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

PETITIONER:
Employer Account No. – 1614736
LAW OFFICES OF KRAUTZ & GUERRA PA
800 BRICKELL AVE STE 701
MIAMI FL 33131-2967

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

PROTEST OF LIABILITY
DOCKET NO. 0025 0221 44-02

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 2, 2014, 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 4th day of **June, 2015**.

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.

DEPUTY CLERK DATE 6·9·15

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 9th **day of June, 2015.**

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

By U.S. Mail:

LAW OFFICES OF KRAUTZ & GUERRA PA
800 BRICKELL AVE STE 701
MIAMI FL 33131-2967

DAVID DONET SR
10808 SW 75TH TER
MIAMI FL 33173-2774

FLORIDA DEPARTMENT OF REVENUE
DRENEA YORK
4230 LAFAYETTE STREET SUITE D
MARIANNA FL 32446

DIANNE AYERS
FLORIDA DEPARTMENT OF REVENUE
PO BOX 6417
TALLAHASSEE FL 32399-0160

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

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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 December 2, 2014.

After due notice to the parties, a telephone hearing was held on March 26, 2015. The Petitioner, represented by one of its partners, appeared and testified. The Respondent was represented by a Department of Revenue Tax Auditor III. The Joined Party appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

Issue: Whether services performed for the Petitioner by the Joined Party constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner, Law Offices of Kravitz & Guerra, P.A., is a corporation which operates a law practice.
2. In early 2014 the Joined Party responded to a help wanted advertisement placed on the Internet by the Petitioner for a position as a paralegal. The Petitioner interviewed the Joined Party and informed him that the position was in the Petitioner's litigation department, that the hours of work were from 8:30 AM until 5:30 PM, Monday through Friday with a thirty minute lunch break each day, and that he would be paid by the hour. The Petitioner asked the Joined Party what rate of pay he was seeking and the Joined Party replied that he was seeking $30 per hour. The Petitioner informed the Joined Party that the Petitioner would get back with him. A day or two later the Petitioner contacted the Joined Party and offered him $13 per hour with the understanding that the first ninety days would

be a trial period and that if his work was satisfactory the pay rate would be increased. The Joined Party accepted the Petitioner's offer and began work on February 5, 2014.

3. The Petitioner provided the Joined Party with work space in the Petitioner's office containing a desk, computer, and a telephone. The Joined Party requested that the Petitioner obtain case management software that he was familiar with and the Petitioner purchased the software. The Petitioner provided everything that was needed to perform the work. The Joined Party did not provide any equipment or supplies and did not have any expenses in connection with the work.

4. Another paralegal was designated by the Petitioner as the Joined Party's supervisor. That individual provided initial training concerning office practices. The attorneys in the office also oversaw the Joined Party's work. The Joined Party's work was reviewed and he was instructed concerning corrections which he needed to make. The Joined Party's duties included assisting with the preparation of cases for trial and drafting pleadings and other documents.

5. The Petitioner provided the Joined Party with a swipe card which he was required to swipe in the electronic time clock when he arrived and left each day. The Joined Party was paid on a bi-weekly basis based on the hours worked as recorded by the time clock. When the Joined Party received his first paycheck he noticed that taxes had not been deducted from the pay. He approached the accountant and stated that an error had been made in his pay because payroll taxes had not been deducted. The accountant informed the Joined Party that the Petitioner hires all of its employees on a ninety day trial basis and that during the trial basis the employees are classified as independent contractors.

6. At the time of hire the Joined Party was required to sign a confidentiality agreement which prohibited the Joined Party from working for another law firm for a period of one or two years following termination. The Joined Party objected to not being able to work for another law firm following termination and declined to sign the agreement. However, because of the agreement the Joined Party believed that he would not be allowed to work for another law firm while working for the Petitioner.

7. The Joined Party was required to personally perform the work. He was not allowed to hire others to perform the work for him.

8. The Joined Party was not allowed to have any direct contact with any of the Petitioner's clients, either verbally or in writing, unless an attorney was present.

9. Either party could terminate the relationship at any time without incurring liability for breach of contract.

10. On May 9, 2014, the Petitioner's accountant sent an email to the Joined Party. The email states "Please be advised that your salary rate has increased to $25.00 per hour since April 22, 2014. As you will be include (sic) in our Payroll starting May 5, 2014, please complete attached W-4 form and send me it back. Congratulations!"

11. There were no changes in the terms and conditions of the working relationship other than beginning May 5, 2014, the Joined Party's pay rate was increased and the Petitioner withheld payroll taxes from the pay. The Joined Party continued working as a paralegal for the Petitioner until he was terminated on October 7, 2014.

12. During the time that the Joined Party performed services for the Petitioner the Joined Party did not have any investment in a business, did not advertise his services to the general public, did not perform services for others, did not have business liability insurance, and did not have an occupational license.

13. The Joined Party filed a claim for reemployment assistance benefits. When the Joined Party did not receive credit for his earnings with the Petitioner 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.

14. On December 2, 2014, the Department of Revenue issued a determination holding that the Joined Party performed services for the Petitioner as an employee retroactive to February 5, 2014. The Petitioner filed a timely protest by mail postmarked December 17, 2014.

Conclusions of Law:

15. The issue in this case, whether services performed for the Petitioner by the Joined Party 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.

16. 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).

17. 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.

18. 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.

19. 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.

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.

21. 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.

22. In this case there was no agreement that the Joined Party would perform services for the Petitioner as an independent contractor. The Joined Party was not even aware that the Petitioner had classified him as an independent contractor until he received his first paycheck, approximately two weeks after beginning work. 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."

23. The Petitioner is a law firm. The Joined Party provided paralegal services to the Petitioner. The Petitioner provided everything that was needed to perform the work. The Joined Party did not have any expenses in connection with the work, did not have an investment in a business, did not have an occupational license, did not have business liability insurance, and did not advertise his services to the general public. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services 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.

24. Paralegal is a skilled profession which requires supervision by the attorney for whom the work is performed. Generally, 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) However, 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." In University Dental Health Center, Inc. v. Agency for Workforce Innovation, 89 So. 3rd 1139 (Fla. 4th DCA 2012), a case involving a dentist who performed services for a dental office, the court found that the dentist was a highly skilled professional who performed services without supervision, who determined what treatments were necessary, and who determined how to perform the treatments. The court found that the relationship was at-will, that the dental office provided the tools and space for the dentist, that the dental office scheduled the patients, that the dentist could not refuse patients, that the dentist was required to report for work at a particular time, and that the dentist could leave only if there were no scheduled patients. The court determined that the dentist was an employee of the dental office.

25. The Petitioner paid the Joined Party by time worked rather than based on production or by the job. The Petitioner determined the method of pay and controlled the hourly rate of pay. The fact that the Petitioner chose not to withhold payroll taxes from the pay during the initial ninety day trial period does not, standing alone, establish an independent contractor relationship. Section 443.1217(1),

Florida Statutes, provides that the wages subject to the Reemployment Assistance Program 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.

26. The Petitioner hired the Joined Party as a paralegal for an indefinite period of time but classified the Joined Party as an independent contractor during just the first ninety days. There were no changes in the terms and conditions of the relationship after the trial period. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. 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."
27. At all times, both prior to May 5, 2014, and subsequent to May 5, 2014, the Petitioner controlled what work was performed, when it was performed, where it was performed, by whom it was performed, and how it was performed. The Petitioner controlled the financial aspects of the relationship. 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.
28. It is determined that the Joined Party performing services for the Petitioner as a paralegal was the Petitioner's employee.

Recommendation: It is recommended that the determination dated December 2, 2014, be AFFIRMED.

Respectfully submitted on April 21, 2015.

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 envió 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:
April 21, 2015

Copies mailed to:
Petitioner
Respondent
Joined Party

DAVID DONET SR
10808 SW 75TH TERRACE
MIAMI FL 33173-2774

FLORIDA DEPARTMENT OF REVENUE
ATTN: DRENEA YORK
4230 LAFAYETTE STREET STE D
MARIANNA FL 32446

FLORIDA DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
PO BOX 6417
TALLAHASSEE FL 32314-6417