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

PETITIONER:
Employer Account No. - 2909913
PROFESSIONAL PAYMENT SOLUTIONS
KARIN ROHRET
11125 PARK BLVD STE 104-225
SEMINOLE FL 33772

PROTEST OF LIABILITY
DOCKET NO. 2010-122570L

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 August 5, 2010.

After due notice to the parties, a telephone hearing was held on November 3, 2010. An administrator for the Petitioner appeared and testified at the hearing. The Joined Party appeared and testified on her own behalf. A tax specialist 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 and other individuals 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 a subchapter C corporation, incorporated September 20, 2007, for the purpose of running a payroll and temporary placement services business. The Petitioner provided payroll services for a client company.

2. The Joined Party performed services as a customer service representative for a client of the Petitioner from July 2009, through April 15, 2010. The Joined Party had provided services for the Petitioner prior to the current term of service. The Joined Party signed an independent contractor agreement at the time of hire. The Joined Party applied for work with the client company. The client company hired the Joined Party as a worker supplied by the Petitioner.

3. The Joined Party was required to report to work at 9am Monday through Friday. The Joined Party was expected to check messages and then contact customers with problems. The Joined Party was to attempt to resolve the problems. The Joined Party was required to leave at 4pm. The Joined Party was allowed 2 fifteen minute breaks and a thirty minute unpaid lunch each day.

4. The Joined Party was provided training in how to perform the work. The Joined Party was expected to work in accordance with the Petitioner's rules and procedures. The Joined Party was supervised and directed in what steps should be taken and what order those steps should be taken in. The Joined Party was occasionally directed to do sales work.

5. The Joined Party was initially paid $8 per hour. The pay was increased by the Petitioner to $9 per hour. The Joined Party received a commission on any sales.

Conclusions of Law:

6. 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.

7. 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).

8. 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).

9. 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.

10. 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.

11. 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.
12. The evidence presented in this case reveals that the Petitioner, through the client company, exercised control over where, when, and how the Joined Party performed the work. The Joined Party had a set schedule which was determined by the Petitioner. The Joined Party was required to work at the client company's place of business. The client company supervised and directed the Joined Party's work.
13. The Joined Party was provided with training in how to perform the work.
14. The Joined Party was paid an hourly rate with the possibility of commissions when the Joined Party was directed to perform sales work. Hourly pay tends to be indicative of employment rather than an independent contractor relationship.
15. The Joined Party was directed and supervised with regards to all work performed.
16. A preponderance of the evidence presented in this hearing reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated August 5, 2010, be AFFIRMED.

Respectfully submitted on December 29, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals

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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 August 5, 2010, is AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION