AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2730937
TRILOGY INTERNATIONAL PARTNERS LLC
PO BOX 53010
BELLEVUE WA 98015-3010

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

PROTEST OF LIABILITY
DOCKET NO. 2010-140049L

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 **April, 2011**.

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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

PETITIONER:
Employer Account No. - 2730937
TRILOGY INTERNATIONAL PARTNERS LLC
STACIE TIMMERMANS
PO BOX 53010
BELLEVUE WA 98015-3010

PROTEST OF LIABILITY
DOCKET NO. 2010-140049L

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 January 20, 2011. The Petitioner, represented by the Director of Accounting, appeared and testified. 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 working in accounting 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. In March 2010 an employee who worked in the Petitioner's accounting department was preparing to go on a maternity leave of absence. In an attempt to obtain a temporary replacement for the employee the Petitioner placed a help wanted advertisement on an employment website. The advertisement stated that the position was a "contract position."

2. The Joined Party was employed at that time but responded to the advertisement by sending her resume. The Petitioner's Director of Accounting contacted the Joined Party and interviewed the Joined Party. The Director of Accounting told the Joined Party that the position was a full time temporary position, that the Joined Party would be required to work the Petitioner's regular business hours from 8 AM until 5 PM with some overtime required, that the rate of pay was $27 dollars per hour, and that it was a contract position. The Joined Party replied that she had never worked as a contract employee. The Joined Party asked if the Petitioner would match the Joined Party's current rate of pay, $28 per hour, and the Director of Accounting agreed. The Joined Party asked about the rate of pay for the overtime hours and the Director of Accounting replied that she did not know but that she would check into it. The Director of Accounting instructed the Joined Party to report for work on Monday April 5, 2010. The Joined Party complied.
3. The Joined Party was assigned a work station containing a desk and a computer. The Petitioner provided all equipment and supplies that were needed to perform the work. The Joined Party did not have any expenses in connection with the work other than the expense of commuting to and from the Petitioner's office each day.
4. During the Joined Party's first week of work the Petitioner presented the Joined Party with an *Independent Contractor Agreement* for signature. The Agreement was an Agreement that the Petitioner required all contractors to sign, however, the Agreement was modified to include the terms that were specific to the Joined Party such as rate of pay, duties, and duration of the work assignment.
5. The *Independent Contractor Agreement* provides that the Joined Party's assigned duties are to provide accounting support while another employee is out on maternity leave. The Agreement provides that the approximate duration of the work assignment is from April 5, 2010, through July 31, 2010, but that the Petitioner has the right to terminate the agreement at any time, with or without cause.
6. The employee for whom the Joined Party was hired as a temporary replacement was still working when the Joined Party began work. The Petitioner provided training to the Joined Party concerning what work was to be performed and how it was to be performed. The training was provided by the pregnant employee, by the Director of Accounting, and by another employee. The three individuals spent a lot of time working with the Joined Party. The Director of Accounting reviewed the Joined Party's completed paperwork.
7. The Joined Party was required to record her days and hours of work on a time sheet. The Joined Party was required to record the time she reported for work each day, the time she left work each day, and the amount of time that she took for a lunch break.
8. The Joined Party was not allowed to come and go as she pleased. She was required to work the Petitioner's regular business hours. If she had to leave work early she was required to request and receive permission. If she was not able to work as scheduled she was required to notify the Petitioner.
9. The Joined Party was required to personally perform the work. She was not allowed to hire others to perform the work for her.
10. The Joined Party's immediate supervisor was the Director of Accounting. The Petitioner determined the sequence that the work was to be performed. The Joined Party was required to keep the Petitioner informed concerning the progress of the work.
11. The Petitioner paid the Joined Party on a bi-weekly basis. No payroll taxes were withheld from the pay. The Petitioner did not provide any fringe benefits to the Joined Party other than to provide the Joined Party with a parking pass.

12. The Joined Party did not have an occupational license, did not have liability insurance, and did not have any financial investment in a business. The Joined Party did not advertise or offer services to the general public. While working for the Petitioner the Joined Party performed services only for the Petitioner.

13. The Petitioner informed the Joined Party that the Joined Party needed to begin working overtime on weekends and after 5 PM on weekdays, as much as 14 hours per day. The Joined Party advised the Petitioner that she could not work the extended hours because she had a small child. The Joined Party's last day of work for the Petitioner was May 6, 2010.

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 Petitioner hired the Joined Party as a temporary worker to assist in the accounting department by performing the duties of an employee who was going on a maternity leave of absence. The Joined Party's duties were not separate and distinct from the Petitioner's business but were an integral and necessary part of the Petitioner's business.

22. The Petitioner provided everything that was needed to perform the work. The Joined Party did not have any expenses in connection with the work and was not at risk of suffering a financial loss from services performed.

23. The Petitioner paid the Joined Party by time worked rather than by the job or based on production. The Petitioner controlled the hours of work and determined the rate of pay. The Petitioner controlled the financial aspects of the relationship. 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 Joined Party was hired to fill in for an employee who was going to go on maternity leave and the written agreement set forth the approximate time frame of the maternity leave. However, the agreement gave the Petitioner the absolute right to terminate the relationship at any time. 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."

25. Although the Joined Party testified that she signed the *Independent Contractor Agreement* she testified that she did not have her own business and believed that she was the Petitioner's employee. A statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

26. The Petitioner controlled what work was performed, where it was performed, when it was performed, and how it was performed. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.

27. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

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

Respectfully submitted on February 15, 2011.

R. O. SMITH, Special Deputy
Office of Appeals