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

PETITIONER:
Employer Account No. - 2845061
TREBDAYCO INC
ATTN: MICHAEL LUCCI
4900 LYONS TECHNOLOGY PARKWAY STE 7
COCONUT CREEK FL 33073-4357

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

PROTEST OF LIABILITY
DOCKET NO. 2011-153993L

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 August 19, 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.

Shanedra Y. Barnes
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
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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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
MSC 347 CALDWELL BUILDING
107 EAST MADISON STREET
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PROTEST OF LIABILITY
DOCKET NO. 2011-153993L

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

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 August 19, 2011.

After due notice to the parties, a telephone hearing was held on June 6, 2012. The Petitioner, represented by the Petitioner's president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, 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:

TIMELINESS: Whether a response was filed by a party entitled to notice of an adverse determination within fifteen days after the mailing of the Order to Show Cause to the address of record or, in the absence of mailing, within fifteen days after delivery of the order, pursuant to Florida Administrative Code Rule 73B-10.035(5).

Whether services performed for the Petitioner by the Joined Party and other individuals working as office sales associates 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 filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a corporation which was formed on September 14, 2007, for the purpose of operating a flooring business. The Petitioner's president's former wife operated a flooring business from the same business location until September 2007. The Petitioner's president was active in his wife's business as a salesman. His former wife was active in the business doing clerical work including working as a front desk clerk, ordering materials and supplies, scheduling the installation of the floors, answering the telephone, and screening the telephone calls.
2. The Joined Party worked for the former company as a commissioned salesman. On or about September 27, 2007, when the Petitioner took over the business the Petitioner's president told the Joined Party that he could continue working as a salesman and that he would be paid a commission of 25% of the profit from the jobs that the Joined Party sold. The president told the Joined Party that the Petitioner would pay the Joined Party $300 per week to perform the duties that were previously performed by the former wife. The president informed the Joined Party that he was required to open the business each day, remain at the office from 9 AM until 5 PM, Monday through Friday, and from 10 AM until 3 PM on Saturday. The president told the Joined Party that the Joined Party could make outside sales before 9 AM and after 5 PM. The Joined Party accepted the offer.
3. There were no written agreements or contracts between the parties.
4. The Petitioner provided the business location, a desk, and telephone. The flooring samples were provided by the flooring distributors. The Joined Party was not required to provide anything to perform the work. The Joined Party did not have any expenses in connection with the work.
5. The Joined Party remained at the business location from 9 AM until 5 PM as instructed and from 10 AM until 3 PM on Saturdays. Since the president was out of the office most of the time, and since no one else worked in the office, the Joined Party did not believe that he was authorized to leave the office for lunch or other reasons. The Petitioner's president never came into the office on Saturdays and in approximately 2010 the president informed the Joined Party that the business was no longer to be open on Saturdays.
6. When the Joined Party sold floor covering the Joined Party determined the sales price and determined which installer to use. The Joined Party scheduled the installer. The Petitioner paid for the flooring materials and paid for the installation. When the president sold a floor the president told the Joined Party which installer to schedule and when to schedule the installation.
7. The Petitioner frequently reprimanded the Joined Party. Whenever anything went wrong on a job the president blamed the Joined Party, whether the Joined Party was at fault or not.
8. The Petitioner usually paid the Joined Party the $300 per week pay at three week intervals. The Petitioner usually paid the Joined Party for any commission which the Joined Party earned when the money was available. No taxes were withheld from either the weekly pay or the commission pay. The Petitioner did not provide any fringe benefits to the Joined Party. At the end of 2007, 2008, 2009, and 2010, the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation. The Petitioner did not provide any earnings statement to the Joined Party, such as Form 1099-MISC, for 2011.
9. The earnings reported by the Petitioner for the Joined Party were $30,420.23 for 2008, $20,130 for 2009, and $20,346 for 2010.

10. Either party had the right to terminate the relationship at any time. In June 2011 the Petitioner discharged the Joined Party when the Petitioner told the Joined Party to leave and not return to work.

11. During the time that the Joined Party performed services for the Petitioner he did not have any investment in a business, did not advertise or offer services to the general public, did not perform services for other flooring businesses, did not have business liability insurance, and did not have an occupational or business license. The Joined Party believed that he was an employee of the Petitioner and did not believe that he had the right to work for others or to hire others to perform the work for him.

12. The Joined Party filed an initial claim for unemployment compensation benefits effective June 12, 2011. 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 as an employee or as an independent contractor.

13. On August 19, 2011, a Tax Specialist with the Department of Revenue determined that the Joined Party and other individuals performing services for the Petitioner are the Petitioner's employees retroactive to September 27, 2007. The Tax Specialist personally mailed the determination to the Petitioner's correct address of record. Among other things the determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter."

14. The Petitioner did not receive the determination. The Petitioner learned of the determination in November 2011 and obtained a copy of the determination from the Department of Revenue. On November 23, 2011, the Petitioner contacted the Tax Specialist by telephone and was advised to file an appeal. The Petitioner filed an appeal by letter dated November 25, 2011.

15. On December 27, 2011, the Department of Economic Opportunity mailed an *Order to Show Cause* to the Petitioner's correct address of record directing the Petitioner to file a written statement within fifteen calendar days explaining why the Petitioner's protest should not be dismissed for lack of jurisdiction. The Petitioner did not respond to the *Order to Show Cause* because the Petitioner did not receive the *Order to Show Cause* in the mail.

16. On March 15 2012, an *Order* was mailed by the Department of Economic Opportunity which states "An *Order to Show Cause* mailed to the Petitioner on December 27, 2011, provided fifteen (15) calendar days for the Petitioner to explain why its protest filed November 25, 2011, should be considered a timely appeal to the determination dated August 19, 2011. Since no evidence of timely filing was received, the Petitioner's protest is dismissed pursuant to rule 60BB-2.035(5), Florida Administrative Code."

17. The Petitioner responded to the *Order* by letter dated March 29, 2012, requesting to reopen the appeal because the Petitioner never received the *Order to Show Cause.* On May 3, 2012, the Assistant Director of the Department of Economic Opportunity issued an *Order* setting aside the *Final Order* dated March 15, 2012, and remanding the case for a hearing.

Conclusions of Law:

18. Rule 73B-10.035(5)(b), Florida Administrative Code provides that if a protest appears to have been filed untimely, the Department of Economic Opportuinity may issue an *Order to Show Cause* to the Petitioner, requesting written information as to why the protest should be considered timely. If the Petitioner does not, within 15 days after the mailing date of the *Order to Show Cause*, provide written evidence that the protest is timely, the protest will be dismissed.

19. Although an *Order to Show Cause* was mailed to the Petitioner, the Petitioner did not receive it and did not have an opportunity to respond. As a result the Petitioner is granted an opportuinity to present evidence concerning the filing of the protest.

20. Section 443.141(2)(c), Florida Statutes, provides:
    (c) *Appeals.*--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.

21. Rule 73B-10.035(5)(a)1., Florida Administrative Code, provides:
    Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.

22. The evidence reveals that the Tax Specialist personally mailed the August 19, 2011, determination to the Petitioner's correct address of record. In spite of that evidence the Petitioner's testimony reveals that the determination was not received. The Petitioner did not learn of the determination until November 2011 when the Department of Revenue provided a copy. Upon receipt of the copy the Petitioner immediately filed an appeal. Thus, the Petitioner's protest is accepted as timely filed.

23. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as inside sales associates 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.

24. 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).

25. 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.

26. 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.

27. 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.

28. 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.

29. 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.

30. There was no written agreement or contract between the parties. The verbal agreement merely provided that the Joined Party would perform specified duties, within a specified work schedule, and that the Petitioner would pay the Joined Party $300 per week plus a 25% commission on the profit from any sales made by the Joined Party. 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."

31. The Petitioner operates a flooring business. The Petitioner sells the flooring products and arranges for the installation of the products. The Joined Party was responsible for answering the telephone at the Petitioner's business location, screening the calls, ordering the flooring products, and scheduling the installations. The Joined Party was also responsible for, along with the Petitioner's president, selling the Petitioner's products. Everything that was needed to perform the work was provided by the Petitioner. 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 Petitioner's business.

32. Although the Joined Party had prior experience as a flooring salesperson 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)

33. The Petitioner paid the Joined Party by time worked plus a commission on the profit of any sales made by the Joined Party. Based on the total annual earnings reported by the Petitioner on Form 1099-MISC the weekly wages significantly exceeded the commissions. 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 from the pay does not, standing alone, establish an independent contractor relationship.

34. It is noted that the Petitioner testified that the $300 weekly wage was a draw against commissions. However, the evidence also reveals that the Petitioner never told the Joined Party that the weekly wage was a draw or loan against future earnings, never tracked the weekly pay against earned commissions, and did not require repayment if the weekly payments exceeded earned commissions. Thus, the Petitioner's testimony that the weekly payments were draws against commission is rejected.

35. The Petitioner required the Joined Party to work specified days and hours. The Joined Party was required to open the business office each day at 9 AM, and to remain at the Petitioner's office until 5 PM. The Petitioner, not the Joined Party, controlled the place of work and the days and hours of work.

36. The Joined Party performed services exclusively for the Petitioner from September 2007 until June 2011, a period of approximately four years. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence, typical of an employer-employee relationship.

37. The Petitioner terminated 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."

38. The Joined Party testified that he always believed that he was the Petitioner's employee and that he never believed that he was performing services that were independent of the Petitioner's business. The Joined Party did not have any investment in a business and did not perform services for others. He did not have liability insurance, did not have an occupational or business license, did not advertise, did not have expenses in connection with the work, and was not at risk of suffering a financial loss from services performed.

39. The Petitioner controlled what work was to be performed, where it was to be performed, and when it was to be performed. The Petitioner frequently reprimanded the Joined Party concerning how the work was performed. The reprimands reveal that the Petitioner had the right to control the manner in which the work was performed. 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.

40. The Petitioner exercised significant control over the Joined Party. Thus, it is concluded that the services performed for the Petitioner by the Joined Party and other similarly situated workers constitute insured employment.

Recommendation: It is recommended that the Petitioner's protest be accepted as timely filed. It is recommended that the determination dated August 19, 2011, be AFFIRMED.

Respectfully submitted on June 12, 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 opozisyon 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

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
June 12, 2012

Copies mailed to:
Petitioner
Respondent
Joined Party

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