Arizona Department of Economic Security

Appeals Board

UNEMPLOYMENT INSURANCE TAX PROGRAM

APPEALS BOARD DECISIONS

2ND QUARTER 2024

To request any of these documents in an alternative format, contact the Appeals Board at (602) 771-9019.

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1935245-001-B

[redacted]

Petitioner

STATE OF ARIZONA ESA TAX UNIT
c/o JASON CORLEY, ASST
ATTORNEY GENERAL
2005 N CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** June 3, 2024 *****.

DECISION
REVERSED

THE **PETITIONER** petitioned for a hearing from the Department's Reconsidered Determination issued on July 26, 2023, which affirmed the Department's Determination of Liability for Employment or Wages issued on December 7, 2017. The Reconsidered Determination held that services performed by individuals as event staff ("Workers") constitute employment and all forms of remuneration paid for such services constitute wages.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing for February 28, 2024. Appeals Board Administrative Law Judge Robert Irani presided over the hearing on that date, and all parties were given an opportunity to present evidence on the following issues:

(1) Whether the services performed by the Workers for the Petitioner from January 1, 2016 through June 30, 2017 (the "audit period") were employees; and

(2) Whether payments the Petitioner made to the Workers during the audit period constitute wages.

The Petitioner appeared at the scheduled hearing and presented testimony from one witness. The Department appeared through counsel and presented testimony from two witnesses. Exhibits D1 through D14, P1 through P7, and A1 were admitted into evidence.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Petitioner is a sole proprietorship that operated within the State of Arizona during the audit period.

2. The Petitioner is a special events company that plans and provides special events for its clients, such as casino-themed parties, western-themed parties, company picnics, and team-building activities for conventions and local companies.

3. The Petitioner owns various games and equipment, including western-themed games, casino games, and gaming tables that are used for an event.

4. The Workers provided event staff services on behalf of the Petitioner during the audit period. The event staff services included casino dealers for casino-themed parties, or general staffing for the various games and activities used at the event.

5. The services provided by the Workers comprised part of the Petitioner's regular business activity.

6. The Workers and the Petitioner had agreed to an independent contractor relationship. The Workers entered into a written agreement with the Petitioner agreeing to be notified of various event staff

opportunities that included the duration, location and type of event services required. The term of the agreement was for the duration of the event.

7. The Petitioner did not prevent or prohibit the Workers from hiring assistants.

8. The Petitioner did not have a written policy and procedures.

9. The Workers were not required to provide the Petitioner with an oral or written report.

10. The Workers did not provide their services at the Petitioner's premises. The Workers provided their services at the location of the event, which was determined by the client in agreement with the Petitioner.

11. The Workers provided their services for the duration of an event. The duration of an event was typically between 2-3 hours.

12. The Workers had the right to hire a replacement to perform their services.

13. The Petitioner did not control the sequence order for the services performed by the Workers.

14. The time set for the performance of the Workers' services was based on the predetermined time of the event established by the client in agreement with the Petitioner.

15. The Petitioner did not provide any training or instruction on how the Workers were to perform their services, either orally or in writing. The Workers drew from their own expertise in the performance of their services.

16. The Petitioner did not require the Workers to work full-time or a minimum number of hours.

17. The Petitioner provided the various games and equipment used for an event.

18. The Workers paid their own expenses without reimbursement by the Petitioner.

19. The Workers were not prevented from providing their services outside of the Petitioner's business. The Petitioner was aware that the Workers

worked outside of the Petitioner's business and the Petitioner did not take actions to prevent it.

20. The Petitioner compensated the Workers on a per job basis at the conclusion of an event. The Petitioner determined the rate of payment. The Workers were compensated the full rate, regardless of an event concluding earlier or being cancelled.

21. The Workers did not have significant liabilities or obligations in connection with the performance of their services.

REASONING AND CONCLUSIONS OF LAW

The Petitioner contends that the Workers were independent contractors and not employees for the period from January 1, 2016 through June 30, 2017. The issues in dispute in this case are the employment status of the Workers from January 1, 2016 through June 30, 2017, and whether the pay earned by the Workers during that period constituted wages.

Arizona Revised Statutes, § 23-615, provides in pertinent part as follows:

Employment; definition

> A. "Employment" means any service of whatever nature performed by an employee for the person employing the employee, including service in interstate commerce ...

Arizona Revised Statutes § 23-613.01 provides in pertinent part:

Employee; definition; exempt employment

> A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Indications of control by the employing unit include controlling the individual's hours of work, location of work, right to perform services for others, tools, equipment, materials, expenses and use of other workers and other indicia of employment, except employee does not include:
>
> 1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic

of an independent profession, trade, skill or occupation.

2. An individual subject to the direction, rule or control or subject to the right of direction, rule or control of an employing unit solely because of a law regulating the organization, trade or business of the employing unit.

Arizona Revised Statutes § 23-622(A) provides as follows:

Wages

A. "Wages" means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the department.

Arizona Administrative Code, Section R6-3-1723, provides as follows:

A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.

1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.

2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.

B. "Employee" as defined in subsection (A) does not include:

1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent businessperson, independent agent, or independent consultant, or in a capacity characteristic of an

independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.

2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit "... solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.

   a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.

   b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.

   c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

   * * *

C. The following services are exempt employment under this Chapter, unless there is evidence of direction, rule or control sufficient to satisfy the definition of an employee under subsection (A) of this Section, which is distinct from any evidence of direction, rule or control related to or associated with establishing the nature or circumstances of the services considered pursuant to this subsection:

* * *

2.Services by an individual for an employing unit through isolated or occasional transactions, regardless of whether such services are a part or process of the organization, trade or business of the employing unit.

a. The phrase "isolated or occasional" has its commonly understood meaning. The intent of the relationship between the employing unit and the individual performing the services is to be considered with the intent of the parties being that it is on a permanent basis or for a long period; e.g., an individual employed who either quits or is discharged after a brief period of employment, would not be considered an isolated or occasional transaction regardless of how brief the period of employment may be.

b. An individual who performs services on less than thirteen days in a calendar quarter will be presumed to be performing isolated or occasional transactions. An individual who performs services on thirteen days or more in a calendar quarter will be presumed not to be performing isolated or occasional transactions. In all cases in which there is a standing or continuing arrangement with an individual to perform required services on either a regularly scheduled basis or on call as requested, it will be presumed the individual is not performing isolated or occasional transactions.

* * *

D. In determining whether an individual who performs services is an employee under the general definition of subsection (A), all material evidence pertaining to the relationship between the individual and the employing unit must be examined. Control as to the result is usually present in any type of contractual relationship, but it is the additional presence of control, as determined by such control factors as are identified in paragraph (2) of this subsection, over the method in which the

services are performed, that may create an employment relationship.

1. The existence of control solely on the basis of the existence of the right to control may be established by such action as: reviewing written contracts between the individual and the employing unit; interviewing the individual or employing unit; obtaining statements of third parties; or examining regulatory statutes governing the organization, trade or business. In any event, the substance, and not merely the form of the relationship must be analyzed.

2. The following are some common indicia of control over the method of performing or executing the services:

    a. Authority over individual's assistants. Hiring, supervising, and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job. Sometimes, one worker may hire, supervise, and pay other workers. He may do so as the result of a contract in which he agrees to provide materials and labor and under which he is responsible only for the attainment of a result; in which case he may be independent. On the other hand, if he does so at the direction of the employing unit, he may be acting as an employee in the capacity of a foreman for or representative of the employer.

    b. Compliance with instructions. Control is present when the individual is required to comply with instructions about when, where and how he is to work. Some employees may work without receiving instructions because they are highly proficient in their line of work and can be trusted to work to the best of their abilities; however, the control factor is present if the employer has

the right to instruct or direct. The instructions may be oral or may be in the form of manuals or written procedures which show how the desired result is to be accomplished.

c. Oral or written reports. If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for his actions. Periodic progress reports relating to the accomplishment of a specific result may not be indicative of control if, for example, the reports are used to establish entitlement to partial payment based upon percentage of completion. Completion of forms customarily used in the particular type of business activity, regardless of the relationship between the individual and the employing unit, may not constitute written reports for purposes of this factor; e.g., receipts to customers, invoices, etc.

d. Place of work. Doing the work on the employing unit's premises is not control in itself; however, it does imply that the employer has control, especially when the work is of such a nature that it could be done elsewhere. A person working in the employer's place of business is physically within the employer's direction and supervision. The fact that work is done off the premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee. In some occupations, the services are necessarily performed away from the premises of the employing unit. This is true, for example, of employees in the construction trades, or employees who must work over a fixed route, within a fixed territory, or at any outlying work station.

e. Personal performance. If the services must be rendered personally it indicates that the employing unit is interested in the method as well as the result. The employing unit is interested not only in getting a desired result, but, also, in who does the job. Personal performance might not be indicative of control if the work is very highly specialized and the worker is hired on the basis of his professional reputation, as in the case of a consultant known in academic and professional circles to be an authority in the field. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

f. Establishment of work sequence. If a person must perform services in the order of sequence set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the established routines and schedules of the employing unit. Often, because of the nature of an occupation, the employing unit does not set the order of the services, or sets them infrequently. It is sufficient to show control, however, if the employing unit retains the right to do so.

g. Right to discharge. The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control. The employing unit exercises control through the ever present threat of dismissal, which causes the worker to obey any instructions which may be given. The right of control is very strongly indicated if the worker may be terminated with little or no notice, without cause, or for failure to use specified methods, and if the worker does not make his services available to the public on a continuing basis. An independent worker,

on the other hand, generally cannot be terminated as long as he produces an end result which measures up to his contract specifications. Many contracts provide for termination upon notice or for specified acts of nonperformance or default and may not be indicative of the existence of the right to control. Sometimes, an employing unit's right to discharge is restricted because of a contract with a labor union or with other entities. Such a restriction does not detract from the existence of an employment relationship.

h. Set hours of work. The establishment of set hours of work by the employing unit is a factor indicative of control. This condition bars the worker from being master of his own time, which is a right of the independent worker. Where fixed hours are not practical because of the nature of the occupation, a requirement that the worker work at certain times is an element of control.

i. Training. Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, is a factor of control because it is an indication that the employer wants the services performed in a particular method or manner. This is especially true if the training is given periodically or at frequent intervals. An independent worker ordinarily uses his own methods and receives no training from the purchaser of his services.

j. Amount of time. If the worker must devote his full time to the activity of the employing unit, the employing unit has control over the amount of time the worker spends working and, impliedly, restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he

chooses. Full time does not necessarily mean an 8-hour day or a 5- or 6-day week. Its meaning may vary with the intent of the parties, the nature of the occupation and customs in the locality. These conditions should be considered in defining "full time". Full-time services may be required even though not specified in writing or orally. For example, a person may be required to produce a minimum volume of business which compels him to devote all of his working time to that business, or he may not be permitted to work for anyone else, and to earn a living he necessarily must work full time.

k. Tools and materials. The furnishing of tools, materials, etc. by the employing unit is indicative of control over the worker. When the worker furnishes the tools, materials, etc., it indicates a lack of control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

l. Expense reimbursement. Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses. Consideration must be given to the fact some independent professionals and consultants require payment of all expenses in addition to their fees.

E. Among the factors to be considered in addition to the factors of control, such as those identified in subsection (D), when determining if an individual performing services may be independent when paragraph (1) of subsection (B) is applicable, are:

1. Availability to public. The fact that an individual makes his services available to the

general public on a continuing basis is usually indicative of independent status. An individual may offer his services to the public in a number of ways. For example, he may have his own office and assistants, he may display a sign in front of his home or office, he may hold a business license, he may be listed in a business directory or maintain a business listing in a telephone directory, he may advertise in a newspaper, trade journal, magazine, or he may simply make himself available through word of mouth, where it is customary in the trade or business.

2. Compensation on job basis. An employee is usually, but not always, paid by the hour, week or month; whereas, payment on a job basis is customary where the worker is independent. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job at a fixed rate per hour. Payment on a job basis may involve periodic partial payments based upon a percent of the total job price or the amount of the total job completed. The guarantee of a minimum salary or the granting of a drawing account at stated intervals, with no requirement for repayment of the excess over earnings, tends to indicate that existence of an employer-employee relationship.

3. Realization of profit or loss. An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is an employee is not in such a position. Opportunity for profit or loss may be established by one or more of a variety of circumstances; e.g.:

    a. The individual has continuing and recurring significant liabilities or obligations in connection with the performance of the work involved, and success or failure depends, to an appreciable degree, on the relationship of receipts to expenditures.

b. The individual agrees to perform specific jobs for prices agreed upon in advance, and pays expenses incurred in connection with the work, such as wages, rents or other significant operating expenses.

4. Obligation. An employee usually has the right to end his relationship with his employer at any time he wishes without incurring liability, although he may be required to provide notice of his termination for some period in advance of the termination. An independent worker usually agrees to complete a specific job. He is responsible for its satisfactory completion and would be legally obligated to make good for failure to complete the job, if legal relief were sought.

5. Significant investment. A significant investment by a person in facilities used by him in performing services for another tends to show an independent status. On the other hand, the furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status on the part of the worker. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, etc., that are provided by employees as a common practice in their trade. If the worker makes a significant investment in facilities, such as a vehicle not reasonably suited to personal use, this is indicative of an independent relationship. A significant expenditure of time or money for an individual's education is not necessarily indicative of an independent relationship.

6. Simultaneous contracts. If an individual works for a number of persons or firms at the same time, it indicates an independent status because, in such cases, the worker is usually free from control by any of the firms. It is possible, however, that a person may work for a number of people or firms and still be an employee of one or all of them. The decisions

reached on other pertinent factors should be considered when evaluating this factor.

F. Whether the preponderance of the evidence is being weighed to determine if the individual performing services for an employing unit is an employee under the general definition of employee contained in subsection (A), or may be independent when paragraph (1) of subsection (B) is applicable, the factors considered shall be weighed in accordance with their appropriate value to a correct determination of the relationship under the facts of the particular case. The weight to be given to a factor is not always constant. The degree of importance may vary, depending upon the occupation or work situation being considered and why the factor is present in the situation. Some factors may not apply to occupations or situation, while there may be other factors not specifically identified herein that should be considered.

* * *

In weighing the evidence and applying the law to the facts in this case, the Appeals Board considered evidence of the substance, not merely the form, of the relationship between the Petitioner and the Workers, as required in A.A.C. Section R6-3-1723(D)(1), including the elements of control and independence within the meaning of A.A.C. Sections R6-3-1723(A)(1), (D), and (E). Additional considerations were also examined by the Appeals Board pursuant to A.A.C. Section R6-3-1723(F) to determine whether an employer-employee relationship exists.

Common Indicia of Control

Arizona Administrative Code, Section R6-3-1723 provides guidance for determining whether an employer-employee relationship exists. Section R6-3-1723(D)(2) lists the common indicia of control to be considered in any determination.

Authority Over Individual's Assistants

Pursuant to A.A.C. Section R6-3-1723(D)(2)(a), the hiring, supervising, and payment of an individual's assistants by the employing unit generally shows control over the individuals on the job.

In this case, the Workers had the authority to hire, supervise, and pay their own assistants to assist in the performance of their services. However, in actual practice, the Workers typically did not engage the services of an assistant when providing their services.

During the hearing, the witness for the Petitioner testified that the Petitioner did not prevent or prohibit the Workers from hiring assistants, and that any payment made to an assistant would have been the responsibility of the Workers. However, the witness acknowledged that due to the nature of the occupation, the Workers typically did not retain or utilize any assistants.

The Department's witness testified that while the Department had considered this factor, it did not find it applicable in the terms of the overall relationship of the services and did not give it much weight in its determination.

In this case, the weight allocated to this factor is minimal, given that it does not apply to the occupation or situation. The evidence of record establishes that, while the Workers were not prohibited from hiring assistants, they did not in fact do so.

Consequently, we find this factor to be neutral.

Compliance with Instructions

Pursuant to A.A.C. Section R6-3-1723(D)(2)(b), control is present when an individual is required to comply with instructions about when, where and how to work.

In this case, the Workers did receive instruction about where and when their services were to be performed. The client determined the time, date, and location for an event, which was agreed upon by the Petitioner. However, the Petitioner did not provide any written or oral instructions to the Workers regarding how the services were to be performed. The Workers drew from their own expertise and experience when providing their services.

During the hearing, the witness for the Petitioner credibly testified that the client determined the time, date, and location for the special event, and that the location was not at the Petitioner's facility. The witness also testified that the Petitioner had not provided any training or instruction to the Workers based on the simplicity and self-explanatory nature of the services that the Workers were providing or because the Workers already had prior experience and training.

While there may be some level of control exhibited by the Petitioner in its agreement with the client about when and where an event was to take place, we find that the lack of instruction regarding how the services were to be performed by the Workers to be determinative in our analysis.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Oral or Written Reports

Pursuant to A.A.C. Section R6-3-1723(D)(2)(c), if regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for their actions.

In this case, the Workers were not required to provide an oral or written report to the Petitioner.

During the hearing, the witness for the Petitioner credibly testified that the Workers had never been required to submit an oral or written report to the Petitioner.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Place of Work

Pursuant to A.A.C. Section R6-3-1723(D)(2)(d), work performed on the employing unit's premises implies that the employer has control, whereas work that is performed away from the employer's premises implies some freedom from control.

The Workers did not perform their services at the Petitioner's premises. The client selected the location for the event, which was agreed upon by the Petitioner.

During the hearing, the witness for the Petitioner credibly testified that the location for an event was determined by the client and that the event was never conducted at the Petitioner's premises.

In this case, the Workers' services were performed away from the Petitioner's premises and at a location determined by the client.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Personal Performance

Pursuant to A.A.C. Section R6-3-1723(D)(2)(e), if the services must be rendered personally, it indicates that the employing unit is interested in the method as well as the result. The employing unit is interested not only in getting a desired result, but in who does the job.

In this case, the Petitioner did not require the Workers services to be rendered personally.

During the hearing, the witness for the Petitioner credibly testified that if the Workers were unable to attend an event, the Workers were free to find a replacement to provide the services in their place. The witness also confirmed that the Petitioner was not concerned with who performed the services, just that the services were provided.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Establishment of Work Sequence

Pursuant to A.A.C. Section R6-3-1723(D)(2)(f), if a person must perform services in the order of sequence set by the employing unit, it indicates the worker is subject to control.

In this case, an order of sequence for the performance of the Workers' services had not been established by the Petitioner. The Workers were not instructed by the Petitioner about how or in what sequence the Workers were required to provide their services.

During the hearing, the witness for the Petitioner credibly testified that the Petitioner did not set any requirements concerning the Workers services, based on the simplistic nature of the services that were being provided and because the Workers relied on their own experience and expertise in the performance of the services.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Right to Discharge

Pursuant to A.A.C. Section R6-3-1723(D)(2)(g), the right of control is very strongly indicated if a worker may be terminated with little or no notice, without cause, or for failure to use specified methods, and if the worker does not make their services available to the public on a continuing basis. The right to discharge is distinguished from the right to terminate a contract; many contracts provide for termination upon notice or for specified acts of nonperformance or default and may not be indicative of the existence of the right to control.

In this case, the Petitioner did not have the right to discharge the Workers without cause once the Workers had agreed to provide their services for an event.

In the Reconsidered Determination, the Department stated that "[e]vent staff are required to sign the employer's Event Staff Agreement and that Line #9 states 'This relationship may be terminated by either party without penalties or liabilities'". However, during the hearing, the witness for the Petitioner credibly testified that the Event Staff Agreement only authorized the Petitioner to notify the Workers through email about future events which the Workers could elect to provide services for as independent contractors. The witness further testified that the independent contractor agreement constituted the email itself and was on a per event basis. The contractual agreement for providing the services took effect once the Workers had responded affirmatively to the email.

The witness for the Petitioner also testified that the Petitioner could not discharge the Workers at-will, such as in the course of performing their services mid event, without being liable for damages based on the independent contractor agreement.

In the Reconsidered Determination, the Department stated that "there was no evidence provided which would indicate that the event staff operate an independent business. The event staff do not have their own business cards and they do not advertise".

However, the witness for the Petitioner credibly testified that the Workers had worked other private events, as well as having worked for other event companies. The witness also testified that the Workers were always free to provide their services to other clients and had not in any way been restricted by the Petitioner from advertising or providing their services to the public.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Set Hours of Work

Pursuant to A.A.C. Section R6-3-1723(D)(2)(h), the establishment of set hours of work by the employing unit is a factor indicative of control.

The evidence of record indicates the establishment of set hours for the services to be performed by the Workers for an event. In this case, the client would select the time and duration for the event in agreement with the Petitioner.

During the hearing, the witness for the Petitioner credibly testified that the duration of a typical event was usually 2 to 3 hours and that the Workers were always free to decide whether to provide their services.

In this case, there may be some level of control exhibited by the Petitioner in its agreement with the client over the time and duration for an event.

However, due to the nature of the occupation, the services may be required to be provided at the time set for the event by the client.

Consequently, we find this factor to be neutral.

Training

Pursuant to A.A.C. Section R6-3-1723(D)(2)(i), the training of an individual is a factor of control because it is an indication that the employer wants the services performed in a particular method or manner.

In this case, the Workers had not received training by the Petitioner. The Workers either did not require training based on the simplicity of the services that they were providing or were experienced and drew from their own expertise to determine how they would perform the services.

During the hearing, the witness for the Petitioner credibly testified that for those Workers that provided basic staffing services, training was not required due to the simplistic nature of the work. Alternatively, for those services that did require training, such as for the casino dealers, the Workers were already trained and drew from their prior training and experience in providing their services.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Amount of Time

Pursuant to A.A.C. Section R6-3-1723(D)(2)(j), control by the employing unit is indicated if a worker must devote their full time to the activity of the employing unit, impliedly restricting the worker from doing other gainful work.

In this case, the Petitioner did not establish the amount of time the Workers were required to provide their services and they were not required to work full-time.

During the hearing, the witness for the Petitioner credibly testified that the Petitioner did not require the Workers to work full-time and did not require the Workers to work a minimum number of hours, as the Workers were free to decide whether to provide their services for a particular event and were able to work as little or as much as they liked.

The Workers' freedom established that they were able to work when and for whom they chose. In fact, the witness for the Petitioner testified that he believed the Workers had worked other private events, as well as having worked for competitor corporate event planning companies.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Tools & Materials

Pursuant to A.A.C. Section R6-3-1723(D)(2)(k), the furnishing of tools and materials can be indicative of the employing unit's control over the worker. Additionally, a lack of control is not established when a worker provides tools or supplies that are customarily furnished by the workers in the trade.

The evidence establishes that the Petitioner furnished the tools and materials for an event, while the Workers typically did not.

During the hearing, the witness for the Petitioner credibly testified that certain Workers, such as the casino dealers, might use their own dealing shoes or cards at an event. However, the witness acknowledged that it was the Petitioner who would generally furnish materials such as the booths, casino tables, and games for the event.

In this case, we find that the Petitioner's furnishing of the tools and materials used for the event to be to be determinative in our analysis.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Expense Reimbursement

Pursuant to A.A.C. Section R6-3-1723(D)(2)(l), payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses.

In this case, the Workers were not reimbursed for any expenses incurred while performing their services.

During the hearing, the Petitioner's witness credibly testified that payment by the Petitioner to the Workers was on a per job basis and that any incidental expenses the Workers incurred, including any travel costs, were borne by the Workers.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Factors Indicative of Independence

Arizona Administrative Code, Section R6-3-1723 provides guidance for determining whether an employer-employee relationship exists. Section R6-3-1723(E) lists the common factors indicative of independence to be considered in any determination.

Availability to Public

Pursuant to A.A.C. Section R6-3-1723(E)(l), independence is exhibited when a worker makes their services available to the general public on a continuing basis. Examples of availability to the public include having an office, hiring assistants, displaying signs, holding business licenses, having business listings in directories, advertising in print materials, or engaging in word-of-mouth advertising when it is customary.

In this case, the Workers had made themselves available to the general public.

During the hearing, the witness for the Petitioner credibly testified that the Workers had made themselves available to the public. The witness also testified that the Workers had worked other private events as well as having worked for other event companies.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Compensation on Job Basis

Pursuant to A.A.C. Section R6-3-1723(E)(2), an employee is usually paid by the hour, week or month, while an independent contractor is generally paid on a job basis. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job at a fixed rate per hour.

In this case, the Workers were paid a predetermined lump sum by the Petitioner on a per job basis.

During the hearing, the witness for the Petitioner credibly testified that the Workers received a lump sum payment by the Petitioner after they had provided their services for an event. The witness stated that the payment was strictly on an event basis and that the Workers would receive a check from the Petitioner at the conclusion of the event.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Realization of Profit or Loss

Pursuant to A.A.C. Section R6-3-1723(E)(3), an independent contractor is generally in a position to realize a profit or suffer a loss as a result of their services, while an employee is not in such a position. Opportunities for profit or loss can include whether the worker has recurring liabilities or obligations and whether the worker pays expenses such as wages, rent or other significant operating expenses.

The Department concluded that the Workers did not realize a profit or suffer a loss in the performance of their services for the Petitioner. In the Reconsidered Determination, the Department stated that "[i]n the instant case, there is no probative evidence regarding recurring/continuing liability/obligation or a significant operating expense within the plain meaning of A.A.C. R6-3-1723(E)" and that "a vehicle suited for personal use is not indicative of a significant investment under A.A.C. R6-3-1723(E)".

During the hearing, the witness for the Petitioner testified that the Workers realized a profit or loss, as they had to agree to work an event, and factor travel expenses, including gas, to attend the event. The witness also identified the attire worn by the Workers for certain events as an additional expense.

In this case, the evidence of record establishes that the Workers did not pay for rent, utilities, and had minimal operating expenses. The only expenses established were those associated with transportation to an event and the specific attire worn by the Workers during certain events. Additionally, there is no evidence that the Workers incurred any costs regarding advertisements, payment of wages, or other operational expenses associated with a business. While the Workers could experience a realization of profit by virtue of minimal expenses, the lack of any significant expenses make it difficult or impossible for the Workers to suffer a loss.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Obligation

Pursuant to A.A.C. Section R6-3-1723(E)(4), an employee usually has the right to end their employment at any time without incurring liability, although notice of the termination for some period in advance may be required. An independent contractor is usually obligated to complete a specific job, typically controlled by the terms of a contract.

In this case, the Workers could incur liability for failing to perform the services they had agreed to perform.

During the hearing, the witness for the Petitioner credibly testified that once the Workers had agreed to provide their services for a particular event, they were contractually obligated to do so. The witness also testified that should the Workers fail to appear at the event, they would not receive payment, and that the Petitioner would have the right to pursue legal action for the non-performance.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

.

Significant Investment

Pursuant to A.A.C. Section R6-3-1723(E)(5), independence is exhibited when a worker invests in facilities used to perform services for another. Conversely, the furnishing of all necessary facilities by the employing unit tends to indicate a lack of independence by the worker. Facilities include equipment or premises necessary for the work.

In this case, the Workers did not have a significant investment in business assets necessary to perform their services.

In the Reconsidered Determination, the Department stated that in the instant case, there is no probative evidence regarding recurring/continuing liability/obligation or a significant operating expense within the plain meaning of A.A.C. R6-3-1723 (E) [and that] a vehicle suited for personal use is not indicative of a significant investment under A.A.C. R6-3-1723 (E)".

During the hearing, the witness for the Petitioner also acknowledged that the Workers did not make a significant investment in business assets used in the performance of their services.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Simultaneous Contracts

Pursuant to A.A.C. Section R6-3-1723(E)(6), if an individual works for a number of persons or firms at the same time, it indicates an independent status because, in such cases, the worker is usually free from control by any of the firms.

During the hearing, the witness for the Petitioner credibly testified that the Workers were not prevented from providing their services outside of the Petitioner's business. The witness noted that because an event typically lasted only 2 to 3 hours in duration, the Workers had other jobs. The witness further testified that he believed the Workers had worked for other event companies

while providing services for the Petitioner and that the Petitioner had never made any attempt to prohibit the Workers from doing so.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Additional Considerations

Arizona Administrative Code, Section R6-3-1723(F) provides guidance on additional considerations for determining whether an employer-employee relationship exists.

In ultimately concluding that an employer-employee relationship existed between the parties, the Department considered the integration and continuing relationship of the Workers with the Petitioner's business and the intent of the parties.

In the Reconsidered Determination, the Department concluded that the services provided by the Workers were integral to the Petitioner's business and that the Workers had a continuing relationship with the Petitioner's business.

As the Petitioner is a special events company that plans and provides special events for its clients, we agree with the Department's determination that the services performed by the Workers formed an integral part of the Petitioner's regular business activity. However, the duration of the working relationship between the Petitioner and the Workers varied and there is not sufficient evidence to establish that a continuing relationship existed between the Workers and the Petitioner.

In the Reconsidered Determination, the Department also considered the intent of the parties.

In this case, the parties had intended an independent contractor relationship and there had been a written contractual agreement between the Workers and the Petitioner that established such a relationship. During the hearing, the witness for the Petitioner credibly testified that when the parties agreed to sign the staffing agreement, it established an independent contractor relationship and that affirmative confirmation by the Workers in response to the Petitioner's email communication regarding work opportunities established the contractual relationship on an event-by-event basis.

Such intent was also evidenced by other factors considered. In this case, the Petitioner did not provide employee benefits such as insurance, pension, and paid leave to the Workers. The Workers were also obligated to perform the services they had agreed to provide, and the Petitioner did not have the right to discharge the Workers. In addition, the Petitioner did not monitor the Workers'

job performance, and the Workers were free to provide their services to other parties without restriction by the Petitioner.

Consequently, we find that the additional considerations reviewed favor a finding that the Workers were independent contractors.

DECISION

We conclude that the preponderance of evidence of independent contractor status outweighs the evidence of employee status. Therefore, we find that the Workers were not employees of the Petitioner from January 1, 2016 through June 30, 2017, but rather, the Workers performed services for the Petitioner pursuant to an independent contractor relationship. We further conclude that all payments to the Workers for their services from January 1, 2016 through June 30, 2017, did not constitute wages by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **REVERSES** the Department's July 26, 2023 Reconsidered Determination that found that from January 1, 2016 through June 30, 2017, services performed by individuals as event staff constituted employment. From January 1, 2016 through June 30, 2017, services performed by these workers did not constitute employment, because the parties had an independent contractor relationship. All forms of remuneration paid to these workers for such services did not constitute wages.

DATED: 5/3/2024

APPEALS BOARD

NANCY MILLER, Chairman

DENISE E. MOORE, Member

WILLIAM G. DADE, Member

---

take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See,* Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3442**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

> C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
>
> D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
>
> 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
>
> 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the

action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 5/3/2024
to:

(x) Er: [redacted] Acct. No: [redacted]

(x) JASON CORLEY
ASST ATTORNEY GENERAL
2005 N CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

(x) MARIA VANRAALTE, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: ___LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1957947-001-B

[redacted]

STATE OF ARIZONA ESA TAX UNIT
c/o DONALD BAIER
ASST ATTORNEY GENERAL
2005 N. CENTRAL AVE.
MAIL DROP 1911
PHOENIX, AZ 85004

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** June 20, 2024 *****.

DECISION
AFFIRMED

THE **PETITIONER** petitioned for a hearing from the Department's Reconsidered Determination issued on March 30, 2023, which affirmed the Department's Determination of Liability for Employment or Wages issued on December 2, 2021. The Reconsidered Determination held that services performed by a trainer and marketing manager, appointment setters, and installers ("Workers") constitute employment and all forms of remuneration paid for such services constitute wages.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing for April 10, 2024. Appeals Board Administrative Law Judge Robert Irani presided over the hearing on that date, and all parties were given an opportunity to present evidence on the following issues:

(1) Whether the services performed by the Workers for the Petitioner from January 1, 2019 through September 30, 2021 (the "audit period") were employees; and

(2) Whether payments the Petitioner made to the Workers during the audit period constitute wages.

The Petitioner appeared at the scheduled hearing and presented testimony from one witness. The Department appeared through counsel and presented testimony from two witnesses. Exhibits D1 through D7, and A1 were admitted into evidence.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Petitioner is a commercial and residential window installation company that operated within the State of Arizona during the audit period.

2. The Workers provided services for the Petitioner during the audit period. The Workers included installers, appointment setters, and a trainer and marketing manager ("manager"). The installers included individuals that provided window installation services and individuals that provided stucco and paint repair services.

3. The services provided by the Workers comprised part of the Petitioner's regular business activity.

4. The Workers and the Petitioner had not entered into a written contractual agreement that indicated an independent contractor relationship.

5. The Workers had not engaged the services of an assistant.

6. The installers were required to complete a punch list to demonstrate tasks that were completed, document hours worked, and document when stucco and paint work was performed.

7. The appointment setters were not required to submit an oral or written report to the Petitioner.

8. The Petitioner required the manager to hire, recruit and train the appointment setters to sell replacement residential windows to potential customers door to door, measure windows and complete appointment sheets. The Petitioner provided the manager with the training materials and training program instructions. The manager trained the appointment setters to contact potential new customers by phone from a lead list, schedule appointments for possible window sales and installation, perform potential door to door sales in neighborhoods selected by the petitioner, measure windows, and complete customer appointment sheets for submission into the office.

9. The manager was required to provide his services at the Petitioner's premises and to train the appointment setters in residential neighborhoods.

10. The installers were required to provide their services at the jobsite location of the Petitioner's customers.

11. The Petitioner required appointment setters to attend training, perform their duties in accordance with the Petitioner's training instructions, and use the Petitioner's script when speaking with customers. The Petitioner required the appointment setters to perform their services in residential neighborhoods within specific parameters that were identified by the Petitioner and periodically at the Petitioner's business location for mandatory training during the Petitioner's identified hours.

12. The services provided to the Petitioner had been rendered personally by the Workers.

13. An order of sequence for the performance of the Workers' services had not been established by the Petitioner.

14. The Petitioner provided instructions on how the manager was to perform his services.

15. The manager provided training to the appointment setters.

16. The Petitioner hired installers with previous work experience who drew from their own expertise in the performance of their services.

17. The Petitioner provided materials and supplies for the Workers to perform their services. The Petitioner provided the manager with

marketing materials such as company shirts, business cards, and a script. The Petitioner provided appointment setters with brochures, pamphlets, sheets to document the measurement of the windows, and a company shirt. The Petitioner provided the manager and appointment setters all the office equipment and supplies required to perform their duties. The installers provided some tools customarily furnished by workers in the trade. The Petitioner provided the installers with all other materials and supplies required to perform their duties.

18. The Workers did not advertise their services to the public.

19. The Workers received a predetermined payment by the Petitioner on a weekly basis at a rate set by the Petitioner. The Petitioner paid the manager $1,000 per week plus a monthly commission on sales, the appointment setters $500 per sale, and the installers $100 per window, an additional $350 if stucco work was to be performed, and an additional $75 if any painting was required.

20. The Workers were not prevented from providing their services outside of the Petitioner's business.

21. The Workers did not have a significant investment in business assets necessary to perform their services.

22. The Workers did not have continuing and recurring liabilities or obligations in connection with the performance of their services.

23. The Petitioner and the Workers had the right to end their working relationship without incurring liability.

24. The Workers performed their services on a continuous basis during the audit period. The Petitioner paid the manager from January 2019 until March 2020, the appointment setters and installers from January 2019 until September 2021.

REASONING AND CONCLUSIONS OF LAW

The Petitioner contends that the Workers were independent contractors and not employees for the period from January 1, 2019 through September 30, 2021. The issues in dispute in this case are the employment status of the Workers from January 1, 2019 through September 30, 2021, and whether the pay earned by the Workers during that period constituted wages.

Arizona Revised Statutes, § 23-615, provides in pertinent part as follows:

Employment; definition

A. "Employment" means any service of whatever nature performed by an employee for the person employing the employee, including service in interstate commerce ...

Arizona Revised Statutes § 23-613.01 provides in pertinent part:

Employee; definition; exempt employment

A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Indications of control by the employing unit include controlling the individual's hours of work, location of work, right to perform services for others, tools, equipment, materials, expenses and use of other workers and other indicia of employment, except employee does not include:

1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.

2. An individual subject to the direction, rule or control or subject to the right of direction, rule or control of an employing unit solely because of a law regulating the organization, trade or business of the employing unit.

Arizona Revised Statutes § 23-622(A) provides as follows:

Wages

A. "Wages" means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the department.

Arizona Administrative Code, Section R6-3-1723, provides as follows:

A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.

1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.

2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.

B. "Employee" as defined in subsection (A) does not include:

1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent businessperson, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.

2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit "... solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.

a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.

b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.

c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

* * *

D. In determining whether an individual who performs services is an employee under the general definition of subsection (A), all material evidence pertaining to the relationship between the individual and the employing unit must be examined. Control as to the result is usually present in any type of contractual relationship, but it is the additional presence of control, as determined by such control factors as are identified in paragraph (2) of this subsection, over the method in which the services are performed, that may create an employment relationship.

1. The existence of control solely on the basis of the existence of the right to control may be established by such action as: reviewing written contracts between the individual and the employing unit; interviewing the individual or employing unit; obtaining statements of third parties; or examining regulatory statutes governing the organization, trade or business. In any event, the substance, and not merely the form of the relationship must be analyzed.

2. The following are some common indicia of control over the method of performing or executing the services:

a. Authority over individual's assistants. Hiring, supervising, and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job. Sometimes, one worker may hire, supervise, and pay other workers. He may do so as the result of a contract in which he agrees to provide materials and labor and under which he is responsible only for the attainment of a result; in which case he may be independent. On the other hand, if he does so at the direction of the employing unit, he may be acting as an employee in the capacity of a foreman for or representative of the employer.

b. Compliance with instructions. Control is present when the individual is required to comply with instructions about when, where and how he is to work. Some employees may work without receiving instructions because they are highly proficient in their line of work and can be trusted to work to the best of their abilities; however, the control factor is present if the employer has the right to instruct or direct. The instructions may be oral or may be in the form of manuals or written procedures which show how the desired result is to be accomplished.

c. Oral or written reports. If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for his actions. Periodic progress reports relating to the accomplishment of a specific result may not be indicative of control if, for example, the reports are used to establish entitlement to partial payment based upon percentage of completion. Completion of forms customarily used in the particular type of business activity, regardless of the

relationship between the individual and the employing unit, may not constitute written reports for purposes of this factor; e.g., receipts to customers, invoices, etc.

d. Place of work. Doing the work on the employing unit's premises is not control in itself; however, it does imply that the employer has control, especially when the work is of such a nature that it could be done elsewhere. A person working in the employer's place of business is physically within the employer's direction and supervision. The fact that work is done off the premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee. In some occupations, the services are necessarily performed away from the premises of the employing unit. This is true, for example, of employees in the construction trades, or employees who must work over a fixed route, within a fixed territory, or at any outlying work station.

e. Personal performance. If the services must be rendered personally it indicates that the employing unit is interested in the method as well as the result. The employing unit is interested not only in getting a desired result, but, also, in who does the job. Personal performance might not be indicative of control if the work is very highly specialized and the worker is hired on the basis of his professional reputation, as in the case of a consultant known in academic and professional circles to be an authority in the field. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

f. Establishment of work sequence. If a person must perform services in the order of sequence set for him by the employing unit, it indicates the worker is subject to

control as he is not free to follow his own pattern of work, but must follow the established routines and schedules of the employing unit. Often, because of the nature of an occupation, the employing unit does not set the order of the services, or sets them infrequently. It is sufficient to show control, however, if the employing unit retains the right to do so.

g. Right to discharge. The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control. The employing unit exercises control through the ever present threat of dismissal, which causes the worker to obey any instructions which may be given. The right of control is very strongly indicated if the worker may be terminated with little or no notice, without cause, or for failure to use specified methods, and if the worker does not make his services available to the public on a continuing basis. An independent worker, on the other hand, generally cannot be terminated as long as he produces an end result which measures up to his contract specifications. Many contracts provide for termination upon notice or for specified acts of nonperformance or default and may not be indicative of the existence of the right to control. Sometimes, an employing unit's right to discharge is restricted because of a contract with a labor union or with other entities. Such a restriction does not detract from the existence of an employment relationship.

h. Set hours of work. The establishment of set hours of work by the employing unit is a factor indicative of control. This condition bars the worker from being master of his own time, which is a right of the independent worker. Where fixed hours are not practical because of the nature of the

occupation, a requirement that the worker work at certain times is an element of control.

i. Training. Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, is a factor of control because it is an indication that the employer wants the services performed in a particular method or manner. This is especially true if the training is given periodically or at frequent intervals. An independent worker ordinarily uses his own methods and receives no training from the purchaser of his services.

j. Amount of time. If the worker must devote his full time to the activity of the employing unit, the employing unit has control over the amount of time the worker spends working and, impliedly, restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses. Full time does not necessarily mean an 8-hour day or a 5- or 6-day week. Its meaning may vary with the intent of the parties, the nature of the occupation and customs in the locality. These conditions should be considered in defining "full time". Full-time services may be required even though not specified in writing or orally. For example, a person may be required to produce a minimum volume of business which compels him to devote all of his working time to that business, or he may not be permitted to work for anyone else, and to earn a living he necessarily must work full time.

k. Tools and materials. The furnishing of tools, materials, etc. by the employing unit is indicative of control over the worker. When the worker furnishes the tools, materials, etc., it indicates a lack of

control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

l. Expense reimbursement. Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses. Consideration must be given to the fact some independent professionals and consultants require payment of all expenses in addition to their fees.

E. Among the factors to be considered in addition to the factors of control, such as those identified in subsection (D), when determining if an individual performing services may be independent when paragraph (1) of subsection (B) is applicable, are:

1. Availability to public. The fact that an individual makes his services available to the general public on a continuing basis is usually indicative of independent status. An individual may offer his services to the public in a number of ways. For example, he may have his own office and assistants, he may display a sign in front of his home or office, he may hold a business license, he may be listed in a business directory or maintain a business listing in a telephone directory, he may advertise in a newspaper, trade journal, magazine, or he may simply make himself available through word of mouth, where it is customary in the trade or business.

2. Compensation on job basis. An employee is usually, but not always, paid by the hour, week or month; whereas, payment on a job basis is customary where the worker is independent. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job

at a fixed rate per hour. Payment on a job basis may involve periodic partial payments based upon a percent of the total job price or the amount of the total job completed. The guarantee of a minimum salary or the granting of a drawing account at stated intervals, with no requirement for repayment of the excess over earnings, tends to indicate that existence of an employer-employee relationship.

3. Realization of profit or loss. An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is an employee is not in such a position. Opportunity for profit or loss may be established by one or more of a variety of circumstances; e.g.:

   a. The individual has continuing and recurring significant liabilities or obligations in connection with the performance of the work involved, and success or failure depends, to an appreciable degree, on the relationship of receipts to expenditures.

   b. The individual agrees to perform specific jobs for prices agreed upon in advance, and pays expenses incurred in connection with the work, such as wages, rents or other significant operating expenses.

4. Obligation. An employee usually has the right to end his relationship with his employer at any time he wishes without incurring liability, although he may be required to provide notice of his termination for some period in advance of the termination. An independent worker usually agrees to complete a specific job. He is responsible for its satisfactory completion and would be legally obligated to make good for failure to complete the job, if legal relief were sought.

5. Significant investment. A significant investment by a person in facilities used by

him in performing services for another tends to show an independent status. On the other hand, the furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status on the part of the worker. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, etc., that are provided by employees as a common practice in their trade. If the worker makes a significant investment in facilities, such as a vehicle not reasonably suited to personal use, this is indicative of an independent relationship. A significant expenditure of time or money for an individual's education is not necessarily indicative of an independent relationship.

6. Simultaneous contracts. If an individual works for a number of persons or firms at the same time, it indicates an independent status because, in such cases, the worker is usually free from control by any of the firms. It is possible, however, that a person may work for a number of people or firms and still be an employee of one or all of them. The decisions reached on other pertinent factors should be considered when evaluating this factor.

F. Whether the preponderance of the evidence is being weighed to determine if the individual performing services for an employing unit is an employee under the general definition of employee contained in subsection (A), or may be independent when paragraph (1) of subsection (B) is applicable, the factors considered shall be weighed in accordance with their appropriate value to a correct determination of the relationship under the facts of the particular case. The weight to be given to a factor is not always constant. The degree of importance may vary, depending upon the occupation or work situation being considered and why the factor is present in the situation. Some factors may not apply to occupations or situation, while there may be other factors not specifically identified herein that should be considered.

* * *

In weighing the evidence and applying the law to the facts in this case, the Appeals Board considered evidence of the substance, not merely the form, of the relationship between the Petitioner and the Workers, as required in A.A.C. Section R6-3-1723(D)(1), including the elements of control and independence within the meaning of A.A.C. Sections R6-3-1723(A)(1), (D), and (E). Additional considerations were also examined by the Appeals Board pursuant to A.A.C. Section R6-3-1723(F) to determine whether an employer-employee relationship exists.

Common Indicia of Control

Arizona Administrative Code, Section R6-3-1723 provides guidance for determining whether an employer-employee relationship exists. Section R6-3-1723(D)(2) lists the common indicia of control to be considered in any determination.

Authority Over Individual's Assistants

Pursuant to A.A.C. Section R6-3-1723(D)(2)(a), the hiring, supervising, and payment of an individual's assistants by the employing unit generally shows control over the individuals on the job.

In this case, the Workers typically did not engage the services of an assistant when providing their services.

During the hearing, the witnesses for the Department testified that there was no evidence to suggest that any of the Workers had engaged the services of an assistant.

The witness for the Petitioner also testified that the Workers "did not have assistants. It was just them individually".

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Compliance with Instructions

Pursuant to A.A.C. Section R6-3-1723(D)(2)(b), control is present when an individual is required to comply with instructions about when, where and how to work.

Manager

In this case, the Petitioner provided instructions regarding the work performed by the manager.

The Petitioner required the manager to hire, recruit and train the appointment setters to sell replacement residential windows to potential customers door to door. The manager also trained the appointment setters to measure windows and complete appointment sheets. While the manager did have prior experience, the Petitioner provided the manager with instructions on how to train the appointment setters.

The manager performed his services at the business location of the Petitioner and would train the appointment setters in the residential neighborhoods recommended by the Petitioner.

The manager worked Monday through Friday during the business hours of the Petitioner. During the hearing, the witness for the Petitioner testified that the manager worked in the office Monday through Friday.

Although the manager did have previous experience, we find that the control exhibited by the Petitioner in its instructions regarding how the appointment setters were to be trained and its requirements for when and where the manager was to perform his services to be determinative in our analysis.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Appointment Setters

In this case, the manager provided the training to the appointment setters. During the hearing, the witness for the Petitioner testified that the Workers were also provided a script for speaking with the customers.

The appointment setters performed their services in the residential neighborhoods recommended by the Petitioner. During the hearing, the witness for the Petitioner testified that the Petitioner would “recommend specific areas” and give the “parameters” regarding the neighborhoods for the appointment setters to work. The witness further testified that the appointment setters would perform their services at the time recommended by the Petitioner.

We find the Petitioner’s control of the training instructions, the sales script, and the locations and times for performance of the services to be determinative in our analysis.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Installers

The Petitioner did not provide the installers with any written or oral instructions as to how the services were to be performed and had engaged the services of installers that had prior work experience. However, the installers were required to complete a punch card, document their hours worked, and document when stucco or paintwork was performed.

Due to the nature of the occupation, the installers provided their services at the jobsite location of the Petitioner's customers and at the time determined by the Petitioner's customers. During the hearing, the witness for the Petitioner testified that the Petitioner instructed the installers where to do the work, which "would have to be done at the jobsite that was sold".

We find that there was control exhibited by the Petitioner in its agreement with its customers about when and where the work was to take place. While the Petitioner did not provide the installers with any instructions regarding how the services were performed, the installers were required to complete a punch card and document hours worked, and when stucco or paintwork was performed.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Oral or Written Reports

Pursuant to A.A.C. Section R6-3-1723(D)(2)(c), if regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for their actions.

Manager/Appointment Setters

In this case, the manager and the appointment setters were not required to provide an oral or written report to the Petitioner.

During the hearing, the witness for the Petitioner testified that the manager and the appointment setters had never been required to submit an oral or written report to the Petitioner.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Installers

The installers were required to complete a punch list to demonstrate tasks that had been completed, document hours worked and document when stucco and

paint work was performed.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Place of Work

Pursuant to A.A.C. Section R6-3-1723(D)(2)(d), work performed on the employing unit's premises implies that the employer has control, whereas work that is performed away from the employer's premises implies some freedom from control.

Manager

The manager provided his services at the business location of the Petitioner. The manager would also train the appointment setters in residential neighborhoods that had been recommended by the Petitioner.

In this case, we find that there was control exhibited by the Petitioner, as the manager provided his services at the Petitioner's premises and trained the appointment setters in a location recommended by the Petitioner.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Appointment Setters

The appointment setters performed their services in the residential neighborhoods recommended by the Petitioner and periodically at the business location of the Petitioner.

During the hearing, the witness for the Petitioner testified that the appointment setters worked in residential neighborhoods that had been recommended by the Petitioner and would periodically return to the Petitioner's business premises to "pick up supplies if they needed them like business cards or anything like that [and if] the manager had scheduled a training with them to just kind of go over everything they had been doing, then they would come into the office as well".

In this case we find that there was control exhibited by the Petitioner based on the location that the appointment setters worked. Based on the nature of the occupation, the services of the appointment setters were generally provided at a location away from the Petitioner's premises and in this case, in the residential neighborhoods that had been recommended by the Petitioner.

Consequently, we find this factor weighs in favor of an employer-employee

relationship.

Installers

The installers were required to provide their services at the jobsite location of the Petitioner's customers.

During the hearing, the witness for the Petitioner testified that the Petitioner instructed the installers where to do the work, which "would have to be done at the jobsite that was sold".

In this case we find that there was control exhibited by the Petitioner based on the location that the appointment setters worked. Based on the nature of the occupation, the services provided by the installers were performed at a location away from the Petitioner's premises. In this case, the installers were instructed to provide their services at the job-site location of the Petitioner's customers.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Personal Performance

Pursuant to A.A.C. Section R6-3-1723(D)(2)(e), if the services must be rendered personally, it indicates that the employing unit is interested in the method as well as the result. The employing unit is interested not only in getting a desired result, but in who does the job.

In this case, the services provided for the Petitioner by the Workers had been rendered personally.

During the hearing, the witness for the Petitioner testified that while personal performance would not have been required, he was not aware of any situation in which the services were not personally performed by the Workers.

Consequently, we find this factor to be neutral.

Establishment of Work Sequence

Pursuant to A.A.C. Section R6-3-1723(D)(2)(f), if a person must perform services in the order of sequence set by the employing unit, it indicates the worker is subject to control.

In this case, an order of sequence for the performance of the Workers' services had not been established by the Petitioner. The Workers had not been

instructed by the Petitioner about the sequence that the Workers were required to provide their services.

During the hearing, the witness for the Petitioner testified that the Petitioner had not established any requirement regarding the work sequence for the Worker's services. The Workers were able to set a sequence order for performing their services at their own discretion.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Right to Discharge

Pursuant to A.A.C. Section R6-3-1723(D)(2)(g), the right of control is very strongly indicated if a worker may be terminated with little or no notice, without cause, or for failure to use specified methods, and if the worker does not make their services available to the public on a continuing basis. The right to discharge is distinguished from the right to terminate a contract; many contracts provide for termination upon notice or for specified acts of nonperformance or default and may not be indicative of the existence of the right to control.

In this case, the Petitioner reserved the right to discharge the Workers if their actions warranted termination. As well, there is no evidence to establish that the Workers made their services available to the public.

The Petitioner and the Workers had not entered into a contractual agreement which may have contained terms for the termination of the contract. In this case, the Petitioner could discharge the Workers at-will, such as in the course of performing their services, without being liable for damages.

During the hearing, the witness for the Petitioner testified that he was not aware of an instance in which the Petitioner had discharged the Workers. In the Reconsidered Determination, the Department also determined that while the Petitioner had not terminated any of the Workers, it did reserve the right to do so if their actions warranted termination.

A witness for the Department testified during the hearing that based on a search on-line, it was determined that the Workers did not advertise their services on the internet. The witness for the Petitioner testified that he was not aware whether any of the Workers advertised their services to the public.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Set Hours of Work

Pursuant to A.A.C. Section R6-3-1723(D)(2)(h), the establishment of set hours of work by the employing unit is a factor indicative of control.

Manager

In the Reconsidered Determination, the Department determined that the manager worked Monday through Friday during the business hours of the Petitioner. During the hearing, the witness for the Petitioner testified that the manager was in the office on Monday through Friday.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Appointment Setters

During the hearing, a witness for the Department testified that the appointment setters were scheduled to work Monday through Friday and an occasional Saturday with various start times. The witness for the Petitioner testified that the appointment setters would perform their services at the time recommended by the Petitioner.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Installers

The installers were required to complete a punch list to demonstrate the competition of tasks, document hours worked, and document when stucco and paint work had been performed.

During the hearing, a witness for the Department testified that the Department had determined that the installers were required to document their total hours worked on a punch list. In addition, the installers were also required to provide their services at the jobsite location of the Petitioner's customer at the time determined by the customer.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Training

Pursuant to A.A.C. Section R6-3-1723(D)(2)(i), the training of an individual is a factor of control because it is an indication that the employer wants the services performed in a particular method or manner.

Manager

While the manager had prior experience, the Petitioner did require the manager to hire recruit and train individuals to sell replacement residential windows in the manner specified by the Petitioner. During the hearing, a witness for the Department testified that the Petitioner "has a specific way in which they approach and talk to customers about their specific product so that information would have been provided to [the manager] in order for [him] to pass that along to the appointment setters".

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Appointment Setters

In this case, the Petitioner provided formalized training to the appointment setters. The manager trained the appointment setters to contact potential new customers by phone from a lead list, schedule appointments for possible window sales and installation, perform potential door to door sales in neighborhoods selected by the petitioner, measure windows, and complete customer appointment sheets for submission into the office. During the hearing, the witness for the Petitioner also testified that the Petitioner provided a script for speaking with potential customers.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Installers

In this case, the installers had not received training by the Petitioner. The Petitioner hired workers who were already experienced and did not require further training.

During the hearing, the witness for the Petitioner testified that the Workers were already trained and drew from their prior training and experience in providing their services.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Amount of Time

Pursuant to A.A.C. Section R6-3-1723(D)(2)(j), control by the employing unit is indicated if a worker must devote their full time to the activity of the employing unit, impliedly restricting the worker from doing other gainful work.

In this case, the Petitioner did not establish the amount of time the Workers were required to provide their services. The Workers were also free to decide whether to provide their services to others.

During the hearing, the witness for the Petitioner testified that the Petitioner had not set the amount of time that the Workers were required to provide their services. The witness further testified that the Workers were free to decide whether to provide their services to others.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Tools & Materials

Pursuant to A.A.C. Section R6-3-1723(D)(2)(k), the furnishing of tools and materials can be indicative of the employing unit's control over the worker. Additionally, a lack of control is not established when a worker provides tools or supplies that are customarily furnished by the workers in the trade.

Manager

The Petitioner provided the materials and supplies required for the manager to perform his services.

In this case, the Petitioner had provided the manager with marketing materials such as company shirts, business cards, and a script. The Petitioner also provided all the office equipment and supplies that was required for the manager to perform his services.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Appointment Setters

The Petitioner provided the materials and supplies for the appointment setters to perform their services.

During the hearing, a witness for the Department testified that all the materials needed for the appointment setters to perform their services had been

provided by the Petitioner, including brochures, pamphlets, and sheets to document the measurement of the windows. The witness also testified that the Petitioner had provided a company shirt to the appointment setters.

The witness for the Petitioner testified that the Petitioner had provided the appointment setters with "marketing materials such as brochures and cards and they had shirts that they could use of ours".

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Installers

The Petitioner provided the materials and supplies for the installers to perform their services.

During the hearing, a witness for the Department testified that the Petitioner supplied the "windows and other materials they would need to complete their work" and that while the basic tools of the trade would have been furnished by the installers, "anything additional [the Petitioner] would have been responsible for paying for".

The witness for the Petitioner testified that the installers used their own tools of the trade to perform their services, but that the Petitioner provided the installers with materials and supplies, such as windows, to perform the services. The witness for the Petitioner also testified that the installers were "given shirts from [the Petitioner]" and that "some of them felt more comfortable if they were wearing company attire".

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Expense Reimbursement

Pursuant to A.A.C. Section R6-3-1723(D)(2)(l), payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses.

The Workers were not reimbursed for any expenses incurred while performing their services. However, except for traveling expenses, the Workers did not incur any additional incidental expenses.

During the hearing, the witness for the Petitioner testified that travel costs, such as gas, was borne by the Workers.

Consequently, we find this factor to be neutral.

Factors Indicative of Independence

Arizona Administrative Code, Section R6-3-1723 provides guidance for determining whether an employer-employee relationship exists. Section R6-3-1723(E) lists the common factors indicative of independence to be considered in any determination.

Availability to Public

Pursuant to A.A.C. Section R6-3-1723(E)(l), independence is exhibited when a worker makes their services available to the general public on a continuing basis. Examples of availability to the public include having an office, hiring assistants, displaying signs, holding business licenses, having business listings in directories, advertising in print materials, or engaging in word-of-mouth advertising when it is customary.

In this case, the Workers had not made themselves available to the general public.

During the hearing, a witness for the Department testified that a website search was conducted that had led the Department to conclude that the Workers did not advertise their services to the general public. The witness for the Petitioner also testified that he was unaware whether the Workers had advertised their services to the public.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Compensation on Job Basis

Pursuant to A.A.C. Section R6-3-1723(E)(2), an employee is usually paid by the hour, week or month, while an independent contractor is generally paid on a job basis. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job at a fixed rate per hour.

Manager

The manager received a predetermined payment by the Petitioner on a weekly basis at a rate set by the Petitioner.

During the hearing, the witness for the Petitioner testified that the manager was paid $1,000 per week “plus a monthly commission on sales” by the Petitioner. The rate of the payment was established by the Petitioner.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Appointment Setters

The appointment setters received a predetermined payment by the Petitioner on a weekly basis at a rate set by the Petitioner.

During the hearing, the witness for the Petitioner testified that the Petitioner paid the appointment setters $500 per sale. The appointment setters were paid on a weekly basis at a rate established by the Petitioner.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Installers

The installers received a predetermined payment by the Petitioner on a weekly basis at a rate set by the Petitioner.

The Petitioner paid the installers $100 per window, an additional $350 if stucco work was to be performed, and an additional $75 if any painting was required. The installers were paid on a weekly basis. The rate of the payment was set by the Petitioner.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Realization of Profit or Loss

Pursuant to A.A.C. Section R6-3-1723(E)(3), an independent contractor is generally in a position to realize a profit or suffer a loss as a result of their services, while an employee is not in such a position. Opportunities for profit or loss can include whether the worker has recurring liabilities or obligations and whether the worker pays expenses such as wages, rent or other significant operating expenses.

The Workers were not in a position to realize a profit or suffer a loss as a result of their services.

In the Reconsidered Determination, the Department stated that "there was no relationship between receipts and expenditures or significant operating costs that would subject the workers to an opportunity for profit or loss without the plain meaning of this factor".

In this case, the evidence of record establishes that the Workers did not pay for rent or utilities, and had minimal operating expenses. The only expenses established were those associated with their transportation to and from work. Additionally, there is no evidence that the Workers incurred any costs regarding advertisements, payment of wages, or other operational expenses associated with a business.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Obligation

Pursuant to A.A.C. Section R6-3-1723(E)(4), an employee usually has the right to end their employment at any time without incurring liability, although notice of the termination for some period in advance may be required. An independent contractor is usually obligated to complete a specific job, typically controlled by the terms of a contract.

The Workers would not incur liability for failing to perform the services they had agreed to perform.

In this case, the evidence of record establishes that the Workers had the right to end the services provided to the Petitioner at any time without incurring legal liability. The Petitioner and the Workers had not entered into a contractual agreement which may have contained terms for the termination of the contract. In this case, the Workers had the right to end their employment at any time without being liable for damages.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

.

Significant Investment

Pursuant to A.A.C. Section R6-3-1723(E)(5), independence is exhibited when a worker invests in facilities used to perform services for another. Conversely, the furnishing of all necessary facilities by the employing unit tends to indicate a lack of independence by the worker. Facilities include equipment or premises necessary for the work.

In this case, the Workers did not have a significant investment in business assets necessary to perform their services.

In the Reconsidered Determination, the Department stated that there was no evidence that the Workers had made any significant investments with respect to their services.

During the hearing, the witness for the Petitioner also acknowledged that the Workers did not make a significant investment in facilities used in the performance of their services and testified that he was unaware whether the Workers had offices or facilities.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Simultaneous Contracts

Pursuant to A.A.C. Section R6-3-1723(E)(6), if an individual works for a number of persons or firms at the same time, it indicates an independent status because, in such cases, the worker is usually free from control by any of the firms.

During the hearing, the witness for the Petitioner testified that the Workers were not prevented from providing their services outside of the Petitioner's business. The witness further testified that he believed the Workers had worked for other companies while providing services for the Petitioner, and that the Petitioner had never made any attempt to prohibit the Workers from doing so.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Additional Considerations

Arizona Administrative Code, Section R6-3-1723(F) provides guidance on additional considerations for determining whether an employer-employee relationship exists.

In ultimately determining that an employer-employee relationship existed between the parties, the Department considered the integration and the continuing relationship of the Workers with the Petitioner's business.

In the Reconsidered Determination, the Department concluded that the services provided by the Workers were integral to the Petitioner's business and that the Workers had a continuing relationship with the Petitioner's business.

As the Petitioner is a commercial and residential window installation company, we agree with the Department's determination that the services performed by the Workers as installers, appointment setters, and manager formed an integral part of the Petitioner's regular business activity.

We also agree with the Department's determination that the Workers had a continuing relationship with the Petitioner's business. In this case, the Workers providing services as installers, appointment setters, and manager had worked for the Petitioner on a continuous basis during the audit period. In the

Reconsidered Determination, the Department determined that the manager had received payments from the Petitioner from January 2019 until March 2020, the appointment setters had received payments from the Petitioner from January 2019 until September 2021, and the installers had received payments for their services from January 2019 until September 2021.

During the hearing, the witness for the Petitioner testified that the manager had "worked from November of 2019 to March of 2020" until "he was incarcerated". The witness also testified that "the longest we had any appointment setters [...] was maybe a year and a half. Generally, it's four to six months" and that the installers would have worked for the Petitioner for "[m]aybe six, seven months [to] a couple of years".

Consequently, we find that the additional considerations reviewed favor a finding that the Workers were employees.

DECISION

We conclude that the preponderance of evidence of employee status outweighs the evidence of independent contractor status. Therefore, we find that the Workers were employees of the Petitioner from January 1, 2019 through September 30, 2021. We further conclude that all payments to the Workers for their services from January 1, 2019 through September 30, 2021, constituted wages by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's March 30, 2023 Reconsidered Determination that found that from January 1, 2019 through September 30, 2021, services performed by a trainer and marketing manager, appointment setters, and installers constituted employment. All forms of remuneration paid to these workers for such services constituted wages.

DATED: 5/21/2024

APPEALS BOARD

NANCY MILLER, Chairman

DENISE E. MOORE, Member

WILLIAM G. DADE, Member

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See,* Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3442**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

> C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
>
> D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
>
> 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.

2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 5/21/2024
to:

(x) Er: [redacted] Acct. No: [redacted]

(x) DONALD BAIER
ASST ATTORNEY GENERAL
2005 N CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

(x) MARIA VANRAALTE, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: ___LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1954060-001-B

[redacted]

STATE OF ARIZONA ESA TAX UNIT
c/o DONALD BAIER
ASST ATTORNEY GENERAL
2005 N. CENTRAL AVE.
MAIL DROP 1911
PHOENIX, AZ 85004

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

DECISION
DISMISSED

THE **PETITIONER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

> A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:

1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

We have carefully reviewed the record.

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. The hearing scheduled for June 12, 2024, is cancelled. This decision does not affect any agreement entered into between the Petitioner and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 5/29/2024

APPEALS BOARD

ROBERT IRANI,
Administrative Law Judge

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 5/29/2024
to:

(x) Er: [redacted] Acct. No: [redacted]

(x) DONALD BAIER
ASST ATTORNEY GENERAL
2005 N CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

(x) MARIA VANRAALTE, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: __LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1935251-001-B

[redacted]

STATE OF ARIZONA ESA TAX UNIT
C/O DONALD BAIER
ASST ATTORNEY GENERAL
2005 N CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** July 26, 2024 *****.

DECISION
AFFIRMED

THE **PETITIONER** petitioned for a hearing from the Department's Reconsidered Determination issued on July 31, 2023, which modified the Department's Determination of Liability for Employment or Wages and affirmed the Determination of Unemployment Insurance Liability, both dated September 10, 2018. The Reconsidered Determination held that the services performed by individuals as a Substance Abuse Counselor, Registered Nurse, Massage Therapist, Life Coach, Maintenance Person, Admissions Coordinator, Yoga

Instructor, Naturopathic Medical Doctor, Group Facilitator, Clinical Director, General Laborer, Vice President of Operations, part-time Housekeeper, Medical Assistant, and Behavioral Health Professional constitute employment and all forms of remuneration paid for such services constitute wages.

The Reconsidered Determination further held that the Petitioner did not exert sufficient control over the services performed by individuals as a Maintenance Person ([redacted]) and a General Laborer ([redacted]) to constitute employment, and that remuneration paid to those individuals for services performed did not constitute wages.

The Reconsidered Determination also held that because [redacted] was performing services for the Petitioner as a Cook and a Determination of Liability for Employment or Wages issued on January 11, 2011 had determined services performed as a Cook constitute employment, the 2011 Determination was accorded administrative finality pursuant to Arizona Revised Statutes (A.R.S.) § 23-724(F), whereby renumeration paid to him for his services during the audit period constitutes wages.

The Reconsidered Determination further held that [redacted], President and Chief Operating Officer (CEO), and [redacted], Vice President of Operations (VP of Operations), were corporate officers, and that a corporate officer was a statutory employee pursuant to A.R.S. § 23-615(A)(4).

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing for April 24, 2024. Appeals Board Administrative Law Judge Robert Irani presided over the hearing on that date, and all parties were given an opportunity to present evidence on the following issues:

(1) Whether the services provided by individuals as a Maintenance Person ([redacted]), General Laborer ([redacted]), Cook ([redacted]), President and CEO ([redacted]), and VP of Operations ([redacted]) for the Petitioner from January 1, 2016, through December 31, 2017 (the audit period) constitute employment; and

(2) Whether remuneration paid by the Petitioner for these services during the audit period constitutes wages.

The Petitioner appeared at the scheduled hearing and presented testimony from one witness. The Department appeared through counsel and presented testimony from two witnesses. Exhibits D1 through D11, and A1 were admitted into evidence.

THE APPEALS BOARD FINDS the facts pertinent to the issues before us and necessary to our decision are:

1. The Petitioner is an addiction treatment center that operated within the State of Arizona during the audit period.

2. During the audit period, the Petitioner was a limited liability company (LLC) organized legally as an S Corporation for federal tax treatment. It was established during 2007 or 2008 and in good standing with the Arizona Corporation Commission.

3. In a Determination of Liability for Employment or Wages issued on January 11, 2011 (2011 Determination), the Department held that services provided by individuals for the Petitioner as a Cook, including those provided by [redacted], constitute employment under A.R.S. § 23-613.01 and all forms of remuneration paid for such services constitute wages. The Petitioner did not submit an appeal.

4. [redacted] provided services as a Cook for the Petitioner during the 3rd and 4th quarters 2016 and the 1st quarter 2017. The services were the same as those considered in the 2011 Determination.

5. [redacted] provided services as President and CEO for the Petitioner during the audit period. He supervised the management and operations of the business.

6. [redacted] provided services as the VP of Operations for the Petitioner during the audit period. The Petitioner paid Ms. [redacted] for services during the 4th quarter 2016 and the 1st quarter 2017 in the amounts of $1,485.07 and $2780, respectively. The Petitioner treated Ms. [redacted] as an employee from February 27, 2009 to November 30, 2016. As of January 16, 2017, the Petitioner began treating Ms. [redacted] as an independent contractor with the position title, Executive Consultant.

7. The Petitioner's work logs reflect that the VP of Operations' duties include reviewing and replying to emails, answering telephone calls, confirming the process of blogs, emailing the BHS team fully executed contracts, attending weekly insurance meetings and typing up notes, sending the weekly planner and following up on action items, reviewing group calls, working on credentialing and contract matters, and seeking other business opportunities.

REASONING AND CONCLUSIONS OF LAW

It is the public policy of this state to provide economic security for unemployed workers and their families by dedicating reserves to be used for periods of unemployment. A.R.S. § 23-601. State law imposes on every employer for each calendar year an unemployment insurance excise tax with respect to wages paid for employment. The employer's contributions are payable on a quarterly basis and set aside in the state unemployment compensation fund.

In this case, the Petitioner disputes the Reconsidered Determination that held the Petitioner was an employer responsible for contributions and that assessed contributions for payments made for the performance of services for specified positions during the audit period. The Petitioner contends that the services performed by a Maintenance Person ([redacted]), General Laborer ([redacted]), Cook ([redacted]), President and CEO ([redacted]), and VP of Operations ([redacted]) do not constitute employment and that remuneration paid for the performance of those services does not constitute wages. The Petitioner does not contest any other conclusions made in the Reconsidered Determination.

Maintenance Person / General Laborer

Arizona Revised Statutes, Section 23-613.01, provides in pertinent part:

Employee; definition; exempt employment

A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. ...

The July 31, 2023 Reconsidered Determination contained inconsistent statements regarding whether the Petitioner exercised sufficient control over individuals performing services as a Maintenance Person and General Laborer to constitute employment and whether all remuneration paid for such services constitutes wages. The Department clarified its position during the hearing. The Department reversed its original liability determination and held that the Petitioner does not exert sufficient control to constitute employment in either position. Therefore, remuneration paid to individuals performing such services is not wages. The Department removed remuneration paid during the audit period to the Maintenance Person ([redacted]) and General Laborer ([redacted]) from the delinquency assessment. Consequently, the employment status of individuals who perform such services, including Messrs. [redacted] and [redacted], is not in dispute. Services performed for the Petitioner as a Maintenance Person and a General Laborer do not constitute covered employment in accordance with A.R.S. § 23-631.01.

The remaining issues before the Appeals Board are the employment status of individuals performing services as a Cook ([redacted]), President and CEO ([redacted]), and VP of Operations ([redacted]) for the period from January 1, 2016 through December 31, 2017, and whether remuneration paid for those services constitutes wages.

Cook

The Reconsidered Determination held that remuneration paid during the audit period to [redacted] for services performed as a Cook constitutes wages. The Department based this conclusion upon its finding that the 2011 Determination, which held services performed as a Cook were covered employment, was final and could not be reconsidered. The Department determined that the Petitioner failed to comply with the 2011 Determination when it reverted to the former employment status and paid Mr. [redacted] as an independent contractor.

The Petitioner contends that Mr. [redacted] did not perform services during the relevant period. During the hearing the Petitioner witness, the President and CEO, testified that he could not recall whether Mr. [redacted] provided services during the audit period as "it has been a long time [...] and I do not recall." Regarding whether he had any recollection, knowledge or information about the Cook, the witness for the Petitioner testified that he did not. The witnesses for the Department credibly testified that Mr. [redacted] performed services as a Cook and received payments during the audit period. Department records substantiate the testimony and reflect that Mr. [redacted] received payments for those services during three quarters within the audit period. The preponderance of the evidence establishes that Mr. [redacted] performed services as a Cook and received remuneration during the audit period.

The Petitioner contends that it should not be held responsible for unemployment insurance contributions for payments made to a Cook during the audit period because an employer-employee relationship did not exist. The Petitioner alleges that it does not exert sufficient control over services performed by a Cook to constitute employment and that remuneration paid to individuals performing such services is not wages. The Petitioner witness testified that Cooks often resign or leave the business for months or years and later return to work on a part-time basis.

The first issue is whether the 2011 Determination has become final. Arizona Revised Statutes, Section 23-724, in effect during 2011, provides in pertinent part as follows:

Liability determinations; review; finality

A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration. [Emphasis added.]

* * *

A.R.S. § 23-274(F) addresses the effect of a determination when it becomes final. It provides that:

> The determination of the department or decision of the appeals board, together with the record, shall be admissible in any subsequent judicial proceeding involving liability for contributions. A determination or decision that an employing unit is liable that has become final shall be conclusive and binding on the employing unit and shall not be reconsidered in proceedings brought before the department or a hearing officer. [Emphasis added.]

The Department witness credibly testified that the Petitioner did not submit an appeal from the 2011 Determination. The Petitioner did not deny the testimony. Consequently, the 2011 Determination has become final and, under A.R.S. § 23-724(F), is conclusive and binding on the Petitioner. It may not be reconsidered.

The second issue is whether the 2011 Determination may be revised. The Department has the authority to revise a final determination. The requirements to grant a request are outlined in A.R.S. § 23-274. It provides as follows:

C. On an employer's written request and the submission of pertinent information to the department, the department shall, or on its own motion may, consider whether a determination, reconsidered determination or decision that has become final should be revised. Revision shall be granted if either:

1. There has been a substantial and material change in the facts on which the determination, reconsidered determination or decision relied.

2. There has been a change in the law or interpretation of the law that warrants a revised determination, reconsidered determination or decision.

Depending on the circumstances, the revision becomes effective the date on which the change occurred or the first day of the calendar quarter in which the employer submitted both the request and the pertinent information. (A.R.S. § 23-274(D))

The Petitioner submitted a timely request for reconsideration of the Department's original liability determination issued during September 2018 and a timely appeal from the Reconsidered Determination; however, there is no evidence to establish that the Petitioner submitted a written request that the 2011 Determination be revised. The Petitioner did not offer any specific evidence to establish a substantial and material change in the facts on which the Department relied during 2011 when reviewing the employment status of individuals performing services as a Cook or that there has been a subsequent change in the law or its interpretation. The greater weight of the credible evidence in the record does not establish that the Petitioner submitted a request to revise the 2011 Determination. The Appeals Board finds that the 2011 Determination may not be revised at this time.

The Department's January 11, 2011, ruling that services performed by individuals for the Petitioner as a Cook, including Mr. [redacted], constitute employment and all forms of remuneration paid to those individuals constitute wages is final and may not be reconsidered. The Department is not permitted to grant a revision under the current circumstances. In this case, the evidence established that the services provided by Mr. [redacted] during the audit period were the same services as those determined to constitute employment as a Cook during 2011. Therefore, the services performed by Mr. [redacted] during the audit period constitute employment and all forms of remuneration he received constitute wages.

Corporate Officers

In the Reconsidered Determination, the Department held that individuals providing services as the President and CEO and the VP of Operations, including [redacted] and [redacted], are the Petitioner's corporate officers and deemed to be employees by application of Arizona law. (A.R.S. § 23-615(A)(4)) Therefore, the Petitioner is responsible for contributions regarding wages paid to those individuals. In its request for an Appeals Board hearing, the Petitioner identifies Mr. [redacted] and Ms. [redacted] and contends that "[it] would like to further discuss and clarify the specifics of this classification as it applies to the individuals mentioned in the Determination".

In defining an “Employer”, Arizona Revised Statutes, Section 23-613 states the following:

> A. "Employer" means:
>
> * * *
>
> 2. Any employing unit:
>
> (a) That after December 31, 1971 for some portion of a day in each of twenty different calendar weeks, whether or not the weeks are or were consecutive, in either the current or the preceding calendar year, has or had in employment at least one individual irrespective of whether the same individual was in employment in each day. ...

Arizona Revised Statutes, Section 23-614(A), provides in part:

> "Employing unit" means an individual or type of organization, including a partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, [...] which has, or after January 1, 1936 had, one or more individuals performing services for it within this state. ...

The Petitioner is an LLC that elected federal tax treatment as a corporation. Therefore, it is treated as a corporation for the purposes of the unemployment insurance excise tax in Arizona. Arizona DES, *Únemployment Insurance Tax – Employment and Wages FAQ*, https://des.az.gov/services/employment/unemployment-employer/employer-handbook-unemployment-insurance-tax/employment (last visited June 17, 2024).

Pursuant to A.R.S. § 23-613(A)(2)(a), once the corporation has been in existence for 20 weeks in the same calendar year, and has or had in employment at least one individual, the corporation has met the definition of employer under the section. In this case, the Petitioner has met the criteria.

In defining “employment”, Arizona Revised Statutes, Section 23-615(A)(4), states the following:

> A. "Employment" means any service of whatever nature performed by an employee for the person employing the employee, including service in interstate commerce, and includes:
>
> * * *
>
> 4. Service performed by an officer of a corporation.

Arizona Revised Statutes, Section 23-622, provides in pertinent part as follows:

> Wages
>
> A. "Wages" means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the department.

Pursuant to Arizona law, services provided by officers of a corporation constitute employment and all remuneration paid to those employees constitutes wages.

President and CEO - [redacted]

The Reconsidered Determination held that the Petitioner is obligated to pay contributions based on all remuneration paid to individuals who perform services as the President and CEO because the President and CEO is a corporate officer. A witness for the Department testified that Mr. [redacted] position as President and CEO "fit[s] the definition of a corporate officer, that the services that he would be performing constituted employment, and that he would be a statutory employee".

During the hearing, the witness for the Petitioner did not deny that he was a corporate officer. He testified that "I was acting as the President and CEO" for the Petitioner. The witness further testified that the responsibilities of the position "would be basically to oversee the management and operations of [the Petitioner]". He admitted that he received the payments from the Petitioner as alleged by the Department.

In this case, evidence establishes that Mr. [redacted] served as the Petitioner's President and CEO for several years prior to the audit period, during the audit period, and then for some time thereafter. All services provided by the President and CEO, a corporate officer, constitute employment by operation of Arizona Revised Statutes § 23-615(A)(4). Consequently, we conclude from the evidence that Mr. [redacted] was an employee, and that any payments for his services constitute wages by operation of A.R.S. § 23-622(a) and are subject to the unemployment insurance excise tax.

Vice President of Operations – [redacted]

The Reconsidered Determination held that the Petitioner is obligated to for contributions based on all remuneration paid to individuals who perform services as the VP of Operations because the VP of Operations is a corporate officer. The

Department determined that remuneration paid to the VP of Operations for services performed for the Petitioner, including payments paid to Ms. [redacted] during the audit period, constitutes wages as a corporate officer.

During the hearing, the witness for the Department testified that Ms. [redacted] "had received a 1099 in 2017 and had previously been reported as an employee and then was summarily considered an independent contractor [and] was misclassified as an independent contractor and should have been properly reportable as an employee." The witness further testified that there was "a statute for [an] employee as a corporate officer [and considered] the role of vice president of operations to fit that category of corporate officer".

The Petitioner does not deny that individuals who perform services as the VP of Operations are corporate officers and that wages paid to them constitute wages. However, the Petitioner contends that it should not be held responsible for unemployment insurance excise tax contributions for payments made to Ms. [redacted] during at least a portion of the audit period because an employer-employee relationship did not exist. The Petitioner alleges that Ms. [redacted] resigned her position as the VP of Operations during the audit period and later returned and provided services as an Executive Consultant in an independent contractor capacity. The Petitioner alleges that it did not exert sufficient control over services performed by an Executive Consultant to constitute employment and that remuneration paid to individuals performing those services was not wages.

The Petitioner did not provide any specific facts to the Department when the audit was performed or during the hearing to reflect that there were substantial differences between the duties performed by the VP of Operations and those by the Executive Consultant and the controls the Petitioner asserted upon individuals performing those roles. Specifically, there is no evidence in the record to reflect Ms. [redacted] performed any duties throughout the audit period other than those that fell within the scope of responsibility by the VP of Operations. The witness for the Department testified that when there has "been a change from W-2 to independent 1099, and the services are exactly the same prior and after, we would then say they're still in covered employment".

The Petitioner contends that it is uncertain whether Ms. [redacted] provided services for the Petitioner during the audit period. However, based on the information obtained by the Department, including the credible testimony of the Department witnesses, records of the Department's direct communications with the Petitioner, and documentary evidence obtained from the Petitioner, the evidence establishes that Ms. [redacted] provided services for the Petitioner and received payments for those services during at least two quarters within the audit period. The preponderance of the evidence establishes that Ms. [redacted] performed services and received remuneration during the audit period.

The Petitioner further contends that Ms. [redacted] did not provide services on a full-time basis for the Petitioner. During the hearing, the witness for the Petitioner questioned whether working or consulting only five hours a week or ten hours a month would still be considered employment. The witness for the Department testified that "Arizona makes no distinction between the number of hours. Services performed by whatever nature can be on a part-time, full-time, on-call or as-needed basis". We concur.

In this case, Ms. [redacted] functioned as a corporate officer for the Petitioner during the audit period. The services provided by Ms. [redacted] as VP of Operations are consistent with those of a corporate officer.

All services provided by the VP of Operations, a corporate officer, constitute employment by operation of A.R.S. § 23-615(A)(4). Consequently, we conclude from the evidence that Ms. [redacted] was an employee, her services constitute employment, and that any payment for her services constitutes wages by operation of A.R.S. § 23-622(a) and are subject to the unemployment insurance excise tax.

Statute of Limitations

The Petitioner contends that the Department did not have the authority to assess the additional contributions against the business because it did not act within the timeframes provided by state law. The statute of limitations, A.R.S.§ 23-743(A), precludes the Department from assessing additional contributions, interest, or penalties after three years from the date the contributions became delinquent. Here, contributions for the 2016 through 2017 audit period first became delinquent on May 1, 2016. Both the Department's original Determination of Liability for Employment or Wages and the Determination of Unemployment Insurance Liability were issued on September 10, 2018, within the three-year statutory period.

The statute of limitations, A.R.S.§ 23-743(B), extinguishes the employer's assessment liability for contributions, interest, or penalties if it is not collected by the Department six years after the liability was determined due; however, the enforced collection period is extended if collections have been stayed by operation of federal or state law during the period. (A.R.S.§ 23-743(B)(3)) In this case, the amounts were determined due on September 10, 2018. The enforced collection period would have ended on September 10, 2024; however, it was extended because the Department's right to enforce the obligation was stayed when the Petitioner timely filed the request for reconsideration and then the appeal from the Reconsidered Determination. Assessments are not final until the liability itself becomes final. The bar extinguishing collections is not yet applicable because the liability has been under review. The amount due or owing has not been subject to review because of the pending appeal to the liability and,

therefore, the assessment is not extinguished. Accordingly,

DECISION

THE APPEALS BOARD **AFFIRMS** the Reconsidered Determination issued on July 31, 2023.

We conclude that services performed for the Petitioner as a Maintenance Person and a General Laborer do not constitute covered employment in accordance with A.R.S. § 23-631.01. Specifically, payments by the Petitioner to [redacted] and [redacted], from January 1, 2016 through December 31, 2017 for their services in those positions do not constitute wages.

We conclude that the Determination of Liability for Wages or Employment issued January 11, 2011, is final. All services performed by individuals as a Cook constitute employment and renumeration paid for those services constitutes wages. We find that [redacted] was an employee of the Petitioner for services provided as a Cook and that all payments made to him for his services from January 1, 2016 through December 31, 2017, constitute wages.

We conclude that individuals performing services as the President and CEO and the Vice President of Operations are corporate officers, services performed by those individuals constitute employment, and remuneration paid to them constitutes wages. We find that [redacted] and [redacted] were corporate officers from January 1, 2016 through December 31, 2017. Their services constitute employment by operation of Arizona Revised Statutes § 23-615(A)(4) and all payments made to them from January 1, 2016, through December 31, 2017, constitute wages.

DATED: 6/26/2024

APPEALS BOARD

NANCY MILLER, Chairman

DENISE E. MOORE, Member

WILLIAM G. DADE, Member

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See,* Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3442**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

> C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
>
> D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
>
> 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to

prevent or enjoin the collection of any tax, penalty or interest.

2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 6/26/2024
to:

(x) Er: [redacted] Acct. No:

(x) DONALD BAIER
ASST ATTORNEY GENERAL
2005 N CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

(x) MARIA VANRAALTE, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: _LS_____
For The Appeals Board