

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

PETITIONER:

Employer Account No. - 3076820
PLATINUM MARKETING GROUP LLC
260 SW NATURA AVE
DEERFIELD BEACH FL 33441-3026

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-43795L**

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 March 26, 2012, is MODIFIED to pertain only to the Joined Party rather than the entire class of telemarketers and to reflect a retroactive date of December 12, 2011. It is further ORDERED that the portion of the determination holding that the Joined Party performed services for the Petitioner as an employee is AFFIRMED as modified. It is also ORDERED that the Petitioner be found to have not established liability for the payment of reemployment assistance tax based on the Joined Party's services.

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 **September, 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 September, 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:

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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
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**PROTEST OF LIABILITY
DOCKET NO. 2012-43795L**

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 March 26, 2012.

After due notice to the parties, a telephone hearing was held on July 12, 2012. The Petitioner was represented by its attorney. The Petitioner's managing member testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist, 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 Petitioner.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as telephone agents constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Findings of Fact:

1. The Petitioner is a Florida limited liability company which operates a telemarketing firm. The Petitioner has approximately 170 telemarketers all of whom are classified by the Petitioner as independent contractors. The telemarketers generate leads for the Petitioner's clients by conducting consumer surveys.

2. The day to day operation of the Petitioner's business is managed by the Petitioner's managing member. In addition the Petitioner has call center managers who assist the telemarketers by answering any questions that the telemarketers may have.
3. For federal income tax purposes the Petitioner has elected to be taxed as a partnership.
4. The Joined Party worked for the Petitioner as a telemarketer from December 12, 2011, until January 3, 2012.
5. The Petitioner interviews each applicant who responds to a help wanted advertisement placed by the Petitioner. If an applicant is selected by the Petitioner, the Petitioner obtains a telemarketing license for the applicant which allows the applicant to perform telemarketing services for the Petitioner. The cost of the license is \$50 which is paid by the Petitioner. The applicant is required to sign an *Independent Contractor Agreement* and is required to complete a two to three week training program provided by the Petitioner.
6. The Joined Party signed the *Independent Contractor Agreement* on December 12, 2011. The Agreement was not signed by the Petitioner until December 22, 2011.
7. The *Independent Contractor Agreement* provides that the Joined Party is engaged as an independent contractor and not as an employee, that the Petitioner is not responsible for the payment of any payroll taxes, workers' compensation, or other payroll related deductions. The Agreement provides that the Petitioner will determine the commission rates and that the Joined Party is not entitled to a draw against commissions. The Agreement provides that the Joined Party is required to perform services during such hours and at such locations as designated by the Petitioner and in the sole discretion of the Petitioner. The Petitioner, in its sole discretion, may provide office facilities and supplies. The Joined Party is free to engage in outside employment. Either party may terminate the relationship at any time upon notice given by one party to the other.
8. Since the Joined Party was in the Petitioner's mandatory training program during her entire period of work, the Petitioner determined the work schedule. The training took place at the Petitioner's call center. The Petitioner provided the Joined Party with a computer containing proprietary software. The computer automatically dialed the prospects and the Joined Party was required to read a script to the prospects, without deviation. The proprietary software program told the Joined Party what to do and how to do it. The calls were monitored by a call center manager who was able to send messages to the Joined Party while the Joined Party was on the telephone. The computer program logged the hours worked by the Joined Party. The Joined Party's commission rate was determined by the Petitioner based on the Joined Party's hours worked, efficiency, and performance.
9. The work performed by the Joined Party required only basic telephone and computer skills. However, the majority of the Petitioner's new hires "flunk out" of the training program before completion.
10. The Joined Party was required to personally perform the work. The Joined Party was not free to hire others to perform the work for her unless the substitute was interviewed by the Petitioner and completed the Petitioner's training program.
11. No earnings were paid to the Joined Party during 2011. Although the Joined Party's last day of work for the Petitioner was on January 3, 2012, the Petitioner paid the Joined Party \$390.00 in commissions during 2012. No taxes were withheld from the pay.
12. Following her separation from the Petitioner the Joined Party reopened an existing claim for unemployment compensation benefits. An investigation was issued to the Department of Revenue to determine "for adjudication purposes" if the Joined Party performed services for the Petitioner as an employee or as an independent contractor. Upon receipt of the investigation the Department

of Revenue determined that the Petitioner had not previously registered for payment of unemployment compensation tax.

