

ACT 70

H.B. NO. 1379

A Bill for an Act Relating to Employment Security Law.

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

SECTION 1. The purpose of this Act is to provide the same type of unemployment insurance exclusion in state law as in federal law for the exclusion of

certain alien agricultural workers and to conform coverage of Indian tribe workers under state law to federal law.

Under Public Law 94-566, the Unemployment Compensation Act of 1976, agricultural labor became subject to the federal unemployment tax, except for nonresident aliens who were temporarily admitted to the United States to perform contract agricultural work. Under Public Law 96-84, alien agricultural labor must be included solely for purposes of determining the threshold of coverage such as cash wages paid and number of individuals and weeks worked.

Under Public Law 106-554, the Consolidated Appropriations Act, 2001, American Indian tribes must now be treated similarly to state and local governments and nonprofit organizations under federal and state law. The provisions of this bill conform with the Consolidated Appropriations Act requirements.

SECTION 2. Chapter 383, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§383- Treatment of Indian tribes. (a) Benefits based on service in employment as defined in this section shall be payable in the same amount, on the same terms, and subject to the same conditions as benefits payable on the basis of other service subject to this chapter. The financing of benefits shall apply in the same manner and under the same terms and conditions as in section 383-62 for nonprofit organizations subject to this chapter; except that the provisions of this section shall apply where there is a conflict.

(b) Any Indian tribe or tribal unit (subdivisions, subsidiaries, or business enterprises wholly owned by the Indian tribe) subject to this chapter on or after January 1, 2007:

- (1) Shall pay contributions under the provisions of this part (with the exception of the provisions in section 383-62(b)) applicable to other employers, unless it elects to pay to the director for the fund an amount equal to the amount of benefits that is attributable to service in the employ of an Indian tribe;
- (2) That elects to make payments in lieu of contributions shall make this election in the same manner and under the same conditions as provided in section 383-62(d)(1). Indian tribes or tribal units shall determine if reimbursement for benefits paid will be elected by the tribe as a whole, by individual tribal units, or by combinations of individual tribal units;
- (3) Shall be billed and payments shall be made in accordance with section 383-62(d)(2), for the full amount of benefits attributable to service in the employ of the Indian tribe or tribal unit on the same schedule as nonprofit organizations that have elected to make reimbursement payments in lieu of contributions; and
- (4) That elects to become liable for payments in lieu of contributions shall be required, within thirty days after the effective date of its election, to deposit with the department an amount of money as security as determined by section 383-62(d)(3).

(c) Failure of the Indian tribe or tribal unit to make any required payment under this chapter within ninety days after a notice of delinquency was mailed to its last known address or was otherwise delivered to it, shall cause the Indian tribe to lose the option to make payments in lieu of contributions and the termination shall continue for the four-consecutive-calendar-quarter period beginning with the quarter in which the termination becomes effective.

Any Indian tribe that loses the option to make payments in lieu of contributions due to late payment or nonpayment, shall have such option reinstated after a period of one year if all contributions have been timely made; provided no contribu-

tions, payments in lieu of contributions for benefits paid, security deposit, and penalties or interest remain outstanding.

If any Indian tribe or tribal unit fails to make payments required under this section (including assessed interest and penalty) within ninety days of a notice of delinquency, the department shall immediately notify the United States Internal Revenue Service and the United States Department of Labor.

(d) Notices of payment and reporting delinquency to Indian tribes and tribal units shall include information that failure to make full payments within the prescribed time shall cause the Indian tribe to:

- (1) Be liable for taxes under the Federal Unemployment Tax Act; and
- (2) Lose the option to make payments in lieu of contributions.

(e) Except as provided in subsection (f), the amount payable to the fund by each Indian tribe or tribal unit that is liable for payments in lieu of contributions shall be determined in the same manner as provided in section 383-62(e).

(f) An Indian tribe or tribal unit shall reimburse the fund for all extended benefits paid that are attributable to service in the employ of the Indian tribe or tribal unit unless the benefits are reimbursed by the federal government.

(g) Any two or more Indian tribes or tribal units that have become liable for payments in lieu of contributions may file a joint application to the department for the establishment of a group account for the purpose of sharing the cost of benefits paid that are attributable to service in the employ of such employers in the same manner as provided in section 383-62(f).

(h) As used in this section:

“Employer” includes any Indian tribe for which service in employment, as defined in section 383-2, is performed.

“Employment” means service performed in the employ of an Indian tribe; provided that the service is excluded from employment as defined in the Federal Unemployment Tax Act solely by reason of Section 3306(c)(7), of the Federal Unemployment Tax Act, and is not otherwise excluded from employment under this chapter. For purposes of this section, the exclusions from employment under section 383-7, apply to services performed in the employ of an Indian tribe in the same manner as the exclusions apply to government and nonprofit entities.

“Indian tribe” has the meaning given the term by Section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. Section 450b(e)), and includes any subdivision, subsidiary, or business enterprises wholly owned by the Indian tribe.”

SECTION 3. Section 383-7, Hawaii Revised Statutes, is amended to read as follows:

“§383-7 Excluded service. “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, 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[;], including labor performed by an alien referred to in subparagraph (C); and
 - (B) Which 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[;], including labor performed by an alien referred to in subparagraph (C); 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[;], including labor performed by an alien referred to in subparagraph (C); or
 - (C) If such agricultural labor is performed by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to Sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act;
- (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 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 institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such 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.

None of the foregoing exclusions (1) to (22) 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 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 5. This Act shall take effect on July 1, 2007.

(Approved May 16, 2007.)

Note

- 1. Edited pursuant to HRS §23G-16.5.