AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2926105
KENCO DISTRIBUTORS INC
4647 JOHN MOORE ROAD
BRANDON FL 33511-8033

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

PROTEST OF LIABILITY
DOCKET NO. 2009-166886L

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 November 2, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **July, 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. - 2926105
KENCO DISTRIBUTORS INC
KENNETH POWERS
4647 JOHN MOORE ROAD
BRANDON FL 33511-8033

PROTEST OF LIABILITY
DOCKET NO. 2009-166886L

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 November 2, 2009.

After due notice to the parties, a telephone hearing was held on April 14, 2010. The Petitioner, represented by the Vice President/Chief Operating Officer, appeared and testified. An individual performing services for the Petitioner as a Field Representative testified as a witness. The Respondent was represented by a Department of Revenue Senior Tax Specialist. A Tax Auditor II testified as a witness. 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 and other individuals working as field manager/sales 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 that was formed on April 25, 2005, to operate a business as a distributer of an insulated masonry wall system. The Petitioner's Vice President/Chief Operating Officer has been active in the operation of the business since inception. The Petitioner's President is also active in the operation of the business.
2. In approximately June 2008 the Petitioner hired an individual to perform services for the Petitioner as a field sales representative. That individual referred his son, the Joined Party, to the

Petitioner for work as a field representative. The Petitioner interviewed the Joined Party and informed the Joined Party of the job responsibilities, how to conduct himself on the job, the hours of the business, the hours the Joined Party was expected to work, and the dress code. The job responsibilities were to include training other sales representatives, rewriting the telephone sales script, entering daily activities on spreadsheets, and ordering products while maintaining the warehouse inventory. The Joined Party was informed that he was to work from 8 AM until 5 PM and after hours as needed. The Petitioner informed the Joined Party that the Petitioner would pay the Joined Party a bi-weekly guarantee of $1,500. The Joined Party accepted the Petitioner's offer of work and signed a *Sales Agent Agreement.*

3. The *Sales Agent Agreement* requires the Joined Party to act in a professional manner and to follow all of the Petitioner's policies and procedures. The Agreement requires the Joined Party to submit weekly sales reports to the Petitioner. The Joined Party signed the Agreement and began work on July 12, 2008.

4. The Petitioner provided the Joined Party with a shirt bearing the company name which the Joined Party was required to wear when making sales presentations. The Joined Party was required to wear jeans or khaki pants with the uniform shirt. The shirttail was required to be tucked into the pants.

5. During the first thirty days of work the Petitioner provided very specific, intensive training concerning the Petitioner's product and how to sell the product. The Joined Party did not have a construction background and the Petitioner trained the Joined Party concerning the techniques used to install the insulated masonry wall system. The Joined Party rode with the Petitioner's Chief Operating Officer so that the Joined Party could observe the Chief Operating Officer's attempts to sell the Petitioner's product. The Chief Operating Officer also observed the Joined Party's attempts to sell the product and offered guidance concerning how the Joined Party could improve his sales presentation. The Petitioner had training and construction manuals which the Joined Party was required to read and videos which the Joined Party was required to watch.

6. The Petitioner provided the Joined Party with office space and a desk in the Petitioner's office. The Petitioner provided the Joined Party with a telephone, a computer, other office equipment, and all forms and supplies that were needed to perform the work. The Petitioner provided the Joined Party with a vehicle to drive for business purposes only. The Petitioner provided the Joined Party with a credit card to be used only for business expenses such as fuel for the vehicle and for taking sales prospects to lunch. The Joined Party did not have any expenses in connection with the work which he performed for the Petitioner.

7. The Petitioner provided the Joined Party with a company email address. The Petitioner provided business cards containing the Petitioner's name, the Joined Party's name and title, the Petitioner's telephone number and fax telephone number, the Joined Party's cell phone number, and the Joined Party's company email address.

8. The Joined Party was required to begin each day, Monday through Friday, by reporting to the Petitioner's office between 8 AM and 9 AM. On some days the Joined Party worked from the office for the day and on other days the Joined Party worked outside the office. If the Joined Party was not able to work a scheduled day, he was required to notify the Petitioner.

9. The Petitioner provided the Joined Party with sales leads. The Joined Party was required to work the sales leads and to turn in a weekly sales report showing his efforts to make sales. If the Joined Party failed to turn in a sales report the Chief Operating Officer asked the Joined Party if the Joined Party had contacted the leads and the results of the contacts.

10. The Joined Party was not required to complete a timesheet showing the hours that he worked. It was assumed by the Petitioner that the Joined Party would work full time to sell the Petitioner's product. Generally, the Joined Party worked between forty and fifty hours per week.

11. The Joined Party was not allowed to sell other products or to perform services for a competitor. The Joined Party was not allowed to hire others to perform the work for him.

12. The Petitioner provided on-going training for the Joined Party and the other sales representatives. The Petitioner held one or two sales meetings each month. The purpose of the sales meetings was to provide product knowledge, to teach the sales representatives how to sell the product, and to tell the sales representatives how to improve their sales presentations. Attendance at the sales meetings was mandatory unless the sales representative had a good reason for not being able to attend. If the Joined Party or other sales representative refused to attend a sales meeting without a good reason, the Petitioner would have discharged the individual.

13. After the Joined Party worked for the Petitioner for about six months the Petitioner hired other sales representatives and promoted the Joined Party to the position of field supervisor. The Joined Party was responsible for training the new sales representatives and was required to supervise one of the sales representatives.

14. The Petitioner paid the Joined Party $1,500 on each regularly scheduled bi-weekly pay date. The Petitioner did not withhold any taxes from the pay. In approximately October 2008 the Joined Party took an approved vacation with his family. The Joined Party received his regular pay while on vacation. The Joined Party stayed in a timeshare resort which was owned by the Chief Operating Officer at no expense to the Joined Party. The Joined Party also received the full pay during holiday pay periods when the office was closed or during pay periods when the Joined Party was absent for illness or other reasons. The Joined Party did not receive any other fringe benefits such as health insurance or retirement benefits.

15. Although the Petitioner told the Joined Party that the Petitioner would report the Joined Party's earnings on Form W-2, the Petitioner never reported the Joined Party's earnings on Form W-2 or on Form 1099-MISC. Following the end of 2008 the Joined Party asked the Petitioner for Form W-2. The Petitioner told the Joined Party not to worry about it and stated that the Petitioner was taking care of it.

16. Either party had the right to terminate the relationship at any time, for any reason, without incurring liability. The Joined Party worked for the Petitioner until on or about September 18, 2009. During the time that the Joined Party worked for the Petitioner neither the Joined Party nor any other individual sold any of the Petitioner's product. The Petitioner has not sold any of the insulated masonry wall systems since inception of the business.

17. The Joined Party has never at any time had any investment in a business. He has never had a business or occupational license, has never advertised services to the general public, and has never had business liability insurance. Prior to working for the Petitioner the Joined Party never performed services as an independent contractor. During the time the Joined Party performed services for the Petitioner the Joined Party always believed that he was the Petitioner's employee.

18. During the time the Joined Party worked for the Petitioner, the Petitioner never told the Joined Party, either verbally or in writing, that the bi-weekly payments were draws against commission, pay advances, or loans. The Petitioner never told the Joined Party was that he would be required to repay any portion of his earnings if he did not make any sales or earn any commissions. After the Joined Party terminated the relationship the Petitioner mailed a letter to the Joined Party informing the Joined Party that he was required to repay the draws against commissions.

19. The Joined Party filed an initial claim for unemployment compensation benefits effective September 20, 2009. When the Joined Party did not receive credit for his earnings from the

Petitioner, the Joined Party filed a *Request for Reconsideration of Monetary Determination.* The Florida Department of Revenue conducted an investigation and on November 2, 2009, issued a determination holding that the persons performing services for the Petitioner as field manager/sales are the Petitioner's employees retroactive to July 12, 2008. The Petitioner filed a timely protest of the determination.

Conclusions of Law:

20. 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.

21. 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).

22. 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).

23. 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.

24. 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.

25. 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.

26. 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.

27. The Petitioner and the Joined Party in this case entered into a *Sales Agent Agreement.* The copy of the Agreement submitted to the Department of Revenue by the Joined Party states that the Joined Party is an employee of the Petitioner and that the Petitioner will pay the Joined Party a bi-weekly salary plus commissions on projects sold. The Agreement is signed by both parties. The Petitioner testified that the Agreement submitted by the Joined Party has been altered or manufactured. The Petitioner also submitted a copy of a *Sales Agent Agreement.* The Petitioner testified that the original signed Agreement has been misplaced and in its place the Petitioner submitted an Agreement that is not signed by the Joined Party. The Agreement submitted by the Petitioner states that the Joined Party is not an employee of the Petitioner but is a commissioned independent contractor.

28. Section 90.952, Florida Statutes, provides that, "Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph."

29. The copy of the Agreement submitted by the Petitioner is not, according to the testimony of the Petitioner, the original Agreement. Therefore, the copy submitted by the Petitioner is not sufficient to prove the contents of the original Agreement. Whether the Agreement states that the Joined Party is an employee of the Petitioner or whether the Agreement states that the Joined Party is an independent contractor, the Agreement, it is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

30. The Petitioner's business is the sale and distribution of an insulated masonry wall system. The Joined Party was engaged by the Petitioner to sell the insulated masonry wall system. The Joined Party was identified as being part of the Petitioner's enterprise by the uniform shirt bearing the Petitioner's name, by business cards bearing the Petitioner's name, and by a company email address. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the business.

31. The Petitioner provided the place of work, a vehicle for the Joined Party's use, a computer, and all other equipment and supplies that were needed to perform the work. The Petitioner provided the Joined Party with a company credit card for the payment of business expenses. The Joined Party did not have any expenses in connection with the work. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

32. The Petitioner provided thirty days initial training which was very specific and intensive. The training included observing the Chief Operating Officer's sales presentations. The Chief Operating Officer observed the Joined Party's sales presentations and told the Joined Party how to improve the presentations. After the initial training there was on-going training provided by the

Petitioner. There were mandatory sales meetings during which sales techniques were discussed. Training is a factor of control because it specifies how the work is to be performed.

33. The Joined Party could not perform services for a competitor. The Joined Party was required to personally perform the work. He could not hire others to perform the work for him.

34. The Petitioner provided the Joined Party with leads. The Joined Party was required to work the leads and to report back to the Petitioner concerning the results. The Joined Party was required to complete weekly sales reports.

35. The Joined Party did not have a construction background and any knowledge concerning the product and the installation of the product was provided by the Petitioner during the initial and on-going training. The job did not require any special skill. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

36. The Petitioner engaged the Joined Party to perform full time services for the Petitioner. Although some flexibility may have been provided in the work schedule, the Petitioner generally determined the days and hours of work. The Joined Party was required to call in if he was not able to work as scheduled.

37. The Petitioner paid the Joined Party the amount of $1,500 for each bi-weekly pay period. The Petitioner did not withhold any payroll taxes from the pay. In his testimony the Petitioner's Chief Operating Officer referred to the payments made to the Joined Party as a "base salary/draw." The Petitioner never informed the Joined Party, either verbally or in writing, that the payments were considered to be draws against commissions. A draw is a loan against future earnings. A draw which is not offset by earnings or is not required to be repaid is a salary. Although the Petitioner informed the Joined Party that the Petitioner would report the earnings on Form W-2, the Petitioner never reported the Joined Party's earnings to the Internal Revenue Service on Form W-2 or on Form 1099-MISC. The fact that the Petitioner chose not to withhold payroll taxes does not, standing alone, establish an independent contractor relationship.

38. Either party could terminate the relationship at any time, for any reason, without incurring liability. It was a continuing relationship and the Joined Party worked for a period of approximately fourteen months. These facts reveal the existence of an at-will relationship of relative permanence. 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."

39. 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).

40. The evidence presented in this case reveals that the Petitioner exercised significant control over the Joined Party and the means and manner of performing the work. The Petitioner determined what work was performed, when it was performed, where it was performed and how it was performed. Thus, it is concluded that the Joined Party and other individuals performing services for the Petitioner as sales agents, whether compensated or not, are the Petitioner's employees.

Recommendation: It is recommended that the determination dated November 2, 2009, be AFFIRMED.

Respectfully submitted on May 4, 2010.

R. O. SMITH, Special Deputy
Office of Appeals