

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

**PETITIONER:**

Employer Account No. - 2157893  
PATHFINDER PAYMENT SOLUTIONS INC  
ATTN JASON KULA FINANCE MANAGER  
COLUMBIA MD 21046-5120

**PROTEST OF LIABILITY**  
**DOCKET NO. 0019 3454 11-01**

**RESPONDENT:**

DEPARTMENT OF ECONOMIC  
OPPORTUNITY  
c/o Department of Revenue  
Compliance Enforcement

**ORDER**

This matter comes before me for final Department Order.

The issues before me are 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, and whether services performed for the Petitioner by the Joined Party and other individuals working as Director of Business Management/Sales Manager constitute insured employment, and if so, the effective date of liability pursuant to sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed a reemployment assistance claim in March 2013. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Department of Economic Opportunity (the Department) that he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As a result of the Joined Party's request, the Department of Revenue, hereinafter referred to as the Respondent, conducted an investigation to determine whether the Joined Party and other individuals working as Director of Business Development/Sales Manager performed services for the Petitioner as employees or independent contractors. If the Joined Party worked for the Petitioner as an employee, he would qualify for reemployment assistance benefits, and the Petitioner would owe reemployment assistance taxes on the remuneration it paid to the Joined Party and any other workers who performed services under the same terms and conditions. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, he would remain ineligible for benefits, and the Petitioner would not owe reemployment assistance taxes on the wages it paid to the Joined Party and any other

individuals performing services as Director of Business Development/Sales Manager. Upon completing the investigation, the Respondent's auditor determined that the services performed by the Joined Party and other workers performing services under the same terms and conditions were in insured employment. The Petitioner was required to pay reemployment assistance taxes on wages it paid to the Joined Party and other individuals working as Director of Business Development/Sales Manager. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because he had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on September 4, 2013. The Petitioner, represented by its Finance Manager, appeared and testified. The Respondent, represented by a Senior Tax Specialist, appeared and testified. The Joined Party did not appear for the hearing. The Special Deputy issued a recommended order on September 6, 2013.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is a Maryland corporation which is involved in the business of providing services, such as processing credit card payments, to small businesses. The Petitioner decided to operate a new segment of the Petitioner's business in Florida beginning on or about April 1, 2012.
2. The Joined Party is an individual who was acquainted with the Petitioner's president. The Petitioner's president thought that it would be a great idea to have the Joined Party operate the new segment of the business in Florida for the Petitioner. The Petitioner's president entered into an oral agreement to pay the Joined Party \$6,000 per month to operate the Florida segment of business.
3. The Petitioner rented the Florida business location and provided all of the equipment and supplies that were needed to operate a call center. The Joined Party interviewed applicants for employment positions in the call center and the Petitioner chose which employees to hire. The Petitioner hired approximately five employees and the Joined Party was responsible for training and supervising the Petitioner's employees.
4. The Petitioner established the hours of operation of the call center as 10 AM until 4:30 PM, Monday through Friday.
5. The call center employees were paid by the Petitioner. The Petitioner registered with the Florida Department of Revenue for payment of reemployment assistance program contributions on the earnings of the employees.
6. The Petitioner paid the Joined Party on a biweekly basis and did not withhold payroll taxes from the pay. The Petitioner did not report the Joined Party's earnings to the Department of Revenue for payment of reemployment assistance program contributions.
7. At the end of 2012 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

