AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2932664
MEDICAL THERAPEUTIC MASSAGE CLINIC
540 E MCNAB ROAD STE D
POMPANO BEACH FL 33060-9354

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

PROTEST OF LIABILITY
DOCKET NO. 2010-31393L

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 21, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **October, 2010**.

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. - 2932664
MEDICAL THERAPEUTIC MASSAGE CLINIC
SAMUEL LAFFER
540 E MCNAB ROAD STE D
POMPANO BEACH FL 33060-9354

PROTEST OF LIABILITY
DOCKET NO. 2010-31393L

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 21, 2009.

After due notice to the parties, a telephone hearing was held on July 15, 2010. The Petitioner's president appeared and provided testimony at the hearing. A tax auditor II appeared and testified 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 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 1998 for the purpose of running an acupuncture and massage clinic. The Petitioner's president is the sole corporate officer.

2. The Joined Party provided services for the Petitioner April 1, 2009 through September 25, 2009. The Joined Party worked as a billing specialist to handle insurance billing for the clinic. The Joined Party also worked to help the Petitioner organize the Petitioner's billing procedures.

3. The Joined Party could work for a competitor.

4. The Joined Party was paid approximately $10 per hour on a weekly basis. The Petitioner maintained a handwritten log of hours worked by the Joined Party. The Petitioner paid $9,667.50 to the Joined Party in 2009.

5. The hours worked by the Joined Party varied based upon the amount of work available. The Petitioner would inform the Joined Party when she would be needed for work. The Joined Party worked at least one day per week for the duration of the time the Joined Party provided services for the Petitioner.

6. The Petitioner provided a computer for the Joined Party to use in the performance of her duties. The Joined Party brought her own computer on some occasions. The Petitioner provided reference books for the Joined Party's use.

7. The Petitioner monitored the Joined Party's work.

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

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 at the hearing revealed that the Petitioner exercised control over how, when, and where the Joined Party performed the work. The Petitioner informed the Joined Party when her services would be required. The Petitioner monitored the work of the Joined Party as it was being performed. All work was performed at the Petitioner's place of business.

16. The Petitioner paid the Joined Party by the hour. Hourly pay is indicative of an employer-employee relationship rather than of a subcontractor relationship.

17. The Petitioner provided a computer and reference books necessary for the work. The Joined Party was allowed to bring her own equipment.

18. The relationship was terminable at will. Either party could end the relationship at anytime 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."

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

20. Section 443.036(21), Florida Statutes, provides:
"Employment means a service subject to this chapter under s. 443.1216, which is performed by an employee for the person employing him or her.

21. Section 443.1216(1)(a), Florida Statutes, provides in pertinent part:
The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:
(1) An officer of a corporation.

(2) An individual who, under the usual common law rules applicable in determining the employer-employee relationship is an employee.

22. Section 443.1215, Florida Statutes, provides:
Each of the following employing units is an employer subject to this chapter:

i) An employing unit that:

a) In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or

b) For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

23. The Joined Party is held to have been an employee of the Petitioner. The Joined Party was paid $9,667.50 in 2009. The Joined Party worked at least one day per week during her time of service to the Petitioner from April 2009, through September 25, 2009. This period is in excess of 20 weeks. Therefore, the Petitioner meets the liability requirements for Florida unemployment compensation contributions effective April 1, 2009. The Petitioner did not give competent substantial evidence regarding the pay and length of service of the corporate officer. Accordingly, the Florida Department of Revenue should investigate the issue of corporate officer for purposes of determining any additional liability.

Recommendation: It is recommended that the determination dated December 21, 2009, be AFFIRMED.

Respectfully submitted on August 26, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals