

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2996023
DESIGNS IN SIGNS
1485 W C 48
BUSHNELL FL 33513-8973

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-8513L**

ORDER

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 December 20, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **August, 2011**.



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. - 2996023
DESIGNS IN SIGNS
ATTN: RUSSELL S. LYONS
1485 W C 48
BUSHNELL FL 33513-8973



**PROTEST OF LIABILITY
DOCKET NO. 2011-8513L**

RESPONDENT:

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

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 December 20, 2010.

After due notice to the parties, a telephone hearing was held on May 26, 2011. The Petitioner’s accountant appeared as a representative and called the Petitioner’s owner as a witness at the hearing. The Joined Party did not appear at the hearing. A tax specialist appeared 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 sole proprietorship, established in 2008 for the purpose of running a sign shop.
2. The Petitioner and the Joined Party were acquaintances. The Joined Party had the opportunity to purchase a sign business. The Joined Party did not have funds to purchase the business. The Joined Party contacted the Petitioner for funding.

3. The Petitioner agreed to purchase the business and have the Joined Party operate the business for a period of five years. At the end of the five year period the Joined Party was expected to purchase the business from the Petitioner for \$22,000. The Petitioner would retain a 60% split of all subsequent profits. The written agreement was not signed by the Joined Party.
4. The Petitioner purchased the business in 2008. The Joined Party operated the business from the time of purchase until September 24, 2010.
5. The Joined Party was expected to report to the place of business by at least 9am and work until 5pm. The Petitioner allowed some flexibility in the hours worked.
6. The Petitioner closely monitored the Joined Party. The Petitioner verbally admonished the Joined Party over tardiness or absences. The Petitioner docked the Joined Party's pay due to fines incurred by the Joined Party.
7. The Petitioner established rules which the Joined Party was expected to follow. The Joined Party was required to keep the shop clean. The Joined Party was not allowed any food or drink in proximity to the computers.
8. The Petitioner sent the Joined Party to sign shop open houses and trade shows at the Petitioner's expense.
9. The work required equipment including computers, printers, laminators, straight edges, and squeegees. The equipment was provided by the Petitioner. The Petitioner provided business cards for the Joined Party. The business cards listed the Joined Party's title as 'manager'. The Petitioner provided a hat with the company logo.
10. The Joined Party was paid weekly. The Joined Party's weekly wage was determined by the Petitioner on a week by week basis. The Joined Party's weekly wage averaged approximately \$400. The Petitioner directed all business profits back into the business. The Petitioner paid the Joined Party a Christmas bonus.
11. The Joined Party was not allowed to subcontract the work.
12. The Petitioner maintained insurance on the building and equipment.

Conclusions of Law:

13. 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.
14. 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).
15. 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).

16. 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.
17. 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.
18. 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. 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.
19. The evidence presented in this hearing reveals that the Petitioner exercised control over where and when the work was performed. The Joined Party was required to report to the Petitioner’s place of business between set hours. The Petitioner established rules to which the Joined Party was required to conform. The Petitioner supervised and oversaw the work of the Joined Party as store manager.
20. The work performed by the Joined Party in managing and operating the store was an integral part of the daily course of business for the Petitioner’s sign store.
21. The Petitioner provided all of the tools, equipment, and materials needed to perform the work. The Petitioner paid for the Joined Party’s expenses for any trips made for the business. The Petitioner provided business cards for the Joined Party.
22. The Joined Party performed services for the Petitioner for in excess of two years. Such a length of time is indicative of a permanent relationship between the parties.
23. The Petitioner had unilateral control over the financial aspects of the relationship. The Petitioner determined from week to week, what pay the Joined Party was to receive.

24. Consideration was given to the possibility that a partnership might have been formed inadvertently between the parties. An examination of the facts demonstrates that the Petitioner retained complete control over the distribution of profits. The relationship between the parties does not demonstrate the sharing of responsibility and profits indicative of a partnership but rather demonstrates a master servant relationship between the parties.
25. 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 December 20, 2010, be AFFIRMED.

Respectfully submitted on July 12, 2011.



KRIS LONKANI, Special Deputy
Office of Appeals