

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

PETITIONER:

Employer Account No. - 3051905
GULF COAST PROCESSING & TRAVEL INC
ATTN:KELLY DEPERGOLA
4585 140TH AVE N
CLEARWATER FL 33762-3806

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-106984L**

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 August 20, 2012, is MODIFIED to reflect a retroactive date of September 27, 2011. As modified, it is ordered that the determination 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 February, 2013.



Altemese Smith,
Bureau Chief,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Shanendra Y. Barnes

DEPUTY CLERK

DATE

CERTIFICATE OF SERVICE

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

Shanendra Y. 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:

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

DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

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TALLAHASSEE FL 32399-4143

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RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-106984L**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Executive Director,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated August 20, 2012.

After due notice to the parties, a telephone hearing was held on December 4, 2012. The Petitioner, represented by the Petitioner's Accounting Manager, 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 not received.

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.

Findings of Fact:

1. The Petitioner is a corporation that operates a travel agency. The Petitioner markets and sells vacation packages for a cruise line.
2. The Joined Party performed telemarketing services for the Petitioner from September 27, 2011, until February 10, 2012.
3. The Joined Party responded to an advertisement posted by the Petitioner on Craigslist. The Joined Party completed an application, was interviewed, and passed a limited background check. The Joined Party was told he would be working the day shift from 9:00 a.m. to 3:00 p.m., Monday through Friday.

4. The Petitioner provided the Joined Party with two days of classroom training and one day of on the job training. The Petitioner provided the Joined Party with a script to be used when speaking with a customer. The Petitioner trained the Joined Party in the handling of customer questions or objections through role playing exercises. The Petitioner reviewed its work place policies against harassment and discrimination with the Joined Party. After completion of the classroom training, one of the Petitioner's "take over agents" worked with the Joined Party on actual sales calls for a day. The Joined Party was paid for the time spent in training.
5. The Joined Party was presented with an *Independent Contractor Agreement* that he signed on September 27, 2011. The agreement states that the Joined Party, referred to in the agreement as "Contractor," is an Independent Contractor in his relationship to the Petitioner. The Joined Party completed a form W-9.
6. The Joined Party initially worked from 9:00 a.m. to 3:00 p.m., Monday through Friday. At some point, the shift worked by the Joined Party was extended to 3:30 p.m. or 4:00 p.m. The Joined Party was required to work every other Saturday. The Joined Party was required to notify the general manager if he was going to be absent or late for his shift. The Joined Party was permitted to take two 10 minute breaks, as long as the breaks were not in the first or last hour of his shift. The Joined Party's hours were recorded by logging on and off the Petitioner's telephone system. Any sales made by the Joined Party were recorded in the Petitioner's system. The Joined Party could not perform services outside of the Petitioner's regular business hours. The Joined Party was not provided with a key to the Petitioner's office.
7. The Joined Party performed his services within a call center at the Petitioner's business location. The Petitioner furnished the cubicle, computer, telephone equipment, headphones, script, and sales leads needed for the work. The Petitioner maintains and repairs the equipment. The Joined Party was not responsible for damage of the equipment. The Joined Party was permitted to use his personal headphones if he desired. Under the terms of the *Independent Contractor Agreement*, the Petitioner deducted \$20 or \$30 from the Joined Party's weekly pay, depending upon the number of sales the Joined Party achieved, for use of the work space, equipment and leads.
8. The Joined Party was supervised by the general manager of the sales floor. The Joined Party was required to attend a daily sales meeting prior to the start of his shift. The Joined Party was required to follow the script. The Petitioner prohibited the use of profanity on the sales floor. The Joined Party was required to meet sales goals established by the Petitioner. The Joined Party's calls were monitored by the Petitioner's take over agents and, occasionally, by the general manager. A take over agent told the Joined Party what to say in situations where the Joined Party hesitated in speaking with a customer or did not know what to say to the customer. A take over agent took control of a call if the take over agent felt the Joined Party was unable to make the sale. The sales calls were recorded, and the Petitioner reviewed the Joined Party's performance on some calls with the Joined Party.
9. The Petitioner paid the Joined Party on a weekly basis. For the first week of service, the Joined Party was paid \$9 per hour or a commission, whichever was greater. From the second week forward, the Joined Party was paid \$8 per hour or a commission, whichever was greater. The Petitioner established a graduated commission structure based upon the number of sales achieved in a week. The Petitioner adjusted the commission structure from time to time. The Joined Party did not submit an invoice for his services. The Petitioner determined the Joined Party's pay based upon the work hours and sales recorded in the Petitioner's telephone system. The Petitioner did not withhold taxes from the Joined Party's pay. The Joined Party did not receive sick pay, vacation pay, or holiday pay. The Petitioner paid the Joined Party \$4,926.31 in the fourth quarter 2011 and \$4,057.20 in the first quarter 2012.
10. The Joined Party could not subcontract the work or hire others to assist him in performing his services for the Petitioner.

11. The Joined Party could not perform services for another travel agency selling vacation packages for the same cruise ship being marketed by the Petitioner.
12. During the time that the Joined Party performed services for the Petitioner the Joined Party did not have a business or occupational license and did not perform telemarketing services for anyone else.
13. Under the terms of the *Independent Contractor Agreement* the Petitioner had the right to terminate the agreement at any time with notice to the Joined Party. Additionally, the Petitioner had the right to terminate the agreement immediately and without notice if the Joined Party failed or refused to comply with the written policies or reasonable directives of the Petitioner, was guilty of misconduct in connection with his performance, or breached a material provision of the agreement. The Joined Party terminated the relationship in order to relocate.
14. The Joined Party filed a claim for reemployment assistance benefits effective July 1, 2012. When the Joined Party did not receive credit for his earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed and an investigation was conducted by the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.
15. The Department of Revenue issued a determination dated August 20, 2012, holding that the Joined Party was an employee of the Petitioner retroactive to August 1, 2011. The Petitioner filed a timely protest.

Conclusions of Law:

16. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation 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.
17. 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).
18. 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).
19. 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.
20. 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.
21. 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.
22. 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 cannot be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.
23. In this case, the parties entered into *Independent Contractor Agreement* which states that the Joined Party is an independent contractor and not an employee. 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.”
24. The Petitioner operates a travel agency. The Joined Party performed services on a full time basis as a telemarketer for the Petitioner. The work performed by the Joined Party was not separate and distinct from the Petitioner’s business, but was an integral and necessary part of the Petitioner’s business. The Joined Party did not have his own telemarketing business. The Joined Party did not have any financial risk associated with the work performed for the Petitioner.
25. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that the basic test for determining a worker’s status is the employing unit’s right of control over the manner in which the work is performed. The Court, quoting Farmer’s and Merchant’s Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958), stated: “[I]f the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor; if he is subject to the control of the person being served as to the means to be used, he is not an independent contractor.” In this case the Petitioner exercised significant control over the details of the work. The Petitioner determined what work was performed, where the work was performed, when the work was performed and, through the training and supervision, how the work was performed. The Joined Party was required to personally perform the work.

26. The Petitioner provided the sales leads, work space, and all equipment needed for the work. The Joined Party paid a nominal fee for the use of those instrumentalities, and was not responsible for maintenance costs or damages.
27. The Petitioner determined the rate and method of payment. At a minimum, the Joined Party was paid by time. The fact that taxes were not withheld from the Joined Party's pay does not, standing alone, establish an independent contractor relationship.
28. It is concluded that the services performed for the Petitioner by the Joined Party as a telemarketer constitute insured employment.
29. The determination in this case holds the Petitioner liable for payment of reemployment assistance taxes retroactive to August 1, 2011. However, the record shows the Joined Party began performing services for the Petitioner on September 27, 2011. Therefore, the correct retroactive date is September 27, 2011.

Recommendation: It is recommended that the determination dated August 20, 2012, be MODIFIED to reflect a retroactive date of September 27, 2011. As MODIFIED, it is recommended that the determination be AFFIRMED.

Respectfully submitted on January 16, 2013.



SUSAN WILLIAMS, 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 16, 2013**

Copies mailed to:

Petitioner
Respondent
Joined Party

TYLER C PARTAIN
226 RAINBOW DRIVE #12623
LIVINGSTON TX 77399-2026

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