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

PETITIONER:
Employer Account No. - 2148844

SURGICAL ONCOLOGY ASSOCIATES
OF SOUTH FL
ATTN: KATHERINE ANDERSONPA
3800 JOHNSON ST STE A
HOLLYWOOD FL 33021-6030

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

PROTEST OF LIABILITY
DOCKET NO. 2012-86268L

O R D E R

This matter comes before me for final Department Order.

The issue before me is whether services performed for the Petitioner by the Joined Party constitute insured employment, and if so, the effective date of liability pursuant to sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed a reemployment assistance claim in December 2011. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Department of Economic Opportunity (the Department) that she worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As a result of the Joined Party's request, the Department of Revenue, hereinafter referred to as the Respondent, conducted an investigation to determine whether the Joined Party worked for the Petitioner as an employee or independent contractor. If the Joined Party worked for the Petitioner as an employee, she would qualify for reemployment assistance benefits, and the Petitioner would owe reemployment assistance taxes on the remuneration it paid to the Joined Party. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, she would remain ineligible for benefits, and the Petitioner would not owe reemployment assistance taxes on the wages it paid to the Joined Party. Upon completing the investigation, the Respondent's auditor determined that the services performed by the Joined Party were in insured employment.

The Petitioner was required to pay reemployment assistance taxes on wages it paid to the Joined Party. The Petitioner filed a protest of the determination. The claimant who requested the investigation was joined as a party because she had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on February 21, 2013. The Petitioner appeared and was represented by its Practice Administrator. Both the Petitioner's Practice Administrator and the Petitioner's president testified as witnesses on behalf of the Petitioner. The Joined Party appeared and testified on her own behalf. The Respondent, represented by a Tax Specialist II, appeared and testified. The Special Deputy issued a recommended order on March 14, 2013.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner, Surgical Oncology Associates of South Florida, Inc., is a corporation which operates the medical practice of Dr. Robert Donoway, a breast cancer surgeon. The Petitioner established liability for payment of unemployment tax to Florida effective 1998.
2. Dr. Donoway's former wife is a doctor whose practice is incorporated separately from the Petitioner. The former wife's practice employed an individual, the Joined Party in this case, to perform certain tasks including babysitting the doctors' children and cleaning the doctors' home. In approximately 2006 the former wife discharged that employee. In 2006 the Petitioner hired the Joined Party to clean the Petitioner's office, to do filing, to run errands, to do housekeeping, and to babysit the doctors' children. The parties did not enter into any written agreement at the time of hire.
3. The Petitioner never withheld payroll taxes from the Joined Party's pay. However, during the second and fourth quarters 2006 and the first quarter 2007 the Petitioner reported the Joined Party's earnings to the Florida Department of Revenue and paid unemployment tax on the earnings.
4. The Joined Party did not have an occupational or business license, did not have business liability insurance, and did not offer services to the general public. On occasion the Joined Party cleaned apartments for other individuals during the weekend.
5. The Joined Party performed services for the Petitioner at the Petitioner's office and at the residence of the Petitioner's president. The Joined Party picked the doctor's children up from school and cared for them while the doctor was in surgery, was at the hospital, or was seeing patients. When the Joined Party was not caring for the children she was assigned to do other tasks by the Practice Administrator, such as filing at the Petitioner's office. The Joined Party worked an average of 25 to 35 hours per week for the Petitioner.
6. The Petitioner provided everything that was needed to perform the work. Although the Joined Party used her own vehicle to pick up the children from school or to run errands, the Petitioner reimbursed the Joined Party for the gas. The Petitioner provided the cleaning supplies. If the Joined Party had to purchase any supplies she was reimbursed by the Petitioner. The Joined Party did not have any unreimbursed expenses in connection with the work.

7. The Joined Party did not submit a bill or invoice to the Petitioner for the services which she performed. The Petitioner paid the Joined Party $950 every other week. No taxes were withheld from the pay and at the end of each year the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
8. The Petitioner did not provide any fringe benefits such as health insurance or retirement benefits for the Joined Party. The Joined Party's pay was not reduced for absences, holiday weeks, or vacations. If the Joined Party wanted to take a vacation she was required to contact the Petitioner's president for approval.
9. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract.
10. The Petitioner created a *Non-Employee Contract & Confidentiality Agreement* which it requires all "1099 employees" to sign. Among other things the Agreement states "I understand that I am voluntarily signing this contract and agreement and this is a legally binding agreement between myself and Surgical Oncology Associates the office of Dr Robert Donoway. I am aware that by agreeing to work as a nonessential 1099 employee I am responsible for paying my own taxes, social security, medicare, insurance and expenses. I am willingly agreeing to provide services without any expectation of any benefits being paid to me now or in the future, any liabilities incurred I assume on my own and I will not come back after Dr Robert Donoway or Surgical Oncology Associates of South Florida in regard to any issues occurring because of my 1099 employee status." The Agreement also states "I understand that I must sign and comply with this agreement at all times as a condition of my 1099 employment."
11. The majority of the Agreement concerns the confidentiality of patient information and personal information involving Dr. Robert Donoway and Surgical Oncology Associates of South Florida. The Agreement provides that as a 1099 employee of Surgical Oncology Associates of South Florida the Joined Party has a legal and ethical responsibility to maintain all information as confidential.
12. The Agreement does not set forth any agreement between the parties concerning the duties to be performed or the compensation. The Agreement does not set forth the term of the agreement but states "I understand that violation of this agreement may result in immediate disciplinary action up to and including termination of my employment/assignment/affiliation with Dr Robert Donoway and Surgical Oncology Associates of South Florida and/or suspension, restriction or loss of privileges in accordance with Dr Robert Donoway and Surgical Oncology Associates of South Florida policies as well as potential personal civil and criminal legal penalties."
13. The Joined Party performed services for the Petitioner until on or about July 1, 2011. Following termination of the relationship the Joined Party filed a claim for unemployment compensation benefits, now known as reemployment assistance program benefits, effective December 18, 2011. The Joined Party's filing on that date established a base period from July 1, 2010, through June 30, 2011. 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.
14. Upon completion of its investigation the Department of Revenue issued a determination dated January 25, 2012, holding that the Joined Party was the Petitioner's employee retroactive to October 1, 2010. The determination was mailed to the Petitioner's correct mailing address and was received by the Petitioner's Practice Administrator on February 7, 2012. Among other things the January 25, 2012, determination advises "This letter is an official notice of the

above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter."

15. The Petitioner uses a medical records storage facility for storage of business records. The Practice Administrator contacted the storage facility to retrieve the Joined Party's records. Upon receipt of the Joined Party's records the Practice Administrator filed an appeal by fax on February 20, 2012, which was received by the Department of Revenue on an unknown date.
16. On August 24, 2012, the Department of Economic Opportunity issued an *Order to Show Cause* to the Petitioner, directing the Petitioner to file a written statement within fifteen calendar days explaining why the Petitioner's protest should not be dismissed for lack of jurisdiction. The Petitioner responded by fax received by the Department of Economic Opportunity on August 31, 2012.

Based on these Findings of Fact, the Special Deputy recommended that the Petitioner's protest be accepted as timely filed. The Special Deputy also recommended that the determination dated January 25, 2012, be modified to reflect a retroactive date of January 1, 2008. The Special Deputy further recommended that the determination be affirmed as modified. The Petitioner's exceptions were received by mail postmarked March 25, 2013. No other submissions were received from any party.

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 Petitioner's exceptions are addressed below. Also, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the essential requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

In Exceptions #1-6, the Petitioner proposes alternative findings of fact and conclusions of law and specifically takes exception to Conclusions of Law #30 and 36. Pursuant to section 120.57(1)(l), Florida Statutes, the Special Deputy is the finder of fact in an administrative hearing, and the Department may not reject or modify the Special Deputy's Findings of Fact unless the Department first determines from a review of the entire record that the findings of fact were not based upon competent substantial evidence. Also pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Conclusions of Law unless the Department first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy resolved conflicts in evidence in favor of the Joined Party. A review of the record further reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record and that the Special Deputy's Conclusions of Law, including Conclusions of Law #30 and 36, reflect a reasonable application of the law to the facts. As a result, the Department may not modify the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the Findings of Fact and Conclusions of Law as written by the Special Deputy. Accordingly, Exceptions #1-6 are respectfully rejected.

In Exceptions #5-7, the Petitioner alleges that the Special Deputy was biased against the Petitioner. Section 120.57(1)(l), Florida Statutes, provides that the Special Deputy's Findings of Fact can be rejected by the Department if the proceedings on which the findings were based did not comply with essential requirements of law. Upon review of the record and the Petitioner's exceptions, the Department concludes that there is no evidence of bias. Further examination of the Petitioner's contentions reveals that the Petitioner has not met the requirement to demonstrate that the proceedings did not comply with essential requirements of law.

The Petitioner argues that Conclusion of Law #36 shows bias against the Petitioner. The Petitioner also contends that the Special Deputy ignored the parties' intent and agreement and thereby established "an unfair bias and abuse of process." As previously stated, section 120.57(1)(l), Florida Statutes, provides that the Department must accept the Special Deputy's Findings of Fact if they are supported by competent substantial evidence in the record and must also accept the Special Deputy's Conclusions of Law if they

reflect a reasonable application of the law to the facts. Additionally, rule 73B-10.032(1), Florida Administrative Code, requires that each employing unit maintain records pertaining to remuneration for services performed for five years following the calendar year in which the services were performed. A review of the record establishes that the Special Deputy considered the intent of the parties and the agreement and resolved conflicts in evidence in favor of the Joined Party. The record also shows that the Special Deputy found that the Joined Party began performing services for the Petitioner in 2006 and as a result, the Special Deputy ultimately concluded that the appropriate retroactive date of the Petitioner's liability was January 1, 2008, because the Petitioner was only required to maintain its records until that point pursuant to rule 73B-10.032(1), Florida Administrative Code. Contrary to the Petitioner's allegations, the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record, and the Special Deputy's Conclusions of Law, including Conclusion of Law #36, reflect a reasonable application of the law to the facts. As mentioned above, the Petitioner's contentions do not support the conclusions that the Special Deputy was biased against the Petitioner or that the proceedings did not comply with essential requirements of law. The Department accepts the Special Deputy's Findings of Fact and Conclusions of Law without modification in accord with section 120.57(1)(l), Florida Statutes. Exceptions #5-7 are respectfully rejected.

A review of the record reveals that the Findings of Fact 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 of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the Petitioner's exceptions, the record of this case, and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order.

Therefore, it is ORDERED that the Petitioner's protest is accepted as timely filed. It is also ORDRED that the determination dated January 25, 2012, is MODIFIED to reflect a retroactive date of January 1, 2008. It is further ORDERED that the determination is AFFIRMED as modified.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this *Order* and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY]* en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt *Lòd* sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **April, 2013**.

Altemese Smith,
Bureau Chief,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Shanedra Y. Barnes
DEPUTY CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of April, 2013.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

SURGICAL ONCOLOGY ASSOCIATES
OF SOUTH FL
ATTN: KATHERINE ANDERSONPA
3800 JOHNSON ST STE A
HOLLYWOOD FL 33021-6030

MARY L COLLINS
403 TANGLEWOOD DRIVE
LOUISBURG NC 27549

DEPARTMENT OF REVENUE
ATTN: PATRICIA ELKINS - CCOC #1-4866
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
PO BOX 6417
TALLAHASSEE FL 32314-6417

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

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2148844
SURGICAL ONCOLOGY ASSOCIATES
OF SOUTH FL
ATTN: KATHERINE ANDERSON
3800 JOHNSON ST STE A
HOLLYWOOD FL 33021-6030

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

PROTEST OF LIABILITY
DOCKET NO. 2012-86268L

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: SECRETARY,
Bureau Chief,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated January 25, 2012.

After due notice to the parties, a telephone hearing was held on February 21, 2013. The Petitioner, represented by the Practice Administrator, appeared and testified. The Petitioner's president 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.

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, Surgical Oncology Associates of South Florida, Inc., is a corporation which operates the medical practice of Dr. Robert Donoway, a breast cancer surgeon. The Petitioner established liability for payment of unemployment tax to Florida effective 1998.
2. Dr. Donoway's former wife is a doctor whose practice is incorporated separately from the Petitioner. The former wife's practice employed an individual, the Joined Party in this case, to perform certain tasks including babysitting the doctors' children and cleaning the doctors' home. In approximately 2006 the former wife discharged that employee. In 2006 the Petitioner hired the Joined Party to clean the Petitioner's office, to do filing, to run errands, to do housekeeping, and to babysit the doctors' children. The parties did not enter into any written agreement at the time of hire.
3. The Petitioner never withheld payroll taxes from the Joined Party's pay. However, during the second and fourth quarters 2006 and the first quarter 2007 the Petitioner reported the Joined Party's earnings to the Florida Department of Revenue and paid unemployment tax on the earnings.
4. The Joined Party did not have an occupational or business license, did not have business liability insurance, and did not offer services to the general public. On occasion the Joined Party cleaned apartments for other individuals during the weekend.
5. The Joined Party performed services for the Petitioner at the Petitioner's office and at the residence of the Petitioner's president. The Joined Party picked the doctor's children up from school and cared for them while the doctor was in surgery, was at the hospital, or was seeing patients. When the Joined Party was not caring for the children she was assigned to do other tasks by the Practice Administrator, such as filing at the Petitioner's office. The Joined Party worked an average of 25 to 35 hours per week for the Petitioner.
6. The Petitioner provided everything that was needed to perform the work. Although the Joined Party used her own vehicle to pick up the children from school or to run errands, the Petitioner reimbursed the Joined Party for the gas. The Petitioner provided the cleaning supplies. If the Joined Party had to purchase any supplies she was reimbursed by the Petitioner. The Joined Party did not have any unreimbursed expenses in connection with the work.
7. The Joined Party did not submit a bill or invoice to the Petitioner for the services which she performed. The Petitioner paid the Joined Party $950 every other week. No taxes were withheld from the pay and at the end of each year the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
8. The Petitioner did not provide any fringe benefits such as health insurance or retirement benefits for the Joined Party. The Joined Party's pay was not reduced for absences, holiday weeks, or vacations. If the Joined Party wanted to take a vacation she was required to contact the Petitioner's president for approval.
9. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract.
10. The Petitioner created a *Non-Employee Contract & Confidentiality Agreement* which it requires all "1099 employees" to sign. Among other things the Agreement states "I understand that I am voluntarily signing this contract and agreement and this is a legally binding agreement between myself and Surgical Oncology Associates the office of Dr Robert Donoway. I am aware that by agreeing to work as a nonessential 1099 employee I am responsible for paying my own taxes, social security, medicare, insurance and expenses. I am willingly agreeing to provide services without any expectation of any benefits being paid to me now or in the future, any liabilities incurred I assume on my own and I will not come back after Dr Robert Donoway or Surgical

Oncology Associates of South Florida in regard to any issues occurring because of my 1099 employee status." The Agreement also states "I understand that I must sign and comply with this agreement at all times as a condition of my 1099 employment."

11. The majority of the Agreement concerns the confidentiality of patient information and personal information involving Dr. Robert Donoway and Surgical Oncology Associates of South Florida. The Agreement provides that as a 1099 employee of Surgical Oncology Associates of South Florida the Joined Party has a legal and ethical responsibility to maintain all information as confidential.

12. The Agreement does not set forth any agreement between the parties concerning the duties to be performed or the compensation. The Agreement does not set forth the term of the agreement but states "I understand that violation of this agreement may result in immediate disciplinary action up to and including termination of my employment/assignment/affiliation with Dr Robert Donoway and Surgical Oncology Associates of South Florida and/or suspension, restriction or loss of privileges in accordance with Dr Robert Donoway and Surgical Oncology Associates of South Florida policies as well as potential personal civil and criminal legal penalties."

13. The Joined Party performed services for the Petitioner until on or about July 1, 2011. Following termination of the relationship the Joined Party filed a claim for unemployment compensation benefits, now known as reemployment assistance program benefits, effective December 18, 2011. The Joined Party's filing on that date established a base period from July 1, 2010, through June 30, 2011. 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.

14. Upon completion of its investigation the Department of Revenue issued a determination dated January 25, 2012, holding that the Joined Party was the Petitioner's employee retroactive to October 1, 2010. The determination was mailed to the Petitioner's correct mailing address and was received by the Petitioner's Practice Administrator on February 7, 2012. Among other things the January 25, 2012, determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter."

15. The Petitioner uses a medical records storage facility for storage of business records. The Practice Administrator contacted the storage facility to retrieve the Joined Party's records. Upon receipt of the Joined Party's records the Practice Administrator filed an appeal by fax on February 20, 2012, which was received by the Department of Revenue on an unknown date.

16. On August 24, 2012, the Department of Economic Opportunity issued an *Order to Show Cause* to the Petitioner, directing the Petitioner to file a written statement within fifteen calendar days explaining why the Petitioner's protest should not be dismissed for lack of jurisdiction. The Petitioner responded by fax received by the Department of Economic Opportunity on August 31, 2012.

Conclusions of Law:

17. Section 443.141(2)(c), Florida Statutes, provides:

    (c) *Appeals.*--The Agency for Workforce Innovation 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.

18. 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.

19. Rule 73B-10.023(1), Florida Adminsitrative Code, provides in pertinent part:
    Filing date. The postmark date will be the filing date of any report, protest, appeal or other document mailed to the DEO or DOR. The term "postmark date" includes the postmark date affixed by the United States Postal Service or the date on which the document was delivered to an express service or delivery service for delivery to DEO or DOR. The date of receipt will be the filing date of any report, protest, appeal, or other document faxed to DEO or DOR.

20. Although the determination of the Department of Revenue is dated January 25, 2012, it does not contain any certification that it was mailed to the Petitioner or the date on which it was mailed. No evidence was presented by the Department of Revenue to show the actual date of mailing. The testimony of the Petitioner's Practice Administrator reveals that the determination was received by the Petitioner in the mail on February 7, 2012. Since the date of mailing can not be established it is concluded that the Petitioner had twenty days from the date of receipt to file the protest. The Practice Adminstrator testified that the protest was filed by fax on February 20, 2012. Since the date of receipt of the fax by the Department of Revenue is not known, February 20, 2012, is accepted as the date of filing. Thus, the Petitioner's protest is accepted as timely filed.

21. 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.

22. 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).

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. The Joined Party began performing services for the Petitioner in 2006. Although no evidence was presented concerning whether the Joined Party was initially engaged to perform services as an independent contractor or as an employee the evidence reveals that during at least a portion of 2006 and 2007 the Petitioner reported the Joined Party's earnings to the Department of Revenue and paid unemployment tax on the earnings. 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."

29. On June 1, 2010, the Petitioner required the Joined Party to sign a generic *Non-Employee Contract & Confidentiality Agreement.* The Agreement was not specific to the Joined Party and the Petitioner's testimony reveals much of the Agreement does not pertain to the Joined Party. Although the Agreement states that the Joined Party understands that she is voluntarily signing the Agreement, it also states that the Joined Party must sign the Agreement. The word "must" implies that if the Joined Party did not sign the Agreement she could not continue performing services for the Petitioner. Thus, the Joined Party's signature was not purely voluntary. The Agreement states that as a "1099 employee" the Joined Party was responsible for payment of her own taxes. A statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). 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."

30. The Petitioner's business is a medical practice involving cancer surgery performed by the Petitioner's president. The Petitioner describes the services performed by the Joined Party as nonessential to the Petitioner's business. Although the Joined Party did not perform surgery, her services enabled the president to perform surgery. The president's testimony reveals that as a single parent he could not have performed surgery unless the Joined Party watched his children. The undesirable alternative was to have his children wait for him at the hospital while he was in surgery. Thus, the Joined Party's services were essential to the Petitioner's ability to provide services.

31. The Joined Party did not have an occupational or business license, did not have business liability insurance, and did not advertise or offer her services to the general public. The fact that the Joined Party occasionally cleaned apartments for others during the weekend does not establish that the Joined Party was engaged in an independent business while performing services for the Petitioner. The Joined Party did not have any expenses in connection with the work she performed for the Petitioner. The Petitioner provided everything that was needed to perform the work and reimbursed the Joined Party for any work connected expenses. The Joined Party was not at risk of suffering a financial loss from performing services for the Petitioner.

32. The work performed by the Joined Party, housekeeping, babysitting, filing, and running errands, did not require any training, skill, or special knowledge. 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)

33. The Petitioner paid the Joined Party a flat rate on a biweekly basis. The rate of pay was not based on production but based on time worked. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship. 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.

34. The Joined Party performed services for the Petitioner for a period of approximately six years. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."

35. The *Non-Employee Contract & Confidentiality Agreement* states that the Joined Party was subject to disciplinary action including suspension, restriction, or loss of privileges if the Joined Party violated the Agreement or violated the Petitioner's policies. That clause establishes that the Petitioner had the right to direct or control the manner in which the services were performed. In order for an employer-employee relationship to exist it is not necessary for the employer to actually direct or control the manner in which the services are performed; it is sufficient if the agreement provides the employer with the right to direct and control the worker. Of all the factors, the right of control as to the mode of doing the work is the principal consideration. VIP Tours v. State, Department of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984)

36. The evidence presented in this case reveals that the services performed for the Petitioner by the Joined Party constitute insured employment. However, the determination is only retroactive to October 1, 2010, while the Joined Party performed services for the Petitioner retroactive to 2006.

37. Rule 73B-10.032(1), Florida Administrative Code, provides that each employing unit must maintain records pertaining to remuneration for services performed for a period of five years following the calendar year in which the services were rendered. Thus, it is concluded that the correct retroactive date is January 1, 2008.

Recommendation: It is recommended that the Petitioner's protest be accepted as timely filed. It is recommended that the determination dated January 25, 2012, be MODIFIED to reflect a retroactive date of January 1, 2008. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on March 14, 2013.

R. O. SMITH, Special Deputy
Office of Appeals

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

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envió por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke *Lòd Rekòmande* a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke *Lòd Rekòmande* a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

Shanedra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
March 14, 2013

Copies mailed to:
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