THE DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2402601
ECCOLAB GROUP CO
8370 W FLAGLER ST STE 216
MIAMI FL 33144-2038

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

PROTEST OF LIABILITY
DOCKET NO. 2011-69496L

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 May 9, 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

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RESPONDENT:
State of Florida
Agency for Workforce Innovation
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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 May 9, 2011.

After due notice to the parties, a telephone hearing was held on July 27, 2011. The Petitioner was represented by its attorney. The Petitioner's President testified as a witness. The Respondent was represented by a Department of Revenue Tax Audit Supervisor. A Tax Auditor testified as a witness.

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 constitute insured employment, and if so, the effective date of the Petitioner's liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation which was formed in 2001 to operate a medical laboratory.
2. The Petitioner has contracts with medical facilities, such as nursing homes throughout the state of Florida, to provide medical laboratory services, including the drawing of blood. The Petitioner has engaged account representatives to sell the Petitioner's services, phlebotomists to draw the blood samples, and drivers to pick up the blood samples and transport them to the Petitioner's laboratory for testing. The Petitioner has classified the account representatives, the phlebotomists, and the drivers as independent contractors, as well as other classes of workers.

3. The Department of Revenue randomly selected the Petitioner for an audit of the Petitioner's books and records for the 2009 tax year to ensure compliance with the Florida Unemployment Compensation Law.

4. The Audit was performed at the office location of the Petitioner's Certified Public Accountant. The Certified Public Accountant provided copies of 53 1099 forms that were issued to workers who were classified by the Petitioner as independent contractors. In addition, the Certified Public Accountant provided representative copies of an Independent Contractor Agreement for a computer technician, a driver, a technician, two account representatives, and a phlebotomist.

5. All of the Independent Contractor Agreements are identical fill-in-the-blank agreements. The fill-in-the-blank portions of the agreements are for the worker's name, the beginning date of the agreement, the type of work to be performed, and the method and rate of pay.

6. All of the agreements provide that the worker is engaged for an at-will relationship of indefinite duration. The agreements state that the Petitioner may terminate the Agreement immediately, at will, and in the sole discretion of the Petitioner. Each of the agreements provides that the workers must give fifteen days written notice to the Petitioner in order to terminate the agreements.

7. All of the agreements provide that, in all aspects of the work, the workers "shall comply with the policies, standards, regulations of the company from time to time established, and shall perform the duties assigned faithfully, intelligently, to the best of his/her/their ability, and in the best interest of the company."

8. All of the agreements state that the worker agrees to perform the services as an independent contractor and that the worker is not entitled to any fringe benefits and not entitled to any remuneration or expenses other than as specifically provided for in the agreement. The agreements state that the cost of providing unemployment insurance is the responsibility of the workers. The agreements state that the worker "shall be free to dispose of such portion of its entire time, energy, and skill during regular business hours as it is not obligated to devote hereunder to Company in such manner as it sees fit and to such persons, firms or corporations as it deems advisable."

9. One of the representative agreements is for a computer technician. That agreement provides that the Petitioner will pay the computer technician $1,200 per bi-weekly pay period. One of the representative agreements is for a driver. That agreement provides that the Petitioner will pay the driver $500 per bi-weekly pay period. One of the representative agreements is for a technician and provides that the Petitioner will pay the technician at the rate of $25.00 per week. Two of the representative agreements are for outside account representatives. One of the agreements provides that the Petitioner will pay the account representative $1,100 per bi-weekly pay period and the other provides that the Petitioner will pay the account representative $1,400 per bi-weekly pay period. One of the representative agreements is for a phlebotomist and provides that the Petitioner will pay the phlebotomist an unspecified amount per collection on a bi-weekly basis. All of the agreements provide that the Petitioner will not withhold payroll taxes from the pay.

10. The Petitioner assigns each phlebotomist to work in a specific geographical area and to visit each of the medical facilities under contract with the Petitioner in the geographical area to draw blood from patients per doctors' orders. If a phlebotomist does not visit each of the medical facilities as required, the Petitioner will discharge the phlebotomist.

11. One of the Phlebotomists, Karla Conway, formed a corporation, Lab Lady, Inc., in 2006. That corporation was dissolved in 2009. The Petitioner paid Karla Conway personally for the services which she performed rather than issuing payment to the corporation. The Form 1099-MISC was issued by the Petitioner to Karla Conway personally rather than to the corporation.

12. None of the workers bill the Petitioner or submit an invoice to the Petitioner for services performed.

13. Initially, the Tax Auditor found that all 53 workers who received a 1099 form from the Petitioner were misclassified as independent contractors and that the total wages paid to the 53 workers was $289,912.98. After the Petitioner submitted additional information the Tax Auditor concluded that individuals who used their own vehicles while performing services as drivers, individuals performing services as computer technicians, and individuals performing outside coding and billing services, were independent contractors. The Tax Auditor found 49 of the 53 workers to be employees with taxable wages of $266,308.22.

14. The Department of Revenue issued a *Notice of Proposed Assessment* by mail on an unspecified date. The Petitioner filed a written protest on May 11, 2011.

Conclusions of Law:

15. 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.

16. 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).

17. 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).

18. 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.

19. 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.

20. 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.

21. 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.

22. The Petitioner's business is a medical laboratory which performs human fluid tests. The account representatives sell the Petitioner's services and the phlebotomists draw the blood from individuals for testing. The work performed by the account representatives and the work performed by the phlebotomists are both integral and necessary parts of the Petitioner's regular business activity rather than services which are outside the sphere of the Petitioner's regular business activity.

23. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "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. The Independent Contractor Agreements state that the workers are independent contractors. However, the Independent Contractor Agreements also require the workers, in all aspects of the work, to comply with the Petitioner's policies, standards, and regulations established by the Petitioner or which the Petitioner may chose to establish in the future. The agreements require the workers to perform the duties assigned by the Petitioner faithfully, intelligently, to the best of the workers' ability, and in the best interest of the Petitioner. These facts reveal that the Petitioner has the right to exercise control over the workers.

25. With the exception of the representative Independent Contractor Agreement for a phlebotomist, the Petitioner paid the workers by time worked rather than by production or by the job. The phlebotomist agreement only states the method of pay as "per collection" but does not specify an amount. Since the agreement does not specify an amount and since the phlebotomists do not submit a bill or invoice to the Petitioner for services performed, the agreement indicates that the Petitioner controls the amount to be paid per collection.

26. The Independent Contractor Agreements are for an indefinite term rather than for a specified term. The agreements may be terminated immediately by the Petitioner, at any time, at the will of the Petitioner, and in the sole discretion of the Petitioner. 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." In that case the court stated that the most telling

factor establishing control was that the employer fired the worker without giving rise to a cause of action for breach of contract.

27. It is not necessary for the employer to actually direct or control the manner in which the services are performed; it is sufficient if the agreement provides the employer with the right to direct and control the worker. Of all the factors, the right of control as to the mode of doing the work is the principal consideration. VIP Tours v. State, Department of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984)

28. The evidence presented in this case reveals that, based on the agreements, the Petitioner has the right to control the workers. The agreements require the workers to comply with all company policies, standards, and regulations established by the Petitioner or which the Petitioner may chose to establish in the future.

29. The Petitioner asserts that the Petitioner is entitled to relief from the payment of unemployment compensation taxes based on the safe harbor provisions of Section 530 of the Revenue Act of 1978. Under Section 530 an employer who misclassifies employees as independent contractors is protected from federal employment taxes if certain requirements are met. Section 530 of the Revenue Act of 1978 has no relevance in this case as the protection is solely for federal employment tax purposes and is not extended to include Florida unemployment compensation taxes. 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.

30. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error. The Petitioner has not satisfied the necessary burden.

Recommendation: It is recommended that the determination dated May 9, 2011, be AFFIRMED.

Respectfully submitted on August 25, 2011.

R. O. SMITH, Special Deputy
Office of Appeals