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

PETITIONER:
Employer Account No. - 2720784
JBA SERVICES INC
JOANN BOCK-ACKERMAN
3823 PENDLEBURY DR
PALM HARBOR FL 34685-2670

PROTEST OF LIABILITY
DOCKET NO. 2010-66229L

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 April 8, 2010.

After due notice to the parties, a telephone hearing was held on September 30, 2010. The Petitioner's administrator appeared and testified at the hearing. A tax specialist II appeared and testified on behalf of the Respondent. The Joined Party did not appear at the hearing.

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 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 a subchapter S corporation, incorporated in 2006 for the purpose of running a residential assisted living home.

2. The Petitioner's workers are primarily considered employees. The Joined Party was considered an independent contractor by the Petitioner.

3. The Joined Party contacted the Petitioner while looking for work. The Joined Party informed the Petitioner that the Joined Party was licensed as a Certified Nurse Assistant. The Joined Party was looking for 'fill in' work. The Joined Party insisted upon being hired as an independent contractor.

4. The Joined Party provided services as a caregiver from June 6, 2009, through February 26, 2010. The Joined Party provided companionship and assistance with daily activities to the Petitioner's patients.

5. The Joined Party would inform the Petitioner when she was available for work. The Petitioner would then schedule the Petitioner's employees around the Joined Party's schedule. The Joined Party would work a twenty four hour shift, living in the facility during the shift.

6. The caregiver position requires first aid training, HIV prevention training, and food sanitation certification. The Joined Party was a licensed CNA and took care of any other certification without assistance from the Petitioner.

7. The Joined Party was paid $85 per day in addition to meals and boarding during the shift. The Joined Party was able to use the cleaning supplies already present in the facility.

8. The Joined Party was not supervised during the shift by the Petitioner. The Joined Party was expected to follow the instructions of the patients within the Joined Party's medical judgment. The Petitioner and staff often deferred to the Joined Party due to the Joined Party's superior training.

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. 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 evidence presented in this case reveals that the Petitioner did not control when or how the Joined Party performed the work. The Joined Party was required to provide services at the Petitioner's place of business; however, such was the specific task for which the Joined Party was hired. The Joined Party set her own schedule.

16. The Petitioner did not supervise the Joined Party. The Petitioner often deferred to the Joined Party's superior training and expertise. While the Joined Party was required to follow direction from the Petitioner's patients, the Joined Party was specifically hired to provide care to those patients.

17. The Petitioner did not provide any training or certification assistance to the Joined Party. The Joined Party took care of any certification needs and in fact was licensed as a Certified Nurse Assistant prior to working for the Petitioner.

18. The Parties agreed upon an independent contractor relationship. While it is not dispositive, such an agreement does demonstrate the intentions of the parties in creating the work relationship.

19. A preponderance of the evidence presented 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 parties.

Recommendation: It is recommended that the determination dated April 8, 2010, be REVERSED.

Respectfully submitted on November 10, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals

AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

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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 April 8, 2010, is REVERSED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION