AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2932144
ASHLEY VU INC
NGUYET-HANG A VU
944 4TH STREET N
ST PETERSBURG FL 33701-1735

PROTEST OF LIABILITY
DOCKET NO. 2010-26429L

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

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 December 14, 2009, is MODIFIED. The portion of the determination holding that the nail technicians performed services for the Petitioner as employees is REVERSED. The portion of the determination holding that the Petitioner's corporate officer was a statutory employee under section 443.1216(1)(a), Florida Statutes, is AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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

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RESPONDENT:
State of Florida
Agency for Workforce Innovation
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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 December 14, 2009.

After due notice to the parties, a telephone hearing was held on January 20, 2011. The Petitioner's president and accountant both appeared and provided testimony 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.

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 subchapter S corporation incorporated in October 2008, for the purpose of running a nail salon.

2. The Joined Party provided services as a nail technician from October 2009, through April 2010. The Joined Party answered an advertisement placed by the Petitioner for work.

3. The Joined Party signed a standard independent contractor agreement provided by the Petitioner.

4. The Joined Party was allowed to work for a competitor. The Joined Party performed services for a competitor while retained by the Petitioner.

5. The Joined Party is required to pay the Petitioner 40% of her earnings. There is a $1000 minimum per month. The percentage includes rent for the work space. The Joined Party set her own prices.

6. The Petitioner's place of business opens at 10 a.m. The Joined Party does her own scheduling. The Joined Party sets her own hours.

7. The Joined Party provided her own tools and equipment. The Petitioner provided polish. The nail technicians all contribute to a fund to purchase the polish.

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 hearing reflects that the Petitioner did not exercise control over the work of the Joined Party. The Joined Party was able to set her own schedule, work hours, and prices. The Joined Party paid rent to the Petitioner for the use of the workspace and donated to a fund to purchase the materials used in the work.

15. A preponderance of the evidence presented in this hearing reflects that the Petitioner did not establish sufficient control over the Joined Party as to create an employer-employee relationship.

16. The Petitioner did not provide a preponderance of competent and substantial evidence with regards to the issue of liability. Without competent, substantial evidence, the determination dated December 14, 2009, shall remain undisturbed with regard to the issue of liability.

Recommendation: It is recommended that the determination dated December 14, 2009, be REVERSED to show that the services performed by the Joined Party and others as nail technicians do not constitute insured work.

It is recommended that the determination dated December 14, 2009, be AFFIRMED that the Petitioner meets the liability requirements for Florida unemployment compensation contributions with regards to the statutory employee corporate officer(s).

Respectfully submitted on March 16, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals