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

PETITIONER:
Employer Account No. - 2873726
TIMESHARE CLEARINGHOUSE, LLC
8808 RIVERSCAPE WAY
TAMPA FL 33635-9102

PROTEST OF LIABILITY
DOCKET NO. 2010-82784L

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 April 22, 2010.

After due notice to the parties, a telephone hearing was held on October 4, 2010. The Petitioner, represented by the Petitioner's owner, appeared and testified. 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 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 Joined Party and the Petitioner's owner were employed by Super Timeshare Resales, a timeshare resale company. The Joined Party worked as an administrator and was responsible for mailing contracts to customers and performing data entry. When the Petitioner's owner formed the Petitioner, Timeshare Clearinghouse LLC, the owner asked the Joined Party to come work for the Petitioner. The Joined Party accepted and started work for the Petitioner in March 2009.
2. The Petitioner's business is to advertise timeshares for resale. The Petitioner has sales persons who contact timeshare owners and sell the advertising. It was the Joined Party's responsibility to type the timeshare owner's name and address on the contracts and mail the contracts to the timeshare owners after the salesmen sold the contracts. The Joined Party was also responsible for answering the telephone, taking messages, and posting the timeshare properties that were offered for sale on the Petitioner's website. The assigned duties were the same as the duties the Joined

Party performed during his prior employment. Since the Joined Party knew how to perform the work it was not necessary for the Petitioner to provide any training.

3. There was no written contract or agreement between the Petitioner and the Joined Party. The verbal agreement was that the Petitioner would pay the Joined Party a base pay or salary of $200 per week and that the base pay would be increased as the company grew. If the company sold a certain amount of advertising contracts during a week, the Joined Party would be paid a bonus.

4. The Joined Party's assigned hours of work were from 10 AM until 9 PM, Monday through Friday and from 12 PM until 6 PM on Saturday. The Petitioner provided the Joined Party with a key to the Petitioner's office and the Joined Party was responsible for opening and closing the office each day.

5. The Petitioner provided the Joined Party with work space in the Petitioner's office. The Petitioner provided a desk and chair, a computer, and a telephone for the Joined Party's use. The Joined Party was not required to provide anything to perform the work and did not have any expenses in connection with the work.

6. If the Joined Party was not able to report for work as scheduled he was required to notify the Petitioner. The Joined Party was not allowed to leave the Petitioner's office during working hours without the Petitioner's permission. On occasion the Joined Party requested permission to leave the office so that he could purchase food for his meal break. On some of those occasions the Petitioner told the Joined Party that the office was too busy for the Joined Party to leave and denied permission for the Joined Party to leave.

7. The Joined Party was required to personally perform the work. He could not hire others to perform the work for him. During the time the Joined Party performed services for the Petitioner the Joined Party did not perform any services for others. The Joined Party did not have an occupational license, did not have business liability insurance, did not have an investment in a business and did not offer services to the general public. The Joined Party provided services exclusively for the Petitioner.

8. Although the Joined Party's beginning salary or base pay was $200 per week, the Petitioner unilaterally increased the base pay. The final base pay was $500 per week. When the office exceeded the specified weekly sales goal the Petitioner included a bonus in the Joined Party's pay. The amount of the bonus was at the Petitioner's discretion.

9. The Petitioner paid the Joined Party on a weekly basis with the weekly payday falling on Tuesday. The Joined Party believed that the Petitioner was withholding payroll taxes from the pay since there had not been any discussion concerning taxes not being withheld. The Petitioner did not withhold taxes from the pay and did not provide any fringe benefits such as paid vacations or health insurance.

10. Either party had the right to terminate the relationship at any time without incurring liability. The Joined Party terminated the relationship in January 2010.

11. After the Joined Party terminated the relationship in January 2010, the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation. It was at that time that the Joined Party learned that the Petitioner had not withheld payroll taxes from the pay.

Conclusions of Law:

12. 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.

13. 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).

14. 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).

15. 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.

16. 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.

17. 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.

18. 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. There was no written agreement or contract between the Petitioner and the Joined Party. No evidence was presented concerning any verbal agreement as to whether the Joined Party was hired as an employee or 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."

20. The Petitioner's business is to sell advertising contracts to advertise timeshare properties for resale. The Joined Party's primary responsibility was to mail the contracts to the timeshare owners and to post the advertising on the Petitioner's website. 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 Petitioner's business. The Joined Party performed services exclusively for the Petitioner. The Joined Party did not have any financial investment in a business and did not have any expenses in connection with the work. Everything that was needed to perform the work was provided by the Petitioner. It was not shown that the Joined Party was at risk of suffering a financial loss from services performed.

21. Although the Joined Party had prior experience gained during his prior employment with Super Timeshare Resales, it was not shown that any special knowledge or skill was required to perform the work. 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)

22. The Petitioner paid the Joined Party a base pay plus bonus. The Petitioner unilaterally determined amount of both the base pay and the bonus. The Joined Party had a set work schedule. Thus, the Joined Party was paid by time worked rather than production. That fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

23. The Joined Party was not hired to work for a specified period of time. The relationship was a continuing relationship which lasted for almost one year. Either party had the right to terminate the relationship at any time. These facts reveal the existence of an at-will relationship of relative permanence. 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. The Petitioner controlled what work was performed, where it was performed, and when it was performed. 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).

25. The evidence presented in this case reveals that the services performed by the Joined Party for the Petitioner constitute insured employment.

26. The special deputy was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. Factors considered in resolving evidentiary conflicts include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent

improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the special deputy finds the testimony of the Joined Party to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the Joined Party.

Recommendation: It is recommended that the determination dated April 22, 2010, be AFFIRMED.

Respectfully submitted on October 7, 2010.

R. O. SMITH, Special Deputy
Office of Appeals

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TALLAHASSEE, FLORIDA

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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 April 22, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **January, 2011**.

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION