DEPA..TMENT OF ECONOMIC OPP..RTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:
Employer Account No. – 2143526
SOUTH FLORIDA BUSINESS VENTURES INC
200 KNUTH RD STE 100
BOYNTON BEACH FL 33436-4635

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

PROTEST OF LIABILITY
DOCKET NO. 0019 3454 40-01

ORDER

This matter comes before me for final Department Order.

The issue before me is whether services performed for the Petitioner by the Joined Party and other individuals constitute employment pursuant to § 443.036(19); 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed a reemployment assistance claim in February 2013. 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 and other individuals in the same class of workers performed services for the Petitioner as employees or independent contractors. If the Joined Party worked for the Petitioner as an employee, the Petitioner would owe reemployment assistance taxes on the remuneration it paid to the Joined Party and other workers of the same type. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, the Petitioner would not owe reemployment assistance taxes on the wages it paid to the Joined Party and the other workers. Upon completing the investigation, the Respondent's auditor determined that the services performed by the Joined Party and other sales/customer service representatives were in insured employment. The Petitioner was required to pay reemployment assistance taxes on wages it paid to the Joined Party and other workers in the same class.

The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because she had an interest in the outcome of the case.

A telephone hearing was held on February 11, 2013. The Petitioner was represented by its attorney, and the Petitioner's president appeared and testified on its behalf. The Respondent, represented by a Tax Auditor II, appeared and testified. The Joined Party appeared and testified on her own behalf. The Special Deputy issued a recommended order on March 21, 2014.

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

1. The Petitioner has been in operation since 1997. It sells vacation packages over the telephone to customers throughout the United States. Sales are made by workers in the Petitioner's call center. The Petitioner uses approximately two dozen such workers.

2. The Joined Party was one of the call center workers. She was associated with the Petitioner from May 17, 2012 to November 14, 2012. When the Joined Party began her association with the Petitioner, she signed a *Direct Seller Agreement*, as do all other call center workers who sell vacation packages. The *Direct Seller Agreement* provides, among other things: "*SFBV does not treat the DIRECT SELLER as an employee for federal or state tax purposes.*" The agreement provides, among other things, that the company is not liable for injuries or accidents to the worker; that the company can terminate the worker at any time; and that the worker is not to engage in competition with the company. There are requirements about the conduct of sales calls. The agreement sets out a commission structure. The commission structure depends primarily on whether the worker sets his or her own hours, or whether the work follows a schedule set out by the Petitioner. Penalties reducing paid compensation are set out for failing to notify the company of attendance as scheduled, and the penalties apply when the worker quits, unless the worker follows a specific notice procedure.

3. The Joined Party chose to work according to the Petitioner's schedule. The Joined Party had to ask permission of a supervisor to take breaks. The Joined Party was required to follow a sales script. She could add personal touches, but she could not fail to give all of the information in the script. The script included certain disclosures that were required by Federal and state law. Supervisors reviewed sales calls and suggested ways of conducting the calls.

4. The worker would sit at a workstation provided by the Petitioner. Calls were made by the Petitioner's computer system automatically. When a potential customer answered the telephone the call would be routed to one of the workers, which could be the Joined Party or whoever was available to speak to a customer. The worker would then make a sales presentation. All of the tools and supplies for the work were provided by the Petitioner, with the exception that workers were supposed to supply their telephone headsets. The Joined Party borrowed a headset from the Petitioner, intending to purchase her own if she was successful in the job. The Joined Party did not use a headset of her own during her association with the Petitioner.

5. A successful sales call would result in a customer agreeing to buy a vacation package, which would include an ocean cruise. The customer would give a credit card number or possibly checking account information, which would be checked by one of the supervisors working for

the Petitioner. Once the payment information was approved, the call would be referred to a verifier. The verifier was an employee of the cruise line on whose behalf the Petitioner was selling vacation packages. The verifier would confirm the details of the sale. Occasionally the customer would have second thoughts at that stage and cancel the transaction. When that happened the customer would not be charged and the worker would not get credit for a sale.

6. The Petitioner provided a draw against commission of $8 per hour, paid weekly. The Joined Party rarely achieved the level of sales necessary to be paid commission in excess of the draw, so her income was almost all draw. The Joined Party was not advised that she would have to pay back any arrearage. The Petitioner did not deduct or withhold any amount for taxes. A 1099-MISC was issued to the Joined Party for 2012 setting out the amount paid for the year under "nonemployee compensation".

