

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

PETITIONER:

Employer Account No. - 1450762
RICK M MORSE CPA PA
ATTN: MINDY MORSE
5521 N UNIVERSITY DRIVE STE 201
CORAL SPRINGS FL 33067-4648

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-96340L**

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 August 15, 2012, 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 January, 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 January, 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:

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SHELLEY HERMAN
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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

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RESPONDENT:

State of Florida
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**PROTEST OF LIABILITY
DOCKET NO. 2012-96340L**

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 August 15, 2012.

After due notice to the parties, a telephone hearing was held on October 12, 2012. The Petitioner, represented by the Petitioner's administrator, appeared and testified. The Petitioner's sole officer and two bookkeepers testified as witnesses for the Petitioner. The Respondent, represented by a Department of Revenue Tax Specialist, appeared and testified. The Joined Party appeared and testified. An accountant testified as a witness on behalf of the Joined Party.

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 as Billing and Collection 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 professional corporation, formed in 1993, that provides accounting, payroll, and bookkeeping services.

2. The Joined Party performed billing and collection services for the Petitioner as an accounts receivable clerk/manager from February 2010, until June, 2011. The Joined Party obtained the work after responding to an advertisement placed by the Petitioner on Craigslist. During an interview, the parties discussed the Joined Party's work experience and the services needed by the Petitioner. The Joined Party was told the work would be full-time, 40 hours per week, with some additional hours during tax season. The Joined Party was told she would be eligible for sick pay and vacation pay after a certain period of time. The Petitioner set the Joined Party's compensation at \$600 per week, based upon a 40- hour work week, or \$15 per hour. The Joined Party requested that the Petitioner not withhold taxes from her pay, as the Joined Party preferred to pay her own taxes. The parties did not enter into a written agreement. Persons who previously performed the same type of services for the Petitioner were the Petitioner's employees.
3. The Joined Party's duties included creating bills for clients using the Petitioner's "Imagine" software billing program, posting payments to the client's receivable balance, issuing notices and making telephone calls to clients with past due accounts, recording bank deposits and other data in QuickBooks, and preparing daily cash receipt reports.
4. The Joined Party was an experienced bookkeeper, particularly with QuickBooks. The Joined Party did not have experience with the Petitioner's "Imagine" billing program. One of the Petitioner's employees trained the Joined Party on the use of the system and provided technical assistance when needed by the Joined Party. The Petitioner paid for the Joined Party to attend a seminar that focused on laws relating to collections.
5. The Joined Party performed her services at the Petitioner's business location. During an approximate two-week period when the Joined Party was recovering from surgery, the Joined Party performed some of her duties from her home. The Petitioner's normal business hours were 9:00 a.m. to 5:30 p.m., Monday through Friday. The Joined Party was allowed some flexibility in her work hours and often arrived before 9:00 a.m. Most of the time the Joined Party worked until 5:30 p.m. The Joined Party was allowed 30 minutes for lunch. During the tax season, the Joined Party was required to work in excess of 40 hours per week. The Petitioner gave the Joined Party a key to the office. The Joined Party notified the Petitioner, usually the head bookkeeper, if she was going to be late or absent.
6. The Petitioner provided the work space, telephone, computer, software programs, and all other equipment and supplies needed to perform the work. During the time the Joined Party was recovering from surgery, the Petitioner provided an access code to the Petitioner's billing system so that the Joined Party could work from home. The Joined Party was reimbursed if she picked up items needed for her work. The Joined Party had no expenses in connection with the work.
7. The Joined Party entered information from timesheets completed by the Petitioner's sole officer and other individuals into the billing system. If the Joined Party had a question about an entry, she went directly to the individual for clarification. The Joined Party prepared bills for clients for tax returns from written directions provided with each return by the Petitioner's sole officer. Some of the Petitioner's clients were billed on a monthly or quarterly basis. An employee of the Petitioner initially gave the Joined Party instructions as to how those clients were to be billed. To follow-up on past due accounts, the Joined Party worked from an aging account report which was notated by the Petitioner's administrator as to any special treatment of an individual client, such as "do not call" or "call this one first." The Joined Party also prepared collection letters, using a format approved by the Petitioner's administrator. The Joined Party was authorized to use the title "Accounts Receivable Manager" on the collection letters. The Joined Party did not have discretion to discount a past due bill. The Joined Party provided a daily cash activity report to the Petitioner's sole officer.

8. The Joined Party did not bill the Petitioner for her services. The Joined Party kept track of her hours and submitted time sheets to the Petitioner on a weekly basis. The Joined Party was paid \$600 per week. During tax season, the Joined Party was paid at a rate of \$15 per hour for hours in excess of 40 hours per week. The Joined Party received holiday pay, sick pay and a one-time bonus of \$100. The Petitioner did not withhold payroll taxes from the Joined Party's pay. The Petitioner reported the Joined Party's earnings on a form 1099-MISC.
9. The Joined Party operated a bookkeeping service until 2008. The Joined Party did not operate a business and did not have a business card, occupational license, or business liability insurance during the time the Joined Party performed services for the Petitioner.
10. The Joined Party was not prohibited from performing services for others while working for the Petitioner, as long as the other services did not interfere with the Joined Party's work for the Petitioner.
11. The Petitioner terminated the relationship with the Joined Party.

Conclusions of Law:

12. The issue in this case, whether services performed for the Petitioner 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.
13. 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).
14. 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).
15. 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.
16. 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.
17. 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.
18. 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.
19. The record does not reveal the existence of any 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."
20. The Petitioner operates an accounting practice. The Joined Party worked as an accounts receivable clerk/manager for the Petitioner. 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 was not in business for herself.
21. 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 sufficient control over the Joined Party to establish an employer-employee relationship. The Petitioner determined what work was performed, when the work was performed and, through training and direction, how the work was performed.
22. The Petitioner furnished the work space and all equipment and supplies needed for the work.
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 Joined Party requested that taxes not be withheld from her pay does not, standing alone, establish an independent contractor relationship.
24. The Joined Party received holiday pay and sick pay, benefits normally reserved for employees.

25. The Joined Party was hired for an indefinite term. The Joined Party performed services for the Petitioner for approximately 16 months. Those factors reflect an at-will relationship of relative permanence, consistent with an employer-employee relationship rather than an independent contractor relationship.
26. It is concluded that the services performed for the Petitioner by the Joined Party and others as accounts receivable clerks/managers constitute insured employment.

Recommendation: It is recommended that the determination dated August 15, 2012, be AFFIRMED.

Respectfully submitted on December 5, 2012.



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 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:
December 5, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

SHELLEY HERMAN
6746 MOONLIT DRIVE
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