

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2776726
SOUTHEASTERN DECORATORS INC
1819 KINGS AVE
JACKSONVILLE FL 32207-8727

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-136036L**

ORDER

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 July 27, 2010, is AFFIRMED.

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



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. - 2776726
SOUTHEASTERN DECORATORS INC
ATTB: AMY KNOPF
1819 KINGS AVE
JACKSONVILLE FL 32207-8727



**PROTEST OF LIABILITY
DOCKET NO. 2010-136036L**

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 July 27, 2010.

After due notice to the parties, a telephone hearing was held on February 14, 2011. The Petitioner, represented by the Manager of Accounting, appeared and testified. 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 working as a technician/laborer 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 corporation whose primary business is the rental of tents, booths, tables and chairs for events and trade shows.
2. The Petitioner's employees transport the Petitioner's rental equipment and supplies from the Petitioner's warehouse to the event location and set up the tents, tables, chairs, and booths. The Petitioner provides the trucks that are used for transporting the equipment. The Petitioner is responsible for the cost of operating the trucks.

3. The Petitioner engaged the Joined Party to work as an assistant to transport and set up the Petitioner's tents, booths, tables, and chairs. There was no written agreement or contract between the Joined Party and the Petitioner. The Joined Party performed services for the Petitioner between February 13, 2009, and May 8, 2009.
4. The Joined Party worked under the supervision of the team leader. The team leader determined what was to be done, when it was to be done, and how it was to be done.
5. The Joined Party was required to personally perform the work. He was not allowed to hire others to perform the work for him.
6. The Petitioner paid the Joined Party \$10 per hour for the work which the Joined Party performed. No taxes were withheld from the pay. At the end of 2009 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.
7. The Joined Party was not required to redo defective work without additional compensation.
8. Either party had the right to terminate the relationship at any time without incurring liability.

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.
 15. 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. There was no written agreement or contract between the Petitioner and the Joined Party. The Petitioner's witness, the Manager of Accounting, was not the individual who hired the Joined Party. No competent evidence was presented concerning any verbal agreement of hire. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the court provides guidance on how to proceed absent an express agreement, "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."
 17. The Petitioner's primary business is the rental and setting up of equipment for events and trade shows. The Joined Party was engaged by the Petitioner to assist in setting up the equipment for the events and trade shows. 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.
 18. All of the equipment and supplies needed to perform the work were provided by the Petitioner. It was not shown that the Joined Party had 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.
 19. It was not shown that any skill or special knowledge was required to perform the work. 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. 2^d DCA 1980)
 20. The Joined Party was paid by the hour for the work which he performed rather than by the job or based on production. The Joined Party was not required to redo defective work at his own expense. No taxes were withheld from the pay. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.
 21. Either party had the right to terminate the relationship at any time without incurring liability. 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."
 22. The Petitioner determined what work was performed, when it was performed, and how it was performed. It is not necessary for the employer to actually direct or control the manner in which the services are performed; it is sufficient if the agreement provides the employer with the right to direct and control the worker. Of all the factors, the right of control as to the mode of doing the work is the principal consideration. VIP Tours v. State, Department of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984)

23. The Petitioner's witness, the Manager of Accounting, testified that she was not directly involved with the day to day operations of setting up the equipment. The majority of her testimony was based on what she had been told by others. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.
24. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
25. The Petitioner's evidence is not sufficient to establish that the determination of the Department of Revenue is in error. Thus, it is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

Recommendation: It is recommended that the determination dated July 27, 2010, be AFFIRMED.

Respectfully submitted on February 16, 2011.



R. O. SMITH, Special Deputy
Office of Appeals