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

PETITIONER:
Employer Account No. - 1449348
PRIMERICA GROUP ONE INC
3609 MADACA LN
TAMPA FL 33618-2048

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

PROTEST OF LIABILITY
DOCKET NO. 2012-126975L

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 **August, 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 August, 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. 2012-126975L

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

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 22, 2012.

After due notice to the parties, a telephone hearing was held on June 10, 2013. The Petitioner was represented by its attorney. The Petitioner's president and the Petitioner's Controller testified as witnesses. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party, represented by his attorney, 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 timely 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, Primerica Group One, Inc., is a corporation which operates a business as a commercial real estate broker and developer. The Petitioner's primary business function is finding properties for development by the Petitioner's clients, most of which are retail businesses.

2. Over the last fifteen years the Petitioner has used the services of individuals with active commercial real estate licenses to locate construction sites and properties for purchase by the Petitioner's clients. The Petitioner refers to those individuals as site selectors. The Petitioner has classified most of the site selectors as independent contractors.

3. The Joined Party worked as an independent real estate agent while attending college. In approximately 2004 the Joined Party was just out of school and had an active commercial real estate license. The Joined Party was offered an independent contractor position with the Petitioner as a site selector and he accepted. The Joined Party performed services for the Petitioner as an independent contractor site selector for approximately one and one-half years. In approximately 2006 the Joined Party was offered an opportunity to return to work for the Petitioner as an independent contractor site selector. The Joined Party did not believe that he was truly an independent contractor during the previous period of work and he declined the Petitioner's offer. After the Joined Party declined the offer of work the Petitioner offered the Joined Party an opportunity to perform the site selection work for the Petitioner as an employee. The Joined Party accepted the offer of employment and worked for the Petitioner until late 2007 or early 2008.

4. In early 2011 the Petitioner offered the Joined Party an opportunity to perform services for the Petitioner as an independent contractor site selector and provided the Joined Party with an *Independent Contractor Agreement.* On February 2, 2011, the Joined Party declined the Petitioner's offer of work as an independent contractor in writing stating, among other things, that the position requires significantly more duties and time than the typical independent contractor real estate broker position, that the position requires employee duties such as research, due diligence, project management, and that the position requires fiduciary and commitment loyalties that are not typical of an independent contractor who has the flexibility to do business with others. The Joined Party advised the Petitioner that he was not willing to work on a commission basis while being responsible for business expenses because the expenses can be high and the deals take a very long time to close. The Petitioner's president responded on February 2, 2011, stating "I would like to see your model. Lets do this…try a probationary period for 90 days I provide for a draw of $3000/mo no loan. I advance against out of town expenses, you pay your own expenses for day turnaround trips. After 90 we enter into an agreement long term or you leave. Anything we/you generate in the 90 belongs to Primerica of which you participate in the commission. That's the best I can do…yes you have to generate the business if you do not feel it can happen then you are right this is not the place for you. Let me know - today." The Joined Party accepted the Petitioner's offer and believed that he was hired to be an employee of the Petitioner.

5. The Petitioner provided the Joined Party with an office at the Petitioner's location and provided all equipment and supplies that were needed to perform the work. The Petitioner provided the Joined Party with business cards bearing the Petitioner's name and logo, the Petitioner's business address, the Petitioner's telephone number, the Petitioner's fax number, the Joined Party's name and title of Site Selection & Acquisitions, and the Joined Party's cell telephone number. The Joined Party was required to submit a monthly expense account for reimbursement. The Joined Party included all business expenses on the expense report, not just out of town travel expenses. The Petitioner reimbursed the Joined Party for all of the submitted business expenses. The Joined Party did not have any unreimbursed business expenses.

6. The Joined Party was required to personally perform the work. He was not allowed to hire others to perform the work for him. The Joined Party was not allowed to perform services for other real estate companies.

7. The Joined Party was told by the Petitioner's president that he was required to work full time for the Petitioner, Monday through Friday. During some weeks the Joined Party was required to come in to the Petitioner's office during the weekend to meet with the Petitioner's president. The Joined Party was required to complete a weekly report each Friday using a format developed by the Petitioner. The Joined Party was required to attend a staff meeting each Monday morning.

