

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

PETITIONER:

Employer Account No. - 3030658
NATIONAL MARKETING SERVICES LL C
1515 N MARION ST 2ND FL
TAMPA FL 33602-2636

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-86267L**

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 May 16, 2012, is REVERSED.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _____ day of February, 2013.



Altemese Smith,
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 February, 2013.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

NATIONAL MARKETING SERVICES LL C
1515 N MARION ST 2ND FL
TAMPA FL 33602-2636

ALAN DARULLA
1732 CORAL WAY
LARGO FL 33771

DEPARTMENT OF REVENUE
ATTN: PATRICIA ELKINS - CCOC #1-4866
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

MYRA TAYLOR
FLORIDA DEPARTMENT OF REVENUE
P O BOX 6417
TALLAHASSEE FLORIDA 32314-6417

FORD & HARRISON LLP
ATTN: TODD S AIDMAN
101 E KENNEDY BLVD SUITE 900
TAMPA FL 33602

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. 2012-86267L**

RESPONDENT:

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

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 May 16, 2012.

After due notice to the parties, a telephone hearing was held on December 5, 2012. The Petitioner was represented by its attorney. The Petitioner's managing member testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, 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, National Marketing Services , LLC is a Florida limited liability company that was formed in June 2010. The Petitioner's business is the generation of leads for debt reduction services.
2. The Petitioner purchases leads from vendors. The Petitioner then qualifies each lead by determining if the lead is an individual who is in need of financial services. The qualification process is performed by individuals who are acknowledged employees of the Petitioner. The Petitioner then sells the qualified leads to financial service companies.

3. The Joined Party is an individual who sold leads to the Petitioner between March 1, 2011, and October 6, 2011. There was no written agreement or contract between the Petitioner and the Joined Party.
4. The Petitioner did not provide any training to the Joined Party.
5. The Joined Party did not perform any services for the Petitioner at the Petitioner's place of business and the Petitioner did not provide any tools, equipment, or supplies. The Petitioner did not reimburse the Joined Party for expenses.
6. The Petitioner did not provide any instructions to the Joined Party concerning when to do the work or how to do the work. The Petitioner did not supervise the Joined Party.
7. The Joined Party was free to sell leads to other companies. The Joined Party was free to hire others to generate the leads for him.
8. The Petitioner paid the Joined Party \$10 per lead which the Petitioner purchased from the Joined Party. The Petitioner paid the Joined Party \$10 per lead regardless of whether the lead was qualified or not. The Petitioner paid the Joined Party on a weekly basis and no payroll taxes were withheld from the pay. The Petitioner did not provide any fringe benefits such as health insurance, life insurance, vacation pay, holiday pay, sick pay, retirement benefits, workers' compensation coverage, or bonuses. At the end of 2011 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
9. The Joined Party filed a claim for unemployment compensation benefits (now known as reemployment assistance benefits) effective April 1, 2012, and established a base period consisting of the 2011 calendar year. When the Joined Party did not receive credit for any earnings from the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was issued to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.
10. By determination dated May 16, 2012 the Department of Revenue ruled that the services performed for the Petitioner by the Joined Party constituted insured employment. The Petitioner filed a timely protest by mail postmarked June 5, 2012.

Conclusions of Law:

11. The issue in this case, whether services performed for the Petitioner by the Joined Party 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.
12. 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).
13. 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.

14. 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.
15. 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.
16. 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.
17. 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.
18. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."
19. The Petitioner did not provide the place of work and did not provide any tools, equipment, or supplies. The Petitioner did not reimburse the Joined Party for any expenses that the Joined Party may have had.
20. The Petitioner did not train the Joined Party, did not tell the Joined Party how to perform the work, did not supervise the Joined Party, and did not control when the Joined Party performed the work.
21. The Petitioner paid the Joined Party \$10 per lead regardless of the quality of the lead. The Petitioner paid the Joined Party based on production rather than based on time worked. No taxes were withheld from the pay, no fringe benefits were provided, and at the end of the year the Petitioner reported the Joined Party's earnings as nonemployee compensation.
22. The evidence presented in this case reveals that the Petitioner did not control where the work was performed, when the work was performed, or how the work was performed.

23. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.
24. It is concluded that the services performed for the Petitioner by the Joined Party do not constitute insured employment.

Recommendation: It is recommended that the determination dated May 16, 2012, be REVERSED.

Respectfully submitted on January 2, 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.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
January 2, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

ALAN DARULLA
1732 CORAL WAY
LARGO FL 33771

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

MYRA TAYLOR
FLORIDA DEPARTMENT OF REVENUE
P O BOX 6417
TALLAHASSEE FLORIDA 32314-6417

FORD & HARRISON LLP
ATTN: TODD S AIDMAN
101 E KENNEDY BLVD SUITE 900
TAMPA FL 33602