

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

PETITIONER:

Employer Account No. - 2836364
CHANGES YOUTH & FAMILY SERVICES INC
ATTN AUDRA ADAMS DIR HR & MARKETING
3270 SUNTREE BLVD SUITE 101
MELBOURNE FL 32940-7540

RESPONDENT:

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

PROTEST OF LIABILITY
DOCKET NO. 0019 3444 26-01

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 January 5, 2013, is MODIFIED to reflect that the Joined Party's job title was Billing Specialist. 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 13th day of **January, 2014**.



Altemese Smith
Altemese Smith,
Bureau Chief,
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

1-14-14
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 14th day of January, 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:

CHANGES YOUTH & FAMILY
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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

TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2836364
CHANGES YOUTH & FAMILY SERVICES INC
ATTN AUDRA ADAMS DIR HR & MARKETING
3270 SUNTREE BLVD SUITE 101
MELBOURNE FL 32940-7540

**PROTEST OF LIABILITY
DOCKET NO. 2013-23710L**

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 January 5, 2013.

After due notice to the parties, a telephone hearing was held on September 23, 2013. The Petitioner was represented by its attorney. The Petitioner's vice president testified as a witness. The Respondent, represented by a Department of Revenue Senior Tax Specialist, 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.

Issue:

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

Findings of Fact:

1. The Petitioner is a corporation which provides mental health services to individuals.

2. The Joined Party posted her resume on the Internet and was contacted by the Petitioner in approximately June 2011. The Joined Party was interviewed by the Petitioner and was informed that the position title was Billing Specialist and that the duties of the position entailed data entry and other general office duties. The Joined Party was provided with a job description for the billing specialist position. The Petitioner informed the Joined Party that the hours of work were Monday through Friday from 9 AM until 5 PM, that the rate of pay was \$12.00 per hour, and that the Joined Party would be a contract worker. The Joined Party did not understand what being a contract worker meant but she accepted the Petitioner's offer of work.
3. The Petitioner provided the Joined Party with a document entitled *Medicaid Specialist Contract* for her signature. The Contract provides that the Petitioner will pay the Joined Party "\$12 per hour @ 40 hours per week to perform the duties outlined in the attached Medicaid Specialist job description. Payment will be made on the 15th and last day of the month." The Petitioner did not provide the Joined Party with the Medicaid Specialist job description because the Joined Party was hired to do data entry and other general office work. The Petitioner provided the Joined Party with a job description for the position of Billing Specialist. The Contract provides that the Petitioner may immediately terminate the Agreement for cause but that the Contract could be terminated at any time by either party "as deemed necessary by either party."
4. The Joined Party performed her services at the Petitioner's office during the Petitioner's regular hours of operation. The Petitioner provided the Joined Party with an identification badge bearing the Joined Party's name and photograph. The Petitioner provided the Joined Party with a private office, a desk and chair, filing cabinet, computer, printer/copier, telephone, and all other equipment and supplies that were needed to perform the work. The Petitioner provided the Joined Party with a company email address. The Joined Party did not have any expenses in connection with the work.
5. The type of work assigned to the Joined Party by the Petitioner did not require the Joined Party to have any type of certification or license. The Petitioner told the Joined Party what to do and showed her how to do it.
6. The Joined Party did not have any investment in a business, did not have an occupation license or business license, did not have business liability insurance, did not advertise her services to the general public, and provided services exclusively for the Petitioner.
7. The Joined Party was required to punch a time clock. She was allowed to take a 30 minute lunch break and was not required to clock out for lunch unless she took more than 30 minutes. If the Joined Party needed to take time off from work she was required to request and obtain permission. If she was not able to work as scheduled she was required to notify the Petitioner's office manager. The Joined Party was not allowed to come and go as she pleased.
8. Although the Petitioner told the Joined Party that she was hired to be a contract worker the Joined Party did not understand that the Petitioner would not withhold payroll taxes from the pay. It was explained to the Joined Party when she received her first paycheck that the Joined Party was responsible for paying her own taxes.
9. The Joined Party did not submit a bill or invoice to the Petitioner to be paid for the services which she performed. The Joined Party was paid based on the time worked and recorded on her timecard. No taxes were withheld from the Joined Party's pay. The Petitioner did not provide any fringe benefits such as paid holidays, paid sick days, paid vacations, or health insurance. At the end of the year the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

10. The Joined Party believed that she was not allowed to perform services for a competitor of the Petitioner and believed that she was not allowed to hire others to perform the work for her. The Petitioner never discussed with the Joined Party whether she was required to personally perform the work or whether she could or could not work for a competitor. During the latter part of 2011 the Joined Party obtained part time employment with a company that prepares income tax returns for individuals. The Joined Party worked for the income tax preparation company only on nights and weekends.
11. On February 28, 2012, the Petitioner informed the Joined Party that the Joined Party was discharged because the Petitioner believed that the part time job was interfering with the Joined Party's work and because the Petitioner believed that the Joined Party did not have an allegiance to the Petitioner.
12. The Joined Party filed a claim for reemployment assistance benefits effective December 9, 2012. When the Joined Party did not receive credit for her earnings with the Petitioner she filed a *Request for Reconsideration of Monetary Determination* 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. On January 15, 2013, the Department of Revenue issued a determination holding that the Joined Party and other workers in the same class are the Petitioner's employees retroactive to June 13, 2011. The Petitioner filed a timely protest by mail postmarked January 24, 2013.

Conclusions of Law:

13. The issue in this case, whether services performed for the Petitioner 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.
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). 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.
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 can not be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.
20. At the time of hire the Petitioner informed the Joined Party that she was hired as a contract worker. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented “while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other.”
21. The Petitioner’s business is to provide mental health services to individuals. The Joined Party was engaged by the Petitioner to perform general office duties including billing Medicaid for the mental health services performed by the Petitioner’s workers. The work performed by the Joined Party was not separate and distinct from the Petitioner’s business but was a necessary and integral part of the Petitioner’s business.
22. The Petitioner provided the place of work and all equipment and supplies that were needed to perform the work. The Joined Party did not have any expenses in connection with the work, did not have any investment in a business, and was not at risk of suffering a financial loss from performing services.
23. The Joined Party was not required to be certified or licensed to perform the duties assigned by the Petitioner. No evidence was submitted to show that the Joined Party was required to have any special skill or knowledge to perform the work. The Petitioner taught the Joined Party how to perform the work. 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)

24. The Petitioner paid the Joined Party by time worked rather than based on production or by the job. The Petitioner determined the method of pay as well as the rate of pay. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor 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.
25. The Joined Party performed services for the Petitioner for a period of approximately eight months. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Petitioner terminated the relationship. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."
26. The Petitioner controlled what work was performed, where the work was performed, when the work was performed, by whom the work was performed, and how the work was performed. The Petitioner controlled the financial aspects of the relationship.
27. 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.
28. It is concluded that the services performed for the Petitioner by the Joined Party and other similarly situated workers constitute insured employment.
29. The special deputy was presented with conflicting evidence 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. During the course of the investigation the Petitioner's Human Resource Director submitted an *Independent Contractor Analysis*, Form UCS-6061. At the hearing the Petitioner's president offered testimony that was in direct contradiction of the Petitioner's previously presented evidence. The Human Resource Director did not testify at the hearing, thus, the form completed by the Human Resource Director is hearsay. Rule 73B-10.035 (15) (c) Florida Administrative Code, provides that hearsay evidence, whether received over objection or not, may be used to supplement or explain other evidence, but will not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, F.S. The testimony of the Joined Party is consistent with the information provided by the Human Resource Director. Therefore, the *Independent Contractor Analysis* submitted by the Petitioner supplements and supports the Joined Party's testimony. Although the Petitioner's vice president testified that she was active in the operation of the business the vice president answered many questions, even elementary questions, by stating that she did not know the answer. Upon considering these factors, the special deputy finds the testimony of the Joined Party to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the Joined Party.

Recommendation: It is recommended that the determination dated January 5, 2013, be MODIFIED to reflect that the Joined Party's job title was Billing Specialist. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on September 27, 2013.



A handwritten signature in black ink, appearing to read "R. O. Smith".

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.

A handwritten signature in black ink, appearing to read "Shanendra Y. Barnes".

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
September 27, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

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