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

**PETITIONER:**
Employer Account No. - 2926320
APPOINTMENT DEPOT INC
1000 NW 1ST AVE SUITE 20
BOCA RATON FL 33432-2601

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

**PROTEST OF LIABILITY**
**DOCKET NO. 2010-5505L**

**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 3, 2009, is AFFIRMED.

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

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. - 2926320
APPOINTMENT DEPOT INC
IRA ALTMAN
1000 NW 1ST AVE SUITE 20
BOCA RATON FL 33432-2601

**PROTEST OF LIABILITY**
**DOCKET NO. 2010-5505L**

**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 3, 2009.

After due notice to the parties, a telephone hearing was held on June 7, 2010. The Petitioner, represented by the Petitioner's president, appeared and testified. The Petitioner's Certified Public Accountant testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 appointment setters 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 in June 2008 to operate an appointment setting business. Primarily, the Petitioner sets appointments for janitorial or cleaning companies throughout the country. The Petitioner's corporate president is active in the operation of the business.
2. On or about August 25, 2008, the Petitioner engaged the Joined Party to perform services for the Petitioner as an appointment setter. In addition to the Joined Party the Petitioner engaged

approximately eight or more other individuals to perform services for the Petitioner as appointment setters. The appointment setters are supervised by the Petitioner's president.

3. The Petitioner trained the Joined Party during the first two days of work. The Petitioner provided the Joined Party with a work station in the Petitioner's office and a telephone to use to contact the prospective customers. The Petitioner provided leads and lists of prospective customers which the Joined Party was required to contact. The Joined Party did not have any known expenses in connection with the work.

4. The Petitioner paid the Joined Party by the hour worked plus $10 for each appointment which the Joined Party set. The Joined Party submitted an informal timesheet showing the total hours worked each day. The Petitioner paid the Joined Party on a weekly basis with no taxes withheld from the pay.

5. The Petitioner paid the Joined Party $1,740 during the quarter ending September 30, 2008, $4,120 during the quarter ending December 31, 2008, and $3,780 during the quarter ending March 31, 2009.

6. The Joined Party missed a lot of time from work because she was providing care for a family member. The Petitioner set a quota for the Joined Party and the Joined Party's hours of work were determined in part on whether the Joined Party met the quota.

7. Either the Petitioner or the appointment setters had the right to terminate the relationship at any time without incurring liability. The Joined Party performed services for the Petitioner as an appointment setter through March 16, 2009.

**Conclusions of Law:**

8. 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.

9. 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).

10. 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).

11. 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.

12. 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.

13. 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.

14. 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.

15. The Petitioner's primary business activity is setting appointments for janitorial and cleaning services. The Petitioner engaged the Joined Party as an appointment setter to set the appointments with the janitorial and cleaning services. 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.

16. The Petitioner provided the place of work and everything that was needed to complete the work. It was not shown that the Joined Party was at risk of suffering a financial loss from services performed.

17. The Petitioner paid the Joined Party by time worked plus a $10 commission for each appointment. The Petitioner paid the Joined Party on a regularly scheduled weekly payday. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

18. The Petitioner trained the Joined Party how to perform the work. Training is a method of control because it specifies how a job must be performed. It was not shown that setting appointments requires any special skill or knowledge. 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).

19. The Joined Party performed services for the Petitioner for a period of time in excess of six months. The relationship was an on-going or continuing relationship and either party had the right to terminate the relationship at any time without incurring liability. 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."

20. 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.

21. A majority of the Restatement factors point to an employer/employee relationship. In addition, the evidence reveals that there was a significant degree of control present in the relationship. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error.

22. The Petitioner's evidence is not sufficient to establish that the determination of the Department of Revenue, holding that the services performed by the Joined Party and other individuals working as appointment setters constitute insured employment, is in error.

23. Section 443.1215, Florida States, provides:
    (1) Each of the following employing units is an employer subject to this chapter:
        (a) An employing unit that:
            1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
            2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

24. The Petitioner paid wages to the Joined Party during the third quarter 2008 in the amount of $1,740. Therefore, the evidence reveals that the Petitioner established liability for payment of unemployment compensation taxes effective with the third quarter 2008.

**Recommendation:** It is recommended that the determination dated November 3, 2009, be AFFIRMED.

Respectfully submitted on June 9, 2010.

R. O. SMITH, Special Deputy
Office of Appeals