

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

PETITIONER:

Employer Account No. - 3068215
FORECLOSURE RESCUE FOUNDATION INC
8815 CONROY WINDEMERE RD #376
ORLANDO FL 32835-3129

PROTEST OF LIABILITY
DOCKET NO. 0019 3454 08-01

RESPONDENT:

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

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, 2012, is MODIFIED to reflect a retroactive date of liability beginning April 5, 2011. 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

1.13.14
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 13th 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:

FORECLOSURE RESCUE FOUNDATION
INC
8815 CONROY WINDEMERE RD #376
ORLANDO FL 32835-3129

MELANIE MARTINEZ
682 SPREADING OAK AVE
ORLANDO FL 32835-3129

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
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. - 3068215
FORECLOSURE RESCUE FOUNDATION INC
8815 CONROY WINDEMERE ROAD # 376
ORLANDO FL 32835-3129

**PROTEST OF LIABILITY
DOCKET NO. 2013-24517L**

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, 2012.

After due notice to the parties, a telephone hearing was held on August 13, 2013. The Petitioner, represented by its president, appeared and testified. 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:

TIMELINESS: Whether a response was filed by a party entitled to notice of an adverse determination within fifteen days after the mailing of the Order to Show Cause to the address of record or, in the absence of mailing, within fifteen days after delivery of the order, pursuant to Florida Administrative Code Rule 73B-10.035(5).

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

Whether the Petitioner meets liability requirements for Florida reemployment assistance contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

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.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 73B-10.035(18).

Findings of Fact:

1. The Petitioner, Foreclosure Rescue Foundation, Inc. was formed as a Florida nonprofit corporation on April 5, 2011, to help homeowners, for a fee, who are facing foreclosure. The Petitioner's president has been active in the operation of the business since inception. The Petitioner's president receives a salary of \$1,000 per month.
2. When the Petitioner was formed as a Florida non profit corporation the Petitioner's Certified Public Accountant advised the Petitioner that the Petitioner did not need to do anything else to be exempt from payment of taxes. Based on that advice the Petitioner's president believed that the Petitioner did not need to withhold any payroll taxes from the president's salary or from the earnings of other employees.
3. In approximately June 2011 the Petitioner hired a part time bookkeeper and two salesmen.
4. In approximately June or early July 2011 the Joined Party replied to a help wanted advertisement posted by the Petitioner for the position of administrative assistant. The Petitioner's president interviewed the Joined Party and informed the Joined Party that the hours of work were Monday through Friday from 9 AM until 5 PM and that the rate of pay was \$13 per hour. The Petitioner offered the position to the Joined Party. The Joined Party accepted the offer and began work on or about July 5, 2011. The parties did not enter into any written agreement or contract.
5. The Joined Party did not have any financial investment in a business, did not have a business license or occupational license, did not have business liability insurance, did not perform services for anyone other than the Petitioner, and did not advertise or offer services to the general public. In the interview the Petitioner did not inform the Joined Party that she was classified as a contract worker. The Joined Party believed that she was hired to be the Petitioner's employee.
6. The Petitioner provided the Joined Party with workspace in the Petitioner's office, a computer, fax machine, telephone, and any other equipment or supplies that were needed to perform the work. The Joined Party occasionally purchased supplies for the office and was reimbursed for the cost of the supplies. If the Joined Party used her vehicle to run an errand, the Petitioner reimbursed the Joined Party for the automobile expense. The Joined Party did not have any unreimbursed expenses in connection with the work.
7. The Joined Party's duties included answering the telephone, greeting people who came into the office, completing paperwork including a spreadsheet, and communicating with attorneys. The Joined Party's immediate supervisor was the Petitioner's president who provided on-the-job training concerning how to complete the paperwork and spreadsheets. The Petitioner provided the Joined Party with a key to the Petitioner's office. The Joined Party was responsible for opening the office approximately two days a week and occasionally responsible for closing the office at the end of the workday.
8. In August 2011 the Petitioner's president was informed that the Petitioner was not exempt from taxes unless the Petitioner was granted an exemption by the Internal Revenue Service. On or about August 8, 2011, the Petitioner applied for a 501(c)3 tax exemption. The Petitioner has not received any response from its application.

9. The Joined Party worked at least forty hours a week and was required to complete a timesheet. The Petitioner paid the Joined Party based on the hours worked. The Petitioner also paid the Joined Party for a paid vacation, paid holidays, and paid sick days. No payroll taxes were withheld from the Joined Party's pay. At the end of 2011 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation in the amount of \$14,929.75. The Petitioner also issued a Form 1099-MISC to the Petitioner's president and to the other workers.
10. In approximately March 2012 the Petitioner closed the Petitioner's office and moved the business to the home of the Petitioner's president because the Petitioner had stopped accepting new clients. Beginning in March 2012 the Joined Party performed her services as an administrative assistant from the home of the Petitioner's president. In approximately June 2012 the Petitioner gave the Joined Party a laptop computer and a cell phone to use so that the Joined Party could perform the majority of the services from the Joined Party's home.
11. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Petitioner terminated the Joined Party in September 2012 to reduce the expense of operating the business.
12. The Joined Party filed a claim for reemployment assistance benefits effective September 2, 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 and to determine if the Petitioner was liable for payment of state unemployment compensation taxes.
13. The Petitioner's mailing address is 8815 Conroy Windemere Road #376, Orlando, Florida. 8815 Conroy Windemere Road is a United Parcel Service store and #376 is the mail drop box assigned to the Petitioner within the store.
14. On October 24, 2012, the Department of Revenue issued a determination holding that the Joined Party, performing services as an administrative assistant, is the Petitioner's employee retroactive to July 5, 2011. The determination also advises that corporate officers are employees by statute and that the Petitioner is liable for payment of unemployment taxes retroactive to July 5, 2011. The determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file a written protest within twenty days from the date of this letter."
15. The October 24, 2012, determination was mailed to the Petitioner at 8815 Conroy Windemere Road, Orlando, Florida. The address did not contain the mailbox number and the Petitioner did not receive the determination in the mail.
16. On December 3, 2012, the Tax Auditor who made the determination spoke to the Petitioner's president by telephone. The Petitioner's president explained that the Petitioner never received the determination in the mail. On December 3, 2012, the Tax Auditor faxed a copy of the determination to the Petitioner. The Petitioner filed a written protest by mail postmarked December 19, 2012.
17. On March 28, 2013, an *Order to Show Cause* was mailed to the Petitioner directing the Petitioner to show cause, by filing a written statement within fifteen days, why the Petitioner's protest should not be dismissed for lack of jurisdiction. The *Order to Show Cause* was mailed to 8815 Conroy Windemere Road but did not include the mailbox number. The Petitioner did not receive the *Order to Show Cause* and did not file a written statement.

18. On or before June 5, 2013, a *Notice of Telephone Hearing Before Special Deputy* was mailed to the Petitioner's correct address of record, including the correct mailbox number, advising the Petitioner that a telephone hearing would be held on July 3, 2013. The Petitioner did not receive the *Notice of Telephone Hearing Before Special Deputy* and was not aware of the scheduled hearing. On July 3, 2013, the special deputy attempted to contact the Petitioner for the hearing and left a voice mail message when the telephone was not answered. A *Recommended Order of Dismissal* was mailed to the Petitioner on July 3, 2013. The Petitioner requested reopening of the protest by letter dated July 8, 2013.

Conclusions of Law:

19. Rule 73B-10.035, Florida Administrative Code, provides:
- (18) Request to Re-Open Proceedings. Upon written request of the Petitioner or upon the special deputy's own motion, the special deputy will for good cause rescind a Recommended Order to dismiss the case and reopen the proceedings. Upon written request of the Respondent or Joined Party, or upon the special deputy's own motion, the special deputy may for good cause rescind a Recommended Order and reopen the proceedings if the party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to the party. The special deputy will have the authority to reopen an appeal under this rule provided that the request is filed or motion entered within the time limit permitted to file exceptions to the Recommended Order. A threshold issue to be decided at any hearing held to consider allowing the entry of evidence on the merits of a case will be whether good cause exists for a party's failure to attend the previous hearing. If good cause is found, the special deputy will proceed on the merits of the case. If good cause is not found, the Recommended Order will be reinstated.
20. Rule 73B-10.035(19)(c), Florida Administrative Code, provides that any party aggrieved by the Recommended Order may file written exceptions to the Director or the Director's designee within 15 days of the mailing date of the Recommended Order.
21. The Petitioner requested reopening of the protest within fifteen days of the mailing date of the *Recommended Order of Dismissal*. Thus, the request was timely filed. The Petitioner did not attend the previously scheduled hearing on June 24, 2013, because the Petitioner did not receive notice of the hearing. Thus, good cause for reopening has been established.
22. Section 443.141(2), Florida Statutes, provides:
- (c) *Appeals*.--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.
23. Rule 73B-10.035, Florida Administrative Code provides:
- (1) Filing a Protest. Protests of determinations of liability, assessments, reimbursement requirements, and tax rates are filed by writing to the Department of Revenue in the time and manner prescribed on the determination document. Upon receipt of a written protest, the Department of Revenue will issue a redetermination if appropriate. If a redetermination is not issued, the letter of protest, determination, and all relevant documentation will be forwarded to the Office of Appeals, Special Deputy Section, in the Agency for Workforce Innovation for resolution.
24. Rule 73B-10.035, Florida Administrative Code, provides:
- (5) Timely Protest.
- (a)1. Determinations issued pursuant to Sections 443.1216, 443.131-1312, F.S., will become final and binding unless application for review and protest is filed with the Department

- within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.
2. Determinations issued pursuant to Section 443.141, F.S., will become final and binding unless application for review and protest is filed within 15 days from the mailing date of the determination. If not mailed, the determination will become final 15 days from the date the determination is delivered.
 - (b) If a protest appears to have been filed untimely, the Agency may issue an Order to Show Cause to the Petitioner, requesting written information as to why the protest should be considered timely. If the Petitioner does not, within 15 days after the mailing date of the Order to Show Cause, provide written evidence that the protest is timely, the protest will be dismissed.
25. The Petitioner did not comply with the *Order to Show Cause* because the Petitioner did not receive the *Order to Show Cause*. The Petitioner did not file a written protest within twenty days of the of the October 24, 2012, determination because the Petitioner did not receive the determination until December 3, 2012, when it was faxed to the Petitioner by the Tax Auditor. Both the *Order to Show Cause* and the determination were mailed to an incorrect address. The Petitioner filed the written protest within twenty days of December 3, 2012. Thus, the Petitioner's protest is accepted as timely filed.
 26. 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.
 27. 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).
 28. 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.
 29. 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.
 30. 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.
31. 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.
 32. 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.
 33. There was no written agreement or contract between the Petitioner and the Joined Party. The only verbal agreement was what the Petitioner's president told the Joined Party during the interview. The verbal agreement was that the Joined Party would work Monday through Friday from 9 AM until 5 PM and that the Petitioner would pay the Joined Party \$13 per hour. There was no agreement between the parties that the Joined Party would perform services for the Petitioner as an independent contractor. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."
 34. The Petitioner's business is to help homeowners who are facing foreclosure. The Petitioner hired the Joined Party to greet people when they came into the Petitioner's office, to answer the telephone, and to assist the Petitioner's president with paperwork. 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 Petitioner's business. The Petitioner provided the place of work and all equipment and supplies that were needed to perform the work. The Petitioner reimbursed the Joined Party for any work related expenses. The Joined Party did not have any unreimbursed 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.
 35. The Petitioner provided on-the-job training to teach the Joined Party how to perform the work. It was not shown that the job required any skill or special knowledge. 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. 2^d DCA 1980)
 36. The Joined Party was required to personally perform the work and was paid by time worked rather than by production or by the job. The Petitioner determined the hours of work, the method of pay, and the rate of pay. In that manner the Petitioner was in control of the financial aspects of the relationship. The Petitioner provided fringe benefits such as paid vacations, paid holidays, and paid sick days. In addition to the factors enumerated in the Restatement of Law, the provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004). The fact that the Petitioner did not 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.

37. The Joined Party performed services exclusively for the Petitioner from July 2011 until September 2012, a period in excess of one year. Either party had the right to 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 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."
38. 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. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.
39. It is concluded that the Joined Party performed services for the Petitioner as an employee rather than as an independent contractor.
40. Section 443.1216(1)(a), Florida Statutes, provides in pertinent part:

The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:

 1. An officer of a corporation.
41. 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.
42. The Petitioner is a corporation. The Petitioner's president is active in the operation of the business and has been compensated by a monthly salary since the inception of the business. Thus, the Petitioner's president is a statutory employee of the Petitioner.
43. Section 443.1216, Florida Statutes, provides that Employment, as defined in s.443.036, is subject to this chapter under the following conditions:
 - (3) The employment subject to this chapter includes service performed by an individual in the employ of a religious, charitable, educational, or other organization, if:
 - (a) The service is excluded from the definition of "employment" in the Federal Unemployment Tax Act solely by reason of s. 3306(c)(8) of that act; and
 - (b) The organization had at least four individuals in employment for some portion of a day in each of 20 different weeks during the current or preceding calendar year, regardless of whether the weeks were consecutive and whether the individuals were employed at the same time.

44. 3306(c)(8) of the Federal Unemployment Tax Act, as referred to in Section 443.1216(3)(a), Florida Statutes, provides an exclusion from the definition of employment for federal unemployment tax purposes for service performed in the employ of a religious, charitable, educational, or other organization described in section 501 (c)(3) which is exempt from income tax under section 501 (a).
45. The Petitioner was formed as a Florida non profit corporation, however, the Petitioner has not received notice of any tax exemption from the Internal Revenue Service.
46. Section 443.1215, Florida States, 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.
47. The Petitioner's president has been active in the operation of the business since inception in April 2011. Thus, the Petitioner has had at least one employee performing services during twenty different weeks of the 2011 calendar year.
48. The Department of Revenue correctly held that the services performed by the Joined Party for the Petitioner retroactive to July 5, 2011, constitute insured employment. The Department of Revenue correctly held that the services performed for the Petitioner by the Petitioner's president constitute insured employment. However, based on the employment of the Petitioner's president the correct retroactive date of liability is April 5, 2011, rather than July 5, 2011.

Recommendation: It is recommended that the determination dated October 24, 2012, be MODIFIED to reflect a retroactive date of liability beginning April 5, 2011. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on September 9, 2013.



A handwritten signature in dark 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 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.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:

September 9, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

MELANIE MARTINEZ
682 SPREADING OAK AVE
DELTONA FL 32738

DEPARTMENT OF REVENUE
ATTN: JODY BURKE
4230-D LAFAYETTE ST.
MARIANNA, FL 32446

FORECLOSURE RESCUE FOUNDATION INC
8815 CONROY-WINDERMERE RD #376
ORLANDO FL 32835

DEPARTMENT OF REVENUE
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