

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

PETITIONER:

Employer Account No. - 3081589
VENTURA TEC INC
ATTN ODANNY VELAZQUEZ
9907 NW 79TH AVENUE
HIALEAH FL 33010

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-66107L**

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 April 23, 2012, 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 November, 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 November, 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:

VENTURA TEC INC
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NICOLAS ACOSTA
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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. 2012-66107L**

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 April 23, 2012.

After due notice to the parties, a telephone hearing was held on September 13, 2012. The Petitioner, represented by the Petitioner's President, appeared and testified. The Petitioner's Vice President/General Manager testified as a witness on behalf of the Petitioner. 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 not received.

Issues:

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.

Whether the Petitioner meets liability requirements for Florida reemployment assistance 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 corporation formed on March 14, 2000, to operate a used car dealership. The Petitioner's president has been active in the daily operation of the business since the inception of the corporation. The Petitioner's vice president/general manager has been active in the business since 2002 and receives a salary from the Petitioner.

2. The Joined Party responded to an advertisement placed by the Petitioner for a special finance manager. During an interview with the Joined Party, the Petitioner's president explained how the dealership operated, reviewed the responsibilities and working hours of the position, and offered the Joined Party the position of finance manager at a compensation rate of 20% of the net profit on vehicle sales. The Joined Party, who was unemployed at the time of the interview, accepted the offer.
3. The Joined Party performed services as a finance manager for the Petitioner from May 2011, until January 2012. There was no written agreement between the parties. The Joined Party believed he was an employee of the Petitioner. The Petitioner classified the Joined Party as an independent contractor. The Petitioner reports the compensation paid to all of its workers, including the corporate officers, on a form 1099-MISC as non-employee compensation.
4. The Joined Party had prior experience as a finance manager for an automobile dealership. The Petitioner provided the Joined Party with an initial orientation concerning the Petitioner's computer generated document system.
5. The Joined Party was required to work from 9:00 a.m. until 7:00 p.m., or until the last customer left the premises, Monday through Saturday. The Joined Party was required to obtain permission from the Petitioner's president to take time off from work. The Joined Party was required to attend weekly sales meetings with the Petitioner's president and the salespersons. The Joined Party did not perform any services for the Petitioner outside of the Petitioner's regular business hours.
6. The Joined Party performed his services at the Petitioner's business location. The Petitioner furnished the Joined Party with an office, computer, software programs, telephone, and all other equipment and supplies needed for the work.
7. The Joined Party hired and supervised salespersons that were paid by the Petitioner. The Joined Party had the authority to determine, within certain guidelines provided by the Petitioner, the price at which a vehicle could be sold. The Joined Party's work was supervised by the Petitioner's president.
8. The Joined Party was not permitted to subcontract any of his services as finance manager for the Petitioner. The Joined Party was not restricted from performing similar services for others.
9. The Petitioner paid the Joined Party on a weekly basis. The Joined Party did not invoice the Petitioner for his services. The Petitioner paid the Joined Party 20% of the net profit on sales that were closed and funded by a lender each week. The Petitioner did not withhold taxes from the Joined Party's pay. The Petitioner did not provide the Joined Party with any fringe benefits such as paid vacation, sick leave, or health insurance. The Petitioner reported the Joined Party's 2011 earnings on a form 1099-MISC.
10. The Joined Party did not have his own business.
11. Either party could terminate the relationship without a penalty or liability for breach of contract. The Joined Party resigned his position with the Petitioner to accept a position at another dealership.
12. The Joined Party filed a claim for unemployment compensation benefits effective February 26, 2012. When the Joined Party did not receive credit for his earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed. An investigation was assigned to the Florida Department of Revenue to determine if the Joined Party performed services for the

Petitioner as an independent contractor or as an employee. On April 23, 2012, the Department of Revenue issued a determination holding that the services performed for the Petitioner by the Joined Party as finance manager constitute insured employment retroactive to April 1, 2011. The determination also held the Petitioner liable for unemployment tax contributions effective April 1, 2007, based upon 20 weeks of corporate officer activity. The Petitioner filed a timely protest.

Conclusions of Law:

13. 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.
14. 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).
15. 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).
16. 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.
17. 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.
18. 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.

19. 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 cannot be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.
20. The evidence presented in this case reveals that the Joined Party performed services for the Petitioner as a skilled finance manager. In Florida Gulf Coast Symphony, Inc. v. Department of Labor and Employment Security, 386 So.2d 259 (Fla. 2nd DCA 1980) the court discussed the factors to be considered when determining the extent of control over the work performed by skilled individuals. The court, citing Carnes v. Industrial Commission, 73 Ariz. 264, 240 P.2d 536 (1952), concluded, “if the alleged employer has the right to direct the time and the place in which the services are to be rendered, the person to or for whom the services are to be rendered and the degree and amount of said services, then the relationship is that of employer/employee, despite the fact that the employer does not closely direct the details of the performance.”
21. In this case the Petitioner determined what work was to be performed, where the work was to be performed, and when the work was to be performed. The Petitioner determined the rate and method of payment. The Joined Party was required to personally perform the work. The Joined Party’s work was supervised.
22. The Petitioner furnished the work space, and all equipment and supplies needed for the work.
23. The Joined Party did not have his own business. The Petitioner operates an automobile dealership. The Joined Party’s services as a finance manager were not separate and distinct from the Petitioner’s business, but were an integral and necessary part of that business.
24. The Joined Party was hired for an indefinite term, and either party could terminate the relationship without penalty or liability for breach of contract. Those facts are more indicative of an employer-employee relationship than an independent contractor relationship.
25. It is concluded that the Joined Party performed services for the Petitioner as an employee and not as an independent contractor.
26. Section 443.1216(1)(a), Florida Statutes, provides in part:
 - (1)(a) The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:
 1. An officer of a corporation.
 2. An individual who, under the usual common law rules applicable in determining the employer-employee relationship is an employee.
27. The Petitioner is a corporation. The Petitioner’s president and vice president perform services for the Petitioner. Thus, the Petitioner’s president and vice president are the Petitioner’s employees.
28. 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 preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.
29. The determination in this case holds the Petitioner liable for payment of unemployment compensation taxes retroactive to April 1, 2007. The Petitioner's president has been active in the daily operation of the business since 2000. Those services are sufficient to establish liability based on the fact that the Petitioner employed at least one individual in employment during twenty calendar weeks during a calendar year.
30. 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.
31. Although the Petitioner may have established liability for payment of unemployment compensation taxes in 2000, the Petitioner's retroactive liability is limited to a period of five years after services were performed. Therefore, the retroactive date of liability is April 1, 2007.

Recommendation: It is recommended that the determination dated April 23, 2012, be AFFIRMED.

Respectfully submitted on October 9, 2012.



SUSAN WILLIAMS, 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:
October 9, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

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