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

PETITIONER:
Employer Account No. - 3017109
ASSURE SOLUTIONS LLC
VALERIE S DANIELS
7402 NORTH 56TH ST STE 895
TEMPLE TERRACE FL 33617

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

PROTEST OF LIABILITY
DOCKET NO. 2011-71002L

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 April 18, 2011, is MODFIED to reflect a retroactive date of July 1, 2008. It is further ORDERED that the determination is AFFIRMED as modified.

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 **April, 2012**.

Altemese Smith,
Assistant Director,
Unemployment Compensation 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 April, 2012.

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation 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 REVENUE
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DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
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PETITIONER:
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PROTEST OF LIABILITY
DOCKET NO. 2011-71002L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
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 April 18, 2011.

After due notice to the parties, a telephone hearing was held on October 14, 2011. The Petitioner was represented by its attorney. The Petitioner's owner/operator testified as a witness. A supported living coach testified as a witness for the Petitioner. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party was represented by her attorney. The Joined Party appeared and testified. A supported living coach testified as a witness for the Joined Party.

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 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, Assure Solutions LLC, is a limited liability company that was formed in 2008 and began operations in approximately June 2008. The Petitioner contracted with the Agency for Persons with Disabilities to provide in home support services for clients of the Agency for Persons with Disabilities. The Petitioner has never had any worker that it acknowledges to be an employee.

2. The Joined Party is an individual who was employed prior to June 2008 as a residential manager for a company that operates group homes. The Petitioner's owner/operator knew the Joined Party through family connections and solicited the Joined Party to help start the Petitioner's business, to provide services as a supported living coach, and to provide in home support for disabled individuals. The Joined Party had never previously worked as a supported living coach and had never previously provided in-home support for disabled individuals. The Joined Party was required to give a one month notice to her employer and during that month the Joined Party obtained required training from the Agency for Persons with Disabilities so that she could perform in home support services for the Petitioner. The Joined Party was not required to pay for the training.

3. The Joined Party began performing services for the Petitioner during the latter part of June or early July 2008. There was no written agreement or contract between the Petitioner and the Joined Party. The verbal agreement was that the Joined Party would assist the Petitioner's owner by running errands, making calls, organizing the staff, and working with the clients. The Petitioner received a fee, the amount of which was determined by the Agency for Persons with Disabilities, for providing in home services for the clients assigned to the Petitioner. Some of those fees were based on an hourly amount and some of the fees were based on a daily rate. The Petitioner offered to pay the Joined Party a percentage of the fees for in home services performed, amounting to $9 per hour, and $10 per hour for other services performed for the Petitioner by the Joined Party. The Joined Party accepted the offer of work. The Petitioner advised the Joined Party that it was a full time position. There was no agreement concerning whether the Joined Party would perform the services as an employee or as an independent contractor. The Joined Party believed that she was hired to be the Petitioner's employee.

4. The Petitioner's owner informed the Joined Party that she had listed the Joined Party on paperwork filed with the Agency for Persons with Disabilities as the Petitioner's Chief Operating Officer and as the Petitioner's Administrator. The owner introduced the Joined Party to other individuals as the Chief Operating Officer of the company. The Petitioner gave the Joined Party the job title of Operations Manager.

5. The Petitioner told the Joined Party that the Joined Party was required to be in the office from 9 AM until 5 PM, Monday through Friday, unless the Joined Party was in the field performing in-home support services or services as a supported living coach for clients. The Joined Party was required to complete and submit a timesheet showing the times that she reported for work each day and the times that she left work each day. The Joined Party was required to be on-call seven days per week, twenty-four hours per day.

6. The Joined Party did not have any investment in the Petitioner's business or any other business. The Joined Party did not have an occupational license and did not offer services to the general public. The Joined Party was required to personally perform the services for the Petitioner and was not allowed to hire others to perform the services for her. The Petitioner provided business cards to the Joined Party containing only the Petitioner's name, logo, and telephone number.

7. The Petitioner did not pay the Joined Party for the work which the Joined Party had performed beginning during the latter part of June 2008 until September 2008. At that time the Joined Party realized that the Petitioner had not withheld any payroll taxes from the pay.

8. On December 29, 2008, the Petitioner presented the Joined Party with an untitled document for her signature. That document states "The undersigned, as a self-employed person, working under sub-contract labor, does hereby accept the responsibility of paying all taxes due to the Internal Revenue Service and acquiring the appropriate insurance needed for this sub-contract job. The undersigned (sic) agrees not to solicit any of this companies (sic) customers for any related services or to use this association as a means to draw any of the clientele away from said

company." The Joined Party signed the document even though she did not believe that she was self employed. The Joined Party was not provided an option to perform services as an employee of the Petitioner.

9. The Petitioner reported the payments made to the Joined Party during 2008 on Form 1099-MISC as nonemployee compensation. The amount of the reported compensation received by the Joined Party during 2008 was $6,735.00, approximately one-half of which was received by the Joined Party during the third quarter and approximately one-half of which was received by the Joined Party during the fourth quarter 2008.

10. The Joined Party's duties consisted of providing orientation and training to staff members on core assurances, how to complete monthly summaries, providing training to the office manager to help the office manager understand how paperwork was generated and what the paperwork was for, supervising the supported living coaches, coordinating the monthly behavior summaries by making sure the summaries were submitted on time and that they were accurate and complete, reviewing all documentation submitted for each client, answering the telephone, filling in for staff members who were absent, as well as providing in-home support and supported living coach duties for two clients assigned to the Joined Party by the Petitioner. Although the Joined Party did interview applicants to fill vacant positions with the Petitioner and offered recommendations to the Petitioner, only the Petitioner had the authority to hire new staff members. The Joined Party was required to personally perform the Joined Party's assigned duties.

11. The Joined Party worked an average of approximately fifty to sixty hours per week for the Petitioner. The Joined Party did not believe that she had the right to work for a competitor of the Petitioner. Even if she had been allowed to work for a competitor she would not have been able to do so because of the number of hours she was required to work for the Petitioner.

12. The Petitioner provided the Joined Party with an office containing a desk, computer, and telephone. The Petitioner provided all supplies including paper and pens and a notebook. The Petitioner provided the Joined Party with business cards listing the Petitioner's name, logo, and telephone number. There was a blank space on the business card so that the Joined Party could write her name on the cards. The Joined Party used her personal cell phone and personal automobile for business purposes. The Petitioner did not reimburse the Joined Party for the use of the cell phone or automobile.

13. The Joined Party voluntarily left her position with the Petitioner in March 2009 to accept employment with an assisted living facility. The Joined Party returned to work for the Petitioner in August 2010. At the time of rehire the Petitioner told the Joined Party that, initially, the Joined Party would perform mostly in-home support and supported living coach duties with the remainder of the time working in the Petitioner's office helping with office work. The Petitioner would pay the Joined Party a flat rate per week, $200 and in December the Petitioner would increase the flat rate to $300.

14. When the Joined Party returned to work for the Petitioner in August 2010, the Joined Party was required to sign an *Independent Contractor's Agreement.* The Agreement states that the Agreement is a summary of the arrangements which were discussed and that the Joined Party is retained to perform services "as an independent contractor to provide caregiving services to person (sic) with disabilities. As an independent contractor, you are responsible for providing safety and professional care to our clients. You are required to follow the client(s) Support Plans, specific to their goals, and work within the policies and procedures discussed including reporting to work on time and completing clients (sic) service logs daily and your timesheets. Any taxes, FICA, or other deductions which we are legally required to make from the pay of regular employees **will not be withheld from your payments**. As an independent contractor, you will not be entitled to any fringe benefits that would be offered to regular employees including unemployment insurance,

medical insurance, pension plans, and other benefits. You are responsible for filing your own taxes at the end of each year of employment with Assure Solutions. You will be sent a 1099 tax form to the address on file." The Joined Party signed the Agreement on August 16, 2010. The Joined Party believed that if she did not sign the Agreement she would not be allowed to return to work for the Petitioner.

15. Approximately two months after the Joined Party returned to work for the Petitioner, the Petitioner reinstated the Joined Party to the position of Operations Manager. As Operations Manager the Joined Party was required to be in the office during regular business hours unless the Joined Party was in the field working with clients. On occasions that the Petitioner was out of the office on payday the Joined Party was required to write the pay checks for the staff members and to distribute the paychecks. The Petitioner provided the Joined Party with a list of the staff members and the amount that each member was to be paid. The Joined Party did not have the authority to sign the checks but the Petitioner provided the Joined Party with a signature stamp and authorized the Joined Party to use the signature stamp.
16. Although the Joined Party was paid a flat rate each week, the Joined Party was still required to complete a timesheet showing the starting and ending times for each day.
17. On one occasion the Petitioner was audited by the Agency for Persons with Disabilities. The Joined Party spent additional time making sure that the Petitioner got a good grade on the audit. As a result the Petitioner paid additional cash to the Joined Party. The Petitioner also paid additional cash to the Joined Party when the Joined Party prepared the paychecks for the staff members.
18. The Joined Party believed that she had the right to decline to accept any client assignment, however, she never declined to accept any client assignment. On occasion, the Petitioner issued verbal warnings to the Joined Party. On one occasion Petitioner issued a written warning and suspended the Joined Party for three days.
19. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Agreement was terminated in February 2011.
20. The Joined Party filed a claim for unemployment compensation benefits effective February 6, 2011, and established a base period from October 1, 2009, through September 30, 2010. When the Joined Party did not receive credit for her earnings from the Petitioner during the base period of the claim 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. On April 18, 2011, the Department of Revenue issued a determination holding that the services performed for the Petitioner by the Joined Party constitute employment retroactive to January 1, 2010. The Petitioner filed a timely protest on April 18, 2011.

Conclusions of Law:

21. 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.
22. 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).

23. 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 Agency is limited to applying only Florida common law in determining the nature of an employment relationship.

24. 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.

25. 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.

26. 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.

27. 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.

28. The evidence reveals that there was no initial agreement between the parties when the Joined Party began performing services in June 2008 other than the Petitioner would pay the Joined Party an hourly wage for work performed. It was not until two or three months later, when the Joined Party received payment for back wages, that the Joined Party learned that the Petitioner had not withheld payroll taxes. On December 29, 2008, the Joined Party was required to sign a document stating that the Joined Party accepted the responsibility of paying her own taxes to the Internal Revenue Service. When the Joined Party returned to work in August 2010 the Joined Party was required to sign the *Independent Contractor's Agreement* which specifies that the Joined Party is classified as

an independent contractor and is responsible for payment of her own taxes. None of these documents set forth the terms and conditions of the actual working relationship.

29. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995). 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 Petitioner's business is to provide in home support for clients through the Petitioner's contract with the Agency for Persons with Disabilities. 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. The Joined Party did not have an occupational license to operate a separate business, did not have any investment in a business, and did not offer services to the general public. The Petitioner provided the office where the Joined Party spent the majority of her time performing administrative or clerical duties. The Joined Party's only expense associated with the work was transportation.

31. The Petitioner determined the Joined Party's work schedule and paid the Joined Party by time worked. The Joined Party's pay was not based on production or by the job. The Joined Party was required to complete a weekly time sheet to account for her time. These facts reveal that the Petitioner controlled the financial aspects of the relationship.

32. The Petitioner chose not to withhold taxes from the Joined Party's pay and did not provide any fringe benefits. However, the Petitioner did not withhold taxes from the pay of any of the workers and did not provide fringe benefits to any of the workers. The fact that the Petitioner chose not to withhold taxes from the pay does not, standing alone, establish an independent contractor relationship.

33. It was not shown that any skill or special knowledge was required to perform the work. In fact, the Joined Party did not have any prior experience providing in home support for disabled individuals. 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)

34. Initially, the Joined Party performed services for the Petitioner from July 2008 until March 2009 and subsequently performed services for the Petitioner from August 2010 until February 2011. Either party could terminate the relationship at any time for any reason. These facts reveal the existence of an at-will relationship 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 Petitioner controlled what work was performed, when it was performed, and where it was performed. Some of the work was performed in the homes of the Petitioner's clients and was not subject to the direct supervision of the Petitioner. 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) The fact that the *Independent Contractor Agreement* requires the Joined Party to follow the Petitioner's policies and procedures, including reporting for work on time, completing daily service logs, completing timesheets, and the fact that the Petitioner issued both verbal and written warnings to the Joined Party, reveals that the Petitioner not only had the right to direct and control the means and manner of performing the work, but exercised that control.

36. The facts presented in this case reveals that the services performed for the Petitioner by the Joined Party constitute insured employment. However, the determination issued by the Department of Revenue is retroactive only to January 1, 2010, while the Joined Party began performing services during the latter part of June 2008 or early July 2008.

37. Section 443.1215, Florida States, 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.

38. During 2008 the Petitioner paid wages to the Joined Party, as reported on Form 1099-MISC, in the amount of $6,735. Approximately one-half of that amount was paid to the Joined Party during the third quarter 2008. Since the Petitioner paid wages of at least $1,500 during the third calendar quarter 2008, the Petitioner is liable for payment of unemployment compensation taxes effective July 1, 2008.

39. It is noted that the special deputy was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. Factors considered in resolving evidentiary conflicts may include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, specifically including the Petitioner's contradictory and inconsistent testimony, the special deputy finds the testimony of the Joined Party to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the Joined Party.

Recommendation: It is recommended that the determination dated April 18, 2011, be MODIFIED to reflect a retroactive date of July 1, 2008. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on December 22, 2011.

R. O. SMITH, Special Deputy
Office of Appeals