

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143**

PETITIONER:

Employer Account No. - 2656250
CONSÓRCIO PROMOTING LATIN AMERICA
ATTN: BUSTOS ENNIO
2000 NW 89TH PL 122B
DORAL FL 33172-2618

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-127788L**

ORDER

This matter comes before me for final Department 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 September 6, 2011, is AFFIRMED.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this *Order* and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **April, 2012**.



Altemese Smith,
Assistant Director,
Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Shanendra Barnes

DEPUTY CLERK

DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of April, 2012.

Shanendra Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Unemployment Compensation Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

CONSORCIO PROMOTING LATIN AMERICA
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DORAL FL 33172-2618

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

DEPARTMENT OF REVENUE
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5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

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MIAMI FL 33126-1831

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Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
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**PROTEST OF LIABILITY
DOCKET NO. 2011-127788L**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Director, Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated September 6, 2011.

After due notice to the parties, a telephone hearing was held on January 3, 2012. The Petitioner, represented by its Certified Public Accountant, appeared and testified. The Petitioner's Administrative Manager testified as a witness. The Respondent was represented by a Department of Revenue Tax Auditor III. A Tax Auditor II 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 company which operates a merchandising business that performs food product demonstrations in various retail stores.

2. The Department of Revenue randomly selected the Petitioner for an audit of the Petitioner's books and records to ensure compliance with the Florida Unemployment Compensation Law for the 2009 tax year. The audit was performed at the Petitioner's business location.
3. Among the books and records examined by the Tax Auditor were the 1099 forms issued by the Petitioner to individuals who performed the product demonstrations. Based on information provided by the Petitioner's Administrative Manager the Tax Auditor concluded that the product demonstrators were employees of the Petitioner rather than independent contractors.
4. The Petitioner contracts with food manufacturers to demonstrate the manufacturers' products in various retail stores. The Petitioner bills the manufacturers for the demonstrations performed by the product demonstrators. The Petitioner pays the product demonstrators an hourly wage which varies from product to product based on the Petitioner's agreements with the manufacturers. The Petitioner does not withhold any payroll taxes from the pay of the product demonstrators and does not provide any fringe benefits. There are no written contracts or agreements between the Petitioner and the product demonstrators.
5. The Petitioner provides training to the product demonstrators so that the demonstrators are knowledgeable about the products which they demonstrate. The Petitioner provides the demonstrators with scripts to be used in the demonstrations. The Petitioner provides the demonstration tables and all tools and supplies needed to demonstrate the products, including napkins and cups.
6. The Petitioner obtains permission from various retail stores to perform the demonstrations in the stores. The Petitioner determines when the demonstrations are performed. The Petitioner then contacts product demonstrators to inform them of the work assignments. A product demonstrator is permitted to decline work assignments if the product demonstrator is not available on the date and time specified by the Petitioner.
7. The Product demonstrators are required to personally perform the work. They may not hire others to perform the work for them.
8. The Petitioner has designated two of the product demonstrators as supervisors or managers. Those individuals are responsible for making sure that the demonstration areas are set up correctly, that the demonstrators are working as scheduled, and that the demonstrators are correctly demonstrating the products. If a demonstrator is not demonstrating a product correctly the supervisor will tell the demonstrator how to correctly demonstrate the product.
9. Either the Petitioner or the product demonstrators may terminate the relationship at any time.
10. On August 24, 2011, the Tax Auditor issued a *Notice of Intent to Make Audit Changes*. That Notice informed the Petitioner that the Petitioner had the right to request an audit conference within thirty days and that if an audit conference was not requested within thirty days a *Notice of Proposed Assessment* would be issued based on the *Notice of Intent to Make Audit Changes*.
11. On September 6, 2011, the Department of Revenue issued the *Notice of Proposed Assessment*. The *Notice of Proposed Assessment* advised the Petitioner that the Petitioner had the right to file a protest within twenty days. By letter dated September 22, 2011, the Petitioner's Certified Public Accountant requested an audit conference. The request for an audit conference was accepted by the Department of Revenue as a protest of the *Notice of Proposed Assessment*.

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). 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.
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.
18. 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.

19. No evidence was presented concerning any agreement or contract between the Petitioner and the product demonstrators. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."
20. The Petitioner's business is the demonstration of food products for the Petitioner's clients, the manufacturers of the food products. The Petitioner engaged the product demonstrators to perform the demonstrations. The Petitioner provided everything that was needed to perform the demonstrations. The work performed by the product demonstrators was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business.
21. It was not shown that any skill or special knowledge was needed to perform the product demonstrations. The Petitioner trained the product demonstrators, provided scripts, and supervised the product demonstrators to ensure that they were performing the demonstrations correctly. 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)
22. Either party was free to terminate the relationship at any time without incurring liability for breach of contract. 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."
23. The Petitioner paid the product demonstrators an hourly wage, the amount of which was determined by the Petitioner based on the Petitioner's contracts with the Petitioner's clients. Although the product demonstrators were free to decline a work assignment, the Petitioner determined the dates and times of work. The pay was not based on production or by the job. These facts reveal that the Petitioner controlled the financial aspects of the relationship. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.
24. The evidence presented in this case reveals that the Petitioner controlled what work was performed, where it was performed, when it was performed, and how it was performed. The Petitioner controlled the method of pay, the rate of pay, and the hours of work. The Petitioner provided all tools and supplies that were needed to perform the work. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing

between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

25. It is concluded that the services performed by the product demonstrators, including the supervisors and managers, constitute insured employment.

Recommendation: It is recommended that the determination dated September 6, 2011, be AFFIRMED.

Respectfully submitted on January 5, 2012.



R. O. SMITH, Special Deputy
Office of Appeals