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

PETITIONER:
Employer Account No. - 1629201
IZAK GROUP INC
SAM BERTIZLIAN
PO BOX 1746
GOLDENROD FL 32733-1746

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

PROTEST OF LIABILITY
DOCKET NO. 2010-14977L

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 November 17, 2009.

After due notice to the parties, a telephone hearing was held on September 21, 2010. A shareholder and corporate officer appeared and testified for the Petitioner. The Joined Party appeared and testified on her own behalf. A tax audit supervisor appeared for the Respondent and called a tax specialist I as a witness.

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 in 1997 as a holding company for a franchise.

2. The Joined Party and the Joined Party's husband were employee managers of the Petitioner from 1997 through October 1, 2007.

3. The Joined Party purchased the business from the Petitioner October 1, 2007. The Joined Party paid a 20% down payment to the Petitioner and agreed to make scheduled payments to the Petitioner.

4. The Petitioner retained the franchise rights until the business was paid off by the Joined Party. The Petitioner remained as a shareholder while not being involved in the business.

5. The Joined Party and the Joined Party's husband assumed control of the business. The Joined Party had control over the store, the bank account, ordering, and all other aspects of the business.

6. The Joined Party retained a payroll company initially but could not afford to continue retaining the payroll company's services. The Joined Party and her husband worked the business with no other employees or workers.

7. The Joined Party and her husband paid them selves using the business bank account in the form of either draws or loans.

8. The Joined Party began to have difficulty with the business and realized that the Joined Party would be unable to make payments for the business. The Joined Party, the Joined Party's husband, and the Petitioner discussed a solution to the problem and agreed to sell the business to a third party.

Conclusions of Law:

9. 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.

10. 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).

11. 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).

12. 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.

13. 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.

14. 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.

15. The evidence presented in this case reveals that the Petitioner did not exercise any control over the Joined Party in the performance of her work. The Petitioner was separated from the day to day operations of the business. The Joined Party had full control over what, if any, hours would be worked. The Joined Party had full control over the finances of the business including what compensation would be paid for the Joined Party's services.

16. While no documents were provided to corroborate the sale of the business and the change in relationship between the Joined Party and the Petitioner; the presence of an agreement is not dispositive of the matter. The status of the parties is depends upon all of the circumstances of their dealings with each other. Justice v. Belford Trucking Company, Inc., 272 So.2d 131(Fla. 1972)

17. A preponderance of the evidence presented in this case reveals that the Petitioner did not establish sufficient control over the Joined Party as to create an employer-employee relationship between the parties subsequent to the October 1, 2007, sale of the business.

Recommendation: It is recommended that the determination dated November 17, 2009, be REVERSED.

Respectfully submitted on October 27, 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 November 17, 2009, is REVERSED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION