AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2904783
ARTIST RELATED LLC
1410 SUNSET HARBOUR DR STE 212
MIAMI BEACH FL 33139-1408

PROTEST OF LIABILITY
DOCKET NO. 2010-26411L

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 10, 2009.

After due notice to the parties, a telephone hearing was held on October 5, 2010. The Petitioner, represented by the Petitioner's former office manager, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, 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 and other individuals working as directors of operations 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, Artist Related LLC, is a limited liability company which operates a talent agency.
2. The Joined Party is an individual who has worked for many years in the nightlife industry. Prior to 2008 the Joined Party was last employed for a period of five years doing booking and marketing for a talent agency. In early 2008 the Joined Party was referred to the Petitioner by a mutual acquaintance for a position involving booking and marketing. The Petitioner interviewed the Joined Party for the position and in March 2008 the Petitioner hired the Joined Party.
3. There was no written agreement or contract. The verbal agreement was that the Joined Party was hired to be an employee of the Petitioner; however, the Joined Party would be paid as an independent contractor for a period of two to four weeks until the Petitioner could engage a payroll company. The Petitioner would pay the Joined Party a monthly salary of $4,000 and the

Joined Party would perform various marketing, booking, and business development activities, including managing client accounts.

4. The Petitioner provided the Joined Party with work space in the Petitioner's office. The Petitioner provided the Joined Party with a desk, chair, computer, telephone, cell phone, and any supplies that were needed to perform the work. The Joined Party did not have any expenses in connection with the work.

5. The Joined Party's required work schedule was Monday through Friday, seven to eight hours per day. The starting and ending times each day were changed by the Petitioner from time to time; however, the Joined Party was generally required to work from 9 AM until 5 PM.

6. The Joined Party did not have an occupational license, did not have business liability insurance, and did not offer services to the general public. The Joined Party performed services exclusively for the Petitioner on a full time basis.

7. No payroll taxes were withheld from the Joined Party's pay. Each month the Joined Party objected to being classified as an independent contractor by the Petitioner. On a couple of occasions the Petitioner reduced the Joined Party's pay because the Petitioner did not have the funds to pay the Joined Party at the rate of $4,000 per month. Sometimes the Joined Party was paid by a check drawn against another business, Irie Music Corp, which was also owned by the Petitioner's owner. At the end of 2008 the Petitioner owed the Joined Party for back salary.

8. At the end of 2008 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

9. The Joined Party worked for the Petitioner until March 2009 at which time the Petitioner transferred the Joined Party to the payroll of Irie Music Corp as an employee. In June 2009 the Petitioner transferred the Joined Party back to the Petitioner, Artist Related LLC, as an employee. The Joined Party continued working for the Petitioner as an employee until August 2009. In September 2009 the Petitioner paid the Joined Party $2,000 for work performed in 2008.

10. The Joined Party filed an initial claim for unemployment compensation benefits. The Joined Party did not receive credit for her earnings during 2008 and the first quarter 2009. A *Request for Reconsideration of Monetary Determination* was filed and an investigation was issued to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor. On December 10, 2009, the Department of Revenue issued a determination holding that the Joined Party and other persons performing services as directors of operations were the Petitioner's employees retroactive to May 1, 2008. The Petitioner filed a timely protest.

Conclusions of Law:

11. 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.

12. 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).

13. 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).

14. 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.

15. 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.

16. 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.

17. 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 only agreement of hire between the parties was a verbal agreement that the Joined Party was hired to be an employee of Artist Related LLC but that the Petitioner would not withhold payroll taxes for two to four weeks until the Petitioner could engage a payroll company. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).

19. The Petitioner is a talent booking agency. The work performed by the Joined Party involved marketing and developing the Petitioner's business, including booking clients and managing client accounts. 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 Petitioner's business. The Joined Party performed services exclusively for the Petitioner on a full time basis. The Petitioner

provided the work space, equipment, supplies, and everything else that was needed to perform the work. The Joined Party did not have a financial investment in a business and 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 services performed.

20. The Joined Party was paid by time worked rather than based on production or by the job. The Petitioner did not withhold or pay payroll taxes until March 2009 when the Petitioner transferred the Joined Party to the payroll of a sister corporation. The fact that the Petitioner chose not to withhold payroll taxes from the Joined Party's earnings does not, standing alone, establish an independent contractor relationship.

21. The Petitioner determined the Joined Party's days and hours of work. The Petitioner determined the rate of pay. The Petitioner unilaterally altered both the work schedule and the amount of the monthly salary from time to time. These facts reveal that the Petitioner controlled the financial aspects of the relationship.

22. The relationship was not contracted for a specific period of time. The relationship was a continuing relationship and either party could terminate the relationship at any time without incurring liability. In total, the Joined Party performed services for the Petitioner and the sister corporation for a period of almost one and one-half years. These facts reveal an at-will relationship of relative permanence.

23. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

24. The preponderance of the competent evidence presented in this case reveals that that the services performed for the Petitioner by the Joined Party at all times constitutes insured employment. However, the testimony reveals that the Joined Party began work for the Petitioner in March 2008. Therefore, the correct retroactive date is March 1, 2008.

Recommendation: It is recommended that the determination dated December 10, 2009, be MODIFIED to reflect a retroactive date of March 1, 2008. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on October 7, 2010.

R. O. SMITH, Special Deputy
Office of Appeals

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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 December 10, 2009, is MODIFIED to reflect a retroactive date of March 1, 2008. It is also ORDERED that the determination is AFFIRMED as modified.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION