

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

PETITIONER:

Employer Account No. - 2777962
CASA SMERALDA LLC
ATTN:MARIE LOUISE LEUENBERGER
153 BEACH RD
SARASOTA FL 34242-2084

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-106985L**

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 September 4, 2012, is MODIFIED to reflect a retroactive date of August 11, 2011. 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 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:

CASA SMERALDA LLC
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153 BEACH RD
SARASOTA FL 34242-2084

ANNIE MAE MOORE
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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. 2012-106985L

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 September 4, 2012.

After due notice to the parties, a telephone hearing was held on December 3, 2012. The Petitioner, represented by the Petitioner's member/owner, 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 and other individuals constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Findings of Fact:

1. The Petitioner is a limited liability company that operates a retail clothing boutique. The Petitioner utilizes individuals as salespersons, some of whom are classified by the Petitioner as employees and some of whom are classified by the Petitioner as independent contractors.
2. The Joined Party performed services as a salesperson for the Petitioner from August 11, 2011, until June 15, 2012. The claimant's duties included assisting customers, completing sales transactions, receiving deliveries of merchandise, folding and straightening merchandise, and light cleaning.

3. The Joined Party obtained the work through a friend who also worked for the Petitioner. The Joined Party was looking for a job, and the friend told the Joined Party the Petitioner was hiring. The Joined Party visited the store and spoke with the Petitioner's member/owner. The Petitioner asked the Joined Party to submit a resume. Approximately one week later, the Joined Party again met with the Petitioner's member/owner and was hired. The Joined Party was told she would be paid \$9 per hour to start and, if things worked out, she would receive an increase to \$10 per hour. There was no written agreement between the parties. The claimant believed she was being hired as an employee.
4. The Joined Party did not have prior retail sales experience. The Petitioner provided training to the Joined Party. The Joined Party was given verbal instructions as to how to sell. The Joined Party was also provided with written instructions concerning other store duties.
5. The Joined Party's services were performed at the Petitioner's place of business. The Petitioner furnished all of the equipment and supplies needed for the work. The Petitioner provided the Joined Party with a key to the store.
6. The Petitioner's business operates from 9:30 a.m. or 10:00 a.m. until approximately 7:00 p.m., Monday through Sunday. The Joined Party usually worked 25 to 30 hours per week. The Petitioner determined the Joined Party's work hours. The Petitioner prepared a schedule for the salespersons a few days in advance of the work week. The Joined Party and other salespersons were permitted to put in requests for time off for various reasons. The Petitioner attempted to accommodate those requests when preparing the schedule. During a shift, the Joined Party was permitted to take a meal break as determined by the Petitioner.
7. The Joined Party's work was supervised by the Petitioner's member/owner. The Joined Party was required to report sales to the Petitioner several times during the work day.
8. The Joined Party was not restricted from working for a competitor of the Petitioner.
9. The Joined Party was paid by the hour. The Joined Party recorded her hours on time sheets provided by the Petitioner. The Joined Party submitted her time sheets every two weeks for payment by the Petitioner. The Petitioner did not withhold taxes from the Joined Party's pay. The Joined Party did not receive bonuses, sick pay, vacation pay, or holiday pay. The Joined Party received a 70% discount on merchandise purchased from the boutique. The Petitioner reported the Joined Party's earnings on a form 1099-MISC.
10. The Joined Party did not have her own business or occupational license. The Joined Party did not advertise her services to the general public.
11. Either party could terminate the relationship without penalty or liability for breach of contract.
12. The Joined Party ended the work relationship when the Petitioner told the Joined Party her hours would be reduced.

Conclusions of Law:

13. The issue in this case, whether services performed for the Petitioner by the Joined Party and others as retail salespersons constitute employment subject to the Florida Unemployment Compensation Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.
14. 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).
15. 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 Agency is limited to applying only Florida common law in determining the nature of an employment relationship.

16. 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.
17. 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.
18. 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.
19. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often cannot be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.
20. The evidence presented in this case does not reveal the existence of an agreement, verbal or written, specifying whether the Joined Party would perform services as an employee or as an independent contractor. 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 cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."
21. The Petitioner operates a retail clothing boutique. The Joined Party performed services as a salesperson. The work performed by the Joined Party was not separate and distinct from the Petitioner's business, but was an integral and necessary part of the Petitioner's business. The

Joined Party did not have her own business. The Joined Party did not have any expense or financial risk associated with the work performed for the Petitioner.

- 22. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that the basic test for determining a worker’s status is the employing unit’s right of control over the manner in which the work is performed. The Court, quoting Farmer’s and Merchant’s Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958), stated: “[I]f the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor; if he is subject to the control of the person being served as to the means to be used, he is not an independent contractor.” In this case the Petitioner exercised significant control over the details of the work. The Petitioner determined what work was performed, where the work was performed, when the work was performed and, through the training and direction, how the work was performed.
- 23. The Petitioner determined the rate and method of payment. The Joined Party was paid by time rather than by the job. The fact that the Petitioner chose not to withhold taxes from the Joined Party’s pay does not, standing alone, establish an independent contractor relationship.
- 24. Either party had the right to terminate the relationship at any time without incurring a penalty or liability for breach of contract. The Joined Party performed services for the Petitioner for approximately ten months. 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.”
- 25. In Adams v. Department of Labor and Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the court determined the Department had the authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers. It is concluded that the services performed for the Petitioner by the Joined Party and others as retail salespersons constitute insured work.
- 26. The determination in this case holds the Petitioner liable for payment of reemployment assistance taxes retroactive to August 1, 2011. However, the record shows the Joined Party began performing services for the Petitioner on August 11, 2011. Therefore, the correct retroactive date is August 11, 2011.

Recommendation: It is recommended that the determination dated September 4, 2012, be MODIFIED to reflect a retroactive date of August 11, 2011. As MODIFIED, it is recommended that the determination be AFFIRMED.

Respectfully submitted on January 4, 2013.

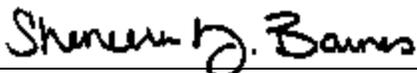


SUSAN WILLIAMS, Special Deputy
Office of Appeals

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

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un resumen 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:
January 4, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

ANNIE MAE MOORE
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SARASOTA FL 34239

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