

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

**PETITIONER:**

Employer Account No. – 2137441  
MONUMENTAL LIFE INSURANCE COMPANY  
C/O RENAISSANCE BUSINESS SERVICES  
PO BOX 5108  
ARLINGTON VA 22205-0208

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 0020 9764 87-02**

**ORDER**

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated October 24, 2013, is REVERSED.

### JUDICIAL REVIEW

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

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

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

DONE and ORDERED at Tallahassee, Florida, this 11<sup>th</sup> day of April, 2014.



*Magnus Hines*

Magnus Hines,  
RA Appeals Manager,  
Reemployment Assistance Program  
DEPARTMENT OF ECONOMIC OPPORTUNITY

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

*Shanendra Y. Barnes*

DEPUTY CLERK

*4-11-14*

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 11<sup>th</sup> day of April, 2014.

*Shanendra Y. Barnes*

SHANEDRA Y. BARNES, Special Deputy Clerk  
DEPARTMENT OF ECONOMIC  
OPPORTUNITY  
Reemployment Assistance Appeals  
PO BOX 5250  
TALLAHASSEE FL 32399-5250

By U.S. Mail:

EDLINE ESTIVERNE  
830 NE 159TH ST  
NORTH MIAMI BEACH FL 33162-4430

MONUMENTAL LIFE INSURANCE  
COMPANY  
C/O RENAISSANCE BUSINESS  
SERVICES  
PO BOX 5108  
ARLINGTON VA 22205-0208

DEPARTMENT OF REVENUE  
WILLA DENNARD  
CCOC BLDG #1 SUITE 1400  
2450 SHUMARD OAK BLVD  
TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE  
ATTN: MYRA TAYLOR  
PO BOX 6417  
TALLAHASSEE FL 32314-6417

State of Florida  
DEPARTMENT OF ECONOMIC OPPORTUNITY  
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**RESPONDENT:**

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

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Altemese Smith  
Bureau Chief,  
Reemployment Assistance Program  
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated October 24, 2013.

After due notice to the parties, a telephone hearing was held on January 27, 2014. A representative from the Petitioner's tax agent and a district manager appeared for the Petitioner. The district manager gave testimony for the Petitioner. The Joined Party appeared. A Senior Tax Specialist appeared for the Respondent. No proposed findings of fact or conclusions of law were received. The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted.

**Issue:**

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

**Findings of Fact:**

1. The Petitioner sells life insurance, medical insurance, and annuities. The Joined Party worked as a sales agent for the Petitioner, selling the products from April 1, 2010 to June 6, 2013.
2. The Joined Party worked under a written agreement with the Petitioner which set out the compensation arrangements, among other things.
3. The Joined Party was paid commission on sales according to four categories: pooled sales, non-pooled sales, renewals, and quality performance bonus. Pooled sales related to automatic payments from a client's checking account or credit card. Non-pooled sales related to premium payments that were not automatic. Pooled sales commissions were calculated and paid automatically; non-pooled payments were paid as the premiums were actually received. Renewal commissions relate to premiums paid on ongoing policies. The quality performance bonus is a

commission paid for maintaining a high level of “placements” where a placement is a sale that has actually been accepted by the company after underwriting review.

4. The paychecks issued to the Joined Party were subject to various taxes such as Social Security (OASDI), Medicare, and income tax withholding. There were deductions for various kinds of insurance paid out of the Joined Party’s pre-tax earnings, and there were amounts shown for employer provided insurance: Life, Dental, Medical, Vision, and Long Term Disability (LTD).
5. The Joined Party filed a claim effective September 1, 2013. A determination finding the Joined Party to be an employee on whom reemployment assistance taxes must be paid was issued on October 24, 2013, retroactive to January 1, 2012.

**Conclusions of Law:**

6. Section 443.036 (28), Florida Statutes, provides:  
(28) “Insured work” means employment for employers.
7. 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.
8. Section 443.1216 (13) provides, in relevant part:  
(13) The following are exempt from coverage under this chapter:  
(m) Service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all of the service performed by the individual for that person is performed for remuneration solely by way of commission, except for services performed in accordance with 26 U.S.C. s. 3306(c)(7) and (8). For purposes of this section, those benefits excluded from the wages subject to this chapter under s. 443.1217(2)(b)-(f), inclusive, are not considered remuneration.

Note: the Federal statutory provisions mentioned above, in 26 USC 3306 (c), defining “Employment,” exempt certain activities including service for certain government entities and Indian tribes (26 USC 3306 (c) 7) and service for an exempt “religious, charitable, educational, or other organization described in section 501(c)(3)” (26 USC 3306 (c) 8).

9. Section 443.1217, Florida Statutes, “Wages” provides in relevant part:  
(2) For the purpose of determining an employer’s contributions, the following wages are exempt from this chapter:  
(b) Payment by an employing unit with respect to services performed for, or on behalf of, an individual employed by the employing unit under a plan or system established by the employing unit which provides for payment to its employees generally or to a class of its employees, including any amount paid by the employing unit for insurance or annuities or paid into a fund on account of:
  1. Sickness or accident disability. When payment is made to an employee or any of his or her dependents, this subparagraph exempts from the wages subject to this chapter only those payments received under a workers’ compensation law.
  2. Medical and hospitalization expenses in connection with sickness or accident disability.
  3. Death, if the employee:
    - a. Does not have the option to receive, in lieu of the death benefit, part of the payment or, if the death benefit is insured, part of the premiums or contributions to premiums paid by his or her employing unit; and

- b. Does not have the right under the plan, system, or policy providing the death benefit to assign the benefit or to receive cash consideration in lieu of the benefit upon his or her withdrawal from the plan or system; upon termination of the plan, system, or policy; or upon termination of his or her services with the employing unit.

10. Section 73B-10.035, Florida Administrative Code, provides:

- (7) Burden of Proof. The burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.

11. The Joined Party sold insurance for the Petitioner. The Petitioner withheld amounts for income tax, and deducted Social Security and Medicare taxes, implying that the Joined Party would be considered an employee under Federal tax law and under common law. But if the Joined Party's work is within an exemption, then the work is not considered employment for reemployment assistance purposes. The exemption at issue is section 443.1216 (13) (m), Florida Statutes.


12. The evidence in this case shows that the Joined Party sold insurance, and was paid solely by commission, except for certain insurance fringe benefits. The commission was figured several different ways, but the various kinds of commission were all based on sales to and income received from purchasers of insurance.

13. The paycheck stub of the Joined Party reveals that there were deductions from the Joined Party's pre-tax income relating to insurance, but those deductions were payments by the Joined Party, though administered by the Petitioner. There were payments by the Petitioner to the Joined Party in addition to payments of commission; however, those payments are for benefits that all fall within the items covered by sec. 443.1217 (2) (b), Florida Statutes. Since those additional fringe benefit payments are not considered "remuneration" for purposes of applying the exemption from "employment," they are not considered in determining whether the Petitioner paid the Joined Party "remuneration solely by way of commission" for her services.

14. The evidence shows that all of the payments defined as remuneration from the Petitioner to, or on behalf of, the Joined Party were commission. Accordingly, the facts in this case show that the statutory exemption of section 443.1216 (13) (m), Florida Statutes, applies to the work of the Joined Party for the Petitioner.

**Recommendation:** It is recommended that the determination dated October 24, 2013, finding that the Joined Party was an employee of the Petitioner, be REVERSED.  
Respectfully submitted on February 20, 2014.



  
\_\_\_\_\_  
J. Jackson Houser, 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 anlà 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.

*Shanendra Y. Barnes*

SHANEDRA Y. BARNES, Special Deputy Clerk

*Date Mailed:*

*February 20, 2014*

Copies mailed to:

Petitioner

Respondent

Joined Party

**Joined Party:**

EDLINE ESTIVERNE

830 NE 159<sup>TH</sup> STREET

NORTH PALM BEACH FL 33162-4430

**Other Addresses:**

WILLA DENNARD

DEPARTMENT OF REVENUE

CCOC BLDG #1 SUITE 1400

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