

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

PETITIONER:

Employer Account No. - 1077186
R E RODRIGUEZ PA
ATTN RAFAEL RODRIGUEZ CPA
8410 NW 53RD TERRACE SUITE 211
DORAL FL 33166

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-48056L**

ORDER

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated April 18, 2013, is MODIFIED to reflect a retroactive date of August 11, 2010. It is further ORDERED that the determination is AFFIRMED as modified.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **September, 2013**.



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

DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of September, 2013.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
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Reemployment Assistance Appeals
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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:

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RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-48056L**

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 18, 2013.

After due notice to the parties, a telephone hearing was held on August 7, 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:

Whether services performed for the Petitioner by the Joined Party and other individuals working as computer draftsmen, 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, R E Rodriguez, P.A., is incorporated as a professional association to operate the accounting practice of a Certified Public Accountant, Raphael Rodriguez, the Petitioner's president. Raphael Rodriguez is also president of another company, Don Rice Company, LLC, which is involved in the sale of machinery that is used in the rice industry.
2. In addition to its accounting practice the Petitioner conducts feasibility studies and marketing research for its clients. The feasibility studies require computer-aided design or drafting. The Joined Party had performed services in sales for Don Rice Company, LLC. The Joined Party had experience in computer-aided design and applied for work with the Petitioner in August 2010.

3. The Petitioner offered work to the Joined Party and informed the Joined Party that the hours of the business were from 8 AM until 5 PM, Monday through Friday, that the Joined Party was restricted to working no more than seven hours a day, that the Petitioner would pay the Joined Party \$15 per hour, and that the Joined Party would be paid as an independent contractor. The Joined Party accepted the offer and began work on or about August 11, 2010. The parties did not enter into any written agreement or contract.
4. All of the Joined Party's work was performed in the Petitioner's office. The Petitioner provided the work space, a desk, a computer, a printer, and all other equipment and supplies that were needed to perform the work. The Joined Party was not required to provide any equipment, tools, or supplies and did not have any expenses in connection with the work.
5. The Joined Party was required to personally perform the work. He was not allowed to hire others to assist him or to perform the work for him. The Joined Party was not allowed to perform drafting work for others or to perform services for a competitor.
6. The Petitioner did not provide the Joined Party with a key to the Petitioner's office and the Joined Party was restricted to working only during the Petitioner's regular business hours. The Joined Party was allowed to take a thirty minute lunch break each day.
7. The Joined Party's regular work schedule was thirty-five hours per week amounting to a weekly pay of \$525. The Joined Party did not work on holidays but was paid by the Petitioner for the holidays. The Joined Party did not receive any other fringe benefits such as paid vacations or health insurance.
8. The Joined Party was usually paid by check drawn against the bank account of the Petitioner. On at least three occasions the Petitioner paid the Joined Party from the bank account of Don Rice Company, LLC due to the availability of funds. On several occasions the Joined Party requested to be paid in cash and the Petitioner complied. No payroll taxes were withheld from the Joined Parties earnings. At the end of each year the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as "other income."
9. The Joined Party's work was reviewed by the Petitioner's president. On occasion the president criticized the Joined Party's work and directed the Joined Party to make changes. The Joined Party complied.
10. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Petitioner terminated the relationship on January 18, 2013, due to lack of work.
11. The Joined Party filed a claim for reemployment assistance benefits effective January 13, 2013. When the Joined Party did not receive credit for his 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.
12. On April 18, 2013, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner as computer design are the Petitioner's employees retroactive to January 1, 2011. The Petitioner filed a timely protest.

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. The only agreement between the parties is the verbal agreement created by the Petitioner at the time of hire. At the time of hire the Petitioner told the Joined Party that the Joined Party would be paid as an independent contractor. The Florida Supreme Court has 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 asserts that the work performed by the Joined Party was not part of the Petitioner's business, accounting. However, the Petitioner testified that the Petitioner's business includes performing feasibility studies for the Petitioner's clients. Thus, feasibility studies which require computer-aided design are part of the Petitioner's business. The Joined Party performed the work at the Petitioner's location and the Petitioner provided everything that was needed to perform the work. It was not shown that the Joined Party had any expenses in connection with the work, that the Joined Party had an investment in a business, that the Joined Party offered services to the general public, or that the Joined Party was at risk of suffering a financial loss from performing services.
22. Computer-aided design work requires some degree of skill or knowledge. Generally, 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) However, in James v. Commissioner, 25 T.C. 1296, 1301 (1956), the court stated in holding that a doctor was an employee of a hospital "The methods by which professional men work are prescribed by the techniques and standards of their professions. No layman should dictate to a lawyer how to try a case or to a doctor how to diagnose a disease. Therefore, the control of an employer over the manner in which professional employees shall conduct the duties of their positions must necessarily be more tenuous and general than the control over the non-professional employees." In University Dental Health Center, Inc. v. Agency for Workforce Innovation, 89 So. 3rd 1139 (Fla. 4th DCA 2012), a case involving a dentist who performed services for a dental office, the court found that the dentist was a highly skilled professional who performed services without supervision, who determined what treatments were necessary, and who determined how to perform the treatments. The court found that the relationship was at-will, that the dental office provided the tools and space for the dentist, that the dental office scheduled the patients, that the dentist could not refuse patients, that the dentist was required to report for work at a particular time, and that the dentist could leave only if there were no scheduled patients. The court determined that the dentist was an employee of the dental office.
23. The Joined Party was paid by time worked rather than based on production or by the job. The Petitioner determined the Joined Party's work schedule and the hourly rate of pay. In this manner the Petitioner controlled the financial aspects of the relationship. 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.
24. The Petitioner paid the Joined Party for holidays even though the Joined Party did not work on the holidays. Paid holidays are a fringe benefit that is normally reserved for employment relationships. 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).

25. The Joined Party performed services exclusively for the Petitioner from August 2010 until January 2013, a period of approximately two and one-half years. 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."
26. The evidence reveals that the Petitioner controlled what work was performed, where it was performed, when it was performed, by whom it was performed, and how it was performed. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.
27. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as computer-aided designers or draftsmen constitute insured employment. However, the determination of the Department of Revenue is only retroactive to January 1, 2011, while the evidence reveals that the Joined Party performed services beginning on or about August 11, 2010. Thus, the correct retroactive date is August 11, 2010.

Recommendation: It is recommended that the determination dated April 18, 2013, be MODIFIED to reflect a retroactive date of August 11, 2010. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on August 9, 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:
August 9, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

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