

JAN 22 2007

S.B. NO. 1465

A BILL FOR AN ACT

RELATING TO EMPLOYMENT SECURITY LAW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The purpose of this bill is to provide the same
2 type of unemployment insurance (UI) exclusion [coverage] in
3 state law as in federal law for [the exclusion of] certain alien
4 agricultural workers and to conform coverage of Indian tribe
5 workers under state law to federal law.

6 Under Public Law 94-566, Unemployment Compensation Act of
7 1976, agricultural labor became subject to the federal
8 unemployment tax except for nonresident aliens who were
9 temporarily admitted to the United States to perform contract
10 agricultural work. Under Public Law 96-84, alien agricultural
11 labor must be included solely for purposes of determining the
12 threshold of coverage such as cash wages paid and number of
13 individuals and weeks worked.

14 Under Public Law 106-554, Consolidated Appropriations Act,
15 2001, American Indian tribes must now be treated similarly to
16 state and local governments and nonprofit organizations under
17 federal and state law. The provisions of this bill conform with
18 the Consolidated Appropriations Act requirements.

LBR-01(07)

1 SECTION 2. Chapter 383, Hawaii Revised Statutes is amended
2 by adding a new section to be designated and to read as follows:

3 "§383-62.5 Treatment of Indian tribes. (a) As used in
4 this section:

5 "Employer" includes any Indian tribe for which service in
6 employment as defined in section 383-2 is performed.

7 "Employment" means service performed in the employ of an
8 Indian tribe, provided that such service is excluded from
9 employment as defined in the Federal Unemployment Tax Act solely
10 by reason of section 3306(c)(7), Federal Unemployment Tax Act,
11 and is not otherwise excluded from employment under this
12 chapter. For purposes of this section, the exclusions from
13 employment under section 383-7, apply to services performed in
14 the employ of an Indian tribe in the same manner as the
15 exclusions apply to government and nonprofit entities.

16 "Indian tribe" has the meaning given such term by section
17 4(e) of the Indian Self-Determination and Education Assistance
18 Act (25 U.S.C. section 450b(e)), and includes any subdivision,
19 subsidiary, or business enterprises wholly owned by the Indian
20 tribe.

21 (b) Benefits based on service in employment as defined in
22 this section shall be payable in the same amount, on the same
23 terms and subject to the same conditions as benefits payable on
24 the basis of other service subject to this chapter. The

1 financing of benefits shall apply in the same manner and under
2 the same terms and conditions as in section 383-62, for
3 nonprofit organizations subject to this chapter; except that the
4 provisions of this section shall apply where there is a
5 conflict.

6 (1) Any Indian tribe or tribal unit (subdivisions,
7 subsidiaries or business enterprises wholly owned by
8 the Indian tribe) subject to this chapter on or after
9 January 1, 2007, shall pay contributions under the
10 provisions of this part (with the exception of the
11 provisions in section 383-62(b)) applicable to other
12 employers unless it elects to pay to the director for
13 the fund an amount equal to the amount of benefits
14 that is attributable to service in the employ of an
15 Indian tribe.

16 (2) Any Indian tribe or tribal unit electing to make
17 payments in lieu of contributions shall make this
18 election in the same manner and under the same
19 conditions as provided in section 383-62(d)(1).
20 Indian tribes or tribal units must determine if
21 reimbursement for benefits paid will be elected by the
22 tribe as a whole, by individual tribal units, or by
23 combinations of individual tribal units.

1 (3) An Indian tribe or tribal unit shall be billed and
2 payments shall be made in accordance with section 383-
3 62(d)(2), for the full amount of benefits attributable
4 to service in the employ of the Indian tribe or tribal
5 unit on the same schedule as nonprofit organizations
6 that have elected to make reimbursement payments in
7 lieu of contributions.

8 (4) Any Indian tribe or tribal unit that elects to become
9 liable for payments in lieu of contributions shall be
10 required, within thirty days after the effective date
11 of its election, to deposit with the department an
12 amount of money as security as determined by section
13 383-62(d)(3).

14 (c)(1) Failure of the Indian tribe or tribal unit to make any
15 required payment under this chapter within ninety days
16 after a notice of delinquency was mailed to its last
17 known address or was otherwise delivered to it, will
18 cause the Indian tribe to lose the option to make
19 payments in lieu of contributions and the termination
20 shall continue for the four-consecutive-calendar-
21 quarter period beginning with the quarter in which the
22 termination becomes effective.

23 (2) Any Indian tribe that loses the option to make
24 payments in lieu of contributions due to late payment

1 or nonpayment, shall have such option reinstated after
2 a period of one year if all contributions have been
3 made timely, provided no contributions, payments in
4 lieu of contributions for benefits paid, security
5 deposit, and penalties or interest remain outstanding.

6 (3) If any Indian tribe or tribal unit fails to make
7 payments required under this section (including
8 assessed[ment of] of interest and penalty) within
9 ninety days of a notice of delinquency, the department
10 will immediately notify the United States Internal
11 Revenue Service and the United States Department of
12 Labor.

13 (d) Notices of payment and reporting delinquency to Indian
14 tribes and tribal units shall include information that
15 failure to make full payments within the prescribed time
16 will cause the Indian tribe to:

17 (1) Be liable for taxes under Federal Unemployment Tax
18 Act; and

19 (2) Lose the option to make payments in lieu of
20 contributions.

21 (e) Except as provided in subsection (f) of this section, the
22 amount payable to the fund by each Indian tribe or tribal
23 unit that is liable for payments in lieu of contributions

1 shall be determined in the same manner as provided in
2 section 383-62(e).

3 (f) An Indian tribe or tribal unit must reimburse the fund for
4 all extended benefits paid that are attributable to service
5 in the employ of the Indian tribe or tribal unit unless the
6 benefits are reimbursed by the federal government.

7 (g) Any two or more Indian tribes or tribal units that
8 have become liable for payments in lieu of contributions may
9 file a joint application to the department for the establishment
10 of a group account for the purpose of sharing the cost of
11 benefits paid that are attributable to service in the employ of
12 such employers in the same manner as provided in section 383-
13 62(f)."

14 SECTION 3. Section 383-7, Hawaii Revised Statutes, is amended
15 to read as follows:

16 "§383-7 Excluded service. "Employment" shall not include
17 the following service:

18 (1) Agricultural labor as defined in section 383-9 if it
19 is performed by an individual who is employed by an
20 employing unit:

21 (A) Which, during each calendar quarter in both the
22 current and the preceding calendar years, paid
23 less than \$20,000 in cash remuneration to
24 individuals employed in agricultural labor[+]

1 (including labor performed by an alien referred
2 to in subparagraph (C)); and

3 (B) Which had, in each of the current and the
4 preceding calendar years:

5 (i) No more than nineteen calendar weeks,
6 whether consecutive or not, in which
7 agricultural labor was performed by its
8 employees[+] (including labor performed by
9 an alien referred to in subparagraph (C));

10 or

11 (ii) No more than nine individuals in its employ
12 performing agricultural labor in any one
13 calendar week, whether or not the same
14 individuals performed the labor in each week
15 (including labor performed by an alien
16 referred to in subparagraph (C)); or

17 (C) If such agricultural labor is performed by an
18 individual who is an alien admitted to the United
19 States to perform agricultural labor pursuant to
20 sections 214(c) and 101(a)(15)(H) of the
21 Immigration and Nationality Act;

22 (2) Domestic service in a private home, local college
23 club, or local chapter of a college fraternity or

1 sorority as set forth in section 3306(c)(2) of the
2 Internal Revenue Code of 1986, as amended;

- 3 (3) Service not in the course of the employing unit's
4 trade or business performed in any calendar quarter by
5 an individual, unless the cash remuneration paid for
6 the service is \$50 or more and the service is
7 performed by an individual who is regularly employed
8 by the employing unit to perform the service. For the
9 purposes of this paragraph, an individual shall be
10 deemed to be regularly employed to perform service not
11 in the course of an employing unit's trade or business
12 during a calendar quarter only if:

13 (A) On each of some twenty-four days during the
14 quarter the individual performs the service for
15 some portion of the day; or

16 (B) The individual was regularly employed as
17 determined under subparagraph (A) by the
18 employing unit in the performance of the service
19 during the preceding calendar quarter;

- 20 (4) (A) Service performed on or in connection with a
21 vessel not an American vessel, if the individual
22 performing the service is employed on and in
23 connection with the vessel when outside the
24 United States;

1 (B) Service performed by an individual in (or as an
2 officer or member of the crew of a vessel while
3 it is engaged in) the catching, taking,
4 harvesting, cultivating, or farming of any kind
5 of fish, shellfish, crustacea, sponges, seaweeds,
6 or other aquatic forms of animal and vegetable
7 life, including service performed as an ordinary
8 incident thereto, except:

9 (i) The service performed in connection with a
10 vessel of more than ten net tons (determined
11 in the manner provided for determining the
12 register tonnage of merchant vessels under
13 the laws of the United States);

14 (ii) The service performed in connection with a
15 vessel of ten net tons or less (determined
16 in the manner provided for determining the
17 register tonnage of merchant vessels under
18 the laws of the United States) by an
19 individual who is employed by an employing
20 unit which had in its employ one or more
21 individuals performing the service for some
22 portion of a day in each of twenty calendar
23 weeks all occurring, whether consecutive or

1 not, in either the current or the preceding
2 calendar year; and
3 (iii) Service performed in connection with the
4 catching or taking of salmon or halibut for
5 commercial purposes;
6 (5) Service performed by an individual in the employ of
7 the individual's son, daughter, or spouse, and service
8 performed by a child under the age of twenty-one in
9 the employ of the child's father or mother;
10 (6) Service performed in the employ of the United States
11 government or an instrumentality of the United States
12 exempt under the Constitution of the United States
13 from the contributions imposed by this chapter, except
14 that to the extent that the Congress of the United
15 States permits states to require any instrumentalities
16 of the United States to make payments into an
17 unemployment fund under a state unemployment
18 compensation law, all of the provisions of this
19 chapter shall apply to those instrumentalities, and to
20 services performed for those instrumentalities, in the
21 same manner, to the same extent, and on the same terms
22 as to all other employers, employing units,
23 individuals, and services; provided that if this State
24 is not certified for any year by the Secretary of

1 Labor under section 3304(c) of the federal Internal
2 Revenue Code, the payments required of those
3 instrumentalities with respect to that year shall be
4 refunded by the department of labor and industrial
5 relations from the fund in the same manner and within
6 the same period as is provided in section 383-76 with
7 respect to contributions erroneously collected;

8 (7) Service performed in the employ of any other state, or
9 any political subdivision thereof, or any
10 instrumentality of any one or more of the foregoing
11 which is wholly owned by one or more states or
12 political subdivisions; and any service performed in
13 the employ of any instrumentality of one or more other
14 states or their political subdivisions to the extent
15 that the instrumentality is, with respect to the
16 service, exempt from the tax imposed by section 3301
17 of the Internal Revenue Code of 1986, as amended;

18 (8) Service with respect to which unemployment
19 compensation is payable under an unemployment system
20 established by an act of Congress;

21 (9) (A) Service performed in any calendar quarter in the
22 employ of any organization exempt from income tax
23 under section 501(a) of the federal Internal
24 Revenue Code (other than an organization

1 described in section 401(a) or under section 521
2 of the Code), if:

3 (i) The remuneration for the service is less
4 than \$50; or

5 (ii) The service is performed by a fully
6 ordained, commissioned, or licensed minister
7 of a church in the exercise of the
8 minister's ministry or by a member of a
9 religious order in the exercise of duties
10 required by the order;

11 (B) Service performed in the employ of a school,
12 college, or university, if the service is
13 performed by a student who is enrolled and is
14 regularly attending classes at the school,
15 college, or university; or

16 (C) Service performed by an individual who is
17 enrolled at a nonprofit or public educational
18 institution which normally maintains a regular
19 faculty and curriculum and normally has a
20 regularly organized body of students in
21 attendance at the place where its educational
22 activities are carried on as a student in a full-
23 time program, taken for credit at such
24 institution, which combines academic instruction

1 with work experience, if such service is an
2 integral part of such program, and such
3 institution has so certified to the employer,
4 except that this subparagraph shall not apply to
5 service performed in a program established for or
6 on behalf of an employer or group of employers;

7 (10) Service performed in the employ of a foreign
8 government (including service as a consular or other
9 officer or employee of a nondiplomatic
10 representative);

11 (11) Service performed in the employ of an instrumentality
12 wholly owned by a foreign government:

13 (A) If the service is of a character similar to that
14 performed in foreign countries by employees of
15 the United States government or of an
16 instrumentality thereof; and

17 (B) If the United States Secretary of State has
18 certified or certifies to the United States
19 Secretary of the Treasury that the foreign
20 government, with respect to whose instrumentality
21 exemption is claimed, grants an equivalent
22 exemption with respect to similar service
23 performed in the foreign country by employees of

1 the United States government and of
2 instrumentalities thereof;

3 (12) Service performed [by] as a student nurse in the
4 employ of a hospital or a nurses' training school by
5 an individual who is enrolled and is regularly
6 attending classes in a nurses' training school
7 chartered or approved pursuant to state law; and
8 service performed as an intern in the employ of a
9 hospital by an individual who has completed a four-
10 year course in a medical school chartered or approved
11 pursuant to state law;

12 (13) Service performed by an individual for an employing
13 unit as an insurance producer, if all service
14 performed by the individual for the employing unit is
15 performed for remuneration solely by way of
16 commission;

17 (14) Service performed by an individual under the age of
18 eighteen in the delivery or distribution of newspapers
19 or shopping news, not including delivery or
20 distribution to any point for subsequent delivery or
21 distribution;

22 (15) Service covered by an arrangement between the
23 department and the agency charged with the
24 administration of any other state or federal

1 unemployment compensation law pursuant to which all
2 services performed by an individual for an employing
3 unit during the period covered by the employing unit's
4 duly approved election, are deemed to be performed
5 entirely within the agency's state;

6 (16) Service performed by an individual who, pursuant to
7 the Federal Economic Opportunity Act of 1964, is not
8 subject to the federal laws relating to unemployment
9 compensation;

10 (17) Service performed by an individual for an employing
11 unit as a real estate salesperson, if all service
12 performed by the individual for the employing unit is
13 performed for remuneration solely by way of
14 commission;

15 (18) Service performed by a registered sales representative
16 for a registered travel agency, when the service
17 performed by the individual for the travel agent is
18 performed for remuneration by way of commission;

19 (19) Service performed by a vacuum cleaner salesperson for
20 an employing unit, if all services performed by the
21 individual for the employing unit are performed for
22 remuneration solely by way of commission;

23 (20) Service performed for a family-owned private
24 corporation organized for profit that employs only

1 members of the family who each own at least fifty per
2 cent of the shares issued by the corporation; provided
3 that:

4 (A) The private corporation elects to be excluded
5 from coverage under this chapter;

6 (B) The election for exclusion shall apply to all
7 shareholders and under the same circumstances;

8 (C) No more than two members of a family may be
9 eligible per entity for exclusion under this
10 paragraph;

11 (D) The exclusion shall be irrevocable for five
12 years;

13 (E) The family-owned private corporation presents to
14 the department proof that it has paid federal
15 unemployment insurance taxes as required by
16 federal law; and

17 (F) The election to be excluded from coverage shall
18 be effective the first day of the calendar
19 quarter in which the application and all
20 substantiating documents requested by the
21 department are filed with the department;

22 (21) Service performed by a direct seller as defined in
23 section 3508 of the Internal Revenue Code of 1986; and

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1 (22) Service performed by an election official or election
2 worker as defined in section 3309(b) (3) (F) of the
3 Internal Revenue Code of 1986, as amended.

4 None of the foregoing exclusions (1) to (22) shall apply to
5 any service with respect to which a tax is required to be paid
6 under any federal law imposing a tax against which credit may be
7 taken for contributions required to be paid into a state
8 unemployment fund or which as a condition for full tax credit
9 against the tax imposed by the federal Unemployment Tax Act is
10 required to be covered under this chapter."

11 SECTION 4. Statutory material to be repealed is bracketed
12 and stricken. New statutory material is underscored.

13 SECTION 5. This Act shall take effect on January 1, 2007.

14
15 INTRODUCED BY: _____
16 BY REQUEST

JUSTIFICATION SHEET

DEPARTMENT: Labor and Industrial Relations

TITLE: A BILL FOR AN ACT RELATING TO EMPLOYMENT SECURITY LAW.

PURPOSE: The purpose of this bill is to provide the same type of unemployment insurance (UI) coverage in state law as in federal law for the exclusion of certain alien agricultural workers and to conform coverage of Indian tribe workers under state law to federal law. Under Public Law No. 94-566, Unemployment Compensation Act of 1976, agricultural labor became subject to the FUTA tax except for nonresident aliens who were temporarily admitted to the United States to perform contract agricultural work. Under Public Law No. 96-84, alien agricultural labor must be included solely for purposes of determining the threshold of coverage such as cash wages paid and number of individuals and weeks worked. Under Public Law No. 106-554, Consolidated Appropriations Act, 2001 (CAA), American Indian tribes must now be treated similarly to state and local governments and nonprofit organizations under federal and state law. The provisions of this bill conform with the CAA requirements.

MEANS: Add a new section to chapter 383 and amend section 383-7(1), Hawaii Revised Statutes (HRS).

JUSTIFICATION: Both of the coverage proposals in this bill will render state law consistent with federal law. The proposal for Indian tribe workers is needed because federal law requires states with "Indian tribes" to implement the requirements created by the CAA. The services performed in the employ of tribes must be covered under state law and tribes must be offered the reimbursement option. One recognized Indian tribe is currently doing business in Hawaii and is subject to the CAA requirements under a stipulated agreement reached in March 2006. Without this statutory change, the state unemployment insurance (UI) law will be out of compliance with the FUTA law on required coverage and equal treatment provisions and employers in the state will not be able to receive credit

against the FUTA tax. The federal administrative grants to operate the UI program in Hawaii will also be in jeopardy.

While the proposal to exclude alien agricultural workers is optional to states, consistency with the federal law creates less confusion for employers. Even if the services performed by alien agricultural workers are excluded, federal law dictates that such services must continue to be included in determining the size of the firm.

Impact on the public: If Hawaii law does not conform to federal law, employers will be subject to higher federal payroll taxes if the FUTA tax offset credit is lost. In addition, if Hawaii loses its federal administrative grant of \$13 million, all UI offices will shutdown and unemployed workers would be unable to file for unemployment insurance benefits unless state funds are available to continue operations.

Impact on the department and other agencies: There should be minimal impact on the UI trust fund as very few Indian tribes are expected to do business in Hawaii and the number of alien contract workers is not substantial.

GENERAL FUND: None.

OTHER FUNDS: Federal.

PPBS PROGRAM DESIGNATION: LBR-171.

OTHER AFFECTED AGENCIES:

EFFECTIVE DATE: January 1, 2007.