7. The Joined Party's association with the Petitioner came to an end after a supervisor warned that she would be terminated unless she made a sale in the next two days. The Joined Party attempted to make a sale but she was unsuccessful. At the end of the second day the supervisor told the Joined Party that her employment was at an end.

8. The Joined Party filed a claim for reemployment assistance benefits effective February 3, 2013. After an investigation, the Florida Department of Revenue (DOR) issued a determination on March 26, 2013 finding that the Joined Party and any other similar worker was an employee.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated March 26, 2013, be affirmed. Upon receipt of the Petitioner's timely written request on March 28, 2014, the Special Deputy granted an extension of time for filing exceptions until April 21, 2014. The Petitioner's exceptions were received by mail on April 21, 2014. 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 substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

The Petitioner takes exception to Conclusions of Law 27–29 and 34. Section 120.57(1)(l), Florida Statutes, provides that 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 demonstrates that the Petitioner's contentions have merit. As a result, the Department must modify the Recommended Order in order to meet the requirements of section 120.57(1)(l), Florida Statutes.

A review of the record reflects that Conclusions of Law 27–29 and 34 do not reflect a reasonable application of the law to the facts. Thus, the Special Deputy's ultimate conclusion that the Joined Party did not perform services as an exempt direct seller is not a reasonable application of the law to the facts. Section 443.1216(13)(u), Florida Statutes, provides that a person "who is engaged in the trade or business of selling or soliciting the sale of consumer products in the home or in another place that is not a permanent retail establishment" is a direct seller if the person is substantially remunerated based on sales and performs services under a written contract that provides that the person will not be treated as an employee for those services for federal tax purposes. In *Prysi v. Dep't of Health*, 823 So. 2d 823, 825 (Fla. 1st DCA 2002), the court held that an agency must state its particular reasons for rejecting conclusions of law and "make a finding that its substituted conclusion of law is as, or more, reasonable than that which was rejected or modified." The record demonstrates that the Joined Party sold consumer products in a place other than a permanent retail establishment, was paid related to her sales, and performed services under a contract that provided that she would not be treated as employee for those services for federal tax purposes. Accordingly, it is more reasonable for the Department to hold that the Joined Party performed services as an exempt direct seller pursuant to section 443.1216, Florida Statutes. The Conclusions of Law are modified to reflect that the Joined Party performed services as an exempt direct seller pursuant to section 120.57(1)(l), Florida Statutes.

The Findings of Fact are supported by competent substantial evidence in the record. The modified Conclusions of Law reflect a reasonable application of the law to the facts. The Special Deputy's Conclusions of Law 27–29 and 34 are respectfully rejected by the Department.

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 modified Conclusions of Law reflect a reasonable application of the law to the facts and are adopted by the Department.

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 as set forth in the Recommended Order. The Conclusions of Law are adopted as modified above. The Special Deputy's recommendation that the Department hold that the Joined Party did not perform services as an exempt direct seller is respectfully rejected.

Therefore, it is ORDERED that the determination dated March 26, 2013, is REVERSED.

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 18th day of **June, 2014**.

Magnus Hines,
RA Appeals Manager,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

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

Shanedra Y. Barnes
DEPUTY CLERK

20.6.14
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 20th day of June, 2014.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
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TALLAHASSEE FL 32399-5250

By U.S. Mail:

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

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PROTEST OF LIABILITY
DOCKET NO. 0019 3454 40-01

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Magnus Hines
RA Appeals Manager,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated March 26, 2013.

After due notice to the parties, a telephone hearing was held on February 11, 2013. The Petitioner, represented by counsel appeared and the company president testified; the Joined Party appeared; and a Tax Auditor II appeared for the Respondent. The Petitioner submitted proposed findings of fact and conclusions of law. The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted.

Issue: Whether services performed for the Petitioner by the Joined Party and other individuals constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner has been in operation since 1997. It sells vacation packages over the telephone to customers throughout the United States. Sales are made by workers in the Petitioner's call center. The Petitioner uses approximately two dozen such workers.

2. The Joined Party was one of the call center workers. She was associated with the Petitioner from May 17, 2012 to November 14, 2012. When the Joined Party began her association with the Petitioner, she signed a *Direct Seller Agreement*, as do all other call center workers who sell vacation packages. The *Direct Seller Agreement* provides, among other things: "*SFBV does not treat the DIRECT SELLER as an employee for federal or state tax purposes.*" The agreement provides, among other things, that the company is not liable for injuries or accidents to the worker;

that the company can terminate the worker at any time; and that the worker is not to engage in competition with the company. There are requirements about the conduct of sales calls. The agreement sets out a commission structure. The commission structure depends primarily on whether the worker sets his or her own hours, or whether the work follows a schedule set out by the Petitioner. Penalties reducing paid compensation are set out for failing to notify the company of attendance as scheduled, and the penalties apply when the worker quits, unless the worker follows a specific notice procedure.

3. The Joined Party chose to work according to the Petitioner's schedule. The Joined Party had to ask permission of a supervisor to take breaks. The Joined Party was required to follow a sales script. She could add personal touches, but she could not fail to give all of the information in the script. The script included certain disclosures that were required by Federal and state law. Supervisors reviewed sales calls and suggested ways of conducting the calls.

4. The worker would sit at a workstation provided by the Petitioner. Calls were made by the Petitioner's computer system automatically. When a potential customer answered the telephone the call would be routed to one of the workers, which could be the Joined Party or whoever was available to speak to a customer. The worker would then make a sales presentation. All of the tools and supplies for the work were provided by the Petitioner, with the exception that workers were supposed to supply their telephone headsets. The Joined Party borrowed a headset from the Petitioner, intending to purchase her own if she was successful in the job. The Joined Party did not use a headset of her own during her association with the Petitioner.

5. A successful sales call would result in a customer agreeing to buy a vacation package, which would include an ocean cruise. The customer would give a credit card number or possibly checking account information, which would be checked by one of the supervisors working for the Petitioner. Once the payment information was approved, the call would be referred to a verifier. The verifier was an employee of the cruise line on whose behalf the Petitioner was selling vacation packages. The verifier would confirm the details of the sale. Occasionally the customer would have second thoughts at that stage and cancel the transaction. When that happened the customer would not be charged and the worker would not get credit for a sale.

6. The Petitioner provided a draw against commission of $8 per hour, paid weekly. The Joined Party rarely achieved the level of sales necessary to be paid commission in excess of the draw, so her income was almost all draw. The Joined Party was not advised that she would have to pay back any arrearage. The Petitioner did not deduct or withhold any amount for taxes. A 1099-MISC was issued to the Joined Party for 2012 setting out the amount paid for the year under "nonemployee compensation".

7. The Joined Party's association with the Petitioner came to an end after a supervisor warned that she would be terminated unless she made a sale in the next two days. The Joined Party attempted to make a sale but she was unsuccessful. At the end of the second day the supervisor told the Joined Party that her employment was at an end.

8. The Joined Party filed a claim for reemployment assistance benefits effective February 3, 2013. After an investigation, the Florida Department of Revenue (DOR) issued a determination on March 26, 2013 finding that the Joined Party and any other similar worker was an employee.

Conclusions of Law:

9. Section 443.036, Florida Statutes, "Definitions" provides in relevant part:
(21) "Employment" means a service subject to this chapter under s. 443.1216 which is performed by an employee for the person employing him or her.

10. 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.

11. Section 443.1216, Florida Statutes, further provides:
(13) The following are exempt from coverage under this chapter:
(u) Service performed by a direct seller. As used in this paragraph, the term "direct seller" means a person:
1. a. Who is engaged in the trade or business of selling or soliciting the sale of consumer products to buyers on a buy-sell basis, on a deposit-commission basis, or on a similar basis, for resale in the home or in another place that is not a permanent retail establishment; or
b. Who is engaged in the trade or business of selling or soliciting the sale of consumer products in the home or in another place that is not a permanent retail establishment;
2. Substantially all of whose remuneration for services described in subparagraph 1., regardless of whether paid in cash, is directly related to sales or other output, rather than to the number of hours worked; and
3. Who performs the services under a written contract with the person for whom the services are performed, if the contract provides that the person will not be treated as an employee for those services for federal tax purposes.

12. In Cantor v. Cochran, 184 So. 2d 173 (Fla. 1966), the Supreme Court of Florida adopted the test in 1 Restatement of Law, Agency 2d Section 220 (1958) used to determine whether an employer-employee relationship exists. Section 220 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 the one employed is 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 worker supplies the instrumentalities, tools, and a 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 time or job;
(h) whether or not the work is 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.

13. 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.

14. 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. The factors listed in Cantor v. Cochran are the common law factors that determine if a worker is an employee or an independent contractor. See, for example, Brayshaw v. Agency for Workforce Innovation, 58 So. 3d 301 (Fla. 1st DCA 2011).

15. The relationship of employer-employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and the method and details by which the desired result is to be accomplished is the feature that distinguishes an independent contractor from a servant. Collins v. Federated Mutual Implement and Hardware Insurance Co., 247 So. 2d 461 (Fla. 4th DCA 1971); La Grande v. B. & L. Services, Inc., 432 So. 2d 1364 (Fla. 1st DCA 1983).

16. In Keith v. News and Sun-Sentinel Co., 667 So.2d 167, 171 (Fla. 1995) the Florida Supreme Court stated:

> Hence, courts should initially look to the agreement between the parties, if there is one, and honor that agreement, unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status. In the event that there is no express agreement and the intent of the parties cannot otherwise be determined, courts must resort to a fact-specific analysis under the Restatement based on the actual practice of the parties. Further, where other provisions of an agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties, the actual practice and relationship of the parties should control.

17. Section 73B-10.035, Florida Administrative Code, provides:

> (7) Burden of Proof. The burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.

18. The evidence shows that the Joined Party was not an independent contractor, which the Petitioner largely but not entirely concedes. The Petitioner's main assertion is that the Joined Party's work was exempt under the Direct Seller provision.

19. The evidence shows that the Joined Party was controlled by the Petitioner in the manner of making her presentation to potential customers. There was a script which had to be followed. This was in addition to the disclosures required by law. The legally-required disclosures would not show control by the Petitioner (they would show state regulation rather than Petitioner control). The script, though, contained more than just the legally mandated disclosures: the script related to the sales presentation. The evidence shows that the Joined Party could add personal touches of her own, but was substantially bound by the presentation and rebuttals developed by the Petitioner. The Joined Party's sales presentations were reviewed by supervisors who gave directions for future solicitations. The Petitioner's control over the sales presentation distinguishes the Joined Party's situation from the independent contractor telephone solicitors in cases such as Cosmo Personnel v. Dept. of Labor and Employment Security, 407 So.2d 249 (Fla. 4th DCA 1981) (workers titled 'employment counselors'); Sarasota Chamber of Commerce v. Dept. of Labor and

Employment Security, 463 So. 2d 461 (Fla. 2d DCA 1985); and United States Telephone Co. v. Dept. of Labor and Employment Security, 410 So.2d 1002 (Fla. 3rd DCA 1982).

20. Notwithstanding the Joined Party's status as a common law employee, the Joined Party would not be covered by the reemployment assistance law if her work falls within an exemption. If the exemption applies, then the Petitioner is not liable for reemployment assistance taxes on remuneration paid to the Joined Party, whether she is an employee or an independent contractor. The exemption that might apply in this case is section 443.1216 (13) (u), Florida Statutes, the direct seller exemption, set out above. That provision has three aspects, all of which must be met for the exemption to apply.

21. Taking the clearest of the three factors first, in this case there is a written contract that provides that the Joined Party will not be treated as an employee for Federal tax purposes. The requirements of sec. 443.1216 (13) (u) 3, Fla. Stat. have been met. The language in the agreement tracks the language in the statute.

22. Subsection 2 of the exemption requires, "*Substantially all of whose remuneration for services...is directly related to sales or other output, rather than to the number of hours worked*". The agreement provides for a commission on sales, and it provides for additional commission and bonuses for working a specific schedule set by the Petitioner. The Joined Party received the enhanced remuneration rate by submitting to the Petitioner's work schedule. The additional compensation looks a little like remuneration for hours worked rather than for output, but the compensation and sales bonuses are still tied to the sales themselves, so they meet the "directly related to sales" requirement. The evidence shows that the Joined Party received a draw against commission of $8 per hour. This would assure compliance with minimum wage requirements, which can apply even to commission salespersons. See, for example, Martinez v. Ford Midway Mall, 59 So.3d 168 (Fla. 3rd DCA 2011). It has not been shown that the draw (or some part of it above minimum wage) was subject to being repaid if the Joined Party was consistently in arrears. A nonrefundable draw against commission is salary or wages. See, Lester v. Kahn-McKnight Co. Inc., 521 So.2d 312 (Fla. 3rd DCA 1988). The Joined Party testified that she consistently received just the hourly rate for her services. There were only a few instances when the Joined Party earned any commission above the draw. However, it can be accepted that the remuneration in this case was "directly related to sales" because the primary mode of compensation was a commission on sales, with the draw acting simply as a substitute that the Petitioner would have hoped and intended to be temporary or occasional. The Joined Party testified that she was fired because she was not meeting sales goals: on the one hand this corroborates that she was a common law employee[1], but it also reinforces the inference that the draw was not intended to be a permanent hourly wage. So, the provisions of section 443.1216 (13) (u) 2, Fla. Stat. can be considered to have been met. That just leaves the provision relating to the trade or business, sec. 443.1216 (13) (u) 1, Fla. Stat.

23. The first alternative in that provision, sec. 443.1216 (13) (u) (1)a, Fla. Stat., does not apply in this case. While the terms, "*buy-sell basis, on a deposit-commission basis, or on a similar basis*" are not defined in the statute, and they appear to be vending terms of art, the names imply a situation where the seller provisionally buys certain goods (or pledges to buy certain goods) from a distributor (who may be the manufacturer) and then the seller goes out and sells those goods door

[1] See, Cantor v. Cochran, 184 So.2d 173, 174 (Fla. 1966), quoting 1 Larson, Workmens' Compensation Law, Section 44.35: "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."

to door, remitting any unpaid portion of the provisional or pledged price to the distributor. The seller keeps the difference between the amount the consumer pays and the amount remitted to the distributor. There may or may not be provisions for refunds for goods that cannot be sold. This would be the model for Amway salespersons, perhaps; it is similar to the way some taxi services work; or some barbershops (where the fee for the cab or chair is analogous to the purchase of the goods); or for that matter, school fundraisers or Girl Scout cookies (though there are also other reasons that schoolchildren and Girl Scouts are not employees of their respective organizations).

24. That leaves sec. 443.1216 (13) (u) (1) b., Fla. Stat. The key terms are: "*selling or soliciting the sale*", "*consumer products*" and "*in the home or in another place that is not a permanent retail establishment.*" There are two cases that help determine the meaning of these terms: Kirby Center of Springhill v. Dept. of Labor and Employment Security, 650 So.2d 1060 (Fla. 1st DCA 1995) and Cleveland Institute of Electronics v. United States, 787 F.Supp.741 (N.D. Ohio 1992), where the Federal District court construed sec. 25 USC 3508, part of the Federal unemployment tax act (FUTA), which provides an exemption for Federal unemployment compensation tax in terms substantially the same as sec. 443.1216 (13) (u), Fla. Stat. As noted in Reese v. Reemployment Assistance Appeals Commission, 103 So.3d 195, 198 (Fla. 3d DCA 2012), Florida reemployment assistance law can and should be construed by reference to parallel Federal statutes and regulations. In Cleveland Institute, the overall issue was whether sellers of home study educational courses were covered by the direct seller exemption. The salespersons in that case met with potential customers in the customers' homes, shopping malls, or at other locations. The contract between the company and the salesperson provided that the sales person would be paid solely by commission, and that the salesperson was an independent contractor and would not be treated as an employee for federal tax purposes. The specific disputed issue was whether the home study courses constituted a "consumer product." There were some material, tangible items—manuals with instructions, for example—but the main thing being sold was the working knowledge of electronics. The district court's opinion reviewed the background of the direct seller exemption, showing that it was to provide a safe harbor allowing certain workers to be treated as independent contractors for FUTA purposes. It was a provision enacted along with a provision exempting real estate salespersons. The court concluded that the home study courses were a "consumer product" after reviewing the varying meanings assigned to that term in other Federal statutes. The court found that the term should encompass both tangible consumer goods and intangible consumer services. Cleveland Institute, at 750. Applying that decision to the current case, it is noted that there is no specific definition of "consumer product" in chapter 443, Fla. Stat. or ch.73B-10, Florida Administrative Code.

25. Tax statutes are generally construed in favor of the taxpayer, Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, 497 So.2d 630 (Fla. 1986); a principle which applies specifically to reemployment assistance/unemployment compensation tax, Bayonet Point Hospital Medical Center v. Dept. Labor and Employment Security, 460 So.2d 473 (Fla. 2nd DCA 1984). Construing "consumer product" to refer to both consumer goods and consumer services is a construction more favorable to the Petitioner for tax purposes than limiting the term to tangible consumer goods. It gives greater scope to the exemption. Accordingly, the vacation packages sold by the Joined Party should be considered consumer products because they are sold to the people who would actually go on the cruise—the ones who would consume the services and associated goods.

26. The primary Florida case construing the direct seller provision is Kirby Center of Springhill v. Dept. of Labor and Employment Security, 650 So.2d 1060 (Fla. 1st DCA 1995). In that case, telephone appointment solicitors who set up in-home demonstrations of Kirby vacuum cleaners were found to be direct sellers. The court reversed a Department finding that the telephone solicitors were covered employees. Sales of the vacuum cleaners could only be made after in-home demonstrations. The court stated:

Therefore making appointments to set up in-home demonstrations was an essential part of the sale. By soliciting appointments for the salespeople, the telephone solicitors were in effect soliciting sales. Kirby Center at 1062.

27. Telephone salespersons/solicitors such as the Joined Party in the current case are not automatically excluded from the category of direct sellers. But the work of the Joined Party in this case was different from those telephone solicitors in Kirby Center: the sales of the vacation packages in this case took place entirely over the telephone. There was no in-person sale, whether made in the consumer's home or in some other place. In Cleveland Institute of Electronics the sales were made through an in-person, often in-home, solicitation. Similarly, in Miles Homes, Div. of Insilco Corp. v. Schloeder, Comm'r Jobs & Training, 407 N.W. 2d 479 (MN Ct. App. 1987), sellers of pre-fab house kits were found to be direct sellers under a Minnesota statute similar to the one at issue in the current case. Some sales were from the seller's office, but most were not.

28. To find that the purely telephone sales in this case count as sales "in the home or in another place that is not a permanent retail establishment" would render the "in the home" provision meaningless. The direct seller exemption would cover every consumer sale, so long as the seller was paid by commission and the employer included a line in a contract stating that the seller would not be treated as an employee for federal tax purposes. It would be as if sec. 443.1216 (13) (u) (1)b, Fla. Stat. didn't exist at all. That isn't construing a statute in favor of the taxpayer; that is changing the statute. Instead, note that the exemption in sec. 443.1216 (13) (u), Fla. Stat. is one of a number of specific exemptions listed from (a) through (y), each exemption setting out a special case or giving a break to some special interest. Some exemptions are extremely detailed and narrow, and some rather broad. If the legislature had intended to exempt consumer product salespeople generally it could easily have said so, but it didn't. The primary operative term is, "*in the home*". The following phase, "*or in another place that is not a permanent retail establishment*" modifies the primary term; it should be construed by reference to the primary term. Otherwise, the reference would simply be to, 'a sale not in a permanent retail establishment,' which would automatically include in-home sales. Giving full scope to all of the terms of sec. 443.1216 (13) (u), Fla. Stat., the exemption covers door-to-door salespeople and even their appointment setters, if any, so long as the appointment setters don't actually close the sale. It could conceivably cover, say, itinerant tailors who go to customers' offices to take measurements and then return later, delivering finished suits that were made in Hong Kong. Food trucks might be an example at the margin: the truck might be a "permanent retail establishment" even though it doesn't have a permanent retail location, so a food truck worker might or might not be an exempt direct seller. That is a decision for another day. But the exemption doesn't stretch to cover situations where there isn't some in-person contact by a salesperson with the customer, where that contact occurs in the customer's home, or in some other analogous place and the contact is necessary to complete the sale. The seller has to go to the customer, rather than the other way around. In the current case, everybody, both seller and customer, stays right where they are throughout the sale and there is no in-person contact. There is no sale in the home, or in some other analogous location. The Petitioner's call center functions more like a permanent retail establishment than it resembles a mere back office processing center for sales made in the field.

29. The Petitioner presented proposed findings of fact and conclusions of law. To the extent the proposed findings of fact are relevant and supported by the record they are incorporated in the findings of fact set out above, and to the extent that the proposed findings are either not relevant or not supported by the record they are not accepted. The Petitioner cites Smoky Mountain Secrets, Inc. v. United States, 910 F. Supp. 1316 (E.D. Tenn. 1995) as a case of telemarketers being treated as direct sellers. In that case, the company (SMS) sold gourmet foods and condiments, primarily but not exclusively using the services of telemarketers. The items purchased were then delivered to the consumer/purchaser by delivery persons associated with SMS. The delivery person would

collect the purchase price and turn over the goods, and would sometimes make additional sales. Sometimes the delivery person would have to engage in further sales efforts to confirm the sale. Sales were not complete and no commission was earned by the telemarketer or the delivery person until the delivery person had collected the purchase price to close the sale. Smoky Mountain Secrets at 1318—1319. The court found that both the telemarketers and the delivery persons were direct sellers within the meaning of the Federal statute. Smoky Mountain Secrets at 1323. This case is consistent with the analysis given above: an in-person sales component was a necessary part of the sale. The telemarketers found to be direct sellers in Smoky Mountain Secrets are similar to the telephone solicitors of Kirby Center.

30. The Petitioner also cites to 29 CFR 779.318(a) to define "retail establishment". That section provides:

    §779.318 Characteristics and examples of retail or service establishments.

    (a) Typically a retail or service establishment is one which sells goods or services to the general public. It serves the everyday needs of the community in which it is located. The retail or service establishment performs a function in the business organization of the Nation which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization and does not take part in the manufacturing process. (See, however, the discussion of section 13(a)(4) in §§779.346 to 779.350.) Such an establishment sells to the general public its food and drink. It sells to such public its clothing and its furniture, its automobiles, its radios and refrigerators, its coal and its lumber, and other goods, and performs incidental services on such goods when necessary. It provides the general public its repair services and other services for the comfort and convenience of such public in the course of its daily living. Illustrative of such establishments are: Grocery stores, hardware stores, clothing stores, coal dealers, furniture stores, restaurants, hotels, watch repair establishments, barber shops, and other such local establishments.

31. Ch. 29 CFR 779 is part of the regulations under the Fair Labor Standards Act (FLSA) rather than part of the regulations relating to unemployment compensation taxes, so it is of limited relevance. But some discussion may still be warranted. The point of the Petitioner's citation is to support the contention that the call center should not be considered a retail establishment because it does not have the normal characteristics of such an entity. People can't walk into the call center and purchase the vacation packages.

32. The CFR section cited is an example or clarification of a more general definition, which is found at 29 CFR 779.312:

    §779.312 "Retail or service establishment", defined in section 13(a)(2).

    a. The 1949 amendments to the Act defined the term "retail or service establishment" in section 13(a)(2). That definition was retained in section 13(a)(2) as amended in 1961 and 1966 and is as follows:

    b. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

    c. It is clear from the legislative history of the 1961 amendments to the Act that no different meaning was intended by the term "retail or service establishment" from that already established by the Act's definition, wherever used in the new provisions, whether relating to coverage or to exemption. (See S. Rept. 145, 87th Cong., first session p. 27; H.R. 75, 87th Cong., first session p. 9.) The legislative history of the

1949 amendments and existing judicial pronouncements regarding section 13(a)(2) of the Act, therefore, will offer guidance to the application of this definition.

33. The vacation packages in the current case were not for resale. There was no specific industry-wide evidence to show whether or not the vacation packages were "*recognized as retail sales or services in the particular industry*," but to the extent that the sales are not for resale and are not wholesale or bulk sales it seems unlikely that they would be regarded as anything other than retail sales. The call center in this case is not like a car dealership or a grocery store or a barbershop. On the other hand, the reference to "coal dealers" in the cited section is of interest. Coal is bought by consumers for heating purposes. Generally consumers do not stroll down the aisles of coal stores filling their scuttles with their select mix of anthracite and bituminous: instead, they have a contract for delivery of certain amounts of coal at stated times, or they call the coal company and arrange for the delivery of coal as needed. This is an example of a retail seller with a permanent retail establishment that consumers do not visit. All of this is of relatively minor weight because the regulations in question are for an area of law other than unemployment compensation tax, but even in this case the cited regulations are not inconsistent with the recommendation in this order.

34. It is concluded that the Joined Party was a common law employee, not an independent contractor, and was not within the exemption for direct sellers. This would also apply to any other similarly situated worker.

Recommendation: It is recommended that the determination dated March 26, 2013 be AFFIRMED.

Respectfully submitted on March 21, 2014.

J. Jackson Houser

Jackson Houser, 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

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