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

**PETITIONER:**
Employer Account No. - 0575902
MAVCO INC
555 NW 95TH ST
MIAMI FL 33150-1957

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

**PROTEST OF LIABILITY**
**DOCKET NO. 2011-56685L**

**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 4, 2011, is MODIFIED to reflect a retroactive date of April 1, 2009. It is further ORDERED that the determination is AFFIRMED as modified.

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 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

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# RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Director, Unemployment Compensation Services
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 4, 2011.

After due notice to the parties, a telephone hearing was held on August 15, 2011. The Petitioner was represented by its attorney. The Chief Operating Officer and the Facilities Manager testified as witnesses. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party was represented by her attorney. 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 Petitioner is a company which operates a business that designs and installs commercial entertainment systems. The business is operated from two separate buildings at the same location. The Petitioner engaged a janitorial service to clean the buildings, however, the Petitioner was not satisfied with the services provided by the janitorial service and terminated the contract. The Petitioner's Chief Operating Officer asked a friend if the friend was aware of anyone who would be willing to clean the building for the Petitioner on a regular basis. The friend referred the Joined Party to the Petitioner.

2. The Joined Party was a student who had only worked as a babysitter. The Joined Party did not provide cleaning services to anyone as a self employed individual and she did not have a business license or an occupational license. The Joined Party did not have an investment in a business, did not advertise or offer services to the general public, and did not have business liability insurance. When the friend notified the Joined Party that the Petitioner was seeking someone to clean the Petitioner's offices, the Joined Party contacted the Petitioner and was interviewed by the Petitioner's Facilities Manager.

3. The Facilities Manager told the Joined Party that the hours of work were six hours per day from 8:15 AM until 2:30 PM on Monday, Wednesday, and Friday with an unpaid lunch break from 12 PM until 12:15 PM each day. The Facilities Manager informed the Joined Party that the rate of pay was $15 per hour. The Facilities Manager gave the Joined Party paperwork to sign including a written agreement that specified that the Joined Party would receive benefits such as paid holidays and paid vacations. The Joined Party accepted the offer of work and signed the paperwork including the agreement.

4. The Joined Party began work for the Petitioner during the latter part of March or the early part of April 2009. On the Joined Party's first day of work the Facilities Manager took her around the Petitioner's buildings. In the building containing the Petitioner's offices the Facilities Manager told the Joined Party which office the Joined Party would be required to clean first each day and the sequence in which the other offices were to be cleaned. The Facilities Manager told the Joined Party what she was required to do in each office and showed her how to clean the offices. The Facilities Manager showed the Joined Party how to clean the restrooms, how to clean the kitchen, and how to pick up trash from outside the building. On that first day the Joined Party was trained by the Facilities Manager from 11 AM until 4 PM but she did not do any cleaning. The Petitioner paid the Joined Party for the training time.

5. Approximately one week later the Petitioner told the Joined Party that the paperwork which the Joined Party had previously signed was given to her in error by the Facilities Manager and that the Petitioner had torn up the paperwork. The Joined Party was required to sign new paperwork including a *Form W-9 Request for Taxpayer Identification Number and Certification* and an *Agreement for Services.* The Petitioner told the Joined Party that she was hired as an independent contractor and not as an employee and that she would not receive benefits such as paid holidays and paid vacations. The Joined Party signed the paperwork on April 6, 2009.

6. The *Agreement for Services* provides that the Joined Party is deemed to be an independent contractor and that the Joined Party covenants and agrees to indemnify and hold harmless the Petitioner from any and all claims for bodily injury, personal injury, and property damages including damages to the Petitioner's property, and any other losses, damages, and expenses arising out of, or in connection with, the services performed by the Joined Party. The Agreement specifies that the first $10 of remuneration paid to the Joined Party is for the indemnification provided for by the Agreement. The Agreement specifies that the Joined Party may not, during the term of the Agreement or for a period of two years thereafter, solicit or attempt to solicit business from any of the Petitioner's clients. A portion of the Agreement specified that the Joined Party was responsible for providing workers' compensation insurance and business liability insurance, but the Petitioner crossed out that portion of the Agreement. The Agreement does not specify the term of the Agreement, conditions of termination of the Agreement, the duties to be performed, or the amount of payment for services performed.

7. All of the work performed by the Joined Party was performed on the Petitioner's premises during the Petitioner's regular business hours. The Joined Party was not provided with a key to the Petitioner's premises and the Joined Party was not allowed to be on the Petitioner's premises unless the Petitioner was present.

8. The Petitioner provided all equipment, tools, and supplies that were needed to perform the work, including a vacuum cleaner, mops, goggles, facemask, and supplies. The Facilities Manager gave the Joined Party a uniform shirt bearing the Petitioner's logo and told the Joined Party that the Petitioner's president had stated that the Joined Party was required to wear the uniform each day at work. The Petitioner included the Joined Party under the Petitioner's workers' compensation insurance and liability insurance policies.

9. The Joined Party was supervised by the Facilities Manager. The Facilities Manager monitored the progress of the work and inspected the work performed by the Joined Party to make sure it was performed properly. On occasion the Facilities Manager instructed the Joined Party to redo the work because it was not performed to his satisfaction. The Facilities Manager assisted the Joined Party with any problems the Joined Party had and gave the Joined Party periodic guidance concerning how to perform the work.

10. The Joined Party was required to personally perform the work. The Joined Party was not allowed to hire others to perform the work for her without the Petitioner's prior consent. The Joined Party was verbally reprimanded by the Facilities Manager because the Joined Party was not always able to complete the assigned work within the allotted time. The Facilities Manager told the Joined Party that if she could not complete the work in the allotted time the Petitioner would replace the Joined Party. The Joined Party requested permission to have her sister assist with the work and the Petitioner denied the request. The Joined Party requested permission to work additional hours to complete the work, however, those requests were also denied. Instead, the Petitioner scheduled another maintenance worker, a painter named Eduardo who was classified by the Petitioner as an independent contractor, to assist the Joined Party with the Joined Party's assigned work.

11. On some occasions when the Joined Party requested additional hours the Petitioner scheduled the Joined Party to work additional hours in the Petitioner's office doing clerical work such as filing. The Joined Party approached the Chief Operating Officer and asked if she could clean the personal residence of the Chief Operating Officer for additional money and asked if the Chief Operating Officer knew of anyone who would allow the Joined Party to perform cleaning. The Chief Operating Officer did not agree to allow the Joined Party to clean her home and did not refer the Joined Party to any other party to perform cleaning.

12. The Joined Party was never absent from work without permission, however, she was late reporting for work on occasion. On those occasions the Joined Party would telephone the Facilities Manager to let him know that she was going to be late. On occasion the Joined Party requested permission to take unpaid time off from work. The Facilities Manager always granted the Joined Party's requests for unpaid time off.

13. The Joined Party was required to complete a timesheet showing the time she reported for work each day, the time she left for and returned from lunch, and the time she left work. The Joined Party turned the completed timesheets in to the Facilities Manager. At the end of each bi-weekly pay period the Facilities Manager would use a template prepared by the Petitioner to create an invoice listing the total hours worked by the Joined Party during the pay period, the hourly rate of pay, and the total earnings during the pay period. The Facilities Manager created the invoice to give the appearance that the invoice had been prepared and submitted by the Joined Party.

14. The Petitioner paid the Joined Party on a bi-weekly basis and did not withhold any payroll taxes from the pay. At the end of each year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation. The Petitioner did not provide holiday pay, vacation pay, or health insurance.

15. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. On or about February 7, 2011, the Petitioner terminated the Joined Party without prior notice. The Petitioner included eighteen hours of severance pay in the Joined Party's final paycheck. The Petitioner replaced the Joined Party with the maintenance worker, Eduardo, who occasionally assisted the Joined Party. At that time the Petitioner reclassified Eduardo as an employee.

16. The Joined Party filed an initial claim for unemployment compensation benefits effective February 6, 2011. Her filing on that date established a base period from October 1, 2009, through September 30, 2010. When the Joined Party did not receive credit for her earnings within the base period of the claim a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee. On April 4, 2011, the Department of Revenue issued a determination holding that the Joined Party performed services for the Petitioner as an employee retroactive to January 1, 2010. The Petitioner filed a timely protest.

**Conclusions of Law:**

17. The issue in this case, whether services performed for the Petitioner by the Joined Party 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.

18. 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).

19. 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). In Brayshaw v. Agency for Workforce Innovation, et al; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the Agency is limited to applying only Florida common law in determining the nature of an employment relationship.

20. 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.

21. 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.

22. 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.

23. 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 can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

24. The Petitioner's regular business activity is the design and installation of commercial entertainment systems. The work performed by the Joined Party, cleaning the Petitioner's premises, is not an integral part of the Petitioner's regular business activity. The task of cleaning the premises may be performed by employees or may be performed by legitimate independent contractors.

25. Generally, independent contractors have multiple clients for whom they perform services. Independent contractors have an investment in a business and provide the tools, equipment, and supplies that are needed to complete the work. In this case the Joined Party performed services only for the Petitioner and the Petitioner provided everything that was needed to perform the work. The Joined Party did not hold herself out to the general public as an independent contractor.

26. The Joined Party signed an *Agreement for Services* which specifies that the Joined Party is deemed by the Petitioner to be an independent contractor. The Agreement does not set forth relevant factors normally found in an agreement such as the duties to be performed, the remuneration, the term of the agreement, or the conditions under which a party may terminate the agreement. A statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). 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."

27. Prior to performing maintenance services for the Petitioner the Joined Party had only worked as a babysitter. The Petitioner provided six hours of training during which the Facilities Manager told the Joined Party what to do and showed her how to perform the work. It was not shown that any skill or special knowledge was required to perform the duties of a maintenance worker. 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)

28. The Petitioner determined the hours of work, the method of pay, and the rate of pay. The Joined Party was required to complete a time sheet showing not just the total hours worked but showing the time that the Joined Party reported for work, the time she left work, and the time she left for

and returned from her meal break. The Joined Party did not submit a bill or invoice to the Petitioner. The invoices were prepared by the Petitioner. The Petitioner paid the Joined Party by time worked rather than by production or by the job which is a factor that points toward employment. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

29. The Petitioner covered the Joined Party under the Petitioner's workers' compensation insurance policy and provided severance pay at the time of termination. In addition to the factors enumerated in the Restatement of Law, the provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

30. The Joined Party performed services for the Petitioner for a period of almost two years. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Petitioner terminated the Joined Party without prior notice and replaced the Joined Party with another worker. 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."

31. The Petitioner controlled what work was performed, where it was performed, when it was performed, and how it was performed. The Petitioner even determined the amount of time that the Joined Party was allowed to take for a meal break. The Petitioner controlled the financial aspects of the relationship. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.

32. The evidence reveals that the Petitioner exercised significant control over the means and manner in which the work was performed. Thus, it is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

33. The determination issued by the Department of Revenue is retroactive to January 1, 2010. However, the Joined Party first performed services for the Petitioner beginning in late March 2009 or early April 2009. Thus, the correct retroactive date should be April 1, 2009.

**Recommendation:** It is recommended that the determination dated April 4, 2011, be MODIFIED to reflect a retroactive date of April 1, 2009. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on September 12, 2011.

R. O. SMITH, Special Deputy
Office of Appeals