

MEMORANDUM

To: ES&A Clients and Friends

From: Trisha Gibo, Esq.
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Date: 6/6/2019

Subject: *Spar Marketing Services, Inc, v. State of Hawai'i, Department of Labor and Industrial Relations, Employment Security Appeals Referees' Office*
Standard of Review for Appeal of an ESARO Unemployment Decision

SUMMARY OF THE CASE

On February 22, 2019, the Hawaii Intermediate Court of Appeals (ICA) addressed the standard of review for appeal of a State of Hawaii Department of Labor and Industrial Relations (DLIR) – Employment Security Appeals Referees' Office (ESARO) unemployment decision on independent contractor status and reaffirmed ESARO's interpretation of state laws and regulations, which make it extremely difficult to use independent contractors in the State of Hawaii.

In this case, individuals were contracted by Spar Marketing Services, Inc. ("Spar") to stock shelves for Spar's vendors at the vendor's retail locations. ESARO held that Spar had misclassified its independent contractors by failing to meet all three parts of the "ABC" independent contractor test: (a) control of direction, (b) services performed, and (c) independent business. Among other facts, ESARO held despite the fact that Spar had no offices in Hawaii, its *client's* retail locations in Hawaii were extensions of Spar's place of business and therefore Spar failed to meet part B of the test.

ESARO's decisions on misclassification of independent contractors were appealed to the Circuit Court. The Circuit Court overturned ESARO's decisions by re-weighing the evidence presented to ESARO. The matter was appealed to the ICA.

The ICA held that when appealing an ESARO decision, the issue is not whether the evidence presented to the hearings officer supported the Employer's position more than that of the Director, but rather whether the hearings officer clearly erred because: "(1) the record lacked substantial evidence to support the agency's finding or determination, or (2) despite substantial evidence to support the finding or determination, we are left with the definite and firm conviction that a mistake has been made." *See also* HRS §91-14(g).

In misclassification cases, ESARO only needs to have “substantial evidence” in the record to uphold their decision. “Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.” *Del Monte Fresh Produce (Hawaii), Inc. v. Int'l Longshore & Warehouse Union, Local 142*, 128 Hawai'i 289, 302, 287 P.3d 190, 203 (2012). “[D]eference will be given to the agency's expertise and experience in the particular field and the court should not substitute its own judgment for that of the agency.” *Dole Hawaii Div.- Castle & Cooke, Inc. v. Ramil*, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990).

Accordingly, the ICA found that the ESARO evidence was substantial and affirmed the ESARO's analysis that the performance of work at *vendor or client's* locations was substantial evidence that services were performed at the *company's* business locations and therefore a failure to meet part B of the independent contractor test.

WHAT THIS MEANS FOR EMPLOYERS

It has been ESARO's longstanding practice to favor employer-employee relationships over independent contractors and accordingly it is difficult for businesses to utilize true independent contractors in the state. This case further solidifies ESARO's position but making it extremely difficult for businesses to pass Part B of the test by essentially making *any location* in which services are performed the company's place of business and therefore an almost automatic failure of the test.

Again, Employers have the burden of proof to establish all three parts of the ABC independent contractor test; if any of the three parts fail, the individual will be deemed an independent contractor. If an ESARO decision is appealed, the Circuit Court will not re-weigh evidence presented in the administrative hearing. The court will give deference to the ESARO's opinion in evaluating if there is “substantial evidence” in the record to reasonably support its decision. Therefore, the Employer must take care to be thorough in presenting all of the available evidence at the agency level.

* James O'Rourke is a legal intern working under the supervision of attorney Trisha Gibo, Esq.