TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015

ON THE FOLLOWING MEASURE:
H.B. NO. 1213, H.D. 1, RELATING TO EMPLOYMENT SECURITY.

BEFORE THE:
HOUSE COMMITTEES ON CONSUMER PROTECTION & COMMERCE AND JUDICIARY

DATE: Monday, March 2, 2015 **TIME:** 2:15 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Russell A. Suzuki, Attorney General, or
Robyn M. Kuwabe, Deputy Attorney General

Chairs McKelvey and Rhoads and Members of the Committees:

The Department of the Attorney General (the Department) has concerns about the provisions in this bill as originally proposed and as amended.

As introduced, H.B. No. 1213 proposed to delete the criteria, commonly referred to as the "ABC test" in section 383-6, Hawaii Revised Statutes (HRS), currently used for determining the existence of an employer-employee relationship under Hawaii's unemployment compensation laws. In its stead, the bill provides four criteria to be used in determining independent contractor status, requires the Department of Labor and Industrial Relations to certify an individual who meets the four criteria as an independent contractor, and, once certified, creates a presumption of independent contractor status that the individual has the burden to rebut if the individual files for unemployment benefits against the individual's customer. The House Committee on Labor and Public Employment amended the bill by deleting the deletion of section 383-6, HRS, and establishing the above-outlined independent contractor provisions as a new section in chapter 383, HRS.

The U.S. Department of Labor (USDOL) has recently indicated that the bill as originally proposed raised two conformity issues. First, the bill appears to remove the requirement to determine if anyone has a right to control and direct the individual who performs the services. USDOL advised that states may not, consistent with the requirements of Federal law, use a test for independent contractors that is less rigorous than the Internal Revenue Service (IRS) test when determining coverage of services performed for 3309 entities (government entities,

501(c)(3) nonprofit organizations, and Indian tribes). Whether services are performed in an employer-employee relationship for purposes of the required coverage is governed by Federal law, specifically, section 3306(i), Federal Unemployment Tax Act (FUTA), which defines "employee" by referring to the common law test found in section 3121(d) of the Internal Revenue Code. IRS regulations at 26 C.F.R. § 31.3306(i)-1 provide that every individual is an employee if the relationship between the individual and the person for whom services are performed has the legal relationship of employer and employee. Generally, such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services; the person need not actually direct or control the manner in which service is performed, it is sufficient that the person has the right to do so. Second, the USDOL advised that because the proposed subsection (d) would place the burden of proof on workers to establish that they are employees and not independent contractors if the workers filed for unemployment benefits, such provision would not be in conformity with section 303(a)(1) of the Social Security Act. That section requires as a condition for a state to receive administrative grants for its unemployment compensation programs that the state law provide for "[s]uch methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." The USDOL advised that it has long interpreted that provision to require state unemployment compensation agencies take the initiative in discovering information regarding the circumstances surrounding an individual's unemployment and to obtain all the facts necessary to make the correct decision.

The amendments in H.D. 1 do not appear to address the concerns raised by the USDOL. In addition, the amendments in H.D. 1 create a conflict between the provisions of section 383-6, HRS, and the proposed independent contractor provisions. Section 383-6, HRS, creates a presumption of employment when services are performed for wages under any contract of hire, until it can be shown to the satisfaction of the Department of Labor and Industrial Relations that:

(1) 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; and

(2) The service is either outside the usual course of business for which the service is performed or that the service is performed outside of 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, occupation, profession or business of the same nature as that involved in the contract of service.

Contrarily, the bill as amended provides that an individual shall be presumed by the Department of Labor and Industrial Relations to be an independent contractor if the individual has:

(1) A valid employee identification number issued by the United States Internal Revenue Service;

(2) Registered with the department of commerce and consumer affairs to do business;

(3) A current general excise tax license issued by the department of taxation; and

(4) Entered into a written agreement with a customer to perform services for which the individual has registered to do business.

As seen from the foregoing juxtaposition of the two sets of criteria, it would be possible for an individual to obtain the requisite documentation, requiring the Department of Labor and Industrial Relations to presume that the individual is an independent contractor under the proposed provisions and certify him as such and also to presume the individual to be in employment under section 383-6, HRS; thus, resulting in an irreconcilable conflict.

For the reasons discussed above, we have concerns about the provision of the bill and request the bill be held.

U.S. Department of Labor

Employment and Training Administration
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Elaine Young
Acting Director
Department of Labor & Industrial Relations
830 Punchbowl Street
Room 321Honolulu, Hawaii 96813

Dear Director Young:

We have reviewed Senate Bill (SB) 1219 and House Bill (HB) 1213 for conformity to Federal unemployment compensation (UC) law. These two bills, which were identical when introduced, raise issues with the requirements of Federal UC law. First, they would appear to remove the requirement to determine if anyone has a right to control and direct the individual who performs the services. Second, they would place the burden of proof on workers to establish that they are employees and not independent contractors. We note that HB 1213 has been amended, but as drafted, still creates an issue with the requirements of Federal UC law. A detailed discussion follows.

These bills would amend Chapter 383 of the Hawaii Revised Statutes to add language regarding independent contractors. SB 1219 would amend Section 383-6 to delete the current language regarding independent contractors and replace it with the language below. House Draft 1 of HB 1213 would add identical language as a new section to Chapter 383. The new language in both bills provides:

> (a) An individual performing services under any contract of hire shall be deemed to be an independent contractor if the individual meets the requirements for independent contractor status pursuant to rules adopted by the department ……:
>
> (b) Notwithstanding subsection (a), an individual shall be presumed by the department to be an independent contractor if the individual has:
>
> > (1) A valid employee identification number issued by the United States Internal Reyenue Service;
> >
> > (2) Registered with the department of commerce and consumer affairs to do business;
> >
> > (3) A current general excise tax license issued by the department of taxation; and
> >
> > (4) Entered into a written agreement with a customer to perform services for which the individual has registered to do business.
>
> (c) An individual who meets the requirements for independent contractor status under this section shall be certified by the department as an independent contractor. The individual shall provide a written copy of the certification to each customer to whom the individual provides services.

(d) If a certified independent contractor files a claim for unemployment insurance benefits against a customer pursuant to this chapter, the burden shall be on the certified independent contract to prove that an employer-employee relationship exists."

Section 3304(a)(6)(A) of the Federal Unemployment Tax Act (FUTA), requires, as a condition for employers in a state to receive credit against the Federal tax, that UC be payable based on certain services. Specifically, UC must be payable based on services excepted from the Federal definition of employment (1) solely by reason of being performed for the state and local governmental entities or federally recognized Indian tribes described in Section 3306(c)(7), FUTA, or (2) solely by reason of being performed for the nonprofit organizations described in Section 3306(c)(8), FUTA. (See Section 3309(a)(1), FUTA.) However, states are not required to pay UC on these services if they are excepted from employment or coverage under other provisions of Federal law.

The first issue with these bills is that states may not, consistent with the requirements of Federal law, use a test for independent contractor that is less rigorous than the Internal Revenue Service (IRS) test when determining coverage of services performed for 3309 entities (governmental entities, 501(c)(3) non-profit organizations, and Indian tribes). Whether services are performed in an employer-employee relationship for purposes of this required coverage is governed by Federal law. Specifically, Section 3306(i), FUTA, defines "employee" by referring to the common law test found in Section 3121(d) of the Internal Revenue Code. IRS regulations at 26 C.F.R. 31.3306(i)-1 provide that every individual is an employee if the relationship between the individual and the person for whom services are performed has the legal relationship of employer and employee. Generally, such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. The regulations further provide that "it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so." Also, if an employer-employee relationship exists, "it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like."

To effectuate this aspect of required coverage, the state must apply a test of the employer-employee relationship that is at least as rigorous as the Federal common law test. Hawaii law currently does this through application of an "ABC test" found in current Section 383-6, where the "A" part of the test determines whether direction and control exists. These bills do not include this "direction and control" test. As such, the removal of the current language in Section 383-6 provided for in SB 1219 raises an issue with the requirements of Federal UC law. House Draft 1 of HB 1213 does not delete the current language in Section 383-6, but adds the language quoted above as a new section. If that language has the effect of providing that when individuals meet the provisions of the new section they are independent contractors, even if they would otherwise be determined to be an employee under Section 383-6, an issue exists as it relates to services for governmental entities, Indian tribes, and certain non-profit organizations.

The second issue is with the following provision of both bills:

> (d) If a certified independent contractor files a claim for unemployment insurance benefits against a customer pursuant to this chapter, the burden shall be on the certified independent contract to prove that an employer-employee relationship exists.

It is the responsibility of the agency to determine whether services are performed as an employee or an independent contractor. That responsibility cannot be placed on the individual who files a claim for benefits.

Section 303(a)(1) of the Social Security Act requires, as a condition for a state to receive administrative grants for its unemployment compensation (UC) program, that the state law provide for "[s]uch methods of administration ... as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." The Department of Labor has long interpreted this provision to require state UC agencies to take the initiative in discovering information regarding the circumstances surrounding an individual's unemployment and to obtain all the facts necessary to make the correct decision. This includes determining whether the individual was an employee (and thus whether wages were covered under state law) or an independent contractor.

Please contact Debra Brower your Regional office's legislative liaison, at brower.debra@dol.gov or at 415-625-7925 should you have questions regarding this letter.

Sincerely,

Gay M. Gilbert
Administrator
Office of Unemployment Insurance

cc: Virginia Hamilton
Regional Administrator
San Francisco

DAVID Y. IGE
GOVERNOR

SHAN S. TSUTSUI
LT. GOVERNOR

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CATHERINE P. AWAKUNI COLÓN
DIRECTOR

JO ANN M. UCHIDA TAKEUCHI
DEPUTY DIRECTOR

TO THE HOUSE COMMITTEES ON CONSUMER PROTECTON & COMMERCE AND JUDICIARY
THE TWENTY-EIGHTH LEGISLATURE
REGULAR SESSION OF 2015

Date: Monday, March 2, 2015
Time: 2:15 p.m.
Conference Room: 325

TESTIMONY ON HOUSE BILL NO. 1213 H.D.1
RELATING TO EMPLOYMENT SECURITY

TO THE HONORABLE ANGUS L.K. MCKELVEY, CHAIR, THE HONORABLE KARL RHOADS, CHAIR, AND MEMBERS OF THE COMMITTEES:

Thank you for the opportunity to submit comments on this bill. My name is Tung Chan, Commissioner of Securities and head of the Business Registration Division ("Division") of the Department of Commerce and Consumer Affairs. We have concerns relating to business registration and take no position beyond our area of expertise.

This H.D. 1 provides a mechanism for businesses to confirm that an individual is an independent contractor using, in part, DCCA's business registration. We recommend removing the references to DCCA's business registration in paragraphs (b)(2) and (4) of new section 383-__ of this H.D. 1. because individuals as sole proprietorships are not required to register with our Division. We support the changes made to the Senate companion bill S.B. No. 1219, S.D. 1, which replaces the business registration requirements with other practical requirements.

To set forth our concerns in more detail, Section 2 of this H.D.1 instructs DLIR to treat an individual as an independent contractor if the individual has:

> "(1) A valid employee identification number issued by the United States Internal Revenue Service;
>
> (2) Registered with the department of commerce and consumer affairs to do business;
>
> (3) A current general excise tax license issued by the department of taxation; and
>
> (4) Entered into a written agreement with a customer to perform services for which the individual has registered to do business." (Emphasis added.)

Our first concern is that the language in paragraph (2), above, that requires proof of registration is ambiguous and may cause confusion. Sole propietorships are not required to register with the Division and may have no proof of registration.

Secondly, the language in paragraph (4) is confusing and cannot be implemented. The Division does not register the services of an individual or any of its entities. To ask an individual to comply with a registration that does not exist makes compliance impossible.

For these reasons, we ask that the language in paragraphs (b)(2) and (4) of H.D. 1 that refer to business registration be deleted. The Division processes over 130,000 documents a year and manages 7 databases with millions of records each. Though we are ministerial, our registry is an important one in the state and should not be confused with more in-depth de facto licensing.

Thank you for the opportunity to testify. I would be happy to answer any questions the Committee may have.

HAWAII STATE AFL-CIO

345 Queen Street, Suite 500 • Honolulu, Hawaii 96813

Randy Perreira
President

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The Twenty-Eighth Legislature, State of Hawaii
Hawaii State House of Representatives
Committee on Consumer Protection and Commerce
&
Committee on Judiciary

Testimony by
Hawaii State AFL-CIO
March 2, 2015

H.B. 1213, H.D.1 – RELATING TO EMPLOYMENT SECURITY

The Hawaii State AFL-CIO opposes H.B. 1213, H.D.1 which allows the Department of Labor and Industrial Relations to set criteria for independent contractor status and when that status is presumed, establishes certification procedures, and places the burden of proving an employee-employer relationship on the certified independent contractor if the contractor files unemployment insurance benefits claim against a customer.

The Hawaii State AFL-CIO is concerned changing the independent contractor law will 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. If H.B. 1213, H.D.1 becomes law, many employees will be leveraged into accepting an independent contractor status and it will be up to them to prove they are employees and not independent contractors. Consequently, the Hawaii State AFL-CIO strongly urges the Committee on Consumer Protection and Commerce and the Committee on Judiciary to defer H.B. 1213, H.D.1 indefinitely.

Thank you for the opportunity to testify.

Respectfully submitted,

Randy Perreira
President

Before the House Committee on Consumer Protection & Commerce
and
House Committee Judiciary

DATE: Monday, March 2, 2015

TIME: 2:15 p.m.

PLACE: Conference Room 325

Re: HB1213 Relating to Employment Security

Testimony of Melissa Pavlicek for NFIB Hawaii

We are testifying on behalf of the National Federation of Independent Business (NFIB) in opposition to HB 1213 relating to employment security. NFIB Hawaii respectfully view supports this measure.

HB 1213 aims to allow the Department of Labor and Industrial Relations to set criteria for independent contractor status. The measure will establish criteria for applicable definitions that the department shall use to deem that an individual is an independent contractor. The language further charges the department to certify independent contractors and requires independent contractors to provide a written copy of certification to each customer. Finally, the measure places the burden of proving an employee-employer relationship on the certified independent contractor if the contractor files an unemployment insurance benefits claim against a customer.

This bill appears designed to address a chasm that exists in Hawai'i's current employment and labor law. The benefits of this measure are to provide clarity, certainty and predictability to both the employing organization and the independent contractor.

We look forward to engaging in continued conversation and mahalo the legislature for its consideration.

841 Bishop Street, Suite 2100, Honolulu, Hawaii 96813 (808) 447-1840

Testimony to the House Committee on Consumer Protection & Commerce and
House Committee on Judiciary
Monday, March 2, 2015 at 2:15 p.m.
State Capitol - Conference Room 325

RE: HOUSE BILL 1213 RELATING TO EMPLOYMENT SECURITY

Aloha Chair McKelvey, Vice Chair Woodson, Chair Rhoads, Vice Chair San Buenaventura and members of the committees:

We are Melissa Pannell and John Knorek, the Legislative Committee co-chairs for the Society for Human Resource Management – Hawaii Chapter ("SHRM Hawaii"). SHRM Hawaii represents nearly 1,000 human resource professionals in the State of Hawaii. Our members are responsible for balancing the interests of employers and employees on a daily basis. 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 are writing to **support** HB 1213, which allows the department of labor and industrial relations to set criteria for independent contractor status. It establishes criteria for when the department shall presume an individual is an independent contractor. It requires the department to certify independent contractors and requires independent contractors to provide a written copy of certification to each customer. It places the burden of proving an employee-employer relationship on the certified independent contractor if the contractor files an unemployment insurance benefits claim against a customer. We believe that this bill would help promote clarity and facilitate business operations.

Please favorably consider this bill. We look forward to being a part of the continuing dialogue concerning it and other measures. Thank you for the opportunity to testify.

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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

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March 2, 2015

The Honorable Angus L.K. McKelvey, Chair
House Committee on Consumer Protection & Commerce

The Honorable Karl Rhoads, Chair
House Committee on Judiciary
State Capitol, Room 325
Honolulu, Hawaii 96813

RE: H.B. 1213, H.D.1, Relating to Employment Security

HEARING: Monday, March 2, 2015, at 2:15 p.m.

Aloha Chair McKelvey, Chair Rhoads, and Members of the Joint Committees:

I am Myoung Oh, Government Affairs Director, here to testify on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,400 members. HAR **submits comments with amendments** on H.B. 1213, H.D.1 which allows the Department of Labor and Industrial Relations to set criteria for independent contractor status and when that status is presumed; establishes certification procedures; and places the burden of proving an employee-employer relationship on the certified independent contractor if the contractor files an unemployment insurance benefits claim against a customer.

The majority of our 8,400 members practice as independent contractors. The independent contractor relationships underpin the practice and business of real estate which is characterized by highly flexible, independent business professionals that provide individualized service to Hawaii's real estate consumers.

The current definition of independent contractor contained in Hawai'i Revised Statutes §383-6 is consistent with well-established legal standards for independent contractors, in particular the concept of control. In short, independent contractors are free to control the time spent, manner and nature of the services they provide consistent with applicable law.

If this Committee is inclined to pass this measure, HAR respectfully requests that explicit language be inserted in this measure and the Committee Report to ensure that the rights, duties, and exemptions in HRS §383-7 *Excluded Service* continue to be clear exemptions from the definition of employment and amendments to independent contractor.

Mahalo for the opportunity to testify.

woodson2-Rachel

From:	Wayne Hikiji <Wayne@envisionsentertainment.com>
Sent:	Saturday, February 28, 2015 6:06 PM
To:	CPCtestimony
Cc:	Pamela Tumpap (pamela@mauichamber.com)
Subject:	HB1213 - TESTIMONY IN SUPPORT - HEARING ON MARCH 2, 2015 - CONFERENCE ROOM 325
Attachments:	HB1213 - Envisions Entertainment - Written Testimony (submitted 02-28-15....pdf; Circuit Court Decision - Pertinent Facts, Conclusions of Law, and Order - Envisions Entertainment.PDF; Legal Memo to W Hikiji re HB 1213 & Rebuttal (02-08-15).pdf
Importance:	High

Aloha Chair, Vice Chair and Members of the Consumer Protection & Commerce and Judiciary Committees:

I submitted my written testimony on-line but am submitting it again here for your easy reference along with:

(1) the supporting Legal Memorandum from my attorney, Anna Elento-Sneed, and
(2) the Circuit Court Case involving my company we refer to in our respective testimony.

Mahalo for your consideration!

Wayne Hikiji
Envisions Entertainment & Productions, Inc.
"Your One Stop Event Source"
381 Huku Li'i Place, Suite 3 | Kihei, HI 96753
(808) 874-1000 main line | (808) 875-7953 direct line | (808) 870-4000 mobile
www.EnvisionsEntertainment.com
Follow Us for the latest updates!

February 28, 2015

To: The Honorable Angus L.K. McKelvey, Chair
The Honorable Justin H. Woodson, Vice Chair
Members of the Committee on Consumer Protection & Commerce

The Honorable Karl Rhoads, Chair
The Honorable Joy A. San Buenaventura, Vice Chair
Members of the Committee on Judiciary

Date: Monday, March 2, 2015
Time: 2:15 pm
Place: State Capitol, Conference Room 325

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

RE: H.B. 1213 Relating to Employment Security

TESTIMONY IN SUPPORT OF H.B. 1213

INTRODUCTION. My name is Wayne Hikiji and I am the president of *Envisions Entertainment & Productions, Inc.*, an event production company based in Kihei, Maui who has been doing business state-wide since 1995.

PURPOSE OF H.B. 1213. I am writing in strong support of H.B.1213. Contrary to opposing testimony by the DLIR and others, H.B. 1213 does not create a new definition of Independent Contractor (IC). Rather, it simply clarifies who qualifies as an IC in two (2) separate and distinct situations:

- In uncontested cases, where an individual freely chooses to be an IC, H.B. 1213 would require the DLIR to certify that individual as such through a streamlined certification process. This Certification would protect legitimate ICs and those who hire them from erroneous rulings by the DLIR.

- In contested cases, H.B. 1213 simply requires the DLIR to follow the regulations it promulgated to determine IC status. Whether in our original draft or HD1, H.B. 1213 would require the DLIR to follow and correctly apply the "20-factor" I.R.S. test embodied in Hawaii Administrative Rules, Section 12-5-2, as mandated by Federal conformity laws.

It is significant that the overwhelming testimony since the 1st committee hearings are in support of HB1213 and predominantly from individuals who are fully aware of the implications of their IC status and are speaking out because they do not want to be employees of their customers.

381 Huku Li'i Place, Suite 3, Kihei, Hawaii 96753 * Office: (808) 874-1000 * Fax: (808) 879-0720 *
INFO@EnvisionsEntertainment.com

IMPETUS FOR H.B. 1213. The impetus for H.B. 1213 is the DLIR's unfavorable determination in 2013 against my company based on its overzealous interpretation of H.R.S. Section 383-6, commonly referred to as the "ABC Test." (A copy of the Circuit Court Decision is attached).

In our case, the DLIR ruled that a self-employed musician we booked on occasion was our employee, even though it found that this individual:

- had an independently established business for his musician services:
- filed a claim against his full-time music store employer who terminated him, not *Envisions Entertainment*;
- had a registered business in our State for his musician services
- had a current General Excise Tax License for his musician services and received 1099s from us annually;
- insisted, during the intake interview with the UI Auditor, that (i) he was a self-employed musician who was hired periodically by my company and other customers, and (ii) did not want to be an employee of his customers; and
- signed our company's Independent Contractor Agreement voluntarily and willfully.

This Decision made it clear to me that even if an individual wants to be considered an independent contractor, there is no guarantee the DLIR will agree. In fact, the DLIR's overly-broad view in our case takes "employment" to its logical absurdity by classifying virtually all sole proprietors as employees if his/her client does so much as instruct the individual on when and where to perform the contracted services.

SUMMARY OF OUR CASE ON APPEAL. On appeal, Judge Cahill reversed the DLIR's decision on the grounds that the DLIR's and the appeals referees' findings were "clearly erroneous in view of the reliable, probative and substantial evidence in the record as a whole." The significance of this case precedent is three-fold. Judge Cahill ruled that:

- the DLIR did not follow the regulations it promulgated in determining IC status. He found that the DLIR blatantly ignored the factors of independent contractor status which it was bound to consider, including the 20-factor test for direction and control which the DLIR adopted from the I.R.S.'s original test in H.A.R. 12-5-2.

- the DLIR's interpretation of "business premise" was an unreasonable extension of our place of business to the event venues where we produced events for our clients

- the DLIR's interpretation of "outside the usual course of business" was seriously flawed. He agreed with us that playing the saxophone was not integral to our business as an event production company. He ruled that "integral" means a fundamental aspect of one's business, and that nothing in the record indicated that our business would fail if the musician's services were not available to us, and there were no other saxophone players available.

Although we prevailed on appeal, it came at a significant expense to my company (approx. $70,000) only to prove what the musician and our company had insisted all along – that he was a self-employed IC.

Yet sadly, the legal precedent of our case provides no assurances that the DLIR will change its overly-broad interpretation of H.R.S. 383-6 in future cases.

In oral testimony before the Senate Committee on Judiciary & Labor, the DLIR made it clear that it would continue to interpret H.R.S. 383-6 as it has in the past, despite Judge Cahill's edict to the contrary. In fact, we recently learned that the DLIR would like to codify the I.R.S. 20-factor in the conjunctive, making it virtually impossible for any individual to be considered an IC.

REBUTTAL TO TESTIMONY IN OPPOSITION.

DLIR: H.B. 1213 does not eliminate the state's test for IC status or conflict with Federal Law as the DLIR and the United States Department of Labor (USDoL) suggests. It simply requires the DLIR to follow the regulations it promulgated. Since the IRS' "20-Factor Test" is embodied in H.A.R. 12-5-2, requiring the DLIR to adhere to its own regulations will not result in a conflict with the IRS or U.S. Department of Labor. If anything, H.B. 1213 would promote conformity.

The DLIR and USDoL would have you believe that shifting the burden of proof in HB1213 sub-section (d) somehow shifts the DLIR's fact-finding and decision-making function as well. Their position is patently incorrect and a non sequitur. As is clearly evident, the DLIR and DoL confuse the DLIR's role as fact-finder and decision-maker, which the Bill does not change, with the separate and distinct evidentiary burden of proof. One has nothing to do with the other.

As noted in Attorney Anna Elento-Sneed's legal memo that I submitted in support, it is important to note that the Social Security Act does not prohibit state agencies from establishing burdens of proof in evidentiary hearings concerning unemployment insurance (UI) benefits as a condition to releasing UI funds to the states.

To be clear, under HB1213, the burden of proof remains on the taxpayer company where an individual believes he/she should be an employee. The burden of proof only shifts to the individual when he/she elects to be in an IC relationship, but believes, for example, that the business relationship has evolved into an employee situation which the company refuses to recognize.

AFL-CIO & Hawaii Regional Council of Carpenters. The AFL-CIO and Hawaii Regional Council of Carpenters share concerns that H.B. 1213 would encourage unscrupulous employers to misclassify employees. The AFL-CIO, Council of Carpenters, and for that matter the DLIR, assume an unjustified naiveté of today's workforce. To the contrary, the opposite is true. The Certification process of H.B. 1213 would actually distinguish those who choose to be ICs from those who do not seek certification because they feel they have been misclassified, for whom the current UI claims process is intended. H.B. 1213 does not change this well-established recourse.

ILWU: The ILWU asserts that it is impossible to certify an individual as an IC. It suggests that if circumstances change, what begins as an IC relationship may evolve into an employment situation. Sub-section (d) addresses this precise issue by providing recourse to certified ICs in such cases.

The ILWU also believes there is no reason to amend H.R.S. 383 because an employer is always free to object to the payment of UI benefits once a claim is filed. Again, the purpose of H.B. 1213 is to clarify IC status up front and prevent unnecessary litigation years later.

The ILWU's position that H.B. 1213 will affect the eligibility for UI benefits is misplaced. Clearly, eligibility is a non-issue when an individual freely elects to be an IC who, by definition, is not entitled to collect UI benefits.

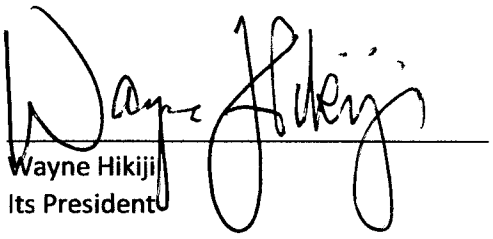
Finally, the ILWU asserts that, rather than redefine IC status, the simplest course of action to avoid such situations would be to ask the individual if he/she has a GET license, is properly in business for himself/herself, and has other clients besides the taxpayer company. The criteria set forth in H.B. 1213 sub-section (b) are essentially what the ILWU suggests.

CLOSING. We are not asking this Committee to dilute the protection afforded the "protected class" of individuals who legitimately should be employees. Nor are we asking this Committee to shift the DLIR's statutory fact-finding and decision-making responsibilities to the individual. Rather, H.B. 1213 simply requires the DLIR to recognize the free choice of an individual to be an IC in these uncontested situations and, in contested cases, to correctly apply the law as it was intended.

For all of the foregoing reasons, I urge you to please support H.B. 1213.

Respectfully submitted,

ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC.



Wayne Hikiji
Its President

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MEMORANDUM

TO: Wayne Hikiji DATE: February 8, 2015

FROM: Anna Elento-Sneed, Esq.

RE: **H.B. 1213 – RELATING TO EMPLOYMENT SECURITY**

This is in response to your request for a summary of the current state law and regulations governing independent contractor status under Hawai`i's Employment Security Law, HRS Chapter 383, and a summary of how HB 1213 would change the current law and regulations. You have also asked whether:

- H.B. 1213 would interfere with the real estate licensing law by requiring real estate licensees to register as a separate business entity with the DCCA;
- H.B. 1213 would conflict with the independent contractor test used by the Internal Revenue Service ("IRS"; and
- Subsection (d) of H.B. 1213 would deprive the Department of Labor and Industrial Relations ("DLIR") of the authority to render decisions on whether an individual meets the independent contractor test; and
- A significant allocation of state general revenues must be appropriated in order to implement the certification process.

My comments are as follows.

I. SUMMARY OF CURRENT LAW

A. Registering As A Business In Hawaii

"Independent contractor" is a term used to describe an individual who is self-employed and provides services to other businesses.[1] In Hawaii, individuals who want to go into business for themselves must: (1) register with the Internal Revenue Service (IRS) as a business; (2) register with the Hawaii Department of Commerce and Consumer Affairs (DCCA) as a business; and (3) register with the Hawaii Department of Taxation (DoTax) and obtain a general excise tax number.[2] The entire state registration process can be accomplished by filing a single form – the BB-1 – with the DCCA.[3]

Note, however, that businesses are not required to register with the Department of Labor and Industrial Relations (DLIR) unless they employ one or more persons.[4] Furthermore, businesses that only employ family members who each own at least 50% of the shares issued for the company, need not register either.[5]

As a result of these exceptions, individuals who are self-employed do not register with the DLIR are not scrutinized until they become the subject of an Unemployment Insurance Division audit or they file a claim for unemployment insurance benefits. At that point, the Unemployment Insurance Division will initiate an investigation to determine if the individual meets the test for independent contractor status under Employment Security Law.[6]

B. Determining Independent Contractor Status

The test for independent contractor status under the Employment Security Law is set forth in HRS 383-6 which states:

> Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists unless and until it is shown to the

[1] See http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee.

[2] Under state law, individuals who are sole proprietors need not register with the DCCA, but individuals who incorporate or create a limited liability company must register with the DCCA. See http://cca.hawaii.gov/breg/registration/. All self-employed individuals must register with DoTax. See HRS Section 237-9.

[3] See https://hbe.ehawaii.gov/BizEx/home.eb.

[4] See Hawaii Administrative Rules Section 12-5-17(a).

[5] See HRS Section 383-7(a)(20).

[6] See HRS 383-70.

> satisfaction of the Department of Labor and Industrial Relations that:
>
> (1) 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; and
> (2) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of 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, occupation, profession, or business of the same nature as that involved in the contract of service.[7]

Because independent contractor cases normally arise when unemployment benefit claims are filed by individuals who assert they were "employed" by a business (referred to as the "taxpayer"), the DLIR places the burden on the taxpayer (the alleged employer) to prove that the individual qualifies as an "independent contractor."

The DLIR enacted regulations which provide guidelines for determining whether an individual is an employee or an independent contractor.[8] However, as you discovered in your own case, *In the Matter of Envisions Entertainment & Productions, Inc. v. Dwight Takamine, Director, Department of Labor and Industrial Relations, State of Hawai`i,* Civil No. 13-1-0931(2), in the Circuit Court of the Second Circuit, State of Hawai`i (2014), the DLIR does not believe it is bound by the regulations. In fact, <u>even if an individual wants to be considered an independent contractor, there is no guarantee the DLIR will agree</u>. This is because the DLIR believes it must have unfettered discretion to determine if an individual should be classified as an employee for his or her own "protection."[9] Judge Cahill did not agree with the DLIR's position and ruled in Envisions' favor.[10] Whether other state judges will agree with the approach taken by Judge Cahill remains to be seen.

