AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2905798
AMBER LYN CHOCOLATES
1812 W SUNSET BLVD STE 34
ST GEORGE UT 84770-6661

RESPONDENT:
State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

PROTEST OF LIABILITY
DOCKET NO. 2009-100326L

O R D E R

This matter comes before me for final Agency Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated June 16, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **April, 2010**.

TOM CLENDENNING
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

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Unemployment Compensation Appeals
MSC 346 Caldwell Building
107 East Madison Street
Tallahassee FL 32399-4143

PETITIONER:
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AMBER LYNN CHOCOLATES
MARC PURLES
1812 W SUNSET BLVD STE 34
ST GEORGE UT 84770-6661

PROTEST OF LIABILITY
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RESPONDENT:
State of Florida
Agency for Workforce Innovation
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RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Director, Unemployment Compensation Services
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated June 16, 2009.

After due notice to the parties, a telephone hearing was held on September 16, 2009. The Petitioner's President and a Road Show Coordinator appeared and testified on behalf of the Petitioner. The Joined Party appeared and testified on his own behalf. The Respondent's Representative appeared along with a Tax Auditor II who testified as a witness.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

Issue: Whether services performed for the Petitioner by the Joined Party and other individuals as demonstrator/salespersons constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Findings of Fact:

1. The Petitioner is an out-of-state corporation engaged in the production and sales of chocolate since 1999.

2. The Joined Party contacted the Petitioner for work after being referred by a relative. The Joined Party did not have his own business.

3. The Joined Party performed services for the Petitioner from May 8, 2007 through August 13, 2008. The Joined Party conducted road shows for the Petitioner. The Joined Party would demonstrate and sell chocolates for the Petitioner at road shows. The road shows were held at retail stores owned by a client of the Petitioner. The client company set the location of the work, the hours worked, and the required attire. The Petitioner passed on these requirements to the Joined Party.

4. There was a written agreement between the Petitioner and the Joined Party which indicated that the Joined Party was an independent contractor. The written agreement was signed December 16, 2007. The written agreement set out the duties and responsibilities of the Joined Party.

5. The Petitioner provided training in giving demonstrations to the Joined Party.

6. The Joined Party was required to store chocolate at a storage facility between road shows. The storage facility was rented and insured by the Petitioner. The chocolate was provided by the Petitioner. The Petitioner established extensive instructions as to how the chocolate was to be stored and maintained. The Joined Party was expected to follow the instructions for the storage of chocolate.

7. The Petitioner provided the Joined Party with a list of road shows that the Petitioner had scheduled the Joined Party to work. The Petitioner expected the Joined Party to attend all scheduled road shows. The Joined Party could call in to notify the Petitioner in the event that illness or emergency prevented the Joined Party from attending a road show.

8. The Joined Party was required to bring the chocolate to road shows, provide samples to customers at the client's location, and sell chocolate to the customers. The Joined Party was required to set up the demonstration and sales area. Signs and props were provided by the Petitioner. The Petitioner established procedures for dispensing chocolate which the Joined Party was expected to follow. The Joined Party was required to follow a dress code and to wear aprons provided by the Petitioner.

9. The Joined Party was expected to submit an expense report and an inventory report to the Petitioner at the conclusion of each road show. The Petitioner paid for the Joined Party's hotel expenses and mileage for travel in excess of twenty five miles.

10. The Petitioner received regular reports from the client company regarding the services performed by the Joined Party.

11. The Petitioner would speak with the Joined Party in the event of client complaints and reserved the right to place the Joined Party on probation. The Petitioner had the right to discharge the Joined Party at any time without liability. The Joined Party had the right to quit after notice without liability.

12. The Joined Party could request time off for vacation or illness from the Petitioner.

13. The Joined Party was paid $800 for each road show with incentive bonuses for meeting different sales levels. The pay per show was based upon a five day show. The pay and bonus schedule was set by the Petitioner. The Joined Party was paid $27,201.42 in 2007 by the Petitioner. The Joined Party was paid $30,040.51 in 2008 by the Petitioner.

14. The Joined Party was allowed to hire a third party to perform the required work in his place. The Joined Party was responsible for any pay owed to a third party worker. The Joined Party exercised this right by having family members take over for him during occasional breaks. The Petitioner had reservations about allowing the Joined Party to work for a competitor although it had not been actually forbidden.

Conclusions of Law:

15. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.

16. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).

17. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987).

18. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.

    1 Restatement of Law, Agency 2d Section 220 (1958) provides:

    (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.

    (2) The following matters of fact, among others, are to be considered:
    - (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
    - (b) whether or not the one employed 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 employer or by a specialist without supervision;
    - (d) the skill required in the particular occupation;
    - (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
    - (f) the length of time for which the person is employed;
    - (g) the method of payment, whether by the time or by the job;
    - (h) whether or not the work is a part of the regular business of the employer;
    - (i) whether or not the parties believe they are creating the relation of master and servant;
    - (j) whether the principal is or is not in business.

19. Comments in the Restatement explain that the word “servant” does not exclusively connote manual labor, and the word “employee” has largely replaced “servant” in statutes dealing with various aspects of the working relationship between two parties. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to

be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

20. In this case, the Joined Party sought work from the Petitioner. The Joined Party did not have his own business. There was a written agreement between the Joined Party and the Petitioner which specified that the relationship between the parties was an independent contractor relationship. Although it may have been the Petitioner's intent to establish an independent contractor relationship, such a relationship is not established by the actual working relationship between the parties. The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

21. The Petitioner provided training and guidance to the Joined Party in the performance of his duties. The Petitioner required the Joined Party to follow a dress code and to submit regular reports. The Petitioner set the days and times that the Joined Party was to perform his duties. The Petitioner provided the supplies and equipment needed by the Joined Party. The Petitioner paid for the Joined Party's hotel and travel expenses. The Joined Party's services sampling and selling chocolate were not separate and distinct from the Petitioner's business manufacturing and distributing chocolate. The Joined Party's services were an integral and necessary part of the Petitioner's regular business. While many of the Petitioner's requirements may have been established by a client company, the requirements were passed on from the client to the Petitioner and then to the Joined Party.

22. The Petitioner determined the rate of pay and controlled the financial aspects of the relationship, including the conditions for awarding incentive bonuses.

23. Either party had the right to end the relationship at any time without incurring liability. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."

24. A preponderance of the evidence in this case reveals that the Petitioner established sufficient control over the means and manner of performing the work as to create an employer-employee relationship between the Petitioner and the Joined Party.

Recommendation: It is recommended that the determination dated June 16, 2009, be AFFIRMED.

Respectfully submitted on March 8, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals