

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

PETITIONER:

Employer Account No. - 1042816
YE OLDE STITCHING POST
ATTN: CHARLOTTE A. HOOPER
1055 SE 17TH ST
FORT LAUDERDALE FL 33316-2116

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-128364L**

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 16, 2011, is MODIFIED to reflect a retroactive date of January 1, 2007. As MODIFIED, it is ORDERED that the determination 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 **October, 2012.**



Altemese Smith,
Assistant Director,
Reemployment Assistance 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 Y. 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 October, 2012.

Shanendra Y. Barnes

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

By U.S. Mail:

YE OLDE STITCHING POST
ATTN: CHARLOTTE A. HOOPER
1055 SE 17TH ST
FORT LAUDERDALE FL 33316-2116

VALENTINA I DIMOV
1150 ARTHUR STREET
HOLLYWOOD FL 33019

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

MARIA MOUDY
7921 SOUTH SIVERADO CIRCLE
DAVIE FL 33024

DOR BLOCKED CLAIMS UNIT
ATTENTION: MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417

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

DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

107 EAST MADISON STREET

TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 1042816
YE OLDE STITCHING POST
ATTN: CHARLOTTE A. HOOPER
1055 SE 17TH ST
FORT LAUDERDALE FL 33316-2116

**PROTEST OF LIABILITY
DOCKET NO. 2011-128364L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Reemployment Assistance 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 16, 2011.

After due notice to the parties, a telephone hearing was held on August 13, 2012. The Petitioner, Charlotte Hooper, appeared and testified. A former bookkeeper testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party was represented by her daughter. Both the Joined Party and her daughter 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 Petitioner.

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.

Findings of Fact:

1. Ye Olde Stitching Post is the trade name of a business, which alters articles of clothing, that is operated as a sole proprietorship by Charlotte Hooper. Approximately ten years ago Charlotte Hooper married Mr. Hooper. Prior to that marriage she was married to Mr. Hoover and went under the name of Charlotte Hoover. Since her marriage to Mr. Hooper the Petitioner has used the names of Charlotte Hoover, Charlotte Hooper, and Charlotte Hoover-Hooper interchangeably.

2. The Petitioner was determined to be liable for payment of unemployment taxes as a result of a blocked claim investigation involving an individual who worked for the Petitioner as an office manager. The Department of Revenue set up the Petitioner's account under the name of Charlotte Hoover although at the time the Petitioner was married to Mr. Hooper. Although the Department of Revenue determined that the office manager was the Petitioner's employee the Petitioner never complied with the determination and never reported the wages paid to the office manager and never paid tax on those wages. The Department of Revenue filed a lien against the Petitioner. The Department of Revenue inexplicably inactivated the Petitioner's account on March 31, 2008.
3. Charlotte Hooper operates another business, Custom Yacht Fashions, Inc., from the same business location as Ye Olde Stitching Post. In the past Charlotte Hooper has relied on other individuals to operate Ye Olde Stitching Post for her and has classified all of the workers as independent contractors.
4. The Joined Party was hired as a part time seamstress by the lead seamstress at Ye Olde Stitching Post in November 2005. The verbal agreement was that the Joined Party would work Monday, Wednesday, and Friday from 9 AM and until the lead seamstress told her that she could leave for the day. The lead seamstress told the Joined Party that the Petitioner would pay the Joined Party 50% of the income which the Petitioner derived from the work performed by the Joined Party. There was no written agreement or contract.
5. Either party could terminate the relationship at any time without incurring liability.
6. The Joined Party worked at the Petitioner's business location. The Petitioner provided the sewing machines, irons, scissors, thread, and everything else that was required to perform the work. The Joined Party did not have any expenses in connection with the work.
7. The Joined Party did not determine the amounts to charge the Petitioner's customers for the alterations. The Petitioner told the Joined Party how much to charge for the alterations.
8. The Joined Party was paid by the Petitioner, not by the lead seamstress, for the work which the Joined Party performed. No taxes were withheld from the pay and the Joined Party did not receive any fringe benefits such as paid holidays or paid vacations. The Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.
9. In approximately February 2009 the lead seamstress passed away unexpectedly. At that time the Petitioner's bookkeeper told the Joined Party that the Joined Party was now the lead seamstress, that her work schedule was Monday through Friday from 9 AM until 5:30 PM and on Saturday from 9 AM until 2 PM, that the Petitioner would pay her 60% of the income, and that the Joined Party was responsible for taking care of everything in the business. The Joined Party was not provided with any written agreement or contract.
10. Shortly after the Joined Party became the lead seamstress the Petitioner told the Joined Party to hire another seamstress. The Joined Party complied. The Joined Party did not personally pay the new seamstress or any of the other workers at the business. They were all paid by the Petitioner.
11. As lead seamstress the Joined Party was responsible for talking to the customers, collecting the fees from the customers, handling the cash register, and doing all of the paperwork. As lead seamstress the Joined Party was allowed some discretion concerning customer charges. The Petitioner provided the Joined Party with business cards showing the name of the Petitioner's business, the Joined Party's name, and the title of Alteration Specialist. The Petitioner provided the Joined Party with a key to the business and the Joined Party was responsible for opening the business each day.

12. The Petitioner received complaints from customers and overheard conversations between the Joined Party and the customers. The Petitioner grew dissatisfied with the Joined Party because she overheard the Joined Party complaining about the Joined Party's lot in life, complaining about the Petitioner, and being short with the customers. The Petitioner warned the Joined Party about her conduct.
13. The Joined Party was scheduled for surgery in 2011 and she was instructed by the Petitioner to hire someone to replace her during her absence. The Joined Party hired a replacement; however, the Petitioner advised the Joined Party that she did not trust the individual which the Joined Party hired. The Petitioner did not allow the individual to work in the business. On April 16, 2011, the Petitioner advised the Joined Party that she was not satisfied with the Joined Party's performance, that she was concerned about the length of time that the Joined Party would be absent due to the surgery, and that the Joined Party was terminated.
14. The Joined Party filed a claim for reemployment assistance effective April 17, 2011. When the Joined Party did not receive credit for her 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 as an employee or as an independent contractor.
15. By determination dated July 15, 2011, the Department of Revenue notified the Petitioner that it was determined that the Joined Party was the Petitioner's employee retroactive to January 1, 2010, and that the unemployment tax account of Charlotte Hoover was reinstated effective January 1, 2010. On September 16, 2011, the Department of Revenue issued a determination as an affirmation of the July 15, 2011, determination with the Petitioner's name corrected to Charlotte Hooper. Charlotte Hooper filed a written protest by letter dated September 23, 2011.

Conclusions of Law:

16. The issue in this case, whether services performed for the Petitioner by the Joined Party 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. There was no written agreement or contract between the Petitioner and the Joined Party either at the time of hire in 2005 or at the time the Joined Party was promoted to lead seamstress in February 2009. In 2005 the lead seamstress told the Joined Party the terms of hire. No evidence was presented to show that the Joined Party was hired to be an independent contractor. In February 2009 the altered terms of hire were communicated to the Joined Party by the bookkeeper. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme 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.”
24. The Petitioner provided the place of work and all equipment, tools, and supplies which were needed to perform the work. The Joined Party did not have any expenses in connection with the work when she worked as a part time seamstress or when she worked as the lead seamstress.

25. Ye Olde Stitching Post is a business which is owned by the Petitioner and which is operated as a sole proprietorship. The Petitioner's business provides alterations for clothing. The Joined Party was hired to alter the clothing. As lead seamstress the Joined Party was also responsible dealing with the Petitioner's customers. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was a necessary and integral part of the Petitioner's business.
26. In 2005 the Petitioner's lead seamstress told the Joined Party what days to work and what hours to work. The Joined Party was not free to come and go as she pleased. The Petitioner also determined the Joined Party's days and hours of work when the Joined Party was promoted to lead seamstress.
27. The Joined Party did not have any control over the amounts that were charged to the customers when she worked as a part time seamstress, however, she was allowed to use some discretion concerning the customer charges after the Joined Party was promoted to lead seamstress. The Petitioner determined and controlled the percentage paid to the Joined Party both as a part time seamstress and as the lead seamstress. These facts reveal that the Petitioner controlled the financial aspects of the relationship.
28. 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 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 taxes from the pay does not, standing alone, establish an independent contractor relationship.
29. The Joined Party worked for the Petitioner from November 2005 until April 2011 a period of approximately five and one-half years. Either party could terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner terminated the Joined Party in April 2011. 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."
30. 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).
31. The Petitioner exercised significant control over the means and manner in which the Joined Party performed the work. The Petitioner provided the place of work and the equipment, tools, and supplies. The Petitioner determined the hours of operation of the business and determined the Joined Party's work schedule. The Petitioner had the right to tell the Joined Party what to do and how to do it. These facts reveal that the services performed by the Joined Party constitute insured employment.

- 32. Although the determination correctly holds that the Joined Party is the Petitioner's employee, the determination is only retroactive to January 1, 2010. The Joined Party began work as the Petitioner's employee in November 2005.
- 33. Rule 73B-10.032(1), Florida Administrative Code, provides that each employing unit must maintain records pertaining to remuneration for services performed for a period of five years following the calendar year in which the services were rendered. Thus, it is concluded that the correct retroactive date is January 1, 2007.
- 34. The special deputy was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. Factors considered in resolving evidentiary conflicts include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the special deputy finds the testimony of the Joined Party to be more credible than the testimony of the Petitioner. Therefore, material conflicts in the evidence are resolved in favor of the Joined Party.
- 35. The Petitioner timely submitted proposed findings of fact and conclusions of law which includes documentary evidence that was not presented at the hearing. Rule 73B-10.035(10)(a), Florida Administrative Code, provides that the parties will have 15 days from the date of the hearing to submit written proposed findings of fact and conclusions of law with supporting reasons. However, no additional evidence will be accepted after the hearing has been closed. Thus, the additional evidence presented by the Petitioner is rejected and has not been considered in this recommended order.

Recommendation: It is recommended that the determination dated September 16, 2011, be MODIFIED to reflect a retroactive date of January 1, 2007. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on September 7, 2012.

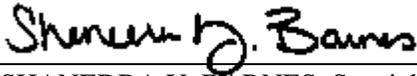


R. O. SMITH, Special Deputy
Office of Appeals

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 ken z 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:
September 7, 2012**

Copies mailed to:

Petitioner
Respondent
Joined Party

VALENTINA I DIMOV
1150 ARTHUR STREET
HOLLYWOOD FL 33019

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

MARIA MOUDY
7921 SOUTH SIVERADO CIRCLE
DAVIE FL 33024

DOR BLOCKED CLAIMS UNIT
ATTENTION MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417