

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

PETITIONER:

Employer Account No. - 3114518
L V WALTERS GROUP HOMES INC
ATTN LAWRENCE WALTERS
7422 NW 66TH TER
TAMARAC FL 33321-5201

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-24518L**

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 November 6, 2012, is MODIFIED to reflect a retroactive date of October 1, 2009. As modified, it is ORDERED that the determination 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 June, 2013.



Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Shanendra Y. Barnes

DEPUTY CLERK

DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of June, 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:

L V WALTERS GROUP HOMES INC
ATTN LAWRENCE WALTERS
7422 NW 66TH TER
TAMARAC FL 33321-5201

SONIA DOOLEY
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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

MSC 347 CALDWELL BUILDING

107 EAST MADISON STREET

TALLAHASSEE FL 32399-4143

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**PROTEST OF LIABILITY
DOCKET NO. 2013-24518L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith,
Bureau Chief,
Reemployment Assistance 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 November 6, 2012.

After due notice to the parties, a telephone hearing was held on April 29, 2013. 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, L.V. Walters Group Homes, Inc., is a Florida profit corporation which was formed in February 2003 to operate group homes to provide care for the Petitioner's clients, mentally disabled individuals. The Petitioner provides services for the clients including, among other things, administering medications, housekeeping, feeding, and bathing.
2. The Petitioner's president and the Petitioner's director have been active in the operation of the business since inception and have received income from the business. The Petitioner operated four group homes and each group home was managed by an administrator. The Petitioner had a human resource manager. Since the inception of the business the Petitioner has classified all

workers, including the caregivers, administrators, human resource managers, and corporate officers, as independent contractors. The Petitioner ceased business effective September 30, 2012, however, the corporation has not been dissolved.

3. The Petitioner hired its caregivers by placing help wanted advertisements in the newspaper or by word of mouth.
4. The Joined Party is an individual who was previously employed by the government of the Cayman Islands to provide services as a caregiver for mentally disabled individuals. The Joined Party applied for work with the Petitioner and was hired in approximately November 2009. At the time of hire the Petitioner told the Joined Party that the rate of pay was \$8.00 per hour and that the Joined Party would be on probation for an unspecified period of time. The Joined Party accepted the offer of work.
5. The Joined Party was required to complete a form listing the days and times that she would be available to work. The Petitioner then scheduled the Joined Party to work within her days and hours of availability, depending on the Petitioner's needs.
6. The Joined Party was not required to provide any tools, equipment, or supplies to perform the work. The Joined Party did not have any expenses in connection with the work.
7. During the probationary period the administrators of the group homes where the Joined Party was assigned to work by the Petitioner observed the Joined Party as she performed her assigned duties. The administrators supervised the Joined Party and told the Joined Party what to do, when to do it, and how to do it.
8. The Petitioner issued a swipe card to the Joined Party. The Joined Party was required to swipe the card at the beginning of each work shift and at the end of each work shift. The Joined Party did not complete a timesheet or bill the Petitioner for her services. The Joined Party's hours of work were recorded by swiping the card.
9. The Joined Party performed services for the Petitioner on a full time basis as scheduled by the Petitioner.
10. The Joined Party was paid on a biweekly basis. Although the Petitioner did not withhold social security taxes and income taxes from the Joined Party's pay, the Petitioner withheld a lump sum from each paycheck which the Petitioner later sent to the Internal Revenue Service in the Joined Party's behalf as payment of estimated taxes on Form 1040-ES.
11. The Petitioner provided bonuses to the caregivers in the form of paid holidays and paid vacations. The Petitioner's purpose for providing the paid days off was to encourage the caregivers to remain on the job with the Petitioner rather than leaving to work elsewhere. In addition to the paid holidays the Joined Party was informed that she was allowed to take two weeks of vacation per year of which one week was with pay.
12. The Joined Party was not allowed to come and go as she pleased. She was required to work her assigned shifts and if she was not able to work as scheduled she was required to notify the Petitioner. Sometimes the administrator would tell the Joined Party to contact one of the other caregivers to have that caregiver work for the Joined Party. On other occasions the administrator would make the arrangements for another caregiver to work for the Joined Party. The Joined Party was not allowed to have another individual work for her unless the other individual was already working for the Petitioner as a caregiver.
13. On January 20, 2010, the Petitioner provided the Joined Party with a handbook containing approximately sixty pages. The Joined Party was required to sign a *Receipt of Contractor Handbook and Employment-at-Will Statement* (sic) even though the Joined Party was not provided an opportunity to read the handbook before signing. Among other things the acknowledgement states "This is to acknowledge that I have received a copy of the L.V. Walters

Group Homes Inc. Contractor Handbook and understand that it sets forth the terms and conditions of my employment as well as the duties, responsibilities and obligations of employment with the company. I understand that it is my responsibility to read the Contractor Handbook and be able to abide by the rules, policies and standards set forth in it. I also acknowledge that my employment/contractual service with the company is not for a specified period of time and can be terminated at any time for any reason, with or without cause or notice by me or the company." The acknowledgement also states that the Petitioner has the right to revise, delete, or add to the handbook at any time and the right to modify the terms and conditions under which the Joined Party performed services for the Petitioner.

14. On August 6, 2012, the Petitioner notified the workers that the Petitioner was shutting its doors on September 30, 2012. The Petitioner removed the Joined Party from the schedule on or about August 6, 2012.
15. During the time that the Joined Party worked as a caregiver for the Petitioner the Joined Party did not have any financial investment in a business, did not have business liability insurance, did not have a business license or occupational license, and did not offer services to the general public. The Joined Party did not perform services for any other company or any competitor of the Petitioner. The Joined Party performed services only for the Petitioner.
16. The Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation for 2010, 2011, and 2012.
17. The Joined Party filed an initial claim for unemployment compensation benefits, now known as reemployment assistance benefits, effective August 5, 2012. When the Joined Party did not receive credit for her earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.
18. On November 6, 2012, the Department of Revenue issued a determination holding that the Joined Party performed services for the Petitioner as an employee and that the Petitioner was liable for payment of unemployment compensation taxes effective January 1, 2010. The Petitioner filed an appeal by letter dated November 16, 2012, and provided additional documentation. On February 13, 2013, the Department of Revenue issued a determination based on the additional documentation stating "This is an affirmation of a prior determination dated 11/06/12."

Conclusions of Law:

19. 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.
20. 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).
21. 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.

22. 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.
23. 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.
24. 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.
25. 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.
26. The *Receipt of Contractor Handbook and Employment-at-Will Statement* (sic) signed by the Joined Party was submitted by the Petitioner as evidence. However, the Petitioner did not submit a copy of the handbook which the Petitioner describes as being approximately sixty pages. The acknowledgement states that the handbook "sets forth the terms and conditions of my employment" and that the Joined Party was required to "abide by the rules, policies, and standards" set forth in the handbook. The "terms and conditions of employment" and the "rules, policies, and standards" contained in the handbook have not been presented as evidence. The Petitioner did not offer any testimony concerning the specific contents of the handbook. Section 90.952, Florida Statutes, provides that, "Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph."
27. 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."

28. In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."
29. The Joined Party performed services at the Petitioner's place of business for the Petitioner's clients. The Joined Party did not have any investment in a business and did not have any expenses in connection with the work. The Joined Party was not at risk of suffering a financial loss from performing services for the Petitioner.
30. It was not shown that any skill or special knowledge was required to perform the work. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)
31. The Petitioner paid the Joined Party based on time worked rather than based on production or by the job. The Petitioner determined both the method of pay and the rate of pay. The Petitioner determined the days and hours of work. These facts reveal that the Petitioner controlled the financial aspects of the relationship. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Reemployment Assistance Program Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.
32. The Petitioner provided fringe benefits in the form of bonuses, paid holidays, and paid vacations. Paid vacations and paid holidays are fringe benefits that are customarily reserved for employment relationships. In addition to the factors enumerated in the Restatement of Law, the provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).
33. The Joined Party performed services exclusively for the Petitioner from November 2009 until August 2012, a period of almost three years. The Petitioner provided paid time off to encourage longevity of the relationship. Either party had the right to terminate the relationship at any time, for any reason, with or without cause, with or without notice, without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."
34. The Petitioner controlled where the work was performed, when the work was performed, and how the work was performed. The Petitioner exercised significant control over the terms and conditions of the relationship and was in control of the financial aspects of the relationship. 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.

- 35. The Department of Revenue correctly determined that the services performed for the Petitioner by the Joined Party constitute insured employment. However, the determination is only retroactive to January 1, 2010, while the Joined Party performed services for the Petitioner beginning in November 2009.
- 36. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.
- 37. The Petitioner is a corporation. The Petitioner's president and director have been active in the operation of the business since the corporation was formed in February 2003. Therefore, the Petitioner's president and vice president are statutory employees of the Petitioner, retroactive to February 2003.
- 38. Section 443.1215, Florida States, provides:
 - (1) Each of the following employing units is an employer subject to this chapter:
 - (a) An employing unit that:
 - 1. In a calendar quarter during the current or preceding calendar year paid wages of at least \$1,500 for service in employment; or
 - 2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.
- 39. The Petitioner's corporate officers performed services during twenty weeks of each year. Although there were workers performing services as caregivers for the Petitioner prior to 2009, the determination in this case addresses only the Petitioner's liability for payment of tax on the Joined Party's wages, not on the wages of similarly situated workers. Therefore the correct retroactive date of liability is the beginning of the fourth quarter 2009, October 1, 2009.

Recommendation: It is recommended that the determination dated November 6, 2012, be MODIFIED to reflect a retroactive date of October 1, 2009. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on May 1, 2013.

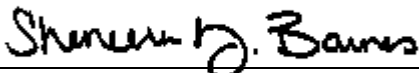


R. O. SMITH, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke Lòd Rekòmande a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke Lòd Rekòmande a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.



SHANEDRA Y. BARNES, Special Deputy Clerk

**Date Mailed:
May 1, 2013**

Copies mailed to:

- Petitioner
- Respondent
- Joined Party

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