

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

PETITIONER:

Employer Account No. - 2848568
AMERICAN HOME HEALTH AGENCY INC
ATTN ANTHONY PRYCE
5803 NW 151ST STREET STE 201
MIAMI LAKES FL 33014-2473

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-66106L**

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 April 12, 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 January, 2013.



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 January, 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:

AMERICAN HOME HEALTH AGENCY
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YAUMARA MARRERO
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DEPARTMENT OF REVENUE
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
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DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

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RESPONDENT:

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**PROTEST OF LIABILITY
DOCKET NO. 2012-66106L**

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 April 12, 2012

After due notice to the parties, a telephone hearing was held on October 29, 2012. The Petitioner, represented by the Petitioner's President, 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 has provided home health services for approximately six years. The Petitioner is licensed by the state of Florida to provide home health services in Miami-Dade and Monroe counties. The Petitioner is a licensed Medicare provider.

2. The Joined Party provided services for the Petitioner as a quality assurance analyst from August 11, 2011, through February 2, 2012. The Joined Party's responsibility was to ensure that individuals performing in-home care services for the Petitioner followed the patient's plan of care. The Joined Party reviewed notes submitted by nurses and other care providers and audited patient files for compliance with the plan of care.
3. The Joined Party obtained the work through her sister and brother-in-law, who are the Petitioner's employees. The Joined Party had prior experience as a quality assurance analyst. An independent contractor utilized by the Petitioner provided training to the Joined Party concerning Medicare regulations applicable to the work. The Joined Party was paid during the training period. The Petitioner provided the Joined Party with a checklist to be used when auditing files.
4. Initially, the Petitioner hired the Joined Party as an employee, and taxes were withheld from her pay. After receipt of her first paycheck, the Joined Party questioned the amount of taxes withheld. The Joined Party expressed to the Petitioner that she did not believe the Petitioner was deducting the appropriate amounts. After that discussion, the Petitioner did not withhold taxes from the Joined Party's pay. The parties then executed an *Independent Contractor Agreement* effective August 11, 2011. The agreement identifies the Joined Party as a "Contractor" and states that the services to be provided are home health services. The Joined Party did not provide home health services as set forth in the agreement. For convenience, the Petitioner utilized a form of agreement that the Petitioner customarily uses for individuals providing in-home services for patients.
5. The Joined Party's services were performed at the Petitioner's business location. The Petitioner provided the work space, computer, software program, and telephone needed for the work. The Petitioner required the Joined Party and others performing similar services to utilize the Petitioner's computer system in order to protect the patient's identity and health information.
6. The Joined Party was required to perform her work during the Petitioner's regular business hours which were from 9:00 am until 5:00 pm, Monday through Friday. The Joined Party did not have a key to the Petitioner's office. The Joined Party could not take files out of the Petitioner's office, and the Petitioner did not have an electronic data system in place that would have allowed the Joined Party to access information from a remote location. If the Joined Party needed to work late to complete her tasks, an employee of the Petitioner stayed at the Petitioner's office with the Joined Party.
7. The Joined Party was paid at a rate of \$13 or \$14 per hour. The Joined Party clocked in and out upon arriving and leaving work. Every two weeks, the Petitioner provided the Joined Party with a report of the hours recorded in the time clock system. The Joined Party reviewed the hours for accuracy, edited the number of hours shown, if applicable, and signed the report. The Petitioner treated the signed report as an invoice. The Joined Party was paid on a bi-weekly basis.
8. The Joined Party's work was supervised by the Petitioner's director of nursing and by the Petitioner's president. The director of nursing reviewed and signed off, where applicable, on the charts reviewed by the Joined Party. The Joined Party had to notify or obtain approval from the Petitioner's president in the event the Joined Party was ill or wanted to take time off from work.
9. The Joined Party could not sub-contract the work or hire others to do the work.
10. The Joined Party did not have her own business, occupational license, or liability insurance.

11. The Petitioner terminated the relationship with the Joined Party after being informed of a negative background check result.

Conclusions of Law:

12. 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.
13. 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).
14. 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).
15. 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.
16. 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.
17. 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.
18. 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.

19. The record is clear that the intent of the parties at the time of hire was to enter into an employer-employee relationship. It was only after the Joined Party questioned whether the Petitioner withheld the appropriate amount of taxes from the Joined Party’s pay that the parties entered into a written agreement designating the Joined Party as an independent contractor. It is also clear that the material terms of that agreement do not reflect the services actually performed by the Joined Party or the working relationship. 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.”
20. 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 a significant degree of control over the performance 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 direction, how the work was performed. The Joined Party was required to personally perform the work.
21. The Joined Party did not have her own business. The Petitioner supplied the work space and all equipment and supplies needed to perform the work.
22. The Joined Party was paid by time, rather than by the job. The Joined Party was required to clock in and out using the Petitioner’s time clock system. The fact that the Petitioner did not withhold taxes from the Joined Party’s pay does not, standing alone, establish an independent contractor relationship.
23. The Petitioner is in the business of providing home health services to patients in accordance with an established plan of care. The Joined Party performed quality assurance services to ensure that the individuals providing the in-home care services were complying with the plan of care. The work performed by the Joined Party was not separate and distinct, but rather was an integral and necessary part of the Petitioner’s business.
24. It is concluded that the services performed for the Petitioner by the Joined Party as a quality assurance analyst constitute insured employment.

Recommendation: It is recommended that the determination dated April 12, 2012 be AFFIRMED.

Respectfully submitted on November 30, 2012.

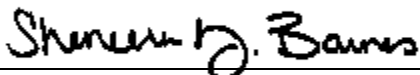


SUSAN WILLIAMS, Special Deputy
Office of Appeals

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 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 ken z 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:
November 30, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

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