AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2567360
BUSINESSPLANS.COM INC
220 S MILITARY TRAIL
DEERFIELD BEACH FL 33442-3017

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

PROTEST OF LIABILITY
DOCKET NO. 2009-164785L

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 Petitioner's appeal is accepted as timely filed and that the determination dated October 16, 2009, is AFFIRMED.

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

TOM CLENDENNING
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
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BUSINESSPLANS.COM INC
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PROTEST OF LIABILITY
DOCKET NO. 2009-164785L

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

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 October 16, 2009.

After due notice to the parties, a telephone hearing was held on March 29, 2010. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Florida Department of Revenue Tax Specialist II, appeared and testified. The Joined Party 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 working as a sales representative constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner, Businessplans.com, Inc., is a corporation which was formed in 2003 to operate a business which writes business plans for companies and individuals throughout the country. The Petitioner has a website and the Petitioner also sells advertising on its website so that attorneys can advertise their services and so the Petitioner can refer its customers to the attorneys.
2. The Joined Party has a background as a stock broker, as a commodity broker, and as a telemarketer. In May 2008 the Joined Party was seeking employment when he saw a help wanted sign in the window of the Petitioner's office. He inquired about the position and was interviewed

by the Petitioner's president. The president informed the Joined Party that the position involved cold calling attorneys throughout the country in an attempt to sell the Petitioner's lawyer referral service to attorneys. The president informed the Joined Party that the position was an independent contractor position and that the Joined Party would be paid commissions based on the Joined Party's sales. The Joined Party had worked as an independent contractor when he was a stock broker and he did not like the idea of being classified as an independent contractor. However, he needed a job and felt that he did not have a choice. The Joined Party accepted the Petitioner's offer. The parties did not enter into any written agreement or contract.

3. The Petitioner scheduled the Joined Party to attend a training class with seven or eight other individuals who were hired at the same time for the same position. The training class lasted for approximately two days. In the training class the Petitioner taught the Joined Party and the other sales representatives about the Petitioner's business and about the Petitioner's website. They were taught what to say when contacting attorneys and were provided with a script. They listened in while experienced sales representatives contacted attorneys. The script required the Joined Party to identify himself as an employee of Businessplans.com.

4. After the Joined Party completed the training the Petitioner assigned a desk and a telephone in the Petitioner's office as the Joined Party's work station. He was instructed to contact attorneys within assigned zip codes and the Petitioner provided the Joined Party with a list of the attorneys in those zip codes. The Joined Party did not have any expenses in connection with the work. Everything that was needed to perform the work was provided by the Petitioner. The Petitioner provided the Joined Party with a price list showing the prices to be charged to the attorneys, based on the population of the areas where the attorneys were located. The Joined Party was not allowed to deviate from the price list.

5. The Joined Party's work schedule was Monday through Friday from 9 AM until 5 PM. The Joined Party was allowed to take one hour for lunch from 12 noon until 1 PM. If the Joined Party was absent from work he was required to call in. During one week the Joined Party was satisfied with his sales during the early part of the week. The Joined Party had to take care of some personal business and decided to call off for one of the days in the week so that he could attend to his personal business. When the Joined Party returned to work he was informed by the Petitioner that he would only be paid for four-fifths of the commissions he had earned during the week because he had only worked four days during the week.

6. The Joined Party found the work environment to be very structured and he believed that he was the Petitioner's employee. The environment was not at all the same as when he had previously worked as an independent stock broker. The Joined Party was supervised by the Petitioner's president and by another worker. On one occasion the Joined Party and a co-worker were whispering to each other during working hours. The Petitioner separated the two workers by assigning them to different work stations so that they could not talk during working hours.

7. The Joined Party would cross off the names of the attorneys that he contacted from the list that was provided by the Petitioner. If the Joined Party made an appointment to call an attorney back at another date or time, the Joined Party was required to write the appointment on an appointment blackboard.

8. During the early weeks of the Joined Party's work the president listened in while the Joined Party made calls. The work was simple and the Joined Party performed the work to the president's satisfaction. Throughout the working relationship the president had conversations with the Joined Party during which the president offered suggestions about better ways for the Joined Party to make his sales calls. The president discussed different sales techniques with the Joined Party. After the Joined Party gained experience he began deviating from the script, depending on the

circumstances. The Petitioner strongly encouraged the Joined Party to adhere to the script at all times.

9. The Joined Party's commissions were based on a graded commission scale based on the monetary total of the sales. The greater the amount of the sales during a week, the greater the percentage of the commission. The purpose of the graded commission schedule was to create an incentive for the sales representatives to produce more sales.

10. No payroll taxes were withheld from the Joined Party's pay. The Petitioner did not provide any fringe benefits such as health insurance, retirement benefits, or paid time off from work. At the end of 2008 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

11. During the time that the Joined Party worked for the Petitioner the Joined Party did not have an occupational or business license, did not have business liability insurance, and did not advertise or offer services to the general public. The Joined Party performed services exclusively for the Petitioner. The Joined Party did not believe that he had the right to hire others to perform the work for him. At all times the Joined Party believed that he was the Petitioner's employee.

12. Either party had the right to terminate the relationship at any time without incurring liability. On one occasion the Joined Party observed the Petitioner discharge a sales representative due to lack of sales. In November 2008 the Joined Party grew concerned because he was not earning any commissions and he left the job to seek other employment.

13. The Joined Party filed a claim for unemployment compensation benefits effective July 19, 2009. His filing on that date established a base period from April 1, 2008, through March 31, 2009. The Joined Party did not receive credit for his earnings with the Petitioner and the Joined Party filed a *Request for Reconsideration of Monetary Determination*. The Agency for Workforce Innovation assigned an investigation to the Department of Revenue to determine if the Joined Party was entitled to wage credits from employment.

14. On October 16, 2009, the Department of Revenue issued a determination holding that the Joined Party was an employee of the Petitioner retroactive to April 14, 2008. Among other things the determination states "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter. If your protest is filed by mail, the postmark date will be considered the filing date of your protest."

15. Upon receipt of the determination the Petitioner's president immediately telephoned the individual who had conducted the investigation and who had issued the determination. That individual informed the Petitioner that, if the Petitioner disagreed with the determination, the Petitioner could write a note on the determination and return the determination to the Department of Revenue. The Petitioner complied with that instruction shortly after receipt of the determination, by writing an undated note of protest on the determination.

16. The Petitioner's protest was received by the Department of Revenue. The Department of Revenue did not date stamp the correspondence in and, if the protest was filed by mail, the Department of Revenue did not retain the envelope bearing the postmark date. After the protest letter was reviewed by one or more individuals with the Department of Revenue, the letter was presented to a Tax Specialist II on November 16, 2009, for review.

Conclusions of Law:

17. Section 443.141(2)(c), Florida Statutes, provides:

> (c) *Appeals.*--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an

opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.

18. Rule 60BB-2.035(5)(a)1., Florida Administrative Code, provides:

> Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.

19. Rule 60BB-2.023(1), Florida Administrative Code, provides, in pertinent part:

> Filing date. The postmark date will be the filing date of any report, protest, appeal or other document mailed to the Agency or Department. The "postmark date" includes the postmark date affixed by the United States Postal Service or the date on which the document was delivered to an express service or delivery service for delivery to the Department.

20. The last date for filing a timely protest was November 15, 2009. The Petitioner's testimony does not establish the date the Petitioner received the determination nor the date the Petitioner filed the protest. The Petitioner is only able to recall that he filed the protest shortly after receipt of the determination. The Department of Revenue did not record the date that the protest was received and, if the protest was filed by mail, the Department did not retain the envelope bearing the postmark. The protest came into the possession of a Department of Revenue Tax Specialist II on November 16 after it had been reviewed by other individuals. These facts show a strong probability that the protest was filed within the twenty day filing period. Thus, the protest should be accepted as timely filed.

21. 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.

22. 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).

23. 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).

24. 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.

25. 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.

26. 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.

27. 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.

28. The evidence presented in this case reveals that there are two prongs to the Petitioner's business, selling business plans to its business plan customers and selling advertising to attorneys who wish to be referred by the Petitioner to the Petitioner's business plan customers. It was the Joined Party's assigned responsibility to sell the advertising and referral service to attorneys. The work performed by the Joined Party was not separate and distinct from the Petitioner's business, but rather it was an integral and necessary part of the business. The Joined Party did not provide services to others, did not have an occupational or business license and did not have any expenses in connection with the work. The Joined Party was not at risk of suffering a financial loss from performing services for the Petitioner.

29. At the time of hire the Petitioner informed the Joined Party that the Joined Party was hired to be an independent contractor. 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), that while the obvious purpose to be accomplished by an agreement is 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.

30. The Petitioner described the Joined Party's assigned work as "simple." and indicated that it did not require any special knowledge or skill other than the ability to make sales. 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)

31. The Petitioner paid the Joined Party a commission on sales. The Petitioner determined the price to be charged to the attorneys for the advertising and referral service and determined the percentage

of the commission to be paid on the sales. The Petitioner controlled 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. The fact that the Petitioner chose not to withhold payroll taxes from the pay and chose to report the earnings to the Internal Revenue Services on Form 1099-MISC as nonemployee compensation, standing alone, does not establish an independent relationship.

32. Either party had the right to terminate the relationship at any time without incurring liability. This fact reveals the existence of an at-will relationship. 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."

33. The Petitioner exercised significant control over how the work was performed. The Petitioner trained the Joined Party. Training is a method of control because it specifies how the work must be performed. The Petitioner provided the Joined Party with a script and strongly encouraged the Joined Party to adhere to the script at all times. The Petitioner monitored the Joined Party's performance and offered suggestions about how to improve his performance. The Petitioner determined when the work was to be performed and penalized the Joined Party when he took a day off with permission. The Petitioner determined where the work was performed, even to the extent of requiring the Joined Party to move to a different work station when the Joined Party was discovered talking to a co-worker during working hours.

34. 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).

35. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

Recommendation: It is recommended that the Petitioner's appeal be accepted as timely filed. It is recommended that the determination dated October 16, 2009, be AFFIRMED.

Respectfully submitted on March 31, 2010.

R. O. SMITH, Special Deputy
Office of Appeals