DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 3015494
9 TO 5 REDESIGN LLC
261 NE 102ND STREET
MIAMI FL 33138-2426

RESPONDENT:
State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

PROTEST OF LIABILITY
DOCKET NO. 2011-69491L

O R D E R

This matter comes before me for final Department 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 March 25, 2011, is MODIFIED to show that the services performed by the Joined Party and others as assistant/helpers, constitutes employment effective January 1, 2007. It is further ORDERED that the determination is AFFIRMED as modified.

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

TOM CLENDENNING
Director of Workforce Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

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261 NE 102ND STREET
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RESPONDENT:
State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
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 March 25, 2011.

After due notice to the parties, a telephone hearing was held on July 18, 2011. The Petitioner's accountant and owner appeared and testified at the hearing. The Joined Party appeared and testified on his own behalf. A tax specialist II appeared and testified on behalf of the Respondent.

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 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 limited liability company formed in May or June of 2006, for the purpose of running a real estate staging and interior design business. The Petitioner filed as a corporation for federal tax purposes.

2. The Petitioner has two managing members or officers. One of the officers provides services for the Petitioner. The officer has not received compensation for services. Petitioner funds have not been used for any personal expenses or bills of the officers.

3. The Joined Party provided services for the Petitioner from October 11, 2006, through on or about January 19, 2011. There was no written contract between the parties.

4. The Joined Party worked on an 'as needed' basis for the Petitioner. The Petitioner would contact the Joined Party when work was available. The Joined Party would be informed when and where the work should be performed. The Joined Party could refuse work.

5. At the work site, the Petitioner would initially evaluate each room. The Joined Party would then be instructed to clear the room of furnishings and other contents. The Petitioner would then decide upon a new look or design for each room. The Joined Party would be expected to implement the new look or design to the Petitioner's specifications. The work included placing furniture and hanging artwork.

6. The Joined Party was not expected to redo defective work without pay.

7. The Joined Party was paid at the conclusion of each job. The Joined Party was paid an hourly rate. The Joined Party was initially paid $20 per hour. The Petitioner reduced the Joined Party's pay to $15 per hour during the term of service.

8. The Joined Party used basic hand tools for the work. The hand tools were provided by the Petitioner. The Joined Party also used boxes and packing materials supplied by the client.

9. The Joined Party did not have his own business.

Conclusions of Law:

10. 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.

11. 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).

12. 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).

13. 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.

14. 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.

15. 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.

16. The evidence presented in this case reveals that the Petitioner exercised control over when and how the work was performed. While the time at which the work must be performed may be dictated by the client, the requirements are passed on to the Joined Party through the Petitioner. The Petitioner determined exactly what needed to be moved in a given room and exactly where it needed to be positioned.

17. The work performed by the Joined Party for the Petitioner did not require a great deal of skill or training. The work consisted of boxing, moving furniture, and hanging art.

18. The Petitioner supplied the hand tools needed to perform the work. The Joined Party was not required to supply any tools or materials for the work.

19. The Joined Party performed services for the Petitioner for a period of over four years. Such a length of time is not indicative of the temporary nature implicit in an independent contractor relationship. It tends to indicate a more permanent relationship.

20. The Joined Party was paid an hourly rate. Such a method of pay tends to be associated with an employer-employee relationship. The Petitioner maintained control over the rate of pay and reduced the rate of pay during the relationship between the parties.

21. The work performed by the Joined Party in assisting and helping the Petitioner in the Petitioner's staging business was a part of the regular business of the Petitioner.

22. The Joined Party believed that he was an employee.

23. The Joined Party did not have his own business.

24. A preponderance of the evidence presented in this case reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated March 25, 2011, be MODIFIED to show that services performed for the Petitioner by the Joined Party and others as assistant/helpers, constitutes employment, effective January 1, 2007. As MODIFIED, it is recommended that the determination be AFFIRMED.

Respectfully submitted on September 30, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals