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

PETITIONER:
Employer Account No. - 2321837
TECH SEARCH AMERICA INC
ATTN ED ZAKARIAN
6901 OKEECHOBEE BLVD STE D5-J1
WEST PALM BEACH FL 33411-2517

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

PROTEST OF LIABILITY
DOCKET NO. 2012-119941L

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 October 2, 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 **October, 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 October, 2013.

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

By U.S. Mail:

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ATTN ED ZAKARIAN
6901 OKEECHOBEE BLVD STE D5-J1
WEST PALM BEACH FL 33411-2517

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CATHLEEN SCOTT & ASSOCIATES PA
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DEPARTMENT OF REVENUE
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4230-D LAFAYETTE ST.
MARIANNA, FL 32446

DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
PO BOX 6417
TALLAHASSEE FL 32314-6417

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

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

PROTEST OF LIABILITY
DOCKET NO. 2012-119941L

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated October 2, 2012.

After due notice to the parties, a telephone hearing was held on January 7, 2013. The Petitioner was represented by its attorney. The Petitioner's president testified as a witness. The Respondent was represented by a Department of Revenue Tax Specialist II. The Joined Party appeared and testified. A recommended order was mailed to the parties on February 6, 2013. Both the Petitioner and the Joined Party filed exceptions to the recommended order. On May 7, 2013, the case was remanded to schedule an additional hearing to allow submission of additional evidence. After due notice to the parties an additional telephone hearing was held on August 1, 2013. The Petitioner was represented by its attorney. The Petitioner's president and a former account manager testified as witnesses. The Respondent, represented by a Department of Revenue Senior Tax Specialist appeared and testified. The Joined Party did not appear.

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. Proposals which are supported by competent, material, and credible evidence are incorporated herein.

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, Tech Search America Inc, is a corporation which was formed in approximately April 2001 to operate a business as an information technology consulting and staffing company. The Petitioner's president manages the day-to-day operations of the business. The Petitioner established liability for payment of Florida unemployment compensation tax effective May 22, 2001.
2. In 2005 the Joined Party was seeking work and posted his resume on the Internet. An employee of the Petitioner contacted the Joined Party by telephone and asked the Joined Party some questions. The Joined Party informed the employee that he was only interested in doing work from his home. The employee then transferred the call to the Hiring Manager of the Petitioner's client, Wackenhut Services, for an interview. The Joined Party had interviews with the Hiring Manager of the client company and with the Petitioner's Vice President, Human Resources. During the interviews the Petitioner stated the rate of pay was $45 per hour. The Joined Party attempted to negotiate a higher rate of pay; however, the Petitioner was not willing to pay more than $45 per hour.
3. By letter dated October 14, 2005, the Petitioner's Vice President, Human Resources, offered the Joined Party the position of Senior Programmer to work with the Petitioner's client with a tentative start date of October 31, 2005. The offer letter states that the Joined Party was requested to report to the assigned client site, that the Joined Party would be responsible for delivery of consulting services as directed by the client, that the Joined Party would report directly to the Vice President, Human Resources with all internal matters with regard to employee-employer relations, and that the Joined Party was prohibited from disclosing any such matters either directly or indirectly to the client.
4. The offer letter states that the Joined Party's compensation for performing the assigned duties as an hourly 1099 employee shall be $45 per hour for all client approved hours worked and that the Joined Party would be responsible for reporting all hours worked on the Petitioner's time sheet forms and to have the assigned client manager sign and approve all hours worked. The offer letter advised the Joined Party that he was required to abide by the client's work schedule as agreed during the interview, that the client must pre-approve all expenses in writing for expense reimbursement, and that the Joined Party would be responsible for payment of all state, federal, and local employment taxes.
5. The offer letter state that the Joined Party was being offered the position as an employee and that the Joined Party would be entitled to receive fringe benefits including 401k and health insurance. Attached to the offer letter was an *Employment Agreement* which, among other things specified the duties of the position, stated that the Joined Party was required to comply with the Petitioner's policies and procedures, and contained a non-solicitation clause.
6. Shortly after the offer letter and Employment Agreement were provided to the Joined Party, the Petitioner's account manager who was responsible for the Wackenhut account contacted the Joined Party and explained that there had been a mistake and that the offer of work was not an offer of employment and that the Joined Party was offered work as an independent contractor. The Joined Party replied that he understood that it was not an offer of employment, that he was aware that he was an independent contractor, and that he wanted to be an independent contractor because he could write off expenses as an independent contractor.
7. The Joined Party began performing services at the client location in early November 2005. After the first month of work the Joined Party performed the majority of his services from the Joined Party's home. While working from his home the Joined Party used his personal laptop computer and software which the Joined Party purchased. The Joined Party was reimbursed by the Petitioner for the expense of commuting to and from the client's location.

