

**AGENCY FOR WORKFORCE INNOVATION**  
**Unemployment Compensation Appeals**

MSC 345 CALDWELL BUILDING  
107 EAST MADISON STREET  
TALLAHASSEE FL 32399-4143

**PETITIONER:**

Employer Account No. - 2922344  
CARING HOME CARE INC  
JEFF RITTENBERG  
15455 W DIXIE HWY STE A  
NORTH MIAMI BEACH FL 33162-6067

**PROTEST OF LIABILITY**  
**DOCKET NO. 2010-14982L**

**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 October 13, 2009.

After due notice to the parties, a telephone hearing was held on September 23, 2010. An attorney appeared on behalf the Petitioner and called the Petitioner's director/treasurer as a witness. The Joined Party did not appear at the hearing. 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 constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

**Findings of Fact:**

1. The Petitioner is a subchapter S corporation incorporated in 2001 for the purpose of providing home health aides to patients.

2. The Joined Party performed services as a home health aide from January 16, 2005, through June 30, 2009.
3. The Petitioner maintains a roster of home health aides for patients in need of such services.
4. Home health aides typically provide personal care such as bathing and meal preparation for patients.
5. Home health aides apply to be placed on the Petitioner's roster. The Petitioner determines that the applicant has the proper certifications for the job.
6. Patients contact the Petitioner to request a home health aide. The Petitioner contacts a home health aide from the roster. The Petitioner describes the job to the home health aide at which point the home health aide can accept or decline the work.
7. The home health aide meets with the patient to discuss scheduling and what tasks are needed. The home health aide may negotiate pay with the patient.
8. The home health aide is allowed to work for a competitor.
9. The Petitioner does not provide any training, licensing, or continuing education.
10. The home health aide is required to submit a weekly time record to the Petitioner for billing purposes.

#### **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. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1<sup>st</sup> 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. 1<sup>st</sup> 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.
17. The evidence presented in this case reveals that the Petitioner did not control where, when, or how the Joined Party performed services. The Petitioner acted in effect as a broker for services between the Joined Party and patients. The Joined Party created a schedule along with the patient. The Joined Party could refuse work at any point in the process.
18. The Joined Party was allowed to work for a competitor.
19. The Petitioner did not supervise or direct the Joined Party.
20. The Petitioner did not provide any training or equipment to the Joined Party.
21. 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.

**Recommendation:** It is recommended that the determination dated October 13, 2009, be REVERSED.

Respectfully submitted on November 2, 2010.



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KRIS LONKANI, Special Deputy  
Office of Appeals

**AGENCY FOR WORKFORCE INNOVATION  
TALLAHASSEE, FLORIDA**

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**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 October 13, 2009, is REVERSED.

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



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TOM CLENDENNING  
Assistant Director  
AGENCY FOR WORKFORCE INNOVATION