AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2312018
APRILS HAIR DESIGN INC
15201 N CLEVELAND AVE STE 1320
NORTH FORT MYERS FL 33903-2718

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

PROTEST OF LIABILITY
DOCKET NO. 2010-33768L

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 January 13, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **September, 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. - 2312018
APRILS HAIR DESIGN INC
C/O APRIL WALKER
15201 N CLEVELAND AVE STE 1320
NORTH FORT MYERS FL 33903-2718

PROTEST OF LIABILITY
DOCKET NO. 2010-33768L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Director, Unemployment Compensation Services
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated January 13, 2010.

After due notice to the parties, a telephone hearing was held on June 22, 2010. The Petitioner's owner, a nail technician, and a hair stylist appeared and provided testimony. The Joined Party appeared and testified on her own behalf. A tax specialist II appeared and provided testimony for 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.

Findings of Fact:

1. The Petitioner is a subchapter S corporation, incorporated in 2000 for the purpose of running a hair and nail studio. The Petitioner considered its workers to be employees at the time of incorporation.

2. The Joined Party provided services to the Petitioner performing hair, nail, and waxing services, from October 2008, through November 4, 2009. The Joined Party was originally hired as an

employee of the Petitioner. The Joined Party was provided with an employee handbook at the time of hire.

3. The Petitioner altered their business model in January 2009, to require employees to become independent contractors.

4. The Petitioner's workers were required to sign an *Independent Contractors/Self-Employed Agreement* in January 2009. The agreement was prepared by the Petitioner. The agreement required that the worker be licensed by the State of Florida as a stylist. The agreement required that the worker provide services only for the Petitioner. The Petitioner did not choose to enforce the provision requiring exclusivity from the workers. The agreement further stated that the workers were paid by the job and that all rules and regulations contained in the employee manual remained in effect. The agreement gave the Petitioner the right to alter the agreement at will.

5. The Petitioner provided all supplies needed for the work with the exception of scissors and clippers. The Joined Party provided her own cutting tools. The Petitioner gradually ceased providing supplies to the workers after the January 2009 agreement went into effect.

6. The work stations were provided by the Petitioner.

7. The Petitioner required that all work be done at the salon. The Joined Party was allowed to work outside of the Petitioner's normal hours of operation with prior approval.

8. The Joined Party was allowed to pay for her own advertising listing the Petitioner's telephone number.
9. The Joined Party was paid a commission on each appointment. The prices for services were set by the Petitioner. The commission was determined by the Petitioner.

10. The Joined Party was covered by the Petitioner's liability insurance.

11. The Joined Party was required to maintain a journal. The journal was to include comments for each day worked, totals for the day, and client notes.

12. The Joined Party was expected to consult with a manager for anything the Joined Party was uncertain about. The Joined Party was expected to consult with a manager before making any price or procedural changes.

13. Either Party was free to end the relationship at anytime without liability.

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 at the hearing reveals that the Petitioner hired the Joined Party as an employee and subsequently the Petitioner unilaterally changed the relationship to that of independent contractor as a business decision.

21. The Petitioner was a hair and nail studio. The Joined Party's service as a stylist was an integral part of the Petitioner's normal course of business.

22. The record reveals that the Petitioner maintained control over the hours at which the Joined Party could perform services. The Petitioner required consent be sought before the Joined Party could provide services outside of the normal business hours. The Petitioner controlled the location of the services, requiring that all services be provided at the Petitioner's place of business.

23. The Petitioner had control over the financial aspects of the relationship. The Petitioner controlled the price charged to clients for services provided by the Joined Party, as well as the rate of commission by which the Joined Party's pay was determined.

24. The relationship was terminable at will. Either party was free to 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."
25. A preponderance of the evidence 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 January 13, 2010, be AFFIRMED.

Respectfully submitted on July 12, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals