**THE DEPARTMENT OF ECONOMIC OPPORTUNITY**
**TALLAHASSEE, FLORIDA**

**PETITIONER:**
Employer Account No. - 3004284
PENSACOLA NAIL LOUNGE
4450 BAYOU BLVD
PENSACOLA FL 32503

**RESPONDENT:**
State of Florida
THE DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

**PROTEST OF LIABILITY**
**DOCKET NO. 2011-42307L**

**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 February 8, 2011, is AFFIRMED.

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

TOM CLENDENNING
Director of Workforce Services
THE DEPARTMENT OF ECONOMIC OPPORTUNITY

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

**PETITIONER:**
Employer Account No. - 3004284
PENSACOLA NAIL LOUNGE INC
ATTN: JENNY C TRAN
4450 BAYOU BLVD
PENSACOLA FL 32503

**PROTEST OF LIABILITY**
**DOCKET NO. 2011-42307L**

**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 February 8, 2011.

After due notice to the parties, a telephone hearing was held on June 29, 2011. An attorney appeared for the Petitioner and called the Petitioner's treasurer/manager/co-owner as a witness. A tax auditor II appeared 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:**

TIMELINESS: Whether a response was filed by a party entitled to notice of an adverse determination within fifteen days after the mailing of the Order to Show Cause to the address of record or, in the absence of mailing, within fifteen days after delivery of the order, pursuant to Florida Administrative Code Rule 60BB-2.035(5).

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.

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.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

**Jurisdictional Issue: TIMELINESS:** Whether a response was filed by a party entitled to notice of an adverse determination within fifteen days after the mailing of the Order to Show Cause to the address of record or, in the absence of mailing, within fifteen days after delivery of the order, pursuant to Florida Administrative Code Rule 60BB-2.035(5). An Order to Show Cause letter was mailed to the Petitioner on April 20, 2011. The Petitioner requested an extension of time to reply to the Order to Show Cause. The extension was granted, extending the time limit to respond to May 20, 2011. The Petitioner responded to the Order to Show Cause on May 20, 2011 by facsimile. The Petitioner's response to the Order to Show Cause is timely.

**Jurisdictional Issue:** Whether the Petitioner filed a timely protest pursuant to §443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 60BB-2.035, Florida Administrative Code. The Florida Department of Revenue issued a Determination with a mail date of February 8, 2011. The Petitioner received the Determination on February 24, 2011. The Petitioner submitted an appeal to the Determination on March 1, 2011. In the instant case, the lateness of receipt of the Determination by the Petitioner indicates that either the Determination was not mailed upon the date listed or that some unknown issue held up the delivery of the Determination. In either case, the Petitioner responded promptly to the Notice of Determination. The Petitioner's appeal is therefore timely.

**Findings of Fact:**

1. The Petitioner is a corporation, created for the purpose of running a nail salon.

2. The Petitioner has three corporate officers. The corporate officers receive a share of the yearly profits in lieu of other compensation.

3. The Joined Party provided services for the Petitioner as a receptionist from May 20, 2010 through December 2010.

4. The Joined Party's duties included answering phones, booking appointments, and rarely polishing nails. All work by the Joined Party was performed at the Petitioner's place of business.

5. The Joined Party was a family friend of the Petitioner. The Joined Party filled out an application and began work the next day. The Petitioner gave the Joined Party the option of paying her own taxes. The Joined Party agreed that she would pay her own taxes.

6. The Petitioner had one other worker performing services as a receptionist. The other worker performed the same duties under the same conditions as the Joined Party. The other worker was considered an employee by the Petitioner. The only difference between the two workers was the handling of taxes.

7. The Petitioner was open seven days per week. The Petitioner was open from 9am until 7pm Monday through Saturday. The Petitioner was open from noon until 6pm on Sundays. The Petitioner had a receptionist on duty every day.

8. The Joined Party was paid $8 per hour by the Petitioner. The Joined Party's hours were kept track of through the use of a time sheet. The Petitioner provided a holiday bonus.

9. The Joined Party's schedule was created on a weekly basis by the Petitioner based upon the availability of the Joined Party and the other receptionist.

10. The Petitioner provided training in the use of the computer system for the Joined Party. The training was mandatory and paid by the Petitioner.

11. The Joined Party was covered under the Petitioner's workmen's compensation policy.

12. The Petitioner required that the Joined Party wear a uniform shirt. The Petitioner provided uniform shirts with the Petitioner's logo.

**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 schedule was created by the Petitioner and all work was required to be performed at the Petitioner's place of business.
20. The Joined Party duties did not generally require a great deal of skill, training, or direction from the Petitioner once the initial training was completed.
21. The Petitioner provided the work place and uniform for the job. The Petitioner required that the uniform shirt be worn by the Joined Party.
22. The Joined Party was paid an hourly rate. Payment by time tends to indicate an employer-employee relationship between the parties.
23. The Petitioner had a second receptionist working under the same conditions as the Joined Party. The second receptionist was considered an employee by the Petitioner. The sole difference between the two workers was that the Joined Party had to pay her own taxes.
24. A preponderance of the evidence reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.
25. Section 443.1215, Florida Statutes, provides:

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

    i) 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 of preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

26. The Petitioner had an employee receptionist on duty each day that the place of business was open. The place of business is open seven days each week. Therefore the Petitioner meets the liability requirements for Florida unemployment compensation contributions effective May 18, 2010.

**Recommendation:** It is recommended that the determination dated February 8, 2011, be AFFIRMED.

Respectfully submitted on August 29, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals