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October 28, 2024



Bradley R. Tamm
Chief Disciplinary Counsel
Office of Disciplinary Counsel
201 Merchant Street, Suite 1600
Honolulu, Hawai'i 96813

Re: Business registration and tax compliance by *pro hac vice* lawyers

Dear Mr. Tamm:

By letter dated August 19, 2024, you asked whether attorneys admitted *pro hac vice* in Hawaii courts are required to have their firms (1) register with the Business Registration Division of the Department of Commerce and Consumer Affairs ("DCCA-BREG") and (2) obtain a general excise tax license number issued by the Department of Taxation.

**Registration with the DCCA-BREG**

As to whether out-of-state firms employing *pro hac vice* counsel needs to be registered with the DCCA-BREG, in short, the answer is "it depends." Some firms may be required to register. Others will not.

Generally, out-of-state firms must register with DCCA-BREG by obtaining certificate of authority if they "transact business in this State", unless the actions fall within a non-exhaustive list of exempted activities. See e.g., HRS section 414-431 (other similarly worded statutes apply to LLC's and LLP's). This list, however, describes examples of activities that do not constitute the transaction of business in the State (i.e. safe harbors) rather than actual exemptions.

HRS section 414-431, which governs foreign corporations, provides two potentially applicable exempted activities on the question of whether *pro hac vice* counsel needs to register in Hawaii with the DCCA-BREG: (1) conducting an isolated transaction that is completed within thirty days and that is not one in the course of repeated transactions of a like nature; and (2) transacting business in interstate commerce.

Guidance as to what constitutes transacting business and the above exemptions can be found in the commentary to the 1984 Model Business Corporation Act, which provided the basis to HRS chapter 414. See S. Journal, 20th Leg., S.C. Rep. 3284 (Haw. 2000). The commentary provides that the model act does not attempt to formulate an inclusive definition of what constitutes the transaction of business; rather the concept is defined in a negative fashion with certain exemptions. See Model Bus. Corp. Act § 15.01 cmt (1984). The commentary explains:

> In general terms, any conduct more regular, systematic, or extensive than that described in [the exemptions], constitute[] the transaction of business and requires the corporation to obtain a certificate of authority. Typical conduct requiring a certificate of authority includes maintaining an office to conduct local intrastate business, selling personal property not in interstate commerce, entering into contracts relating to the local business or sales, and owning or using real estate for general corporate purposes.

Id.

With respect to the exemption for isolated transactions, the exemption provides a partially objective test that a transaction completed within 30 days does not constitute "transacting business" in the State. See id. The commentary, however, notes that this exemption is not a requirement, but a "safe harbor" for not requiring a certificate of authority. See id.

As to the exemption for interstate commerce, the commentary notes that the exemption is reflected in the provisions of the U.S. Constitution that preclude states from imposing restrictions or conditions upon interstate commerce. See id. Thus, a foreign corporation is not required to obtain a certificate of authority even though it sells goods within the state if they are shipped to the purchasers in interstate commerce. See id. Likewise, a corporation does not need to obtain a certificate of authority even if it also does work and performs acts within the state incidental to the interstate business. See id.

Applying the concepts noted above, in Hinden/Owen/Engelke, Inc. v. Wailea Kai Charters, 949 F. Supp. 775 (D. Haw. 1996), the U.S. District Court for the District of Hawaii measured a company's level of activity in determining whether it was transacting business in the State. Id. at 776-77. Wailea Kai Charters involved a California corporation that was in the business of finding financing for entities needing money. Id. at 775. The corporation met with its client in Hawaii, and upon returning to California, entered into a consulting agreement with the client. Id. at 776. The corporation arranged for a lender to provide financing to its client, but the client refused to pay the finder's fee to the corporation. Id. The corporation sued the client in the District of Hawaii to obtain its fee and the client moved to dismiss asserting that the corporation cannot maintain suits in Hawaii without obtaining a certificate from the State of Hawaii to conduct business here. Id.

The district court denied the motion to dismiss and held that the corporation has not "transacted business" in Hawaii. Id. at 777. The court also noted that even if the corporation's actions could constitute transacting business, it appears to be interstate commerce and therefore the statute exempted the corporation from the certification requirements. Id. The court explained that the corporation has no offices in Hawaii, has no agents or independent contractors in Hawaii, has no solicited business in Hawaii, but only entered one contract associated with Hawaii. Id. In addition, the contract did not form a long-term relationship between the parties or require any performance by Plaintiff in Hawaii. Id.

In a Georgia case, Reisman v. Martori, Meyer, Hendricks, & Victor, 271 S.E.2d 685 (1980), a law firm sued its client for fees for legal services. The client appealed the trial court's decision that the law firm was not required to register as a foreign corporation for the purposes of maintaining its suit. Id. at 687. The appellate court held that the law firm was not required to register as a foreign corporation in Georgia, although the attorney for the firm represented the client in federal court and in disciplinary proceedings by the client's employer. Id. at 687-88. The appellate court held that the law firm's activities were concentrated in Arizona even when various attorneys in the firm handled litigation in other states. Id. at 688. Further, the law firm's representation of the client amounted to an isolated transaction in Georgia, which did not constitute doing business in the state. Id.

Based on the above cases and the model act's commentary, an out-of-state law firm that appears *pro hac vice* in a single case, but does not establish a presence in Hawaii, such as maintaining an office, may not necessarily be "transacting business" within the State and may not need to register with DCCA-BREG. However, this inquiry requires a fact-specific analysis, and the conclusions may differ from case to case depending on the counsel's total level of activity in Hawaii.

**Registration for a General Excise Tax (GET) license number**

As to whether out-of-state firms employing *pro hac vice* counsel need to register with the Department of Taxation for a GET license, the answer is very likely **yes.**

"The GET is a privilege tax assessed based on the privilege or activity of doing business within the State and not on the fact of domicile. It is a tax imposed upon entrepreneurs for the privilege of doing business that applies at all levels of economic activity from production or manufacturing to retailing ... and to virtually all goods and services." Travelocity.com, L.P. v. Dir. of Tax'n, 135 Haw. 88, 103 (2015) (internal citations, quotation marks, and brackets omitted). According to our Supreme Court, the GET "is assessed when the taxpayer avails itself of the protection, opportunities, and benefits afforded by the State of Hawaii" and the Legislature designed the GET to tax "virtually every economic activity imaginable." Id. Unless a specific exemption is granted by the Legislature, any person with gross income subject to GET must

obtain a GE license from the Department of Taxation "as a condition precedent to engaging or continuing in such business," and must pay all applicable taxes they incur. HRS § 237-9.

Out-of-state law firms and their employees who earn income from acting as *pro hac vice* counsel in Hawaii fall squarely within the broad definitions of "doing business within the State" set forth by caselaw and the GET statutes. For GET purposes, "'[p]erson' or 'company' includes every individual, partnership. . . group. . . corporation. . . or other entity, whether such persons are doing business for themselves or in a fiduciary capacity, and whether the individuals are residents or nonresidents of the State, and whether the corporation or other association is created or organized under the laws of the State or of another jurisdiction." HRS § 237-1. "'Business' includes all activities (personal, professional, or corporate) engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect"; a person does not need to be physically present in the State to "engage in business" within the State. HRS §§237-2; 237-2.5. *Pro hac vice* legal services are a type of "service business or calling" in which services (such as professional or transportation services) are rendered for other persons in exchange for consideration. HRS §237-7. GET is imposed at the rate of four percent on service business at the retail level, and at one-half percent on service businesses at the wholesale level. HRS § 237-13(6).

Although *pro hac vice* counsel in Hawaii must obtain a GE license and pay all applicable taxes, not <u>all</u> their business income will necessarily be subject to GET. Under the "used or consumed" test established by Act 70, Session Laws of Hawaii 1999, and codified at HRS § 237-29.53, HRS, "a taxpayer is subject to GET if the service is used or consumed in the State, and conversely, is exempt from GET if the service is used or consumed outside the State." Tax Information Release (TIR) No. 2018-06. TIR No. 2018-06 examines the Hawaii Administrative Rules that delineate where legal services are "used and consumed" in great detail:

> <u>Legal services provided to a party in a judicial or administrative action or proceeding, arbitration, mediation, or other method of dispute resolution are used or consumed where the case or matter is filed.</u> HAR § 18-237-29.53-07.
>
> If an action or proceeding is not pending, or if the customer is not a party to the action or proceeding, income from legal services is sourced based on whether the client is an individual, business, or military or government. HAR § 18-237-29.53-11. Legal services provided to an individual are used or consumed where the individual resides. HAR § 18-237-29.53-11(a)(3). Legal services provided to the military or government are used or consumed where the benefit of the services is received. HAR § 18-237-29.53-11(a)(4). If legal services are provided to a business and the legal services relate to the client's business activities, the legal services are used or consumed where the client's related business activities occur. HAR § 18-237-29.53-11(a)(1). If legal services are

> provided to a business and the legal services are unrelated to the client's business activities, the legal services are used or consumed where the client's principal place of business is located. HAR § 18-237-29.53-11(a)(2).
>
> (Emphasis added).

Presumably, *pro hac vice* counsel can only become *pro hac vice* once an action or proceeding is pending, and inherently only provide *pro hac vice* services to a party in that proceeding. However, prospective *pro hac vice* counsel should note the other sourcing rules for legal services they might provide before an action is officially pending or before their customer becomes an actual party to that proceeding. These sourcing rules regarding where legal services are "used and consumed" can also be used to determine to which county their GET income should be sourced for county surcharge purposes. HAR § 18-237-8.6-03.

Please let us know if you have any questions.

Very truly yours,

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