AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2816271
ULTRA BODY FITNESS FLORIDA INC
PO BOX 4338
HIALEAH FL 33014-4558

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

PROTEST OF LIABILITY
DOCKET NO. 2010-3560L

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 November 16, 2009, is AFFIRMED.

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

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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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 November 16, 2009.

After due notice to the parties, a telephone hearing was held on May 5, 2010. The Petitioner, represented by its Office Manager, appeared and testified. The Respondent, represented by a Department of Revenue Service Center Manager, appeared and testified. A Tax Specialist I testified as a witness. The Joined Party appeared and testified.

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 working as a personal trainer 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 corporation which was formed in October 2007 to provide fitness training for the Petitioner's clients.
2. The Joined Party is a certified personal trainer. In early 2009 the Joined Party was seeking employment and was referred to the Petitioner by a friend who worked for the Petitioner as a personal trainer. The Joined Party was interviewed by the manager of a gym that was just opening for business. The manager told the Joined Party that the gym did not yet have any personal training clients and that it would be the Joined Party's responsibility to sign up members of the gym to receive the personal training services. The manager told the Joined Party that the Joined

Party would be paid by the hour for the personal training services and that when the Joined Party signed up clients for the personal training services the Petitioner would pay the Joined Party a commission. The Joined Party accepted the offer of work and entered into a *Personal Trainer Agreement-Florida* with the Petitioner on February 9, 2009.

3. The *Personal Trainer Agreement-Florida* states that the Joined Party "shall become an independent contractor and shall not be an employee" of the Petitioner. The Agreement states that the Petitioner shall have the right to provide guidelines and supervision to ensure that the Joined Party's work is proper, that the work complies with the Petitioner's requirements to meet specifications, and that the work is completed in a timely manner. The Agreement prohibits the Joined Party from making any representation that is contrary to the Petitioner's rules, regulations, and procedures.

4. The *Personal Trainer Agreement-Florida* requires the Joined Party to provide at his own expense a telephone, a computer, software, the workplace, and all equipment and supplies necessary to perform the work. The Agreement specifies that any items or materials prepared by the Joined Party in carrying out his duties shall be subject to the Petitioner's approval.

5. Contrary to the Agreement the Joined Party was required to perform the personal training at the location of the Petitioner's gym. The Petitioner provided the computer, software, telephone, and the equipment and supplies. The Joined Party was required to provide a camera to take pictures of the clients to record their progress. The Joined Party was responsible for the cost of printing the pictures.

6. The Petitioner provided the Joined Party with a shirt bearing the Petitioner's name and logo. The Joined Party was required to wear the shirt while working.

7. The gym is open twenty four hours per day. Initially, the Joined Party was responsible for referring the clients to the manager so that the manager could sign the clients up for the Joined Party's personal training services. The Joined Party was not paid for that time. He was only paid for the time he provided personal training to the Petitioner's clients. The rate of pay was $20 per hour.

8. The Petitioner provided initial and on-going training concerning how to sell the personal training services. The Petitioner did not provide any training to the Joined Party concerning how to provide the personal training to the Petitioner's clients.

9. The Joined Party was required to perform the personal training for the Petitioner's clients on the days and times that the clients wanted to receive the training. The Petitioner did not schedule the clients' training times. The Joined Party was subject to termination by the Petitioner if the Joined Party refused to provide the personal training on the dates and times specified by the clients.

10. At the beginning of each training session the Joined Party and the client were required to log on to the Petitioner's computer. The Joined Party was not required to complete a timesheet. The Petitioner paid the Joined Party only for the time that he was logged on to the Petitioner's computer. No payroll taxes were withheld from the Joined Party's pay. The Joined Party did not receive any fringe benefits such as health insurance, retirement benefits, or paid vacations.

11. The Joined Party was required to take measurements of the Petitioner's clients so that the clients could see their development. The Joined Party was required to report the progress of each client to the Petitioner.

12. The Joined Party worked under the indirect supervision of the gym manager. Although the gym manager did not direct the Joined Party how to provide the personal training services, the Joined Party believed that the manager had the right to control how the joined Party performed the work.

13. Once each week the Petitioner held a staff meeting with the Joined Party and other personal trainers who performed services for the Petitioner at other gym locations. Attendance at the staff meetings was mandatory even though the Joined Party was not paid for the time. At the staff meetings the personal trainers were instructed about how to sell the Petitioner's services.

14. The Joined Party was not allowed to perform services for a competitor or to perform personal training for anyone other than the Petitioner's clients. The Joined Party was required to personally perform the work. He could not hire others to perform the work for him.

15. Either party had the right to terminate the relationship at any time without incurring liability.

16. During the latter part of September or early part of October 2009 the Joined Party attended two consecutive staff meetings which were canceled when the person who was to conduct the meetings did not arrive. As a result the Joined Party decided not to attend the next scheduled staff meeting. The Petitioner discharged the Joined Party on October 12, 2009, because the Joined Party did not attend the staff meeting.

17. During the time the Joined Party performed services for the Petitioner he did not perform any services for others. He did not have an occupational or business license, did not have liability insurance, did not have any investment in a business, and did not advertise or offer services to the general public.

18. In February 2010 the Petitioner reported the Joined Party's 2009 earnings to the Internal Revenue Service on Form 1099-MISC.

Conclusions of Law:

19. 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.

20. 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).

21. 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).

22. 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.

23. 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.

24. 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.

25. 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.

26. The *Personal Trainer Agreement-Florida* entered into by the Petitioner and the Joined Party states that the Joined Party shall become an independent contractor and shall not be an employee of the Petitioner. A statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

27. The Petitioner's business is to provide personal fitness training to the Petitioner's clients. The Petitioner engaged the Joined Party to perform the personal fitness training for the Petitioner's clients. The work performed for the Petitioner by the Joined Party was not separate and distinct from the Petitioner's business but was a necessary and integral part of the Petitioner's business.

28. Although the *Personal Trainer Agreement-Florida* specifies that the Joined Party was responsible for providing the workplace and all equipment and supplies, the Petitioner provided the workplace and all equipment and supplies other than a camera. It was not shown that the Joined Party had significant expenses in connection with the work. The Joined Party did not have any investment in a business and did not have expenses normally associated with a business. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

29. The Petitioner prohibited the Joined Party from performing personal training services for anyone other than the Petitioner. Generally, an independent contractor performs services for multiple clients and determines the amounts charged to the clients. In this case the Petitioner determined

the amounts charged to the Petitioner's clients. The Petitioner prohibited the Joined Party from hiring others to perform the work for him. An independent contractor generally has the freedom to hire others to perform the work for the independent contractor.

30. The Petitioner paid the Joined Party by the hour during the time that the Joined Party provided the training to the Petitioner's clients. If he was involved in the sale of a personal training contract for the Petitioner, the Petitioner paid a commission to the Joined Party. Section 443.1217(1), Florida Statutes provides that wages subject to unemployment compensation tax includes all remuneration for employment including commissions. The fact that the Petitioner chose not to withhold payroll taxes does not, standing alone, establish an independent contractor relationship.

31. The *Personal Trainer Agreement-Florida* is not for a specified period of time. Either party could terminate the Agreement at any time without incurring liability for breach of contract. It was a continuing relationship and the Joined Party performed services for a period of approximately eight months. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner terminated the Joined Party because the Joined Party failed to attend one mandatory staff meeting. 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."

32. The "extent of control" referred to in Restatement section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

33. The evidence presented in this case reveals that the Petitioner exercised significant control over the Joined Party. Although the Petitioner provided only indirect supervision of the Joined Party the evidence shows that the Petitioner had the right to direct the means and manner of performing the work. Thus, it is concluded that the services performed for the Petitioner by the Joined Party as a personal trainer constitute insured employment.

Recommendation: It is recommended that the determination dated November 16, 2009, be AFFIRMED.

Respectfully submitted on May 10, 2010.

R. O. SMITH, Special Deputy
Office of Appeals