# DEPARTMENT OF ECONOMIC OPPORTUNITY
## Reemployment Assistance Appeals
## THE CALDWELL BUILDING
## 107 EAST MADISON STREET
## TALLAHASSEE FL 32399-4143

**PETITIONER:**
Employer Account No. - 3036409
ALTERNATIVE SUPPORT APPARATUS
ATTN: MARK A NATOLI PRESIDENT
PO BOX 556
MIDVALE OH 44653-0556

**RESPONDENT:**
State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

**PROTEST OF LIABILITY**
**DOCKET NO. 2011-119233L**

**O R D E R**

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated July 25, 2011, is AFFIRMED.

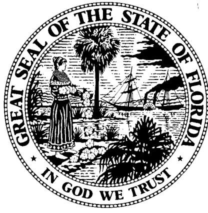
**JUDICIAL REVIEW**

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY]* en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt *Lòd* sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _______ day of **July, 2012**.



Altemese Smith,
Assistant Director,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

DEPUTY CLERK DATE

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _______ day of July, 2012**.

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

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DOR BLOCKED CLAIMS UNIT
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

**DEPARTMENT OF ECONOMIC OPPORTUNITY**
**Unemployment Compensation Appeals**
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DEPARTMENT OF ECONOMIC
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**DOCKET NO. 2011-119233L**

# RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated July 25, 2011.

After due notice to the parties, a telephone hearing was held on May 30, 2012. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

**Issue:**

Whether services performed for the Petitioner by the Joined Party and other individuals in sales constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

**Findings of Fact:**

1. The Petitioner is a company located in Ohio which manufactures and markets off-road emergency vehicles. The Petitioner's vehicles are usually sold by dealers to municipalities and other government entities.

2. The Joined Party is a resident of Florida who has an extensive history of employment in sales. Prior to August 2010 the Joined Party was last employed by a company that was a dealer for the Petitioner's vehicles. The Petitioner's president became acquainted with the Joined Party through that association. The dealer went out of business and the Joined Party lost his employment. The Petitioner then offered the Joined Party work as a sales representative for the Petitioner. The Joined Party accepted the offer and began work on or about August 1, 2010.

3. There was no written contract or agreement between the parties other than a document stating what was expected of the Joined Party in regards to sales results. The Petitioner told the Joined Party that the rate of pay was $1,250 per bi-monthly pay period, with paydays on the first and fifteenth of each month.

4. The Joined Party flew to Ohio for two days of initial training in August 2010. The Petitioner paid for the flight, the hotel, meals, and other expenses in connection with the training. The training was provided by the individual the Joined Party was to report to, the Sales Manager. The training consisted of how to represent the product, how to do a quote, how to operate the off-road vehicles, and the features and benefits of the Petitioner's vehicles. The Petitioner informed the Joined Party that the Joined Party was the sales representative for Florida but that the Petitioner would also allow the Joined Party to make sales in Georgia and Alabama.

5. The Petitioner determined the prices of the Petitioner's vehicles. The Petitioner has a long list of options that may be installed on the vehicles. It was the Joined Party's responsibility to contact potential customers, demonstrate the vehicle, determine what options the customer wanted, mark the options on the quote sheet, and quote the total price to the customer.

6. The Petitioner provided the Joined Party with a truck, a trailer, and an off-road demonstration vehicle. The Petitioner was responsible for the fuel, maintenance, repairs, license, insurance, and other costs of operating the truck, trailer, and demonstration vehicle. The Petitioner provided the Joined Party with a credit card to be used for business expenses. The Petitioner provided the Joined Party with a cell phone for company business. The Petitioner provided the Joined Party with business cards listing the Petitioner's name, logo, business address, website address, the Joined Party's name and title of sales representative, and the Joined Party's telephone number. The Petitioner provided the Joined Party with a company e-mail address.

7. The Petitioner provided the Joined Party with sales leads. The Joined Party was required to make contact with the sales leads and was required to report the status of each of the leads. The Joined Party reported directly to the Sales Manager but also reported to the Petitioner's president. The Joined Party was required to provide a written report to the president, at least monthly, listing all of the sales attempts and contacts that the Joined Party had made during the month and the status of those sales contacts.

8. The Joined Party was prohibited from selling products or performing any services for a competitor. The Joined Party believed that he was not allowed to hire others to perform the work for him. The Joined Party did not have any investment in a business, did not have an occupational or business license, and did not offer his services to the general public. The Joined Party always believed that he was the Petitioner's employee.

9. The Petitioner paid the Joined Party $1,250 on each bi-monthly pay day until March 1, 2011, when the Petitioner unilaterally reduced the Joined Party's pay to $575 per bi-monthly pay period. The Petitioner did not withhold any taxes from the pay and did not provide any fringe benefits such as medical insurance or retirement benefits. The Joined Party never took a vacation and was never absent from work except for one occasion when he had the flu. The Joined Party was allowed to take time off from work without a reduction in pay.

10. At the end of 2010 the Petitioner reported the Joined Party's earnings for 2010 on Form 1099-MISC as nonemployee compensation. The Petitioner reported earnings of $11,250.00 for 2010.
11. Either party had the right to terminate the relationship at any time without a penalty for breach of contract. The Joined Party devoted his full efforts toward selling the Petitioner's products, however, due to the economy potential customers told the Joined Party that they did not have the money in their budgets to purchase the vehicles. The Petitioner's president was not satisfied with the Joined Party's sales efforts due to the lack of sales and terminated the Joined Party on June 1, 2011.
12. The Joined Party filed a claim for unemployment compensation benefits effective June 5, 2011. His filing on that date established a base period consisting of the 2010 calendar year. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.
13. On July 25, 2011, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services as sales are the Petitioner's employees retroactive to August 14, 2010. The Petitioner filed a timely protest by mail postmarked August 12, 2011.

**Conclusions of Law:**

14. The issue in this case, whether services performed for the Petitioner by the Joined Party constitute employment subject to the Florida Unemployment Compensation Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.
15. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).
16. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987). In Brayshaw v. Agency for Workforce Innovation, et al; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the Department is limited to applying only Florida common law in determining the nature of an employment relationship.
17. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.
18. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:
    (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.

    (2) The following matters of fact, among others, are to be considered:
    (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
    (b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant;
(j) whether the principal is or is not in business.

19. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties.

20. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

21. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

22. The evidence presented in this case does not establish the existence of any written or verbal agreement or contract specifying that the Joined Party was engaged by the Petitioner as an independent contractor. The Joined Party testified that he always believed that he was the Petitioner's employee.

23. The Petitioner's business is the manufacture and sale of specialty off-road vehicles. The Joined Party was engaged to sell the Petitioner's vehicles in Florida, Georgia, and Alabama. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the business. The Joined Party was prohibited from performing services for a competitor. The Petitioner provided everything that was needed to perform the work. The Petitioner provided a truck, a trailer, and a demonstration vehicle. The Petitioner provided the Joined Party with a telephone. The Petitioner was responsible for the payment of all business expenses. The Joined Party did not have any investment in a business and did not have any expenses in connection with the work. The Joined Party was not at risk of suffering a financial loss from performing services for the Petitioner.

24. The Petitioner provided training to the Joined Party concerning, among other things, how to represent the Petitioner's product. Although the Joined Party has extensive experience in sales it was not shown that any skill or special knowledge was required to perform the work. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

25. The Joined Party was paid by time worked rather than by production. The method of pay and the rate of pay were controlled solely by the Petitioner and the Petitioner unilaterally reduced the pay

on March 1, 2011. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash. The fact that the Petitioner chose not to withhold payroll taxes or provide fringe benefits does not, standing alone, establish an independent contractor relationship.

26. Although the Joined Party worked from a remote location, his residence in Florida, the Petitioner supervised the Joined Party and his activities. The Joined Party was required to report to both his immediate supervisor, the Sales Manager, and the Petitioner's president. The Joined Party was required to report all sales attempts and contacts with prospective customers. He was required to contact each of the leads provided by the Petitioner and to report on the progress of each lead. These facts demonstrate that the Petitioner had the right to control how the work was performed and exercised that control. It is not necessary for the employer to actually direct or control the manner in which the services are performed; it is sufficient if the agreement provides the employer with the right to direct and control the worker. Of all the factors, the right of control as to the mode of doing the work is the principal consideration. VIP Tours v. State, Department of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984)

27. The Joined Party performed services exclusively for the Petitioner from August 1, 2010, until June 1, 2011, a period of ten months. Either party had the right to terminate the relationship at anytime without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner discharged the Joined Party. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."

28. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

29. Section 443.036(21), Florida Statutes defines "employment" as a service subject to this chapter under s. 443.1216 which is performed by an employee for the person employing him or her. It is concluded that the services performed for the Petitioner by the Joined Party constitute employment.

30. Section 443.1216, Florida Statutes, provides in pertinent part that employment, as defined in 443.036, is subject to this chapter under the following conditions:
    (7) The employment subject to this chapter includes an individual's entire service, performed inside or both inside and outside this state if:
        (a) The service is localized within this state; or
        (b) The service is not localized within any state, but some of the service is performed in this state, and:
            1. The base of operations, or, if there is no base of operations, the place from which the service is directed or controlled, is located within this state; or

2. The base of operations or place from which the service is directed or controlled is not located within any state in which some part of the service is performed, but the individual's residence is located within this state.

31. The Petitioner's base of operations is in Ohio. Although the Joined Party made trips to the factory in Ohio from his residence in Florida, the Joined Party did not perform services for the Petitioner in Ohio. Thus, the employment is subject to the Florida Unemployment Compensation Law.

32. Section 443,1215, Florida Statutes, provides:
    1) Each of the following employing units is an employer subject to this chapter:
        (a) An employing unit that:
            1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
            2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day

33. The Joined Party began employment with the Petitioner on August 1, 2010. He performed services during the third and fourth calendar quarters 2010 and received wages in the amount of $11,250.00. Thus, the Petitioner paid wages of at least $1,500 during a calendar quarter and has established liability for payment of unemployment compensation tax on the Joined Party's wages.

34. The July 25, 2011, determination holds the Petitioner liable for payment of unemployment compensation tax effective August 14, 2010. Since the Joined Party began his employment on August 1, 2010, the correct effective date of liability is August 1, 2010.

**Recommendation:** It is recommended that the determination dated July 25, 2011, be MODIFIED to reflect the effective date of liability as August 1, 2010. As modified it is recommended that the determination be AFFIRMED.

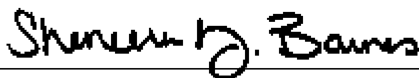
Respectfully submitted on June 4, 2012.

R. O. SMITH, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envió por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke *Lòd Rekòmande* a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke *Lòd Rekòmande* a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozizyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.



SHANEDRA Y. BARNES, Special Deputy Clerk

**Date Mailed:**
**June 4, 2012**

Copies mailed to:
Petitioner
Respondent
Joined Party

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