AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2677691
STERLING MARKETING GROUP LLC
7319 SANDSCOVE CT STE 7
WINTER PARK FL 32792-6979

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

PROTEST OF LIABILITY
DOCKET NO. 2010-30594L

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 17, 2009, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **March, 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. - 2677691
STERLING MARKETING GROUP LLC
CAREY STEWART
7319 SANDSCOVE CT STE 7
WINTER PARK FL 32792-6979

PROTEST OF LIABILITY
DOCKET NO. 2010-30594L

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 December 17, 2009.

After due notice to the parties, a telephone hearing was held on November 30, 2010. An attorney appeared on behalf of the Petitioner and called the Petitioner's owner as a witness. A tax specialist II appeared on behalf of the Respondent. The Joined Party did not appear at the hearing.

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 received from the Petitioner on December 16, 2010.

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 limited liability corporation, incorporated for the purpose of running a promotional products business. The Petitioner manufactures and distributes promotional products.

2. The Joined Party provided services for the Petitioner as a sales assistant from on or about May 22, 2006, through December 10, 2006.

3. Sales assistants enter into a written independent contractor agreement with the Petitioner.

4. Sales assistants have discretion to determine what items they will sell. The Joined Party had full control over the sales. The Joined Party could set the price.

5. Sales assistants are paid based on a negotiated commission. Pay is held by the Petitioner until payment has been received from the client.

6. The Petitioner does not provide supervision or instruction to the sales assistants.

7. The Joined Party was able to set her own schedule. The Joined Party could provide her services from the Petitioner's place of business at her discretion. The Joined Party could work outside of the Petitioner's normal hours of operation and was provided with a key in order to do so.

8. The Joined Party was allowed to work for a competitor.

9. The Joined Party was allowed to hire, fire, and supervise her own staff.

10. The Joined Party was responsible for providing her own office supplies. The Joined Party was required to pay for her own advertising.

11. Sales assistants often have their own company.

Conclusions of Law:

12. 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.

13. 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).

14. 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).

15. 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.

16. 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.

17. 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.

18. The evidence presented in this case revealed that the Petitioner did not exercise control over where, when, or how the Joined Party performed the work. The Joined Party was allowed to set her own hours. The Joined Party had the option of working from the Petitioner's place of business. The Joined Party could select what products to sell as well as how and for how much they would be sold.

19. The Petitioner did not provide any of the materials or supplies used by the Joined Party in performing the work. The Joined Party being required to purchase her own supplies and materials tends to indicate an independent relationship.

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

21. The Petitioner submitted Proposed Findings of Fact and/or Conclusions of Law on December 16, 2010. Where the Petitioner's findings comport with the record, they are incorporated in this Recommended Order. Where the Petitioner's findings fail to comport with the record, they are respectfully rejected.

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

Respectfully submitted on February 1, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals