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

**PETITIONER:**
Employer Account No. – 3249676
MEDIA RESEARCH CENTER INC
1900 CAMPUS COMMONS DR STE 600
RESTON VA 20191-1535

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

**PROTEST OF LIABILITY**
**DOCKET NO. 0024 6086 72-02**

## 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 November 6, 2014, 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 20th day of **May, 2015**.

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**

5.20.15
**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 May, 2015.**

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

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DEPARTMENT OF ECONOMIC
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# 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 November 6, 2014.

After due notice to the parties, a telephone hearing was held on March 19, 2015. The Petitioner was represented by its General Counsel. The Petitioner's Executive Vice President testified as a witness. The Respondent, represented by a Department of Revenue Tax Auditor II, appeared and testified. The Joined Party appeared and testified. A former Media Monitor and the Petitioner's former Director of Alternative Media Monitoring testified as witnesses for the Joined Party.

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

**Issue:**

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

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

**Findings of Fact:**

1. The Petitioner, Media Research Center, Inc., is a Virginia non-profit corporation which was formed in approximately 1987. The Petitioner has obtained a 501(c)(3) tax exemption from the Internal Revenue Service. The Petitioner has approximately seventy employees, most of which perform services in Virginia, and has established liability for payment of unemployment compensation tax to Virginia. None of the Petitioner's acknowledged employees and none of the Petitioner's officers perform services in Florida.
2. The Joined Party is an individual who has come up through the ranks in the radio industry. The Joined Party has produced radio talk shows and has been the host of radio talk shows.
3. The Petitioner is engaged in media analysis, primarily involving television programs. In 2007 the Petitioner was starting a new project, called the Alternative Media Project, which involved monitoring liberal radio broadcasts for inaccurate statements or hate speeches. The Petitioner's Director of Alternative Media Monitoring contacted the Joined Party and solicited him for the position of Media Monitor for the Alternative Media Project.
4. The Director of Alternative Media Monitoring explained the duties of the position and explained how the Joined Party would be compensated. The Director of Alternative Media Monitoring believed that the Joined Party was being hired as an employee of the Petitioner. There was no conversation concerning performing services as an independent contractor, fringe benefits, or the withholding of payroll taxes. The parties did not enter into any written agreement or contract other than the Joined Party was required to sign a confidentiality agreement stating that the Joined Party would not speak to anyone about the Alternative Media Project. The Joined Party accepted the offer of work and began performing services for the Petitioner from his Florida residence on November 15, 2007.
5. The only equipment needed to perform the work was a computer. Initially, the Joined Party used his own personal computer.
6. The Joined Party was informed that the Director of Alternative Media Monitoring was his immediate supervisor. The Director of Alternative Media Monitoring gave the Joined Party the work assignments and provided instructions concerning how to perform the work. The Joined Party was an experienced radio show host and did not need training concerning monitoring radio broadcasts.
7. The Petitioner recorded the radio shows on the Petitioner's server. The Joined Party was instructed to listen to the recorded radio shows as soon as the recordings were available on the server, to write a summary of the radio show content, and to provide the summary to the Petitioner within twenty-four hours of the broadcast. The Joined Party was told that he should start work at 7 AM each morning as soon as the audio was available. Initially, the Joined Party was assigned only a few projects. The Petitioner gradually increased the work assignments until the Joined Party was working nine hours a day, Sunday through Friday.
8. The Joined Party was instructed to submit a record of the hours worked on the first and the fifteenth of each month. Two or three days after submitting the hours to the Petitioner the Joined Party would receive a check in the mail as payment for the hours worked. The Joined Party was satisfied with his pay and never requested a pay increase. At least once a year the Director of Alternative Media Monitoring would evaluate or assess the Joined Party's work performance and provide that assessment to the department head. The evaluations included whether the Joined Party completed work assignments on time, the quality of the Joined Party's work, and whether the Joined Party was available when needed by the Petitioner. The Petitioner increased the Joined Party's pay on several occasions based on the performance assessments and based on the Petitioner's budget.

9. The Petitioner did not withhold payroll taxes from the Joined Party's pay. At the end of each calendar year the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation. Although the Joined Party was never informed that he was classified as an independent contractor and although the Director of Alternative Media Monitoring believed that the Joined Party was employed as the Petitioner's employee, the Joined Party never questioned the lack of tax withholding.

10. The Joined Party never missed work due to illness and never took time off for a vacation. The Petitioner paid the Joined Party for holidays even though he did not perform services on the holidays. In February 2013 the Joined Party's father passed away. The Petitioner told the Joined Party to take a week off from work. The Petitioner paid the Joined Party for the week that he was absent.

11. In 2009 the Joined Party's computer broke down and the Petitioner sent the Joined Party a computer. The computer supplied by the Petitioner did not work and the Petitioner instructed the Joined Party to purchase a new computer and the Petitioner would reimburse the Joined Party. The Joined Party complied and was reimbursed for the cost of the computer. On at least two occasions the Joined Party traveled to Virginia for company functions and was reimbursed for his travel expenses. The Joined Party did not have any significant expenses in connection with the work.

12. The Joined Party was required to personally perform the work. He was not allowed to hire others to perform the work for him. The Joined Party was not allowed to perform services for a competitor of the Petitioner.

13. Either party could terminate the relationship at any time without incurring liability for breach of contract. In November 2013 the Petitioner determined that the Petitioner's funds would be better spent on projects other than the Alternative Media Project. The Petitioner discontinued the project on November 20, 2013. The Petitioner paid the Joined Party through December 31, 2013, to make the Christmas season easier for the Joined Party.

14. The Director of Alternative Media Monitoring told the Joined Party to file a claim for unemployment compensation benefits. However, when the Joined Party filed a claim for Florida reemployment assistance benefits he did not receive credit for his earnings with the Petitioner and an investigation was assigned to the Florida Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor and to determine if the Petitioner was liable for payment of Florida reemployment assistance taxes.

15. During the course of the investigation the Department of Revenue mailed a Form 6061, *Independent Contractor Analysis* to the Petitioner for completion. The Petitioner's Executive Vice President did not receive the form and the Petitioner did not provide any information during the investigation. No information was provided showing that the Petitioner was a 501(c)(3) tax exempt organization. On October 21, 2014, the Department of Revenue issued a determination holding that the Joined Party performed services for the Petitioner as an employee retroactive to January 1, 2013, and that the Petitioner's liability for payment of reemployment assistance tax was effective January 1, 2013. The Petitioner filed a letter of protest dated November 3, 2014, showing that the October 21, 2014, determination had been mailed to an incomplete address. On November 6, 2014, the Department of Revenue issued a new determination also holding that the Joined Party was an employee of the Petitioner retroactive to January 1, 2013, and holding that the Petitioner was liable for payment of reemployment assistance tax effective January 1, 2013. In addition, the determination stated that officers of corporations are statutorily covered employees of the corporation and the wages are reportable for reemployment assistance tax. The new determination was mailed to the Petitioner's complete, correct address. The Petitioner filed a timely protest by letter dated November 18, 2014.

**Conclusions of Law:**

16. The issue in this case, whether services performed for the Petitioner 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.

17. 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).

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. The parties did not enter into any written agreement or contract. The only evidence of a verbal agreement is the testimony of the Joined Party and the testimony of the Petitioner's former Director of Alternative Media Monitoring, the individual who hired the Joined Party. Their testimony is consistent in establishing the absence of any written or verbal agreement that the Joined Party would perform services for the Petitioner as an independent contractor. The Director of Alternative Media Monitoring testified that he believed that the Joined Party was hired to be the Petitioner's employee and that, although he was the Joined Party's immediate supervisor, he was never made aware by anyone, at any time, that the Joined Party had been classified by the Petitioner as an independent contractor.

24. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

25. The Joined Party performed services for the Petitioner from the Joined Party's Florida residence. The only equipment needed to perform the work was a computer which, for the majority of the relationship, was provided by the Petitioner. The Joined Party did not have significant unreimbursed expenses in connection with the work. On at least two occasions the Joined Party performed work related travel and was reimbursed by the Petitioner for the travel expenses.

26. The Petitioner's primary activity is the monitoring and analysis of media broadcasts. The Joined Party was responsible for monitoring radio broadcasts as assigned and directed by the Petitioner. The work performed by the Joined Party was not separate and distinct from the Petitioner's primary business activity but was an integral and necessary part of the Petitioner's business activity. It was not shown that the Joined Party operated a business separate from the Petitioner's business. The Joined Party did not have an investment in a business, did not have business expenses, and did not advertise his services to the general public. The Petitioner testified that the Joined Party was prohibited from performing similar services for any competitor of the Petitioner. The Joined Party testified that he was required to personally perform the work and could not hire others to perform the work for him.

27. The Joined Party came up through the ranks in the radio broadcast industry and had extensive experience. However, it was not shown that listening to radio broadcasts and writing summaries of the broadcast content requires 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)

28. The Petitioner testified that the Joined Party was paid on a regularly scheduled payday by time worked, basically by the hour, and that no payroll taxes were withheld from the pay. The Joined Party was required to submit a record of the time worked on a bi-weekly basis. The Joined Party testified that he did not know how his pay was computed. His hours did not vary from week-to-week and his pay did not vary from week-to-week. The Joined Party believed that he was paid a flat rate per week. In either case the Joined Party was paid by time worked rather than by production. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Reemployment Assistance Program Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

29. In addition to the Joined Party's earnings based on time worked, the Petitioner paid the Joined Party for time which he did not work including paid holidays, paid time off due to the death of the Joined Party's father, and from November 20, 2013, through December 31, 2013, because the Petitioner

wanted the Joined Party to have an easier Christmas. These are benefits that are not usually afforded to independent contractors but which are typically provided to employees. In addition to the factors enumerated in the Restatement of Law, the provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

30. The Joined Party performed services exclusively for the Petitioner from November 2007, until November 2013, a period of six years. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. Although the Petitioner argues that the relationship between the Petitioner and the Joined Party was a temporary relationship the facts reveal an at-will relationship of relative permanence which was unilaterally terminated by the Petitioner. 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."

31. The facts of this case reveal that the Petitioner controlled what work was performed, when it was performed, by whom it was performed, and how it was performed. The Petitioner controlled the financial aspects of the relationship including the method of pay and the rate of pay. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.

32. It is determined that the Joined Party performed services for the Petitioner as an employee rather than as an independent contractor.

33. Section 3306(c)(8) of the Federal Unemployment Tax Act provides that service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under 501(a) is exempt from federal unemployment tax.

34. The Petitioner is a non-profit corporation which has obtained a 501(c)(3) tax exemption from the Internal Revenue Service. The Joined Party is the only employee of the Petitioner that has performed services from Florida.

35. Section 443.1216, Florida Statutes, provides that Employment, as defined in s.443.036, is subject to this chapter under the following conditions:
    (3) The employment subject to this chapter includes service performed by an individual in the employ of a religious, charitable, educational, or other organization, if:
        (a) The service is excluded from the definition of "employment" in the Federal Unemployment Tax Act solely by reason of s. 3306(c)(8) of that act; and
        (b) The organization had at least four individuals in employment for some portion of a day in each of 20 different weeks during the current or preceding calendar year, regardless of whether the weeks were consecutive and whether the individuals were employed at the same time. (emphasis supplied)

36. Although it has been shown that the Joined Party was an employee of the Petitioner from November 2007 until November 2013, it has not been shown that the Petitioner has established liability for payment of unemployment tax, now known as reemployment assistance tax, to Florida on the basis of having four or more employees in Florida during twenty different weeks during a calendar year.

37. Although the Joined Party was an employee of the Petitioner the services performed for the Petitioner by the Joined Party from November 2007 through November 2013 are exempt from the Florida Reemployment Assistance Program Law and do not constitute insured employment.

**Recommendation:** It is recommended that the determination dated November 6, 2014, be REVERSED.

Respectfully submitted on April 13, 2015.

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:***
***April 13, 2015***

Copies mailed to:
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Respondent
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