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

**PETITIONER:**
Employer Account No. - 2889180
EXPERIOLOGY LLC
3754 HUNTERS ISLE DR
ORLANDO FL 32837-5807

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

**PROTEST OF LIABILITY**
**DOCKET NO. 2009-52098L**

**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 March 11, 2009, is MODIFIED to only pertain to the Joined Party and to reflect a retroactive date of February 1, 2007. It is also ORDERED that the determination is AFFIRMED as modified.

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

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# 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 March 11, 2009.

After due notice to the parties, a telephone hearing was held on May 11, 2010. The Petitioner was represented by its attorney. The Petitioner's Chief Creative Officer, the Petitioner's accountant, and the owner of an advertising business testified as witnesses. 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 and other individuals working as project managers 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 was formed in March 2006 to operate a hotel consulting business. The Petitioner's Chief Creative Officer is the only individual who performs the hotel consulting services for the Petitioner. The Petitioner does not have a commercial business office and operates the business from the home of the Chief Creative Officer.
2. The Joined Party is an individual who was employed at a local university. Before going to work each morning the Joined Party would have coffee at a Starbucks located in the subdivision where the Joined Party lives. The Petitioner's Chief Creative Officer lives in the same subdivision and he would also have coffee each morning at the same Starbucks. The Chief Creative Officer and the Joined Party became acquainted in that manner and over the course of years they developed a

friendship. The Joined Party's employment with the university ended during the latter part of 2006 or the early part of 2007 but he continued to go to the Starbucks each morning for coffee.

3. The Chief Creative Officer was aware that the Joined Party had some health problems and that he needed to have health insurance. From their conversations the Chief Creative Officer was aware that the Joined Party had experience in financial matters, accounting, and working with computers. The Petitioner's accounting system was to just throw records into a box. The Petitioner needed someone to manage the Petitioner's website and needed someone to do the accounting, to prepare invoices, and to prepare estimates. The Chief Creative Officer wanted to help his friend, the Joined Party, and in January 2007 the Chief Creative Officer invited the Joined Party to his home to show him how he operated the business.

4. The Chief Creative Officer asked the Joined Party if he would like to work for the Petitioner and the Joined Party accepted. The Chief Creative Officer offered to pay the Joined Party $3,000 per month with health insurance provided by the Petitioner. The Petitioner would pay the Joined Party twice a month and the Petitioner would pay all of the health insurance premiums. The Petitioner would reimburse the Joined Party for any business expenses. Since the Petitioner did not have a business office the Joined Party would perform the work from his home using the Joined Party's computer. They would continue to meet at Starbucks and at the home of the Chief Creative Officer to discuss business matters and to deliver paperwork to each other. The Petitioner suggested several different job titles for the Joined Party including the title of Project Manager since the Joined Party would be handling different tasks or projects as assigned by the Petitioner. The Petitioner realized that the Joined Party was accustomed to earning a much higher salary and promised the Joined Party that the pay would be increased as the business grew. The Petitioner and the Joined Party did not enter into any written agreement or contract. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract.

5. The Joined Party began work for the Petitioner in February 2007. Initially, the Joined Party was just managing the Petitioner's website. In March the Petitioner decided to transfer the responsibility for development of the website to another individual and instructed the Joined Party to concentrate on the financial aspects of the Petitioner's business, to organize the Petitioner's records and accounting system, and to prepare a profit and loss statement.

6. The Petitioner assigned a company email address to the Joined Party. The Petitioner provided the Joined Party with a box of business cards listing the Petitioner's name, the business address of the company which was the residence of the Chief Creative Officer, the Joined Party's name and title of Chief Financial Officer, and the Joined Party's company email address. Periodically the Chief Creative Officer would give the Joined Party cash to cover expenses and would provide paper and supplies to the Joined Party.

7. The Petitioner had three or four other individuals who performed services for the Petitioner and who were classified as independent contractors. The Petitioner had not issued a Form 1099 for any of the independent contractors for the year of 2006. The Petitioner instructed the Joined Party to issue the forms and the Joined Party complied. The Chief Creative Officer instructed the Joined Party to set up the Chief Creative Officer, the wife of the Chief Creative Officer and the Joined Party as employees of the Petitioner. The Chief Creative Officer instructed the Joined Party to set up all other workers as independent contractors. The Joined Party complied.

8. The accounting software program which the Joined Party used to keep the Petitioner's accounting records always reminded the Joined Party when payroll tax reports were due. The Petitioner did not withhold any payroll taxes from the Joined Party's pay. The Joined Party told the Chief Creative Officer that the Petitioner was required to withhold payroll taxes from his pay and the Chief Creative Officer replied that the accountant would take care of it. The Joined Party

reminded the Chief Creative Officer several times that the Petitioner was required to submit the withholding taxes and pay the unemployment compensation taxes on a quarterly basis. On each occasion the Chief Creative Officer informed the Joined Party that the Petitioner's accountant would take care of it.

9. In approximately May 2007 the Chief Creative Officer flew to Grand Cayman Island to meet with a client, a hotel. The Petitioner also flew the Joined Party to Grand Cayman for three days at the Petitioner's expense at the same time. The Joined Party and the Chief Creative Officer met with the client. The Chief Creative Officer drove the Joined Party around the island so that the Joined Party could take photographs of area attractions for the client's business purposes. They also investigated opening a bank account in the Cayman Islands for the Petitioner.

10. In approximately September 2007 the Petitioner informed the Joined Party that the Petitioner could no longer afford to pay the Joined Party $3,000 per month. The Petitioner reduced the Joined Party's pay to $1,500 per month with the promise that the Petitioner would increase the Joined Party's pay when business conditions improved.

11. In an attempt to earn income the Joined Party created a website under the domain name of "Hunter's Geeks", sent out flyers, and placed an advertisement in the subdivision newsletter using the same fictitious name, offering to perform computer related services. The Joined Party's efforts did not produce any income until 2008. During 2008 the Joined Party earned approximately $6,000 from Hunter's Geeks.

12. The Petitioner's business conditions did not improve and the Petitioner did not have the funds to continue paying the Joined Party. The final payment made to the Joined Party was on July 8, 2008, for work which the Joined Party had performed in April 2008.

13. The Joined Party filed an initial claim for unemployment compensation benefits effective November 16, 2008. His filing on that date established a base period from July 1, 2007, through June 30, 2008. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was issued to the Department of Revenue to determine if the Joined Party performed services as an independent contractor or as an employee.

14. On March 11, 2009, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to July 1, 2007.

**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.

19. 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.

20. 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.

21. 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.

22. No evidence was presented concerning any specific agreement that the Joined Party would perform services as an employee or as an independent contractor. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the court provides guidance on how to proceed absent an express agreement, "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

23. The belief of the parties is exemplified by the fact that the Petitioner told the Joined Party that the Joined Party was to set the books up to show the Joined Party as an employee and to show other workers as independent contractors. Also the Joined Party reminded the Petitioner that the Petitioner was required to withhold taxes and to file payroll reports on the Joined Party's earnings. The Petitioner responded to those reminders by stating that the Petitioner's accountant would take care of it.

24. The Petitioner controlled the method and rate of pay. The Petitioner initially paid the Joined Party $3,000 per month with the promise that the Petitioner would increase the Joined Party's pay as the business grew. Instead, the Petitioner decreased the Joined Party's pay. The fact that the Petitioner did not withhold payroll taxes from the Joined Party's pay does not, standing alone, establish an independent contractor relationship.

25. The Petitioner provided the Joined Party with health insurance benefits and paid the entire premium for the insurance. In addition to the factors enumerated in the Restatement of Law, the provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

26. The Petitioner's business is a home based business and the Petitioner did not have a public business office. The Joined Party also worked from home and used his own computer. The Petitioner provided the Joined Party with supplies and paid for the Joined Party to travel to Grand Cayman with the Petitioner. It was not shown that the Joined Party had a significant investment in a business.

27. The Joined Party worked for the Petitioner for a period of over one year. From the testimony of both parties it was the intent of the parties to establish a relationship of relative permanence.

28. Either party had the right to 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."

29. Initially, the Joined Party was engaged to just manage the Petitioner's website. The Petitioner removed the Joined Party from that responsibility and directed him to perform other duties including organizing the Petitioner's accounting system and preparing financial statements. The Petitioner routinely told the Joined Party what to do and the Joined Party did it. Although the Petitioner did not directly supervise the Joined Party while the work was being performed, the Petitioner did have the right to direct and control the Joined Party. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984).

30. A preponderance of the evidence presented in this case reveals that the services performed for the Petitioner by the Joined Party constitute insured employment. However, the determination is only retroactive to July 1, 2007. The Joined Party began performing services for the Petitioner in February 2007. Therefore, the correct retroactive date is February 1, 2007.

**Recommendation:** It is recommended that the determination dated March 11, 2009, be MODIFIED to only pertain to the Joined Party and to reflect a retroactive date of February 1, 2007. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on August 30, 2010.

R. O. SMITH, Special Deputy
Office of Appeals