

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

**PETITIONER:**

Employer Account No. – 2480332  
2020 FINANCIAL ADVISERS OF  
DAYTONABEACH LLC  
ATTN: E ROBERT BRANCH III  
345 CLYDE MORRIS BLVD STE 460  
ORMOND BEACH FL 32174-3114

**PROTEST OF LIABILITY  
DOCKET NO. 0023 5735 44-02**

**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 July 17, 2014, is AFFIRMED.

### JUDICIAL REVIEW

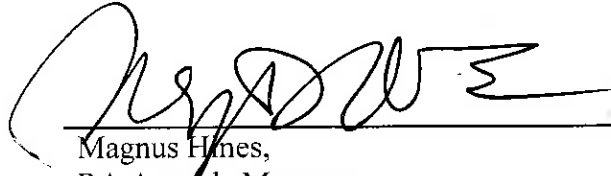
Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed 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 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 21<sup>st</sup> day of April, 2015.



  
Magnus Hines,  
RA Appeals Manager,  
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.

  
DEPUTY CLERK

4-21-15  
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 21<sup>st</sup> day of April, 2015.

  
SHANEDRA Y. BARNES, Special Deputy Clerk  
DEPARTMENT OF ECONOMIC  
OPPORTUNITY  
Reemployment Assistance Appeals  
PO BOX 5250  
TALLAHASSEE FL 32399-5250

By U.S. Mail:

KATERINA PATYK  
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DAYTONA BEACH FL 32124

2020 FINANCIAL ADVISERS OF  
DAYTONA BEACH LLC  
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State of Florida  
DEPARTMENT OF ECONOMIC OPPORTUNITY  
c/o Department of Revenue

**DEPARTMENT OF ECONOMIC OPPORTUNITY  
Reemployment Assistance Appeals  
PO BOX 5250  
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**PETITIONER:**

Employer Account No. - 2480332  
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DOCKET NO. 0023 5735 44-02**

**RESPONDENT:**

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

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Magnus Hines  
RA Appeals Manager,  
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 July 17, 2014.

After due notice to the parties, a telephone hearing was held on January 20, 2015. The Petitioner was represented by its attorney. The Petitioner's Managing Partner testified as a witness. The Respondent, represented by a Department of Revenue Senior Tax Specialist, appeared and testified. The Joined Party appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is here with 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 constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

**Findings of Fact:**

1. The Petitioner, 2020 Financial Advisers of Daytona Beach, LLC, is a Florida limited liability company which has operated a financial advisory business since 2003. At some point in time the Petitioner transferred most of its employees to an employee leasing company.
2. During the latter part of 2012 the Petitioner was seeking to hire an individual to perform various clerical and administrative tasks in the Petitioner's office. Due to financial reasons the Petitioner did not want to commit to the expense of hiring a permanent employee without knowing whether or not the worker would be a satisfactory employee.

3. One of the producers associated with the Petitioner knew the Joined Party and referred the Joined Party to the Petitioner. The Joined Party submitted a resume and the Petitioner's Managing Partner and the producer interviewed the Joined Party during the latter part of 2012. The Managing Partner gave the Joined Party a brief description of the duties but would not tell the Joined Party how the Joined Party would be compensated until after the Joined Party worked a brief trial period. The Joined Party accepted the Petitioner's terms. The parties did not enter into a written agreement or contract.
4. The Petitioner would not allow the Joined Party to work the trial period until after the Petitioner completed a background check, a pre-hire process that is completed for all new employees. The Joined Party was finger printed. The Petitioner completed the background check, including a review of the Joined Party's credit reports, during the latter part of 2012. The Joined Party began work at the beginning of 2013.
5. The Petitioner's regular business hours are from 8:30 AM until 5:00 PM, however, usually there are employees working in the office after 5:00 PM. The Joined Party was required to work forty hours each week. If the Joined Party was not able to work on a regularly scheduled work day the Petitioner allowed the Joined Party the flexibility of making up the time on another day or days. If the Petitioner required the Joined Party to work overtime, the Petitioner allowed the Joined Party to offset the overtime by taking time off. The Joined Party was required to complete a timesheet.
6. The Petitioner gave the Joined Party tasks to perform and showed her how to perform the tasks. The work was not complex and did not require formal training. After the Petitioner determined that the Joined Party could perform the work satisfactorily the Petitioner informed the Joined Party that the Joined Party would be paid \$1,250.00 bi-weekly.
7. The Joined Party performed the work from the Petitioner's business office. The Petitioner provided a desk, computer, telephone, and any other equipment and supplies that were needed to perform the work. Occasionally, the Joined Party purchased something for the office and on those occasions the Joined Party was reimbursed by the Petitioner. The Joined Party did not have any unreimbursed expenses in connection with the work.
8. The Petitioner did not withhold any payroll taxes from the Joined Party's earnings. The Petitioner did not provide any fringe benefits such as health insurance or paid vacations. The Petitioner did pay the Joined Party for holidays.
9. The Joined Party did not have any investment in a business, did not advertise her services to the general public, performed services only for the Petitioner, did not have a business license, and did not have business liability insurance. Either party could terminate the relationship at any time without incurring liability for breach of contract.
10. The Joined Party proved to be a satisfactory worker and on October 1, 2013, the Petitioner transferred her to the employee leasing company as a permanent employee.
11. Following the end of 2013 the Petitioner reported the Joined Party's earnings for the period prior to October 1, 2013, on Form 1099-MISC as nonemployee compensation in the amount of \$24,015.95.
12. The Joined Party continued working for the Petitioner as a leased employee of the employee leasing company until she was terminated by the Petitioner. The Joined Party filed a claim for reemployment assistance benefits and when she did not receive credit for her earnings received prior to October 2013 an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor. On July 17, 2014, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to January 1, 2013. The Petitioner filed a timely protest by letter dated July 25, 2014.

**Conclusions of Law:**

13. The issue in this case, whether services performed for the Petitioner by the Joined Party 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. 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.

20. In this case there was no formal written agreement or contract between the Petitioner and the Joined Party. The verbal agreement was merely that the Joined Party would perform clerical services at the Petitioner's direction during a trial period. 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."
21. The Petitioner operates a financial advisory business. The Joined Party was hired to perform clerical duties for the Petitioner in the Petitioner's office. 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 business. The Petitioner provided the place of work and everything that was needed to complete the work. The Joined Party did not have expenses in connection with the work, did not have an investment in a business, and was not at risk of suffering a financial loss from performing services.
22. The work performed by the Joined Party did not require any special skill or knowledge. The Joined Party simply performed the work as instructed. 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)
23. The Petitioner paid the Joined Party by time worked rather than by production or by the Job. The Petitioner determined and controlled the hours of work, the method of pay, and the rate of pay. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Reemployment Assistance Program Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash.
24. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Joined Party performed services for the Petitioner during the time in question from January 1, 2013, until September 30, 2013, however, the Joined Party continued to perform services for the Petitioner as a leased employee beginning October 1, 2013, until the time of termination from the employee leasing company. 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."
25. The Petitioner controlled what work was performed, where it was performed, when it was performed, and how it was performed. The Petitioner controlled the financial aspects of the relationship. 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.
26. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.



**Recommendation:** It is recommended that the determination dated July 17, 2014, be AFFIRMED.  
Respectfully submitted on March 5, 2015.




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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 resumen en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke Lòd Rekòmande a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke Lòd Rekòmande a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

*Shanendra Y. Barnes*

SHANEDRA Y. BARNES, Special Deputy Clerk

**Date Mailed:**  
**March 5, 2015**

Copies mailed to:

Petitioner

Respondent

Joined Party

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