[7] This test is commonly referred to as the "ABC" test.
[8] See Hawaii Administrative Rules Section 12-5-2.
[9] See DLIR brief attached.
[10] See Judge Cahill's Order attached.

C. The Current Situation

Independent contractor cases continue to be litigated before the DLIR and in the state courts. Each case must be decided on its own merits, and because the DLIR does not believe it should be bound by the regulations it promulgated, there is no way for a self-employed individual and his/her customer to determine whether their business relationship will be declared – ex post facto – an employer/employee relationship.

Given the high cost of litigation and the high risks associated with this type of litigation, businesses are increasingly reluctant to contract with self-employed persons. This is problematic since current business trends show more and more individuals choosing to go into business for themselves.

II. SUMMARY OF H.B. 1213

H.B. 1213 would do three things:

A. Require the DLIR to adhere to Hawaii Administrative Rules Section 12-5-2, which the department has already promulgated;
B. Require self-employed individuals to receive "certification" from the DLIR[11] that they are doing business as "independent contractors;" and
C. In the event a "certified independent contractor" should file a claim for unemployment insurance benefits, then he/she would have the burden to prove that the business relationship with the taxpayer was actually an employment relationship.

H.B. 1213 also has several advantages. If enacted, the law would:

- Clarify the criteria for determining independent contractor status and eliminate unnecessary, expensive litigation which discourages businesses from dealing with self-employed persons;
- Incentivize taxpayers to do business only with "legitimate" independent contractors who have been certified by the DLIR;
- Indirectly encourage self-employed persons to properly register with the DCCA, DoTax and the DLIR to do business and pay their general excise taxes; and

[11] The DLIR can require the self-employed individual to affirm that they meet the guidelines under Hawaii Administrative Rules Section 12-5-2.

- Reduce the workload of the Unemployment Insurance Division and focus their attention on cases involving real abuse.

III. H.B. 1213 WILL **NOT** INTERFERE WITH THE REAL ESTATE LICENSING LAWS

HRS Chapter 383 only applies to individuals providing services to entities that are considered "employing units" under the law.[12] However, certain types of services performed by individuals are excluded from coverage under HRS Chapter 383.[13] Services performed by real estate salespersons are ***excluded*** from coverage.[14]

H.B. 1213 only applies to individuals who do not fall within one of the blanket exclusions set forth in HRS Section 383-7. Accordingly, H.B. 1213 will not impact real estate salespersons or any of the other individuals listed in HRS Section 383-7.

IV. H.B. 1213 DOES **NOT** CONFLICT WITH THE IRS TEST FOR INDEPENDENT CONTRACTOR STATUS

First, it should be noted that H.B. 1213 does not eliminate the state's test for independent contractor status. It simply requires the DLIR to follow the regulations it promulgated to guide determinations on independent contractor status.[15]

Second, the DLIR's regulations are based on the IRS' original test for independent contractor status – called the " 20-Factor Test."[16] Under the IRS test, the following factors were relevant in determining whether an individual could be classified as an independent contractor: (1) instructions — or control factor; (2) integration; (3) employer's right to discharge; (4) employee's right to terminate; (5) services rendered personally or right to delegate; (6) hiring, supervising, and paying assistants; (7) training; (8) payment by hour, week, month; (9) payment of business and/or traveling expenses; (10) continuing relationship; (11) set hours of work; (12) full time required; (13) working for more than one firm at a time; (14) making service available to general public; (15) furnishing of tools and materials; (16) doing work on employer's premises; (17) order or sequence set; (18) oral or written reports; (19) significant investment; and (20) realization of profit or loss. There were also a number of other factors the IRS looked at, in

[12] See HRS Section 383-1.
[13] See HRS Section 383-7.
[14] See HRS Section 383-7(a) (17).
[15] See Hawaii Administrative Rules Section 12-5-2.
[16] See IRS Rev Rule 87-41. Compare IRS Rev Rule 87-41 with Hawaii Administrative Rules Section 12-5-2(b).

addition to the above factors (i.e., intent, industry practice, governmental or regulatory rules, benefits, insurance, etc.).[17] As you can see, these are the same factors in the DLIR's regulations.

In short, requiring the DLIR to adhere to its own regulations will not result in a conflict with the IRS or the U.S. Department of labor ("USDOL"). If anything, it will *promote* conformity.

V. SUBSECTION (d) of H.B. 1213 DOES **NOT** REMOVE THE DLIR'S AUTHORITY TO RENDER DECISIONS ON UNEMPLOYMENT INSURANCE CLAIMS

Under the Federal Unemployment Tax Act, the U.S. Secretary of Labor is required to review and approve all state laws governing unemployment insurance benefits as a condition to release of unemployment insurance funds to the states.[18] Section 303(a) of the Social Security Act sets general guidelines the Secretary of Labor must use in his/her review and approval of state programs.[19]

The Social Security Act does not prohibit state agencies from establishing burdens of proof in evidentiary hearings concerning unemployment insurance benefit. The federal law only requires that the Secretary of Labor ensure the state law provides an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied…"[20]

Hawai`i's fair hearing procedures for unemployment compensation claims are set forth in HRS Sections 383-32 through 383-41. H.B. 1213 does not amend those provisions. Rather, Subsection (d) of H.B. 1213 simply places the burden of proof on a "certified independent contractor" if he/she should choose to file a claim for unemployment compensation benefits.

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[17] The IRS has modernized its independent contractor test by grouping the 20 factors into three categories: (1) behavioral control; (2) financial control; and (3) the relationship of the parties. "Behavioral control" focuses on whether the supposed independent contractor receives extensive instructions on how work is to be done (i.e. how, when or where to do the work; what tools or equipment to use; what assistants to hire or help with work; where to purchase supplies and services) or training on the procedures and methods to be used in performing the work. "Financial control" focuses on the whether the supposed independent contractor has made a significant investment in his/her business, obtains reimbursement for some or all of his/her business expenses, and whether he/she has an opportunity for profit or loss. "Relationship of the parties" focuses on whether the supposed independent contractor receives employee benefits and whether the parties have entered into a written contract specifying the terms of the relationship. *See* IRS Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, and Internal Revenue Manual 4.23.5.3.

[18] See 26 U.S.C. Section 3304(a).

[19] See 42 U.S.C. Section 503(a).

[20] 42 U.S.C. Section 503(a)(3).

It should be noted that while the current Hawai`i law and regulations do not expressly state that the alleged employer has the burden of proof in all "independent contractor" cases,[21] the DLIR places that burden, in all cases, on the alleged employer.[22] If enacted, H.B. 1213 would place the burden of proof in contested cases:

- On the taxpayer (i.e. the alleged employer) if the taxpayer retains an individual who is not certified as an independent contractor; and
- On the certified independent contractor if he/she contracts with the taxpayer as an independent contractor and subsequently files a claim for unemployment compensation benefits against that same taxpayer.

In either situation, the authority and responsibility to review the evidence presented, apply the law and the applicable regulations, and then render a determination would still lie with the Unemployment Insurance Division pursuant to HRS Section 383-33, and with the Employment Security Appeals Referees Office under HRS Sections 383-37 through 383-40. Since the determination and appeals procedures have been previously reviewed and approved by the U.S. Secretary of Labor, and nothing in H.B. 1213 would change those provisions, there should be no conflict with the Social Security Act.

VI. H.B. 1213 SHOULD NOT REQUIRE A SIGNIFICANT ALLOCATION OF STATE REVENUES TO IMPLEMENT

As noted in my previous memorandum, the DLIR already has a form – UC-1 – which is completed by businesses in conjunction with the form BB-1 (which is used by the Department of Commerce and Consumer Affairs to register businesses, and by the Department of Taxation to issue general excise tax license numbers). Both the UC-1 and the BB-1 are available online as a PDF document.

It should not be difficult for the DLIR to instruct an individual registering with the DCCA and obtaining a GET license, to: (1) submit the UC-1 and indicate he/she intends to operate as an independent contractor; and (2) "check a box" on the UC-1 to affirm that he/she has read and understands the statute and regulations pertaining to independent contractors. If the individual completes and submits the form, the DLIR can then issue an "independent contractor" number to the individual, similar to the number they assign to employers. Since the form, the procedure

[21] See HRS Section 383-6 and Hawaii Administrative Rules Section 12-5-2.

[22] See DLIR brief in *In the Matter of Envisions Entertainment & Productions, Inc. v. Dwight Takamine, Director, Department of labor and Industrial Relations, State of Hawai`i,* civil No. 13-11-0931(2), in the Circuit Court of the Second Circuit, State of Hawai`i (2014).

and the personnel are already in place, this minimal change in the form and procedure should not entail significant costs.

If you have any questions or need further information, please let me know.

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ENVISIONS ENTERTAINMENT &
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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

PAUL BUNUAN,

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 Paul Bunuan ("Bunuan") 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 Bunuan

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

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

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

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

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

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

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

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

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

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

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

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

7. In 2012, Bunuan 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 Bunuan executed an independent contractor agreement to govern Bunuan's provision of those services.

Procedural History

8. On January 7, 2013, Bunuan 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 Bunuan 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 Bunuan 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, Bunuan was not free from control or direction over the performance of his services; and, as to "Clause 2" of HRS §383-6, Bunuan's 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 Bunuan 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 Bunuan.

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 Bunuan.

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 Bunuan provided his services, and thus, Envisions would have been responsible for finding a replacement if Bunuan cancelled at the last minute. The record also shows that Envisions collected event fees from its clients and paid Bunuan 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 Bunuan 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. Bunuan 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 Bunuan with respect to his saxophone performance skills or supervise any aspect of his performance. Bunuan 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 Bunuan.

24. Ignoring the independent contractor relationship in this particular case may have a detrimental effect on Bunuan's provision of saxophone services. In effect, Envisions is an agent that simply directs business to Bunuan. Without that ability, Bunuan 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 Bunuan was in total control as to whether or not he accepted any particular performance. If Bunuan were to reject the engagement, it was Envisions' responsibility, not Bunuan's, to find an alternate saxophonist from

its list. Even after Bunuan's services were engaged, with or through Envisions, Bunuan 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 Bunuan 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 Bunuan was merely as to the result to be accomplished by Bunuan's 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 Bunuan 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 Bunuan's 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, Mr. Bunuan's 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 Bunuan's services were not incidental and not outside Envisions' usual course of business.

34. The services provided by Bunuan were limited to the playing of the saxophone, and the playing of the saxophone by Bunuan 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 Bunuan's services were not

available to Envisions, and there were no other saxophone players of Bunuan's competence, that Envisions' business would fail.

36. The record clearly indicates that Bunuan's 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 Bunuan's 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

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February 27, 2015

To: The Honorable Angus L. K. McKelvey, Chair,
and Members of the House Committee on Consumer Protection & Commerce

The Honorable Karl Rhoads, Chair,
and Members of the House Committee on Judiciary

Date: Monday, March 2, 2015
Time: 2:15 p.m.
Place: Conference Room 325, State Capitol

From: Elaine Young, Acting Director
Department of Labor and Industrial Relations (DLIR)

Re: H.B. No. 1213HD1 Relating to Employment Security

I. OVERVIEW OF PROPOSED LEGISLATION

HD1213HD1 proposes to add a new section to Hawaii Revised Statutes (HRS), with a new definition of "independent contractor."

Although HD1 addressed the department's objection to deleting the ABC test in the original measure, the department remains strongly opposed to this proposal, which would raise conformity issues with federal laws. Failure of state law to conform with provisions of the Federal Unemployment Tax Act (FUTA) and the Social Security Act will result in the loss of federal administrative grants ($14,000,000) to operate the UI program and subject all employers to the full 6% of the FUTA payroll tax instead of .6% (see attached letter from the United States Department of Labor).

In recognition of some challenges in making these determinations, in February 2014 a committee was formed to develop written guidelines when examining coverage cases (employment versus non-employment). The committee is still in the process of developing policies and procedures. Further, once the concern was raised through the Circuit Court decision, the department took several steps to address the situation. The auditors that perform the work were provided legal

training. The Administrator for the Employment Security Appels Referees' Office (ESARO), which reviews the appeals coming from the UI Division, has begun reviewing all decisions pertaining to coverage issues at the appeal level.

II. CURRENT LAW

Section 383-6, HRS, provides that services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to Chapter 383, HRS, irrespective of whether the common law relationship of master and servant exists, unless it is shown to the department that the following criteria have been met in the conjunctive:

1. 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, 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, occupation, profession, or business of the same nature as that involved in the contract of service.

III. COMMENTS ON THE HOUSE BILL

The Department opposes HB 1213HD1 because of the potential for increased FUTA payroll taxes for all employers and withholding of UI administrative grants to operate Hawaii's UI program if state law is not consistent with federal law. 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.

The bill provides that an individual who meets the provisions of the new language is an independent contractor regardless of whether they would be considered to be an employee under the ABC standard under section 383-6 (that is, a person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also the details and means by which the result is accomplished). A conformity issue with Federal law is created as it relates to governmental entities, Indian tribes, and certain non-profit organizations. The sanctions for failure of state law to conform to federal statutes are decertification for employers to receive the FUTA

tax offset credits and withholding of federal administrative grants to operate the state's UI program. Consequently, the FUTA payroll tax for all employers will increase tenfold, from .6% to the full 6.0%, and by losing over $14,000,000 in federal UI funds, no local offices will be functional to process benefits to eligible individuals.

Subsection (d) of the bill states that if a UI claim is filed, the burden shall be on the certified independent contractor to prove that an employer-employee relationship exists. This requirement raises a potential conformity issue with section 303(a)(1) of the Social Security Act (SSA) which has been interpreted by the USDOL as requiring states to take the initiative in discovering information regarding the circumstances surrounding an individual's unemployment and to obtain all the facts necessary to make a determination. Where the department does not fulfill its responsibility to make the determination and shifts that burden to the individual filing a claim for benefits, the state will jeopardize receipt of $14,000,000 in federal UI administrative grants.

While proponents of this bill insist that UI coverage should be a matter of choice, a decision made by mutual agreement between an employer and an individual who will enter into agreement for performance of services. Though reasonable and logical on its face, 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. In addition, these persons will not have access to UI compensation, or potentially other benefits provided under existing labor laws, when most needed.

U.S. Department of Labor

Employment and Training Administration
200 Constitution Avenue, N.W.
Washington, D.C. 20210

FEB 18 2015

Ms. Elaine Young
Acting Director
Department of Labor & Industrial Relations
830 Punchbowl Street
Room 321Honolulu, Hawaii 96813

Dear Director Young:

We have reviewed Senate Bill (SB) 1219 and House Bill (HB) 1213 for conformity to Federal unemployment compensation (UC) law. These two bills, which were identical when introduced, raise issues with the requirements of Federal UC law. First, they would appear to remove the requirement to determine if anyone has a right to control and direct the individual who performs the services. Second, they would place the burden of proof on workers to establish that they are employees and not independent contractors. We note that HB 1213 has been amended, but as drafted, still creates an issue with the requirements of Federal UC law. A detailed discussion follows.

These bills would amend Chapter 383 of the Hawaii Revised Statutes to add language regarding independent contractors. SB 1219 would amend Section 383-6 to delete the current language regarding independent contractors and replace it with the language below. House Draft 1 of HB 1213 would add identical language as a new section to Chapter 383. The new language in both bills provides:

> (a) An individual performing services under any contract of hire shall be deemed to be an independent contractor if the individual meets the requirements for independent contractor status pursuant to rules adopted by the department ……:
>
> (b) Notwithstanding subsection (a), an individual shall be presumed by the department to be an independent contractor if the individual has:
>
> > (1) A valid employee identification number issued by the United States Internal Revenue Service;
> >
> > (2) Registered with the department of commerce and consumer affairs to do business;
> >
> > (3) A current general excise tax license issued by the department of taxation; and
> >
> > (4) Entered into a written agreement with a customer to perform services for which the individual has registered to do business.
>
> (c) An individual who meets the requirements for independent contractor status under this section shall be certified by the department as an independent contractor. The individual shall provide a written copy of the certification to each customer to whom the individual provides services.

(d) If a certified independent contractor files a claim for unemployment insurance benefits against a customer pursuant to this chapter, the burden shall be on the certified independent contract to prove that an employer-employee relationship exists."

Section 3304(a)(6)(A) of the Federal Unemployment Tax Act (FUTA), requires, as a condition for employers in a state to receive credit against the Federal tax, that UC be payable based on certain services. Specifically, UC must be payable based on services excepted from the Federal definition of employment (1) solely by reason of being performed for the state and local governmental entities or federally recognized Indian tribes described in Section 3306(c)(7), FUTA, or (2) solely by reason of being performed for the nonprofit organizations described in Section 3306(c)(8), FUTA. (See Section 3309(a)(1), FUTA.) However, states are not required to pay UC on these services if they are excepted from employment or coverage under other provisions of Federal law.

The first issue with these bills is that states may not, consistent with the requirements of Federal law, use a test for independent contractor that is less rigorous than the Internal Revenue Service (IRS) test when determining coverage of services performed for 3309 entities (governmental entities, 501(c)(3) non-profit organizations, and Indian tribes). Whether services are performed in an employer-employee relationship for purposes of this required coverage is governed by Federal law. Specifically, Section 3306(i), FUTA, defines "employee" by referring to the common law test found in Section 3121(d) of the Internal Revenue Code. IRS regulations at 26 C.F.R. 31.3306(i)-1 provide that every individual is an employee if the relationship between the individual and the person for whom services are performed has the legal relationship of employer and employee. Generally, such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. The regulations further provide that "it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so." Also, if an employer-employee relationship exists, "it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like."

To effectuate this aspect of required coverage, the state must apply a test of the employer-employee relationship that is at least as rigorous as the Federal common law test. Hawaii law currently does this through application of an "ABC test" found in current Section 383-6, where the "A" part of the test determines whether direction and control exists. These bills do not include this "direction and control" test. As such, the removal of the current language in Section 383-6 provided for in SB 1219 raises an issue with the requirements of Federal UC law. House Draft 1 of HB 1213 does not delete the current language in Section 383-6, but adds the language quoted above as a new section. If that language has the effect of providing that when individuals meet the provisions of the new section they are independent contractors, even if they would otherwise be determined to be an employee under Section 383-6, an issue exists as it relates to services for governmental entities, Indian tribes, and certain non-profit organizations.

The second issue is with the following provision of both bills:

(d) If a certified independent contractor files a claim for unemployment insurance benefits against a customer pursuant to this chapter, the burden shall be on the certified independent contract to prove that an employer-employee relationship exists.

It is the responsibility of the agency to determine whether services are performed as an employee or an independent contractor. That responsibility cannot be placed on the individual who files a claim for benefits.

Section 303(a)(1) of the Social Security Act requires, as a condition for a state to receive administrative grants for its unemployment compensation (UC) program, that the state law provide for "[s]uch methods of administration ... as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." The Department of Labor has long interpreted this provision to require state UC agencies to take the initiative in discovering information regarding the circumstances surrounding an individual's unemployment and to obtain all the facts necessary to make the correct decision. This includes determining whether the individual was an employee (and thus whether wages were covered under state law) or an independent contractor.

Please contact Debra Brower your Regional office's legislative liaison, at brower.debra@dol.gov or at (415) 625-7925 should you have questions regarding this letter.

Sincerely,

Gay M. Gilbert
Administrator
Office of Unemployment Insurance

cc: Virginia Hamilton
Regional Administrator
San Francisco

The Twenty-Eighth Legislature
Regular Session of 2015

LATE

THE SENATE
Committee on Consumer Protection and Commerce
Rep. Angus L.K. McKelvey, Chair
Rep. Justin H. Woodson, Vice Chair
Committee on Judiciary
Rep. Karl Rhoads, Chair
Rep. Joy A. San Buenaventura, Vice Chair

State Capitol, Conference Room 325
Monday, March 2, 2015; 2:15 p.m.

STATEMENT OF THE ILWU LOCAL 142 ON H.B. 1213, HD1
RELATING TO EMPLOYMENT SECURITY

The ILWU Local 142 **opposes** H.B. 1213, HD1, which allows the Department of Labor and Industrial Relations to set criteria for independent contractor status and when that status is presumed, establishes certification procedures, places the burden of proving an employee-employer relationship on the certified independent contractor if the contractor files an unemployment insurance benefits claim against a customer.

We believe this bill is unnecessary and will further muddy the waters regarding independent contractor status. HD1 allows for the Department to establish and adopt criteria to determine independent contractor status in addition to the "ABC test" in current law. Under the current statute (HRS 383), an individual is deemed an independent contractor if: (A) he has been and will continue to be free from control or direction in the performance of his work; (B) his service is performed outside the employer's usual course of business or places of business; and (C) he is contracted for the type of work that he is customarily engaged in as an independent contractor. There is no valid reason to depart from or add to this definition.

This bill appears to have been introduced in response to a misapplication of the guidelines in the unemployment insurance claim of an individual contracted for work by a Maui employer, who subsequently prevailed in Circuit Court to have two earlier decisions vacated. The Court's decision has since been incorporated into the Department's procedures in applying the test for "control and direction" by the employer and, thus, no justification exists for changing the definition of independent contractor.

Furthermore, the U.S. Department of Labor has advised Hawaii's Department of Labor that, if this bill is passed, **Hawaii will not be in conformance with federal requirements as our test for independent contractor status is less rigorous** than one applied by the federal government, namely the Internal Revenue Service. This non-conformance will jeopardize federal funds for the administration of Hawaii's unemployment insurance program and will require all employers to be assessed 6% more in FUTA taxes. What this means, we understand, is that the unemployment insurance program in Hawaii will essentially be halted (the Division is entirely funded with federal dollars), and all workers who are laid off will receive no UI checks.

Another concern is that, under this bill, an individual may be deemed an independent contractor simply by having an ID number, a GET license, DCCA registration to do business, and a written agreement with a customer/employer. H.B. 1213, HD1 serves to incentivize employers to **escape providing benefits** to employees by persuading those interested in work to fulfill the requirements to be an independent contractor—even as the employer **retains control and direction** by setting hours of work, directing where and when the individual must work, controlling how he accomplishes the tasks set for him, and having the ability to discipline and terminate him at any time.

As independent contractors, these individuals, likely desperate for employment, will lose their entitlement to union representation, wage and hour protections, unemployment insurance, workers' compensation, prepaid medical coverage, and any other benefits as an employee.

A contract or written agreement does not automatically establish independent contractor status. The issue of control and direction must be considered. If the employer exercises control over the individual and directs the work he does, the worker is, in fact, an employee and NOT an independent contractor.

The presumption in current law is that an employer-employee relationship exists unless independent contractor status can be proven. This bill will change the presumption and require the individual to prove that he is not an independent contractor—potentially difficult for an individual facing an employer with far more resources, in a superior position, and with the power to grant employment or not.

The ABC test in the current law and the 20-point guidelines in the administrative rules have provided a sound and rational basis to determine independent contractor status. Please do not let a misapplication in a single case result in enactment of a bad law.

The ILWU respectfully urges that H.B. 1213, HD1 be held. Thank you for considering our views and concerns.