13. By determination dated March 26, 2012, the Department of Revenue notified the Petitioner that the persons performing services for the Petitioner as telephone agents are the Petitioner's employees retroactive to March 1, 2011. The Petitioner filed a timely protest by mail postmarked April 13, 2012.

Conclusions of Law:

14. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as telephone agents 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 Department 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. The Petitioner operates a telemarketing business which contacts prospects to generate sales leads for the Petitioner's clients. The Joined Party was a telemarketer who was being trained by the Petitioner to contact the prospects for the Petitioner to obtain the sales leads for the Petitioner's clients. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business.
22. The Joined Party's period of work with the Petitioner was brief and consisted of attending mandatory training provided by the Petitioner. During the training the Joined Party's activities were closely monitored and controlled. Training, by its very nature, is control because it specifies how the work must be performed. The Petitioner determined the place of work, the days and hours of work, as well as how the work was to be performed. The Joined Party was required to adhere to a script. The commission rate was determined by the Petitioner based on the hours worked as well as the Joined Party's performance. The Petitioner provided everything that was needed to perform the work, including the telemarketing license. No evidence was submitted to show that the Joined Party had any expenses in connection with the work.
23. The Joined Party signed an *Independent Contractor Agreement* which states that the Joined Party is an independent contractor and not an employee. 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 work performed by the Joined Party did not require any special skill or 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)
25. The Petitioner paid the Joined Party a commission based on the Joined Party's sales. The Agreement provides that the Petitioner had the sole discretion to determine the commission rate. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions.
26. Either party had the right to terminate the relationship at any time and for any reason. That fact reveals the existence of an at-will relationship, typical of an employer-employee relationship. 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.”

27. The *Independent Contractor Agreement* establishes the Petitioner's right, in the Petitioner's sole discretion, to control the hours of work, the place of work, the rate of pay, and the provision of equipment and supplies. Of all the factors, the right of control as to the mode of doing the work is the principal consideration. VIP Tours v. State, Department of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984)
28. 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.
29. The evidence presented in this case affirmatively establishes that the Joined Party performed services for the Petitioner as an employee and not as an independent contractor. However, due to the Joined Party's brief period of employment and the fact that the Joined Party was in a training program for the entire period, there is an insufficient nexus between the Joined Party and the entire working class to determine that all of the telemarketers are the Petitioner's employees.
30. Section 443.1215, Florida Statutes, 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.
31. The Petitioner did not pay any wages to the Joined Party until the first quarter 2012. The wages, however, do not equal at least \$1,500. Since it has not been determined that the services performed by the other telemarketers constitute insured employment there is no evidence to show that the Petitioner paid wages of at least \$1,500 during a calendar quarter. The Joined Party began her employment on December 12, 2011. Thus, the Joined Party performed services for the Petitioner for only three weeks during 2011.
32. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.
33. The Petitioner is a limited liability company which for federal income tax purposes is classified as a partnership. Thus, the services performed for the Petitioner by the managing member do not constitute employment subject to the Florida Unemployment Compensation Law. The evidence

does not support a conclusion that the Petitioner has established liability for payment of unemployment compensation taxes on the wages paid to the Joined Party.

Recommendation: It is recommended that the determination dated March 26, 2012, be MODIFIED to pertain only to the Joined Party rather than the entire class of telemarketer and that the retroactive date be MODIFIED to December 12, 2011. As modified it is recommended that the determination holding that the Joined Party performed services for the Petitioner as an employee be AFFIRMED. It is recommended that it be found that the Petitioner has not established liability for payment of unemployment tax based on the services performed by the Joined Party.

Respectfully submitted on August 2, 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.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
August 2, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

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