AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2814660
DEPIWAX ORLANDO INC
2941 E COLONIAL DR
ORLANDO FL 32803-5041

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

PROTEST OF LIABILITY
DOCKET NO. 2010-83585L

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 27, 2010, is AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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

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RESPONDENT:
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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 27, 2010.

After due notice to the parties, a telephone hearing was held on March 4, 2011. An attorney appeared and called a waxer as a witness. The Joined Party did not appear at the hearing. 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 received.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Findings of Fact:

1. The Petitioner is a corporation, incorporated for the purpose of running a body waxing studio.

2. The Joined Party provided services for the Petitioner as a waxer from October 2007, through February 27, 2010. The Joined Party sought work with the Petitioner after reading an advertisement for work placed by the Petitioner. The Joined Party completed an application and an interview with the Petitioner prior to being hired.

3. The Petitioner provided a W-9 form to the Joined Party. The Petitioner required the Joined Party to complete the W-9 form in order to work for the Petitioner.

4. The Joined Party signed a document titled *Norms and Policies for the Employees of Depiwax Orlando* at the time of hire. The contract stipulated that the Petitioner would provide free training to waxers on the particular blend of wax used by the Petitioner. The contract bound the Joined Party to a confidentiality agreement with regards to the Petitioner's "exclusive process and procedures".

5. The contract indicates that the working hours are from Monday to Friday, 10 am to 8 pm; Saturdays from 10 am to 5 pm. The contract goes on to indicate that the Petitioner will establish a rotation of workers for Saturday work. The contract indicates that tardiness will be sanctioned by the Petitioner with penalties up to termination. The contract indicates that Petitioner approval is necessary to perform work outside of the established work hours.

6. The contract indicates that the Petitioner will provide two uniforms to the worker. The worker is required by the contract to keep the uniforms clean and neat. The worker is further required to keep her hair clean and wear it up.

7. The contract establishes the Joined Party as receiving a 30% commission for services provided. The Petitioner set the prices charged to customers. The contract goes on to set a 20% commission on product sold by the Joined Party. The Petitioner reserved the right to change the pay conditions unilaterally.

8. The contract had approximately two pages of various rules and policies. The rules range from instructions on maintaining hygiene, to how customers should be treated, to what steps should be taken in preparation for and subsequent to performing waxing services.

9. The Joined Party was licensed to perform work as a waxer.

10. The Petitioner provided all tools, equipment, and materials needed to perform the services. The work was performed using a workspace provided by the Petitioner.

11. Either party could end the relationship at any time without liability.

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. 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.

18. The evidence presented in this hearing reveals that the Petitioner had the right to control where, when, and how the Joined Party performed the work. The Joined Party was required to sign and initial an agreement which established the hours of work and schedule of work performed for the Petitioner. The Petitioner had control over what clothing the Joined Party wore to work as well as how the Joined Party kept her hair.

19. The agreement established protocols for how the Joined Party was to conduct herself while performing the work, what steps the Joined Party should take while performing the work, and how the Joined Party should maintain the work area during and between services.

20. The work performed by the Joined Party as a waxer is not separate and distinct from the Petitioner's body waxing studio; rather it is an integral part of the Petitioner's business.

21. The Petitioner supplied the work place, tools, materials, and equipment needed to perform the work. The Joined Party had no material expenses in conjunction with the work.

22. The Joined Party was paid a 30% commission for work performed for the Petitioner. The Petitioner had control over the scheduling of clients and determined the rate that clients would be charged for services. The Petitioner retained the right to alter the commission unilaterally.

23. While the Petitioner did not chose to enforce the provisions stated in the *Norms and Policies for the Employees of Depiwax Orlando* agreement, the Petitioner had the right to enforce those provisions at anytime. While the Petitioner contended that the provisions were mere guidelines, the document is phrased in such a way that they can only be interpreted as commands to the signing party. That the document must be signed and each section initialed by the Joined Party further indicates that the document cannot be construed as guidelines to be ignored at will by the Joined Party.
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 parties.
25. The Petitioner submitted proposed findings of fact and conclusions of law on March 18, 2011. Where those proposals are supported by the record, they are incorporated into the recommended order. Where those proposals do not comport with the record, they are respectfully rejected.

Recommendation: It is recommended that the determination dated April 27, 2010, be AFFIRMED.

Respectfully submitted on May 6, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals