

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

PETITIONER:

Employer Account No. - 2708494
SUSAN B COLUMBO, PA
2242 SE MIDTOWN ROAD
PORT ST LUCIE FL 34952-4835

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-81465L**

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 March 3, 2012, is MODIFIED to reflect a retroactive date of October 1, 2007. 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,
Bureau Chief,
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:

SUSAN B COLUMBO, PA
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ETHEL KRAM
767 SE ATLANTUS AVENUE
PORT ST LUCIE FL 34983

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

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

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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

PETITIONER:

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PROTEST OF LIABILITY

DOCKET NO. 2012-81465L

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 March 3, 2012.

After due notice to the parties, a telephone hearing was held on December 26, 2012. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, 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.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a subchapter S corporation which was formed in December 2005 to operate a real estate sales business. The Petitioner's president is the licensed real estate sales agent and is active in the operation of the business. The Petitioner established liability for payment of unemployment tax effective May 1, 2006.

2. The Petitioner engaged the Joined Party as a Real Estate Assistant on or about October 1, 2007. The Joined Party did not have a real estate sales license and had never worked in the real estate field.
3. The parties did not enter into any formal agreement or contract. The Petitioner told the Joined Party that the Petitioner would pay the Joined Party \$10 per hour and that the Petitioner would try to give her at least twenty hours per week. The rate of pay was based on what the Petitioner felt that the Petitioner could afford to pay the Joined Party.
4. The Joined Party's duties consisted of, among other things, answering the telephone, typing, preparation of invoices, and taking pictures of properties.
5. The Petitioner provided the place of work, a computer, a telephone, and a camera. The Petitioner reimbursed the Joined Party for gas when the Joined Party used her own automobile for company business. The Petitioner provided the Joined Party with business cards bearing the Petitioner's name as well as the Joined Party's name.
6. Due to the Joined Party's lack of experience in the real estate field the Joined Party was required to work under the supervision of the Petitioner. The Petitioner told the Joined Party how to perform the work and provided guidance whenever necessary.
7. The Joined Party's work schedule was determined by the Petitioner based on the Petitioner's needs. The Petitioner told the Joined Party what time to begin work each day.
8. The Joined Party was required to personally perform the work for the Petitioner. She was not allowed to hire others to perform the work for her.
9. The Petitioner allowed the Joined Party to perform similar work for other real estate sales agents.
10. The Joined Party did not submit a bill or invoice to the Petitioner to receive her pay. The Joined Party was not required to complete a timesheet. The Petitioner paid the Joined Party at the end of each pay period based on the number of hours worked by the Joined Party.
11. The Petitioner did not withhold any payroll taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits such as health insurance, life insurance, paid vacations, or paid holidays.
12. The Petitioner's business slowed down during the time that the Joined Party performed services for the Petitioner. As a result the Petitioner could no longer afford to pay the Joined Party at the rate of \$10 per hour. The Petitioner reduced the rate of pay to \$8 per hour.
13. The Petitioner reported the Joined Party's earnings at the end of each year to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
14. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Joined Party discontinued performing services for the Petitioner on or about December 8, 2011.
15. The Joined Party filed an initial claim for unemployment compensation benefits, now known as reemployment assistance benefits, effective January 29, 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 for the Petitioner as an employee or as an independent contractor.

16. On March 3, 2012, a Tax Auditor with the Department of Revenue issued a determination holding that the Joined Party, performing services for the Petitioner as a Real Estate Assistant, was the Petitioner's employee retroactive to January 1, 2010. Among other things the determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter.
17. The Petitioner filed a written protest on March 21, 2012. The Tax Auditor was on a medical leave of absence at the time and the protest letter was misplaced. The Department of Revenue accepted subsequent correspondence from the Petitioner as a written protest, however, that correspondence was not within twenty days of March 3, 2012. The Department of Revenue located the March 21, 2012, protest letter during the latter part of December 2012.

Conclusions of Law:

18. Section 443.141(2)(c), Florida Statutes, provides:
 - (c) *Appeals*.--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.
19. Rule 73B-10.035(5)(a)1., Florida Administrative Code, provides:

Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.
20. The evidence reveals that the Petitioner filed a written protest within twenty days of the March 3, 2012, determination. Thus, the Petitioner's protest was timely filed.
21. The issue in this case, whether services performed for the Petitioner by the Joined Party as a Real Estate Assistant 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.
22. 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).
23. 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.
24. 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.

25. 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.
26. 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.
27. 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.
28. 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."
29. The evidence reveals that there was no formal agreement between the parties. There is no evidence of any agreement, formal or informal, which establishes an independent contractor relationship.
30. The Petitioner is a licensed Real Estate Sales Agent. The Joined Party did not have any license or certification and at the time of hire was not knowledgeable about the real estate business. 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.
31. The Petitioner provided the place of work and all equipment and supplies that were needed to perform the work. The Petitioner reimbursed the Joined Party for any expenses in connection with the work.
32. It was not shown that any special knowledge or skill was needed to perform the work. Although the humblest labor can be independently contracted and the most highly trained artisan can be an employee, see Farmers and Merchants Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958), 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)

33. The Petitioner determined the method of pay and the rate of pay. The Petitioner paid the Joined Party by time worked rather than by the job or by production. The Petitioner determined the number of hours that the Joined Party worked each week. Thus, the Petitioner controlled the financial aspects of the relationship.
34. The Petitioner did not withhold payroll taxes from the pay and reported the Joined Party's earnings at the end of the year on Form 1099-MISC as nonemployee compensation. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.
35. The Joined Party performed services for the Petitioner for a period in excess of four years. Either party could terminate the relationship at any time 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."
36. The evidence in this case reveals that the Petitioner determined who performed the work, 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.
37. It is concluded that the services performed by the Joined Party for the Petitioner as a Real Estate Assistant constitute insured employment. However, the determination issued by the Department of Revenue is only retroactive to October 1, 2010, even though the evidence establishes that the Joined Party began performing services for the Petitioner effective October 1, 2007.
38. Rule 73B-10.032(1), Florida Administrative Code, provides that each employing unit must maintain records pertaining to remuneration for services performed for a period of five years following the calendar year in which the services were rendered.
39. It is concluded that the services performed for the Petitioner retroactive to October 1, 2007, constitute insured employment.

Recommendation: It is recommended that the determination dated March 3, 2012, be MODIFIED to reflect a retroactive date of October 1, 2007. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on January 18, 2013.

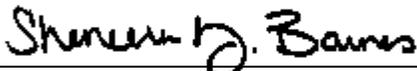


R. O. SMITH, Special Deputy
Office of Appeals

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:
January 18, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

ETHEL KRAM
767 SE ATLANTUS AVENUE
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DEPARTMENT OF REVENUE
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DOR BLOCKED CLAIMS UNIT
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