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

PETITIONER:
Employer Account No. - 2967061

CASA SALSA INC
1317 E COMMERCIAL BLVD
OAKLAND PARK FL 33334-5722

PROTEST OF LIABILITY
DOCKET NO. 2012-80881L

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

O R D E R

This matter comes before me for final Department Order.

An issue before me is whether services performed for the Petitioner by the Joined Party and other individuals constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability. An issue also before me is whether the Petitioners corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 73B-10.025, Florida Administrative Code.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Special Deputy issued the Recommended Order on December 13, 2012. The Petitioner's exceptions to the Recommended Order were received by fax on January 3, 2013. Rule 73B-10.035(19)(c), Florida Administrative Code, requires that written exceptions be filed within 15 days of the mailing date of the Recommended Order. As a result, the Department may not consider the Petitioner's exceptions in this order because the exceptions were filed more than 15 days after the mailing date of the Recommended Order. No other submissions were received from any party.

A review of the record reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's findings are thus adopted in this order. The special deputy's recommended Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having fully considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order. A copy of the Recommended Order is attached and incorporated in this order.

Therefore, it is ORDERED that the determination dated June 28, 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.

Sherenda 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.

Sherenda 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:

CASA SALSA INC
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OAKLAND PARK FL 33334-5722

ASHLEY SEIJO
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DEPARTMENT OF REVENUE
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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. 2012-80881L

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

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 June 28, 2012.

After due notice to the parties, a telephone hearing was held on November 14, 2012. The Petitioner, represented by its attorney, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party was represented by her attorney. The Joined Party appeared and testified.

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

Issue:

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

Whether the Petitioner's corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 73B-10.025, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a Florida profit corporation which was formed on December 4, 2006, to operate a dance studio. The Petitioner's president, Christian Espinola, and the Petitioner's vice president, Monica Espinola, are active in the operation of the business.

2. The Petitioner hired individuals to provide dance instruction to the Petitioner's clients and classified the dance instructors as independent contractors. The Joined Party was a student at another dance studio. From time-to-time the Joined Party's dance instructor at the other dance studio would give the Joined Party $10 cash for helping with the beginning students. The Joined Party had no other experience as a dance instructor. On or about May 1, 2009, the Petitioner hired the Joined Party as a dance instructor and required the Joined Party to sign an independent contractor agreement but did not provide the Joined Party with a copy of the agreement. The Joined Party signed the agreement even though she did not know what an independent contractor was. The Petitioner required the Joined Party to complete approximately two months of training provided by the Petitioner before she was allowed by the Petitioner to teach the students. In the training the Petitioner taught the Joined Party how to dance, how to teach others to dance, and how to introduce herself to the students.

3. The Joined Party taught the Petitioner's students at the Petitioner's dance studios. The Petitioner scheduled the place and time of the lessons. Some of the lessons scheduled by the Petitioner were group lessons and some were private lessons. The Joined Party worked thirty to forty hours or more per week. The Petitioner determined the amounts that were charged to the students and collected the fees from the students.

4. The Joined Party did not have an occupational license or business license, did not have any investment in a business, did not have business liability insurance, did not advertise her services to the general public, and did not provide dance instruction to anyone other than the Petitioner's clients.

5. The Petitioner provided the Joined Party with uniform shirts bearing the Petitioner's name which the Joined Party was required to wear while teaching the Petitioner's students. The Petitioner also provided the Joined Party with business cards bearing the Petitioner's name and address as well as the Joined Party's name and telephone number. The Joined Party was responsible for providing her own dance shoes and was responsible for her own travel expenses incurred when traveling to events or lesson locations.

6. Effective December 27, 2010, the Joined Party was required to sign an *Independent Contractor Non-Compete Agreement* to replace the prior written agreement. The *Independent Contractor Non-Compete Agreement* was to expire on December 27, 2012, unless written notice of termination was provided by either party at any time prior to December 27, 2012.

7. The *Independent Contractor Non-Compete Agreement* states "It is expressly understood and accepted that this is not an employment agreement and as such the Contractor will have no claim to Company benefits or employee considerations, including but not limited to profit sharing, pension, shares or bonuses. Upon expiry of this contract it is understood that (sic) the relationship between the parties has ended."

8. The *Independent Contractor Non-Compete Agreement* requires the Joined Party to instruct scheduled group classes for up to 15 hours per week with a minimum of two nights off from scheduled group classes, to provide basic service to the Petitioner, including but not limited to, outing organizer, basic photography, and administrative assistance etc. The Joined Party was required do daily posting of studio classes on at least two social networking sites of which the Joined Party was a member, required to attend all studio events and functions as well as work any promotional hours requested by the Petitioner, required to arrive 15 minutes early to any studio event or gathering with material that was up to the standards of the Petitioner, prior to beginning recording of videos including, but not limited to, instructional videos, promotional videos, and advertising videos. The Joined Party was required to comply with all studio promotions. The Agreement requires the Joined Party to perform the services at any location the Petitioner sees fit.

9. Prior to April 1, 2010, the Petitioner paid the Joined Party a base salary of $12,000 per year. In addition, the Petitioner paid the Joined Party for private lessons provided to the Petitioner's clients and paid the Joined Party for attending certain events and workshops. The Joined Party was paid on a bi-monthly basis and the Petitioner did not withhold any taxes from the pay. The Petitioner provided a paid vacation consisting of five working days for each year. The Joined Party was required to request the vacation time and receive approval at least two weeks in advance of the requested time. Effective April 1, 2010, the Petitioner increased the Joined Party's base pay to $12,720 per year based on the Joined Party's work performance.

10. The *Independent Contractor Non-Compete Agreement* effective December 27, 2010, provides that the Joined Party's base pay is $1060 per month, that the Joined Party would be paid 90% of the fess collected by the Petitioner for private lessons less $10 for a floor fee, would be paid a minimum of $100 for attending events, and would be paid 50% of fees collected by the Petitioner for workshops. If the Joined Party failed to attend any class or event for whatever reason without the Petitioner's approval the Petitioner would charge the Joined Party from $50 to $100 in the sole discretion of the Petitioner.

11. The *Independent Contractor Non-Compete Agreement* provides that the Joined Party may not delegate or assign any of her duties and responsibilities without the prior written consent of the Petitioner. The Joined Party never hired others to perform the work for her and never paid anyone to assist with the teaching of a class. One student offered to provide massages to the Joined Party in exchange for dancing instruction. The Joined Party sought and obtained the Petitioner's approval and, thereafter, the Petitioner deducted $10 from the Joined Party's pay for each dance instruction which the Joined Party provided to that client. The Joined Party also sought and obtained approval from the Petitioner to have certain students assist her with teaching other students. The Petitioner agreed to waive the student fees for the students who assisted with the classes.

12. The *Independent Contractor Non-Compete Agreement* provides that all documents, records, creations, drawings, photographs, videos, computer programs, and notes, related to the Petitioner's business, made by the Joined Party or obtained by the Joined Party, are the property of the Petitioner and must be surrendered to the Petitioner upon demand. The Agreement also provides that the Joined Party is required to assign to the Petitioner the total right, title, and interest in and to any copyright in any existing or future works of whatever nature that the Joined Party, individually or jointly with any other person, has made or created, or will make or create, during the course and scope of the Agreement and by the Joined Party's performance of services for the Petitioner.

13. The *Independent Contractor Non-Compete Agreement* provides that the Joined Party may not directly or indirectly compete with the business of the Petitioner and may not own, manage, consult, or be employed in a business substantially similar to, or competitive with, the Petitioner's present business or other such business activity which the Petitioner may engage during the period of the Agreement and for a period of two years after termination of the Agreement notwithstanding the cause or reason for termination, within a radius of ten miles from the Petitioner's business location.

14. The Petitioner provided training for the Joined Party not only at the outset but throughout the time that the Joined Party performed services for the Petitioner. Although the Joined Party did not have any outside certification to teach dancing the Petitioner required the Joined Party to attend weekly training provided by the Petitioner and to obtain certification from the Petitioner to teach various dances. The Petitioner determined which classes the Joined Party could or could not teach based on the certifications. The Joined Party was required to attend weekly instructor training and meetings, to attend monthly company meetings, and to view weekly online videos.

15. At the end of 2009 the Petitioner did not provide any type of earnings statement to the Joined Party. The Joined Party approached the Petitioner's vice president and requested an earnings statement so that the Joined Party could file her income tax return. Initially, the vice president told that Joined Party that she was not aware that the Petitioner was required to provide an earnings statement. Subsequent to that conversation the Petitioner provided the Joined Party with a Form 1099-MISC reporting the Joined Party's earnings as nonemployee compensation. The Petitioner also reported the Joined Party's earnings for 2010 on Form 1099-MISC as nonemployee compensation and for 2011 on Form 1099-MISC as nonemployee compensation.

16. On June 29, 2011, the Petitioner amended the *Independent Contractor Non-Compete Agreement* to provide that outside the Joined Party's responsibilities to the Petitioner, the Joined Party was required to have written authorization from the Petitioner to, but not limited to, teach, perform, coach, conduct or choreograph in a private and/or public level and that the Joined Party was required to disclose such activities to the Petitioner and to obtain written approval before performing the activities. The *Contract Amendment* states that the Petitioner will provide the Joined Party with a leveled training program, including but not limited to, timing techniques, instructor training, class format, and business development. The Petitioner valued each certification level at $1,000, for up to seven levels. The *Contract Amendment* provides that the Joined Party shall be responsible for repayment to the Petitioner if the Joined Party does execute and complete the *Independent Contractor Non-Compete Agreement* in totality and until the expiration of the Agreement. All other terms and conditions of the *Independent Contractor Non-Compete Agreement* remained the same.

17. In March 2012 the Petitioner terminated the Joined Party's Agreement and the Joined Party filed a claim for reemployment assistance benefits effective April 8, 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 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. On June 11, 2012, the Department of Revenue issued a determination holding that the Joined Party and other persons performing services for the Petitioner as dance instructors are the Petitioner's employees retroactive to May 1, 2009. In addition, the determination states that corporate officers are employees by statute and as such their wages are reportable. In response to the determination the Petitioner provided additional information. On June 28, 2012, the Department of Revenue issued a determination stating "This is an affirmation of a prior determination dated June 11, 2012." The Petitioner filed a timely protest on July 18, 2012.

Conclusions of Law:

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

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

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

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

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

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

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

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

25. The services which the Joined Party performed for the Petitioner were governed by the *Independent Contractor Non-Compete Agreement* and the *Contract Amendment* entered into by the parties. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented

"while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

26. The Petitioner's business is to teach dancing to the Petitioner's clients. The Petitioner engaged the Joined Party to teach dancing to the Petitioner's clients. 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 Petitioner determined the fees that were charged to the students and collected the fees from the students. The Petitioner provided the dance studio. The Joined Party provided her own shoes and was responsible for the expense of commuting to and from the dance studio or other location where the Petitioner scheduled the Joined Party to teach the dance lessons. The Joined Party did not have significant expenses in connection with the work, did not have an investment in a business, and did not advertise her services to the general public or provide services to the general public. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

27. It was not shown that any special skill or knowledge is required to teach dancing. The Petitioner taught the Joined Party how to dance and how to teach dancing, even to the point of how to introduce herself to the students. Training is a method of control because it specifies how a task must be performed. 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)

28. The Petitioner paid the Joined Party an annual salary plus other considerations for events and workshops. The Petitioner determined the amount of the salary and the other considerations. 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. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

29. Although the *Independent Contractor Non-Compete Agreement* was for a two year period of time, from December 27, 2010, until December 27, 2012, either party had the right to terminate the Agreement at any time simply by notifying the other party in writing. The Joined Party performed services beginning on or about May 1, 2009, until March 2012, a period of almost three years. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner terminated the Joined Party prior to the expiration of the Agreement. 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."

30. The Petitioner determined what services were performed by the Joined Party, where the services were performed, when the services were performed, and how the services were performed. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also

determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

31. It is concluded that the services performed by the Joined Party and other individuals working as dance instructors constitute insured employment.

32. The Petitioner is a corporation and both the Petitioner's president and vice president perform services for the Petitioner and are active in the operation of the business.

33. Section 443.1216(1)(a), Florida Statutes, provides in pertinent part that the employment subject to this chapter includes a service performed by an officer of a corporation.

34. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

35. In Spicer Accounting, Inc. v. United States, 918 F.2d 90 (9th Cir. 1990), the court determined that dividends paid by an S corporation to an officer of the corporation who performed services for the business, were wages subject to federal employment taxes, including federal unemployment compensation taxes. The court relied upon federal regulations which provide that the "form of payment is immaterial, the only relevant factor being whether the payments were actually received as compensation for employment."

36. It is concluded that the Petitioner's president, Christian Espinola, and the Petitioner's vice president, Monica Espinola, are employees of the Petitioner The Petitioner is required to report and pay reemployment assistance taxes on earnings received by the corporate officers.

Recommendation: It is recommended that the determination dated June 28, 2012, be AFFIRMED.

Respectfully submitted on December 13, 2012.

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:
December 13, 2012

Copies mailed to:
Petitioner
Respondent
Joined Party

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