

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

PETITIONER:

Employer Account No. - 2961836
IRONING EXPRESS SERVICES INC
8901 SW 157TH AVE UNIT 11
MIAMI FL 33196-1157

PROTEST OF LIABILITY
DOCKET NO. 0019 4672 52-02

RESPONDENT:

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

ORDER

This matter comes before me for final Department Order.

The issue before me is whether services performed for the Petitioner by the Joined Party and other individuals constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

With respect to the recommended order, section 120.57(1)(l), Florida Statutes, provides:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Exceptions to the Recommended Order were not received from any party.

Upon review of the entire record, it was determined that the Special Deputy's *Recommendation* on the fourth page of the Recommended Order must be modified because it lists an incorrect determination date. The record reflects that the determination at issue has a mailing date of August 30, 2013. Accordingly, the paragraph is amended as follows:

Recommendation: It is recommended that the determination dated August 30, 2013, finding that persons performing services as driver are employees, retroactive to January 15, 2012, be AFFIRMED.

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 modified herein. 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 30, 2013, 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 April, 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

4.7.14

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 7th day of April, 2014.

Shanendra Y. Barnes

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

By U.S. Mail:

IRONING EXPRESS SERVICES INC
8901 SW 157TH AVE UNIT 11
MIAMI FL 33196-1157

DEPARTMENT OF REVENUE
WILLA DENNARD
CCOC BLDG #1 SUITE 1400
2450 SHUMARD OAK BLVD
TALLAHASSEE FL 32399

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

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

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RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith
Bureau Chief,
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 August 30, 2013.

After due notice to the parties, a telephone hearing was held on December 17, 2013. The general manager appeared for the Petitioner; the Joined Party did not appear; A Senior Tax Specialist 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:

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

Findings of Fact:

1. The Petitioner incorporated in May 2002. It is a laundry and dry cleaning business. The Joined Party is the brother of the general manager. The general manager is married to the president and principal owner of the corporation. The operations of the business are carried on primarily by the general manager and the president.
2. The Petitioner owns a delivery van. The general manager or the president use the van occasionally to collect and return clothing to customers, when necessary. Most of the Petitioner's business is done on the Petitioner's business premises. In early 2012, the Joined Party asked if he could earn some money by performing deliveries. The general manager and the Joined Party agreed that the Joined Party would work on-call as needed, at \$8 per hour.

3. Normally when the Petitioner uses workers other than the general manager or president, the worker signs a document, Independent Contracting Agreement. The Joined Party did not sign any such agreement during the time that he worked with the Petitioner.
4. When the Petitioner had pick-ups or deliveries to be done, the general manager would call the Joined Party and assign the work. Generally there would be two or more customers on an assignment. The Joined Party would travel to the Petitioner's premises, lay out a route and then begin the travel. The Petitioner provided the delivery van, and it paid for the fuel. The Joined Party did not need to provide any tools or equipment necessary to do the work. The Joined Party would typically finish the route after the Petitioner's shop had closed for the day, so the Joined Party would leave the van and submit documentation of the hours of work later. The documentation would consist of the Joined Party's notations on a piece of paper.
5. The Joined Party drove with an ordinary driver's license. No specialized license was necessary for the Petitioner's van. The Joined Party was not in business for himself as a delivery service.
6. No one other than the general manager, company president, or the Joined Party used the Petitioner's van to make deliveries or pick-ups for the Petitioner.
7. The Petitioner paid the Joined Party weekly for whatever work he had done that week. No taxes were deducted from payments to the Joined Party. The Petitioner supplied the Joined Party with a 1099-MISC form for 2012, showing payment of \$6291 for the year.
8. The association between the Petitioner and the Joined Party came to an end in late December 2012, when the Joined Party and the general manager were looking at cell phones that the Petitioner was going to supply to the Joined Party. The Joined Party became upset and left. He did not take any further delivery assignment after that. The Petitioner concluded that the Joined Party had quit.
9. A claim for benefits was filed effective July 7, 2013. After an investigation, the Florida Department of Revenue issued a determination on August 30, 2013 finding that the Joined Party and other persons performing services as driver were employees, not independent contractors, retroactive to January 15, 2012.

Conclusions of Law:

10. 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.
11. 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).

12. 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.
13. 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.
14. 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. 1st DCA 2011).
15. 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.
16. 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.
17. The Petitioner supplied the tools and supplies for the work, and the Petitioner controlled what driving assignments were available. The Joined Party was paid by the hour. These factors tend to show that the Petitioner had the right to control the manner of doing the work.

18. The Joined Party decided on the particular route to follow in making a delivery, and the Petitioner did not deduct any amount for taxes. While these factors are consistent with an independent contractor relationship, they are not necessarily inconsistent with the status of employee. Sometimes employees need to have a relatively wide discretion in order to deal with unforeseeable difficulties. The deduction or not of taxes is secondary, in that it may be a sign that at least one of the parties believes that the worker is an independent contractor, but withholding taxes or not does not imply anything about the degree of control over the details of the work that may be exercised.
19. The Petitioner would normally have workers sign an agreement expressly designating them as independent contractors, but the Petitioner did not require that in this case. Moreover, the particular work that the Joined Party did was the sort of work that was otherwise done by employees of the Petitioner, either the owner or the general manager.
20. The work did not require any special skills, and the Joined Party was not in a separate business.
21. When an employing unit controls when the work is to be performed, controls the essential means of performing the work, and the tools supplied are to be used exclusively for that employing unit, the relationship is one of employment, even if the parties might call it something else. See, for example, Justice v. Belford Trucking Co., Inc., 272 So.2d 131 (Fla. 1972). The evidence in this case shows that the Petitioner controlled all of the means by which the work was done. The relationship between the Petitioner and Joined Party was that of employer-employee.

Recommendation: It is recommended that the determination dated August 30, 2012, finding that persons performing services as driver are employees, retroactive to January 15, 2012, be AFFIRMED. Respectfully submitted on January 8, 2014.



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:

January 9, 2014

Copies mailed to:

Petitioner

Respondent

Joined Party

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