

STATE OF HAWAII  
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS  
Employment Security Appeals Referees' Office  
830 Punchbowl Street, Room 429  
Honolulu, Hawaii 96813

DECISION IN THE MATTER OF: 1401959

INTERESTED PARTIES:

Date Appeal Filed: May 31, 2014

Claimant:

[REDACTED]

Section of Hawaii Employment Security Law:  
HRS 383-1, 383-2, 383-6, 383-10

Appellant: Employer

Participating: telephone  
Sent via: mail

Date, Time, and Place of Hearing:

[REDACTED]  
Employment Security Appeals Office  
830 Punchbowl St. Rm 429  
Honolulu, HI 96813

Employer:

[REDACTED]

Parties Present: Claimant, Employer's  
Representative, Unemployment Insurance Division  
Representative

Participating: telephone  
Sent via: mail

Unemployment Insurance Division:

Participating: Yes

ISSUE ON APPEAL:

The issue is whether Claimant was employed by Taxpayer. Taxpayer filed a timely, perfected appeal of a Decision and Notice of Assessment issued by the Unemployment Insurance Division (UID) on May 31, 2014. The issue to be resolved is whether counseling services performed by Claimant constituted covered employment pursuant to Haw. Rev. Stat. § 383-1, 383-2, 383-6, and 383-10.

RULING:

The decision is affirmed.

STATEMENT OF FACTS:

Taxpayer is a counseling center on Maui. Claimant is a licensed clinical psychologist. Claimant provided psychological and counseling services to patients that completed and signed Taxpayer's registration and consent forms. Claimant also attended office meetings at Taxpayer's office, she worked in a cubicle at the office, and engaged in peer discussions and meetings to discuss cases. Taxpayer set Claimant's rate of pay and authorized revisions to the fees. The documents that patients and Claimant signed for services claimant would render were on Taxpayer's letterhead. Taxpayer's General Information and Informed Consent form (Consent Form) stated their doctoral level psychologists' hourly fee was \$180.00, Taxpayer was able to negotiate some reduced fees, other services would be billed accordingly, Taxpayer could change providers for the patient, and it was an agreement which required the signatures of the patient and West Maui Counseling Center's Provider. Taxpayer made telephone contacts with the patients and issued

billing statements to medical insurance carriers for payments of services rendered.

New patients were required to complete a form printed on Taxpayer's letterhead which included the patient's name, as a patient of Taxpayer and it stated the patient understood s/he was financially responsible for payment of all services rendered and to charge on the patient's credit card the amount for sessions, insurance co-pay, general excise taxes or fees. Taxpayer stated it paid Claimant based on a percentage of what the insurance carrier dictated and Claimant did not have a set rate of pay.

Taxpayer did not employ any LCC owned by Claimant to provide psychological services to their patients. Patients completed Taxpayer's Registration Form which contained patient information, insurance information, and emergency contact information. Taxpayer's General Information and Informed Consent Signature Page showed the patient agreed with Taxpayer's policies and procedures and required the patient and the Taxpayer provider's signature. Claimant was in the process of establishing a limited liability company (LCC) and practice. Claimant's LLC was in effect from June 4014, but Taxpayer was not paying fees to Claimant's LLC before that and Claimant did not have a general excise license before establishing her LLC.

Claimant holds the psychology license which is subject to potential malpractice issues. Claimant said her primary site is on Molokai, but there is a need for services on Maui and she does not pay any of Taxpayer's overhead costs.

#### **REASONS FOR DECISION:**

Section 383-1 of the Hawaii Revised Statutes provides that an employer is an employing unit which for some portion of a day within the current calendar year has or had in employment one or more individuals. This section defines an employing unit as an individual, organization, partnership, association, or corporation which has or had one or more individuals performing services for it within this state.

Section 383-2 defines employment as service, including service in interstate commerce, performed for wages under any contract of hire, written or oral, express or implied. Section 383-10 defines wages as remuneration for services from whatever source.

Section 383-6 of the Hawaii Revised Statutes provides that services performed by an individual for wages or under any contract of hire shall be considered employment subject to Chapter 383, irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the Department of Labor and Industrial Relations that:

- (1) The individual has been and will continue to be free from control or direction over the performance of such service, both under a contract of hire and in fact;
- (2) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and
- (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service.

The law creates a presumption of employment, with the taxpayer carrying the burden of proof to overcome such presumption by demonstrating that all three clauses of the aforementioned analysis have been met. In determining whether claimant was free from control and direction from the taxpayer, the Hawaii Supreme Court explained that control need not extend to all the details of the physical performance of the services by the worker that may be essential to the master-servant relationship but may be merely a general one exercisable, directly or indirectly, over the physical activities and time surrendered by the worker. Bailey's Bakery v. Tax Commissioner, 38 Haw. 16, 50 (1948). The taxpayer "need not actually exercise control; it is sufficient that there is a right to do so." Haw. Admin. R. § 12-5-2.

As to the first prong of the test, Taxpayer exercised control and direction over Claimant's services. Here, Claimant performed her services at Taxpayer's office, she had a cubicle she could use there, and she went to meetings and had peer discussions there. The evidence showed Taxpayer also set Claimant's rate of pay as indicated by the terms of the patient contract, Taxpayer could adjust the fees and assign different providers if warranted. Taxpayer prepared and submitted billing statements for Claimant's services to the insurance carrier for payment. Based on the foregoing, Claimant was not free from control or direction over the performance of her services. As such, taxpayer failed to satisfy the first prong.

As to the second prong of the three-part test, claimant's counseling services was integral to Taxpayer's business since counseling was the core business for Taxpayer as a counseling center. Claimant's work product was important to Taxpayer's business, which was patient counseling. Claimant performed her services at Taxpayer's offices. Therefore, Claimant's services were not outside of the usual course of Taxpayer's business. As such, Taxpayer has failed to satisfy the second requirement because claimant's services promoted, advanced and furthered Taxpayer's business.

The third prong deals with the occupational status of Claimant performing the services and requires that Claimant functions, usually and to an appreciable extent, as an independent business enterprise as would someone who was in business for themselves, and that she assumes business and entrepreneurial risks. Here, Claimant did not have her own general excise tax license or business entity such as an LLC until around June 2014 and she did not perform her services at her own business location. Instead, Claimant worked at Taxpayer's offices. Claimant did not have any of the risks or overhead expenses that self-employed person would usually have such as rent, accounts payable, accounts receivable, billing, insurance, and having enough patients. Claimant did not have financial risks because the consent and agreement forms were contracts between Taxpayer and the patient and the Taxpayer prepared and submitted billing statement to the medical insurance carrier. Therefore, Taxpayer has failed to meet the third prong of the test because Claimant did not customarily provide counseling services through her own business entity.

In conclusion, Taxpayer has the burden to overcome the presumption that the employer-employee relationship existed. In this case, Taxpayer failed to meet its burden to find that the services Claimant performed for Taxpayer did not constitute employment within the meaning of the Hawaii Employment Security Law. Therefore, Claimant was employed by Taxpayer and the remuneration Claimant received from Taxpayer constituted wages subject to unemployment insurance contributions.

**DECISION:**

The decision is affirmed. The services performed by Claimant for the Taxpayer constitutes employment pursuant to Haw. Rev. Stat. § 383-1, 383-2, 383-6, and 383-10.

Date mailed/delivered: [REDACTED]

[REDACTED]  
Appeals Officer

*This decision becomes final 30 days from the mailing date. See attached blue sheet for further appeal rights*

I do hereby certify that the foregoing is a full, true and correct copy of the original file in this office.

*~*