

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

PETITIONER:

Employer Account No. - 3072630
THE MAIDS ARE HERE INC
ATTN MARC IMHOF
7028 W WATERS AVE 295
TAMPA FL 33634-2292

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-34518L**

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 February 24, 2012, 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 July, 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.

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 July, 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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PROTEST OF LIABILITY

DOCKET NO. 2012-34518L

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 February 24, 2012.

After due notice to the parties, a telephone hearing was held on May 14, 2013. The Petitioner was represented by its attorney. The Petitioner's vice president and a maid testified as witnesses. The Respondent, represented by a Department of Revenue Tax Specialist, appeared and testified. The Joined Party appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is 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 and other individuals constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

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 is a corporation which was formed February 15, 2008, to operate a residential cleaning service. The Petitioner's vice president has been active in the operation of the business since inception and has received income from the business.

2. The Petitioner uses individuals who the Petitioner classifies as independent contractors to perform the cleaning. Over the years the Petitioner has had four to six cleaners or maids at any given time.
3. The Joined Party immigrated to the United States in August 2008 and obtained employment in a factory. During a following period of unemployment the Joined Party applied for work with the Petitioner and was interviewed by the Petitioner's president. The Joined Party does not speak or read English. The Joined Party had no prior experience as a maid.
4. The Joined Party was hired by the Petitioner on July 6, 2010, at which time the Petitioner gave the Joined Party paperwork to sign, including an *Acknowledgement of Status*, which was printed in English. The Joined Party signed the *Acknowledgement of Status*.
5. The *Acknowledgement of Status* provides that the Joined Party understands that the clients belong to the Petitioner and that the Joined Party will do her best to perform the proper cleaning services for each of the Petitioner's clients, that the Joined Party understands that she is in the United States legally, that the Joined Party understands that the Petitioner is authorized to do background and criminal checks on her, that the Joined Party understands that she is required to have her own automobile insurance coverage, that the Joined Party understands that the Petitioner will not withhold taxes from the pay, that the Joined Party understands that the Petitioner will provide the Joined Party with a 1099 form, that the Joined Party understands that she will be paid weekly for the services provided to clients as an independent contractor, that the Joined Party understands that there is no guarantee of work, and that the Joined Party accepts the work as the work is given to her.
6. The Petitioner's business is operated from the home of the Petitioner's president and vice president. The Joined Party and the other maids were required to report to the home of the Petitioner's president and vice president each morning at 8 AM. Each morning the Petitioner assigns the maids to work together in teams of two. The maids do not have the option of choosing to work alone or choosing who to work with.
7. Upon reporting to work each morning the maids are provided with a route sheet. The route sheet contains the address of the home to be cleaned, the size of the house, the cleaning to be done at the house, and the amount of money which the Petitioner has charged the customer. The route sheet does not state the amount that will be paid to the maid for cleaning the house. The Petitioner pays the maids a percentage of the fee which the Petitioner collects from the Petitioner's customer. The percentage varies from job to job based on the Petitioner's discretion. The maids know from experience that the percentage is generally 20 to 22 percent of the amount shown on the route sheet which the Petitioner charges the Petitioner's customer.
8. The Joined Party did not believe that she had the right to refuse any work assignment.
9. The Petitioner provides the brooms, mops, vacuum cleaners, and all supplies for the maids. Generally, the maids on a team take turns providing the transportation. The Petitioner reimburses the maid who provides the transportation based on mileage.
10. During the Joined Party's first three days of work the Petitioner's president rode with her to each cleaning job. The Petitioner's president taught the Joined Party how the Petitioner wanted the work to be performed.
11. The Joined Party was not required to keep track of the time she worked because she was not paid by the hour. The Joined Party did not submit a bill or invoice to the Petitioner for work performed and did not know the exact amount that she would be paid for the work. The Petitioner paid the Joined Party at the end of each week. The Petitioner did not withhold any taxes from the pay and did not provide any fringe benefits such as bonuses, paid vacations, paid holidays, or paid sick days.

12. During the time that the Joined Party performed services for the Petitioner the Joined Party did not have a business license or occupational license, did not have business liability insurance, did not advertise her services to the general public, did not have an investment in a business, and did not perform cleaning services for anyone other than the Petitioner.
13. The Joined Party and the other maids had the right to stop performing services for the Petitioner at any time without incurring liability for breach of contract. The Petitioner had the right to terminate the Joined Party or the other maids at any time without incurring liability for breach of contract.
14. The Joined Party filed a claim for unemployment compensation benefits, now known as reemployment assistance benefits, effective January 1, 2012. When the Joined Party did not receive credit for her earnings with the Petitioner 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.
15. On February 24, 2012, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner are the Petitioner's employees. The determination also held that the Petitioner was liable for payment of unemployment compensation tax retroactive to February 15, 2008, based on the activity of the corporate officer. The Petitioner filed a timely protest on March 14, 2012.

Conclusions of Law:

16. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals working as maids 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.
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). 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.
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 can not be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.
23. The Joined Party signed an *Acknowledgement of Status*, written in English, which states that the Joined Party understands that she will be paid by the Petitioner, for services performed for the Petitioner's clients, as an independent contractor. The Joined Party does not read or speak English and no evidence was presented to show that the document was translated for the Joined Party or that the Joined Party understood what she was signing.
24. Although it is well established that an individual is bound by a document he or she signs even if he or she does not read or understand the document, see Rivero v. Rivero, 963 So. 2d 934 (Fla. 3d DCA 2007); Peralta v. Peralta Food Corp., 506 F. Supp. 1274 (S.D.Fla. 2007) and Merrill Lynch v. Benton, 467 So. 2d 311, 313 (Fla. 5th DCA 1985), it is equally well established that a statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). 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.”
25. The Petitioner operates a residential cleaning business. The Petitioner engaged the Joined Party to perform the cleaning work for the Petitioner's customers. The work performed by the Joined Party and the other maids was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business.
26. The Petitioner provided everything that was needed to perform the work including brooms, mops, vacuum cleaners, and supplies. When the Joined Party used her automobile to drive to the homes of the Petitioner's customers, the Petitioner reimbursed the Joined Party for the transportation by paying for mileage. It was not shown that the Joined Party had any expenses in connection with the work. It was not shown that the Joined Party was at risk of a financial loss from services performed.

27. It was not shown that the work performed by the Joined Party required any skill or special knowledge. 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)
28. The Joined Party was paid by the job rather than by time worked. However, the Petitioner controlled the financial aspects of the relationship. The Petitioner determined which cleaning jobs, and how many cleaning jobs, were assigned to the Joined Party. The Petitioner determined the amounts charged to the customers. The Petitioner determined the percentages paid to the Joined Party without the Joined Party's advance knowledge of the exact percentage. The Petitioner controlled both the method of pay and the rate of pay.
29. 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 taxes from the pay does not, standing alone, establish an independent contractor relationship.
30. The Joined Party performed services for the Petitioner for a period in excess of one year. 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."
31. The Petitioner controlled what work was performed, when it was performed, by whom it was performed, and how it was performed. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if 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 the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.
32. It is concluded that the services performed by the Joined Party and other individuals as maids constitute insured employment.
33. 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.
34. The Petitioner is a corporation. The Petitioner's president and vice president have been active in the operation of the business since the corporation was formed on February 15, 2008. Therefore, the Petitioner's president and vice president are statutory employees of the Petitioner, retroactive to February 15, 2008.

35. Section 443.1215, Florida States, 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.

36. The Petitioner's corporate officers have performed services for the Petitioner during twenty weeks of each year since February 15, 2008. Thus, the Petitioner has established liability for payment of reemployment assistance program taxes effective February 15, 2008.

37. The special deputy was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. Factors considered in resolving evidentiary conflicts include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the special deputy finds the testimony of the Joined Party to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the Joined Party.

Recommendation: It is recommended that the determination dated February 24, 2012, be AFFIRMED.

Respectfully submitted on June 3, 2013.



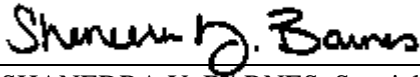
R. O. SMITH, Special Deputy
Office of Appeals

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 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.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:

June 3, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

ELIZABETH ROJAS CERNICHAR
9704 CYPRESS STREET
TAMPA FL 33635

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