

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: 1504510

INTERESTED PARTIES:

Date Appeal Filed: December 14, 2015

Claimant:

[REDACTED]

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

Appellant: Taxpayer

Participating: telephone
Sent via: mail

Date, Time, and Place of Hearing:

[REDACTED]

Taxpayer:

[REDACTED]

ESARO
830 Punchbowl St, Rm 429
Honolulu, HI 96813

Parties Present:
Taxpayer, Taxpayer's Attorney, Department

Participating: telephone
Sent via: mail

[REDACTED]

ESARO
830 Punchbowl St, Rm 429
Honolulu, HI 96813

Parties Present:
Taxpayer, Taxpayer's Attorney, Department

Unemployment Insurance Division:
Participating: Yes

ISSUES ON APPEAL:

The taxpayer appealed a November 23, 2015 Unemployment Insurance Division (UID) decision which held that services performed by claimant constitute covered employment under Chapter 383, Haw. Rev. Stat. The UID's determination arose after claimant filed a claim for unemployment insurance benefits.

RULING: The UID decision is AFFIRMED.

STATEMENT OF FACTS:

The taxpayer is a limited liability corporation that is based in Missouri. The taxpayer identifies itself as a technology company that provides an internet platform or digital marketplace, whereby individuals seeking personalized tutoring and test preparation instruction to accelerate their academic achievement can be connected, through the taxpayer's website, with tutors and test instructors who provide tutoring and test preparation services. To maintain its internet business and its website, the taxpayer employs software and web developers, managers, sales directors and associates, and recruiters. Tutors and users of the taxpayer's platform reside throughout the country. Tutors possess a variety of educational skills, achievements and teaching experience.

Prospective tutors interested in providing services through the taxpayer's platform go through the taxpayer's screening process which requires the individuals to provide applicable test scores and transcripts, submit a mock individualized learning plan, perform a mock tutoring session and submit to an authorized background check.

Recruiters interview and evaluate candidates, examining the candidates' educational skills, achievements and teaching experience, and then determine whether the candidates possess the skills necessary to provide effective tutoring services. After determining that a candidate is qualified to be included as a tutor on the taxpayer's website, the taxpayer places the tutor under an Independent Contractor Agreement and then lists the tutor on its website, displaying a photo of the tutor and identifying the tutor's name, specialty, interests, hobbies, hometown, and qualifications. Tutors are required to update the taxpayer of changes to their tutor profile such as in educational levels and experience and other areas of qualification.

Students may identify a potential tutor that may meet their needs through the taxpayer's tutor gallery or with the assistance of the taxpayer's director or representative. The taxpayer notifies the tutor by email when a student is interested in the tutor's services. The tutor has 24 hours to decide whether to engage with the student or not. If the tutor declines or does not respond within 24 hours, the taxpayer will move on to the next tutor. The tutor must contact the student within 24 hours of accepting the student. Tutors may provide services online or in person, in which case, the location would be determined by the tutor and student. The tutor and student determine the schedule, format, structure, and content of the sessions. The taxpayer does not train tutors and does not require tutors to attend particular training. The services to be provided by the tutor are developed solely by the tutor and the student, based on their best judgment as to the tutoring needed to meet the student's goals. Tutors set their own schedule and availability, and are asked to update the taxpayer on their availability. The taxpayer requires tutors to create a set and regular schedule. Tutors are allowed to terminate their agreement with the taxpayer at any time with 30 days written notice. The taxpayer sets minimum times for each tutoring session: 1 hour sessions for 5th grade and below; 1.5 hour sessions for 6th grade and above; 2-hour sessions for all test prep student. If a shorter session is needed, the tutor must speak with directors before the session is held.

To receive tutoring services, students must purchase packages of tutoring hours from the taxpayer to pay for the tutoring services. After receiving an hour of tutoring services, the student's balance of purchased tutoring hours is lessened by the hour of service.

Claimant was a teacher of mathematics in intermediate and high schools and at the college level. Claimant last worked as a math teacher at a public school on the Big Island in June 2015. After losing his job, claimant found the taxpayer's job posting for a tutor on Craigslist. Claimant applied to be a tutor through the taxpayer's website business, offering tutoring services in mathematics. Claimant was interviewed by one of the taxpayer's directors of recruitment and conducted a mock tutoring session to demonstrate his tutoring skills. After claimant passed the taxpayer's screening process, the taxpayer required claimant to sign an independent contractor agreement and considered claimant an independent contractor. Claimant signed the contract on July 28, 2015. Thereafter, claimant was instructed by email how to set up a tutor profile on the taxpayer's website, including uploading a photo of himself to market himself to clients. Claimant was provided instructions to set up direct deposit with his financial institution for payments for his services. Claimant was also issued a guide entitled "Tutor Expectations" which provided information on the tutoring process, the taxpayer's payment process, and the taxpayer's requirements which included having an appropriate voicemail that represented himself and the taxpayer well, having an appropriate email address and corresponding profile picture, having a respectable presence in social media sites, and keeping client information confidential.

