

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2481904
UPI PROPERTY MANAGEMENT GROUP
800 W FRANKLIN AVE
MINNEAPOLIS MN 55405-3122

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2009-174807L**

ORDER

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 protest is accepted as timely filed and the determination dated October 29, 2009, is AFFIRMED.

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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**PROTEST OF LIABILITY
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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 October 29, 2009.

After due notice to the parties, a telephone hearing was held on April 28, 2010. The Petitioner, represented by the sole member of the LLC, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 an event planner 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 is a Florida limited liability company which was formed in 2002 and which established liability for payment of unemployment compensation taxes effective July 1, 2004. The Petitioner is involved in various real estate management activities and event planning.
2. The Petitioner purchased a nine unit bed and breakfast hotel in Naples. It was the Petitioner's intent to open a restaurant at the hotel. In early 2008, shortly after the Petitioner opened the hotel, the Petitioner obtained information that the Joined Party was an individual who was capable of

preparing the restaurant to open. The Petitioner contacted the Joined Party and hired the Joined Party to provide event planning services for the Petitioner.

3. The Petitioner paid the Joined Party a flat amount each month.
4. The Petitioner provided training to the Joined Party concerning the Petitioner's processes.
5. The Joined Party performed the work on the Petitioner's premises. The Petitioner provided a computer and all equipment and supplies that were needed to perform the work. The Petitioner reimbursed the Joined Party for any work related expenses that the Joined Party had.
6. The Petitioner supervised the Joined Party and gave the Joined Party directions about how to do the work. The Joined Party had set hours of work. The Petitioner wanted the Joined Party to perform the work when the Petitioner was present.
7. The Joined Party was required to personally perform the work. The Joined Party could not subcontract the work or hire others to perform the work for her.
8. The Petitioner did not withhold any taxes from the Joined Party's pay. At the end of 2008 the Petitioner reported earnings in the amount of \$26,536.25 on Form 1099-MISC as nonemployee compensation.
9. Either party had the right to terminate the relationship at any time without incurring liability. The Petitioner terminated the relationship.
10. The Joined Party filed a claim for unemployment compensation benefits effective August 2, 2009. When the Joined Party 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 the Joined Party performed services as an employee or as an independent contractor.
11. On October 29, 2009, the Department of Revenue issued a determination holding that the Joined Party performing services for the Petitioner as an event planner was the Petitioner's employee retroactive to April 1, 2008. The Petitioner filed a written protest on November 16, 2009.

Conclusions of Law:

12. 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.
13. 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.
14. 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.
15. The evidence reveals that the Petitioner's protest was filed within the twenty day appeal period.

16. 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.
17. 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).
18. 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).
19. 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.
20. 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.
21. 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.
22. 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.

23. Part of the Petitioner's business is event planning. The Petitioner engaged the Joined Party to provide event planning services for the Petitioner. The services performed by the Joined Party were not separate and distinct from the Petitioner's business but were an integral and necessary part of the Petitioner's business. The Petitioner provided all of the equipment and supplies and reimbursed the Joined Party for work expenses.
24. The Joined Party had set hours of work and she was paid a flat amount per month. The Joined Party was compensated for time worked rather than by production or by the job.
25. Either party could terminate 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."
26. The Petitioner's witness, the sole member of the LLC, provided inconsistent and conflicting evidence and testimony. Among other things he testified that the Joined Party had set hours of work and that the Joined Party was required to perform the work when the member was present. He also testified that he did not know when the Joined Party worked and that the Joined Party was free to come and go as she pleased. The witness provided conflicting evidence concerning the Joined Party's dates of work and the Joined Party's earnings. He testified that the Joined Party was paid a flat amount per month regardless of the hours worked. He then testified that the Joined Party's earnings varied during some months because the Joined Party worked less hours during those months. The witness submitted a pre-hearing statement attesting that there was no written agreement between the parties; however, he testified that there was a written agreement. No written agreement was submitted as evidence. Section 90.952, Florida Statutes, provides that, “Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph.”
27. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
28. The Petitioner's inconsistent testimony and contradictory evidence is not sufficient to establish that the determination of the Department of Revenue is in error.

Recommendation: It is recommended that the Petitioner's appeal be accepted as timely filed. It is recommended that the determination dated October 29, 2009, be AFFIRMED.

Respectfully submitted on June 7, 2010.



R. O. SMITH, Special Deputy
Office of Appeals