8. Either the Petitioner or the Joined Party had the right to terminate the relationship at any time without incurring liability for breach of contract. In early 2013 the Petitioner discontinued the Florida segment of business because it was not profitable. The relationship with the Joined Party was terminated at that time.
9. The Joined Party filed a claim for reemployment assistance benefits effective March 17, 2013. When the Joined Party did not receive credit for his earnings with the Petitioner he filed a *Request for Reconsideration of Monetary Determination* and an investigation was issued to the Department of Revenue to determine whether the Joined Party performed services for the Petitioner as an employee or as an independent contractor.
10. On April 28, 2013, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner as Director of Business Development/Sales Manager are the Petitioner's employees. The determination was mailed to the Petitioner at an incorrect address and was returned by the Post Office.
11. The Department of Revenue re-mailed the determination to the Petitioner's correct mailing address by mail postmarked May 16, 2013. The Petitioner received the determination on May 23, 2013, and filed a written protest on May 24, 2013.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated April 26, 2013, be affirmed. The Petitioner's exceptions were received by mail and fax on September 20, 2013. While the Petitioner submitted additional exceptions by fax on September 24, 2013, those exceptions are not being considered in this order because rule 73B-10.035(19)(c), Florida Administrative Code, requires that exceptions be filed within 15 days of the mailing date of the Recommended Order. No other submissions were received from any party.

With respect to the recommended order, section 120.57(1)(l), Florida Statutes, provides:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but

an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Also, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

In its exceptions, the Petitioner alleges that the Special Deputy's Findings of Fact are incorrect. Pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Findings of Fact unless the Department first determines from a review of the entire record that the findings of fact were not based upon competent substantial evidence. A review of the record reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. As a result, the Department may not modify or the Special Deputy's Findings of Fact pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact as written by the Special Deputy. The Petitioner's exceptions are respectfully rejected.

A review of record also reveals that the Special Deputy did not cite current law in Conclusions of Law 12-14. Also pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Conclusions of Law unless the Department first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. The record reflects that Conclusions of Law 12-14 do not contain current law and do not reflect a reasonable application of the law to the facts. Accordingly, Conclusion of Law 12 is modified as follows:

Section 443.141(2), Florida Statutes, provides:

- (c) *Appeals*.--The department and the state agency providing reemployment assistance 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.

Conclusion of Law 13 is amended as follows:

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 DOR in the time and manner prescribed on the determination document. Upon receipt of a written protest, DOR 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 DEO for resolution.

Conclusion of Law 14 is amended similarly:

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 DOR 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, DEO 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.

The modified Conclusions of Law reflect a more reasonable application of the law to the facts.

Competent substantial evidence in the record continues to support the Special Deputy's ultimate conclusions that the Petitioner filed a timely protest and that the Joined Party performed services in insured work for the Petitioner. These conclusions reflect a reasonable application of the law to the facts. As a result, the Special Deputy's conclusions that the Petitioner filed a timely protest and that the Joined Party performed services in insured work for the Petitioner are accepted by the Department.

Having considered the Petitioner's exceptions, the record of this case, and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact as set forth in the Recommended Order. I adopt the Conclusions of Law as modified above. I also adopt the Special Deputy's Recommendation that the Respondent's determination be affirmed.

Therefore, it is ORDERED that the determination dated April 26, 2013, is 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 prezantè 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 13<sup>th</sup> 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 13<sup>th</sup> day of January, 2014.

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:

PATHFINDER PAYMENT SOLUTIONS  
INC  
ATTN JASON KULA FINANCE  
MANAGER  
9693-A GERWIG LANE STE A  
COLUMBIA MD 21046-5120

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

JOHN A DEMARCO  
PO BOX 6883  
HUDSON FL 34674

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. - 2157893  
PATHFINDER PAYMENT SOLUTIONS INC  
ATTN JASON KULA FINANCE MANAGER  
9693-A GERWIG LANE STE A  
COLUMBIA MD 21046-2851

**PROTEST OF LIABILITY  
DOCKET NO. 2013-54367L**

**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 April 26, 2013.

After due notice to the parties, a telephone hearing was held on September 4, 2013. The Petitioner, represented by its Finance Manager, appeared and testified. The Respondent, represented by a Department of Revenue Senior Tax Specialist, 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 Director of Business Management/Sales Manager 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 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.

**Findings of Fact:**

1. The Petitioner is a Maryland corporation which is involved in the business of providing services, such as processing credit card payments, to small businesses. The Petitioner decided to operate a new segment of the Petitioner's business in Florida beginning on or about April 1, 2012.

2. The Joined Party is an individual who was acquainted with the Petitioner's president. The Petitioner's president thought that it would be a great idea to have the Joined Party operate the new segment of the business in Florida for the Petitioner. The Petitioner's president entered into an oral agreement to pay the Joined Party \$6,000 per month to operate the Florida segment of business.
3. The Petitioner rented the Florida business location and provided all of the equipment and supplies that were needed to operate a call center. The Joined Party interviewed applicants for employment positions in the call center and the Petitioner chose which employees to hire. The Petitioner hired approximately five employees and the Joined Party was responsible for training and supervising the Petitioner's employees.
4. The Petitioner established the hours of operation of the call center as 10 AM until 4:30 PM, Monday through Friday.
5. The call center employees were paid by the Petitioner. The Petitioner registered with the Florida Department of Revenue for payment of reemployment assistance program contributions on the earnings of the employees.
6. The Petitioner paid the Joined Party on a biweekly basis and did not withhold payroll taxes from the pay. The Petitioner did not report the Joined Party's earnings to the Department of Revenue for payment of reemployment assistance program contributions.
7. At the end of 2012 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
8. Either the Petitioner or the Joined Party had the right to terminate the relationship at any time without incurring liability for breach of contract. In early 2013 the Petitioner discontinued the Florida segment of business because it was not profitable. The relationship with the Joined Party was terminated at that time.
9. The Joined Party filed a claim for reemployment assistance benefits effective March 17, 2013. When the Joined Party did not receive credit for his earnings with the Petitioner he filed a *Request for Reconsideration of Monetary Determination* and an investigation was issued to the Department of Revenue to determine whether the Joined Party performed services for the Petitioner as an employee or as an independent contractor.
10. On April 28, 2013, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner as Director of Business Development/Sales Manager are the Petitioner's employees. The determination was mailed to the Petitioner at an incorrect address and was returned by the Post Office.
11. The Department of Revenue re-mailed the determination to the Petitioner's correct mailing address by mail postmarked May 16, 2013. The Petitioner received the determination on May 23, 2013, and filed a written protest on May 24, 2013.

#### **Conclusions of Law:**

12. 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.
13. 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.

14. 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.

15. The determination of the Department of Revenue was not mailed to the Petitioner's correct address until mail postmarked May 16, 2013. The protest was filed on May 24, 2013. Since the protest was filed in writing within twenty days of the date that the determination was mailed to the Petitioner's correct mailing address, the protest was timely filed.

16. 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.

17. 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).

18. 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.

19. 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.

20. 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.
21. 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.
22. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1<sup>st</sup> DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1<sup>st</sup> DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often can not be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.
23. The only evidence presented in this case regarding the agreement between the Petitioner and the Joined Party is the testimony of the Petitioner's Finance Manager. The agreement was verbal and the Finance Manager was not a party to the verbal agreement. 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."
24. The Petitioner's business is to provide business services, such as credit card processing, for small businesses. The Joined Party was engaged to manage the Florida segment of the Petitioner's business. The Petitioner's segment of business in Florida was not separate and distinct from the Petitioner's business was an integral part of the business.
25. The Petitioner provided the place of work and all of the equipment and supplies that were needed to perform the work. The Petitioner paid the employees who worked in the call center and was responsible for all other expenses of operation.
26. The Petitioner paid the Joined Party \$6,000 per month. The Joined Party's pay was not based on production. Thus, the Joined Party was paid by time worked. 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.
27. The Joined Party performed services for the Petitioner for a period of over nine months. 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."

28. The Petitioner's Finance Director was not a party to the agreement and does not have personal knowledge of the terms and conditions under which the Joined Party performed services for the Petitioner. The majority of the competent evidence presented in this case points directly to an employer-employee relationship. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error. No competent evidence has been presented to show that the Joined Party performed services as an independent contractor.

**Recommendation:** It is recommended that the determination dated April 26, 2013, be AFFIRMED.

Respectfully submitted on September 6, 2013.



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.

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:  
September 6, 2013

Copies mailed to:

Petitioner  
Respondent  
Joined Party

JOHN A DEMARCO  
12825 PECAN TREE DRIVE  
HUDSON FL 34669-2850

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

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