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

**PETITIONER:**
Employer Account No. - 2008939
LOTSPEICH CO OF FLORIDA INC
6351 NW 28TH WAY UNIT A
FORT LAUDERDALE FL 33309-1739

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

**PROTEST OF LIABILITY**
**DOCKET NO. 2010-56092L**

**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 February 25, 2010, is MODIFIED to reflect a retroactive date of March 1, 2005. It is further ORDERED that the determination is AFFIRMED as modified.

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. - 2008939
LOTSPEICH CO OF FLORIDA INC
6351 NW 28TH WAY UNIT A
FORT LAUDERDALE FL 33309-1739

**PROTEST OF LIABILITY**
**DOCKET NO. 2010-56092L**

**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 February 25, 2010.

After due notice to the parties, a telephone hearing was held on July 13, 2010. A division manager, a financial officer, and a human resources manager appeared and testified for the Petitioner. A tax specialist 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 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 established for the purpose of running a general interior contracting business.

2. The Joined Party began work for the Petitioner in June 2000 as an employee. The Joined Party changed status from employee to independent consultant in February 2005. The Joined Party's last date of service for the Petitioner was October 2009.

3. The Joined Party performed services as a project manager. The work entailed examining construction plans, creating lists of materials those plans required, order those materials, and make certain those materials arrived at the job site. The Joined Party could select which jobs he wished to take and had the right to refuse jobs.

4. The Joined Party performed similar work throughout his period of service with the Petitioner. The Petitioner directed the Joined Party's work prior to the 2005 status change. The Joined Party did not have the right to refuse work during the time he was considered an employee. The Joined Party was allowed to set his own work hours subsequent to the status change. The Petitioner required the Joined Party to personally perform the services.

5. The Joined Party was allowed to work for a competitor so long as he was not actually performing work for the Petitioner.

6. The Joined Party would submit an invoice with a list of hours worked, receipts, and mileage to the Petitioner. The Petitioner would verify the information and pay the Joined Party monthly. The Petitioner paid the Joined Party $40 per hour. The Petitioner did not hold the Joined Party's pay. The Petitioner compensated the Joined Party for mileage and expenses. The Petitioner paid some bonuses to the Joined Party.

7. The Petitioner provided the Joined Party with office space and a computer. The Petitioner provided stationary and other minor supplies.

8. The Petitioner would conduct a monthly profitability review.

9. Both parties could end the relationship at anytime, without liability.

**Conclusions of Law:**

10. 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.

11. 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).

12. 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).

13. 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.

14. 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.

15. 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.

16. The evidence presented at hearing revealed that the Joined Party performed services for the Petitioner from June 2000, through February 2005 as an employee. The terms of service changed February 2005, at which point, the Joined Party was considered an independent contractor by the Petitioner through October 2009.

17. The Petitioner was unable to present competent substantial evidence as to the nature of any independent contractor agreement or reason for the change in status from employee to independent contractor. It was shown that upon being considered an independent contractor, the Joined Party could refuse work, set his own hours, and was paid at an hourly rate.

18. The Petitioner did not provide a preponderance of competent substantial evidence to show that the status change of the Joined Party from employee to independent contractor was supported by a sufficient change in the terms of service to warrant such a change in status.

**Recommendation:** It is recommended that the determination dated February 25, 2010, be MODIFIED to show an effective date of March 1, 2005, and as modified, the determination is AFFIRMED. .

Respectfully submitted on August 26, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals