DEPART. .ENT OF ECONOMIC OPPOR'. NITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:
Employer Account No. - 3144858

DISCOVERY BUILDINGS INC
ATTN BLAKE BRANDON
3526 ELLIS LANE
MIMS FL 32754-3609

PROTEST OF LIABILITY
DOCKET NO. 0019 3463 24-01

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

ORDER

This matter comes before me for final Department Order.

An issue before me is whether services performed for the Petitioner by the Joined Party and other individuals performing services as salespersons constitute insured employment, and if so, the effective date of liability pursuant to sections 443.036(19); 443.036(21); 443.1216, Florida Statutes. An issue also before me is whether the Petitioner meets liability requirements for Florida reemployment assistance contributions, and if so, the effective date of liability, pursuant to sections 443.036(19); 443.036(21), Florida Statutes.

The Joined Party filed a reemployment assistance claim in May 2013. An initial determination held that the Joined Party earned sufficient 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 worked 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 class of workers. 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 salespersons were in insured employment. The Petitioner was required to pay reemployment assistance taxes on wages it paid to the Joined Party and other salespersons. 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 November 21, 2013. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Senior Tax Specialist, appeared and testified. The Joined Party appeared and testified on her own behalf. The Special Deputy issued a recommended order on January 2, 2014.

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

1. The Petitioner is a corporation that sells and installs mobile homes, storage buildings, and trailers. It began in 2009. The president of the corporation is the principal owner. She has been president since the corporation began. The president is active in the management of the business. She does not take any regular payment for her services, and has not done so since the beginning of operations.

2. Starting in February 2010, the Petitioner had a sales person who worked on the business premises. There were at least two different individuals who worked as a sales person between February 2010 and September 2011. They worked under arrangements like that of the Joined Party. The Joined Party was a salesperson for the Petitioner starting in September 2011, and she worked to May 17, 2013. The Joined Party and the president agreed that the Joined Party would work under a "1099" arrangement. The primary feature of that arrangement, in the view of the parties, was that the Petitioner would not deduct taxes from the pay due to the Joined Party. There was no written agreement relating to the Joined Party's status as a worker. The Joined Party submitted a W-9 form, "Request for Taxpayer Identification Number and Certification," to the Petitioner on September 15, 2011. The Joined Party began work as a salesperson not long after that.

3. Pursuant to their agreement, the Petitioner would pay the Joined Party $200 per week, plus commission on a percentage of the Joined Party's sales to the extent that the sales commission exceeded the weekly payment. The president thought of the regular payment as a draw against commission; the Joined Party thought of the $200 per week as base pay. The Petitioner first paid the Joined Party on September 28, 2011. The amount was $200. The Joined Party was paid weekly. She received the minimum payment on occasion, but usually her commissions exceeded the $200 per week. When the Joined Party made a sale, she was paid commission on the sale that week.

4. The Joined Party worked for the Petitioner Monday through Friday, usually appearing at work at about 9 a.m. and working until 5 p.m., with some time out for the Joined Party to leave the premises to pick up her son from school and transport him home. The Joined Party could and did leave the premises for other reasons. When the Joined Party left the Petitioner's premises on weekdays she would set the Petitioner's telephone to forward calls to the Joined Party's cell phone. The Joined Party received calls from potential customers on her cell phone from time to time, including occasionally on the weekend. The president did not require the Joined Party to work a strict schedule. The Joined Party was not counseled or disciplined if she was not at work during the days or times previously mentioned. The Joined Party did not typically work for the Petitioner on Saturdays, though the Joined Party would work on that day if special arrangements were made. The Joined Party was not paid extra if she worked on Saturday, or if she worked beyond 5 p.m., as was sometimes the case.

5. During the typical work hours the Joined Party would attempt to make sales to potential customers who came to the business location. She would answer the telephone. She would respond to inquiries on the internet. The Joined Party did some cleaning and straightening up of the premises. A majority of the Joined Party's working time was spent on the Petitioner's premises, though the Joined Party did leave the premises for business purposes in connection with some transactions.

6. The Joined Party engages in the equestrian activity of barrel racing, and as a result she is highly knowledgeable about horse trailers. Much of the Joined Party's sales activity for the Petitioner was related to the sales of horse trailers. The Joined Party persuaded acquaintances in the barrel racing community who wished to sell their horse trailers to sell them through the Petitioner on consignment. When there was a transaction of that type, the Joined Party would receive a different commission than she would for sales of the Petitioner's merchandise.

7. In January 2013, the Petitioner agreed that the Joined Party would work on a "W-2" basis, meaning that the Petitioner would begin to deduct taxes from the Joined Party's pay. The Petitioner registered with the Florida Department of Revenue to pay reemployment assistance taxes for the 1st quarter of 2013. In February 2013 the Petitioner hired a sales person to work primarily on weekends. The person was designated an employee, and his wages were subject to tax deductions. He had worked for the Petitioner as a sales person, designated a "1099" worker, prior to the Joined Party beginning with the Petitioner.

8. After the Joined Party was designated as an employee, the Petitioner paid the Joined Party on a straight commission basis, without any guaranteed draw or base. The commission percentage was increased. The president of the Petitioner expected the Joined Party to devote more time to the work of the Petitioner during the day, and the Joined Party did so. The Joined Party was assigned to engage in more marketing efforts than she had participated in previously.

9. The Petitioner had been selling new horse trailers, which it bought from the manufacturer. In the spring of 2013, the manufacturer advised that it was going to be selling horse trailers directly to the public exclusively, rather than selling through a dealer. The Petitioner's horse trailer sales diminished significantly. In May 2013 the president of the Petitioner advised the Joined Party that it was becoming unprofitable to retain the services of the Joined Party, in light of her diminished sales. The Petitioner permitted the Joined Party to seek work with other employers, but the Joined Party was unsuccessful in locating suitable work. The Joined Party

> filed a claim for reemployment assistance benefits effective May 19, 2013, and initially no wage credits were assigned to the claim. After an investigation, the Florida Department of Revenue issued a determination on June 24, 2013 finding that the Joined Party, and any similar worker, was an employee. The effective date of liability was designated as February 1, 2010. A superseding determination was issued on July 29, 2013 reiterating the finding of employment, but establishing an effective date of liability as of October 1, 2011.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated July 29, 2013, be modified to reflect an effective date of liability of February 1, 2010. The Special Deputy further recommended that the determination be affirmed as modified. The Petitioner submitted exceptions on January 24, 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.

Upon review of the entire record, it was determined that a portion of the first paragraph of the *Issue* section on the first page of the Recommended Order must be modified to accurately reflect the issue addressed by the Special Deputy in the order. The record reflects that the Respondent's determination, the notice of hearing, and the Recommended Order address the entire class of workers. Accordingly, the first paragraph of the *Issue* section is amended as follows:

> Whether services performed for the Petitioner by the Joined Party and other salespersons constitute insured employment, and if so, the effective date of liability, pursuant to section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

In its exceptions, the Petitioner takes exception to the Special Deputy's Findings of Fact and Conclusions of Law and proposes alternative findings of fact and conclusions of law. In Exception 2, the claimant takes exception to the Special Deputy resolving conflicts in evidence in favor of the Joined Party. Pursuant to section 120.57(1)(l), Florida Statutes, the Special Deputy is the trier 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 based on the record of the hearing. 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 the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As a result, the Department may not modify or reject 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, the Petitioner's exceptions are respectfully rejected.

A review of the record reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings 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 modified herein.

Therefore, it is ORDERED that the determination dated July 29, 2013, is MODIFIED to reflect an effective date of liability of February 1, 2010. 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 25th day of **March, 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

3.27.14
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 27th day of March, 2014.

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

By U.S. Mail:

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DISCOVERY BUILDINGS INC
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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 3463 24-01
(2013-79119L)

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith
Bureau Chief,
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 July 29, 2013.

After due notice to the parties, a telephone hearing was held on November 21, 2013. The president of the Petitioner appeared; the Joined Party appeared; and a Senior Tax Specialist appeared for the Respondent. No proposed findings of fact or conclusions of law were received. 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 constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions pursuant to §443.036(19); 443.036(21); 443.1215, Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation that sells and installs mobile homes, storage buildings, and trailers. It began in 2009. The president of the corporation is the principal owner. She has been president since the corporation began. The president is active in the management of the business. She does not take any regular payment for her services, and has not done so since the beginning of operations.

2. Starting in February 2010, the Petitioner had a sales person who worked on the business premises. There were at least two different individuals who worked as a sales person between February 2010 and September 2011. They worked under arrangements like that of the Joined Party. The Joined Party was a salesperson for the Petitioner starting in September 2011, and she worked to May 17, 2013. The Joined Party and the president agreed that the Joined Party would work under a "1099" arrangement. The primary feature of that arrangement, in the view of the parties, was that the Petitioner would not deduct taxes from the pay due to the Joined Party. There was no written agreement relating to the Joined Party's status as a worker. The Joined Party submitted a W-9 form, "Request for Taxpayer Identification Number and Certification," to the Petitioner on September 15, 2011. The Joined Party began work as a salesperson not long after that.

3. Pursuant to their agreement, the Petitioner would pay the Joined Party $200 per week, plus commission on a percentage of the Joined Party's sales to the extent that the sales commission exceeded the weekly payment. The president thought of the regular payment as a draw against commission; the Joined Party thought of the $200 per week as base pay. The Petitioner first paid the Joined Party on September 28, 2011. The amount was $200. The Joined Party was paid weekly. She received the minimum payment on occasion, but usually her commissions exceeded the $200 per week. When the Joined Party made a sale, she was paid commission on the sale that week.

4. The Joined Party worked for the Petitioner Monday through Friday, usually appearing at work at about 9 a.m. and working until 5 p.m., with some time out for the Joined Party to leave the premises to pick up her son from school and transport him home. The Joined Party could and did leave the premises for other reasons. When the Joined Party left the Petitioner's premises on weekdays she would set the Petitioner's telephone to forward calls to the Joined Party's cell phone. The Joined Party received calls from potential customers on her cell phone from time to time, including occasionally on the weekend. The president did not require the Joined Party to work a strict schedule. The Joined Party was not counseled or disciplined if she was not at work during the days or times previously mentioned. The Joined Party did not typically work for the Petitioner on Saturdays, though the Joined Party would work on that day if special arrangements were made. The Joined Party was not paid extra if she worked on Saturday, or if she worked beyond 5 p.m., as was sometimes the case.

5. During the typical work hours the Joined Party would attempt to make sales to potential customers who came to the business location. She would answer the telephone. She would respond to inquiries on the internet. The Joined Party did some cleaning and straightening up of the premises. A majority of the Joined Party's working time was spent on the Petitioner's premises, though the Joined Party did leave the premises for business purposes in connection with some transactions.

6. The Joined Party engages in the equestrian activity of barrel racing, and as a result she is highly knowledgeable about horse trailers. Much of the Joined Party's sales activity for the Petitioner was related to the sales of horse trailers. The Joined Party persuaded acquaintances in the barrel racing community who wished to sell their horse trailers to sell them through the Petitioner on consignment. When there was a transaction of that type, the Joined Party would receive a different commission than she would for sales of the Petitioner's merchandise.

7. In January 2013, the Petitioner agreed that the Joined Party would work on a "W-2" basis, meaning that the Petitioner would begin to deduct taxes from the Joined Party's pay. The Petitioner registered with the Florida Department of Revenue to pay reemployment assistance taxes for the 1st quarter of 2013. In February 2013 the Petitioner hired a sales person to work primarily on weekends. The person was designated an employee, and his wages were subject to

tax deductions. He had worked for the Petitioner as a sales person, designated a "1099" worker, prior to the Joined Party beginning with the Petitioner.

8. After the Joined Party was designated as an employee, the Petitioner paid the Joined Party on a straight commission basis, without any guaranteed draw or base. The commission percentage was increased. The president of the Petitioner expected the Joined Party to devote more time to the work of the Petitioner during the day, and the Joined Party did so. The Joined Party was assigned to engage in more marketing efforts than she had participated in previously.

9. The Petitioner had been selling new horse trailers, which it bought from the manufacturer. In the spring of 2013, the manufacturer advised that it was going to be selling horse trailers directly to the public exclusively, rather than selling through a dealer. The Petitioner's horse trailer sales diminished significantly. In May 2013 the president of the Petitioner advised the Joined Party that it was becoming unprofitable to retain the services of the Joined Party, in light of her diminished sales. The Petitioner permitted the Joined Party to seek work with other employers, but the Joined Party was unsuccessful in locating suitable work. The Joined Party filed a claim for reemployment assistance benefits effective May 19, 2013, and initially no wage credits were assigned to the claim. After an investigation, the Florida Department of Revenue issued a determination on June 24, 2013 finding that the Joined Party, and any similar worker, was an employee. The effective date of liability was designated as February 1, 2010. A superseding determination was issued on July 29, 2013 reiterating the finding of employment, but establishing an effective date of liability as of October 1, 2011.

10. Conclusions of Law:

11. 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.

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:
    a. 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 443.1216(1)(a), Florida Statutes, provides in pertinent part:
    (1)(a) The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:
    1. An officer of a corporation.
    2. An individual who, under the usual common-law rules applicable in determining the employer-employee relationship, is an employee.

18. Section 443.1215(1), Florida Statutes, provides in pertinent part:
    (1) Each of the following employing units is an employer subject to this chapter:
    (a) An employing unit that:
    (1) In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
    (2) For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

19. Section 73B-10.035, Florida Administrative Code, provides:
    a. (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.

20. The president of the Petitioner, an officer of the corporation, has been active in the management of the corporation from its beginning. The corporation has therefore had at least one employee since its beginning in 2009. However, the evidence establishes that the president has not received any wages from the corporation, so the corporation was not paying any remuneration to workers until it hired a sales person, which first occurred in February 2010. The wages, if any, paid to such a sales person or persons have not been established, so liability has not been established based on quarterly wages paid. However, because the Petitioner had at least one employee in service—the president, and then an additional sales person—for at least twenty weeks during 2010, the Petitioner could be liable for reemployment taxes at the point that it began paying remuneration to a salesperson, if the remuneration is properly characterized as wages. That would be February of 2010. But that would only be the case if the sales person was an employee. If the sales person or persons were independent contractors, then the Petitioner's liability for reemployment assistance taxes on wages would not start until January 2013, when the Petitioner started paying the Joined Party as an employee. There is no dispute that the Joined Party was an employee at that point. The president of the Petitioner admits that sales people prior to the Joined Party worked under the same arrangement as the Joined Party worked under, so the evidence relating to the Joined Party establishes whether those prior sales people were employees or not, based on whether the Joined Party was an employee or not prior to January 2013.

21. Of the Cantor v. Cochran factors only one might be considered to lean more strongly in favor of independence than of employment, and that is the undisputed expertise that the Joined Party had with respect to the sale of horse trailers. Even there, though, the Joined Party's particular skill and expertise was only a part of her job; and that skill and expertise were personal to her, rather than applying to all sales people.

22. The Petitioner controlled the premises on which the Joined Party primarily worked, and controlled what goods the Joined Party would be attempting to sell. The Petitioner controlled the hours of work, though it did not control those things in a highly rigid manner. See, Bill Rivers Trailers, Inc. v. Miller, 489 So.2d 1139, 1141(Fla.1st DCA 1986).

23. The Petitioner was in business, and the Joined Party worked as part of the regular business of the Petitioner. The Petitioner supplied the primary place of work, and supplied most of the tools, such as they were, for the work to be done. Those tools would be the business telephone and the computer for internet access. The Joined Party used her own tool—her cell phone—sometimes, but the evidence shows that even then the signal was being routed from the Petitioner's telephone to the Joined Party. That is, the Joined Party testified that she forwarded phone calls from the Petitioner's phone system to the Joined Party's cell phone. The Joined Party and the Petitioner were associated for a substantial period of time, not linked to any particular project or event. The Joined Party was paid, in part, by time in the form of the regular weekly $200 payment, whether that payment might be called a draw or base pay. The Petitioner did not make arrangements for the Joined Party to repay any accumulated arrearages in the draw, should they have occurred. When there is no express agreement to repay a draw on commissions, the draw is considered salary. Lester v. Kahn-McKnight Co. Inc., 521 So.2d 312 (Fla. 3rd DCA 1988). These factors, out of those mentioned in Cantor v. Cochran tend to show that the Joined Party was an employee throughout the time she worked for the Petitioner.

24. When the Joined Party was recognized as an employee, in January 2013, there was no substantial change in the way that the Joined Party worked. The president of the Petitioner testified that she expected the Joined Party to spend more of the workday at work, and the Joined Party was directed to engage in more extensive marketing activities, but these things just show a slight extension of the way that the Joined Party was already working. There was no qualitative change in the way that the work was done. As a result, since it is undisputed that the Joined Party was an

employee as of January 2013, it implies that the Joined Party was an employee before, since she was doing the same kind of work in much the same way. And since the Joined Party was an employee throughout, the sales people working in the same way were employees, too.

25. The Petitioner and the Joined Party agreed at the outset that the Petitioner would not be deducting taxes from the pay of the Joined Party. There is no dispute about that. But the evidence does not establish that the president of the Petitioner made it clear to the Joined Party, with the Joined Party agreeing, that the president would not have the authority to direct and control the Joined Party's sales activities. The president of the Petitioner might have thought that the Joined Party would have drawn that conclusion from the agreement that taxes were not to be deducted, but an expectation or hope is not a substitute for an actual agreement, whether in writing or not. In this case there was no written agreement, and it has not been established that there was even an oral agreement. It has been held that even when the parties expressly designate the relationship as that of independent contractor, the actual relationship may show employment. See, for example, Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972). If an express agreement that one is an independent contractor isn't enough to establish the status, an agreement that merely implies that status is even weaker evidence.

26. The greater weight of the evidence shows that when the Joined Party was providing services to the Petitioner it was as an employee rather than as an independent contractor. And since other sales people worked in essentially the same way, those prior sales people should be considered employees, too. At the very least, the Petitioner has not met the burden of proof on it of establishing that the determination was incorrect in designating the Joined Party and other sales people as employees. The liability of the Petitioner for reemployment assistance taxes on wages therefore should start with the time that work by a sales person was first performed, which the evidence shows was in February 2010.

Recommendation: It is recommended that the determination dated July 29, 2013, finding the work of the Joined Party and other similarly situated workers to be employment be AFFIRMED, and the finding of liability as of October 1, 2011 be MODIFIED to establish liability as of February 1, 2010.

Respectfully submitted on January 2, 2014.

J. Jackson Houser

J.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

Date Mailed:
January 3, 2014

Copies mailed to:
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