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LATE

February 01, 2016

To: The Honorable Mark Nakashima, Chair
The Honorable Jarrett Keohokalole, Vice Chair, and
Members of the House Committee on Labor & Public Employment

Date: Tuesday, February 2, 2016
Time: 9:30 a.m.
Place: Conference Room 309, State Capitol

From: Linda Chu Takayama, Director
Department of Labor and Industrial Relations (DLIR)

Re: H.B. No. 2208 Relating to Employment Security

I. OVERVIEW OF PROPOSED LEGISLATION

H.B. 2208 proposes to amend Chapter 383-6, Hawaii Revised Statutes (HRS), by adding new sections as follows:

1. Require the department to issue written determinations to investigated individuals and employers subsequent to the determination as to whether a worker is an employee or self-employed as an independent contractor.

2. Require the department to render a written pre-determination under section 383-6 as to whether as employer-employee relationship exists, at the request of an individual or employer prior to any claim for Unemployment Insurance (UI) benefits and to further post such information on the department website, and

3. Require the department to issue a determination within thirty days of an employer's appeal of a determination under 383-6; and if a decision is not issued within 30 days, the appeal is automatically dismissed in favor of the employer.

DLIR opposes the measure as drafted for both practical reasons and for the federal conformity issues it raises as discussed in depth in Part III below.

II. CURRENT LAW

Act 219, Session Laws of Hawaii (1939) created the Unemployment Insurance Program in Hawaii in response to federal action taken under the Social Security Act of 1935. The two provisions amended in the proposal were incorporated into Hawaii's law via Act 219, Session Laws of Hawaii (1939):

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

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 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.

II. Section 383-74 Appeal; correction of assessment or contributions (HRS) provides an appeal mechanism for employers aggrieved by any assessment of a contribution or a penalty or contributions assessed under chapter 383.

III. COMMENTS ON THE HOUSE BILL

The Department opposes HB 2208 for these major reasons:

1. In recognition of concerns raised over the coverage determinations made by the department, DLIR undertook several measures to improve the process and training of staff regarding coverage determinations. The department, in conjunction with the Department of the Attorney General, conducted statewide auditor training that provided guidelines to assist auditors in applying section 383-6, HRS, during audit investigations. The guidelines included requiring increased factual information to make coverage determinations, essentially requiring the UI auditors to perform thorough and rigorous investigations.

   Furthermore, DLIR revamped the written determination process that now requires each determination letter to address each section of the ABC test in detail and applicable administrative rules.

2. Coverage determinations are made on a case-by-case basis and the length of an investigation is dependent on the complexity of each case. Once the

determination letters are finalized, the letter is immediately mailed to the employer. As written, the bill gives the department ten days to issue a determination from the conclusion of the investigation.

DLIR notes that the proposed subsection 383-6 (b) requires the department to issue a coverage determination to the investigated individual and employer. Further, the proposal incorrectly cites HRS section 383-38, which applies to UI benefit appeals. The applicable statute for coverage determination appeals is HRS section 383-74. Pursuant to 383-74, an employer may appeal a tax assessment resulting from a coverage determination. The applicable provisions of Hawaii Employment Security Law when determining unemployment coverage for the employee are HRS sections 383-1, 383-2, 383-6, and 383-10. As a result, the investigated individual is not an aggrieved party who may appeal a tax assessment on a coverage determination.

3. The proposed 383-6 subsection (c) raises federal conformity issues that jeopardizes approximately $14,000,000 in federal funding to operate the Unemployment Insurance Program. The proposed subsection (c) provides "an employer may appeal the department's determination of a relationship pursuant to section 383-38. The department shall have thirty days after the filing of the appeal by an employer to issue its decision regarding the appeal. If the department does not issue its decision regarding the appeal in thirty days, the appeal shall be dismissed in favor of the employer."

   However, Section 303(a)(1) of the Social Security Act requires state law provide for "such 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 U.S.DOL has interpreted this provision to mean that once a determination is made, it must remain in force until such time that the determination is amended or overturned. The state may not make a determination in favor of the employer without issuing a determination based on the facts of the case. If the appeal is dismissed, the original determination is still in force and continues to be so until overturned or amended.

   Additionally, the language creates a disparate treatment between employers and claimants. The current language would unfairly impact claimants if employers automatically prevailed within 30 days without a decision issued, as it would be unfair to employers if claimants who appealed and did not have a resolution within 30 days automatically qualified for benefits.

   Moreover, there are many factors outside DLIR's control, which could result in a decision being issued beyond 30 days, such as a request for an in-person hearing, a party's postponement request, or a hearing officer's unexpected absence from work.

4. The proposed sections 386-6 (d), (e) and (f) permit individuals and employers to request an advisory opinion that DLIR must issue within thirty (30) days of the request and post on DLIR's website. Employers may mistake an advisory opinion to be the equivalent of an appealable coverage determination. Coverage determinations require a thorough in-depth investigation that contains factual evidence and not hypothetical case situations.

   The coverage determination process is a time-intensive process that requires considerable staff resources. Requiring the department to issue an advisory opinion also detracts from the major functions of the UI tax section. Current federal funding levels are sufficient to allow the department to carry out the major functions of the UI tax section—adding any additional functions would not be supported by increased allocations from the U.S.DOL, and therefore, would require generally-funded positions to cover this additional function.