

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

PETITIONER:

Employer Account No. - 2559489
FLORIDA LIFESTYLES REALTY INC
ATTEN: RICHARD WAUGH
737 19TH AVE N
SAINT PETERSBURG FL 33704-3343

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-60777L**

ORDER

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 January 9, 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 January, 2013.



Altemese Smith,
Assistant Director,
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.

Shanendra 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 January, 2013.

Shanendra 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. 2012-60777L**

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 January 9, 2012

After due notice to the parties, a telephone hearing was held on October 23, 2012. The Petitioner, represented by the Petitioner's former 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.

Issues:

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.

Whether the Petitioner meets liability requirements for Florida reemployment assistance contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner, a corporation, was formed in 2001 to operate a real estate sales office. The business ceased operation on June 15, 2011. The corporation was dissolved in September 2012.
2. The Joined Party performed clerical services for the Petitioner from February 9, 2004, to April 2, 2008, for a short period of time later in 2008, and again from September 2009, until June 17, 2011. The Joined Party's duties included answering the telephone, filing, faxing, scanning, entering data into the Multiple Listing Service, preparing fliers, and posting advertisements on Craigslist.
3. From February 9, 2004, to April 2, 2008, the Petitioner considered the Joined Party to be an employee. Taxes were withheld from the Joined Party's pay and her earnings were reported on a form W-2. For a period of time in 2008, after April 2, 2008, the Petitioner paid the Joined Party in cash and did not withhold taxes from the Joined Party's pay. From September 2009, until June 17, 2011, the Petitioner considered the Joined Party to be "contract labor." The Petitioner did not withhold taxes from the Joined Party's pay and reported the Joined Party's earnings on a form 1099-MISC.
4. There was no written agreement between the parties. When the Joined Party returned to work in September 2009, she was told that the Petitioner could not afford to pay payroll taxes. The Petitioner told the Joined Party that taxes would not be withheld from her pay and that her earnings would be reported on a form 1099.
5. The Joined Party received training from another employee of the Petitioner when she began working for the Petitioner in 2004. The Joined Party was told what to do and how to do it. The Joined Party performed substantially the same services from September 2009 until June 17, 2011, as she had from February 9, 2004, to April 2, 2008. The Joined Party's work was directed and supervised primarily by the Petitioner's broker, until his death in May of 2011.
6. The Joined Party's services were performed at the Petitioner's business office. The Petitioner furnished a desk, telephone, computer, copy machine, fax machine, scanner, and all other equipment and supplies needed for the work. The Petitioner allowed the Joined Party to use a company car for convenience. The Joined Party was given a key to the office. The Joined Party did not have any expenses in connection with the work.
7. The Joined Party worked from 8:30 a.m. to 5:30 p.m., Monday through Friday. If the Joined Party wanted to take time off, she obtained the approval of the Petitioner's broker or vice president.
8. The Joined Party could not work for a competitor of the Petitioner.
9. The Joined Party was required to personally perform the work.
10. The Joined Party did not operate her own business, did not have an occupational license, and did not advertise her clerical services to the general public.
11. From September 18, 2009, until June 17, 2011, the Joined Party was paid at a rate of \$10 per hour. The Joined Party kept track of her hours and submitted them to the Petitioner, verbally, at the end of each week. The Joined Party did not receive vacation pay. The Joined Party received pay for some holidays. The Joined Party received a Christmas bonus in 2009.
12. Either party could terminate the relationship at any time without liability for breach of contract. The relationship ended when the Petitioner closed its office.

13. The Joined Party filed a claim for unemployment compensation benefits effective July 3, 2011. When the Joined Party did not receive credit for her earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed. An investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.
14. On January 9, 2012, a Field Auditor II with the Department of Revenue issued a determination holding that the services performed by the Joined Party as an office clerk constitute insured employment retroactive to January 1, 2010. Among other things the determination states "This letter is an official notice of the above determination and will become conclusive and binding unless you file a written application to protest this determination within twenty (20) days from the date of this letter."
15. On February 2, 2012, the Department of Revenue issued a *Notice of Final Assessment* for tax due based upon reactivation of the Petitioner's account effective January 1, 2010.
16. The address of record for the Petitioner is the personal residence of the Petitioner's former vice president. The Petitioner's former vice president was hospitalized from January 2, 2012, until January 15, 2012, for back surgery. During the period of hospitalization, mail delivered to the residence of the Petitioner's former vice president was collected by a third party. After being discharged from the hospital, the Petitioner's former vice president returned to his residence to recuperate.
17. The Petitioner received the determination dated January 9, 2012, on a date unknown. The Petitioner received the *Notice of Final Assessment* dated February 2, 2012, within a week of the date of issuance. On February 9, 2012, the Petitioner's former vice president contacted the Department of Revenue Service Center in Clearwater, Florida. The Petitioner's former vice president followed the instructions given to him by a representative at the Service Center. The Petitioner submitted a protest on February 9, 2012.

Conclusions of Law:

18. Section 443.141(2)(c), Florida Statutes, provides:
 - (c) *Appeals*.--The Department and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.
19. Rule 73B-10.035(5)(a)1., Florida Administrative Code, provides:

Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.
20. Rule 73B-10.022(1), Florida Administrative Code, defines "Address of Record" for the purpose of administering Chapter 443, Florida Statutes, as the mailing address of a claimant, employing unit, or authorized representative, provided in writing to the Agency, and to which the Agency shall mail correspondence.
21. The determination issued by the Department of Revenue on January 9, 2012, does not contain a mailing date or any certification of the date that the determination may have been mailed to the Petitioner.

22. The Petitioner filed the protest by letter dated February 9, 2012. Since no evidence was presented to show when the determination was mailed to the Petitioner, the Petitioner's protest is accepted as timely filed.
23. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation 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.
24. 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).
25. 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).
26. 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.
27. 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.
28. 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.
29. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly

classified an employee or an independent contractor often cannot be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.

30. The evidence presented in this case does not reveal the existence of an agreement, verbal or written, specifying whether the Joined Party would perform services as an employee or as an independent contractor. 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 cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."
31. The Petitioner operated a real estate sales office. The Joined Party performed services on a full-time basis as an office clerk. 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. The Joined Party did not have her own business. The Joined Party did not have any expense or financial risk associated with the work performed for the Petitioner.
32. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that the basic test for determining a worker's status is the employing unit's right of control over the manner in which the work is performed. The Court, quoting Farmer's and Merchant's Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958), stated: "[I]f 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 he is subject to the control of the person being served as to the means to be used, he is not an independent contractor." In this case the Petitioner exercised significant control over the details of the work. The Petitioner determined what work was performed, where the work was performed, when the work was performed and, through the training and direction, how the work was performed. The Joined Party was required to personally perform the work and could not work for a competitor of the Petitioner.
33. The Petitioner provided all of the equipment and supplies needed for the work.
34. The Petitioner determined the rate and method of payment. The Joined Party was paid by time rather than by the job. The Joined Party received holiday pay and a Christmas bonus, benefits normally reserved for employees. The fact that taxes were not withheld from the Joined Party's pay does not, standing alone, establish an independent contractor relationship.
35. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Joined Party performed services for the Petitioner on and off for approximately six years. 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."
36. It is concluded that the services performed for the Petitioner by the Joined Party as an office clerk constitute insured employment.
37. Section 443.1215(1)(a), Florida Statutes, provides:
 - (1) Each of the following employing units is an employer subject to this chapter:
 - (a) An employing unit that:

1. In a calendar quarter during the current or preceding calendar year paid wages of at least \$1,500 for service in employment; or
 2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.
38. The Joined Party performed services for the Petitioner from September 2009, until June 17, 2011. Those services are sufficient to establish liability effective January 1, 2010, based on the fact that the Petitioner employed at least one individual in employment during twenty different calendar weeks during a calendar year.

Recommendation: It is recommended that the determination dated January 9, 2012 be AFFIRMED.

Respectfully submitted on December 12, 2012.



SUSAN WILLIAMS, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío 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.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
December 12, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

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