

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 2943486
MIARO ENTERPRISES LLC
8400 NW 96TH STREET
MEDLEY FL 33166

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-45743L**

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 February 10, 2010.

After due notice to the parties, a telephone hearing was held on November 15, 2010. An attorney appeared and called the Petitioner's president as a witness on behalf of the Petitioner. 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 limited liability corporation formed in 2004 for the purpose of running a welding and heavy equipment repair business. The Petitioner filed federal taxes as an individual.
2. The Petitioner's president is the sole corporate officer. The Petitioner's president is paid for his service as a corporate officer and works throughout the year.

3. The Joined Party provided services as a mechanic for the Petitioner from January 2008, through November 2009.
4. The Joined Party contacted the Petitioner while seeking work. The Petitioner explained to the Joined Party that the Joined Party would be working as an independent contractor.
5. The Joined Party was allowed to work for a competitor.
6. The Joined Party would be contacted when work was available on an as-needed basis. The Joined Party could refuse work. The Joined Party did welding work for the Petitioner. The Joined Party would perform the work at the Petitioner's place of business.
7. The Petitioner paid the Joined Party upon completion of each job. The Joined Party was paid a percentage of the estimate charged to the client.
8. The Joined Party provided his own hand tools. The Petitioner provided a facility and large equipment such as air compressors.

Conclusions of Law:

1. 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.
2. 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).
3. 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).
4. 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.

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.
5. 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.
 6. The evidence presented in this case reveals that the Joined Party was contacted by the Petitioner on an as needed basis. The Joined Party was free to refuse work. The Joined Party did not keep the Petitioner informed as to the progress of the work except to inform the Petitioner when the work was finished.
 7. The Joined Party was paid by the job. This type of pay is indicative of an independent contractor relationship.
 8. The Joined Party provided his own hand tools while the Petitioner made available large tools and equipment that are difficult to transport.
 9. 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 February 10, 2010, be REVERSED.

Respectfully submitted on November 16, 2010.



KRIS LONKANI, Special Deputy
Office of Appeals

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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 February 10, 2010, is REVERSED.

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



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION