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

PETITIONER:
Employer Account No. - 2902852
ANNE LORD TOMAS DO PA
13300 SOUTH CLEVELAND AVENUE STE 56 #318
FORT MYERS FL 33907-3871

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

PROTEST OF LIABILITY
DOCKET NO. 2012-126972L

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 November 16, 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
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By U.S. Mail:

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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 November 16, 2012.

After due notice to the parties, a telephone hearing was held on March 19, 2013. The Petitioner, represented by its vice president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

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

Issue:

Whether services performed for the Petitioner by the Joined Party constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation which was formed to operate a medical practice. The Petitioner established liability for payment of unemployment tax to Florida in 2009.
2. In 2011 the Petitioner was seeking to hire an individual to work as the front desk receptionist. One of the Petitioner's employees referred her sister, the Joined Party, to the Petitioner as an applicant for the position. The Joined Party was a full time student who was employed on a part time basis but was not satisfied with her part time job. The Joined Party had never worked in a medical office and had never worked as a receptionist. The Petitioner interviewed the Joined Party and informed the Joined Party that the job was for twenty hours per week and that the rate of pay was $13 per hour. The offered rate of pay was higher than what the Joined Party was

receiving at her current employment and she accepted the Petitioner's offer. The Petitioner provided the Joined Party with an employee manual so that the Joined Party would know how to behave on the job and would know how to dress. The Petitioner informed the Joined Party that she was being hired on a trial basis. The parties did not enter into any written agreement or contract.

3. After the interview the Petitioner's Office Manager gave the Joined Party paperwork to complete including *Form W-4 Employee's Withholding Allowance Certificate*. The Joined Party asked the Office Manager if there was any way that she could increase that amount of tax that the Petitioner would withhold so that the Joined Party would not owe any tax at the end of the year. The Office Manager told the Joined Party to complete the form by listing zero dependents which would result in additional income tax being withheld by the Petitioner. The Joined Party complied and began work for the Petitioner during the latter part of November 2011.

4. The Petitioner trained the Joined Party for the receptionist position. The training consisted mainly of the Joined Party sitting behind the receptionist and observing how the job was performed. The Office Manager told the Joined Party what to do and how to do it, including what to say. During the training period the Office Manager explained that one of the Office Manager's duties was to do the insurance verification for patients. The Office Manager explained that she was going to ask the Petitioner for permission to shift the insurance verification duty to the Joined Party. Subsequently, the Office Manager trained the Joined Party how to perform the insurance verification and that task became part of the Joined Party's job duties.

5. The Joined Party's immediate supervisor was the Office Manager. The Joined Party was required to personally perform the work. She was not allowed to hire others to perform the work for her. The Joined Party did not have any financial investment in a business, did not advertise her services to the general public, did not perform similar services for others, did not have business liability insurance, and did not have a business license or occupational license. The Joined Party believed that she was an employee of the Petitioner.

6. From the outset the Joined Party worked more than the twenty hours per week stated in the interview by the Petitioner. During the first two week pay period the Joined Party worked 84 hours and she continued to work full time as scheduled during the following weeks. Eventually, the Joined Party asked the Office Manager if, since the doctors were in surgery on Fridays, she could have Fridays off so that she could catch up with her school work. The Office Manager replied that the Office Manager would have to obtain permission from the doctors. The Petitioner granted the Joined Party's request.

7. The Petitioner did not withhold any payroll taxes from the Joined Party's pay. On several occasions the Joined Party approached the Office Manager and asked why taxes were not being withheld. The Office Manager told the Joined Party that taxes were supposed to be withheld and that she did not know why taxes were not being withheld. When the Joined Party would bring the matter up again the Office Manager would state that she was working on it. At the end of 2011 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

8. The Petitioner did not provide the Joined Party with any fringe benefits such as paid sick days, paid vacations, paid holidays, or health insurance.

9. The Petitioner provided the place of work and all equipment which was needed to perform the work including a computer, a telephone, and a printer. The Joined Party did not have any expenses in connection with the work.

10. The Petitioner's regular business hours are Monday through Friday from 8:30 AM until 4:30 PM. The Petitioner did not provide the Joined Party with a key to the office. The Joined Party performed the insurance verifications on-line and occasionally the Joined Party performed some of the verifications from her home with the Petitioner's permission.

11. In July 2012 the Petitioner reduced the Joined Party's hours of work to two days per week, six hours per day. The Joined Party requested additional hours but her requests were denied.

12. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Joined Party was terminated by the Petitioner when the Office Manager informed the Joined Party that her services were no longer needed.

13. The Joined Party filed an initial claim for unemployment compensation benefits, now known as reemployment assistance benefits, effective September 16, 2012. When the Joined Party did not receive credit for her earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was issued to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor. On November 16, 2012, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to November 21, 2011. The Petitioner filed a timely protest.

Conclusions of Law:

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

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

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

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

18. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:
    (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.

    (2) The following matters of fact, among others, are to be considered:
        (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
        (b) whether or not the one employed is engaged in a distinct occupation or business;
        (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
        (d) the skill required in the particular occupation;
        (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
        (f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant;
(j) whether the principal is or is not in business.

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

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

21. There was no written agreement or contract between the parties. The only evidence of an agreement of any kind is what the Petitioner told the Joined Party during the interview, that the Petitioner would pay the Joined Party $13 per hour and that the Petitioner would set the work schedule. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

22. The Petitioner's business is a medical office. The Petitioner's vice president testified that the Petitioner's business could not operate without someone to work as a receptionist and as an insurance verifier. Therefore, the work performed by the Joined Party as a receptionist and insurance verifier was an integral and necessary part of the Petitioner's business rather than separate and distinct from the Petitioner's business. The Petitioner provided the place of work and everything that was needed to perform the work. The Joined Party did not have any expenses in connection with the work and was not at risk of suffering a financial loss from performing services for the Petitioner.

23. It has not been shown that the Joined Party was required to have any skill or special knowledge to work as a receptionist and insurance verifier for the Petitioner. The Joined Party did not have any prior experience working in a medical office, working as a receptionist, or performing insurance verification. The Petitioner trained the Joined Party. Training is a method of control because it specifies how a task must be performed. 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)

24. The Petitioner determined both the method of pay and the rate of pay. The Petitioner paid the Joined Party by time worked rather than by production or by the job. 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 does not, standing alone, establish an independent contractor relationship.

25. The Joined Party performed services exclusively for the Petitioner for a period of approximately nine months. Either party was free to terminate the relationship at any time 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."

26. The Petitioner controlled what work was performed, where it was performed, when it was performed, and how it 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.

27. 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 November 16, 2012, be AFFIRMED.

Respectfully submitted on March 21, 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 21, 2013

Copies mailed to:
Petitioner
Respondent
Joined Party

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