

**DEPARTMENT OF ECONOMIC OPPORTUNITY  
Reemployment Assistance Appeals  
PO BOX 5250  
TALLAHASSEE FL 32399-5250**

**PETITIONER:**

Employer Account No. – 2250018  
TOP FLIGHT MARKETING INC  
ATTN: CARL FOSS, PRESIDENT  
4651 SHERIDAN ST STE 301  
HOLLYWOOD FL 33021-3427

**PROTEST OF LIABILITY  
DOCKET NO. 0021 1428 45-02**

**RESPONDENT:**

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

**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 October 9, 2013, is REVERSED.

### 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 12<sup>th</sup> day of **June, 2014**.



*Magnus Hines*

Magnus Hines  
RA Appeals Manager,  
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

6.16.14  
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 16<sup>th</sup> day of June, 2014.

*Shanendra Y. Barnes*

SHANEDRA Y. BARNES, Special Deputy Clerk  
DEPARTMENT OF ECONOMIC  
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Reemployment Assistance Appeals  
PO BOX 5250  
TALLAHASSEE FL 32399-5250

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State of Florida  
DEPARTMENT OF ECONOMIC OPPORTUNITY  
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**Reemployment Assistance Appeals**  
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**RESPONDENT:**

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

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Magnus Hines  
RA Appeals Manager,  
Reemployment Assistance Program  
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated October 9, 2014.

After due notice to the parties, a telephone hearing was held on February 26, 2014. The president of the corporation testified for the Petitioner, which was represented by counsel, and two additional witnesses gave testimony; the Joined Party appeared; and a Tax Auditor II appeared for the Respondent. No proposed findings of fact or conclusions of law were received. The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted.

**Issue:**

The issue(s) involved in this appeal  
Whether services performed for the Petitioner by the Joined Party constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

**Findings of Fact:**

1. The Petitioner sells promotional advertising. It has done so since 1999. The promotional material consists of gift certificates entitling the bearer to participate in activities at a discount—there are promotions for discounted tickets to see professional sports teams, for example; or promotions for a hotel stay as part of a timeshare sales promotion; or sometimes just a discount on items to be purchased at a fast food restaurant. The Petitioner might have arrangements with a dozen or more clients at a time to sell promotional materials.

2. The Joined Party was one of several salespeople associated with the Petitioner. The Joined Party was associated from March 15, 2011 to January 5, 2013.
3. The Joined Party and other salespeople would typically appear at the Petitioner's office at 7:30 a.m. to choose which promotional item or items that they would sell that day. The gift certificates would typically be in the form of a flyer or brochure. The salesperson would choose the number of such items that he or she estimated could be sold. The salesperson would designate a particular area in which the salesperson proposed to operate. Often the area would consist of a shopping mall or a street with many businesses, or perhaps an office building, but it could be a residential area. Once a salesperson had chosen a particular area, no other salespeople associated with the Petitioner could sell in that area that day. If there were disputes the salesperson who chose the area first would be the one assigned to the area. Sometimes salespeople returned to the same area they had worked in the day before, when an area that was supposed to be saturated with sales could not be finished all in one day.
4. The number of certificates or brochures taken by the sales person was recorded and at the end of the day, unless the sales person had been given special permission for a delay, the salesperson would return to the Petitioner's office for cash-in. The salesperson would return any unsold certificates, and would pay to the Petitioner the designated amount for the rest of the certificates. The certificates had a purchase price printed on the certificate itself. A lower amount was designated to be paid to the Petitioner for certificates sold. If a sales person took 20 certificates in the morning, and turned in ten unsold certificates at night, the sales person would pay the Petitioner the cost of ten certificates. If the certificate had a face value of \$19.99 for sports tickets, for example, the designated amount to the Petitioner might be \$15, and the sales person would pay the Petitioner \$150 (i.e., \$15 per certificate for the ten certificates sold in this example). The difference between the selling amount of the certificate and the amount that had to be paid to the Petitioner was the salesperson's commission. In this example, the \$4.99 commission, just under 20%, would be on the low end of the commission percentage, but the amount would vary from promotion to promotion.
5. In the very rare instances when a sales person was deprived of the certificates through no fault of his own (by robbery, for example), the Petitioner might waive the payment of the designated amount for the missing certificates, but the salesperson would not be paid anything.
6. A sales person might increase sales by selling the certificate for less than the face amount, but the designated amount to the Petitioner would not change: the reduction in sales price came out of the sales person's retained commission.
7. Certificates were usually purchased with cash, so cash-in was straightforward in those cases. But payment was sometimes made by check, and sometimes by credit card. Purchase checks were made out to the Petitioner, not to the sales person. When a credit card was used the salesperson would take the credit card information and call the Petitioner for verification prior to completing the transaction. At cash-in, the Petitioner would disburse cash to the salesperson for that sale, less a small processing fee to cover the additional costs associated with credit card purchases.
8. Salespeople, including the Joined Party, typically settled up each day, so they received daily pay; but a salesperson could allow some commissions to accumulate for a weekly payment.

9. There was a meeting each morning which the Joined Party understood to be mandatory, though the Petitioner did not regard it in that light. So long as the salesperson was aware of any sales restrictions on the certificates required by the client, the salesperson could pick up the certificates and go out to sell. At the morning meeting the Petitioner's president discussed sales techniques and presented motivational material. The meeting was usually over around 9 a.m. The salespeople would return to the Petitioner's office for cash-in about 6 p.m. The full work week was Monday through Saturday. Some sales people only worked a few days per week. Sometimes the Joined Party did not work for a week or more.
10. Salespeople would go to a potential sales location, which might be a store in a shopping mall. The salesperson would introduce himself or herself and identify the sales promotion that was being sold. The specific sales pitch was left to the salesperson, but if the Petitioner's client had required disclaimers or restrictions, the salesperson was required to announce those before completing a sale. A salesperson might be required to advise that the vacation promotion required attendance at a timeshare presentation, for example. Repeated complaints to the Petitioner that a salesperson had not conformed to the required announcements was grounds for the Petitioner declining to allow the salesperson to perform any further services. If the salesperson's presentation was successful, the customer bought one or more of the certificates and the salesperson moved on to the next prospect. The Joined Party and other salespeople often sold to workers in businesses, but they could sell to anyone unless the client imposed a restriction on selling to certain potential purchasers—the client's own employees, or minors, for example.
11. When the Joined Party first began work with the Petitioner he signed an agreement along with other documents relating to handling of sales transactions. The Petitioner revised the documents in the summer of 2012. The Joined Party signed a set of documents on August 21, 2012. The actual work procedures did not change.
12. The *Independent Distributor Agreement* of August 21, 2012 provided, among other things:  
DISTRIBUTOR UNDERSTANDS THAT HE/SHE IS A SELF-EMPLOYED INDIVIDUAL/INDEPENDENT CONTRACTOR AND NOT AN AGENT OR EMPLOYEE OF CORPORATION. HE/SHE SHALL HAVE NO CLAIMS AGAINST CORPORATION FOR WAGES, UNEMPLOYMENT, WORKERS' COMPENSATION OR DISABILITY BENEFITS AND HE/SHE SHALL BE LIABLE FOR PAYMENT OF ALL FEDERAL, STATE AND LOCAL INCOME TAXES. IN PARTICULAR, CORPORATION WILL NOT TREAT THE DISTRIBUTOR AS AN EMPLOYEE WITH RESPECT TO ANY SERVICES FOR FEDERAL OR STATE TAX PURPOSES. [All caps in original.]
13. The Petitioner did not withhold or deduct any amount from commissions for Federal income taxes, or for Social Security or Medicare. The Petitioner issued a 1099-MISC form to the Joined Party for each year in which the Joined Party received commissions on sales. The amount was listed in the "nonemployee compensation" box on the form.
14. The Joined Party regarded himself as an employee, and not as a self-employed person. The Joined Party discontinued his association with the Petitioner in order to do some other work. The Joined Party eventually filed a claim for reemployment assistance benefits, effective August 4, 2013. After an investigation the Florida Department of Revenue issued its determination of September 24, 2013, reaffirmed on October 9, 2013 that the Joined Party was an employee. The Petitioner appealed on the grounds that the Joined Party was an exempt "direct seller."

**Conclusions of Law:**

15. Section 443.036, Florida Statutes, "Definitions" provides in relevant part:

- (21) "Employment" means a service subject to this chapter under s. 443.1216 which is performed by an employee for the person employing him or her.

16. 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.

17. Section 443.1216, Florida Statutes, further provides:

(13) The following are exempt from coverage under this chapter:

- (u) Service performed by a direct seller. As used in this paragraph, the term "direct seller" means a person:
1. a. Who is engaged in the trade or business of selling or soliciting the sale of consumer products to buyers on a buy-sell basis, on a deposit-commission basis, or on a similar basis, for resale in the home or in another place that is not a permanent retail establishment; or
  - b. Who is engaged in the trade or business of selling or soliciting the sale of consumer products in the home or in another place that is not a permanent retail establishment;
  2. Substantially all of whose remuneration for services described in subparagraph 1., regardless of whether paid in cash, is directly related to sales or other output, rather than to the number of hours worked; and
  3. Who performs the services under a written contract with the person for whom the services are performed, if the contract provides that the person will not be treated as an employee for those services for federal tax purposes.

18. In Cantor v. Cochran, 184 So. 2d 173 (Fla. 1966), the Supreme Court of Florida adopted the test in 1 Restatement of Law, Agency 2d Section 220 (1958) used to determine whether an employer-employee relationship exists. Section 220 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 the one employed is 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 worker supplies the instrumentalities, tools, and a 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 time or job;
  - (h) whether or not the work is 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.

19. 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.

20. 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. The factors listed in Cantor v. Cochran are the common law factors that determine if a worker is an employee or an independent contractor. See, for example, Brayshaw v. Agency for Workforce Innovation, 58 So. 3d 301 (Fla. 1<sup>st</sup> DCA 2011).
21. The relationship of employer-employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and the method and details by which the desired result is to be accomplished is the feature that distinguishes an independent contractor from a servant. Collins v. Federated Mutual Implement and Hardware Insurance Co., 247 So. 2d 461 (Fla. 4th DCA 1971); La Grande v. B. & L. Services, Inc., 432 So. 2d 1364 (Fla. 1st DCA 1983).
22. In Keith v. News and Sun-Sentinel Co., 667 So.2d 167, 171 (Fla. 1995) the Florida Supreme Court stated:

Hence, courts should initially look to the agreement between the parties, if there is one, and honor that agreement, unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status. In the event that there is no express agreement and the intent of the parties cannot otherwise be determined, courts must resort to a fact-specific analysis under the Restatement based on the actual practice of the parties. Further, where other provisions of an agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties, the actual practice and relationship of the parties should control.
23. Section 73B-10.035, Florida Administrative Code, provides:

(7) Burden of Proof. The burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
24. The evidence shows that the Joined Party was not controlled in his sales presentation. He was required to provide certain disclaimers so that sales would meet legal obligations, but beyond that the Petitioner did not impose any requirement relating to sales technique or specific selling content. Requiring that workers comply with legal requirements does not show that the principal has control over the manner of doing the work; instead it shows control by the state or other entity that imposed the legal requirement. The situation in this case is largely similar to F.L Enterprises, Inc. v. Unemployment Appeals Commission, 515 So.2d 1340 (Fla. 5<sup>th</sup> DCA 1987), which involved solicitors for time-share presentations who were assigned to certain locations, but otherwise were not controlled as to the content of the presentation. The solicitors were found to be independent contractors.
25. The claimant had considerable control over when and where he would work, and he had control over what items he would attempt to sell. Where a worker does not have control over what work is to be done, that implies employment, see University Dental Health Center, Inc. v. Agency for Workforce Innovation, 89 So.3d 1139 (Fla. 4<sup>th</sup> DCA 2012), so the control over sales activities that the Joined Party retains implies the opposite, that he was an independent contractor.
26. The Petitioner was in business, and selling the gift certificates was certainly part of the Petitioner's business, but these factors that point toward employment are balanced by others that

tend to point toward a status of independent contractor. There were few, if any tools or equipment that needed to be used in the sales activity, so the Petitioner could not exercise control in that regard. Payment was derived directly from sales; if there was no sale there was no payment. The Joined Party was expected simply to produce a result, rather than being paid for engaging in any particular set of actions.

27. The evidence shows that even if the Joined Party were to be considered an employee, his work would still not be insured work, because all of the elements of the “direct seller” exemption of sec. 443.1216 (13) (u), Florida Statutes, apply: the Joined Party was paid by commission on the sale of consumer products, the gift certificates, which were sold in the field by the Joined Party going to the buyer, rather than from a location where the buyer went to the seller. The contract between the Petitioner and the Joined Party contains the necessary disclaimer of employment for Federal tax purposes.
28. Either way, the evidence shows that the services that the Joined Party provided to the Petitioner were not services in “employment” as defined by the Reemployment Assistance law.

**Recommendation:** It is recommended that the determination dated October 9, 2013, that the Joined Party was an employee (reaffirming the determination dated September 24, 2013), be REVERSED. Respectfully submitted on April 8, 2014.




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J. Jackson Houser, 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 ken z 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.

*Shanendra Y. Barnes*

SHANEDRA Y. BARNES, Special Deputy Clerk

*Date Mailed:  
April 9, 2014*

Copies mailed to:

Petitioner

Respondent

Joined Party

JOINED PARTY:

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