

**AGENCY FOR WORKFORCE INNOVATION  
TALLAHASSEE, FLORIDA**

**PETITIONER:**

Employer Account No. - 2645017  
ATEX TRADING INC  
19501 NE 10TH AVE STE E  
MIAMI FL 33179-3576

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2010-26410L**

**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 December 10, 2009, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this \_\_\_\_\_ day of **November, 2010**.



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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. - 2645017  
ATEX TRADING INC  
ATTN ALFREDO TUERO  
19501 NE 10TH AVE STE E  
MIAMI FL 33179-3576

**PROTEST OF LIABILITY  
DOCKET NO. 2010-26410L**

**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 December 10, 2009.

After due notice to the parties, a telephone hearing was held on August 9, 2010. A manager appeared and testified on behalf of the Petitioner. A tax specialist appeared and provided testimony 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 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 corporation established for the purpose of running a furniture warehouse and delivery business.
2. The Joined Party provided services for the Petitioner as a warehouse helper from December 1, 2008, through October 22, 2009.

3. The Joined Party contacted the Petitioner while looking for work. The Petitioner needed a driver. The Joined Party was unable to work as a driver or to work full time. The Joined Party began contacting the Petitioner asking if there was any work available. The Petitioner would inform the Joined Party if there was work available at that time. The Petitioner explained that the piece work performed by the Joined Party would be performed as an independent contractor.
4. The Joined Party would be tasked with general labor and helping out at the warehouse. At times the Joined Party would ride along on deliveries as an assistant.
5. The Joined Party was paid \$11 or \$12 per hour for performing the work. The Joined Party was paid by the Petitioner on Fridays unless the Joined Party requested that he be paid earlier.
6. The Petitioner did not supervise or monitor the Joined Party's work.

### Conclusions of Law:

7. 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.
8. 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).
9. 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).
10. 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.
11. 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.
12. 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.
  13. The evidence presented in this case reveals that the Petitioner had control over where and when work was performed by the Joined Party. The Petitioner would inform the Joined Party when work was available and the work was performed either at the Petitioner’s place of business or on delivery for the Petitioner. The Petitioner did not control how the Joined Party performed the work or otherwise supervise the Joined Party.
  14. The Joined Party contacted the Petitioner when looking for work. The Joined Party was not retained on an as needed basis, rather, the Petitioner allowed the Joined Party to perform non-critical work when such work was available and the Joined Party requested it.
  15. A preponderance of the evidence presented in this case reveals that the Petitioner did not exercise sufficient control over the Joined Party as to create an employer-employee relationship between the Petitioner and the Joined Party.

**Recommendation:** It is recommended that the determination dated December 10, 2009, be REVERSED.

Respectfully submitted on September 2, 2010.



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KRIS LONKANI, Special Deputy  
Office of Appeals