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

PETITIONER:
Employer Account No. - 2671281
PODS ENTERPRISES INC
5585 RIO VISTA DR
CLEARWATER FL 33760-3114

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

PROTEST OF LIABILITY
DOCKET NO. 2012-6420L

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 27, 2011, 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 **May, 2012**.

Altemese Smith,
Assistant Director,
Unemployment Compensation 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.

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 May, 2012.

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

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DOR BLOCKED CLAIMS UNIT
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
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PROTEST OF LIABILITY
DOCKET NO. 2012-6420L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Unemployment Compensation 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 27, 2011.

After due notice to the parties, a telephone hearing was held on February 23, 2012. The Petitioner, represented by its Vice President of Human Resources, appeared and testified. The Petitioner's Vice President of Logistics & Purchasing testified as a witness. 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 engaged in the business of moving and storage. The Petitioner utilizes containers and a container lift system in its business. At one time, the Petitioner operated its own factories for production of the containers and lifts. Prior to April 2010, the Petitioner decided to close its factories and to outsource the production of the containers and lifts to a third-

party vendor. The Petitioner established a temporary portable factory at its Pinellas Park, Florida warehouse facility to construct as many containers as possible from the remaining supply of materials.

2. The Joined Party was employed by the Petitioner from August 21, 2000, until April 16, 2010. The Joined Party last held the position of Vice President of Manufacturing. The Joined Party's primary responsibilities in that position were to establish and manage a parts and services department, manage third-party vendors, assist the Petitioner's legal department with issues relating to the closing of the factories, and assist the Petitioner's marketing department with new product development. On or before April 12, 2010, the Petitioner advised the Joined Party that he would be replaced by someone with more experience in logistics. The Petitioner offered the Joined Party an opportunity to continue his relationship with the Petitioner on a part time basis as an independent contractor.

3. The Petitioner and Joined Party entered into an *Independent Contractor Agreement* on April 12, 2010. The Petitioner prepared the agreement and determined the work to be performed, the compensation to be paid, the number of weekly hours to be worked, and the other terms and conditions applicable to the work. The agreement provides that the Joined Party's status is that of an independent contractor and not an employee or partner of the Petitioner. The Joined Party began performing services for the Petitioner under the agreement on April 16, 2010, and continued performing those services until July 20, 2011.

4. The agreement sets forth a list of the Joined Party's duties and responsibilities, referred to as the "Scope of Work," and provides for completion of the work approximately eight (8) months from the effective start date of April 19, 2010. The agreement provides that the Joined Party will work three days per week and any additional days required for international travel. The agreement requires the Joined Party to report directly to the Petitioner's Director of Local Sales & Marketing ("Director").

5. The agreement provides for compensation of the Joined Party at the rate of $50 per hour, plus expenses for business related travel. The agreement requires the Joined Party to submit an invoice on a bi-weekly basis by a specified date for approval by the Director. The agreement requires the Joined Party to sign a form W-9, and states that the Joined Party will receive a form 1099 for tax purposes.

6. The agreement requires the Joined Party to comply with all laws, ethical codes and company policies, procedures, rules or regulations, including those forbidding sexual harassment, discrimination, and unfair business practices.

7. The agreement allows termination, without cause or liability, by either party with a one-week written notice.

8. The Joined Party did not require any training to perform the work under the agreement. The Joined Party's duties and responsibilities under the agreement were the same as his duties and responsibilities as an employee, except that he had no responsibility for supervision of the Petitioner's employees or contractors. The Joined Party relied on his previous experience as an employee of the Petitioner in order to carry out the work. The Joined Party followed the same policies, principles, and guidelines that were established during his tenure as an employee.

9. The Joined Party expressed a preference to work on Mondays, Tuesdays, and Wednesdays, and that schedule was acceptable to the Director. If the Joined Party believed the work required more or less than 24 hours in a given week, or if he wanted to take a day off from work, the Joined Party notified the Petitioner and obtained permission. The Joined Party usually worked from 7:30 a.m. until 4:00 or 4:30 p.m. The Joined Party kept track of his hours and submitted an invoice to the Petitioner in accordance with the agreement.

10. The Joined Party performed the majority of his services at the Petitioner's Pinellas Park warehouse. The Joined Party also traveled to off-site locations in connection with the management of vendors and the disposal of surplus materials. The Petitioner provided the office space, laptop computer, accounting software, email account, cellular telephone, credit card, and other supplies needed for the work. The Joined Party occupied the same office and used the same equipment and supplies that he had used in his position as an employee. The Petitioner reimbursed the Joined Party for all of his travel expenses in accordance with the agreement.
11. The Joined Party reported initially to the Director. After a period of four or five months, the Joined Party began reporting to the Petitioner's Vice President of Logistics & Purchasing. The Joined Party was required to keep the Petitioner informed of the progress of the work. The Joined Party reported by telephone or electronic mail on at least a weekly basis.
12. The Joined Party was required to personally perform the work.
13. The Joined Party did not have his own business, occupational license, or business liability insurance. The Joined Party did not advertise his services to the general public. The Joined Party did not have any expense or financial investment in connection with the work.
14. After April 16, 2010, the Petitioner did not withhold payroll taxes from the Joined Party's pay or provide fringe benefits to the Joined Party, such as health insurance, sick pay or vacation pay. The Petitioner reported the Joined Party's earnings on a form 1099-MISC.
15. The relationship ended when the Petitioner told the Joined Party his services were no longer needed.

Conclusions of Law:

16. 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.
17. 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).
18. 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).
19. 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.
20. 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.

21. 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.

22. 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.

23. The written agreement between the parties states that the Joined Party is an independent contractor, and not an employee or partner of the Petitioner. A statement in an agreement that the existing relationship is that of an independent contractor is not dispositive of the issue. Lee v. American Family Assurance Company, 431 So.2d 249 (Fla. 1st DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So. 2d 131 (Fla. 1972), a case involving an independent contractor agreement that specified the worker was not to be considered an employee, 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."

24. The work performed by the Joined Party under the agreement required a high degree of knowledge and skill. Courts have noted the particular difficulty in determining the extent of control over the activities of a professional person or highly skilled worker. See Florida Gulf Coast Symphony, Inc. v. Department of Labor and Employment Security, 386 So.2d 259 (Fla. 2d DCA 1980); Kay v. General Cable Corp., 144 F.2d 653 (3d Cir. 1944); Carnes v. Industrial Commission, 73 Ariz. 264, 240 P.2d 536 (1952). The engaging party's control "must necessarily be more tenuous and general than the control over nonprofessional employees." James v. Commissioner, 25 T.C. 1296, 1301 (1956).

25. In this case, the Petitioner exercised sufficient control over the Joined Party's work to support a finding that the Joined Party was an employee of the Petitioner. The Petitioner determined what worked was to be performed. The majority of the work had to be performed at the Petitioner's warehouse or at other locations determined by the Petitioner's business needs. The Joined Party's work schedule was subject to the review and approval of the Petitioner. The Joined Party was required to personally perform the work. The Petitioner determined the rate and method of payment.

26. The Joined Party was not engaged in a distinct occupation or business. The Joined Party did not have an occupational license or business liability insurance. The Joined Party had no financial risk or expenses in connection with the performance of his services for the Petitioner.

27. The Petitioner furnished the work space and all of the instrumentalities needed to perform the work.
28. The Joined Party was paid hourly and not by the job. This factor is more indicative of an employer-employee relationship. The fact that the Petitioner did not withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.
29. The Petitioner operates a moving and storage business. The Joined Party managed the Petitioner's production operations. With the exception of supervisory responsibilities, the Joined Party's duties under the agreement were the same as his duties as an employee. The work performed by the Joined Party was an integral and necessary part of the Petitioner's business. As the court stated in Hilldrup Transfer & Storage of New Smyrna Beach, Inc. v. Department of Labor and Employment Security, 447 So.2d 414 (Fla. 5th DCA 1984), "if the work performed in the relationship under consideration is a part of the principle's business, this factor indicates an employment status, even if the work requires a high level of skill to perform it."
30. Although the agreement anticipated an eight-month term, the Joined Party worked for the Petitioner under the agreement for approximately 15 months. Either party had the right to terminate the relationship at any time without cause and without liability. 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 is 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."
31. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

Recommendation: It is recommended that the determination dated October 27, 2011 be AFFIRMED

Respectfully submitted on April 9, 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 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:
April 9, 2012

Copies mailed to:
Petitioner
Respondent
Joined Party

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DEPARTMENT OF REVENUE
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