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

PETITIONER:
Employer Account No. - 2743402
SUNCOAST PATHOLOGY ASSOCIATES INC
3030 VENTURE LANE SUITE 108
MELBOURNE FL 32934-4143

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

PROTEST OF LIABILITY
DOCKET NO. 2012-111419L

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 September 10, 2012, is MODIFIED to apply only to the Joined Party and to reflect a retroactive date of December 9, 2011. As modified, it is ORDERED that the determination 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 May, 2013.

Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
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 May, 2013.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
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Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

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

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING
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RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith,
Bureau Chief,
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 10, 2012.

After due notice to the parties, a telephone hearing was held on January 9, 2013. The Petitioner was represented by an attorney. The Petitioner's president, technical supervisor, and bookkeeper testified as witnesses for the Petitioner. 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 on January 22, 2013. Proposed Findings of Fact and Conclusions of Law were not received from the Respondent or Joined Party.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals 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 that operates a clinical and anatomical laboratory. The Petitioner has contracts with nursing home facilities and assisted living facilities to draw and analyze blood samples for patients of the facilities. The Petitioner utilizes phlebotomists to collect blood samples from patients and to transport the blood samples and other specimens to the Petitioner's laboratory. The Petitioner classifies the phlebotomists as independent contractors.

2. The Joined Party performed phlebotomy and clerical services for the Petitioner from December 9, 2011, until May 9, 2012. The Joined Party's services included collecting blood samples from patients at facilities and other locations, transporting the samples to the Petitioner's laboratory, entering blood sample information into the Petitioner's computerized system, entering information into patient records for billing purposes, answering the telephone, assisting walk-in patients, and filing. The parties did not enter into a written agreement for the Joined Party's services. The Joined Party was told she was being hired as "a 1099." The Joined Party later understood that term to mean she was hired as a contractor.

3. The Joined Party had prior experience as a phlebotomist. The Joined Party did not require training to draw blood. The Petitioner initially had the Joined Party accompany another phlebotomist to a physician's office to draw blood so that the other phlebotomist could confirm to the Petitioner that the Joined Party was capable of performing the work. The Petitioner trained the Joined Party to use the Petitioner's computerized system to read blood work orders and to enter information concerning completed blood draws, to enter data for billing purposes, and to input information for walk-in patients.

4. The Joined Party was assigned to draw blood at a particular facility every morning, Monday through Friday. The Petitioner told the Joined Party what time to start drawing blood at the facility, usually 5:00 a.m. When the Joined Party arrived at the facility each morning, the Joined Party checked the Petitioner's computer located at the facility and an order book maintained by the facility for patient blood work orders. After completing the blood draws at the facility, the Joined Party checked the Petitioner's computer for information concerning any additional blood draws she was to perform at other facilities or private homes before returning to the laboratory. On some days, the Petitioner contacted the Joined Party by telephone to dispatch her to another location to draw blood before returning to the laboratory. The Petitioner expected the Joined Party to have the samples to the laboratory by 9:00 a.m.

5. The Joined Party worked an eight-hour day, usually until 3:00 p.m. Upon arrival at the laboratory, the Joined Party entered information required for the completed blood draws in the Petitioner's computerized system. Then the Joined Party was given filing or other office work to perform. The Joined Party answered the telephone and responded to calls for immediate blood draws. The Petitioner had a time clock at the laboratory. The Joined Party hand wrote the time she arrived at the primary facility on the time card for each day. The Joined Party clocked in and out for lunch. The Joined Party was told to clock out at the end of her day. The Joined Party was required to participate in on-call rotations for blood draws after 5:00 p.m., Monday through Thursday.

6. The Petitioner provided the Joined Party with blood vials, needles, gloves, gauze, and other supplies needed for the blood draws. The Joined Party used the Petitioner's computers at the facility and at the laboratory. The Petitioner provided the Joined Party with a name tag bearing the Petitioner's logo and name and the Joined Party's first name. The Joined Party used her personal vehicle in connection with the work. The Petitioner reimbursed the Joined Party for mileage. The Petitioner provided the Joined Party with a cellular telephone for use during her on-call rotation. The Joined Party used her personal cellular telephone to communicate with the Petitioner when she did not have the Petitioner's on-call telephone in her possession.

7. The Petitioner paid the Joined Party on a bi-weekly basis at a rate of $13 per hour. The Petitioner determined the rate of compensation. The Joined Party was paid additional compensation for being available, or on-call, to draw blood after 5:00 p.m. If the Joined Party was called out to draw blood after 5:00 p.m., she received a minimum of one hour's pay. The Petitioner did not withhold taxes from the Joined Party's pay. The Joined Party's earnings were reported on a form 1099-MISC. The Joined Party kept a record of her mileage. The Petitioner reimbursed the Joined Party for mileage at a rate of $.38 per mile. The Petitioner determined the rate of reimbursement for mileage. The Petitioner did not provide sick pay, vacation pay, or holiday pay to the Joined Party.

The Petitioner's professional liability insurance policy covered the phlebotomy services performed by the Joined Party.

8. The Joined Party was required to return to a facility to draw a blood sample in the event she missed a patient or made an error that required another sample to be drawn. The Petitioner paid for the time and mileage involved in correcting the omission or error.
9. The Joined Party was not restricted from performing similar services for a competitor of the Petitioner. The Joined Party did not perform similar services for anyone else while performing services for the Petitioner.
10. The Joined Party did not have her own business, occupational license, or business liability insurance.
11. Either party could terminate the relationship at any time without penalty or liability for breach of contract.
12. The Joined Party filed a claim for reemployment assistance benefits effective May 22, 2012. When the Joined Party did not receive credit for her earnings with the Petitioner in the base period of her claim, an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.
13. On September 10, 2012, the Department of Revenue issued a determination holding that the services performed by the Joined Party and other individuals as phlebotomists constitute insured employment retroactive to May 2008. The Petitioner filed a timely protest.
14. The Joined Party performed services for the Petitioner under terms and conditions that were different from the terms and conditions under which other phlebotomists performed services for the Petitioner.

Conclusions of Law:

15. The issue in this case, whether services performed for the Petitioner 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.
16. 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).
17. 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).
18. 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.
19. 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.

20. 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.

21. 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.

22. The parties did not enter into a written agreement. Although the Petitioner informed the Joined Party she was hired as "a 1099," the evidence presented does not demonstrate an express agreement or meeting of the minds as to the status of the work relationship. The fact that the Joined Party accepted the offer of work does not necessarily establish an independent contractor relationship. Courts have held that an express statement in an agreement that the existing relationship is that of an independent contractor is not dispositive of the issue. Lee v. American Family Assurance Company, 431 So.2d 249 (Fla. 1st DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So. 2d 131 (Fla. 1972), a case involving an independent contractor agreement that specified the worker was not to be considered an employee, 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."

23. The Petitioner operates a laboratory that provides blood collection and testing services. The Joined Party performed phlebotomy and clerical services for the Petitioner. The work performed by the Joined Party was not separate and distinct from the Petitioner's business, but was an integral and necessary part of the Petitioner's business. In Hilldrup Transfer & Storage of New Smyrna Beach, Inc. v. Department of Labor and Employment Security, 447 So.2d 414 (Fla. 5th DCA 1984), the Court stated, "if the work performed in the relationship under consideration is a part of the principle's business, this factor indicates an employment status, even if the work requires a high level of skill to perform it."

24. The relationship of employer-employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and the method and details by which the desired result is to be accomplished is the feature that distinguishes an independent contractor from a servant. Collins v. Federated Mutual Implement and Hardware Insurance Co., 247 So. 2d 461 (Fla. 4th DCA 1971); La Grande v. B. &

L. Services, Inc., 432 So. 2d 1364 (Fla. 1st DCA 1983). The Petitioner determined what work was performed by the Joined Party, when the work was performed, and where the work was performed. The Petitioner determined, through training and direction, how the Joined Party was to record blood samples in the Petitioner's computer and how the Joined Party was to perform assigned office work.

25. The Petitioner controlled the financial aspects of the relationship. The Petitioner determined the rate and method of payment. The Joined Party was paid by the hour, rather than by production or by the job. The Joined Party was not required to correct defective work without additional compensation. The fact that the Petitioner did not withhold payroll taxes from the Joined Party's pay does not, standing alone, establish an independent contractor relationship.

26. The Petitioner furnished a computer and all of the supplies needed for the Joined Party's phlebotomy services. The Petitioner furnished the work space, telephone, and computer needed for the clerical services performed by the Joined Party. Although the Joined Party used her personal vehicle to travel to the facilities and other locations, the Petitioner reimbursed the Joined Party for mileage associated with the use of her vehicle.

27. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured work. In Adams v. Department of Labor and Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the court determined the Department had the authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers. It was shown that other individuals performing services as phlebotomists for the Petitioner did not perform their services under the same terms and conditions as the Joined Party.

28. The determination in this case holds the Petitioner liable for payment of reemployment assistance taxes retroactive to May 2008. However, the record shows the Joined Party first performed for the Petitioner on December 9, 2011. Therefore, the correct retroactive date is December 9, 2011.

29. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law. The Petitioner's Proposed Findings of Fact and Conclusions of Law were considered by the Special Deputy. Those Proposed Findings of Fact and Conclusions of Law that are supported by the record were incorporated in the recommended order. Those Proposed Findings of Fact and Conclusions of Law that are not supported by the record were respectfully rejected.

Recommendation: It is recommended that the determination dated September 10, 2012, be MODIFIED to apply only to the Joined Party. It is further recommended that the determination be MODIFIED to reflect a retroactive date of December 9, 2011. As MODIFIED, it is recommended that the determination be AFFIRMED.

Respectfully submitted on April 8, 2013.

SUSAN WILLIAMS, 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:
April 9, 2013

Copies mailed to:
Petitioner
Respondent
Joined Party

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