

ACT 259

H.B. NO. 833

A Bill for an Act Relating to Employment.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that services rendered by individuals who provide in home care under the State of Hawaii Medicaid DD-MR Waiver Program, as authorized the Social Security Act, as amended, should be excluded from “employment” under chapters 383, 386, 392, and 393, Hawaii Revised Statutes. The legislature finds that if these individuals are not excluded, then the social service payments must be upwardly adjusted to include the cost of employee benefits for these individuals.

The legislature finds that excluding these individuals from “employment” under chapters 383, 386, 392, and 393, Hawaii Revised Statutes, is consistent with existing law and reflects the past practices under the determinations of the law by the director of the department of labor and industrial relations prior to 2005.

The purpose of this Act is to clarify the existing exclusions under chapters 386, 392, and 393, Hawaii Revised Statutes, and to provide a new exclusion under chapter 383, Hawaii Revised Statutes.

SECTION 2. Section 383-1, Hawaii Revised Statutes, is amended by adding a new definition to be appropriately inserted and to read as follows:

““Recipient of social service payments” includes:

- (1) A person who is an eligible recipient of social services such as attendant care and day care services; and
- (2) A corporation or private agency that contracts directly with the department of human services to provide attendant care and day care authorized under the Social Security Act, as amended.”

SECTION 3. Section 386-1, Hawaii Revised Statutes, is amended by adding a new definition to be appropriately inserted and to read as follows:

““Recipient of social service payments” includes:

- (1) A person who is an eligible recipient of social services such as attendant care and day care services; and

- (2) A corporation or private agency that contracts directly with the department of human services to provide attendant care and day care authorized under the Social Security Act, as amended.”

SECTION 4. Section 392-3, Hawaii Revised Statutes, is amended by adding a new definition to be appropriately inserted and to read as follows:

““Recipient of social service payments” includes:

- (1) A person who is an eligible recipient of social services such as attendant care and day care services; and
- (2) A corporation or private agency that contracts directly with the department of human services to provide attendant care and day care services authorized under the Social Security Act, as amended.”

SECTION 5. Section 393-3, Hawaii Revised Statutes, is amended by adding a new definition to be appropriately inserted and to read as follows:

““Recipient of social service payments” includes:

- (1) A person who is an eligible recipient of social services such as attendant care and day care services; and
- (2) A corporation or private agency that contracts directly with the department of human services to provide attendant care and day care authorized under the Social Security Act, as amended.”

SECTION 6. Section 383-7, Hawaii Revised Statutes, is amended to read as follows:

“**§383-7 Excluded service.** (a) “Employment” shall not include [the following service]:

- (1) Agricultural labor as defined in section 383-9 if it is performed by an individual who is employed by an employing unit:
 - (A) [Which] That, during each calendar quarter in both the current and the preceding calendar years, paid less than \$20,000 in cash remuneration to individuals employed in agricultural labor; and
 - (B) [Which] That had, in each of the current and the preceding calendar years:
 - (i) No more than nineteen calendar weeks, whether consecutive or not, in which agricultural labor was performed by its employees; or
 - (ii) No more than nine individuals in its employ performing agricultural labor in any one calendar week, whether or not the same individuals performed the labor in each week;
- (2) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority as set forth in section 3306(c)(2) of the Internal Revenue Code of 1986, as amended;
- (3) Service not in the course of the employing unit’s trade or business performed in any calendar quarter by an individual, unless the cash remuneration paid for the service is \$50 or more and the service is performed by an individual who is regularly employed by the employing unit to perform the service. For the purposes of this paragraph, an individual shall be deemed to be regularly employed to perform service not in the course of an employing unit’s trade or business during a calendar quarter [only] if:
 - (A) On each of some twenty-four days during the quarter the individual performs the service for some portion of the day; or

- (B) The individual was regularly employed as determined under subparagraph (A) by the employing unit in the performance of the service during the preceding calendar quarter;
- (4) (A) Service performed on or in connection with a vessel not an American vessel, if the individual performing the service is employed on and in connection with the vessel when outside the United States;
- (B) Service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including service performed as an ordinary incident thereto, except:
 - (i) The service performed in connection with a vessel of more than ten net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States);
 - (ii) The service performed in connection with a vessel of ten net tons or less (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States) by an individual who is employed by an employing unit which had in its employ one or more individuals performing the service for some portion of a day in each of twenty calendar weeks all occurring, whether consecutive or not, in either the current or the preceding calendar year; and
 - (iii) Service performed in connection with the catching or taking of salmon or halibut for commercial purposes;
- (5) Service performed by an individual in the employ of the individual's son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of the child's father or mother;
- (6) Service performed in the employ of the United States government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by this chapter, except that to the extent that the Congress of the United States permits states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation law, all of the provisions of this chapter shall apply to those instrumentalities, and to services performed for those instrumentalities, in the same manner, to the same extent, and on the same terms as to all other employers, employing units, individuals, and services; provided that if this State is not certified for any year by the Secretary of Labor under section 3304(c) of the federal Internal Revenue Code, the payments required of those instrumentalities with respect to that year shall be refunded by the department of labor and industrial relations from the fund in the same manner and within the same period as is provided in section 383-76 with respect to contributions erroneously collected;
- (7) Service performed in the employ of any other state, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more states or political subdivisions; and any service performed in the employ of any instrumentality of one or more other states or their political subdivisions to the extent that the instrumentality is, with respect to the service, exempt

- from the tax imposed by section 3301 of the Internal Revenue Code of 1986, as amended;
- (8) Service with respect to which unemployment compensation is payable under an unemployment system established by an act of Congress;
 - (9) (A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) of the federal Internal Revenue Code (other than an organization described in section 401(a) or under section 521 of the Internal Revenue Code), if:
 - (i) The remuneration for the service is less than \$50; or
 - (ii) The service is performed by a fully ordained, commissioned, or licensed minister of a church in the exercise of the minister's ministry or by a member of a religious order in the exercise of duties required by the order;
 - (B) Service performed in the employ of a school, college, or university, if the service is performed by a student who is enrolled and is regularly attending classes at the school, college, or university; or
 - (C) Service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at ~~such~~ the institution, which combines academic instruction with work experience, if ~~such~~ the service is an integral part of such program, and ~~such~~ the institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers;
 - (10) Service performed in the employ of a foreign government [~~(~~, including service as a consular or other officer or employee of a nondiplomatic representative~~)~~];
 - (11) Service performed in the employ of an instrumentality wholly owned by a foreign government:
 - (A) If the service is of a character similar to that performed in foreign countries by employees of the United States government or of an instrumentality thereof; and
 - (B) If the United States Secretary of State has certified or certifies to the United States Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States government and of instrumentalities thereof;
 - (12) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law; and service performed as an intern in the employ of a hospital by an individual who has completed a four-year course in a medical school chartered or approved pursuant to state law;
 - (13) Service performed by an individual for an employing unit as an insurance producer, if all service performed by the individual for the employing unit is performed for remuneration solely by way of commission;
 - (14) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including

- delivery or distribution to any point for subsequent delivery or distribution;
- (15) Service covered by an arrangement between the department and the agency charged with the administration of any other state or federal unemployment compensation law pursuant to which all services performed by an individual for an employing unit during the period covered by the employing unit's duly approved election, are deemed to be performed entirely within the agency's state;
 - (16) Service performed by an individual who, pursuant to the Federal Economic Opportunity Act of 1964, is not subject to the federal laws relating to unemployment compensation;
 - (17) Service performed by an individual for an employing unit as a real estate salesperson, if all service performed by the individual for the employing unit is performed for remuneration solely by way of commission;
 - (18) Service performed by a registered sales representative for a registered travel agency, when the service performed by the individual for the travel agent is performed for remuneration by way of commission;
 - (19) Service performed by a vacuum cleaner salesperson for an employing unit, if all services performed by the individual for the employing unit are performed for remuneration solely by way of commission;
 - (20) Service performed for a family-owned private corporation organized for profit that employs only members of the family who each own at least fifty per cent of the shares issued by the corporation; provided that:
 - (A) The private corporation elects to be excluded from coverage under this chapter;
 - (B) The election for exclusion shall apply to all shareholders and under the same circumstances;
 - (C) No more than two members of a family may be eligible per entity for exclusion under this paragraph;
 - (D) The exclusion shall be irrevocable for five years;
 - (E) The family-owned private corporation presents to the department proof that it has paid federal unemployment insurance taxes as required by federal law; and
 - (F) The election to be excluded from coverage shall be effective the first day of the calendar quarter in which the application and all substantiating documents requested by the department are filed with the department;
 - (21) Service performed by a direct seller as defined in section 3508 of the Internal Revenue Code of 1986; [and]
 - (22) Service performed by an election official or election worker as defined in section 3309(b)(3)(F) of the Internal Revenue Code of 1986, as amended[-]; and
 - (23) Domestic in-home and community-based services for persons with developmental disabilities and mental retardation under the medicaid home and community-based services program pursuant to title 42 Code of Federal Regulations sections 440.180 and 441.300, and title 42 Code of Federal Regulations, part 434, subpart A, as amended, and identified as chore, personal assistance and habilitation, residential habilitation, supported employment, respite, and skilled nursing services, as the terms are defined and amended from time to time by the department of human services, performed by an individual whose services are contracted by a recipient of social service payments and who voluntarily

agrees in writing to be an independent contractor of the recipient of social service payments unless the individual is an employee and not an independent contractor of the recipient of social service payments under the Federal Unemployment Tax Act.

(b) None of the [foregoing] exclusions [(1) to (22)] in subsection (a) shall apply to any service with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which as a condition for full tax credit against the tax imposed by the federal Unemployment Tax Act is required to be covered under this chapter.’’

SECTION 7. Section 386-1, Hawaii Revised Statutes, is amended by amending the definition of ‘‘employment’’ to read as follows:

‘‘‘Employment’’ means any service performed by an individual for another person under any contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully entered into. It includes service of public officials, whether elected or under any appointment or contract of hire express or implied.

‘‘Employment’’ does not include [~~the following service~~]:

- (1) Service for a religious, charitable, educational, or nonprofit organization if performed in a voluntary or unpaid capacity;
- (2) Service for a religious, charitable, educational, or nonprofit organization if performed by a recipient of aid therefrom and the service is incidental to or in return for the aid received;
- (3) Service for a school, college, university, college club, fraternity, or sorority if performed by a student who is enrolled and regularly attending classes and in return for board, lodging, or tuition furnished, in whole or in part;
- (4) Service performed by a duly ordained, commissioned, or licensed minister, priest, or rabbi of a church in the exercise of the minister’s, priest’s, or rabbi’s ministry or by a member of a religious order in the exercise of nonsecular duties required by the order;
- (5) Service performed by an individual for another person solely for personal, family, or household purposes if the cash remuneration received is less than \$225 during the current calendar quarter and during each completed calendar quarter of the preceding twelve-month period;
- (6) Domestic, [~~which includes attendant care, and day care services authorized by the department of human services under the Social Security Act, as amended,~~] in-home and community-based services for persons with developmental disabilities and mental retardation under the medicaid home and community-based services program pursuant to title 42 Code of Federal Regulations sections 440.180 and 441.300, and title 42 Code of Federal Regulations, part 434, subpart A, as amended, and identified as chore, personal assistance and habilitation, residential habilitation, supported employment, respite, and skilled nursing services, as the terms are defined by the department of human services, performed by an individual [~~in the employ of~~] whose services are contracted by a recipient of social service payments[;] and who voluntarily agrees in writing to be an independent contractor of the recipient of social service payments;
- (7) Service performed without wages for a corporation without employees by a corporate officer in which the officer is at least a twenty-five per cent stockholder;

- (8) Service performed by an individual for a corporation if the individual owns at least fifty per cent of the corporation; provided that no employer shall require an employee to incorporate as a condition of employment; and
- (9) Service performed by an individual for another person as a real estate salesperson or as a real estate broker, if all the service performed by the individual for the other person is performed for remuneration solely by way of commission.

As used in this paragraph "religious, charitable, educational, or nonprofit organization" means a corporation, unincorporated association, community chest, fund, or foundation organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual."

SECTION 8. Section 392-5, Hawaii Revised Statutes, is amended to read as follows:

"§392-5 Excluded services. "Employment" as defined in section 392-3 shall not include [the following services]:

- (1) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority, performed in any calendar quarter by an individual if the cash remuneration paid by the employer for such service is less than \$225;
- (2) Service not in the course of the employer's trade or business performed in any calendar quarter by an individual, unless the cash remuneration paid for the service is \$50 or more and the service is performed by an individual who is regularly employed by the employer to perform the service. An individual shall be deemed to be regularly employed to perform service not in the course of the employer's trade or business during a calendar quarter only if:
 - (A) On each of some twenty-four days during the quarter the individual performs the service for some portion of the day; or
 - (B) The individual was regularly employed [({, as determined under subparagraph (A)}),] by the employer in the performance of the service during the preceding calendar quarter;
- (3) Service performed on or in connection with a vessel not an American vessel, if the individual performing the service is employed on and in connection with the vessel when outside the United States;
- (4) Service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including service performed as an ordinary incident thereto, except:
 - (A) The service performed in connection with a vessel of more than ten net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States);
 - (B) The service performed in connection with a vessel of ten net tons or less (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States) by an individual who is employed by an employer who, for some portion in each of twenty different calendar weeks in either the current or preceding calendar year, had in the em-

- ployer's employ one or more persons performing the service, whether or not the weeks were consecutive and whether or not the same individuals performed the service in each week; and
- (C) The service performed in connection with the catching or taking of salmon or halibut for commercial purposes;
- (5) Service performed by an individual in the employ of the individual's son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of the child's father or mother;
 - (6) Service performed in the employ of the United States government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by this chapter;
 - (7) Service performed in the employ of any other state, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing [which] that is wholly owned by one or more such states or political subdivisions; and any service performed in the employ of any instrumentality of one or more other states or their political subdivisions to the extent that the instrumentality is, with respect to such service, exempt from the tax imposed by section 3301 of the Internal Revenue Code of 1986;
 - (8) Service with respect to which temporary disability compensation is payable for sickness under a temporary disability insurance system established by an act of Congress;
 - (9) Service performed in any calendar quarter in the employ of any non-profit organization exempt from income tax under section 501 of the Internal Revenue Code of 1986, if:
 - (A) The remuneration for such service is less than \$50;
 - (B) The service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university;
 - (C) The service is performed by a duly ordained, commissioned, or licensed minister or licensed minister of a church in the exercise of the minister's ministry or by a member of a religious order in the exercise of nonsecular duties required by the order; or
 - (D) The service is performed for a church by an employee who fails to meet the eligibility requirements of section 392-25;
 - (10) Service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of the association or their dependents, if:
 - (A) No part of its net earnings inures (other than through such payments) to the benefit of any private shareholder or individual; and
 - (B) Eighty-five per cent or more of its income consists of amounts collected from members and amounts contributed by the employer of the members for the sole purpose of making such payments and meeting expenses;
 - (11) Service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of the association or their dependents or their designated beneficiaries, if:
 - (A) Admission to membership in the association is limited to individuals who are officers or employees of the United States government; and
 - (B) No part of the net earnings of the association inures (other than through such payments) to the benefit of any private shareholder or individual;

- (12) Service performed in the employ of a school, college, or university, not exempt from income tax under section 501 of the Internal Revenue Code of 1986, if the service is performed by a student who is enrolled and is regularly attending classes at the school, college, or university;
- (13) Service performed in the employ of any instrumentality wholly owned by a foreign government, if:
- (A) The service is of a character similar to that performed in foreign countries by employees of the United States government or of an instrumentality thereof; and
 - (B) The United States Secretary of State has certified or certifies to the United States Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States government and of instrumentalities thereof;
- (14) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law; and service performed as an intern in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to state law;
- (15) Service performed by an individual for an employer as an insurance producer, if all such service performed by the individual for the employer is performed for remuneration solely by way of commission;
- (16) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;
- (17) Service covered by an arrangement between the department and the agency charged with the administration of any other state or federal unemployment compensation law pursuant to which all services performed by an individual for an employer during the period covered by the employer's duly approved election, are deemed to be performed entirely within the agency's state;
- (18) Service performed by an individual who, pursuant to the Federal Economic Opportunity Act of 1964, is not subject to the federal laws relating to unemployment compensation;
- (19) ~~Domestic[; which includes attendant care, and day care services authorized by the department of human services under the Social Security Act, as amended;]~~ in-home and community-based services for persons with developmental disabilities and mental retardation under the medicaid home and community-based services program pursuant to title 42 Code of Federal Regulations sections 440.180 and 441.300, and title 42 Code of Federal Regulations, part 434, subpart A, as amended, and identified as chore, personal assistance and habilitation, residential habilitation, supported employment, respite, and skilled nursing services, as the terms are defined by the department of human services, performed by an individual [in the employ of] whose services are contracted by a recipient of social service payments[;] and who voluntarily agrees in writing to be an independent contractor of the recipient of social service payments;
- (20) Service performed by a vacuum cleaner salesperson for an employing unit, if all such services performed by the individual for such employing unit are performed for remuneration solely by way of commission; or

- (21) Service performed by an individual for an employer as a real estate salesperson or as a real estate broker, if all the service performed by the individual for the employer is performed for remuneration solely by way of commission.’’

SECTION 9. Section 393-5, Hawaii Revised Statutes, is amended to read as follows:

“**§393-5 Excluded services.** ‘‘Employment’’ as defined in section 393-3 does not include ~~[the following services]:~~

- (1) Service performed by an individual in the employ of an employer who, by the laws of the United States, is responsible for care and cost in connection with such service[-];
- (2) Service performed by an individual in the employ of the individual’s spouse, son, or daughter, and service performed by an individual under the age of twenty-one in the employ of the individual’s father or mother[-];
- (3) Service performed in the employ of a voluntary employee’s beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of the association or their dependents or their designated beneficiaries, if:
 - (A) Admission to membership in the association is limited to individuals who are officers or employees of the United States government[-]; and
 - (B) No part of the net earnings of the association inures (other than through such payments) to the benefits of any private shareholder or individual[-];
- (4) Service performed by an individual for an employer as an insurance agent or as an insurance solicitor[-] if all [such] service performed by the individual for the employer is performed for remuneration [solely] by way of commission[-];
- (5) Service performed by an individual for an employer as a real estate salesperson or as a real estate broker[-] if all [such] service performed by the individual for the employer is performed for remuneration [solely] by way of commission[-];
- (6) Service performed by an individual who, pursuant to the Federal Economic Opportunity Act of 1964, is not subject to the provisions of law relating to federal employment, including unemployment compensation[-]; and
- (7) ~~Domestic[-], which includes attendant care, and day care services authorized by the department of human services under the Social Security Act, as amended,] in-home and community-based services for persons with developmental disabilities and mental retardation under the Medicaid home and community-based services program pursuant to title 42 Code of Federal Regulations sections 440.180 and 441.300, and title 42 Code of Federal Regulations, part 434, subpart A, as amended, and identified as chore, personal assistance and habilitation, residential habilitation, supported employment, respite, and skilled nursing services, as the terms are defined and amended from time to time by the department of human services, performed by an individual [in the employ of] whose services are contracted by a recipient of social service payments[-] and who voluntarily agrees in writing to be an independent contractor of the recipient of social service payments.’’~~

SECTION 10. The department of labor and industrial relations shall submit a report to the legislature not later than twenty days prior to the convening of the regular session of 2009 on the financial impact and consequences of the exclusions from the employment related laws established under this Act for service providers who provide medicaid home and community-based services for persons with developmental disabilities and mental retardation.

SECTION 11. If any provision of this Act, or the application thereof to any person or circumstance is contrary to federal law, that provision or any application thereof to any person or circumstance shall be invalid; provided that the invalidity does not affect other provisions or applications of the Act, which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 12. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 13. This Act shall take effect upon its approval.

(Approved July 6, 2007.)