

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

PETITIONER:

Employer Account No. - 3037994
NOBIS BENE INC
ATTN: JOHN D KEENE CHIE,FLMI
1192 PERREGRINE CIRCLE WEST
SAINT JOHNS FL 32259-2961

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-17123L**

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 December 27, 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 **June, 2012**.



Altemese Smith,
Assistant Director,
Unemployment Compensation 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 June, 2012.

Shanendra Y. Barnes

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

By U.S. Mail:

NOBIS BENE INC
ATTN: JOHN D KEENE CHIE,FLMI
1192 PERREGRINE CIRCLE WEST
SAINT JOHNS FL 32259-2961

AUSTIN K KATOH
31 COVENTRY COURT
BLUFFTON SC 29910

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DOR BLOCKED CLAIMS UNIT
ATTENTION MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
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RESPONDENT:

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**PROTEST OF LIABILITY
DOCKET NO. 2012-17123L**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Unemployment Compensation 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 December 27, 2011.

After due notice to the parties, a telephone hearing was held on May 7, 2012. The Petitioner, represented by the Petitioner's president, appeared and testified. The Petitioner's Treasurer testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The hearing was consolidated with 2012-24239L, a protest filed by Spy Sushi & Saketini Lounge Inc. Spy Sushi & Saketini Lounge Inc was represented by its former President.

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. Spy Sushi & Saketini Lounge Inc is a corporation which was formed in February 2010 to operate a sushi restaurant.
2. Spy Sushi & Saketini Lounge Inc hired the Joined Party, Austin Katoh, to be a sushi roller, to train other employees to roll sushi, and to supervise the other sushi rollers.

3. It was the intention of Spy Sushi & Saketini Lounge Inc to hire Austin Katoh as an employee, however, the Joined Party stated that he had not paid income taxes on previous income and that he did not want taxes to be withheld from the pay. As a result Spy Sushi & Saketini Lounge Inc agreed to pay the Joined Party as an independent contractor.
4. Spy Sushi & Saketini Lounge Inc agreed to pay the Joined Party on a biweekly basis at the pay rate of \$35,000 per year. The Joined Party was required to work between forty and fifty-five hours per week. There was no written agreement or contract between Spy Sushi & Saketini Lounge Inc and the Joined Party.
5. Spy Sushi & Saketini Lounge Inc required the Joined Party to wear a black chef's coat and he was given the option of purchasing a black chef's coat bearing the name of Spy Sushi & Saketini Lounge. The Joined Party chose to purchase the chef's coat bearing the business name rather than to provide his own chef's coat. Business cards were not provided specifically for the Joined Party. However, Spy Sushi & Saketini Lounge Inc printed business cards for their own use and included the Joined Party's name on the cards as the sushi chef for the restaurant.
6. The Joined Party's immediate supervisor was the general manager of the restaurant. The President of Spy Sushi & Saketini Lounge Inc also supervised the Joined Party to make sure that the Joined Party performed the work in a manner that was suitable for the restaurant, including the Joined Party's demeanor, how well he got along with the employees, and whether the Joined Party complied with the restaurant dress code.
7. The restaurant was open from 4 PM until 9 PM. The restaurant was open seven days per week, however, on the Saturday the restaurant usually stayed open until 10 PM. The employees were able to report for work as early as 3 PM to prepare the restaurant to open at 4 PM. The Joined Party did not have a key to the restaurant and usually reported for work between 3 PM and 4 PM. The Joined Party was not required to remain after hours to help clean and he usually left shortly after the restaurant closed for the day. The Joined Party's day off was Monday, however, if an employee called off the Joined Party was required to work on his day off to cover for the absent employee.
8. The Joined Party was the head sushi chef at the restaurant and he was responsible for ordering the food products that were used in making the sushi. Spy Sushi & Saketini Lounge Inc paid for the materials and supplies ordered by the Joined Party. The Joined Party provided his own knives. The Joined Party did not have any expenses in connection with the work.
9. The Joined Party was responsible for training the employees who worked with the sushi and responsible for supervising those employees. The employees were paid by Spy Sushi & Saketini Lounge Inc. The Joined Party did not have the authority to hire or fire employees but he did have the authority to recommend that an employee be dismissed.
10. There were occasions when the Joined Party was not able to report for work as scheduled. On those days the Joined Party telephoned the general manager or the President to report his absence. If the Joined Party had failed to call in to report his absences, he would have been dismissed.
11. Spy Sushi & Saketini Lounge Inc warned the Joined Party about absences from work and warned the Joined Party about what was perceived to be a substance abuse problem. On several occasions the Joined Party was warned and sent home because he appeared to be impaired.
12. Spy Sushi & Saketini Lounge Inc provided workers' compensation coverage for its employees. If the Joined Party had injured himself while working, Spy Sushi & Saketini Lounge Inc would have covered the Joined Party under their workers' compensation policy if the Joined Party did not have his own medical insurance.
13. Spy Sushi & Saketini Lounge Inc paid the Joined Party on a biweekly basis and no taxes were withheld from the pay. The pay rate was the same regardless of the number of hours that the

Joined Party worked. Spy Sushi & Saketini Lounge would have provided the Joined Party with a paid vacation each year if the business had been in operation for more than approximately one year. At the end of 2010 Spy Sushi & Saketini Lounge Inc reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

14. On August 11, 2011, Spy Sushi & Saketini Lounge Inc sold the restaurant to Nobis Bene Inc, a corporation which was formed in June 2011 for the purpose of purchasing the business and continuing the operation of the restaurant. Nobis Bene Inc acquired the employees as part of the purchase. Nobis Bene Inc understood that the Joined Party worked for Spy Sushi & Saketini Lounge Inc as an independent contractor. Nobis Bene Inc allowed the Joined Party to continue working at the restaurant under substantially the same terms and conditions. The Joined Party was changed to a weekly pay period based the annual pay of \$35,000. Nobis Bene Inc hired an executive chef who was a graduate of the Culinary Institute. The general manager of the restaurant continued to be the Joined Party's immediate supervisor, however, the Joined Party was also supervised by the executive chef. The executive chef had not been trained in sushi and the Joined Party was responsible for educating the executive chef about sushi.
15. Nobis Bene Inc requested that the Joined Party provide a copy of his business license and a copy of his business liability insurance policy. The Joined Party did not provide a copy of the documents. On October 5, 2011, Nobis Bene Inc presented the Joined Party with a written contract for the Joined Party's signature. The contract required the Joined Party to perform more work for the same amount of pay. The Joined Party refused to sign the contract and was discharged by Nobis Bene Inc.
16. At the end of 2011 Nobis Bene Inc reported the Joined Party's earnings from August 11 through October 5, 2011, on Form 1099-MISC as nonemployee compensation. Spy Sushi & Saketini Lounge Inc reported the Joined Party's earnings from January 1, 2011, until August 11, 2011, on a separate Form 1099-MISC as nonemployee compensation.

Conclusions of Law:

17. The issue in this case, whether services performed for Nobis Bene Inc by the Joined Party as sushi chef 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.
18. 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).
19. 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.
20. 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.

21. 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.
22. 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.
23. 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.
24. 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."
25. Nobis Bene Inc did not enter into an agreement with the Joined Party other than to continue to allow the Joined Party to perform services for the restaurant under the same terms and conditions as when he performed services for Spy Sushi & Saketini Lounge Inc. The former president of Spy Sushi & Saketini Lounge Inc testified that the Joined Party was classified as an independent contractor as a direct result of the Joined Party's request that taxes not be withheld from the pay so that the Joined Party could evade the payment of income tax on his earnings. There was no written agreement or contract. An agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). 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.”

26. The Petitioner operated a sushi restaurant and engaged the Joined Party to be the head sushi chef. The Joined Party worked at the business location and used the supplies and materials provided by the Petitioner. Among other things the Joined Party was responsible for ordering the food products and supplies, training the employees, and supervising the Petitioner's employees. 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 business. The Joined Party did not have any expenses in connection with the work and was not at risk of suffering a financial loss from performing services.
27. The Joined Party performed services for the Petitioner as a skilled sushi chef. The Joined Party's level of skill does not preclude the Joined Party from employment. In James v. Commissioner, 25 T.C. 1296, 1301 (1956), the court stated in holding that a doctor was an employee of a hospital “The methods by which professional men work are prescribed by the techniques and standards of their professions. No layman should dictate to a lawyer how to try a case or to a doctor how to diagnose a disease. Therefore, the control of an employer over the manner in which professional employees shall conduct the duties of their positions must necessarily be more tenuous and general than the control over the non-professional employees.”
28. The Joined Party was engaged for an indefinite period of time and worked for Spy Sushi & Saktini Lounge Inc until the business was sold to Nobis Bene Inc. The Joined Party worked for Nobis Bene Inc for approximately two months until he was terminated for refusing to accept the terms of a new agreement. The Petitioner had the right to terminate the Joined Party at any time. 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.”
29. The Petitioner determined that the Joined Party was required to work between forty and fifty-five hours per week in the Petitioner's restaurant. The Petitioner determined the days and hours of the restaurant and limited the Joined Party to working only within those hours. Nobis Bene Inc paid the Joined Party weekly based on an annual salary. These facts reveal that the Joined Party was paid by time worked rather than based on production or by a percentage of the profits. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation 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 parties agreed that payroll taxes would not be withheld from the pay does not, standing alone, establish an independent contractor relationship.
30. The Petitioner controlled what work was performed, when it was performed, and where it was performed. The Petitioner provided everything that was needed to perform the work with the exception of hand tools such as knives. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if 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 the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant.

31. 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.
32. The competent evidence presented in this case does not show that the determination of the Department of Revenue was in error. Thus, it is concluded that the services performed for Nobis Bene Inc by the Joined Party as a sushi chef constitute insured employment.

Recommendation: It is recommended that the determination dated December 27, 2011, be AFFIRMED.

Respectfully submitted on May 10, 2012.



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 10, 2012

Copies mailed to:
Petitioner

Respondent
Joined Party

AUSTIN K KATOH
31 COVENTRY COURT
BLUFFTON SC 29910

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
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DOR BLOCKED CLAIMS UNIT
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