

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: 1401801

INTERESTED PARTIES:

Date Appeal Filed: May 23, 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

Employer:

[REDACTED]

Parties Present: Taxpayer, Taxpayer's Attorney,
Department Representative

Participating: in-person
Sent via: mail

Unemployment Insurance Division:

Participating: Yes

ISSUE ON APPEAL:

The taxpayer appealed from a May 1, 2014 Department decision which held that services performed by the claimant constitute covered employment under Haw. Rev. Stat. (HRS), Chapter 383. The Department's determination arose after claimant filed a claim for unemployment insurance (UI) benefits.

RULING:

The Department's decision is **AFFIRMED**. Services performed by the claimant, for the taxpayer, constitute employment. Remuneration paid to the claimant for such services are subject to HRS, Chapter 383.

STATEMENT OF FACTS:

The taxpayer is a licensed real estate brokerage firm, dba Alii Beach Rentals Inc. that primarily engages in real estate/property management and not real estate sales. The taxpayer managed a number of short term vacation rental units for property owners in the Waikiki area. To assist him in managing these units, the taxpayer advertised for two licensed Hawaii real estate (RE) agents to work part-time as guest relation specialists on an independent contractor (IC) basis. The taxpayer required that prospective applicants possess a current RE sales license, be available to work an open and flexible schedule including weekends and evenings, be willing to accept IC status and to be paid a monthly salary, have excellent people and problem solving skills, have intermediate computer skills, and be a positive team player.

Claimant was previously employed as a property manager. Claimant was not a broker, but had a valid RE sales license. Claimant applied for the advertised position and on September 25, 2013, she signed an Independent Contractor Agreement (ICA) with the taxpayer to perform services as a part-time guest relation specialist.

managing about 30 units. Her ICA services included general guest services, guest courtesy calls, acting as a liaison to assist the company in resolving issues and satisfying guest needs, acting as a liaison between guests, the company, maintenance department, cleaning companies, and various building managers, showing rental properties to potential guests, and assisting in property damage loss prevention and recovery. Claimant had no set working hours and no set work site, but because it was a critical aspect of her job to be able to respond to the needs of guest and maintenance staff, she was required to be either "on call" or on "emergency" status on a 24 hours a day/seven days a week basis as the "point of contact" to respond to and to resolve calls related to guest services. Guests occupying the rental units that claimant managed were given a toll free number to call which was then forwarded to claimant's phone for her appropriate action. Although it was left up to claimant as to how she responded/resolved these calls, the required and expected end result was total guest satisfaction.

Although the taxpayer initially advertised that the position paid \$2700.00 a month, claimant's ICA specified that she was to be paid \$3000.00 a month, plus an additional \$40 for each "meet and greet check in" performed. In order to be paid, claimant had to submit an invoice to the taxpayer. Claimant received two days of training at the company's premises. Claimant, in her interaction with the guests, held herself out as a representative of the taxpayer's property management business and her job title on company issued business cards was "Guest Relations."

The ICA specified that the taxpayer reserved the right to terminate the ICA for any reason upon giving 48 hours notice to claimant. Upon notice to the breaching party, either party could also terminate the ICA for cause

After the taxpayer terminated the ICA in March 2014, claimant filed a UI application for benefits. The taxpayer argued that he only managed and supervised claimant in accordance with HRS, Chapter 467 and Title 16 Chapter 99 of the Hawaii real estate law. It was also argued that the ruling in a Supreme Court case to determine whether real estate sales agents were ICs or employees of a realty firm under HRS Chapter 386 of Hawaii Workers' Compensation (WC) law was relevant to the issue under appeal in this case.

REASONS FOR DECISION:

Although claimant possessed a RE sales license, this was only an incidental requirement for the job and the ICA did not require her to conduct any sales transactions for the taxpayer. Claimant also filed an application to determine her eligibility for UI and not WC. Therefore it is concluded that the applicable section of the law in this case is HRS Chapter 383 and the taxpayer's argument is without merit.

Haw. Rev. Stat., §383-1, defines "employing unit" 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.

Haw. Rev. Stat. §383-2(a), defines "employment", subject to §§383-3 to 383-9, to mean 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", subject to section 383-11, to mean 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 services as a guest relation specialist for the taxpayer's property management

company. Consequently, pursuant to the definition of "wages", under Section 383-10, HRS, the remuneration to claimant, for such services, constitutes wages.

Although the taxpayer and claimant agreed that the claimant would be an independent contractor, Haw. Rev. Stat. §383-6, provides that 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.

Haw. Admin. Rule (HAR) 12-5-2. Master and servant relationship. (a) Services are deemed to be in employment if Haw. Rev. Stat. §§383-2 and 383-10, 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 Haw. Rev. Stat. §383-6, are met. In applying Haw. Rev. Stat. §383-6, 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 claimant, the service provider, was free from control or direction over the performance of her 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 HAR 12-5-2(a)(2), which defines "control or direction over the performance of such service" to mean "general control and 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, relevant elements of control pursuant to HAR 12-5-2(b) include the taxpayer determining what duties claimant had to perform, what days and hours claimant had to be available to perform these duties, who claimant had to interact with to perform her duties, and what the expected end result was (Factor #1); the taxpayer provided training relevant to claimant's guest relations specialist position (Factor #2); the taxpayer assigned 30 units to claimant for her to manage and provide guest related services (Factor #4); the taxpayer was the one who advertised for and entered into an ICA with claimant, and agreed to pay her a monthly salary (Factor #5 and #12); although claimant was not a full-time worker, she was required to be available to perform services on a continuing/recurring "24/7" on call or emergency basis (Factor #6); in accordance with the RE laws, claimant could only perform services for the taxpayer's brokerage firm (Factor #17); and in accordance with the ICA, the taxpayer reserved the right to terminate or discharge claimant with notice or for cause (Factor #19). In view of the foregoing, clause (1) has not been met.

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.

In this case, relevant elements pursuant to HAR 12-5-2(b) as it pertains to Clause (2) include claimant's acting as a liaison to assist the company in resolving issues and satisfying guest needs and performing other related duties were integral to the taxpayer's business of providing services to the rental clients to ensure their satisfaction (Factor #3). Claimant also performed her services at the taxpayer's place of business which extends to the locations where the services had to be performed, such as the guest's unit and other locations of related activities (Factor #9). In view of the foregoing, Clause (2) has not been met.

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, relevant elements of control pursuant to HAR 12-5-2(b) as it pertains to Clause (3) include claimant only acting as a liaison with the taxpayer's maintenance department, cleaning companies and various building managers, and not having to pay for or invest in these facilities (Factor #15); claimant was being paid for her services whether the business was profitable or not (Factor #16); in accordance with the ICA and RE laws, claimant was unable to and was not offering her services to the general public (Factor #18); and claimant has the right to end the relationship with the taxpayer for whom services are being performed without incurring liability pursuant to the ICA (Factor #20). In view of the foregoing, Clause (3) has not been met.

Based on all of the foregoing, the taxpayer failed to meet its burden of proof to establish that all three clauses of Haw. Rev. Stat. §383-6, are satisfied. Accordingly, it is found that the services performed by the claimant for the taxpayer constitute employment and the payments made by the taxpayer to the claimant for such services are wages subject to HRS Chapter 383.

DECISION:

The Department's decision is affirmed. The services performed by the claimant for the taxpayer constitute employment. Therefore, remuneration paid to the claimant for such services are subject to HRS Chapter 383.

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.