LATE TESTIMONY

MAUI CHAMBER OF COMMERCE

OUR BUSINESS IS MAUI BUSINESS

HEARING BEFORE THE HOUSE COMMITTEES ON
CONSUMER PROTECTION & COMMERCE AND JUDICIARY
March 2, 2015
State Capitol, Conference Room 325
2:15PM

Aloha Chair McKelvey, Chair Rhoads, Vice-Chair Woodson, Vice-Chair Buenaventura and Members of the Committees:

I am writing to share our strong support of HB1213 HD1 with modifications noted below to help clarify who qualifies as an Independent Contractor (IC). This clarification will protect legitimate ICs and those that hire them.

Impetus for This Bill

Over the years we have seen numerous rulings where the Department of Labor and Industrial Relations (DLIR) made determinations against clients, classifying ICs as employees for unemployment benefits through discretionary calls and misapplication of the 3-way test and the subsequent testing built into the rules. We have worked to address this issue with and on behalf of our members for years, but many businesses, particularly small businesses, do not have the time or money to take on the state, so many poor rulings stand.

Last year one of our members, Envisions Entertainment, received a determination from the DLIR that a musician and sole proprietor they hired twice in 18 months to perform music for two events was considered by the DLIR to be employee, not an IC, even though this individual had a full-time position elsewhere, said he was an IC who occasionally provided services to Envisions Entertainment, had a registered business in our state, had a general excise tax license, and signed an IC agreement. This was not a contested case and the DLIR determination was made before interviewing Envisions Entertainment and doing any fact finding. Further, it is important to note that the DLIR's ruling against Envisions Entertainment did not provide any additional benefits to the musician and did not garner the state any more in taxes. The determination merely shifted some of the unemployment benefits burden from the man's full-time employer to Envisions Entertainment. Therefore, the company made the decision to fight the ruling as they regularly need to hire ICs in their course of business and the ruling could devastate their company.

We spoke with legislators last year about this and were encouraged to first work through the Administration and Department, which we and Envisions Entertainment did. We met with and helped educate the Lt. Governor and department on the issue in the hopes of garnering an administrative fix to avoid a costly legal battle on both sides.

However, the former DLIR Director stood by the department's incorrect ruling. During that meeting, the former Director told us that they do sometimes rule in favor of employers and that he would send us 20 redacted copies of rulings in favor of employers as proof. After several months, working through the Lt. Governor's office who worked with DLIR to obtain those copies, they could not send us even 1 ruling, which further illustrates the prevalence of this problem.

Envisions Entertainment had to and did take their case to court. It was an expensive battle (approximately $70,000), but the company won! Not only did they win, but the judge's ruling showcased how inappropriate the department's behavior was and created a new precedent. And, while that is helpful, there is still too much leeway for "interpretation" in the law, DLIR has a history of broad and poor interpretations against employers, and in testimony regarding SB1219 still indicated they would review each situation on a cases by case basis. This is not just an Envisions Entertainment issue or a Maui issue, this is a state issue that affects individuals, businesses and industries who hire ICs to perform specific services. The protected class here is ICs, who choose to operate as such.

Given the good intentions of the current law, we felt the best way to address the problem is to clarify who qualifies as an IC as more and more entrepreneurs are doing business as ICs in this changing economic environment. Therefore, HB1213 HD1 seeks to make it clear as to who qualifies as an IC to remove ambiguity and incorrect determinations against ICs and companies that hire them.

This clarification in no way affects employees. Instead, it recognizes that more and more people are operating as ICs in a new economy and clarifies in state statutes who is an IC under the law. This will avoid discretionary determinations by the DLIR, which will save both businesses and the state a great deal in terms of time, money, and headaches.

Another Wrinkle to Consider

Further, there is also a financial impact to the state that has not been fully considered. ICs pay GET, which nets the state more revenue than the unemployment insurance tax. If the state determines ICs to be employees, will they then be refunding the ICs the amount of GET paid for services performed? This could be a significant impact.

Concerns Raised by DLIR

There have been some concerns raised by DLIR, with information provided in a letter by the USDOL, which has been circulated by DLIR. The initial USDOL response raised two concerns:

- First, a concern was raised with respect to Section 3309 entities. It appears the DLIR is extending USDOL's concern beyond the scope of 3309 entities (governmental entities, certain 501(c)(3) nonprofit organizations and Indian tribes), which we feel is misleading and incorrect. To address the concern regarding 3309 entities, HB1213HD1 could except or exclude FUTA, Section 3309 entities from the Bill's application.
- Second, there is a concern of control, however, HB1213HD1 does not eliminate the states test for IC status and therefore does not conflict with Federal Law. It simply requires that DLIR follow the regulations they promulgated. Please see attorney Anna Elento-Sneed's Memorandum of February 8, 2015.

After seeing a copy of the USDOL letter, attorney Anna Elento-Sneed had a teleconference with Debra Bower, the USDOL's legislative liaison, regarding the two issues raised in the USDOL's letter to Elaine Young. Here is a brief recap of that conversation:

- Regarding the burden of proof (b/p) issue, Ms. Bower sees no Federal conflict given Anna's explanation as to why this shift in the b/p was included in the Bill. Anna analogized it to the shift in the b/p in termination vs. resignation cases. In termination cases, the b/p is on the employer to prove gross misconduct, and in resignation cases, the b/p is on the employee.
- Regarding the control test issue, Ms. Bower read our Circuit Court Decision and agreed with Judge Cahill's analysis and judgment reversing the DLIR's decision. She agreed that ALL 20 factors of the IRS test must be considered and acknowledged that the DLIR failed to do so.

- Finally, Anna relayed that the USDOL's initial letter was based on incomplete facts, so they are working on a 2nd letter to Elaine Young. Anna is hopeful that the substance of her conversation with Ms. Bower will find its way into the letter as well. Ms. Bower would not disclose when it would be sent or its content. We have made follow-up calls to her office and have yet to hear if the letter has been sent.

Further, in conversations with legislators, we understand that DLIR is proposing to codify the 20 point test in the law, which we initially thought would be okay. However, we understand their solution in codifying the 20 point test is to have clients (considered employers) meet all conditions of the 20 point text, which is not a workable solution. This would further extend DLIR's discretionary power, not reduce it. And, this goes well above and beyond the intent of that 20 point test and the scope that the IRS requires. Therefore, we can only support codifying the 20 point test if the language is changed to indicate that there is a preponderance of evidence in contested cases that someone should be an employee as verified by clear and convincing evidence.

Recommendations for HB1213HD1

To address concerns raised by the USDOL and other matters that have come up, we recommend the following changes to HB1213HD1 to strengthen this bill.

- Add a Section to HB1213 to specifically exclude FUTA, Section 3309 entities from the Bill's application to address USDOL comments;
- Eliminating the DCCA registration in (b)(2) as sole proprietors are not required to register with the DCCA.
- Amending Section (c) to: (c) An individual who meets the requirements for IC status under SUBSECTION (A) OR SUBSECTION (B) OF this section shall be certified by the department as an IC. The individual shall provide a written copy of the certification to each customer to whom the individual provides service. This additional language would clarify that subsection (a) (the department test) and subsection (b) (the new, feasible factor test) are alternative tests that each establish a separate, legally-recognized basis for IC certification.
- Amending Section (d) to: (d) If a certified IC files a claim for unemployment insurance benefits against a customer pursuant to this chapter, the burden shall be on the certified independent contract OR to prove that an employer-employee relationship exists BY CLEAR AND CONVINCING EVIDENCE. By including within the legislation that a greater standard of proof (i.e., clear and convincing evidence) must be met by the claimant and/or the agency in order to overturn a claimant's IC certification under Section (a) or (b), the greater threshold of proof would discourage frivolous claims. It also offers additional protection from attempts to usurp the certification process.
- Adding an effective date of January 1, 2016.

Mahalo nui loa for the opportunity to provide testimony on HB1213HD1. We hope you will move this bill forward so that a legislative fix to a long-standing problem can be obtained this year.

Sincerely,

Pamela Tumpap

Pamela Tumpap
President