

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

**PETITIONER:**

Employer Account No. – 2498372  
PROGRESSIVE EMPLOYER SERVICES VI  
LLC  
6407 PARKLAND DR  
SARASOTA FL 34243-4037

**PROTEST OF LIABILITY**  
**DOCKET NO. 0019 3454 33-01**

**RESPONDENT:**

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

**ORDER**

This matter comes before me for final Department Order.

The issues before me are whether the Petitioner's tax rates were properly computed, pursuant to §443.131, Florida Statutes; Rules 73B-10.026; 10.031, Florida Administrative Code, and whether the Petitioner's liability for unemployment compensation contributions was properly determined pursuant to Sections 443.1215, 1216, 1217; 443.131, Florida Statutes.

The Department of Revenue, hereinafter referred to as the Respondent, issued a determination notifying the Petitioner of a partial tax rate transfer from its predecessor account. As a result of the determination, the Petitioner was required to pay additional taxes and interest. The Petitioner filed a timely protest of the determination.

A telephone hearing was held on September 11, 2014, and September 12, 2014. The Petitioner was represented by its attorney. The Chief Executive Officer of Progressive Employer Services V, LLC and Progressive Employer Services VI, LLC testified as a witness. The Respondent was represented by an Assistant Attorney General. A Department of Revenue Tax Auditor III, a Department of Revenue Program Administrator I, and a Tax Law Specialist appeared as witnesses on behalf of the Respondent. A Department of Revenue Tax Auditor III and a Department of Revenue Program Administrator I testified on behalf of the Respondent. The Special Deputy issued a recommended order on January 6, 2015.

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

1. Progressive Employer Services V, LLC and Progressive Employer Services VI, LLC are limited liability companies that are part of a group of related companies that operated an employee leasing business prior to October 31, 2010.
2. Progressive Employer Services V, LLC established liability for payment of unemployment compensation tax to Florida effective the fourth quarter 2004. Progressive Employer Services VI, LLC established liability for payment of unemployment compensation tax to Florida effective the fourth quarter 2003.
3. Steve F. Herrig is the Chief Executive Officer, Michael Corley is president, and H. Rayburn Martin is Chief Financial Officer of both Progressive Employer Services V, LLC and Progressive Employer Services VI, LLC.
4. During 2009 the Progressive Employer Services group of companies had an internal policy that, generally, new client companies would be assigned to Progressive Employer Services VI, LLC.
5. In early 2009 Progressive Employer Services V, LLC received information from five different client companies that the client companies had either been sold, changed their name, or had new ownership. The Client Service Agreements with those five client companies were terminated and Progressive Employer Services entered into new Client Service Agreements with the new entities.
6. Each of the Client Service Agreements are identical and contain blank spaces to be filled in for the name and address of the client company and the effective date of the Agreement. The name of the employee leasing company is printed as "Progressive Employer Services \_\_\_\_, LLC." Each of the Agreements was completed without filling in the blank to designate which company within the Progressive Employer Services group the client company was contracting with.
7. Among other things each of the Client Service Agreements state that on the effective date of the Agreement the client company shall transfer all personnel to Progressive Employer Services; that Progressive Employer Services agrees to furnish employees to the client company; that Progressive Employer Services retains the right of direction and control over the employees; that Progressive Employer Services has the responsibility for payment of wages to the employees and payment of payroll taxes to the Internal Revenue Service and the State of Florida; and that Progressive Employer Services retains the authority to hire, terminate, discipline, and reassign the employees, however, the client company has the right to accept or cancel the assignments of any assigned employee.
8. Upon receipt of the newly signed Client Service Agreements, Progressive Employer Services assigned each of the new entities to be clients of Progressive Employer Services VI, LLC.

9. Progressive Employer Services V, LLC filed its quarterly unemployment compensation tax report and reported the wages paid to employees, including the wages paid to the employees of the five terminated client companies prior to the dates of the client company terminations. Progressive Employer Services VI, LLC filed its unemployment compensation tax report and reported wages paid to its employees, including the wages paid to the employees of the five new entities subsequent to the effective dates of the new Client Service Agreements.
10. The Department of Revenue has a computer program that identifies the movement of employees from one employer to another employer based on the wage information provided by the employers on their quarterly wage and tax reports. The computer program identified that 95 employees of Progressive Employer Services V, LLC moved to Progressive Employer Services VI, LLC.
11. By letter mailed to Progressive Employer Services VI, LLC on or before February 10, 2011, the Department of Revenue provided notification that it appeared that Progressive Employer Services VI, LLC had acquired part of the workforce of Progressive Employer Services V, LLC. Since it appeared that Progressive Employer Services V, LLC and Progressive Employer Services VI, LLC had common ownership, management, or control, the letter stated that Progressive Employer Services VI, LLC needed to supply the Department of Revenue with a list of the social security numbers of all employees that were in the units/positions transferred during the fourteen quarters prior to the transfer, even if the employees were no longer there when the transfer took place.
12. Progressive Employer Services VI, LLC complied with the request and uploaded a list of 572 employees who had been furnished by Progressive Employer Services V, LLC to work for the five client companies during the fourteen quarters prior to termination of the five client companies.
13. The Department of Revenue transferred the unemployment experience attributable to the 572 employees from Progressive Employer Services V, LLC to Progressive Employer Services VI, LLC effective June 1, 2009.
14. By determinations mailed on or before March 23, 2011, the Department of Revenue notified Progressive Employer Services V, LLC and Progressive Employer Services VI, LLC that a partial tax rate transfer had been processed. The determinations also notified Progressive Employer Services VI, LLC that its tax rate increased effective July 1, 2009, and notified Progressive Employer Services V, LLC that its tax rate decreased effective July 1, 2009.
15. By letter postmarked April 7, 2011, the Chief Executive Officer of both Progressive Employer Services V, LLC and Progressive Employer Services VI, LLC filed a written protest.
16. Subsequent to the filing of the April 7, 2011, protest the Department of Revenue manually recalculated the tax rate resulting from the partial transfer of unemployment experience and discovered an error in the original calculation for 2010 and for the last two quarters 2009. The Department of Revenue notified Progressive Employer Services of the revised and reduced tax rates and reduced tax liability by notice dated February 26, 2013.

Based on these Findings of Fact, the Special Deputy recommended that the determination be affirmed as modified on February 26, 2013. On January 20, 2015, after receiving the Petitioner's timely extension request, the Special Deputy granted an extension for the filing of exceptions until February 5, 2015. The Petitioner filed exceptions on February 5, 2015. On February 12, 2015, the Special Deputy granted an extension for the filing of counter exceptions until March 9, 2015, in response to the Respondent's February 9, 2015, extension request. The Respondent filed counter exceptions on March 6, 2015. The Petitioner requested an extension of time for the filing of a brief in opposition to the counter exceptions on March 9, 2015, and the Special Deputy granted an extension of time until March 23, 2015, by order dated March 10, 2015. The Petitioner submitted its brief in opposition to the counter exceptions on March 23, 2015. No additional 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 exceptions, the counter exceptions, and the brief in opposition to the counter 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.

Upon a review of the record, it was determined that a portion of the fifth full paragraph from the bottom of the first page of the Recommended Order must be modified because it does not accurately state the witnesses who provided testimony on behalf of the Respondent. The record reflects that the Tax Law Specialist did not testify and only appeared on behalf of the Respondent. The paragraph is amended as follows:

After due notice to the parties, a telephone hearing was held on September 11, 2014. The Petitioner was represented by its attorney. The Chief Executive Officer of Progressive Employer Services V, LLC and Progressive Employer Services VI, LLC testified as a witness. The Respondent was represented by an Assistant Attorney General. A Department of Revenue Tax Auditor III and a Revenue Program Administrator I testified as witnesses.

The Petitioner takes exception to the references to “Progressive Employer Services” in Conclusions of Law 20 and 31. A review of the record reflects that the Special Deputy stated in Conclusion of Law 20 that arguments were made by “Progressive Employer Services” when the arguments were presented by the Petitioner, Progressive Employer Services VI, LLC. The hearing record also shows that the Special Deputy did not specify which Progressive Services company uploaded the list of 572 employees in Conclusion of Law 31. The hearing record and Finding of Fact 12 demonstrate that Progressive Employer Services VI, LLC was the company that uploaded the list. Accordingly, Conclusion of Law 20 is modified as follows:

Progressive Employer Services VI, LLC does not dispute that there is common ownership, management, and control of Progressive Employer Services V, LLC and Progressive Employer Services VI, LLC. Although Progressive Employer Services VI, LLC agrees that a transfer of workforce constitutes a transfer of trade or business, it argues that a transfer of workforce did not occur in this case. The Petitioner argues that, although the employees furnished to the five client companies of Progressive Employer Services V, LLC were the same employees that were furnished to the five new client companies of Progressive Employer Services VI, LLC, the employees were furnished to new client companies and, thus, the employees were not transferred from Progressive Employer Services V, LLC to Progressive Employer Services VI, LLC.

Also, Conclusion of Law 31 is modified as follows:

Both Section 468.529(2), Florida Statutes, and Section 443.1216(1)(a)2., Florida Statutes, require an employee leasing company to maintain the name of each client company and a listing of all employees provided to each client company. Thus, the wages paid to the employees furnished to each client company are identified and segregated from the wages paid to the employees who are furnished to other client companies. Progressive Employer Services VI, LLC identified its employees when it uploaded the list of the 572 employees who had been furnished to the five client companies during the 14 quarters prior to the transfer. Thus, the unemployment experience attributable to the 572 employees is required to be transferred from Progressive Employer Services V, LLC to Progressive Employer Services VI, LLC for purposes of tax rate calculation.

The Petitioner takes exception to the Special Deputy's Findings of Fact and Conclusions of Law, including Findings of Fact 5-9, and Conclusions of Law 20, 24-26, and 30-31. The Petitioner also proposes alternative findings of fact and conclusions of law in its exceptions. Additionally, the Petitioner requests that all remaining references to "Progressive Employer Services" be struck from the Recommended Order. Pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Findings of Fact unless the Department first determines that the findings of fact are not supported by competent substantial evidence in the record. 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 reflects that all of the Special Deputy's Findings of Fact and Conclusions of Law, including Findings of Fact 5-9, and Conclusions of Law 20, 24-26, and 30-31, are supported by competent substantial evidence in the record. The record also reflects that the Special Deputy's Conclusions of Law, including Conclusions of Law 20, 24-26, and 30-31, reflect a reasonable application of the law to the facts. The record further reflects that the remaining references to "Progressive Employer Services" refer to the actual wording of the agreements in evidence and cannot be modified because these references are supported by competent substantial evidence in the record. As a result, the Department may not further modify the Special Deputy's Findings of Fact and Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as modified herein. The Petitioner's remaining exceptions are respectfully rejected.

A review of the record reveals that the Findings of Fact and the amended Conclusions of Law 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 Conclusions of Law as amended herein reflect a reasonable application of the law to the facts and are also adopted.

Having considered the exceptions, the counter exceptions, the brief in opposition to the counter 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 modified herein.

Therefore, it is ORDERED that the determinations dated March 23, 2011, are AFFIRMED as modified on February 26, 2013.

**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 17th day of **June, 2015**.



*[Handwritten signature]*

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

6.18.15  
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 18th day of June, 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:

FLORIDA DEPARTMENT OF  
REVENUE  
ATTN: DIANNE AYERS  
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TALLAHASSEE FL 32314-6417

PROGRESSIVE EMPLOYER SERVICES  
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SARASOTA FL 34243-4037

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FLORIDA DEPARTMENT OF REVENUE  
DRENEA YORK  
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OFFICE OF THE ATTORNEY GENERAL  
ATTN: ANGEL EASON  
REVENUE LITIGATION SECTION  
PL-01, THE CAPITOL  
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FLORIDA DEPARTMENT OF REVENUE  
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TALLAHASSEE FL 32314-6417

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

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

**PETITIONER:**

Employer Account No. – 2498372  
PROGRESSIVE EMPLOYER SERVICES  
6407 PARKLAND DRIVE  
SARASOTA FL 34243

**PROTEST OF LIABILITY  
DOCKET NO. 0019 3454 33-01**

**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 determinations dated March 23, 2011.

After due notice to the parties, a telephone hearing was held on September 11, 2014. The Petitioner was represented by its attorney. The Chief Executive Officer of Progressive Employer Services V, LLC and Progressive Employer Services VI, LLC testified as a witness. The Respondent was represented by an Assistant Attorney General. A Department of Revenue Tax Auditor III, a Revenue Program Administrator I, and a Tax Law Specialist, testified as witnesses.

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 and were received from the Respondent.

**Issue:**

Whether the Petitioner's tax rates were properly computed, pursuant to §443.131, Florida Statutes; Rules 73B-10.026; 10.031, Florida Administrative Code.

Whether the Petitioner's liability for unemployment compensation contributions was properly determined pursuant to Sections 443.1215, 1216, 1217; 443.131, Florida Statutes.

**Findings of Fact:**

1. Progressive Employer Services V, LLC and Progressive Employer Services VI, LLC are limited liability companies that are part of a group of related companies that operated an employee leasing business prior to October 31, 2010.

2. Progressive Employer Services V, LLC established liability for payment of unemployment compensation tax to Florida effective the fourth quarter 2004. Progressive Employer Services VI, LLC established liability for payment of unemployment compensation tax to Florida effective the fourth quarter 2003.
3. Steve F. Herrig is the Chief Executive Officer, Michael Corley is president, and H. Rayburn Martin is Chief Financial Officer of both Progressive Employer Services V, LLC and Progressive Employer Services VI, LLC.
4. During 2009 the Progressive Employer Services group of companies had an internal policy that, generally, new client companies would be assigned to Progressive Employer Services VI, LLC.
5. In early 2009 Progressive Employer Services V, LLC received information from five different client companies that the client companies had either been sold, changed their name, or had new ownership. The Client Service Agreements with those five client companies were terminated and Progressive Employer Services entered into new Client Service Agreements with the new entities.
6. Each of the Client Service Agreements are identical and contain blank spaces to be filled in for the name and address of the client company and the effective date of the Agreement. The name of the employee leasing company is printed as "Progressive Employer Services \_\_\_\_, LLC." Each of the Agreements was completed without filling in the blank to designate which company within the Progressive Employer Services group the client company was contracting with.
7. Among other things each of the Client Service Agreements state that on the effective date of the Agreement the client company shall transfer all personnel to Progressive Employer Services; that Progressive Employer Services agrees to furnish employees to the client company; that Progressive Employer Services retains the right of direction and control over the employees; that Progressive Employer Services has the responsibility for payment of wages to the employees and payment of payroll taxes to the Internal Revenue Service and the State of Florida; and that Progressive Employer Services retains the authority to hire, terminate, discipline, and reassign the employees, however, the client company has the right to accept or cancel the assignments of any assigned employee.
8. Upon receipt of the newly signed Client Service Agreements, Progressive Employer Services assigned each of the new entities to be clients of Progressive Employer Services VI, LLC.
9. Progressive Employer Services V, LLC filed its quarterly unemployment compensation tax report and reported the wages paid to employees, including the wages paid to the employees of the five terminated client companies prior to the dates of the client company terminations. Progressive Employer Services VI, LLC filed its unemployment compensation tax report and reported wages paid to its employees, including the wages paid to the employees of the five new entities subsequent to the effective dates of the new Client Service Agreements.
10. The Department of Revenue has a computer program that identifies the movement of employees from one employer to another employer based on the wage information provided by the employers on their quarterly wage and tax reports. The computer program identified that 95 employees of Progressive Employer Services V, LLC moved to Progressive Employer Services VI, LLC.
11. By letter mailed to Progressive Employer Services VI, LLC on or before February 10, 2011, the Department of Revenue provided notification that it appeared that Progressive Employer Services VI, LLC had acquired part of the workforce of Progressive Employer Services V, LLC. Since it appeared that Progressive Employer Services V, LLC and Progressive Employer Services VI, LLC had common ownership, management, or control, the letter stated that Progressive Employer Services VI, LLC needed to supply the Department of Revenue with a list of the social security numbers of all employees that were in the units/positions transferred during the fourteen quarters prior to the transfer, even if the employees were no longer there when the transfer took place.

12. Progressive Employer Services VI, LLC complied with the request and uploaded a list of 572 employees who had been furnished by Progressive Employer Services V, LLC to work for the five client companies during the fourteen quarters prior to termination of the five client companies.
13. The Department of Revenue transferred the unemployment experience attributable to the 572 employees from Progressive Employer Services V, LLC to Progressive Employer Services VI, LLC effective June 1, 2009.
14. By determinations mailed on or before March 23, 2011, the Department of Revenue notified Progressive Employer Services V, LLC and Progressive Employer Services VI, LLC that a partial tax rate transfer had been processed. The determinations also notified Progressive Employer Services VI, LLC that its tax rate increased effective July 1, 2009, and notified Progressive Employer Services V, LLC that its tax rate decreased effective July 1, 2009.
15. By letter postmarked April 7, 2011, the Chief Executive Officer of both Progressive Employer Services V, LLC and Progressive Employer Services VI, LLC filed a written protest.
16. Subsequent to the filing of the April 7, 2011, protest the Department of Revenue manually recalculated the tax rate resulting from the partial transfer of unemployment experience and discovered an error in the original calculation for 2010 and for the last two quarters 2009. The Department of Revenue notified Progressive Employer Services of the revised and reduced tax rates and reduced tax liability by notice dated February 26, 2013.

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

17. Section 443.131(3), Florida Statutes, provides:
  - (g) Transfer of unemployment experience upon transfer or acquisition of a business.-- Notwithstanding any other provision of law, upon transfer or acquisition of a business, the following conditions apply to the assignment of rates and to transfers of unemployment experience:
    - 1.a. If an employer transfers its trade or business, or a portion thereof, to another employer and, at the time of the transfer, there is any common ownership, management, or control of the two employers, the unemployment experience attributable to the transferred trade or business shall be transferred to the employer to whom the business is so transferred. The rates of both employers shall be recalculated and made effective as of the beginning of the calendar quarter immediately following the date of the transfer of the trade or business unless the transfer occurred on the first day of a calendar quarter, in which case the rate shall be recalculated as of that date.
18. Section 443.131(3)(g)7.b., Florida Statutes, provides that "trade or business" shall include the employer's workforce.
19. Rule 73B-10.031(3), Florida Administrative Code, provides in pertinent part that for the purpose of implementing Section 443.131(3)(g), F.S.:
  - (a) The term "ownership" means any proprietary interest in a business, including, but not limited to, shares of stock in a corporation, partnership interest in a partnership or membership interest in a Limited Liability Company (LLC).
  - (b) "Common ownership" exists when a person has ownership in two or more businesses.
  - (c) A person in "management" includes any officer or director of a corporation, owner of a sole proprietorship, partner in a partnership, manager of an LLC, or person with the ability to direct the activities of an employing unit, either individually or in concert with others.
  - (d) "Common management" exists when a person concurrently occupies management positions in two or more businesses.
  - (e) A person in "control" of a business includes any officer or director of a corporation, owner of a sole proprietorship, partner in a partnership, manager of an LLC, or other person with the ability, directly or indirectly, individually or in concert with others, to influence or direct management, activities or policies of the business through ownership of stock, voting rights, contract, or other

- means. Control exists when an employee leasing company dictates or specifies the businesses with which a client company must contract.
- (f) "Common control" exists when a person or group of persons has control of two or more businesses.
  - (g) The phrase "transfer or acquisition" encompasses any and all types of transfers and acquisitions including, but not limited to, assignments, changes in legal identity or form, consolidations, conveyances, mergers, name changes, purchase and sale agreements, reorganizations, stock transfers and successions.
  - (h) The phrase "trade or business or a portion thereof" includes but is not limited to assets, customers, management, organization and workforce.
  - (i) For the purpose of determining issues relating to the transfer of employment records upon transfer or acquisition of a business, the term "person" has the meaning set forth in Section 7701(a)(1) of the Internal Revenue Code.
20. Progressive Employer Services does not dispute that there is common ownership, management, and control of Progressive Employer Services V, LLC and Progressive Employer Services VI, LLC. Although Progressive Employer Services agrees that a transfer of workforce constitutes a transfer of trade or business, it argues that a transfer of workforce did not occur in this case. The Petitioner argues that, although the employees furnished to the five client companies of Progressive Employer Services V, LLC were the same employees that were furnished to the five new client companies of Progressive Employer Services VI, LLC, the employees were furnished to new client companies and, thus, the employees were not transferred from Progressive Employer Services V, LLC to Progressive Employer Services VI, LLC.
  21. Section 468.520(4), Florida Statutes, defines "employee leasing" as an arrangement whereby a leasing company assigns its employees to a client and allocates the direction and control over the leased employees between the leasing company and the client.
  22. Section 468.520(6), Florida Statutes, defines "client company" as a person or entity that contracts with an employee leasing company and is provided employees pursuant to that contract.
  23. Section 468.529(1), Florida Statutes, provides that a licensed employee leasing company is the employer of the leased employees and that the employee leasing company shall be responsible for timely payment of reemployment assistance taxes pursuant to chapter 443.
  24. Chapter 468, the chapter of Florida Statutes that regulates professions and occupations, establishes that employees assigned or provided by an employee leasing company to client companies are employees of the employee leasing company rather than employees of the client companies. That fact is further shown through the Client Service Agreements between Progressive Employer Services and the client companies. Those Agreements state that the client companies shall transfer all personnel to Progressive Employer Services, that Progressive Employer Services agrees to furnish employees to the client company, that Progressive Employer Services retains the right of direction and control over the employees, that Progressive Employer Services has the responsibility for payment of wages to the employees and payment of payroll taxes to the Internal Revenue Service and the State of Florida, and that Progressive Employer Services retains the authority to hire, terminate, discipline, and reassign the employees.
  25. The employees furnished by Progressive Employer Services V, LLC to the five client companies which were terminated due to change of ownership, sale of the business, or name change were employees of Progressive Employer Services V, LLC rather than employees of the five client companies. When the client companies terminated, Progressive Employer Services, according to its Agreements with the clients, had the right to reassign the employees who had been furnished to the clients. When Progressive Employer Services signed new Client Service Agreements with the new client companies and furnished the same employees to the new client companies, Progressive Employer Services in effect reassigned the employees to the new client companies. No evidence was presented to show that either the former clients or the new clients exercised the right to cancel

the assignments.

26. Although the Petitioner may have had an internal policy to assign new client companies to Progressive Employer Services VI, LLC, the arbitrary internal policy does not serve to circumvent the law. The Petitioner had the ability to assign the new client companies to any of the companies within the Progressive Employer Services group of companies, including Progressive Employer Services V, LLC. The Petitioner's choice to reassign employees from Progressive Employer Services V, LLC to Progressive Employer Services VI, LLC, constitutes a transfer of a portion of the trade or business from Progressive Employer Services V, LLC to Progressive Employer Services VI, LLC.
27. The Petitioner argues that, if it is found that a partial transfer of workforce occurred, only the unemployment experience of the 95 employees which the Department of Revenue identified as transferred should be transferred from Progressive Employer Services V, LLC to Progressive Employer Services VI, LLC. As part of its argument the Petitioner relies upon Rule 73B-10.031(2)(b), Florida Administrative Code. Rule 73B-10.031(2)(b) addresses the requirements for a voluntary transfer of employment records. Because there is common ownership, management, or control of Progressive Employer Services V, LLC and Progressive Employer Services VI, LLC the transfer of employment records is not voluntary. The transfer of unemployment experience in this case is mandatory.
28. Rule 73B-10.031(3)(o), Florida Administrative Code, provides in pertinent part:
  - (3) Mandatory Transfer of Employment Records.
    - (o) If the transfer of trade or business involved a partial transfer of workforce and common ownership, management, or control, information from the predecessor's records must be submitted regarding all employees who worked for the transferred unit(s) or position(s) during any part of the 14 calendar quarters immediately preceding and up to the date the succession commenced, by completing and submitting Form RTS-1SA "List of Employees to be Transferred." within 30 days after DOR mails written notification of the RTS-1SA requirement to the employer.
29. Section 443.131(3)(b)3., Florida Statutes, provides that for each calendar year, the tax collection service provider shall compute a benefit ratio for each employer whose employment record was chargeable for benefits during the 12 consecutive quarters ending June 30 of the calendar year preceding the calendar year for which the benefit ratio is computed. An employer's benefit ratio is the quotient obtained by dividing the total benefits charged to the employer's employment record during the 3-year period ending June 30 of the preceding calendar year by the total of the employer's annual payroll for the 3-year period ending June 30 of the preceding calendar year.
30. The 95 transferred employees have been identified by the Department of Revenue as furnished to the five client companies by Progressive Employer Services V, LLC at the time of the transfer. It is unlikely that any unemployment benefits would have been paid to the 95 employees and charged to the employment record of Progressive Employer Services V, LLC because the 95 employees were still employed at the time of the transfer. Transferring only the employment records of the transferred employees fails to comply with the requirements of law and would allow Progressive Employer Services V, LLC to evade responsibility for the payment of unemployment benefits to the additional 477 employees furnished to the five client companies during the fourteen calendar quarters prior to the transfer. The law requires the transfer of the employment records of "all employees" who worked in the transferred units or positions during any part of the 14 calendar quarters immediately preceding and up to the date of transfer.
31. Both Section 468.529(2), Florida Statutes, and Section 443.1216(1)(a)2., Florida Statutes, require an employee leasing company to maintain the name of each client company and a listing of all employees provided to each client company. Thus, the wages paid to the employees furnished to each client company are identified and segregated from the wages paid to the employees who are furnished to other client companies. Progressive Employer Services identified its employees when

it uploaded the list of the 572 employees who had been furnished to the five client companies during the 14 quarters prior to the transfer. Thus, the unemployment experience attributable to the 572 employees is required to be transferred from Progressive Employer Services V, LLC to Progressive Employer Services VI, LLC for purposes of tax rate calculation.

**Recommendation:** It is recommended that the determinations dated March 23, 2011, as modified on February 26, 2013, be AFFIRMED.

Respectfully submitted on January 6, 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 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:  
January 6, 2015

**Copies mailed to:**

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**Respondent**

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