophone music at two separate events organized by Envisions, for a grand total of five (5) hours. Envisions and [redacted] executed an independent contractor agreement to govern [redacted] provision of those services.

Procedural History

8. On January 7, 2013, [redacted] filed an unemployment benefits claim after he was laid off from employment with an unrelated third-party employer.

9. On February 4, 2013, the DLIR's UID auditor issued an employment determination and a benefits determination, finding that the saxophone services performed by [redacted] constituted employment, and thus, the remuneration paid to him by Envisions was subject to HRS Chapter 383. Envisions appealed.

10. On July 24, 2013, ESARO conducted a hearing in the appeal of the employment determination.

11. On August 20, 2013, the ESARO appeals referee ruled that [redacted] ran an independently established business so that "Clause 3" of HRS §383-6 had been met. However, the appeals referee also ruled that: as to "Clause 1" of HRS §383-6, [redacted] was not free from control or direction over the performance of his services; and, as to "Clause 2" of HRS §383-6, [redacted] services were not outside the usual course of Envisions' business or outside all of Envisions' places of business.

12. The ESARO appeals referee concluded that because only a single clause of the three-part test under HRS §383-6 had been satisfied, the services performed by [redacted] constituted employment, and thus, payments made to him were wages subject to HRS Chapter 386.

13. On September 23, 2014, the ESARO conducted a separate hearing regarding UID Decision 1300751, charging Employer's reserve account for a percentage of benefits payable to [redacted]

14. On October 7, 2014, the ESARO appeals referee affirmed UID Decision 1300751, charging Employer's reserve account for a percentage of benefits payable to [redacted].

15. Envisions file a notice of appeal for each ESARO decision. The two appeals were consolidated into the Appeal herein.

CONCLUSIONS OF LAW

Issues on Appeal

16. The statute in question is HRS §383-6, which presumes that all services performed by an individual for a taxpayer are employment. To determine if an individual is an independent contractor pursuant to HRS §383-6, the taxpayer must establish all three clauses of the independent contractor test set forth in the statute.

17. In the present case, the ESARO appeals officer determined that Envisions satisfied "Clause 3" of the test, but failed to establish "Clause 1" and "Clause 2" of the test.

"Clause 1"

18. Under Clause 1, it must be shown that the individual has been and will continue to be free from control or direction over the performance of such service, both under the individual's contract of hire and in fact. Hawaii Administrative Rules ("HAR") §12-5-2(a) provides that control or direction means general control, and need not extend to all details of the performance of service. Furthermore, general control does not mean actual control necessarily, but only that there is a right to exercise control.

19. HAR §12-5-2 provides a twenty-part test that serves as guidelines the DLIR uses, or should be using, to determine whether a person is within the employer-employee relationship. However, there is nothing in the appeals referee's decision to indicate that she went through the guidelines set forth in HAR §12-5-2 and analyzed any of the evidence submitted by Envisions or the testimony of its president, Wayne Hikiji.

20. Envisions points to evidence in the record showing that it had an obligation to its clients to provide saxophone services during the events at which [redacted] provided his services, and thus, Envisions would have been responsible for finding a replacement if [redacted] cancelled at the last minute. The record also shows that Envisions collected event fees from its clients and paid [redacted] for its services. Contrary to the DLIR's argument, the Court finds these factors as indicative of and establishing Envisions' lack of general control, not an exercise of general control.

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

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

choose his own music selection within these parameters, and he provided his own instrument as well as his own attire. At no time did Envisions provide him with tools, equipment, or uniform. At no time did Envisions train [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. 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. It services are in planning and organizing events for its clients.

33. The DLIR argues that Envisions' testimony that it provided entertainment for its clients, and the fact that Envisions' client contracts specifically required a saxophone player at events, constitutes dispositive evidence that [redacted] services were not incidental and not outside Envisions' usual course of business.

34. The services provided by [redacted] were limited to the playing of the saxophone, and the playing of the saxophone by [redacted] was not integral to Envisions' business.

35. "Integral" means a foundation aspect of Envisions' business. There is nothing in the record that indicates that if [redacted] services were not

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

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

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

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

ORDER

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

DATED: Honolulu, Hawaii, Waiuku SEP - 2 2014.

/S/ PETER T. CAHILL (SEAL)
Judge of the Above-Entitled Court

APPROVED AS TO FORM:

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DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

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ENVISIONS ENTERTAINMENT &
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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI`I

In the Matter of

ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC.,

Taxpayer-Appellant,

vs.

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

Appellees,

and

[redacted]

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

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

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

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

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

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

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

7. In 2012, [redacted] contracted with Envisions to provide live saxophone music at two separate events organized by Envisions, for a grand total of five (5) hours. Envisions and [redacted] executed an independent contractor agreement to govern [redacted] provision of those services.

Procedural History

8. On January 7, 2013, [redacted] filed an unemployment benefits claim after he was laid off from employment with an unrelated third-party employer.

9. On February 4, 2013, the DLIR's UID auditor issued an employment determination and a benefits determination, finding that the saxophone services performed by [redacted] constituted employment, and thus, the remuneration paid to him by Envisions was subject to HRS Chapter 383. Envisions appealed.

10. On July 24, 2013, ESARO conducted a hearing in the appeal of the employment determination.

11. On August 20, 2013, the ESARO appeals referee ruled that [redacted] ran an independently established business so that "Clause 3" of HRS §383-6 had been met. However, the appeals referee also ruled that: as to "Clause 1" of HRS §383-6, [redacted] was not free from control or direction over the performance of his services; and, as to "Clause 2" of HRS §383-6, [redacted] services were not outside the usual course of Envisions' business or outside all of Envisions' places of business.

12. The ESARO appeals referee concluded that because only a single clause of the three-part test under HRS §383-6 had been satisfied, the services performed by [redacted] constituted employment, and thus, payments made to him were wages subject to HRS Chapter 386.

13. On September 23, 2014, the ESARO conducted a separate hearing regarding UID Decision 1300751, charging Employer's reserve account for a percentage of benefits payable to [redacted]

14. On October 7, 2014, the ESARO appeals referee affirmed UID Decision 1300751, charging Employer's reserve account for a percentage of benefits payable to [redacted].

15. Envisions file a notice of appeal for each ESARO decision. The two appeals were consolidated into the Appeal herein.

CONCLUSIONS OF LAW

Issues on Appeal

16. The statute in question is HRS §383-6, which presumes that all services performed by an individual for a taxpayer are employment. To determine if an individual is an independent contractor pursuant to HRS §383-6, the taxpayer must establish all three clauses of the independent contractor test set forth in the statute.

17. In the present case, the ESARO appeals officer determined that Envisions satisfied "Clause 3" of the test, but failed to establish "Clause 1" and "Clause 2" of the test.

"Clause 1"

18. Under Clause 1, it must be shown that the individual has been and will continue to be free from control or direction over the performance of such service, both under the individual's contract of hire and in fact. Hawaii Administrative Rules ("HAR") §12-5-2(a) provides that control or direction means general control, and need not extend to all details of the performance of service. Furthermore, general control does not mean actual control necessarily, but only that there is a right to exercise control.

19. HAR §12-5-2 provides a twenty-part test that serves as guidelines the DLIR uses, or should be using, to determine whether a person is within the employer-employee relationship. However, there is nothing in the appeals referee's decision to indicate that she went through the guidelines set forth in HAR §12-5-2 and analyzed any of the evidence submitted by Envisions or the testimony of its president, Wayne Hikiji.

20. Envisions points to evidence in the record showing that it had an obligation to its clients to provide saxophone services during the events at which [redacted] provided his services, and thus, Envisions would have been responsible for finding a replacement if [redacted] cancelled at the last minute. The record also shows that Envisions collected event fees from its clients and paid [redacted] for its services. Contrary to the DLIR's argument, the Court finds these factors as indicative of and establishing Envisions' lack of general control, not an exercise of general control.

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

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

choose his own music selection within these parameters, and he provided his own instrument as well as his own attire. At no time did Envisions provide him with tools, equipment, or uniform. At no time did Envisions train [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. 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. It services are in planning and organizing events for its clients.

33. The DLIR argues that Envisions' testimony that it provided entertainment for its clients, and the fact that Envisions' client contracts specifically required a saxophone player at events, constitutes dispositive evidence that [redacted] services were not incidental and not outside Envisions' usual course of business.

34. The services provided by [redacted] were limited to the playing of the saxophone, and the playing of the saxophone by [redacted] was not integral to Envisions' business.

35. "Integral" means a foundation aspect of Envisions' business. There is nothing in the record that indicates that if [redacted] services were not

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

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

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

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

ORDER

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

DATED: Honolulu, 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