

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: 1402523

INTERESTED PARTIES:

Date Appeal Filed: July 10, 2014

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's Representative,
Taxpayer's Witness, Unemployment Insurance
Division Representative

Participating: in-person
Sent via: mail

Unemployment Insurance Division:

Participating: Yes

ISSUES ON APPEAL:

Taxpayer appeals the June 23, 2014 Unemployment Insurance Determination and Assessment which determined that services performed by claimant for Taxpayer constitute covered employment under Hawaii Unemployment Insurance Law. The issue to be determined is whether claimant's services for Taxpayer constitute employment within the meaning of Haw. Rev. Stat. §§ 383-1, 383-2, 383-6, and 383-10.

RULING: The Unemployment Insurance Determination is AFFIRMED.

STATEMENT OF FACTS:

Taxpayer produces energy drinks which are marketed and sold nationwide. Taxpayer is headquartered in California and has no corporate offices or production facilities in Hawaii. Taxpayer sells its products at retail locations throughout Hawaii via local distributors.

For ten years, Taxpayer has operated a National College Marketing Program (NCMP) to promote its products to college students. From June 23, 2011 through May 30, 2013, claimant performed services for Taxpayer as an NCMP ambassador. Claimant learned of the position at one of Taxpayer's promotional events, completed an application, was interviewed by Taxpayer, and was offered the opportunity to perform services on an independent contractor basis. Claimant and Taxpayer signed an

Independent Contractor agreement annually. Taxpayer prepared the agreement and uses the same agreement form for all NCMP ambassadors nationwide. Claimant was also required to sign and adhere to Taxpayer's Marketing Code Where Alcohol is Present. This Code states that Taxpayer is committed to discouraging underage drinking of alcohol and provides that NCMP ambassadors shall not promote Taxpayer's products at events which do not have effective systems for checking identification to ensure compliance with minimum age laws regarding consumption of alcohol.

Claimant promoted Taxpayer's products while attending a university in Hawaii. Claimant was the only NCMP ambassador at her university. Claimant promoted Taxpayer's products through social media and by offering free samples at various events on campus. Claimant was free to choose the events at which she promoted Taxpayer's products. Claimant reported to the NCMP Director, who is located in California. Claimant was required to submit a bi-monthly report by email on the 15th and 30th of every month. Claimant was not required to use a particular form or format for her reports but was required to include photographs with every report. Taxpayer did not provide claimant with a computer or camera for preparing her reports. Taxpayer paid claimant \$200:00 per month for her services and issued her pay on the 15th of each month for the previous month. Taxpayer paid claimant via direct deposit to claimant's personal checking account. Taxpayer required the same reports of all NCMP ambassadors and paid all NCMP ambassadors the same rate of pay according to the same pay schedule.

Taxpayer supplied claimant with its products to use for sampling at no charge to claimant. Claimant obtained Taxpayer's products from local distributors. Taxpayer provided claimant with a tee shirt with Taxpayer's brand logo, but claimant was not required to wear the tee shirt or any other specified attire or gear for promotional events. Taxpayer did not reimburse claimant for expenses she incurred in promoting its products.

Under the terms of the Independent Contractor agreement, claimant was prohibited from marketing or promoting other energy drinks in direct competition with Taxpayer's products. Claimant was free to perform marketing and/or promotional services for any other type of product while serving as an NCMP ambassador for Taxpayer. Claimant does not own an independent business which offers marketing or promotional services. Claimant did not carry liability insurance while performing services as an ambassador for taxpayer. If an individual became ill or was injured as a result of consuming one of Taxpayer's products at one of claimant's events, Taxpayer would be subject to liability.

REASONS FOR DECISION:

Section 383-1 of the Hawaii Revised Statutes provides:

"Employing unit" means as 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.

Section 383-2 of the Hawaii Revised Statutes defines "employment" as "service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, expressed or implied."

Section 383-10 of the Hawaii Revised Statutes 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. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the department of labor and industrial relations.

In this case, claimant provided promotional services to Taxpayer for Taxpayer's products and Taxpayer paid claimant for such services. Pursuant to the definition of "wages" under Haw. Rev. Stat. § 383-10, Taxpayer's remuneration to claimant for her services constitutes wages.

Section 383-6 of the Hawaii Revised Statutes provides:

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.

Rule 12-5-2 of the Hawaii Administrative Rules provides:

(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.

The issue of "control" is further addressed by Haw. Adm. Rul. §12-5-2(a)(2), which defines "control or direction over the performance of such service" to mean "general control [which] need not extend to all details of the performance of the service. The employer need not actually exercise control; it is sufficient that there is a right to do so."

In this case, Taxpayer exercised control over claimant by requiring her to sign a standard Independent Contractor Agreement drafted by Taxpayer and required of NCMP ambassadors nationwide, setting her rate of pay, paying her at regular intervals, determining her pay dates, requiring her to submit regular reports with photographs to verify her activities, and prohibiting her from performing marketing or promotional services for any of Taxpayer's competitor energy drinks. Taxpayer also exercised control by requiring claimant to sign and abide by its Alcohol Code. In addition, the fact that claimant performed promotional services for Taxpayer on a recurring basis over a period of months is indicative of a continued relationship consistent with employment. Although claimant was allowed a great deal of discretion in determining how she wished to promote Taxpayer's products, how much time she wanted to spend performing promotional services, and the dates, times, and locations within campus where she performed her services, claimant's autonomy with respect to these aspects of her services is not sufficient to show that claimant performed her services free from Taxpayer's control or direction. Finally, the fact that Taxpayer has been operating the NCMP for ten years and requires the same reporting and payment procedures for service providers at college campuses around the country shows that employer is maintaining control over the promotion of its products rather than retaining the services of a truly independent contractor. Clause (1) has not been met.

Clause (2) raises the issue of whether the claimant's services were outside the usual course of the Taxpayer's business or outside all of the Taxpayer's places of business. In this case, Taxpayer is in the business of selling energy drinks and claimant's services promoting Taxpayer's products were designed to increase sales of Taxpayer's products and therefore were directly within the usual course of Taxpayer's business. Although claimant did not perform her services in one of Taxpayer's physical offices or production facilities, any location in which Taxpayer promotes its products and offers its products for free as a means of attracting customers becomes an extension of Taxpayer's business. Taxpayer has failed to show that it meets the requirements of Clause (2).

Clause (3) raises the issue of whether the claimant is 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, there is no evidence that claimant has a registered business name or holds herself out to the general public as a provider of promotional or marketing services. There is no evidence that claimant made any investment in a business or possessed a transferrable proprietary interest in a business. There is no evidence that claimant stood to make a profit or loss based on her provision of promotional services. Finally, claimant had the right to terminate her relationship with Taxpayer without incurring liability. Taxpayer has failed to show that Clause (3) has been met.

Based on the foregoing, Taxpayer failed to meet its burden of proof to establish that all three clauses of Haw. Rev. Stat. §383-6 are satisfied. As a result, 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 Unemployment Insurance Determination is affirmed. The services performed by claimant for Taxpayer constitute employment pursuant to 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 file in this office. [Signature]