THE DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2169723

NEXTSTEP MARKETING INTERNATIONAL IN
ATTN: JUNE KOTELES
8597 BONITA ISLE DR
LAKE WORTH FL 33467

PROTEST OF LIABILITY
DOCKET NO. 2011-17382L

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

O R D E R

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner by the Joined Party constitute insured employment, and if so, the effective date of liability pursuant to Sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed an unemployment compensation claim prior to January 2011. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency (the Agency for Workforce Innovation and its successor, the Department of Economic Opportunity) that she worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As a result of the Joined Party's request, the Department of Revenue (DOR) conducted an investigation to determine whether the Joined Party worked for the Petitioner as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, she would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes on the remuneration it paid to the Joined Party. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, she would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the wages it paid to the Joined Party. Upon completing the investigation, an auditor at DOR determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages it paid to the Joined Party. The Petitioner filed a timely

protest of the determination. The claimant who requested the investigation was joined as a party because she had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on June 14, 2011. The case was held as a consolidated hearing for docket numbers 2010-54782L and 2011-17382L. The Petitioner, represented by its president, appeared and testified. Six former data managers appeared as witnesses for the Petitioner. The Respondent, represented by a DOR Tax Auditor II, appeared and testified. The Joined Party for each case appeared and testified on her own behalf. The Special Deputy issued a recommended order on August 8, 2011.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is a corporation which operated a media consulting business from November 1996 until July 31, 2009. The business was operated from the home of the Petitioner's president. The Petitioner's clients included television, radio, newspaper, cable, and billboard companies. The Petitioner provided a variety of services to its clients to help the clients increase the clients' advertising revenue. The Petitioner used newspaper advertising data from various cities in providing the consulting services for the Petitioner's clients.
2. The Petitioner hired Joined Party Tracey Lee on or about June 19, 2000, to be a Data Manager. Data Managers were responsible for reviewing the advertisements published in various newspapers, measuring the advertisements, compiling data about the advertisements, and inputting the data into the Petitioner's computer system. Tracey Lee was trained by other Data Managers who were employed by the Petitioner. Tracey Lee was taught to use red ink pens to mark certain advertisements and blue ink pens to mark other types of advertisements. The Petitioner provided her with two boxes of red ink pens, two boxes of blue ink pens, an eighteen inch ruler, and an easel. Tracey Lee was required to provide her own computer and the Petitioner loaded the Petitioner's software on the computer. Tracey Lee performed the work from her own home.
3. The Petitioner determined that Tracey Lee would be paid $200 per week for each newspaper that she was assigned to analyze. The Petitioner provided the newspapers. The Petitioner withheld payroll taxes from the pay and at the end of each year the Petitioner reported the earnings on Form W-2 as wages. No fringe benefits were provided with the exception of a Christmas bonus.
4. Joined Party Ashley Interlandi was hired by the Petitioner to be a Data Manager on or about December 1, 2003. At that time the Petitioner had approximately ten Data Managers who were employees of the Petitioner. Ashley Interlandi is the niece of Tracey Lee. Tracey Lee trained Ashley Interlandi in the same manner that she had been trained when she began her employment in 2000. The Petitioner provided the same tools, supplies, and computer software to Ashley Interlandi as had been provided to Tracey Lee. The Petitioner provided the newspapers. Taxes were withheld from the pay and at the end of 2003 the Petitioner reported the earnings on Form W-2 as wages. Ashley Interlandi was hired by the Petitioner under the same terms and conditions as Tracey Lee.
5. The Petitioner established a deadline each week, 5 PM on Thursday, for the Data Managers to complete the work and to upload the data. The Petitioner would then review the data that was uploaded and notify each Data Manager if there were any corrections to be made, such as spelling errors. The Data Managers were required to make the corrections unless it could be

shown that there was no error. The Data Managers were required to keep the newspapers for three months after the information was uploaded.

6. Some newspapers contained advertising supplements; however, it was a common occurrence that the supplements were missing from the newspapers that were delivered to the Data Managers. The Petitioner would not be aware if a Data Manager missed some of the advertisements in the newspaper. The Petitioner would be aware after reviewing the uploaded data if a Data Manager missed an advertising supplement. The Petitioner would contact the Data Manager so that the Data Manager could check the newspaper to see if the advertising supplement was present. If the supplement was missing the Petitioner would provide the supplement to the Data Manager.
7. Tracey Lee and Ashley Interlandi worked from their homes without direct supervision. They determined when to perform the work as long as the work was completed before the deadline. They were not required to track the hours worked or to report the hours to the Petitioner.
8. Effective January 1, 2004, the Petitioner decided to reclassify all of the Data Managers from employees to independent contractors. The only change in the terms and conditions of the work was that the Petitioner discontinued withholding payroll taxes from the pay. Beginning with 2004 the Petitioner reported the earnings of each Data Manager on Form 1099-MISC as nonemployee compensation.
9. In April 2006 the Petitioner created an *Independent Contractor Agreement* to be signed by the Data Managers. The Agreement did not represent any change in the duties, method of pay, or terms and conditions under which the work was performed. Ashley Interlandi signed the Agreement on April 17, 2006, and Tracey Lee signed the Agreement on April 25, 2006.
10. The *Independent Contractor Agreement* states that the term of the agreement is for a period of one year and that the Agreement will automatically renew each year unless written notice of non-renewal is provided by either party at least thirty days prior to the end of any one year term unless the Agreement was voluntarily terminated by either party by giving at least fourteen calendar days notice of termination, or unless the agreement was terminated by the Petitioner without notice for cause.
11. The *Independent Contractor Agreement* states that the Data Manager is responsible for performing certain services, including but not limited to: inputting of newspaper advertising data into the Petitioner's software and transferring the data to the Petitioner's FTP site to meet weekly and monthly deadlines; checking and correcting advertising data entered; contacting points of origination for newspapers to address shipping related issues; obtaining advertising rates from newspapers; accessing vendor source memberships for information and using that information to produce reports and graphs and inputting certain information obtained from those sources into the Petitioner's software; producing periodic reports for clients; creating instruction manuals, charts, and spreadsheets for both internal use and for use by the Petitioner's clients; creating training programs utilizing software purchased by the Petitioner; e-mailing reports and information to clients; helping clients and prospects; and being responsible for all other services requested by the Petitioner. The Agreement provides that the Data Manager shall act in good faith and devote as much time as is reasonably necessary to perform the responsibilities assigned from time to time by the Petitioner.
12. The *Independent Contractor Agreement* provides that the Petitioner will pay the Data Manager, for delivery of assigned services on or before the deadline, a regular, set gross amount on a bi-weekly basis, the amount of which will be subject to adjustment by the Petitioner, at the Petitioner's sole discretion, based on the workload and performance of the Data Manager. The Agreement provides that the Data Manager is not limited to working a forty hour workweek and is not entitled to additional compensation for any hours in excess of forty hours in a workweek. The Agreement states that it is understood that the Petitioner is not required to withhold taxes from any payment.

13. The *Independent Contractor Agreement* provides that any inventions, developments, creative works, and useful ideas of any description resulting from or related to work performed for the Petitioner by the Data Manager, whether during regular business hours or not, which the Data Manager conceives or develops, either in whole or in part, either alone or jointly with others, during the term of the engagement with the Petitioner, will be the sole property of the Petitioner.
14. The *Independent Contractor Agreement* states that Agreement and all of the Data Manager's rights, duties, and obligations under the Agreement are personal in nature and shall not be assignable by the Data Manager. The *Independent Contractor Agreement* provides that during the Data Manager's engagement with the Petitioner, and for a period of twelve months after termination, the Data Manager shall not, without the authorized express written approval of the Petitioner, directly or indirectly own, manage, participate in or otherwise engage in any form or have any connection with any business which is in the business, in whole or in part or is in any way involved in the business, of supplying and/or marketing newspaper advertising data. The Agreement provides that the Data Manager may make passive investments in a competitive enterprise, the shares of which are publicly traded, provided that the Data Manager's holdings in such enterprise do not exceed five percent of the outstanding shares of stock of such enterprise.
15. The Data Managers were not required to notify the Petitioner if the Data Manager was ill or unable to work on any particular day unless the illness would prevent the Data Manager from meeting the deadline. In July 2007 Joined Party Ashley Interlandi was ill and was hospitalized. She was not able to meet the deadline and asked the Petitioner for permission to allow Joined Party Tracey Lee to perform the work for her. The request was granted.
16. For a period of time the Petitioner assigned to Joined Party Tracey Lee the responsibility of ensuring that all of the Data Managers received their assigned newspapers each week. The Petitioner paid additional money to Tracey Lee for performing that assigned duty. Subsequently, the Petitioner assigned that responsibility to another Data Manager. The Petitioner did not reduce the pay of Tracey Lee even though Tracey Lee was no longer responsible for performing that task.
17. The Petitioner assigned to Tracey Lee the responsibility of training several new Data Managers, including Ashley Interlandi. No additional pay was provided for training the Data Managers. The Petitioner also started a toll free twenty-four hour help line for the Petitioner's clients. The Petitioner told Tracey Lee that Tracey Lee had to be on-call twenty-four hours a day in case the Petitioner needed to contact Tracey Lee for information in regard to any call which the Petitioner received from a client on the help line, so that the Petitioner could respond to the client.
18. Neither Joined Party Tracey Lee nor Joined Party Ashley Interlandi had any occupational or business license, or liability insurance. Neither offered data management services to the general public or performed data management services for anyone other than the Petitioner. Even though both Tracey Lee and Ashley Interlandi were informed by the Petitioner in January 2004 that they had been reclassified by the Petitioner to be independent contractors, and although both Tracey Lee and Ashley Interlandi signed the Independent Contractor Agreement in April 2006, they believed that, at all times, they were employees of the Petitioner.
19. By certified letter mailed June 18, 2009, the Petitioner notified all of the Data Managers, including Joined Party Tracey Lee and Joined Party Ashley Interlandi, that the *Independent Contractor Agreement* was canceled effective July 17, 2009. The Petitioner ceased operations on July 31, 2009.

Based on these Findings of Fact, the Special Deputy recommended that the determination be affirmed. The Petitioner's exceptions to the Recommended Order were received by mail on August 22, 2011. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

The Petitioner takes exception to the Special Deputy's credibility determination in favor of the Joined Party and proposes alternative findings of facts and conclusions of law. Pursuant to section 120.57(1)(l), Florida Statutes, the Special Deputy is the finder of fact in an administrative hearing and the Agency may not reject or modify the Special Deputy's Findings of Fact unless the Agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Also pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Conclusions of Law unless

the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy resolved conflicts in evidence in favor of the Joined Party, the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record, and the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As a result, the Agency may not modify the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. The Petitioner's exceptions are respectfully rejected.

The Petitioner also takes exception to several alleged procedural errors associated with the hearing. Specifically, the Petitioner alleges that it experienced unfair surprise in regard to written materials, the Special Deputy requested other witnesses for the Petitioner other than its president's family members, the Petitioner was given "serious misinformation," the Petitioner was told that it did not need an attorney, and the Petitioner was given incorrect information. As previously stated, section 120.57(1)(l), Florida Statutes, does not permit modification or rejection of the Special Deputy's Findings of Fact or Conclusions of Law unless the findings of fact are not supported by competent substantial evidence in the record, the proceedings on which the findings were based did not comply with the essential requirements of law, or the conclusions of law do not represent a reasonable application of the law to the facts. A review of the record demonstrates that the alleged procedural errors did not occur and that evidence in the record does not support the Petitioner's allegations. A review of the record also reflects that the Petitioner was given an opportunity to ask questions about the procedures, did not object to any procedures, and did not make any objections regarding unfair surprise during the hearing. A review of the record further reflects that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record, the proceedings complied with the essential requirements of law, and the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. Accordingly, the Agency accepts both the Special Deputy's Findings of Fact and Conclusions of Law without modification in accord with section 120.57(1)(l), Florida Statutes. The Petitioner's exceptions that allege procedural errors are respectfully rejected.

The Petitioner also contends that it complied with the federal law when classifying the Joined Party as an independent contractor. In *Brayshaw v. Agency for Work Force Innovation*, 58 So.3d 301, 302 (Fla. 1st DCA 2011), the court held that only Florida common law should apply when determining the nature of an employment relationship. A review of the record demonstrates that the Special Deputy concluded in the Conclusions of Law that the Joined Party was an employee based on several common

law factors. Thus, the Special Deputy did not err when applying Florida common law rather than federal law in this case as required by the *Brayshaw* case. The Petitioner's exception is respectfully rejected.

The Petitioner argues that it received a determination from DOR that indicated that the Petitioner had classified the data work properly. While a determination dated March 7, 2008, holding that Julie Romano and other "marketing/data" workers performed services as independent contractors has been admitted as evidence, the record reflects that the determinations at issue in this case apply only to the services performed by the Joined Parties Ashley Interlandi and Tracey Lee as data managers and do not apply to the services performed by any other data managers. The record also reflects that the determinations hold that the Joined Parties performed services as employees of the Petitioner and that the Special Deputy affirmed both determinations in the Recommended Order. Competent substantial evidence in the record supports the Special Deputy's Findings of Fact. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. Accordingly, the Agency does not reject the Special Deputy's Findings of Fact and Conclusions of Law. The Petitioner's exception is respectfully rejected.

A review of the record reveals that the Findings of Fact are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having fully considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order.

In consideration thereof, it is ORDERED that the determination dated January 14, 2011, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **October, 2011.**

_____
TOM CLENDENNING,
Director of Workforce Services
THE DEPARTMENT OF ECONOMIC OPPORTUNITY

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2169723
NEXTSTEP MARKETING INTERNATIONAL IN
ATTN: JUNE KOTELES
8597 BONITA ISLE DR
LAKE WORTH FL 33467

PROTEST OF LIABILITY
DOCKET NO. 2011-17382L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated January 14, 2011.

After due notice to the parties, a telephone hearing, consolidated with 2010-54782, was held on June 14, 2011. The Petitioner, represented by its president, appeared and testified. Six former Data Managers appeared as witnesses for the Petitioner. The Respondent, represented by a Department of Revenue Tax Auditor II, appeared and testified. Joined Party Ashley Interlandi appeared and testified. Joined Party Tracey Lee 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 received from the Petitioner.

Issue:

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

Findings of Fact:

1. The Petitioner is a corporation which operated a media consulting business from November 1996 until July 31, 2009. The business was operated from the home of the Petitioner's president. The Petitioner's clients included television, radio, newspaper, cable, and billboard companies. The Petitioner provided a variety of services to its clients to help the clients increase the clients' advertising revenue. The Petitioner used newspaper advertising data from various cities in providing the consulting services for the Petitioner's clients.

2. The Petitioner hired Joined Party Tracey Lee on or about June 19, 2000, to be a Data Manager. Data Managers were responsible for reviewing the advertisements published in various newspapers, measuring the advertisements, compiling data about the advertisements, and inputting the data into the Petitioner's computer system. Tracey Lee was trained by other Data Managers who were employed by the Petitioner. Tracey Lee was taught to use red ink pens to mark certain advertisements and blue ink pens to mark other types of advertisements. The Petitioner provided her with two boxes of red ink pens, two boxes of blue ink pens, an eighteen inch ruler, and an easel. Tracey Lee was required to provide her own computer and the Petitioner loaded the Petitioner's software on the computer. Tracey Lee performed the work from her own home.

3. The Petitioner determined that Tracey Lee would be paid $200 per week for each newspaper that she was assigned to analyze. The Petitioner provided the newspapers. The Petitioner withheld payroll taxes from the pay and at the end of each year the Petitioner reported the earnings on Form W-2 as wages. No fringe benefits were provided with the exception of a Christmas bonus.

4. Joined Party Ashley Interlandi was hired by the Petitioner to be a Data Manager on or about December 1, 2003. At that time the Petitioner had approximately ten Data Managers who were employees of the Petitioner. Ashley Interlandi is the niece of Tracey Lee. Tracey Lee trained Ashley Interlandi in the same manner that she had been trained when she began her employment in 2000. The Petitioner provided the same tools, supplies, and computer software to Ashley Interlandi as had been provided to Tracey Lee. The Petitioner provided the newspapers. Taxes were withheld from the pay and at the end of 2003 the Petitioner reported the earnings on Form W-2 as wages. Ashley Interlandi was hired by the Petitioner under the same terms and conditions as Tracey Lee.

5. The Petitioner established a deadline each week, 5 PM on Thursday, for the Data Managers to complete the work and to upload the data. The Petitioner would then review the data that was uploaded and notify each Data Manager if there were any corrections to be made, such as spelling errors. The Data Managers were required to make the corrections unless it could be shown that there was no error. The Data Managers were required to keep the newspapers for three months after the information was uploaded.

6. Some newspapers contained advertising supplements, however, it was a common occurrence that the supplements were missing from the newspapers that were delivered to the Data Managers. The Petitioner would not be aware if a Data Manager missed some of the advertisements in the newspaper. The Petitioner would be aware after reviewing the uploaded data if a Data Manager missed an advertising supplement. The Petitioner would contact the Data Manager so that the Data Manager could check the newspaper to see if the advertising supplement was present. If the supplement was missing the Petitioner would provide the supplement to the Data Manager.

7. Tracey Lee and Ashley Interlandi worked from their homes without direct supervision. They determined when to perform the work as long as the work was completed before the deadline. They were not required to track the hours worked or to report the hours to the Petitioner.

8. Effective January 1, 2004, the Petitioner decided to reclassify all of the Data Managers from employees to independent contractors. The only change in the terms and conditions of the work was that the Petitioner discontinued withholding payroll taxes from the pay. Beginning with 2004

the Petitioner reported the earnings of each Data Manager on Form 1099-MISC as nonemployee compensation.

9. In April 2006 the Petitioner created an *Independent Contractor Agreement* to be signed by the Data Managers. The Agreement did not represent any change in the duties, method of pay, or terms and conditions under which the work was performed. Ashley Interlandi signed the Agreement on April 17, 2006, and Tracey Lee signed the Agreement on April 25, 2006.

10. The *Independent Contractor Agreement* states that the term of the agreement is for a period of one year and that the Agreement will automatically renew each year unless written notice of non-renewal is provided by either party at least thirty days prior to the end of any one year term unless the Agreement was voluntarily terminated by either party by giving at least fourteen calendar days notice of termination, or unless the agreement was terminated by the Petitioner without notice for cause.

11. The *Independent Contractor Agreement* states that the Data Manager is responsible for performing certain services, including but not limited to: inputting of newspaper advertising data into the Petitioner's software and transferring the data to the Petitioner's FTP site to meet weekly and monthly deadlines; checking and correcting advertising data entered; contacting points of origination for newspapers to address shipping related issues; obtaining advertising rates from newspapers; accessing vendor source memberships for information and using that information to produce reports and graphs and inputting certain information obtained from those sources into the Petitioner's software; producing periodic reports for clients; creating instruction manuals, charts, and spreadsheets for both internal use and for use by the Petitioner's clients; creating training programs utilizing software purchased by the Petitioner; e-mailing reports and information to clients; helping clients and prospects; and being responsible for all other services requested by the Petitioner. The Agreement provides that the Data Manager shall act in good faith and devote as much time as is reasonably necessary to perform the responsibilities assigned from time to time by the Petitioner.

12. The *Independent Contractor Agreement* provides that the Petitioner will pay the Data Manager, for delivery of assigned services on or before the deadline, a regular, set gross amount on a bi-weekly basis, the amount of which will be subject to adjustment by the Petitioner, at the Petitioner's sole discretion, based on the workload and performance of the Data Manager. The Agreement provides that the Data Manager is not limited to working a forty hour workweek and is not entitled to additional compensation for any hours in excess of forty hours in a workweek. The Agreement states that it is understood that the Petitioner is not required to withhold taxes from any payment.

13. The *Independent Contractor Agreement* provides that any inventions, developments, creative works, and useful ideas of any description resulting from or related to work performed for the Petitioner by the Data Manager, whether during regular business hours or not, which the Data Manager conceives or develops, either in whole or in part, either alone or jointly with others, during the term of the engagement with the Petitioner, will be the sole property of the Petitioner.

14. The *Independent Contractor Agreement* states that Agreement and all of the Data Manager's rights, duties, and obligations under the Agreement are personal in nature and shall not be assignable by the Data Manager. The *Independent Contractor Agreement* provides that during the Data Manager's engagement with the Petitioner, and for a period of twelve months after termination, the Data Manager shall not, without the authorized express written approval of the Petitioner, directly or indirectly own, manage, participate in or otherwise engage in any form or have any connection with any business which is in the business, in whole or in part or is in any way involved in the business, of supplying and/or marketing newspaper advertising data. The Agreement provides that the Data Manager may make passive investments in a competitive

enterprise, the shares of which are publicly traded, provided that the Data Manager's holdings in such enterprise do not exceed five percent of the outstanding shares of stock of such enterprise.

15. The Data Managers were not required to notify the Petitioner if the Data Manager was ill or unable to work on any particular day unless the illness would prevent the Data Manager from meeting the deadline. In July 2007 Joined Party Ashley Interlandi was ill and was hospitalized. She was not able to meet the deadline and asked the Petitioner for permission to allow Joined Party Tracey Lee to perform the work for her. The request was granted.

16. For a period of time the Petitioner assigned to Joined Party Tracey Lee the responsibility of ensuring that all of the Data Managers received their assigned newspapers each week. The Petitioner paid additional money to Tracey Lee for performing that assigned duty. Subsequently, the Petitioner assigned that responsibility to another Data Manager. The Petitioner did not reduce the pay of Tracey Lee even though Tracey Lee was no longer responsible for performing that task.

17. The Petitioner assigned to Tracey Lee the responsibility of training several new Data Managers, including Ashley Interlandi. No additional pay was provided for training the Data Managers. The Petitioner also started a toll free twenty-four hour help line for the Petitioner's clients. The Petitioner told Tracey Lee that Tracey Lee had to be on-call twenty-four hours a day in case the Petitioner needed to contact Tracey Lee for information in regard to any call which the Petitioner received from a client on the help line, so that the Petitioner could respond to the client.

18. Neither Joined Party Tracey Lee nor Joined Party Ashley Interlandi had any occupational or business license, or liability insurance. Neither offered data management services to the general public or performed data management services for anyone other than the Petitioner. Even though both Tracey Lee and Ashley Interlandi were informed by the Petitioner in January 2004 that they had been reclassified by the Petitioner to be independent contractors, and although both Tracey Lee and Ashley Interlandi signed the Independent Contractor Agreement in April 2006, they believed that, at all times, they were employees of the Petitioner.

19. By certified letter mailed June 18, 2009, the Petitioner notified all of the Data Managers, including Joined Party Tracey Lee and Joined Party Ashley Interlandi, that the *Independent Contractor Agreement* was canceled effective July 17, 2009. The Petitioner ceased operations on July 31, 2009.

