**AGENCY FOR WORKFORCE INNOVATION**
**TALLAHASSEE, FLORIDA**

**PETITIONER:**
Employer Account No. - 1249165
MAZZEI REALTY SERVICES INC
1550 MADRUGA AVE STE 150
CORAL GABLES FL 33146-3016

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

**PROTEST OF LIABILITY**
**DOCKET NO. 2009-173256L**

**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 November 6, 2009, is MODFIED to reflect a retroactive date of November 5, 2007. It ORDERED that the determination is AFFIRMED as modified.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **July, 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

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State of Florida
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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 November 6, 2009.

After due notice to the parties, a telephone hearing was held on April 26, 2010. The Petitioner, represented by its president, appeared and testified. The Petitioner's Director of Operations testified as a witness. The Respondent, represented by a 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 as a secretarial/clerical worker constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

**Findings of Fact:**

1. The Petitioner is a corporation which was formed in 1988 to operate a commercial real estate business. The Petitioner registered for payment of Florida unemployment compensation tax effective January 1, 1990. The Petitioner currently has approximately eight acknowledged employees including the Petitioner's president and the Director of Operations.
2. In 2007 the Joined Party, who is a family member of one of the Petitioner's employees, was a college student. The Petitioner arranged for the Joined Party to work for one of the Petitioner's clients as an employee of the client. The client withheld payroll taxes from the pay and reported

the Joined Party's earnings to the Internal Revenue Service on Form W-2. During approximately October or early November 2007 the client company discharged the Joined Party due to dissatisfaction with the Joined Party's performance. On or about November 5, 2007, the Petitioner assigned the Joined Party to perform clerical duties for the Petitioner at the Petitioner's office.

3. The Joined Party attended college two day per week. The verbal agreement between the Petitioner and the Joined Party was that the Joined Party would work in the Petitioner's office on the days that she was not in school. After some negotiations the Petitioner offered to pay the Joined Party $13 per hour and the Joined Party accepted.

4. The Joined Party's assigned duties consisted of answering the telephone, doing filing, sorting mail, greeting visitors, and maintaining the Petitioner's database with information provided by other workers in the office. The Joined Party was responsible for assisting all other workers in the Petitioner's office; however, she was primarily responsible for assisting the Director of Operations.

5. The Petitioner provided the Joined Party with lists of tasks that the Joined Party was required to perform. Although the tasks were not listed in order of priority, on some occasions the Petitioner told the Joined Party which tasks to perform first. As the Joined Party completed each of the assigned tasks the Joined Party notified the Director of Operations that the task was complete.

6. The Petitioner provided the Joined Party with a desk, a computer, a telephone, a company email address, and all other office equipment and supplies that were needed to perform the work. The Joined Party did not have any business expenses in connection with the work.

7. At the beginning of each school semester the Joined Party notified the Petitioner of her school schedule and notified the Petitioner which days she would be available to work in the Petitioner's office. The Petitioner was very accommodating with the Joined Party's school schedule. Although the Joined Party's hours of work varied according to her availability, the Joined Party generally worked eight hours a day, three days per week. If the Joined Party was not able to work on a scheduled day, she was required to notify the Petitioner.

8. The Petitioner believed that the Joined Party was not qualified to perform any work for the Petitioner other than clerical work. Generally, the work performed by the Joined Party did not require any training. If a task was assigned to the Joined Party and the Joined Party did not know how to perform the task, the Joined Party would ask how to perform the task. The Petitioner would then provide instructions. On a few occasions the Joined Party participated in informal staff meetings.

9. The Joined Party was required to complete a weekly timesheet. Initially, the Joined Party completed the timesheet to show the total hours worked per day. Although the Petitioner did not question the accuracy of the timesheets, the Petitioner directed the Joined Party to show the time she reported for work each day and the time that she left each day rather than just the total hours worked. The Joined Party was not paid for any breaks, such as a lunch breaks, and she was instructed to show the amount of time that she took for breaks so that the Petitioner would not pay her for that time. She was told by the Petitioner that she should try to take her lunch break between 12 PM and 1 PM and that she should not begin her lunch break after 1 PM.

10. On occasions the Joined Party made errors which required her to redo certain tasks. The Petitioner paid the Joined Party for all of the work time, including the additional time it took to redo the tasks.

11. The Petitioner paid the Joined Party on a weekly basis with the payday falling on Friday. The Petitioner did not withhold any taxes from the pay. The Petitioner did not provide any fringe benefits such as health insurance, retirement benefits, paid vacations, or paid holidays. At the end of each year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

12. The Joined Party was not allowed to perform services for any competitor of the Petitioner. The Joined Party was required by the Petitioner to personally perform the work. She could not hire others to perform the work for her.

13. Either party had the right to terminate the relationship at any time without incurring liability. On April 22, 2009, the Petitioner sent an email to the Joined Party advising the Joined Party that her services were no longer needed.

**Conclusions of Law:**

14. 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.

15. 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).

16. 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).

17. 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.

18. 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.

20. 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.

21. The Joined Party performed tasks for the Petitioner as assigned by the Petitioner, including filing, sorting mail, answering the telephone, greeting visitors, and any other assigned clerical tasks to assist the Director of Operations and other employees. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business.

22. The Petitioner provided the work space and all equipment and supplies needed to perform the work. The Joined Party did not have any expenses in connection with the work. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner. The Petitioner controlled the Joined Party to the point that the Joined Party was prohibited from performing services for any competitor and was prohibited from hiring others to perform the work for her.

23. The Joined Party was paid by the hour rather than by the job or based on production. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

24. The work performed for the Petitioner by the Joined Party did not require any skill or special knowledge. 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)

25. The Joined Party worked for the Petitioner for a period of one and one-half years. Either party had the right to terminate the relationship at any time without incurring liability. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner terminated the Joined Party without advance notice in April 2009. 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."

26. The Petitioner controlled what work was performed and where it was performed. Although the Petitioner was very accommodating with the Joined Party's school schedule, it is clear that the Petitioner had the right to control when the work was performed. By requiring the Joined Party to personally perform the work the Petitioner controlled how the work was 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).

27. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment. The Joined Party began performing services for the Petitioner on November 5, 2007; however, the determination issued by the Department of Revenue is only retroactive to January 1, 2008. Thus, the correct retroactive date is November 5, 2007.

**Recommendation:** It is recommended that the determination dated November 6, 2009, be MODIFIED to reflect a retroactive date of November 5, 2007. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on April 28, 2010.

R. O. SMITH, Special Deputy
Office of Appeals