AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2948051
ALLIANCE REFRIGERATION LLC
5109 LAKE NINA DR
ORLANDO FL 32810-3344

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

PROTEST OF LIABILITY
DOCKET NO. 2010-56093L

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 March 12, 2010, is MODIFIED to reflect a retroactive date of June 1, 2008. 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. - 2948051
ALLIANCE REFRIGERATION LLC
RONNIE HOLLAND
5109 LAKE NINA DRIVE
ORLANDO FL 32810-3344

PROTEST OF LIABILITY
DOCKET NO. 2010-56093L

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 March 12, 2010.

After due notice to the parties, a telephone hearing was held on July 16, 2010. The Petitioner's owner appeared and testified at the hearing. The Joined Party appeared and testified on his own behalf. A tax specialist II appeared and testified on behalf of 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.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a limited liability corporation established in 2004 for the purpose of running an air conditioning and heating company.

2. The Joined Party provided services for the Petitioner as a service technician from May 2008, through January 12, 2010.

3. The Joined Party contacted the Petitioner to ask if the Petitioner needed any contractors. The Joined Party supplied the Petitioner with a resume and agreed to perform services as a subcontractor for the Petitioner.

4. The Joined Party was contacted by the Petitioner when work was available. The Joined Party was informed by the Petitioner that refusal to accept work could result in the loss of future work.

5. The Joined Party was assigned to perform installations and service calls on behalf of the Petitioner.

6. The Petitioner required that the Joined Party wear a shirt with the company logo and place magnetic signs on the vehicle for identification purposes.

7. The Joined Party provided his own hand tools. The Joined Party would use his own vehicle at his own expense at times. The Petitioner allowed the Joined Party to use a company vehicle on some occasions. The Petitioner provided all parts and materials needed for the work.

8. The Joined Party was paid by the job. Each job had its own pay rate. The pay rate was set by the Petitioner. The Joined Party was paid a weekly pay check. The amount of the pay check was determined by invoices. The Petitioner supplied the invoices to the Joined Party. In the event that the Joined Party was required to re-do defective work, no additional pay was provided. The Petitioner paid the Joined Party $30,630.07 in 2008. The Petitioner paid the Joined Party $28,858.84 in 2009.

9. The Petitioner responded to customer complaints about the Joined Party's conduct by explaining to the Joined Party that such conduct was prohibited and ultimately by discharging the Joined Party.

10. The Joined Party could quit at any time without liability.

11. The Joined Party could not subcontract the work.

12. The Joined Party did not have a subcontractor's license. The Joined Party did not supply his own liability insurance.

Conclusions of Law:

13. 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.

14. 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).

15. 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).

16. 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.

17. 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.

18. 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.

19. The evidence presented in this case reveals that the Petitioner exercised control over where and when the Joined Party performed the work. The Petitioner contacted the Joined Party when the Petitioner needed work done. The Petitioner directed the Joined Party as to where the work was to be performed.

20. The Petitioner controlled the financial aspects of the relationship. The Petitioner set the prices that the Petitioner was paid for various services. The Petitioner controlled the amount the customers were charged for services performed by the Joined Party.

21. The Petitioner required the Joined Party to wear a uniform shirt with the company logo. The purpose of this requirement was to identify the Joined Party as working for the Petitioner. As such, this should not be considered as a control factor.

22. The Joined Party provided his own hand tools. All other materials and parts were provided by the Petitioner.

23. The relationship was terminable at will. Both parties had the right to end the relationship without liability. The Petitioner discharged the Joined Party due to customer complaints. 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."

24. A preponderance of the evidence presented 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.

25. Section 443.036(21), Florida Statutes, provides:
"Employment" means a service subject to this chapter under s. 443.1216, which is performed by an employee for the person employing him or her.

26. Section 443.1216(1)(a), Florida Statutes, provides in pertinent part:
The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:
(1) An officer of a corporation.
(2) An individual who, under the usual common law rules applicable in determining the employer- employee relationship is an employee.

27. Section 443.036(20)(c), Florida Statutes, provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

28. Section 443.1215, Florida States, provides:

Each of the following employing units is an employer subject to this chapter:

An employing unit that:

a) In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or

b) For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least

one individual in employment, irrespective of whether the same individual was in employment during each day.

29. The Petitioner paid the Joined Party $30,630.07 in 2008. The Petitioner paid the Joined Party $28,858.84 in 2009. The Joined Party is held to have been an employee. Therefore, the Petitioner meets the liability requirements for Florida unemployment compensation contributions effective June 1, 2008.

Recommendation: It is recommended that the determination dated March 12, 2010, be MODIFIED to show an effective liability date of June 1, 2008, as modified, the determination is AFFIRMED.

Respectfully submitted on August 27, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals