

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

**PETITIONER:**

Employer Account No. - 3010446  
BEST INTERIORS PAINTERS INC  
5200 NW 43RD STREET  
GAINESVILLE FL 32606-4484

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2011-52137L**

**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 February 24, 2011, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this \_\_\_\_\_ day of **November, 2011**.



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**TOM CLENDENNING**  
Director of Workforce Services  
THE DEPARTMENT OF ECONOMIC  
OPPORTUNITY

**THE DEPARTMENT OF ECONOMIC OPPORTUNITY  
Unemployment Compensation Appeals**

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

**PETITIONER:**

Employer Account No. - 3010446  
BEST INTERIORS PAINTERS INC  
ATTN: ERIC GOYANES  
5200 NW 43RD STREET  
GAINESVILLE FL 32606-4484



**PROTEST OF LIABILITY  
DOCKET NO. 2011-52137L**

**RESPONDENT:**

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

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

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

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated February 24, 2011.

After due notice to the parties, a telephone hearing was held on May 24, 2011. The Petitioner's co-owner appeared and testified at the hearing. The Joined Party did not appear at the hearing. A tax specialist appeared and testified 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:**

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 limited liability company, created in March 2008, for the purpose of running a painting contracting company.
2. The Joined Party began performing services for the Petitioner as a painter on March 26, 2010. The Petitioner made the Joined Party an employee in mid-2010.

3. The Petitioner would contact the claimant when work was available. The claimant would be informed what the scope of the work would be and what the pay would be. The claimant could decline work.
4. The Joined Party provided brushes, rollers, and hand tools. The Petitioner provided all paints, scaffolding, lifts, and ladders. The Petitioner provided t-shirts with the company logo.
5. The Petitioner conducts an estimate for a job. The Petitioner then contacts the Joined Party and informs the Joined Party what the pay will be. The pay is based on the size of the job. The pay is determined by the Petitioner.
6. The Petitioner would check up on the Joined Party by telephone and occasional visits to the work site. The Petitioner determined how many workers were needed for the job. The Petitioner determined what workers would be working on a given job. The Petitioner would occasionally put one worker in charge of the group in cases where more than one worker was assigned to the job.
7. The Petitioner converted the Joined Party into an employee in mid-2010. The Joined Party was covered by workmen's compensation insurance after the change. There were no other changes to the work conditions.

#### **Conclusions of Law:**

8. 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.
9. 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).
10. 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).
11. 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.
12. 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.
13. 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. 1<sup>st</sup> 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. 1<sup>st</sup> 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.
14. The evidence presented in this hearing reflects that the Petitioner exercised control over where, when, and how work was to be performed by the Joined Party. The Petitioner would indicate when work was available and where the work was to be performed. The Petitioner provided some supervision of the work at the work site. The Petitioner determined how many workers the Joined Party would work with as well as what specific workers the Joined Party would work with.
15. The Joined Party has provided services for the Petitioner for approximately one year. Such a length of time tends to demonstrate a more permanent relationship. The Petitioner changed the Joined Party’s status to employee in 2010 without significant change to the work conditions. Such a change is a strong factor in favor of an employer-employee relationship between the parties.
16. The rate of pay was based upon the size of the job according to the Petitioner’s estimate. While payment by the job tends to indicate an independent contractor arrangement; the Petitioner had control over all of the financial aspects of the relationship. The Petitioner performed the estimate and set the pay to the Joined Party based upon that estimate.
17. A preponderance of the evidence presented in this case reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

**Recommendation:** It is recommended that the determination dated February 24, 2011, be AFFIRMED.

Respectfully submitted on October 13, 2011.



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KRIS LONKANI, Special Deputy  
Office of Appeals