



**LATE**

**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-EIGHTH LEGISLATURE, 2016**

---

**ON THE FOLLOWING MEASURE:**

**S.B. NO. 2694, S.D. 1, RELATING TO EMPLOYMENT SECURITY.**

**BEFORE THE:**

**SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH**

**DATE:** Friday, February 26, 2016

**TIME:** 10:30 a.m.

**LOCATION:** State Capitol, Room 229

**TESTIFIER(S):** WRITTEN COMMENTS ONLY. For more information, call  
Robyn M. Kuwabe, Deputy Attorney General at 586-1450.

---

Chair Baker and Members of the Committee:

The Department of the Attorney General provides comments about this bill.

The purpose of this bill is to clarify Hawaii's employment security law, regarding the tests to be used in determining whether an individual is an independent contractor.

This bill modifies what is commonly referred to as the "ABC Test," found in section 383-6, Hawaii Revised Statutes (HRS), by deleting the word "customarily" from section 383-6(a)(3) and adds a revamped version of the common-law twenty factor test. The common-law twenty factor test is currently found in the Department of Labor and Industrial Relations' administrative rules, section 12-5-2(b), Hawaii Administrative Rules (HAR). Because the two tests are already in the statute and administrative rules, this bill may not be necessary.

In addition, the bill includes on page 6, lines 3-12, a definition of "independent contractor," which creates an internal conflict. The definition is not consistent with the ABC and the common-law tests provided in the bill for determining if an individual is an independent contractor because the definition does not incorporate all the requirements of the two tests.

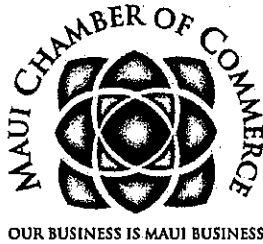
To the extent that the bill seeks to inform the public of the criteria used by the Department of Labor and Industrial Relations when determining if an individual is an employee or independent contractor, the Department suggests that section 12-5-2, HAR, be codified in lieu of the proposed revamped version of the twenty factor test as that will avoid the problem with the independent contractor definition. In addition, the Department suggests that the deletion of

**LATE**

Testimony of the Department of the Attorney General  
Twenty-Eighth Legislature, 2016  
Page 2 of 2

“customarily” in section 383-6(a)(3) may not be necessary if the independent contractor definition is deleted.

We respectfully request that the bill be amended as suggested above.



**LATE**

HEARING BEFORE THE  
SENATE COMMITTEE ON JUDICIARY & LABOR  
February 26, 2016  
State Capitol, Room 229  
10:30 AM

**TESTIMONY IN STRONG SUPPORT OF SB2694SD1  
RELATING TO EMPLOYMENT SECURITY**

Aloha Chair Baker, Vice Chair Kidani, and Members of the Committee:

I am writing share our **strong support of SB2694SD1** which clarifies Hawaii's employment security law for independent contractors; includes twenty factors to be used as guidelines when determining whether an individual could be an independent contractor, retains the ability of the department of labor and industrial relations to determine if an individual is an independent contractor; requires the Director of Labor and Industrial Relations to report to the legislature prior to the regular session of 2017 regarding guidelines developed by the unemployment insurance coverage committee; and requires an annual report to the legislature regarding covered employment determinations. This bill goes a long way toward protecting legitimate independent contractors and those that hire them from erroneous rulings by the Department of Labor and Industrial Relations (DLIR), where legitimate independent contractors have been determined to be employees.

Over the years we have seen numerous rulings where the DLIR has made determinations against employers, classifying people 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 they simply chose not to fight it and many poor rulings stand.

Two years ago 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 independent contractor, even though this individual had a full-time position elsewhere, said he was an independent contractor who occasionally provided services to Envisions Entertainment and others, had a registered business in our state, had a general excise tax license, and signed an independent contractor agreement. The DLIR determination was made before interviewing the company 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 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 independent contractors in their course of business and the ruling could devastate their company.

Many who read the department's determination, including several lawyers, called it "ridiculous" and we had to agree. So, we spoke with legislators two years 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 and said they do sometimes rule in favor of employers and that he would send us 20 redacted copies of rulings 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 (over \$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 and DLIR has a history of broad and poor interpretations against employers. 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 independent contractors to perform specific services.

Given the good intentions of the current law, we felt a better route was to simply clarify who qualifies as an independent contractor as more and more entrepreneurs are doing business as independent contractors in this changing economic environment. Two bills were introduced last legislative session HB1213 and SB1219. They sought to make it clear as to who qualifies as an independent contractor to remove ambiguity and incorrect determinations against independent contractors and companies that hire them. This clarification in no way affected employees. Instead, it recognizes that more and more people are operating as independent contractors in a new economy and clarifies in state statutes who is an independent contractor under the law.

Both bills went through the legislative process. HB1213 died earlier on, but SB1219 made it to conference committee. Through this process, many Senators and Representatives well understood the issue and had stories of their own of people who had been negatively impacted by erroneous rulings.

Further, the state may find that they have unfairly and unlawfully collected taxes on those Independent Contractor who were later deemed to be employees by DLIR as they paid GET as an Independent Contractor. When the state was asked if the GET paid was returned in those cases, there was no answer from the DLIR or the Tax Department.

So, today, in an effort to continue the dialog, be clear that this is not an employee issue, and obtain better protections for independent contractors and those that hire them, **we are here to encourage strong support SB2694** as this bill:

- Recognizes that more individuals are doing business as independent contractors and that they may still have other jobs outside of their business;
- Provides greater clarity in Hawaii's employment security law for those who choose to be independent contractors;
- Provides better guidelines for determinations; and
- Requires reporting and more transparency from the DLIR.

Mahalo nui loa for the opportunity to provide testimony. **We ask for your strong support of SB2694 SD1 to rectify this ongoing problem.**

Sincerely,



Pamela Tumpap  
President

The Twenty-Eighth Legislature  
Regular Session of 2016

## THE SENATE

Senator Gilbert S.C. Keith-Agaran, Chair  
Senator Maile S.L. Shimabukuro, Vice Chair  
State Capitol, Conference Room 016  
Tuesday, February 16, 2016; 9:00 a.m.

### STATEMENT OF THE ILWU LOCAL 142 ON S.B. 2694, SD1 RELATING TO EMPLOYMENT SECURITY

The ILWU Local 142 **opposes** S.B. 2694, SD1, which clarifies Hawaii's employment security law for independent contractors to include 20 factors to be used as guidelines when determining whether an individual could be an independent contractor. The bill retains the ability of the Department of Labor and Industrial Relations to determine if an individual is an independent contractor and requires DLIR to report to the Legislature prior to the regular session of 2017 regarding guidelines developed by the Unemployment Insurance Coverage Committee and requires annual reports to the Legislature regarding covered employment determinations.

We believe this bill is unnecessary and will further muddy the waters regarding independent contractor status. The Employment Security law (HRS 383) is clear. According to HRS 383-6, a "master-servant"—or employer-employee—relationship exists unless and until it is shown to the satisfaction of DLIR that the "ABC test" applies, namely that:

- (A) 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
- (B) the service is either outside the usual course of the business for which the service performed or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and
- (C) 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.

Furthermore, the Administrative Rules (12-5-2) are clear and clarify the law. They spell out 20 factors which may be used as guides to determine if an individual is an employee. These 20 factors need not be included in the law as they are "guidelines," as the bill states, the same as is stated in the Administrative Rules.

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 recognized that application of the test for "control and direction" should determine independent contractor status. That the guidelines and law were not strictly applied in one instance should not justify changing the law. This bill does nothing to make a bad situation better. In fact, it will make matters worse.

# LATE

Although the issue of conformity with federal law seems to have been addressed, amending the law must be carefully thought through to ensure no unintended consequences. However, we firmly believe there is **no need to amend the law**.

The ILWU respectfully urges that S.B. 2694, SD1 be HELD. Thank you for considering our views and concerns.

**baker6 - Christina**

---

**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Thursday, February 25, 2016 2:53 PM  
**To:** CPH Testimony  
**Cc:** bob@whalersrealty.com  
**Subject:** \*Submitted testimony for SB2694 on Feb 26, 2016 10:30AM\*

**SB2694**

Submitted on: 2/25/2016

Testimony for CPH on Feb 26, 2016 10:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Robert J Cartwright	Whalers Realty Inc	Support	No

## Comments:

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

Do not reply to this email. This inbox is not monitored. For assistance please email [webmaster@capitol.hawaii.gov](mailto:webmaster@capitol.hawaii.gov)

baker6 - Christina

---

**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Thursday, February 25, 2016 2:06 PM  
**To:** CPH Testimony  
**Cc:** divinhawaii@hawaii.rr.com  
**Subject:** Submitted testimony for SB2694 on Feb 26, 2016 10:30AM

**SB2694**

Submitted on: 2/25/2016

Testimony for CPH on Feb 26, 2016 10:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Nicholas Fidelibus	Individual	Support	No

Comments: Aloha, I am an independent contractor and I support this bill. As an independent contractor, I am able to gain contracts and work that I would otherwise not be able to obtain. I am able to provide for my family according to the lifestyle that I choose to live. I can set my own hours, work when I want and be my own boss. This bill helps to support that. Sincerely, Nick Fidelibus

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

Do not reply to this email. This inbox is not monitored. For assistance please email [webmaster@capitol.hawaii.gov](mailto:webmaster@capitol.hawaii.gov)