Claimant was told that he would be contacted via email or phone when a client was interested in his services, and he had 24 hours to reply to requests from interested clients or the taxpayer would move to the next tutor. Within 24 hours of accepting a student, claimant was required to call the client. If the client did not answer his initial call, claimant was instructed to leave a message and then send a follow up email. After making contact with the client, claimant was required to introduce himself, ask the client if they had a chance to review claimant's tutor profile online and tell the client about himself. Claimant was also instructed to find out more about the student and discuss their needs, what materials they would provide for the sessions and what goals the student wanted to accomplish. Claimant was also required to create a set, regular tutoring schedule with the client.

According to claimant's contract with the taxpayer, claimant would be paid different rates for tutoring services: \$15.00 per hour for online tutoring and \$20.00 per hour for in-person tutoring. These were standard rates the taxpayer paid its tutors. Claimant performed only online tutoring using his computer at home. Claimant used the taxpayer's platform to communicate with the students via text, video, and voice. When there were issues with the system, claimant communicated with students via Google hangout or Skype.

Claimant was required to log his hours into the database at the taxpayer's website within 24 hours of any tutoring session. Claimant was not paid for any travel time or time spent preparing for a tutoring session. Claimant was paid once a month according to the employer's schedule and based on the session and session notes claimant submitted. Claimant was responsible for any tax obligations associated with his work for the taxpayer and was issued a U.S. Tax Form 1099, "Miscellaneous Income", at the end of the year. Claimant was free to work as an employee or independent contractor for other individuals or entities. Claimant did not have a registered business or tradename.

After a first session with a student, claimant was required to let the taxpayer know how the session went and if the tutoring arrangement would work out. After each session, claimant was required to submit tutor session notes to the taxpayer so the taxpayer could track the student's progress and to prove the tutoring session occurred. Claimant was expected to write detailed explanations about what he worked on with the student, how the session went, and the student's progress. Claimant was required to rate every session with every client using a star rating ranging from 1 (horrible) to 5 (great). The taxpayer expected claimant to communicate all of this within 24 hours after a session. Claimant was directed to check his voicemail or email at least once a day so he could be easily reached by the taxpayer.

If claimant was going to be unavailable, was not meeting with the student regularly, or was unable to continue with the student, he was asked to call or email the taxpayer with the dates he would not be available so the taxpayer could make necessary arrangements. Claimant was not allowed to assign his tutoring services to another individual of his choosing.

Under the taxpayer's cancellation policy, claimant was required to give his student at least 24-hour notice prior to the scheduled tutoring session start time if he could not attend a session. If claimant gave less than 24-hour notice, he would owe the client one hour of free tutoring. If claimant did not give any notice, he would owe two free hours of tutoring. The client was also required to give claimant at least 24-hour notice prior to the scheduled tutoring session start time if they could not attend a session. If the client gave claimant less than 24-hour notice, claimant was directed to log the cancellation and indicate the scheduled session time, the time the session was cancelled, and who cancelled the session. The taxpayer would then compensate claimant \$20.00. If the client did not give any notice, they would be charged for a full session and claimant would be compensated for the full session.

Claimant was required to be fully responsible to provide all tools, material, and equipment. Claimant had sole discretion to use or not use any material or equipment and was solely responsible for obtaining material or equipment for his tutoring sessions. The taxpayer did not provide insurance, training, or reimbursement for material, equipment, or travel.

Through the taxpayer's website, claimant expressed interest in 50 student opportunities, declined 28 student opportunities, and did not respond to 63 student opportunities that were presented to him through the taxpayer's platform. As a result, claimant obtained 39 students through the taxpayer over a period of approximately nine months.

REASONS FOR DECISION:

The relevant issue is whether claimant's services for the taxpayer constitute employment under Haw. Rev. Stat. §383-1, 2, 6, 10.

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 tutorial services to the taxpayer's student customers. Consequently, pursuant to the definition of "wages", under Haw. Rev. Stat. §383-10, the taxpayer's remuneration to claimant, for such services, constitutes wages.

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. R. §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 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 the instant case, the evidence of claimant's working relationship with the taxpayer met the elements of "control", under Haw. Admin. R. §12-5-2(a)(2) and (b). Haw. Adm. R. §12-5-2(a)(2) 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." While the taxpayer did not train claimant in the performance of tutorial services nor required claimant to perform his services in a specific manner, the taxpayer exerted control over claimant's services to the extent that it monitored and controlled claimant's progress with the student/clients. Claimant was required to comply with the taxpayer's instructions to create a set and regular schedule of tutoring sessions and adhere to prescribed timelines for cancellations of tutoring sessions [Haw. Admin. R. §12-5-2(b)(1)]; claimant was required to submit written progress reports (tutor session notes) to the taxpayer, as prescribed by the taxpayer, within 24 hours after each session, writing detailed explanations about what he and the student worked on, how the session went, the student's progress, and rating every session with each client using the taxpayer's star-rating system [Haw. Admin. R. §12-5-2(b)(11)]; after claimant and a student/client agreed claimant would tutor the client, the taxpayer required that the tutorial services be performed by claimant and did not allow claimant to assign his tutoring services to another individual of his choosing [Haw. Admin. R. §12-5-2(b)(4)]; the taxpayer qualified claimant to be listed in its marketplace of tutors only after requiring claimant to undergo an extensive vetting process that was controlled by the taxpayer's recruiters and then the taxpayer paid claimant for his services in accordance with its schedule of pay rates [Haw. Admin. R. §12-5-2(b)(5)]; the taxpayer paid claimant on a monthly basis for services performed, based on claimant's sessions and session notes [Haw. Admin. R. §12-5-2(b)(12)]; and finally, the taxpayer had the right to discharge or terminate its relationship with claimant [Haw. Admin. R. §12-5-2(b)(19)].

The foregoing aspects of claimant's working relationship with the taxpayer clearly demonstrated "control" by the taxpayer, under Haw. Admin. R. §12-5-2(b)(1), (4), (5), (11), (12), (19). Therefore, 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, claimant's tutorial services were clearly integral to the taxpayer's internet platform or digital marketplace of tutors and tutorial services, as his services were essential to the taxpayer's ability to offer tutorial services from its marketplace of tutors. Therefore, claimant's services for the taxpayer were part of the taxpayer's regular business and an indicia of employment,

under Haw. Admin. R. §12-5-2(b)(3). Although the taxpayer's corporation is based in Missouri, and claimant worked from his home in Hawaii, claimant performed tutorial services for the taxpayer from his home. Therefore, claimant's home served as an extension of the taxpayer's business of offering tutors through its marketplace, and claimant's services were performed within the taxpayer's places of business. In view of the foregoing, Clause (2) has not been met.

Clause (3) raises the issue of whether claimant was customarily engaged in an independently established business, functioning, usually and to an appreciable extent, as an independent business enterprise, holding himself out to the general public as such, and assuming all of the business risks of an entrepreneur.

Haw. Admin. R. §12-5-2(a)(4) defines the concept of whether "the individual is customarily engaged in an independently established trade, occupation, profession, or business" as referring 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.

In this matter, the evidence of claimant's working relationship with the taxpayer and lack of engagement in other tutorial services met the factors, under Haw. Admin. R. §12-5-2(b), to find that claimant was an employee. There was no evidence claimant had a proprietary interest in the taxpayer's business or exacted any profit or loss as a result of performing his services for the taxpayer as claimant was guaranteed a set hourly pay rate for his services and received payment only from the taxpayer, based on the hourly rates offered by the taxpayer [Haw. Admin. R. §12-5-2(b)(16)]; there was no evidence claimant performed his tutorial services independently for a number of other employers at the same time or made his tutorial services available to the general public [Haw. Admin. R. §12-5-2(b)(17) and (18)]; and claimant had the right to end his relationship with the taxpayer without incurring liability pursuant to his contract with the taxpayer [Haw. Admin. R. §12-5-2(b)(20)]. In view of the foregoing, Clause (3) has not been met.

The evidence of claimant's services for the taxpayer meets the factors under Haw. Admin. R. §12-5-2(a) and (b) to show that claimant had an employer-employee relationship with the taxpayer. Based on 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. Therefore, the services performed by claimant for the taxpayer constitute employment and payments made by the taxpayer to claimant for such services are wages subject to Haw. Rev. Stat., Chapter 383.

DECISION:

The UID decision is affirmed. Services performed by claimant for the taxpayer constitute employment, under Haw. Rev. Stat. §383-1, 2, 6, and 10. Therefore, remuneration paid to claimant for such services are subject to Haw. Rev. Stat., Chapter 383.

Date mailed/delivered: [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.____