

# S.B. NO. 2810

JAN 25 2012

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## A BILL FOR AN ACT

RELATING TO EMPLOYMENT EXEMPTION FOR DOMESTIC SERVICES  
AUTHORIZED BY THE DEPARTMENT OF HUMAN SERVICES.

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

1           SECTION 1. Section 386-1, Hawaii Revised Statutes, is  
2 amended by amending the definition of "employment" to read as  
3 follows:

4           "Employment" means any service performed by an individual  
5 for another person under any contract of hire or apprenticeship,  
6 express or implied, oral or written, whether lawfully or  
7 unlawfully entered into. It includes service of public  
8 officials, whether elected or under any appointment or contract  
9 of hire, express or implied.

10           "Employment" does not include:

11           (1) Service for a religious, charitable, educational, or  
12           nonprofit organization if performed in a voluntary or  
13           unpaid capacity;

14           (2) Service for a religious, charitable, educational, or  
15           nonprofit organization if performed by a recipient of  
16           aid therefrom and the service is incidental to or in  
17           return for the aid received;

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- 1           (3) Service for a school, college, university, college  
2           club, fraternity, or sorority if performed by a  
3           student who is enrolled and regularly attending  
4           classes and in return for board, lodging, or tuition  
5           furnished, in whole or in part;
- 6           (4) Service performed by a duly ordained, commissioned, or  
7           licensed minister, priest, or rabbi of a church in the  
8           exercise of the minister's, priest's, or rabbi's  
9           ministry or by a member of a religious order in the  
10          exercise of nonsecular duties required by the order;
- 11          (5) Service performed by an individual for another person  
12          solely for personal, family, or household purposes if  
13          the cash remuneration received is less than \$225  
14          during the current calendar quarter and during each  
15          completed calendar quarter of the preceding twelve-  
16          month period;
- 17          (6) Domestic, in-home and community-based services for  
18          persons with developmental and intellectual  
19          disabilities under the medicaid home and community-  
20          based services program pursuant to Title 42 Code of  
21          Federal Regulations sections 440.180 and 441.300, and  
22          Title 42 Code of Federal Regulations, Part 434,  
23          Subpart A, as amended, and identified as chore,

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1 personal assistance and habilitation, residential  
2 habilitation, supported employment, respite, and  
3 skilled nursing services, as the terms are defined by  
4 the department of human services, performed by an  
5 individual whose services are contracted by a  
6 recipient of social service payments and who  
7 voluntarily agrees in writing to be an independent  
8 contractor of the recipient of social service  
9 payments;

10 (7) Domestic, which includes attendant care, and day care  
11 services authorized by the department of human  
12 services under the Social Security Act, as amended, or  
13 when provided through state-funded medical assistance  
14 to individuals ineligible for medicaid, when performed  
15 by an individual in the employ of a recipient of  
16 social service payments. For the purposes of this  
17 paragraph only, a "recipient of social service  
18 payments" is a person who is an eligible recipient of  
19 social services such as attendant care and day care  
20 services;

21 ~~(7)~~ (8) Service performed without wages for a  
22 corporation without employees by a corporate officer

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1 in which the officer is at least a twenty-five per  
2 cent stockholder;

3 ~~[(8)]~~ (9) Service performed by an individual for a  
4 corporation if the individual owns at least fifty per  
5 cent of the corporation; provided that no employer  
6 shall require an employee to incorporate as a  
7 condition of employment;

8 ~~[(9)]~~ (10) Service performed by an individual for another  
9 person as a real estate salesperson or as a real  
10 estate broker, if all the service performed by the  
11 individual for the other person is performed for  
12 remuneration solely by way of commission;

13 ~~[(10)]~~ (11) Service performed by a member of a limited  
14 liability company if the member is an individual and  
15 has a distributional interest, as defined in section  
16 428-101, of not less than fifty per cent in the  
17 company; provided that no employer shall require an  
18 employee to form a limited liability company as a  
19 condition of employment;

20 ~~[(11)]~~ (12) Service performed by a partner of a  
21 partnership, as defined in section 425-101, if the  
22 partner is an individual; provided that no employer

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1 shall require an employee to become a partner or form  
2 a partnership as a condition of employment;

3 [~~(12)~~] (13) Service performed by a partner of a limited  
4 liability partnership if the partner is an individual  
5 and has a transferable interest as described in  
6 section 425-127 in the partnership of not less than  
7 fifty per cent; provided that no employer shall  
8 require an employee to form a limited liability  
9 partnership as a condition of employment; and

10 [~~(13)~~] (14) Service performed by a sole proprietor.

11 As used in this definition, "religious, charitable, educational,  
12 or nonprofit organization" means a corporation, unincorporated  
13 association, community chest, fund, or foundation organized and  
14 operated exclusively for religious, charitable, or educational  
15 purposes, no part of the net earnings of which inure to the  
16 benefit of any private shareholder or individual."

17 SECTION 2. Section 392-5, Hawaii Revised Statutes, is  
18 amended to read as follows:

19 "§392-5 **Excluded services.** "Employment" as defined in  
20 section 392-3 shall not include:

21 (1) Domestic service in a private home, local college  
22 club, or local chapter of a college fraternity or  
23 sorority, performed in any calendar quarter by an

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- 1 individual if the cash remuneration paid by the  
2 employer for such service is less than \$225;
- 3 (2) Service not in the course of the employer's trade or  
4 business performed in any calendar quarter by an  
5 individual, unless the cash remuneration paid for the  
6 service is \$50 or more and the service is performed by  
7 an individual who is regularly employed by the  
8 employer to perform the service. An individual shall  
9 be deemed to be regularly employed to perform service  
10 not in the course of the employer's trade or business  
11 during a calendar quarter only if:
- 12 (A) On each of some twenty-four days during the  
13 quarter the individual performs the service for  
14 some portion of the day; or
- 15 (B) The individual was regularly employed, as  
16 determined under subparagraph (A), by the  
17 employer in the performance of the service during  
18 the preceding calendar quarter;
- 19 (3) Service performed on or in connection with a vessel  
20 not an American vessel, if the individual performing  
21 the service is employed on and in connection with the  
22 vessel when outside the United States;

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

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

14           (B) The service performed in connection with a vessel  
15           of ten net tons or less (determined in the manner  
16           provided for determining the register tonnage of  
17           merchant vessels under the laws of the United  
18           States) by an individual who is employed by an  
19           employer who, for some portion in each of twenty  
20           different calendar weeks in either the current or  
21           preceding calendar year, had in the employer's  
22           employ one or more persons performing the  
23           service, whether or not the weeks were

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1 consecutive and whether or not the same  
2 individuals performed the service in each week;  
3 and

4 (C) The service performed in connection with the  
5 catching or taking of salmon or halibut for  
6 commercial purposes;

7 (5) Service performed by an individual in the employ of  
8 the individual's son, daughter, or spouse, and service  
9 performed by a child under the age of twenty-one in  
10 the employ of the child's father or mother;

11 (6) Service performed in the employ of the United States  
12 government or an instrumentality of the United States  
13 exempt under the Constitution of the United States  
14 from the contributions imposed by this chapter;

15 (7) Service performed in the employ of any other state, or  
16 any political subdivision thereof, or any  
17 instrumentality of any one or more of the foregoing  
18 that is wholly owned by one or more such states or  
19 political subdivisions; and any service performed in  
20 the employ of any instrumentality of one or more other  
21 states or their political subdivisions to the extent  
22 that the instrumentality is, with respect to such



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1 service, exempt from the tax imposed by section 3301  
2 of the Internal Revenue Code of 1986;

3 (8) Service with respect to which temporary disability  
4 compensation is payable for sickness under a temporary  
5 disability insurance system established by an act of  
6 Congress;

7 (9) Service performed in any calendar quarter in the  
8 employ of any nonprofit organization exempt from  
9 income tax under section 501 of the Internal Revenue  
10 Code of 1986, if:

11 (A) The remuneration for such service is less than  
12 \$50;

13 (B) The service is performed by a student who is  
14 enrolled and is regularly attending classes at a  
15 school, college, or university;

16 (C) The service is performed by a duly ordained,  
17 commissioned, or licensed minister or licensed  
18 minister of a church in the exercise of the  
19 minister's ministry or by a member of a religious  
20 order in the exercise of nonsecular duties  
21 required by the order; or

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1 (D) The service is performed for a church by an  
2 employee who fails to meet the eligibility  
3 requirements of section 392-25;

4 (10) Service performed in the employ of a voluntary  
5 employees' beneficiary association providing for the  
6 payment of life, sick, accident, or other benefits to  
7 the members of the association or their dependents,  
8 if:

9 (A) No part of its net earnings inures (other than  
10 through such payments) to the benefit of any  
11 private shareholder or individual; and

12 (B) Eighty-five per cent or more of its income  
13 consists of amounts collected from members and  
14 amounts contributed by the employer of the  
15 members for the sole purpose of making such  
16 payments and meeting expenses;

17 (11) Service performed in the employ of a voluntary  
18 employee's beneficiary association providing for the  
19 payment of life, sick, accident, or other benefits to  
20 the members of the association or their dependents or  
21 their designated beneficiaries, if:

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- 1 (A) Admission to membership in the association is  
2 limited to individuals who are officers or  
3 employees of the United States government; and
- 4 (B) No part of the net earnings of the association  
5 inures (other than through such payments) to the  
6 benefit of any private shareholder or individual;
- 7 (12) Service performed in the employ of a school, college,  
8 or university, not exempt from income tax under  
9 section 501 of the Internal Revenue Code of 1986, if  
10 the service is performed by a student who is enrolled  
11 and is regularly attending classes at the school,  
12 college, or university;
- 13 (13) Service performed in the employ of any instrumentality  
14 wholly owned by a foreign government, if:
- 15 (A) The service is of a character similar to that  
16 performed in foreign countries by employees of  
17 the United States government or of an  
18 instrumentality thereof; and
- 19 (B) The United States Secretary of State has  
20 certified or certifies to the United States  
21 Secretary of the Treasury that the foreign  
22 government, with respect to whose instrumentality  
23 exemption is claimed, grants an equivalent

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1 exemption with respect to similar service  
2 performed in the foreign country by employees of  
3 the United States government and of  
4 instrumentalities thereof;

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

14 (15) Service performed by an individual for an employer as  
15 an insurance producer, if all such service performed  
16 by the individual for the employer is performed for  
17 remuneration solely by way of commission;

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

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1           (17) Service covered by an arrangement between the  
2           department and the agency charged with the  
3           administration of any other state or federal  
4           unemployment compensation law pursuant to which all  
5           services performed by an individual for an employer  
6           during the period covered by the employer's duly  
7           approved election, are deemed to be performed entirely  
8           within the agency's state;

9           (18) Service performed by an individual who, pursuant to  
10          the Federal Economic Opportunity Act of 1964, is not  
11          subject to the federal laws relating to unemployment  
12          compensation;

13          (19) Domestic in-home and community-based services for  
14          persons with developmental and intellectual  
15          disabilities under the medicaid home and community-  
16          based services program pursuant to Title 42 Code of  
17          Federal Regulations sections 440.180 and 441.300, and  
18          Title 42 Code of Federal Regulations, Part 434,  
19          Subpart A, as amended, and identified as chore,  
20          personal assistance and habilitation, residential  
21          habilitation, supported employment, respite, and  
22          skilled nursing services, as the terms are defined by  
23          the department of human services, performed by an

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1 individual whose services are contracted by a  
2 recipient of social service payments and who  
3 voluntarily agrees in writing to be an independent  
4 contractor of the recipient of social service  
5 payments;

6 (20) Domestic, which includes attendant care, and day care  
7 services authorized by the department of human  
8 services under the Social Security Act, as amended, or  
9 when provided through state-funded medical assistance  
10 to individuals ineligible for medicaid, when performed  
11 by an individual in the employ of a recipient of  
12 social service payments. For the purposes of this  
13 paragraph only, a "recipient of social service  
14 payments" is a person who is an eligible recipient of  
15 social services such as attendant care and day care  
16 services;

17 [~~(20)~~] (21) Service performed by a vacuum cleaner  
18 salesperson for an employing unit, if all such  
19 services performed by the individual for such  
20 employing unit are performed for remuneration solely  
21 by way of commission; or

22 [~~(21)~~] (22) Service performed by an individual for an  
23 employer as a real estate salesperson or as a real

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1 estate broker, if all the service performed by the  
2 individual for the employer is performed for  
3 remuneration solely by way of commission."

4 SECTION 3. Section 393-5, Hawaii Revised Statutes, is  
5 amended to read as follows:

6 "§393-5 **Excluded services.** "Employment" as defined in  
7 section 393-3 does not include:

8 (1) Service performed by an individual in the employ of an  
9 employer who, by the laws of the United States, is  
10 responsible for care and cost in connection with such  
11 service;

12 (2) Service performed by an individual in the employ of  
13 the individual's spouse, son, or daughter, and service  
14 performed by an individual under the age of twenty-one  
15 in the employ of the individual's father or mother;

16 (3) Service performed in the employ of a voluntary  
17 employee's beneficiary association providing for the  
18 payment of life, sick, accident, or other benefits to  
19 the members of the association or their dependents or  
20 their designated beneficiaries, if:

21 (A) Admission to membership in the association is  
22 limited to individuals who are officers or  
23 employees of the United States government; and

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- 1 (B) No part of the net earnings of the association  
2 inures (other than through such payments) to the  
3 benefits of any private shareholder or  
4 individual;
- 5 (4) Service performed by an individual for an employer as  
6 an insurance agent or as an insurance solicitor if all  
7 service performed by the individual for the employer  
8 is performed for remuneration by way of commission;
- 9 (5) Service performed by an individual for an employer as  
10 a real estate salesperson or as a real estate broker  
11 if all service performed by the individual for the  
12 employer is performed for remuneration by way of  
13 commission;
- 14 (6) Service performed by an individual who, pursuant to  
15 the Federal Economic Opportunity Act of 1964, is not  
16 subject to the provisions of law relating to federal  
17 employment, including unemployment compensation; [and]
- 18 (7) Domestic in-home and community-based services for  
19 persons with developmental and intellectual  
20 disabilities under the medicaid home and community-  
21 based services program pursuant to Title 42 Code of  
22 Federal Regulations sections 440.180 and 441.300, and  
23 Title 42 Code of Federal Regulations, Part 434,



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1 Subpart A, as amended, and identified as chore,  
2 personal assistance and habilitation, residential  
3 habilitation, supported employment, respite, and  
4 skilled nursing services, as the terms are defined and  
5 amended from time to time by the department of human  
6 services, performed by an individual whose services  
7 are contracted by a recipient of social service  
8 payments and who voluntarily agrees in writing to be  
9 an independent contractor of the recipient of social  
10 service payments[.]; and

11 (8) Domestic, which includes attendant care, and day care  
12 services authorized by the department of human  
13 services under the Social Security Act, as amended, or  
14 when provided through state-funded medical assistance  
15 to individuals ineligible for medicaid, when performed  
16 by an individual in the employ of a recipient of  
17 social service payments. For the purposes of this  
18 paragraph only, a "recipient of social service  
19 payments" is a person who is an eligible recipient of  
20 social services such as attendant care and day care  
21 services."

22 SECTION 4. Statutory material to be repealed is bracketed  
23 and stricken. New statutory material is underscored.

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1 SECTION 5. This Act shall take effect upon its approval.

2

3

INTRODUCED BY: CASTA

4

BY REQUEST

5

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**Report Title:**

Employment Exemption

**Description:**

Amends the definition of "employment" in the workers' compensation, temporary disability insurance, and prepaid health care statutes by clarifying the "domestic services" exclusion for services authorized by the Department of Human Services.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

## JUSTIFICATION SHEET

DEPARTMENT: Human Services

TITLE: A BILL FOR AN ACT RELATING TO EMPLOYMENT EXEMPTION FOR DOMESTIC SERVICES AUTHORIZED BY THE DEPARTMENT OF HUMAN SERVICES.

PURPOSE: To clarify and make consistent the wording relating to the exclusion of home and community based and attendant care services from the definition of "employment" for purposes of workers' compensation, temporary disability insurance, and the Prepaid Health Care Act.

MEANS: Amend sections 386-1, 392-5, and 393-5, Hawaii Revised Statutes.

JUSTIFICATION: Sections 386-1, 392-5, and 393-5, Hawaii Revised Statutes, exempt recipients of social service payments with developmental and intellectual disabilities from providing workers' compensation, temporary disability insurance, and prepaid health care. This bill will provide clarification and consistency by exempting the Department of Human Services (DHS), aged recipients and disabled recipients of home and community-based services, and recipients of DHS state-funded home and community-based services, from having to provide workers' compensation, temporary disability insurance, and prepaid health care. This exemption will allow greater access to home and community-based services to needy individuals.

Impact on the public: As this bill does not change current practice but rather codifies it, no impact is anticipated.

Impact on the department and other agencies: As this bill does not change current practice but rather codifies it, no impact is anticipated.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM  
DESIGNATION: HMS 401 and 601.

OTHER AFFECTED  
AGENCIES: Department of Labor and Industrial  
Relations.

EFFECTIVE DATE: Upon approval.