AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2985040
LATIN EXPRESS LLC
7016 DELORA DR
ORLANDO FL 32819

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

PROTEST OF LIABILITY
DOCKET NO. 2010-161258L

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 October 14, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **June, 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. - 2985040
LATIN EXPRESS, LLC
ATTN: LUZ MARINA ARIAS
7016 DELORA DR
ORLANDO FL 32819

PROTEST OF LIABILITY
DOCKET NO. 2010-161258L

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 October 14, 2010.

After due notice to the parties, a telephone hearing was held on February 15, 2011. The Petitioner's accountant appeared on behalf of the Petitioner and called the Petitioner's owner as a witness. The Joined Party appeared and testified in her 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 company, established in 2002 for the purpose of running a passenger transportation business. The Petitioner provided transportation for passengers between Orlando and Miami.

2. The Joined Party provided services for the Petitioner from September 2009, through June 3, 2010, as a clerk. The Joined Party was hired by the Petitioner to take travel reservations for the company. The Joined Party was informed that she would be working as an independent contractor at the time of hire.

3. The Petitioner provided the Joined Party with a cellular telephone and a computer. The Petitioner paid the cellular telephone bills. The Joined Party was allowed to use the telephone for private calls. The Joined Party used a personal lap top computer for the work when she worked away from her home.

4. The Joined Party worked from the location of her choosing. The Joined Party was expected to turn the company phone on at 5 a.m. and could turn the phone off at 10:30 p.m. The Joined Party would receive calls from customers on the cellular telephone. The Joined Party would then enter the reservation information on either the provided computer or her laptop computer.

5. The Petitioner's drivers would contact the Joined Party if there was difficulty finding passengers scheduled for pickup.

6. The Petitioner provided a pamphlet with instructions for drop off and pick up locations as well as how the phone should be answered.

7. The Joined Party was paid $300 per week.

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 case reveals that the Petitioner exercised control over when and how the work was performed. The Petitioner required that the Joined Party have the telephone turned on from 5 a.m. until 10:30 p.m. The Petitioner provided pamphlets with instructions on how calls were to be answered.

15. The Petitioner provided the telephone and computer necessary for the performance of the work. The Joined Party used a personal laptop computer for the purpose of making the work more convenient. The Petitioner paid the telephone bill for the telephone provided to the Joined Party.

16. The Joined Party was paid a weekly salary. This method of payment is indicative of an employer-employee relationship as opposed to payment by the job.

17. The work performed by the Joined Party was not separate and distinct from the Petitioner's business. The work was an integral part of the Petitioner's normal course of business.

18. 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 parties.

Recommendation: It is recommended that the determination dated October 14, 2010, be AFFIRMED.

Respectfully submitted on April 19, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals