



STATE OF HAWAII  
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS  
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January 30, 2017

To: The Honorable Aaron Ling Johanson, Chair  
The Honorable Daniel Holt, Vice Chair, and  
Members of the House Committee on Labor & Public Employment

Date: Tuesday, January 31, 2017

Time: 9:00 a.m.

Place: Conference Room 309

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

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

**I. OVERVIEW OF PROPOSED LEGISLATION**

HB347 amends section 383-6, Hawaii Revised Statutes (HRS), by adding a second criterion that must be met to determine the existence of an employee-employer relationship. A new subsection codifies a non-conforming version of the IRS 20 common-law factors and requires that both a preponderance of these elements and the ABC test must be considered in the adjudication of independent contractor status.

Section 12-5-2, Hawaii Administrative Rules (HAR), currently identifies 20 factors to be used as a guide in deciding whether sufficient control or direction is present to establish employment. However, HB347 includes a non-conforming version of the 20 elements, which is still different from the Internal Revenue Service's (IRS) twenty common law factors, and adds definitions of "client and "independent contractor," ostensibly to simplify and facilitate the self-employment determination process. These are three different versions of the 20 factors.

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

DLIR supports sections 3 and 4 that would provide greater transparency regarding coverage determinations and information to the Legislature. The department has taken steps to insure staff makes determinations using solid guidelines. This was undertaken after rigorous training to prevent erroneous rulings. For example, the Unemployment Insurance Division conducted extensive training on the matter of coverage determinations and implemented additional reviews of determinations, during 2015. More information pertaining to employment coverage decisions is provided in the comments section below.

## **II. CURRENT LAW**

The IRS applies the common-law standard for Federal Unemployment Tax Act (FUTA) purposes and developed the 20 point criteria to weigh facts relevant to an employer's right to control and direct an individual who performs services, whether that right is exercised or not. Whereas only part "A" of the ABC test must be passed to meet federal conformity requirements, section 383-6, HRS, requires that all three prongs be satisfied to render an independent contractor ruling under state law.

Section 383-6, HRS, provides that services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to chapter 383, HRS, irrespective of whether the common law relationship of master and servant exists, unless it is shown to the department that each of the following criteria have been met:

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 common law rules. The rule clearly enunciates that the degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed, without requiring a "preponderance of factors."

### **III. COMMENTS ON THE HOUSE BILL**

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

The Department raises the following concerns regarding HB347:

1. Subsection (b) effectively replaces the 20 factors contained in the HAR, and assumes that these factors “shall be guidelines for determining whether an individual could be deemed an independent contractor.” This reasoning, in conjunction with the definition of “independent contractor” in subsection (c) which limits its focus to prong C, neither includes the conjunctive ABC and “preponderance of factors” tests, nor fully addresses all aspects of the ABC test.
2. Subsection (c) includes new “client” and “independent contractor” definitions that have no other references in chapter 383, HRS. The rationale of restricting these terms to section 383-6, when their applicability should be integrated and compatible with established definitions of “employer” or “employing unit” is unclear. Additionally, “independent contractor” is defined by circular reasoning, which undercuts the basic premise of the Hawaii Employment Security Law that a determination of independent contractor is conditioned on satisfying the three prongs of the ABC test, irrespective of whether the common law relationship of master and servant exists.

If the “purpose of this Act is to provide greater clarity in Hawaii’s employment security law to those individuals choosing to become entrepreneurs by setting forth in greater detail the criteria used to determine independent contractor status” this measure, as drafted, defeats that goal. A greater lack of clarity has resulted to the extent that it would be more burdensome for businesses to apply the ABC and common-law tests when hiring individuals. Moreover, any problematic language increases administrative problems, delaying an already time-intensive coverage determination process and encouraging legal challenges of the final decisions.

3. This measure was introduced to address a situation whereby DLIR made a determination of employment that was later corrected by a ruling in circuit court. As mentioned above, DLIR has taken steps to address training and procedures to ensure fair employment determinations.

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

- DLIR made 35,774 claims determinations in 2016.
- 4,061 claims appeals were filed, 4,186 appeals were disposed, and 239

are pending as of this date.

- DLIR made 397 tax coverage decisions 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 independent contractors and not covered employment in 2016.



January 30, 2017

To: The Honorable Aaron Ling Johanson, Chair  
The Honorable Daniel Holt, Vice Chair  
Members of the Committee on Labor & Public Employment

Date: Tuesday, January 30, 2017

Time: 9:00 am

Place: State Capitol, House Conference Room 309  
415 South Beretania Street

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

**RE: H.B. 347 Relating to Employment Security**

### **TESTIMONY IN SUPPORT OF H.B. 347**

**INTRODUCTION.** My name is Wayne Hikiji and I am the president of *Envisions Entertainment & Productions, Inc.*, an event production company based in Kahului, Maui. We have been in business since 1995, producing events for corporate functions, weddings and special events state-wide.

**IMPETUS FOR H.B. 347.** The impetus for HB 347 is the Department of Labor and Industrial Relations' ("DLIR") incorrect interpretation of H.R.S. Section 383-6 ("383-6"), commonly referred to as the "ABC Test," in a 2013 case against my company. We appealed the DLIR's Decision to the Circuit Court of the 2<sup>nd</sup> Circuit which found that the DLIR erroneously interpreted 383-6 and failed to consider all twenty factors of Hawaii Administrative Rules 12-5-2 ("HAR 12-5-2") in its analysis of the ABC Test based on the undisputed facts of our case (the Circuit Court's Decision is attached).

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

**SUMMARY OF SUPPORT FOR H.B. 347:** We appreciate all of you who understand this is not an isolated case, but a wide-spread and long-standing issue. Therefore, I urge you to support HB 347 for the following reasons:

- HB 347 correctly states the clear purpose of providing greater clarity to determine independent contractor status rather than employee status. While this statement of legislative intent may seem innocuous, we believe it sets the proper tone for the entire Bill and makes it clear what this Bill is intended to address.

- HB 347 appropriately replaces the archaic "Master Servant" title of 383-6 with "Independent Contractor" which codifies the Bill's clear purpose.
- Given the DLIR's missteps in our case, HB 347 codifies the 20 factors and requires the DLIR to document its analysis of all 20 factors in its coverage determinations. The IRS factors are used to address any US DOL federal conformity concerns.

HB 347 does not change the ABC Test in any way as the DLIR may have you believe. All three prongs remain intact and must still be met in the conjunctive. What HB 347 does do is make the law more comprehensive by including the twenty factors the DLIR is mandated to consider and adding definitions of "independent contractor" and "client" to juxtapose the "employee" and "employer" definitions in 383-1. All twenty factors are still considered guidelines to aid in determining the control prong of the ABC Test, and the DLIR retains its discretion to give each factor its proper weight based on the facts of each case.

Codifying the twenty factors also serves two important purposes: First, it requires the DLIR to consider all 20 factors which the Circuit Court chastised the DLIR for not doing in the Envisions case. Second, since 383-6 makes no reference to HAR 12-5-2, Subsection (b) provides employers, clients, and individuals with the very factors the DLIR considers in the statute itself, rather than in HAR where a lay person may not know to look.

- 383-1 defines "employer" and "employee." For purposes of 383-6, HB 347 likewise defines "Client" and "Independent Contractor" to draw a fundamental legal distinction of control that is currently absent in 383-6 and HAR 12-5-2. It is well-established that an IC has the right to control the manner and means used to perform the contracted service. On the other hand, a client has the absolute right to control the result of the individual's work to ensure the desired outcome of the project. We believe this essential legal distinction, which the Circuit Court in our case relied on, 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 adds Sections 3 & 4 to 383-6. It establishes a workable mechanism of accountability which requires the DLIR to demonstrate to the Legislature that its auditors and appeals officers are correctly and consistently interpreting and applying the ABC Test in each case.

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

An increasing number of Hawaii entrepreneurs are choosing to go into business for themselves as ICs. Therefore, HB 347 was drafted to keep up with the times to determine who qualifies as an IC, rather than perpetuate the confusing inverse logic of the current law which determines who is not an employee. To be consistent and clear, the 20 factors of subsection (b) were framed precisely with this perspective in mind.

**CLOSING:**

To reiterate, the Envisions case is not an isolated situation. The Chambers of Commerce on all islands have made it clear that the misclassification of ICs as employees is a long-standing and wide-spread problem that affects every sector of the business population in Hawaii. The fact that companies that chose to hire ICs do not contest the DLIR's erroneous determinations of employee status for fear of exposing themselves to an otherwise unwinnable situation at a considerable financial price is a compelling reason HB 347 is necessary.

Given the foregoing, I humbly ask that you support HB 347.

Respectfully submitted,

*ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC.*

A handwritten signature in black ink, appearing to read "Wayne Hikiia", is written over a horizontal line. The signature is stylized and cursive.

Wayne Hikiia  
Its President

Enclosure

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FILED  
2014 SEP -3 AM 9:57

N. MARTINS, CLERK  
SECOND CIRCUIT COURT

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

In the Matter of  
ENVISIONS ENTERTAINMENT &  
PRODUCTIONS, INC.,

Taxpayer-Appellant,

vs.

DWIGHT TAKAMINE, DIRECTOR,  
DEPARTMENT OF LABOR AND  
INDUSTRIAL RELATIONS, STATE OF  
HAWAII; and DEPARTMENT OF  
LABOR AND INDUSTRIAL RELATIONS,  
STATE OF HAWAII,

Appellees,

and



Claimant-Appellee.

Civil No. 13-1-0931(2)  
(Consolidated)

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

ORAL ARGUMENT

Date: May 30, 2014

Time: 9:00 a.m.

Judge: The Honorable Peter T.  
Cahill



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

On May 30, 2014, Taxpayer-Appellant Envisions Entertainment & Productions, Inc.'s ("Envisions") appeal of the Department of Labor and Industrial Relations Employment Security Appeals Referees' Office ("ESARO") Decisions 1300760 and 1300751, dated August 20, 2013 and October 7, 2013 respectively (the "Appeal")<sup>1</sup> 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,

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<sup>1</sup> 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.*  
*DM*  
The DLIR's and the appeals referees' failure to consider this factor in this particular case was clearly erroneous.

25. Most important, the record does not reflect any consideration by the DLIR or the appeals referee of the issue of control. The record shows that [REDACTED] was in total control as to whether or not he accepted any particular performance. If [REDACTED] were to reject the engagement, it was Envisions' responsibility, not [REDACTED] to find an alternate saxophonist from

its list. Even after [REDACTED] services were engaged, with or through Envisions, [REDACTED] maintained complete control as to whether or not he would show up at a performance. Looking at this situation and the facts in the record, it is [REDACTED] who had total and complete control at all times as to whether or not he would allow his services to be engaged.

26. Taken as a whole, it is evident that the control Envisions exercised over [REDACTED] was merely as to the result to be accomplished by [REDACTED] work and not as to the means and method accomplishing the result.

27. Upon careful review of the entire record on appeal, the Court finds that [REDACTED] was free from control or direction by Envisions over the performance of his services. Consequently, as to Clause 1 of HRS §383-6, the Court concludes that the DLIR's and the appeals referees' findings were not supported by clearly probative and substantial evidence and, therefore, were clearly erroneous.

**"Clause 2"**

28. Clause 2 of HRS §383-6 requires Envisions to prove that [REDACTED] services were either performed outside of Envisions' usual course of business, or performed outside of all of Envisions' places of business.

29. HAR §12-5-2 (3), which describes the standard to be applied, specifies that the term "outside the usual course of the business" refers to services that do not provide or enhance the business of the taxpayer, or services that are merely incidental to, and not an integral part of, the taxpayer's business.



30. In this case, the appeals referee found that Envisions did not prove the services were outside of its usual business, stating, "In this case, [REDACTED] services as musician for Envisions' events were integral to Envisions' event production business." The record indicates that this finding was based on a statement made by the UID auditor at the hearing on the appeal of the employment determination. The UID auditor based her statement on the opinions and experience of her supervisor.

31. The opinions and experience of the UID auditor's supervisor is not evidence, it is simply an opinion. Accordingly, the Court holds that the statement made by the UID auditor should not have been considered by the appeals referee.

32. The record shows that Envisions is an event production company. Its services are in planning and organizing events for its clients.

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

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

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





Randy Perreira  
President

# HAWAII STATE AFL-CIO

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The Twenty-Ninth Legislature, State of Hawaii  
Hawaii State House of Representatives  
Committee on Labor and Public Employment

Testimony by  
Hawaii State AFL-CIO  
January 31, 2017

H.B. 347 – RELATING TO  
EMPLOYMENT SECURITY

The Hawaii State AFL-CIO opposes H.B. 347 which clarifies Hawaii's employment security law for independent contractors.

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 Labor and Public Employment to defer H.B. 347 indefinitely.

Thank you for the opportunity to testify.

Respectfully submitted,

Randy Perreira  
President

HOUSE OF REPRESENTATIVES  
Committee on Labor & Public Employment  
Rep. Aaron Ling Johanson, Chair  
Rep. Daniel Holt, Vice Chair  
State Capitol, Conference Room 309  
Tuesday, January 31, 2017; 9:00 a.m.

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

The ILWU Local 142 **opposes** H.B. 347, which clarifies Hawaii’s employment security law for independent contractors to include 20 factors to be used as guidelines when determining whether an individual could be an independent contractor. The bill retains the ability of the Department of Labor and Industrial Relations to determine if an individual is an independent contractor and requires DLIR to report to the Legislature prior to the regular session of 2017 regarding guidelines developed by the Unemployment Insurance Coverage Committee and requires annual reports to the Legislature regarding covered employment determinations.

We believe this bill is unnecessary and will further muddy the waters regarding independent contractor status. The Employment Security law (HRS 383) is clear. According to HRS 383-6, a “master-servant”—or employer-employee—relationship exists unless and until it is shown to the satisfaction of DLIR that the “ABC test” applies, namely that:

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

Furthermore, the Administrative Rules (12-5-2) are clear and clarify the law. They spell out 20 factors which may be used as guides to determine if an individual is an employee. These 20 factors need not be included in the law as they are “guidelines”, as the bill states, the same as is stated in the Administrative Rules.

This bill appears to have been introduced in response to a misapplication of the guidelines in the unemployment insurance claim of an individual contracted for work by a Maui employer, who subsequently prevailed in Circuit Court to have two earlier decisions vacated. The Court’s decision recognized that application of the test for “control and direction” should determine independent contractor status. That the guidelines and law were not strictly applied in one instance should not justify changing the law. This bill does nothing to make a bad situation better. In fact, it will make matters worse.

Although the issue of conformity with federal law seems to have been addressed, amending the law must be carefully thought through to ensure no unintended consequences. However, we firmly believe there is **no need to amend the law**.

The ILWU respectfully urges that H.B. 347 be HELD. Thank you for considering our views and concerns.

DAVID Y. IGE  
GOVERNOR

SHAN S. TSUTSUI  
LIEUTENANT GOVERNOR



LINDA CHU TAKAYAMA  
DIRECTOR

LEONARD HOSHIO  
DEPUTY DIRECTOR

STATE OF HAWAII  
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS  
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Phone: (808) 586-8844 / Fax: (808) 586-9099  
Email: [dlir.director@hawaii.gov](mailto:dlir.director@hawaii.gov)

**LATE**

January 30, 2017

To: The Honorable Aaron Ling Johanson, Chair  
The Honorable Daniel Holt, Vice Chair, and  
Members of the House Committee on Labor & Public Employment

Date: Tuesday, January 31, 2017

Time: 9:00 a.m.

Place: Conference Room 309

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

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

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DLIR supports sections 3 and 4 that would provide greater transparency regarding coverage determinations and information to the Legislature. The department has taken steps to insure staff makes determinations using solid guidelines. This was undertaken after rigorous training to prevent erroneous rulings. For example, the Unemployment Insurance Division conducted extensive training on the matter of coverage determinations and implemented additional reviews of determinations, during 2015. More information pertaining to employment coverage decisions is provided in the comments section below.

## II. CURRENT LAW

The IRS applies the common-law standard for Federal Unemployment Tax Act (FUTA) purposes and developed the 20 point criteria to weigh facts relevant to an employer's right to control and direct an individual who performs services, whether that right is exercised or not. Whereas only part "A" of the ABC test must be passed to meet federal conformity requirements, section 383-6, HRS, requires that all three prongs be satisfied to render an independent contractor ruling under state law.

Section 383-6, HRS, provides that services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to chapter 383, HRS, irrespective of whether the common law relationship of master and servant exists, unless it is shown to the department that each of the following criteria have been met:

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 common law rules. The rule clearly enunciates that the degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed, without requiring a "preponderance of factors."

### **III. COMMENTS ON THE HOUSE BILL**

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

The Department raises the following concerns regarding HB347:

1. Subsection (b) effectively replaces the 20 factors contained in the HAR, and assumes that these factors “shall be guidelines for determining whether an individual could be deemed an independent contractor.” This reasoning, in conjunction with the definition of “independent contractor” in subsection (c) which limits its focus to prong C, neither includes the conjunctive ABC and “preponderance of factors” tests, nor fully addresses all aspects of the ABC test.
2. Subsection (c) includes new “client” and “independent contractor” definitions that have no other references in chapter 383, HRS. The rationale of restricting these terms to section 383-6, when their applicability should be integrated and compatible with established definitions of “employer” or “employing unit” is unclear. Additionally, “independent contractor” is defined by circular reasoning, which undercuts the basic premise of the Hawaii Employment Security Law that a determination of independent contractor is conditioned on satisfying the three prongs of the ABC test, irrespective of whether the common law relationship of master and servant exists.

If the “purpose of this Act is to provide greater clarity in Hawaii’s employment security law to those individuals choosing to become entrepreneurs by setting forth in greater detail the criteria used to determine independent contractor status” this measure, as drafted, defeats that goal. A greater lack of clarity has resulted to the extent that it would be more burdensome for businesses to apply the ABC and common-law tests when hiring individuals. Moreover, any problematic language increases administrative problems, delaying an already time-intensive coverage determination process and encouraging legal challenges of the final decisions.

3. This measure was introduced to address a situation whereby DLIR made a determination of employment that was later corrected by a ruling in circuit court. As mentioned above, DLIR has taken steps to address training and procedures to ensure fair employment determinations.

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

- DLIR made 35,774 claims determinations in 2016.
- 4,061 claims appeals were filed, 4,186 appeals were disposed, and 239



are pending as of this date.

- DLIR made 397 tax coverage decisions 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 independent contractors and not covered employment in 2016.

## 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



**LATE**

Testimony to the House Labor & Public Employment Committee  
January 31, 2017 at 9:00 a.m.  
State Capitol - Conference Room 308

RE: HB 347, Relating to Employment Security

Aloha Chair Johanson, Vice Chair Holt 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, relating to employment security. This bill seeks to clarify Hawaii's employment security law for independent contractors. 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 LABOR & PUBLIC EMPLOYMENT COMMITTEE  
HAWAII STATE CAPITOL, HOUSE CONFERENCE ROOM 309  
TUESDAY, JANUARY 31, 2017 AT 9:00AM**

To The Honorable Aaron Ling Johanson, Chair;  
The Honorable Daniel Holt, Vice Chair; and  
Members of the Labor & Public Employment Committee

**TESTIMONY IN STRONG SUPPORT FOR HB 347 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.

Over the years we have seen numerous rulings where the Department of Labor & Industrial Relations (DLIR) has made determinations against employers, classifying Independent Contractors as employees for unemployment benefits through discretionary calls and misapplication of the 3-way test and the subsequent testing built into the rules. We have worked to address these issues with and on behalf of our members for years, but most businesses, particularly small businesses, do not have the time or money to take on the state, so they simply choose not to fight and the poor rulings stand. Given this, there are no records of how many businesses have been hurt by this practice.

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

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

We met with Lt. Governor Shan Tsutsui and the department on the issue in the hopes of garnering an administrative fix to avoid a costly legal battle on both sides. However, the former DLIR Director stood by the department's incorrect ruling and said they do sometimes rule in favor of employers and that he would send us 20 redacted copies of rulings as proof. After several months, working through the Lt. Governor's office who worked with DLIR to obtain those copies, they could not send us even 1 ruling in favor of employers that hired Independent Contractors, which further illustrates the prevalence of this problem.

Ultimately, Envisions Entertainment had to and did take their case to court. It was an expensive battle (over \$70,000), but the company won! Not only did they win, but the judge's ruling showcased how inappropriate the department's findings were and created a new precedent. And, while that is helpful, Envisions Entertainment is still out over \$70,000 as there is no recourse against the state, there is still too much leeway for "interpretation" in the law, DLIR has a history of broad and poor interpretations against employers, and DLIR is not changing their practices given Judge Cahill's ruling.

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

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

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

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

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



Testimony to the House Labor & Public Employment Committee  
January 31, 2017  
Page 3.

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

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

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

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

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

Sincerely,



Pamela Tumpap  
President

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



**HAWAII GOVERNMENT EMPLOYEES ASSOCIATION**  
AFSCME Local 152, AFL-CIO

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

**LATE**

The Twenty-Ninth Legislature, State of Hawaii  
House of Representatives  
Committee on Labor and Public Employment

Testimony by  
Hawaii Government Employees Association

January 31, 2017

H.B. 347 – RELATING TO EMPLOYMENT SECURITY

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO opposes the purpose and intent of H.B. 347 which changes the employment security law for independent contractors. 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

From: mailinglist@capitol.hawaii.gov  
Sent: Tuesday, January 31, 2017 9:24 AM  
To: LABtestimony  
Cc: anela@mauihotjobs.com  
Subject: Submitted testimony for HB347 on Jan 31, 2017 09:00AM

**LATE**

**HB347**

Submitted on: 1/31/2017

Testimony for LAB on Jan 31, 2017 09:00AM in Conference Room 309

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Anela Sanchez	Aloha International Employment, Inc.	Support	No

Comments: Aloha International Employment, Inc. is in support of HB347 relating to Independent Contractors.

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

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From: mailinglist@capitol.hawaii.gov  
Sent: Tuesday, January 31, 2017 10:11 AM  
To: LABtestimony  
Cc: doug@levinhu.com  
Subject: Submitted testimony for HB347 on Jan 31, 2017 09:00AM

**HB347**

Submitted on: 1/31/2017

Testimony for LAB on Jan 31, 2017 09:00AM in Conference Room 309

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Douglas Levin	Levin & Co CPAs	Oppose	No

Comments: We are CPAs and advise both employees who've been wrongly treated as independent contractors and employers who need clarity on this issue. While some clarity in this area would be greatly appreciated, this is the wrong bill because it overly presumes a person is an employee and doesn't provide clear cut guidelines that would finally clarify the law. Please continue working on this issue, but not this bill. Thank you!

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LABtestimony

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From: mailinglist@capitol.hawaii.gov  
Sent: Tuesday, January 31, 2017 9:35 AM  
To: LABtestimony  
Cc: allan@crhmaui.com  
Subject: \*Submitted testimony for HB347 on Jan 31, 2017 09:00AM\*



**HB347**

Submitted on: 1/31/2017

Testimony for LAB on Jan 31, 2017 09:00AM in Conference Room 309

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Allan Raikes	Individual	Support	No

Comments:

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To: LABtestimony  
Cc: mmochi@gmail.com  
Subject: Submitted testimony for HB347 on Jan 31, 2017 09:00AM



**HB347**

Submitted on: 1/31/2017

Testimony for LAB on Jan 31, 2017 09:00AM in Conference Room 309

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Michael Mochizuki	Individual	Support	No

Comments: I strongly support this bill

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To: LABtestimony  
Cc: cooksynergy@gmail.com  
Subject: Submitted testimony for HB347 on Jan 31, 2017 09:00AM



**HB347**

Submitted on: 1/31/2017

Testimony for LAB on Jan 31, 2017 09:00AM in Conference Room 309

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Thomas Cook	Individual	Support	No

Comments: I strongly support this measure. Our local music industry will benefit from this. The state department of Labor needs this bills guidance to enable people to work as independent and not be an employee of several people they work for on an independent nature.

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