8. While working from home the Joined Party was required to be available for contact with the client company during regular business hours. However, the Joined Party could perform the actual work during whatever days or times the Joined Party chose to work.

9. The account manager was the liaison between the Petitioner's client, Wackenhut, and the employees who were placed by the Petitioner to work at the location of Wackenhut. Since the Joined Party was an independent contractor rather than an employee the account manager was not the liaison between Wackenhut and the Joined Party. The account manager did not supervise the Joined Party. However, on many occasions, as frequently as once a month, Wackenhut notified the account manager that they were unable to contact the Joined Party during regular business hours and asked the account manager for assistance in locating the Joined Party. The account manager complied with those requests.

10. The Joined Party was required to report his time worked on an electronic timesheet utilizing software which was owned by the Petitioner. After the Joined Party completed the electronic timesheet it was transmitted to a manager at the client location for approval. The client then transmitted the approved timesheet to the Petitioner after approval. The Petitioner paid the Joined Party on a bi-weekly basis. No taxes were withheld from the pay and at the end of each year the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

11. The Joined Party did not receive fringe benefits such as 401k, retirement benefits, health insurance, or paid vacations. The Joined Party did take time off from work with the approval of Wackenhut, however, he was paid only for the hours which he actually worked.

12. The Petitioner did not conduct any performance evaluations. On several occasions the Joined Party asked the account manager to contact Wackenhut and request that Wackenhut approve an increase in the hourly rate of pay. The account manager intervened as requested and the Joined Party did receive pay increases.

13. In approximately June 2010 the amount of work available through the client, Wackenhut, was reduced and as a result the Joined Party's hours of work were decreased. In June 2012 Wackenhut contacted the account manager and informed the account manager that the Joined Party's work assignment would end on July 31, 2012. The account manager relayed the information to the Joined Party. During the following week the client company contacted the Joined Party and informed the Joined Party that the client company had lost some government contracts and that the client company would have no further work available after July 31, 2012.

14. The Joined Party filed an initial claim for unemployment compensation benefits (now known as reemployment assistance benefits) effective July 29, 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 Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.

15. On August 15, 2012, during the course of the investigation, the Joined Party completed an *Independent Contractor Analysis,* Form UCS-6061, on which the Joined Party stated, among other things, that he believed he had performed services for the Petitioner as an employee rather than as an independent contractor.

16. On October 2, 2012, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to November 7, 2005. The Petitioner filed a timely protest by letter dated October 18, 2012.

17. After the investigation was issued to the Department of Revenue the Petitioner's president contacted the Joined Party and informed the Joined Party that the October 14, 2005, offer letter

and the *Employment Agreement* were in error and that the Joined Party was an independent contractor rather than an employee of the Petitioner.

18. Subsequent to the January 7, 2013, hearing held in this matter the Joined Party filed a written statement asserting that he had inadvertently answered questions incorrectly, that neither the Petitioner nor Wackenhut dictated the work schedule, that the Joined Party dictated the hours of work, and that the Joined Party performed services for other clients of the Joined Party during the time that he performed services for the Petitioner. In the written statement the Joined Party asserted that he considered himself to be an independent contractor and not an employee.

Conclusions of Law:

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

20. 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).

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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 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. At the first hearing in this matter the Joined Party offered testimony revealing that he worked under terms and conditions that would tend to establish an employer/employee relationship, especially in view of the offer letter and the terms set forth in the *Employment Agreement*. In a written statement entered into evidence subsequent to the first hearing the Joined Party asserts that his testimony at the first hearing was in error and that he was not employed under the terms set forth in the offer letter and the *Employment Agreement*, that he was not directed and controlled by the Petitioner, and that he performed services as an independent contractor. Although the Joined Party did not appear at the second hearing the Petitioner offered testimony of an additional witness which shows that it was the intent of both parties to establish and maintain an independent contractor relationship, and that, among other things, the Petitioner did not supervise the Joined Party, did not direct the Joined Party concerning how or when to perform the work, and did not conduct performance evaluations as previously alleged by the Joined Party. The Joined Party's written statement submitted after the first hearing and the additional evidence submitted by the Petitioner at the second hearing reveals that the Joined Party's testimony is not worthy of belief.

27. The evidence in this case which has been accepted as competent, material, and credible reveals that it was the intent of both parties to establish an independent contractor relationship and that the Petitioner did not have the right to control how the work was performed or when the work was performed. 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.

28. It is concluded that the services performed for the Petitioner by the Joined Party do not constitute insured employment.

Recommendation: It is recommended that the determination dated October 2, 2012, be REVERSED.

Respectfully submitted on August 27, 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:
August 27, 2013

Copies mailed to:
Petitioner
Respondent
Joined Party

BART EVANS
1863 59TH WAY NORTH
ST PETERSBURG FL 33710

CATHLEEN SCOTT & ASSOCIATES PA
ATTN CATHLEEN SCOTT
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JUPITER FL 33458

DEPARTMENT OF REVENUE
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TALLAHASSEE FL 32399

DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA

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

PROTEST OF LIABILITY
DOCKET NO. 2012-119941L

REMAND ORDER

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, and if so, the effective date of liability pursuant to sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

A review of the record establishes that procedural error requires remanding of this case. Rule 73B-10.035(15)(b), Florida Administrative Code, provides that the special deputy will "preserve the right of each party to present evidence relevant to the issues." Rule 73B-10.035(15)(e), Florida Administrative Code, further provides that only documents submitted to the special deputy and all parties on the notice of hearing in sufficient time for receipt prior to the telephone hearing will be considered by the special deputy unless the parties waive their right to view the documents. The record reflects that the Petitioner's attorney relied on her office to submit documents to all parties for the hearing, and the office failed to submit the documents to the Joined Party and the Respondent. The record also reflects that the Special Deputy denied the Petitioner's request for another opportunity to submit its documents to the parties and did not provide the Joined Party or Respondent with an opportunity to waive their right to view the documents.

Therefore, the record demonstrates that the Petitioner made an unsuccessful attempt to comply with the requirements of rule 73B-10.035(15)(e), Florida Administrative Code, and was not given an opportunity to correct its error by sending its documents to the parties or obtaining a waiver of the right to view the documents from the parties. When the Special Deputy deprived the Petitioner of these opportunities, the Special Deputy failed to preserve the Petitioner's right to present relevant evidence as required by rule 73B-10.035(15)(b), Florida Administrative Code.

Accordingly, it is ORDERED that the case is remanded for a supplemental hearing to allow for the submission of additional evidence. Upon the conclusion of the hearing, the Special Deputy shall issue another Recommended Order based on the entire record of the case.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **May, 2013**.

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

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
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PROTEST OF LIABILITY
DOCKET NO. 2012-119941L

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

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 October 2, 2012.

After due notice to the parties, a telephone hearing was held on January 7, 2013. The Petitioner was represented by its attorney. The Petitioner's president testified as a witness. The Respondent was represented by a Department of Revenue Tax Specialist II. 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 Joined Party.

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, Tech Search America Inc, is a corporation which was formed in approximately April 2001 to operate a business as an information technology consulting and staffing company. The Petitioner's president manages the day-to-day operations of the business. The Petitioner established liability for payment of Florida unemployment tax effective May 22, 2001.

2. In 2005 the Joined Party was seeking work and posted his resume on the Internet. An employee of the Petitioner contacted the Joined Party by telephone and asked the Joined Party some questions. The Joined Party informed the employee that he was only interested in doing work from his home. The employee then transferred the call to the Hiring Manager of the Petitioner's client, Wackenhut Services, for an interview. The Joined Party had interviews with the Hiring Manager of the client company and with the Petitioner's Vice President, Human Resources. During the interviews the Petitioner stated the rate of pay was $45 per hour. The Joined Party attempted to negotiate a higher rate of pay; however, the Petitioner was not willing to pay more than $45 per hour.

3. By letter dated October 14, 2005, the Petitioner's Vice President, Human Resources, offered the Joined Party the position of Senior Programmer to work with the Petitioner's client with a tentative start date of October 31, 2005. The offer letter states that the Joined Party was requested to report to the assigned client site, that the Joined Party would be responsible for delivery of consulting services as directed by the client, that the Joined Party would report directly to the Vice President, Human Resources with all internal matters with regard to employee-employer relations, and that the Joined Party was prohibited from disclosing any such matters either directly or indirectly to the client.

4. The offer letter states that the Joined Party's compensation for performing the assigned duties as an hourly 1099 employee shall be $45 per hour for all client approved hours worked and that the Joined Party would be responsible for reporting all hours worked on the Petitioner's time sheet forms and to have the assigned client manager sign and approve all hours worked. The offer letter advised the Joined Party that he was required to abide by the client's work schedule as agreed during the interview, that the client must pre-approve all expenses in writing for expense reimbursement, and that the Joined Party would be responsible for payment of all state, federal, and local employment taxes.

5. The offer letter states "As an employee of Tech Search America, you are entitled to 401k, medical, and all other company sponsored benefits as outlined in your employee handbook as well as any bonus structures that may apply and as directed by Tech Search America. It is understood that all benefits are subject to company policies and procedures and may be modified at any time at the sole discretion of the Company. It is also agreed that you have currently waived medical coverage from TS America since you have coverage through your spouse."

6. The offer letter states "This offer of employment should not be construed as a guarantee of employment for any specific duration. Your offer of employment is conditioned upon your execution and delivery of the attached Non-Solicitation agreement. Your offer is also contingent upon the final acceptance by the 'Client' which shall be confirmed immediately after receipt of this signed document."

7. The offer letter states "We are excited about your employment with this company. Your expected start date is noted above and will be finalized and confirmed upon your acceptance of this Draft offer. To confirm your acceptance, please sign, date and return a copy of this letter and your Non-Solicitation Agreement to me after you have had a chance to review."

8. Attached to the offer letter was a document entitled *Employment Agreement*. Among other things the Agreement states "Duties, Employee is being employed for a Insurance Outbound submission project as a Programmer or as assigned by the Client and as such will render to Employer those skills necessary to efficiently accomplish his or her employment. The Employee agrees to devote his full time to the discharge of his or her responsibilities and duties under this Agreement. In discharging such duties, Employee agrees that Employee will at all times faithfully and to the best of his ability, experience and talents, perform all of the duties that may be required of and from Employee pursuant to the express and implicit terms of this Agreement, to the satisfaction of the Employer. The Employee shall have the responsibilities, duties and title(s) as may be set forth by the Employer."

9. The *Employment Agreement* states that the term of the Agreement shall be the entire time that the Joined Party is employed on a full-time permanent basis, that the Petitioner will compensate the Joined Party for services rendered under the Agreement at the salary indicated on the offer letter, that the Joined Party shall take vacation time in such amounts and in accordance with established policy, and that the Joined Party shall give at least thirty days notice as a condition of taking vacation time. Any unused vacation time will be lost.

10. The *Employment Agreement* states "Policies and Procedures. The Employer shall have the authority to establish from time to time policies and procedures to be followed by the Employee in fulfilling and discharging Employee's duties under this Agreement. The Employee agrees to comply with such policies and procedures as the Employer may promulgate from time to time."

11. The *Employment Agreement* states that the employment under the Agreement is at will employment and that the Petitioner may, in the Petitioner's sole and absolute discretion, immediately discharge the Joined Party without cause. The Agreement provides that the Petitioner will consider payment of severance pay on a case-by-case basis and that any severance pay will be paid in the sole discretion of the Petitioner.

12. The *Employment Agreement* contains the non-solicitation agreement referred to in the offer letter. The non-solicitation agreement provides that the Joined Party may not solicit business from the Petitioner's client for a period of two years after termination of the *Employment Agreement*. The Joined Party signed the *Employment Agreement* including the non-solicitation agreement, signed the offer letter, and returned them to the Petitioner on October 17, 2005. The Joined Party believed that he was hired to be an employee of the Petitioner.

13. The Joined Party began performing services at the client location in early November 2005. After the first month of work the Joined Party performed the majority of his services from the Joined Party's home. While working from his home the Joined Party used his personal laptop computer and software which the Joined Party purchased. The Joined Party was reimbursed by the Petitioner for the expense of commuting to and from the client's location.

14. While working from home the Joined Party was required to be available for contact with the client company during regular business hours. However, the Joined Party could perform the actual work during whatever days or times the Joined Party chose to work.

15. The Joined Party was required to personally perform the work. He was not allowed to hire others to perform the work for him.

16. The Joined Party worked forty hours or more each week until June 2010. The Joined Party was told by both the Petitioner and the Petitioner's client that the Joined Party was not allowed to work more than forty hours per week without prior authorization. The Joined Party was required to report his time worked on an electronic timesheet utilizing software which was owned by the Petitioner. After the Joined Party completed the electronic timesheet it was transmitted to a manager at the client location for approval. The client then transmitted the approved timesheet to the Petitioner after approval. The Petitioner paid the Joined Party on a bi-weekly basis. No taxes were withheld from the pay and at the end of each year the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

17. The Joined Party reported to the Account Manager who was an employee of the Petitioner. Each year the Petitioner and the client performed an evaluation of the Joined Party's work performance. Factors considered in the evaluation included work quality, dependability, initiative, interpersonal skills, communication skills, technical skills, and whether the Joined Party met work load requirements. The Joined Party received excellent evaluations resulting in annual pay increases.

18. In spite of what was stated in the offer letter the Joined Party did not receive fringe benefits such as retirement benefits or paid vacations. The Joined Party did take time off from work with approval, however, he was paid only for the hours which he actually worked.

19. Based on the needs of the client the Petitioner reduced the Joined Party's hours of work from forty hours per week to twenty hours per week in June 2010. Prior to June 2010 the Joined Party did not attempt to provide services to anyone other than the Petitioner. The Joined Party did not believe that he had the right to perform services for a competitor of the Petitioner because he believed that he was an employee of the Petitioner. After June 2010 the Joined Party's income from the Petitioner was not sufficient to make his mortgage payments and to pay for other living expenses. At that time the Joined Party began seeking outside work in order to supplement his income from the Petitioner. In May 2011 the Joined Party formed a limited liability company for performing outside work.

20. At the end of June 2012 the Petitioner's Account Manager contacted the Joined Party by telephone and informed the Joined Party that the client company had provided thirty days notice that the Joined Party's work assignment would end on July 31, 2012. During the following week the client company contacted the Joined Party and informed him that the client company had lost some government contracts and that the client company would have no further work available after July 31, 2012.

21. The Joined Party filed an initial claim for unemployment compensation benefits (now known as reemployment assistance benefits) effective July 29, 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 Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.

22. On August 15, 2012, during the course of the investigation, the Joined Party completed an *Independent Contractor Analysis*, Form UCS-6061, on which the Joined Party stated that he believed he had performed services for the Petitioner as an employee rather than as an independent contractor.

23. On October 2, 2012, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to November 7, 2005. The Petitioner filed a timely protest by letter dated October 18, 2012.

24. The Petitioner's president was not involved in hiring the Joined Party to perform services for the Petitioner. Although the Petitioner's president was involved in the day to day operations of the company, the president had little or no contact with the Joined Party. After the investigation was issued to the Department of Revenue the Petitioner's president contacted the Joined Party and informed the Joined Party that the October 14, 2005, offer letter and the Employment Agreement were in error and that the Joined Party was an independent contractor rather than an employee of the Petitioner. Based on that notification the Joined Party discontinued his claim for reemployment assistance benefits.

Conclusions of Law:

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

26. 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).

27. 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.

28. 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.

29. 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.

30. 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.

31. 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.

32. The Petitioner's business is to provide information technology consulting services and information technology workers to the Petitioner's clients. The Joined Party was one of the workers provided to one of the Petitioner's clients. 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 activity.

33. The Petitioner paid the Joined Party by time worked rather than by the job or based on production. The Petitioner controlled the Joined Party's hours of work by initially limiting the hours to forty hours per week and subsequently reducing the hours to twenty hours per week. The Petitioner determined the starting rate of pay and the amount of any subsequent pay increases. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Reemployment Assistance Program Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash. The fact that the Petitioner chose not to withhold payroll taxes from the pay or to provide fringe benefits does not, standing alone, establish an independent contractor relationship.

34. The Joined Party performed services for the Petitioner from November 2005 through July 31, 2012, a period in excess of six and one-half years. Either party had the right to terminate the relationship at any time, with or without cause, without incurring liability for breach of contract. 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 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).

36. In this case the Petitioner made an offer of employment to the Joined Party which the Joined Party accepted. The Joined Party accepted and signed the *Employment Agreement*. Both the offer letter and the *Employment Agreement* establish that the Petitioner had the right to control the Joined Party concerning time worked and had the right to require the Joined Party to comply with any of the Petitioner's policies and procedures. The Petitioner's right of control is further evidenced by the annual performance evaluations. The Petitioner evaluated the Joined Party not only on the completed work but on how the work was performed, including among other things, the Joined Party's dependability, initiative, interpersonal skills, and communication skills.

37. The Petitioner's president was not involved in interviewing and hiring the Joined Party in 2005. Although the president may controlled the Petitioner's day-to-day operations he had little or no contact with the Joined Party during the Joined Party's six and one-half years of work with the Petitioner. During the six and one-half years the Joined Party always believed that he was an employee of the Petitioner and always believed that he was subject to the Petitioner's direction and control. It was not until the president contacted the Joined Party subsequent to the end of the relationship that the Joined Party was persuaded to believe that he had performed services as an independent contractor.

38. 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) It is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

39. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

Recommendation: It is recommended that the determination dated October 2, 2012, be AFFIRMED.

Respectfully submitted on February 6, 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:
February 6, 2013

Copies mailed to:
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