DAVID Y. IGE
GOVERNOR

DOUGLAS S. CHIN
LIEUTENANT GOVERNOR

LEONARD HOSHIJO
ACTING DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
830 PUNCHBOWL STREET, ROOM 321
HONOLULU, HAWAII 96813
www.labor.hawaii.gov
Phone: (808) 586-8844 / Fax: (808) 586-9099
Email: dlir.director@hawaii.gov

LATE

February 5, 2018

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, February 6, 2018
Time: 10:30 a.m.
Place: Conference Room 309, State Capitol

From: Leonard Hoshijo, Acting Director
Department of Labor and Industrial Relations (DLIR)

Re: H.B. 2602 RELATING TO INDEPENDENT CONTRACTORS

I. OVERVIEW OF PROPOSED LEGISLATION

HB2602 seeks to amend section 383-6, Hawaii Revised Statutes (HRS), by replacing the 3-part (“ABC”) employment test with three categories and 12 factors to determine independent contractor status. The Internal Revenue Service (IRS) has utilized behavior control, financial control and relationship of the parties, in conjunction with the 20-factor test published in Rev. Rul. 87-41 as analytical tools to reflect primary categories of evidence to determine whether a worker is an independent contractor or employee under the common-law standard.

The Department strongly opposes this measure.

This measure disregards the disparate purposes of the federal and state laws that impact the Unemployment Insurance (UI) program and distorts the legal foundations for section 383-6, HRS, which reflects the intent of the Legislature to reject the limitations of the master-servant relationship in favor of broad protection of all workers.

1) The 3 categories and 12 factors, as proposed in this measure, is intended as a new employment test to supplant the existing ABC standard. However, the IRS has consistently maintained that the 20-factor test and by extension, its modified version as promoted in this bill, are analytical tools and NOT the legal test used for determining worker status. The legal test is the common law, master-servant

Equal Opportunity Employer/Program
Auxiliary aids and services are available upon request to individuals with disabilities.
TDD/TTY Dial 711 then ask for (808) 586-8866

standard. That is, the employer has the right to control and direct the employee, not only as to the work to be done, but also as to the details and means by which the work is done.

2) The right to control under common law rules is applicable only to the A test in section 383-6, HRS, although it was the intended purpose of the Legislature to include all workers whom the law was socially designed to protect. The language not only presumes that services performed by an individual for wages or under a contract is considered to be employment, but asserts an expanded inclusiveness with the clause, “irrespective of whether the common-law relationship of master and servant exists…” Thus, other evidence that affect a ruling of independent contractor status investigating the B and C elements in section 383-6, HRS, must also considered.

3) Under the UI system’s federal-state partnership, employers are assessed a tax on all covered employees under the Federal Unemployment Tax Act (FUTA) as well as under the Hawaii Employment Security Law. Employers who pay contributions under an approved state law may receive offset credits against the FUTA tax, which is collected to provide 100% administrative funding to operate each state’s UI program. Under Chapter 383, HRS, employer contributions deposited into the UI trust fund are used to pay workers who accrue benefits under state law. Therefore, by repealing Hawaii’s ABC test in favor of a narrower, minimum standard of employment, the rights of workers that the Social Security Act passed in 1935 was designed to protect would be harmed.

II. CURRENT LAW

Services performed for remuneration are considered to be in employment under section 383-2, HRS, unless and until all three prongs – in the conjunctive—contained in section 383-6, HRS, are met. The ABC test, a statutory requirement since the beginning of the unemployment insurance (UI) program in 1939, is found in most other state laws:

1. The individual has been and will continue to be free from control or direction 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, profession, or business of the same nature as that involved in the contract of service.

III. COMMENTS ON THE HOUSE BILL

The department opposes this measure for the reasons stated above and, in addition, for the following considerations:

1. The ABC test has been challenged over the years, but has remained undisturbed in the Hawaii Employment Security Law since its adoption in 1939 and its amendment in 1941 adding language to further expand coverage beyond where the common law relationship of master and servant exists**.** Repealing the comprehensive ABC test with an analytical tool to issue common-law rulings based in FUTA statutes and restricted to the A test only, defies logic. If enacted, workers' benefit rights will be impaired, confusion will delay coverage determinations issued by UI auditors and employers may be adversely affected by higher FUTA taxes should there be inconsistencies in interpretations of employment rendered under state and federal laws. At worst, the consequences if a state law fails to cover services that are not excepted from FUTA may result in loss of certification for tax credits for all employers liable for the federal tax.

2. The stability and strength of the UI program lies in its historical significance as remedial legislation to provide financial security to all workers suffering from loss of job income. While the purported intent of this measure is to clarify independent contractor status for individuals seeking to become self-employed, it may seriously erode protection of workers whose livelihoods may depend on a legitimate employment relationship and who truly benefit from that safety net when they find themselves out of work. There is a strong possibility that individuals who become certified as independent contractors may not fully realize the tax consequences and added out-of-pocket costs of paying 100% FICA taxes, medical coverage, liability insurance or other expenses related to being an independent contractor that an employer would normally cover.

   Further, as all employers subject to unemployment taxes pay into a collective unemployment trust fund to support the payment of benefits, if this measure increases the number of self-employed, UI tax collections would diminish to the extent that those employers who cover their workers would ultimately be assessed higher unemployment contributions to maintain a solvent trust fund.

3. DLIR continues to apply the ABC test and follows the guidance in HAR 12-5-2, including the IRS 20 factors, to determine employee status. In 2017, a total of 372 determinations were issued by UI auditors regarding independent contractor vs. employees, which involved 853 individuals. 752 were found to be in covered employment and 121 were ruled as independent contractors.

Equal Opportunity Employer/Program
Auxiliary aids and services are available upon request to individuals with disabilities.
TDD/TTY Dial 711 then ask for (808) 586-8866

HAWAII STATE AFL-CIO

345 Queen Street, Suite 500 • Honolulu, Hawaii 96813

Randy Perreira
President

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

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

Testimony by
Hawaii State AFL-CIO

February 6, 2018

H.B. 2602 – RELATING TO
INDEPENDENT CONTRACTORS

The Hawaii State AFL-CIO strongly opposes H.B. 2602 which provides three categories and twelve factors for the Department of Labor and Industrial Relations to apply to determine independent contractor status.

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. 2602 indefinitely.

Thank you for the opportunity to testify.

Respectfully submitted,

Randy Perreira
President

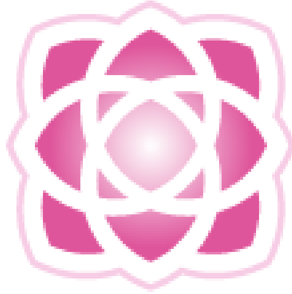
HB-2602
Submitted on: 2/2/2018 4:00:20 PM
Testimony for LAB on 2/6/2018 10:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Joseph D Pluta	WEST MAUI TAXPAYERS ASSOCIATION INC.	Support	No

Comments:

STRONGLY SUPPORT THIS BILL AND HOW IT CAN FIX AND CLARIFY THE ABILITY TO DETERMINE INDEPENDENT CONTRACTOR STATUS. LONG OVERDUE.

PLEASE PASS THIS BILL!



MAUI
CHAMBER OF COMMERCE
VOICE OF BUSINESS

LATE

HEARING BEFORE THE HOUSE COMMITTEE ON
LABOR & PUBLIC EMPLOYMENT
HAWAII STATE CAPITOL, HOUSE CONFERENCE ROOM 309
TUESDAY, FEBRUARY 6, 2018 AT 10:30AM

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

TESTIMONY IN STRONG SUPPORT FOR HB2602 RELATING TO INDEPENDENT CONTRACTORS

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 to share our strong support of HB2602.

Over the years, we have seen numerous rulings where the State 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 ABC test and subsequent testing built into the rules, like in the Envisions Entertainment case. We have worked to address these issues on behalf of our members for years (and had over 126 pieces of testimony in support from 2015-2016), 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 poor rulings stand. Given this, there are no records of how many businesses have been hurt by this practice.

Our national and state economy is changing with an increase in the gig economy and number of independent contractors. Technology has significantly changed the ways people are doing business and making money and will continue to change as the Digital Generation and Millennials continue to participate in and fuel the economy. According to the Intuit 2020 Report, "the number of contingent employees will increase worldwide" and "in the US alone, contingent workers will exceed 40% of the workforce by 2020". In addition, "traditional full-time, full-benefit jobs will be harder to find" and "self-employment, personal and micro business numbers will increase." Further, Intuit states that "government will misclassify workers, creating a major issue for companies of all sizes" and "work classification and work style will emerge as a target of intense political debate." (Intuit 2020 Report). With the changing economy and increased attention to worker classification, Hawaii needs to address this issue now and this bill seeks to assist by clarifying the test and creating consistency with the test now used by the IRS.

On the national level, the US Department of Labor uses the "economic realities test" and the IRS uses the 11-factor common law test to determine if a worker is an employee or independent contractor. Currently, Hawaii state law mandates that the state DLIR use the ABC test to determine worker classification. We are among about twenty states nationwide who use the ABC test, while the others use the IRS common-law test or another variation. However, the ABC test is difficult to use and not consistent with the federal tests. The ABC test focuses on the worker having a stronger level of independence than other tests and it can be extremely difficult for most independent contractors (who choose to be independent contractors) to meet the requirements of all three parts. Many independent contractors cannot satisfy the ABC test due to time and place requirements.

In addition, because of the broad nature of the test, it is often interpreted inconsistently. Most importantly, because Hawaii uses a different test than the IRS, a worker could be classified as an employee by the state DLIR, but an independent contractor by the IRS. This can cause significant hardships for both workers and businesses. Because of the inconsistencies and difficulties in interpretation from the ABC test, HB2602 seeks to update Hawaii state law to adopt the IRS 11-factor test.

The IRS has also attempted to make the classification process easier by recently simplifying their 20-factor test into an 11-factor common-law test which is broken up into 3 categories. This was changed as a result of pressure from members of Congress and labor and business organizations and in an attempt to be more consistent with court opinions on the issue. In addition, other laws and regulations utilize the common law test including: Federal Insurance Contribution Act, Federal Unemployment Tax Act, Employment Retirement and Income Security Act, and the National Labor Relations Act. Overall, the IRS 11-factor common-law test is easier for employers to understand given the 3 categories and focuses on the most important factors. The goal should be to create legislation that offers needed protections and provides clear understanding to promote compliance. We believe this bill does just that and that should contested cases arise, then the DLIR would be able to focus on and better investigate those cases.

HB2602 is an attempt to address the many issues with our state worker classification and to modernize our state laws. By changing our state law to the 11-factor common-law test, our law would be consistent with the IRS. This will prevent the possibility of two different worker classifications from the state and IRS. In addition, by updating our state law to the IRS 11-factor common-law test, we are on the forefront of modernizing our employment law. Further, the 11-factor common-law test is easier to understand for businesses and leaves less room for broad interpretations and inconsistency. This bill goes a long way toward protecting legitimate independent contractors and those that hire them from erroneous rulings. Therefore, we stand in strong support of this bill.

Another important aspect of this bill is that it seeks to remedy the antiquated “master” and “servant” language in our current employment law to “employer” and “employee”. This is another way this bill would help to modernize our state employment law.

We ask that you please pass HB2602 to clarify independent contractors in our state law. 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. This is only going to be more prevalent in future years and we need to address this issue now.

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.

HOUSE OF REPRESENTATIVES
THE TWENTY-NINTH LEGISLATURE
REGULAR SESSION OF 2018

COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
Rep. Aaron Ling Johanson, Chair
Rep. Daniel Holt, Vice Chair

RE: HB2602 - RELATING TO INDEPENDENT CONTRACTORS

Date:	Tuesday, February 6, 2018
Time:	10:30 AM
Conference Room 309 State Capitol 415 South Beretania Street	

Aloha Chair Johanson, Vice Chair Holt and Members of the Committee,

Thank you for the opportunity to testify on this issue. We are the representatives of the film and entertainment industry unions, SAG-AFTRA Hawaii Local, I.A.T.S.E. Local 665, American Federation of Musicians' Local 677, and Hawaii Teamsters & Allied Workers Local 996. Collectively, we represent over 1700 members who work in film, television, music and new media productions as performers, crew, musicians and drivers in Hawaii.

We **strongly oppose** HB2602 which proposes to modify §383-6 of the Hawaii Revised Statutes. Many workers would be negatively affected by this measure, particularly those who work in the creative fields. As it stands, many creative professionals work in different locations and situations and are regularly at risk of being **misclassified as independent contractors**. This not only tends to suppress the wages in these areas, but also places an increased tax burden on those workers while denying them protections granted by the National Labor Relations Act and the Fair Labor Standards Act. We feel this proposal would only serve to muddle the definition of employee rather than clarify it.

On a larger scale, this bill has the potential to run afoul of Federal Labor Laws by emboldening employers to encourage workers to accept employment as independent contractors. The law is supposed to make the determination as to what a worker's status is; not the employer or individual worker. In July 2015, the former Administrator of the U.S. Department of Labor issued guidance pertaining to this effect, stating:

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

We would welcome providing clarity to both employers and workers. However, we believe that this could be achieved through **education, outreach, and enforcement of current labor laws** versus amending the State Statues.

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

Mericia Palma Elmore	Irish Barber	Steve Pearson	Wayne Kaululaau
SAG-AFTRA Hawaii	I.A.T.S.E. Local 665	A.F.M. Local 677	Teamsters Local 996

MOLOKAI CHAMBER OF COMMERCE

P.O. Box 515
Kaunakakai, HI 96748

T 808 646 0928

info@molokaichamber.org

www.molokaichamber.org

LATE

February 6, 2018

HOUSE OF REPRESENTATIVES
THE TWENTY-NINTH LEGISLATURE
REGULAR SESSION OF 2018

COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT
Rep. Aaron Ling Johanson, Chair
Rep. Daniel Holt, Vice Chair

LATE

Tuesday, February 6, 2018
10:30 a.m.
Conference Room 309
State Capitol, 415 South Beretania Street

Support for HB 2602, RELATING TO INDEPENDENT CONTRACTORS.

Honorable LABOR and PUBILC EMPLOYMENT Committee Chair Johanson, Vice Chair Holt and Committee Members:

As a representative organization of the neighbor-island of Molokai with dozens of members who employ hundreds of our neighbors, friends and families, we are respectfully submitting testimony in **SUPPORT** of HB 2602.

In our rural community there are few opportunities for stable full time employment. Because of this, many hard working and industrious residents perform services for hire for multiple businesses and individuals as sub-contractors, what we informally call the “Gig Economy.”

In the past there has been much confusion in determining whether or not someone is an employee or a sub-contractor because the current methods by which we define a sub-contractor under state law are confusing, unclear, and not in alignment with Federal Law and IRS guidelines.

HB 2602 helps to better clarify the definition of a sub-contractor and bring the determining criteria in consonance with Federal Law and IRS guidelines.

As advocates for the Statewide business community, and in partnership with the State Legislature, it is in all of our best interests to assist our entrepreneurs by providing a clear and concise definition of being a sub-contractor so they can make the appropriate decisions best for their individual circumstances and allow the innovation of our private sector to thrive in addressing the business needs of our State.

For these reasons and more, we support HB 2602 and ask that you pass it through your committee.

Please don’t hesitate to contact me if you have any questions or if I can be of any assistance with moving this measure forward. I’m here to be helpful.

Sincerely,

Robert Stephenson, President & CEO

February 5, 2018

To: The Honorable Aaron Ling Johanson, Chair
The Honorable Daniel Holt, Vice Chair
Members of the Labor & Public Employment Committee
Date: Tuesday, February 6, 2018
Time: 10:30 am
Place: State Capitol, Senate Conference Room 302
415 South Beretania Street

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

RE: H.B. 2602 Relating to Independent Contractors

TESTIMONY IN SUPPORT OF H.B. 2602

INTRODUCTION. My name is Wayne Hikiji and I am the president of *Envisions Entertainment & Productions, Inc.* ("*Envisions*"), an event production company based in Kahului, Maui, in business for 23 years.

IMPETUS FOR H.B. 2602. In 2013, the Department of Labor and Industrial Relations' ("DLIR") determined that a self-employed musician we booked on occasion was our employee. On appeal to the 2nd Circuit Court, Judge Cahil reversed the Decision and issued a skathing judgment of the DLIR's "clearly erroneous" interpretation of the ABC Test. (A redacted copy of the Court's Decision is attached and incorporated herein).

Every Legislative session since then, the Maui Chamber of Commerce and I have lobbied for legislative clarity to ensure that the DLIR correctly interpret the ABC Test in future Independent Contractor ("IC") classification cases. Now in our 4th year, both houses have introduced new legislation which would replace the complicated and highly subjective ABC Test with a 12-factor test that embodies the current 11-factor IRS test the Hawaii Department of Taxation ("HI Tax") has also adopted with the additional showing of a valid GET license.

I am, therefore, writing in strong support of HD 2602.

WHY CHANGE EXISTING LAW?

An increasing number of forward-thinking entrepreneurs around the world and in Hawaii are choosing to go into business for themselves as ICs. Studies have predicted that by 2020, 40 percent of American workers would be independent contractors. This trending tide toward a "Gig Economy" mandates the replacement of an archaic law that makes it increasingly difficult to convince the DLIR of legitimate IC relationships even when they are consensual, voluntary, and with the explicit acknowledgement of the rights they would give up as an employee.

The subjective and conjunctive language of the "ABC" Test leaves too much to interpretation. As a result, the DLIR's extreme interpretation of the law has made it virtually impossible for individuals to meet the ABC Test, resulting in many incorrect rulings against legitimate ICs. The *Envisions* case is but one clear example of this.

Under pressure from Congress and from representatives of labor and business, the IRS has simplified and refined its long-standing IC test, consolidating the twenty factors into eleven main factors, and organizing them into three main categories (see: http://www.twc.state.tx.us/news/efte/appx_d_irs_ic_test.html) that is roughly aligned with the three-prongs of the ABC Test. In this context, HB 2602 would offer an intensely vetted IC test that would provide much-needed inter-departmental consistency and clarity in determining IC status for GET, Income tax, Medicare tax, and Unemployment Insurance purposes.

As mentioned, the 12-factor test simplifies and refines the 20 factors of H.A.R. 12-5-2 which the DLIR already relies on in its interpretation of the ABC Test. Codifying the 12-factor test would replace HAR 12-5-2 so there is no redundancy or confusion.

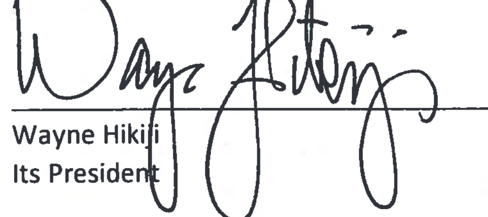
HB 2602 requires the DLIR to demonstrate that "a preponderance of the 12 factors" have been met in IC determinations. The DLIR has contended in past testimony that the "preponderance of the factors" standard is "superfluous" and unnecessary. We believe that, absent an explicit legally-accepted standard of proof, the DLIR could view its burden of proof differently with the change of each new administration. For example, the DLIR could determine that all 12 factors have to be proven, or as it did in the Envisions case, "cherry pick" a few factors to find for employment, even if it's against the greater weight of the evidence.

CLOSING.
Over the past 3 years that we've been lobbying for clarity in the law, we have always acknowledged that HRS 383-6 should continue to protect against nefarious employers who falsely misclassify legitimate employees. So to be crystal clear, this is not an attempt to dilute or circumvent this fundamental principle, as the DLIR and some Labor Unions have argued. Rather, the purpose of HB 2602 is to ensure the equitable application of the law by mandating that the DLIR also be duty-bound to protect and respect the consensual relationship of legitimate ICs and good faith companies that retain them.

Given the foregoing, I humbly ask that you pass through HB 2602.

Respectfully submitted,

ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC.



Wayne Hikiji
Its President

Enclosures

36 Pa'a Street, Kahului, Hawaii 96732 * Office: (808) 874-1000 * Fax: (808) 879-0720
INFO@EnvisionsEntertainment.com

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

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

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

FILED

2014 SEP -3 AM 9:57

N. MARTINS, CLERK
SECOND CIRCUIT COURT

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF 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 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

902139v2

[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. PM The DLIR's and the appeals referees' failure to consider this factor in this particular case was clearly erroneous.

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

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

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

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

"Clause 2"

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

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

30. In this case, the appeals referee found that Envisions did not prove the services were outside of its usual business, stating, "In this case, 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 services were not incidental and not outside Envisions' usual course of business.

34. The services provided by were limited to the playing of the saxophone, and the playing of the saxophone by 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 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~~ Wailuku, Hawaii, SEP - 2 2014.

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

APPROVED AS TO FORM:

[signature]
STACI TERUYA
Attorney for Appellees DWIGHT TAKAMINE and
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

LATE

HAWAII REGIONAL COUNCIL OF CARPENTERS

LATE

February 6, 2018
House Committee on Labor and Public Employment
Chair Aaron Ling Johanson
Vice Chair Daniel Holt

Dear Chair Johanson, Vice Chair Holt, and Members of the House Committee on Labor and Public Employment

The Hawaii Regional Council of Carpenters **opposes** HB 2602 Relating to Independent Contractors. Our position is that this bill complicates Hawaii's laws regarding the determination of independent contractors, and will only create more confusion and misinterpretation which will encourage more abuse - especially in the construction industry.

The misclassification of workers leads to payroll fraud, a problem which our organization at both the local and national level is committed to solving. Employers evade workers comp, unemployment insurance, and basic payroll taxes by knowingly misclassifying workers as "independent contractors," paying in cash off the books, and running other scams. They cost taxpayers billions, hurt honest businesses, and exploit workers.

In the last couple of years, we have found in our own backyard employers falsely identifying employees as independent contractors, which occurred at the Ewa Wing of the Ala Moana Center and the Maile Sky Court Hotel renovation in Waikiki. Those employers were fined and held accountable thanks to the current laws related to employment security and more specially the laws regarding independent contractor determination.

From a policy standpoint the change being proposed in this bill is unnecessary as it attempts to legislate an issue that can be managed within the current law. We respectfully ask that this bill be deferred.

STATE HEADQUARTERS & BUSINESS OFFICES

OAHU: 1311 Hougtailing Street, Honolulu, Hawaii 96817-2712 • Ph. (808) 847-5761 Fax (808) 841-0300
HILO OFFICE: 525 Kilauea Avenue, Room 205, Hilo, Hawaii 96720-3050 • Ph. (808) 935-8575 Fax (808) 935-8576
KONA OFFICE: 75-126 Lunapule Road, Kailua-Kona, Hawaii 96740-2106 • Ph. (808) 329-7355 Fax (808) 326-9376
MAUI OFFICE: 330 Hookahi Street, Wailuku, Maui 96793-1449 • Ph. (808) 242-6891 Fax (808) 242-5961
KAUAI OFFICE: Kuhio Medical Ctr. Bldg., 3-3295 Kuhio Hwy., Suite 201, Lihue, Kauai 96766-1040 • Ph. (808) 245-8511 Fax (808) 245-8911

FIGHTING PAYROLL FRAUD

WHAT IS PAYROLL FRAUD?

Unscrupulous employers evade workers comp, unemployment insurance, and basic payroll taxes by knowingly misclassifying workers as "independent contractors," paying in cash off the books, and running other scams. They cost taxpayers billions, hurt honest businesses, and exploit workers.

Here's what you need to know.

IS IT CRIME, OR CONFUSION?

Illegal Profits & Bid-Rigging
These criminals know their workers meet all legal definitions as "employees." They just want illegal profits and illegally low costs that help them steal business from honest competitors.

Fraud as a Business Plan
The issue is not definitions. These people know they are cheating—they're just used to getting away with it.

No Paper Trail = More Crime
Scammers either file no payrolls at all, file falsely, or pledge to send tax forms but don't. With no records, it's easy to hide fraud and other crimes

Rampant in Construction and Beyond
These scams are construction's "dirty secret." Even big contractors knowingly use law-breaking subs to cut bids and win work. Delivery and many other sectors suffer, too.

A Coast-to-Coast Epidemic
Payroll fraud occurs in all 50 states and Canada, on projects of every kind.

WHO SHOULD CARE?

