AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2909402
UNLIMITED AIRPORT RIDES LLC
812 E ELKCAM CR
MARCO ISLAND FL 34145-2558

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

PROTEST OF LIABILITY
DOCKET NO. 2009-131181L

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 July 30, 2009, is MODIFIED to reflect a retroactive date of liability of January 1, 2007. It is also ORDERED that the determination is AFFIRMED as modified.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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

PETITIONER:
Employer Account No. - 2909402
UNLIMITED AIRPORT RIDES LLC
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812 E ELKCAM CR
MARCO ISLAND FL 34145-2558

PROTEST OF LIABILITY
DOCKET NO. 2009-131181L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated July 30, 2009.

After due notice to the parties, a telephone hearing was held on November 2, 2010. The Petitioner, represented by its owner, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. Joined Parties Saul Wilner, Robert DeFulgentis, and Lora Mims appeared and testified.

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 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 LLC which operates a business that provides transportation for passengers. The Petitioner's business is located on Marco Island but the Petitioner will pick up passengers at any location and transport them to any location as long as the passengers can afford the fare. The Petitioner currently owns seven sedans and four passenger vans that are used to transport the passengers. In the past the Petitioner owned more sedans and vans than what the Petitioner currently owns.

2. Both the Petitioner's owner and his wife are active in the business. The Petitioner's adult son also works for the business on a part time basis. The Petitioner has a full time business manager. The Petitioner has classified all of the individuals who drive the Petitioner's vehicles as independent contractors. The Petitioner does not acknowledge any workers to be the Petitioner's employees.

3. Joined Party Robert DeFulgentis began working for the Petitioner as a driver in 2003. Initially, he worked on a part time basis. He did not work for the Petitioner in 2004 but he subsequently returned as a full time driver. There was no written agreement prior to 2007. The Petitioner created a *Driver Agreement* which all drivers were required to sign. Robert DeFulgentis signed the *Driver Agreement* on January 25, 2007.

4. The *Driver Agreement* provides that the drivers are independent contractors and that the Petitioner will provide training, orientation, and supervision to assist the drivers and to facilitate the working relationships. The Agreement provides that the drivers will provide passenger limousine and taxi transportation services for the Petitioner's customers on prescheduled days and times. If a driver is not able to work on a prescheduled day the driver must notify the Petitioner at least six hours in advance of the scheduled shift. If the driver fails to provide six hours of notice the driver is subject to immediate termination. The Agreement requires the drivers to work no less than twelve hours per day that the drivers are available to work. The Agreement provides that certain days are mandatory work days and the drivers are expected to work on the mandatory days. The mandatory work days include Thanksgiving, Christmas Eve, Christmas Day, New Years Eve, New Years Day, Easter, and Independence Day. If a driver is not available to work on a mandatory work day without prior approval the Petitioner may hold the driver in default of the Agreement.

5. The *Driver Agreement* requires the drivers to perform the services in a professional manner and requires the drivers to build the image and reputation of both the Petitioner and the drivers with customers and with the public in general. The Agreement requires the drivers to perform the services under similar or superior standards as set forth in the Petitioner's rules and regulations, which the Petitioner may choose to amend from time to time. The rules and regulations require the drivers to comply with a dress code, to be clean shaven, hair trimmed, and nails cleaned and trimmed. If a driver is not in compliance with the dress code the driver will not be allowed to perform services. The rules and regulations require the drivers to notify the Petitioner when the driver picks up the passenger and when the drivers deliver the passenger. The drivers are required to help passengers with luggage and to be polite, gentle, kind, and helpful to all customers. The drivers may not smoke, eat, drink, chew gum, or use foul language in the presence of a customer. The drivers are not allowed to smoke in the vehicles. The drivers are not allowed to take any personal, business, or reservation information from customers. The drivers are not allowed to accept any check payment from customers and can only accept payment by cash or credit card. The drivers are not allowed to use the vehicles for personal use and are allowed to use the vehicles for business purposes only. A driver is subject to termination if the driver uses the vehicle for personal use. The drivers are required to return the assigned vehicles to the Petitioner's office after each day of work unless told otherwise by the Petitioner. The drivers are not allowed in the Petitioner's office except to drop off paperwork or to pick up work assignments. The drivers are required to remain on Marco Island unless told otherwise by the Petitioner. The drivers are subject to random drug tests. The *Driver Agreement* provides that any request for time off must be in writing within one week of the requested time off.

6. The *Driver Agreement* provides that the Petitioner will pay the driver 45% of the driver's fares for transporting the passengers plus an additional 1% for every year of service up to a maximum of 50%. On the sixth year of uninterrupted service the Petitioner may, in the discretion of the Petitioner, grant a bonus based on the driver's performance. Factors included in the performance evaluation include customer complaints, driving record, driver negligence, driver appearance, and

driver reliability. A driver is permitted to receive 100% of the driver's tips as long as the driver turns in the trip sheets on a daily basis. The Petitioner deducts a cleaning surcharge of fifty cents for each trip. The Petitioner deducts $50 from the driver's commission each week until the Petitioner has deducted a total of $1,000 from the driver. If the Petitioner determines that the driver is in default of the Agreement the Petitioner retains the money. If the driver voluntarily terminates the Agreement with proper notice, the money is returned to the driver.

7. The *Driver Agreement* may be terminated by the driver without cause upon written notice to the Petitioner of fifteen business days. The Petitioner may terminate the Agreement without cause with ten business days written notice to the driver. The Petitioner may terminate a driver without advance notice if the Petitioner determines that the driver has not performed the services to the Petitioner's satisfaction.

8. The *Driver Agreement* provides that all past, present, and future customers are the Petitioner's customers and not the customers of the drivers. The Agreement provides that during the term of the Agreement and for a period of five years following termination of the Agreement, the drivers and/or any of the drivers' family members will not enter a competitive business within any county that the Petitioner does business or intends to do business.

9. Joined Party Saul Wilner responded to a newspaper help wanted advertisement placed by the Petitioner and was interviewed by the Petitioner. For training purposes he was required to ride with other drivers for two days. He was not compensated for the two days of training. Saul Wilner signed a *Driver Agreement* on March 5, 2008, and began work for the Petitioner on that date.

10. The brother of Joined Party Lora Mims worked for the Petitioner as a driver. Lora Mims was unemployed and was referred to the Petitioner by her brother. Lora Mims had never previously worked as a driver. For training purposes she was required to ride with other drivers for two days. She was not paid for the training period. She began work for the Petitioner as a driver on October 1, 2008, when she signed the *Driver Agreement*.

11. The Petitioner provides the vehicles which are used to transport the passengers. The Petitioner is responsible for the repair, maintenance, insurance, and licenses. The drivers are responsible for providing the fuel and for any expense of washing the vehicles.

12. The Petitioner determines the amounts that are charged to the passengers. The drivers may not deviate from the passenger rates determined by the Petitioner.

13. At the time of hire the drivers complete a form showing the days of the week and the times of the day that they are available to transport passengers. Generally, the Petitioner schedules the drivers during the days and times that the drivers are available. Sometimes the drivers are scheduled to work by the Petitioner on other days and times. If a driver does not accept a work assignment the driver is penalized by the Petitioner by withholding other work assignments. The drivers have been verbally reprimanded by the Petitioner for various reasons. When the Petitioner's owner verbally reprimands the drivers the owner yells and screams at the drivers.

14. The Petitioner posts the schedule for all of the drivers on the wall of the Petitioner's office. Each day when the drivers report for work at their assigned time the Petitioner provides them with trip sheets showing the work assignments for the day. During the course of each day additional work assignments are provided by the Petitioner. During times that assignments are not available the drivers are not permitted to wait for assignments in the Petitioner's office and are not allowed to leave Marco Island. They are required to remain in the vehicles on Marco Island while waiting for additional work assignments during the twelve hour assigned shifts.

15. The drivers are required to personally perform the work. They are not allowed to hire others to perform the work for them. The drivers are not allowed to perform similar services for

competitors. The Petitioner tells the drivers that they will be discharged if they perform services for a competitor.

16. The drivers are paid on a regularly established payday, Friday of each week. No taxes are withheld from the pay. No fringe benefits are provided. At the end of the year the Petitioner reports the earnings of the drivers on Form 1099-MISC as nonemployee compensation.

17. On or about June 2, 2009, Joined Party Saul Wilner went home after he completed his twelve hour work shift. Saul Wilner was in bed asleep when the Petitioner's owner called him on the telephone and woke him up. The Petitioner's owner screamed at Saul Wilner on the telephone. Saul Wilner replied that he would talk to the Petitioner's owner in the morning and hung up the telephone. On the following morning the Petitioner's owner informed Saul Wilner that he was discharged because he was insubordinate by hanging up the telephone.

18. Saul Wilner filed a claim for unemployment compensation benefits effective June 14, 2009. When Saul Wilner did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if Saul Wilner performed services for the Petitioner as an employee or as an independent contractor.

19. By determination dated July 15, 2009, the Department of Revenue held that Saul Wilner performed services for the Petitioner as an employee and that the Petitioner was liable for payment of unemployment compensation tax retroactive to March 11, 2008. The determination was provided to the Petitioner by mail postmarked July 21, 2009. The Petitioner filed a written protest by letter dated August 5, 2009.

20. Joined Party Robert DeFulgentis worked for the Petitioner until approximately June 2009. Robert DeFulgentis filed an initial claim for unemployment compensation benefits effective June 28, 2009. When he did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if Robert DeFulgentis performed services for the Petitioner as an employee or as an independent contractor.

21. On July 30, 2009, the Department of Revenue determined that Robert DeFulgentis and other individuals performing services for the Petitioner as limousine drivers are the Petitioner's employees retroactive to January 1, 2008. The Petitioner filed a protest by letter dated August 19, 2009.

22. Joined Party Lora Mims performed services for the Petitioner until approximately July 2009 when the Petitioner stopped providing work. The Petitioner informed Lora Mims that there was no further work available and Lora Mims filed a claim for unemployment compensation benefits effective September 23, 2009. Lora Mims submitted a resignation on October 12, 2009, effective October 26, 2009, so that she could receive the $1,000 which the Petitioner had withheld from her pay. When Lora Mims did not receive credit for her earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if Lora Mims performed services for the Petitioner as an employee or as an independent contractor.

23. On November 19, 2009, the Department of Revenue determined that Lora Mims and other individuals performing services for the Petitioner as drivers are the Petitioner's employees retroactive to March 11, 2008. The Petitioner filed a protest by letter dated December 9, 2009.

Conclusions of Law:

24. 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.

25. 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).

26. 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).

27. 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.

28. 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.

29. 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.

30. 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 cannot be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.

31. The Petitioner operates a business to transport passengers. The drivers transport the Petitioner's passengers. The work performed by the drivers is not separate and distinct from the Petitioner's business but is an integral and necessary part of the Petitioner's business. The drivers are required to personally perform services exclusively for the Petitioner and are not allowed to perform services for others or hire others to perform the services.

32. The Petitioner provides the vehicles which are used to transport the passengers and is responsible for the maintenance and repair of the vehicles. The Petitioner is responsible for the vehicle licenses and insurance. The drivers are only responsible for the fuel and for washing the vehicles. It was not shown that the drivers have a significant investment in a business or that the drivers are at risk of suffering a financial loss from performing services.

33. It was not shown that any skill or special knowledge is needed to perform the work. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

34. Robert DeFulgentis began performing services for the Petitioner in 2003 on a part time basis. After a period of time when he did not perform services he was rehired as a full time driver. He signed the *Driver Agreement* on January 25, 2007, and worked for a period of two and one-half years until June 2009. Both Saul Wilner and Lora Mims performed services for a year or more. The *Driver Agreement* provides incentives which include additional pay and bonuses based on longevity of service. These facts reveal relationships of relative permanence between the Petitioner and the drivers. In addition, the Agreement provides that the Petitioner may immediately terminate the relationship if the Petitioner is not satisfied with the performance of a driver. 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."

35. The Petitioner pays the drivers based on production rather than by time worked. However, the Petitioner determines the amount of the fares, the work schedule, and how the passengers are assigned to each driver. The drivers are not allowed to transport their own passengers and may not perform services for other transportation companies. The Petitioner determines the percentage that is paid to each driver. These facts reveal that the Petitioner controls the financial aspects of the relationship. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash. The fact that the Petitioner chooses not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

36. The *Driver Agreement* provides that the drivers are independent contractors. However, a statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). 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."

37. The facts presented in this case reveal that the Petitioner exercises significant control over what work is performed, when it is performed, where it is performed, and how it is performed. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee.

Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

38. In the case of Richard T. Adams v. Department of Labor and Employment Security, 458 So. 2d 1161 (Fla. 1st DCA 1984), the Court determined the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers. No evidence was adduced showing any difference between the working conditions of the Joined Parties and the other workers. The Court noted that Section 443.171(1), Florida Statutes, authorizes the Agency to administer the chapter; including the power and authority to require reports, make investigations, and take other action deemed necessary or suitable to that end.

39. It is concluded that the services performed for the Petitioner by Joined Parties Saul Wilner, Robert DeFulgentis, Lora Mims, and by other individuals as drivers constitute insured employment.

40. Section 443.1215, Florida States, provides:
    (1) Each of the following employing units is an employer subject to this chapter:
        (a) An employing unit that:
            1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
            2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

41. Although the evidence reveals that Robert DeFulgentis performed services for the Petitioner prior to the date that he signed the *Driver Agreement* no evidence was presented to show the number of weeks that he or other drivers performed services prior to 2007 or the amount of the earnings paid to the drivers. However, there is sufficient evidence to establish that the Petitioner is liable for payment of unemployment compensation tax effective January 1, 2007.

Recommendation: It is recommended that the determination dated July 30, 2009, be MODIFIED to reflect a retroactive date of liability of January 1, 2007. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on November 15, 2010.

R. O. SMITH, Special Deputy
Office of Appeals