

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143**

PETITIONER:

Employer Account No. - 2993548
R F LILLY AND ASSOCIATES LLC
ATTN: RICHARD TOPLAK
935 TULIP CIR
WESTON FL 33327-2449

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-128359L**

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 September 21, 2011, is AFFIRMED.

JUDICIAL REVIEW

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

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

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

DONE and ORDERED at Tallahassee, Florida, this _____ day of **April, 2012**.



Altemese Smith,
Assistant Director,
Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

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

Shanendra Barnes

DEPUTY CLERK

DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of April, 2012.

Shanendra Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Unemployment Compensation Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

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**PROTEST OF LIABILITY
DOCKET NO. 2011-128359L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated September 21, 2011.

After due notice to the parties, a telephone hearing was held on February 29, 2012. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were received from the Joined Party.

Issue:

Whether services performed for the Petitioner by the Joined Party as a sales representative 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, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a limited liability company which was formed in April 2008 to operate a marketing business which obtains sales leads for various client companies including home improvement businesses and automobile windshield replacement businesses.
2. The Petitioner's president has been active in the operation of the Petitioner's business since inception. The Petitioner registered with the Department of Revenue for payment of unemployment compensation taxes effective July 1, 2010.
3. The Joined Party responded to a help wanted advertisement placed by the Petitioner listing an "opportunity for employment." The Joined Party was interviewed by the Petitioner's president. The Petitioner's president told the Joined Party that the Joined Party would be obtaining sales leads for a windshield replacement business, Coast to Coast, and that the Petitioner would pay the Joined Party \$45 for each lead that resulted in a sale. The Joined Party did not have any previous experience in outside sales and he did not have any experience with windshield replacement. The president advised the Joined Party that the Joined Party was hired for the advertised position and that the Petitioner would provide training.
4. The Joined Party began work for the Petitioner in October 2009. Initially, the Joined Party was required to attend rigorous training with a room full of other individuals hired for the same position. The training was five days per week. The first two hours each day was classroom training. During the remainder of each day the Joined Party rode with a supervisor and observed as the supervisor attempted to obtain leads. During the training the Petitioner taught the Joined Party how to contact potential customers and what to say to the potential customers. The training lasted for approximately one month.
5. During the training period the Petitioner paid the Joined Party approximately \$200 to \$250 each week. No taxes were withheld from the pay. After the Joined Party completed the training period he worked without direct supervision and attempted to make sales.
6. No tools or equipment were needed to perform the work and the Joined Party did not have any expenses in connection with the work with the exception of pens, pencils, and notepads. The Petitioner provided the Joined Party with an identification badge and business cards listing the name, address, and telephone number of the windshield replacement company, Coast to Coast, and the Joined Party's name.
7. After the Joined Party completed the training the Joined Party's work schedule was from 10:30 AM until 8 PM. After working for the Petitioner for a period of three or four months the Joined Party was required to train newly hired workers in the same manner that he was trained by a supervisor. The Joined Party did not receive additional pay for training the new workers.
8. The work performed by the Joined Party did not require any special skill or knowledge. The Joined Party did not advertise or offer services to the general public. The Joined Party did not have an occupational license or business license and did not have business liability insurance.
9. The Joined Party did not complete a timesheet and he did not submit a bill or invoice to the Petitioner for his services. Coast to Coast submitted a listing of the windshield replacements and the name of the sales representative for each windshield. From that list the Petitioner paid the Joined Party \$45 for each lead that resulted in a sale. No taxes were withheld from the pay.
10. The Petitioner did not pay any bonuses to the Joined Party. The Petitioner did not provide any fringe benefits such as paid vacations, paid holidays, or paid sick days.
11. At the end of 2009 the Petitioner reported the Joined Party's earnings on Form 1099-MISC in the amount of \$2,025.00 as nonemployee compensation. At the end of 2010 the Petitioner reported

the Joined Party's earnings in the amount of \$10,330.00 on Form 1099-MISC as nonemployee compensation.

12. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. In 2011 the Joined Party was only able to obtain one or two leads per week and the income was not sufficient to meet his needs. As a result the Joined Party left his position with the Petitioner in March 2011.
13. The Joined Party filed a claim for unemployment compensation benefits effective May 2, 2011. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor. By determination dated September 21, 2011, the Department of Revenue determined that the Joined Party performed services for the Petitioner as an employee. The determination held the Petitioner liable for payment of unemployment compensation tax effective October 1, 2009. The Petitioner filed a timely protest on September 27, 2011.

Conclusions of Law:

14. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation 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.
15. 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).
16. 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 Agency is limited to applying only Florida common law in determining the nature of an employment relationship.
17. 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.
18. 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.
19. 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.
20. 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.
21. In this case no evidence was submitted concerning any written or verbal agreement or contract specifying that the Joined Party performed services for the Petitioner as an independent contractor. 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."
22. The Petitioner operates a marketing business which obtains leads for, among other things, automobile windshield replacement. It was the Joined Party's assigned responsibility to contact prospects to obtain the leads. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was a necessary and integral portion of the Petitioner's business. The Joined Party did not have any investment in a business, did not have a business license, did not offer services to the general public, did not have significant business expenses, and was not at risk of suffering a financial loss from performing services.
23. The Petitioner provided substantial, rigorous, required training and paid the Joined Party for attending the training. The Petitioner trained the Joined Party how to perform the work. Training is a method of control since it specifies how to perform the work. No special skill or knowledge was needed in order to perform the work. 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. 2^d DCA 1980)
24. Other than during the training period the Petitioner paid the Joined Party based on production rather than by time worked. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation 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 Petitioner did not provide any fringe benefits to the Joined Party and did not

withhold payroll taxes from the pay. The fact that the Petitioner chose not to withhold payroll taxes does not, standing alone, establish an independent contractor relationship.

25. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Joined Party performed services for the Petitioner for a period of approximately one and one-half years. 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 L 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."
26. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).
27. The evidence in this case reveals that the Petitioner exercised significant control over what work was performed, how the work was performed and when the work was performed. Thus, it is concluded that the services performed by the Joined Party constitute insured employment.
28. Section 443.1215, Florida States, provides:
 - (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 the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.
29. The Form 1099-MISC which the Petitioner issued to the Joined Party for the 2009 tax year reveals that the Petitioner paid the Joined Party \$2,025.00 for services performed during the fourth quarter 2009. Thus, the Petitioner paid wages of more than \$1,500 for service in employment during the fourth quarter 2009 and has established liability for payment of unemployment compensation tax effective October 1, 2009.

Recommendation: It is recommended that the determination dated September 21, 2011, be AFFIRMED.

Respectfully submitted on March 20, 2012.



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 envío 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, Special Deputy Clerk

Date Mailed:
March 20, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

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DEPARTMENT OF REVENUE
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