

**DEPARTMENT OF ECONOMIC OPPORTUNITY  
Reemployment Assistance Appeals  
PO BOX 5250  
TALLAHASSEE FL 32399-5250**

**PETITIONER:**

Employer Account No. - 1565588  
CARPE DIEM SALES & MARKETING INC  
4560 36TH ST  
ORLANDO FL 32811-6526

**PROTEST OF LIABILITY  
DOCKET NO. 0020 9513 37-02**

**RESPONDENT:**

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

**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 October 28, 2013, is AFFIRMED.

### JUDICIAL REVIEW

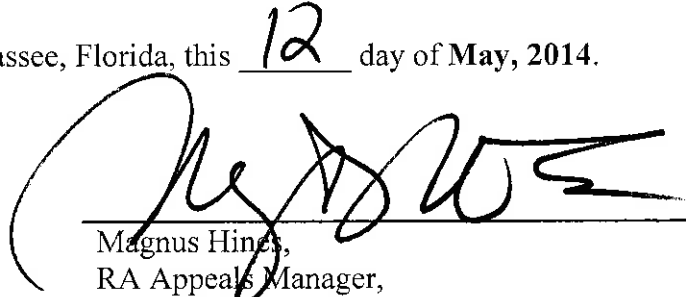
Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed 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 responsabiltè 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 12 day of May, 2014.



  
Magnus Hines,  
RA Appeals Manager,  
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.

  
DEPUTY CLERK

5.16.14  
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 16th day of May, 2014.

  
SHANEDRA Y. BARNES, Special Deputy Clerk  
DEPARTMENT OF ECONOMIC  
OPPORTUNITY  
Reemployment Assistance Appeals  
PO BOX 5250  
TALLAHASSEE FL 32399-5250

By U.S. Mail:

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY  
Reemployment Assistance Appeals  
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DOCKET NO. 0020 9513 37-02**

**RESPONDENT:**

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

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Magnus Hines  
RA Appeals Manager,  
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 October 28, 2013.

After due notice to the parties, a telephone hearing was held on February 19, 2014. A company Vice-President appeared for the Petitioner; the Joined Party appeared; and a Senior Tax Specialist appeared for the Respondent. No proposed findings of fact or conclusions of law were received. The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted.

**Issue:**

Whether services performed for the Petitioner by the Joined Party constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

**Findings of Fact:**

1. The Petitioner assists clients in their marketing efforts by providing uniforms and fulfillment services. Certain clients are in the timeshare industry. The Petitioner will store and assemble marketing materials for them. The assembly of the materials into marketing kits is done in a portion of the Petitioner's warehouse known as the kit room. Another client is in the fast food industry. The Petitioner creates and distributes tee-shirts to be used in the client's stores throughout the US when the client is conducting sales promotions. Boxes of tee shirts are sent by the Petitioner to the various stores, pursuant to orders from the client.

2. The Joined Party provided services to the Petitioner starting in 2011. She was sometimes assigned to the kit room, and sometimes assigned to the regular warehouse area to pack boxes. The Joined Party worked as called. Typically assignments might last for three or four days. However, from mid-September 2012 to August 5, 2013 the Joined Party worked for the Petitioner in most of the weeks. On a few occasions during that period the Petitioner assigned marginal work for a few days to the Joined Party just so that she would remain available for an upcoming packing assignment, or just out of a sense of benevolence. The Petitioner used other workers under similar arrangements. The Joined Party and other similar workers were known as seasonal workers, to distinguish them from the Petitioner's ordinary warehouse employees. Although work from clients could theoretically arise at almost any time, as a practical matter the Petitioner could expect marketing from the time share clients or promotional events from the fast food client to occur at about the same times each year.
3. The seasonal workers were advised by the human resources department that they were not regular employees of the Petitioner. No taxes would be deducted from the seasonal workers' pay. They would work as called by the Petitioner. The Joined Party was aware of these conditions and accepted them.
4. When the Joined Party worked in the kit room she would assemble brochures and other marketing materials as instructed by the kit room manager. The kits would then be packed in boxes and shipped to the time share client.
5. When the Joined Party worked as a packer in the warehouse she would typically be part of an assembly line directed by the project manager for that client or by the warehouse manager. A packing slip containing the number and types of tee shirts for a particular store would be associated with a packing box. The workers would retrieve the appropriate number of shirts of the required size; a worker would pack them into a box; the box would be sealed and marked for shipping; and then shipped to the client store. For very small assignments, or as work was winding down on an assignment, a worker such as the Joined Party might perform all of the tasks; on big assignments the Joined Party might just concentrate on one or two of the tasks. When a deadline was very short, the Petitioner would reassign its regular warehouse employees, or even clerical and managerial workers from the office, to help the seasonal workers to complete the order on time.
6. The Joined Party would check with the project manager or the warehouse manager to learn when she was expected to be at work.
7. The Joined Party was paid by the hour. No taxes or other deductions were taken from the Joined Party's pay. The Petitioner issued the Joined Party a form 1099-MISC for each year summarizing the amount paid to the Joined Party. The amount was listed in the "Nonemployee Compensation" box on the form.
8. The Joined Party filed a claim for reemployment assistance benefits effective August 25, 2013. After an investigation the Florida Department of Revenue (DOR) issued a determination on October 28, 2013 finding the Joined Party to have been an employee. The determination was retroactive to January 1, 2012.

**Conclusions of Law:**

9. 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.

10. In Cantor v. Cochran, 184 So. 2d 173 (Fla. 1966), the Supreme Court of Florida adopted the test in 1 Restatement of Law, Agency 2d Section 220 (1958) used to determine whether an employer-employee relationship exists. Section 220 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 the one employed is 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 worker supplies the instrumentalities, tools, and a 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 time or job;
    - (h) whether or not the work is 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.
11. 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.
12. 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. The factors listed in Cantor v. Cochran are the common law factors that determine if a worker is an employee or an independent contractor. See, for example, Brayshaw v. Agency for Workforce Innovation, 58 So. 3d 301 (Fla. 1<sup>st</sup> DCA 2011).
13. The relationship of employer-employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and the method and details by which the desired result is to be accomplished is the feature that distinguishes an independent contractor from a servant. Collins v. Federated Mutual Implement and Hardware Insurance Co., 247 So. 2d 461 (Fla. 4th DCA 1971); La Grande v. B. & L. Services, Inc., 432 So. 2d 1364 (Fla. 1st DCA 1983).
14. Section 73B-10.035, Florida Administrative Code, provides:
  - (7) Burden of Proof. The burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
15. The evidence shows that the Joined Party was not considered one of the Petitioner's regular employees. But since the issue that distinguishes employees from independent contractor is the right to control the methods of performing the work, the irregular nature of the work schedule is only a minor consideration. If the Petitioner controlled the methods of work while the Joined Party was actually working, then the Joined Party was an employee.

16. The evidence shows that the Joined Party was directed by a supervisor in the sequence of the work. The work was performed on the Petitioner's premises, using materials supplied by the Petitioner, to advance the Petitioner's business purposes. She was paid by the hour. These factors, among those noted in Cantor v. Cochran, point toward the relationship in this case as one of employment. The Petitioner controlled how the Joined Party worked, rather than merely expecting certain results.
17. The work did not require the Joined Party to engage in any specialized independent judgment about what methods or techniques to apply or when to apply them. The more professional skill is needed to produce results, the more likely a worker is to be considered an independent contractor. See, for example, Florida Gulf Coast Symphony, Inc. v. Dept. Labor and Employment Security, 386 So.2d 259 (Fla. 2d DCA 1980) (professional musicians, subject to direction of conductor when they played with the orchestra, were independent contractors since they had to use professional training and skill to practice and produce the necessary musical results); compare to University Dental Health Center v. Agency for Workforce Innovation, 89 So.3d 1139 (Fla. 4<sup>th</sup> DCA 2012) (dentist, who did use professional judgment and skill to treat patients, was nonetheless an employee because he worked on the employer's premises, using the employer's tools, only on the employer's patients, and he could not pick and choose which patients to see). The evidence shows that the Joined Party simply did whatever work was assigned to her, rather than exercising any judgment over whether, for example, to fill one store's box of tee shirts rather than another's.
18. A factor to be considered is whether the parties believe that they are creating a relationship of employer/employee or not. In answering questionnaires sent by the Department, both the Petitioner and the Joined Party checked a box to note that the relationship was that of independent contractor rather than employment. But this is just one factor to be considered, and not necessarily the factor with the most weight. See, for example, Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972) (truck driver was subject to trucking company's control over performance of duties, so an employee in spite of a written contract designating driver as an independent contractor).
19. The greater weight of the various factors to be considered shows that the Joined Party was an employee whenever she worked for the Petitioner. She was an employee with an irregular and unguaranteed work schedule.

**Recommendation:** It is recommended that the determination dated October 28, 2013, finding the Joined Party to be an employee, be AFFIRMED.

Respectfully submitted on March 21, 2014.



A handwritten signature in black ink that reads "J. Jackson Houser".

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Jackson Houser, 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:**

**March 21, 2014**

Copies mailed to:

Petitioner  
Respondent  
Joined Party

**Joined Party:**

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**Other Addresses:**

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