**AGENCY FOR WORKFORCE INNOVATION**
**TALLAHASSEE, FLORIDA**

**PETITIONER:**
Employer Account No. - 2688650
C & L HOME SERVICES INC
3117 HARROW RD
SPRING HILL FL 34606-3026

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

**PROTEST OF LIABILITY**
**DOCKET NO. 2010-5504L**

**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 6, 2009, is MODIFIED to reflect a retroactive date of April 1, 2007. It is also ORDERED that the determination is AFFIRMED as modified.

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. - 2688650
C&L HOME SERVICES INC
CHERYL TIMM
3117 HARROW RD
SPRING HILL FL 34606-3026

**PROTEST OF LIABILITY**
**DOCKET NO. 2010-5504L**

**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 November 6, 2009.

After due notice to the parties, a telephone hearing was held on June 8, 2010. The Petitioner was represented by its attorney. The Petitioner's president testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 as a television repair person 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 2005 to provide home services including television repair. The Petitioner established liability for payment of unemployment compensation tax effective the first quarter 2006.
2. The Joined Party was initially employed by the Petitioner as a house cleaner. The Joined Party's ex-husband performed services as a television repair technician and the Joined Party assisted him. The Petitioner reported the Joined Party as an employee and paid unemployment compensation taxes during all four quarters 2006 and the first quarter 2007.

3. Beginning April 1, 2007, the Petitioner stopped withholding taxes from the workers' pay, including the Joined Party's pay, and discontinued reporting their earnings for unemployment compensation tax. The Petitioner reclassified all of the workers as independent contractors.

4. The Petitioner does not allow the television repair technicians to go on service calls alone. The Joined Party was the second person on the service calls and assisted the repair technicians. Generally, the Joined Party cleaned picture tubes and used the television remotes to program the televisions. The Joined Party did not install parts in any televisions. In addition to assisting the repair technicians the Joined Party assisted the Petitioner in the office. When the Petitioner received calls from customers who needed to have their televisions repaired the Joined Party was responsible for scheduling the repair technicians and responsible for notifying the customers of the dates and times that the repair technicians would be at the customers' homes.

5. Some of the televisions were brought into the Petitioner's shop to be repaired. If a television was brought into the shop to be repaired the Joined Party was responsible for cleaning the picture tube and programming the remote in the shop. Whether the Joined Party performed the work in the customer's home or in the shop, the Joined Party did not use any tools or equipment. The only supplies that were required were rags and cleaning fluid.

6. The Joined Party was not required to provide her own transportation. If she performed the work at a customer's home, she traveled to the customer's home with the service technician. The Petitioner reimbursed the service technicians for the mileage.

7. The Petitioner required the Joined Party to personally perform the work. The Joined Party was not permitted to hire others to perform the work for her.

8. The Joined Party was required to inform the Petitioner of the date each television would be ready for the customer. If a customer complained about the amount of time that it was taking to repair a television, the Petitioner would require the Joined Party to work on that television first.

9. The Petitioner provided business cards for the Joined Party to give to customers. The business cards listed the Petitioner's name but did not list the Joined Party's name or the name of the repair technician.

10. The Joined Party was covered under the Petitioner's business liability insurance policy. If the Joined Party damaged a television or broke something in a customer's home, the Petitioner was liable for the damages.

11. The Petitioner's pay week ends on Thursday. On Thursday of each week the Joined Party would report her hours that she had worked during the pay week. The Petitioner paid the Joined Party by the hour for the work which the Joined Party performed. The Joined Party's final rate of pay was $12 per hour. Beginning with the second quarter 2007 the Petitioner did not withhold payroll taxes from the Joined Party's earnings. At the end of 2008 the Petitioner reported the Joined Party's 2008 earnings in the amount of $22,122.00 on Form 1099-MISC as nonemployee compensation.

12. On occasion the Joined Party performed work which was not performed to the Petitioner's satisfaction. On those occasions the Petitioner required the Joined Party to redo the work. The Petitioner paid the Joined Party for the additional time needed to redo the work.

13. The Joined Party performed services for the Petitioner through April 29, 2009, at which time the Joined Party discontinued reporting for work.

14. The Joined Party filed an initial claim for unemployment compensation benefits effective September 20, 2009. Her filing on that date established a base period from April 1, 2008, through March 31, 2009. A *Request for Reconsideration of Monetary Determination* was filed when the Joined Party did not receive credit for her base period earnings with the Petitioner. On November

6, 2009, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to January 1, 2008. The Petitioner filed a written application to protest the determination.

**Conclusions of Law:**

15. 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.

16. 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).

17. 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).

18. 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.

19. 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.

20. 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.

21. 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.

22. No evidence was presented to show that there was a specific agreement between the Petitioner and the Joined Party that the Joined Party would perform services as an independent contractor. The Petitioner merely reclassified the Joined Party and all other employees effective April 1, 2007. 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."

23. The Petitioner's business is to provide services to homeowners, including television repair. The Joined Party's duties were to assist the television repair technicians by cleaning picture tubes and programming the television remotes. The Joined Party also assisted in the Petitioner's office by scheduling the television repair technicians. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the business.

24. The Joined Party did not repair televisions. The Joined Party was an assistant to the repair technicians and was only responsible for cleaning the picture tubes with a rag and cleaning fluid and for programming the televisions with the remote control. The work performed by the Joined Party did not require any skill or special knowledge. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

25. The Joined Party was not required to provide any tools or equipment to perform the work. It was not shown that the Joined Party had any expenses in connection with the work. It was not shown that the Joined party was at risk of suffering a financial loss from performing services.

26. The Petitioner paid the Joined Party by time worked rather than based on production. The Petitioner determined the rate of pay. The Joined Party's final rate of pay was $12 per hour. For the year of 2008 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as $22,122.00. Dividing the Joined Party's earnings by $12 per hour reveals that the Joined Party worked at least 35 hours a week for the Petitioner during 2008. The fact that the Petitioner discontinued withholding payroll taxes beginning April 1, 2007, does not, standing alone, establish an independent contractor relationship.

27. The Joined Party worked for the Petitioner for a period of time in excess of three years. That fact reveals that the relationship was one of relative permanence.

28. The analysis of the facts of this case reveal that the services performed for the Petitioner by the Joined Party constitute insured employment. However, the determination issued by the Department of Revenue is only retroactive to January 1, 2008. The Petitioner reported the Joined Party as an employee during all of 2006 and the first quarter 2007. The Petitioner discontinued reporting the Joined Party's earnings beginning April 1, 2007. Therefore, the correct retroactive date is April 1, 2007.

**Recommendation:** It is recommended that the determination dated November 6, 2009, be MODIFIED to reflect a retroactive date of April 1, 2007. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on June 29, 2010.

R. O. SMITH, Special Deputy
Office of Appeals