**AGENCY FOR WORKFORCE INNOVATION**
**TALLAHASSEE, FLORIDA**

**PETITIONER:**
Employer Account No. - 2485174
LENORE NOLAN-RYAN INC
228 COMMERCIAL BLVD
LAUDERDALE BY THE SEA FL 33308-4438

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

**PROTEST OF LIABILITY**
**DOCKET NO. 2009-108483L**

**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 June 29, 2009, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **July, 2010**.

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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**Unemployment Compensation Appeals**
MSC 346 Caldwell Building
107 East Madison Street
Tallahassee FL 32399-4143

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# RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Director, Unemployment Compensation Services
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated June 29, 2009.

After due notice to the parties, a telephone hearing was held on November 4, 2009. The Petitioner's Owner appeared and provided testimony at the hearing. The Joined Party did not appear. 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 in catering services 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 corporation incorporated in September 2000 for the purpose of running a cooking school and catering service.

2. The Petitioner is contacted by a client for catering services. The Petitioner maintains a roster of individuals that perform catering services. The Petitioner relies upon that list as well as upon family members to prepare and serve food at the catered event. The Petitioner generally did not pay family members for their services.

3. The Joined Party provided services for the Petitioner from November 2008, through 2009.

4. The Joined Party delivered food and provided services at clients' homes for events. The Joined Party would deliver food and pass hors d'oeuvres at events at client locations.

5. The Joined Party approached the Petitioner to offer services as a delivery driver. The Petitioner informed the Joined Party that she would be an independent contractor. The Joined Party was on the Petitioner's roster of individuals that met the Petitioner's qualification requirements and were available for catering help.

6. The Petitioner would call the Joined Party to see if she was available for a delivery. If the Joined Party was not available, the Petitioner's Owner would make the delivery or have the client pick up the food. If the Joined Party was available to make the delivery, the Joined Party would come to the Petitioner's workplace to get the address of the delivery location.

7. The Joined Party provided her own delivery vehicle. The Petitioner paid for the Joined Party's mileage with a set rate per mile. The mileage was intended to cover the cost of fuel as well.

8. During a catering function, the Petitioner expected the Joined Party to wear either the company T-shirt or black and white clothing depending upon the client's wishes. The Petitioner provided a T-shirt with the company logo. The black and white clothing was the industry standard uniform in the catering business. The Joined Party was expected to carry out the tray with hors d'oeuvres, identify the hors d'oeuvres for guests, and smile. While the Petitioner would oversee the catered function, the Petitioner generally expected the Joined Party to be aware of her duties and responsibilities based upon the Joined Party's experience in the industry.

9. The Petitioner paid the Joined Party an hourly rate of $10 per hour for deliveries and $15 per hour for serving at a catered event. The Joined Party was paid every two weeks. The Joined Party would submit her hours and mileage to the Petitioner. The rate of pay was determined by the Petitioner. The Joined Party was paid $1733.75 in 2008 by the Petitioner.

10. The Joined Party could work for a competitor.

11. The Joined Party could subcontract her work. The Petitioner would pay either the contractor or the Joined Party depending upon the Joined Party's request.

**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. 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.

18. The evidence presented in this case reveals that the Joined Party offered her services as a delivery driver to the Petitioner. The parties verbally agreed upon an independent contractor relationship. While the agreement of the parties is not dispositive of the matter, it does demonstrate the clear intent of the parties.

19. The record reflects that the Joined Party provided her own vehicle for the work. The Petitioner allowed the Joined Party to report mileage for which the Petitioner paid the Joined Party. The Petitioner provided a T-shirt with the company logo to the Joined Party for use at some catered events. The Petitioner required that the Joined Party wear the industry standard black and white clothing when indicated by the client. In this case, the use of either uniform allows for ease of identification of workers to the client and the client's guests at a catered function.

20. The record shows that the Petitioner exercised minimal guidance and supervision of the Joined Party. Guidance in the delivery role was limited to informing the Joined Party of where and when the delivery was to be made. The Petitioner was present onsite at catered events to coordinate activities, but the Petitioner expected the Joined Party to be aware of how to conduct herself and perform her duties in light of the Joined Party's experience.

21. A preponderance of the evidence 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 Petitioner and the Joined Party.

**Recommendation:** It is recommended that the determination dated June 29, 2009, be REVERSED.

Respectfully submitted on June 3, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals