DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:
Employer Account No. - 2884907
EAST COAST TRANSPORTATION COMPANY OF NORTH FLORIDA LLC
ATTN: ROBERT SOBOL
14125 BEACH BLVD
JAX BCH FL 32250-1543

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

PROTEST OF LIABILITY
DOCKET NO. 0023 4536 61-02

ORDER

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated June 13, 2014, is MODIFIED to hold that the Joined Party and other individuals performing services for the Petitioner while operating the Petitioner's vehicles are the Petitioner's employees retroactive to January 1, 2013. 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 11 day of **December, 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**

12.11.14
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 11th day of December, 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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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:
Employer Account No. - 2884907
EAST COAST TRANSPORTATION
14125 BEACH BLVD
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PROTEST OF LIABILITY
DOCKET NO. 0023 4536 61-02

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Magnus Hines
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 June 13, 2014.

After due notice to the parties, a telephone hearing was held on October 15, 2014. The Petitioner, represented by its managing member, appeared and testified. The Respondent, represented by a Department of Revenue Senior Tax Specialist, appeared and testified. The Joined Party did not appear.

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

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

Findings of Fact:

1. The Petitioner, East Coast Transportation Company of North Florida, LLC, is a limited liability company that has operated a business providing ground transportation for passengers since 2008.
2. The Petitioner uses the services of approximately thirty drivers, all of whom are classified by the Petitioner as independent contractors. Approximately seven of the drivers operate vehicles which are owned by the drivers. The remainder of the drivers operate vehicles which are owned and maintained by the Petitioner.
3. The Joined Party is an individual who began performing services for the Petitioner as a driver on or about March 4, 2013. The Joined Party operated a vehicle that was owned by the Petitioner.

4. Individuals who operate the Petitioner's vehicles are required to sign an *Independent Contractor Agreement.* Individuals who operate privately owned vehicles to perform services for the Petitioner are required to sign a different agreement. The Joined Party signed the *Independent Contractor Agreement* on March 4, 2013.

5. Among other things the *Independent Contractor Agreement* signed by the Joined Party provides that the Joined Party is an independent contractor and not an employee of the Petitioner. The Agreement provides that the Petitioner will not withhold any amounts from the pay for taxes and that the Joined Party is not entitled to any fringe benefits such as pension or retirement benefits.

6. The Agreement provides that the Joined Party shall be available and shall provide to the Petitioner professional services in the area of chauffeuring as needed and requested. In consideration of the services performed the Petitioner will pay the Joined Party a percentage of the base rate per job, varying by vehicle type, plus the entire billed gratuity. As per the Agreement the Petitioner agreed to pay the Joined Party, as full compensation, 12% of the base rate for driving a sedan or limousine, 10% of the base rate for driving an SUV, 8% of the base rate for driving a van, and 6% of the base rate for driving a mini coach. The Petitioner determined the base rates as well as the percentages paid to the Joined Party.

7. The Agreement provides that the Joined Party will receive the vehicle fully fueled and that he is required to return the vehicle to the Petitioner fully fueled. The Agreement provides that the Petitioner will provide general liability and automobile liability insurance in the amount of $1,000,000. If the Joined Party becomes uninsurable the Petitioner will immediately terminate the Joined Party.

8. The Agreement provides that all work will be done in a competent fashion in accordance with applicable standards of the profession and that all services are subject to final approval by a representative of the Petitioner prior to payment. The Agreement provides that the Joined Party shall submit written, signed reports of the jobs performed and the time spent performing chauffeuring services, itemizing in detail the dates on which services were performed, the number of hours spent on such dates and a brief description of the services rendered. The Petitioner will pay the Joined Party the amount due pursuant to the submitted reports on a bi-weekly basis after the reports are received by the Petitioner.

9. The Agreement signed by the Joined Party contains a typographical error. The Agreement states "This Agreement shall commence on March 4, 2013, and shall terminate on March 3, 2013 2015, unless earlier terminated by either party hereto." The Petitioner intended the Agreement to state the date of termination as March 3, 2015. The Agreement provides that either party may terminate the Agreement with thirty days prior written notice and provides that the Petitioner may, at its option, automatically renew the Agreement for an additional term of one year under the same terms and conditions. The Agreement does not provide for renewal at the option of the Joined Party.

10. The Petitioner did not provide any training to the Joined Party concerning how to drive. The Petitioner provided orientation concerning how the Petitioner operates its business and how the Joined Party was required to perform the work under the Petitioner's business mode of operation. The Petitioner provided the Joined Party with a list of the Petitioner's standards including how to treat customers, what the Joined Party was required to do, what the Joined Party could not do, and how the Joined Party was required to dress.

11. The Joined Party was required to contact the Petitioner's dispatcher for assistance if he encountered any problems while working on an assignment. The Joined Party was required to provide a cell phone, required to purchase his own clothes, and required to have a valid driver's license and any permits required to work as a driver. The Petitioner provided the Joined Party with company business cards on which the Joined Party was free to write his name.

12. Although the Agreement states that the Joined Party "shall" provide services as needed and requested by the Petitioner, in reality the Joined Party was not required to accept every assignment

offered by the Petitioner. The Joined Party had the right to refuse to accept an assignment. If the Joined Party accepted a work assignment he was required to pick up the Petitioner's vehicle at the Petitioner's location. Each work assignment included a pick up time and location for the customer. If the customer failed to be at the pick up location at the scheduled time the Joined Party was required to wait for a period of time and then contact the Petitioner's dispatcher for instructions. If the Joined Party was not able to transport a customer due to the customer's failure to be available for pick up, the Petitioner would pay the Joined Party for completion of the assignment, regardless of whether the Petitioner received payment from the customer.

13. The Petitioner determines the amounts to be charged to the customers and determines the amounts of the billed gratuities. Generally, the Petitioner charges the customers a 20% gratuity. Generally, the Petitioner is responsible for collecting the fees from the customers. Occasionally, a customer prefers to pay the driver after the service is performed. In those cases, if the customer pays by credit card the driver must call the dispatcher and provide the credit card information to the dispatcher for processing. The driver may accept a check from the customer. If the check is not good the Petitioner does not hold the driver accountable and the driver is paid by the Petitioner for completing the assignment.

14. The Petitioner provides the vehicles and is responsible for all maintenance and repairs. The Petitioner provides the vehicle licenses and insurance. The drivers are only responsible for the fuel used while completing the assignments. If a driver pays any tolls or parking fees, the driver is reimbursed by the Petitioner.

15. The Joined Party was required to personally perform the work. He was not allowed to hire others to perform the work for him.

16. The Petitioner pays bonuses to the drivers. The bonuses are usually paid at the end of the year and are based on several factors including a driver's length of service with the Petitioner and based on performance.

17. The Petitioner paid the Joined Party based on the services provided by the Joined Party as a driver. No taxes were withheld from the pay and no fringe benefits such as health insurance or paid time off were provided. At the end of 2013 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation in the amount of $10,863.50.

18. Although the Agreement provides for a thirty day prior written notice for termination of the Agreement by either party, the Petitioner has not attempted to enforce the Agreement when drivers have left without prior notice. In reality either party could terminate the Agreement at any time without incurring a penalty for breach of contract.

19. The Joined Party last performed services for the Petitioner on November 29, 2013. In December 2013 the Joined Party had a health problem which prevented him from driving and he filed a claim for reemployment assistance benefits. When the Joined Party did not receive credit for his earnings with the Petitioner an investigation was issued to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.

20. On June 13, 2014, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner as drivers are the Petitioner's employees retroactive to January 15, 2013. The Petitioner filed a timely protest by mail postmarked June 24, 2014.

Conclusions of Law:

21. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as drivers 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 Petitioner and the Joined Party entered into an *Independent Contractor Agreement* dated March 4, 2013, which provides that the Joined Party is an independent contractor and not an employee of the Petitioner. In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), the Florida Supreme Court addressed a similar factual situation involving the relationship between a truck driver

and a trucking company. In that case the parties entered into a written independent contractor agreement which specified that the driver was not to be considered the employee of the trucking company at any time, under any circumstances, or for any purpose. In its decision the 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." The Court found that the driver owned his own truck and leased the trailer from the trucking company. The trailer was to be used by the driver exclusively for hauling freight for the trucking company. The trucking company told the driver where to pick up the freight and where to deliver the freight. The driver had the right to refuse any dispatch. The trucking company paid the driver a percentage of the freight charge for the shipment. Either party could terminate the relationship without cause upon thirty days written notice to the other. The Court concluded, based on these facts, that the driver was an employee of the trucking company.

29. The Petitioner operates a passenger transportation business. The Joined Party was engaged to transport the Petitioner's customers using the Petitioner's vehicles. The Petitioner was responsible for the majority of the vehicle expenses including insurance, maintenance, repairs, tolls, and parking. The Joined Party was only responsible for the fuel which he used. The services performed by the Joined Party were not separate and distinct from the Petitioner's business but were an integral and necessary part of the Petitioner's business. It was not shown that the Joined Party had an investment in a business or that he had significant expenses. It was not shown that the Joined Party was at risk of suffering a financial loss from services performed.

30. The Joined Party performed services as a driver, a task that does not require any 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)

31. The Petitioner paid the Joined Party a portion of the fees which the Petitioner charged the Petitioner's customers. The Petitioner determined the amount of the customer charge including the amount of the billed gratuity, determined which vehicle would be driven, and determined the percentages paid to the Joined Party which varied according to the assigned vehicle. Although the parties agreed that payroll taxes would not be withheld from the pay and that the Petitioner would not provide fringe benefits, that fact, standing alone, does not 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.

32. Although the Agreement states that either party may terminate the Agreement with thirty days prior written notice the Petitioner has not attempted to enforce the Agreement and testified that either party could terminate the agreement at any time without incurring liability for breach of contract. The Joined Party was engaged by the Petitioner to perform services as a driver for at least two years. The Joined Party worked for approximately nine months before terminating the Agreement. 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."

33. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor.

It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

34. The evidence presented in this case reveals that the Petitioner exercises substantial control over the workers who drive the Petitioner's vehicles and that the Petitioner is in control of the financial aspects of the relationships. The Petitioner determines the amounts charged to the customers for the services, the amounts paid to the drivers for performing the services, which assignments are offered to which drivers, which vehicles are driven by the drivers, when the work is performed, where the work is performed, who may perform the work, and to a substantial degree, how the work is performed.

35. Drivers who perform services for the Petitioner by operating their own vehicles work under a different agreement and are not found to be similarly situated. There is insufficient evidence to conclude that drivers who operate their own vehicles are employees of the Petitioner. It is determined that the Joined Party and other individuals who performed services as drivers for the Petitioner while driving the Petitioner's vehicles are the Petitioner's employees retroactive to January 1, 2013.

Recommendation: It is recommended that the determination dated June 13, 2014, be MODIFIED. The Joined Party and other individuals performing services for the Petitioner while operating the Petitioner's vehicles are the Petitioner's employees retroactive to January 1, 2013. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on November 21, 2014.

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:
November 21, 2014

Copies mailed to:
Petitioner
Respondent
Joined Party

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