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

February 8, 2018

To: The Honorable Jill Tokuda, Chair,
The Honorable J. Kalani English, Vice-Chair, and
Members of the Senate Committee on Labor

Date: Tuesday, February 8, 2018
Time: 3:30 p.m.
Place: Conference Room 229, State Capitol

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

Re: S.B. 3106 RELATING TO INDEPENDENT CONTRACTORS

OVERVIEW OF PROPOSED LEGISLATION

SB3106 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 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.

Chamber of Commerce HAWAII
The Voice of Business

Testimony to the Senate Committee on Labor
Thursday, February 8, 2018 at 3:30 P.M.
Conference Room 229, State Capitol

RE: SENATE BILL 3106 RELATING TO INDEPENDENT CONTRACTORS

Chair Tokuda, Vice Chair English, and Members of the Committee:

The Chamber of Commerce Hawaii ("The Chamber") **supports** SB 3106, which provides three categories and twelve factors for the Department of Labor and Industrial Relations to apply to determine independent contractor status.

The Chamber is Hawaii's leading statewide business advocacy organization, representing about 2,000+ businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

The Chamber believes independent contractors are an important part of Hawaii's business community and economy. We have seen too much of a broad interpretation in the current law as to who qualifies as an independent contractor versus an employee of a company. This bill seeks to provide clarity to workers and businesses by updating Hawaii state law to better conform with federal law interpretations. Additionally, this measure recognizes a more modern understanding of employment and removes the archaic "master and servant" dichotomy from the employment lexicon.

Thank you for the opportunity to testify.

1132 Bishop Street, Suite 2105 • Honolulu, Hawaii 96813 • Phone: (808) 545-4300 • Facsimile: (808) 545-4369

MOLOKAI CHAMBER OF COMMERCE

P.O. Box 515
Kaunakakai, HI 96748

T 808 646 0928

info@molokaichamber.org

www.molokaichamber.org

February 8, 2018

THE SENATE
THE TWENTY-NINTH LEGISLATURE
REGULAR SESSION OF 2018

COMMITTEE ON LABOR
Senator Jill N. Tokuda, Chair
Senator J. Kalani English, Vice Chair

Thursday, February 8, 2018
3:30 p.m.
Conference Room 229
State Capitol, 415 South Beretania Street

Support for SB 3106, RELATING TO INDEPENDENT CONTRACTORS.

Honorable LABOR Committee Chair Tokuda, Vice Chair English 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 SB 3106.

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.

SB 3106 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 SB 3106 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

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 Senate
Committee on Labor

Testimony by
Hawaii State AFL-CIO

February 8, 2018

S.B. 3106 – RELATING TO INDEPENDENT CONTRACTORS

The Hawaii State AFL-CIO strongly opposes S.B. 3106 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 to defer S.B. 3106 indefinitely.

Thank you for the opportunity to testify.

Respectfully submitted,

Randy Perreira
President

envisions
creative event production

February 7, 2018

To: The Honorable Jill N. Tokuda, Chair
The Honorable J. Kalani English, Vice Chair
Members of the Committee on Labor
Date: Thursday, February 8, 2018
Time: 3:30 pm
Place: State Capitol, Conference Room 229
415 South Beretania Street

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

RE: S.B. 3106 Relating to Independent Contractors

TESTIMONY IN SUPPORT OF S.B. 3106

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 S.B. 3106. 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 scathing 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 companion 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 SD 3106.

WHY CHANGE EXISTING LAW?

1. 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 ICs. Therefore, this trending tide toward a "Gig Economy" mandates the replacement of the archaic ABC Test which the DLIR acknowledges has remained "undisturbed" since 1939. With more and more of the work force electing to be ICs instead of employees, the

changing times require that the rights of legitimate IC relationships needs to be protected when it is consensual, voluntary, and with full knowledge of the rights of employment they would be giving up. SB 3106

2. The DLIR's astounding argument that SB 3106 would increase the number of self-employed individuals which, in turn, would diminish unemployment tax revenue is a non-sequitur. As noted above and in many studies, the current business environment, not SB 3106, bears claim to this trend to a gig economy.

3. The subjective nature and conjunctive requirement of the "ABC" Test leaves too much to interpretation and creates an insurmountable burden for ICs and companies that retain them. The *Envisions* case is but one clear example of how the DLIR's extreme interpretation of the law makes it virtually impossible for individuals to meet the ABC Test, resulting in many incorrect rulings against legitimate ICs. In our case, the DLIR found sufficient control under the A prong of the test to deem the individual our employee solely because we told the musician when and where to perform. Having "failed" the A prong, the conjunctive nature of the test mandated a determination of employment even if we satisfied the B and C prong. The 12 factor test of SB 3106, which requires that each factor be given is due consideration and taken as a whole, would not have resulted in such an unjust ruling.

4. Under pressure from Congress and representatives of labor and business, the IRS has simplified and refined its long-standing twenty (20) factor test into eleven (11) factors organized into three (3) main categories - behavior, relationship and financial - which roughly align with the three (3) prongs of the ABC Test (see: http://www.twc.state.tx.us/news/efte/appx_d_irs_ic_test.html). As such, the DLIR's assertion that the IRS Test only addresses the "A" or control prong of the ABC Test is totally misplaced and misleading.

5. The DLIR also incorrectly argues that the IRS' 11-factor test is merely an analytic tool and not the legal test used to determine an individual's work status. To the contrary, the IRS explicitly and unequivocally refers to the 3 categories and 11 factors as the "Common Law Rule." (See: https://www.irs.gov/pub/irs-pdf/p15a.pdf). In this context, SB 3106 would offer a heavily lobbied and 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.

6. 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 be consistent with the IRS' current test and Federal best practices, and would replace HAR 12-5-2 so there is no redundancy or confusion.

7. SB 3106 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 was 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 agreed that HRS 383-6 should protect against nefarious employers who falsely misclassify legitimate employees. So to be crystal clear, SB 3106 is not an attempt to dilute, confuse, or circumvent this fundamental principle, as the DLIR and some Labor Unions have argued. Rather, the purpose of SB 3106 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 SB 3106 through your committee.

Respectfully submitted,

ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC.

Wayne Hikiji
Its President

Enclosures

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

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

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

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI`I

In the Matter of

ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC.,

Taxpayer-Appellant,

vs.

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

Appellees,

and

[redacted]

Claimant-Appellee.

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

PERTINENT FACTS, CONCLUSIONS OF LAW, AND ORDER

ORAL ARGUMENT
Date: May 30, 2014
Time: 9:00 a.m.
Judge: The Honorable Peter T. Cahill

PERTINENT FACTS, CONCLUSIONS OF LAW, AND ORDER

On May 30, 2014, Taxpayer-Appellant Envisions Entertainment & Productions, Inc.'s ("Envisions") appeal of the Department of Labor and Industrial Relations Employment Security Appeals Referees' Office ("ESARO") Decisions 1300760 and 1300751, dated August 20, 2013 and October 7, 2013 respectively (the "Appeal")[1] was heard by the Honorable Peter T. Cahill in his courtroom. Anna Elento-Sneed, Esq. of Alston Hunt Floyd & Ing appeared on behalf of Appellant Envisions. Staci Teruya, Esq., Deputy Attorney General, appeared on behalf of Appellees Dwight Takamine, Director, Department of Labor and Industrial Relations, State of Hawai`i and Department of Labor and Industrial Relations, State of Hawai`i ("DLIR"). Appellee [redacted] made no appearance.

The Court, having heard and considered the briefs filed by the parties, the arguments of counsel, the files and records on appeal herein, hereby finds and concludes as follows:

PERTINENT FACTS

Envisions and [redacted]

1. Envisions is a Maui-based event production company that provides event planning and organization services for conventions, wedding,

[1] ESARO Decision 1300760 affirmed the Decision and Notice of Assessment issued by the DLIR Unemployment Insurance Division ("UID") dated February 4, 2013 that found that [redacted] was an employee of Envisions under HRS Chapter 383. ESARO Decision 1300751 affirmed the Decision issued by the UID dated February 15, 2013 that found that 5.963 percent of the benefits payable to [redacted] were chargeable to Envisions' reserve account.

and special events in the State of Hawai`i. Envisions provides its clients with supplies and services for these events that include tents, chairs, dance floors, stages, props, floral arrangements, audio/visual systems and entertainment.

