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

PETITIONER:
Employer Account No. - 2971107
RICH'S TOTAL CARE TAKING LLC
RICHARD LAGREGO
6069 MANASOTA KEY ROAD
ENGLEWOOD FL 34223-9251

PROTEST OF LIABILITY
DOCKET NO. 2010-118674L

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 21, 2010.

After due notice to the parties, a telephone hearing was held on October 18, 2010. The Petitioner's owner/manager and a customer appeared and testified at the hearing. The Joined Party appeared and provided testimony on his own behalf. A tax specialist II appeared and testified on behalf of the Respondent.

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 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 meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a limited liability corporation, incorporated in approximately 2000 for the purpose of running a caretaking service for seasonal homes. The Petitioner provides various caretaking services for homes the owners of which are absent for a large portion of the year.

2. The Joined Party was referred to the Petitioner by a friend. The Joined Party sought work with the Petitioner. The Joined Party provided services for the Petitioner from May 18, 2009, through December 28, 2009. There was no written agreement between the parties.

3. The Joined Party would report to work from 8am through 2pm from Monday through Wednesday. The Joined Party would occasionally work on Thursdays or Fridays if the Petitioner had additional work available.

4. The Joined Party would be transported from the Petitioner's place of business by the Petitioner. The Petitioner would transport the Joined Party from work site to work site during the day. Upon arrival at the worksite, the Petitioner would direct the Joined Party as to what work needed to be performed at the particular site. Once all of the work indicated by the Petitioner was complete, the Joined Party would be taken to the next work site.

5. The Joined Party's work consisted of landscaping work. The work included mowing, picking up garbage, raking and bagging leaves, and other similar tasks.

6. The Petitioner initially paid the Joined Party $9 per hour. The Petitioner increased the Joined Party's rate of pay to $10 per hour during the work relationship.

7. Either party could end the relationship at anytime, without liability.

Conclusions of Law:

8. 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.

9. 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).

10. 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).

11. 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.

12. 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.

13. 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. 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.

14. The evidence presented in this hearing reveals that the Petitioner exercised control over where, when, and how the Joined Party performed the work. The Petitioner transported the Joined Party from work site to work site according to the Petitioner's needs and directed the work of the Joined Party at each work site.

15. The work performed by the Joined Party was not highly skilled work and did not require specialized training or education to perform. Such labor tends to be indicative of an employer-employee relationship as opposed to the skilled professionals generally utilized as independent contractors.

16. The work performed by the Joined Party was a part of the normal course of business of the Petitioner. The Joined Party performed various landscaping services for the Petitioner's business which maintained homes and properties for absentee owners.

17. The Joined Party was paid by the hour. Such a method of pay is indicative of an employer-employee relationship.

18. The relationship was terminable at will. Either party could end the relationship at anytime, without liability. An independent contractor can neither quit nor be discharged without the possibility of a breach of the contract which defines the relationship between the contractor and the employing unit.

19. A preponderance of the evidence presented in this case reveals that the Petitioner exercised sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated July 21, 2010, be AFFIRMED.

Respectfully submitted on December 7, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals

AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

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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 21, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **February, 2011**.

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION