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

PETITIONER:
Employer Account No. - 3131899

ALLIANCE TRANSPORT SERVICES LLC
12556 W ATLANTIC BLVD
CORAL SPRINGS FL 33071-4085

PROTEST OF LIABILITY
DOCKET NO. 2013-23114L

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

O R D E R

This matter comes before me for final Department Order.

An issue before me is whether services performed for the Petitioner by the Joined Party constitute insured employment, and if so, the effective date of liability pursuant to sections 443.036(19); 443.036(21); 443.1216, Florida Statutes. An issue also before me is 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.

The Joined Party filed a reemployment assistance claim in December 2012. An initial determination held that the Joined Party earned sufficient 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 worked for the Petitioner as an employee or independent contractor. If the Joined Party worked for the Petitioner as an employee, the Petitioner would owe reemployment assistance taxes on the remuneration it paid to the Joined Party. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, the Petitioner would not owe reemployment assistance taxes on the wages it paid to the Joined Party.

Upon completing the investigation, the Respondent's auditor determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay reemployment assistance taxes on wages it paid to the Joined Party. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because he had an interest in the outcome of the case.

A telephone hearing was held on July 10, 2013. The Petitioner, represented by its director, appeared and testified. The Respondent, represented by a Tax Specialist II, appeared and testified. The Joined Party appeared and testified on his own behalf. The Special Deputy issued a recommended order on August 7, 2013.

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

1. The Petitioner, Alliance Transport Services, LLC, is a Florida limited liability company which was formed effective November 15, 2007, and which is classified as a corporation for federal tax purposes. The Petitioner operates a business as a truck transportation broker. The Petitioner's director has been active in the operation of the business since its inception.

2. The Joined Party is an individual with over forty years experience in sales. In 2011 the Joined Party was employed by an ocean freight company but during the latter part of 2011 he was seeking other employment and posted his resume on the Internet. The Petitioner was seeking to hire a sales representative to sell domestic trucking services and contacted the Joined Party. The Joined Party informed the Petitioner that his experience in the sale of trucking services was as an adjunct to the sale of ocean and air freight, more or less as a person who would purchase the Petitioner's services rather than to sell the Petitioner's services. In spite of the Joined Party's lack of experience selling trucking services the Petitioner's director interviewed the Joined Party on or about February 3, 2012, and offered the position to the Joined Party at a salary of $400 per week. The Joined Party was earning approximately $35,000 per year in his current employment and he rejected the Petitioner's offer. The Petitioner then offered to pay the Joined Party $400 per week plus a draw against future commissions of $300 per week for a total of $700 per week. The Joined Party accepted the Petitioner's offer.

3. On February 3, 2012, the Petitioner presented the Joined Party with several documents to sign, including an *Independent Contractor Agreement*, a *Confidentiality Agreement*, and a *Covenant Not to Compete*. The Joined Party signed the documents and, after resigning his existing employment, began performing services for the Petitioner on February 6, 2012.

4. The *Independent Contractor Agreement* states that the Joined Party is retained by the Petitioner as an Account Executive and that the time period for the Agreement is expected to be for a minimum of one year. The Agreement states that the Joined Party is an independent contractor, that the Joined Party is responsible for all state and federal taxes that apply to the Joined Party's wages, that the Petitioner will not withhold any taxes from the pay, and that the Joined Party is not eligible to receive any fringe benefits.

5. The *Confidentiality Agreement* provides that the Joined Party agrees to hold all confidential or proprietary information or trade secrets in trust and confidence, agrees that such information shall be used only for the contemplated purpose and shall not be used for any other purpose or disclosed to any third party under any circumstances whatsoever, that the Joined Party may not make any copies of any written information, and that at the conclusion of discussions between the Petitioner and the Joined Party, or upon demand by the Petitioner, all information including written notes, photographs, or memoranda shall be promptly returned to the Petitioner.

6. The *Covenant Not to Compete* states that the Joined Party agrees "that for so long as he/she is an agent of the Corporation and for the five year period he/she ceases to be contracted by the Corporation (the 'Covenant Period') he/she will not directly or indirectly, either for himself/herself, or as agent, employee, officer, director, Trustee, consultant or shareholder, for or with any other person or persons, firms or corporations, engage in or become financially interested in, or participate in any capacity with any person or entity which shall compete with the Corporation, or solicit or contract with any customers or accounts of the Corporation existing at the effective date of severance."

7. Due to the Joined Party's extensive experience in sales the Petitioner's director determined that he did not need to train the Joined Party how to make sales. However, due to the Joined Party's lack of experience in the sale of trucking services the director instructed the Joined Party to observe the director so that the Joined Party could learn how to perform the work. The director told the Joined Party what to do and how to do it.

8. The director told the Joined Party that the Joined Party was required to work Monday through Friday from 9 AM until 5 PM. Almost all of the Joined Party's work was performed from the Petitioner's office. There were a few occasions when the director and the Joined Party met with a customer outside the Petitioner's office. On one of those occasions the customer was located near the Joined Party's home between the Joined Party's home and the Petitioner's office. On that occasion the Joined Party drove from his home to the customer's location and the Petitioner's director met the Joined Party at the customer's location. On all other occasions the Joined Party rode in the director's vehicle with the director.

9. The Joined Party was not free to come and go as he pleased. The Joined Party was required to request time off from work and to request permission if the Joined Party had to leave the office early.

10. The Petitioner provided the Joined Party with workspace in the Petitioner's office. The Petitioner provided all of the equipment and supplies that were needed to perform the work. The Petitioner provided the Joined Party with a company email address. The Joined Party did not have any expenses in connection with the work.

11. The Joined Party was responsible for cold calling prospective customers and accepting quote requests from companies that were interested in using the Petitioner's services. The Joined Party was then required to obtain a price quote from the Petitioner's director. The Joined Party was not allowed to deviate from the amount of the quote. If the prospective customer attempted to negotiate a lower price the Joined Party was required to present the customer's offer to the director for approval or rejection.

12. The Petitioner decided to hire telephone solicitors to make the cold calls to generate leads for the Joined Party to contact. The director instructed the Joined Party to interview the applicants for the telephone solicitor position. After the Petitioner hired the telephone solicitors the Petitioner instructed the Joined Party to write a script for the telephone solicitors and to supervise the telephone solicitors. The telephone solicitors were paid by the Petitioner, not by the Joined Party.

13. The Petitioner paid the Joined Party on a weekly basis. No taxes were withheld from the pay and no fringe benefits, such as health insurance and paid vacations, were provided to the Joined Party. The Joined Party was aware that a portion of his earnings were considered to be a draw against commissions, however, the Petitioner never provided the Joined Party with an accounting to show the amount of the earned commissions or to show if the Joined Party's earned commissions were less than the draws.

14. The Joined Party did not have an investment in a business, did not have business liability insurance, did not have a business license or occupational license, did not advertise, and did not offer services to the general public.

15. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. On or about November 30, 2012, the Petitioner informed the Joined Party that the Petitioner was eliminating the draw. The Joined Party was unwilling to accept the elimination of the draw and discontinued performing services for the Petitioner.

16. The Joined Party filed an initial claim for unemployment compensation benefits, now know as reemployment assistance program benefits, effective December 2, 2012. The Joined Party established a valid claim for benefits based on his prior employment, however, he did not receive credit for his earnings with the Petitioner. As a result 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.

17. During the course of the investigation the Department of Revenue determined that the Petitioner had never registered for payment of unemployment compensation tax. On January 24, 2013, the Department of Revenue issued a determination holding that the Joined Party performed services for the Petitioner as an employee and holding that the Petitioner was liable for payment of unemployment tax effective February 6, 2012. The Petitioner filed a timely protest on January 31, 2013.

18. The Petitioner has not required the Joined Party to repay any excess draws and has not made any decision to require the Joined Party to repay the excess draws at any time in the future.

19. In the middle of February 2013 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated January 24, 2013, be affirmed. The Petitioner submitted exceptions on August 22, 2013. 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.

The Petitioner takes exception to the Special Deputy's Findings of Fact. The Petitioner specifically takes exception to Findings of Fact #2, 7-13, and 17. The Petitioner also proposes alternative findings of fact and conclusions of law and requests consideration of evidence previously considered by the Special Deputy. Pursuant to section 120.57(1)(l), Florida Statutes, the Special Deputy is the trier of fact in an administrative hearing, and 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. 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. A review of the record reveals that the Special Deputy resolved conflicts in evidence in favor of the Joined Party based on the record of the hearing.

A review of the record further reveals that the Special Deputy's Findings of Fact, including Findings of Fact #2, 7-13, and 17, are supported by competent substantial evidence in the record and the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As a result, the Department may not modify or reject the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. Accordingly, the Petitioner's exceptions are respectfully rejected.

A review of the record reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

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 and Conclusions of Law of the Special Deputy as set forth in the Recommended Order. A copy of the Recommended Order is attached and incorporated in this order.

Therefore, it is ORDERED that the determination dated January 24, 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 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 **October, 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.

Sherren D. 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 October, 2013.

Sherren D. 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:

ALLIANCE TRANSPORT SERVICES LLC
12556 W ATLANTIC BLVD

CORAL SPRINGS FL 33071-4085

LESTER BUSHMAN
10680 NW 12TH DRIVE
PLANTATION FL 33322

DEPARTMENT OF REVENUE
ATTN: JODY BURKE
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FLORIDA 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
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PETITIONER:
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CORAL SPRINGS FL 33071-4085

PROTEST OF LIABILITY
DOCKET NO. 2013-23114L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated January 24, 2013.

After due notice to the parties, a telephone hearing was held on July 10, 2013. The Petitioner, represented by its director, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 received from the Petitioner.

Issue:

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.

Findings of Fact:

1. The Petitioner, Alliance Transport Services, LLC, is a Florida limited liability company which was formed effective November 15, 2007, and which is classified as a corporation for federal tax purposes. The Petitioner operates a business as a truck transportation broker. The Petitioner's director has been active in the operation of the business since its inception.

2. The Joined Party is an individual with over forty years experience in sales. In 2011 the Joined Party was employed by an ocean freight company but during the latter part of 2011 he was seeking other employment and posted his resume on the Internet. The Petitioner was seeking to hire a sales representative to sell domestic trucking services and contacted the Joined Party. The Joined Party informed the Petitioner that his experience in the sale of trucking services was as an adjunct to the sale of ocean and air freight, more or less as a person who would purchase the Petitioner's services rather than to sell the Petitioner's services. In spite of the Joined Party's lack of experience selling trucking services the Petitioner's director interviewed the Joined Party on or about February 3, 2012, and offered the position to the Joined Party at a salary of $400 per week. The Joined Party was earning approximately $35,000 per year in his current employment and he rejected the Petitioner's offer. The Petitioner then offered to pay the Joined Party $400 per week plus a draw against future commissions of $300 per week for a total of $700 per week. The Joined Party accepted the Petitioner's offer.

3. On February 3, 2012, the Petitioner presented the Joined Party with several documents to sign, including an *Independent Contractor Agreement*, a *Confidentiality Agreement*, and a *Covenant Not to Compete*. The Joined Party signed the documents and, after resigning his existing employment, began performing services for the Petitioner on February 6, 2012.

4. The *Independent Contractor Agreement* states that the Joined Party is retained by the Petitioner as an Account Executive and that the time period for the Agreement is expected to be for a minimum of one year. The Agreement states that the Joined Party is an independent contractor, that the Joined Party is responsible for all state and federal taxes that apply to the Joined Party's wages, that the Petitioner will not withhold any taxes from the pay, and that the Joined Party is not eligible to receive any fringe benefits.

5. The *Confidentiality Agreement* provides that the Joined Party agrees to hold all confidential or proprietary information or trade secrets in trust and confidence, agrees that such information shall be used only for the contemplated purpose and shall not be used for any other purpose or disclosed to any third party under any circumstances whatsoever, that the Joined Party may not make any copies of any written information, and that at the conclusion of discussions between the Petitioner and the Joined Party, or upon demand by the Petitioner, all information including written notes, photographs, or memoranda shall be promptly returned to the Petitioner.

6. The *Covenant Not to Compete* states that the Joined Party agrees "that for so long as he/she is an agent of the Corporation and for the five year period he/she ceases to be contracted by the Corporation (the 'Covenant Period') he/she will not directly or indirectly, either for himself/herself, or as agent, employee, officer, director, Trustee, consultant or shareholder, for or with any other person or persons, firms or corporations, engage in or become financially interested in, or participate in any capacity with any person or entity which shall compete with the Corporation, or solicit or contract with any customers or accounts of the Corporation existing at the effective date of severance."

7. Due to the Joined Party's extensive experience in sales the Petitioner's director determined that he did not need to train the Joined Party how to make sales. However, due to the Joined Party's lack of experience in the sale of trucking services the director instructed the Joined Party to observe the director so that the Joined Party could learn how to perform the work. The director told the Joined Party what to do and how to do it.

8. The director told the Joined Party that the Joined Party was required to work Monday through Friday from 9 AM until 5 PM. Almost all of the Joined Party's work was performed from the Petitioner's office. There were a few occasions when the director and the Joined Party met with a customer outside the Petitioner's office. On one of those occasions the customer was located near the Joined Party's home between the Joined Party's home and the Petitioner's office. On that occasion the Joined Party drove from his home to the customer's location and the Petitioner's

director met the Joined Party at the customer's location. On all other occasions the Joined Party rode in the director's vehicle with the director.

9. The Joined Party was not free to come and go as he pleased. The Joined Party was required to request time off from work and to request permission if the Joined Party had to leave the office early.

10. The Petitioner provided the Joined Party with workspace in the Petitioner's office. The Petitioner provided all of the equipment and supplies that were needed to perform the work. The Petitioner provided the Joined Party with a company email address. The Joined Party did not have any expenses in connection with the work.

11. The Joined Party was responsible for cold calling prospective customers and accepting quote requests from companies that were interested in using the Petitioner's services. The Joined Party was then required to obtain a price quote from the Petitioner's director. The Joined Party was not allowed to deviate from the amount of the quote. If the prospective customer attempted to negotiate a lower price the Joined Party was required to present the customer's offer to the director for approval or rejection.

12. The Petitioner decided to hire telephone solicitors to make the cold calls to generate leads for the Joined Party to contact. The director instructed the Joined Party to interview the applicants for the telephone solicitor position. After the Petitioner hired the telephone solicitors the Petitioner instructed the Joined Party to write a script for the telephone solicitors and to supervise the telephone solicitors. The telephone solicitors were paid by the Petitioner, not by the Joined Party.

13. The Petitioner paid the Joined Party on a weekly basis. No taxes were withheld from the pay and no fringe benefits, such as health insurance and paid vacations, were provided to the Joined Party. The Joined Party was aware that a portion of his earnings were considered to be a draw against commissions, however, the Petitioner never provided the Joined Party with an accounting to show the amount of the earned commissions or to show if the Joined Party's earned commissions were less than the draws.

14. The Joined Party did not have an investment in a business, did not have business liability insurance, did not have a business license or occupational license, did not advertise, and did not offer services to the general public.

15. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. On or about November 30, 2012, the Petitioner informed the Joined Party that the Petitioner was eliminating the draw. The Joined Party was unwilling to accept the elimination of the draw and discontinued performing services for the Petitioner.

16. The Joined Party filed an initial claim for unemployment compensation benefits, now know as reemployment assistance program benefits, effective December 2, 2012. The Joined Party established a valid claim for benefits based on his prior employment, however, he did not receive credit for his earnings with the Petitioner. As a result 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.

17. During the course of the investigation the Department of Revenue determined that the Petitioner had never registered for payment of unemployment compensation tax. On January 24, 2013, the Department of Revenue issued a determination holding that the Joined Party performed services for the Petitioner as an employee and holding that the Petitioner was liable for payment of unemployment tax effective February 6, 2012. The Petitioner filed a timely protest on January 31, 2013.

18. The Petitioner has not required the Joined Party to repay any excess draws and has not made any decision to require the Joined Party to repay the excess draws at any time in the future.

19. In the middle of February 2013 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC.

Conclusions of Law:

20. 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.

21. 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).

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. The Petitioner and the Joined Party entered into a written *Independent Contractor Agreement* which states, unequivocally, that the Joined Party was retained by the Petitioner as an independent contractor. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

28. The Petitioner's business is to sell transportation services as a broker. It was the Joined Party's responsibility to sell the transportation services for the Petitioner. The services performed by the Joined Party for the Petitioner were not separate and distinct from the Petitioner's business but were an integral and necessary part of the Petitioner's business.

29. The Joined Party performed the majority of the services from the Petitioner's office. The Petitioner provided the workspace and all equipment and supplies that were needed to perform the work. The Joined Party did not have any expenses in connection with the work and was not at risk of suffering a financial loss from performing services.

30. The Joined Party performed sales work for the Petitioner. Although the Joined Party had forty years of experience in sales, it was not shown that any skill or special knowledge was needed to perform the work. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

31. The Petitioner determined the days and hours of work and determined that the Joined Party would be paid $700 per week. Although there was conflicting testimony concerning whether the entire $700 was a draw or whether only $300 of the payment was a draw, the Petitioner affirmatively testified that no decision has been made to require the Joined Party to repay any excess draws. In the absence of a specific undertaking to repay the amount of a draw against commission the draw is considered as a plain and simple salary. Lester v. Kahn-McKnight Company, Inc., 521 So. 2d 312 (Fla. 3rd DCA 1988) Thus, it is concluded that the Joined Party was paid by time worked rather than by production or by the job. 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. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

32. The *Independent Contractor Agreement* states that the term of the Agreement is "expected to be a minimum of one year." The Joined Party performed services for the Petitioner for a period of approximately ten months. Either party could 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."

33. The Petitioner controlled what work was performed, where it was performed, when it was performed, and how it 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.

34. Section 443.1215, Florida Statutes, 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.

35. 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.

36. The Petitioner's director is a member of a limited liability company which is classified as a corporation for federal income tax purposes. The Petitioner's director is an employee of the Petitioner. Thus, the Petitioner has had at least one employee during twenty weeks of a calendar year prior to the date that the Joined Party began performing services for the Petitioner. In addition, since the Joined Party began performing services on February 6, 2012, and since the Joined Party was paid $700 per week, the Petitioner would have paid wages of at least $1,500 during the first quarter 2012. Therefore, it is concluded that the Petitioner has established liability for payment of reemployment assistance program taxes and that the services performed for the Petitioner by the Joined Party constitute insured employment.

Recommendation: It is recommended that the determination dated January 24, 2013, be AFFIRMED.

Respectfully submitted on August 7, 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 envió 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

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
August 7, 2013

Copies mailed to:
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Respondent
Joined Party

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