AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2951467
MAYA E ROSENBLUM
1600 SAWGRASS CORPORATE PKWY STE 300
SUNRISE FL 33323-2821

PROTEST OF LIABILITY
DOCKET NO. 2010-80841L

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 31, 2010.

After due notice to the parties, a telephone hearing was held on November 12, 2010. The Petitioner and the Petitioner's accountant appeared and provided testimony 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.

Findings of Fact:

1. The Petitioner is a private individual. The Petitioner is not in business for herself.

2. The Petitioner contacted the Joined Party after receiving a reference from a friend. The Petitioner requested a resume and references from the Joined Party.

3. The Joined Party performed services for the Petitioner as a private chef from September 2004, through on or about October 31, 2009. The Joined Party was hired as an independent contractor.

4. The Joined Party was expected to provide dinners for the Petitioner 5 nights per week and to cater parties hosted by the Petitioner.

5. The Joined Party was free to create the menu. The Joined Party did the food shopping and preparation. The Joined Party was allowed to hire and supervise workers to assist with catered events.

6. The Joined Party was paid monthly. The Joined Party would submit a bill to the Petitioner containing the monthly salary plus expenses. These expenses included pay for any workers and the cost of groceries. The Petitioner paid the Joined Party's corporation once it was created.

7. The Joined Party is a trained chef with years of professional experience. The Joined Party performed services as a chef for others, prior to, during, and subsequent to the Joined Party's service for the Petitioner.

8. The Joined Party formed his own corporation in September 2005.

9. The Joined Party had his own liability insurance.

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 in this hearing reveals that the Petitioner did not exercise control over the details of the work performed by the Joined Party. While the Petitioner might have exercised some control at times over the menu, the Joined Party was free to select ingredients, perform the cooking, and retain workers at his own professional discretion.
17. The Joined Party was trained and experienced as a professional chef. The Joined Party was in business as a chef prior to the beginning of his term of service with the Petitioner.
18. The Joined Party had attended culinary school and had years of experience as a chef before working for the Petitioner.
19. The Joined Party was responsible for purchasing all of the ingredients for the preparation of meals. The Joined Party would bill the Petitioner monthly for the cost of ingredients.
20. The Petitioner is a private individual and is not in business for herself. The Joined Party's work cannot be a part of the regular course of business for the Petitioner since there is no business.
21. Both parties believed that an independent contractor relationship had been created between the parties.
22. A preponderance of the evidence presented in this hearing demonstrates that the Petitioner did not establish sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated March 31, 2010, be REVERSED.

Respectfully submitted on January 5, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals

AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

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ORDER

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 31, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _______ day of **March, 2011**.

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION