



LATE TESTIMONY

Testimony to the Senate Committee on  
Judiciary and Labor  
February 10, 2017 at 9:30 a.m.  
State Capitol - Conference Room 16

RE: SB 345 Relating to Employment Security

Aloha members of the Committee:

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

We are writing to support SB 345, which clarifies Hawaii's employment security law for independent contractors. It includes twenty factors to be used as guidelines when determining whether an individual could be an independent contractor. It also retains the ability of the department of labor and industrial relations to determine if an individual is an independent contractor. This bill requires the director of labor and industrial relations to report to the legislature prior tgo the regular session of 2018 regarding guidelines developed by the unemployment insurance coverage committee. It also requires an annual report to the legislature regarding covered employment determinations. We believe this bill will bring needed clarity to the determination of independent contractor status.

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

Thank you for the opportunity to testify.



SHRM Hawaii, P. O. Box 3175, Honolulu, Hawaii (808) 447-1840

# LATE TESTIMONY

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** Submitted testimony for SB345 on Feb 10, 2017 09:30AM  
**Date:** Friday, February 10, 2017 12:48:46 AM

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## **SB345**

Submitted on: 2/10/2017

Testimony for JDL on Feb 10, 2017 09:30AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
James Moffitt	Musicians' Association of Hawaii	Oppose	No

Comments: As Vice President of the Musicians' Association of Hawaii, I am opposed to SB 345. This bill would negatively affect workers, especially in creative fields, like musicians. Misclassifying these workers leads to surpassed wages and increasing tax burdens on these workers while denying them the protections under the National Labor Relations Act and Fair Labor Standards Act. Thanks you, James Moffitt

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

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February 9, 2017

To: The Honorable Gilbert S.C. Keith-Agaran, Chair  
The Honorable Karl Rhoads, Vice Chair  
Members of the Committee on Judiciary & Labor

Date: Friday, February 10, 2017

Time: 9:30 am

Place: State Capitol, Senate Conference Room 016  
415 South Beretania Street

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

**RE: S.B. 345 Relating to Employment Security**

**TESTIMONY IN SUPPORT OF S.B. 345**

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

**THE ENVISIONS CASE.** The impetus for SB 345 is the Department of Labor and Industrial Relations' ("DLIR") incorrect interpretation of H.R.S. Section 383-6 ("383-6"), commonly referred to as the "ABC Test," in a 2013 case against my company. At considerable expense to us, we were forced to appeal the DLIR's Decision to the Circuit Court of the 2<sup>nd</sup> Circuit. Judge Cahill found that the DLIR's interpretation of 383-6 based on the undisputed facts of our case, and its failure to consider all twenty factors of Hawaii Administrative Rules 12-5-2 ("HAR 12-5-2") in its analysis of the ABC Test was clearly erroneous. (The Circuit Court's Decision is attached).

I am, therefore, writing in strong support of SB 345 because it provides much-needed statutory clarification in independent contractor ("IC") determinations for (i) individuals who choose to be self-employed entrepreneurs, (ii) companies that hire them, and (iii) the DLIR which is charged to correctly and consistently interpret and apply the ABC Test.

**SUMMARY OF SUPPORT FOR S.B. 345:** We appreciate all of you who understand this is not an isolated case, but a wide-spread and long-standing issue that affects all industries, not just the special events industry. Therefore, I urge you to support SB 345 for the following reasons:

- SB 345 correctly states the clear purpose of providing greater clarity to determine independent contractor status rather than employee status. While this statement of legislative intent may seem innocuous, we believe it sets the proper tone for the entire Bill and makes it clear what this Bill is intended to address.

- SB 345 appropriately replaces the archaic “Master Servant” title of 383-6 with “Independent Contractor” which codifies the Bill’s clear purpose.
- SB 345 does not change the ABC Test in any way as the DLIR and certain Labor Unions would have you believe. All three prongs of the ABC Test remain intact and must still be met in the conjunctive.
- SB 345 does not transform the 20 factors into a new test. The 20 factors are still considered guidelines to aid in determining the “control prong” of the ABC Test. SB 345 (b) simply codifies the 20 factors (moving it from H.A.R. to H.R.S.) and requires the DLIR to analyze all factors in its coverage determinations. If SB 345 (b) is adopted, it should replace the 20 factors of HAR 12-5-2 so there is no confusion as to which 20 factors to consider. Under SB 345, the DLIR’s discretion to give each factor its proper weight based on the facts of each case also remains unchanged.
- SB 345 adds the definitions of “independent contractor” and “client” to juxtapose the definition of “employee” and “employer” in 383-1. At the House Labor and CPC hearings on companion bill HB 347, the DLIR argued that these definitions have no similar reference in 383. Adding these definitions to 383-1 would address this concern.
- The DLIR also contended that “...independent contractor is defined by circular reasoning.” To follow its logic, so too could the definition of “employee” likewise be construed as circular. At the House Labor Hearing on HB 347, Director Linda Takayama acknowledged that a definition of “independent contractor” would be helpful. If this Committee believes that the definition in SB 345 is unclear or problematic, we welcome any alternative definition that brings clarity to 383-6.
- SB 345 (c)’s definition of “client” draws a fundamental legal distinction of control that is currently absent in 383-6 and HAR 12-5-2. It is well-established case law that an IC has the right to control the manner and means used to perform the contracted service. On the other hand, a client has the absolute right to control the result of the individual’s work to ensure the desired outcome of the project. We believe this critical legal distinction, which the DLIR failed to acknowledge, and which the Circuit Court relied on, in our case, must be included in the law.
- We support the deletion of “customarily” in 383-6(3) because many individuals seek part-time, casual work as ICs to supplement their income from their primary jobs. It would, therefore, be unfair to those individuals if they are required to be “customarily engaged” in an established independent business to be classified as an IC for these one-off projects.
- Finally, we are pleased that SB 345 adds Sections 3 & 4 to 383-6. It establishes a workable mechanism of accountability which requires the DLIR to demonstrate to the Legislature that its auditors and appeals officers are correctly and consistently interpreting and applying the ABC Test in each case.

*Envisions Entertainment & Productions, Inc.*  
JDL Hearing – February 10, 2017  
Written Testimony in Support of SB345  
February 9, 2017  
Page 3 of 3

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

An increasing number of Hawaii entrepreneurs are choosing to go into business for themselves as ICs. Therefore, SB 345 was drafted to keep up with the times to determine who qualifies as an IC, rather than perpetuate the confusing inverse logic of the current law which determines who is not an employee. To be consistent and clear, the 20 factors of subsection (b) were framed precisely with this perspective in mind.

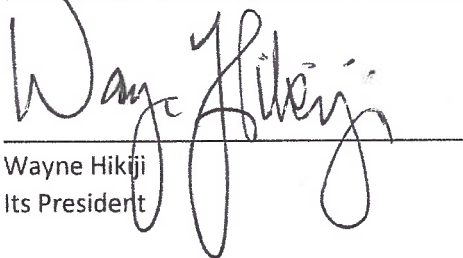
**CLOSING:**

To reiterate, the Envisions case is not an isolated situation. The Chambers of Commerce on all islands have made it clear that the misclassification of ICs as employees is a long-standing and wide-spread problem that affects every sector of the business population in Hawaii. The fact that companies that chose to hire ICs do not contest the DLIR's erroneous determinations of employee status for fear of exposing themselves to an otherwise unwinnable situation at a considerable financial price is a compelling reason SB 345 is necessary.

Given the foregoing, I humbly ask that you support SB 345.

Respectfully submitted,

*ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC.*



Wayne Hikiji  
Its President

Enclosure




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ENVISIONS ENTERTAINMENT &  
PRODUCTIONS, INC.

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
STATE OF HAWAII

In the Matter of  
ENVISIONS ENTERTAINMENT &  
PRODUCTIONS, INC.,  
Taxpayer-Appellant,  
vs.  
DWIGHT TAKAMINE, DIRECTOR,  
DEPARTMENT OF LABOR AND  
INDUSTRIAL RELATIONS, STATE OF  
HAWAII; and DEPARTMENT OF  
LABOR AND INDUSTRIAL RELATIONS,  
STATE OF HAWAII,  
Appellees,  
and  
  
Claimant-Appellee.

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

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

ORAL ARGUMENT

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

FILED  
2014 SEP -3 AM 9:57

N. MARTINS, CLERK  
SECOND CIRCUIT COURT

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

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

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

### **PERTINENT FACTS**

#### **Envisions and [REDACTED]**

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

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

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

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

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

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

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

6. ██████████ and Envisions contemplated an independent contractor type of relationship with one another.

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

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



████████ cancelled at the last minute, Envisions was responsible for finding a replacement.

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

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

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

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

g. ██████████ filled out an IRS Form W-9. He received an IRS Form 1099 from Envisions.

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

#### **Procedural History**

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

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

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

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

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

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

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

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

### **CONCLUSIONS OF LAW**

#### **Issues on Appeal**

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

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

#### **"Clause 1"**

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

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

20. Envisions points to evidence in the record showing that it had an obligation to its clients to provide saxophone services during the events at which ██████ provided his services, and thus, Envisions would have been responsible for finding a replacement if ██████ cancelled at the last minute. The record also shows that Envisions collected event fees from its clients and paid ██████ 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 ██████ 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. ██████ 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 <sup>business.</sup> The DLIR's and the appeals referees' failure to consider this factor in this particular case was clearly erroneous. *DM*

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

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

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

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

**"Clause 2"**

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

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



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

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

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

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

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

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

