

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

**PETITIONER:**

Employer Account No. - 0593769

UNIVERSITY DENTAL HEALTH CENTER INC  
ATTN:LINDA COMMONS  
5629 GLENCREST BLVD  
TAMPA FL 33625-1008

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2012-100391L**

**ORDER**

This matter comes before me for final Department Order.

The issue before me is whether services performed for the Petitioner 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 Department of Revenue, hereinafter referred to as the Respondent, conducted an audit of the Petitioner's records for the 2009 tax year. After completing the audit, the Respondent issued a determination holding that the Petitioner was required to pay additional taxes and interest. The Respondent based its determination on the Petitioner's failure to properly report the gross and taxable wages of its workers. The Respondent concluded that the Petitioner was required to report the wages of its workers because the workers performed services as employees of the Petitioner and were not excluded from reemployment assistance tax coverage as independent contractors. The Petitioner filed a protest of the determination.

A telephone hearing was held on February 25, 2013. The Petitioner appeared and was represented by its president. The Petitioner's Certified Public Accountant and former office manager also testified as witnesses on behalf of the Petitioner. The Respondent appeared and was represented by a Department of Revenue Tax Auditor. A Tax Auditor II testified as a witness on behalf of the Respondent. The Special Deputy issued a recommended order on March 21, 2013.

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

1. The Petitioner, University Dental Health Center, Inc., is a corporation which formerly operated a dental practice in Ft Lauderdale. When the owner of the business passed away on October 10, 2007, the owner's daughter, Linda Bellomio Commons, an attorney in Tampa, inherited the business. Linda Bellomio Commons was not active in the operation of the business but oversaw the operation from Tampa.
2. A dentist who had performed services for the Petitioner from June 8, 2009, through November 30, 2009, Miriam Beydoun, filed a claim for unemployment compensation benefits following termination. The Department of Revenue conducted an investigation to determine if Miriam Beydoun had performed services for the Petitioner as an employee or as an independent contractor. During the course of the investigation the Petitioner's president completed a questionnaire on which she stated that all of the individuals performing services for the Petitioner as dentists did so under the same terms and conditions. Subsequently, the Department of Revenue issued a determination holding that Miriam Beydoun had performed services for the Petitioner as an employee, retroactive to June 8, 2009. The Petitioner filed a timely protest. A hearing was held before a special deputy and on September 1, 2010, the special deputy issued a recommended order affirming the determination of the Department of Revenue. The Petitioner filed exceptions to the recommended order and in October 2010, the Agency for Workforce Innovation issued a final order affirming the determination of the Department of Revenue. The Petitioner appealed the final order issued by the Agency for Workforce Innovation to the Florida Fourth District Court of Appeals.
3. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2009 tax year to ensure compliance with the Florida Unemployment Compensation Law. The Petitioner notified the Department of Revenue that the Department of Revenue should conduct the audit in Tampa at the office of the Petitioner's Certified Public Accountant. During the audit the Tax Auditor became aware of the prior determination holding that Miriam Beydoun, performing services as a dentist, was an employee of the Petitioner. The Tax Auditor also became aware that the Petitioner's president had completed a questionnaire on which she stated that all of the dentists performing services for the Petitioner did so under the same terms and conditions as Miriam Beydoun.
4. Among other books and records the Tax Auditor examined the Petitioner's general ledger. The general ledger contained an account titled "Contract Professionals." The Tax Auditor made a list of the individuals whose payments were posted to the account and the amounts paid to those individuals. The Tax Auditor then approached the Certified Public Accountant and asked what type work had been performed by each of the individuals. The Certified Public Accountant contacted the Petitioner's president and asked what type of work had been performed by the individuals during 2008 and 2009. The Petitioner's president provided the Certified Public Accountant with a list showing that all of the individuals had performed services as dentists. The Certified Public Accountant then provided that information to the

Tax Auditor. The names on the list provided by the Petitioner's president matched all of the names of the individuals whose payments were recorded in the contract professionals account. The Tax Auditor relied on the information provided by the Petitioner as being accurate. Since it had already been found that a dentist performing services for the Petitioner was the Petitioner's employee and since all dentists performed services under the same terms and conditions, the Tax Auditor concluded that all of the dentists were employees of the Petitioner.

5. On May 9, 2011, the Tax Auditor mailed a *Notice of Intent to Make Audit Changes* to the Petitioner listing additional gross wages of \$148,155.54, with an information sheet advising the Petitioner of the Petitioner's options. The *Notice of Intent to Make Audit Changes* advised the Petitioner that the Petitioner could request an audit conference and that after thirty days the Department of Revenue would issue a *Notice of Proposed Assessment* which the Petitioner could protest. On June 7, 2011, the Petitioner filed a written protest. The Department of Revenue computer system miscalculated the amount of tax due on the additional gross wages shown on the May 9, 2011, *Notice of Intent to Make Audit Changes*. On June 22, 2011, the Department of Revenue issued a new *Notice of Intent to Make Audit Changes* correcting the amount of tax due. On July 5, 2011, the Department of Revenue issued a *Notice of Proposed Assessment*. Among other things the *Notice of Proposed Assessment* advised that the Petitioner had the right to file a written protest within twenty days. The Department of Revenue accepted the Petitioner's June 7, 2011, protest as a protest of the *Notice of Proposed Assessment* and forwarded the protest to the Office of Appeals for a hearing.
6. The Petitioner appealed the *Final Order of The Agency for Workforce Innovation*, which affirmed the recommended order of the special deputy holding that Miriam Beydoun was an employee of the Petitioner, to the District Court of Appeal. Pending the outcome of the Petitioner's appeal to the District Court of Appeal the Department of Economic Opportunity dismissed the Petitioner's protest of the July 5, 2011, determination without prejudice providing that the Petitioner had the right to request that the appeal be reopened and a hearing scheduled, if the Petitioner's request was filed prior to October 1, 2012. The Petitioner requested that the appeal be reopened by mail postmarked September 25, 2012.
7. On June 20, 2012, the District Court of Appeal of Florida, Fourth District, affirmed the determination that the dentist, Miriam Beydoun, was the Petitioner's employee. The Petitioner filed an appeal with the Supreme Court of Florida. On August 28, 2012, the Supreme Court of Florida dismissed the Petitioner's appeal on the Court's own motion.
8. The information which the Petitioner's president provided to the Petitioner's Certified Public Accountant for the audit performed by the Department of Revenue was not accurate. The payments recorded in the contract professionals account of the general ledger were made not only to dentists but to dental hygienists, dental assistants, and student assistants.
9. All of the dental hygienists, dental assistants, and student assistants worked at the Petitioner's place of business, used the Petitioner's equipment, tools, and supplies, and performed services on the Petitioner's patients. The individuals were scheduled to work on specified days and times by the Petitioner's office manager and they worked under the supervision of the dentists. The Petitioner determined the amount of the fees charged to the patients and collected the fees. The Petitioner paid the dental hygienists, dental assistants, and student assistants by time worked at a pay rate determined by the Petitioner. The Petitioner had the right to terminate the dental hygienists, dental assistants, and student assistants at any time without incurring liability for breach of contract. The dental hygienists, dental assistants, and student assistants worked under a *Covenant Not to Compete* which provides that the dental hygienists, dental assistants, and student assistants would not become an employee, agent, partner, individual

owner, stockholder, officer, or director, or in any way engage in the practice of dentistry within a radius of ten miles for a period of three years after termination.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated July 5, 2011, be affirmed. The Petitioner's exceptions were received by fax on April 5, 2013. 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 Petitioner's exceptions are addressed below. Also, 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.

In Exceptions 1-9, the Petitioner proposes alternative findings of fact and conclusions of law. The Petitioner also takes exception to Finding of Fact #9. Pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Findings of Fact unless the Department first determines from a review of the entire record that the findings of fact were not based upon competent substantial evidence. Also pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject

or modify the Special Deputy's Conclusions of Law unless the Department first determines 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 Findings of Fact, including Finding of Fact #9, are supported by competent substantial evidence in the record and that the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. Accordingly, the Department may not modify or the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. The Petitioner's exceptions are respectfully rejected.

The Petitioner also requests the consideration of additional evidence. Rule 73B-10.035, Florida Administrative Code, provides that additional evidence will not be accepted after the close of a hearing. As a result, the Department cannot accept the Petitioner's additional evidence because the Petitioner did not provide the evidence until after the close of the hearing. Accordingly, the Petitioner's request is respectfully denied.

A review of the record reveals that the Findings of Fact contained in the Recommended Order 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 are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the Petitioner's exceptions, the record of this case, and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order. A copy of the Recommended Order is attached and incorporated in this order.

Therefore, it is ORDERED that the determination dated July 5, 2011, 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 **May, 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 May, 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:

UNIVERSITY DENTAL HEALTH CENTER  
INC  
ATTN:LINDA COMMONS  
5629 GLENCREST BLVD  
TAMPA FL 33625-1008

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

RICHARD COMMONS  
901 NORTH HERCULES AVENUE SUITE A  
CLEARWATER FL 33764

FLORIDA DEPARTMENT OF REVENUE  
BRIAN SABEAN  
2295 VICTORIA AVE STE 270  
FT MYERS FL 33901

FLORIDA DEPARTMENT OF REVENUE  
ATTN: MARIE WIRTENBURG  
19337 US HWY 19 NORTH  
CLEARWATER FL 33764

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

**PETITIONER:**

Employer Account No. - 0593769  
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ATTN:LINDA COMMONS  
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TAMPA FL 33625-1008

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2012-100391L**

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: SECRETARY,  
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 July 5, 2011.

After due notice to the parties, a telephone hearing was held on February 25, 2013. The Petitioner, represented by its president, appeared and testified. The former office manager testified as a witness. The Petitioner's Certified Public Accountant testified as a witness. The Respondent was represented by a Department of Revenue Tax Auditor. A Tax Auditor II testified as a witness.

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 constitute insured employment, and if so, the effective date of the Petitioner's liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

**Findings of Fact:**

1. The Petitioner, University Dental Health Center, Inc., is a corporation which formerly operated a dental practice in Ft Lauderdale. When the owner of the business passed away on October 10, 2007, the owner's daughter, Linda Bellomio Commons, an attorney in Tampa, inherited the business. Linda Bellomio Commons was not active in the operation of the business but oversaw the operation from Tampa.

2. A dentist who had performed services for the Petitioner from June 8, 2009, through November 30, 2009, Miriam Beydoun, filed a claim for unemployment compensation benefits following termination. The Department of Revenue conducted an investigation to determine if Miriam Beydoun had performed services for the Petitioner as an employee or as an independent contractor. During the course of the investigation the Petitioner's president completed a questionnaire on which she stated that all of the individuals performing services for the Petitioner as dentists did so under the same terms and conditions. Subsequently, the Department of Revenue issued a determination holding that Miriam Beydoun had performed services for the Petitioner as an employee, retroactive to June 8, 2009. The Petitioner filed a timely protest. A hearing was held before a special deputy and on September 1, 2010, the special deputy issued a recommended order affirming the determination of the Department of Revenue. The Petitioner filed exceptions to the recommended order and in October 2010, the Agency for Workforce Innovation issued a final order affirming the determination of the Department of Revenue. The Petitioner appealed the final order issued by the Agency for Workforce Innovation to the Florida Fourth District Court of Appeals.
3. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2009 tax year to ensure compliance with the Florida Unemployment Compensation Law. The Petitioner notified the Department of Revenue that the Department of Revenue should conduct the audit in Tampa at the office of the Petitioner's Certified Public Accountant. During the audit the Tax Auditor became aware of the prior determination holding that Miriam Beydoun, performing services as a dentist, was an employee of the Petitioner. The Tax Auditor also became aware that the Petitioner's president had completed a questionnaire on which she stated that all of the dentists performing services for the Petitioner did so under the same terms and conditions as Miriam Beydoun.
4. Among other books and records the Tax Auditor examined the Petitioner's general ledger. The general ledger contained an account titled "Contract Professionals." The Tax Auditor made a list of the individuals whose payments were posted to the account and the amounts paid to those individuals. The Tax Auditor then approached the Certified Public Accountant and asked what type work had been performed by each of the individuals. The Certified Public Accountant contacted the Petitioner's president and asked what type of work had been performed by the individuals during 2008 and 2009. The Petitioner's president provided the Certified Public Accountant with a list showing that all of the individuals had performed services as dentists. The Certified Public Accountant then provided that information to the Tax Auditor. The names on the list provided by the Petitioner's president matched all of the names of the individuals whose payments were recorded in the contract professionals account. The Tax Auditor relied on the information provided by the Petitioner as being accurate. Since it had already been found that a dentist performing services for the Petitioner was the Petitioner's employee and since all dentists performed services under the same terms and conditions, the Tax Auditor concluded that all of the dentists were employees of the Petitioner.
5. On May 9, 2011, the Tax Auditor mailed a *Notice of Intent to Make Audit Changes* to the Petitioner listing additional gross wages of \$148,155.54, with an information sheet advising the Petitioner of the Petitioner's options. The *Notice of Intent to Make Audit Changes* advised the Petitioner that the Petitioner could request an audit conference and that after thirty days the Department of Revenue would issue a *Notice of Proposed Assessment* which the Petitioner could protest. On June 7, 2011, the Petitioner filed a written protest. The Department of Revenue computer system miscalculated the amount of tax due on the additional gross wages shown on the May 9, 2011, *Notice of Intent to Make Audit Changes*. On June 22, 2011, the Department of Revenue issued a new *Notice of Intent to Make Audit Changes* correcting the amount of tax due. On July 5, 2011, the Department of Revenue issued a *Notice of Proposed Assessment*. Among other things the *Notice of Proposed Assessment* advised that the Petitioner had the right to file a written protest within twenty days. The Department of Revenue accepted the Petitioner's June 7,

2011, protest as a protest of the *Notice of Proposed Assessment* and forwarded the protest to the Office of Appeals for a hearing.

6. The Petitioner appealed the *Final Order of The Agency for Workforce Innovation*, which affirmed the recommended order of the special deputy holding that Miriam Beydoun was an employee of the Petitioner, to the District Court of Appeal. Pending the outcome of the Petitioner's appeal to the District Court of Appeal the Department of Economic Opportunity dismissed the Petitioner's protest of the July 5, 2011, determination without prejudice providing that the Petitioner had the right to request that the appeal be reopened and a hearing scheduled, if the Petitioner's request was filed prior to October 1, 2012. The Petitioner requested that the appeal be reopened by mail postmarked September 25, 2012.
7. On June 20, 2012, the District Court of Appeal of Florida, Fourth District, affirmed the determination that the dentist, Miriam Beydoun, was the Petitioner's employee. The Petitioner filed an appeal with the Supreme Court of Florida. On August 28, 2012, the Supreme Court of Florida dismissed the Petitioner's appeal on the Court's own motion.
8. The information which the Petitioner's president provided to the Petitioner's Certified Public Accountant for the audit performed by the Department of Revenue was not accurate. The payments recorded in the contract professionals account of the general ledger were made not only to dentists but to dental hygienists, dental assistants, and student assistants.
9. All of the dental hygienists, dental assistants, and student assistants worked at the Petitioner's place of business, used the Petitioner's equipment, tools, and supplies, and performed services on the Petitioner's patients. The individuals were scheduled to work on specified days and times by the Petitioner's office manager and they worked under the supervision of the dentists. The Petitioner determined the amount of the fees charged to the patients and collected the fees. The Petitioner paid the dental hygienists, dental assistants, and student assistants by time worked at a pay rate determined by the Petitioner. The Petitioner had the right to terminate the dental hygienists, dental assistants, and student assistants at any time without incurring liability for breach of contract. The dental hygienists, dental assistants, and student assistants worked under a *Covenant Not to Compete* which provides that the dental hygienists, dental assistants, and student assistants would not become an employee, agent, partner, individual owner, stockholder, officer, or director, or in any way engage in the practice of dentistry within a radius of ten miles for a period of three years after termination.

### **Conclusions of Law:**

10. The issue in this case, whether services performed for the Petitioner 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.
11. 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).
12. 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.

13. 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.
14. 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.
15. 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.
16. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1<sup>st</sup> 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. 1<sup>st</sup> 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.
17. In this case a dentist who performed services for the Petitioner during 2009, Miriam Beydoun, was found by the District Court of Appeal for Florida, Fourth District, to be an employee of the Petitioner. See University Dental Health Center, Inc. v. Agency for Workforce Innovation, 89 So. 3d (Fla. 4th DCA 2012). The evidence reveals that all of the dentists performed services for the Petitioner under the same terms and conditions. In the case of Richard T. Adams v. Department of Labor and Employment Security, 458 So. 2d 1161 (Fla. 1st DCA 1984), the Court determined the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers. No evidence was adduced showing any difference between the employment conditions of the applicant and the other workers. The Court noted that Section 443.171(1), Florida Statutes, authorizes the Agency to administer the chapter; including the power and authority to require reports, make investigations, and take other action deemed necessary or suitable to that end. Thus, the services performed by all of the dentists constitute insured employment.

18. The Tax Auditor relied upon erroneous information provided by the Petitioner's president during the audit and concluded that all of the Petitioner's workers which the Petitioner classified as contract professionals were dentists. However, the Petitioner's president has testified that some of those workers were dental hygienists, dental assistants, and student assistants.
19. The services performed by the dental hygienists, dental assistants, and student assistants were an integral and necessary part of the Petitioner's business rather than separate and distinct from the Petitioner's business. The Petitioner provided the place of work and all tools, equipment, and supplies that were needed to perform the work.
20. No evidence was presented concerning the skill level of the dental hygienists, dental assistants, and student assistants. Although there is no doubt that the work performed required skill or special knowledge, they were supervised by the dentists. Thus, the level of skill or special knowledge was less than what would be required of a dentist. 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)
21. The dental hygienists, dental assistants, and student assistants were paid by time worked rather than by production or by the job. The fact that the Petitioner may have chosen not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor 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.
22. The Petitioner had the right to terminate the dental hygienists, dental assistants, and student assistants at any time without incurring liability for breach of contract. 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."
23. The Petitioner controlled the dental hygienists, dental asistants, and student assistants as to where the work was performed, when the work was performed and how the work was performed. 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. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error. The Petitioner has not established by a preponderance of the evidence that the *Notice of Proposed Assessment* issued and dated by the Department of Revenue on July 5, 2011, is in error.

**Recommendation:** It is recommended that the determination dated July 5, 2011, be AFFIRMED.

Respectfully submitted on March 21, 2013.



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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.

A handwritten signature in black ink that reads "Shanendra Y. Barnes".

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SHANEDRA Y. BARNES, Special Deputy Clerk

**Date Mailed:**  
**March 21, 2013**

Copies mailed to:

Petitioner

Respondent

Joined Party

FLORIDA DEPARTMENT OF REVENUE  
BRIAN SABEAN  
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DEPARTMENT OF REVENUE  
ATTN: PATRICIA ELKINS - CCOC #1-4866  
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