The Petitioner's president "micro managed" the Joined Party and told him when to work and how to perform the work. On occasion the Petitioner's president traveled with the Joined Party to meet with clients. The Petitioner's president constantly threatened the Joined Party that if he did not perform the work to the president's satisfaction, the Joined Party would be let go.

8. The Petitioner paid the Joined Party bi-weekly at the rate of $3000 per month. Although the Petitioner referred to the Joined Party's pay as an advance or draw against commissions, the Joined Party was not required to repay any draws in excess of the earned commissions. The Petitioner also considered the payments to the Joined Party for expenses to be draws against commissions. The Joined Party was not required to repay any excess expense payments that were not covered by earned commissions. The Petitioner did not withhold any payroll taxes from the pay and did not provide any fringe benefits such as health insurance or paid vacations.

9. After the ninety day probation period the Petitioner and the Joined Party did not enter into any written agreement or contract. The Joined Party continued working under the same terms and conditions.

10. In October 2011 the Joined Party was recuperating at home from surgery and was not able to perform services for the Petitioner while recuperating. The Petitioner did not pay the bi-weekly draws to the Joined Party during the period of recuperation. The Joined Party was offered an opportunity to perform some research work for another company. It was the Joined Party's belief that the work would be performed as an independent contractor. The Joined Party advised the Petitioner that the work would not interfere with his work with the Petitioner and requested permission for the Petitioner to allow him to perform the "part time 2nd job." Permission was granted by the Petitioner. The Joined Party was mistaken in his belief that the work would be performed as an independent contractor. At the end of 2011 the Joined Party received a Form W-2 reporting wages of $951.50 from the second job.

11. The Joined Party's work performed for the Petitioner during 2011 resulted in one commission in the amount of $2,000. The Petitioner retained the earned commission which was used by the Petitioner to offset the draws which were paid to the Joined Party. At the end of 2011 the Petitioner provided a Form 1099-MISC reporting $2,000 of compensation paid to the Joined Party.

12. In January 2012 the Petitioner agreed to pay the Joined Party a $5,000 bonus or "consideration payment" for facilitating the execution of an amendment to a declaration which was required to allow a housing authority to develop an affordable housing residential project. The $5,000 was paid to the Joined Party by the Petitioner in addition to the bi-weekly draws. The $5,000 was not considered to be a commission and was not used to offset a portion of the draws which the Joined Party had received from the Petitioner.

13. During 2012 the Petitioner and the Joined Party continued to attempt to negotiate an independent contractor agreement that was acceptable to both parties. In June 2012 the Petitioner offered an independent contractor agreement to the Joined Party which included an increase in the draw from $3,000 per month to $4,166 per month. The Joined Party rejected the new independent contractor agreement.

14. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Petitioner terminated the Joined Party following a staff meeting on or about August 28, 2012.

15. The Joined Party did not earn any commissions during 2012.

16. The Joined Party filed a claim for unemployment compensation benefits, now known as reemployment assistance benefits, effective September 2, 2012. When the Joined Party did not receive credit for any 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.

17. On October 22, 2012, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee while performing services as a site selector retroactive to February 3, 2011. The Petitioner filed a timely protest.

18. After the Petitioner received the October 22, 2012, determination the Petitioner reported the draws paid to the Joined Party during 2011 and 2012 to the Internal Revenue Service on Form W-2 as wages paid in 2012 in the amount of $52,500. Although the Petitioner had not withheld any payroll taxes from the Joined Party's earnings during 2011 or 2012, the Petitioner prepared the W-2 to reflect that Social Security and Medicare taxes had been withheld.

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. In early 2011 the Petitioner offered the Joined Party the opportunity to perform services for the Petitioner under the classification of independent contractor. The Joined Party rejected that offer while explaining that his reasons for rejecting the offer were that the position requires significantly more duties and time than the typical independent contractor real estate broker position, that the position requires employee duties such as research, due diligence, and project management, and that the position requires fiduciary and commitment loyalties that are not typical of an independent contractor who has the flexibility to do business with others. In spite of the Joined Party's rejection of the independent contractor offer, the Petitioner verbally offered the Joined Party an opportunity to work for the Petitioner on a ninety day probationary basis while being paid a guaranteed stipend. Although there was no formal written agreement it was the Joined Party's belief that it was an offer of employment and the Joined Party accepted.

27. 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."

28. The Petitioner's primary business is locating properties for purchase by the Petitioner's clients. The Joined Party was engaged by the Petitioner to locate those properties. 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 business.

29. The Petitioner provided the Joined Party with an office and all equipment and supplies that were needed to perform the work. The Petitioner provided the Joined Party with an expense account and reimbursed the Joined Party for all business and travel expenses. The Joined Party did not have any investment in a business and was not at risk of suffering a financial loss from performing services for the Petitioner.

30. The Joined Party was required to have a commercial real estate license in order to perform the work for the Petitioner. Thus, the Joined Party was required to have some special knowledge. Although the humblest labor can be independently contracted and the most highly trained artisan can be an employee, see Farmers and Merchants Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958), 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)

31. The Joined Party was paid a guaranteed draw against commissions each month. If the Joined Party did not earn commissions he was not required to repay the draw. In the absence of a specific undertaking to repay the amount of a draw against commission the draw is considered as a plain and simple salary. Lester v. Kahn-McKnight Company, Inc., 521 So. 2d 312 (Fla. 3rd DCA 1988)

The Joined Party was required to work full time by the Petitioner and during the time he was not able to work due to surgery, he was not paid by the Petitioner. Therefore, the Joined Party was paid by time worked rather than based on 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.

32. The Joined Party performed services for the Petitioner from February 2011 until the end of August 2012, a period of approximately one and one-half years. Either party could 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. The Petitioner frequently threatened the Joined Party with termination and eventually terminated the Joined Party. 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."

33. The Petitioner required the Joined Party to work full time, Monday through Friday, and required the Joined Party to attend meetings during some weekends. He was required to attend staff meetings each Monday morning. Thus, the Petitioner exercised control over when the work was performed. The Petitioner directed the Joined Party concerning how to perform the work, required the Joined Party to submit weekly reports, traveled with the Joined Party to some appointments with clients, and generally "micro managed" the Joined Party. Thus, the Petitioner exercised control over how 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.

34. It is concluded that the Joined Party performed services for the Petitioner as an employee of the Petitioner retroactive to February 3, 2011.

35. Section 443.036(21), Florida Statutes, defines "Employment" to mean a service subject to the chapter under s. 443.1216 which is performed by an employee for the person employing him or her.

36. Although it is concluded that the Joined Party performed services for the Petitioner as an employee rather than as an independent contractor, certain types of employment are exempt from coverage under the Florida Reemployment Assistance Law.

37. 443.1216(13)(n), Florida Statutes, provides that service performed by an individual for a person as a real estate salesperson or agent is exempt from coverage under the law if all of the service is performed for remuneration solely by way of commission.

38. It is the Petitioner's position that the Joined Party was paid a draw or advance against commissions and, since the Joined Party is a licensed real estate agent, the amounts paid to the Joined Party by the Petitioner are exempt from coverage under the law. It is undisputed that the draws were not considered to be a loan against future commissions and that the Joined Party is not required to repay any of the draws even though his total earned commissions were only $2,000.

39. In Realty Management Corporation v. Fla. Dept. of Labor and Emp. Security, 380 So. 2d 1114 (Fla. 1st DCA 1980), the Court held that real estate salesmen who were paid a draw against

commission, but were not required to repay excess draws, were not paid solely by way of commission and were not exempt from the Florida Unemployment Compensation Law.

40. It is concluded that the services performed for the Petitioner constitute insured employment retroactive to February 3, 2011.

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

Respectfully submitted on July 3, 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, Special Deputy Clerk

Date Mailed:
July 3, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

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