AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2912718
V N NAILS & SPA
8646 GLADIOLUS DR
FORT MYERS FL 33908-4107

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

PROTEST OF LIABILITY
DOCKET NO. 2010-5503L

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 12, 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. - 2912718
V N NAILS & SPA
JIMMY TRUONG
8646 GLADIOLUS DR
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PROTEST OF LIABILITY
DOCKET NO. 2010-5503L

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 November 12, 2009.

After due notice to the parties a telephone hearing was held on June 8, 2010. The Petitioner appeared and testified. The Respondent was represented by a Department of Revenue Tax Auditor II. The Joined Party appeared. After due notice to the parties, a second telephone hearing was held on August 4, 2010. The Petitioner appeared and testified. A customer of the Petitioner testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. 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 nail technician 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 an individual who opened a nail salon business in 1999. The Petitioner operates the business under the fictitious name of Regal Nails.
2. The Joined Party is a licensed nail technician and is qualified to do manicures, pedicures, artificial nails, and body waxing. In January 2008 the Joined Party was seeking work as a nail technician and saw a help wanted sign posted at Regal Nails. The Joined Party telephoned the number on the

sign and spoke to the Petitioner who scheduled the Joined Party to come in for an interview. The Petitioner informed the Joined Party that the Petitioner was in the process of opening a new location which would operate under the fictitious name of VN Nails. The Petitioner told the Joined Party that the position was for VN Nails but that the Joined Party would work temporarily at Regal Nails until the new salon opened. The Petitioner told the Joined Party that she would be paid a 50% commission for work which she completed. When the Joined Party transferred to the new salon the Petitioner would guarantee that the Petitioner would pay the Joined Party a minimum of $300 per week. The Petitioner informed the Joined Party that the business hours were seven days per week from 9 AM until 7 PM and that the Joined Party would be required to work Monday through Saturday from 9 AM until 7 PM. The Joined Party replied that she was not able to work those hours because she had children. It was agreed that the Joined Party could work Wednesday through Saturday from 9 AM until 5:30 PM. The Petitioner informed the Joined Party that she would perform manicures and pedicures but that she would not be allowed to do artificial nails because the Petitioner did not like the way that Americans do artificial nails. Although the Joined Party wanted to do artificial nails the Petitioner repeated that she would not be allowed to do artificial nails. The Joined Party accepted the offer of work and began work during the latter part of January 2008.

3. Although the Joined Party is an experienced nail technician, not all nail technicians use the same techniques to perform the work. The Petitioner required that all of the nail technicians working in his salon use the same technique to perform the work. The Petitioner trained the Joined Party concerning the technique which she was required to use. The Petitioner trained the Joined Party concerning the sequence that the work was required to be performed. If a customer wanted a manicure and a pedicure the Joined Party was required to perform the pedicure first and then the manicure. The Petitioner trained the Joined Party concerning how the Petitioner required the Joined Party to talk to customers and how the Petitioner required the Joined Party to do the work.

4. The Petitioner provided the place of work and all equipment including manicure tables, pedicure tables, files, and buffers. The Petitioner provided all of the materials and supplies. The Joined Party was required to provide her own implements such as nail clippers and pushers. The cost of the implements was about twenty dollars. The implements needed to be replaced about every two months.

5. The Joined Party's duties included washing and folding towels, sweeping and mopping the floor, cleaning the bathroom, and restocking the work stations with supplies. The Joined Party did not receive additional pay for those duties. The Petitioner also sold retail items, such as nail polish, to customers. If the Joined Party sold any retail items she did not receive any commission or extra pay.

6. The general rule was that the nail technician who reported for work first would take the first customer unless that customer requested a specific nail technician. The nail technicians would rotate on servicing the customers as the customers came into the salon. However, any nail technician who was not working with a customer at the time could service any customer who came into the salon. Any disputes between the nail technicians were resolved by the Petitioner.

7. The Petitioner determined the amounts that the customers were charged for each service performed by the nail technicians. The Petitioner posted the charges in the shop and the Joined Party could not deviate from the posted charges. The Joined Party collected the fees from the customer after the Joined Party completed the work. The Joined Party would then write a receipt for the customer from a receipt book and would give the money to the Petitioner. If the customer gave the Joined Party a tip the Joined Party was allowed to keep the tip.

8. The Joined Party did not submit a bill or invoice to the Petitioner for the services which the Joined Party performed. The Petitioner totaled the amounts which the Petitioner received from the Joined

Party based on the receipts written by the Joined Party during each biweekly pay period. The Petitioner paid the Joined Party 50% of the amount collected by the Joined Party for services performed. The Petitioner did not withhold any payroll taxes from the pay.

9. The Petitioner did not provide any fringe benefits such as paid holidays, paid sick days, paid vacations, or health insurance. At the end of the year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

10. The Petitioner opened the new salon, VN Nails, in March 2008. The Petitioner transferred the Joined Party to VN Nails at that time. However, the Petitioner would frequently, on an almost weekly basis, transfer the Joined Party back to Regal Nails for a day or two at a time. The Petitioner assigned the Joined Party to work in whichever salon the Petitioner felt that the Joined Party was needed to work. Because the Petitioner transferred the Joined Party back and forth between the two salons the Joined Party did not have an opportunity to build up a clientele.

11. The Petitioner supervised the Joined Party at one salon and the Petitioner's wife supervised the Joined Party at the other salon. During one period of time the Petitioner had to go out of the country due to a death in the family. During that period of time the Petitioner's niece was placed in charge of the business.

12. The Joined Party was required to personally perform the work. She was not allowed to hire others to perform the work for her. If the Joined Party was not able to work as scheduled she was required to notify the Petitioner. If the Joined Party needed to leave work early she was required to request permission.

13. The Petitioner's business became very slow and the commissions earned by the Joined Party decreased. Although the Petitioner had promised the Joined Party that she would be paid a guaranteed salary of $300 per week if she did not earn that amount in commissions, the Petitioner never paid the guaranteed salary to the Joined Party even though the Joined Party's earnings were less than $300 during a few weeks.

14. Either party had the right to terminate the relationship at any time without incurring liability. On several occasions the Petitioner threatened to discharge the Joined Party because the Joined Party was not able to work a scheduled shift.

15. On occasion the Joined Party asked for permission to leave work early because business was slow. On some of those occasions the Joined Party had to pick up her children from the day care center. On several occasions the Petitioner denied the Joined Party's requests and the Joined Party was charged a penalty by the day care center. On other occasions the Joined Party informed the Petitioner that she needed to leave early because she was tired. The Petitioner required the Joined Party to remain in the salon even though there were no customers present. The Petitioner gave the Joined Party permission to take a nap in the back of the salon if there were no customers present.

16. The Joined Party became pregnant and tried to hide that fact from the Petitioner because the Joined Party was concerned that the Petitioner would discharge her due to her pregnancy. The Joined Party's pregnancy was revealed to the Petitioner. Approximately two weeks later, on or about May 18, 2009, the Petitioner informed the Joined Party that work was slow and that the Joined Party's services were no longer needed.

17. During the time that the Joined Party worked for the Petitioner she did not have an occupational license, did not have liability insurance, did not advertise, did not offer services to the general public, and did not perform nail services for anyone other than the Petitioner. The Joined Party believed that she performed services for the Petitioner as an employee of the Petitioner.

Conclusions of Law:

18. 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.

19. 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).

20. 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).

21. 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.

22. 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.

23. 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.

24. 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.

25. The Petitioner and the Joined Party did not enter into any written agreement or contract. No evidence was presented to show that the Joined Party was hired to perform services as an employee or that the Joined Party was hired to perform services as an independent contractor. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the court provides guidance on how to proceed absent an express agreement, "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

26. The Petitioner's business is a nail salon. The Joined Party performed services for the Petitioner in the Petitioner's nail salons as a nail technician. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was a necessary and integral part of the business.

27. The Petitioner provided the place of work and all equipment and supplies. The Joined Party provided her own implements which had to be replaced every two months. The implements provided by the Joined Party do not represent a substantial investment in a business. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

28. The Petitioner paid the Joined Party a commission of 50% of the fees received from customers. Although the Joined Party's earnings were based on production rather than time worked, the Petitioner controlled the amounts that were charged to the customers. The Petitioner also determined the percentage that was paid to the Joined Party. The fact that the Petitioner chose not to withhold payroll taxes from the Joined Party's pay does not, standing alone, establish an independent contractor relationship.

29. The Joined Party worked for the Petitioner for a period of over one year. Either party had the right to terminate the relationship at any time without incurring liability. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner terminated the relationship. 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."

30. The Petitioner determined what work was performed by the Joined Party. Although the Joined Party was qualified to do artificial nails, the Petitioner would not allow the Joined Party to do artificial nails. The Petitioner determined when the work was performed and where the work was performed. The Petitioner determined how the work was performed and required the Joined Party to adhere to the Petitioner's preferred techniques and to use the materials and supplies provided by the Petitioner.

31. 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).

32. The Petitioner exercised significant control over the means used to perform the work. Thus, it is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

Recommendation: It is recommended that the determination dated November 12, 2009, be AFFIRMED.

Respectfully submitted on August 6, 2010.

R. O. SMITH, Special Deputy
Office of Appeals