AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2573745
FLORIDA DRAPERY & WALLCOVERING LLC
925 W STATE ROAD 434 STE 100
WINTER SPRINGS FL 32708-5789

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

PROTEST OF LIABILITY
DOCKET NO. 2009-163936L

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 October 12, 2009, is AFFIRMED.

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

TOM CLENDENNING
Director, Unemployment Compensation Services
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. - 2573745
FLORIDA DRAPERY & WALLCOVERING LLC
CECILIO V KELLY
925 W STATE ROAD 434 STE 100
WINTER SPRINGS FL 32708-5789

PROTEST OF LIABILITY
DOCKET NO. 2009-163936L

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

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 October 12, 2009.

After due notice to the parties, a telephone hearing was held on March 29, 2010. The Petitioner, represented by the business owner, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

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 as a designer 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 an interior design company. The business was operated as a sole proprietorship until July 2004 when the business owner formed a limited liability company. The Petitioner established liability for payment of unemployment compensation taxes effective July 1, 2004.
2. In approximately February 2006 the Petitioner hired the Joined Party as an employee to perform interior design work. The Joined Party was an experienced interior designer and did not require any training. The Petitioner paid the Joined Party a commission of 10% on the work which the Joined Party performed for the Petitioner's clients. Payroll taxes were withheld from the Joined Party's pay and at the end of each year the Petitioner reported the Joined Party's earnings to the

Internal Revenue Service on Form W-2 as wages. The Petitioner did not provide fringe benefits such as health insurance or retirement benefits but did provide the Joined Party with two weeks paid vacation each year.

3. The Petitioner provided the Joined Party with business cards listing the Petitioner's business name as well as the Joined Party's name. The Joined Party did not have any expenses in connection with the work with the exception of automobile expenses. The Petitioner reimbursed the Joined Party for gas. No equipment or tools were necessary with the exception of product samples which were provided by the Petitioner. The Petitioner allowed the Joined Party to work for others, including performing services for the Joined Party's own private clients.

4. The Petitioner set the appointments for the Joined Party with the Petitioner's clients. The Petitioner determined the sequence of the work. The Joined Party was required to report the progress of the work to the business owner. The Petitioner computed the Joined Party's pay based on the income which the Joined Party generated for the business.

5. The Petitioner's business was losing money due to the poor economy. As a result, the Petitioner attempted to find ways to reduce business expenses. In February 2008 the Petitioner informed the Joined Party that the Petitioner could not afford to employ the Joined Party as an interior designer but that the Joined Party could continue performing services for the Petitioner as an independent contractor.

6. Nothing changed in the working relationship between the Petitioner and the Joined Party other than the Petitioner discontinued withholding payroll taxes, the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation, and the Petitioner discontinued the two week paid vacation. The Petitioner continued to pay the Joined Party a 10% commission on the income which the Joined Party generated for the Petitioner.

7. After February 2008 the Joined Party continued to use the business cards previously provided by the Petitioner and continued to use the samples provided by the Petitioner. The Joined Party did not apply for or obtain an occupational or business license, did not obtain business liability insurance, and did not offer services to the general public. The Petitioner continued to reimburse the Joined Party for the Joined Party's gas, the only expense associated with the work. The Joined Party was not at risk of suffering a financial loss from performing services for the Petitioner's clients.

8. Either party had the right to terminate the relationship at any time without incurring liability.

Conclusions of Law:

9. 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.

10. 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).

11. 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).

12. 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.

13. 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.

14. 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.

15. 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.

16. The Petitioner is an interior design company. The Joined Party performed services for the Petitioner's clients as an interior designer. The Petitioner provided everything that was needed to perform the work and reimbursed the Joined Party for expenses in connection with the work. Through the business cards provided by the Petitioner the Joined Party represented himself as part of the Petitioner's business. The services performed by the Joined Party were not separate and distinct from the Petitioner's business but were an integral and necessary part of the Petitioner's business.

17. Either party had the right to terminate the relationship at any time without incurring liability. 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."

18. The only significant difference between the conditions of employment and the conditions after the Petitioner mandated that the Joined Party work as an independent contractor was that the Petitioner discontinued withholding payroll taxes. The lack of payroll tax withholding, standing alone, does not establish an independent contractor relationship.

19. 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).

20. No change occurred in the extent of control exercised by the Petitioner or in the Petitioner's right to control the Joined Party. Thus, it is concluded that the services which the Joined Party performed for the Petitioner constitute insured employment.

Recommendation: It is recommended that the determination dated October 12, 2009, be AFFIRMED.

Respectfully submitted on March 31, 2010.

R. O. SMITH, Special Deputy
Office of Appeals