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

PETITIONER:
Employer Account No. - 2951370
HOME ALTERNATIVES INC
ATTN MANUEL SANTOS
7903 TIMBERLANE WEST DR
TAMPA FL 33615-1671

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

PROTEST OF LIABILITY
DOCKET NO. 2011-92499L

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 February 23, 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 **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:

HOME ALTERNATIVES INC
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPARTMENT OF REVENUE
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DOR BLOCKED CLAIMS UNIT
ATTENTION MYRA TAYLOR
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DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
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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 February 23, 2011.

After due notice to the parties, a telephone hearing was held on November 2, 2011. The Petitioner, represented by the Petitioner's president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were received from the Petitioner.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as Certified Nursing Assistants 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.

Findings of Fact:

1. The Petitioner is a corporation which was formed in July 2008 for the specific purpose of providing twenty-four hour in-home care for a head injury patient who was about to be released from a facility. The patient does not have any purposeful movement of his arms or legs. The patient's release from the facility was delayed until December 2008 and the Petitioner did not provide any in-home care until approximately December 18, 2008. The Petitioner divided each weekday into three shifts, 7 AM until 3 PM, 3 PM until 11 PM, and 11 PM until 7 AM. On

weekends the days were divided into twelve hour shifts. The Petitioner's president is a Registered Nurse; however, the president does not provide any care for the patient. The Petitioner's corporate secretary provides care for the patient generally from 7 AM until 3 PM, Monday through Friday. The Petitioner engaged Certified Nursing Assistants to provide the care for the patient during the other designated shifts.

2. The Joined Party is an individual who was employed as a nurse in Cuba until 2004 when he relocated to the United States. In the United States the Joined Party was employed in a pizza restaurant and employed in a factory. The Joined Party obtained certification to work as a Certified Nursing Assistant in the United States in August 2008.

3. During the latter part of 2008 the Petitioner placed a help wanted advertisement on the Internet seeking workers who had prior experience as a Certified Nursing Assistant. The Joined Party replied to the advertisement and was interviewed by the Petitioner's president and corporate secretary. The Petitioner had already hired a Certified Nursing Assistant to work the 11 PM to 7 AM shift, and since the corporate secretary worked the 7 AM until 3 PM shift the Petitioner told the Joined Party that the work schedule was 3 PM until 11 PM, Monday through Friday. The Petitioner told the Joined Party that the rate of pay was $10 per hour from 3 PM until 6 PM and $10.25 per hour from 6 PM until 11 PM. The Joined Party was informed that he was required to wear a uniform with white shoes. The advertisement did not specify that the position was for an independent contractor and during the interview the Petitioner did not tell the Joined Party that the position was for an independent contractor.

4. The Joined Party accepted the Petitioner's offer of work. The Petitioner provided the Joined Party with an *Independent Contractor Agreement*, written in English, for the Joined Party's signature. The Joined Party does not speak English nor read English. The Petitioner told the Joined Party that the Agreement just set forth the hours of work and the rate of pay that had been discussed in the interview. The Joined Party signed the Agreement on December 15, 2008, without a translation, and began work on the first day that the Petitioner provided care for the patient, December 18, 2008.

5. The Joined Party did not understand that he had been hired by the Petitioner to perform services as an independent contractor. The Joined Party had never worked as an independent contractor and did not know the meaning of that term. The Joined Party did not have any financial investment in a business, did not have a business or occupational license, did not have business liability insurance, and did not offer services to the general public.

6. The Independent Contractor Agreement requires the Joined Party to work an average of 40 hours per week, Monday through Friday, from 3 PM until 11 PM. The Agreement states that the rate of pay is $10 per hour with a pay differential of $0.25 for evening work and $0.50 for weekend work with the payday occurring every two weeks on Friday. The Agreement provides that the Joined Party shall not be considered to be an employee and that the Joined Party is responsible for the payment of all federal, state, and local taxes including unemployment insurance, Social Security, and income taxes. The Agreement prohibits the Joined Party, during the unspecified term of the Agreement and for a period of twelve months following termination of the Agreement, from directly or indirectly soliciting or seeking to perform professional services to, or on behalf of, any client to which the Joined Party was referred by the Petitioner. Although the Agreement was for an indefinite period of time, either party could terminate the Agreement at any time and for any reason whatsoever, with or without notice.

7. The Petitioner did not provide any training to the Joined Party. However, the Joined Party was informed that he was required to complete training which was available on the computer. The Joined Party completed that training which included training on traumatic head and brain injuries

and training on assisting with medications. The Petitioner told the Joined Party that the Petitioner had taken care of the costs of the training.

8. The Joined Party was not required to provide any tools, equipment or supplies in order to perform the work. All of the tools, equipment, and supplies were provided by the patient. The Petitioner obtained liability insurance and the Joined Party was covered under the Petitioner's insurance policy.

9. The Joined Party's assigned duties included providing personal care, such as bathing the patient, feeding the patient through a feeding tube, turning the patient every two hours, observing the patient, documenting the care which the Joined Party provided, and maintaining the care area including sweeping the floor. The Joined Party was allowed to watch television or read while providing services for the patient.

10. The Petitioner's corporate secretary was classified by the Petitioner as an employee. All other individuals performing services for the Petitioner as Certified Nursing Assistants, including the Joined Party, were classified as independent contractors. The corporate secretary was considered to be a lead worker or a supervisor over the Joined Party and the other Certified Nursing Assistants. The Petitioner's president also periodically visited the patient's home while the Joined Party was working.

11. The duties of the Petitioner's corporate secretary include keeping track of the Certified Nursing Assistants, handling communications between the Certified Nursing Assistants and the doctor, ordering supplies and medications, preparing and keeping track of the work schedules for the Certified Nursing Assistants, providing timesheets to the Certified Nursing Assistants, and determining how many hours were worked by each Certified Nursing Assistant during each pay period.

12. Several verbal and written warnings were issued to the Joined Party by the Petitioner's president and by the Petitioner's corporate secretary for deviating from doctor's orders and for deviating from work expectations. On one occasion the Joined Party wore black shoes with his uniform and the president appeared, to the Joined Party, to be upset. The Joined Party was warned for being late on one occasion. The Joined Party was allowed to use his cell phone on the job for emergency purposes. Several warnings were issued to the Joined Party because the Petitioner believed that the Joined Party used his cell phone too frequently. The Petitioner also alleged that the Joined Party was sleeping on the job. Although the Joined Party denied the untrue allegation, the Petitioner issued a written warning to the Joined Party. The Petitioner warned the Joined Party about patient care issues and about failure to keep the work area clean.

13. After the Joined Party's first six months of work the Petitioner provided the Joined Party with one paid personal day and one paid sick day for each six month period of time worked. The Petitioner also provided the Joined Party with a paid day off for the Joined Party's birthday. The Petitioner paid a Christmas bonus to the Joined Party. On four or five occasions the Petitioner gave the Joined Party $20 gas cards in appreciation for good work performance.

14. If the Joined Party was not able to work a scheduled shift he was required to notify the Petitioner's president or the corporate secretary so that the Petitioner could arrange for another Certified Nursing Assistant to care for the patient. The Joined Party and the other Certified Nursing Assistants, including the corporate secretary, were required to request other time off in advance and to make arrangements to cover the shifts. On one occasion the corporate secretary went on vacation and the Joined Party worked double shifts to cover for the secretary. When the Joined Party went on vacation the secretary worked for the Joined Party. All schedule changes had to be approved in advance by the Petitioner's president. The Petitioner never denied the claimant's requests for time off and the Joined Party never refused to work for another Certified Nursing Assistant when asked to do so.

15. The Joined Party was required to complete and sign a timesheet for each pay period. Payday was every other Friday. No taxes were withheld from the Joined Party's pay. At the end of each year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

16. The Petitioner decided to terminate the Joined Party due to dissatisfaction with the Joined Party's work performance. On January 8, 2011, the Petitioner gave the Joined Party a letter to notify the Joined Party of the immediate termination of the *Independent Contractor Agreement*. The letter did not provide a reason for the termination but stated that the Agreement provides that the Agreement may be terminated in the sole discretion of the Petitioner, for any reason whatsoever, at any time, with or without notice. Enclosed with the termination letter was a check in the amount of $420 as an "exit bonus." Although the letter did not explain the reason for the payment of an "exit bonus" the payment was intended to help the Joined Party due to the sudden loss of income as a result of the termination.

17. The Joined Party filed a claim for unemployment compensation benefits effective January 9, 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 for the Petitioner as an employee or as an independent contractor. On February 23, 2011, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner as Certified Nursing Assistants are the Petitioner's employees retroactive to January 1, 2009. The Petitioner filed a timely protest.

Conclusions of Law:

18. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as Certified Nursing Assistants 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.

19. 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).

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. The Petitioner was created for the sole purpose of providing in-home care for one patient. The Petitioner engaged the Joined Party and the other Certified Nursing Assistants to provide that in-home care for the patient. The work performed by the Joined Party and the other Certified Nursing Assistants was not separate and distinct from the Petitioner's business but was an integral and necessary part of the business. The Joined Party did not have any investment in a business, did not have a business or occupational license, did not have business liability insurance, and did not advertise or offer services to the general public. The Joined Party performed services exclusively for the Petitioner.

26. Although the Joined Party was not aware that he was hired to be an independent contractor, the parties signed an *Independent Contractor Agreement* which specified that the Joined Party was not hired to be an employee. The Joined Party was not aware of the contents of the Agreement because he does not read English. A party is bound by a document which he signs even if he does not speak the language in which the document is written. See, e.g., Rivero v. Rivero, 963 So. 2d 934 (Fla. 3d DCA 2007); and Peralta v. Peralta Food Corp., 506 F. Supp. 1274 (S.D.Fla. 2007). The Peralta court stated that "(p)ersons not capable of reading English, as well as those who are, are free to elect to bind themselves to contract terms they sign without reading." Peralta at 1282, citing Merrill Lynch v. Benton, 467 So. 2d 311, 313 (Fla. 5th DCA 1985). "The burden is on the person who cannot read to know that he cannot read and if he desires to have an instrument read and explained to him to select a reliable person to do so before he signs it." Peralta at 1283. Thus, a person who voluntarily signs a contract or agreement with another private entity can be held liable for that contract or agreement even though he does not understand the language in which the contract or agreement is written.

27. 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). 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."

28. Although the Joined Party signed the *Independent Contractor Agreement* and is responsible for knowing its contents, it has not been shown that there was a meeting of the minds concerning the status of independent contractor. In addition, the Agreement contains language which shows that the Joined Party was not independent but rather was subject to the Petitioner's control. Thus, the relationship must be analyzed using the Restatement factors.

29. The Petitioner contracted to provide in-home care for one client, a head injury patient. The Petitioner engaged the Joined Party and others to provide the in-home care services. 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 any investment in a business and did not have any expenses connected with the work. Everything that was needed to perform the work was provided to the Joined Party. The Joined Party was required to perform the duties for the Petitioner on a full time basis. The Joined Party did not advertise or offer to perform similar services to the general public.

30. The Petitioner determined the hours of work and the rate of pay. By doing so the Petitioner controlled the financial aspects of the relationship. The Joined Party was paid by time worked rather than by production or by the job. The Petitioner paid bonuses to the Joined Party at the Petitioner's discretion. The Petitioner also provided the Joined Party with paid time off, a fringe benefit that is ordinarily reserved for employment relationships. In addition to the factors enumerated in the Restatement of Law, the provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

31. The Petitioner paid the Joined Party on a regularly established payday. No payroll taxes were withheld from the pay and at the end of the year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

32. The Petitioner monitored the Joined Party's work performance. The Petitioner rewarded the Joined Party upon instances of good performance and reprimanded the Joined Party if the Joined Party's performance or behavior did not meet the Petitioner's standards. The Petitioner even controlled how the Joined Party dressed and how often he used the telephone. These facts reveal the exercise of substantial control over the Joined Party.

33. The Joined Party performed full time services for the Petitioner for a period in excess of two years. 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 January 2011 the Petitioner chose to terminate the relationship without prior notice. 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."

34. In this case the Petitioner controlled what work was to be performed, where the work was to be performed, when it was to be performed, and to a significant degree how the work was to be 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.

35. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as Certified Nursing Assistants constitute insured employment.

Recommendation: It is recommended that the determination dated February 23, 2011, be AFFIRMED.

Respectfully submitted on December 16, 2011.

R. O. SMITH, Special Deputy
Office of Appeals