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

PETITIONER:
Employer Account No. - 3111146
HEAVEN ESSENTIALS VIRTUAL SERVICES LLC
ATTN KARLA GREEN
7628 COVEDALE DRIVE
ORLANDO FL 32818-4739

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

PROTEST OF LIABILITY
DOCKET NO. 2012-119944L

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 22, 2012, is AFFIRMED.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY]* en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt *Lòd* sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _____ day of April, 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
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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PROTEST OF LIABILITY
DOCKET NO. 2012-119944L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: SECRETARY,
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 October 22, 2012.

After due notice to the parties, a telephone hearing was held on March 6, 2013. The Petitioner, represented by the Petitioner's managing member, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

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

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as customer service 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. Arise Virtual Solutions Inc. is a corporation which contracts to provide customer service for its clients, including AT&T.

2. The Petitioner, Heaven Essentials Virtual Services LLC, is a Florida limited liability company which was formed on May 16, 2011. The Petitioner contracted with Arise Virtual Solutions Inc to provide customer service for the clients of Arise Virtual Solutions Inc. Arise Virtual Solutions Inc does not contract with individuals and only contracts with corporations or limited liability companies. There is no common ownership between the Petitioner and Arise Virtual Solutions Inc. Although the Petitioner's president did perform some of the customer service work for Arise Virtual Solutions Inc, the Petitioner chose to hire other workers to perform the majority of the customer service work and to retain a portion of the earnings generated by the workers.

3. The Joined Party is an individual with a history of employment as an electronic technician and in customer service. In 2011 the Joined Party was seeking employment and responded to a help wanted advertisement posted on an Internet work search site. In response, the Petitioner's managing member contacted the Joined Party in November 2011 and informed him that in order to apply for work with the Petitioner the Joined Party had to contact Arise Virtual Solutions Inc and had to complete a training program offered by Arise Virtual Solutions Inc. The Petitioner advised the Joined Party that the Petitioner would reimburse the Joined Party for the cost of the training.

4. The Joined Party successfully completed the training offered by Arise Virtual Solutions Inc and contacted the Petitioner. On February 2, 2012, the Petitioner sent a letter to the Joined Party confirming that the Petitioner offered the Joined Party the position of a Billing and Tech Customer Service Representative as an "Arise Certified Professional independent contractor' and that the Joined Party had accepted the offer. Among other things the offer of work states that the first day of employment is February 14, 2012, that the agreement will expire on March 19, 2012, that the pay would be based on the number of minutes that the Joined Party was on the telephone performing customer service with a guaranteed hourly rate of $10, that the Joined Party would be paid bi-monthly, that the Petitioner would withhold a 10% service fee, that the Petitioner would withhold an Arise membership fee of $19.75, that the Joined Party would report directly to the Petitioner's managing member, that the Petitioner would reimburse the Joined Party for the training fee within the first 30 days of active employment, that the Joined Party must maintain 90 days of active employment with the Petitioner or the training fee would be charged back to the Joined Party's bank account, and that the Joined Party would be eligible for optional health, vision, and dental benefits effective 60 days following the date of hire. The offer letter which was accepted by the Joined Party states "Your employment is subject to all of the policies and practices of the company. Please be advised that this constitute (sic) a contract of employment with the understanding that at least the minimum of 20 hours is required to be worked per week with 4 of those hours worked on Sat/Sun." The Joined Party signed the offer letter on February 2, 2012, and began performing services for the Petitioner on or about February 14, 2012.

5. In addition to the Joined Party the Petitioner had engaged approximately five other workers to perform customer service work. Since the Joined Party and the other customer service representatives worked at locations other than the location of the Petitioner's home-based business the Petitioner did not "micromanage" the workers.

6. The Joined Party understood that he was hired to be a contract worker. The Joined Party understood that being a contract worker meant that he was responsible for paying his own taxes.

7. The Joined Party worked from his home and was responsible for providing a computer, a telephone, and the Internet connection. The Petitioner did not provide any tools, equipment, or supplies and did not reimburse the Joined Party for any expenses other than the cost of the training. The Joined Party was required to connect remotely to a server at Arise Virtual Solutions Inc in order to perform the customer service work which required that the Joined Party accept in-bound customer service calls.

8. The Joined Party was free to choose his hours of work within the operating hours of the AT&T customer service program, as long as the Joined Party worked at least 20 hours a week and worked at least 4 hours per weekend.

9. The Joined Party's calls were monitored by Arise Virtual Solutions Inc. The Joined Party was informed that he was required to meet certain performance guidelines and that if he failed to meet the performance guidelines his contract with the Petitioner would be terminated. On occasion Arise Virtual Solutions Inc would notify the Petitioner of problems with the Joined Party's performance. The Petitioner would then contact the Joined Party and advise the Joined Party what the Joined Party needed to do to improve his performance. The Joined Party was required to report any problems to the Petitioner. On occasion the Joined Party contacted Arise Virtual Solutions Inc or AT&T when he had questions about how to handle a customer service problem. On those occasions the Joined Party was instructed to contact the Petitioner.

10. The work performed by the Joined Party did not require any skill or special knowledge. The Joined Party was not required to possess any type of certification other than that issued by Arise Virtual Solutions Inc.

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

12. Arise Virtual Solutions Inc computed the pay earned by the Joined Party based on the time that the Joined Party was logged onto the server. The Joined Party received hourly pay rate increases based on the level of training which he had completed. Arise Virtual Solutions Inc paid the Joined Party's earnings to the Petitioner on the fifteenth day and the last day of each month. Upon receipt the Petitioner deducted 10% of the earnings as a Heaven Essentials Virtual Services Inc. contractor's fee and deducted a $19.75 membership fee per pay period. The Petitioner also paid bonuses to the Joined Party including a birthday bonus. The Petitioner did not withhold any payroll taxes from the Joined Party's pay.

13. The Petitioner made provisions for the workers to obtain health insurance, dental insurance, and vision insurance. The Joined Party did not apply for the insurance. If the Joined Party had applied for and been approved for the insurance the Joined Party would have been responsible for paying the insurance premiums.

14. When the initial agreement with the Joined Party expired on March 19, 2012, the Petitioner created a new agreement by copying, pasting, and amending portions of the Petitioner's contract with Arise Virtual Solutions Inc. That *Statement of Work Agreement* was in effect from March 19, 2012, until July 31, 2012, and was signed by the Joined Party on July 2, 2012. On July 27, 2012, Arise Virtual Solutions Inc notified the Petitioner that Arise Virtual Solutions Inc was extending the agreement with the Petitioner through August 31. Many portions of the Agreement copied by the Petitioner from the Petitioner's agreement with Arise Virtual Solutions Inc did not apply to the Joined Party but only applied to the Petitioner, even though the Joined Party signed the Agreement on July 2, 2012.

15. The Joined Party had the right to stop performing services for the Petitioner at any time without incurring penalties for breach of contract. The Petitioner had the right to terminate the Joined Party's services at any time without incurring penalties for breach of contract. On August 16, 2012, Arise Virtual Solutions Inc notified the Petitioner that Arise Virtual Solutions Inc had terminated the agreement with the Petitioner because the Joined Party, who was providing services on behalf of the Petitioner, had failed to meet the performance quality requirements of Arise Virtual Solutions Inc. The Petitioner then notified the Joined Party of the termination.

16. During the time that the Joined Party performed services for the Petitioner the Joined Party did not have any investment in a business, did not offer services to the general public, did not advertise, did not have business liability insurance, and did not have a business license or occupational license.

17. The Joined Party filed an initial claim for unemployment compensation benefits, now known as reemployment assistance program benefits, effective August 19, 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. By determination dated October 22, 2012, the Department of Revenue determined that the Joined Party and other individuals performing services for the Petitioner as customer service were the Petitioner's employees retroactive to February 1, 2012. The Petitioner filed a timely protest.

Conclusions of Law:

18. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as customer service representatives 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.

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

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

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

22. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:
    (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.

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

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

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

25. The initial agreement in this case, the Petitioner's letter to the Joined Party dated February 2, 2012, identifies the relationship between the Petitioner and the Joined Party as an employment relationship and identifies the letter as a "contract of employment." The letter identifies and establishes the Petitioner's right to control the Joined Party by stating that the Joined Party's "employment is subject to all of the policies and practices of the company." The letter identifies and establishes the Petitioner's right to control the hours of work by requiring the Joined Party to work at least twenty hours a week and requiring the Joined Party to work at least four hours each weekend. Although the letter identifies the Joined Party as an "Arise Certified Professional independent contractor" no evidence was submitted to show the existence of any agreement or contract between the Joined Party and Arise Virtual Solutions Inc. The relationship was between the Petitioner and the Joined Party.

26. The Petitioner did not provide any tools, equipment, or supplies. The Joined Party was required to use a computer and a telephone and was required to have an Internet connection. Most households commonly have the use of a computer with Internet connectivity and a telephone. Thus, it has not been shown that the Joined Party had a significant investment in a business nor has it been shown that the Joined Party had significant business expenses. It has not been shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

27. The Petitioner's testimony reveals that the work of a customer service representative does not require any skill or special knowledge. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

28. The Joined Party performed services for the Petitioner for a period of approximately five months. Either party could terminate the relationship at any time without incurring liability for breach of contract. The Petitioner terminated the Joined Party due to the Joined Party's failure to meet the performance requirements of Arise Virtual Solutions Inc. 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."

29. The Joined Party was paid by time worked rather than by the job or based on production. 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 Petitioner made health, dental, and vision insurance available to the Joined Party. In addition to the factors enumerated in the Restatement of Law, the provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004). The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

30. The Joined Party understood that he was hired to be a contract worker based solely on the fact that he understood that he would be responsible for paying his own taxes, not based on the factors enumerated in Cantor v. Cochran, 184 So.2d 173 (Fla. 1966). A statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

31. Although the Joined Party worked from his home and was not directly supervised by the Petitioner, the evidence reveals that the Petitioner had the right to control, at least to some degree, when the work was performed. Since the Joined Party was required to personally perform the work the Petitioner was in control of who performed the work. The Joined Party was required to complete training which was provided by Arise Virtual Solutions Inc, the cost of which was reimbursed by the Petitioner. Mandatory training is a method of control since it establishes how a task must be performed. The provision of training establishes that the Petitioner controlled how the work was performed. The initial agreement between the Petitioner and the Joined Party establishes that the Joined Party was required to adhere to all of the Petitioner's policies and practices.

32. 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)

33. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

34. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as customer service representatives constitute insured employment.

Recommendation: It is recommended that the determination dated October 22, 2012, be AFFIRMED.

Respectfully submitted on March 8, 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:
March 8, 2013

Copies mailed to:
Petitioner
Respondent
Joined Party

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