2. While Envisions owns some event supplies (such as certain event props, decorations, dance floors and chairs), it contracts with outside vendors for the other required event services and supplies (such as live entertainment).

3. Envisions collects payment for the entire event from its client and distributes payment to the separate individuals and businesses that provided services and supplies for the event.

4. [redacted] is a professional musician who advertises his services through websites and social media where he identifies himself as an "entertainment professional."

5. [redacted] entered into his first independent contractor agreement with Envisions to perform saxophone services in 2006.

6. [redacted] and Envisions contemplated an independent contractor type of relationship with one another.

a. Envisions notified [redacted] of the date, time and place of the events. The date, time and place of events where [redacted] was to perform his services were determined by Envisions' clients.

b. If [redacted] rejected an engagement, it was Envisions' responsibility, not [redacted], to find an alternate saxophonist for the event. If

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

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

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

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

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

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

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

Procedural History

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

Issues on Appeal

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

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

"Clause 1"

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

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

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

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

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

choose his own music selection within these parameters, and he provided his own instrument as well as his own attire. At no time did Envisions provide him with tools, equipment, or uniform. At no time did Envisions train [redacted] with respect to his saxophone performance skills or supervise any aspect of his performance. [redacted] set his own billing rate throughout the matter, filled out an IRS Form W-9, and received an IRS Form 1099.

23. The facts presented in the record on appeal clearly indicate the parties contemplated an independent contractor relationship with one another, and there are advantages to both parties that the independent contractor relationship exist. However, there is nothing in the record that indicates the DLIR or the appeals referee considered any of these factors or the benefits that accrued to [redacted].

24. Ignoring the independent contractor relationship in this particular case may have a detrimental effect on [redacted] provision of saxophone services. In effect, Envisions is an agent that simply directs business to [redacted]. Without that ability, [redacted] has the potential to lose business. The DLIR's and the appeals referees' failure to consider this factor in this particular case was clearly erroneous.

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

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

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

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

"Clause 2"

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

DATED: Honolulu, Hawaii, SEP - 2 2014.

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

APPROVED AS TO FORM:

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

SB-3106
Submitted on: 2/7/2018 7:38:47 AM
Testimony for LBR on 2/8/2018 3:30:00 PM

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.

SB-3106
Submitted on: 2/7/2018 9:10:27 AM
Testimony for LBR on 2/8/2018 3:30:00 PM

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

Comments:

Aloha Honorable Senators,

I am a small business owner by choice, and grateful to be able to work with a variety of clients as an independent consultant and not an employee. I support this bill's effort to remove antiquated language and ensure our state laws align with federal standards, and do not create unnecessary hardships for the numerous small business owners and entrepreneurs in Hawaii.

Mahalo,

Luly Unemori

SB-3106
Submitted on: 2/7/2018 9:25:16 AM
Testimony for LBR on 2/8/2018 3:30:00 PM

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

Comments:

This bill will fix the existing problems with Independent Contractor Determination and is Long Overdue. Please Pass this bill. Mahalo.

This bill provides consistency between DLIR & IRS determinations

SB-3106
Submitted on: 2/7/2018 10:49:58 AM
Testimony for LBR on 2/8/2018 3:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Rick Volner Jr		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.

SB-3106
Submitted on: 2/7/2018 10:57:21 AM
Testimony for LBR on 2/8/2018 3:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Teresa Rizzo		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

SB-3106
Submitted on: 2/7/2018 7:09:17 PM
Testimony for LBR on 2/8/2018 3:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Brian Kashima	Island Landscape	Support	No

Comments:

The current law leaves room for incorrect rulings by the DLIR, which have occurred for years where independent contractors where determined to be employees despite the independent contractors obtaining a GET license, paying taxes as an independent contractor and being viewed by the tax office as independent contractors. This has happened to many small businesses who do not have the time or money to fight the state on such issues, so poor decisions stand and create challenges for businesses who are simply trying to do the right thing. This bill creates a more equitable solution for independent contractors, businesses that hire them and the state by recognizing the growing number of independent contractors, providing needed clarity to help prevent misclassifications, and incorporating the IRS test for consistency. Further, it still provides for a review by DLIR to address real problems.

LATE

THE SENATE
THE TWENTY-NINTH LEGISLATURE
REGULAR SESSION OF 2018

COMMITTEE ON LABOR
Sen. Jill N. Tokuda, Chair
Sen. J. Kalani English Vice Chair
State Capitol, Conference Room 229
Thursday, February 8, 2018, 3:30 p.m.

STATEMENT OF ILWU LOCAL 142 RE: SB 3106

Thank you for the opportunity to present testimony regarding S.B. 3106. ILWU Local 142 opposes this bill as it would disturb settled law, not bring the clarification of the definition of "independent contractor" status it claims to achieve, and is unsound as a matter of public policy.

The Department of Labor and Industrial Relations has developed long settled interpretations for determining who is and who is not an independent contractor for many decades. S.B. 3106 seeks to abandon those criteria as now stated in Section 386-6 HRS. In its place are proposed more ambiguous standards of "behavioral control," "type of relationship," and "financial control."

The proposed criteria appear to be carefully designed so that any business with an intention to turn employees into independent contractors, thus avoiding the insurance, disability benefit, and potential tort liabilities can do so.

For example, an employee can become an independent contractor under the new standards by outsourcing the giving of instructions and training in Section 386-6(1); specifying the work performed is as an independent contractor by contract, withholding insurance, pension, vacation and sick leave, and making the relationship temporary in nature rather than permanent under Section 386-6(2); and requiring the individual employed to acquire a GET license, not reimbursing their business expenses, requiring the individual to have their own tools and a personal computer; paying on a non-hourly basis; and giving the individual an incentive plan of some sort that allows her to realize a profit or loss under Section 386-6(3) HRS.

SB 3106 also replaces a three factor test with a twelve factor test. Simple arithmetic suggests that the nine additional factors is likely to bring confusion, not clarity.

In our view, S.B. 3106 is also unsound as a matter of public policy because it seeks to undermine the long-standing protections of unemployment, temporary disability, workers' compensation, and pre-paid health insurance by maximizing the number of independent contractors in the workforce who are not subject to these essential protections. Such a retreat

represents is not in the interest of our statewide workforce in general, the working poor and the middle class, and ultimately it ill serves the upward mobility of the vast majority of Hawai'i's working citizens.

For all those reasons, we oppose SB 3106 and that it be held.

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

LATE

COMMITTEE ON LABOR
Senator Jill N. Tokuda, Chair
Senator J. Kalani English, Vice Chair

RE: SB3106 - RELATING TO INDEPENDENT CONTRACTORS

Date:	Thursday, February 8, 2018
Time:	3:30 PM
Conference Room 229 State Capitol 415 South Beretania Street	

Aloha Chair Tokuda, Vice Chair English 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** SB3106 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

MAUI CHAMBER OF COMMERCE
VOICE OF BUSINESS

LATE

HEARING BEFORE THE SENATE COMMITTEE ON LABOR
HAWAII STATE CAPITOL, SENATE CONFERENCE ROOM 229
THURSDAY, FEBRUARY 8, 2018 AT 3:30PM

To The Honorable Jill N. Tokuda, Chair;
The Honorable J. Kalani English, Vice Chair; and
Members of the Committee on Labor:

TESTIMONY IN STRONG SUPPORT FOR SB3106 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 SB3106.

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. **This is an extreme burden for both independent contractors and the companies who hire them as the broad and subjective interpretation creates a risk for both parties.**

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, SB3106 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. **Further, the 3 categories of the IRS 11-factor test are very similar to the 3 prongs of the ABC test. The DLIR has argued that the 20-factor test is just used as a supplement to the ABC test, but half of states do not use the ABC test in their laws.** 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.

SB3106 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 (with a GET license requirement as the 12th factor), 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. **The bill requires a preponderance of the factors be present for added consistency so the DLIR can use this as an ongoing standard and not vary based on the case.** 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.

SB3106 is not meant to re-classify workers or increase the number of independent contractors as many labor unions have proposed. With the changing economy, people are choosing to become independent contractors more frequently. This is an economic trend and would not be a direct result of using the 11-factor test. The purpose of SB3106 is to ensure clarity, consistency, and protection for all types of workers and businesses in Hawaii’s employment law.

We ask that you please pass SB3106 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

95 Mahalani Street, Suite 22A, Wailuku, Hawaii 96793 808-244-0081 info@MauiChamber.com MauiChamber.com