

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

**PETITIONER:**

Employer Account No. - 3048096  
BLUE FLAME LLC  
ATTEN JOHN MILLWARD  
21 HANFORD PLACE  
NORWALK CT 06854-3017

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2011-149449L**

**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 10, 2011, is MODIFIED to exclude employees of temporary staffing firms performing services for the Petitioner as brand ambassadors. It is further ORDERED that the determination is AFFIRMED as modified.

**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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DOR BLOCKED CLAIMS UNIT  
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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

**PETITIONER:**

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**PROTEST OF LIABILITY  
DOCKET NO. 2011-149449L**

**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 October 10, 2011.

After due notice to the parties, a telephone hearing was held on January 10, 2012. The Petitioner, represented by the Petitioner’s partner, appeared and testified. The Petitioner’s controller testified as a witness. The Respondent, represented by a Tax Specialist II, appeared and testified. The Joined Party did not appear.

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/or Conclusions of Law were not received.

**Issues:**

Whether services performed for the Petitioner by the Joined Party and other individuals as brand ambassador 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.

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 Connecticut limited liability company, organized in 2005, that operates an event marketing business. The Petitioner files with the Internal Revenue Service as a partnership. The Petitioner produces large-scale events for its clients, including trade shows, consumer sales

and marketing programs, live stage productions, and touring programs. The Petitioner utilizes brand ambassadors during sales and marketing programs to represent the client's brand.

2. The Joined Party performed services for the Petitioner as a brand ambassador during a marketing event produced by the Petitioner for a manufacturer of athletic footwear. The Joined Party's services were performed from May 5, 2010, until June 5, 2010. The event for which the Joined Party provided services was one of many similar events being produced by the Petitioner during the same period of time in other areas of the country.
3. The Joined Party was required to sign an *Independent Contractor Service Agreement* in order to obtain the work with the Petitioner. The agreement is dated as of April 13, 2010, and identifies the Joined Party as "Contractor." The agreement sets forth the services to be performed by the Contractor as a brand ambassador for a kiosk program in Orlando, Florida, including day-to-day project activation for the program, coordination with management team, representing the client as the face of the brand, constant communication with all consumers, photographing and filming consumer interactions, distribution of premiums, recording of hours worked by local staff, and any other responsibilities assigned by a manager or assistant manager.
4. The agreement provides for "a fee of \$500 per week of salary." The agreement provides that the Contractor is an independent contractor responsible for the payment of all applicable payroll taxes.
5. The agreement restricts the Joined Party from interfering with the relationship between the Petitioner and its clients, from disparaging the Petitioner in any manner, and from soliciting, engaging or attempting to engage the Petitioner's clients to contract directly with the Joined Party. The agreement does not require the Joined Party to work exclusively for the Petitioner.
6. The agreement provides that the Petitioner may terminate the agreement at any time without penalty.
7. The Joined Party and other brand ambassadors were required to attend several days of training provided by the Petitioner that included education about the specific product line, testing and evaluation of public speaking skills, film practice sessions, and review of pre-approved brand talking points and suggested scripts. The Petitioner provides standards for engaging with consumers and retailers to promote an ideal consumer experience. Brand ambassadors are told to be positive, not to argue with consumers, not to wear a competitor's brand, not to wear glasses, and not to chew gum. The time spent in the training and the costs associated with travel to the training location were paid by the Petitioner.
8. The Joined Party's services were performed at a kiosk located in a shopping mall. The Petitioner supplied the kiosk, a laptop, program template, TV/DVD, video camera, and all other equipment and supplies needed to perform the work. The Petitioner also supplied the Joined Party with several sets of clothing and footwear of the client's brand that the Joined Party was required to wear.
9. The Petitioner hired and paid four individuals, identified as local staff, to assist the Joined Party, as the lead brand ambassador, in the performance of the work. The Petitioner sometimes hires local staff directly, and at other times hires local staff through a temporary staffing agency. These workers are paid by the hour and do not receive the training provided to the Joined Party by the Petitioner. The Joined Party was expected to manage these workers and to record and submit their hours on a daily basis using an electronic timesheet supplied by the Petitioner. The Joined Party

was responsible for monitoring the performance of these workers. The Joined Party did not have authority to hire or fire; however, she could make recommendations to the Petitioner.

10. The kiosk program operated during the hours the shopping mall was open for business. The Petitioner expected the Joined Party or a local staff member to be present at the kiosk during the mall's operating hours. The Petitioner divided the shifts among the Joined Party and the other four workers. In scheduling the Joined Party's working hours, the Petitioner relied upon the Joined Party's assessment of the high traffic times during which her presence would be most beneficial for the program.
11. The Joined Party was required to provide a daily report of the program activity by electronic mail. The report was to include specific information such as the number of consumers trying on the product, the resulting number of retail store visits, the general level of traffic in the mall, service comments from retailers, and any problems encountered. The Joined Party was also expected to submit photographs and video clips on at least a weekly basis. The Joined Party and other lead brand ambassadors were required to participate in a weekly conference call with the Petitioner to discuss the levels of success of the program in the different geographic areas.
12. The Petitioner employs managers who provide oversight for the various events produced by the Petitioner. For this particular program, a manager made two visits to the event location to make visual inspections, monitor the success of the program, and provide support to the workers at the location.
13. The Joined Party was required to personally perform the work. She could not hire others to perform the work for her. The Joined Party could terminate the relationship at any time without penalty or liability.
14. No payroll taxes were deducted from the Joined Party's pay. The Joined Party did not receive any bonuses or fringe benefits. The Petitioner reported the Joined Party's 2010 earnings on a form 1099-MISC.

### **Conclusions of Law:**

15. 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)(2)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.
16. 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).
17. 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).
18. 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.

19. 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.

20. 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.

21. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1<sup>st</sup> 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. 1<sup>st</sup> 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.

22. The written agreement between the parties states that the Joined Party is an independent contractor, and not an employee or partner of the Petitioner. A statement in an agreement that the existing relationship is that of an independent contractor is not dispositive of the issue. Lee v. American Family Assurance Company, 431 So.2d 249 (Fla. 1<sup>st</sup> DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So. 2d 131 (Fla. 1972), a case involving an independent contractor agreement that specified that the worker was not to be considered an employee, 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.”

23. The Petitioner determined where the work was performed and when the work was performed. Through the training, the Petitioner controlled how the work was performed. The Joined Party was required to report on the progress of the work on a daily basis. Additionally, the agreement gave the Petitioner the right to assign additional work responsibilities to the Joined Party at the Petitioner’s discretion. 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 that is significant in distinguishing between an independent contractor and a servant.

24. The Petitioner controlled the financial aspects of the relationship. The Joined Party was paid by time rather than by the job. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.
25. The Petitioner supplied the work location, equipment, and supplies needed to perform the work. It was not shown that the Joined Party had any expense or financial risk in connection with the work.
26. The relationship was terminable at will. Either party had the right to end the relationship at anytime and without liability. 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 Petitioner's business includes the production of marketing programs for clients. The Joined Party was engaged by the Petitioner to run the marketing program in the Orlando market. 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 business.
28. It was not shown that the Joined Party had her own business or occupational license, or advertised her services to the general public.
29. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the court determined the Department had the authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers. To the extent the other brand ambassadors, local staff, were employees of temporary help firms, those brand ambassadors are not similarly situated workers.
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 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 paid the Joined Party \$2,286 in the second quarter 2010. Accordingly, the Petitioner meets the liability requirements for Florida unemployment compensation contributions effective May 5, 2010.

**Recommendation:** It is recommended that the determination dated October 10, 2011, be modified to exclude employees of temporary staffing firms performing services for the Petitioner as brand ambassadors. As modified, the determination dated October 10, 2011, is **AFFIRMED**.

Respectfully submitted on March 19, 2012.




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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.

---

SHANEDRA Y. BARNES, Special Deputy Clerk

**Date Mailed:**  
**March 19, 2012**

Copies mailed to:  
Petitioner  
Respondent  
Joined Party

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906 MAPLE FOREST DRIVE  
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DEPARTMENT OF REVENUE  
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