

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

PETITIONER:

Employer Account No. - 2916667

SONA IMAGING SOLUTIONS INC
BABY'S FIRST
296 TREEMONT DR
ORANGE CITY FL 32763-7945

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-6421L**

ORDER

This matter comes before me for final Department Order.

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

The Joined Party filed a reemployment assistance claim in August 2011. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Department of Economic Opportunity (the Department) that she worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As a result of the Joined Party's request, the Department of Revenue, hereinafter referred to as the Respondent, conducted an investigation to determine whether the Joined Party and other ultrasound technicians worked for the Petitioner as employees or independent contractors. If the Joined Party worked for the Petitioner as an employee, she would qualify for reemployment assistance benefits, and the Petitioner would owe reemployment assistance taxes on the remuneration it paid to the Joined Party and any other workers that performed services under the same terms and conditions as the Joined Party. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, she would remain ineligible for benefits, and the Petitioner would not owe reemployment assistance taxes on the wages it paid to the Joined Party and any other ultrasound technicians.

Upon completing the investigation, the Respondent's auditor determined that the services performed by the Joined Party and other ultrasound technicians were in insured employment. The Petitioner was required to pay reemployment assistance taxes on wages it paid to the Joined Party and any workers who performed services under the same terms and conditions as the Joined Party. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because she had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on February 9, 2012. The Petitioner, represented by its president, appeared and testified. The Petitioner's medical records and front office assistant testified as a witness on behalf of the Petitioner. The Joined Party appeared and testified on her own behalf. The Respondent, represented by a Tax Specialist II, appeared and testified. The Special Deputy issued a recommended order on April 16, 2012.

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

1. The Petitioner is a corporation that was formed in February 2008, to operate an ultrasound imaging service. The services provided by the Petitioner include mobile ultrasound services, ultrasound staffing, and screening ultrasound exams. The Petitioner's clients include physicians, imaging centers, and hospitals. Most of the ultrasound services are performed at the client locations. The Petitioner offers screening ultrasound exams and research support services at its business location.
2. The Petitioner's mobile ultrasound service provides sonographers, also referred to as ultrasound technicians, equipment, and supplies to clients. The clients pay a contracted amount to the Petitioner that includes rental of the equipment and supplies. The Petitioner's ultrasound staffing service provides sonographers to clients who have their own equipment and supplies.
3. The Petitioner considers some of the sonographers to be employees and some of the sonographers to be independent contractors. The Petitioner first hired a sonographer it considered an independent contractor on August 16, 2008. The sonographers classified as employees receive fringe benefits, such as health and disability insurance, and are covered under the Petitioner's medical malpractice and workers' compensation insurance. They are required to clock in and clock out on the Petitioner's online time management system, and are paid for actual time worked. The sonographers classified as independent contractors do not receive fringe benefits. They are required to carry their own medical malpractice insurance and are not covered under the Petitioner's workers' compensation insurance. The sonographers considered independent contractors are paid for a minimum of four hours for each assignment. They record their time on account log sheets submitted to the Petitioner at the end of the work day.

4. A license is not required to perform ultrasound exams. The sonographers hired by the Petitioner are required to have completed a certificate program or a degree program. Sonographers can obtain registry credentials with the American Registry for Diagnostic Medical Sonographers upon completing certain educational or work experience requirements and passing an exam. Some of the Petitioner's clients require registered sonographers, and, as of January 2012, registration is required for Medicare reimbursement for ultrasound services.
5. All contracts or arrangements for ultrasound services are made between the Petitioner and its clients. The Petitioner assigns accounts to sonographers based upon the requirements of the client and the skill level of the sonographer. The sonographers have the right to decline an assignment. The Petitioner and the client determine the days and times the services are to be performed. The sonographers may not alter the scheduled days or times. The Petitioner maintains an online scheduling system that the sonographers can check for any changes to their schedules. If a client makes a complaint about a sonographer, the Petitioner addresses the issue with the sonographer. If the problem is not corrected, the Petitioner issues a warning. After two warnings, the Petitioner may discontinue using the services of a sonographer it considers an independent contractor and may terminate a sonographer it considers an employee.
6. The Petitioner requires the sonographers to personally perform the work. If a sonographer is unable to service an account on the assigned date and time, the sonographer is required to notify the Petitioner at least two hours prior to the start of the scheduled shift so that the Petitioner can obtain coverage for the shift. All sonographers, including those considered to be independent contractors, are subject to the Petitioner's written policy on unexcused absences. More than four unexcused absences per calendar year may result in "suspension and/or termination of employment and/or contractor agreement."
7. The Petitioner requires the sonographers to adhere to the Petitioner's standards and protocols in performing their services. The sonographers are also required to abide by the specific policies and protocols of the office or facility in which they perform their services. The sonographers are required to complete a worksheet for each examination performed and a log sheet for each account serviced, which are to be submitted to the Petitioner's office at the end of each day. For mobile accounts, the sonographers are also required to upload images to the Petitioner's hosting software.
8. The Petitioner provides the equipment, gel, gloves, and other supplies needed for the mobile ultrasound services. The Petitioner maintains and insures the equipment. If a device such as a blood pressure cuff or Doppler is needed, and the sonographer does not have the device, the Petitioner provides one for the sonographer's use. For staffing services, the clients provide the necessary equipment and supplies. The Petitioner provides the sonographers with a badge with the Petitioner's name and the name of the sonographer. The sonographers use their own vehicles to travel to the client's office or facility. When the Joined Party began performing services for the Petitioner, the Petitioner reimbursed sonographers for mileage associated with travel to certain accounts at a rate of \$.405 per mile. The Petitioner later reduced the rate of reimbursement to \$.35 per mile and paid only for mileage in excess of 50 miles one-way.
9. On September 12, 2009, the Joined Party received and acknowledged an *Offer of Independent Contractor Employment* from the Petitioner. The offer states that "employment" will be on a per diem/as needed basis. The offer allows for acceptance or refusal of an assignment. The offer provides for payment at a rate of \$28 per hour, with a guarantee of four paid hours per

shift, and a pay increase of \$1 per hour upon completion of certain registry credentials. The offer states that mileage associated with certain accounts will be reimbursed at a rate of \$.405 per mile.

10. On the same date, September 12, 2009, the Joined Party and the Petitioner entered into an *Independent Contractor Agreement*. The agreement identifies the Joined Party as an Independent Contractor. The agreement does not incorporate the offer or otherwise define the scope of work or compensation. With respect to the work to be performed, the agreement states only that the Independent Contractor is to be paid on a per assignment basis and that the Independent Contractor is responsible for invoicing the Petitioner on a bi-weekly basis.
11. The agreement provides that the Independent Contractor is responsible for the payment of all applicable taxes, unemployment “insurance,” and worker’s compensation insurance. The agreement provides that the Independent Contractor is not entitled to any fringe benefits. The agreement requires the Independent Contractor to maintain malpractice insurance coverage.
12. The agreement reserves to the Independent Contractor the right to perform ultrasound services for other companies, including the Petitioner’s competitors. The agreement restricts the Independent Contractor, for a period of one year from the date of termination of the agreement, from obtaining employment of any type with any facility or office to which the Independent Contractor was assigned by Petitioner, or from calling on or soliciting any client of the Petitioner for whom the Independent Contractor provided services, became acquainted, or learned of during the term of the agreement.
13. The agreement provides that either party may terminate the agreement at any time for any reason. The agreement requires the Independent Contractor to give a 14-day advance written notice of termination.
14. The Joined Party completed an ultrasound certificate program, and had approximately five months of work experience as a sonographer before performing services for the Petitioner. The Petitioner provided some initial training to the Joined Party. The Petitioner’s president accompanied the Joined Party to a particular account location for a period of one month to demonstrate the specific protocols the physician required.
15. In June 2011, the Petitioner reduced the Joined Party’s hourly rate from \$28 to \$26 because the Joined Party failed to obtain certain registry credentials.
16. The Joined Party utilized the Petitioner’s optional online time and mileage reimbursement system to report her hours and miles. The Petitioner did not withhold payroll taxes from the Joined Party’s pay. The Petitioner did not provide any fringe benefits to the Joined Party such as health insurance, sick pay, or vacation pay. The Petitioner reported the Joined Party’s earnings on a form 1099-MISC.
17. The Joined Party did not have her own business, occupational license, or business liability insurance. The Joined Party maintained medical malpractice insurance for the first year she performed services for the Petitioner. The Joined Party did not perform services for others while performing services for the Petitioner.
18. The Joined Party terminated the relationship, after giving two weeks written notice, due to the reduction in her hourly rate and the mileage reimbursement.

19. The Joined Party last worked for the Petitioner on August 10, 2011. The Joined Party filed a claim for unemployment compensation benefits effective August 14, 2011. When the Joined Party did not receive credit for her earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed. An investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.
20. On November 28, 2011, the Department of Revenue issued a determination holding that the services performed by the Joined Party and other individuals as ultrasound technicians constitute insured employment retroactive to August 15, 2009. The Petitioner filed a timely protest.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated December 5, 2011, be modified to reflect a retroactive date of August 16, 2008. The Special Deputy also recommended that the determination be affirmed as modified. On May 2, 2012, and May 8, 2012, extensions for the time for filing exceptions were granted until May 16, 2012, and June 1, 2012, respectively. The Petitioner's exceptions were received by mail postmarked May 31, 2012. No other submissions were received from any party.

With respect to the recommended order, section 120.57(1)(l), Florida Statutes, provides:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts. The Petitioner's exceptions are also addressed below.

Upon review of the record, it was determined that Finding of Fact #3, Conclusion of Law #35, and the Special Deputy's *Recommendation*, the first paragraph on the sixth page of the Recommended Order, must be modified because they include an incorrect retroactive date of liability. The record reflects that the Petitioner's president testified that the first ultrasound technicians that the Petitioner classified as independent contractors began working for the Petitioner on August 15, 2008. Accordingly, Finding of Fact # 3 is amended to say:

The Petitioner considers some of the sonographers to be employees and some of the sonographers to be independent contractors. The Petitioner first hired a sonographer it considered an independent contractor on August 15, 2008. The sonographers classified as employees receive fringe benefits, such as health and disability insurance, and are covered under the Petitioner's medical malpractice and workers' compensation insurance. They are required to clock in and clock out on the Petitioner's online time management system, and are paid for actual time worked. The sonographers classified as independent contractors do not receive fringe benefits. They are required to carry their own medical malpractice insurance and are not covered under the Petitioner's workers' compensation insurance. The sonographers considered independent contractors are paid for a minimum of four hours for each assignment. They record their time on account log sheets submitted to the Petitioner at the end of the work day.

Conclusion of Law #35 is amended to say:

The determination in this case holds the Petitioner liable for payment of unemployment compensation taxes retroactive to August 15, 2009. However, the record shows the Petitioner employed a sonographer as early as August 15, 2008. Therefore, the correct retroactive date is August 15, 2008.

The Special Deputy's *Recommendation* is also amended to say:

Recommendation: It is recommended that the determination dated December 5, 2011, be MODIFIED to reflect a retroactive date of August 15, 2008. As modified, it is recommended that the determination be AFFIRMED.

In its exceptions, the Petitioner requests consideration of affidavits that were provided to the Department after the hearing was held. Rule 73B-10.035(19)(a), Florida Administrative Code, provides that additional evidence will not be accepted after the close of the hearing. The Petitioner's request for the consideration of additional evidence is respectfully denied.

The Petitioner also contends that the Special Deputy's Findings of Fact and Conclusions of Law are not supported by competent substantial evidence in the record. Additionally, the Petitioner's exceptions propose findings of fact in accord with the Special Deputy's Findings of Fact and alternative findings of fact and conclusions of law. The Petitioner specifically takes exception to Findings of Fact #3, 5-6, 8-10, and 14, Conclusions of Law #30-31 and 33-35, and the Special Deputy's *Recommendation*, the first paragraph on the sixth page of the Recommended Order. Section 120.57(1)(l), Florida Statutes, does not allow the modification or rejection of the Special Deputy's Findings of Fact or Conclusions of Law unless the Department first determines that the findings of fact are not supported by the competent substantial evidence in the record or that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's amended Findings of Fact, including Findings of Fact #3, 5-6, 8-10, and 14, are supported by competent substantial evidence in the record. A review of the record further reveals that the Special Deputy's amended Conclusions of Law, including Conclusions of Law #30-31 and #33-35 and the Special Deputy's *Recommendation*, are supported by competent substantial evidence in the record and reflect a reasonable application of the law to the facts. 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 exceptions are respectfully rejected.

The Petitioner requests in its exceptions that the hearing be reopened to review the Special Deputy's *Recommendation* that other independent contractors are all similarly situated and are or were insurable employees. Rule 73B-10.035(18), Florida Administrative Code, provides that a special deputy may rescind a recommended order for good cause and reopen the proceedings if a party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to the party. Because the Petitioner has failed to demonstrate good cause for reopening the hearing, the Petitioner's request is respectfully denied.

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

Having fully considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as amended herein. A copy of the Recommended Order is attached and incorporated in this Final Order.

Therefore, it is ORDERED that the determination dated December 5, 2011, is MODIFIED to reflect a retroactive date of August 15, 2008. It is further ORDERED that the determination be 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 _____ day of **August, 2012**.



Altemese Smith,
Assistant Director,
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 August, 2012.

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:

SONA IMAGING SOLUTIONS INC
BABY'S FIRST
296 TREEMONT DR
ORANGE CITY FL 32763-7945

LESLIE BYRD
11121 LOST CREEK TERRACE
APT 306
BRADENTON FL 34211

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DOR BLOCKED CLAIMS UNIT
ATTENTION MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417

PHIL A D'ANIELLO
1325 WEST COLONIAL DRIVE
ORLANDO FL 32804

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2916667
SONA IMAGING SOLUTIONS INC
BABY'S FIRST
296 TREEMONT DR
ORANGE CITY FL 32763-7945



**PROTEST OF LIABILITY
DOCKET NO. 2012-6421L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Unemployment Compensation 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 December 5, 2011.

After due notice to the parties, a telephone hearing was held on February 9, 2012. The Petitioner, represented by the Petitioner's president, appeared and testified. The Petitioner's medical records and front office assistant testified as a witness. The Respondent, represented by a 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/or Conclusions of Law were not received.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals as ultrasound technicians/sonographers 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.

Findings of Fact:

1. The Petitioner is a corporation that was formed in February 2008, to operate an ultrasound imaging service. The services provided by the Petitioner include mobile ultrasound services, ultrasound staffing, and screening ultrasound exams. The Petitioner's clients include physicians, imaging centers, and hospitals. Most of the ultrasound services are performed at the client

locations. The Petitioner offers screening ultrasound exams and research support services at its business location.

2. The Petitioner's mobile ultrasound service provides sonographers, also referred to as ultrasound technicians, equipment, and supplies to clients. The clients pay a contracted amount to the Petitioner that includes rental of the equipment and supplies. The Petitioner's ultrasound staffing service provides sonographers to clients who have their own equipment and supplies.
3. The Petitioner considers some of the sonographers to be employees and some of the sonographers to be independent contractors. The Petitioner first hired a sonographer it considered an independent contractor on August 16, 2008. The sonographers classified as employees receive fringe benefits, such as health and disability insurance, and are covered under the Petitioner's medical malpractice and workers' compensation insurance. They are required to clock in and clock out on the Petitioner's online time management system, and are paid for actual time worked. The sonographers classified as independent contractors do not receive fringe benefits. They are required to carry their own medical malpractice insurance and are not covered under the Petitioner's workers' compensation insurance. The sonographers considered independent contractors are paid for a minimum of four hours for each assignment. They record their time on account log sheets submitted to the Petitioner at the end of the work day.
4. A license is not required to perform ultrasound exams. The sonographers hired by the Petitioner are required to have completed a certificate program or a degree program. Sonographers can obtain registry credentials with the American Registry for Diagnostic Medical Sonographers upon completing certain educational or work experience requirements and passing an exam. Some of the Petitioner's clients require registered sonographers, and, as of January 2012, registration is required for Medicare reimbursement for ultrasound services.
5. All contracts or arrangements for ultrasound services are made between the Petitioner and its clients. The Petitioner assigns accounts to sonographers based upon the requirements of the client and the skill level of the sonographer. The sonographers have the right to decline an assignment. The Petitioner and the client determine the days and times the services are to be performed. The sonographers may not alter the scheduled days or times. The Petitioner maintains an online scheduling system that the sonographers can check for any changes to their schedules. If a client makes a complaint about a sonographer, the Petitioner addresses the issue with the sonographer. If the problem is not corrected, the Petitioner issues a warning. After two warnings, the Petitioner may discontinue using the services of a sonographer it considers an independent contractor and may terminate a sonographer it considers an employee.
6. The Petitioner requires the sonographers to personally perform the work. If a sonographer is unable to service an account on the assigned date and time, the sonographer is required to notify the Petitioner at least two hours prior to the start of the scheduled shift so that the Petitioner can obtain coverage for the shift. All sonographers, including those considered to be independent contractors, are subject to the Petitioner's written policy on unexcused absences. More than four unexcused absences per calendar year may result in "suspension and/or termination of employment and/or contractor agreement."
7. The Petitioner requires the sonographers to adhere to the Petitioner's standards and protocols in performing their services. The sonographers are also required to abide by the specific policies and protocols of the office or facility in which they perform their services. The sonographers are required to complete a worksheet for each examination performed and a log sheet for each account

serviced, which are to be submitted to the Petitioner's office at the end of each day. For mobile accounts, the sonographers are also required to upload images to the Petitioner's hosting software.

8. The Petitioner provides the equipment, gel, gloves, and other supplies needed for the mobile ultrasound services. The Petitioner maintains and insures the equipment. If a device such as a blood pressure cuff or Doppler is needed, and the sonographer does not have the device, the Petitioner provides one for the sonographer's use. For staffing services, the clients provide the necessary equipment and supplies. The Petitioner provides the sonographers with a badge with the Petitioner's name and the name of the sonographer. The sonographers use their own vehicles to travel to the client's office or facility. When the Joined Party began performing services for the Petitioner, the Petitioner reimbursed sonographers for mileage associated with travel to certain accounts at a rate of \$.405 per mile. The Petitioner later reduced the rate of reimbursement to \$.35 per mile and paid only for mileage in excess of 50 miles one-way.
9. On September 12, 2009, the Joined Party received and acknowledged an *Offer of Independent Contractor Employment* from the Petitioner. The offer states that "employment" will be on a per diem/as needed basis. The offer allows for acceptance or refusal of an assignment. The offer provides for payment at a rate of \$28 per hour, with a guarantee of four paid hours per shift, and a pay increase of \$1 per hour upon completion of certain registry credentials. The offer states that mileage associated with certain accounts will be reimbursed at a rate of \$.405 per mile.
10. On the same date, September 12, 2009, the Joined Party and the Petitioner entered into an *Independent Contractor Agreement*. The agreement identifies the Joined Party as an Independent Contractor. The agreement does not incorporate the offer or otherwise define the scope of work or compensation. With respect to the work to be performed, the agreement states only that the Independent Contractor is to be paid on a per assignment basis and that the Independent Contractor is responsible for invoicing the Petitioner on a bi-weekly basis.
11. The agreement provides that the Independent Contractor is responsible for the payment of all applicable taxes, unemployment "insurance," and worker's compensation insurance. The agreement provides that the Independent Contractor is not entitled to any fringe benefits. The agreement requires the Independent Contractor to maintain malpractice insurance coverage.
12. The agreement reserves to the Independent Contractor the right to perform ultrasound services for other companies, including the Petitioner's competitors. The agreement restricts the Independent Contractor, for a period of one year from the date of termination of the agreement, from obtaining employment of any type with any facility or office to which the Independent Contractor was assigned by Petitioner, or from calling on or soliciting any client of the Petitioner for whom the Independent Contractor provided services, became acquainted, or learned of during the term of the agreement.
13. The agreement provides that either party may terminate the agreement at any time for any reason. The agreement requires the Independent Contractor to give a 14-day advance written notice of termination.
14. The Joined Party completed an ultrasound certificate program, and had approximately five months of work experience as a sonographer before performing services for the Petitioner. The Petitioner provided some initial training to the Joined Party. The Petitioner's president accompanied the Joined Party to a particular account location for a period of one month to demonstrate the specific protocols the physician required.

15. In June 2011, the Petitioner reduced the Joined Party's hourly rate from \$28 to \$26 because the Joined Party failed to obtain certain registry credentials.
16. The Joined Party utilized the Petitioner's optional online time and mileage reimbursement system to report her hours and miles. The Petitioner did not withhold payroll taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits to the Joined Party such as health insurance, sick pay, or vacation pay. The Petitioner reported the Joined Party's earnings on a form 1099-MISC.
17. The Joined Party did not have her own business, occupational license, or business liability insurance. The Joined Party maintained medical malpractice insurance for the first year she performed services for the Petitioner. The Joined Party did not perform services for others while performing services for the Petitioner.
18. The Joined Party terminated the relationship, after giving two weeks written notice, due to the reduction in her hourly rate and the mileage reimbursement.
19. The Joined Party last worked for the Petitioner on August 10, 2011. The Joined Party filed a claim for unemployment compensation benefits effective August 14, 2011. When the Joined Party did not receive credit for her earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed. An investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.
20. On November 28, 2011, the Department of Revenue issued a determination holding that the services performed by the Joined Party and other individuals as ultrasound technicians constitute insured employment retroactive to August 15, 2009. The Petitioner filed a timely protest.

Conclusions of Law:

21. 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.
22. 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).
23. 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).
24. 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.
25. 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.
26. 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.
27. 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.
28. The written agreement between the parties states that the Joined Party is considered to be an Independent Contractor. A statement in an agreement that the existing relationship is that of an independent contractor is not dispositive of the issue. Lee v. American Family Assurance Company, 431 So.2d 249 (Fla. 1st DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So. 2d 131 (Fla. 1972), a case involving an independent contractor agreement that specified the worker was not to be considered an employee, 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.”
29. The work performed by the Joined Party required a high degree of knowledge and skill. Courts have noted the particular difficulty in determining the extent of control over the activities of a professional person or highly skilled worker. See Florida Gulf Coast Symphony, Inc. v. Department of Labor and Employment Security, 386 So.2d 259 (Fla. 2d DCA 1980); Kay v. General Cable Corp., 144 F.2d 653 (3d Cir. 1944); Carnes v. Industrial Commission, 73 Ariz. 264, 240 P.2d 536 (1952). The engaging party’s control “must necessarily be more tenuous and general than the control over nonprofessional employees.” James v. Commissioner, 25 T.C. 1296, 1301 (1956).
30. In this case, the Petitioner exercised a significant degree of control over the performance of the work. The Petitioner determined what work was performed and where the work was performed. Although the Joined Party could decline an assignment, the Petitioner set the hours for each shift assigned. The Joined Party was not free to arrange her own hours with an assigned account. The Petitioner controlled how the work was performed through its protocols, policies, reporting requirements, and training.
31. The Petitioner controlled the financial aspects of the relationship. The Petitioner determined the rate and method of payment. The Joined Party was paid by the hour, rather than by production or

by the job. The Joined Party was required to submit daily log sheets that were used to verify her hours. The fact that the Petitioner did not withhold payroll taxes from the Joined Party's pay does not, standing alone, establish an independent contractor relationship.

32. The Petitioner operates an ultrasound imaging service. The Joined Party performed services for the Petitioner as a sonographer. The work performed by the Joined Party was an integral and necessary part of the Petitioner's business. As the court stated in Hilldrup Transfer & Storage of New Smyrna Beach, Inc. v. Department of Labor and Employment Security, 447 So.2d 414 (Fla. 5th DCA 1984), "if the work performed in the relationship under consideration is a part of the principle's business, this factor indicates an employment status, even if the work requires a high level of skill to perform it."
33. The *Offer of Independent Contractor Employment* and the *Independent Contractor Agreement* are for indefinite rather than specified terms. The Joined Party worked for the Petitioner for approximately two years. The Petitioner had the right to terminate the agreement at any time for any reason without notice. 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 is 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."
34. In Adams v. Department of Labor and Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the court determined the Department had the authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers. It is concluded that the services performed for the Petitioner by the Joined Party and others as sonographers constitute insured work.
35. The determination in this case holds the Petitioner liable for payment of unemployment compensation taxes retroactive to August 15, 2009. However, the record shows the Petitioner employed a sonographer as early as August 16, 2008. Therefore, the correct retroactive date is August 16, 2008.

Recommendation: It is recommended that the determination dated December 5, 2011, be MODIFIED to reflect a retroactive date of August 16, 2008. As modified, it is recommended that the determination be AFFIRMED.

Respectfully submitted on April 16, 2012.

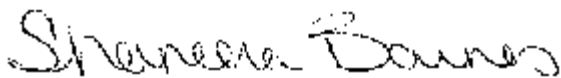


SUSAN WILLIAMS, Special Deputy
Office of Appeals

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 resumen 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.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
April 16, 2012

Copies mailed to:

Petitioner
Respondent
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