DEFINITION OF AN "INDEPENDENT CONTRACTOR" UNDER HAWAII'S LABOR LAWS

Linda K. Goto
Researcher

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Legislative Reference Bureau
State Capitol, Room 004
Honolulu, Hawaii 96813

FOREWORD

This study to develop a uniform definition of "independent contractor" to be applicable to title 21, Hawaii Revised Statutes, relating to employment security, workers' compensation, temporary disability insurance, and prepaid health care laws is in response to Senate Resolution No. 145, S.D. 2, adopted during the 1986 Regular Session.

The Bureau found that the issue of a uniform definition of "independent contractor" for these four labor laws is spurious. The three part ABC test present in the employment security statute and the temporary disability insurance and prepaid health care administrative rules is the test uniformly used to differentiate between a covered employee and an independent contractor under these three laws. Regarding determinations under the workers' compensation law, the Department of Labor and Industrial Relations appears to have adopted a test of "economic reality" rather than the "relative nature of the work" test which is more well-established in the workers' compensation field. However, both of these tests have similar analyses to the ABC test and all three of these tests ("economic reality", "relative nature of the work" and the ABC test) are departures from the common-law-master-servant test. Accordingly, uniformity in the definition of "independent contractor" among these four labor laws does not appear to be the critical issue underlying this study.

Based on discussions with parties involved with the independent contractor issue, the real dispute among the parties is over general coverage of these four labor laws. There is no simple answer to resolve the concerns of all of the parties regarding the scope of coverage under these four labor laws. This report does not purport to have the final answer to resolve the problem of differentiating between a covered employee and a noncovered independent contractor, because it is one of policy. It is hoped, however, that the findings and conclusions reported in this study will focus the interested parties on the real controversy and provide a background in the legal aspects of the coverage issue to establish a foundation for meaningful legislative deliberation.

The Department of Labor and Industrial Relations provided the Bureau with access to their personnel who are involved in the implementation of the coverage provisions of these four labor laws. The Bureau is grateful for the Department's cooperation and willingness to share their knowledge. Special thanks to Robert C. Gilkey, former Director of Labor and Industrial Relations and to Linda Uesato of the Unemployment Insurance Division for their contributions to this study.

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SAMUEL B. K. CHANG
Director

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TABLE OF CONTENTS

Appendices

Chapter 1

INTRODUCTION

One constant, critical, and controversial issue with social legislation designed to protect the worker has been coverage--defining who is intended to benefit from the program. With each law establishing a social program the line between a covered employee and an excluded independent contractor has been drawn in different places to suit the particular purpose of that law. With Hawaii's employment security, temporary disability, and prepaid health care laws, this demarcation has been made based on the same three part test, known as the ABC test. Blurring of this line has resulted, however, from the passage of special interest legislation arbitrarily excluding from coverage service of certain groups of employees. With the workers' compensation law, historically, the basis for the demarcation has been less certain. The common-law, master-servant test, the "relative nature of the work" test, and the "economic reality" test have all been used to distinguish a covered employee from an independent contractor under the workers' compensation law. The "economic reality" test which has been most recently applied by the Department of Labor and Industrial Relations has a philosophical basis similar to the ABC test which is to broaden coverage to accomplish the remedial purpose of the social program.

At enactment, each of these four labor laws[1] contained exclusions of service for certain employees based upon model federal or state laws in the area. During the 1982 Regular Session, the Hawaii State Legislature began amending these laws to carve out additional exclusions for the service of employees who under the ABC test were otherwise covered. During the 1982 Regular Session, Acts 192 and 194 were adopted. Act 194 excluded service performed by vacuum cleaner salespersons from chapter 383, Hawaii Revised Statutes (hereinafter HRS), relating to employment security and from chapter 392, HRS, relating to temporary disability insurance.[2] Act 192 provided a similar exclusion from the employment security law for service performed for a commission by a registered sales representative for a registered travel agency.

Following the carving out of these particular exclusions from coverage of the employment security and temporary disability laws, various other measures were introduced during subsequent legislative sessions to exclude services performed by other groups of employees from coverage. Employees proposed for exclusion from one or more of these laws included alternate energy device salespersons paid by commission; mortgage solicitors paid by commission; certain outside sellers paid solely on commission basis; certain models or announcers in the production of print or broadcast advertisement; professional corporations by licensed physicians and surgeons, naturopaths, opticians, optometrists, osteopaths, pharmacists, public accountants, veterinarians, and attorneys, who are shareholders of the corporations; vacuum cleaner salespersons paid by commission; taxicab drivers; real estate salespersons; independent financial advisors; and owner-employees.

During the 1986 Regular Session, the Hawaii State Legislature confronted with the continual onslaught of such legislation adopted two measures relating

to coverage of these four labor laws. Senate Bill No. 2169, S.D. 1, exempted services performed by a vacuum cleaner salesperson if paid by commission only and services performed by an individual owner of a taxicab from the definition of "employment" under the workers' compensation law. Senate Bill No. 2169, S.D. 1, was vetoed by the Governor on April 21. The Governor's veto message cited agreement with legislative committee reports that the piecemeal approach to excluding specific occupations from statutory coverage is unsatisfactory and that a uniform definition of "independent contractor" should be developed to apply to all of the employment related statutes as reasons for the veto.[3] Senate Resolution No. 145, S.D. 2, requested the Legislative Reference Bureau (hereinafter Bureau) to conduct a study and develop a uniform definition of "independent contractor" to be applicable to laws in title 21, HRS, relating to employment security, temporary disability insurance, workers' compensation, and prepaid health care (see Appendix A). Standing Committee Report No. 1165 on Senate Resolution No. 145, S.D. 2, stated as the basis for the resolution that "Each [the four state labor laws] lists slightly different exemptions from coverage, giving rise to anomalous situations...."

Scope of the Study

Based upon the resolution, the scope of this study is limited to the development of a uniform definition of "independent contractor" for the employment security, the workers' compensation, the prepaid health care, and the temporary disability insurance laws included in title 21, HRS. The initial focus of this study is to decide whether the development of a uniform definition of "independent contractor" is legally proper and necessary. The secondary focus is to establish the alternative uniform definitions which may be applied. The purpose of approaching the study in this manner is to provide the Legislature with the background to consider and discuss the alternative policies necessary to fulfill their role as policymaker on the independent contractor problem. The objectives of the study were the following:

(1) To provide a complete review of the legal and practical problems associated with determining which workers are covered employees under each of the four laws;

(2) To determine the positions of various business organizations, the state Department of Labor and Industrial Relations, and certain labor unions on the issue of developing a uniform definition of "independent contractor";

(3) To provide a thorough legal analysis of the employee-independent contractor determinations under each of the four state labor laws based upon the pertinent statutory provisions, the administrative rules promulgated thereunder, the legislative history, and the administrative and court decisions interpreting the law;

(4) To provide a thorough legal analysis of the employee-independent contractor determinations under the federal laws including the

Internal Revenue Code, the Social Security Act, the Fair Labor Standards Act, and the National Labor Relations Act;

(5) To provide a review of the types of employees excluded under other states' employment security laws using the same three part ABC test for determining independent contractor status as Hawaii's labor laws;

(6) To provide specific findings regarding the problems of determining employee-independent contractor status and of formulating a uniform definition of "independent contractor" under the four state labor laws;

(7) To provide specific recommendations regarding whether a uniform definition of "independent contractor" for each of the four state labor laws is legally feasible and necessary, and what alternative definitions of independent contractor should be considered in developing a uniform definition.

Methodology and Conduct of Study

The research and field work for this study involved the following phases:

(1) Review of the pertinent sections of the HRS, the administrative rules promulgated thereunder by the Department of Labor and Industrial Relations, and the administrative and court decisions interpreting the coverage of these four labor laws;

(2) Review of literature, studies, and reports relating to employee-independent contractor determinations under federal law and other states' labor laws;

(3) Review of federal and other state labor statutes, administrative rules, and administrative and court decisions relating to employee coverage under these laws;

(4) Interviews with personnel from various business organizations, labor unions, Department of Labor and Industrial Relations administrators, and state legislators regarding the independent contractor issues and problems under the four labor laws; and

(5) Review and analysis of the exclusions from coverage under employment security statutes from other states which have a three part ABC test similar to Hawaii's.

In the course of this study, it became evident that there is a general misunderstanding about uniformity in the definitions of "employee" and "independent contractor" under these four labor laws. As this study will show, the three part ABC test is the definition of "independent contractor" and is uniformly applied to three of the four labor laws--either by statute or administrative rules or decisions. Although the workers' compensation law

currently employs a different test of "economic reality" to distinguish between an employee and an independent contractor, the definition of "independent contractor" under the "economic reality" test is philosophically similar to the definition of "independent contractor" under the ABC test. The statutory exclusions which have been created by the Legislature have eroded the uniformity of that definition. The real issue underlying this independent contractor study is coverage--whether a broader or narrower definition of "independent contractor" should be adopted for one or more of these four labor laws. The decision is one of policy which should ultimately be made by the Legislature. If this study is to accomplish one purpose, it is to focus the Legislature on the real issue underlying the independent contractor problem which is that of coverage.

Chapter 2

PERSPECTIVES ON THE INDEPENDENT CONTRACTOR PROBLEM

The first step in focusing the issues of the independent contractor problem is understanding the positions and problems of the parties involved with and affected by the independent contractor situation. To gain a complete perspective on the issues surrounding the independent contractor under the labor laws, the Bureau conducted interviews with various people in the business community, the labor movement, and the Department of Labor and Industrial Relations. Like the blind men's perception of the elephant, no one person perceives the entire independent contractor problem. Since each sees just one part, no one is either completely right or completely wrong--each point of view is correct but incomplete.

Business Community Concerns

The business community characterizes the problem of the independent contractor as a small business issue.[1] The concerns expressed by the business community underscore the significance of the coverage question as the core of the independent contractor problem. The expressed concerns over coverage focus on four major points: the ABC test, the statutory exclusions from coverage, the lack of uniformity between federal and state labor laws regarding the independent contractor test, and the basic philosophical question about the appropriateness of the present coverage.

Regarding the ABC test, as interpreted by the Department of Labor and Industrial Relations, the business community's objections are three-fold: (1) the burden of proof is 100 per cent on the employer and the test is impossible to meet; (2) the test is not clearly articulated nor identified as the pertinent legal standard to determine independent contractor status which creates general confusion among employers over which workers are considered covered employees; and (3) the narrowness of the test is no longer appropriate to the present social, industrial, and economic situation which calls for more small, independent businesses not to be subject to the payment of benefits.[2]

The business community maintains that the ABC test, as interpreted by the Department of Labor and Industrial Relations, places 100 per cent of the burden of showing the independent contractor relationship on the employer. Placing the full burden of proof on the employer results in the broad coverage of workers under these four labor laws and produces a tremendous financial burden particularly on the small businesses with marginal operations (coverage up to 35 per cent of payroll costs). The small business employers feel that this broad coverage is unfair because it includes situations where the employer has no control over the performance of work by the employee.[3]

The business community asserts that the ABC test is not recognized by employers as the "independent contractor" definition. The lack of a clearly articulated and recognized test is asserted as a reason that many small

businesses are not paying into the fund and thereby running the risk of financial harm when back payments are assessed upon the filing of a claim.[4]

Numerous misconceptions by both employers and workers over which workers are employees covered under the state labor laws also have arisen. Many employers and workers mistakenly assume that a worker is automatically an independent contractor if: (1) the worker has a general excise tax license or an employment contract stating that the worker is an independent contractor; or (2) the worker is statutorily excluded from one of the state or federal laws; or (3) the worker is employed on a part-time or temporary basis. The small business organizations are continually confronted with factual situations posed by employers regarding whether a certain worker is covered under one or more of these laws. Some of the types of workers which commonly cause confusion are gasoline dealers, beauty operators, vacuum cleaner and travel agency salespersons, free lance employees such as models and food demonstrators, lecturers, and entertainers.[5]

The statutory exclusions are attacked as inequitable by certain industries.[6] For example, workers in industries such as real estate are covered by workers' compensation while those in a similar industry such as insurance are not covered. Specifically within the real estate industry, there are further allegations that the companies are forced by state law to pay premiums for workers' compensation insurance coverage but that their employees' claims are being denied. The alleged basis for the denial is that the real estate employees are independent contractors under the federal Internal Revenue Code and thus are not covered under the terms of the workers' compensation insurance policy.[7]

Apart from the specific problem of the real estate companies, it is asserted that there is a lack of uniformity in the definition of an "independent contractor" between federal and state laws and among the four state labor laws which creates administrative and bookkeeping problems for businesses. (See chapters 3 and 4 for further discussion on uniformity among these laws.) The lack of uniformity causes administrative confusion over which laws must be complied with for each employee.[8]

Finally, the broad coverage of the four labor laws is philosophically unacceptable to business because it is viewed as an unwarranted government intrusion into the right of an employer to enter into a private contract for employment with a worker. This intrusion chills new labor opportunities within the State.[9] Broad coverage was appropriate during the plantation days when workers were ignorant of their legal rights and required protection, but times have changed. Changing life-styles and industries have also created the need for more flexible working conditions and fostered the demand for small, independent businesses not subject to the payment of benefits.[10]

The solutions offered by the business community to the independent contractor problem are diverse. One is to tie the definition of "independent contractor" under state labor laws into the federal Internal Revenue Code definition.[11] This solution would resolve the problem of the realtors--paying premiums without receiving coverage. Other solutions suggested are to adopt the common law control test[12] or the National Labor Relations Act test[13]

(which is similar to the control test) to determine independent contractor status under the four labor laws. The blanket exclusion of certain types of workers such as real estate salespersons, taxicab drivers, and vacuum cleaner salespersons, workers employed by small businesses with less than a certain number of employees, or workers required to have professional or vocational licenses by administrative rules is another recommendation.[14] These exclusions would remove the case-by-case determinations regarding these workers. Another suggestion is for the Department of Labor and Industrial Relations to adopt internal guidelines, developed with the assistance of industry personnel, to specify what factors are considered in determining independent contractor status. The purpose of these guidelines would be to alleviate some of the confusion within certain industries regarding coverage.[15] Finally, the business community recommends that the Department of Labor and Industrial Relations adopt a procedure to ensure that its administrative determinations of employee or independent contractor status are uniform among each of the four labor laws by implementing a more centralized administration of coverage.[16]

Labor Union Position

While the independent contractor problem does not appear to have been an important issue for most labor unions during past legislative sessions,[17] a couple of labor union representatives offered this perspective on the effect of further exclusions on coverage. The labor perspective starts with the premise that the purpose of the labor laws is to assist the worker. If a worker is discharged or disabled, in the absence of the labor law protection, the worker is left with no means of support. While the small businesses may bear the burden of paying for these benefits, the cost of these benefits are tax deductible business expenses.[18] On this philosophical basis the International Longshoremen's and Warehousemen's Union, Local 142, for example, has consistently opposed the special interest legislation creating exclusions from coverage of the labor laws for certain groups of workers.[19]

One labor representative asserts that the ABC test present in the employment security law provides an exemption from coverage for legitimate independent contractors on a case-by-case basis from coverage of that law.[20] There is further an appeal procedure for both the employer and employee to dispute the coverage of a worker as an independent contractor. Labor representatives do not oppose the present ABC test criteria for determining independent contractor status under the employment security law nor the exclusion of legitimate independent contractors from the coverage of these labor laws. The term "independent contractor," however, is used very loosely in the actual work setting because the employer wants to avoid paying benefits and the worker needs the job. The problem arises when the worker is injured or disabled and then realizes that there are no benefits because the employment was made on an independent contractor basis. The situations in which a worker is hired as an independent contractor, therefore, need to be limited, according to the unions.[21]

Regarding the uniformity and present coverage of these four labor laws, like the business community, the essential problem from the labor representatives' perspective rests with the piecemeal exclusions. These

exclusions have whittled down the coverage provided by the ABC test, eroding the effect of these four labor laws.[22]

While labor union representatives do not object to the concept of a uniform definition of "independent contractor" for these four labor laws, the representatives stated that their major concern is the broadness of the language of such definition. Accordingly, one union representative specifically objects to adoption of the federal Internal Revenue Code definition of "independent contractor" for state employment security, for example, asserting that there is no basis for incorporating this tax standard. The representative maintains that the ABC test contains the proper criteria for determining an independent contractor relationship under this labor law.[23]

Department of Labor and Industrial Relations Position

The Department of Labor and Industrial Relations' position is that there is no significant problem with uniformity in the definition of "independent contractor" among the four labor laws. The department maintains that the definition of "independent contractor" is uniform under the four labor laws. The department further asserts that the system administratively provides some uniformity in the implementation of the independent contractor standard. Although the unemployment insurance division makes its own determinations regarding independent contractor status under the employment security law, the disability compensation division, which administers the remaining three labor laws, attempts to ensure uniformity both within the division and with the unemployment insurance division. Efforts to obtain uniformity within the division are made through a joint hearing on coverage attended by the staff responsible for administering the three laws upon the filing of a claim under any one of these laws. Uniformity with the unemployment insurance division is obtained by checking for previous employment security determinations.[24]

Concerning the other source of dissatisfaction dealing with the distinction between the ABC test and the control test, the department maintains that the ABC test is basically a measurement of employer control over the worker. The department further asserts that employers do not understand that employer control is not limited to physical control but extends to a general control exercisable, directly or indirectly, over the physical activities and time surrendered by the worker.[25]

Like the business community and the labor representatives, the department perceives piecemeal statutory exclusions as the source of whatever uniformity problems there are with the definition of independent contractor.[26] The exclusion of certain workers from some, but not all, of the four labor laws has created not only a lack of uniformity but confusion over what defines an independent contractor. Employers take the position before the Legislature that a certain group of workers should be excluded because the employer has no control over the work being performed and therefore the workers are independent contractors. Employers then use this position to argue that this group of employees should be excluded from the other labor laws based on their independent contractor status. The department's interpretation is that for a worker to be excluded as an independent contractor, there must be a showing by the employer that the worker meets

the ABC test. Piecemeal statutory exclusions create groups of excluded employees, who do not meet the ABC test.

The philosophy of the department regarding coverage issues is that the four labor laws were intended to provide very broad coverage. This philosophy is based on rulings of the Hawaii Supreme Court interpreting the ABC test very strictly to maintain broad coverage of the labor laws.[27] Like the International Longshoremen's and Warehousemen's Union, Local 142, the department opposed legislation to exclude vacuum cleaner salespersons from the workers' compensation law during the 1986 legislative session, for example, on the grounds that such an exclusion is an erosion of the concepts underlying the law.[28]

One of the department's proposed solutions is that if uniformity in the definition of "independent contractor" among the four state labor laws is the objective, it should be achieved by amending the workers' compensation law to add the ABC test and by deleting the exclusions from each of the four labor laws.[29] Regarding uniformity with federal law, the department concurs with the labor representative that the purposes of the federal Internal Revenue Code and the state labor laws are too disparate to warrant adoption of the federal tax standard. The Internal Revenue Code is concerned with assessment of taxes and the independent contractor determination merely decides who is responsible for withholding the taxes. The purpose of the state labor laws, on the other hand, is remedial--to protect the workers.[30]

A review of the positions of these parties involved with and affected by the independent contractor problem shows that each offers a different perspective. Each perspective is correct but incomplete. These positions must be weighed against the legal issues presented by employee coverage under these four labor laws.

Chapter 3

DEFINITION OF EMPLOYMENT AND INDEPENDENT CONTRACTOR RELATIONSHIPS UNDER HAWAII'S LABOR LAWS

PART I. INTRODUCTION

Collectively, the four labor laws create a comprehensive social program of compensation and benefits for workers during periods of disability and unemployment. A thorough legal analysis of the occupational coverage aspects of each of these laws is required to ascertain the extent of uniformity of the definitions of covered "employee" and of "independent contractor" under these four laws. A legal analysis of such coverage[1] of each of these laws requires a review of the pertinent statutory provisions, administrative rules, legislative history, and court and administrative agency decisions.

PART II. LEGAL ANALYSIS OF OCCUPATIONAL COVERAGE UNDER HAWAII'S LABOR LAWS

Worker's Compensation Law

Legislative History. Workers' compensation is the oldest social insurance program in the State. The workers' compensation concept arose with the development of an industrialized society and a need for protecting workers from the effects of work-related injuries. The workers' compensation system is not based on the traditional legal doctrines of tort liability. The right to benefits under the workers' compensation law depends on a statutorily created legal relationship between the parties determined by three elements: (1) the occupational status of the injured worker; (2) the character of the harm sustained; and (3) the nexus of the harm with the employment.[2] The first element--the occupational status of the injured worker is the significant issue in the present legal analysis.

The legislative history of the provisions in the workers' compensation law relating to occupational coverage conclusively shows that the basic legislative intent has been for such coverage to be inclusive, that is, for the coverage to include most occupations.

Hawaii's workers' compensation law was initially passed by the territorial legislature during the Regular Session of 1915 as Act 221. (See Appendix B for an overview of the revisions to the workers' compensation law relevant to this discussion.) The original workers' compensation law contained four major parts: coverage, benefits, administration and procedure, and security for payment.[3] The law was substantially similar to a uniform act drafted by the Commissioners on Uniform State Laws.[4] However, there were some significant omissions and modifications. One area of modification was occupational coverage. The Hawaii law substituted the all-inclusive language "any and all industrial employment" for the language "all public and all industrial employment" contained in the uniform act. The language of Act 221, section 1, further affirms the broad coverage intended stating, "This Act shall apply to any and all industrial employment, as hereinafter defined. If a workman receives personal injury by accident arising out of and in the course of such

employment, his [the workman's] employer or the insurance carrier shall pay compensation in the amounts and to the person or persons hereinafter specified."[5]

Other provisions of Act 221 showed that public employment was included within the intended broad coverage by the "...Territory [of Hawaii] or by any county, or by any subdivision of the Territory..." and private employment, including employment "...in a trade or occupation which is carried on by the employer for the sake of pecuniary gain."[6]

"Workman" and "employee" were defined synonymously to include "...any person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer. The exclusions from these definitions were limited to persons whose: (1) employment is purely casual; (2) employment is not for the purpose of the employer's trade or business; or (3) remuneration from any one employer, excluding overtime, exceeds $36 per week."[7]

"Wages" were defined as "...includ[ing] the market value of board, lodging, fuel, and other advantages which can be determined in money which the employee receives from the employer as a part of his remuneration." Excluded from "wages" were "...any sums for which the employer has paid to the employee to cover any special expenses entailed on him by the nature of his employment."[8]

The subsequent amendments to the occupational coverage provisions of the workers' compensation law[9] all moved in one direction--to extend coverage. For example, the definition of "employment" was progressively amended to become more inclusive. The 1917 amendments extended the definition of "industrial employment" to include employers pursuing professions.[10] The 1939 amendments extended coverage to include employees with weekly earnings, excluding overtime pay, from any one employer of $50 or less.[11] The 1945 amendments established elective coverage for private employers pursuing a trade, occupation, or business not falling within the definition of "industrial employment" and for employees whose remuneration exceeded $100 per week.[12] The 1949 amendments extended compulsory coverage to all employees in industrial employment and all non-elective public officials, regardless of the amount of their weekly earnings or their annual salary.[13] The 1959 amendments provided a major extension of coverage by including all officials, elected or under any appointment or contract of hire, within the definition of "employee",[14] and by establishing a presumption that a claim for compensation was within the provisions of the law.[15] The legal presumption placed on the employer the burden of going forward with the evidence and of ultimate persuasion to rebut the presumption that the employee's injury is within the provisions of the workers' compensation law. If the employer fails to present substantial evidence to rebut this presumption, the claimant must prevail.[16]

Subsequently, the Legislative Reference Bureau was requested to examine Hawaii's workers' compensation law with the purpose of clarifying and recodifying the statutory provisions. The study, conducted by a consultant, Dr. Stefan A. Riesenfeld, and entitled Study of the Workmen's Compensation Law in Hawaii, was submitted before the 1963 Regular Session. This study resulted in major revisions to the workers' compensation law during the 1963

Regular Session.[17] There were three amendments pertinent to occupational coverage which followed the previous trend of extending coverage: (1) the definition of "employee" was amended to broaden coverage to "...any individual in the employment of another, except for employment for personal, family, or household purposes;"[18] (2) the definition of "employment" was more broadly defined to cover all service relations established by "...any contract of hire or apprenticeship, express or implied, oral or written..." and to cover the "...service of public officials, whether elected or under any appointment or election...;"[19] and (3) the definition of "wages" was more broadly defined to include "...all remuneration for services constituting employment."[20] An exclusion was carved out for service for certain charitable, educational, or nonprofit organizations.[21] There is no statement in the legislative history regarding the reason for the exclusion.

Despite the general legislative direction towards inclusive coverage, recent amendments to the workers' compensation law have carved out additional exclusions from covered employment for: (1) service performed by an individual for another person solely for personal, family, or household purposes which meets certain enumerated requirements;[22] (2) domestic services by a recipient of social service payments authorized by the department of social services and housing;[23] and (3) service performed without wages for a corporation without employees by a corporate officer in which the officer is at least a twenty-five per cent stockholder.[24]

Current Statutory Provisions and Court and Administrative Decisions. Interpretation and application of these three definitions of "employment", "employee", and "wages" to the particular facts of a case are required to determine whether a worker is an employee or an independent contractor under the workers' compensation law.

There is only one court decision resolving the issue of whether a worker is an employee or an independent contractor within the meaning of these definitions contained in the workers' compensation law. The case is Re Tomongdong, 32 Haw. 373 (1932) (hereinafter Tomongdong).

In Tomongdong, Ikezaki, a general contractor, contracted with an owner of certain land to build a house thereon. The claimant Tomongdong and his partner Shimabuku were performing the preparatory work under some arrangement with Ikezaki. The claimant sought compensation for loss of eyesight and part of an arm while clearing the plot of land. In support of the claim for compensation, the claimant asserted that he was an employee of Ikezaki. Ikezaki denied liability on the ground that the claimant was an independent contractor. Ibid. at 375. On appeal, the Hawaii Supreme Court found that the circuit court's finding that the claimant was an employee of Ikezaki was based upon the Court's decision in Re Ikoma, 23 Haw. 291 (1916) (hereinafter Ikoma).[25] The Court stated that the Ikoma case held that "...an injured workman whether employed directly by the owner or operator of a business or indirectly through a contractor is entitled to compensation as against the owner or operator of said business." The Court then found that the lower court's reliance on the Ikoma decision was based upon conclusions that: (1) Ikezaki was the owner and operator of this business; (2) Shimabuku was an independent contractor for preparation of the ground; and (3) the claimant was Shimabuku's employee. The Court ruled that the lower court's findings were correct except for the finding that the claimant was an

employee of Shimabuku. 32 Haw. at 375-376. In so ruling, the Court relied upon the common law analysis of the distinction between independent contractor and employee. The Court stated that the focus of this analysis was whether "...the employer has or has not retained power of control of superintendence of the contractor or employee." Ibid. at 378. Applying this control test, the Court concluded that Shimabuku and claimant were partners and therefore both were independent contractors. Ibid. at 384.

Other workers' compensation cases interpreting the language of these definitions show historically that the common-law control test is the established criteria for determining an employment relationship in "lent employee" cases. These cases are not directly on point because the definitions are not intended to differentiate between an employment and an independent contractor relationship. These cases are relevant, however, to show criteria which have been applied by the Court to determine an employment relationship under the workers' compensation law.

The "control 'power of superintendence' test" was statutorily adopted as the specific test for the employment relationship in the "lent employee" situation by amending the definition of "employee". Decisions involving "lent employee" situations following this amendment dealt with disputes regarding which employer is liable for a claimant's workers' compensation benefits. These decisions have applied and interpreted the control test for "lent employees" contained in the definition of "employee".

In Kepa v. Hawaii Welding Company, Ltd., 56 Haw. 544, 545 P.2d 687 (1976) (hereinafter Kepa), the claimant was paid by Hawaii Welding Company but was working on a project for J.A. Thompson & Sons. The labor appeals board held that Hawaii Welding had not transferred sufficient control over the claimant to make Thompson the liable employer under the definition of "employee" in section 386-1, Hawaii Revised Statutes. Ibid. at 545, 545 P.2d at 689. In affirming the appeals board decision, the Court stated that the paramount consideration in determining whether the alleged special employer is in fact a special employer of the worker in "lent employee" cases is whether the alleged special employer exercised control over the details of the work of the loaned employee. Such control, the Court went on, strongly supports the inference that a special employment relationship exists. Ibid. at 548, 545 P.2d at 691.

In a similar decision, Yoshino v. Saga Food Service, 59 Haw. 139, 577 P.2d 787 (1978), the Hawaii Supreme Court considered an appeal by Saga Food Service from the Labor and Industrial Relations Appeals Board's decision affirming the Director of Labor and Industrial Relations' decision. The Director's decision awarded workers' compensation benefits to the claimant, assessing such payments entirely against Saga Food. The Court affirmed the decision of the appeals board. Ibid. at 140, 577 P.2d at 789. The Court found that the board, in reaching its decision, had relied upon two tests: (1) the "relative nature of the work" test; and (2) the control test. The Court disapproved of the board's primary emphasis on the "relative nature of the work test". The Court reiterated the ruling in the Kepa case, that the control test is the primary guideline for determining whether an employer is a special employer for workers' compensation purposes. Ibid. at 143-144, 577 P.2d at 790.

In the most recent decision involving a "lent employee" situation, Harter v. County of Hawaii, 63 Haw. 374, 628 P.2d 629 (1981), the Hawaii Supreme Court again affirmed the control test as the primary determinant of liability in a "lent employee" situation. The Court applied the test to find that the county was the employer of the claimant at the time of injury. Ibid. at 379-381, 628 P.2d at 632-633.

While there have been no recent court decisions, there are two Labor and Industrial Relations Appeals Board decisions which are directly on point for the issue presented by this study--criteria for determining whether a worker was an employee or an independent contractor. These decisions substantiate the appeals board's position that the "relative nature of the work" test is the proper test to be applied in making such determinations. In Torres v. Filter Queen of Hawaii and Island Insurance Company (hereinafter Torres), AB 72-196 (1975), the appeals board was reviewing a Director of Labor and Industrial Relations' decision that the claimant salesperson in that case was an independent contractor. In reversing the determination, the appeals board noted that there were two ways of distinguishing between an employee and an independent contractor--the common-law, master-servant test and the new standard "nature of the claimant's work in relation to the regular business of the employer" test. The appeals board adopted the "relative nature of the work" test and concluded as follows:

> The newer way of interpreting the term "employee" to distinguish between an employee and an independent contractor uses the standard: "the nature of the claimant's work in relation to the regular business of the employer." (Larson, §43.50, Vol. 1A, p. 8-12).
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> The logic of this approach is set forth by Larson, §43.51, Vol. 1A, p. 8-12:
>
> > The theory of compensation legislation is that the cost of all industrial accidents should be borne by the consumer as a part of the cost of the product. It follows that any worker whose services form a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channeled, is within the presumptive area of intended protection.
>
> The work Claimant did for Employer was an integral part of the Employer's regular business. There is no evidence the Claimant, in relation to the Employer's business, was in a business or profession of his own as an independent contractor.
>
> The Employer, through such devices as regular meetings and the furnishing of leads, exercised his right to control the work and production of salespeople. The employment of sales people could be terminated by the Employer. The method of payment of Claimant by Employer indicates Claimant was a regular employee for well over a

decade as does the furnishing of demonstration equipment to Claimant.

The conclusion is clear that the Claimant was an employee of Employer within the scope of the Hawaii Workmen's Compensation Act on the date of the accident. Ibid. at 4-5. (Emphasis added)

The appeals board's decision in Osborne v. Ken Raupp and Special Compensation Fund, AB 77-3306 (WH) (1981) in which the board reviewed the Director's decision that Raupp was liable for temporary total disability payments for injuries sustained by the claimant has a similar effect. The appeals board, in affirming that decision, and further finding that Raupp was required to reimburse the special compensation fund, concluded that under the definitions of "employee" and "employment", the claimant was an employee. In support of its position, the appeals board relied upon its decision in the Torres case, stating:

1. Claimant at the time of his injury was an employee of Ken Raupp. Section 386-1, Hawaii Revised Statutes, states in relevant part:

"Employee" means any individual in the employment of another person.

"Employment" means any service performed by an individual for another person under any contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully entered into.

In Torres v. Filter Queen of Hawaii, AB 72-196 (1975) this Board held that whether a Claimant was an employee or independent contractor should be measured according to "the nature of Claimant's work in relation to the regular business of the employer." In so stating, this Board quoted from 1A Larson, Workers' Compensation Law, Section 43.51:

Here it is plain that Claimant was not an independent contractor. Claimant refused to sign four contracts as an independent contractor. He took orders from Raupp and received a straight salary of $200 a week. He did not share in the profits and had no general excise license. He did not purchase equipment or supplies with his own money. Claimant paid a part-time employee out of petty cash and did not use his own funds. Clearly, Claimant was not in business for himself. Accordingly, we conclude that Claimant was an employee within the meaning of Chapter 386, Hawaii Revised Statutes. Ibid. at 4-5.

Recent informal opinions rendered by the Department of Labor and Industrial Relations in response to employer queries regarding the employment or independent contractor status of their workers have shown that the department has adopted an expansive view of the definition of an "employee" where factors other than the common-law, master-servant relationship exists.[26] Relying upon the United States Supreme Court's decision in United States v. Silk, 331 U.S. 703 (1947), the department takes the position that

the proper test for defining "employee" as used in social insurance statutes is the "economic reality" test. The "economic reality" test broadens the protection afforded by such statutes. The department maintains that under this test, individuals who as a matter of economic reality perform services for and are dependent for their livelihood on the employer for whom their services are rendered should be protected under the workers' compensation law.

To summarize, there are three tests which have been used in determining employee status under the workers' compensation law: (1) the common law control test; (2) the "relative nature of the work" test; and (3) the "economic reality" test. Although the statutorily established common law control test has been the standard in "lent employee" cases, such cases are factually distinguishable from those cases requiring a determination of employee versus independent contractor status. A "lent employee" situation involves a dispute between two employers regarding liability for the claimant's workers' compensation benefits. Coverage of the worker under the law is not disputed. In contrast, in determining independent contractor status, coverage under the law is the essential question. In such cases an evaluation of the facts, in accordance with the intent and purpose of the workers' compensation law to protect and compensate the worker for all injuries received during employment irrespective of negligence and proximate cause, is required.

Although the "relative nature of the work" test is the more well-recognized test for determining an employment relationship in the workers' compensation field, the Department of Labor and Industrial Relations has been inclined in informal opinions to follow the broader "economic reality" test in determining whether a worker is an employee or an independent contractor under the workers' compensation law. Since the Tomongdong case, decided in 1932, the workers' compensation law has been amended to progressively broaden general coverage.[27] It is uncertain what standard the Hawaii Supreme Court would apply if confronted with the issue of whether a worker is an employee or an independent contractor under the current workers' compensation law. It would appear, however, that to effectuate the intent and purpose of the workers' compensation law, the Court would be compelled to reevaluate its position in the Tomongdong case and to adopt a standard broader than the common-law control test which has traditionally been pertinent to a negligence and proximate cause analysis.

Employment Security Law

Legislative History. Hawaii's employment security or unemployment compensation law was passed by the territorial legislature in 1937 as Act 243.[28] (See Appendix C for an overview of the major revisions to the employment security law pertinent to this discussion.) The purpose of Act 243 was to establish a system of unemployment compensation for the payment of compensation to the unemployed.[29] One of the particular reasons for the adoption of the employment security law was to bring the Territory of Hawaii under the provisions of the federal Social Security Act and the federal "National Employment Act" (known as the Wagner-Peyser Act).[30]

"Employment" in Act 243 was broadly defined to include "...services in interstate or foreign commerce, performed within the Territory [of Hawaii] for remuneration or under any contract of hire, expressed or implied, oral or written...."[31] Excepted from this definition were services performed: (1) in agricultural labor; (2) in domestic service in a private home; (3) as an officer or member of the crew of a vessel on the navigable waters of the United States; (4) in family employment; (5) in the employ of the United States government or of an instrumentality of the United States government; (6) in the employ of the Territory, a political subdivision thereof, or an instrumentality of one or more states or territories or political subdivisions; and (7) in the employ of a nonprofit organization.[32] "Employee" was statutorily defined within the context of this Act as "...only a person who is or has been employed by an employer subject to this Act in an employment also subject to this Act."[33] "Wages" were defined as "...all remuneration including commissions and bonuses for employment including the cash value of all remuneration payable in any medium other than cash."[34]

Like the workers' compensation law, the legislative history of subsequent amendments to the employment security law shows a definite trend toward expansion of basic coverage with gradual additions of specific exclusions of service. Two years after Act 243, there was a major revision of the employment security law by Act 219, Session Laws of Hawaii 1939. The definition of "employee" was deleted and references to "individual" were substituted throughout the employment security law.[35] Under this revision, the definition of "employment" was changed to: (1) broaden coverage to certain services in interstate or foreign commerce whether within or without the State; (2) substitute the term "wages" in place of the term "remuneration"; and (3) add the following provision:[36]

> (5) Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this Act unless and until it is shown to the satisfaction of the board that,
>
> (A) such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and
>
> (B) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> (C) such individual is customarily engaged in an independently established trade, occupation, profession, or business.

The added provision, referred to as the ABC test, was contained in the draft act recommended for adoption by the Social Security Board. The provision originally appeared in the Wisconsin employment security law. The purpose of the provision was to avoid the common-law connotations of "master", "servant", and "independent contractor" relationships in the interpretation of the employment security law.[37]

Added to the exclusions from the definition of "employment" was service with respect to which unemployment compensation is payable under an unemployment compensation system established by an Act of Congress.[38]

Act 304, Session Laws of Hawaii 1941, amended both the ABC test and the exclusions from the definition of "employment". The purpose of the amendment made to the ABC test provision was to clarify: (1) the intent that coverage not be determined by principles applicable to the common-law, master-servant relationship by adding to the first sentence of the provision the language "irrespective of whether the common-law relationship of master and servant exists;"[39] and (2) that the independently established trade, occupation, profession, or business must be "of the same nature as that involved in the contract of service."[40]

The enumerated exclusions from the definition of "employment" proliferated to include: (1) casual labor; (2) service performed in the employ of any organization exempt from income tax under the provisions of the federal Internal Revenue Code providing for exemptions from corporation tax which meet certain enumerated requirements; (3) employment performed in the employ of a foreign government or an instrumentality of a foreign government; (4) service performed by a student nurse or an intern which meets enumerated requirements; (5) employment for an employing unit as an insurance agency or as an insurance solicitor on a commission basis; (6) employment by individuals under the age of 18 in the delivery or distribution of newspapers or shopping news; (7) service covered by arrangement between the board and the agency charged with the administration of any other state or federal unemployment compensation law; and (8) any service, which pursuant to an Act of Congress, is not included as employment for purposes of the tax levied by the Federal Unemployment Tax Act.[41] The definition of "wages" was amended to make the meaning "...subject to other provisions of this subsection."[42]

Since these 1941 amendments, the definition of "employment" and the ABC test provision have remained virtually unchanged. The definition of "employment", the ABC and the excluded service provisions were recodified to break down the definitional section into several statutory sections.[43] The excluded service provision has been amended to alter the specific language of the excluded service provision and to create additional exclusions.[44]

Subsequent amendments to the employment security law did alter the definition of "wages" to exclude "...tips and gratuities paid directly to an individual by a customer of his employer and not accounted for by the individual to his employer."[45]

Current Statutory Provisions and Court and Administrative Decisions. There are a number of Hawaii Supreme Court cases which interpret and apply the definitions of "employment" and "wages" and the ABC test to determine whether particular workers are employees or independent contractors under the employment security law. While the control test is one of the elements of this analysis, this line of cases demonstrates that: (1) general control is sufficient to establish an employment relationship; and (2) the common-law control test is one, but not <u>the</u>, controlling factor in making such determinations.

The first decision on this issue was Bailey's Bakery, Ltd. v. Borthwick, 38 Haw. 16 (1948). This decision established the basic principles underlying determinations of employee versus independent contractor status under Hawaii's employment security law. In that case, the plaintiff bakery sought to recover unemployment contribution assessments made under the Hawaii unemployment compensation law and paid under protest. The circuit court decision affirmed the commission of labor and industrial relations' finding that: (1) the bakery was an employer within the terms of the law; (2) the services performed for the bakery were for wages; and (3) the bakery should make contributions on all wages earned by the drivers from January 1, 1937, to and including September 30, 1944. Ibid. at 24-25.

On appeal, the position of the bakery was that: (1) the word "services" contained in the statutory definition of "employment" meant personal services performed for another; (2) the services rendered by the drivers were not performed for the bakery but for themselves upon the resale and delivery by them of the bakery products to retailers; and (3) if the buyer-seller relationship was not created by the delivery contracts, the delivery contracts created a relationship of contractee and independent contractors not subject to the provisions of the unemployment compensation law. Ibid. at 27. In rejecting the bakery's position that the relationship between the drivers and the bakery was one of buyer-seller, the Court emphasized that although the words "employment", "employee", "wages", and "employer" are terms of art, the statutory definition is the one to be applied, stating:

> It should be emphasized at the outset that the unemployment compensation law was enacted by the legislature for the relief of workers under the stress of unemployment occasioned through no fault of their own; that in construing the provisions of the law designed to effect that purpose they should be liberally construed "in the light of the mischief to be corrected and the end to be attained," and that "Where words are defined in a particular statute, and it is clear that the legislature intended to give such words a different meaning than the one generally and ordinarily given * * * the statutory definition is the one to be applied."
>
> The words "employment," "employee," "wages" and "employer," as ordinarily employed, are words of art. To them are attached common-law definitions and connotations well defined and understood. But it is apparent from the respective definitions of those terms contained in the law as originally enacted that the legislature made a studied effort to avoid limitation upon the class to be benefited by rejecting standards that might restrict it exclusively to workers sustaining a master-servant relationship, as understood at common law and to include all workers whom the law was socially designed to protect. By the adoption of controlling definitions it sought to effect coverage not only for workers employed under "contracts of hire" but also those who performed personal "services" for "remuneration" (or "wages") under contracts of service, the terms and conditions of which subjected them to the same contingencies of unemployment and resulting distress as those occupying the master-servant relationship. These definitions, though amended from time to time, remained substantially the same and were patently designed

to preserve that purpose. Ibid. at 27-29. (Emphasis added)

By applying this approach to the facts, the Court determined that the contracts of service between the bakery and the drivers created a master and servant relationship in that the drivers were employed under "contracts of hire" as defined both by common law and by the employment security law. In finding that the contracts of hire did not make the drivers independent contractors, the Court ruled that while the control test is the deciding factor, the rigidity of the common-law control test must yield to the objects and purposes of social legislation. General control was found to be sufficient to establish the master-servant relationship:

> Nor do we believe that the drivers under their contracts of service were independent contractors. The respective definitions of "master," "servant" and "independent contractor" contained in the Restatement of the Law of Agency are quoted in the margin. To the definition of "servant" repeated in the Restatement, in section 220, are appended factual considerations directed to the distinction between a servant and independent contractor. They are also copied in the margin. The control test is the deciding factor. Many of the authorities hold that an essential of the common-law, master-servant relationship is the complete control by the master of all the details of the physical activities of the servant. And if this were so then the lack of control by the bakery over the maintenance and operation of the delivery equipment owned by the drivers might be considered as excluding the drivers from the master-servant relationship and placing them in the category of independent contractors. But in our opinion, due to the original sphere of application of the control test to the vicarious liability under the doctrine of respondeat superior, the rigidity of the test must yield to the objects and purposes of social insurance and the control reserved to the principal for unemployment compensation purposes need not extend to all the details of the physical performance of the service 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 bakery had a general control over the drivers. Ibid. at 31-32. (Emphasis added; footnotes omitted)

The Court then further concluded that the drivers were also individuals performing "services for wages". In reaching this conclusion, the Court determined that the master-servant relationship is not an essential prerequisite to the imposition of the tax, stating:

> The relation of master and servant is not an essential prerequisite to the imposition of the tax. The general objective of social insurance is to increase the coverage beyond the class occupying the strictly master-servant relationship and include all workers not clearly independent of superior control and whose employment status is such that in the event of unemployment they may suffer equally as those admittedly sustaining the master-servant relationship. The legal incidents of the employment relation has been modified by the necessities of social security. The

> specialized definitions employed in the law indicate a recession from the common-law concepts of the master-servant relationship and the creation of an employer-employee relationship unknown to the common law, the only exclusion from which is the purely independent contractor relation. Hence it may be said that the drivers were not only individuals performing service under "contracts of hire" within the meaning of the law, but also ones performing "services for wages." Ibid. at 36. (Emphasis added)

The Court further supported its decision by relying upon the United States Supreme Court decision in United States v. Silk, 331 U.S. (1947) (hereinafter Silk). Ibid. at 44-50. In the Silk decision, the United States Supreme Court held that the federal law coverage should be interpreted by the "economic reality" test which outweighs technical legal classifications for purposes unrelated to the statute's objectives. The Hawaii Supreme Court, based upon the United States Supreme Court's decisions in Silk and Board v. Hearst Publications, 322 U.S. 111 (1944), concluded that for coverage under the employment security law, it is not necessary to sustain the common-law, master-servant relationship, and further, the control test as applied to the tort principle of respondeat superior is not the controlling factor, stating:

> What the court held in the Silk case is not as important as the implications of its conclusions. Implicit in the decision in that case is the deduction that a beneficiary under the Act need not sustain common-law master-servant relationship and that the control test as applied to the vicarious liability of masters under the respondeat superior doctrine is not the controlling factor in determining the legal status of the worker. Applying the rationale of the Hearst and Silk cases to the Hawaii unemployment compensation law, we conclude that it is not sufficient to establish immunity from its terms and provisions to show that there had not been reserved to the master the extent of control necessary to establish the relationship of master and servant when measured by the technical standards of the common law. But it must appear that the worker is free from the direction or control both under his contract of service and in fact and is not within the class of workers that the law was designed to protect. Ibid. at 49-50. (Emphasis added)

Since the Court found that there was a master-servant relationship in the Bailey's Bakery case, the Court did not rule on the legal effect of the ABC test provision on the facts of that case.

In a subsequent case, the Court was required to interpret and apply the ABC test in determining whether certain house salespersons of cooking utensils for Century Metalcraft, known as distributors, were in "employment" as defined under the employment security law in Re Century Metalcraft Corporation, 41 Haw. 508 (1957). The issue was presented on appeal from a decision of the tax appeal court affirming the commission of labor and industrial relations' decision to overturn an assessment for unemployment compensation contributions on unreported commissions paid to the distributors. Ibid. at 509. The taxpayer took the position before the Court that the distributors were not in its employment because the concept of employment in the employment security laws is premised upon the existence of the common-law, master-servant relationship. The taxpayer asserted that the

distributors were independent contractors. Ibid. at 513. In rejecting the taxpayer's argument and reversing the tax appeal court's decision, the Court initially reviewed the legislative history of the ABC test provision, in particular, noting that early judicial decisions frustrated the legislative intent behind the enactment of the ABC test provision by limiting the coverage of the state laws to situations in which the common-law, master-servant relationship existed. The Court found that the state legislature made a studied effort to avoid such limitations with the ABC test provision in Hawaii's employment security law, reasoning:

> In some states which enacted this provision, notably Washington and Utah, early judicial decisions frustrated the legislative intent behind such enactment by limiting the coverage of the state laws to situations in which the common-law relationship of master and servant existed. (91 P.[2d] 718; Fuller Brush Co. v. Industrial Commission, 99 Utah 97, 104 P. [2d] 201)
>
> Our legislature took positive action to prevent any such limitation by judicial decision. By Act 304 of the Session Laws of 1941 it amended the provision quoted above by inserting in the first sentence thereof the words "irrespective of whether the common-law relationship of master and servant exists." The Act also added to clause C the words "of the same nature as that involved in the contract of service." The provision as so amended is compiled in section 4207 of the Revised Laws of Hawaii 1945. It is to be noted that in the original Act the word "employee" was used but the use of the word is avoided in the subsequent revision and amendments thereof. Persons covered by the local law, presently and during the period in question, are referred to as "individuals" and not as employees. Thus, as stated in Bailey's Bakery v. Tax Commissioner, 38 Haw. 16, at page 28, "the legislature made a studied effort to avoid limitation upon the class to be benefited by rejecting standards that might restrict it exclusively to workers sustaining a master-servant relationship, as understood at common law and to include all workers whom the law was socially designed to protect." Ibid. at 515. (Emphasis added)

Based upon the legislative history, the Court found that there was a presumption that individuals who receive wages are in employment. This presumption can be overcome by satisfying the requirements of the ABC test, and the burden of proof rested on the taxpayer. Applying the test to the case before the Court, the Court concluded that the burden had not been met in that case. Specifically, the Court found that elements A and C of the test were not satisfied. Ibid. at 515-516. Regarding the showing required by clause A, the Court stated that the taxpayer must show that the distributors were free from control or direction over the performance of their services, both under their contracts of hire and in fact. The control contemplated by this clause is general control and need not extend to all details of the performance of service. The Court then applied these principles to find that sufficient elements of control lurked in the contract itself and in the actual operation of the distributors. Ibid. at 516-517. Regarding clause C, the Court found that the showing required under the clause is that: the trade, occupation, profession, or business must be: (1) customarily engaged in; (2) independently established; and (3) of the same nature as that involved in the

contract of service. The Court held that the record did not support a showing that any of the distributors were able to satisfy all three parts of this test. Ibid. at 519.

In Homes Consultant Company, Inc. v. Agsalud, 2 Haw. App. 421, 633 P.2d 564 (1981), the Hawaii Intermediate Court of Appeals applied the Hawaii Supreme Court's interpretation of the ABC test in an appeal taken by the Director of Labor and Industrial Relations from a decision and order entered by the circuit court reversing an unemployment compensation referee's decision. The referee's decision held that the salespersons for Homes Consultant Company were covered by the Hawaii employment security law. Ibid. at 421-422; 633 P.2d at 566-567.

On appeal, the Director contended that two of the circuit court's findings were "clearly erroneous" within the meaning of section 91-14(g)(5), Hawaii Revised Statutes: first, the circuit court's reversal of the referee's finding that salespersons were subject to control by Homes; and second, the circuit court's affirmation of the referee's determination that the salespersons representing Homes were "customarily engaged in an independently established trade." Ibid. at 425, 633 P.2d at 568.

Regarding the first issue, the Court agreed with the Director that while Homes appeared to have given up all control and direction over its salespersons, there remained sufficient indicia of control to support the referee's decision from evidence that: (1) Homes had final approval on acceptance or rejection of proposed contracts; (2) although Homes stated it did not keep records on its salespersons, Homes did maintain records of the whereabouts of its sales literature, sales kits, and to whom payments were made; and (3) despite the substantial leeway given the salespersons in setting prices, the activities were subject to review by the sales manager prior to the company's approval of the contract. Ibid.

The Court further concluded that both the referee and the circuit court clearly erred regarding requirement (3)--that Homes salespersons were "customarily engaged in an independently established trade." In so concluding, the Court found that Homes did not produce sufficient evidence to carry the burden of establishing, by reliable, substantive, and probative evidence, that the salespersons were "customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service." The Court reversed the judgment of the circuit court and affirmed the decision of the Appeals Board. Ibid. at 426; 633 P.2d at 568-569.

Subsequent circuit court and unemployment compensation appeals division cases have applied the principles established by this line of appellate decisions, interpreting the definition of "employment" and the ABC test provision, in determining whether particular workers are employees under the employment security law. Such decisions generally fall in favor of coverage. One significant circuit court decision is the decision and order rendered in Agsalud v. First Hawaiian Investment Company, Civil No. 50079 (5/2/78). The Court, in applying section 383-6, Hawaii Revised Statutes, held that an employment relationship exists in services statutorily excluded from the definition of "employment" in section 383-7, Hawaii Revised Statutes. In that case, the Department of Labor and Industrial Relations appealed from a

referee's decision finding that securities salespersons on commission satisfied the ABC test criteria. Ibid. at 1. One of the grounds upon which the department appealed was that the referee exceeded his jurisdiction and committed an error of law in finding that there was no distinction between the sale of securities and the sale of real estate. Based upon that finding, the referee concluded that the securities salespersons met the third part of the ABC test relating to "customarily engaged in an independently established trade or business." Ibid. at 3-4. In agreeing with the department that this conclusion was "clearly erroneous" within section 91-14(g), Hawaii Revised Statutes, the court stated:

> Appellant also contends that the Referee exceeded his jurisdiction and committed an error of law when he stated that he could not distinguish the difference between the sale of securities and the sale of real estate or insurance.
>
> The Court agrees with Appellant.
>
> All three tests in §383-6, H.R.S., have not been met.
>
> In the Refereee's Reasons for Decision, the Referee stated with regard to the third clause or test of §383-6, inter alia:
>
> > "...[T]he selling of real estate, insurance, investment counseling services, and tax services together with the sale of securities, all amount to the sale of investments or investment services. Thus, I cannot distinguish between the sale of securities, and sale of real estate or sale of insurance. They all appear to be investment sales, which is in my view an independently established trade, occupation, profession, or business of the same nature. Therefore, the employer has also met the 3rd test of section 383-6, and the Referee will reverse the assessment decision as to any of the amounts assessed after March 1, 1975."
>
> What the Referee is expressing in his Decision is that securities sales is a type of investment sales. Real estate sales and insurance sales are also types of investment sales. In the Referee's view, real estate and insurance selling are independently established occupations. This is where the Referee has erred. Real estate and insurance selling are not independently established occupations.
>
> From this point, the Referee went on to reason that because real estate and insurance selling were independent contractor situations, securities selling which was also a type of investment sales should also be considered an independent contractor operation or a so-called independently established occupation.
>
> To arrive at that conclusion, the Referee analogized the sale of real estate and insurance to that of investment sales and called such investment sales an independently established occupation. Under §383-7, subsections (1) through (17), the Legislature over the years has specified certain classes of service that are to be

excluded from "employment". Among them are §383-7(13), excluding insurance salesmen, and §383-7(17), excluding real estate salesmen if remuneration is solely by way of commission.

Because real estate salesmen and insurance salesmen have been excluded from "employment" by statute does not give the Referee license to analogize them to investment sellers and call investment sales an independently established occupation. The Referee is taking two specific exclusions from "employment" and calling them an independently established occupation.

It is clear from the Hawaii Supreme Court case, In Re Century Metalcraft Corp., supra, and from reading the legislative intent for excluding particular services from "employment" that the employment relationship does exist in the services excluded. It is only by statute that these services have been excluded from "employment".

Furthermore, it is well settled in this State that the statutes in this section are to be strictly interpreted. It is for this reason that the Hawaii Legislature has acted to exclude certain services that would otherwise be presumed to be included in "employment".

There is at present no such exclusion for those individuals selling securities. The Referee in his Decision has created an exclusion from "employment" for securities salesmen by erroneously comparing securities sales to that of the excluded services of real estate and insurance sales. In so doing, the Referee has usurped a function of the Legislature and therein committed an error of law. Ibid. at 3-5. (Emphasis added)

Unlike the workers' compensation law precedent, these court decisions establish definite rules for determining an employment relationship under the employment security law. The rule is that an employment relationship will be presumed unless the employer can carry the burden of showing that all three parts of the ABC test contained in section 383-6, Hawaii Revised Statutes, have been met.

Temporary Disability Insurance Law

Legislative History. Temporary disability insurance is an income maintenance program, customarily providing benefits for workers measured by their earnings prior to disability.[46] In comparison with the workers' compensation and employment security programs, temporary disability insurance is a relatively recent program.[47] The temporary disability insurance program was established by Act 148, Session Laws of Hawaii 1969. The legislative purpose of the temporary disability insurance law was to provide protection for workers in current employment by affording reasonable compensation for wage loss caused by a worker's temporarily disabling non-occupational sickness or accident. (See Appendix D for an overview of the major revisions to the temporary disability insurance law.) The Legislature specifically found that the temporary disability insurance law was necessary to fill the gaps in protection provided by the workers' compensation law and the

employment security law.[48] In fact, the language of the definitions pertinent to occupational coverage under the temporary disability insurance law closely paralleled the language of similar definitions under the employment security law.

Act 148 defined "employment" and "employed" synonymously. Similar to the employment security law definition of "employment", "employment" in the temporary disability insurance law is defined as "...service, including service in interstate commerce, performed for wages under any contract of hire, written or oral, expressed or implied, with an employer, except as otherwise provided in sections -4 and -5." Likewise, the services excluded from the definition of "employment" paralleled the exclusions existing in the employment security law at the time of Act 148's adoption, except that: (1) an exclusion was added in the temporary disability insurance law for service performed in the employ of a voluntary employees beneficiary association; and (2) there was no exclusion in the temporary disability insurance law similar to the real estate salesperson exclusion in the employment security law.[49]

The definition of "wages" similarly followed the definition of "wages" contained in the employment security law at the time the temporary disability insurance law was adopted.[50]

Since the enactment of the temporary disability insurance law, amendments to these definitions have been minor. The definition of "employment" has remained unchanged. The services excluded from the definition of "employment" were extended to: (1) domestic service performed by an individual in the employ of a recipient of social service payments;[51] and (2) service performed by a vacuum cleaner salesperson for an employing unit on a commission basis.[52] The definition of "wages" was amended to limit the tips or gratuities included as wages "...to the extent that they are customary and expected in that type of employment and reported to the employer for payroll tax deduction purposes...."[53]

In 1981, the Department of Labor and Industrial Relations adopted administrative rules implementing the temporary disability insurance law. Such administrative rules flesh out and supplement the provisions in the statute and clarify the department's interpretation and application of the statutory provisions. These administrative rules have the same force and effect of law as the statutory provisions. Section 12-11-1, Temporary Disability Insurance Law Rules, provided a definition of "employee" meaning "...any individual who performs services in employment for an employer." This same section of the Rules clarified the definition of "employment" by specifying that the definition of "employment" included "...services performed by an individual for wages or under any contract of hire irrespective of whether the common-law relationship of master and servant exists unless it is shown to the satisfaction of the director [of labor and industrial relations]..." that the three criteria of the ABC test have been met (the ABC test provision).[54]

It is clear from this review of the statutory provisions, and the administrative rules relevant to general coverage under the temporary disability insurance law, that occupational coverage was intended to be basically coextensive with the coverage under the employment security law. Further, this review shows that a worker will not be excluded from temporary

disability insurance benefits based on occupational status unless it is shown that the worker meets the three criteria of the ABC test.

Court and Administrative Decisions. There are no court or administrative decisions interpreting and applying these definitions of "employment", "employee", and "wages" to determine whether a worker is an employee or an independent contractor under the temporary disability insurance law.

Prepaid Health Care Law

Legislative History. The final component of this comprehensive social program--the prepaid health care program--was created in 1974 by Act 210, Session Laws of Hawaii 1974. The stated legislative purpose in enacting this law was to provide employees in this State with prepaid health care to protect them from the spiraling costs of medical care.[55]

Like the temporary disability insurance law, the basic occupational coverage of the prepaid health care law appears to have been intended to be coextensive with that provided by the employment security and the prepaid health care laws. (See Appendix E for an overview of the major revisions to the prepaid health care law.) The definitions of "wages" and "employment" contained in Act 210 were basically similar to the definitions of "wages" and "employment" contained in the employment security and temporary disability insurance laws in 1974.[56] However, the prepaid health care definition of "wages" differed because the remuneration included in "wages" was limited to "cash remuneration" (emphasis added), and there was a provision providing for situations in which the employee does not account to the employer for the tips and gratuities received and is engaged in an occupation in which the employee customarily and regularly receives more than $20 a month in tips.[57] The services excluded from "employment" in the prepaid health care law were limited only to service performed by an individual: (1) in the employ of an employer who, by federal law, is responsible for care and cost in connection with such service; (2) in family employment; (3) in the employ of a voluntary employee's beneficiary association; (4) for an employer as an insurance agent or as an insurance solicitor on a commission basis; (5) for an employer as a real estate salesperson or a real estate broker; and (6) who, pursuant to the Federal Economic Opportunity Act of 1964, is not subject to the provisions of law relating to federal employment, including unemployment compensation.[58]

Since enactment, there have been only two amendments to these occupational coverage provisions. One amendment specifically excluded from the definition of "wages" in the prepaid health care law those payments specified under the employment security, temporary disability insurance, and workers' compensation laws.[59] The other amendment excluded from the definition of "employment" domestic, including attendant and day care services authorized by the Department of Social Services and Housing under the Social Security Act performed by an individual in the employ of a recipient of social service payments.[60] It should be noted that one reason for the lack of amendment to these provisions rests with the lack of an exemption from preemption or superseding by the federal Employee Retirement Income Security Act of 1974 (ERISA) of any substantive amendments to Hawaii's prepaid health care law after September 2, 1974.[61]

In 1981, like the temporary disability insurance law, the Department of Labor and Industrial Relations adopted section 12-12-1, Prepaid Health Care Law Rules, which included within the definition of "employment" the ABC test provision.[62]

Judging from the similarities of the occupational coverage provisions of the prepaid health care law and the temporary disability insurance and employment security laws, it appears that the Legislature intended that the occupational coverage status of a worker under these three labor laws be coextensive. The legislative intent appears to provide broad occupational coverage to protect all workers, except those that meet the three part ABC test criteria. Such intent is consistent with the broad remedial purpose of this social legislation.

Court and Administrative Decisions. There are no court or administrative agency decisions interpreting and applying these definitions relevant to occupational coverage to resolve the issue of whether an employment or an independent contractor relationship exists under the prepaid health care law.

PART III. ANALYSIS OF CURRENT OCCUPATIONAL COVERAGE PROVISIONS AMONG THE FOUR LABOR LAWS

To complete the analysis of the occupational coverage provisions among the four labor laws, a comparison of the current statutory and administrative provisions relating to occupational coverage in the four labor laws is required. Appendix F provides an overview of the key occupational coverage provisions in each of the four laws.

In general, the major distinctions which appear in the occupational coverage provisions among the four labor laws are between the workers' compensation provisions and the other three laws--employment security, temporary disability insurance, and prepaid health care. The definition of "wages" in the employment security, temporary disability insurance, and prepaid health care laws is basically the same except for the limitation in the temporary disability insurance law definition on the tips and gratuities to those "...customary and expected in that type of employment...." While the basic definition of "wages" in the workers' compensation law is similar to the other three labor laws, the specified items included and excluded within the workers' compensation definition of "wages" differ from the items included and excluded in the definition of "wages" contained in the other three labor laws. The market value of board, lodging, fuel, and other advantages having a cash value which the employer has paid as a part of the employee's remuneration and gratuities received in the course of employment from others than the employer are included in the workers' compensation definition. Commissions and bonuses and the cash value of all remuneration in any medium other than cash are specifically included within the definition of "wages" in the other three labor laws while tips and gratuities are specifically excluded.

The workers' compensation law is the only one of the four labor laws with a definition of "employee" in the statute. As previously discussed, the term "individual" is uniformly substituted throughout the other three labor

law statutes for the term "employee". However, the Department of Labor and Industrial Relations' administrative rules implementing the temporary disability insurance law contain a definition of "employee". The definition of "employment" is substantially the same among the four labor laws. In the employment security law, there is a statutory provision added which provides that all services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to the law irrespective of whether the common law relationship of master and servant exists unless the ABC test criteria is met. For the temporary disability insurance and the prepaid health care laws, this same ABC test provision appears in the administrative rules implementing the laws. However, there is no similar provision in either the workers' compensation statute or in the administrative rules implementing that statute.

The exclusions from the definition of "employment" under each of the four labor laws are compared in Appendix G.[63] A review of Appendix G shows that there are very few conclusions which can be drawn about the similarities and dissimilarities among the four labor laws regarding the exclusions from employment. The employment security and the temporary disability laws have the greatest number of exclusions--over twenty exclusions each. The prepaid health and workers' compensation law each have comparatively fewer exclusions--six each. There are no exclusions which are common to all four of these labor laws. Only six of the exclusions appear in three of the laws: (1) service in domestic employment; (2) service in family employment; (3) student employment; (4) service by insurance agents or solicitors on a commission basis; (5) service exempt under the Federal Economic Opportunities Act; and (6) service by a duly ordained, commissioned, or licensed minister, rabbi, priest, or member of a religious order. However, there is no consistency in which three of the four labor laws these exclusions appear.

In summary, under the current provisions regarding occupational coverage in these four labor laws, there is uniformity in the general occupational coverage provisions among the employment security, temporary disability insurance, and prepaid health care laws. Any lack of uniformity in the occupational coverage of these three labor laws is most obvious in the different exclusions of services from "employment" which have been carved out. The workers' compensation law provisions differ in some respects from the provisions in the other three labor laws, but the major difference in occupational coverage between the workers' compensation law and the other three labor laws is the absence of the ABC test provision in the workers' compensation law.

Chapter 4

DEFINING THE EMPLOYMENT RELATIONSHIP UNDER FEDERAL LAW

As shown in chapter 2, one of the controversial issues in the independent contractor situation is whether the federal approach to distinguishing an employment versus independent contractor relationship should be incorporated into the Hawaii labor laws. To provide an overview of the federal approach, this chapter will review the criteria used to differentiate an employment from an independent contractor relationship under the National Labor Relations Act (NLRA), the Federal Unemployment Tax Act (FUTA), the Federal Insurance Contribution Act (FICA), the Social Security Act, and the Fair Labor Standards Act (FLSA). This overview shows that the federal laws like the Hawaii labor laws are also not consistent in drawing the line between a covered employee and an excluded independent contractor.

National Labor Relations Act (NLRA)

Statutory Provisions. The National Labor Relations Act, also known as the Wagner Act, established the right of employees to self-organization, the machinery for holding elections to determine the union preference of the majority of employees, and exclusive bargaining rights for the union so chosen. The National Labor Relations Act also sets forth employer conduct which constitutes unfair labor practices that interfere with the employees' right to organize.[1]

The definition in the National Labor Relations Act pertinent to this inquiry is the definition of "employee". "Employee" is defined in section 2(3) of the National Labor Relations Act[2] as follows:

> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

This definition of "employee" specifically excludes "...any individual having the status of an independent contractor...." There is no definition of "independent contractor" in the National Labor Relations Act.

Court Decisions. The earliest United States Supreme Court case interpreting the meaning of the term "employee" in the National Labor Relations Act is National Labor Relations Board v. Hearst Publications, Inc.,

322 U.S. 102 (1944) (hereinafter Hearst Publications). This case arose from the refusal of publishers of four Los Angeles daily newspapers to bargain collectively with a union representing newsboys who distributed their papers on the streets. The basis of the refusal to bargain was the publishers' contention that they were not required to bargain because the newsboys were not their "employees" within the meaning of that term in the National Labor Relations Act. The National Labor Relations Board (hereinafter referred to as "Board") concluded that the regular full-time newsboys selling each paper were employees within the meaning of this Act and then designated appropriate units and ordered elections. In these elections, a union representative was selected by the newsboys and certified. The publishers refused to bargain with the union and unfair labor practice charges were filed by the union. The Board ordered the publishers to cease and desist from such violations and to bargain collectively with the union. The circuit court of appeals, upon the publishers' petitions for review and the Board's petition for enforcement, set aside the Board's orders. In so ruling, the circuit court found that the common-law standards for determining employee status applied and concluded that the newsboys were not employees within this Act. Ibid. at 114-115.

On appeal from the circuit court of appeals' decision, the publishers argued that, by common-law standards, the extent of their control and direction of the newsboys' activities created no more than an "independent contractor" relationship. The Supreme Court rejected the publishers' argument by first noting the complexity of the application of the test for employee versus independent contractor status as follows:

> The principal question is whether the newsboys are "employees." Because Congress did not explicitly define the term, "respondents say its meaning must be determined by reference to common-law standards. In their view "common-law standards" are those the courts have applied in distinguishing between "employees" and "independent contractors" when working out various problems unrelated to the Wagner Act's purposes and provisions.
>
> The argument assumes that there is some simple, uniform and easily applicable test which the courts have used, in dealing with such problems, to determine whether persons doing work for others fall in one class or the other. Unfortunately this is not true. Only by a long and tortuous history was the simple formulation worked out which has been stated most frequently as "the test" for deciding whether one who hires another is responsible in tort for his wrongdoing. But this formula has been by no means exclusively controlling in the solution of other problems. And its simplicity has been illusory because it is more largely simplicity of formulation than of application. Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.

It is hardly necessary to stress particular instances of these variations or to emphasize that they have arisen principally, first, in the struggle of the courts to work out common-law liabilities where the legislature has given no guides for judgment, more recently also under statutes which have posed the same problem for solution in the light of the enactment's particular terms and purposes.

It is enough to point out that, with reference to an identical problem, results may be contrary over a very considerable region of doubt in applying the distinction, depending upon the state or jurisdiction where the determination is made; and that within a single jurisdiction a person who, for instance, is held to be an "independent contractor" for the purpose of imposing vicarious liability in tort may be an "employee" for the purposes of particular legislation, such as unemployment compensation. See, e.g., Globe Grain & Milling Co. v. Industrial Comm'n, 98 Utah 36, 91 P.2d 512. In short, the assumed simplicity and uniformity, resulting from application of "common-law standards," does not exist. Ibid. at 120-122. (Emphasis added; footnotes omitted.)

The Court's analysis resulted in a finding that the term "employee" must be interpreted primarily from the history, terms, and purposes of the legislation. After concluding that the Congressional intent was that the definition include a wider field than the narrow technical common law definition of "master and servant", the Court adopted an "economic reality" test reasoning as follows:

Whether, given the intended national uniformity, the term "employee" includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word "is not treated by Congress as a word of art having a definite meaning...." Rather "it takes color from its surroundings...[in] the statute where it appears," ...and derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained."

Congress, on the one hand, was not thinking solely of the immediate technical relation of employer and employee. It had in mind at least some other persons than those standing in the proximate legal relation of employee to the particular employer involved in the labor dispute. It cannot be taken, however, that the purpose was to include all other persons who may perform service for another or was to ignore entirely legal classifications made for other purposes. Congress had in mind a wider field than the narrow technical legal relation of "master and servant," as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally "employment," by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment.

It will not do, for deciding this question as one of uniform national application, to import wholesale the traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effectiveness. To do this would be merely to select some of the local, hairline variations for nation-wide application and thus to reject others for coverage under the Act. That result hardly would be consistent with the statute's broad terms and purposes.

* * *

...Hence the avowed and interrelated purposes of the Act are to encourage collective bargaining and to remedy the individual worker's inequality of bargaining power by "protecting the exercise...of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection...."

The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to "employees" within the traditional legal distinctions separating them from "independent contractors." Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way or the other, depending upon the weight of this balance and its relation to the special purpose at hand.

* * *

In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.

To eliminate the causes of labor disputes and industrial strife, Congress thought it necessary to create a balance of forces in certain types of economic relationships. These do not embrace simply employment associations in which controversies could be limited to disputes over proper "physical conduct in the performance of the service." On the contrary, Congress recognized those economic relationships cannot be fitted neatly into the containers designated "employee" and "employer" which an earlier law had shaped for different purposes. Its Reports on the bill disclose clearly the understanding that "employers and employees not in proximate relationship may be drawn into common controversies by economic

> forces," and that the very disputes sought to be avoided might involve "employees [who] are at times brought into an economic relationship with employers who are not their employees." In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.
>
> Hence "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants" have been rejected in various applications of this Act both here and in other federal courts. There is no good reason for invoking them to restrict the scope of the term "employee" sought to be done in this case. That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. "Where all the conditions of the relation require protection, protection ought to be given." Ibid. at 124-129. (Emphasis added; citations and footnotes omitted.)

Applying this analysis, the Court upheld the Board's finding that the newsboys were "employees" within the meaning of the National Labor Relations Act and found that there was ample basis in the law for the Board's findings:

> In this case the Board found that the designated newsboys work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers, who dictate their buying and selling prices, fix their markets and control their supply of papers. Their hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or their agents. Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publisher's benefit. Stating that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act," the Board concluded that the newsboys are employees. The record sustains the Board's findings and there is ample basis in the law for its conclusion. Ibid. at 131-132.

The Hearst Publications case is particularly significant because of its comprehensive analysis of the definition of the "employment" relationship in the context of the National Labor Relations Act's intent and purpose. The reasoning of this decision has been followed in other federal and state decisions analyzing the employment relationship under other pieces of social legislation.[3]

In more recent cases challenging Board decisions finding an employment relationship, federal courts have retreated from the "economic reality" test and adhered to the common-law agency test in distinguishing an "employee" from an "independent contractor" under the National Labor Relations Act. In

National Labor Relations Board v. United Insurance Company of America, 390 U.S. 254 (1968) (hereinafter United Insurance Company), the United States Supreme Court applied the common-law agency test to decide whether United Insurance Company debit agents whose primary responsibilities were to collect premiums from policyholders, prevent the lapsing of policies, and sell new insurance were employees or independent contractors. The issue arose from an election of the Insurance Workers International Union as the collective bargaining representative of the debit agents. The company refused to recognize the union, claiming that the debit agents were independent contractors not employees. The National Labor Relations Board held that these agents were employees and ordered the company to bargain collectively with the union. The court of appeals reversed the Board's decision, finding that these agents were independent contractors. Ibid. at 255.

On appeal, the Supreme Court initially addressed the standard that should be applied in distinguishing between "employee" and "independent contractor" as the terms are used in the National Labor Relations Act. While noting the "economic reality" standard used in the Hearst Publications case, the Court found that the Congressional amendment which specifically excluded "any individual having the status of an independent contractor" from the definition of "employee" contained in section 2(3) of the National Labor Relations Act changed the applicable standard to the common-law agency test, stating:

> At the outset the critical issue is what standard or standards should be applied in differentiating "employee" from "independent contractor" as those terms are used in the Act. Initially this Court held in NLRB v. Hearst Publications, 322 U.S. 111, that "Whether...the term 'employee' includes [particular] workers...must be answered primarily from the history, terms and purposes of the legislation." 322 U.S. at 124. Thus the standard was one of economic and policy considerations within the labor field. Congressional reaction to this construction of the Act was adverse and Congress passed an amendment specifically excluding "any individual having the status of an independent contractor" from the definition of "employee" contained in §2(3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act. And both petitioners and respondents agree that the proper standard here is the law of agency. Thus there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor. Ibid. at 256. (Emphasis added.)

In reversing the court of appeals' decision and affirming the Board's order, the Court ruled that the common-law agency test required that all of the incidents of the relationship be assessed and weighed with no one factor being decisive. The Court assessed the factors in the case as follows:

> There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor, and these cases present such a situation. On the one hand these debit agents perform their work primarily away from the company's offices and fix their own hours of

work and work days; and clearly they are not as obviously employees as are production workers in a factory. On the other hand, however, they do not have the independence, nor are they allowed the initiative and decision-making authority, normally associated with an independent contractor. In such a situation as this there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles. When this is done, the decisive factors in these cases become the following: the agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the "Agent's Commission Plan" that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory. Probably the best summation of what these factors mean in the reality of the actual working relationship was given by the chairman of the board of respondent company in a letter to debit agents about the time this unfair labor practice proceeding arose:

> "if any agent believes he has the power to make his own rules and plan of handling the company's business, then that agent should hand in his resignation at once, and if we learn that said agent is not going to operate in accordance with the company's plan, then the company will be forced to make the agents final [sic]."
>
> "The company is going to have its business managed in your district the same as all other company districts in the many states where said offices are located. The other company officials and I have managed the United Insurance Company of America's operations for over 45 years very successfully, and we are going to continue the same successful plan of operation, and we will not allow anyone to interfere with us and our successful plan."

The Board examined all of these facts and found that they showed the debit agents to be employees. This was not a purely factual finding by the Board, but involved the application of law to facts--what do the facts establish under the common law of agency: employee or independent contractor? It should also be pointed out that such a determination of pure agency law involved no special administrative expertise that a court does not possess. On the other hand, the Board's determination was a judgment made after a

> hearing with witnesses and oral argument had been held and on the basis of written briefs. Such a determination should not be set aside just because a court would, as an original matter, decide the case the other way. Ibid. at 258-260. (Emphasis added and footnotes omitted.)

Subsequent Ninth Circuit Court of Appeals' decisions[4] have applied this analysis to review other Board decisions finding that the workers involved were "employees" within the meaning of the National Labor Relations Act. For example, in Associated Independent Owner-Operators, Inc. v. National Labor Relations Board, 407 F.2d 1383 (9th Cir. 1969) (hereinafter Associated Independent Owner-Operators), the Ninth Circuit vacated a Board order dismissing a complaint by Associated Independent Owner-Operators, Inc., charging that the International Union of Operating Engineers, Local 12, had violated various unfair labor practice sections of the National Labor Relations Act by threatening several contractors with strikes and picketing to force the contractors to cease doing business with two non-union owner-operators. In so ruling, the court applied the common-law agency test. The court found that this test rests primarily upon the amount of supervision that the putative employer has a right to exercise over the individual, particularly the details of the work. In applying the test, the court determined that all incidents of the given relationship must be assessed to determine whether "the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished." Ibid. at 1385. Based on a review of the record, the court in Associated Independent Owner-Operators found that there was no substantial evidence to support the Board's findings that the workers were employees.[5] Ibid. at 1387.

In Carnation Company v. National Labor Relations Board, 429 F.2d 1130 (9th Cir. 1970), the Ninth Circuit further defined the nature of the control sufficient to justify the determination that a worker is an employee within the meaning of the Act. The Ninth Circuit specifically ruled that evidence of economic control is not sufficient. The case arose from a petition filed by the Carnation Company to set aside a National Labor Relations Board decision and order which found that certain dairy route salespersons were employees rather than independent contractors. The company had entered into a collective bargaining agreement with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 274, and subsequently negotiated individually with its wholesale and retail route drivers to enter into distribution agreements. The union challenged these negotiations as unfair labor practices. The Board held that these agreements were invalid, that the route drivers were employees covered by the collective bargaining agreement, and that Carnation's bargaining constituted unfair labor practices. In determining that the Board erred in finding that the drivers were employees rather than independent contractors,[6] the Ninth Circuit rejected the Board's argument that economic control by Carnation over its distributors is sufficient to justify a determination that the drivers were employees, stating:

> Evidence of economic control is not necessarily proof of the kind of control that is relevant to a decision whether a person is a contractor or an employee.

> Most of the facts which the Board now asserts to be proof of Carnation's retention of the power to control its drivers are facts (economic rights and sanctions) which can be found in a variety of "franchise" arrangements oriented toward brand-name protection and market penetration. In such cases there is no attempt to supervise the details of the work, and no assertion that the franchise holder is anything but an independent business man. Ibid. at 1134. (Emphasis added.)

The Ninth Circuit's decision in Brown v. National Labor Relations Board, 462 F.2d 699 (9th Cir. 1972) is to similar effect. In that case, the Ninth Circuit cited the Carnation Company case rule, that economic control is not necessarily proof of the kind of control relevant to a decision about whether a person is an employee or an independent contractor under the National Labor Relations Act. On this basis, the Ninth Circuit rejected as immaterial to the inquiry the trial examiner's finding that in accomplishing the circulation and sale of the employer's newspapers, the dealers bore slight resemblance to the independent business people whose earnings are controlled by self-determined policies and personal investment. The Ninth Circuit then reviewed the Board's application of a three-factor analysis to determine that newspaper dealers were employees rather than independent contractors. The three factors were: (1) the entrepreneurial aspects of the dealer's business, including the "right to control"; (2) the risk of loss and opportunity for profit; and (3) the dealer's proprietary interest in the dealer's dealership. Regarding the first factor--the entrepreneurial aspects,[7] the court found that independent contractor status was indicated from the following facts: (1) the distribution contract specifically disavowed any intention to control the details of the distribution process; and (2) the company maintained no control over the manner and means of delivery. As to the second factor--risk of loss and opportunity for profit, the court determined that the risk of loss for damages and for investments made in the business rested almost entirely on the dealers and that the dealers' opportunities for profit were limited only by their own initiative and policies. Finally, regarding the proprietary interest factor, the court found that the proprietary interest of the dealers was found in the personal investment each dealer made in the dealer's dealership in terms of cars, and equipment. Based upon this review of the record, the court concluded that the Board erred in ruling that the dealers were employees rather than independent contractors. Ibid. at 703-705.

A Ninth Circuit case of particular significance to Hawaii is Sida of Hawaii, Inc. v. National Labor Relations Board, 512 F.2d 354 (9th Cir. 1975). Sida of Hawaii had petitioned the court for a review of a decision and order by the National Labor Relations Board requiring Sida to recognize and bargain with the certified representative of its "members". The Board had found the "members" to be "employees" within the meaning of section 2(3) of the National Labor Relations Act. In support of its petition, Sida argued that the "members" were independent contractors rather than employees. In agreeing with Sida that the Board's determination that the SIDA owner-operators are employees lacked substantial support in the record, the Ninth Circuit applied general agency principles. The court found that the following factors clearly established the relative absence of actual control by SIDA and the independent contractor status of the drivers: (1) the drivers made substantial personal investments in their taxicab business, such as purchasing and maintaining their own vehicles, obtaining all necessary permits, and

paying their own health insurance, Social Security, unemployment, income taxes, automobile insurance, monthly stall rental fees, and trip fees; (2) the drivers were substantially independent in their operations, including the decisions to work or not, to moonlight, and where to operate; and (3) the driver's contract specifically provided for an independent contractor relationship. Ibid. at 357-358.

More recent Ninth Circuit cases have adhered to the common-law agency test analysis established by the United Insurance Company case, to overturn other National Labor Relations Board findings of employee status. For example, in Associated General Contractors of California, Inc. v. National Labor Relations Board, 564 F.2d 271 (9th Cir. 1977), the Ninth Circuit applied the common-law agency test to determine that owner-operators of dump trucks were independent contractors within the National Labor Relations Act. The Ninth Circuit reasoned in that decision that the contractors' control shown in that case of the loading and dumping sites and instructions to the owner-operators as to where to pick up and dump this material demonstrated the contractor's right to control the result of the work, not the manner or means of doing the work. Ibid. at 279. In another case, Merchants Home Delivery Service, Inc. v. National Labor Relations Board, 580 F.2d 966 (9th Cir. 1978), the common-law agency test was applied to hold that owner-operators of trucks working for Merchants which had a contract to deliver household appliances and furniture from the J.C. Penney department store were independent contractors rather than employees for purposes of the National Labor Relations Act. In that case, the court of appeals found that while a balancing of the various indicia of control by the contractor was somewhat inconclusive, the entrepreneurial characteristics of the owner-operators were decidedly in favor of independent contractor status. Ibid. at 974-975.

Based upon the United Insurance Company decision, and the subsequent Ninth Circuit court of appeals decisions interpreting that decision, it is obvious that the common-law control test is the analysis to be used to determine whether an employment or an independent contractor relationship exists under the National Labor Relations Act. The Ninth Circuit has further adopted a three factor analysis in applying this common-law agency test--(1) entrepreneurial aspects; (2) risk of loss and opportunity for profit; and (3) proprietary interest.

The Social Security Act (SSA) and the Internal Revenue Code (IRC)

Statutory Provisions. The Social Security Act was enacted to establish a national social insurance program and an agency to administer it. The program was devised to "provide some safeguard against the insecurity of modern life through cooperative action by federal and state governments, thus making possible the fullest consideration of the local economic and social problems...while maintaining a national unity of program and purposes."[8] Major programs provided under the Act presently include: (1) unemployment compensation; (2) old age and survivors' insurance; (3) disability insurance; (4) aid to needy families with children and child-welfare services; (5) maternal and child health services; (6) services to aged, blind, or disabled; and (7) hospital insurance and medical care for the aged.[9] The benefits of the Social Security Act for old age and survivors' insurance and for

unemployment compensation are financed by taxes imposed on employers and employees calculated on wages. Taxes for old age and survivors' insurance are assessed under the Federal Insurance Contributions Act (FICA), part of the Internal Revenue Code.[10] Taxes for unemployment compensation are assessed under the Federal Unemployment Tax Act (FUTA), also contained in the Internal Revenue Code.[11]

The definitions of "employee", "employment", and "wages" contained in the Social Security Act,[12] in the Federal Insurance Contributions Act,[13] and in the Federal Unemployment Tax Act[14] are synonymous. These Acts define "employee" in accordance with the "...usual common law rules applicable in determining the employer-employee relationship" with the addition of various specified occupations. "Employment" is defined in these Acts as "any service, of whatever nature performed either...": (1) within the United States; (2) outside the United States and the employee is a United States citizen or resident working for an American employer, or a foreign affiliate of an American employer; and (3) on or in connection with an American vessel under certain conditions specified in the Acts. "Wages" are defined as "...all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash...." The exclusions for services from the definition of "employment" and for certain payments and remuneration from the definition of "wages" under the Social Security Act provisions[15] relating to old-age and survivors' insurance and the Federal Insurance Contributions Act differ from similar exclusions to these definitions contained in the Federal Unemployment Tax Act.

Court Decisions. The first United States Supreme Court case interpreting the meaning of the terms "employee" and "employment" in the Social Security Act is United States v. Silk, 331 U.S. 704 (1947) (hereinafter Silk). The United States Supreme Court was considering, on appeal, two suits to recover sums exacted from businesses by the Commissioner of Internal Revenue as employment taxes on employers under the Social Security Act. In the first suit, Silk sued the United States to recover taxes alleged to have been illegally assessed and collected for the years 1936 through 1939. The taxes were assessed against Silk as an employer of certain truckers and unloaders involved in transporting coal. The Collector ruled that the unloaders and truckers were employees of Silk, and accordingly, assessed the taxes at issue in this appeal. Silk filed a claim for a refund which was denied. The district court and the court of appeals held that the truckers and unloaders were independent contractors and overturned the Collector's determination.

In the other suit, Greyvan Lines, Inc., a common carrier by motor truck similarly sued the Collector of Internal Revenue to recover employment taxes alleged to have been illegally assessed and collected. The district court and the court of appeals held for Greyvan. Ibid. at 706-708. The critical question on appeal in both of these cases was whether truckers who performed the actual service of carrying the goods shipped by the public were employees of the taxpayers. After noting that the legislative history and the amendments to the Social Security Act contained no information of assistance in determining the coverage of the tax sections of the Social Security Act, the Supreme Court relied upon the Congressional exemptions from coverage contained in this Act to show that the intent of the Act was not to cover the whole field of service to every business enterprise. Based

on the specificity of the exemptions and the generality of the employment definitions contained in the Act, the Court found that the terms "employment" and "employee" are to be construed to accomplish the purposes of the legislation, stating:

> ...Nothing that is helpful in determining the scope of the coverage of the tax sections of the Social Security Act has come to our attention in the legislative history of the passage of the Act or amendments thereto.
>
> Since Congress has made clear by its many exemptions, such as, for example, the broad categories of agricultural labor and domestic service, 53 Stat. 1384, 1393, that it was not its purpose to make the Act cover the whole field of service to every business enterprise, the sections in question are to be read with the exemptions in mind. The very specificity of the exemptions, however, and the generality of the employment definitions indicates that the terms "employment" and "employee," are to be construed to accomplish the purposes of the legislation. As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation. These considerations have heretofore guided our construction of the Act. Ibid. at 711-712. (Emphasis added; citations and footnotes omitted.)

Citing their reasoning in the Hearst Publications decision, which first addressed the question of the criteria to be used in differentiating between an "employee" and an "independent contractor" under the National Labor Relations Act, the Court concluded that applications of the social security legislation should follow the same rule that was applied in that case:

> The problem of differentiating between employee and an independent contractor, or between an agent and an independent contractor, has given difficulty through the years before social legislation multiplied its importance. When the matter arose in the administration of the National Labor Relations Act, we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was "some simple, uniform and easily applicable test." The word "employee," we said, was not there used as a word of art, and its content in its context was a federal problem to be construed "in the light of the mischief to be corrected and the end to be attained." We concluded that, since that end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality. The aim of the Act was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions. We rejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants." This is

> often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. Restatement of the Law, Agency, §220. We approved the statement of the National Labor Relations Board that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act." Labor Board v. Hearst Publications, 322 U.S. 111, 120, 123, 124, 128, 129, 131.
>
> Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the Hearst case. This, of course, does not leave courts free to determine the employer-employee relationship without regard to the provisions of the Act. The taxpayer must be an "employer" and the man who receives wages an "employee." There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors. The Social Security Act was drawn with this industrial situation as a part of the surroundings in which it was to be enforced. Where a part of an industrial process is in the hands of independent contractors, they are the ones who should pay the social security taxes. Ibid. at 713-714. (Emphasis added.)

In affirming the lower court's determination that the truckers were independent contractors and in reversing the lower court's determination that the unloaders are employees, the Court concluded that it is the total situation, including the risk undertaken, the control exercised, and the opportunity for profit from sound management that marks an independent contractor:

> Both lower courts in both cases have determined that these workers are independent contractors. These inferences were drawn by the courts from facts concerning which there is no real dispute. The excerpts from the opinions below show the reasons for their conclusions.
>
> Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the unloaders in the Silk case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act. They are of the group that the Social Security Act was intended to aid. Silk was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been held to be employees in tort cases.

> There are cases, too, where driver-owners of trucks or wagons have been held employees in accident suits at tort or under workmen's compensation laws. But we agree with the decisions below in Silk and Greyvan that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors. Ibid. at 716-719. (Emphasis added; footnotes omitted.)

In Bartels v. Birmingham, 332 U.S. 126 (1947) (hereinafter Bartels), the Supreme Court elaborated upon the test for differentiating between an employee and an independent contractor under the Social Security Act established in the Silk case. In reversing a lower court decision holding that certain members of a dance band were employees of the owners of dance halls in which the band performed, the Court clarified that in the social legislation context the common law test of control which the alleged employer may or could exercise over the details of the service rendered by the worker is not the sole determinant of an employer-employee relationship. The Court found that the more appropriate test is one of "economic reality", reasoning:

> In United States v. Silk, supra, we held that the relationship of employer-employee, which determines the liability for employment taxes under the Social Security Act, was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker or workers. Obviously control is characteristically associated with the employer-employee relationship, but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service. In Silk, we pointed out that permanency of the relation, the skill required, the investment in the facilities for work, and opportunities for profit or loss from the activities were also factors that should enter into judicial determination as to the coverage of the Social Security Act. It is the total situation that controls. These standards are as important in the entertainment field as we have just said, in Silk, that they were in that of distribution and transportation. Ibid. at 130. (Emphasis added.)

In a case over twenty years later, United States v. Webb, 397 U.S. 179 (1970) (hereinafter Webb), the Supreme Court held that the standards of maritime law which are similar to the common-law control test were applicable to determinations of the employment status of captains and crews under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act. In so ruling, the Court found that subsequent to the decisions rendered in the Silk and Bartels cases, the executive agencies began to change their original regulation which had defined the employment relationship in terms of the incidents of employment at common-law to a regulation embodying the test of "economic reality". This proposed regulation never took effect because a

Congressional resolution was subsequently introduced in both Houses calling for a reassertion of Congressional intent regarding the application of the traditional common-law control test to the Social Security Act. The Court found that the Senate Finance Committee report on the resolution clarified that the Congressional purpose was to disapprove the proposed regulation and to reaffirm that determinations of employee status were to be based on the traditional legal tests. Ibid. at 185-186.

The Ninth Circuit decisions[16] show an ambivalence by this court as to the standard to be applied in determinations of employment status under the Social Security Act. Many of the Ninth Circuit decisions, while purporting to apply the traditional common-law test in making such determinations, emphasized that the factor of control is not the primary emphasis. It must be noted that all of these Ninth Circuit decisions predate the 1970 Webb case.

In one of the earliest Ninth Circuit cases, Anglim v. Empire Star Mines Company, 129 F.2d 914 (9th Cir. 1942), the Ninth Circuit was considering whether miners operating under a certain type of lease are employees within the intent of the Social Security Act and whether employment taxes should be assessed upon their employer. The United States government appealed from a lower court decision which concluded that the miners were independent contractors. In support of its position, the government argued that under the regulations promulgated under the Social Security Act, the term "employee" should be liberally construed. Ibid. at 916-917. The Ninth Circuit rejected this argument, finding that the regulation at issue did no more than reiterate the common-law principles. The Ninth Circuit, in applying the relevant test, relied upon the lease agreement and affirmed the lower court's ruling that the miners appeared, both in theory and in practice to really have been independent operators. The Ninth Circuit found that the lease agreement provisions requiring the lessees to perform in a minerlike manner and stipulating that the lessor had the right to discharge objectionable workers and to inspect the underground workings and the milling operations were not evidence of an employment relationship because such provisions were for the purpose of suppressing the use of high grade ore and of insuring compliance with safety regulations critical to underground work. While the Ninth Circuit found that the lessor's supplying of tools was of some importance in showing an employment relationship, the fact that the lessees frequently brought extra equipment offset this evidence to a degree. Ibid.

In United States v. Aberdeen Aerie No. 24 of Fraternal Order of Eagles, 148 F.2d 655 (9th Cir. 1945), the Ninth Circuit reviewed two district court decisions holding that subordinate Aeries of the Fraternal Order of Eagles were not employers of certain officers, physicians, and trustees of the organization. Ibid. at 656. The government argued, in support of reversal of the district court decision that the Ninth Circuit should apply the reasoning of the Hearst Publications decision. The Ninth Circuit, in affirming the district court decisions, that the Aeries were not employers in this case, concluded that while the theory of the Hearst Publications case should be considered, the decision is not binding upon the result in this case because of distinctions in facts between the two cases. The Ninth Circuit found that the proper approach was to weigh all the common-law elements to determine whether the relationship of master and servant exists, including: (1) the selection and engagement of the servant; (2) the payment of wages; (3) the

power of dismissal; and (4) the power of control and supervision of the servant's conduct. Ibid. at 658.

In Flemming v. Huycke, 284 F.2d 546 (9th Cir. 1960), the Ninth Circuit clarified that the proper test for determining employment status under the Social Security Act and the related taxing provisions in the Internal Revenue Code is one of "totality of the situation", rather than of common-law control. The Ninth Circuit applied this test to affirm the district court's decision that the decision of a Social Security Administration referee that an older physician was not an employee of a younger physician while in the process of transferring a practice was unsupported by substantial evidence. In concluding that the older physician was an employee of the younger physician, the Ninth Circuit found that the referee's reliance upon provisions in the agreement to transfer the practice as the basis for finding that no employment relationship was created was erroneous. The Ninth Circuit concluded that the transfer of the practice and the employment relationship between the two physicians were distinct transactions. The Ninth Circuit found that the positive evidence of a bona fide employment relationship was overwhelming. This evidence included: (1) testimony that the older doctor was the employee of the younger doctor and that the younger doctor had full power to direct the older doctor and to run the office; (2) evidence that the older doctor was paid a salary and no opportunity to share in the profits of the practice; and (3) evidence that although the older doctor retained title to the office equipment, the equipment was in the process of transfer by conditional sale. Ibid. at 549-550.

The Ninth Circuit decision in Alsco Storm Windows, Inc. v. United States, 311 F.2d 341 (9th Cir. 1962), is to similar effect. In this case, the Ninth Circuit similarly held that the common-law control test applied in determining whether installers were employees of the taxpayer under the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the accompanying taxing provisions contained in the Internal Revenue Code. The Ninth Circuit similarly held, citing the Bartels case, that the common-law control rules were to be applied by determining whether there is a right to control the activities of the workers not only as to results to be accomplished by the work but also as to the means and methods to be used for accomplishing the result. The Ninth Circuit, under this test, affirmed the district court's ruling that the installers were employees. Ibid. at 342-343.

The Ninth Circuit in Delno v. Celebrezze, 347 F.2d 159 (9th Cir. 1965), followed a similar approach while vacating, on other grounds, a summary judgment denying an application for old-age insurance benefits under the Social Security Act. While finding that the generally established criteria for determining the existence of an employee-employer relationship applied, the Ninth Circuit also disapproved of the Appeals Council of the Social Security Administration's emphasis upon the factor of control. Ibid. at 162.

Finally, in McGuire v. United States, 349 F.2d 644 (9th Cir. 1965), the Ninth Circuit, in an apparent attempt to clarify its ambivalent position regarding the standard to be used in determining employment status under the Social Security Act, held that while generally the right to control and direct the specific manner in which an individual works is the fundamental element of the employee-employer relationship, where doubt exists as to the nature of the relationship the total situation of the parties is controlling and

the courts must look to the particular facts of each case. The Ninth Circuit affirmed the lower court's decision that certain unloaders used by the taxpayer's motor carriers were employees even though the unloaders were also subject to directions of receivers at loading docks who were not employees of the carriers. In affirming the lower court's decision, the Ninth Circuit specifically held that the right to control contemplated by the regulations promulgated under the Social Security Act and the common-law test as an incident of employment required only such supervision as the nature of the work required. Ibid. at 645-646.

Based upon these United States Supreme Court decisions and the Ninth Circuit's decisions, the common-law test applies. The Ninth Circuit decisions leave the impression that in this federal circuit the common-law control test is subject to other considerations derived from the totality of the circumstances. The United States Supreme Court's decision in the Webb case, indicated that Congressional intent was for control to be the primary factor in applying the common-law test. The Court further indicated, however, that this Congressional intent did not preclude application in different areas of decisional rules that vary in the precise degree of control required. The Court also specifically noted other significant factors apart from control which may be important, including the right to discharge and the furnishing of tools and a place to work. Webb, 397 U.S. at 192-194. The Webb case left open the question of whether the common-law test to be applied is one of control or one which considers other facts in addition to control. There is simply no definitive conclusion which can be drawn on this issue.[17]

Exclusions of Service From the Definition of Employment Under the Social Security, Federal Insurance Contributions, and Federal Unemployment Tax Acts. Significant to the issue of coverage under the federal old-age and survivors' insurance law and the federal unemployment law are the exclusions for service from the definition of "employment". The Social Security Act provisions relating to old age and survivors' insurance and the related taxing provisions in the Federal Insurance Contributions Act contain similar exclusions (see Appendix G comparing the Federal Insurance Contributions Act--Social Security Act with the Federal Unemployment Tax Act). The exclusions under these laws differ, however, from the exclusions for service from the definition of "employment" contained in the Federal Unemployment Tax Act.[18] The exclusions common to the federal old-age survivors' insurance[19] provisions and to the federal unemployment compensation provisions[20] are the following: (1) domestic service; (2) service performed in family employment; (3) service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft which meets certain enumerated requirements; (4) service performed in the employ of a state, or any political subdivision thereof, or any instrumentality of any one or more of the states or political subdivisions, which is wholly owned by one or more states or political subdivisions, and any service performed in the employ of any instrumentality of one or more states or political subdivisions; (5) service in the employ of a foreign government or an instrumentality thereof; (6) service performed by a student nurse or an intern which meets certain enumerated requirements; (7) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news with certain enumerated exceptions; (8) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement which meets certain enumerated requirements; (9)

service performed in the employ of an international organization; (10) service which is performed by a nonresident alien for the period the alien is temporarily present in the United States as a nonimmigrant which meets certain enumerated requirements; (11) service performed as an employee or employee representative as defined in the applicable railroad benefit provisions (either the Railroad Retirement Tax Act or the Railroad Unemployment Insurance Act); and (12) service performed on a boat engaged in catching fish or other forms of aquatic animal life under an arrangement with the owner or operator of such boat pursuant to certain enumerated requirements.

There are other exclusions of service in the federal old-age and survivors' insurance provisions which are similar to but not the same as exclusions contained in the federal unemployment compensation provisions. There is an exclusion for service performed in the employ of the United States or an instrumentality thereof exempt from tax under the Federal Unemployment Tax Act by any provision of law in the federal unemployment law. The similar exclusion under the federal old-age and survivors' insurance provisions is limited to employment with instrumentalities of the United States exempt under the Federal Insurance Contributions Act by any provision of law. There is an exclusion under both systems for service in the fishing industry. Both the federal old age and survivors' insurance law and the federal unemployment law exclude service performed on a boat engaged in catching fish or other forms of aquatic animal life under an arrangement with the owner or operator of such boat pursuant to certain enumerated requirements. The federal unemployment compensation provision further excludes service performed by an individual in or as an officer or member of the crew of a vessel while it is engaged in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life with certain enumerated exceptions. The federal unemployment law excludes agricultural labor, but the federal old-age and survivors' insurance law limits the exclusion to service performed by foreign agricultural workers who meet certain enumerated requirements. Both the federal old-age and survivors' insurance law and the federal unemployment law contain exclusions of service performed in domestic service. The federal old-age and survivors' insurance law restricts this exclusion to student employment. The federal unemployment law contains no such restriction and also adds domestic service in a private home to this exclusion.

The federal old-age and survivors' insurance law contains the following exclusions not contained in the federal unemployment law for service performed: (1) in the employ of the United States or any instrumentality thereof if the service is covered by a federal retirement system; (2) by a duly ordained, commissioned, licensed minister of a church or by a member of a religious order in the exercise of duties which meet certain enumerated requirements; (3) in the employ of an instrumentality of the United States exempt from tax imposed by the Federal Insurance Contributions Act; (4) by a student enrolled and regularly attending classes at and employed by a school, college, or university which meets certain enumerated requirements; (5) by an individual under an arrangement with an owner/tenant of land to provide agricultural or horticultural commodities; (6) in the employ of an organization registered or required to register as a Communist organization; and (7) in Guam by a resident of the Republic of the Philippines while in

Guam on a temporary basis. Exclusions which the federal unemployment law contains but which are not contained in the federal old-age and survivors' insurance law are: (1) certain agricultural labor not performed by foreign workers; (2) domestic service in a private home, and service performed; (3) not in the course of the employer's trade or business; (4) in the employ of a religious, charitable, educational, or other organization exempted under the exempt organizations provisions of the Internal Revenue Code; (5) in the employ of a school, college, or university by a student or the spouse of a student which meets certain enumerated requirements; (6) by an individual as an insurance agent or solicitor on a commission basis; (7) by an individual in the catching, taking, harvesting, cultivating, or farming of any kind of aquatic forms of life; and (8) by a full-time student in the employ of an organized camp which meets certain enumerated requirements.

A comparison of the exclusions of service under the Hawaii employment security law and the federal unemployment law is shown in Appendix H. There are approximately the same number of exclusions from the definition of "employment" under the Hawaii and federal employment security laws. There are some differences in the exclusions statutorily provided for in the Hawaii employment security law and the federal unemployment law. Exclusions for service which the Hawaii employment security statute provides, but the federal unemployment law does not are for service: (1) with respect to which unemployment compensation is payable under an unemployment system established by an act of Congress; (2) covered by an arrangement between the department and the agency charged with the administration of any other state or federal unemployment compensation law which meets certain enumerated requirements; (3) performed by an individual who is not subject to federal laws relating to unemployment compensation, pursuant to the Federal Economic Opportunity Act of 1964; (4) performed by an individual as a real estate salesperson on a commission basis; (5) performed by a registered sales representative for a registered travel agency on a commission basis; and (6) performed by a vacuum cleaner salesperson on a commission basis. With the exception of the first three exclusions which are relevant only to the state unemployment system, the remaining exclusions are for services which may be excluded from coverage under the federal common-law test contained in the Social Security Act and in the Federal Unemployment Tax Act as those performed by an independent contractor. These services would not be similarly excluded under the Hawaii employment security law in the absence of a specific statutory exclusion because the workers performing these services would not meet the three part ABC test required for independent contractor status under Hawaii law. Exclusions which the federal unemployment statute contains but the state employment security statute does not are those services performed: (1) in the employ of a hospital by a patient; (2) by an individual as an employee or employee representative as defined in the Railroad Unemployment Insurance Act; (3) in the employ of an international organization; and (4) by a nonresident alien individual for the period the alien is temporarily present in the United States as a nonimmigrant which meets certain enumerated requirements.

United States Code, section 501 et seq., provides federal grants to states for unemployment compensation administration. The federal unemployment law dictates, in large measure, the extent of state coverage because the Federal Unemployment Tax Act provides that any employer subject to the federal tax may receive credit against most of the federal

unemployment tax if the employer pays taxes under an approved state unemployment insurance law. Any employer subject to federal law, but not to state law, would be liable for the full 6.2 per cent federal unemployment tax without the credit for the state unemployment tax and yet, no unemployment insurance protection would be available for the employer's employees.[21] Appendix I provides an example illustrating the detrimental effect upon an employer if the employer is subject to the Federal Unemployment Tax Act without being subject to the Hawaii employment security law. Hence, the Hawaii employment security law can include workers in a greater number of services than the federal unemployment law but cannot exclude workers whose services are not similarly excluded from the federal unemployment law. In reality, the Hawaii employment security law includes workers in a broader scope of services than the federal unemployment law because Hawaii's ABC test is stricter than the common-law test contained in the federal unemployment law. Every statutory exclusion for service legislatively proposed for inclusion in the Hawaii employment security law which is not specifically excluded under the federal unemployment law is referred to the federal Department of Labor's regional office for review before being adopted to ensure that the exclusion is in compliance with the coverage of the federal unemployment laws.[22]

Fair Labor Standards Act (FLSA)

Statutory Provisions. The Fair Labor Standards Act, commonly known as the Wage and Hour Law, was adopted to regulate minimum wages, overtime pay, and child labor in interstate commerce and production of goods for interstate commerce.[23]

Section 3 of the Fair Labor Standards Act[24] provides for a definition of "employee" as follows:

> Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.

> "Employ" is also defined in section 3 of the Fair Labor Standards Act as including "...to suffer or permit to work."

Court Decisions. There are numerous federal court cases interpreting these definitions of "employee" and "employ" to determine whether an employment relationship exists within the meaning of the Fair Labor Standards Act. The United States Supreme Court cases established the general parameters of the coverage of this Act. While these cases hold that this Act was intended to apply to many persons and working relationships which were not deemed to fall within an employment relationship prior to the Act's application, the Court has determined that the Act is not broad enough to cover situations where the services of the employee service only the employee's personal interests. These cases further establish the principle that the proper criteria for determining whether an employer-employee relationship exists under the Fair Labor Standards is one of "economic reality", which depends not on isolated factors but upon the circumstances of the whole activity. Subsequent Ninth Circuit court of appeals cases have delineated the factors critical to an "economic reality" test.

United States v. Rosenwasser, 323 U.S. 360 (1945), was the first United States Supreme Court decision which addressed the issue of defining the employment relationship under the Fair Labor Standards Act. The specific issue in that case was whether employees compensated on a piece rate basis are covered by this Act. This issue arose from an appeal from a judgment of the district court sustaining the employer's challenge to the sufficiency of a criminal charge alleging violations of the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act. The basis for the judgment was that this Act was not applicable to employees compensated at piece rates. In holding that such employees were covered by this Act, the Court found that neither the policy of the Act nor the legislative history gave any basis for excluding piece workers from the benefits of the law. The Court then interpreted the language of the statute and determined that the Congressional intention was to include all employees within the scope of this Act unless specifically excluded, stating:

> The plain words of the statute give an even more unmistakable answer to the problem. Section 6(a) of the Act provides that "every employer" shall pay to "each of his employees who is engaged in commerce or in the production of goods for commerce" not less than specified minimum "rates," which at present are "not less than 30 cents an hour." Section 7(a) provides that "no employer" shall employ "any of his employees" for longer than specified hours in any week without paying overtime compensation "at a rate not less than one and one-half times the regular rate at which he is employed." The term "employee" is defined in §3(e) to include "any individual employed by an employer," with certain exceptions not here pertinent being specified in §13, and the term "employ" is defined in §3(g) to include "to suffer or permit to work."
>
> A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame. The use of the words "each" and "any" to modify "employee," which in turn is defined to include "any" employed individual, leaves no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded. And "each" and "any" employee obviously and necessarily includes one compensated by a unit of time, by the piece or by any other measurement. A worker is as much an employee when paid by the piece as he is when paid by the hour. The time or mode of compensation, in other words, does not control the determination of whether one is an employee within the meaning of the Act and no court is justified in reading in an exception based upon such a factor. When combined with the criminal provisions of §§15 and 16, the unrestricted sweep of the term "employee" serves to inform employers with definiteness and certainty that they are criminally liable for willful violations of the Act in relation to their piece rate employees as well as to their employees compensated by other methods. Ibid. at 362-363. (Emphasis added; citations and footnotes omitted.)

In Walling v. Portland Terminal Company, 330 U.S. 148 (1947) (hereinafter Walling), the United States Supreme Court held that the coverage of the Fair Labor Standards Act was not without limits. The Walling case specifically held that the Act does not extend to work which serves only an

employee's personal interest. This case was an appeal from a denial of an injunction to require maintenance of records concerning wages and minimum wages of certain brakeyard trainees, pursuant to provisions of the Fair Labor Standards Act. Preliminarily, the Court found that common-law employee categories or employer-employee classifications under other statutes were not of controlling significance in making such determinations because the Act contained its own definitions, comprehensive enough to require its application to many persons and working relationships which were not deemed to fall within an employer-employee relationship prior to the Act, stating:

> The Fair Labor Standards Act fixes the minimum wage that employers must pay all employees who work in activities covered by the Act. There is no question but that these trainees do work in the kind of activities covered by the Act. Consequently, if they are employees within the Act's meaning, their employment is governed by the minimum wage provisions. But in determining who are "employees" under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. See N.L.R.B. v. Hearst Publications, 322 U.S. 111, 128-129. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category. See United States v. Rosenwasser, 323 U.S. 360, 362-363. Ibid. at 150-151. (Emphasis added.)

The Court reasoned, however, that while the definitions of "employee" and "employ" contained in the Act are broad enough to accomplish the purpose of insuring that every person whose employment contemplated compensation should not be compelled to sell personal services for less than the prescribed minimum wage, these definitions cannot be interpreted to make a person whose work serves only the person's personal interest an employee. The Court held that the trainees were not employees within the meaning of the Fair Labor Standards Act because the railroads received no immediate advantage from any work done by them. Ibid. at 152-153.

In a subsequent case, Rutherford Food Corporation v. McComb, 331 U.S. 722 (1947) (hereinafter Rutherford Food Corporation), the Court held that the "economic reality" test applicable to determining an employment relationship under the Social Security Act was the appropriate analysis for similar determinations under the Fair Labor Standards Act.[25] In the lower court proceedings, the district court had denied the request by the Administrator of the Wage and Hour Division of the Department of Labor to enjoin Rutherfood Food Corporation and the Kaiser Packing Company from further violating the Fair Labor Standards Act, concluding that meat boners were independent contractors. The basis for the request was an allegation that the defendants had failed to keep proper records and to pay overtime to certain employees as required by this Act. The Ninth Circuit reversed on appeal and concluded that the test for determining who was an employee under the Act was not the common-law test of control, "as the Act concerns itself with the correction of economic evils through remedies which were unknown at common law...." The Ninth Circuit held that the "underlying economic realities" led to the conclusion that the boners were employees of Kaiser; and that the work of the boners was a part of the integrated unit of

production under such circumstances that the workers performing the task were employees of the establishment. The United States Supreme Court, in agreeing with the court of appeals, reasoned that the determination of the relationship does not depend on isolated factors but rather upon the circumstances of the whole activity, stating:

> As in the National Labor Relations Act and the Social Security Act, there is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act. Provisions which have some bearing appear in the margin. The definition of "employ" is broad. It evidently derives from the child labor statutes and it should be noted that this definition applies to the child labor provisions of this Act, §12. We have decided that it is not so broad as to include those "who, without any express or implied compensation agreement, might work for their own advantage on the premises of another."
>
> * * *
>
> ...We conclude, however, that these meat boners are not independent contractors. We agree with the Circuit Court of Appeals, quoted above, in its characterization of their work as a part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment. Where the work done, in its essence, follows the usual path of an employee, putting on an "independent contractor" label does not take the worker from the protection of the Act.
>
> * * *
>
> ...We think, however, that the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity. Viewed in this way, the workers did a specialty job on the production line. The responsibility under the boning contracts without material changes passed from one boner to another. The premises and equipment of Kaiser were used for the work. The group had no business organization that could or did shift as a unit from one slaughterhouse to another. The managing official of the plant kept close touch on the operation. While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor. Upon the whole, we must conclude that these meat boners were employees of the slaughtering plant under the Fair Labor Standards Act. Ibid. at 728-730. (Emphasis added; citations and footnotes omitted.)

The Ninth Circuit[26] has applied the principles established in these United States Supreme Court cases to disputes over whether the relationship is one of employment or of independent contractor. Following the Rutherford Food Corporation case, the Ninth Circuit has applied the "economic reality" test to make such determinations. For example, in Hodgson v. Ellis

Transportation Company, 456 F.2d 937 (9th Cir. 1972), the Ninth Circuit applied these principles to find that the work of a diesel mechanic for the defendant was an essential, integral part of its everyday operation. The court of appeals found an employment relationship based on the facts that the mechanic: (1) worked exclusively for Ellis; (2) had no independent business organization or license; (3) depended wholly on Ellis for the mechanic's livelihood; (4) supervised other Ellis mechanics; and (5) was required to maintain regular hours. The court of appeals made this finding despite other findings of fact indicating an independent contractor relationship--namely, the mechanic: (1) paid the mechanic's own insurance, taxes, and social security; (2) did not receive medical coverage, vacation benefits, or paid holidays; and (3) maintained time statements and submitted weekly invoices to Ellis. Ibid. at 939.

In Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748 (9th Cir. 1979), the Ninth Circuit reviewed a grant of summary judgment rendered against certain strawberry growers on the issue of their employment status. In its review, the Ninth Circuit clarified the analysis to be applied under the "economic reality" test by synthesizing a six-factor test from previous federal cases distinguishing employment from independent contractor relationships as follows:

> [3] The courts have identified a number of factors which may be useful in distinguishing employees from independent contractors for purposes of social legislation such as the FLSA. Some of those factors are:
>
> 1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
>
> 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
>
> 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
>
> 4) whether the service rendered requires a special skill;
>
> 5) the degree of permanence of the working relationship; and
>
> 6) whether the service rendered is an integral part of the alleged employer's business. Ibid. at 754.

While noting that the presence of any individual factor is not dispositive of whether an employment relationship exists, the Ninth Circuit found that such a determination depends upon the circumstances of the whole activity. Ibid. at 754.

In holding that summary judgment was not warranted because the strawberry growers had created genuine issues of material fact on their employment relationship, the Ninth Circuit relied upon evidence in the record demonstrating that: (1) Driscoll possesses substantial control over important aspects of the strawberry growers' work; (2) the strawberry growers'

opportunity for profit or loss appears to depend upon the managerial skills of Driscoll Strawberry Associates and its sublicensor; (3) the strawberry growers' investment in equipment is minimal in comparison with the employers' investment in land and equipment; and (4) the strawberry growers' activities appeared to be an integral part of the employers' strawberry growing operation, rather than an independently viable enterprise. Ibid. at 755.

More recent cases have applied the "economic reality" test to make other determinations regarding the employment versus independent contractor relationship of workers. In Bonnette v. California Health and Welfare Agency, 704 F.2d 1465 (9th Cir. 1983), the Ninth Circuit affirmed a lower court decision that the California Health and Welfare Agency was the employer of certain chore workers. The Ninth Circuit found an employment relationship despite the fact that the Agency had delegated certain responsibilities to the recipients benefitting from the chore workers' services. The Ninth Circuit's conclusion was based upon the finding that the Agency: (1) exercised considerable control over the nature and structure of the employment relationship; and (2) had complete economic control over the relationship. Based on these findings, the Ninth Circuit concluded that the "economic reality" was that the Agency employed the chore workers to perform social services for the benefit of the recipients.

In summary, the federal court decisions hold that the employment relationship under the Fair Labor Standards Act extends beyond the common-law concepts of "employee" and "independent contractor". These decisions further hold that the test for determining whether an employment relationship exists under this Act is one of "economic reality", as determined by a six-factor test, including: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the employee's opportunity for profit or loss depending upon the employee's managerial skill; (3) the employee's investment in equipment or materials required for the task or the employee's employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the employer's business.

To summarize, there is no consistency in defining an "employment" relationship among the federal labor laws. While both the National Labor Relations Act and the Social Security Act and its accompanying taxing laws purport to define "employment" status based on the traditional common-law test of control, the Social Security Act and its accompanying taxing provisions consider other factors, such as the employer's right to discharge and furnishing of tools and a place to work, in addition to the element of control. The Fair Labor Standards Act diverges from these other two federal labor laws by defining "employee" in terms of an "economic reality" test which relies upon a six-factor analysis which extends beyond the common-law concepts of "employee" and "independent contractor". Hence, there is no test common to the federal labor laws which determines an employer-employee relationship or an independent contractor relationship.

There also is no consistency in defining an "employment" relationship between the Hawaii employment security law and the federal unemployment law. The ABC test and the definition of "employee" and "employment" in the

Hawaii law result in more workers being included under the Hawaii law than under the federal unemployment law.

Chapter 5

AN OVERVIEW OF NATIONAL EMPLOYMENT SECURITY LAW EXCLUSIONS

During the interviews of the parties both involved with and affected by the independent contractor situation conducted by the Bureau, there was interest expressed, particularly by the business community, in the criteria contained in other states' labor laws to distinguish between an employment and an independent contractor relationship. The ABC test (the uniform criteria applied in making these determinations under Hawaii's employment security, temporary disability insurance, and prepaid health care laws) historically arose in the context of employment security laws.[1] The Bureau, therefore, conducted a review of the employment security laws of other states to ascertain: (1) the extent to which the ABC test is the established criteria for differentiating between an employee and an independent contractor in other state employment security laws; and (2) whether other states' employment security laws, which include an ABC test provision, have exclusions of service from the definition of "employment similar to the exclusions contained in Hawaii's employment security law."

Appendix J, which was provided by the Department of Labor and Industrial Relations, is a table showing the coverage provisions of employment security laws from each of the fifty states and from Puerto Rico and the Virgin Islands. The most recent update of this table by the department occurred in 1985. The Bureau updated this table for 1986 by examining the statutory material available in the University of Hawaii Law School Library.[2] The one limitation to this method is that there is no assurance that all of the employment security statutes reviewed in the course of this research were current.

Like Hawaii, the employment security laws of twenty-eight other states, Puerto Rico, and the Virgin Islands contain the ABC test to distinguish between the covered employee and the independent contractor. Of the remaining twenty-two states, seven of the state employment security laws use two parts of the ABC test and two use one part of the ABC test in making these determinations. Each of those seven state employment security laws containing only two parts of the ABC test omitted the second part of the test--that the service is either outside the usual course of 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. For the two states containing only one part of the ABC test, the Mississippi law contains the first part--the freedom from control or direction over the performance of such service, and the Minnesota law contains the third part--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. Only six state employment security laws use the common-law, master-servant test for determining an employment relationship.

Appendix K provides an overview of the exclusions for service from the definition of "employment" contained in the state employment security statutes which include an ABC test provision like Hawaii's employment security law. This overview is confined to state employment security laws; the employment security laws of Puerto Rico and the Virgin Islands are omitted. Appendix K

also provides a comparison of the state employment security law exclusions and the Federal Unemployment Tax Act exclusions.[3] The information was obtained from an examination of the state employment security laws available in the University of Hawaii Law School Library. As previously noted, the one drawback to this method is that not all of the employment security statutes examined may be current.

Based on the information collected from these ABC provision states, there are very few conclusions which can be drawn regarding the similarities and dissimilarities of the exclusions for service from the definition of "employment." Appendix K shows that the exclusions for service are varied and numerous. The language of many of these exclusions is very specific, indicative of exclusions being created for the benefit of special interest groups of employees or employers. Indeed, there is no exclusion for service which is contained in all twenty-eight employment security statutes. Like Hawaii's employment security law, twenty-six of the state employment security statutes contain exclusions for service in family employment and by an individual as an insurance agent or solicitor paid on commission. Other exclusions which are contained in twenty or more state employment security statutes are for service performed: (1) in agricultural labor which meets certain enumerated requirements; (2) in the employ of the United States government or an instrumentality thereof exempt under the Constitution of the United States from contributions with certain enumerated exclusions; (3) with respect to which unemployment compensation is payable under an unemployment system established by an act of Congress; (4) in the employ of an organization exempt from income tax under provisions of the Internal Revenue Code relating to exempt organizations; (5) by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news; (6) by an individual for an employer as a real estate salesperson on commission; (7) by a patient in the employ of a hospital; (8) by an individual who is enrolled, at a nonprofit or public educational institution which meets certain enumerated requirements; (8) by an individual trainee participating in, and as part of, an unemployment work-relief, work-training, work-experience, or work-study program that is assisted or financed by any federal or state agency or political subdivision thereof; (9) by an individual in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church, convention, or association of churches; (10) by a duly ordained, commissioned, or licensed minister of a church in the exercise of ministry or by a member of a religious order in the exercise of duties; (11) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals with impaired earning capacity which meets certain enumerated requirements; and (12) for a hospital in a state prison or other state correctional institution by an inmate thereof or service performed by an inmate of a custodial or penal institution for a nonprofit organization or governmental entity which meets certain enumerated requirements. Appendix K also shows that a majority of these twelve common exclusions are also contained in the Federal Unemployment Tax Act. Hawaii's employment security law does not contain exclusions (7) through (12). In many of the state employment security laws containing exclusions (7) through (12), these exclusions are limited to service performed in one or more of the following: (1) in the employ of this state or other state or instrumentality thereof for a hospital or institution of higher education in the state excluded under the Federal Unemployment Tax Act; (2)

in the employ of a political subdivision of the state or a wholly owned instrumentality thereof; (3) in the employ of an organization exempt under the Internal Revenue Code provisions relating to exempt organizations; (4) in the employ of a religious, charitable, educational, or other organization if the service is excluded under the Federal Unemployment Tax Act; and (5) employment with a governmental entity if the service is excluded under the Federal Unemployment Tax Act. Although Hawaii's employment security law contains similar exclusions for service performed in the employ of any other state, political subdivision, or instrumentality thereof which is wholly owned, in the employ of any instrumentality of one or more other states or their political subdivisions to the extent that the instrumentality is exempt from the tax imposed by the Federal Unemployment Tax Act, and in the employ of organizations exempt under the Internal Revenue Code provisions relating to exempt organizations, there are no similar limitations upon these exclusions.

Finally, Hawaii's employment security law is unique regarding exclusions for service performed: (1) by an individual who is not subject to the Federal Economic Opportunity Act; (2) by a registered sales representative for a registered travel agency paid on commission; and (3) by a vacuum cleaner salesperson paid on commission.

In summary, Hawaii's employment security law is similar to other state employment security laws containing the ABC test in two respects: (1) there are numerous, varied, and specific exclusions for certain services performed from the definition of "employment"; and (2) the exclusions contained in the Hawaii employment security law parallel the exclusions contained in the Federal Unemployment Tax Act. Hawaii's employment security law is different from other state employment security laws in two respects: (1) Hawaii's law contains no limitations upon the exclusions for service performed in the employ of other states, political subdivisions, or instrumentalities thereof and in the employ of organizations exempt under the provisions of the Internal Revenue Code relating to exempt organizations; and (2) Hawaii's law contains exclusions for service performed by individuals subject to the Federal Economic Opportunity Act, by registered sales representatives for registered travel agencies, and by vacuum cleaner salespersons.

Chapter 6

FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

PART I. OVERVIEW

The major obstacle to the Legislature's consideration of the issues surrounding the independent contractor under Hawaii's labor laws has been a general misunderstanding of the problems at issue. As this study shows, the ABC test provides a uniform definition of "independent contractor" in three of the four labor laws--the employment security, the temporary disability insurance, and the prepaid health care law. The question, therefore, of a uniform definition of "independent contractor" among these four labor laws appears to be spurious. Adding the ABC test provision to the workers' compensation law does not make a significant difference from the present "economic reality" test which is currently being used by the Department of Labor and Industrial Relations in interpreting that law. The real dispute among the parties concerned about this independent contractor problem is the extent of occupational coverage provided by these four labor laws. This is the dispute which has triggered the proliferation of statutory exclusions under these four labor laws.

This study required a comprehensive legal analysis of the occupational coverage provisions of not only Hawaii's four labor laws, but also of other state and federal labor laws. The Bureau is of the opinion that the legal analysis of these labor laws and the findings provided by this study are a sufficient foundation for the Legislature to consider and decide among various alternative policies necessary to address the independent contractor problem.

PART II. A UNIFORM DEFINITION OF "INDEPENDENT CONTRACTOR"

Senate Resolution No. 145, S.D. 2, requested the Bureau to conduct a study and develop a uniform definition of "independent contractor" to be applicable to laws in title 21, HRS, relating to employment security, temporary disability insurance, workers' compensation, and prepaid health care. The Bureau finds that a uniform definition of "independent contractor" currently exists in three of these four labor laws. "Independent contractor" is defined by the ABC test provision present in the employment security statute and in the rules of the Department of Labor and Industrial Relations implementing the temporary disability insurance and prepaid health care laws. However, the ABC test provision does not contain a reference to the term "independent contractor". This omission has created much of the confusion regarding the independent contractor problem. In fact, the language of this provision was framed to avoid the common law connotations of the terms "master", "servant", and "independent contractor" in such social legislation.[1] Nevertheless, the absence of the term "independent contractor" from this provision is from a legal standpoint a distinction without a difference.

The Bureau finds, however, that there is no ABC test provision in either the workers' compensation law or in the administrative rules implementing the law. The "relative nature of the work" test is more well-established in the workers' compensation field, but the Department of Labor

and Industrial Relations in recent informal opinions has used an "economic reality" test for distinguishing between an employment and an independent contractor relationship under the workers' compensation law.[2] This "economic reality" test permits workers' compensation coverage for individuals who as a matter of economic reality perform services for and are dependent for their livelihood on the employer for whom their services are rendered. The Department of Labor and Industrial Relations maintains that the practical result of applying this "economic reality" test is no different from the result under the ABC test. The department reasons that both tests measure the control of the employer over the working relationship. The Bureau is unable to render a legal opinion regarding the legal and practical distinctions between these two tests. Instead, the Bureau finds that interpreting the definition of "independent contractor" in the workers' compensation law differently from the definition in the other labor laws makes no sense from a philosophical standpoint. The purpose of each of these four labor laws is the same--to provide protection of the worker from the problems of disability and unemployment through a program of assistance. Taken together, they form a comprehensive social program of compensation and benefits for workers during periods of disability and unemployment. From a legal standpoint, there are no substantial obstacles to adoption of a uniform definition of "independent contractor" for these four labor laws. However, the workers' compensation law has historically been different from the employment security, temporary disability insurance, and prepaid health care laws and, therefore, a slightly different line of legal precedent has developed for distinguishing between an employee and an independent contractor for the workers' compensation law.[3] Accordingly, while the Bureau finds that the principle of making uniform the definition of "independent contractor" in the four labor laws is theoretically sound it must point out that a policy of uniformity would involve a shift from the established legal precedent for workers' compensation to the ABC test precedent.

The Bureau finds that the most significant cause of the complaints regarding uniformity in defining an employment versus an independent contractor relationship under these four labor laws rests in the statutory exclusions from coverage carved out by the Legislature. Compounding the complaints, there are no exclusions of service which appear in all four of these labor laws. One common misunderstanding which appears to have contributed to the proliferation of these exclusions is that a statutory exclusion confers independent contractor status on a worker. There is no legal basis for such a conclusion. The only legal method to obtaining independent contractor status is to meet the criteria of the ABC test. In fact, these exclusions have been created statutorily because the workers performing these services do not meet the ABC test.

In Agsalud v. First Hawaiian Investment Company, Civil No. 50079 (5/2/78), the circuit court specifically found that the employment relationship does exist in these exclusions of service. The services have been excluded from the definition of "employment" only by statute. In the absence of any legal principle underlying the creation of these exclusions, these statutory exclusions are a substitution of the judgment of the Legislature for the determinations of the department interpreting and applying the ABC or the "economic reality" test to the facts of a particular case.

The Bureau finds that the sources of the complaints before the Legislature regarding the issue of a uniform definition of "independent contractor" for these four labor laws stem from two causes: (1) the absence of the ABC test in the workers' compensation law; and (2) the piecemeal statutory exclusions of service from the definition of "employment" contained in these four labor laws.

PART III. OCCUPATIONAL COVERAGE

Based on the discussions with the parties concerned with the independent contractor problem, the Bureau finds that there is a significant controversy over the extent of occupational coverage under these four labor laws which underlies the independent contractor problem. Since the initial enactment of these four labor laws, the stated purpose of the Legislature has been that these laws are remedial--to protect workers from the negative effects of an industrialized society. The ABC test provision for defining an "independent contractor" under these laws was developed to facilitate this remedial purpose. The Legislature historically has made a studied effort to avoid limiting the class to be benefited by rejecting standards that might restrict it exclusively to workers sustaining a common-law, master-servant relationship and by adopting standards that include all workers whom the law was socially designed to protect. The reasoning has been that the principle pertinent to an employer's legal responsibility to third persons for the acts of the employee's servants--i.e., vicarious liability--has no application to the remedial purpose of these labor laws. The courts, in resolving disputes over whether the worker is a covered employee, have broadly interpreted the occupational coverage provisions of these laws to effectuate the remedial purpose of these laws.

The variety of statutory exclusions of service are symptoms of the occupational coverage dispute. These statutory exclusions of service are the Legislature's attempts to balance the remedial purposes of these laws with the concerns of the business sector over the broadness of the occupational coverage provisions of these labor laws. In making these exclusions, the Legislature has lost sight of the fundamental purpose and intent of these four labor laws.

To complicate the occupational coverage dispute, there are various other tests in other state and federal labor laws used to differentiate between an employee and an independent contractor. These other tests generally result in a broader definition of "independent contractor". For example, the Hawaii workers' compensation law and the federal Fair Labor Standards Act employ an "economic reality" test to distinguish between employment and independent contractor relationships. The Federal Unemployment Tax Act, the Federal Insurance Contributions Act, the Social Security Act, and the National Labor Relations Act differentiate between an employee and an independent contractor based on the common-law, master-servant test of control. Some other state employment security laws base determinations of covered employment upon the contract of hire between the employer and the worker or the service of the worker. With all of these various tests, questions arise regarding whether: (1) there should be only one definition of "independent contractor" consistent among all state and federal labor laws; and (2) another broader definition of "independent contractor" should be adopted for Hawaii's labor laws.

Regarding the first issue, the Bureau finds that there can be no uniform definition of "independent contractor" for all state and federal labor laws because there is no consistent definition of "independent contractor" among the federal labor laws. The Fair Labor Standards Act uses the "economic reality" test and the other three laws (the Social Security Act, the Internal Revenue Code, and the National Labor Relations Act) use the common-law, master-servant test. Regarding the second issue, however, the Bureau finds that while there are no legal obstacles to the Legislature adopting one of these other tests for the employment security, temporary disability insurance, and workers' compensation laws[4] (though with the prepaid health care law, no amendment of the ABC test can be made because the federal Employee Retirement Income Security Act of 1974 (ERISA) does not exempt from preemption substantive amendments to this law), there is a real obstacle to the adoption of one of these other tests and that is one of philosophy--a broader definition of "independent contractor" would erode the coverage and purposes of these four labor laws.

PART IV. CONCLUSIONS AND RECOMMENDATIONS

The Bureau believes that there are no simple, straightforward solutions to the issues surrounding the independent contractor issue. No definition of "independent contractor" will completely resolve all of the complaints of the parties involved with this problem; no definition of "independent contractor" will be agreeable to all parties involved with this problem. As stated, the Bureau finds that the issue of a uniform definition of "independent contractor" for these four labor laws is really spurious. Moreover, this policy would involve a shift in the legal precedent in the workers' compensation area. If the Legislature believes that the problems of the independent contractor should be addressed, nevertheless, the Bureau recommends that the Legislature choose alternative 1 below, a policy of a uniform standard for distinguishing between an employee and an independent contractor rather than alternative 2, a policy of limiting the extent of occupational coverage provided by these laws. These two objectives are mutually exclusive: if the ABC test is retained and extended to the workers' compensation law, this will broaden rather than limit the occupational coverage of these four labor laws.

The Bureau believes that retaining and extending the ABC test is the better approach because it maintains the historical, remedial purposes of these four labor laws. The Legislature created these four labor laws to protect and assist workers from the harsh consequences of industrial life.

While the Bureau recognizes the business community's concerns over the definition of "independent contractor", policies of limiting occupational coverage by a new, narrower definition of "independent contractor" or by creating exclusions from coverage are contrary to the fundamental intent and purpose of these four laws. Moreover, these exclusions of service have blurred the purpose and intent of these labor laws.

Implementing a policy of uniform occupational coverage by retaining and extending the ABC test to the workers' compensation law will create a legal scheme for these labor laws which is more consistent with the intent and

purpose of these laws.

A. Alternative 1: Policy of a Uniform Definition of "Independent Contractor"

In response to the request made in Senate Resolution No. 145, S.D. 2, to study and develop a uniform definition of "independent contractor", the Bureau recommends the following:

1. The Legislature amend the workers' compensation law to include the ABC test provision. The preemption of substantive amendments to Hawaii's prepaid health care law by the federal ERISA precludes any other alternative uniform definition of "independent contractor".

2. While the Bureau would like to recommend deleting all of the statutory exclusions in the four labor laws to provide uniformity in the definition of "employment", this is not feasible because of federal ERISA. (The federal ERISA does not exempt from preemption the deletion of any exclusions presently in the prepaid health care law.) The Bureau, therefore, recommends that the Legislature amend these four labor laws to provide uniform exclusions by amending the definition of "employment" in these four labor laws to include only those exclusions contained in the prepaid health care law.[5] Such amendment should be made only after consultation with the regional office of the federal Department of Labor regarding whether these exclusions of service are consistent with those provided under the Federal Unemployment Tax Act to insure that employers using such services will not be subject to the federal unemployment tax without credit for the state unemployment tax.

B. Alternative 2: Policy Limiting Occupational Coverage

There is no legal barrier to the Legislature adopting any one of the following definitions of "independent contractor": (1) the common-law, master-servant test; (2) the "economic reality" test; or (3) one which ties in with federal Internal Revenue Code determinations. The Legislature should recognize, however, that none of these definitions will completely obviate a case-by-case analysis. Both the common-law, master-servant test and the "economic reality" test involve a complete case-by-case analysis, and while it may appear that a definition tied into determinations of the Internal Revenue Code would dispense with a case-by-case approach, this perception is illusory. Although the Internal Revenue Service may have determined that a worker is an independent contractor under the Internal Revenue Code, there would still have to be a determination made by the Department of Labor and Industrial Relations regarding whether the facts of the case at issue under Hawaii's laws are similar to those ruled on by the Internal Revenue Service. If the facts in the Hawaii case deviate from those facts decided upon by the Internal Revenue Code, then a case-by-case analysis would still have to be made. Obviously, if there is no determination by the Internal Revenue Service regarding a certain class of workers, a case-by-case determination by the State would again have to be made.

In weighing the merits of these conflicting policies, the Legislature should further note the following: no matter what test for determining an "independent contractor" is adopted, the problems of occupational coverage will not go away.[6] Any definition which is adopted will still involve a case-by-case analysis. Even under a standard different than the ABC test, there will continue to be individuals or groups of employers or employees who will maintain that they should be included or excluded from the coverage of these four labor laws and who seek exclusions from coverage. The Legislature should weigh whether adopting the principle of vicarious liability has any relevance to the purposes of these four labor laws. If the Legislature decides to pursue an objective of amending the occupational coverage provisions of one or more of these laws to broaden the definition of "independent contractor", as suggested by the business community, the historical philosophy and purpose of these labor laws will be significantly altered. In short, the broadening of the definition of "independent contractor" in any of these labor laws involves significant changes of social, economic, and administrative policy by the Legislature.

C. Other Recommendations

Regardless of what policy the Legislature pursues regarding the independent contractor under the four labor laws, the Bureau recommends that the system of implementing the policy established should be changed in the following ways:

1. The Department of Labor and Industrial Relations should implement a centralized system for making uniform determinations regarding employment or independent contractor status under all four labor laws. One approach which might be considered is the rendering of one decision regarding the employment relationship of a worker which is determinative of that worker's status under all four labor laws. Another approach might be to adopt administrative rules providing that the determination of one division of the department regarding an employment relationship is precedent for determinations by other divisions of the department.

2. The Department of Labor and Industrial Relations should consider publishing administrative rulings where rules already exist, and adopting administrative rules where none exist, to clarify the application to factual situations in specific industries of the test distinguishing an employee from an independent contractor. The department has not published either informal opinions or decisions for reasons of confidentiality. However, the department could publish such opinions or decisions without disclosing the parties involved in a manner similar to federal Internal Revenue Rulings. (The Employment Tax Branch, State of California, has a system for issuing such rulings.) Appendix L includes a letter from the Deputy Director of the Employment Tax Branch outlining the system for rendering these tax rulings, the administrative rules setting forth the specific factors which are considered in making a determination regarding employment relationship, and some examples of tax rulings which have been issued by the Branch. Some of the prevalent complaints from the business community have been that the test for distinguishing an employee from an independent

contractor is not recognized by employers and that there are many misconceptions surrounding the factors used in making such determinations. This recommendation is aimed at reducing these misconceptions about the occupational coverage of these labor laws.

FOOTNOTES

Chapter 1

1. The references to the four labor laws in this study are: the Hawaii employment security or unemployment compensation law, the workers' compensation law, the temporary disability insurance law, and the prepaid health care law, all contained in title 21, Hawaii Revised Statutes.

2. The purpose clause of Act 194, Session Laws of Hawaii, 1982, indicated that the basis for the amendment was a recent federal Internal Revenue Service ruling that no employee-employer relationship exists in the case of a vacuum cleaner distributor and its dealers.

3. Statement of Objection to Senate Bill No. 2169-86 from George R. Ariyoshi to Honorable Members, Thirteenth Legislature, State of Hawaii, Governor of Hawaii, April 21, 1986.

Chapter 2

1. Meeting with Bette Tatum, National Federation of Independent Business; Tim Lyons, Hawaii Business League; Kate Stanley, Hawaii Association of Realtors; and Russell Blair, Member, House of Representatives, State of Hawaii, May 28, 1986 (hereinafter Tatum meeting).

2. Tatum meeting; interview with Tim Lyons, Executive Vice President, Hawaii Business League, August 12, 1986 (hereinafter Lyons interview).

3. Tatum meeting.

4. Lyons interview.

5. Ibid.

6. Tatum meeting; interview with Subcommittees on Insurance and Contracts and Licensing of the Governmental Affairs Committee, Hawaii Association of Realtors, August 6, 1986 (hereinafter Hawaii Association of Realtors interview).

7. Hawaii Association of Realtors interview.

8. Tatum meeting.

9. Interview with Jared Jossem and Al Konishi, The Chamber of Commerce of Hawaii, July 1, 1986 (hereinafter Chamber of Commerce interview).

10. Lyons interview.

11. Hawaii Association of Realtors interview.

12. Lyons interview.

13. Chamber of Commerce interview.

14. Lyons interview; interview with Connie Hastert, Hawaii Employers' Council, June 19, 1986 (hereinafter Hastert interview).

15. Lyons interview.

16. Ibid.; Hastert interview.

17. The International Longshoremen's and Warehousemen's Union, Local 142, (hereinafter ILWU) is the only labor union which testified during past legislative sessions on legislation to exclude vacuum cleaner salespersons from the workers' compensation, unemployment insurance, and temporary disability insurance laws, taxicab drivers from the workers' compensation law, and registered sales representatives for a registered travel agency from the unemployment insurance law. The ILWU has opposed such exclusions on the grounds that: (1) the exclusions single out one class of workers for discrimination by denying these workers benefits; (2) these workers do not meet the well-defined criteria for determining employee versus independent contractor status; and (3) such exclusions are an attempt to circumvent the law. Statement of ILWU, Local 142, before the Senate Committee on Labor and Employment on Senate Bill No. 2169, S.D. 1, the Thirteenth Legislature, State of Hawaii, February 27, 1986; letter from Shoji Okazaki, Legislative Representative, ILWU, to Senator Clifford Uwaine, Chairman, Senate Committee on Human Resources, March 5, 1982.

    There are two reasons which may be speculated for the lack of opposition by other labor unions. First, labor unions do not represent either independent contractors or employees such as vacuum cleaner salespersons, taxicab drivers, and registered sales representatives for a registered travel agency. Second, the general occupational coverage currently provided by the labor laws is sufficiently broad to include their union members.

18. Interview with Shoji Okazaki, Legislative Representative, ILWU, June 27, 1986 (hereinafter Okazaki interview).

19. Ibid. See also: Statement of ILWU, Local 142, before the Senate Committee on Labor and Employment on Senate Bill No. 2169, the Thirteenth Legislature, State of Hawaii, February 27, 1986; Letter from Shoji Okazaki, Legislative Representative, ILWU,

to Senator Clifford Uwaine, Chairman, Senate Committee on Human Resources, March 5, 1982 (on Senate Bill No. 2531-82, the Eleventh State Legislature, State of Hawaii) .

20. Okazaki interview. The confidential draft of this study contained the statement that "one labor representative asserts that the ABC test present in the employment security, workers' compensation, and temporary disability law provides an exemption from coverage for legitimate independent contractors on a case-by-case basis." In a letter from James A. King, attorney for the ILWU, to Samuel B. K. Chang, Legislative Reference Bureau, the ILWU indicated that this statement was in error. The Bureau rewrote this statement in accordance with a telephone conversation on December 23, 1986, with Shoji Okazaki, Legislative Representative for the ILWU.

21. Ibid.; telephone conversation with Ron Taketa, Carpenters Union Local 745, July 15, 1986.

22. Okazaki interview.

23. Ibid.

24. Meeting with Robert C. Gilkey, Director; Orlando K. Watanabe, Administrator, Disability Compensation Division; Douglas I. Odo, Administrator, Unemployment Insurance Division; Tommy Wong, Temporary Disability Insurance Program, Department of Labor and Industrial Relations, State of Hawaii, June 3, 1986 (hereinafter Gilkey interview).

25. Ibid.

26. Ibid.

27. Ibid.

28. Testimony of Robert C. Gilkey, Acting Director, Department of Labor and Industrial Relations, State of Hawaii, before Members of the Senate Committee on Labor and Employment on Senate Bill No. 2169, the Thirteenth Legislature, State of Hawaii.

29. Gilkey interview.

30. Ibid.

Chapter 3

1. Any references to "coverage" in this chapter refer to "occupational coverage."

2. Stefan A. Riesenfeld, Study of the Workmen's Compensation Law in Hawaii, Legislative Reference Bureau, University of Hawaii (Honolulu: 1963) (hereinafter referred to as the "Riesenfeld Study"), p. iii.

3. 1915 Haw. Sess. Laws, Act 221.

4. Riesenfeld Study, p. 5.

5. 1915 Haw. Sess. Laws, Act 221, sec. 1. See Appendix B for the specific language of this provision.

6. 1915 Haw. Sess. Laws, Act 221, sec. 60(e). See Appendix B for the specific language of this provision.

7. 1915 Haw. Sess. Laws, Act 221, sec. 60(b). See Appendix B for the specific language of this provision.

8. 1915 Haw. Sess. Laws, Act 221, sec. 60(h). See Appendix B for the specific language of this provision.

9. See Riesenfeld Study, pp. 5-16 for a more complete discussion of the amendments to the workers' compensation law.

10. 1917 Haw. Sess. Laws, Act 227, sec. 60(e). See Appendix B for the specific language of this provision.

11. 1939 Haw. Sess. Laws, Act 206, sec. 5. See Appendix B for the specific language of this provision.

12. 1945 Haw. Sess. Laws, Act 10, sec. 3. See Appendix B for the specific language of this provision.

13. 1949 Haw. Sess. Laws, Act 110, sec. 1. See Appendix B for the specific language of this provision.

14. 1959 Haw. Sess. Laws, Act 240, sec. 1. See Appendix B for the specific language of this provision.

15. Ibid.

16. During the 1963 revision of the workers' compensation law in Act 116, 1963 Haw. Sess. Laws, this presumption provision was amended to substitute a presumption "...that the claim is for a covered work injury" for the presumption "...that the claim comes within the provisions of this chapter." As amended, this provision places the burden of going forward with the evidence and of ultimate persuasion to rebut the presumption that the employee's injury is for a covered work injury. Acoustic, Insulation, and Drywall, Inc. v. Labor and Industrial Relations Appeal Board, 51 Haw. 312, 316, 459 P.2d 541, 544 (1970), rehearing denied, 51 Haw. 632, 466 P.2d 439 (1970); Royal State National Insurance v. Labor and Industrial Relations Appeal Board, 53 Haw. 32, 34-35 (1971), 487 P.2d 278, 280; Akamine v. Hawaiian Packing

and Crating, 53 Haw. 406, 407-410, 495 P.2d 1164, 1166 (1972).

17. Senate Standing Committee Report 334 on Senate Bill No. 853, Second Legislature, 1963, State of Hawaii; House Standing Committee Report 889 on Senate Bill No. 853, Second Legislature, 1963, State of Hawaii.

18. 1963 Haw. Sess. Laws, Act 116, sec. 1. See Appendix B for the specific language of this provision.

19. Ibid.

20. Ibid.

21. Ibid.

22. 1975 Haw. Sess. Laws, Act 68, sec. 1. See Appendix B for the specific language of this provision. The legislative history shows that the purpose of this exclusion was to extend workers' compensation benefits to domestic workers who receive remuneration of $50 or more in any calendar quarter from a single household, while excluding from coverage casual domestic workers. Senate Standing Committee Report 682 on House Bill No. 152, Eighth Legislature, 1975, State of Hawaii.

23. 1978 Haw. Sess. Laws, Act 110, sec. 4. See Appendix B for the specific language of this provision. The legislative history of this measure provides no particular reason for excluding these workers except to state, "If the specific exemptions to the State's wage loss replacement and employment insurance programs are not adopted, the attendant care-chore services and in-home child care service payments must be adjusted to include the recipient/employer's contribution to the following programs: State Unemployment Insurance Benefits (UIB); State Worker's Compensation (WC); State Temporary Disability Insurance (TDI); and Prepaid Health Insurance (PPHI)." House Standing Committee Report 794-78 on Senate Bill No. 2620-78, Ninth Legislature, 1978, State of Hawaii.

24. 1979 Haw. Sess. Laws, Act 40, sec. 1. See Appendix B for the specific language of this provision. Senate Standing Committee Report 437 on Senate Bill No. 621 stated as the reason for the exclusion that corporate officers are currently excluded from the coverage of the temporary disability insurance law and the prepaid health care law and for the purpose of consistency should also be excluded from the workers' compensation law.

25. In Re Ikoma, 23 Haw. 291 (1916), claimant filed a workers' compensation claim against Oahu Sugar Company, Ltd. and Kenichi Harumi for loss of eyesight caused by a chip of iron from a drill. The claimant was employed by Harumi, an independent contractor for the drilling with Oahu Sugar Company at the time of the accident. Oahu Sugar denied liability. The ground for the denial was that claimant was the employee of Harumi who paid for the claimant's work and had the right to discharge him. The industrial accident board reserved the issue of the company's liability for the court. The resolution of this issue rested in an interpretation of the definition of "employer". The court noted that, in determining the proper meaning and construction of provisions of the workers' compensation act, the court must look to the act as a whole to determine its scope, object, and general purpose and construe the language broadly and liberally to effectuate the purposes of the act. The court found that the paramount purpose of the act appeared to be to protect the workman and to provide compensation to him from his employer for all injuries received, regardless of negligence and proximate cause. The court then found that the company fell within the definition of "employer" as the owner or lessee of the premises and as the proprietor and operator of the business carried on there.

26. Citations to these informal opinions are omitted for reasons of confidentiality. Hawaii Department of Labor and Industrial Relations Administrative Rules, sec. 12-1-52(a)(3).

27. See p. 11 text.

28. 1937 Haw. Sess. Laws, Act 243.

29. House Standing Committee Report 207 on House Bill No. 303, Nineteenth Legislature, 1937, Territory of Hawaii.

30. Ibid.

31. 1937 Haw. Sess. Laws, Act 243, sec. 5. See Appendix C for the specific language of this provision.

32. Ibid.

33. 1937 Haw. Sess. Laws, Act 243, sec. 6. See Appendix C for the specific language of this provision.

34. 1937 Haw. Sess. Laws, Act 243, sec. 8. See Appendix C for the specific language of this provision.

35. 1939 Haw. Sess. Laws, Act 219.

36. 1939 Haw. Sess. Laws, Act 219, sec. 2. See Appendix C for the specific language of this provision.

37. Asia, "Employment Relation: Common-Law Concept and Legislative Definition", 55 Yale L. J. 76, 83-86 (1945).

38. 1939 Haw. Sess. Laws, Act 219, sec. 2. See Appendix C for the specific language of this provision.

39. 1941 Haw. Sess. Laws, Act 304, sec. 8; Re Century Metalcraft, 41 Haw. 508, 515 (1957). See Appendix C for the specific language of this provision.

40. 1941 Haw. Sess. Laws, Act 304, sec. 8. See Appendix C for the specific language of this provision.

41. Ibid.

42. 1941 Haw. Sess. Laws, Act 304, sec. 12. See Appendix C for the specific language of this provision.

43. Rev. Laws of Haw., secs. 93-1 to 93-7 (1955).

44. Added exclusions include service performed by: (1) an individual who, pursuant to the Federal Economic Opportunity Act of 1964, is not subject to the provisions of the Federal laws relating to unemployment compensation; (2) real estate salesman on a commission basis; (3) a registered sales representative for a registered travel agency on a commission basis; and (4) a vacuum cleaner salesman for an employing unit on a commission basis.

    The legislative history of these Acts shows that the reasons for these exclusions varied. For example, real estate salesmen were excluded because it was found that it is virtually impossible for real estate salesmen who are compensated through commissions to qualify for unemployment benefits even when they make no sales and receive no compensation. The definition of "unemployment" required that an individual perform no services and receive no wages in order to be unemployed. Salesmen in the real estate industry seldom if ever meet the requirement in the definition of "unemployment" of not engaging in any selling activity during a week. House Standing Committee Report 642 on House Bill No. 1034, Sixth Legislature, 1971, State of Hawaii. Vacuum cleaner dealers were excluded on the grounds of conflict between a federal Internal Revenue Service ruling that vacuum cleaner dealers were not employees under the federal law and the state labor laws which provided that vacuum cleaner dealers were not independent contractors. Conference Committee Report 25-82 on Senate Bill No. 2531-82, Eleventh Legislature, 1982, State of Hawaii. Registered, outside travel agency sales representatives were excluded based upon the finding that: (1) it is standard practice for these sales representatives to develop their own clients and contracts, control their own hours, set their own direction, and negotiate their own terms within the limits of agency restrictions; and (2) outside sales representatives are afforded the freedom to take their sales to any travel agent for authenticating travel tickets and arrangements and to accept or reject terms offered by the travel agent. House Standing Committee Report 792-82 on Senate Bill No. 1925, Eleventh Legislature, 1982, State of Hawaii.

45. 1953 Haw. Sess. Laws, Act 23, sec. 1. See Appendix C for the specific language of this provision.

46. Stefan A. Riesenfeld, Temporary Disability Insurance, Legislative Reference Bureau, University of Hawaii (Honolulu: 1969), p. 2.

47. See pp. 10 and 16, text.

48. 1969 Haw. Sess. Laws, Act 148, sec. 2.

49. 1969 Haw. Sess. Laws, Act 148, sec. 5. Excluded by this section were: (1) domestic service; (2) service not in the course of the employer's trade or business; (3) service performed on or in connection with a vessel not an American vessel; (4) service performed by an individual or as an officer or member of the crew of a vessel while it is engaged in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life; (5) service in family employment; (6) service performed in the employ of the United States government or an instrumentality thereof; (7) service in the employ of any other state, or any political subdivision or instrumentality thereof; (8) service performed with respect to which temporary disability compensation is payable for sickness under a temporary disability insurance system established by an Act of Congress; (9) service in the employ of an organization exempt from income tax under the provisions of the federal Internal Revenue Code tax which meets certain enumerated requirements; (10) service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits which meet certain enumerated requirements; (11) service performed in the employ of a school, college, or university, not exempt from federal Internal Revenue Code tax which meets certain enumerated requirements; (12) service performed in the employ of an instrumentality wholly owned by a foreign government which meets certain enumerated requirements; (13) service performed by a student nurse or an intern which meets certain enumerated requirements; (14) service performed by an individual for an employer as an insurance agent or as an insurance solicitor on a commission basis; (15) employment by individuals under the age of 18 in the delivery or distribution of newspapers or shopping news; (16) service covered by an arrangement between the board and the agency charged with the administration of

any other state or federal unemployment compensation law; and (17) service performed by an individual who, pursuant to the Federal Economic Opportunity Act of 1964, is not subject to the federal laws relating to unemployment compensation.

50. See Appendix C for the employment security law definition of "wages".

51. 1978 Haw. Sess. Laws, Act 110, sec. 5. See Appendix D for the specific language of this provision.

52. 1982 Haw. Sess. Laws, Act 194, sec. 3. See Appendix D for the specific language of this provision.

53. 1980 Haw. Sess. Laws, Act 32, sec. 1. See Appendix D for the specific language of this provision.

54. See Appendix D for the specific language of this provision.

55. 1974 Haw. Sess. Laws, Act 210, sec. 2.

56. See Appendices C and D for the specific language of the definitions of "wages" and "employment" contained in the employment security and temporary disability insurance laws.

57. 1974 Haw. Sess. Laws, Act 210, sec. 3. See Appendix E for the specific language of this provision.

58. 1974 Haw. Sess. Laws, Act 210, sec. 5. See Appendix E for the specific language of this provision.

59. 1976 Haw. Sess. Laws, Act 78, sec. 1. See Appendix E for the specific language of this provision.

60. 1978 Haw. Sess. Laws, Act 110, sec. 6. See Appendix E for the specific language of this provision.

61. The federal Ninth Circuit Court of Appeals in Standard Oil Company of California v. Agsalud, 633 F.2d 760 (9th Cir. 1980), aff'd mem. 454 U.S. 801 (1981), affirmed the decision of the federal district court decision holding that the Employee Retirement Income Security Act of 1974 (ERISA) preempted the Hawaii prepaid health care law requiring employers to provide employees with health insurance that covered, among other things, treatment for alcohol and drug abuse. On appeal, the appellant State of Hawaii argued, in part, that: (1) the benefit plans which the Hawaii prepaid health care law required are not employee benefit plans within the meaning of section 3 of ERISA; and (2) the preemption language of section 514(a) of ERISA is not broad enough to encompass the Hawaii prepaid health care law. The Ninth Circuit rejected the State's first argument by disagreeing with the State's contention that Congress intended to exempt plans mandated by state statute from ERISA's coverage. In so ruling, the Ninth Circuit found that while plans by government entities for government employees were exempt, the plans which the Hawaii law required of private employers are not government plans. Regarding the State's second argument, the Ninth Circuit rejected the State's position that since ERISA was concerned primarily with the administration of benefit plans, its provisions were not intended to prevent the operation of laws like the Hawaii prepaid health care law pertaining principally to benefits rather than administration. In so finding, the Ninth Circuit noted that "There is nothing in the statute [ERISA section 514(a)] to support such a distinction between the state laws relating to benefits as opposed to administration."

Subsequent to the Standard Oil decision, Congress passed a measure amending ERISA to save from the section 514(a) preemption the substantive provisions of the Hawaii prepaid health care law that were in effect September 2, 1974, except those providing for the Hawaii law's effective administration. Pub. L. No. 97-473, section 301(a), 96 Stat. 2605, 2611-12 (1983).

For a more complete discussion of ERISA preemption of the Hawaii prepaid health care law, see Irish and Cohen, ERISA Preemption: Judicial Flexibility and Statutory Rigidity, J. of L. Ref., U. of Mich. (Fall 1985).

62. See Appendix E for the specific language of this provision.

63. Only the exclusions contained in Hawaii's four labor laws are addressed in this chapter. The federal unemployment insurance law exclusions are discussed in chapter 4.

Chapter 4

1. Harold S. Roberts, Roberts Dictionary of Industrial Relations, Second Edition (Washington, D.C.: The Bureau of National Affairs, Inc., 1971), p. 351 (hereinafter Roberts' Dictionary). Section 1 of this Act states the findings and policies of the Act as follows: "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. sec. 151 et seq.

2. 29 U.S.C.A. sec. 152(3) (Supp. 1986).

3. See, e.g., United States v. Silk, 331 U.S. 704 (1947) (interpreting the Social Security Act); Walling v. Portland Terminal Company, 330 U.S. 148 (1947) (interpreting the Fair Labor Standards Act); Bailey's Bakery, Ltd. v. Borthwick, 38 Haw. 16 (1948) (interpreting the Hawaii employment security law).

4. There are numerous federal court of appeals cases applying the common-law agency test to various factual situations to determine whether there is an employment relationship under the National Labor Relations Act. Only Ninth Circuit decisions are cited in this discussion. The reason for restricting this discussion to Ninth Circuit decisions is that Hawaii is within this federal circuit, so these particular cases have precedential value for similar cases arising within the State.

5. Facts pertinent to the court's finding were the following: (1) that the two owner-operators owned their own equipment and paid their own costs; (2) that each owner-operator got work through the owner-operator's own solicitations and referrals from contractors and friends; (3) during the year preceding the filing of the charges, one owner-operator worked for 100 customers and the other worked for 75 customers; (4) there were no deductions made by any of these customers for social security or income tax; (5) each owner-operator worked on an hourly basis and the rate was set by the owner-operators, and the payments covered the use of equipment and expenses; (6) the customers did not withhold taxes or keep time records for the owner-operators; (7) each owner-operator was employed only for the period required to do a specific job and no continuing relationship was implied; and (8) each owner-operator was engaged in a distinct occupation and worked under negligible supervision after initial instructions regarding the job to be done.

6. The court noted the following terms of the distribution agreement in finding that there was only economic control by Carnation: (1) the wholesale distributors sell exclusively to wholesale customers and the retail distributors to individual householders; (2) each distributor is granted the exclusive right to sell Carnation's products in a geographic area which Carnation agrees not to unilaterally change; (3) all distributors purchase their trucks and equipment on conditional sales contracts secured by an assignment of a distributor's accounts receivable and execute a "trust" agreement establishing a joint bank account; (4) the retail distributors pay once a week for all products delivered to them, and the wholesaler distributors pay cash for all products; (5) distributors pay Carnation's dock prices and distributors may sell at any price they want; (6) distributors are not allowed to sell any competitive dairy product of another producer but can sell any noncompetitive products; (7) Carnation could furnish advertising materials for the distributor to install and maintain at the distributor's own expense; (8) a distributor may use only vehicles of which the distributor is the registered owner and were required to paint and maintain the paint in a specific manner; (8) distributors are required to carry liability and workers' compensation insurance; and (9) the distributorship agreement specifies termination conditions and a five-year contract duration.

7. The court specifically noted as entrepreneurial characteristics the following: (1) all but one of the owner-operators were doing business as corporations or partnerships; (2) two owner-operators owned more than one truck and sometimes engaged in non-Merchant's business; (3) all had the right to employ their own helpers to assist in making deliveries and several of them paid relevant employment taxes themselves for these helpers; and (4) all had a substantial investment in their equipment.

8. Robert's Dictionary, p. 505.

9. See 42 U.S.C.A. sec. 301 et seq. (West Supp. 1986).

10. 26 U.S.C.A. sec. 3121 et seq. (West Supp. 1986).

11. 26 U.S.C.A. sec. 3301 et seq. (West Supp. 1986).

12. 42 U.S.C.A. sec. 410 (West Supp. 1986).

13. 26 U.S.C.A. sec. 3121 (West Supp. 1986).

14. 26 U.S.C.A. sec. 3306 (West Supp. 1986).

15. The Social Security Act provisions relating to unemployment compensation do not have any definitions of "employee", "employment", and "wages". The Social Security Act provisions relating to unemployment compensation establish grants to states for unemployment compensation administration.

16. See footnote 4, for the reason for citing only Ninth Circuit decisions in this discussion.

17. The Internal Revenue Service in their Internal Revenue Manual have set forth twenty factors or elements to show the control sufficient to meet the common-law test. Any single fact or small group of facts is not conclusive evidence of the presence or absence of control. The factors are whether: (1) the person must comply with instructions of the employer; (2) the person receives training from the employer which indicates that the employer

wants the services performed in a particular method or manner; (3) the person's services are integrated into the business operations generally; (4) the services of the person are rendered personally; (5) the person hires, supervises, and pays assistants; (6) there is a continuing relationship between an individual and the person for whom he performs the services; (7) the employer establishes set hours of work; (8) the person devotes full time to the business of the employer; (9) the person does the work on the employer's premises; (10) the person must perform services in the order or sequence set for the person by the employer; (11) the person is required to submit regular written or oral reports to the employer; (12) the method of payment is by hour, week or month; (13) the person's business or traveling expenses are paid by the employer; (14) the employer furnishes tools and materials; (15) the person makes a significant investment in facilities he uses in performing the services and whether the investment is real, esssential, and adequate; (16) the person can realize a profit or suffer a loss as a result of the services rendered; (17) the person works for more than one firm at a time; (18) the person makes his services available to the general public; (19) the employer has the right to discharge the person; and (20) the person has the right to end his relationship with the employer at anytime without incurring liability.

18. See 42 U.S.C.A. sec. 410 (West Supp. 1986) for the definition of "employment" in the Social Security Act. See 26 U.S.C.A. sec. 3121 (West Supp. 1986) for the definition of "employment" under the Federal Insurance Contributions Act.

19. The Social Security Act provisions relating to old age and survivors' insurance and the Federal Insurance Contributions Act contain specific exclusions from "employment" for service performed: (1) by foreign agricultural workers which meet certain enumerated requirements; (2) in domestic service in a local college club, college fraternity, or sorority by a student who is enrolled and is regularly attending classes at a school, college, or university; (3) family employment; (4) an individual on or in connection with a vessel not an American vessel or on or in connection with an aircraft not an American aircraft which meets certain enumerated requirements; (5) in the employ of an instrumentality of the United States exempt from tax imposed by the Federal Insurance Contributions Act by a provision of law; (6) in the employ of the United States or any instrumentality of the United States if the service is covered by a federal retirement system; (7) in the employ of a State, or any political subdivision thereof, or an instrumentality thereof which is wholly owned thereby except for certain enumerated exceptions; (8) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order with certain enumerated exceptions; (9) service performed by an individual as an employee or employee representative as defined in the Railroad Retirement Tax Law; (10) service performed by a student enrolled and regularly attending classes at and employed by a school, college, or university, or an organization described in the provision in the Internal Revenue Code relating to defining private foundations if the organization is organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university and is operated, supervised, or controlled by or in connection with such school, college, or university with certain enumerated exceptions; (11) service performed in the employ of a foreign government or of an instrumentality wholly owned by a foreign government which meets certain enumerated requirements; (12) service performed as a student nurse or an intern which meets certain enumerated requirements; (13) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news; (14) service performed by an individual in, and at the time of the sale of newspapers or magazines to ultimate consumers, under an arrangement which meets certain enumerated requirements; (15) service performed in the employ of an international organization; (16) service performed by an individual under an arrangement with the owner or tenant of land pursuant to which the individual undertakes to provide agricultural or horticultural commodities; (17) service in the employ of any organization which is performed in any year during any part of which such organization is registered, or there is in effect a final order of the Subversive Activities Control Board requiring such organization to register, under the Internal Security Act as a Communist organization; (18) service performed in Guam by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonimmigrant alien; (19) service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant; and (20) service performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under an arrangement with the owner or operator of such boat pursuant to certain enumerated terms. For the specific language of the provisions in the Federal Insurance Contributions Act and in the Social Security Act creating these exclusions of service from the definition of "employment" contained therein, see 26 U.S.C.A. sec. 3121; 42 U.S.C.A. sec. 410 (West Supp. 1986).

20. The Federal Unemployment Tax Act excludes the following services from the definition of "employment": (1) agricultural labor with certain enumerated exceptions; (2) domestic service in a private home, local college, club, or local chapter of a college fraternity or sorority which meets certain enumerated requirements; (3) service not in the course of the employer's trade or business performed in any calendar quarter by an employee which meets certain enumerated requirements; (4) service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft which meets certain enumerated requirements; (5) service performed in family employment; (6) service performed in the employ of the United States government or of an instrumentality thereof which is either wholly owned thereby or exempt from tax imposed by the Federal Unemployment Tax Act by any provision of law; (7) service performed in the employ of a state, or any political subdivision thereof, or any instrumentality of any state or political subdivision which is wholly owned thereby and any service performed in the employ of any instrumentality of one or more states or political subdivisions to a specified extent; (8) service performed in the employ of a religious, charitable, educational, or other organization described and exempted under the provisions in the Internal Revenue Code relating to exempt organizations; (9) service performed by an individual as an employee or employee representative as defined in the Railroad Unemployment Insurance Act; (10) service performed in any calendar quarter in the employ of any organization exempt from income tax under the provisions in the Internal Revenue Code relating to exempt organizations if the remuneration for such service is less than $50; (11) service performed in the employ of a school, college, or university if such service meets certain enumerated requirements; (12) service performed by an individual under the age of 22 who is enrolled at a nonprofit or public educational institution which meets certain enumerated requirements; (13) service performed by a patient in the employ of a hospital; (14) service performed in the employ of a foreign government or an instrumentality thereof which meets certain enumerated requirements; (15) service performed by a student nurse or an intern which meets certain enumerated requirements; (16) service performed by an individual as an insurance agent or as an insurance solicitor on a commission basis; (17) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news; (18) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement which meets certain enumerated requirements; (19) service performed by an individual in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life with certain enumerated exceptions; (20) service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant; (21) service performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under an arrangement with the owner/operator of such boat pursuant to certain enumerated requirements; and (22) service performed by a full-time student in the employ of an organized camp which meets certain enumerated requirements. For the specific language of the provisions in the Federal Unemployment Tax Act creating these exclusions of service from the definition of "employment" contained therein, see 26 U.S.C.A. sec. 3306 (West Supp. 1986).

The exclusions which are common to both Hawaii and federal laws are for service performed: (1) in certain agricultural work; (2) domestic service in a private home, college club, local college club, or college fraternity or sorority; (3) not in the course of the employer's trade or business which meets certain enumerated requirements; (4) on or in connection with a non-American vessel when employment is outside the United States; (5) by an individual in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life with certain enumerated exceptions; (6) on or in connection with a non-American vessel when employment is outside the United States; (7) in family employment; (8) in the employ of the United States government or of an instrumentality of the United States government; (9) in the employ of a state, or any political subdivision or instrumentality thereof which is wholly owned by one or more states or political subdivisions; (10) in the employ of any instrumentality of one or more states or political subdivisions to the extent that the instrumentality is immune from taxation under provisions of the federal Internal Revenue Code relating to rate of unemployment tax; (11) service performed in the employ of an organization described in the federal Internal Revenue Code provisions relating to exempt organizations which meet certain enumerated requirements; (12) by a student in the employ of a school, college, or university; (13) in the employ of a foreign government; (14) in the employ of an instrumentality wholly owned by a foreign government which meets enumerated requirements; (15) by a student nurse or an intern which meets certain enumerated requirements; (16) by an individual as an insurance agent or solicitor on a commission basis; (17) by an individual under the age of 18 in the delivery or distribution of newspapers or

shopping news; (18) by a duly ordained, commissioned, or licensed minister, priest, or rabbi of a church in the exercise of his ministry or by a member of a religious order in the exercise of nonsecular duties required by the order; and (19) in the employ of a religious, charitable, educational, or other organization exempt from income tax under the Internal Revenue Code provisions relating to exempt organizations.

The exclusion for service in employment with the United States government or of an instrumentality thereof included in the Hawaii employment security law differs from a similar exclusion under the federal unemployment law. The exclusion in the Hawaii law contains an exception from this exclusion "...to the extent that the Congress of the United States permits states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation law...." The exclusion for service in employment of a school, college, or university contained in the Hawaii law also differs from a similar exclusion under the federal law. The federal law extends not only to service by a student but also to service by the student's spouse which meets certain enumerated requirements.

21. National Foundation for Unemployment Compensation and Workers Compensation, Highlights of Federal Compensation Laws (1986), p. 4.

22. Interview with Linda Uesato, Office of the Unemployment Insurance Administrator, Department of Labor and Industrial Relations, State of Hawaii, August 13, 1986.

23. Roberts' Dictionary, p. 142. Section 2 of the Fair Labor Standards Act states the Congressional finding and declaration of policy as follows:

"(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

29 U.S.C.A. sec. 202 (West Supp. 1986).

24. 29 U.S.C.A. sec. 203 (West Supp. 1986).

25. The Court in the Rutherford Food Corporation decision also found that decisions rendered under the National Labor Relations Act were also persuasive precedent for similar determinations under the Fair Labor Standards Act. In support of this position, the Court cited National Labor Relations Board v. Hearst, 322 U.S. 102 (1944). The Hearst Publications case applied the "economic reality" test in determining that the newsboys at issue in that case were "employees" within the meaning of the National Labor Relations Act. However, the United States Supreme Court in National Labor Relations Board v. United Insurance Company of America, 390 U.S. 254 (1968), retreated from the "economic reality" test in favor of the common-law agency test. See pp. 34-35 text.

26. See the reason for citing only Ninth Circuit decisions contained in footnote 4. Other federal circuit courts have similarly applied the "economic reality" test to determine whether a worker is an "employee" or an "independent contractor." See, e.g., Donovan v. New Floridian Hotel, Inc., 676 F.2d 468 (11th Cir. 1982); Robichaux v. Radcliff Material, Inc., 697 F.2d 662 (5th Cir. 1983); Donovan v. Brandel, 736 F.2d 1114 (8th Cir. 1984).

Chapter 5

1. See p. 17 text.

2. The Bureau found that the information provided in the department's table was accurate, except for the information for Utah. According to the 1986 supplement to the Utah employment security law, Utah amended its ABC test provision to delete the second requirement--that the service is either outside the usual course of 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.

3. Although the Federal Unemployment Tax Act contains the common-law control test as the criteria for determining an employment relationship under the Act, the state employment security laws (as previously discussed in Chapter 4) are required to conform to the coverage of the federal

unemployment laws to insure that employers within the state receive the credit for state unemployment tax against the federal unemployment tax assessed. See pp. 48-49 text. This comparison between the state employment security laws exclusions and the Federal Unemployment Tax Act exclusions is relevant to this discussion to show whether the conformity requirement affects the exclusions created by state employment security laws.

Chapter 6

1. As the United States Supreme Court found in United Insurance, 390 U.S. 254 (1968), which arose under the National Labor Relations Act, language excluding an "independent contractor" from the definition of "employment" in the law automatically invokes the common-law agency test. See p. 35 text.

2. In their comments during the external review of this study, the ILWU pointed out that the "relative nature of the work" test is the most applicable standard for determining an employment relationship under the workers' compensation law. While the Bureau agrees that the "relative nature of the work" test is the well-established standard for workers' compensation, the Department of Labor and Industrial Relations has apparently been employing the "economic reality" test in making these determinations in recent informal opinions. Letter from James A. King to Samuel B. K. Chang, dated December 22, 1986, p. 3. Although there are distinctions between these two tests, both of these standards are an attempt to get away from the common-law, master-servant test.

3. See pp. 28-29 text for a discussion of the differences between the workers' compensation law and the employment security, temporary disability insurance, and prepaid health care laws in defining the "employment" relationship. The ILWU also commented regarding workers' compensation that "...the principles laid down in these cases and the analysis thereof are a firm and sufficient basis for an approach to the independent contractor qustion when it arises under Ch. 386." Accordingly, the ILWU concludes "...that no change is needed in the workers' compensation law with respect to the definition of 'employment' therein or the insertion of a specific standard such as the ABC test." Letter from James A. King to Samuel B. K. Chang, dated December 22, 1986, pp. 2-3.

4. As discussed in chapter 4, the Congress of the United States changed the standard for distinguishing between an "employee" and an "independent contractor" from one of "economic reality" to common law agency by inserting language excluding independent contractors from the definition of "employment" in the National Labor Relations Act.

5. The statutory exclusions contained in the prepaid health care law are for service performed by an individual: (1) in the employ of an employer who, by federal law, is responsible for care and cost in connection with such service; (2) in family employment; (3) in the employ of a voluntary employee's beneficiary association; (4) for an employer as an insurance agent or as an insurance solicitor on a commission basis; (5) for an employer as a real estate salesperson or real estate broker; (6) who, pursuant to the Federal Economic Opportunity Act of 1964, is not subject to the provisions of law relating to federal employment, including unemployment compensation; and (7) in the employ of a recipient of social service payments for domestic service, including attendant and day care services authorized by the department of social services and housing under the Social Security Act. Hawaii Rev. Stat., sec. 393-5. The two major groups of workers which would be excluded are real estate salespersons and brokers and insurance agents and brokers.

6. The California employment security law uses the common-law, master-servant test to distinguish between an employee and an independent contractor. As shown in Appendix L, California's Employment Tax Branch has been seeking methods to facilitate determinations being made under this test. In this respect, Hawaii's ABC test has provided more certainty of occupational coverage. As indicated by all of the parties to the independent contractor problem, almost all workers are covered under the ABC test.

   One suggestion made by the business community is that the common-law, master-servant test be adopted and in addition, certain classes of workers receive blanket exclusions by administrative rule on the grounds that these workers are deemed to be independent contractors. The problem with this approach is that it merely creates exclusions from the case-by-case analysis by administrative rules rather than by statute. The effect of the exclusions is the same.

STANDING COMMITTEE REPORT NO. 1165-8

Honolulu, Hawaii

APR 23 1986

Honorable Richard S. H. Wong
President of the Senate
Thirteenth State Legislature
Regular Session of 1986
State of Hawaii

Sir:

RE: S.R. No. 145, S.D. 1

Your Committee on Legislative Management, to which was referred S.R. No. 145, S.D. 1, entitled:

"SENATE RESOLUTION REQUESTING A STUDY TO DEVELOP A UNIFORM DEFINITION OF "INDEPENDENT CONTRACTOR" TO BE APPLICABLE TO TITLE 21, HAWAII REVISED STATUTES",

begs leave to report as follows:

The purpose of this resolution is to request the legislative reference bureau to develop a uniform definition of "independent contractor" that would be applicable throughout title 21, Hawaii Revised Statutes.

At the present there are four chapters under title 21 which relate to employer-employee relationships and benefits, the prepaid health care law, unemployment compensation (employment security) law, workers' compensation, and temporary disability insurance. Each lists slightly different exemptions from coverage, giving rise to anomalous situations, for example, an outside sales representative may be exempt from unemployment coverage because the sales representative is independent but still covered under workers' compensation, prepaid health, and temporary disability insurance.

This study would provide a rational basis for determining who and who is not an independent contractor, which should improve the ability of the department of labor and industrial relations to administer its laws and rules uniformly and equitably across the spectrum of its programs.

Your Committee has amended the resolution to clarify that the study is limited to the portions of title 21, Hawaii Revised Statutes, dealing with employment security, unemployment

compensation, workers' compensation, temporary disability insurance, and prepaid health care, and made a nonsubstantive technical amendment.

Your Committee on Legislative Management concurs with the intent and purpose of S.R. No. 145, S.D. 1, as amended herein, and recommends its adoption in the form attached hereto as S.R. No. 145, S.D. 2.

Respectfully submitted,

Patsy K. Young
PATSY K. YOUNG, Chairman

Gerald T. Hagino
GERALD T. HAGINO, Vice-Chairman

Mary George
MARY GEORGE, Member

(To be made one and seven copies)

THE SENATE
THIRTEENTH LEGISLATURE, 1986
STATE OF HAWAII

S.R. NO. 145 S.D. 2

SENATE RESOLUTION

REQUESTING A STUDY TO DEVELOP A UNIFORM DEFINITION OF "INDEPENDENT CONTRACTOR" TO BE APPLICABLE TO TITLE 21, HAWAII REVISED STATUTES.

WHEREAS, title 21, Hawaii Revised Statutes, includes state laws related to employment security, temporary disability insurance, workers' compensation, prepaid health care, supplying various definitions of "employee", "employer", and employment"; and

WHEREAS, the application of these definitions has been clarified through decisions rendered by the Department of Labor and Industrial Relations based on contested claims; and

WHEREAS, further interpretation of these applications has been sought by petition to the appellate court; and

WHEREAS, the appellate court decisions have indicated that various "employees", such as taxicab drivers and salespersons paid by commission, are actually operating as independent contractors and thus are not subject to the provisions of title 21, Hawaii Revised Statutes, as "employee"; and

WHEREAS, S.B. No. 2169-86 has been considered by the Committee on Labor and Employment, to exclude vacuum cleaner salespersons from workers' compensation coverage; and

WHEREAS, during discussion of this measure the Committee was advised that these salespersons are currently excluded from unemployment insurance law and temporary disability insurance law on the basis that they are independent contractors; and

WHEREAS, further testimony was received by the Committee indicating that taxicab drivers should also receive this same exemption; and

WHEREAS, members of the Committee expressed concern about passing a special exemption for one group when the exemption should possibly be extended to others; now, therefore,

BE IT RESOLVED by the Senate of the Thirteenth Legislature of the State of Hawaii, Regular Session of 1986, that the Legislative Reference Bureau is requested to study and develop a

uniform definition of "independent contractor" to be applicable to laws in title 21, Hawaii Revised Statutes, relating to employment security, temporary disability insurance, workers' compensation, and prepaid health care, and to provide the results of this study to the Legislature twenty days prior to the convening of the Regular Session of 1987; and

BE IT FURTHER RESOLVED that a certified copy of this Resolution be transmitted to the Director of the Legislative Reference Bureau.

Appendix B

SIGNIFICANT REVISIONS OF WORKERS' COMPENSATION LAW

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Services Excluded from Definition of "Employment"	Other Provisions
1915	Act 221, §60(h), SLH 1915, states: "(h) 'Wages' shall include the market value of board, lodging, fuel, and other advantages which can be determined in money which the employee receives from the employer as a part of his remuneration. 'Wages' shall not include any sums which the employer has paid to the employee to cover any special expenses entailed on him by the nature of his employment."	Act 221, §60(b), SLH 1915, states: "(b) 'Workman' is used as synonymous with 'employee,' and means any person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer. It does not include a person whose employment is purely casual or not for the purpose of the employer's trade or business, or whose remuneration from any one employer, excluding pay for over-time, exceeds thirty-six dollars ($36.00) a week. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependents as herein defined, if the context so requires, or, where the employee is a minor or incompetent, to his guardian or next friend."	Act 221, §60(e), SLH 1915, states: "(e) 'Employment,' in the case of private employers, includes employment only in a trade or occupation which is carried on by the employer for the sake of pecuniary gain. Public employment means employment by the Territory, or by a county, or by any political subdivision of the Territory now existing or which may hereafter be created. It does not include the employment of public officials who are elected by popular vote or who receive salaries exceeding eighteen hundred dollars ($1,800.00) a year."	(See services excluded in definition of "employment")	Act 221, §1, SLH 1915, states: "Employments Covered. SECTION 1. This Act shall apply to any and all industrial employment, as hereinafter defined. If a workman receives personal injury by accident arising out of and in the course of such employment, his employer or the insurance carrier shall pay compensation in the amounts and to the person or persons hereinafter specified."
1917			Act 227, §13(e), SLH 1917, states in pertinent part: "(e) 'Industrial employment', in the case of private employers, includes employment only in a trade, occupation or profession which is carried on by the employer for the sake of pecuniary gain. 'Public employment' means employment by the Territory, or by a county, or by any political subdivision of the Territory now existing or which may hereafter be created. It does not include the employment of public officials who are elected by popular vote or who receive salaries exceeding eighteen hundred dollars ($1800.00) a year."	(See services excluded in definition of "employment")	
1939		Act 206, §5, SLH 1939, states in pertinent part: "2. 'Workman' is used as synonymous with 'employee', and means any person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer. It does not include a person whose employment is purely casual and not for the purpose of the employer's trade or business, or whose remuneration from any one employer, excluding pay for overtime, exceeds fifty dollars a week; provided, that where an employee is loaned or hired	Act 206, §5, SLH 1939, states in pertinent part: "5. 'Industrial employment' in the case of private employers, includes employment only in a trade, occupation or profession which is carried on by the employer for the sake of pecuniary gain. 'Public employment' means employment by the territory, or by a county or by any political subdivision of the territory. It does not include the employment of public officials who are elected by popular vote or who receive salaries exceeding twenty-four hundred dollars a year."	(See services excluded in definition of "employment")	

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Services Excluded from Definition of "Employment"	Other Provisions
		(Act 206, §5, SLH 1939 cont'd) out to another person (herein referred to as the 'borrower'), for the purpose of furthering the borrower's trade or business, the employee shall beginning with the time when the control of the employee is transferred to the borrower and continuing until he shall be again returned to the control of the original employer, be deemed to be the borrower's employee regardless of whether he is paid directly by the borrower or not."			
1945			Act 10, §1, SLH 1945, amended RLH 1945, chapter 77, §4403, to read as follows: "Sec. 4403. Employments covered. This chapter shall apply to any and all industrial employment, as defined in this chapter. If a workman receives personal injury by accident arising out of and in the course of the employment or by disease proximately caused by the employment, or resulting from the nature of the employment, his employer or the insurance carrier shall pay compensation in the amounts and to the person or persons hereinafter specified. Election. Any employer whose trade, occupation or profession does not come within the meaning of 'industrial employment' as defined in section 4401 may elect to provide and pay compensation under this chapter, and any employer having employees whose remuneration, excluding pay for overtime, exceeds one hundred dollars a week may elect to provide and pay to such employees compensation hereunder. During the effective period of such election hereinafter prescribed such employer and the employees covered thereby shall be subject in all respects to the provisions of this chapter. Election by any employer to provide and pay compensation under this chapter shall be made by the employer securing compensation to his employees in the manner provided in section 4454 and giving the notice prescribed by section 4455. Every employer who elects under the terms of this section to provide and pay compensation shall be bound thereby until January first of the next succeeding year and for terms of each year thereafter; provided, any such employer may elect not		

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Services Excluded from Definition of "Employment"	Other Provisions
			Act 10, §1, SLH 1945 (cont'd) to provide and pay such compensation for personal injuries occurring after the expiration of any such calendar year by filing notice of such election with the director at least sixty days prior to the expiration of any such calendar year and at the same time posting such notice conspicuously in each place of business where workers perform their duties."		
1949		Act 240, §2, SLH 1949, amended RLH 1945, chapter 77, §4401, to read as follows: "'Workman' is used as synonymous with 'employee', and means any person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer. It does not include a person whose employment is purely casual and not for the purpose of the employer's trade or business; provided, that where an employee is loaned or hired out to another person (herein referred to as the 'borrower'), for the purpose of furthering the borrower's trade or business, the employee shall, beginning with the time when the control of the employee is transferred to the borrower and continuing until he shall be again returned to the control of the original employer, be deemed to be the borrower's employee regardless of whether he is paid directly by the borrower or not."	Act 240, §1, SLH 1949, amended RLH 1945, chapter 77, §4401, to read as follows: "'Industrial employment' in the case of private employers, includes employment only in a trade, occupation or profession which is carried on by the employer for the sake of pecuniary gain. 'Public employment' means employment by the Territory, or by a county, or any political subdivision of the Territory. It does not include the employment of public officials who are elected by popular vote."		
1959		Act 240, §1(a), SLH 1959, states in pertinent part: "SECTION 1. Chapter 97 of the Revised Laws of Hawaii 1955, as amended, is hereby further amended in the following respects: (a) By amending the paragraphs defining 'Workman' and 'Industrial employment' in section 97-1 to read as follows: ''Workman' is used as synonymous with 'employee' and means any person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer. It does not include a person whose employment is purely casual and not for the purpose of the employer's trade or business; provided, that where an employee is loaned or hired out to another person (herein referred to as the 'borrower'), for the purpose of furthering the			Act 240, §1(a), SLH 1959, states in pertinent part: "SECTION 1. Chapter 97 of the Revised Laws of Hawaii 1955, as amended, is hereby further amended in the following respects: * * * (f) By adding a new section after section 97-57 entitled and numbered as follows: 'Sec. 97-57A. Presumptions. In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary: (1) That the claim comes within the provisions of this chapter; (2) That sufficient notice of such injury has been given; (3) That the injury was not caused by the intoxication of the injured employee; and (4) That the injury was not caused by the wilful

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Services Excluded from Definition of "Employment"	Other Provisions
		(Act 240, §1(a), SLH 1959 cont'd)			(Act 240, §1(a), SLH 1959 cont'd)
		borrower's trade or business the employee shall, beginning with the time when the control of the employee is transferred to the borrower and continuing until he shall be again returned to the control of the original employer, be deemed to be the borrower's employee regardless of whether he is paid directly by the borrower or not. 'Employee' as used in this chapter means every person including officials in the service of the Territory, and all counties, and all other political subdivisions within the Territory, whether elected or under any appointment or contract of hire express or implied. 'Industrial employment' in the case of private employers, includes employment only in trade, occupation or profession which is carried on by the employer for the sake of pecuniary gain. 'Public employment' means employment by the Territory, or by a county, or by any political subdivision of the Territory.'"			intention of the injured employee to injure or kill himself or another.'"
1963	Act 116, §1, SLH 1963, states in pertinent part: "'Wages' means all remuneration for services constituting employment. It includes the market value of board, lodging, fuel and other advantages having a cash value which the employer has paid as a part of the employee's remuneration and gratuities received in the course of employment from others than the employer to the extent that they are customary and expected in that type of employment or accounted for by the employee to the employer."	Act 116, §1, SLH 1963, states in pertinent part: "'Employee' means any individual in the employment of another person except where such employment is solely for personal, family or household purposes. Where an employee is loaned or hired out to another person for the purpose of furthering such other person's trade, business, occupation, or profession, the employee shall, beginning with the time when the control of the employee is transferred to such other person and continuing until such control is returned to the original employer, be deemed to be the employee of such other person regardless of whether he is paid directly by such other person or by the original employer. The employee shall be deemed to remain in the sole employment of the original employer if such other person fails to secure compensation to the employee as provided in section 97-120. Whenever an independent contractor undertakes to perform work for another person pursuant to contract, express or implied, oral or written, such independent contractor shall be deemed the employer of all employees performing work in the execution of the contract, including employees of his subcon-	Act 116, §1, SLH 1963, states in pertinent part: "'Employment' means any service performed by an individual for another person under any contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully entered into. It includes service of public officials, whether elected or under any appointment or contract of hire express or implied."	Act 116, §1, SLH 1963, states in pertinent part: "'Employment' does not include the following service-- (a) Service for a religious, charitable, educational or nonprofit organization if performed in a voluntary or unpaid capacity; (b) Service for a religious, charitable, educational or nonprofit organization if performed by a recipient of aid therefrom and the service is incidental to or in return for the aid received; (c) Service for a school, college, university, college club, fraternity or sorority if performed by a student who is enrolled and regularly attending classes and in return for board, lodging or tuition furnished, in whole or in part; (d) Service performed by a duly ordained, commissioned or licensed minister, priest, or rabbi of a church in the exercise of his ministry or by a member of a religious order in the exercise of nonsecular duties required by such order. As used in this paragraph 'religious, charitable, educational or nonprofit organization' means a corporation, unincorporated association, community chest, fund or foundation organized and operated exclusively for religious, charitable or	

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Services Excluded from Definition of "Employment"	Other Provisions
		(Act 116, §1, SLH 1963 cont'd)		(Act 116, §1, SLH 1963 cont'd)	
		tractors and their sub-contractors. However, the liability of the direct employer of an employee who suffers a work injury shall be primary and that of the others secondary in their order. An employer secondarily liable who satisfies a liability under this chapter shall be entitled to indemnity against loss from the employer primarily liable."		educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual."	
1975				Act 68, §1, SLH 1975, states in pertinent part: "'Employment' does not include the following service: (1) Service for a religious, charitable, educational, or non-profit organization if performed in a voluntary or unpaid capacity; (2) Service for a religious, charitable, educational, or non-profit organization if performed by a recipient of aid therefrom and the service is incidental to or in return for the aid received; (3) Service for a school, college, university, college club, fraternity, or sorority if performed by a student who is enrolled and regularly attending classes and in return for board, lodging, or tuition furnished, in whole or in part; (4) Service performed by a duly ordained, commissioned, or licensed minister, priest, or rabbi of a church in the exercise of his ministry or by a member of a religious order in the exercise of nonsecular duties required by the order. (5) Service performed by an individual for another person solely for personal, family, or household purposes if the cash remuneration received is less than $225 during the current calendar quarter and during each completed calendar quarter of the preceding twelve month period. As used in this paragraph 'religious, charitable, educational, or nonprofit organization' means a corporation, unincorpor-	

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Services Excluded from Definition of "Employment"	Other Provisions
				(Act 68, §1, SLH 1975 cont'd) ated association, community chest, fund, or foundation organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual."	
1978				Act 110, §4, SLH 1978, states: "SECTION 4. Section 386-1, Hawaii Revised Statutes, is amended by amending the definition of 'employment' to read as follows: 'Employment' means any service performed by an individual for another person under any contract of hire or apprenticeship, express or implied, oral or written, lawfully or unlawfully entered into. It includes service of public officials, whether elected or under any appointment or contract of hire express or implied. 'Employment' does not include the following service: (1) Service for a religious, charitable, educational, or nonprofit organization if performed in a voluntary or unpaid capacity; (2) Service of a religious, charitable, educational, or nonprofit organization if performed by a recipient of aid therefrom and the service is incidental to or in return for the aid received; (3) Service for a school, college, university, college club, fraternity, or sorority if performed by a student who is enrolled and regularly attending classes and in return for board, lodging, or tuition furnished, in whole or in part; (4) Service performed by a duly ordained, commissioned, or licensed minister, priest, or rabbi of a church in the exercise of his ministry or by a member of a religious order in the exercise of nonsecular duties required by the order. (5) Service performed by	

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Services Excluded from Definition of "Employment"	Other Provisions
				(Act 110, §4, SLH 1978 cont'd) an individual for another person solely for personal, family household purposes if the cash remuneration received is less than $225 during the current calendar quarter and during each completed calendar quarter for the preceding twelve month period. (6) Domestic, which includes attendant care, and day care services authorized by the department of social services and housing under the Social Security Act, as amended, performed by an individual in the employ of a recipient of social service payments. As used in this paragraph 'religious, charitable, educational, or nonprofit organization' means a corporation, unincorporated association, community chest, fund, or foundation organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual.'"	
1979				Act 40, §1, SLH 1979, states: "SECTION 1. Section 386-1, Hawaii Revised Statutes, is amended by amending the definition of 'employment' to read: 'Employment' means any service performed by an individual for another person under any contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully entered into. It includes service of public officials, whether elected or under any appointment or contract of hire express or implied. 'Employment' does not include the following service: (1) Service for a religious, charitable, educational, or nonprofit organization if performed in a voluntary or unpaid capacity; (2) Service for a religious, charitable, educational, or nonprofit organization if performed by a recipient of aid therefrom and	

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Services Excluded from Definition of "Employment"	Other Provisions
				(Act 40, §1, SLH 1979 cont'd)	
				the service is incidental to or in return for the aid received; (3) Service for a school, college, university, college club, fraternity, or sorority if performed by a student who is enrolled and regularly attending classes and in return for board, lodging, or tuition furnished, in whole or in part; (4) Service performed by a duly ordained, commissioned, or licensed minister, priest, or rabbi of a church in the exercise of his ministry or by a member of a religious order in the exercise of nonsecular duties required by the order. (5) Service performed by an individual for another person solely for personal, family, or household purposes if the cash remuneration received is less than $225 during the current calendar quarter and during each completed calendar quarter of the preceding twelve month period. (6) Domestic, which includes attendant care, and day care services authorized by the department of social services and housing under the Social Security Act, as amended, performed by an individual in the employ of a recipient of social service payments. (7) Service performed without wages for a corporation without employees by a corporate officer in which he is at least a twenty-five per cent stockholder. As used in this paragraph 'religious, charitable, educational, or nonprofit organization' means a corporation, unincorporated association, community chest, fund, or foundation organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual.'"	

Appendix C

SIGNIFICANT REVISIONS TO EMPLOYMENT SECURITY LAW

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Services Excluded from Definition of "Employment"	Other Provisions
1937	Act 243, §8, SLH 1937, states in pertinent part: "Section 8. 'Wages' means all remuneration including commissions and bonuses for employment, including the cash value of all remuneration payable in any medium other than cash."	Act 243, §6, SLH 1937, states in pertinent part: "Section 6. 'Employee' means only a person who is or has been employed by an employer subject to this Act in an employment also subject to this Act."	Act 243, §5, SLH 1937, states in pertinent part: "Section 5. 'Employment' means services, including services in interstate or foreign commerce, performed within the Territory for remuneration or under any contract of hire, expressed or implied, oral or written,..."	Act 243, §5, SLH 1937, states in pertinent part: "...except that for the purposes of this Act the term 'employment' shall not include: (a) Agricultural labor; (b) Domestic service in a private home; (c) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States; (d) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother; (e) Service performed in the employ of the United States government or of an instrumentality of the United States; (f) Service performed in the employ of the Territory, a political subdivision thereof, or an instrumentality of one or more states or territories or political subdivisions; (g) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual."	
1939		Definition of "employee" omitted in Act 219, SLH 1939.	Act 219, §2, SLH 1939, states in pertinent part: "(k) (1) 'Employment', subject to the other provisions of this subsection, means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied. * * * (5) Services performed by an individual for wages or under any contract of hire, shall be deemed to be employment subject to this Act unless and until it is shown to the satisfaction of the board that, (A) such individual has been and will continue to	Act 219, §2, SLH 1939,[2] added the following exclusions: "(6) The term 'employment' shall not include * * * (H) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an Act of Congress: Provided, that the board is hereby authorized and directed to enter into agreements with the proper agencies, under such Act of Congress, which agreements shall become effective ten days after publication thereof in the manner provided in section 10(d) of this Act for general rules, to provide reciprocal treatment to individuals who have,	

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Services Excluded from Definition of "Employment"	Other Provisions
			(Act 219, §2, SLH 1939 cont'd)	(Act 219, §2, SLH 1939 cont'd)	
			be free from control or direction over the performance of such services, both under his contract of service and in fact; and (B) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) such individual is customarily engaged in an independently established trade, occupation, profession, or business."	after acquiring potential rights to benefits under this Act, acquired rights to unemployment compensation under such Act of Congress, or who have, after acquiring potential rights to unemployment compensation under such Act of Congress, acquired rights to benefits under this Act."	
1941	Act 304, §12, SLH 1941, amended the definition of "wages" to read: "(p) (1) 'Wages', subject to the other provisions of this subsection, means all remuneration for services from whatever source, including commissions and bonuses 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 board."[1]		Act 304, §8,[3] SLH 1941, states in pertinent part: "(5) Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this Act irrespective of whether the common-law relationship of master and servant exists unless and until it is shown to the satisfaction of the board that-- (A) such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of hire and in fact; and (B) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) such 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."	Act 304, §8,[2] SLH 1941, states in pertinent part: "(6) The term 'employment' shall not include the following service: * * * (C) casual labor not in the course of the employing unit's trade or business; * * * (J) (i) service performed in any calendar quarter in the employ of any organization exempt from income tax under section 101 of the Federal Internal Revenue Code, if (I) the remuneration for such service does not exceed $45, or (II) such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office, or is ritualistic service in connection with any such society, order, or association, or (III) such service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university; (ii) service performed in the employ of an agricultural or horticultural organization exempt from income tax under section 101 (1) of the Federal Internal Revenue Code; (iii) service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents, if (I) no part of its net earnings inures (other than through such payments) to the benefit of any	

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Services Excluded from Definition of "Employment"	Other Provisions
				(Act 304, §8, SLH 1941 cont'd)	
				private shareholder or individual, and (II) eighty-five per centum or more of the income consists of amounts collected from members for the sole purpose of making such payments and meeting expenses; (iv) service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or their designated beneficiaries, if (I) admission to membership in such association is limited to individuals who are officers or employees of the United States government, and (II) no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual; (v) service performed in any calendar quarter in the employ of a school, college, or university, not exempt from income tax under section 101 of the Federal Internal Revenue Code, if such service is performed by a student who is enrolled and is regularly attending classes at such school, college, or university, and the remuneration for such service does not exceed $45 (exclusive of room, board, and tuition); (K) service performed in the employ of a foreign government (including service as a consular or other officer or employee or a non-diplomatic representative); (L) service performed in the employ of an instrumentality wholly owned by a foreign government-- (i) if the service is of a character similar to that performed in foreign countries by employees of the United States government or of an instrumentality thereof; and (ii) if the United States Secretary of State has certified or shall certify to the United States Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States government and of instrumentalities thereof; (M) service performed as	

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Services Excluded from Definition of "Employment"	Other Provisions
				(Act 304, §8, SLH 1941 cont'd)	
				a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law; and service performed as an interne in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to state law; (N) service performed by an individual for an employing unit as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such employing unit is performed for remuneration solely by way of commission; (O) service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution; or (P) service covered by an arrangement between the board and the agency charged with the administration of any other state or federal unemployment compensation law pursuant to which all services performed by an individual for an employing unit during the period covered by such employing unit's duly approved election, are deemed to be performed entirely within such agency's state; (Q) any service which, pursuant to an Act of Congress enacted subsequent to April 1, 1941, is not included as 'employment' for the purposes of the tax levied by the Federal Unemployment Tax Act, so long as and whenever such service is not so included. Provided that none of the exclusions (A) to (P), inclusive, set forth in this paragraph (6), shall apply to any service or labor which is included as 'employment' for the purposes of the tax levied by the Federal Unemployment Tax Act, so long as and whenever such service or labor is so included."	
1945				Act 19, §1, SLH 1945, deleted the exclusion for:	

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Services Excluded from Definition of "Employment"	Other Provisions
				(Act 19, §1, SLH 1945 cont'd) "(I) service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;" and amended the following exclusionary provision to read: "(J) (i) service performed in any calendar quarter in the employ of any organization exempt from income tax under section 101 of the Federal Internal Revenue Code, if (I) the remuneration for such service does not exceed forty-five dollars, or (II) such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office, or is ritualistic service in connection with any such society, order, or association, or (III) such service is performed by a student who is enrolled and is regularly attending classes at school, college, or university, or (IV) such service is performed by members of religious orders or ministers of the gospel;" Act 75, §1,[2] SLH 1947
1947					
1953	Act 23, §1, SLH 1953, amended the definition of "wages" to read: "Sec. 4211. Definition of wages. As used in this chapter, unless the context clearly requires otherwise, 'wages', subject to the other provisions of this subtitle, means all remuneration for services from whatever source, including commissions and bonuses and the cash value of all remuneration in any medium other than cash but not including tips or gratuities paid directly to an individual by a customer of his employer and not				

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Services Excluded from Definition of "Employment"	Other Provisions
	(Act 23, §1, SLH 1953 cont'd) accounted for by the individual to his employer. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the board."				
1959				Act 222, §1(2),[2] SLH 1959 Act 232, §4,[2] SLH 1959	
1961				Act 141, §1, SLH 1961, deleted the following exclusions: "(i) (1) service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501 of the federal Internal Revenue Code, if...(ii) such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order or association, and is performed away from the home office, or is ritualistic service in connection with any such society, order or association, or... (2) Service performed in the employ of an agricultural or horticultural organization exempt from income tax under section 501 of the federal Internal Revenue Code;" Act 81, §1,[2] SLH 1961	
1965				Act 61, §1, SLH 1965, added an exclusion for: "(p) Service performed by an individual who, pursuant to the Federal Economic Opportunity Act of 1964, is not subject to the provisions of the Federal laws relating to unemployment compensation."	
1967				Act 51, §1,[2] SLH 1967	
1969				Act 73, §2,[2] SLH 1969	
1971				Act 187, §2,[2] SLH 1971 Act 213, §2, SLH 1971, added the following exclusion: "(17) Service performed by an individual for an employing unit as a real estate salesman, if all such service performed by such individual for such employment unit is performed for remuneration solely by way of commission."	

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Services Excluded from Definition of "Employment"	Other Provisions
1973				Act 120, §1,[2] SLH 1973	
1974				Act 156, §1,[2] SLH 1974	
1977				Act 148, §2, SLH 1977, amended the following exclusion to read: "(1) Agricultural labor as defined in section 383-9 if it is performed by an individual who is employed by an employing unit: (A) Which, during each calendar quarter in both the current and the preceding calendar years, paid less than $20,000 in cash remuneration to individuals employed in agricultural labor; and (B) Which had, in each of the current and the preceding calendar years: (i) No more than nineteen calendar weeks, whether consecutive or not, in which agricultural labor was performed by its employees; or (ii) No more than nine individuals in its employ performing agricultural labor in any one calendar week, whether or not the same individuals performed the labor in each week;"	
1982				Act 192, §1, SLH 1982, added the following exclusion: "(18) Service performed by a registered sales representative for a registered travel agency, when such service performed by the individual for the travel agent is performed for remuneration by way of commission." Act 194, §4, SLH 1982, added the following exclusion: "(18) Service performed by a vacuum cleaner salesman for an employing unit, if all such services	

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Services Excluded from Definition of "Employment"	Other Provisions
				(Act 194, §4, SLH 1982 cont'd)	
				performed by the individual for such employing unit are performed for remuneration solely by way of commission."	

1. Only the general definition of "wages" and the significant amendments thereto are on this chart. The provisions regarding specific exclusions from the term "wages" and the amendments thereto are omitted because such exclusions have minimal significance to the occupational coverage issue.

2. Only the exclusions added and major language changes of exclusions which were previously in the services excluded provision are shown on this chart because of the extensive number of exclusions. The amendment made by this Act is shown because it did not alter the general categories of workers excluded.

3. Only the general definition of "employment" and the amendments thereto appears on this chart. The provisions and amendments thereto regarding specific inclusions in the term "employment" are omitted because such inclusions have minimal significance to the occupational coverage issue.

Appendix D

SIGNIFICANT STATUTORY AND REGULATORY AMENDMENTS TO THE TEMPORARY DISABILITY LAW

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Exclusions from Definition of "Employment"	Administrative Rules
1969	Act 148, §1, SLH 1969, states in pertinent part: "(8) 'Wages' mean all remuneration for services from whatever source, including commissions and bonuses, and the cash value of all remuneration in any medium other than cash but not including tips or gratuities paid directly to any individual by a customer of his employer and not accounted for by the individual to his employer. The director may issue regulations for the reasonable determination of the cash value of remuneration in any medium other than cash. Wages do not include the amount of any payment specified in section 383-11."		Act 148, §1, SLH 1969, states in pertinent part: "(7) 'Employment' and 'employed' means service, including service in interstate commerce, performed for wages under any contract of hire, written or oral, express or implied, with an employer, except as otherwise provided in sections -4 and -5."	Act 148, §1, SLH 1969, states in pertinent part: "Sec. -5. Excluded services. 'Employment' as defined in section -3 does not include the following service: (1) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority, performed in any calendar quarter by an individual if the cash remuneration paid by the employer for such service is less than $225; (2) Service not in the course of the employer's trade or business performed in any calendar quarter by an individual, unless the cash remuneration paid for the service is $50 or more and the service is performed by an individual who is regularly employed by the employer to perform the service. An individual shall be deemed to be regularly employed to perform service not in the course of the employer's trade or business during a calendar quarter only if (A) on each of some twenty-four days during the quarter the individual performs the service for some portion of the day, or (B) the individual was regularly employed (as determined under clause (A)) by the employer in the performance of the service during the preceding calendar quarter; (3) Service performed on or in connection with a vessel not an American vessel, if the individual performing the service is employed on and in connection with the vessel when outside the United States; (4) Service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including service performed as an ordinary incident thereto, except (A) the service performed in connection with a vessel of more than ten net tons (determined in the manner provided for determining the register tonnage	

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Exclusions from Definition of "Employment"	Administrative Rules
				(Act 148, §1, SLH 1969 cont'd)	
				of merchant vessels under the laws of the United States), and (B) the service performed in connection with a vessel of ten net tons or less (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States) by an individual who is employed by an employer who, for some portion in each of twenty different calendar weeks in either the current or preceding calendar year, had in his employ one or more persons performing the service, whether or not the weeks were consecutive and whether or not the same individuals performed the service in each week, and (C) service performed in connection with the catching or taking of salmon or halibut for commercial purposes; (5) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother; (6) Service performed by an individual in the employ of the United States government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by this chapter. (7) Service performed in the employ of any other state, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more such states or political subdivisions; and any service performed in the employ of any instrumentality of one or more other states or their political subdivisions to the extent that the instrumentality is, with respect to such service, exempt from the tax imposed by section 3301 of the Internal Revenue Code of 1954; (8) Service with respect to which temporary disability compensation is payable for sickness under a temporary disability insurance system established by an act of Congress; (9) Service performed in any calendar quarter in the employ of any organization exempt from income	

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Exclusions from Definition of "Employment"	Administrative Rules
				(Act 148, §1, SLH 1969 cont'd)	
				tax under section 501 of the Internal Revenue Code of 1954, if (A) the remuneration for such service is less than $50, or (B) the service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university, or (C) the service is performed by a duly ordained, commissioned, or licensed minister or licensed minister [sic] of a church in the exercise of his ministry or by a member of a religious order in the exercise of nonsecular duties required by the order. (10) Service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of the association or their dependents, if (A) no part of its net earnings inures (other than through such payments) to the benefit of any private shareholder or individual, and (B) eighty-five percent or more of its income consists of amounts collected from members and amounts contributed by the employer of the members for the sole purpose of making such payments and meeting expenses; (11) Service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of the association or their dependents or their designated beneficiaries, if (A) admission to membership in the association is limited to individuals who are officers or employees of the United States government, and (B) no part of the net earnings of the association inures (other than through such payments) to the benefit of any private shareholder or individual; (12) Service performed in the employ of a school, college, or university, not exempt from income tax under section 501 of the Internal Revenue Code of 1954, if the service is performed by a student who is enrolled and is regularly attending classes at the school, college, or university; (13) Service performed in the employ of an instrumentality wholly owned by a foreign government, if: (A) the service is of a character	

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Exclusions from Definition of "Employment"	Administrative Rules
				(Act 148, §1, SLH 1969 cont'd)	
				similar to that performed in foreign countries by employees of the United States government or of an instrumentality thereof; and (B) the United States Secretary of State has certified or certifies to the United States Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States government and of instrumentalities thereof; (14) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law; and service performed as an intern in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to state law; (15) Service performed by an individual for an employer as an insurance agent or as an insurance solicitor, if all such service performed by the individual for the employer is performed for remuneration solely by way of commission; (16) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution; (17) Service covered by an arrangement between the department and the agency charged with the administration of any other state or federal unemployment compensation law pursuant to which all services performed by an individual for an employer during the period covered by the employer's duly approved election, are deemed to be performed entirely within the agency's state; (18) Service performed by an individual who, pursuant to the Federal Economic Opportunity Act of 1964, is not subject to the federal laws relating to unemployment compensation."	

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Exclusions from Definition of "Employment"	Administrative Rules
1978				Act 110, §5, SLH 1978, added an exclusion for: "(19) Domestic, which includes attendant care, and day care services authorized by the department of social services and housing under the Social Security Act, as amended, performed by an individual in the employ of a recipient of social service payments."	
1980	Act 32, §1, SLH 1980, amended the definition of "wages" to read: "(8) 'Wages' means all remuneration for services from whatever source, including commissions, bonuses, tips or gratuities received in the course of employment from others than the employer to the extent that they are customary and expected in that type of employment and reported to the employer for payroll tax deduction purposes, and the cash value of all remuneration in any medium other than cash. The director may issue regulations for the reasonable determination of the cash value of remuneration in any medium other than cash. Wages do not include the amount of any payment specified in section 383-11."				
1981					§12-11-1, Temporary Disability Insurance Rules, states in pertinent part: "...'Employee' means any individual who performs services in employment for an employer...." 'Employment' as defined in section 392-3(7), HRS, includes services performed by an individual for wages or under any contract of hire irrespective of whether the common-law relationship of master and servant exists unless and until it is shown to the satisfaction of the director that: (1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the individual's contract of hire and in fact; and (2) The service is either outside the

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Exclusions from Definition of "Employment"	Administrative Rules
					(§12-11-1, TDI Rules cont'd) 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...."
1982				Act 194, §3, SLH 1982, added an exclusion for: "(20) Service performed by a vacuum cleaner salesman for an employing unit, if all such services performed by the individual for such employing unit are performed for remuneration solely by way of commission."	

Appendix E

SIGNIFICANT STATUTORY AND REGULATORY PROVISIONS OF THE PREPAID HEALTH CARE LAW

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Exclusions from Definition of "Employment"	Administrative Rules
1974	Act 210, §3, SLH 1974, states in pertinent part: "(9) 'Wages' means all cash remuneration for services from whatever source, including commissions, bonuses, and tips and gratuities paid directly to any individual by a customer of his employer. If the employee does not account to his employer for the tips and gratuities received and is engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips, the combined amount received by him from his employer and from tips shall be deemed to be at least equal to the wage required by chapter 387 or a greater sum as determined by regulation of the director."		Act 210, §3, SLH 1974, states in pertinent part: "(4) 'Employment' means service, including service in interstate commerce, performed for wages under any contract of hire, written or oral, express or implied, with an employer, except as otherwise provided in sections -4 and -5."	Act 210, §5, SLH 1974, states in pertinent part: "Sec. -5 Excluded services. 'Employment' as defined in section -3 does not include the following services: (1) Service performed by an individual in the employ of an employer who, by the laws of the United States, is responsible for care and cost in connection with such service. (2) Service performed by an individual in the employ of his spouse, son, or daughter, and service performed by an individual under the age of twenty-one in the employ of his father or mother. (3) Service performed in the employ of a voluntary employee's beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of the association or their dependents or their designated beneficiaries, if (A) admission to membership in the association is limited to individuals who are officers or employees of the United States government, and (B) no part of the net earnings of the association inures (other than through such payments) to the benefits of any private shareholder or individual. (4) Service performed by an individual for an employer as an insurance agent or as an insurance solicitor, if all such service performed by the individual for the employer is performed for remuneration solely by way of commission. (5) Service performed by an individual for an employer as a real estate salesman or as a real estate broker, if all such service	

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Exclusions from Definition of "Employment"	Administrative Rules
				(Act 210, §5, SLH 1974 cont'd) performed by the individual for the employer is performed for remuneration solely by way of commission. (6) Service performed by an individual who, pursuant to the Federal Economic Opportunity Act of 1964, is not subject to the provisions of law relating to federal employment, including unemployment compensation."	
1976	Act 78, §1, SLH 1976, amended the definition of "wages" to read: "(9) 'Wages' means all remuneration for services from whatever source, including commissions, bonuses, and tips and gratuities paid directly to any individual by a customer of his employer, and the cash value of all remuneration in any medium other than cash. The director may issue regulations for the reasonable determination of the cash value of remuneration in any medium other than cash. If the employee does not account to his employer for the tips and gratuities received and is engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips, the combined amount received by him from his employer and tips shall be deemed to be at least equal to the wage required by chapter 387 or a greater sum as determined by regulation of the director. 'Wages' does not include the amount of any payment specified in section 383-11 or 392-22 or chapter 386."				
1978				Act 110, §6, SLH 1978, added an exclusion for: (7) Domestic, which includes attendant care, and day care services authorized by the department of social services and housing under the Social Security Act, as amended, performed by an individual in the employ of a recipient of social service payments."	
1981					§12-12-1, Prepaid Health Care Rules, states in pertinent part:

Year	Definition of "Wages"	Definition of "Employee"	Definition of "Employment"	Exclusions from Definition of "Employment"	Administrative Rules
					(§12-12-1, Prepaid Health Care Rules cont'd) "'Employment' shall be as defined in section 393-3, HRS, and shall include the period an employee is receiving benefits under chapters 386 or 392, HRS, for a period of not less than that prescribed in section 393-15, HRS. It shall also include services performed by an individual for wages or under any contract of hire irrespective of whether the common-law relationship of master and servant exists unless and until it is shown to the satisfaction of the director that: (1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the 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.... 'Wages' shall be as defined in section 393-3, HRS."

Appendix F

COMPARISON OF COVERAGE RELATED PROVISIONS AMONG THE FOUR LABOR LAWS

Provision	Workers' Compensation Law	Employment Security Law	Temporary Disability Insurance Law	Prepaid Health Care Law
Definition of "Wages"[1]	§386-1, HRS, states: "'Wages' means all remuneration for services constituting employment. It includes the market value of board, lodging, fuel, and other advantages having a cash value which the employer has paid as a part of the employee's remuneration and gratuities received in the course of employment from others than the employer to the extent that they are customary and expected in that type of employment or accounted for by the employee to the employer."	§383-10, HRS, states: "Definition of wages. As used in this chapter, unless the context clearly requires otherwise, 'wages', subject to section 383-11, means all remuneration for services from whatever source, including commissions and bonuses and the cash value of all remuneration in any medium other than cash, but not including tips or gratuities paid directly to an individual by a customer of the individual's employer and not accounted for by the individual to the individual's employer. 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."	§392-3, HRS, states in pertinent part: "'Wages' means all remuneration for services from whatever source, including commissions, bonuses, tips or gratuities received in the course of employment from others than the employer to the extent that they are customary and expected in that type of employment and reported to the employer for payroll tax deduction purposes and the cash value of all remuneration in any medium other than cash."	§393-3, HRS, states in pertinent part: "(9) 'Wages' means all remuneration for services from whatever source, including commissions, bonuses, and tips and gratuities paid directly to any individual by a customer of the individual's employer, and the cash value of all remuneration in any medium other than cash. The director may issue regulations for the reasonable determination of the cash value of remuneration in any medium other than cash. If the employee does not account to the employee's employer for the tips and gratuities received and is engaged in an occupation in which the employee customarily and regularly receives more than $20 a month in tips, the combined amount received by the employee from the employee's employer and from tips shall be deemed to be at least equal to the wage required by chapter 387 or a greater sum as determined by regulation of the director."
	§12-10-1 refers to §386-1, HRS, for the definition of "wages".	None	None	§12-12-1, Prepaid Health Care Rules, refers to §393-3, HRS, for the definition of "employment".
Definition of "Employee"	§386-1, HRS, states in pertinent part: "'Employee' means any individual in the employment of another person. Where an employee is loaned or hired out to another person for the purpose of furthering the other person's trade, business, occupation, or profession, the employee shall, beginning with the time when the control of the employee is transferred to the other person and continuing until the control is returned to the original employer, be deemed to be the employee	None	No statutory provision.	None

Provision	Workers' Compensation Law	Employment Security Law	Temporary Disability Insurance Law	Prepaid Health Care Law
	of the other person regardless of whether the employee is paid directly by the other person or by the original employer. The employee shall be deemed to remain in the sole employment of the original employer if the other person fails to secure compensation to the employee as provided in section 386-121. Whenever an independent contractor undertakes to perform work for another person pursuant to contract, express or implied, oral or written, the independent contractor shall be deemed the employer of all employees performing work in the execution of the contract, including employees of the independent contractor's subcontractors and their subcontractors. However, the liabilities of the direct employer of an employee who suffers a work injury shall be primary and that of the others secondary in their order. An employer secondarily liable who satisfies a liability under this chapter shall be entitled to indemnity against loss from the employer primarily liable."			
	§12-10-1, Workers' Compensation Law Rules, refers to §386-1, HRS, for the definition of "employee."		§12-12-1, Temporary Disability Insurance Rules, states in pertinent part: "'Employee' means any individual who performs services in employment for an employer."	
Definition of "Employment"	§386-1, HRS, states in pertinent part: "'Employment' means any service performed by an individual for another person under any contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully entered into. It includes service of public officials, whether elected or under any appointment or contract of hire express or implied."	§383-2, HRS, states in pertinent part: "Definition of employment.[2] (a) As used in this chapter, unless the context clearly requires otherwise, 'employment', subject to sections 383-3 to 383-9, means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied...."	§392-3, HRS, states in pertinent part: "'Employment' and 'employed' means service, including service in interstate commerce, performed for wages under any contract of hire, written or oral, express or implied, with an employer, except as otherwise provided in sections 392-4 and 392-5."	§393-3, HRS, states in pertinent part: "(4) 'Employment' means service, including service in interstate commerce, performed for wages under any contract of hire, written or oral, expressed or implied, with an employer, except as otherwise provided in sections 393-4 and 393-5."
	None	§383-6, HRS, states: "§383-6 Master and servant relationship, not required when. 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	None	None

Provision	Workers' Compensation Law	Employment Security Law	Temporary Disability Insurance Law	Prepaid Health Care Law
		and will continue to be free from control or direction over the performance of such service, both under the individual's 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."		
	None	None	§12-11-1, Prepaid Health Care Rules, states in pertinent part; "'Employment' as defined in section 392-3(7), HRS, includes services performed by an individual for wages or under any contract of hire irrespective of whether the common-law relationship of master and servant exists unless and until it is shown to the satisfaction of the director that: (1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the individual's 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."	§12-12-1, Prepaid Health Care Rules, states in pertinent part; "'Employment' shall be as defined in section 393-3, HRS, and shall include the period an employee is receiving benefits under chapter 386 or 392, HRS, for a period of not less than that prescribed in section 393-15, HRS. It shall also include services performed by an individual for wages or under any contract of hire irrespective of whether the common-law relationship of master and servant exists unless and until it is shown to the satisfaction of the director that: (1) The individual has been and will continue to be free form control or direction over the performance of the service, both under the 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, profesison or business of the same nature as that involved in the contract of service."

Provision	Workers' Compensation Law	Employment Security Law	Temporary Disability Insurance Law	Prepaid Health Care Law
Services Excluded from Definition of "Employment"	§386-1, HRS, states in pertinent part: "'Employment' does not include the following service: (1) Service for a religious, charitable, educational, or nonprofit organization if performed in a voluntary or unpaid capacity; (2) Service for a religious, charitable, educational, or nonprofit organization if performed by a recipient of aid therefrom and the service is incidental to or in return for the aid received; (3) Service for a school, college, university, college club, fraternity, or sorority if performed by a student who is enrolled and regularly attending classes and in return for board, lodging, or tuition furnished, in whole or in part; (4) Service performed by a duly ordained, commissioned, or licensed minister, priest, or rabbi of a church in the exercise of the minister's, priest's, or rabbi's ministry or by a member of a religious order in the exercise of nonsecular duties required by the order; (5) Service performed by an individual for another person solely for personal, family, or household purposes if the cash remuneration received is less than $225 during the current calendar quarter and during each completed calendar quarter of the preceding twelve month period; (6) Domestic, which includes attendant care, and day care services authorized by the department of social services and housing under the Social Security Act, as amended, performed by an individual in the employ of a recipient of social service payments; (7) Service performed without wages for a corporation without employees by a corporate officer in which the officer is at	§383-7, HRS, states: "§383-7 Excluded service. 'Employment' does not include the following service: (1) Agricultural labor as defined in section 383-9 if it is performed by an individual who is employed by an employing unit: (A) Which, during each calendar quarter in both the current and the preceding calendar years, paid less than $20,000 in cash remuneration to individuals employed in agricultural labor; and (B) Which had, in each of the current and the preceding calenyears: (i) No more than nineteen calendar weeks, whether consecutive or not, in which agricultural labor was performed by its employees; or (ii) No more than nine individuals in its employ performing agricultural labor in any one calendar week, whether or not the same individuals performed the labor in each week;" (2) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority performed in any calendar quarter by an individual if the cash remuneration paid to such individual by an employing unit for such service is less than $225, and if the total cash remuneration paid to all individuals by an employing unit	§392-5, HRS, states: "§392-5 Excluded services. 'Employment' as defined in section 392-3 does not include the following service: (1) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority, performed in any calendar quarter by an individual if the cash remuneration paid by the employer for such service is less than $225; (2) Service not in the course of the employer's trade or business performed in any calendar quarter by an individual, unless the cash remuneration paid for the service is $50 or more and the service is performed by an individual who is regularly employed by the employer to perform the service. An individual shall be deemed to be regularly employed to perform service not in the course of the employer's trade or business during a calendar quarter only if (A) on each of some twenty-four days during the quarter the individual performs the service for some portion of the day, or (B) the individual was regularly employed (as determined under clause (A)) by the employer in the performance of the service during the preceding calendar quarter; (3) Service performed on or in connection with a vessel not an American vessel, if the individual performing the service is employed on and in connection with the vessel when outside the United States; (4) Service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or	§393-5, HRS, states: "§393-5 Excluded services. 'Employment' as defined in section 393-3 does not include the following services: (1) Service performed by an individual in the employ of an employer who, by the laws of the United States, is responsible for care and cost in connection with such service. (2) Service performed by an individual in the employ of the individual's spouse, son, or daughter, and service performed by an individual under the age of twenty-one in the employ of the individual's father or mother. (3) Service performed in the employ of a voluntary employee's beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of the association or their dependents or their designated beneficiaries, if (A) Admission to membership in the association is limited to individuals who are officers or employees of the United States government, and (B) No part of the net earnings of the association inures (other than through such payments) to the benefits of any private shareholder or individual. (4) Service performed by an individual for an employer as an insurance agent or as an insurance solicitor, if all such service performed by the individual for the employer is performed for remuneration solely by way of commission. (5) Service performed by an individual for an employer as a real estate salesman or as a real estate broker, if all such service performed by the individual for the employer is performed for remuneration solely by way of commission. (6) Service performed by

Provision	Workers' Compensation Law	Employment Security Law	Temporary Disability Insurance Law	Prepaid Health Care Law
	least a twenty-five per cent stockholder; As used in this paragraph "religious, charitable, educational, or nonprofit organization" means a corporation, unincorporated association, community chest, fund, or foundation organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual."	for such service is less than $1,000 in each calendar quarter in both the current and preceding calendar years; (3) Service not in the course of the employing unit's trade or business performed in any calendar quarter by an individual, unless the cash remuneration paid for the service is $50 or more and the service is performed by an individual who is regularly employed by the employing unit to perform the service. For the purposes of this paragraph, an individual shall be deemed to be regularly employed to perform service not in the course of an employing unit's trade or business during a calendar quarter only if (A) on each of some twenty-four days during the quarter the individual performs such service for some portion of the day, or (B) the individual was regularly employed (as determined under clause (A)) by the employing unit in the performance of such service during the preceding calendar quarter; (4) (A) Service performed on or in connection with a vessel not an American vessel, if the individual performing the service is employed on and in connection with the vessel when outside the United States; (B) Service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in), the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including service performed as an ordinary incident thereto, except (i) the	other aquatic forms of animal and vegetable life, including service performed as an ordinary incident thereto, except (A) the service performed in connection with a vessel of more than ten net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States), and (B) the service performed in connection with a vessel of ten net tons or less (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States) by an individual who is employed by an employer who, for some portion in each of twenty different calendar weeks in either the current or preceding calendar year, had in the employer's employ one or more persons performing the service, whether or not the weeks were consecutive and whether or not the same individuals performed the service in each week, and (C) service performed in connection with the catching or taking of salmon or halibut for commercial purposes; (5) Service performed by an individual in the employ of the individual's son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of the child's father or mother; (6) Service performed in the employ of the United States government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by this chapter; (7) Service performed in the employ of any other state, or any political subdivision thereof, or any instrumentality of any	an individual who, pursuant to the Federal Economic Opportunity Act of 1964, is not subject to the provisions of law relating to federal employment, including unemployment compensation. (7) Domestic, which includes attendant care, and day care services authorized by the department of social services and housing under the Social Security Act, as amended, performed by an individual in the employ of a recipient of social service payments."

Provision	Workers' Compensation Law	Employment Security Law	Temporary Disability Insurance Law	Prepaid Health Care Law
		service performed in connection with a vessel of more than ten net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States), and (ii) the service performed in connection with a vessel of ten net tons or less (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States) by an individual who is employed by an employing unit which had in its employ one or more individuals performing the service for some portion of a day in each of twenty calendar weeks all occurring, whether consecutive or not, in either the current or preceding calendar year, and (iii) service performed in connection with the catching or taking of salmon or halibut for commercial purposes;	one or more of the foregoing which is wholly owned by one or more such states or political subdivisions; and any service performed in the employ of any instrumentality of one or more other states or their political subdivisions to the extent that the instrumentality is, with respect to such service, exempt from the tax imposed by section 3301 of the Internal Revenue Code of 1954;	
		(5) Service performed by an individual in the employ of the individual's son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of the child's father or mother;	(8) Service with respect to which temporary disability compensation is payable for sickness under a temporary disability insurance system established by an act of Congress;	
		(6) Service performed in the employ of the United States government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by this chapter, except that to the extent that the Congress of the United States permits states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation law, all	(9) Service performed in any calendar quarter in the employ of any nonprofit organization exempt from income tax under section 501 of the Internal Revenue Code of 1954, if (A) the remuneration for such service is less than $50, or (B) the service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university, or (C) the service is performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of the minister's ministry or by a member of a religious order in the nonsecular duties required by the order, or (D) the service is performed for a church by an employee who fails to meet the eligibility requirements of section 392-25;	
			(10) Service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of the association or their dependents, if (A) no part of its net earnings inures (other than through such payments) to the benefit of any private shareholder or	

Provision	Workers' Compensation Law	Employment Security Law	Temporary Disability Insurance Law	Prepaid Health Care Law
		of the provisions of this chapter shall be applicable to such instrumentalities, and to services performed for such instrumentalities, in the same manner, to the same extent, and on the same terms as to all other employers, employing units, individuals, and services; provided that if this State is not certified for any year by the Secretary of Labor under section 3304(c) of the federal Internal Revenue Code, the payments required of such instrumentalities with respect to such year shall be refunded by the department of labor and industrial relations from the fund in the same manner and within the same period as is provided in section 383-76 with respect to contributions erroneously collected; (7) Service performed in the employ of any other state, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more such states or political subdivisions; and any service performed in the employ of any instrumentality of one or more other states or their political subdivisions to the extent that the instrumentality is, with respect to such service, exempt from the tax imposed by section 3301 of the Internal Revenue Code of 1954; (8) Service with respect to which unemployment compensation is payable under an unemployment system established by an act of Congress; (9) (A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) of the federal Internal Revenue Code (other than an organization described in section 401(a) or	individual, and (B) eighty-five per cent or more of its income consists of amounts collected from members and amounts contributed by the employer of the members for their sole purpose of making such payments and meeting expenses; (11) Service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of the association or their dependents or their designated beneficiaries, if (A) admission to membership in the association is limited to individuals who are officers or employees of the United States government, and (B) no part of the net earnings of the association inures (other than through such payments) to the benefit of any private shareholder or individual; (12) Service performed in the employ of a school, college, or university, not exempt from income tax under section 501 of the Internal Revenue Code of 1954, if the service is performed by a student who is enrolled and is regularly attending classes at the school, college, or university; (13) Service performed in the employ of any instrumentality wholly owned by a foreign government, if: (A) the service is of a character similar to that performed in foreign countries by employees of the United States government or of an instrumentality thereof; and (B) the United States Secretary of State has certified or certifies to the United States Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign	

Provision	Workers' Compensation Law	Employment Security Law	Temporary Disability Insurance Law	Prepaid Health Care Law
		under section 521 of such Code), if (i) the remuneration for such service is less than $50, or (ii) the service is performed by a fully ordained, commissioned, or licensed minister of a church in the exercise of the minister's ministry or by a member of a religious order in the exercise of duties required by such order; (B) Service performed in the employ of a school, college, or university, if such service is performed by a student who is enrolled and is regularly attending classes at such school, college, or university; (10) Service performed in the employ of a foreign government (including service as a consular or other officer or employee of a nondiplomatic representative); (11) Service performed in the employ of an instrumentality wholly owned by a foreign government: (A) If the service is of a character similar to that performed in foreign countries by employees of the United States government or of an instrumentality thereof; and (B) If the United States Secretary of State has certified or certifies to the United States Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States government and of	country by employees of the United States government and of instrumentalities thereof; (14) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law; and service performed as an intern in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to state law; (15) Service performed by an individual for an employer as an insurance agent or as an insurance solicitor, if all such service performed by the individual for the employer is performed for remuneration solely by way of commission; (16) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution; (17) Service covered by an arrangement between the department and the agency charged with the administration of any other state or federal unemployment compensation law pursuant to which all services performed by an individual for an employer during the period covered by the employer's duly approved election, are deemed to be performed entirely within the agency's state; (18) Service performed by an individual who, pursuant to the Federal Economic Opportunity Act of 1964, is not subject to the federal laws relating to unemployment compensation; (19) Domestic, which includes attendant care, and day care	

Provision	Workers' Compensation Law	Employment Security Law	Temporary Disability Insurance Law	Prepaid Health Care Law
		instrumentalities thereof; (12) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law; and service performed as an intern in the employ of a hospital by an individual who has completed a four years course in a medical school chartered or approved pursuant to state law; (13) Service performed by an individual for an employing unit as an insurance agent or as an insurance solicitor, if all such service performed by the individual for the employing unit is performed for remuneration solely by way of commission; (14) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution; (15) Service covered by an arrangement between the department and the agency charged with the administration of any other state or federal unemployment compensation law pursuant to which all services performed by an individual for an employing unit during the period covered by the employing unit's duly approved election, are deemed to be performed entirely within the agency's state; (16) Service performed by an individual who, pursuant to the Federal Economic Opportunity Act of 1964, is not subject to the federal laws relating to unemployment compensation; (17) Service performed by an individual for an employing unit as a real estate salesman, if all such service performed by such	services authorized by the department of social services and housing under the Social Security Act, as amended, performed by an individual in the employ of a recipient of social service payments; (20) Service performed by vacuum cleaner salesman for an employing unit, if all such services performed by the individual for such employing unit are performed for remuneration solely by way of commission."	

Provision	Workers' Compensation Law	Employment Security Law	Temporary Disability Insurance Law	Prepaid Health Care Law
		individual for such employing unit is performed for remuneration solely by way of commission; (18) Service performed by a registered sales representative for a registered travel agency, when such service performed by the individual for the travel agent is performed for remuneration by way of commission; (19) Service performed by a vacuum cleaner salesman for an employing unit, if all such services performed by the individual for such employing unit are performed for remuneration solely by way of commission. None of the foregoing exclusions (1) to (19) shall apply to any service with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which as a condition for full tax credit against the tax imposed by the federal Unemployment Tax Act is required to be covered under this chapter."		

1. Does not include provisions for exclusions from "wages".

2. Omitted is §383-2(b) to (e), Hawaii Revised Statutes, providing for specific services included in the definition of "employment".

Appendix G

COMPARISON OF EXCLUSIONS IN FEDERAL UNEMPLOYMENT AND SOCIAL SECURITY LAWS

	Service Performed	FICA	FUTA
1.	By foreign agricultural workers who meet certain enumerated requirements.	x	x (See #21)
2.	In domestic service by a student regularly attending classes in a local college club, fraternity or sorority.	x	x (See #22)
3.	In family employment.	x	x
4.	By an individual on or in connection with a vessel not an American vessel or an aircraft not an American aircraft.	x	x
5.	In the employ of an instrumentality of the United States exempt from tax imposed by the Federal Insurance Contributions Act.	x	
6.	In the employ of the United States or any instrumentality thereof if the service is covered by a federal retirement system.	x	
7.	In the employ of a state or any political subdivision or instrumentality thereof which is wholly owned thereby.	x	x
8.	By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties which meet certain enumerated requirements.	x	
9.	By an individual as an employee or employee representative as defined under either the Railroad Retirement Tax Provisions or the Railroad Unemployment Insurance Act.	x	x
10.	By a student enrolled and regularly attending classes at and employed by a school, college, or university, or organization described in the Internal Revenue provisions relating to private foundations which meets certain enumerated requirements.	x	

	Service Performed	FICA	FUTA
11.	In the employ of a foreign government or with an instrumentality wholly owned by a foreign government which meets certain enumerated requirements.	x	x
12.	By a student nurse or an intern which meets certain enumerated requirements.	x	x
13.	By an individual under the age of 18 in the delivery or distribution of newspapers or shopping news.	x	x
14.	By an individual in, and at the time of the sale of newspapers or magazines to ultimate consumers, under an arrangement which meets certain enumerated requirements.	x	x
15.	In the employ of an international organization.	x	x
16.	By an individual under an arrangement with an owner/tenant of land to provide agricultural or horticultural commodities.	x	
17.	In the employ of an organization which is performed in any year in which the organization is registered or required to register under the Internal Security Act as a Communist organization.	x	
18.	In Guam by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonresident alien.	x	
19.	By a nonresident alien individual for the period he is temporarily in the United States as a nonimmigrant.	x	x
20.	By an individual on a boat engaged in catching fish or other forms of aquatic life under an arrangement with an owner or operator of a boat.	x	x
21.	Agricultural labor.		x
22.	Domestic service in a private home, local college, club, or college fraternity or sorority which meets certain enumerated requirements.		x
23.	Not in the course of the employer's trade or business.		x

Service Performed	FICA	FUTA
24. In the employ of the United States or any instrumentality thereof either wholly owned or exempt from the tax imposed by the Federal Unemployment Tax Act by any provision of law.	x	x
25. In the employ of a religious, charitable, educational, or other organization exempted under the exempt organization provisions of the Internal Revenue Code.		x
26. In the employ of a school, college, or university, by a student or a student's spouse which meets certain enumerated requirements.		x
27. By an individual as an insurance agent or insurance solicitor on a commission basis.		x
28. By an individual in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweed, or other aquatic forms of animal and vegetable life with certain enumerated exceptions.		x

Appendix H

COMPARISON OF SERVICES EXCLUDED UNDER STATE AND FEDERAL LAWS

Service Performed	Unemployment Law	Workers' Compensation Law	Temporary Disability Insurance Law	Prepaid Health Law	Federal Unemployment Tax Act
In agricultural labor which meets certain enumerated requirements.	×				×
In domestic service in a private home, college club, fraternity or sorority which meets certain enumerated requirements.	×	×	×		×
Not in the course of employer's trade or business which meets certain enumerated requirements.	×		×		×
On or in connection with a non-American vessel when employment is outside the United States.	×		×		×
By an individual in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life.	×		×		×
By an individual in family employment.	×		×	×	×
In the employ of the United States government or an instrumentality thereof exempt under the Constitution of the United States from the contributions imposed by the Federal Unemployment Tax Act.	×				×
In the employ of any other state, or any political subdivision thereof, or any instrumentality thereof which is wholly owned by one or more such states or political subdivisions; and in the employ of any instrumentality of one or more other states or their political subdivisions to the extent that the instrumentality is exempt from the tax imposed by the Federal Unemployment Tax Act.	×		×		×
With respect to which unemployment compensation is payable under an unemployment system established by an act of Congress.	×		×		
In the employ of any organization exempt from income tax under the Internal Revenue Code provisions relating to exempt organizations which meets certain enumerated requirements.	×		×		×
By a student at and in the employ of a school, college, or university.	×	×	×		×
In the employ of a foreign government.	×				×

Service Performed	Unemployment Law	Workers' Compensation Law	Temporary Disability Insurance Law	Prepaid Health Law	Federal Unemployment Tax Act
In the employ of an instrumentality wholly owned by a foreign government which meets certain enumerated requirements.	×		×		×
As a student nurse or as an intern which meets certain enumerated requirements.	×		×		×
By an individual as an insurance agent or as an insurance solicitor on a commission basis.	×		×	×	×
By an individual under the age of 18 in the delivery or distribution of newspapers or shopping news.	×		×		×
Which is covered by an arrangement between the department and the agency charged with the administration of any state or federal unemployment compensation law which meets certain enumerated requirements.	×		×		
By an individual who is not subject to the federal laws relating to unemployment compensation pursuant to the Federal Economic Opportunity Act.	×		×	×	
By an individual as a real estate salesman on a commission basis.	×		×	×	
By a registered sales representative for a registered travel agency on a commission basis.	×				
By a vacuum cleaner salesman on a commission basis.	×		×		
For a religious, charitable, educational, or nonprofit organization on a voluntary or unpaid capacity.		×			
For a religious, charitable, educational, or nonprofit organization which is incidental to or in return for the aid received.		×			
By a duly ordained, commissioned, or licensed minister, priest or rabbi of a church in the exercise of his ministry or by a member of a religious order in the exercise of nonsecular duties required by the order.	×[1]	×	×[1]		×[1]
By an individual for another person solely for personal, family, or household purposes which meets certain enumerated requirements.		×			
In domestic service which includes attendant care and day care services authorized by the department of social services and housing under the Social Security Act performed by an individual in the employ of a recipient of social service payments.		×	×	×	

Service Performed	Unemployment Law	Workers' Compensation Law	Temporary Disability Insurance Law	Prepaid Health Law	Federal Unemployment Tax Act
Without wages for a corporation without employees by a corporate officer who is at least a 25 per cent stockholder.		×			
In the employ of the United States government or an instrumentality thereof exempt under the Constitution of the United States from the contributions imposed by the temporary disability law.			×		
With respect to which temporary disability compensation is payable for sickness under a temporary disability insurance system established by an act of Congress.			×		
In the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of the association or to their dependents which meets certain enumerated requirements.			×	×	
By an individual in the employ of an employer who is responsible for cure and cost in connection with such service by federal law.				×	
By an individual as an employee or employee representative as defined in the Railroad Unemployment Insurance Act.					×
In the employ of a religious, charitable, educational or other organization exempt from income tax under the Internal Revenue Code provisions relating to exempt organizations.	×[2]				×
In the employ of a hospital by a patient.					×
In the employ of an international organization.					×
By a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant.					×
An individual on a boat engaged in catching fish or other forms of aquatic animal life under an arrangement with the owner or operator of such boat pursuant to certain enumerated requirements.					×
By a full-time student in the employ of an organized camp which meets certain enumerated requirements.					×

1. To the extent that the service is performed for a religious, charitable, educational, or other organization exempt under the Internal Revenue Code provisions relating to exempt organizations.

2. The Hawaii law limits this service to situations where the remuneration is less than $50 or where it is performed by a duly ordained, commissioned, or licensed minister, or a member of a religious order.

Appendix I

UI COVERAGE

Employer Subject to Both Federal and State UI Laws vs. Employer Subject to only Federal Law (Exempt Under State Law)

A. Employer Subject to Both FUTA and State UI Laws

1. Employer eligible for the FUTA offset credit.

   Section 3302(a) of FUTA allows for the amount of State UI contributions to be credited against 90% of 6.0% of the FUTA tax. The full FUTA tax is 6.2% of the first $7000 in covered wages. In other words, a .8% FUTA tax is mandatory but an employer's State UI tax rate can be credited against the remaining 5.4% FUTA tax.

   EXAMPLE: For a Hawaii employer that has a 3.0% tax rate, the total FUTA tax payable to the Internal Revenue Service would be 3.2% of $7000 in wages:

   .8% + (5.4% - 3.0%) = 3.2%

2. Employer is also eligible for the FUTA additional offset credit.

   Under Section 3302(b) of FUTA, an employer is eligible for an additional credit of the State UI tax against 5.4% of the FUTA tax rate. Therefore, the 3.2% FUTA tax rate in the previous example shown

   would be further lowered to only .8% because 2.4% of the original rate would be eliminated. The employer would, therefore, pay .8% of $7000 in FUTA taxes and and 3.0% of the Hawaii taxable wage base in Hawaii UI taxes.

3. Employees would be eligible for unemployment compensation benefits when they lose their jobs.

B. Employers Subject to Only FUTA (Exempt Under State UI Law)

1. Employers will pay the full 6.2% FUTA tax because no offset credit can be applied against the federal tax if no State UI taxes are paid by the employers.

2. Employers will not pay any State UI taxes but their employees will not be eligible for jobless benefits upon termination from employment.

3. Services performed for governmental entities and non-profit organizations are required to be covered and if a legislated exclusion includes a government worker or an employee of a non-profit organization, a federal conformity issue will be raised. Ultimately, the federal tax offset credit for all employers in the State as well as the receipt of administrative grants to operate the State UI program will be jeopardized.

Source: Hawaii, Department of Labor and Industrial Relations, Unemployment Insurance Division.

Appendix J

COVERAGE

Table 102.--Coverage as Determined by Employer-Employee Relationship

State	Services considered employment unless--			Other provisions
	Workers are free from control over performance	Service is outside regular course or place of employer's business	Worker is customarily in an independent business	
(1)	(2)	(3)	(4)	(5)
Ala.	. . . . .	. . . . .	. . . . .	Master-servant.
Alaska	X	and X	and X	. . . . .
Ariz.	. . . . .	. . . . .	. . . . .	Service of employee.[1]
Ark.	X	and X	and X	. . . . .
Calif.	. . . . .	. . . . .	. . . . .	Contract of hire.[2]
Colo.	X	. . . . .	and X	. . . . .
Conn.	X	and X	and X	. . . . .
Del.	X	and X	and X	. . . . .
D.C.	. . . . .	. . . . .	. . . . .	Contract of hire and master-servant.[2] [3]
Fla.	. . . . .	. . . . .	. . . . .	Service of employee.[1]
Ga.	X	and X	and X	. . . . .
Hawaii	X	and X	and X	. . . . .
Idaho	X	. . . . .	and X	. . . . .
Ill.	X	and X	and X	. . . . .
Ind.	X	and X	and X	. . . . .
Iowa	X	. . . . .	. . . . .	Contract of hire.[2]
Kans.	X	and X	. . . . .	. . . . .
Ky.	. . . . .	. . . . .	. . . . .	Master-servant.[4]
La.	X	and X	and X	. . . . .
Maine	X	and X	and X	. . . . .
Md.	X	and X	and X	. . . . .
Mass.	X	and X	and X	. . . . .
Mich.	X	. . . . .	. . . . .	Contract of hire.[2]
Minn.	. . . . .	. . . . .	X	Master-servant.
Miss.	X	. . . . .	. . . . .	Master-servant.
Mo.	X	and X	and X	. . . . .
Mont.	X	and X	and X	. . . . .
Nebr.	X	and X	and X	. . . . .
Nev.	X	and X	and X	. . . . .
N.H.	X	and X	and X	. . . . .
N.J.	X	and X	and X	. . . . .
N.Mex.	X	and X	and X	. . . . .
N.Y.	. . . . .	. . . . .	. . . . .	Contract of hire.[2]
N.C.	. . . . .	. . . . .	. . . . .	Contract of hire creating employee relationship.
N.Dak.	X	and X	and X	Contract of hire.
Ohio	X	and X	and X	. . . . .

(Table continued on next page)

Table 102.--Coverage as Determined by Employer-Employee Relationship (Continued)

State	Services considered employment unless--			Other provisions
	Workers are free from control over performance	Service is outside regular course or place of employer's business	Worker is customarily in an independent business	
(1)	(2)	(3)	(4)	(5)
Okla.	. . . . .	. . . . .	. . . . .	Master-servant.
Oreg.	X	. . . . .	and X	. . . . .
Pa.	X	. . . . .	and X	. . . . .
P.R.	X	and X	and X	. . . . .
R.I.	X	and X	and X	. . . . .
S.C.	. . . . .	. . . . .	. . . . .	Contract of hire.[2]
S.Dak.	X	. . . . .	and X	. . . . .
Tenn.	X	and X	and X	. . . . .
Tex.	X	. . . . .	. . . . .	Contract of hire.[2]
Utah	X	and X*	and X	. . . . .
Vt.	X	and X	and X	. . . . .
Va.	X	and X	and X	. . . . .
V.I.	X	and X	and X	. . . . .
Wash.	X	and X	and X	. . . . .
W.Va.	X	and X	and X	. . . . .
Wis.	X	. . . . .	and X	. . . . .
Wyo.	X	and X	and X	. . . . .

[1]Service performed by an employee for the person or employing unit employing him.
[2]Service under any contract of hire, written or oral, express or implied.
[3]By regulation.
[4]By judicial interpretation.

*The Bureau found that this requirement was deleted in 1986 Supplement to Utah Code Ann. §35-4-22.

Source: Hawaii, Department of Labor and Industrial Relations, Unemployment Insurance Division.

OVERVIEW OF STATE AND FEDERAL EMPLOYMENT SECURITY LAW EXCLUSIONS

EXCLUSIONS FROM THE DEFINITION OF "EMPLOYMENT" FOR SERVICES PERFORMED	ALASKA STAT. §23.20.526	ARK. STAT. ANN. §81-1103	CONN. GEN. STAT. §31-222	DEL. CODE Tit. 19, §3302	GA. CODE ANN. §34-8-40	HAW. REV. STAT. §38-7	ILL. REV. STAT. Ch. 48, §324-340	IND. CODE ANN. §§22-4-82, 22-4-8-3	LA. REV. STAT. §23.1472	ME. REV. STAT. Tit. 26, §1043	MD. ANN. CODE Art. 95A, §20	MASS. GEN. LAWS ANN. Ch. 151A, §2	MO. ANN. STAT. §288.034	MONT. REV. CODES ANN. §39-51-204	NEB. REV. STAT. §48-604	NEV. REV. STAT. §§612.090 to 612.140	N.H. REV. STAT. ANN. §282:1	N.J. STAT. ANN. §43:21-19 (West)	N.M. STAT. ANN. §51-1-42	N.D. CENT. CODE §52-01-01	OHIO REV. CODE ANN. §4141.01 (Page)	R.I. GEN. LAWS §28-42-8	TENN. CODE ANN. §50-7-207	VT. STAT. ANN. Tit. 21, §1301	VA. CODE §60.1-14	WASH. REV. CODE §§50.04.150 to 50.04.270	W. VA. CODE §21A-1-3	WYO. STAT. §27-3-103	TOTAL STATES	FED. UNEMP. TAX ACT 26 U.S.C.A. §3306
(1) In agricultural labor which meets certain enumerated requirements.	X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X		X	X		X	X	X	X	X		24	X
(2) In domestic service in a private home, local college club, or local chapter of a fraternity/ sorority which meets certain enumerated requirements.	X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X		25	X
(3) Not in the course of the employer's trade or business which meets certain enumerated requirements.	X	X	X		X	X		X	X		X	X		X	X		X				X	X	X		X	X	X			18	X
(4) On or in connection with a vessel not an American vessel which meets certain enumerated requirements.	X	X				X	X	X	X							X									X	X				9	X
(5) By an individual in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crutacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life which meets certain enumerated requirements.		X				X				X	X														X	X				6	X
(6) In family employment.	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X			X	X	X	X	X	X	X	X	X	X	X		26	X
(7) In the employ of the United States government or any instrumentality thereof exempt under the Constitution of the United States from contributions with certain enumerated exceptions.	X	X	X		X	X	X		X	X	X	X				X	X	X	X	X	X	X	X	X	X	X	X	X	X		23	X
(8) In the employ of any other state, or any political subdivision thereof, or any instrumentality which meets certain enumerated requirements.	X[1]					X		X	X	X		X		X		X	X	X		X			X	X	X	X	X				16	X

EXCLUSIONS FROM THE DEFINITION OF "EMPLOYMENT" FOR SERVICES PERFORMED	ALASKA STAT. §23.20.526	ARK. STAT. ANN. §81-1103	CONN. GEN. STAT. §31-222	DEL. CODE Tit. 19, §3302	GA. CODE ANN. §34-8-40	HAW. REV. STAT. §38-7	ILL. REV. STAT. Ch. 48, §324-340	IND. CODE ANN. §§22-4-82, 22-4-8-3	LA. REV. STAT. §23.1472	ME. REV. STAT. Tit. 26, §1043	MD. ANN. CODE Art. 95A, §20	MASS. GEN. LAWS ANN. Ch. 151A, §2	MO. ANN. STAT. §288.034	MONT. REV. CODES ANN. §39-51-204	NEB. REV. STAT. §48-604	NEV. REV. STAT. §§612.090 to 612.140	N.H. REV. STAT. ANN. §282:1	N.J. STAT. ANN. §43:21-19 (West)	N.M. STAT. ANN. §51-1-42	N.D. CENT. CODE §52-01-01	OHIO REV. CODE ANN. §4141.01 (Page)	R.I. GEN. LAWS §28-42-8	TENN. CODE ANN. §50-7-207	VT. STAT. ANN. Tit. 21, §1301	VA. CODE §60.1-14	WASH. REV. CODE §§50.04.150 to 50.04.270	W. VA. CODE §21A-1-3	WYO. STAT. §27-3-103	TOTAL STATES	FED. UNEMP. TAX ACT 26 U.S.C.A. §3306
(9) With respect to which unemployment compensation is payable under an unemployment system established by an act of Congress.	X		X	X		X	X	X	X	X	X		X		X	X	X	X	X	X	X	X			X	X	X			20	X
(10) In employment of an organization exempt from income tax under provisions of the Internal Revenue Code relating to exempt organizations which meets certain enumerated requirements.		X	X		X	X	X	X	X	X	X	X			X		X			X	X	X			X	X			17	X
(11) By a student or spouse of a student in the employ of a school, college, or university who meets certain enumerated requirements.	X[1]	X	X	X			X	X	X	X[1]	X	X	X[1]	X	X	X	X	X	X	X	X	X		X	X	X		X	X	24	X
(12) In the employ of a foreign government.	X	X				X		X	X	X	X	X	X					X	X		X									12	X
(13) In the employ of a wholly owned instrumentality of a foreign government which meets certain enumerated requirements.	X	X				X		X	X	X	X	X	X					X			X									11	X
(14) As a student nurse or an intern which meets certain enumerated requirements.		X	X		X	X	X	X	X	X	X	X			X					X	X				X					14	X
(15) By an individual for an employer as an insurance agent or an insurance solicitor on a commission.	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X	X	X			24	X
(16) By an individual under the age of 18 in the delivery or distribution of newspapers or shopping news.	X	X	X		X	X	X	X	X	X	X	X	X	X	X	X	X		X	X	X				X	X		X		22	X
(17) By an individual who is not subject to the federal unemployment laws, pursuant to the Federal Economic Opportunity Act.						X																								1	
(18) By an individual for an employer as a real estate salesperson on a commission.	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X	X	X			X			X	X		X		22	

EXCLUSIONS FROM THE DEFINITION OF "EMPLOYMENT" FOR SERVICES PERFORMED	ALASKA STAT. §23.20.526	ARK. STAT. ANN. §81-1103	CONN. GEN. STAT. §31-222	DEL. CODE Tit. 19, §3302	GA. CODE ANN. §34-8-40	HAW. REV. STAT. §38-7	ILL. REV. STAT. Ch. 48, §324-340	IND. CODE ANN. §§22-4-82, 22-4-8-3	LA. REV. STAT. §23.1472	ME. REV. STAT. Tit. 26, §1043	MD. ANN. CODE Art. 95A, §20	MASS. GEN. LAWS ANN. Ch. 151A, §2	MO. ANN. STAT. §288.034	MONT. REV. CODES ANN. §39-51-204	NEB. REV. STAT. §48-604	NEV. REV. STAT. §§612.090 to 612.140	N.H. REV. STAT. ANN. §282:1	N.J. STAT. ANN. §43:21-19 (West)	N.M. STAT. ANN. §51-1-42	N.D. CENT. CODE §52-01-01	OHIO REV. CODE ANN. §4141.01 (Page)	R.I. GEN. LAWS §28-42-8	TENN. CODE ANN. §50-7-207	VT. STAT. ANN. Tit. 21, §1301	VA. CODE §60.1-14	WASH. REV. CODE §§50.04.150 to 50.04.270	W. VA. CODE §21A-1-3	WYO. STAT. §27-3-103	TOTAL STATES	FED. UNEMP. TAX ACT 26 U.S.C.A. §3306
(19) By a registered sales representative for a registered travel agency on a commission.						X																							1	
(20) By a vacuum cleaner salesperson on a commission.						X																							1	
(21) As a securities or investment salesperson.	X										X			X												X	X		5	
(22) By an officer or member of a crew of an American vessel on or in connection with the vessel which meets certain enumerated requirements.	X									X						X							X			X	X		6	
(23) In the employ of an international organization.	X	X					X																						3	
(24) By nurses, technicians, and other professional employees of hospitals which meet certain enumerated requirements.	X																												1	
(25) By an individual on a boat engaged in catching fish or other forms of aquatic life under an arrangement with the owner/operator of the boat which meets certain enumerated requirements.	X									X																			2	X
(26) By a prospective or impaneled juror.	X																												1	
(27) For a corporation by an employee of the corporation which meets certain enumerated requirements.	X																												1	
(28) By a patient in the employ of a hospital.	X[1]	X	X	X	X		X	X		X[1]	X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	24	X
(29) In the employ of a school other than an institution of higher education which meets certain enumerated requirements.		X[1]	X[1]	X[1]	X[1]		X[1]	X[1]		X[1]			X[1]		X[1]	X[1]		X[1]		X[1]		X		X[1]	X[1]		X		16	

EXCLUSIONS FROM THE DEFINITION OF "EMPLOYMENT" FOR SERVICES PERFORMED	ALASKA STAT. §23.20.526	ARK. STAT. ANN. §81-1103	CONN. GEN. STAT. §31-222	DEL. CODE Tit. 19, §3302	GA. CODE ANN. §34-8-40	HAW. REV. STAT. §38-7	ILL. REV. STAT. Ch. 48, §324-340	IND. CODE ANN. §§22-4-82, 22-4-8-3	LA. REV. STAT. §23.1472	ME. REV. STAT. Tit. 26, §1043	MD. ANN. CODE Art. 95A, §20	MASS. GEN. LAWS ANN. Ch. 151A, §2	MO. ANN. STAT. §288.034	MONT. REV. CODES ANN. §39-51-204	NEB. REV. STAT. §48-604	NEV. REV. STAT. §§612.090 to 612.140	N.H. REV. STAT. ANN. §282:1	N.J. STAT. ANN. §43:21-19 (West)	N.M. STAT. ANN. §51-1-42	N.D. CENT. CODE §52-01-01	OHIO REV. CODE ANN. §4141.01 (Page)	R.I. GEN. LAWS §28-42-8	TENN. CODE ANN. §50-7-207	VT. STAT. ANN. Tit. 21, §1301	VA. CODE §60.1-14	WASH. REV. CODE §§50.04.150 to 50.04.270	W. VA. CODE §21A-1-3	WYO. STAT. §27-3-103	TOTAL STATES	FED. UNEMP. TAX ACT 26 U.S.C.A. §3306
(30) By a nonresident alien which meets certain enumerated requirements.		X				X																							2	
(31) By an individual for any political caucus, committee, headquarters, or other groups of like nature not established on a permanent basis.		X																											1	X
(32) By an individual as an employee or employee representative as defined under the Railroad Unemployment Insurance Act or with respect to which unemployment is payable under this Act.		X			X			X	X	X	X					X				X		X	X			X	X	12	X
(33) By an individual who is enrolled, at a nonprofit or public educational institution which meets certain enumerated requirements.	X[1]	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X		X	X	25	X
(34) In this state or elsewhere with respect to which contributions are required and paid under an unemployment compensation law of any other state.			X			X																							2	
(35) By an individual in the employ of any town, city, or other political subdivision in lieu of payment of any delinquent taxes which meets certain enumerated requirements.			X																										1	
(36) In the employ of a governmental entity which is a school, not an institution of higher education.																														
(37) For an employer who is a common carrier of persons or property which meets certain enumerated requirements.				X																									1	

EXCLUSIONS FROM THE DEFINITION OF "EMPLOYMENT" FOR SERVICES PERFORMED	ALASKA STAT. §23.20.526	ARK. STAT. ANN. §81-1103	CONN. GEN. STAT. §31-222	DEL. CODE Tit. 19, §3302	GA. CODE ANN. §34-8-40	HAW. REV. STAT. §38-7	ILL. REV. STAT. Ch. 48, §324-340	IND. CODE ANN. §§22-4-82, 22-4-8-3	LA. REV. STAT. §23.1472	ME. REV. STAT. Tit. 26, §1043	MD. ANN. CODE Art. 95A, §20	MASS. GEN. LAWS ANN. Ch. 151A, §2	MO. ANN. STAT. §288.034	MONT. REV. CODES ANN. §39-51-204	NEB. REV. STAT. §48-604	NEV. REV. STAT. §§612.090 to 612.140	N.H. REV. STAT. ANN. §282:1	N.J. STAT. ANN. §43:21-19 (West)	N.M. STAT. ANN. §51-1-42	N.D. CENT. CODE §52-01-01	OHIO REV. CODE ANN. §4141.01 (Page)	R.I. GEN. LAWS §28-42-8	TENN. CODE ANN. §50-7-207	VT. STAT. ANN. Tit. 21, §1301	VA. CODE §60.1-14	WASH. REV. CODE §§50.04.150 to 50.04.270	W. VA. CODE §21A-1-3	WYO. STAT. §27-3-103	TOTAL STATES	FED. UNEMP. TAX ACT 26 U.S.C.A. §3306
(38) By an individual trainee participating in, and as part of, an unemployment work-relief, work-training, work-experience, or work-study program that is assisted or financed by any federal or state agency or political subdivision thereof.	X[1]	X	X[1]	X[1]	X[1]		X[1]	X[1]	X[1]	X[1]	X	X	X[1]	X[1]	X[1]	X[1]	X[1]	X[1]	X	X[1]	X	X[1]	X	X	X	X[1]	X[1]		X		25	
(39) In the employ of a corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes or for the prevention of cruelty to children or animals which meets certain enumerated requirements.				X			X[2]		X				X			X				X			X			X				8	
(40) By an officer of any building and loan association, fraternal order, society, labor union, political club, or political organization, service club, alumni association, or any corporation, association, society, or club organized and operated exclusively for social or civic purposes which meets certain enumerated requirements.				X																										1	
(41) Covered by an arrangement between the department and the agency charged with the administration of any other state or federal unemployment compensation law.	X			X		X		X					X					X	X			X				X				9	

EXCLUSIONS FROM THE DEFINITION OF "EMPLOYMENT" FOR SERVICES PERFORMED	ALASKA STAT. §23.20.526	ARK. STAT. ANN. §81-1103	CONN. GEN. STAT. §31-222	DEL. CODE Tit. 19, §3302	GA. CODE ANN. §34-8-40	HAW. REV. STAT. §38-7	ILL. REV. STAT. Ch. 48, §324-340	IND. CODE ANN. §§22-4-82, 22-4-8-3	LA. REV. STAT. §23.1472	ME. REV. STAT. Tit. 26, §1043	MD. ANN. CODE Art. 95A, §20	MASS. GEN. LAWS ANN. Ch. 151A, §2	MO. ANN. STAT. §288.034	MONT. REV. CODES ANN. §39-51-204	NEB. REV. STAT. §48-604	NEV. REV. STAT. §§612.090 to 612.140	N.H. REV. STAT. ANN. §282:1	N.J. STAT. ANN. §43:21-19 (West)	N.M. STAT. ANN. §51-1-42	N.D. CENT. CODE §52-01-01	OHIO REV. CODE ANN. §4141.01 (Page)	R.I. GEN. LAWS §28-42-8	TENN. CODE ANN. §50-7-207	VT. STAT. ANN. Tit. 21, §1301	VA. CODE §60.1-14	WASH. REV. CODE §§50.04.150 to 50.04.270	W. VA. CODE §21A-1-3	WYO. STAT. §27-3-103	TOTAL STATES	FED. UNEMP. TAX ACT 26 U.S.C.A. §3306
(42) Service performed for an employing unit which meets certain enumerated requirements duly covered under the unemployment compensation law of another state.							X																							1	
(43) By a director or officer of a corporation which meets certain enumerated requirements.							X										X													2	
(44) In connection with the illegal recording or making of bets, wagers, or the selling of pools.							X																							1	
(45) In the employ of this state, or of any political subdivision or instrumentality thereof.		X		X			X[2]		X	X			X	X	X	X	X	X		X	X					X	X		15	
(46) By a hairdresser who holds a booth license and operates within another hairdressing establishment which meets certain enumerated requirements.										X																			X	2	
(47) By a barber who holds a booth license and operates with another barbering establishment which meets certain enumerated requirements.										X																			X	2	
(48) By a contract interviewer engaged in marketing research or public opinion interviewing which meets certain enumerated requirements.										X		X																		2	
(49) By a member or leader of a musical group, band, or orchestra or entertainer that meets certain enumerated requirements.										X							X				X									3	

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(50) Performed in the delivery or distribution of periodicals to the ultimate consumer by an individual on a commission basis or on a profit on the sale.										X				X															2	
(51) By a homeworker in the knitted outerwear industry.										X																			1	
(52) By an individual in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church, convention, or association of churches.		X[1]	X[1]	X[1]	X[1]		X[1]	X[1]	X[1]	X[1]	X	X	X[1]	X[1]	X[1]	X[1]	X[1]	X[1]	X	X[1]	X	X	X	X[1]	X[1]		X		24	
(53) By a duly ordained, commissioned, or licensed minister of a church in the exercise of their ministry or by a member of a religious order in the exercise of their duties.	X[1]	X[1]	X[1]	X[1]	X[1]		X[1]	X[1]	X[1]	X[1]	X	X	X[1]	X[1]	X[1]		X[1]	X[1]	X	X[1]	X	X	X	X[1]	X[1]		X		24	X
(54) By an individual in the employ of a governmental entity in the exercise of duties as an elected official, member of a legislative body, the judiciary, the State or Air National Guard, an employee serving on a temporary basis in case of emergency, or in a position designated a major nontenured policymaking or advisory position or a policymaking or advisory position that ordinarily does not require more than 8 hours a week.			X[1]	X[1]	X[1]			X[1]		X		X[1]	X	X	X		X[1]		X[1]	X		X	X	X[1]		X		16	

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(55) In a facility conducted for the purpose of carrying out a program of rehabilitation for individuals with impaired earning capacity which meets certain enumerated requirements.	x[1]	x[1]	x[1]	x[1]	x[1]		x[1]	x[1]	x[1]	x[1]	x	x	x[1]	x[1]	x[1]	x[1]	x[1]	x[1]	x	x[1]	x	x	x	x[1]	x[1]	x[1]		x		25	
(56) For a hospital in a State prison or other State correctional insitution by an inmate thereof or service performed by an inmate of a custodial or penal institution for a nonprofit organization or governmental entity which meets certain enumerated requirements.	x[1]	x[1]	x[1]	x[1]	x[1]		x[1]	x[1]	x[1]	x[1]		x	x[1]	x[1]	x[1]	x[1]	x[1]	x[1]	x	x[1]	x	x	x	x[1]	x[1]	x[1]		x		23	
(57) In programs authorized and funded by the Comprehensive Employment and Training Act by participants of such programs which meet certain enumerated exceptions.													x													x				2	
(58) As a direct seller engaged in the trade or business of selling or soliciting the sale of consumer products in the home or otherwise than in or affiliated with, a permanent, fixed retail establishment which meets certain enumerated requirements.													x				x													2	
(59) As a volunteer research subject paid on a per study basis for scientific, medical, or drug-related testing for any organization other than one described in the Internal Revenue Code provisions relating to exempt organizations or governmental entity.													x																	1	

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(60) As an officer or member of the crew of a vessel on the navigable waters of the United States.													X																1	
(61) For a motor carrier as defined in the federal or state motor carrier law by a lessor leasing one or more motor vehicles driven by the lessor or one or more drivers provided by the lessor under a lease which meets certain enumerated requirements.														X															1	
(62) By an individual for a business engaged in compilation of marketing data bases which meets certain enumerated requirements.														X															1	
(63) By an individual who is not a classified employee in state classified service with certain enumerated exceptions.																X													1	
(64) By seasonal or temporary classified employees as defined in this section.																X													1	
(65) By an individual in the employ of a labor organization exempt from federal tax.																X	X												2	
(66) In the employ of fraternal beneficiary societies, orders, or associations which meet certain enumerated requirements providing for the payment of life, sick, accident, or other benefits to members thereof.																	X		X	X									3	

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(67) As a member of the board of directors, board of trustees, board of managers, or committee or any bank, building and loan, or savings and loan association which meets certain enumerated requirements.																	X			X									2	
(68) By agents of mutual fund brokers or dealers which meet certain enumerated requirements.																	X										X		2	
(69) In the employ of any veterans' organization chartered by an Act of Congress or of any auxiliary thereof which meets certain enumerated requirements.																	X												1	
(70) In the employ of a day camp whose camping season does not exceed twelve weeks in any calendar year and which service is not subject to the Federal Unemployment Tax Act.																				X									1	X[3]
(71) As a home worker performing work according to specifications furnished by the employer which meets certain enumerated requirements.																				X									1	
(72) As a golf caddy with certain enumerated exceptions.																						X							1	

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(73) By an individual for a person as a salesman, agent, or solicitor if the state law requires the individual to be registered or licensed to engage in the performance of the service and if the individual in the performance of the service is an independent contractor under common law rules and if the service is performed on commission.																								X					1	
(74) By an individual for employing unit as an agent in the wholesale distribution and sale of gasoline and other petroleum products which meets certain enumerated requirements.																									X				1	
(75) By an individual as a taxicab driver provided the commission is furnished evidence that such individual is excluded from tax by the Federal Unemployment Tax Act.																									X				1	
(76) By an individual as a "contract carrier courier driver" provided the commission is furnished evidence that such individual is excluded from tax by the Federal Unemployment Tax Act.																									X				1	
(77) Provided by a public Human Services Agency and such individual to an eligible recipient in the recipient's own home or the home of the service provided.																									X				1	
(78) Certain specially excepted services.																											x2			1	

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(79) Outside salespersons paid by commission which meet certain enumerated requirements.																	X										X			1	
(80) In connection with the raising or harvesting of mushrooms.																											X			1	
(81) By a certified shorthand reporter which meets certain enumerated requirements.																	X													1	

1. This state has this exclusion of service from the definition of "employment", but this exclusion is limited to employment performed in one or more of the following: (1) of this state or other state or instrumentality thereof for a hospital or institution of higher education in the state excluded under the Federal Unemployment Tax Act; (2) of a political subdivision of this State or a wholly owned instrumentality thereof; (3) of an organization exempt from income tax under the Internal Revenue Code provisions relating to exempt organizations; (4) of a religious, charitable, educational, or other organization if the service is excluded under the Federal Unemployment Tax Act provision; and (5) with a governmental entity if the service is excluded under the Federal Unemployment Tax Act. The state statute may also contain other unique exclusions which apply in these circumstances which are not shown on the chart.

2. More specific criteria are listed under this exclusion. See the appropriate state statute.

3. This exclusion is limited to only those services performed by a full-time student.

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY GEORGE DEUKMEJIAN, *Governor*

EMPLOYMENT DEVELOPMENT DEPARTMENT (916) 322-3214
P. O. Box 942880, Sacramento, CA 94280-0001

July 10, 1986

REFER TO:
94:567:mr

Ms. Linda K. Goto
Legislative Reference Bureau
State of Hawaii
State Capitol
Honolulu, Hawaii 96813

Dear Ms. Goto:

Thank you for your letter of June 19, 1986, in which you requested information on the State of California's experience in establishing standards for differentiating between an independent contractor and an employee.

Four Employment Tax Rulings published by the Department in 1985 are enclosed. They discuss services in the home health care, newspaper distribution, artists, and computer service industries, respectively. The intent of the rulings was to clarify the application of the common law rule of employment to factual situations in specific industries.

In each instance, the Department's staff worked with industry leaders as a joint study group analyzing the different ways in which services were performed within that industry. The team members then drafted standards in the terminology of the industry which served as guidelines to determine if workers should be classified as employees. We have found that this approach works well in those areas where employment relationships are not clear.

In addition to the rulings, we are also enclosing a copy of Regulation 4304-1, Title 22, California Administrative Code, Employee Defined, and Section 300-350 of the Department's Tax Status Guide which discusses employee/ Independent Contractor.

We hope that this material will be of assistance to you in your study and development of a uniform definition of independent contractor.

If you need further information, please contact me or Sue Placencia at (916) 322-7197.

Sincerely,

E. L. SULLIVAN
Deputy Director
Employment Tax Branch

Enc.

EMPLOYMENT DEVELOPMENT DEPARTMENT

EMPLOYMENT TAX RULING

EMPLOYMENT TAX BRANCH

NO. 85-2

DATE ISSUED: April 12, 1985

SUBJECT: APPLICATION OF COMMON LAW RULES IN DETERMINATION OF EMPLOYER-EMPLOYEE RELATIONSHIP IN THE HOME HEALTH CARE INDUSTRY

Information has been requested as to the proper application of the principles of common law relationships to individuals performing services in the Home Health Care Industry. It is the ruling of this Department that the following proposed addition to Title 22, California Administrative Code (CAC), be used when making status determinations involving situations within this industry. This proposed section is subdivision (d) of Section 4304-1 (CAC), and is to be applied in the same manner as the preceding subdivisions relating to the Real Estate and Temporary Service Industries. This ruling shall be effective until such time as the formal amendment is made to the California Administrative Code.

Proposed Regulation Language

Subdivision (d) of Section 4304-1:

(d) Application to Home Health Care Industry.

(1) While determination of whether a "home health care professional" is an employee or an independent contractor in the home health care industry will be made generally by the rules set forth in subdivision (a) above, specific application of those rules to services of a "home health care professional", as described in paragraph 2(C) below, in the home health care industry is set forth in this subdivision (d). In circumstances where a specific application is not interpreted by (d), that specific application will be determined by rules set forth in (a), above. No one or more of enumerated factors will necessarily indicate that a particular relationship exists.

(2) Definitions:

(A) The "home health care industry" covers any home health agency that provides for professional health services primarily for a client at a residence.

(B) A "home health agency" means a public agency, private organization or subdivision of such an agency or organization which is primarily engaged in providing skilled nursing and other therapeutic services on a part-time or intermittent basis to patients in a place of residence used as the patient's home under a plan of treatment as prescribed by the attending physician, which meets the requirements of Titles XVIII and XIX, P. L. 93-603(7).

(C) A "home health care professional" is a licensed, certificated, or registered person who is engaged by any home health agency in the home health care industry to provide any of the following professional health services primarily for a client at a residence, although services are occasionally rendered at health care facilities:

(i) Nursing (registered nurse)
(ii) Physical therapy (physical therapist)
(iii) Occupational therapy (occupational therapist)
(iv) Speech therapy (speech pathologist)
(v) Counseling (social worker and/or social work assistant)
(vi) Medical services (doctor)
(vii) Dental services (dentist)
(viii) Hearing related services (audiologist)
(ix) Nutritional services (dietitian)

(D) A "registered nurse" means a person licensed in the State of California by the Board of Registered Nurses.

(E) A "physical therapist" means a person licensed as such by the Physical Therapy Examining Committee under the authority of the Division of Allied Health Professions of the California Board of Medical Quality Assurance.

(F) An "occupational therapist" is a person who is a graduate of an occupational therapy curriculum jointly accredited by the Council of Medical Education of the American Medical Association and the American Occupational Therapy Association and shall possess a current registration with the American Occupational Therapy Association.

(G) A "speech pathologist" means a person licensed as such by the California Speech Pathology and Audiology Examining Committee under the authority of the Division of Allied Health Professions of the California Board of Medical Quality Assurance.

(H) A "social worker" means a person who has a Master of Social Work degree from a school of social work accredited or approved by the Council on Social Work Education and having one year of social work experience in a health care setting.

(I) A "social work assistant" means a person with a baccalaureate degree in the social sciences or related fields.

(J) A "physician" means a person licensed as a physician and surgeon by the California Board of Medical Quality Assurance or by the California Board of Osteopathic Examiners.

(K) A "dentist" means a person licensed as a dentist by the California Board of Dental Examiners.

(L) An "audiologist" means a person licensed as such by the California Board of Medical Quality Assurance.

(M) A "dietitian" means a person registered or eligible for registration as such by the American Dietetic Association.

(3) Basic Guidelines:

(A) Written contracts and agreements. Generally, when a home health care agency and a home health care professional agree to be independent contractors, an "independent contractor agreement" is signed.

When an independent contractor agreement is signed, it shall be evidence of the intent of the parties. However, if the terms of the agreement are not complied with in practice, the agreement shall not be evidence of the intent of the parties to the agreement.

(B) Home health care agency's policies. Since Title 22 of the California Administrative Code and Title 42 of the Code of Federal Regulations require the agency to ensure that treatment and care given to a client by a home health care professional are medically appropriate and actually required, it is expected that each agency will have policies which are required for the protection of clients and which must be binding upon all home health care professionals. Such policies, including the selection of treatment and/or forms required by government agencies shall not be considered evidence of an employment relationship between the agency and the home health care professional. An agency's policies relating to the manner and means of performing services that extend beyond those required by statute or government regulation or procedure shall be evidence of the exercise of a right to control the manner and means by which a home health care professional performs services.

(C) Assignments other than licensed activities. If a home health care professional is expected by the agency to fulfill assignments other than licensed activities or functions incidental thereto, it will be evidence of an employment relationship. Attendance at conferences on the multidisciplinary treatment of a particular patient or patients is not the type of activity which indicates employment. Attendance at initial orientation conferences for the purpose of assuring the agency that a home health care professional understands how to use and fill out clinical notes and medical record forms and billing forms required by law shall not be evidence of employment.

(D) Educational requirements, training and skills. Since an independent contractor is supposed to be a person in business for himself or herself, it would not normally be necessary to train that person to perform the functions of that person's business, nor would it appear appropriate for an agency, except as required by law, to require another independent businessperson to seek any particular educational requirements. Therefore, any requirements not required by law will be looked on as evidence of employment. Voluntary attendance at agency provided training shall not be evidence of employment.

(E) Office, office facilities, desk space, and equipment. While an agency may allow an independent home health care professional to use office facilities, any other than incidental use of such facilities on a voluntary basis shall be evidence of employment. Of particular significance would be assigned desks or support personnel, such as secretarial and clerical help, continuing use of a mail box or basket or other receptacle, and/or continuing use of facilities for transcription, typewriting, duplicating, or telephoning. Payment to the agency by the independent home health care professional for the

use of office facilities, desk space, and equipment shall be considered evidence of an independent relationship only if the charge by the agency bears a reasonable relationship to the actual value of the facilities used by the independent home health care professional. Furthermore, if the agency provides the home health care professional with equipment specifically designated by a physician or the home health care industry to be used to render services, this shall not be considered evidence of employment. Continuing provision to an independent home health care professional by an agency of clinical notes and medical record forms and billing forms mandated by government fiscal intermediaries shall not be considered evidence of employment.

(F) Business cards and advertising. The fact that the agency's name appears on business cards used by a home health care professional shall be considered evidence of an employment relationship. A home health care professional may advertise for purposes of his or her licensed activity at his or her own expense or by cost-sharing with an agency without raising an inference of employment.

(G) Geographical territory. A provision in a contract limiting the specific geographical territory in which an independent home health care professional will perform services to the territory for which the agency is licensed shall not be evidence of employment.

(H) Working hours. Any requirement of a minimum or maximum time limitation upon the hours to be worked by an independent home health care professional shall be considered evidence of an employment relationship. However, any requirement of immediate response in identified medical emergencies shall not be considered evidence of employment. While no inferences shall be drawn from a part-time relationship, any requirement that an independent home health care professional perform his or her services at any particular time or in any particular order during the day shall be considered evidence of employment. Hours of performance shall not be considered evidence of employment if necessitated by the particular or unique needs of the patient. An agency may properly expect an independent contractor to work diligently and to use his or her best efforts in performance of licensed activities.

(I) Method of payment. While payment on a per visit basis only shall not create an inference of either an employment or independent contractor relationship, payment by salary, or guaranteed minimum compensation against visits, unless such advances are secured by promissory notes or other normally acceptable arrangements for repayment by the home health care professional, shall be considered evidence of an employment relationship.

(J) Benefit plans. The fact that an agency allows an independent home health care professional to participate in a health, medical, life insurance, or retirement insurance program shall not be considered evidence of an employment relationship if the independent home health care professional is required to, and in fact does, pay all premiums necessary for participation in such program. Any adjustments in compensation to the home health care professional for payment for partipation in such benefit plans shall be evidence of employment.

(K) Workers' compensation insurance. For the purposes of this section, the fact that an agency carries workers' compensation insurance on all home health care professionals, whether in an employment or independent contractor relationship, shall not create an inference of employment, if in an agreement between the agency and the independent home health care professional it is clearly stated that Workers' compensation insurance is being carried by the agency for its own benefit or for the mutual benefit of both parties.

(L) Insurance. A contract requirement that a home health care professional provide proof to the agency of malpractice insurance, independently paid for by the independent home health care professional, shall be evidence of an independent relationship. It is not evidence of employment if the agency carries blanket personal liability and property damage insurance, or malpractice insurance on all home health care professionals regardless of whether they are employees or independent contractors.

(M) Business licenses. If an independent home health care professional acquires and pays for a county or municipal business license, this shall be evidence of an independent relationship. If the agency acquires and pays for such a license for the home health care professional, it shall be evidence of employment.

(N) Combination operation (independent home health care professionals and employees). When an agency engages the services of home health care professionals, some of whom are considered employees and some of whom are considered independent home health care professionals, the lack of distinctly separate arrangements between employees and independent home health care professionals for the purpose of performing services shall be considered evidence that all home health care professionals are employees. Distinctly separate arrangements shall be decided on a case-by-case basis.

(O) Termination. When, by terms of an agreement or by practice of the agency, the relationship between the agency and a home health care professional may be unilaterally terminated without 30 days notice, it shall be evidence of employment. Termination for good cause shall not be considered evidence of employment or an independent relationship.

(P) Form 1099 (Federal) and Form 599 (State). If an agency does not provide Internal Revenue Form 1099 and Franchise Tax Form 599 to home health care professionals considered by the agency to the independent contractors, and submit copies of such forms to the Internal Revenue Service and Franchise Tax Board as required by law, it shall be evidence of employment.

(Q) Clinical notes and medical records reporting requirements. Pursuant to Title 22, Sections 74697 and 74719(b)(8), health care professionals are required to provide the agency with specific treatment plans for patients and to update the clinical notes and medical records of patients on a regular basis. Therefore, any requirement by the agency that the health care professional maintain and provide these updated clinical notes and medical records on a regular and timely basis shall not be evidence of employment. Submission of such documents for review by the agency as required by law shall not be evidence of employment.

(R) Review and evaluation. Reviewing and evaluating home health care professionals for the purpose of determining whether patients received proper care shall not be evidence of employment. Renewal of contracts with home health care professionals shall be done in conjunction with a contract effectiveness review in accordance with Title 22 of the California Administrative Code.

EMPLOYMENT DEVELOPMENT DEPARTMENT

EMPLOYMENT TAX RULING

EMPLOYMENT TAX BRANCH

NO. 85-3

DATE ISSUED: April 12, 1985

SUBJECT: APPLICATION OF COMMON LAW RULES IN DETERMINATION OF EMPLOYER/EMPLOYEE RELATIONSHIP IN THE NEWSPAPER DISTRIBUTION INDUSTRY

Information has been requested as to the proper application of the principles of common law relationships to individuals performing services in the Newspaper Distribution Industry. It is the ruling of this Department that the following proposed addition to Title 22, California Administrative Code, be used when making status determinations involving situations within this industry. This proposed section is subdivision (e) of Section 4304-1 (CAC) and is to be applied in the same manner as those subdivisions relating to the Real Estate and Temporary Service Industries. This ruling shall be effective until such time as the formal amendment is made to the California Administrative Code.

Proposed Regulatory Language

Subsection (e) of Section 4304-1:

(e) Application to Newspaper Distribution Industry.

(1) While determination of whether a carrier is an employee or an independent contractor in the newspaper distribution industry will be determined generally by the rules set forth in subdivision (a) above, specific application of those rules to services in the newspaper distribution industry are set forth in this subdivision (e). In circumstances where a specific application is not interpreted by (e), that specific application will be determined by the rules set forth in (a), above. No one or more of enumerated factors will necessarily indicate that a particular relationship exists.

(2) Definitions:

(A) A "newspaper" is a newspaper of general circulation as defined in Government Code Section 6000 et seq., and any other publication circulated to the community in general as an extension of or substitute for that newspaper's own circulation, whether that publication be designated a "shoppers' guide," as a zoned edition, or otherwise.

(B) A "publisher" is the natural or corporate person that manages the newspaper's business operations, including circulation.

(C) A "newspaper distributor" is a person or entity that contracts with a publisher to distribute newspapers to the community.

(D) A "principal" is, for the purposes of these regulations, a person or entity that engages the services of a carrier to effect the actual delivery of the newspaper to the customer or reader. The principal of a carrier may be either a publisher which effects its own distribution, or a newspaper distributor.

(E) A "carrier" is a person who effects physical delivery of the newspaper to the customer or reader. He or she is an agent of a principal who may be either a publisher or a newspaper distributor. He or she may be, depending on guidelines listed below, either an employee or an independent contractor with respect to that principal.

(F) A "route" is a geographic sector of the community, or a specified list of customers, to which a carrier effects deliveries of the newspaper.

(3) Basic Guidelines.

(A) Carriers under age 18. A carrier is not in employment of the principal if he or she is under the age of 18 unless his or her principal occupation is regular full-time work and his or her attendance at school is incidental to full-time employment, in which case the carrier's status as employee or independent contractor shall be determined by the guidelines listed below.

(B) Sellers of newspapers. A carrier is not in employment of the principal if his or her service involves the sale of newspapers to ultimate consumers under an arrangement by which the newspapers are to be sold by him or her, his or her compensation being based on the retention of the excess of such price over the amount at which the newspapers are charged to him or her, whether or not he or she is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers turned back.

(C) Written agreements. A written agreement signed by both parties shall be evidence of intent. However, if the terms of the agreement are not complied with in practice, the agreement shall not determine the intent or the relationship of the parties. A written agreement to the extent it provides for negotiation of terms, including fees, expense adjustments and other items of compensation to the carrier, shall tend to indicate the existence of an independent contractor relationship. The outcome of any such negotiations shall not be evidence of the existence of either an employment or an independent contractor relationship.

A provision prohibiting the carrier from affixing to, or inserting in, the newspaper any materials unauthorized by the principal, or from making use of the principal's subscriber list without the principal's consent, shall not be evidence of employment or independence.

A provision by which the carrier holds the principal harmless from liability shall be evidence of independence.

A provision whereby the carrier agrees to post a bond with the principal at the carrier's expense shall be evidence of independence unless the principal increases the carrier's remuneration to pay the cost of such bond.

(D) Compensation. Compensation to the carrier in the form of an hourly rate shall be evidence of an employment relationship. Compensation to the carrier in the form of a flat fee per route or per copy delivered shall be evidence of an independent contractor relationship.

Other bases for compensation, combining factors of distance, difficulty and expense of delivery, shall be evidence of an employment relationship to the extent that such terms are non-negotiable, and of an independent contractor relationship to the extent that they are negotiable.

Bonuses which are paid as an incentive to the maintenance or improvement of customer satisfaction on the carrier's route, such as might be indicated by a slowed rate of cancellations or an increased rate of starts, shall not be evidence of employment or independence.

(E) Benefits plans. The fact that a principal provides the opportunity for a carrier to participate in a health, medical, life insurance, or retirement insurance program shall not be evidence of an employment relationship if the carrier is charged for premiums necessary for participation in such program. Any adjustment in remuneration of the carrier to compensate him or her for the payment for participation in such benefits plans shall be evidence of employment.

(F) Conditions of service. The fact that a principal and a carrier agree that the carrier shall deliver a newspaper to each customer on his or her route in a timely manner and in a readable condition shall not be evidence of an employment relationship as long as other factors indicate the absence of control by the principal of the manner and means of such deliver.

Timeliness of delivery may be indicated by agreement for delivery or completion of a route by a certain hour.

Readability may be indicated by agreement for protecting the newspaper against damp conditions or by placement on the customer's premises, as the situation may require, in a location readily accessible to the customer and protected from theft, animals or moisture.

The fact that carriers are assigned routes by the principal and that such assignments are not negotiated with regard to remuneration, shall be evidence of employment. However, if a route is offered to a carrier and the remuneration for servicing the route is negotiable, it shall be evidence of independence.

The fact that the carrier is required to maintain a subscriber list and update such list and provide copies to the principal upon request for the benefit of the principle shall not be evidence of either an employee or independent contractor relationship.

Where the principal requires the carrier to deliver billings without agreement on compensation to the subscribers, such requirement shall be evidence of employment; however, where the carrier is given the option of delivering billings for additional remuneration, such evidence shall tend to indicate independence. The fact that the principal bills the subscribers and is responsible for collecting the accounts receivable shall not be evidence of employment or independence.

The fact that the principal provides transportation for the carrier's delivery of the newspaper, at less than a fair market cost to the carrier, shall be evidence of employment.

(G) Customer complaints. Customer complaints as to missed delivery, late delivery or delivery in an unreadable condition may be taken by the principal and referred to the carrier without giving rise to the inference of either an employment or an independent contractor relationship. The fact that the principal requires the carrier to respond to or correct such problems shall tend to indicate an employment relationship. The fact that the principal responds to or corrects such problems directly and charges the carrier with a penalty or with the principal's cost of

corrective action shall tend to indicate the existence of an independent contractor relationship; the absence of such a charge will be evidence of employment. The fact that the principal gives the carrier the option of either personally correcting the problem or being charged with a penalty or with the principal's cost of correction shall tend to indicate an independent contractor relationship.

(H) Termination. When, by terms of an agreement or by practice of the principal the relationship between the principal and carrier may be unilaterally terminated without 30 days' notice, it will be evidence of employment. A right of termination without such notice for breach of statutory or regulatory requirements, for the protection of the public or for a material breach by the carrier of the terms and conditions of service including, but not limited to, abandonment or complete failure to deliver a route, or late, incomplete or damaged delivery over a period of time, or other significant interference with customer relationships, shall not be evidence of employment.

(I) Substitutes. The fact that the principal provides substitute carriers for the regular carriers shall be evidence of employment. However, if the principal provides a substitute in an emergency situation and charges the carrier for such delivery, it is evidence of independence. The fact that the carrier can obtain his or her own substitute without the principal's approval shall be evidence of independence. If a substitute carrier is paid directly by the principal in nonemergency situations, whether the substitute is chosen by the carrier or principal, it shall be evidence of employment.

(J) Recruitment advertising and applications. Terminology in carrier recruitment advertising and carrier application forms will be evidence of independence or employment.

(K) Workers' Compensation Insurance. The fact that a principal carries workers' compensation insurance on all carriers, whether in an employment or independent contractor relationship, shall not create an inference of employment or independence.

EMPLOYMENT DEVELOPMENT DEPARTMENT

EMPLOYMENT TAX RULING

EMPLOYMENT TAX BRANCH

NO. 85-4

DATE ISSUED: November 12, 1985

SUBJECT: APPLICATION OF COMMON LAW RULES IN DETERMINATION OF EMPLOYER-EMPLOYEE RELATIONSHIPS TO ARTISTS

Information has been requested as to the proper application of the principles of common law relationships to individuals performing services as artists. It is the ruling of the Department that the following proposed addition to Title 22, California Administrative Code (CAC), be used when making status determinations involving situations within this industry. This proposed section is subdivision (f) of Section 4304-1, CAC, and is to be applied in the same manner as preceding subdivisions. This ruling shall be effective until such time as the formal amendment is made to the California Administrative Code.

Proposed Regulation Language

Subdivision (f) of Section 4304-1:

(f) Application to services by artists:

(1) Determinations of whether an artist is an employee or an independent contractor will be determined generally by the rules set forth in (a) above. This subdivision (f) will describe application of those rules to artists. In situations where a specific application is not interpreted by (f), that specific application will be determined by the rules set forth in (a) above. No one or more of the enumerated factors will necessarily indicate that a particular relationship exists.

(2) An artist is an individual who creates, performs, or interprets works in the visual, literary or performing arts.

(3) Application of the secondary factors described in (a) above to artists follow:

(A) An artist being engaged in a separately established business in the arts or who holds himself or herself out to the public as an entrepreneur in the arts is evidence of independence. Any of the following circumstances will be evidence that an artist is engaged in a separately established occupation or business:

(i) Performances, publications and exhibitions, including, but not limited to film, video tapes, recordings and visual arts.

(ii) Similar services for others at or about the same time.

(iii) Advertising in print or electronic media or any other directory; public recognition, such as, awards, reviews, commissions, fellowships; significant reputation on which the artist can rely for income.

(iv) Having an artist's agent or representative.

(v) Business cards, brochure and stationery demonstrating that one is available for work as an independent person whether or not they have registered a fictitious business name.

(vi) Substantial investment in facilities, tools, equipment, or inventory of products related to the artist's occupation or business.

(B) The following factors will describe whether particular artists usually perform services under the direction of a principal without supervision. However, evidence of control could separate a particular artist from the usual circumstances described below.

(i) Actors, dancers and musicians in a performing company are usually under supervision.

(ii) Actors, dancers and musicians as headlined artists are usually not under supervision.

(iii) Small groups performing under a group name are not usually under supervision.

(iv) Artists performing services in an institutional setting, such as an artistic performance or teaching, do not usually perform their services under supervision as to the specific artistic service, but the circumstances surrounding the specific artistic service may be subject to control. For whether such control is evidence of employment, see paragraph I, below.

(v) Artists performing services under a commission, such as a portrait painter or composer, are not usually under supervision.

(C) Artists possess knowledge of techniques, artistic processes, and methodologies unique to the performance of the arts. Evidence of this specialized knowledge and skill is demonstrated by personal exhibitions, significant studies in a recognized institution of higher learning or with a master teacher or is demonstrated through a substantial body of work which has been reviewed and approved or recommended by a panel of peers or experts in the artist's given field or discipline. A high degree of specialized knowledge and skill is evidence of independence.

(D) Facilities typically supplied by a principal to an artist are large items, such as space, photo equipment, sound equipment, lights, stage facilities, and costumes. The provision of space, such as an auditorium or classroom, by the principal is not evidence that the artist is an employee unless it is likely that the principal will provide instruction in its use. The provision by the principal of other such large items is evidence of employment. Where the facilities necessary for performance of an artistic service are provided by a principal because they are of a type required by law, the provisions of the facilities is not evidence of employment.

Tools of the trade, such as toe shoes, paints and brushes, hand cameras, tuxedo for a symphony, specific costume for a band or singer or dancer are generally supplied by the artist. If the artist provides the tools of the trade, it does not raise an inference of independence or employment. If an artist provides tools or equipment that are unique, it raises an inference of independence.

Tools of the trade provided by the principal to an artist in lieu of pay do not raise an inference of employment or independence. If the principal provides the tools of the trade and not as part of the pay to the artist, it is evidence of employment.

(E) The length of time for which the services are performed by an artist may vary significantly. Services directed to an end result, such as a portrait or a finalized musical composition, which would reasonably be expected to require the time for which services are performed is not considered to be continuing and would not be evidence that the artist is an employee. Performance of services by an artist at regular times or on a regular schedule imposed by the principal for any period of days, weeks or months is evidence that the artist is not independent.

(F) When an artist performs services and payment is measured by the time of services, such as hour, day, week, month, etc., it is evidence of employment. Payment by the job or piece of production is evidence of independence. If payment is determined by the artist or through bona fide negotiations, it is evidence of independence. If the payment is determined by the principal or negotiations for the amount of payment are not truly bona fide, it is evidence of employment.

(G) Whether or not the services performed by the artist are part of the regular business of the principal for whom the services are performed or whether the services are not within the regular business of the principal depends upon the purpose for which the services are being performed. Services that further the functions that are normal to the principal's business will be considered within the purpose of the principal and will be evidence of employment.

The purposes of government and nonprofit entity operations are business purposes within the meaning of this subdivision. The purposes of such institutions and organizations are generally artistic, therapeutic, recreational, religious, charitable, educational, or for rehabilitation. Whether the purposes of a particular institution or organization are furthered by the services of an artist depends on the circumstances surrounding the institution and the services performed.

Where the services are to carry out functions normally provided by the business, institution or organization, it will be evidence that the services are performed by an artist as an employee. Where the purpose of the product of creativity is above or beyond or different than the purpose of the business institution or organization for which the services are performed, it is evidence of independence. For example, in educational institutions where

services are performed to carry out adopted curriculum, there is evidence of employment. Where services are outside and beyond the adopted curriculum there is evidence of independence.

(H) Belief of the parties regarding the relationship they intend may be determined by written agreement. The terminology used in an agreement between an artist and the principal for whom the services are performed is not conclusive of the relationship, even in the absence of fraud or mistake. On the other hand, such an agreement is evidence of the relationship intended by the parties to the agreement. If the agreement provides for the relationship in which services are to be performed for a principal in such a way that the principal expresses only in the desired result and abandons the right to control the manner and means by which the result is achieved, such an agreement is evidence that the relationship intended was not that of employer and employee if the terms of the agreement are in fact carried out. If the factual relationship between the parties is different than that provided by the agreement it is evidence that the agreement does not express the intention of the parties.

If the agreement between the artist and the principal for whom the services are performed specifically denies an employment relationship, but contains provisions which allow for the exercise of control by that principal over the manner and means of performing the services, the provision denying the employment relationship does not express the intent of the parties.

(I) Exercise of control is evidence of the right to control. That the services must be performed on designated premises or in a designated place or structure or structures by itself is not evidence of control. If the services are performed upon the premises of the principal for whom the services are performed and that principal is in business and the artist uses the facilities of the principal in performing the services in compliance with policies or rules for the conduct of workers on the premises, it would be evidence that the artist was performing services as an employee. On the other hand, if the particular rules or policies of the principal are made only for the general safety or security of the premises, and would be equally applicable to individuals whether they were clearly independent contractors or employees, adherence to such policies, rules or customs would not raise the inference that the artist was performing services as an employee.

(J) Services performed by an artist for a principal that is in business which are in furtherance of the purpose of the principal's business, as described in (G) above, are evidence that the artist is performing services as an employee. Services performed for an individual not in business do not raise an inference of employment.

(K) If the artist's services can be terminated at will by the principal or the artist without cause related to the conduct of the principal or the artist and without the expectation of liability for damages for breach of contract, it is evidence of employment.

(L) Designations of status contained in collective bargaining agreements shall be considered when and to the extent required by law.

(M) When an artist receives remuneration for specific services from more than one principal or from a principal for whom the services are not directly performed, and the services are in employment, all remuneration is wages in employment. Whether a principal is an employer, regardless of the period of time for which the services are performed, will be determined pursuant to Section 4304-1(c) of Title 22 of the California Administrative Code. Payment of wages by a principal other than the employer is payment paid by an agent of the employer.

E L Sullivan

E. L. SULLIVAN
Deputy Director
Employment Tax Branch

EMPLOYMENT DEVELOPMENT DEPARTMENT

EMPLOYMENT TAX RULING

EMPLOYMENT TAX BRANCH

NO. 85-5

DATE ISSUED: December 31, 1985

The Department issues Employment Tax Rulings as instructions to department staff on various tax-related issues. The rulings are furnished to employers and other interested parties for information. While they follow prior court decisions, Unemployment Insurance Appeals Board decisions and other legal opinions, Employment Tax Rulings do not have the force and effect of law.

SUBJECT: APPLICATION OF COMMON LAW RULES IN DETERMINING EMPLOYER-EMPLOYEE RELATIONSHIPS IN THE COMPUTER SERVICES INDUSTRY

Information has been requested regarding the proper application of the principles of common law applicable in determining employer-employee relationships to individuals performing services in the computer services industry.

This ruling shall be effective for pay periods ending on and after January 1, 1986. The text of this ruling will be set forth in proposed regulations for submission to the Office of Administrative Law.

(1) While determinations of whether a computer consultant is an employee or an independent contractor in the computer services industry will be determined generally by the rules set forth in Section 4304-1(a), of Title 22 of the California Administrative Code (CAC), specific application of those rules to circumstances in the computer services industry are set forth in this ruling. In circumstances where a specific application is not interpreted by this ruling, that specific application will be determined by the rules set forth in Section 4304-1(a) Title 22, CAC. No one or more of the enumerated factors will necessarily indicate that a particular relationship exists.

(2) A "computer consultant" is an individual who performs various computer related services, including, but not limited to:

(A) Software development and design;
(B) Services for computer services bureaus;
(C) Technical leadership and advice in computer related services;
(D) Programming for computer applications;
(E) System procedures;
(F) System design;
(G) Maintenance of software;
(H) Training of staff in computerized systems and other computer applications.
(I) Computer related technical writing.
(J) Software services in conjunction with the sale or installation of computer hardware.

(3) A "broker" is an individual or firm that refers a computer consultant to a principal and often pays the computer consultant after payment to the broker by the principal of an amount including a broker's fee, whether or not identified as a fee. Whether a broker is the employer of the computer consultant will be determined by the rules set forth in subdivision 4304-1(c) Title 22, CAC regardless of whether the services are temporary or continuing.

(4) A "principal" is an individual or entity for whom or which the computer consultant performs services. Whether the principal is the employer of the computer consultant will be determined by the rules set forth in subdivision 4304-1(c) Title 22, CAC regardless of whether the services are temporary or continuing.

(5) Application of the secondary factors listed in Subdivision 4304-1(a) Title 22, CAC to the computer services industry:

(A) Whether or not the one performing the services is engaged in a separately established occupation or business.

Factors indicating a separately established occupation or business are:

(i) Use of a bonafide corporate form;
(ii) Use of the partnership or unincorporated association form;
(iii) Evidence that an individual is self-employed, such as:
1. Advertising with business cards, stationery, listing in industry directory, or other identifiable means;
2. Registration of a fictitious business name, such as a dba;
3. Marketing unique individual services through an agent or broker;
4. Business licenses;
5. Membership in an independent computer consulting or trade association.
6. Maintaining the right to reserve or assign copyright or patent derived from the services performed;
7. Acceptance by the computer consultant of liability for injury or damage from the performance of services;
8. Substantial investment in facilities needed to perform the services or in a product. (Expenditure for a vehicle used for transportation is not considered a substantial investment.)

9. Maintaining an identifiable work location used exclusively for computer related services.

10. Continuing time and financial investment in training, seminars, conferences and technical presentations related to a computer consultant's ongoing business.

11. Substantial investment in a library of professional technical publications, books, manuals and other publications relating to computer consulting.

12. Performance of services for more than one principal at or about the same time.

If a computer consultant has a separately established business of computer consulting and services in question are performed through the business, or is self-employed as a computer consultant, it is evidence that he or she is performing computer consulting services as an independent contractor.

(B) The kind of occupation, with reference to whether in the locality, the work is usually done under the direction of a principal without supervision.

Computer consultant services may be of a nature that precludes or does not require control of the technical performance of the services. Computer consultant services are generally subject to control regarding the manner of using the premises or facilities and the integration or application of the product of the services into the computerized system.

A "standard walkthrough", is a conference held from time to time with the principal or his or her staff or with other computer consultants wherein the computer consultant's technique and product are discussed or critiqued and unintended technical errors are identified. Walkthroughs, inspections, and performing services as part of a team are recognized in the industry as a standard way to achieve proper integration and correct application of results of computer consultant services. When the principal or his or her staff do not participate in a walkthrough, it is not evidence of employment nor independence.

When the principal or his or her staff participate in a walkthrough and may require changes by the computer consultant in the work product that is the subject of the walkthrough, except for unintended technical errors, it is evidence of employment.

If the services are performed upon the premises of a principal and the computer consultant uses the facilities of the principal in performing the services and the principal has the right to require compliance with policies or regulations for the conduct of workers on the premises, it is evidence that the computer consultant is an employee. If the rules are only for the general safety, or security of the premises, and do not relate to the manner and means of performing the services in question, adherence to such rules is not evidence that the consultant is an employee.

If the computer consultant has only agreed to accomplish a desired result, agreement to follow standards or policies for the handling of the result upon completion, such as distribution, storage, transportation, or display, or conditions that provide

for future maintenance of the work result is not evidence of employment.

If the circumstances surrounding the performance of the technical aspects of the services subject the consultant to the direction and control of the principal for business purposes, such as employee relations, economy or convenience of operations, technical standards or quality control, they are evidence of employment. Therefore, if the principal requires the computer consultant to be present at specific hours, adhere to office procedures, use specified clerical and technical support staff, use specified computer equipment, office space or facilities, or technical resources, it is evidence that the consultant is performing services as an employee. However, where the requirements are only for the safety and security of the premises or facilities, national security, or to prevent industrial espionage, they are not evidence of employment or independence.

(C) The skill required in performing the services and accomplishing the desired result.

While computer consultants are not normally required to be licensed or provide evidence of academic qualification, the skill required may be as high or higher than the level of the environment in which the services are performed. Regardless of the skill level, the services of a computer consultant can be unique to that of the work environment. When the skill and services of a computer consultant are similar to those provided by the principal's employees, it is evidence that the computer consultant is an employee. When the computer consultant's skill and services are unique to the work environment, it is evidence of independence.

(D) Whether the principal or person providing the services supplies the instrumentalities, tools, and the place of work for the person doing the work.

In the computer consulting industry the principal usually provides the premises and the large computer equipment necessary to perform the services. They also provide operating manuals and standards relative to the system in connection with which the computer consultant is performing the services. The provision of such facilities and equipment are not evidence of employment or independence.

The principal may also provide office procedure and policy manuals, desk or office space, clerical support, mail distribution and receptacle, office supplies, and telephone. While a principal may allow an independent computer consultant to use such office facilities and support, other than incidental use on a voluntary basis will be evidence of employment.

When such facilities are provided in the same manner as to the principal's recognized employees, it is evidence that the computer consultant is performing services as an employee. When the computer consultant performs services along with or along side recognized employees, the lack of distinctly separate circumstances for the purposes of performing the services between the recognized employees and the computer consultant will be

evidence that all are performing services as employees.

In some cases the computer consultant will provide his or her own training material, microcomputer, modem, and other personal facilities or equipment. The services may also be performed in the consultant's home or premises. The value and uniqueness of the materials, equipment and facilities provided by the computer consultant and whether they are in fact used to perform the services will determine whether they are tools of the trade or facilities for performance of the service.

(E) The length of time for which the services are performed to determine whether the performance is an isolated event or continuous in nature.

Computer consultant services may involve a single or isolated project, the end result of which may not be achieved for extended periods of time. Therefore, whether the services are considered continuous in nature or for an isolated event must be determined from the circumstances and the initially stated purpose of the service.

Agreements to perform computer consultant services may be documented by purchase order. Purchase orders generally specify that services will be performed during a period of months. A purchase order can specify periods in excess of one year, but most often the period is for three to twelve months. There is often an expectation that the purchase order will be renewed or extended.

Some purchase orders do not specify the number of hours of services to be performed, but set forth a maximum amount of money that will be paid for the service. The hours are generally recorded and billed to the principal or a broker on an invoice prepared by the computer consultant performing the services. The hourly rate is generally used because the computer consultant must integrate his or her services into the environment of the principal, adjust to all of the interruptions and unexpected exigencies of the environment and because of the uncertainty of the method and the precise cost of producing the desired result.

Where an agreement or purchase order is renewed at its termination, it is evidence of continuing relationship. It will not be evidence of a continuing relationship if the sole reason for the purchase order's termination and renewal is the end of a fiscal year of the principal or computer consultant or unless it is discovered that the time allowed to accomplish the desired result originally contracted for was insufficient when the original agreement or purchase order was executed.

Some computer consultants may have one or more agreements or purchase orders in existence concurrently which provide for the computer consultant to render services from time to time as needed. The duration of such agreements shall not be evidence of employment.

A continuing relationship is evidence of employment. A relationship of short duration or for a single transaction which is not continuing in nature is evidence of independence.

(F) The method of payment whether by the time, a piece rate, or by the job.

Because of the circumstances in the computer industry, described in (E) above, computer consultant remuneration is typically computed on an hourly rate regardless of whether the computer consultant is clearly an employee or clearly an independent contractor. Therefore, in the computer industry, payment computed on an hourly rate is neither evidence of employment nor independence.

An employer typically provides a variety of benefits, such as paid vacations, health insurance, and continued education to employees. If the principal supplies benefits such as paid vacations, health insurance, or pays consultant for time spent in general professional education related to consultant's ongoing business, it is evidence of employment.

However, additional training, specific to a contract, may be required to complete a specific contract. Payment by a principal for time spent by a computer consultant in training necessary to the completion of performance under a specific agreement is not evidence of employment nor independence, if it is anticipated and stated as part of the initial agreement, its need is discovered as necessary to complete the result intended by the initial agreement within a reasonable time from entering the agreement or training becomes necessary to complete the originally contracted for desired result because of a new, unforeseen development in the principal's computer environment. However, if it is not anticipated and stated as part of the initial agreement, its need is not discovered within a reasonable time thereafter or the need is not required by a new, unforeseen development in the principal's computing environment which would preclude the originally contracted for desired result, payment by a principal to a computer consultant for time spent in training is evidence of employment.

In the computer services industry, billing is generally by invoice of the computer consultant stating the hours for which services were performed against an agreement or purchase order setting forth an hourly rate and a total amount committed for payment of the services in question. The agreement or purchase order generally does not set forth the number of hours that the individual is intended to perform services.

Where the hourly rate is negotiated between the principal and the consultant, it is not evidence of an employee or independent relationship. Where the hourly rate is set by the principal, it is evidence of employment and when the hourly rate is set by the consultant it is evidence of independence.

Systematic and regular payment by the week, semi-month, or month is evidence of employment. Payment within a reasonable time of invoice submission by the consultant is evidence of independence. When the time for payment on invoices of the computer consultant is substantially the same as for recognized employees of the principal submitting time cards or other work records it indicates that the invoicing is similar to a time card

or other work record and is evidence of employment. If the consultant is paid by a broker only after that broker is paid by the principal, it is evidence of independence. Advances against payments are evidence of employment, unless such advances are secured by contractual obligation or other normally acceptable arrangement.

(G) Whether or not the work is part of the regular business of the principal or whether the work is not within the regular business of the principal.

Procedures or systems that satisfy the business needs of the principal are part of the principal's regular business. For example, if the procedures or systems provide an accounting process that is necessary for the operation of a bank or a retailer, those processes are part of the business of the bank or retailer. However, services of a short period to install or create a hardware or software system for a principal are not services in the regular course of the principal's business. In the same way services of a short period of time to adjust software to the needs of the principal are not in the regular course of the principal's business.

On the other hand, operation and use of a system and software used by a principal is generally in the regular course or a part of the principal's business. Continued operation, use, maintenance and adjustment of data or software to satisfy continuing needs or variations in the conduct of business are in the regular course of the principal's business.

When services of a computer consultant are a part of the regular business of the principal, it is evidence of employment. When the services are not within the regular business of the principal, it is evidence of independence.

(H) Whether or not the parties believe they are creating the relationship of employer and employee.

The terminology used in an agreement between a principal and a computer consultant is not conclusive of the relationship, even in the absence of fraud or mistake. On the other hand, such an agreement is evidence of the relationship intended by the parties to the agreement. If the agreement provides for a relationship in which services are to be performed for a principal in such a way that the principal expresses an interest only in the desired result and abandons the right to control the manner and means by which the result is achieved, such an agreement is evidence that the relationship intended was not that of employer and employee.

If the factual relationship between the parties is different than that provided by the agreement, it is evidence that the agreement does not express the intention of the parties and an employer-employee relationship does in fact exist. If an agreement between a computer consultant and a principal specifically denies an employment relationship, but contains provisions which allow for the exercise of control by the principal over the manner and means of performing the service, the provision that an employment relationship does not exist does not express the intent of the parties that their relationship is

one of independent contractors.

Purchase orders are agreements for the performance of services and usually contain four elements: maximum payment, hourly rate, a starting date and an ending date. The purchase order may or may not specify the service for which payment will be made. If the purchase order or other form of agreement does not specify the desired result and only specifies all or some of the above four elements, it is an agreement to perform services and is evidence of employment. If it specifies a desired result without specifying the manner in which the result is to be achieved, it is evidence of independence.

(I) The extent of actual control exercised by the principal over the manner and means of performing the services.

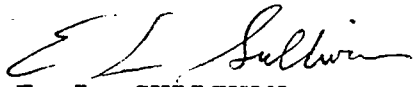
Since computer services are generally performed on the premises and using the facilities of the principal, an individual performing computer services must usually comply with standards and procedures of the principal. The computer consultant is normally provided a password for access to the computer, is designated specific terminals for use at specific times, is required to comply with procedures built into the system, administrative procedures, and existing schedules for use of equipment that can change because of the principal's workload and facilities availability. Requirements relating to access to the computer can be a password or a predetermined time permitting use of the computer or other facilities because of the principal's schedules.

If the requirements of the principal relate only to access to the computer upon which the services are performed, information or procedures necessary to carry out a specific result or are security requirements of the principal, they are not evidence of employment or independence.

Administrative requirements of the principal that are evidence of the right to control may be the designation of a desk at which to work, procedures for duplicating, use of telephones, receipt and distribution of outside or in-house mail, distribution of other materials, etc.

Where the principal has the right to instruct the consultant to perform services other than toward a specific desired result contemplated in the agreement to perform services, it is evidence of employment.

(J) Normally, all principals are in business.



E. L. SULLIVAN
Deputy Director
Employment Tax Branch

DIVISION 2.5. WITHHOLDING TAX ON WAGES

CHAPTER 1. GENERAL PROVISIONS

4304-1. Employee Defined.

(a) Rules Generally Applicable to Determinations of Employment. Whether an individual is an employee for the purposes of Section 13020 of the code will be determined by the usual common law rules applicable in determining an employer-employee relationship. Under those rules, to determine whether one performs services for another as an employee, the most important factor is the right of the principal to control the manner and means of accomplishing a desired result. If the principal has the right to control the manner and means of accomplishing the desired result, whether or not that right is exercised, an employer-employee relationship exists. Strong evidence of that right to control is the principal's right to discharge at will, without cause.

(1) If it cannot be determined whether the principal has the right to control the manner and means of accomplishing a desired result, the following factors will be taken into consideration:

(A) Whether or not the one performing the services is engaged in a separately established occupation or business.

(B) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal without supervision.

(C) The skill required in performing the services and accomplishing the desired result.

(D) Whether the principal or the person providing the services supplies the instrumentalities, tools, and the place of work for the person doing the work.

(E) The length of time for which the services are performed to determine whether the performance is an isolated event or continuous in nature.

(F) The method of payment, whether by the time, a piece rate, or by the job.

(G) Whether or not the work is part of the regular business of the principal, or whether the work is not within the regular business of the principal.

(H) Whether or not the parties believe they are creating the relationship of employer and employee.

(I) The extent of actual control exercised by the principal over the manner and means of performing the services.

(J) Whether the principal is or is not engaged in a business enterprise or whether the services being performed are for the benefit or convenience of the principal as an individual.

(2) The factors enumerated in (1) above are indicia of the right to control. Where there is independent evidence that the principal has the right to control the manner and means of performing the service in question it is not necessary to consider the above enumerated factors. When those factors are considered, a determination of whether an individual is an employee will depend upon a grouping of factors that are significant in relationship to the service being performed.

For personal income tax withholding purposes only, whether an individual provides equipment in the performance of services for remuneration shall not be considered in a determination of whether that individual is an employee.

(A) Instrumentalities and facilities. Whether the principal or worker provides the instrumentalities or facilities necessary to accomplish the work would have little relevance if those instrumentalities are not significant in nature. Examples are hand tools commonly provided by workers or an automobile for personal transportation. On the other hand, if they were of substantial value and supplied by the principal it would indicate that the principal had the right to control the manner and means of their use and that the worker would follow a principal's direction in the use of such valuable instrumentalities if the principal chose to give such directions. Similarly, if the facilities are of an intangible nature or unavailable except through the principal, such as a trade name, office facilities, advertising, merchandise, inventory, or communications, the worker would also be presumed to use such facilities in a way specified by the principal if the principal so chose to specify so that the worker can insure their continued use and availability.

(B) Effect of custom. Unskilled labor is usually supervised and persons performing services, which require little or no skill or experience are customarily regarded as employees. Even where skill is required, such as an artisan, and the services are an incident of the business of the principal, the principal would usually be considered to have the right to control the manner and means of performing the service incident to its business, and the worker would be considered an employee. On the other hand, if the service of the artisan, such as a plumber, were engaged to repair the plumbing for an insurance company in the company's office facilities, the manner and means of performing services would not normally be controlled by persons in the insurance company's offices.

(C) The period of employment and method of payment. If the time in which the service is performed is short, the worker is less apt to subject himself to control as to details of performing the service. This is especially true if the payment is to be made by the job and not by the hour, commission, or piece rate. On the other hand, if the work is not skilled, and the principal supplies the instrumentalities necessary to perform the work, and it is an integral part of the principal's business activity, the worker would be an employee even though the time period was short and the payment was by the job. If the services are performed on a continuing basis it would be evidence of employment, especially if the services are a regular part of the principal's business. The time of performing the service and the method of payment may result in strong evidence of employment if the performance and payment occur during regular intervals at regular times and payment is in regular amounts.

(D) Control of the premises. If the services are performed upon the premises of the principal who is in business and the worker uses the facilities of the principal in performing the services in compliance with policies or regulations for the conduct of workers on the premises, the worker would be an employee. On the other hand, if the rules are made only for the general safety, or security of the premises, and do not relate to the manner and means of performing the actual service in question, adherence to such rules would not raise the inference that the worker is an employee and the relationship would depend on other factors. Similarly, if the worker has only agreed to accomplish a desired result, rules or policies for the handling of the result upon completion, such as distribution, storage, transportation, or display, will not raise the inference that the worker is an employee.

(E) Belief of the parties. The terminology used in an agreement between a principal and a worker is not conclusive of the relationship, even in the absence of fraud or mistake. On the other hand, such an agreement is evidence of the relationship intended by the parties to the agreement. If the agreement provides for a relationship in which services are to be performed for a principal in such a way that the principal expresses an interest only in the desired result and abandons the right to control the manner and means by which the result is achieved, such an agreement is evidence that the relationship intended was not that of employer and employee if the terms of the agreement are in fact carried out. If the factual relationship between the parties is different than that provided by the agreement, an inference will arise that the agreement does not express the intention of the parties and an employer-employee relationship does in fact exist. If an agreement between a worker and a principal specifically denies an employment relationship, but contains provisions which allow for the exercise of control by the principal over the manner and means of performing the service, the provision that an employment relationship does not exist does not express the intent of the parties that their relationship is one of independent contractors.

(F) Services performed as a part of the regular business of the principal. Since for the purposes of these regulations, employment is only significant where remuneration (wages) is paid for services performed, employment will generally occur where the principal is in business. In some situations, employment may occur where there is no business activity of the principal, but it is presumed that those occasions will be rare.

If the principal is in business and the services performed are a regular part of the business of the principal, it is evidence that the services are performed in employment. It is presumed that if the principal is in business, he has the right to control the manner and means by which services in that business are performed as an incident to the principal's right to protect his business interests. There must be a strong showing that the principal has abandoned that right to overcome the evidence of employment under those circumstances. For example, if the principal is in the business of selling insurance, and an individual performs services for remuneration selling insurance, it is evidence that those insurance sales services are in employment. On the other hand, if the principal is in the business of selling insurance and the services are performed by a plumber fixing the pipes in the insurance company's office facilities, it is not evidence that the services of the plumber are performed in the employ of the insurance sales company.

(G) Separately established occupation or business. If the person performing services for the principal is not in a separately established occupation or business it will be evidence that the services are performed in employment. If the individual performing the services does not have an independently established occupation or business, and the services are a regular part of the business of the principal, it will be presumed that the services are performed in employment. Evidence that an occupation or business is separately established is that the individual holds himself or herself out to the general public or a significant segment of the business community, in some readily identifiable way, as ready to perform services similar to those performed for the principal at or about the same time as they are being performed for the principal in the normal course of the independently established occupation or business. A readily identifiable way to hold oneself out as in an independently established occupation or business would include the name of the person or the person's business name in media advertising, commercial telephone listing, signs or displays on vehicles or premises, or brochure.

(b) Application to Real Estate Industry.

(1) While determinations of whether a salesperson is an employee or an independent contractor in the real estate industry will be determined generally by the rules set forth in (a) above, specific application of those rules to circumstances in the real estate industry are set forth in subdivision (b). In circumstances where a specific application is not interpreted by (b), that specific application will be determined by the rules set forth in (a), above. No one or more of enumerated factors will necessarily indicate that a particular relationship exists.

(2) Definitions:

(A) A "broker" is a person licensed as a real estate broker under the laws of this state and who engages the services of salespersons or a salesperson to perform services in the business which the broker conducts under the authority of his or her license.

(B) A "salesperson" is a person who is engaged by a broker to perform services, which may be continuous in nature, as a real estate salesperson under an agreement with a broker regardless of whether the person is licensed as a real estate salesperson or a real estate broker under the laws of this state.

(C) "Presumed" or "presumption" as used in this regulation means a presumption affecting the burden of proof as defined in Section 605 of the Evidence Code.

(D) "Licensed activity" means that activity for which a license is required under Section 10131 through 10131.7 of the Business and Professions Code.

(3) Basic Guidelines:

(A) Written contracts and agreements. Regulations of the Real Estate Commissioner provide that every broker will have a written agreement with each of its salespersons. Generally, when a broker and a salesperson agree to be employer and employee, an "employee contract" is signed, and when a broker and the salesperson agree to be independent contractors, an "independent contractor agreement" is signed.

When an employment agreement is signed, it will be evidence of the intent of the parties. However, if the terms of the agreement are not complied with in practice, the agreement shall not determine the relationship of the parties to the agreement.

(B) Broker's policies. Since the Business and Professions Code and regulations of the Real Estate Commissioner require the broker to insure that the rights of the parties to a real estate transaction are protected and that agreements affecting such rights be reviewed by the broker, it is expected that each broker will have certain policies which are intended to protect the parties to a transaction and which must be binding upon all salespersons engaged by the broker. Such policies, including the selection of forms by the broker, shall be considered as would any other fact in determining if an employment relationship exists between the broker and salesperson. Such policies alone, however, will not establish the right to control the manner and means of performing services necessary for a determination that an employment relationship exists. However, brokers' policies relating to the manner and means of performing services that extend beyond those necessary to ensure satisfaction of statutory and regulatory requirements shall be evidence of the exercise of a right to control the manner and means by which a salesperson performs services.

Contract provisions, or policies which lend themselves to the increase of business, profits, or sales activity will not be considered necessary to satisfy statutory or regulatory requirements. Such provisions would include, but not be limited to fees, time, solicitation, acquisition of listings, closures, floor time, termination, business licenses, fidelity bonds, automobile insurance, expenses, business cards, advertising, secretarial help, educational requirements, training, office and desk space. Such policies shall be construed as provided in this regulation.

Policies relating to ethical standards required of persons in the real estate industry shall be considered as part of the statutory and regulatory requirements going to the end result of the services performed rather than the manner and means by which they will be performed.

(C) Assignments other than licensed activities. If a salesperson is expected, by the broker, to fulfill assignments other than licensed activities or functions incidental thereto, it will be evidence of an employment relationship. Such assignments may involve public relations, tours, office duty, floor time, open house, phone solicitation, making deliveries, or making reports other than as required by law.

(D) Educational requirements, training and skills. Since an independent contractor is supposed to be a person in business for himself or herself, it would not normally be necessary to train that person to perform the functions of that person's business, nor would it appear appropriate for a broker to require another independent businessman to seek any particular educational requirements. Therefore, any requirements in that regard will be looked on as evidence of employment. However, voluntary attendance at broker-provided training would not be evidence of employment.

(E) Office and desk space. While a broker may allow an independent salesperson to use office facilities, other than incidental use of such facilities on a voluntary basis will be evidence of employment. Of particular significance, would be assigned desks or support personnel, such as secretarial and clerical help, continuing mail box or basket or other receptacle, continuing use of transcription or typewriting or duplicating facilities, or telephone facilities. Payment to the broker by the independent salesperson for the use of office facilities and desk space will only be considered evidence of an independent relationship if the charge by the broker bears a reasonable relationship to the actual value of the facilities used by the independent salesperson.

(F) Business cards and advertising. Recognizing that statutes and regulations require that salespersons perform their services in the name of a broker, the fact that the broker's name appears on business cards used by a salesperson and advertising in the name of the broker will not be considered evidence of an employment relationship. However, if the salesperson's name does not appear on the business cards or the business cards are supplied to the salesperson by the broker without a reasonable charge to the salesperson, such cards will be considered evidence of an employment relationship. A salesperson may advertise for purposes of his or her licensed activity at his or her own expense or by cost sharing with a broker without raising an inference of employment.

(G) Floor time. Assignment of floor time will be considered evidence of an employment relationship. Recognizing that it is to the economic advantage of a broker to allow independent salespersons to spend time on the facilities or premises of the broker, floor time will not be considered evidence of an employment relationship if it is allowed by the broker on a voluntary basis and allowed at the sole discretion of the independent salesperson. However, evidence that a salesperson is expected by the broker to perform floor time or that the relationship of the salesperson to the broker would be terminated for not performing some floor time will be evidence of employment. Floor time is considered to be time spent at the broker's premises or at real estate subject to a real estate transaction through the broker.

(H) Open house or house tour. Any requirements either minimizing or limiting the time in which or during which an independent salesperson is expected to retain a house open for possible or probable sales, will be considered evidence of an employment relationship. The same is true of tours by salespersons or accompanying possible or probable purchasers to show real estate which is available for sale through the broker.

(I) Sales meetings. The requirement that a salesperson attend sales meetings or any kind of regular or irregular meetings at any location, make communications to or for the broker, or make appearances at the broker's office or other facilities, will be considered evidence of an employment relationship. Submission of documents attendant to a real estate transaction for review required by law or regulation is not considered an appearance or communication.

(J) Assigned territory (farm system). The assignment by a broker of a specific geographical territory in which an independent salesperson is expected to perform services will be considered evidence of control of the manner and means of performing services and of an employment relationship unless the agreement specifies that performance of services within a specific territory is consideration for entering into the agreement.

(K) Working hours. Any requirement of a minimum or maximum time limitation upon the hours to be worked by an independent salesperson will be considered evidence of an employment relationship. In addition, while no inferences will be drawn from a part-time relationship, any requirement that an independent salesperson perform his or her services during any specified hours, whether normal business or overtime hours, will be considered evidence of employment. A broker, however, may properly expect an independent contractor to work diligently and to use his or her best efforts in performance of licensed activities.

(L) Method of payment. While payment by commission only will not create an inference of either an employment or independent contractor relationship, payment by salary, guaranteed minimum commission, draws or advances against commissions, unless such advances are secured by promissory notes or other normally acceptable arrangement for repayment by the salesperson, will be considered evidence of an employment relationship.

No inferences of employment relationship or independent contractor relationship will be drawn from bonuses which are paid as incentive for additional sales or comparable production, nor will increased commissions by amendment of the agreement with the broker, whether for a single transaction or not. However, overrides, drawing accounts, expense accounts, or other forms of consideration in addition to pre-determined commissions will be considered evidence of an employment relationship.

(M) Benefit plans. The fact that a broker allows an independent salesperson to participate in a health, medical, life insurance, or retirement insurance program will not be considered evidence of an employment relationship if the independent salesperson is required to, and in fact does, pay all premiums necessary for participation in such program. Any adjustments in commissions, or other remuneration to compensate the salesperson for payment for participation in such benefit plans will be evidence of employment.

(N) Workers' compensation insurance. The fact that a broker carries workers' compensation insurance on all salespersons, whether in an employment or independent contractor relationship, will not create an inference of employment, for the purposes of this section, with regard to independent salespersons if in an agreement between the broker and the independent salesperson it is clearly stated that workers' compensation insurance is being carried by the broker for his or her own benefit or for the mutual benefit of both parties.

(O) Insurance and fidelity bonds. A contract requirement that an independent salesperson provide proof to the broker of public liability and property damage insurance, independently paid for by the independent salesperson, will be evidence of an independent relationship only if the amount of the required insurance can be shown to be greater than would be carried by the independent salesperson without such requirement. It will not be evidence of employment if a broker requires a salesperson to furnish a fidelity bond or malpractice insurance at the salesperson's expense. It is not evidence of employment if the broker carries blanket personal liability and property damage insurance, fidelity bond, or malpractice insurance on all salespersons regardless of whether they are employees or independent contractors.

(P) Multiple listing service fees. If multiple listing boards list only brokers, membership of salespersons performing services for that broker are only incidental to membership by the broker. Therefore, the payment of multiple listing service fees by the broker will not be considered evidence of an employment relationship between the broker and its independent salespersons. A contract requirement that the salesperson reimburse the broker in whole or in part for multiple listing service fees is evidence of an independent contractor relationship.

(Q) Business licenses. While the requirements for business licenses vary from county to county and municipality, when a broker provides and pays for a business license to an independent salesperson, without a county or municipality requirement that he or she alone may do so, it will be evidence of an employment relationship.

(R) Combination operation (independent salesperson and employees). When a broker engages the services of salespersons, some of whom are considered employees and some of whom are considered independent salespersons, the lack of distinctly separate arrangements for the purposes of performing services between employees and independent salespersons will be considered evidence that all salespersons are employees.

(S) Termination. When, by terms of an agreement or by practice of the broker, the relationship between the broker and salesperson can be unilaterally terminated without 30 days' notice, it will be evidence of employment. Termination without such notice for breach of ethical standards, breach of statutory or regulatory requirements, or for the protection of the public, will not be considered evidence of employment.

(T) Agreement for specific or specialized purpose. It is recognized that a broker may enter into an agreement with a salesperson under which the salesperson will agree to perform services in connection with a single transaction, a single real estate development, or building tract, or other similar arrangement. In such cases, implications normally drawn, as described above, regarding specified territory, floor time, specified hours, open house arrangements, and assignments other than licensed activities shall not apply if the agreement specifies that such conditions and services are part of the consideration for entering into the agreement.

(U) Managers. Managers, including, but not limited to, sales managers, office managers, and general managers will be presumed to be employees of the broker. Whether remuneration for sales by the manager are wages in employment, depends on whether such sales are a part of the normal duties expected of this manager.

(V) Form 1099 (Federal) and Form 599 (State). If a broker does not provide Internal Revenue Form 1099 and Franchise Tax Form 599 to salespersons considered by the broker to be independent salespersons, and submit copies of such forms to the Internal Revenue Service and Franchise Tax Board as required by law, such salespersons are considered employees and the broker is required to withhold personal income tax from any payments to such salespersons as required by the code.

(c) Application to Temporary Service Industry.

(1) While determinations of whether a worker is an employee or independent contractor in the temporary service industry will be made by application of the rules set forth in subdivision (a) above, the identity of the worker's employer in the temporary service industry will be determined by application of the rules set forth in this subdivision (c).

(2) Definitions:

(A) A "client" or "customer" is a party who has contracted with an individual or entity for the provision of a worker to perform services for the party wherein the party has the right to control the manner and means of performing the services by the worker.

(B) A "temporary service supplier" is an individual or entity that contracts with clients or customers to supply workers to perform services for the client or customer and performs the following functions:

1. Assigns the worker to perform services for a client or customer.
2. Sets the rate of pay of the worker whether or not through negotiation.
3. Pays the worker directly.
4. Retains the authority to assign or refuse to assign a worker to other clients or customers when a worker is determined unacceptable by a specific client or customer.
5. Determines assignments of workers even though workers retain the right to refuse specific assignments.
6. Negotiates with clients or customers for such matters as time, place, type of work, working conditions, quality and price of the service.

(3) Designation of Employer. If an individual or entity contracts to supply a worker to perform services for a customer or client and is a temporary service supplier, as described in (2) (B) above, that supplier is the employer of the worker who performs such services. If an individual or entity contracts to supply a worker to perform services for a client or customer and the supplier is not a temporary service supplier as described in (2) (B) above, or the client or customer pays the worker directly, the client or customer is the employer of the worker who performs such services for the purposes of the code.

(4) Other Third Party Arrangements. In circumstances which are in essence the loan of an employee from one employer to another employer wherein direction and control of the manner and means of performing the services changes to the employer to whom the employee is loaned, the loaning employer will continue to be the employer of the employee for the purposes of the code if the loaning employer continues to pay remuneration to the employee, whether or not reimbursed by the other employer. If the employer to whom the employee is loaned pays remuneration to the worker for the services performed, the employer to whom the employee is loaned will be considered the employer under the code for the purposes of any such remuneration paid to the worker by such employer regardless of whether the loaning employer also pays remuneration to the worker.

NOTE: Authority cited: Sections 305 and 306, Unemployment Insurance Code. Reference: Sections 621, 13004, 13005, and 13020, Unemployment Insurance Code.

HISTORY:

1. New Division 2.5 (Chapters 1–5, Sections 4304-1 through 4371-1, not consecutive) filed 6-18-81; effective thirtieth day thereafter (Register 81, No. 25).
2. Amendment filed 2-23-84; effective thirtieth day thereafter (Register 84, No. 8).

4305-1. Employer Defined.

(a) The term "employer" means any person for whom an individual performs or performed any service, of whatever nature, as the employee of such person.

(b) It is not necessary that the services be continuing at the time the wages are paid in order that the status of employer exists. Thus, for purposes of withholding a person for whom an individual has performed past services for which he is still receiving wages from such person is an "employer".

(c) An employer may be an individual, a corporation, a partnership, a trust, an estate, a joint-stock company, an association, a syndicate, group, pool, joint venture, or other unincorporated organization, group, or entity. A trust or estate, rather than the fiduciary acting for or on behalf of the trust or estate, is generally the employer.

EMPLOYEE - INDEPENDENT CONTRACTOR 300-399

DEFINITION OF EMPLOYEE 300

Statutory Employee 300.100

Section 621, CUIC, provides, with respect to wages paid after December 31, 1971, for services performed after that date:

"Employee" means all of the following:

(a) Any officer of a corporation.

(b) Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

(c) (1) Any individual other than an individual who is an employee under subdivision (a) or (b), who performs services for remuneration for any employing unit if the contract of service contemplates that substantially all of such services are to be performed personally by such individual either:

(A) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry cleaning services, for his principal.

(B) As a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for sideline activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or similar establishments for merchandise for resale or supplies for use in their business operations.

Statutory Employee (Continued) 300.100 (Cont.1)

(C) As a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him or her.

(2) An individual shall not be included in the term "employee" under the provisions of this subdivision if such individual has a substantial investment in facilities used in connection with the performance of such services, other than in facilities for transportation, or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for whom the services are performed.

(d) Any individual who is an employee pursuant to Sections 601.5, 680, or 681, CUIC.

See Title 22 Section 621(c)-1 regarding agent-drivers, commission-drivers and traveling and city salesmen. See "Specific Cases" Section 390.180 and 390.245, TSG, and Section 875, TSG, regarding wages.

Section 010 TSG discusses musicians and Section 1107, TSG, discusses PIT.

Section 621.5, California Unemployment Insurance Code 300.200

Effective January 1, 1983, Section 621.5 of the California Unemployment Insurance Code was added to define "employee also means any individual who is an employee, pursuant to Section 2750.5 of the Labor Code, of a person who holds a valid state contractor's license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code."

Section 621.5, California Unemployment Insurance Code (continued) 300.200 (cont.1)

Section 2750.5 of the Labor Code provides that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor.

Section 2750.5 of the Labor Code provides proof of independent contractor status includes satisfactory proof of these factors:

"(a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.

"(b) That the individual is customarily engaged in an independently established business.

"(c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent by the parties that the work relationship is of an independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract."

Section 621.5, California Unemployment Insurance Code (continued) 300.200 (cont.2)

Section 2750.5 of the Labor Code further provides that in addition to (a), (b), and (c) above, any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code shall hold a valid contractor's license as a condition of having independent contractor's status.

Section 621.5, CUIC, also requires the employer to hold a valid State contractor's license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, before the person for whom services are performed can be held to be the employer.

(See Appendix for citations of Section 2750.5 of the Labor Code, Section 7000 et seq., Chapter 9, Division 3, Business and Professions Code, Section 700 et seq., Title 16, California Administrative Code.)

See Section 1107, TSG, regarding PIT withholding.

COMMON LAW RULES FOR DETERMINING EMPLOYMENT RELATIONSHIP 350

In order to establish an employment relationship it is not essential to show a complete exercise of control over the workman in every detail, or for that matter, to show the actual exercise of any control over him. The principal test is the existence of a right of complete and authoritative control, not the extent of its exercise. P-T-2

No single factor determines a workman's status. The "principal test" or "most important factor" is extent of principal's control right. Control test of status involves existence of control right as distinguished from exercise of control. Significance of exercise of control is an indication (under most circumstances) of right's existence. Right may also be shown by other evidence without any exercise. Instructions which are suggestions as distinguished from orders are not indicative of an employer's control right. Control test of status involves extent of control right. Complete abnegation of control is not essential to independent contractor status. Beneficially interested principal may retain limited control right for definite and restricted purposes without becoming employer. Employment relationship is indicated when control right is "complete," "authoritative," "entire," "absolute," "supreme," "full," "unqualified," or of similar character. It involves a right of general control not only as to what shall be done, but when and how as well; a control of "all material details" of rendition of services; a control of activities "in so far as it is feasible to control a type of service." P-T-2

Unemployment Insurance taxes accrue only on amounts paid as remuneration for services rendered by employees. The relationships of employer-employee and of principal-independent contractor are mutually exclusive, and cannot exist simultaneously with respect to same transaction. Proof of one status automatically precludes the existence of the other. An independent contractor's services are not "employment" within the meaning of the Unemployment Insurance Code and remuneration paid for such services is not taxable. The status of a worker as either an employee or an independent contractor must be made under common law principles from an evaluation of

COMMON LAW RULES FOR DETERMINING EMPLOYMENT RELATIONSHIP (Continued) 350 (Cont.1)

the factors enumerated in the Restatement of Agency, Section 220(2), in accordance with Empire Star Mines case Empire Star Mines Co. v. California Employment Commission (1946), Supra, 28 Cal. 2d 33. The most important factor is the extent of the principal's right to control the workman's manner, mode, methods and means of performing the details of work.

While the extent of the control right is the prime factor to be considered in evaluating the true character of the working relationship, it is not the only factor. Due consideration must also be given to a series of subordinate tests relating to the conditions under which the services of the workman were rendered. In a number of case, the California courts, using language essentially the same as that of the Restatement of the Law of Agency, have enumerated the secondary factors to be considered as:

(a) The extent of control which, by the agreement, the master may exercise over the details of the work;

(b) Whether or not the one performing services is engaged in a distinct occupation or business;

(c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;

(d) The skill required in the particular occupation;

(e) Whether the principal or the workman supplies the instrumentalities, tools and place of work for the person doing the work.

(f) The length of time for which the services are to be performed;

(g) The method of payment, whether by the time or by the job;

COMMON LAW RULES FOR DETERMINING EMPLOYMENT RELATIONSHIP (Continued) 350 (Cont.2)

(h) Whether or not the work is a part of the regular business of the principal;

(i) Whether or not the parties believe they are creating the relationship of employer-employee;

(j) Whether the principal is or is not in business.

A workman's status is determined from the integrated picture of the entire working relationship rather than from the mere consideration or count of component parts. More directly indicative factors prevail over merely more numerous ones. P-T-2

A principal's right to discharge a workman without cause may be strong evidence of an employment relationship. Such right is generally incompatible with the control which an independent contractor enjoys over his work. The right to discharge at will without cause tends to show subservice of workmen and points in direction of completeness of control which characterizes employment relationship.

Right to discharge at will must be distinguished from principal's right to refuse to enter into further contracts, which does not constitute evidence of an employer's control right.

Right to discharge only for cause does not carry same implications of employment as right to discharge at will without cause. Right to discharge at will without cause is most convincing as evidence of employment in situations where workmen would feel sufficient threat from possibility and consequences of discharge to yield to principal's pressure in regard to methods of performance of work. It loses persuasive force where such threat is neither explicitly nor implicity present. It is not very convincing evidence in most situations where the parties have only dimly contemplated their termination rights.

Right to discharge only after reasonable period of notice does not carry same implications of employment as right to discharge at will.

COMMON LAW RULES FOR DETERMINING EMPLOYMENT RELATIONSHIP (Continued) 350 (Cont.3)

Inference of employment does not arise from right of discharge which cannot be exercised against individual workman alone. A discharge right which is clearly in the nature of a limited control and not incompatible with independent contractor relationship, does not give rise to an inference of employment. P-T-2

Express provision in working agreement regarding control right, or express provisions regarding powers of direction and control over performance of work from which existence or absence of control right may be inferred, are not conclusive of fact, but are prima facie evidence of it, entitled to great weight in absence of indication of not being observed in carrying on work. They have little or no weight where not observed. Where services are rendered without express stipulations either affirming or negating control right, or clearly delineating powers of direction and control over performance of work, existence or absence of control right must be determined from reasonable inferences drawn from circumstances surrounding and attending making of contract in conjunction with nature of contract and duties ordinarily performed thereunder. P-T-2

A contract specifying relationship to be that of independent contractor is not controlling. T-67-7

At common law the status of musicians is not determined on the basis that a contract purports to give the purchaser of music control over the group (Bartels v. Birmingham (1947), 332 U.S. 126; Mark Hopkins Incorporated v. California Employment Stabilization Commission, et al., (1948), 86 C.A. 2d 15), nor does the fact that the band is a "name band" or a "house band" establish liability for unemployment insurance taxes (Appeals Board Precedent Decision P-T-99). Where the leader engages the sidemen, picks the music, rehearses the group, decides the division of the contract money, and pays for promotional and other business expenses, the leader, rather than the purchaser of music, is the employer. Furthermore, the establishment was not considered the employer of a loose knit, cooperative

COMMON LAW RULES FOR DETERMINING EMPLOYMENT RELATIONSHIP (Continued) 350 (Cont.4)

musical group when the only control exercised by the owner is to set break times, occasionally request the group to play softer, and request certain songs (Appeals Board Precedent Decision P-T-100).

In considering the status of salespersons under the common law test, the Appeals Board set forth in Appeals Board Precedent Decision P-T-346 the factors which it has considered in its many decisions. Where the salespersons received training, were assigned quotas, were required to follow leads, to furnish reports, to attend sales meetings, were given expense allowances or a guaranteed salary, or they performed services of a continuous nature, as a direct and essential part of the petitioner's business operation, they were found to be employees. Where, on the other hand, the salespersons paid their own expenses, established their own hours of work and itineraries of travel, were not required to attend sales meetings or make reports, and the only direction from the principal consisted of establishing selling prices, terms and conditions of the sale, approval of credit, and furnishing samples, literature or order blanks, they were found to be independent contractors.

Appendix M

The following letter was sent to:

The Department of Labor and Industrial Relations
State of Hawaii

Ms. Kate Stanley
Hawaii Association of Realtors

Mr. Tim Lyons
Hawaii Business League

Mr. Al Konishi
The Chamber of Commerce of Hawaii

Mr. Shoji Okazaki
The International Longshoremen's
and Warehousemen's Union, Local 142

The only response, comments, and technical corrections received were from the International Longshoremen's and Warehousemen's Union, Local 142, and from the Department of Labor and Industrial Relations. The department had no technical correction requiring incorporation in the report. The report incorporates only technical corrections from the ILWU.

Samuel B. K. Chang
Director

LEGISLATIVE REFERENCE BUREAU
State of Hawaii
State Capitol
Honolulu, Hawaii 96813
Phone (808) 548-6237

December 4, 1986

3455A

Mr. Shoji Okazaki
International Longshoremen's and
Warehousemen's Union, Local 142
451 Atkinson Drive
Honolulu, HI 96814

Dear Mr. Okazaki:

Enclosed for your review is a confidential draft of the Legislative Reference Bureau's report to the Legislature regarding study and development of a uniform definition of "independent contractor" applicable to Title 21, Hawaii Revised Statutes, which was prepared pursuant to Senate Resolution No. 145, S.D. 2.

The enclosed draft is the property of the Bureau and its use should be restricted solely for the purpose of this external review. This draft is not for general distribution since it is a preliminary report which is subject to change.

We request your assistance and that of your staff in reviewing the draft and providing comments on and confirmation of the facts presented in the report. We invite you to insert your comments directly on your copy of the draft or in any other form which you find convenient. In order to ensure timely submission of this report to the Legislature, we request that all copies of the draft, along with your comments, be returned to the Bureau no later than 4:00 p.m. on Friday, December 19, 1986.

We sincerely appreciate the cooperation and assistance which you have given us during the course of this report, and request your continuing cooperation with this review. If you have any questions, please do not hesitate to contact Linda Goto or me at 548-6237.

Sincerely yours,

Samuel B. K. Chang
Director

SBKC:mm
Enclosure