

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

PETITIONER:

Employer Account No. - 3079666
KIM'S KLEANING SERVICE,LLC
ATTN: KIM LONG
3312 MANGO TREE DRIVE
EDGEWATER FL 32141-6706

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-61384L**

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 12, 2012, is be MODIFIED to reflect a retroactive date of January 1, 2007. As modified it is ORDERED that the determination be 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:

KIM'S KLEANING SERVICE,LLC
ATTN: KIM LONG
3312 MANGO TREE DRIVE
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SHERRY HAMMOND
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DEPARTMENT OF REVENUE
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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. 2012-61384L

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 12, 2012.

After due notice to the parties, a telephone hearing was held on September 10, 2012. The Petitioner, represented by its owner, appeared and testified. The owner of Gloria's Cleaning Service; one of the Petitioner's customers; one of the Petitioner's domestic cleaners; the Petitioner's domestic partner; and an Enrolled Agent testified as witnesses. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified. A former co-worker testified as a witness for the Joined Party.

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. Proposed findings of fact which are relevant, material, and supported by the weight of the evidence are incorporated herein. Proposed findings and conclusions which are not supported by the weight of the evidence are discussed in the Conclusions of Law section of the recommended order.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals 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 reemployment assistance contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Whether the Petitioner's corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 73B-10.025, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is an individual, Kim Long, who has operated a house cleaning business since approximately 1987. The business is operated from the home of Kim Long. Effective March 20, 2012, the Petitioner formed a single member limited liability company, Kim's Kleaning Service, LLC. The business has been operated by the limited liability company since March 20, 2012. Since prior to 2007 the Petitioner has had at least one individual performing services for the Petitioner during each week of the year. The Petitioner has classified all of the workers as independent contractors.
2. In 2010 the Joined Party was employed by a marketing company to validate telephone sales for a cable company. Prior to that employment the Joined Party had been employed in Georgia as a cleaner for a commercial cleaning company. In February 2010 the Joined Party replied to a newspaper help wanted advertisement placed by the Petitioner. The advertisement stated "Interviewing for energetic hard workers available Monday thru Friday, 7 AM-5 PM. Must have clean driving record, background check required. Physical demanding job. Serious inquiries only." The advertisement provided a telephone number to call for an interview. The Joined Party was not receiving adequate hours with the marketing company and called the number listed in the advertisement. The Petitioner instructed the Joined Party to fill out an application and to place the application on the front door of the Petitioner's residence. The Joined Party complied.
3. The Joined Party did not hear back from the Petitioner until early 2011 when the Petitioner contacted the Joined Party and scheduled the Joined Party for an interview on February 5, 2011. At the interview the Joined Party provided the Petitioner with a copy of her resume. In the interview the Petitioner told the Joined Party the guidelines of the job including the requirement that the work must be performed in a professional manner, that the keys to customers' homes must be secured in the Petitioner's garage, that there would always be two cleaners on a job, that there was no additional pay for call-backs, that the workers may use a company vehicle bearing the Petitioner's business name without charge or the workers may use their own vehicles for transportation as long as the workers affix the Petitioner's sign to the personal vehicle, that the Joined Party had to be available to work from 7 AM until 5 PM, that the Joined Party had to report to the Petitioner's home 30 minutes to an hour before beginning work to load the Petitioner's vehicle, that the Joined Party would be required to replace any damaged property, that the Petitioner would provide shirts bearing the Petitioner's name which the Joined Party was required to wear, that the Joined Party was required to wear black or brown pants or shorts, that the Joined Party was not allowed to wear open-toe shoes, that the Joined Party was not allowed to wear perfume, that the Petitioner would provide all tools and supplies, and that the Petitioner would perform a background check at the Petitioner's expense. The Petitioner informed the Joined Party that the Joined Party would be paid \$9 per hour with the ability to earn a pay increase depending on the amount of responsibility the Joined Party was willing to accept, such as contacting customers and preparing the work schedules. The Petitioner told the Joined Party that the Petitioner had only a handful of employees and that the Petitioner did not withhold taxes from the pay of the employees. The Petitioner told the Joined Party that the Joined Party would be on probation during the first ninety days and that the Petitioner would ride with the Joined Party during the probationary period. The Joined Party accepted the offer of work and believed that she was hired to be the Petitioner's employee.

4. The Petitioner required the Joined Party to sign a document entitled *Kim's Kleaning Service Acknowledgment of Probation*. The Acknowledgment states that the Joined Party understands that as an independent contractor there will be a period of minimal training during which time the Joined Party will become familiar with the quality of work required and that after the 30 to 90 day probation and training period the Petitioner will provide contract cleaning jobs which the Joined Party may accept or decline. The Acknowledgement states that the Joined Party will not be supervised and that if the work is not performed satisfactorily it will be the Joined Party's responsibility to correct the problem without additional compensation. The Acknowledgment states that the Joined Party acknowledges that she has her own occupational license and that she understands that no state or federal taxes will be withheld from the pay. The Acknowledgment states that the Joined Party will fully cooperate with any law enforcement agency including taking a lie detector test should any client accusation require investigation. The Joined Party was anxious to obtain work because she was only working fourteen hours per week for the marketing company. The Joined Party did not read the Acknowledgment but signed it on February 5, 2011 during the interview. At the bottom of the form the Petitioner wrote "Experienced cleaner/no training needed."
5. The Petitioner's purpose of placing all newly hired cleaners on probation is to allow time for the new cleaners to become familiar with the work, to give the Petitioner time to do the background checks, and to verify the employment information on the applications. Most of the new hires were placed on a shorter period of probation than the Joined Party. The Petitioner chose to make the Joined Party's probation period longer than some other new hires because of the difficulty of checking out-of-state references.
6. The Petitioner also required the Joined Party to sign an *Independent Contractor Agreement*. The Agreement states that the purpose of the document is to establish an independent contractor relationship. The Agreement states that the Joined Party will perform cleaning services and will be compensated "___per unit/hour" payable in check at the option of the Petitioner. The Agreement states that the Joined Party will provide all equipment, tools, and supplies. The Agreement states that the contract shall run from day to day, that all amounts shall be paid in full with no deductions of any kind, that the Joined Party may start or cease work at will as long as the contract is performed and accomplished satisfactorily and promptly, and that the Petitioner would not provide any supervision in the details of the work to be performed after the initial period of introduction to the object of the contract. The Petitioner and the Joined Party signed the Agreement on February 7, 2011, when the Joined Party reported for work on her first day. The Joined Party did not read the Agreement. The Joined Party began work on February 7, 2011, after signing the Agreement.
7. The Petitioner provided the Joined Party with two uniform shirts bearing the Petitioner's name, without cost to the Joined Party, and was told that she was required to wear a uniform shirt each day. The Petitioner always provided the vacuum cleaners, tools and all supplies without cost to the Joined Party. The Petitioner provided the vehicle and provided a credit card to be used for the purchase of gasoline, any emergency supplies, and for equipment repairs. The Joined Party did not have any expenses in connection with the work.
8. During the ninety day probationary period the Petitioner rode with the Joined Party from time to time. The Petitioner instructed the Joined Party how to clean. The Petitioner showed the Joined Party how she wanted the work done and told her which cleaning products to use.
9. The Petitioner always assigned the Joined Party to work with another cleaner and the Joined Party was never given the option of choosing which individual to work with. The assigned co-worker changed from time-to-time at the Petitioner's discretion. On several occasions the Joined Party complained to the Petitioner because the assigned co-workers did not do a fair share of the work. On some of those occasions the Petitioner verbally reprimanded the co-workers in the Joined Party's presence. On one day a third person rode with the Joined Party and the cleaning partner.

That person told the Joined Party that she had been assigned to supervise the Joined Party and the other cleaner to make sure that they were performing the work properly.

10. In April 2011 the Petitioner hired a new cleaning person and assigned that individual to work with the Joined Party. The new cleaner was hired under the same terms and conditions as the Joined Party and was placed on probation for a period of thirty to ninety days. The Joined Party did not know the new cleaner, however, neither the Joined Party nor the new cleaner had a choice in being assigned to work together. The Joined Party and the new cleaner worked together as a team until early February 2012. The co-worker always believed that she was an employee of the Petitioner.
11. The work schedule was prepared for the Joined Party in advance so that the Joined Party would know which customers to clean and the approximate time to arrive at the customers' locations. The Joined Party did not believe that she had the right to decline any assigned work or work schedule. The Joined Party was not allowed to change the work schedule, however, if she was running late she was required to call the customer to let the customer know what time she would arrive. The Joined Party was required to give the Petitioner one week notice if she wanted to take time off from work.
12. The Petitioner considered one individual on each cleaning team to be the "preferred contractor" and to be in charge. The Joined Party was never informed that she was in charge of the team nor was she ever informed that the other member of the team was in charge.
13. On more than one occasion the Joined Party did not have a clean uniform shirt to wear and wore her own personal shirt. Upon arrival at the Petitioner's home the Petitioner told the Joined Party that she was required to wear a uniform shirt. The Petitioner gave the Joined Party a new shirt each time and required the Joined Party to change clothes before beginning work. The Petitioner provided four additional shirts to the Joined Party without cost to the Joined Party. The Joined Party's co-worker was only provided with one shirt at the time of hire. The co-worker also was required to change into a uniform shirt if she wore her own personal shirt.
14. On one occasion the Joined Party accidentally broke an item in a customer's home. The Joined Party reported the accident to the homeowner and offered to pay for the item by making weekly payments. The Petitioner agreed to pay half of the replacement cost of the item and to make weekly deductions from the Joined Party's earnings to pay for the Joined Party's share.
15. The Petitioner frequently tried to persuade the Joined Party to contact the Petitioner's customers to prepare the cleaning schedules in return for a pay increase to \$10 per hour. The Joined Party refused because she did not believe it was her responsibility to contact the Petitioner's customers and because she did not want to do it. The Joined Party's assigned cleaning partner also initially refused. Eventually, the Joined Party's assigned partner agreed to contact customers and to prepare the schedules. As a result, the Petitioner increased the pay of the partner and the Joined Party to \$10 per hour.
16. The Joined Party was paid weekly. No payroll taxes were withheld from the pay and no fringe benefits were provided. At the end of 2011 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.
17. The Joined Party always believed that she was an employee of the Petitioner. The Joined Party did not believe that she could work for a competitor and she did not perform services for anyone other than the Petitioner. The Joined Party did not have an investment in a business, did not advertise her services to the general public, did not have an occupational license, did not have business liability insurance, did not believe that she could hire others to perform the work for her, and did not have any expenses in connection with the work.

18. In early 2012 the Petitioner told the Joined Party that the Joined Party needed to get an occupational license and liability insurance and that the Joined Party was required to turn in a weekly invoice showing the number of hours worked during the week. The Petitioner explained that the reason for the changes was because of advice that the Petitioner had received from the individual who prepared her income tax return.
19. In early 2012 the Joined Party went to an accountant to have her federal tax return prepared. Although the Joined Party was aware that the Petitioner had not been withholding taxes from the pay, the Joined Party was not aware that she would owe such a large sum of money for her taxes. As a result the Joined Party and her cleaning partner approached the Petitioner and requested that the Petitioner withhold taxes from their pay. The Petitioner replied that the Joined Party would have to accept a pay cut in order to continue working for the Petitioner and that the Petitioner would have to contact a bookkeeper to determine the reduced amount of pay. The Joined Party requested that the Petitioner contact her when the Petitioner determined how much the Petitioner would pay her. The Petitioner did not contact the Joined Party with that information.
20. The Joined Party filed an initial claim for reemployment assistance benefits effective February 5, 2012. 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 for the Petitioner as an employee or as an independent contractor.
21. On April 12, 2012, the Department of Revenue determined that the Petitioner, Kim Long, doing business as Kim's Kleaning Service LLC, was liable for payment of unemployment compensation taxes on the wages of the Joined Party and other individuals performing services as domestic cleaners retroactive to February 8, 2011. The Petitioner filed a timely protest.

Conclusions of Law:

22. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals performing services as domestic cleaners 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.
23. 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).
24. 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.
25. 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.

26. 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.
27. 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.
28. 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.
29. The Joined Party was required by the Petitioner to sign a *Kim's Kleaning Service Acknowledgment of Probation* and an *Independent Contractor Agreement* before beginning work. The Joined Party did not read either document before signing. Although it is well established that an individual is bound by a document he or she signs even if he or she does not read or understand the document, see Rivero v. Rivero, 963 So. 2d 934 (Fla. 3d DCA 2007); Peralta v. Peralta Food Corp., 506 F. Supp. 1274 (S.D.Fla. 2007) and Merrill Lynch v. Benton, 467 So. 2d 311, 313 (Fla. 5th DCA 1985), it is equally well established that a statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). 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."
30. The Petitioner's business is to provide residential cleaning for the Petitioner's customers. The work performed by the Joined Party and other individuals as domestic cleaners was to clean the homes of the Petitioner's customers. The work performed by the Joined Party and the other domestic cleaners was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business.

31. The Petitioner provided all equipment, tools, and supplies. The Petitioner provided vehicles for the domestic cleaners to use to travel to and from the work locations. The Petitioner provided a credit card to be used by the domestic cleaners to purchase gas for the vehicles and to use for the purchase of supplies or equipment repairs. The Joined Party did not provide any equipment or supplies and did not have any expenses in connection with the work.
32. The *Kim's Kleaning Service Acknowledgement of Probation* provides for a period of training. The Independent Contractor Agreement also refers to supervision during "the initial period of introduction to the object of the contract described herein." The testimony of the Joined Party and of the Joined Party's witness establishes that the Petitioner provided that training and supervision. During the training the Petitioner told the Joined Party how to do the cleaning and what cleaning products to use. Training is a method of control because it specifies how the work must be performed.
33. The work performed by the domestic cleaners does not require any skill or special knowledge. Although the humblest labor can be independently contracted and the most highly trained artisan can be an employee, see Farmers and Merchants Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958), 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)
34. The Petitioner determined which customers' homes were to be cleaned by the Joined Party and the days and times that the work was to be performed. The Petitioner paid the domestic cleaners at an hourly rate of pay that was determined and controlled by the Petitioner. Thus, the domestic cleaners were paid by time worked rather than by production or 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. These facts reveal that the Petitioner controlled the financial aspects of the relationship. 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.
35. The Joined Party performed services exclusively for the Petitioner for a period of approximately one year and the Joined Party's former co-worker performed services for the Petitioner for a period of approximately ten months. 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. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting L 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."
36. The Petitioner determined what work was to be performed, when it was to be performed, where it was to be performed, by whom it was to be performed, and how it was to be performed. 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.

37. The determination of the Department of Revenue correctly holds that the services performed by the Joined Party and other individuals as domestic cleaners constitute insured employment. The determination holds that the Petitioner is liable for payment of unemployment taxes retroactive to February 8, 2011, the approximate date that the Joined Party began her employment. However, the evidence reveals that the Petitioner has had at least one domestic cleaner performing services during each week of the year since prior to 2007.
38. 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.
39. The Petitioner has employed at least one domestic cleaner during 20 different calendar weeks each year since prior to 2007. Thus, the Petitioner has established liability for payment of unemployment tax.
40. 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.
41. Based on the services performed by the domestic cleaners the correct retroactive date of liability is January 1, 2007.
42. Effective March 20, 2012, the Petitioner's business was transferred to Kim's Kleaning Service, LLC, a single member limited liability company.
43. 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.
44. The Petitioner is not a limited liability company which is classified as a corporation for federal income tax purposes. It is a single member limited liability company. Thus, the services performed by the Petitioner's member, Kim Long, do not constitute insured employment.
45. 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. The Petitioner offered testimony that was in conflict with the documentary evidence and offered testimony that was internally inconsistent. For instance, the Petitioner testified that she placed all of the domestic cleaners on an initial period of probation but that the Joined Party was the only worker who was placed on probation for a period of thirty to ninety days. The Petitioner later testified that the

Joined Party was the only worker who was ever placed on a period of initial probation. The Joined Party's former co-worker testified that she also was placed on probation for a period of thirty to ninety days at the time of hire. In addition, the Petitioner mischaracterized prior testimony when conducting cross examination. Upon considering these factors, the special deputy finds the testimony of the Petitioner to lack credibility. Therefore, material conflicts in the evidence are resolved in favor of the Joined Party.

46. In its proposed finding #4 the Petitioner states that the Joined Party was required to provide her own equipment and supplies. The competent evidence that has been accepted as credible reveals that the Joined Party was informed during the initial interview that the Petitioner would provide all equipment and supplies. Both the Joined Party and the Petitioner testified that the Petitioner provided the equipment and supplies without cost to the Joined Party or the other domestic cleaners. In its proposed conclusion #28 the Petitioner states that the Joined Party was given the opportunity to purchase supplies from the Petitioner and to rent the Petitioner's equipment. Since the facts support a conclusion that the Petitioner provided the supplies and equipment without cost to the workers there would have been no reason for the workers to pay the Petitioner for use of the supplies and equipment. Thus, proposed finding #4 and proposed conclusion #28 are not supported by the evidence.
47. In its proposed finding of fact #12 the Petitioner states that the Joined Party was not required to comply with a specific dress code, although shirts could be purchased from the Petitioner. The evidence reveals that the Petitioner told the Joined Party during the initial interview that the Joined Party was required to wear the uniform shirts. The Petitioner provided a total of six shirts to the Joined Party without any cost to the Joined Party. The Petitioner also provided shirts to the former co-worker without cost. Both the Joined Party and the former co-worker testified that they had to change into a uniform shirt before beginning work if they wore a personal shirt, that they were required to wear black or brown pants or shorts, that they were not allowed to wear open toe shoes, and were not allowed to wear perfume. In its proposed conclusion #27 the Petitioner states that the Joined Party was given the opportunity to wear a company issued shirt. Proposed finding #12 and proposed conclusion #27 are not supported by the credible evidence.
48. In its proposed finding #11 the Petitioner states that the Joined Party was hired on a probationary period due to a negative background report obtained by the Petitioner. In its proposed conclusion #30 the Petitioner asserts that the probation period was implemented only as to the Joined Party because a routine background check of the Joined Party produced negative results calling into question the Joined Party's veracity and reliability. Proposed finding #11 and proposed conclusion #30 are contrary to the Petitioner's own testimony. The Petitioner testified that the purpose of placing all of the cleaners on probation at the time of hire was to allow time for the new cleaners to become familiar with the work, to give the Petitioner time to do the background checks, and to verify the employment information on the applications. *Kim's Kleaning Service Acknowledgement of Probation* refers to the probation period as a "training and probation period" during which the cleaner will become familiar with the quality of work required. The Joined Party was placed on probation during the initial interview on February 5, 2011, prior to the Petitioner performing any background check on the Joined Party. Thus, the Joined Party was not placed on probation because of the results of a background check.

Recommendation: It is recommended that the determination dated April 12, 2012, be MODIFIED to reflect a retroactive date of January 1, 2007. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on October 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:
October 2, 2012

Copies mailed to:

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Respondent
Joined Party

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