

**THE DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2627998
TROPICAL REALTY OF SUNTREE INC
ATTN: MITCH RIBAK
263 N COURTENAY PKWY
MERRITT ISLAND FL 32953-3407



**PROTEST OF LIABILITY
DOCKET NO. 2011-70467L**

RESPONDENT:

State of Florida
THE DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Director, Unemployment Compensation Services
THE DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated December 21, 2010.

After due notice to the parties, a telephone hearing was held on August 3, 2011. The Petitioner's president appeared and testified at the hearing. The Joined Party appeared and testified on her own behalf. 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 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 subchapter C corporation, incorporated in 2005 for the purpose of running a real estate brokerage.
2. The Joined Party provided services for the Petitioner as a Lead Conversion Agent from September 15, 2009, through May 17, 2010.

3. The Joined Party signed an independent contractor agreement with the Petitioner at the time of hire. The agreement stipulated that the Joined Party would be considered an agent of the Petitioner. The agreement required the Joined Party to abide by the Petitioner's office policy manual. The agreement required the Joined Party to maintain specific amounts of insurance for bodily injury and property damage. The agreement allowed either party to terminate the relationship with one day of notice. The Joined Party had a duty to prevent the disclosure of the Petitioner's confidential information which extended indefinitely after the termination of the agreement. The Joined Party believed that work performed as a lead conversion agent was employment.
4. The Joined Party was required to sign an agreement with each agent of the brokerage. This agreement was signed by the agent, the Joined Party, and the Petitioner. The agreement was provided by the Petitioner. The agreement determined how fees would be allocated to the Joined Party. The agreement required the Joined Party to make a minimum of 75 calls per day and to make contact with 3 buyers per agent per day. The agreement specified that the Joined Party should leave a 10-15 second tailored message where it was not possible to make contact with a buyer. The agreement specifies that the Joined Party is responsible for updating records regarding calls made. The agreement is rendered null and void if either the Joined Party or the agent should cease to work for the Petitioner.
5. The Petitioner provided a work area with a desk, telephone, and computer for the Joined Party. The Joined Party was provided with a company email address. The Petitioner provided company shirts freely. The Petitioner provided a name tag with the Joined Party's name and the Petitioner's name. The Joined Party could work from home and used her own computer and telephone for work from home. The Joined Party incurred no expenses as a result of the work.
6. The Petitioner provided training sessions for the Joined Party on the computer systems and on job objectives.
7. The Joined Party was expected to work Monday through Friday except for holidays.
8. The Joined Party had a real estate license. The Petitioner paid to have the license reactivated and paid for the license dues.
9. The Joined Party was paid \$1,600 plus commission. The Joined Party was paid every two weeks. Commission pay was held until the sale had completed. The salary portion of the pay was prorated if the Joined Party was not at work. The rate of pay was established by the Petitioner.

Conclusions of Law:

10. Florida Statutes state that service performed by an individual for a person as a real estate salesperson or agent, if all of the service performed by the individual for that person is performed for remuneration solely by way of commission is excluded.
11. The Joined Party was paid a commission plus a salary. Because the Joined Party was not paid solely by commission, Florida Statute 443.1216(13)(n) does not apply.
12. 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.

13. 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).
14. 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).
15. 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.
16. 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.
17. 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.
18. The Petitioner exercised control over the days worked by the Joined Party, requiring the Joined Party to work from Monday through Friday. The Petitioner required the Joined Party to abide by the Petitioner's office policy manual. The Petitioner required the Joined Party to maintain specific levels of insurance. While the agent agreements were ostensibly between the Joined Party and the agent, the Petitioner was a signatory on the agreement and the agreement bore the Petitioner's letterhead. The Joined Party was in effect required to sign the agreements in order to work. The agreements required a minimum of 75 calls per day along with a minimum number of successful contacts per day.

19. The Petitioner provided a workspace, desk, computer, and telephone for the Joined Party. The Joined Party incurred no expenses in the course of business. The Joined Party would use her own equipment in the event that she elected to work from home. The Petitioner provided name tags, shirts, and a company email address to the Joined Party.
20. The Joined Party was paid in part by the job and in part by time worked. The Joined Party's salary was prorated for missed work which in effect makes it payment by time worked. The Petitioner controlled the rate at which the Joined Party was paid.
21. The work performed by the Joined Party as a lead conversion agent was a regular part of the day to day course of business of the Petitioner's brokerage.
22. The Joined Party believed that work as a lead conversion agent was an employment relationship and not an independent contractor relationship which would be typical for a traditional real estate agent. There was a written independent contractor agreement between the parties. The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."
23. A preponderance of the evidence presented in this case reveals that the Petitioner exercised sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated December 21, 2010, be MODIFIED to show the Joined Party's job title as Lead Conversion Agent. As MODIFIED, the determination is AFFIRMED.

Respectfully submitted on November 4, 2011.



KRIS LONKANI, Special Deputy
Office of Appeals