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

PETITIONER:
Employer Account No. - 2269651
TRACI NET INC
550 FAIRWAY DR STE 102
DEERFIELD BEACH FL 33441-1821

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

PROTEST OF LIABILITY
DOCKET NO. 2012-106989L

O R D E R

This matter comes before me for final Department Order.

The issue before me is whether services performed for the Petitioner by the Joined Party 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.

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.

Exceptions to the Recommended Order were not received from any party.

Upon review of the record, it was determined that the Special Deputy's Recommendation, the second paragraph on the fifth page of the Recommended Order, requires clarification. The record reflects that the Special Deputy concluded that the Joined Party performed services as an employee beginning on May, 1, 2010, and did not perform services in insured work after October 1, 2011. Accordingly, the Special Deputy's Recommendation is amended to say:

> **Recommendation:** It is recommended that the determination dated September 11, 2012, be MODIFIED to reflect that the services performed for the Petitioner by the Joined Party from May 1, 2010, to September 30, 2011, constitute insured employment. It is further recommended that the determination dated September 11, 2012, be MODIFIED to reflect that the services performed for the Petitioner by the Joined Party from October 1, 2011, through June 1, 2012, do not constitute insured employment. Accordingly, it is recommended that the portion of the determination holding that the Joined Party performed services as an employee from May 1, 2010, to September 30, 2011, be AFFIRMED. It is further recommended that the portion of the determination holding that the Joined Party performed services as an employee from October 1, 2011, through June 1, 2012, be REVERSED.

Having 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 amended herein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated September 11, 2012, is MODIFIED to reflect that the services performed for the Petitioner by the Joined Party from May 1, 2010, to September 30, 2011, constitute insured employment. It is further ORDERED that the determination dated September 11, 2012, is MODIFIED to reflect that the services performed for the Petitioner by the Joined Party from October 1, 2011, through June 1, 2012, do not constitute insured employment. Accordingly, it is ORDERED that the portion of the determination holding that the Joined Party performed services as an employee from May 1, 2010, to September 30, 2011, is AFFIRMED. It is further ORDERED that the determination holding that the Joined Party performed services as an employee from October 1, 2011, to June 1, 2012, is REVERSED.

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, 2013**.

Altemese Smith,
Bureau Chief,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

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

Shanedra Y. Barnes
DEPUTY CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of April, 2013.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
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By U.S. Mail:

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

DEPARTMENT OF ECONOMIC OPPORTUNITY
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RESPONDENT:
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DEPARTMENT OF ECONOMIC OPPORTUNITY
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PROTEST OF LIABILITY
DOCKET NO. 2012-106989L

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Executive Director,
Reemployment Assistance 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 September 11, 2012.

After due notice to the parties, a telephone hearing was held on January 2, 2013. The Petitioner was represented by its attorney. The Petitioner's Chief Financial Officer and the Petitioner's General Manager appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified.

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

Issue:

Whether services performed for the Petitioner by the Joined Party 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 communications company. On or about May 1, 2010, the Petitioner hired the Joined Party as a telephone solicitor to obtain sales leads for new business.
2. The Joined Party worked a regular work schedule established by the Petitioner at the Petitioner's location under the close supervision of the Petitioner's General Manager. The Petitioner provided the place of work and everything that was needed to perform the work.

3. The Petitioner did not provide any training to the Joined Party concerning how to perform sales because the Joined Party indicated that he had previous sales experience. After the Joined Party began his employment the Petitioner provided training concerning installation and service of the Petitioner's products. The Petitioner provided the Joined Party with a uniform shirt and business cards. The Petitioner provided the Joined Party with the tools that were needed to service and install equipment and provided the Joined Party with a company vehicle to use when going to customer locations.

4. The Petitioner paid the Joined Party an hourly wage and if the Petitioner's sales department closed a sale from one of the leads generated by the Joined Party the Joined Party received a commission. The Petitioner deducted payroll taxes from the pay. The Joined Party did not receive fringe benefits such as health insurance because he was considered to be a part-time employee. At the end of the year the Petitioner reported the Joined Party's earnings on Form W-2 Wage and Tax Statement as wages.

5. The Joined Party was dissatisfied with his earnings as an employee and he wanted a more flexible work schedule due to personal or domestic problems. The Joined Party approached the Petitioner's General Manager and proposed that he would operate a dealer solicitation program from home as an independent contractor developing new dealerships for the Petitioner. The Joined Party appeared excited over the prospect of operating his own business with many clients including the Petitioner and with other individuals performing the work for the Joined Party. The General Manager was reluctant to agree to the Joined Party's proposal because the General Manager did not believe that the Joined Party would be successful. The General Manager explained in depth what it meant to be an independent contractor rather than an employee. The General Manager explained to the Joined Party that the Petitioner would have no say in what the Joined Party did or how the Joined Party did it. The Joined Party insisted on going forward with his proposition and he submitted a letter of resignation from his employment effective September 30, 2011.

6. The Petitioner and the Joined Party entered into a written agreement concerning the Joined Party's proposal. The agreement was to be in effect until June 1, 2012, and if the Joined Party did not develop new business for the Petitioner by that date the agreement would terminate. The written agreement was that the Petitioner would pay the Joined Party $100 for each referral and if the Petitioner's sales department was able to close the deal the Petitioner would pay the Joined Party a commission based on the sale.

7. Beginning October 1, 2011, the Joined Party no longer worked from the Petitioner's location. The Joined Party no longer performed service and installation for the Petitioner and the Petitioner did not provide any tools, supplies, or transportation, and did not reimburse the Joined Party for any expenses. The Petitioner gave the Joined Party a used computer which the Joined Party could use for whatever purpose the Joined Party chose.

8. After the first few weeks the Joined Party still had not obtained any referrals. The Petitioner knew that the Joined Party needed money and, as a favor to the Joined Party, the Petitioner offered to pay the Joined Party a draw against future commissions of $300 per week. The written agreement was not amended. The verbal agreement was that the Joined Party would repay the draw against commissions if the Joined Party did not have sufficient commissions to cover the draw. No taxes were withheld from the draw. The Joined Party did not receive any fringe benefits.

9. The Petitioner only saw the Joined Party when the Joined Party came in each week to pick up the draw check. The Joined Party communicated with the Petitioner by email. The Joined Party did not obtain any business for the Petitioner, however, on a few occasions the Joined Party informed the Petitioner by email that he was working very hard to develop new business. The Petitioner replied to the emails by informing the Joined Party that he was not required to report to the Petitioner concerning his efforts. On one occasion the Joined Party informed the Petitioner by email that the Joined Party was also doing work for a cruise line.

10. At the end of 2011 the Petitioner reported the Joined Party's earnings from January 1, 2011 through September 30, 2011, on Form W-2 as wages. The Joined Party's draws from October 1. 2011, through December 31, 2011, were reported on Form 1099-MISC as nonemployee compensation.

11. The General Manager was aware after only a few months that the Joined Party was not going to be successful and that the Joined Party would not be able to repay the draws. Since the Petitioner was doing the Joined Party a favor by paying the draws the Petitioner made a decision to continue paying the draws even though the Joined Party never produced any business for the Petitioner. The agreement terminated on June 1, 2012, because the Joined Party had not produced any business.

12. The Joined Party filed a claim for unemployment compensation benefits (now known as reemployment assistance benefits) effective July 8, 2012. 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 Florida Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.

13. The Department of Revenue discovered that the Joined Party's earnings had been reported by the Petitioner under an incorrect social security number for the period of time prior to October 1, 2011. The Petitioner had not reported the Joined Party's earnings for the period of time beginning October 1, 2011. On September 11, 2012, the Department of Revenue determined that the Joined Party was the Petitioner's employee for the period beginning October 1, 2011, and ending June 1, 2012. The Petitioner filed a timely protest.

Conclusions of Law:

14. The issue in this case, whether services performed for the Petitioner by the Joined Party from October 1, 2011, through June 1, 2012, constitute employment subject to the Florida Reemployment Assistance Program Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.

15. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).

16. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987). In Brayshaw v. Agency for Workforce Innovation, et al; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the Department is limited to applying only Florida common law in determining the nature of an employment relationship.

17. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.

18. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:

(1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.

(2) The following matters of fact, among others, are to be considered:
(a) the extent of control which, by the agreement, the business may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant;
(j) whether the principal is or is not in business.

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

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

21. The Petitioner's testimony reveals that the Joined Party initiated the change from employee to independent contractor effective October 1, 2011. The Petitioner was reluctant to agree to the Joined Party's proposition and did so only after ensuring that the Joined Party understood the difference between an employee and an independent contractor. The parties entered into a written agreement. 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).

22. The evidence reveals that there were substantial and significant differences between how the Joined Party performed his duties as an employee prior to October 1, 2011, and how he performed services after October 1, 2011. Beginning October 1, 2011, the Petitioner did not provide the place of work, did not provide tools or supplies, and did not reimburse the Joined Party for any expenses. The Petitioner did not determine where the work was performed, by whom it was performed, when it was performed, or how it was performed.

23. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.

24. It is concluded that the services performed for the Petitioner by the Joined Party from October 1, 2011, through June 1, 2012, do not constitute insured employment.

Recommendation: It is recommended that it be found that the services performed for the Petitioner by the Joined Party from October 1, 2011, through June 1, 2012, do not constitute insured employment and that the determination dated September 11, 2012, be REVERSED.

Respectfully submitted on January 24, 2013.

R. O. SMITH, Special Deputy
Office of Appeals

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

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

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

Shanedra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
January 24, 2013

Copies mailed to:
Petitioner
Respondent
Joined Party

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