

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: 1601169

INTERESTED PARTIES:

Date Appeal Filed: March 22, 2016

Claimant:

[REDACTED]

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

Appellant: Taxpayer

Participating: in-person
Sent via: mail

Date, Time, and Place of Hearing:

[REDACTED]
ESARO
830 Punchbowl St. Rm 429
Honolulu, HI 96813

Taxpayer:

[REDACTED]

Parties Present: Taxpayer, Unemployment Insurance
Division

Participating: in-person
Sent via: mail

Unemployment Insurance Division:

Participating: Yes

ISSUE ON APPEAL:

Taxpayer appeals the March 15, 2016 Determination and Notice of Assessment issued by the Unemployment Insurance (UI) Division. The issue to be determined is whether services performed by claimant for Taxpayer constitute covered employment under Haw. Rev. Stat. §§ 383-1, 383-2, 383-6, and 383-10.

RULING: The UI Determination is AFFIRMED.

STATEMENT OF FACTS:

Taxpayer operates a day spa which offers massage, facials, waxing, scrubs, wraps, and related health and beauty services and products. The spa has been in operation since October 2010 and is open six days a week.

Claimant performed services for Taxpayer as a massage therapist from February 25, 2015 through November 10, 2015. Claimant responded to an advertisement Taxpayer placed seeking a massage therapist and was interviewed for the position before being selected. Claimant already possessed a license for massage therapy before she started performing services for Taxpayer. Claimant also provided front desk and reception services when needed. Taxpayer required claimant to sign an independent contractor agreement to perform massage therapy services. Taxpayer drafted the agreement. The

agreement states that Taxpayer “has control of the means manner and method by which services are provided.” The agreement also specified that claimant would be required to maintain malpractice insurance while providing services for Taxpayer.

Taxpayer provided claimant with training regarding steam massage, towel placement, and dressing the table in order to ensure that claimant’s massage services were consistent with services provided by other massage therapists at the spa. Taxpayer also provided claimant with training regarding the phone system and front desk duties. Taxpayer did not provide claimant with training on how to perform massage.

Taxpayer obtains customers by offering group coupons through social media. Customers purchase coupons for services from a social media provider and contact Taxpayer directly to schedule services. Claimant was able to decide how many hours she wanted to work and which days she wanted to work. Taxpayer scheduled the massages with the customers directly and maintained a calendar which claimant could view. Taxpayer kept track of the days and hours claimant worked and calculated her pay. Taxpayer paid claimant weekly. If claimant was not able to work when massages were scheduled, claimant could arrange for someone else to perform the services only if the customer approved the substitute. Otherwise, the appointments were rescheduled by Taxpayer.

Taxpayer is paid by the social media provider, which retains a percentage of the payment. Taxpayer paid claimant \$20.00 per hour for massage services and \$15.00 per hour for front desk work. Taxpayer paid the same rate to all massage therapists. Taxpayer did not withhold taxes from claimant’s pay. Taxpayer reported claimant’s pay to the Internal Revenue Service on Form 1099.

Taxpayer required claimant to wear black pants and a shirt with taxpayer’s logo while performing services. Claimant provide all her services at Taxpayer’s facility and Taxpayer provided claimant with all equipment including the room, massage table, chair stool, stereo, towels, steam equipment, storage area, reception area, laundry facilities, kitchen, and phone services. Claimant sometimes provided her own oils for massage. Claimant was also assigned additional duties including preparing and cleaning the room before and after her massages.

While under contract with Taxpayer, claimant was free to perform services as a massage therapist for other individuals and entities. Taxpayer reports that claimant provided massage classes for pregnant women on Maui. The record does not include any direct evidence showing that claimant maintained a business, such as a business registration with the Department of Commerce and Consumer affairs, a listing with the Better Business Bureau or other evidence of a business such as advertising in print or electronic media, letterhead, directory listings, or business cards.

REASONS FOR DECISION:

Section 383-1 of the Hawaii Revised Statutes states:

“Employing unit” means any individual or type of organization, including the State, and any of its political subdivisions, any instrumentality of the State or its political subdivisions, any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee, or successor of any of the foregoing, or the legal representative of a deceased person, which has or subsequent to January 1, 1937, had one or more individuals performing services within this State.

(1) All individuals performing services within this State for any employing unit which maintains two or more separate establishments within this State shall be deemed to be performing services for a single employing unit for all the purposes of this chapter.

(2) Each individual employed to perform or to assist in performing the work of any person in the service of an employing unit shall be deemed to be engaged by the employing unit for all the purposes of this chapter, whether the individual was hired or paid directly by the employing unit or by such person, provided the employing unit had actual or constructive knowledge of the work.

Haw. Rev. Stat. § 383-2(a) defines "employment" as "service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, expressed or implied."

Haw. Rev. Stat. § 383-10 defines "wages" as "all remuneration for services from whatever source, including commissions or bonuses, tips or gratuities paid directly to an individual by a customer of the employer and reported to the employer, and the cash value of all remuneration in any medium other than cash."

In this case, claimant provided services as a massage therapist for Taxpayer's spa and was paid for these services. Pursuant to the definition of "wages" under Section 383-10, the remuneration claimant received from Taxpayer for such services constitute wages.

Haw. Rev. Stat. § 383-6 states:

Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists unless and until it is shown to the 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; and
- (2) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and
- (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service.

Section 12-5-2 of the Hawaii Administrative Rules states:

(a) Services are deemed to be in employment if sections 383-2 and 383-10, Hawaii Revised Statutes, are satisfied, unless and until it is shown to the satisfaction of the department that all of the three-fold conditions or "ABC" test under section 383-6, Hawaii Revised Statutes, are met. In applying section 383-6, Hawaii Revised Statutes, to an individual's services, the following definitions shall apply:

(1) "Contract of hire" is a written or oral, express or implied, agreement between two or more individuals which creates an obligation to do or not to do a particular thing and where such agreement demonstrates a promise of wages for services performed.

(2) "Control or direction over the performance of such service" means general control and need not extend to all details of the performance of service. The employer need not actually exercise control; it is sufficient that there is a right to do so.

(3) (A) "Outside the usual course of the business" refers to services that do not promote or advance the business of the employer, or services that are merely incidental to, and not an integral part of, that business.

(B) "Outside of all the places of business of the enterprise" refers to places other than the business's home office, headquarters or territory in which the business operates;

(4) "The individual is customarily engaged in an independently established trade, occupation, profession, or business" refers to an individual who is performing services and is established in the business of performing these services independent of whatever connection the individual may have with an employer and that the individual must have a proprietary interest in such business, something in which the individual has a right of continuity, which the individual can sell or give away, and which is not subject to cancellation or destruction upon severance of the relationship with the employer.

(b) As an aid to determining whether an individual is an employee under the common law rules, twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer-employee relationship. The twenty factors set forth below are designed only as guides for determining whether an individual is an employee and the degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed.

(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 employers 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.

Haw. Rev. Stat. § 383-6 establishes a presumption of employment. In determining whether an individual's services shall be excluded as employment, all three clauses of Haw. Rev. Stat. § 383-6 must be satisfied to overcome the presumption. The burden of proof rests on the taxpayer.

Clause (1) raises the issue of whether the service provider was free from control or direction over the performance of his services. In addressing this issue, the Hawaii Supreme Court held, in Bailey's Bakery v. Tax Commissioner, 38 Haw. 16, 50(1948):

Control reserved to the principal for unemployment compensation purposes 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.

In this case, the evidence indicates that claimant's massage services were performed under Taxpayer's direction and control within the meaning of the law. The independent contractor agreement specifically states that Taxpayer "has control of the means, manner and method by which services are provided." This language, which was drafted by Taxpayer, shows that Taxpayer intended to direct and control the performance of claimant's services and made acceptance of such control a condition of claimant's performance of services. In addition to this explicit assertion of control, multiple manifestations of actual control existed in the relationship between Taxpayer and claimant. Taxpayer required claimant to wear clothing that identified Taxpayer while performing services. Taxpayer required claimant to perform her services according to an established protocol and provided the space and equipment for all claimant's services. Taxpayer also exercised control by determining claimant's rate of pay, collecting fees for massage services, and paying claimant at regular intervals. The fact that claimant performed services for taxpayer on an ongoing basis shows that a continuing relationship existed consistent with employment. Although claimant had a license and prior experience as a massage therapist and was free to choose the days and times she worked, these facts are not sufficient to show that claimant performed her services free from Taxpayer's direction and control given the multiple other factors showing control. Taxpayer has failed to show that Clause (1) of Haw. Rev. Stat. § 383-6 is satisfied.

Clause (2) raises the issue of whether claimant's services were outside the usual course of the taxpayer's business or outside all of the taxpayer's places of business. Taxpayer is a spa in the business of providing massages to its customers and generates revenue by providing massage services to its customers. Claimant's services as a massage therapist were directly within the scope of Taxpayer's business and integral to its business model. In addition, all claimant's services were performed at Taxpayer's facility. Taxpayer has failed to establish that Clause (2) of Haw. Rev. Stat. § 383-6 is satisfied.

Clause (3) raises the issue of whether the claimant was customarily engaged in an independently established business, functioning, usually and to an appreciable extent, as an independent business enterprise, holding herself out to the general public as such, and assuming all of the business risks of an entrepreneur. In this case, although taxpayer contends that claimant provided massage classes for pregnant women on Maui, there is insufficient evidence to show that claimant was engaged in an independently established business. If claimant was engaged in an independent business, it is reasonable to believe that evidence of her business would exist and be easily obtainable, such as a state business registration, directory listings, or advertising materials. The record contains no evidence showing that claimant was engaged in an ongoing business. There is no evidence to show that claimant had invested in a business, that she stood to make a profit or loss as a result of her provision of services, or that she had a transferrable interest in a business. Further, claimant had the right to terminate her relationship with Taxpayer without incurring liability. Although Taxpayer paid claimant as an independent contractor and required claimant to maintain malpractice insurance, these facts are not sufficient to establish that claimant was engaged in an independent business within the meaning of Clause (3). Taxpayer has failed to establish that Clause (3) of Haw. Rev. Stat. § 383-6 is satisfied.

Taxpayer has failed to meet its burden of proof to establish that all three clauses of Haw. Rev. Stat. § 383-6 are satisfied. The services performed by claimant for Taxpayer constitute employment and the payments made by Taxpayer to claimant for such services are wages subject to Hawaii unemployment insurance law.

DECISION:

The UI Determination is affirmed. The services performed by claimant for Taxpayer constitute employment within the meaning of Haw. Rev. Stat. §§ 383-1, 383-2, 383-6, and 383-10.

Date mailed/delivered: [REDACTED]

[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 on file in this office. [REDACTED]