- ***Taxpayers & Communities***
- ***Workers & Families***
- ***Small Businesses***
- ***Governments and Agencies***
- ***Insurers***
- ***Hospitals***
- ***Law Enforcement & Prosecutors***
- ***Developers & Construction Users***

WHAT ARE THE REAL COSTS?

Billions in Lost Revenue
Every year, every level of government loses vast sums to payroll fraud—in state and federal taxes, social security and medicare contributions, uncoverered workers comp and unemployment payouts, and more.

Taxpayers Take the Biggest Hit
Tax cheats force honest citizens to choose between higher taxes or cutting key programs like schools and public safety.

Corrupt Firms Control Construction
Fraud gives bidders up to 30% lower costs, so they undercut and ultimately steal markets from tax-paying, law-abiding contractors.

Honest Businesses Lose Business
Fraud forces workers comp, UI, and health care costs higher, so all honest employers pay more—and become even less competitive.

Higher Insurance Costs
Hospitals must treat all job-based injuries, so workers' comp and medical insurers have to raise rates on honest firms to make up for uncovered workers.

Crime and Racketeering
These schemes involve carefully planned major crimes like tax evasion, mail and insurance fraud, grand theft, money laundering, conspiracy, and racketeering/ RICO activity.

The Underground Economy
In many places, construction is now an all-cash business—cash that feeds other crimes.

WHAT CAN WE DO? CAN THE EFFORT BE SELF-FUNDING?

Multi-Agency Enforcement Pays For Itself—and More.
Cracking down reaps big returns—in revenue, fairness for honest employers, less pressure on health care, and respect for the law.

Improve and Enforce the Law.
Use task forces... stop-work orders... per-day/per-worker fines. Give agencies support to catch cheaters and recover revenue.

Back Leaders Who Fight Fraud.
Support officials and candidates who help honest businesses and who take action against those who flout the law.

Prosecute w/ Asset Forfeiture
Along with fines, civil forfeiture helps to settle cases, and creates highly visible enforcement that literally pays for itself.

Join the Nonpartisan Crackdown
The U.S. Govt. Accountability Office, IRS, Treasury Inspector General, Dept. of Labor and many state agencies call payroll fraud a serious problem—and are taking action. The crackdown gives honest employers nothing to fear and much to be gained.

Stand up for honest employers and their employees.

Take a stand against payroll fraud.

For the latest news and resources on legislation, policy, research, task forces, and enforcement, visit

WWW. PAYROLL FRAUD .NET

WHAT IF WE DO NOTHING?

Doing nothing isn't neutral—it helps the criminals.

This information brought to you as a public service by the United Brotherhood of Carpenters and Joiners of America. ©UBCJA 2006-10

HB-2602
Submitted on: 2/5/2018 4:58:30 PM
Testimony for LAB on 2/6/2018 10:30:00 AM

LATE

Submitted By	Organization	Testifier Position	Present at Hearing
William Russell	Individual	Support	No

Comments:

This bill will benefit business by facilitating more accurate designation of independent contractor status.

LATE

LATE

LATE

HB-2602
Submitted on: 2/5/2018 9:59:57 PM
Testimony for LAB on 2/6/2018 10:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Kit Okazaki		Support	No

Comments:

This bill will help many small businesses who've been hurt by flawed or inaccurate DLIR rulings, that they do not have the time or resources to fight, determining independent contractors as employees.

LATE

LATE

LATE

HB-2602
Submitted on: 2/5/2018 11:12:59 PM
Testimony for LAB on 2/6/2018 10:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Sylvia Ho		Support	No

Comments:

This bill provides needed modernization for Hawaii employment laws & the growing number of independent contractors.

LATE

LATE

LATE

HB-2602
Submitted on: 2/6/2018 5:38:02 AM
Testimony for LAB on 2/6/2018 10:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Rick Volner Jr		Support	No

Comments:

This bill provides needed modernization for Hawaii employment laws & the growing number of independent contractors.

LATE

LATE

LATE

HB-2602
Submitted on: 2/6/2018 6:10:57 AM
Testimony for LAB on 2/6/2018 10:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Michael Mochizuki		Support	No

Comments:

This bill will help many small businesses who've been hurt by flawed or inaccurate DLIR rulings, that they do not have the time or resources to fight, determining independent contractors as employees

LATE

LATE