Conclusions of Law:

20. The issue in this case, whether services performed for the Petitioner by Joined Party Tracey Lee 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.

21. 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).

22. 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).

23. 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.

24. 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.

25. 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.

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

27. The Petitioner's business was to provide newspaper advertising data to the Petitioner's clients. The assigned duties of Ashley Interlandi and Tracey Lee were to compile the data and upload it using the Petitioner's software so that the Petitioner could provide the data to the Petitioner's clients. The work performed by Ashley Interlandi and Tracey Lee was not separate and distinct from the Petitioner's business but was a necessary and integral part of the business.

28. It is undisputed that both Ashley Interlandi and Tracey Lee were hired to be employees of the Petitioner. Effective January 1, 2004, the Petitioner unilaterally altered the agreement of hire to reclassify the employees to independent contractors. Although both Ashley Interlandi and Tracey Lee tacitly accepted the forced reclassification, the evidence does not show that there was a meeting of the minds concerning the reclassification. Ashley Interlandi and Tracey Lee both continued to believe that they were the Petitioner's employees rather than independent contractors. In April 2006 Ashley Interlandi and Tracey Lee were required to sign a written *Independent Contractor Agreement.*

29. A statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this

document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

30. The reclassification initiated by the Petitioner effective January 1, 2004, and expressed in writing by the *Independent Contractor Agreement* in April 2006, did not involve any change in the terms and conditions of the relationship other than the Petitioner discontinued withholding payroll taxes from the pay. The Petitioner continued to control how many newspapers each Joined Party was required to work, which newspapers each Joined Party was required to work, the deadlines for working the newspapers, and how long the Joined Parties were required to retain the newspapers after the work was completed. The Joined Parties never had an option of performing services from the Petitioner's premises. They were required by the Petitioner to perform services from a location other than the Petitioner's location. The Petitioner determined the method of pay and the rate of pay, which was subject to change solely in the discretion of the Petitioner. The Joined Parties were not allowed to engage others to perform the work for them without the Petitioner's permission. According to the *Independent Contractor Agreement* any useful ideas or creative works developed by the Joined Parties, even if not during business hours, constituted the sole property of the Petitioner. The *Independent Contractor Agreement* prohibits the Joined Parties from performing services in any form with any business that supplies or markets newspaper advertising data during the term of the Agreement and for a period of twelve months after termination of the Agreement. These facts reveal that, by the Agreement, the Petitioner had a significant right to control what was done and how it was done.

31. The evidence does not show that any significant 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)

32. The Joined Parties were required to provide their own computers and the Petitioner provided the computer software. The Petitioner provided the newspapers. The Joined Parties worked from their own homes and no other significant expenses were present.

33. The Petitioner paid the Joined Parties a flat rate per newspaper, regardless of the amount of time needed to work the newspaper. Both the method of pay and the rate of pay were determined by the Petitioner. The financial aspects of the relationship were controlled by the Petitioner. Although the Joined Parties were paid by the job rather than time worked, 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. Ashley Interlandi performed services for the Petitioner for a period of approximately six and one-half years. Tracey Lee performed services for the Petitioner for a period of approximately nine years. The Petitioner had the right to terminate the relationships at any time with the only requirement being that the Petitioner provide fourteen days notice of termination. The Petitioner could terminate the relationships at any time without notice if the Petitioner determined that there was cause to do so. These facts reveal the existence of at-will relationships of relative permanence. 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."

35. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).
36. It is concluded that the preponderance of the evidence presented in this case reveals that the services performed for the Petitioner by Joined Party Tracey Lee constitute insured employment.

Recommendation: It is recommended that the determination dated January 14, 2011, be AFFIRMED.

Respectfully submitted on August 8, 2011.

R. O. SMITH, Special Deputy
Office of Appeals