HB2602 HD1

Measure Title:	RELATING TO INDEPENDENT CONTRACTORS.
Report Title:	Employment Security Law; Independent Contractors; Employer and Employee Relationship
Description:	Provides three categories and twelve factors for the Department of Labor and Industrial Relations to apply to determine independent contractor status. (HB2602 HD1)
Companion:	SB3106
Package:	None
Current Referral:	LBR
Introducer(s):	YAMASHITA, DECOITE, EVANS, HASHEM, ICHIYAMA, LUKE, MCKELVEY, NAKAMURA, SOUKI, TAKAYAMA, WOODSON, Keohokalole

Sort by Date		Status Text
1/24/2018	H	Introduced and Pass First Reading.
1/29/2018	H	Referred to LAB, FIN, referral sheet 9
2/1/2018	H	Bill scheduled to be heard by LAB on Tuesday, 02-06-18 10:30AM in House conference room 309.
2/6/2018	H	The committees on LAB recommend that the measure be PASSED, WITH AMENDMENTS. The votes were as follows: 7 Ayes: Representative(s) Johanson, Holt, Ichiyama, Keohokalole, Yamashita, Matsumoto; Ayes with reservations: Representative(s) Evans; Noes: none; and Excused: none.
2/15/2018	H	Reported from LAB (Stand. Com. Rep. No. 471-18) as amended in HD 1, recommending passage on Second Reading and referral to FIN.
2/15/2018	H	Passed Second Reading as amended in HD 1 and referred to the committee(s) on FIN with none voting aye with reservations; none voting no (0) and Representative(s) DeCoite, Ing, McDermott, Nakamura, Souki, Todd excused (6).
2/23/2018	H	Bill scheduled to be heard by FIN on Wednesday, 02-28-18 11:00AM in House conference room 308.
2/28/2018	H	The committees on FIN recommend that the measure be PASSED, UNAMENDED. The votes were as follows: 13 Ayes: Representative(s) Luke, Cullen, DeCoite, Gates, Holt, Keohokalole, Lowen, Todd, Yamashita, Tupola, Ward; Ayes with reservations: Representative(s) Cachola, Nakamura; Noes: none; and 2 Excused: Representative(s) Fukumoto, Kobayashi.
3/2/2018	H	Reported from FIN (Stand. Com. Rep. No. 987-18), recommending passage on Third Reading.
3/2/2018	H	Passed Third Reading with none voting aye with reservations; none voting no (0) and Representative(s) Ing, San Buenaventura, Say, Yamane excused (4). Transmitted to Senate.
3/6/2018	S	Received from House (Hse. Com. No. 239).
3/6/2018	S	Passed First Reading.
3/8/2018	S	Referred to LBR.
3/16/2018	S	The committee(s) on LBR has scheduled a public hearing on 03-20-18 2:45PM in conference room 229.

S = Senate | **H** = House | **D** = Data Systems | **$** = Appropriation measure | **ConAm** = Constitutional Amendment

Some of the above items require Adobe Acrobat Reader. Please visit Adobe's download page for detailed instructions.

HB2602 HD1

DAVID Y. IGE
GOVERNOR

DOUGLAS S. CHIN
LIEUTENANT GOVERNOR

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STATE OF HAWAII
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March 19, 2018

To: The Honorable Jill N. Tokuda, Chair,
The Honorable J. Kalani English, Vice-Chair, and
Members of the Senate Committee on Labor

Date: Tuesday, March 20, 2018
Time: 2:45 p.m.
Place: Conference Room 229, State Capitol

From: Leonard Hoshijo, Director
Department of Labor and Industrial Relations (DLIR)

Re: H.B. 2602 HD1 RELATING TO INDEPENDENT CONTRACTORS

I. OVERVIEW OF PROPOSED LEGISLATION

HB2602 HD1 seeks to amend section 383-6, Hawaii Revised Statutes (HRS), by replacing the 3-part ("ABC") employment test with three categories and 12 factors to determine independent contractor status. The Internal Revenue Service (IRS) has utilized behavior control, financial control and relationship of the parties, in conjunction with the 20-factor test published in the IRS *Revenue Ruling 87-41* as analytical tools to reflect primary categories of evidence to determine whether a worker is an independent contractor or employee under the common-law standard.

The Department strongly opposes this measure.

The bill's language raises a potential conformity issue with the U.S.DOL. Federal requirements provide that the state law must provide for a test of the employee-employer relationship that is at least rigorous as the Federal common law test. Hawaii law currently does this through the application of the "ABC test" in §383-6 where the "A" part of the test determines direction and control. The bill in its current form does not contain this "direction and control" test and raises a potential issue with Federal Unemployment Compensation law. The sanction for non-conformity is severe:

1) All employers will face a tenfold increase as the .6% FUTA tax would increase to 6%, and

2) Hawaii may jeopardize over $14 million in federal funds to administer the UI program.

This measure disregards the disparate purposes of the federal and state laws that impact the Unemployment Insurance (UI) program and distorts the legal foundations for §383-6, which reflects the intent of the Legislature to reject the limitations of the master-servant relationship in favor of broad protection of all workers.

1) The 3 categories and 12 factors, as proposed in this measure, are intended as a new employment test to supplant the existing ABC standard. However, the IRS has consistently maintained that the 20-factor test and by extension, its modified version as promoted in this bill, are analytical tools and NOT the legal test used for determining worker status. The legal test is the common law, master-servant standard. That is, the employer has the right to control and direct the employee, not only as to the work to be done, but also as to the details and means by which the work is done.

2) The right to control under common law rules is applicable only to the A test in §383-6, although it was the intended purpose of the Legislature to include all workers whom the law was socially designed to protect. The language not only presumes that services performed by an individual for wages or under a contract is considered to be employment, but asserts an expanded inclusiveness with the clause, "irrespective of whether the common-law relationship of master and servant exists…" Thus, other evidence that affect a ruling of independent contractor status investigating the B and C elements in §383-6 must also considered.

3) Under the UI system's federal-state partnership, employers are assessed a tax on all covered employees under the Federal Unemployment Tax Act (FUTA) as well as under the Hawaii Employment Security Law. Employers who pay contributions under an approved state law may receive offset credits against the FUTA tax, which is collected to provide 100% administrative funding to operate each state's UI program. Under Chapter 383, HRS, employer contributions deposited into the UI trust fund are used to pay workers who accrue benefits under state law. Therefore, by repealing Hawaii's ABC test in favor of a narrower, minimum standard of employment, the rights of workers that the Social Security Act passed in 1935 was designed to protect would be harmed.

II. CURRENT LAW

Services performed for remuneration are considered to be in employment under section 383-2, HRS, unless and until all three prongs – in the conjunctive—contained in section 383-6, HRS, are met. The ABC test, a statutory requirement since the beginning of the unemployment insurance (UI) program in 1939, is found in most other state laws:

1. The individual has been and will continue to be free from control or direction 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, profession, or business of the same nature as that involved in the contract of service.

III. COMMENTS ON THE HOUSE BILL

The department opposes this measure for the reasons stated above and, in addition, for the following considerations:

1. 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**.** Repealing the comprehensive ABC test with an analytical tool to issue common-law rulings based in FUTA statutes and restricted to the A test only, defies logic. If enacted, workers' benefit rights will be impaired, confusion will delay coverage determinations issued by UI auditors and employers may be adversely affected by higher FUTA taxes should there be inconsistencies in interpretations of employment rendered under state and federal laws. At worst, the consequences if a state law fails to cover services that are not excepted from FUTA may result in loss of certification for tax credits for all employers liable for the federal tax.

2. The stability and strength of the UI program lies in its historical significance as remedial legislation to provide financial security to all workers suffering from loss of job income. While the purported intent of this measure is to clarify independent contractor status for individuals seeking to become self-employed, it may seriously erode protection of workers whose livelihoods may depend on a legitimate employment relationship and who truly benefit from that safety net when they find themselves out of work. 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.

   Further, as all employers subject to unemployment taxes pay into a collective unemployment trust fund to support the payment of benefits, if this measure increases the number of self-employed, UI tax collections would diminish to the extent that those employers who cover their workers would ultimately be assessed higher unemployment contributions to maintain a solvent trust fund.

3. DLIR continues to apply the ABC test and follows the guidance in HAR 12-5-2, including the IRS 20 factors, to determine employee status. In 2017, a total of 372 determinations were issued by UI auditors regarding independent contractor vs. employees, which involved 853 individuals. 752 were found to be in covered employment and 121 were ruled as independent contractors.

HB-2602-HD-1
Submitted on: 3/19/2018 10:12:51 AM
Testimony for LBR on 3/20/2018 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Jamie Lawrence	Testifying for Tropical Maui Weddings	Support	No

Comments:

Our business is a "mom & pop" home based business with no employees. The nature of our wedding business makes it necessary for us to frequently hire independent contractors. We hired a contractor to assist with office tasks while my wife and I were away from the office for several weeks. It was understood by all parties that this was a contractual arrangement and not employment. The contractor provided proof of a Hawaii State General Excise Tax license. After 2 months we terminated this contractor. The contractor subsequently filed for Unemployment, and there was an investigation to determine whether or not the contractor was in fact an employee. The auditor concluded that the contractor was, in fact, an employee, and we were directed to pay the appropriate insurance premiums. We filed an appeal. The contractor participated in the appeal and supported our position. We have not received the results of that appeal. Meanwhile, we are required to file quarterly reports to DLIR, even though we have no employees, and do not intend to hire any employees at this time. Failure to file these reports, or to file them on time, results in penalties and fines. We feel that the burden of these reports are unnecessary, and that the employee determination made by the auditor shows the need for better guidelines for auditors to follow in making such a determination. Thank you for the opportunity to provide this testimony.

HB-2602-HD-1
Submitted on: 3/19/2018 9:41:00 AM
Testimony for LBR on 3/20/2018 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Thomas Cook	Testifying for Construcion Industry of Maui	Support	No

Comments:

This bill is necessary to clarify the guidlines of when someone is an empoloyee and when they are an independant contractor.

Thank you

HB-2602-HD-1
Submitted on: 3/19/2018 9:09:16 AM
Testimony for LBR on 3/20/2018 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
kevin obrien	Testifying for esign & design	Support	No

Comments:

Chamber of Commerce HAWAII
The Voice of Business

Testimony to the Senate Committee on Labor
Tuesday, March 20, 2018 at 2:45 A.M.
Conference Room 229, State Capitol

RE: HOUSE BILL 2602 HD1 RELATING TO INDEPENDENT CONTRACTORS

Chair Tokuda, Vice Chair English, and Members of the Committee:

The Chamber of Commerce Hawaii ("The Chamber") **supports** HB 2602 HD1, which provides an appropriation to support the continuation of business accelerator programs.

The Chamber is Hawaii's leading statewide business advocacy organization, representing about 2,000+ businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

HB2602 is an attempt to address the many issues with our state worker classification and to modernize our state laws. By changing our state law to the 11-factor common-law test, our law would be consistent with the IRS. This will prevent the possibility of two different worker classifications from the state and IRS. In addition, by updating our state law to the IRS 11-factor common-law test, we will be on the forefront of modernizing our employment law. The 11-factor common-law test is easier to understand for businesses and leaves less room for broad interpretations and inconsistency. This bill goes a long way toward protecting legitimate independent contractors and those that hire them from erroneous rulings. We ask that you please pass HB2602 to clarify independent contractors in our state law.

Thank you for the opportunity to testify.

1132 Bishop Street, Suite 2105 • Honolulu, Hawaii 96813 • Phone: (808) 545-4300 • Facsimile: (808) 545-4369

envisions
creative event production

March 19, 2018

To: The Honorable Jill N. Tokuda, Chair
The Honorable J. Kalani English, Vice Chair
Members of the Committee on Labor
Date: Tuesday, March 20, 2018
Time: 2:45 am
Place: State Capitol, Conference Room 229
415 South Beretania Street

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

RE: H.B. 2602, HD1 - Relating to Independent Contractors

TESTIMONY IN SUPPORT OF H.B. 2602, HD1

My name is Wayne Hikiji and I am the president of *Envisions Entertainment & Productions, Inc.* ("*Envisions*"), an event production company based in Kahului, Maui, in business for 23 years.

In 2013, the Department of Labor and Industrial Relations' ("DLIR") determined that a self-employed musician we booked on occasion was our employee. On appeal to the 2nd Circuit Court, Judge Cahil reversed the Decision and issued a scathing judgment of the DLIR's "clearly erroneous" interpretation of the ABC Test. (**a redacted copy of the Court's Decision was attached to my previous Written Testimonies on this Bill and was also appended to my February 7th Written Testimony before this committee**).

In our case, the DLIR determined that we exercised sufficient control over a musician by simply telling him where and when to perform. As remarkable as their view of control is, the conjunctive requirement of the ABC Test mandated a finding of employment because failing the A prong without even considering the B and C prongs of the test was sufficient as a matter of law.

The DLIR's erroneous interpretation of the ABC Test continues to result, in many incorrect rulings in favor of employment even when there is uncontroverted evidence of a voluntary and concensual Independent Contractor ("IC") relationship. So much so that it is virtually impossible to be an IC in almost any scenario. In fact, in 2014, 2015 & 2016, the DLIR could not identify any cases in which it found for IC status.

Therefore, for the last three (3) years, the Maui Chamber of Commerce and I have lobbied for legislative clarity to ensure that the DLIR correctly interpret the ABC Test in future IC classification cases. Now in our 4th year, we believe HB 2602, HD1 clarifies and refines the ABC Test to ensure a more equitable application of the law in determining IC classification.

36 Pa'a Street, Kahului, Hawaii 96732 * Office: (808) 874-1000 * Fax: (808) 879-0720
INFO@EnvisionsEntertainment.com

I incorporate by reference my February 7th Written Testimony submitted to this committee. In addition, I am writing in strong support of HD 2602, HD1 ("HD1") for the reasons expressed above and below:

1. The DLIR argues that HD1 replaces the ABC Test. It does not. It simply refines and clarifies it. HD1 still includes the A, B & C categories similar to existing law. What it does do is eliminate the conjunctive language discussed above and adds factors under each category to provide guidance to help anyone reading the statute understand what each part of the test focuses on.

2. The DLIR and many of the Labor Unions continue to argue that many ICs don't understand their obligations as ICs and the rights they give up by not being an employee. This is archaic thinking. That may have been true many years ago, but in this day and age, most people understand that they are not entitled to employee benefits from their customers if they are in business for themselves. If the DLIR is concerned about individuals really understanding what is at stake, the solution is more education and examples in the law, not forcing employee status on these individuals.

3. Spending taxpayer dollars to investigate and disrupt concensual IC relationships is also fiscally irresponsible. Certainly, State dollars are better spent investigating contested cases where there is real concern that an employer is mis-classifying a legitimate employee.

4. The DLIR also suggests that HD1 could put FUTA certification in jeopardy. There is no evidence that clarification of the IC test will jeopardize the State's participation in the UI program. Other states have different statutory language and regulations which enable individuals to do business as ICs and these states still participate in the UI system.

5. The DLIR argues that the Bill will erode protection of workers but provide no explanation of how this would occur. It appears the Dept. is concerned that if more people go into business for themselves, they will have less UI contributions. This makes no sense, particularly since ICs do not draw UI benefits. Plus, as new ICs become successful and grow, they may hire employees and create new accounts of their own so contributions continue.

6. The DLIR asserts that this Bill will increase ICs, thus reducing the employee pool and jeopardizing the solvency of the UI fund. Are they saying that we should discourage the creation of business in order to keep UI contributions low for the existing companies? If so, that is not the purpose of the Employment Security law, and it's not a viable economic model for the state.

   Our State needs to adapt and diversity its economy, which means innovation and growth in new business. The DLIR's view would limit our economy to big business, to the detriment of 90% of the economy which is made up of small businesses.

7. In 2014, 2015 & 2016, the DLIR could not identify any cases in which it found IC status. So, it's hard to believe that one year later, they ruled 121 individuals as ICs, especially given the fact that their official position is still that everyone should be an employee. Perhaps they should post the IC decisions so others can see what factors they considered to be valid indicia of IC status.

8. AFL-CIO: They contend that the Bill jeopardizes employee rights. They offer no factual basis for this bald conclusion other than the unsubstantiated presumption that employers force individuals to be ICs. This is not the case in most instances. For the few contested cases where this is an issue, the DLIR grievance process remains. This Bill does not change this statutory remedy.

9. Finally, an increasing number of individuals around the world and in Hawaii are choosing to go into business for themselves. These ICs are the nation's fastest-growing workforce and studies have predicted that by 2020, 40 percent of American workers will be ICs. In response to this growing gig economy, other jurisdicitions such as Nevada and Arizona have taken bold measures to create legal presumption of valid independent contractor status. (**see the attached NFIB and Lexology articles**). HD1 does not go as far, but it would modernize the ABC test to provide much needed clarity to protect legitimate IC relationships, not just employees.

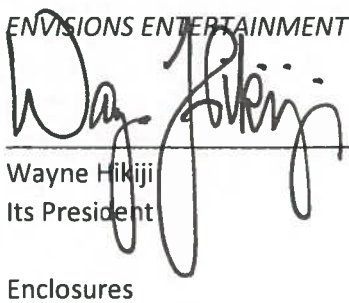
CLOSING.
At the end of the day, we are simply advocating for the equitable application of the law. We certainly don't want situations where the DLIR's paternal tendency forces independent business people to be employees simply because the DLIR thinks it is "better for them."

As an employer of 23 full time and 20-30 part-time employees, many of whom have been with us for 15-20 years, we take seriously the protection of benefits for our valued employees. But as a company that also retains over 150 ICs per year, it is equally important that the DLIR protects and respects legitimate IC relationships too.

Given the foregoing, I humbly ask that you pass HD1 through your committee.

Respectfully submitted,

ENVISIONS ENTERTAINMENT & PRODUCTIONS, INC.



Wayne Hikiji
Its President

Enclosures

National Federation of Independent Business (http://www.nfib.com)

Arizona's New Independent Contracting Law Sets National Standard

Date: May 18, 2016 **Last Edit:** May 23, 2016

Related Content: News State Arizona Independent Contractors

State Rep. Warren Petersen teams up with NFIB/Arizona State Director Farrell Quinlan and David Selden of The Cavanagh Law Firm to produce nationally ground-breaking law for independent contractors

They are the nation's fastest-growing workforce: The people who want to work for themselves, who want to be their own boss.

These entrepreneurially spirited independent contractors, however, have come under intense scrutiny from the state and federal governments. But a new law in Arizona, the first of its kind anywhere, properly rewards, not punishes, the labor of individuals.

Independent contractors are commonly used by businesses in Arizona. However, the classification of workers as either "W-2" employees or "1099" independent contractors is not uniform, and this lack of uniformity can create uncertainty, confusion, risk and costs among businesses and workers.

It also exposes businesses to unexpected liability in the event government regulators retroactively reclassify their 1099 workforce as W-2 employees.

While a business and the contractor may consider their relationship to be an independent contractor relationship, unemployment insurance audits by the state often results in the reclassifying of workers as employees, causing the business to have to pay for all back income tax withholdings, workers compensation premiums, unemployment insurance taxes and other mandated benefits like Obamacare.

"Last July, the U.S. Department of Labor issued a 15-page guidance imploring federal and state enforcement agencies to emphasize the 'ultimate question of economic dependence' rather than the common law control test to determine if a worker should be classified as a 1099 Independent contractor or W-2 employee." *

Responding to this growing challenge to our members, NFIB/Arizona State Director Farrell Quinlan teamed up with Arizona House Commerce Committee Chairman Rep. Warren Petersen and employment law expert David Selden of The Cavanagh Law Firm (http://www.cavanaghlaw.com/) (an NFIB member) to produce House Bill 2114, (http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=HB2114&Session_ID=113) which was signed into law by Gov. Doug Ducey and goes into effect on August 6, 2016.

The new law establishes a Declaration of Independent Business Status (DIBS) that allows workers and businesses to create a legal presumption for state enforcement agencies of a valid independent contractor relationship by:

- the independent contractor executing a DIBS setting forth the intent to be an independent contractor
- the rights that they have as an independent contractor
- and the contracting party acting in a manner consistent with the DIBS.

"Former Labor Department lawyer Tammy McCutchen told *The Wall Street Journal* that the language in the DOL guidance '... essentially declares war on the use of independent contractors.'" *

This first-in-the-nation DIBS option provides a form declaration that incorporates many factors considered by state and federal enforcement agencies when analyzing whether an independent contractor relationship exists. As a result, the DIBS legislation serves as an excellent educational tool for defining the proper use of an independent contractor that will also buttress successful compliance with federal standards.

The major acknowledgements required in the DIBS agreement include:

- the contractor operates their own independent business;
- the contractor's services do not establish any rights arising from an employment relationship;
- the contractor is responsible for all taxes (such as income, FICA, Medicare, workers' compensation, etc.) and the contracting party will not withhold any taxes;
- the contractor is responsible for obtaining and maintaining any required registration, licenses or other authorizations;
- the contractor is not insured under the contracting party's health insurance coverage or workers' compensation insurance coverage;
- the contractor is not only able but expected to perform services for other parties;
- the contractor is not economically dependent on the services performed for the contracting party;
- the contracting party does not dictate the performance, methods or process to perform services;
- the contractor determines the days worked and the time periods of work;
- the contractor is responsible for providing all tools and equipment needed;
- and, the contractor is responsible for all expenses incurred by the contractor in performing the services.

*Above quotes from My View: Seeking clarity on contractor law, (http://www.bizjournals.com/phoenix/print-edition/2016/04/15/my-view-seeking-clarity-on-contractor-law.html) by Farrell Quinlan, Phoenix Business Journal, April 15, 2016.

"A growing proportion of our nation's workforce is made up of freelancers and contract workers. The General Accounting Office estimates their current number to be about 42 million Americans and that's expected to grow to 65 million by the end of the decade." *

Related Content: News | State | Arizona | Independent Contractors

This first-in-the-nation DIBS option provides a form declaration that incorporates many factors considered by state and federal enforcement agencies when analyzing whether an independent contractor relationship exists.

U.S. Department of Labor Withdraws Independent Contractor and Joint Employment Guidance

USA June 12 2017

In a positive development for employers, the United States Department of Labor (DOL) announced on Wednesday, June 7, 2017, that it is withdrawing two Interpretations issued during the Obama Administration.

Interpretation No. 2015-1 addressed the classification of independent contractors under the Fair Labor Standards Act (FLSA), and took the expansive view that most workers qualify as employees and are thus entitled to minimum wages and overtime pay. Interpretation No. 2016-01 expanded the definition of "joint employment" under the FLSA and the Migrant and Seasonal Agriculture Protection Act (MSPA), allowing more workers to claim they were due wages by more than one company.

While these Interpretations were viewed by the Obama Administration as an effort to crack down on employee misclassification and tighten standards for determining joint employment, they created more legal risks for companies by calling into question longstanding work arrangements. The Interpretations were not law, but they served as a guide for the DOL's Wage & Hour Division in its enforcement efforts. Withdrawal of the Interpretations signals that the Trump Administration DOL will be less aggressive in its enforcement efforts in these two areas; however, state laws may differ from federal laws with regard to independent contractor and joint employment status.

For example, Nevada and Arizona have adopted laws that allow for greater certainty for businesses.

In 2015, Nevada enacted NRS 608.0155, which creates a presumption that a person is an independent contractor if he or she (1) possesses or has applied for an employer identification number or social security number, or has filed a tax return for a business or earnings from self-employment with the IRS in the previous year, (2) is required by the contract with the principal to hold any necessary state business registration, licenses, insurance or bonding, and (3) satisfies three or more of the following criteria:

- the person has control and discretion over the means and manner of the performance of any work and the result of the work;
- the person has control over the time the work is performed;
- the person is not required to work exclusively for one principal;
- the person is free to hire employees to assist with the work; and

- the person contributes a substantial investment of capital in the business of the person.

In 2016, Arizona enacted A.R.S. § 23-1601, which creates a rebuttable presumption that an independent contractor relationship exists if the contractor signs a declaration acknowledging that (1) the contractor operates its own business, (2) the contractor is not an employee of the employing entity, (3) the employing entity does not restrict the contractor's ability to perform services for other parties and expects that the contractor will provide services for other parties, (4) the contractor will be paid based on the work to be performed, not on a salary or hourly basis, and (5) the contractor is not covered by the employing entity's health or workers compensation insurance.

California law has principally relied on a multi-factor common law test to determine contractor vs. employee status. However, the California Supreme Court is currently considering an expansive definition of the word "employ." In Dynamex Operations West v. Superior Court, 179 Cal. Rptr. 3d 69, the Second Appellate District rejected the traditional common law test based on whether the employer has the right to control the manner and means of accomplishing the result desired, in favor of defining the word "employ" to mean "to engage, suffer, or permit to work." If upheld, Dynamex will result in the reclassification of many independent service providers as employees, entitling them to California's wage and hour protections.

In light of these developments, employers should seek legal counsel when considering whether to engage someone as a contractor or employee, and to evaluate existing contractor arrangements to determine whether they satisfy these legal tests.

Payne & Fears LLP - Amy R. Patton, Matthew L. Durham and Rhianna S. Hughes

HAWAII STATE AFL-CIO

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Randy Perreira
President

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The Twenty-Ninth Legislature, State of Hawaii
Hawaii State Senate
Committee on Labor

Testimony by
Hawaii State AFL-CIO
March 20, 2018

H.B. 2602, H.D.1 – RELATING TO INDEPENDENT CONTRACTORS

The Hawaii State AFL-CIO strongly opposes H.B. 2602, H.D.1 which provides three categories and twelve factors for the Department of Labor and Industrial Relations to apply to determine independent contractor status.

The Hawaii State AFL-CIO is concerned changing the independent contractor law could 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. As a result, the Hawaii State AFL-CIO strongly urges the Committee on Labor to defer H.B. 2602, H.D.1 indefinitely.

Thank you for the opportunity to testify.

Respectfully submitted,

Jason Bradshaw
COPE Director

Senate Committee on Labor
Tuesday, March 20st, 2018
2:45PM, Room 229

Attention: Seantor Jill N. Tokuda, Chair
Senator J. Kalani English, Vice Chair

Re: Opposition for HB2602 Relating to Independent Contractors

The Labor Caucus of the Democratic Party of Hawai‘i opposes HB2602. Independent contractors do not have the ability to collect unemployment insurance or claim workers compensation. The changes proposed in HB2602 could negitively impact workers in the state of Hawai‘i. For these reasons the The Labor Caucus of the Democratic Party of Hawai‘i urges the committee to defer this measure.

THE SENATE
THE TWENTY-NINTH LEGISLATURE
REGULAR SESSION OF 2018

COMMITTEE ON LABOR
Senator Jill N. Tokuda, Chair
Senator J. Kalani English, Vice Chair

RE: HB2602 HD 1 - RELATING TO INDEPENDENT CONTRACTORS

Date:	Tuesday, March 20, 2018
Time:	2:45 PM
Conference Room 229 State Capitol 415 South Beretania Street	

Aloha Chair Tokuda, Vice Chair English and Members of the Committee,

Thank you for the opportunity to testify on this issue. We are the representatives of the film and entertainment industry unions, SAG-AFTRA Hawaii Local, I.A.T.S.E. Local 665, American Federation of Musicians' Local 677, and Hawaii Teamsters & Allied Workers Local 996. Collectively, we represent over 1700 members who work in film, television, music and new media productions as performers, crew, musicians, and drivers in Hawaii.

We **strongly oppose** HB2602 HD1 which proposes to modify §383-6 of the Hawaii Revised Statutes. Many workers would be negatively affected by this measure, particularly those who work in the creative fields. As it stands, many creative professionals work in different locations and situations and are regularly at risk of being **misclassified as independent contractors**. This not only tends to suppress the wages in these areas, but also places an increased tax burden on those workers while denying them protections granted by the National Labor Relations Act and the Fair Labor Standards Act. We feel this proposal would only serve to muddle the definition of employee rather than clarify it.

In a recent example, orchestral musicians in three states were misclassified by management as independent contractors. This classification was made primarily to prevent the musicians from organizing. After initially being dismissed, the NLRB ruled that they were employees, not contractors. The case eventually made its way to the US Court of Appeals and the D.C. Circuit Court ruled in favor of the musicians in 2016.

On a larger scale, this bill has the potential to run afoul of Federal Labor Laws by emboldening employers to encourage workers to accept employment as independent contractors. The law is supposed to make the determination as to what a worker's status is; not the employer or individual worker. In July 2015, the former Administrator of the U.S. Department of Labor issued guidance pertaining to this effect, stating:

> ***...the economic realities of the relationship, and not the label an employer gives it, are determinative.*** *Thus, an agreement between an employer and a worker designating or labeling the worker as an independent contractor is not indicative of the economic realities of the working relationship and is not relevant to the analysis of the worker's status.*

We would welcome providing clarity to both employers and workers. However, we believe that this could be achieved through **education, outreach, and <u>enforcement of current labor laws</u>** versus amending the State Statues.

We appreciate the legislature's strong support of the industry and Hawaii's creative professionals. Thank you for giving us the opportunity to offer testimony on this measure.

Mericia Palma Elmore	Irish Barber	Steve Pearson	Wayne Kaululaau
SAG-AFTRA Hawaii	I.A.T.S.E. Local 665	A.F.M. Local 677	Teamsters Local 996

HB-2602-HD-1
Submitted on: 3/16/2018 8:29:28 PM
Testimony for LBR on 3/20/2018 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Gordon Takaki	Individual	Support	No

Comments:

I continue to support HB2602 relating to Independent Contractors

HB-2602-HD-1
Submitted on: 3/19/2018 8:50:40 AM
Testimony for LBR on 3/20/2018 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Luly Unemori	Individual	Support	No

Comments:

I'm a small-business owner, and I know many others who willingly choose to work as independent contractors as a primary or secondary source of income. Please support independent contractors. Mahalo!

HB-2602-HD-1
Submitted on: 3/19/2018 9:13:09 AM
Testimony for LBR on 3/20/2018 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Teresa Rizzo	Individual	Support	No

Comments:

HB-2602-HD-1
Submitted on: 3/19/2018 12:43:12 PM
Testimony for LBR on 3/20/2018 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Barbara G Garcia	Individual	Support	No

Comments:

LATE TESTIMONY

MAUI
CHAMBER OF COMMERCE
VOICE OF BUSINESS

LATE

HEARING BEFORE THE SENATE COMMITTEE ON LABOR
HAWAII STATE CAPITOL, SENATE CONFERENCE ROOM 229
TUESDAY, MARCH 20, 2018 AT 2:45PM

To The Honorable Jill N.Tokuda, Chair;
The Honorable J. Kalani English, Vice Chair; and
Members of the Committee on Labor;

TESTIMONY IN STRONG SUPPORT FOR HB2602 RELATING TO INDEPENDENT CONTRACTORS

Aloha, my name is Pamela Tumpap and I am the President of the Maui Chamber of Commerce, serving in this role for over a decade. I am writing to share our strong support of HB2602.

We appreciate the Senate taking up this important matter to consider a much needed, equitable law that recognizes there are different ways to work, as both an employee and independent contractor. With the gig economy growing on a national, international and local level, it is imperative that legislation reflect the various ways to work. The US Census data from Maui County and the State of Hawaii since 2008 shows that more and more people are becoming nonemployer businesses, many of which are independent contractors. However, both on a national and state level, the Departments of Labor have not properly tracked the number of independent contractors or correlated the growing number of nonemployer businesses with tax records to identify independent contractors (https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm). While the State of Hawaii numbers for businesses have stayed between 31,000-33,000 from 2008 to 2015, the number of non-employers has significantly increased from 93,704 in 2008 to 104,707 in 2015.

Further, Hawaii's law is antiquated. It does not recognize the growing gig economy, has an employee bias because it only recognizes employee status, includes the ABC test that uses the word "and", making it a conjunctive test (which is very different from the IRS test), and still uses the "master" and "servant" language, which begs the question as to who benefits from the use of such terms. Also, not recognizing legitimate independent contractors can cause people to work for cash and not pay their General Excise Tax to the state.

We understand the Department of Labor and Industrial Relations (DLIR) and labor unions interest in protecting legitimate employees. We agree! We have always supported protecting legitimate employees in need of protection and do not condone any business that would attempt to skirt the employment law. Therefore, our work has always strived to recognize different ways to work and recognize independent contractor status so that it is clear what a legitimate independent contractor and legitimate employee are to avoid erroneous and incorrect rulings and allow the DLIR to focus on cases of actual abuse. However, the issues go beyond an antiquated law. The DLIR not fully considering additional factors provided by state rules in making their determinations is problematic and has allowed for incorrect determinations to be made. Please see Judge Cahill's ruling attached, where he found that the Department did not analyze all of the data, ignored evidence and came up with a clearly erroneous determination. The issue is also not just "simple math" as some might say. To characterize the issue this way turns a blind eye to the problems at hand. The Envisions Entertainment case highlights how extreme determinations have been, but it is not an isolated case. Please see two stories of ongoing issues attached that can also be found on our website www.ic4real.weebly.com to illustrate current problems.

MAUI
CHAMBER OF COMMERCE
VOICE OF BUSINESS

Additionally, while the Maui Chamber has been trying to address this issue for many years now and we are presenting Maui examples, this is not just a Maui issue. If anyone believes that, then they must ask another question: why is Maui being singled out? Yet, other Chambers and associations statewide are ringing in to say this is a bigger problem. Other legislators we have spoken with have been affected and/or are aware of individuals who have been negatively impacted by incorrect DLIR rulings as well. Of the 12 Representatives who signed onto this bill, 5 are from Maui and 7 are from our sister islands. This is also not simply a problem caused by a past DLIR Director as incorrect rulings continue.

The DLIR reports that there is a **possibility** that Hawaii could lose Federal funds by using the IRS Common Law test, but this is the test used by the IRS, Federal Insurance Contribution Act, Federal Unemployment Tax Act, Employment Retirement and Income Security Act, National Labor Relations Act and even our Hawaii State tax office uses the IRS guidelines for Income Tax. In addition, the 17 following states, use the common law test instead of the ABC test: AL, AZ, CA, DC, FL, IA, KY, MI, MN, MS, MO, NY, NC, ND, SC, TX, and VA. Given this, is it really **likely** that we would lose Federal funding for the reason stated by DLIR?

While there are gaps in the data, one cannot dispute the growing number of nonemployer businesses and the gig economy and it is time for proper legislation that reflects this, acknowledges different ways to work and addresses incorrect rulings. Without such legislation, the state is losing money through GET revenue and in many cases, incorrect rulings do not give additional benefits to workers, such as the multiple cases we have shown where people who state they are legitimate independent contractors file for unemployment from their full-time employer, but DLIR determines they were an employee for companies they performed independent contractor work for and those companies now have to contribute to the unemployment funds with the full-time employer. In these cases, the worker does not receive any additional benefits, it merely shifts who and how many are going to pay into the unemployment fund, and the independent contractor should be entitled to a GET refund.

This fix is needed now. We ask that you please change the effective date in the bill to January 1, 2019 and pass this bill to modernize our state law to provide equity as it recognizes both independent contractors and employee status, provides clarity to help the DLIR make better determinations where they can more fully address issues of abuse, allows the state to keep GET revenue from legitimate independent contractors, avoids different industries from seeking individual exemptions and provides consistency between the IRS, Hawaii DLIR and state tax office.

Sincerely,

Pamela Tumpap

Pamela Tumpap
President

To advance and promote a healthy economic environment for business, advocating for a responsive government and quality education, while preserving Maui's unique community characteristics.

This bill:

- Creates a more equitable solution for independent contractors, businesses that hire them and the state by recognizing the growing number of independent contractors.
- Modernizes our state law and provides clarity on the key areas to evaluate when making a determination for both employee and independent contractor status.
- Helps identify real independent contractors to prevent incorrect classifications by DLIR, while still providing for DLIR review and the authority to address those operating outside of the law. It does not take away the ABC test or in any way diminish employee findings. In fact, it provides clarity to demonstrate when someone is an actual employee and when they are an independent contractor. Currently, the ABC test is a conjunctive test and failing even one prong can cause an individual to be categorized as an employee regardless of many other factors.
- Addresses a very relevant statewide (not just Maui) problem.
    - Many businesses who engage an independent contractor and then have the DLIR make a determination that the independent contractor is an employee just eat the costs and pay the unemployment insurance on the incorrect ruling as they are afraid to fight the state, view the DLIR as abusing their power, and cannot afford the time and money required to contest their case
    - At a Business After Hours event, held on February 21st, 2018, 2 small businesses approached the Maui Chamber President saying that they are dealing with an independent contractor issue now and felt the DLIR was being unfair. This has been an issue each year for the past 12 years our President has been with the Chamber.
    - We encourage our legislators who have not heard of this abuse to talk to the business community. They will not have to go far to find a business who has been impacted by an erroneous ruling.
- Creates consistency between the Federal IRS, State tax office, and State DLIR on independent contractor findings. Currently, an IC can be deemed to be an IC by the Federal and State Tax Office and an employee by the State DLIR.
- Offers clear guidelines to the DLIR to help make quicker determinations and focus on addressing situations of abuse where a business hires an independent contractor that does not meet the test.
- Includes a General Excise Tax license requirement (in addition to the 11-factor test used by the IRS and state tax office) to further aid the DLIR in their analysis as it is a demonstration that the individual took a key step and elected to be an independent contractor.
- Ensures that the state is getting their appropriate amount of taxes as those who choose to be independent contractors pay general excise taxes that provide increased revenue for the state.

- Helps the state avoid the need to create a system for notifying independent contractors “deemed” to be employees of how to get a refund for GET taxes previously paid and the resulting processing of refunds. When someone considered themselves to be an independent contractor and paid taxes, but is later categorized by the DLIR as an employee, they should receive a GET refund. While DLIR has said there is a process for refunds in place, we have not seen the process, nor have we heard that individuals are being notified on how to collect a refund.
- Protects against the shifting of responsibility of unemployment insurance from the full-time employer to the business who hired an independent contractor. If an individual is a full-time employee of Company A and an independent contractor for Company B, in the case of an erroneous DLIR ruling, Company B is only alleviating a portion of the amount that Company A must pay for unemployment insurance. This does not result in the individual being paid more or the state receiving more revenue.
- Encourages transparency. DLIR reports that they do rule in favor of independent contractors, yet they have not demonstrated that and there is a need for distinct information and reporting. The DLIR previously noted that they are publishing reports on independent contractor rulings, but the “Master and Servant Appeals 383-6 HRS” page on the Employment Security Appeals section of the DLIR website has not been updated since February 6, 2017 and all cases noted had “employee” determinations.
- Prevents other industry groups from seeking exemptions. The State does have a list of industries and situations where workers are exempt from unemployment insurance like realtors, but if we were to include every affected industries in that list, there would be exemption requests from numerous industries, including: accountants and auditors, childcare workers, computer/IT services, editors and writers, graphic design, grounds keeping and maintenance work, gym instructors and personal trainers, hairdressers and cosmetologists, janitorial services, lawyers, maids and housekeeping, marketing and promotion services, photographers, wedding planners, etc.
- Recognizes that slavery was abolished long ago and removes the antiquated terms of "Master" and "Servant" from the law.

20 Factor Test

Used by Hawaii DLIR

MAUI CHAMBER OF COMMERCE
VOICE OF BUSINESS

HB2602

Proposed in bill
IRS 11-factors & GET requirement

1. The employer for whom services are being performed requires the individual to comply with instructions regarding when, where, and how services are performed.
2. The employer for whom services are being performed requires particular training for the individual performing services.
3. The services provided by the individual are part of the regular business of the employer for whom services are being performed.
4. The employer for whom services are being performed requires the services be performed by the individual.
5. The employer for whom services are being performed hires, supervises or pays the wages of the individual performing services.
6. The existence of a continuing relationship between the employer for whom services are being performed with the individual performing services which contemplates continuing or recurring work, even if not full-time.
7. The employer for whom services are being performed requires set hours during which services are to be performed.
8. The employer for whom services are being performed requires the individual to devote substantially full-time to its business.
9. The employer for whom services are being performed requires the individual to perform work on its premises.
10. The employer for whom services are being performed requires the individual to follow a set order or sequence of work.
11. The employer for whom services are being performed requires the individual to make oral or written progress reports.
12. The employer for whom services are being performed pays the individual on a regular basis such as hourly, weekly or monthly.
13. The employer for whom services are being performed pays expenses for the individual performing services.
14. The employer for whom services are being performed furnishes tools, materials and other equipment for use by the individual.
15. There is a lack of investment in the facilities used to perform services by the individual.
16. There is a lack of profit or loss to the individual as a result of the performance of such services.
17. The individual is not performing services for a number of employees at the same time.
18. The individual does not make such services available to the general public.
19. The employer for whom services are being performed has a right to discharge the individual.
20. The individual has the right to end the relationship with the employer for whom services are being performed without incurring liability pursuant to an employment contract or agreement.

Behavior Control. Facts that show whether the business has the right to direct and control how the individual does the task for which the individual is hired include the type and degree of:

1. Instructions the business gives the individual;
2. Training that the business gives the individual.

Type of Relationship. Facts that show the parties' type of relationship include:

3. Written contracts describing the relationship the parties intended to create;
4. Whether the business provides the individual with employee-type benefits, such as insurance, a pension plan, vacation pay or sick pay;
5. The permanency of the relationship;
6. The extent to which services performed by the individual are a key aspect of the regular business of the company.

Financial Control. Facts that show whether the business has a right to control the business aspects of the individual's job include:

7. Whether the individual has a valid general excise tax license;
8. The extent to which the individual has unreimbursed business expenses;
9. The extent of the individual's investment in the facilities or tools the individual uses in performing the contracted services;
10. The extent to which the individual makes services available to the relevant market;
11. How the business pays the individual;
12. The extent to which the individual can realize a profit or loss.

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Attorneys for Taxpayer-Appellant
ENVISIONS ENTERTAINMENT &
PRODUCTIONS, INC.

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

[redacted]

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 [redacted] 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 [redacted]

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

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

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

6. [redacted] and Envisions contemplated an independent contractor type of relationship with one another.

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

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

[redacted] cancelled at the last minute, Envisions was responsible for finding a replacement.

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

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

e. At no time did Envisions provide [redacted] with any training with respect to his saxophone performance skills, nor did it supervise any aspect of [redacted] performance.

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

g. [redacted] filled out an IRS Form W-9. He received an IRS Form 1099 from Envisions.

7. In 2012, [redacted] 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 [redacted] executed an independent contractor agreement to govern [redacted] provision of those services.

Procedural History

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

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 [redacted].

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

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

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

34. The services provided by [redacted] were limited to the playing of the saxophone, and the playing of the saxophone by [redacted] 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 [redacted] services were not

available to Envisions, and there were no other saxophone players of [redacted] competence, that Envisions' business would fail.

36. The record clearly indicates that [redacted] 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 [redacted] 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

TROPICAL MAUI WEDDINGS CHALLENGE

Initial Report – February 2017
Basically we hired an independent contractor. She showed us her GE tax license. However DLIR feels she may be an employee. We were part of a telephone hearing on this, as we did contest the determination by the investigator. We have not yet heard the decision, and it has been nearly 2 months. The person we hired was also included in the telephone hearing, and her input was in support of our position. While she did apply for unemployment, she did not expect that we would be affected since she was an independent contractor for us. She only mentioned us in her work history, and that's how we got dragged into the process.

Update - March, 2017

I am still dealing with DLIR with required reporting now, even though there is nothing to report! I am even being fined for not filing the reports on time. It is ridiculous for us to have one more required filing with no reason for it whatsoever. We are still waiting to hear the determination after the phone hearing with the DLIR we were involved in months ago.
Thanks for your efforts with all of this.

Aloha,
Jamie Lawrence
Tropical Maui Weddings

MAUI POPS ORCHESTRA ISSUE

Since September 2016, we have had the issue arise with 3 different musicians who had filed for unemployment due to other work they perform for someone else. Because they had earned modest payments from us for services as independent contractors, they had to report those earnings, as well, and the DLIR chose to pursue the issue in each case to determine EE or IC status. All 3 work as professional musicians/music teachers in Hawaii, have GE licenses, etc. They all also worked in other capacities as employees and independent contractors for others. (It is difficult in Hawaii – especially on Maui – to make enough money solely working as a professional musician. A very high percentage of Maui wages earners work multiple jobs to afford the high cost of living).

The arguments the DLIR made in determining that all 3 were EEs and not ICs were ridiculous, to say the least. "The orchestra provides sheet music to the musician, a music stand and a chair – such as an employer would provide to an employee." "Participation in rehearsals is important to ensure all musicians have an opportunity

to play together to solidify the ensemble before the actual performance. Therefore, [Maui Pops Orchestra] has a vested interest in individual's performance and maintains the right to exercise control if deemed necessary. Such control is indicative of an employer/employee relationship and not that of an independent contractor." Their contention that because the musician watches the conductor and plays their music when indicated, means the conductor (and thereby the Maui Pops Orchestra) is exercising control over the individual. The list goes on.

We have appealed all 3 rulings and have been shot down in each case. We continue to hold our appeal – hoping something would be done to address this situation. In our first appeal, we paid an employment law attorney over $12,000 – only to be denied. We went on our own to register our appeal with the DLIR.

The financial impact to small organizations such as ours would be immense if we had to make all of our musicians employees. We only perform 5 concerts per season, requiring no more than four services (2 ½-hour sessions) each. To set up and maintain a payroll system alone, considering a pool of over 70 musicians from which we draw, only to pay out 5 times a year would be ridiculous, not to mention payroll taxes, and other additional administrative expenses. Currently, we maintain vendor records for our musicians and issue 1099's annually, as required.

Cheryl Lindley

Executive Director

Maui Pops Orchestra

LATE

HB-2602-HD-1
Submitted on: 3/20/2018 11:47:39 AM
Testimony for LBR on 3/20/2018 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Cheryl Lindley	Testifying for Maui Pops Orchestra	Support	No

Comments:

LATE

HAWAII REGIONAL COUNCIL OF CARPENTERS

March 20, 2018
Senate Committee on Labor
Chair Jill Tokuda
Vice Chair Kalani English

Dear Chair Tokuda, Vice Chair English, and Members of the Senate Committee on Labor:

The Hawaii Regional Council of Carpenters **opposes** HB 2602 Relating to Independent Contractors. Our position is that this bill complicates Hawaii's laws regarding the determination of independent contractors, and will only create more confusion and misinterpretation which will encourage more abuse - especially in the construction industry.

The misclassification of workers leads to payroll fraud, a problem which our organization at both the local and national level is committed to solving. Employers evade workers comp, unemployment insurance, and basic payroll taxes by knowingly misclassifying workers as "independent contractors," paying in cash off the books, and running other scams. They cost taxpayers billions, hurt honest businesses, and exploit workers.

In the last couple of years, we have found in our own backyard employers falsely identifying employees as independent contractors, which occurred at the Ewa Wing of the Ala Moana Center and the Maile Sky Court Hotel renovation in Waikiki. Those employers were fined and held accountable thanks to the current laws related to employment security and more specially the laws regarding independent contractor determination.

From a policy standpoint the change being proposed in this bill is unnecessary as it attempts to legislate an issue that can be managed within the current law. We respectfully ask that this bill be deferred.

STATE HEADQUARTERS & BUSINESS OFFICES

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FIGHTING PAYROLL FRAUD

WHAT IS PAYROLL FRAUD?

Unscrupulous employers evade workers comp, unemployment insurance, and basic payroll taxes by knowingly misclassifying workers as "independent contractors," paying in cash off the books, and running other scams. They cost taxpayers billions, hurt honest businesses, and exploit workers. **Here's what you need to know.**

IS IT CRIME, OR CONFUSION?

Illegal Profits & Bid-Rigging

These criminals know their workers meet all legal definitions as "employees." They just want illegal profits and illegally low costs that help them steal business from honest competitors.

Fraud as a Business Plan

The issue is not definitions. These people know they are cheating—they're just used to getting away with it.

No Paper Trail = More Crime

Scammers either file no payrolls at all, file falsely, or pledge to send tax forms but don't. With no records, it's easy to hide fraud and other crimes

Rampant in Construction and Beyond

These scams are construction's "dirty secret." Even big contractors knowingly use law-breaking subs to cut bids and win work. Delivery and many other sectors suffer, too.

A Coast-to-Coast Epidemic

Payroll fraud occurs in all 50 states and Canada, on projects of every kind.

WHO SHOULD CARE?

- ***Taxpayers & Communities***
- ***Workers & Families***
- ***Small Businesses***
- ***Governments and Agencies***
- ***Insurers***
- ***Hospitals***
- ***Law Enforcement & Prosecutors***
- ***Developers & Construction Users***

WHAT ARE THE REAL COSTS?

Billions in Lost Revenue

Every year, every level of government loses vast sums to payroll fraud—in state and federal taxes, social security and medicare contributions, uncoverered workers comp and unemployment payouts, and more.

Taxpayers Take the Biggest Hit

Tax cheats force honest citizens to choose between higher taxes or cutting key programs like schools and public safety.

Corrupt Firms Control Construction

Fraud gives bidders up to 30% lower costs, so they undercut and ultimately steal markets from tax-paying, law-abiding contractors.

Honest Businesses Lose Business

Fraud forces workers comp, UI, and health care costs higher, so all honest employers pay more—and become even less competitive.

Higher Insurance Costs

Hospitals must treat all job-based injuries, so workers' comp and medical insurers have to raise rates on honest firms to make up for uncovered workers.

Crime and Racketeering

These schemes involve carefully planned major crimes like tax evasion, mail and insurance fraud, grand theft, money laundering, conspiracy, and racketeering/ RICO activity.

The Underground Economy

In many places, construction is now an all-cash business—cash that feeds other crimes.

WHAT CAN WE DO? CAN THE EFFORT BE SELF-FUNDING?

Multi-Agency Enforcement Pays For Itself—and More.

Cracking down reaps big returns—in revenue, fairness for honest employers, less pressure on health care, and respect for the law.

Improve and Enforce the Law.

Use task forces... stop-work orders... per-day/per-worker fines. Give agencies support to catch cheaters and recover revenue.

Back Leaders Who Fight Fraud.

Support officials and candidates who help honest businesses and who take action against those who flout the law.

Prosecute w/ Asset Forfeiture

Along with fines, civil forfeiture helps to settle cases, and creates highly visible enforcement that literally pays for itself.

Join the Nonpartisan Crackdown

The U.S. Govt. Accountability Office, IRS, Treasury Inspector General, Dept. of Labor and many state agencies call payroll fraud a serious problem—and are taking action. The crackdown gives honest employers nothing to fear and much to be gained.

Stand up for honest employers and their employees.

Take a stand against payroll fraud.

WHAT IF WE DO NOTHING?

Doing nothing isn't neutral—it helps the criminals.

For the latest news and resources on legislation, policy, research, task forces, and enforcement, visit

WWW.PAYROLLFRAUD.NET

LATE

HB-2602-HD-1
Submitted on: 3/19/2018 11:19:17 PM
Testimony for LBR on 3/20/2018 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Kit Okazaki	Individual	Support	No

Comments:

We need to make it easier for indepenedent contractors to operate. I am an independent contractor and appreciate the flexibilty it provides me. The DOL makes it too difficult for companies to comfortably hire ICs.

LATE

HB-2602-HD-1
Submitted on: 3/20/2018 6:06:14 AM
Testimony for LBR on 3/20/2018 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Rick Volner Jr	Individual	Support	No

Comments:

LATE

COMMITTEE ON LABOR
Senator Jill N. Tokuda, Chair
Senator J. Kalani English, Vice Chair

NOTICE OF HEARING

DATE: Tuesday, March 20, 2018
TIME: 2:45 p.m.
PLACE: Conference Room 229

Personal testimony by Dennis B Miller

Re: HB2602 Relating to Independent Contractors.

I oppose this bill for two reasons.

1. The meaningful testimony for the bill relates to a misapplication of straightforward laws.
2. The language proposed by the HB2602 creates the possibility for an employer to expand the definition of 'when a business owner is not directing an employee.'

This creates the possibility of employers misclassifying employees as independent contractors.

It seems that what is needed is for the DL to be subject to some scrutiny by the legislature, to ensure that the DL doesn't misapply the law.

Furthermore, now, the DL is not attempting to enforce the existing laws in an efficient manner.

The state would receive significantly more voluntary compliance if the DL would send letters to all businesses who currently pay individuals as independent contractors with notice of some of the broadly understood violations.

For example, in construction, lower cost contractors regularly pay their workers as independent contractors. Just by sending a letter which explains the independent contractor law, and which announces an increase in random audits, many businesses will choose to begin to voluntarily comply rather than risk a five-year audit for unpaid payroll taxes.

The massage establishment industry is a clear example of a non-ambiguous status quo. It is the status quo for massage establishments to pay their therapists as independent contractors.

I have owned a massage establishment for 18 years. Initially, I paid my therapists as independent contractors. However, around 8 years ago I was visited by an employee of the UI, who informed me that my therapists were employees. He gave me two choices: A. Voluntarily comply with the law B. Don't, and receive a 5-year audit for unpaid payroll taxes.

Since that time, I have been paying around $200,000 per year in payroll taxes.

However, none of my massage therapist establishment competitors pay their therapists as employees. It is normal for massage establishments, nail salons, beauty salons to pay their workers as independent contractors.

Most owners are not willfully violating the law. They simply don't know that therapists and nail technicians must be paid as employees.

It is extremely unfair to have lax and random enforcement of such a law.

Do the DL's lackadaisical attitude towards education and enforcement, many businesses simply decline to pay their workers as employees.

At least in industries which commonly and clearly violate the independent contractor law, please send out informational letters to all those owners. Just by letting them know what the law is and the potential costs of receiving an audit for unpaid payroll taxes are, more businesses will voluntarily comply.

It would also seem to be necessary for the DL to demonstrate its new found understanding of how to correctly make determinations of independent contractor’s vs employee status.

Sincerely,

Dennis B Miller

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