

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

PETITIONER:

Employer Account No. - 1605768
AARON B WENTZ PA
814 SHADOW LN # A
FORT WALTON BEACH FL 32547-1282

**PROTEST OF LIABILITY
DOCKET NO. 0024 6063 26-02**

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 November 3, 2014, is MODIFIED to reflect a retroactive date of liability of October 30, 2013. 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 20th day of **May, 2015**.



Magnus Hines

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.

Shanendra Y. Barnes
DEPUTY CLERK

5-20-15
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 20th day of May, 2015.

Shanendra Y. Barnes

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

By U.S. Mail:

AARON B WENTZ PA
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ASHLEY PURO
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DEPARTMENT OF REVENUE
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

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Reemployment Assistance Appeals
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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 November 3, 2014.

After due notice to the parties, a telephone hearing was held on March 18, 2015. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Auditor III, 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 constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner, Aaron B. Wentz, P.A., is a corporation which was formed in approximately 1996 to operate the law practice of Aaron B. Wentz.
2. Over the years it has been the Petitioner's practice to hire individuals to be employees, however, during the initial ninety day probationary period the Petitioner classifies the individuals as independent contractors.
3. The Joined Party, Ashley Puro, is an attorney who applied for employment with the Petitioner. It was the Petitioner's intent to hire the Joined Party as a permanent full time employee. The Petitioner chose to classify the Joined Party as an independent contractor during the initial ninety day probationary period.

4. The Petitioner created an *Independent Contractor Agreement* for the Joined Party's signature. Among other things the Agreement states that "The Firm and the Attorney desire to have the attorney practice law as an independent contractor of the Firm" and that "The Firm employs the Attorney as an independent contractor and the Attorney accepts status as an independent contractor in accordance with the terms of this Agreement."
5. The Agreement provides that the Joined Party shall devote full working time and attention to the practice of law for the Petitioner and that the Joined Party shall not directly render services of a professional nature to or for any other person or firm except as an independent contractor of the Petitioner.
6. The Agreement provides that the Petitioner shall determine the duties to be performed by the Joined Party, shall determine the assignment of clients to the Joined Party, shall determine the means and manner by which the duties shall be performed by the Joined Party for the assigned clients, and shall determine the rates at which the Joined Party's work will be billed to the clients.
7. The Agreement provides that the Petitioner shall provide the Joined Party with office space, staff assistance, and other such facilities and services as are reasonable necessary for the performance of the assigned duties.
8. The Agreement provides that the Petitioner shall pay the Joined Party an annual salary of \$40,000.00 payable weekly, that there shall be no bonus program for the initial year of the Agreement, and that the Petitioner shall provide medical insurance, paid vacations, and paid holidays. The Agreement provides that the Petitioner will provide professional liability insurance covering acts and omissions of the Joined Party, and shall pay reasonable expenses incurred by the Joined Party for continuing legal education.
9. The Agreement provides that all records, documents, and files concerning clients of the Petitioner shall belong to and remain the property of the Petitioner. All fees and compensation received or realized as a result of the rendition of professional legal services shall belong to and be paid to the Petitioner. All assets owned or later purchased by the Petitioner remain the property of the Petitioner and that all clients during the course of the Agreement shall remain clients of the Petitioner.
10. The Agreement provides that the parties agree that the relationship is "at-will" and that anytime during the course of the working arrangement either party may elect to discontinue the arrangement and the Agreement will expire without incurring liability to the other.
11. The Joined Party began performing services for the Petitioner on October 30, 2013. The Joined Party's assigned work schedule was from 8 AM until 5 PM, Monday through Friday, unless overtime work was required. The Petitioner provided everything that was needed to perform the work. The Joined Party did not have any expenses in connection with the work.
12. The Petitioner provided the Joined Party with a company email address. The Petitioner provided the Joined Party with business cards showing the firm's name of Aaron B. Wentz, P.A., the Joined Party's name, the Petitioner's business address, the Petitioner's telephone number, the Petitioner's fax number, the address of the Petitioner's website, and the Joined Party's company email address.
13. The Petitioner paid the Joined Party's salary by check on a weekly basis. The Petitioner did not provide any reconciliation concerning how the pay was computed or if any taxes or other deductions were withheld from the pay. At the end of 2013 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
14. In early February 2014, the Petitioner notified the Joined Party that the Joined Party had successfully completed the ninety day probationary period. The parties did not enter into a new written agreement. The Joined Party continued working under the same terms and conditions as prior to February except the Petitioner increased the Joined Party's salary to \$42,500.00 per year. The Petitioner continued to pay the Joined Party by check on a weekly basis without any reconciliation.

15. On or about August 24, 2014, the Petitioner terminated the Joined Party's position and the Joined Party filed a claim for reemployment assistance. The Joined Party did not receive credit for her earnings from the Petitioner during 2013 or the early part of 2014. The Joined Party filed a request for reconsideration and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.
16. On November 3, 2014, the Department of Revenue issued a determination holding that the Joined Party performing services as an attorney was the Petitioner's employee retroactive to November 4, 2013. The Petitioner filed a timely protest by mail postmarked November 14, 2014.
17. Following the close of the 2014 calendar year the Petitioner reported the Joined Party's earnings prior to February on Form 1099-MISC as nonemployee compensation and the earnings after January 2014 on Form W-2 as wages.

Conclusions of Law:

18. 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.
19. 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).
20. 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.
21. 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.
22. 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.
23. 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.
24. 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.
25. The Petitioner and the Joined Party entered into an *Independent Contractor Agreement* on October 30, 2013. 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.”
26. The *Independent Contractor Agreement* provides that the Petitioner has the right to exercise significant control over the Joined Party during the term of the working relationship. The Agreement requires the Joined Party to devote full time and attention to the Petitioner’s practice of law and prohibits the Joined Party from performing professional services for others. The Agreement provides that the Petitioner will determine the duties to be performed, the means and manner of performing the duties, the assignment of clients, and the rates at which the Joined Party’s work was to be billed.
27. The Petitioner provided the place of work and everything that was needed to perform the work, including professional liability insurance. The Joined Party did not have any expenses in connection with the work and it was not shown that the Joined Party had a financial investment in a business. The work performed by the Joined Party was not separate and distinct from the Petitioner’s business but was an integral part of the Petitioner’s practice of law. The Joined Party was not at risk of suffering a financial loss from performing services for the Petitioner.
28. The Joined Party performed services for the Petitioner as an attorney, a highly skilled profession. 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. 2^d 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.

29. The Petitioner paid the Joined Party a salary which was based on time worked rather than based on production or by the job. The Petitioner determined the method of pay as well as 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. The Petitioner provided fringe benefits including paid medical insurance, paid vacations, and paid holidays. 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).
30. The Petitioner's testimony reveals that it was the Petitioner's intent to establish a permanent, full time, employment relationship with only the first ninety days as a probationary period during which the Joined Party would be classified as an independent contractor. The Agreement states that the parties agree that it is an at-will relationship. These facts reveal that the Agreement establishes 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."
31. The Agreement establishes that the Petitioner had the right to control the means and manner of performing the work. The testimony reveals that the Petitioner exercised that control both prior to February 1, 2014 and subsequent to February 1, 2014. The Petitioner controlled what work was performed, which client the work was performed for, when the work was performed, where the work was performed, and how the work was performed. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).
32. The services performed for the Petitioner by the Joined Party constitute insured employment retroactive to October 30, 2013.

Recommendation: It is recommended that the determination dated November 3, 2014, be MODIFIED to reflect a retroactive date of October 30, 2013. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on April 13, 2015.



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 kenx 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:
April 13, 2015

Copies mailed to:

Petitioner

Respondent

Joined Party

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