

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 1238543
INSTITUTE FOR FAMILY THERAPY INC
6175 NW 153RD ST STE 404
MIAMI LAKES FL 33014-2435

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-63350L**

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 March 2, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **December, 2010**.



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. - 1238543
INSTITUTE FOR FAMILY THERAPY INC
BENJAMIN MIRTENBAUM
6175 NW 153RD ST STE 404
MIAMI LAKES FL 33014-2435

**PROTEST OF LIABILITY
DOCKET NO. 2010-63350L**

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 March 2, 2010.

After due notice to the parties, a telephone hearing was held on September 22, 2010. The Petitioner, represented by its Certified Public Accountant, appeared and testified. The Petitioner’s Executive Director testified as a witness. The respondent was represented by a Department of Revenue Tax Audit Supervisor. A Tax Auditor testified as a witness.

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 constitute insured employment, and if so, the effective date of the Petitioners liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner, a corporation which provides mental health counseling and therapy, was randomly selected by the Department of Revenue for an audit of its books and records for the 2008 tax year to ensure compliance with the Florida Unemployment Compensation Law.
2. The mental health services are provided at the Petitioner’s offices by medical doctors, Licensed Mental Health Counselors, and Licensed Clinical Social Workers. Some of those individuals perform the services through corporations or professional associations. During the 2008 tax year the Petitioner issued a Form 1099-MISC to eleven service providers. Those forms were examined by the Tax Auditor.

3. The service providers have occupational licenses, liability insurance, and malpractice insurance. The service providers set their own schedules to see patients and determine the amount that the patients are charged for the services. The Petitioner bills the patients and collects the fees. At the end of each month the Petitioner pays the services providers based on a percentage negotiated with each service provider. No taxes are withheld and no fringe benefits such as health insurance, paid vacations, paid holidays, or retirement benefits are provided. The Petitioner does not provide any instructions to the service providers concerning when to perform the work or how to perform the work. The service providers are responsible for their own expenses. The Petitioner does not reimburse the service providers for any expenses.
4. The Tax Auditor examined the licenses issued to each of the service providers. The Tax Auditor discovered that the practice address listed on four of the licenses was the Petitioner's address. One of those licenses was issued to a medical doctor who performed services through a professional association. The other seven licenses either did not show a practice address or listed a practice address which was different from the Petitioner's address. The Tax Auditor concluded that the service providers who used the Petitioner's address as the practice address, including the professional association, were the Petitioner's employees. The Tax Auditor concluded that the other seven service providers were not the Petitioner's employees because they did not use the Petitioner's address as the practice address.
5. On March 2, 2010, the Department of Revenue issued a *Notice of Proposed Assessment* based on the reclassification of the four service providers. The Petitioner file a timely protest by mail postmarked March 20, 2010.

Conclusions of Law:

6. 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.
7. 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).
8. 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).
9. 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.
10. The only factor considered by the Tax Auditor in determining the status of the service providers was the location of the practice listed on the professional license. Although the location where services are performed is a factor to be considered, whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.
11. In this case the services performed by each of the service providers were performed at the Petitioner’s business location. The Petitioner did not provide any instructions concerning when to perform the services or how to perform the services. It was not shown that the Petitioner exercised any control over the service providers with the exception of the location where the services were performed. Thus, it is concluded that the services performed for the Petitioner by the service providers do not constitute insured employment.

Recommendation: It is recommended that the determination dated March 2, 2010, be REVERSED.

Respectfully submitted on September 22, 2010.



R. O. SMITH, Special Deputy
Office of Appeals