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

PETITIONER:
Employer Account No. - 2397832
JUST BROW-ZING INC
LAURA DI NIRO
9431 LIVE OAK PL APT 304
DAVIE FL 33324-4736

PROTEST OF LIABILITY
DOCKET NO. 2010-14978L

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 November 17, 2009.

After due notice to the parties, a telephone hearing was held on September 22, 2010. A book keeper appeared and provided testimony for the Petitioner. The Petitioner's president was called as a witness. The Joined Party did not appear at the hearing. A tax specialist appeared and called a Revenue Specialist II as a witness 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 S corporation incorporated in 2009 for the purpose of running a beauty salon.

2. A member of the Petitioner's family recommended the Joined Party as being good with nails. The Petitioner did not currently provide nail services. The Petitioner contacted the Joined Party to see if the Joined Party was available to perform services. The Petitioner hired the Joined Party to add manicurist services to the Petitioner's business.

3. The Joined Party performed services for the Petitioner from November 17, 2008 through August 13, 2009. The Petitioner initially hired the Joined Party as an employee in order to determine her niche. At the conclusion of the test period on or about December 6, 2008, it was determined that the Joined Party would work with nails as an independent contractor. The change in status from employee to independent contractor was listed by the Petitioner on the Joined Party's pay check.

4. The Joined Party's work consisted of nail polish services for the Petitioner along with acting as a consultant and making purchases of nail polish materials for the Petitioner. The Joined Party was allowed to provide spray tanning services as well. The Joined Party was considered an employee from November 17, 2008, through December 6, 2008. The Petitioner considered the Joined Party to be an independent contractor from December 6, 2008, through August 13, 2009.

5. The Joined Party was not licensed as a manicurist in the United States. The Joined Party was licensed as a manicurist in Columbia. A license was not required to perform the services.

6. The Petitioner paid the Joined Party $6 per hour. The Joined Party could receive tips when the Joined Party began performing spray tanning services. The Petitioner had a time clock system. The Joined Party was required to clock in and out.

7. The Joined Party would travel to Columbia for the Petitioner in order to purchase nail products for the Petitioner. The Petitioner paid for the Joined Party's air fare, for the products, and for the Joined Party's time spent in Columbia.

8. The Joined Party was free to set her own hours within the hours of operation of the business. The Joined Party was expected to solicit clients of the Petitioner for nail services and spray tanning services. The Joined Party was expected to use an appointment manager computer program to keep track of appointments. The program was supplied by the Petitioner. The Joined Party was required to inform the Petitioner if the Joined Party intended to take time off.

9. The Petitioner provided a workspace for the Joined Party. The Petitioner provided equipment including spray tanning equipment, various manicurist tools, and nail polish products. The Joined Party preferred to use her own manicurist hand tools.

10. Either party could terminate the relationship at anytime without liability.

11. The Joined Party was allowed to subcontract her work.

12. The Joined Party was allowed to set her own prices for nail services.

13. The Joined Party was not required to re-do defective work. The Joined Party was informed of customer complaints.

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. 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.

20. The evidence presented in this case reveals that the Joined Party was not licensed within the United States or the State of Florida. The work being performed did not require that the Joined Party be licensed in order to perform the work.

21. The Petitioner supplied the instrumentalities, tools, and place of work for the Joined Party to perform the work. While the Joined Party supplied her own hand tools, it was at her option. The Petitioner covered travel expenses for the Joined Party’s buying trips.

22. The Joined Party performed services for the Petitioner for approximately nine months. The Joined Party's work for the Petitioner would have likely continued in the event that the Joined Party's work was successful. Such a period of work is indicative of a permanent relationship rather than the temporary relationship implicit in an independent contractor relationship.

23. The Joined Party was paid an hourly rate plus tips. Such a means of pay is indicative of an employer-employee relationship. The Joined Party was required to use a time clock to record the time spent at work.

24. The relationship initially created between the parties was that of employer-employee. The relationship was changed by the Petitioner after the Joined Party had work for approximately three weeks as an employee.

25. The relationship was terminable at will. Either party could end the relationship at anytime and without 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."

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

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

Respectfully submitted on November 2, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals

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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 AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION