

**AGENCY FOR WORKFORCE INNOVATION  
TALLAHASSEE, FLORIDA**

**PETITIONER:**

Employer Account No. - 2526969  
MUNOZ HOME CARE INC  
9745 SW 72ND ST STE 208  
MIAMI FL 33173-4654

**RESPONDENT:**

State of Florida  
Agency for Workforce Innovation  
c/o Department of Revenue

**PROTEST OF LIABILITY  
DOCKET NO. 2010-63348L**

**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 25, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this \_\_\_\_\_ day of **November, 2010**.



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TOM CLENDENNING  
Assistant Director  
AGENCY FOR WORKFORCE INNOVATION

**AGENCY FOR WORKFORCE INNOVATION  
Unemployment Compensation Appeals**

MSC 345 CALDWELL BUILDING  
107 EAST MADISON STREET  
TALLAHASSEE FL 32399-4143

**PETITIONER:**

Employer Account No. - 2526969  
MUNOZ HOME CARE INC  
JAMES MUNOZ  
9745 SW 72ND ST STE 208  
MIAMI FL 33173-4654

**RESPONDENT:**

State of Florida  
Agency for Workforce Innovation  
c/o Department of Revenue

**PROTEST OF LIABILITY  
DOCKET NO. 2010-63348L**

**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 25, 2010.

After due notice to the parties, a telephone hearing was held on August 11, 2010. An attorney appeared on behalf of the Petitioner and called an office manager as a witness. The Joined Party appeared and testified on her own behalf. A tax auditor II 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 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 subchapter C corporation incorporated in 2003 for the purpose of running a Medicaid waiver provider business.

2. The Joined Party provided services for the Petitioner as a home health aide from October 15, 2007, through January 31, 2009.
3. The Joined Party signed a written contract with the Petitioner. The contract indicated that the Joined Party was an independent contractor. The Petitioner explained the consequences of an independent contractor agreement to the Joined Party at the time of hire.
4. The Petitioner acts as a matching service bringing together home health aides with Medicaid supplied customers in need of their services. The customer is allowed to choose the home health aide they wish to use. The home health aide has the right to refuse any given customer. The customer and the home health aide work together to create a schedule. The home health aide performs services at the customer's home.
5. The Petitioner does not supply a care plan or a nursing supervisor. The Petitioner does contact the customers every two to three months to determine if the customer is receiving proper service. In the event that a customer is unhappy with the service, the Petitioner would try to match another home health aide.
6. The Petitioner requires the Joined Party to follow certain rules which included no smoking in customer homes, proper dress, and courtesy to the customers.
7. The Joined Party would provide basic personal care for the customers. The care included helping customers bathe, various household chores, and food preparation. The specific care depended upon the needs of the customer and the arrangements made with the Joined Party.
8. The work required a home health aide license, CPR certification, and HIV certification. The Joined Party possessed the proper license and certifications to perform the work.
9. The Joined Party would send a bill to the Petitioner. The Joined Party was paid \$9 per hour. The rate of pay was dependent upon the experience of the home health aide.
10. Medicaid required physical examinations for home health aides. The Joined Party was required to pay for her own physical examinations.
11. The Joined Party was allowed to work for a competitor.

**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).
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. 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.
18. The evidence presented in this case reveals that the Petitioner did not control when or how the Joined Party performed services. What services were to be provided and when they were to be provided were determined by agreement between the Joined Party and the individual customer.
19. There was a written independent contractor agreement signed by both parties. While such an agreement is not dispositive, it does demonstrate the intentions of the parties.
20. While there were some controls over the work of the Joined Party, these controls were primarily imposed by Medicaid and constitute legal requirements.
21. The Joined Party was a skilled and licensed worker. The Joined Party was selected because of her skills, training, and experience in the field. The Joined Party was expected to use her professional judgment in the creation and implementation of a schedule and care for the customers.
22. A preponderance of the evidence presented in this case reveals that the Petitioner did not establish sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

23. Proposed Findings of Fact and Conclusions of Law were submitted by the Petitioner on August 23, 2010. The Special Deputy considered the proposals. Where the proposals comport with the record, they are incorporated into the recommended order. Where the proposals do not comport with the record, they are respectfully rejected.

**Recommendation:** It is recommended that the determination dated February 25, 2010, be REVERSED.

Respectfully submitted on September 2, 2010.



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KRIS LONKANI, Special Deputy  
Office of Appeals