AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2830032
STATES INC
13436 US HWY 19
HUDSON FL 34667-1660

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

PROTEST OF LIABILITY
DOCKET NO. 2010-83588L

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 June 8, 2010, is AFFIRMED.

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

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. - 2830032
STATES INC
TIMOTHY GROSSMAN
13436 US HWY 19
HUDSON FL 34667-1660

PROTEST OF LIABILITY
DOCKET NO. 2010-83588L

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 June 8, 2010.

After due notice to the parties, a telephone hearing was held on February 1, 2011. The Petitioner's president appeared and testified at the hearing. A tax specialist 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 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 subchapter S corporation, incorporated in February 2008 for the purpose of running an insurance agency.
2. The Joined Party provided services as a book keeper for the Petitioner from August 8, 2008, through March 26, 2010.

3. The Petitioner and Joined Party used a new employee worksheet as a written agreement between the parties. The Joined Party ceased working for the Petitioner and later returned, prompting a second agreement.

4. The Petitioner and the Joined Party worked out a schedule of services and hours.

5. The Joined Party was expected to report to work from 8a.m. until 9:30 a.m. and from 12:30 p.m. until 5:30 p.m. on Monday, Tuesday, Wednesday, and Friday. The Joined Party worked from 8 a.m. until 5 p.m. on Thursdays. The Petitioner required that the Joined Party deposit cash early each morning.

6. The Joined Party was paid $300 per week initially. The Joined Party's pay was increased to $500 per week when she began her second term of work for the Petitioner.

7. The Joined Party was not allowed to work for a competitor.

8. The Joined Party received 10 days per year of paid vacation. The Joined Party received 5 sick days per year. The Joined Party received 2 personal days per year.

9. The Joined Party was covered under the Petitioner's workmen's compensation insurance.

10. The Petitioner would review the Joined Party's work and give instructions on how the work should be performed.

11. The Joined Party was required to perform the work at the Petitioner's place of business.

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 reflects that the Petitioner exercised control over where, when, and how the Joined Party performed the work. The Joined Party had a fixed, regular schedule that she was expected to adhere to each week. The Joined Party was required to perform the services at the Petitioner's place of business. The Petitioner reviewed the work and gave instructions as to how the work should be performed.

19. The Joined Party was paid a salary rather than being paid by the job or task. Salary is indicative of an employer-employee relationship.

20. The Joined Party provided services for approximately a year and a half. Such a length of service tends to indicate a permanent relationship, rather than the temporary relationship consistent with an independent contractor relationship.

21. The Joined Party was covered under the Petitioner's workmen's compensation insurance and received paid time off. These factors are indicative of an employer-employee relationship.

22. The Joined Party was not allowed to work for a competitor. In any truly independent relationship, the hiring company will not generally have control over the contractor's business or dealings before, during, or after the services performed.

23. The Petitioner contended that many of the employee-like benefits were negotiated by the parties into the contract between the parties. While some such negotiation is certainly acceptable, the recommended order must be based upon the actual work relationship between the parties. The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

24. A preponderance of the evidence presented in the hearing revealed that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the Petitioner and the Joined Party.

Recommendation: It is recommended that the determination dated June 8, 2010, be AFFIRMED.

Respectfully submitted on March 21, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals