Arizona Department of Economic Security

Appeals Board

UNEMPLOYMENT INSURANCE TAX PROGRAM

APPEALS BOARD DECISIONS

2023

To request any of these documents in an alternative format, contact the Appeals Board at (602) 771-9019.

Arizona Department of Economic Security

Appeals Board

UNEMPLOYMENT INSURANCE TAX PROGRAM

APPEALS BOARD DECISIONS

1ST QUARTER 2023

To request any of these documents in an alternative format, contact the Appeals Board at (602) 771-9019.

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1885788-001-B

[redacted]

Petitioner

STATE OF ARIZONA E S A TAX UNIT
C/O JASON CORLEY, ASST
ATTORNEY GENERAL
2005 N CENTRAL AVE MAIL DROP
1911
PHOENIX, AZ 85004

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** March 27, 2023 *****.

DECISION
DISMISSED

THE **PETITIONER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:

1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

We have carefully reviewed the record.

THE APPEALS BOARD FINDS there is no reason to deny the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. Any scheduled hearing is cancelled. This decision does not affect any agreement entered into between the Petitioner and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 2/23/2023

APPEALS BOARD

NANCY MILLER, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See,* Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3442**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

> C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
>
> D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
>
> 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
>
> 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 2/22/2023
to:

Er: [redacted] Acct. No: [redacted]

(x) [redacted]

(x) JASON CORLEY
ASSISTANT ATTORNEY GENERAL
2005 N CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

(x) MARIA VANRAALTE, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: __LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1888569-001-B

[redacted]

DONALD J. BAIER, ASSISTANT
ATTORNEY GENERAL
2005 NORTH CENTRAL AVENUE
MAIL DROP 1911
PHOENIX, AZ 85004

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** April 24, 2023 *****.

DECISION
DISMISSED DUE TO FAILURE TO APPEAR

The Petitioner filed a request for review and redetermination on September 30, 2022, from a Determination of Unemployment Insurance Tax Rate for Calendar Years 2021 and 2022 issued by the Department on June 6, 2022. The Department issued a redetermination decision on November 17, 2022, holding that the Department's Determination of Unemployment Insurance Tax Rate for Calendar Years 2021 and 2022 was final on the grounds that the Petitioner's request for review and redetermination had been filed late. The

Petitioner filed a request for a hearing with the Appeals Board on November 30, 2022.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing for March 22, 2023, at 9:00 a.m. Mountain Standard Time, before Appeals Board Administrative Law Judge Robert Irani.

The Petitioner did not appear at the scheduled Board hearing, nor did the Petitioner present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel and a witness for the Department appeared. As a result of the Petitioner not appearing at the scheduled Board hearing, a default was entered on the record.

Arizona Administrative Code, Section R6-3-1502(A), provides in part as follows:

> A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
>
> * * *
>
> 4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Petitioner's petition for hearing. The Petitioner did not appear at the scheduled Board hearing and no evidence was presented to support reversing or modifying the Department's decision issued on November 17, 2022. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. The Determination of Unemployment Tax Rate for Calendar Year 2021 and the Determination of Unemployment Tax Rate for Calendar Year 2022 issued on June 6, 2022, remains in full force and effect.

This decision does not affect any settlement agreement that may have been entered into between the Petitioner and the Department.

DATED: 3/23/2023

APPEALS BOARD

NANCY MILLER, Chairman

No Signature , Board Member

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

HOW TO REQUEST REOPENING OF THE HEARING

A. Within 30 calendar days after this decision is mailed to you, you may file a written request to reopen the hearing. We consider the request to reopen filed:

1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
   - If there is no postmark, the postage meter-mark on the envelope in which it is received.
   - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
2. On the date it is received by the Department, if not sent by USPS.

You may send a request to reopen the hearing to the Appeals Board, 1990 W. Camelback Road, Suite 200, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request to reopen the hearing in person at the above locations.

B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.

C. Your request to reopen the hearing must be in writing, must be signed by you or by your representative, and must be filed on time. Only if a request to reopen the hearing is granted upon a finding that you have established good cause for your nonappearance, will a new hearing be scheduled on the merits of the original request for hearing.

D. If you need more time in order to file a request to reopen the hearing, you must apply to the Appeals Board before the appeal deadline. You must show good cause for your requested extension of time. No extension past the statutory deadline date will exist, unless the Appeals Board grants permission.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 3/23/2023
to:

(x) Er: [redacted] Acct. No: [redacted]

(x) DONALD J. BAIER, ASSISTANT ATTORNEY GENERAL
2005 NORTH CENTRAL AVENUE
MAIL DROP 1911
PHOENIX, AZ 85004

(x) MARIA VANRAALTE, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: _____RM_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

UNEMPLOYMENT INSURANCE TAX PROGRAM

APPEALS BOARD DECISIONS

2ND QUARTER 2023

To request any of these documents in an alternative format, contact the Appeals Board at (602) 771-9019.

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1892088-001-B

[redacted]

STATE OF ARIZONA E S A TAX UNIT
C/O DONALD BAIER, ASST
ATTORNEY GENERAL
2005 N CENTRAL AVE, MAIL DROP 1911
PHOENIX, AZ 85004

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
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RIGHT TO REQUEST REOPENING

Under Arizona Revised Statutes, § 41-1993, the last date to file a request to reopen the hearing is ***** October 12, 2023 *****.

DECISION
DISMISSED DUE TO FAILURE TO APPEAR

The Petitioner filed a request for reassessment on June 3, 2021 from a Determination of Liability for Employment or Wages issued by the Department on May 7, 2021. The Department issued a reconsidered determination on December 1, 2022 which affirmed the May 7, 2021 determination. The Petitioner filed a petition for a hearing with the Appeals Board on December 31, 2022.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing for April 17, 2023, at 9:00 a.m. Mountain Standard Time, before Appeals Board Administrative Law Judge Elizabeth Beatty.

The Petitioner did not appear at the scheduled Board hearing, nor did the Petitioner present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel and witnesses for the Department appeared. As a result of the Petitioner not appearing at the scheduled Board hearing, a default was entered on the record.

Arizona Administrative Code, Section R6-3-1502(A), provides in part as follows:

> A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
>
> * * *
>
> 4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Petitioner's petition for hearing. The Petitioner did not appear at the scheduled Board hearing and no evidence was presented to support reversing or modifying the Department's decision issued on December 1, 2022. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. The Determination of Liability for Employment or Wages issued on May 7, 2021 remains in full force and effect.

This decision does not affect any settlement agreement that may have been entered into between the Petitioner and the Department.

DATED: 9/12/2023

ELIZABETH BEATTY
Administrative Law Judge
For The Appeals Board

HOW TO REQUEST REOPENING OF THE HEARING

A. Within 30 calendar days after this decision is mailed to you, you may file a written request to reopen the hearing. We consider the request to reopen filed:

1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
   - If there is no postmark, the postage meter-mark on the envelope in which it is received.
   - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
2. On the date it is received by the Department, if not sent by USPS.

You may send a request to reopen the hearing to the Appeals Board, 1990 W. Camelback Road, Suite 200, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request to reopen the hearing in person at the above locations.

B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.

C. Your request to reopen the hearing must be in writing, must be signed by you or by your representative, and must be filed on time. Only if a request to reopen the hearing is granted upon a finding that you have established good cause for your nonappearance, will a new hearing be scheduled on the merits of the original request for hearing.

D. If you need more time in order to file a request to reopen the hearing, you must apply to the Appeals Board before the appeal deadline. You must show good cause for your requested extension of time. No extension past the statutory deadline date will exist, unless the Appeals Board grants permission.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 9/12/2023
to:

Er: [redacted] Acct. No: [redacted]

(x) [redacted]

(x) DONALD BAIER
ASST ATTORNEY GENERAL
2005 N CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

(x) MARIA VANRAALTE, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: _____RM_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1903682-001-B

[redacted]

STATE OF ARIZONA ESA TAX UNIT
C/O JASON CORLEY, ASST
ATTORNEY GENERAL
2005 N CENTRAL AVE MAIL DROP 1911
PHOENIX, AZ 85004

Petitioner

Department

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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***July 10, 2023***.

DECISION
DISMISSED

THE **PETITIONER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:

1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

We have carefully reviewed the record.

THE APPEALS BOARD FINDS there is no reason to deny the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. Any scheduled hearing is cancelled. This decision does not affect any agreement entered into between the Petitioner and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 6/8/2023

Elizabeth Beatty
Administrative Law Judge
For The Appeals Board

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See,* Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3442**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

> C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
>
> D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
>
> 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
>
> 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
>
> 3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action

may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 6/12/2023 to:

(x) Er: [redacted] Acct. No: [redacted]

(x) JASON CORLEY
ASSISTANT ATTORNEY GENERAL
2005 N CENTRAL AVE
PHOENIX, AZ 85004

(x) MARIA VANRAALTE, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: _____RM_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

UNEMPLOYMENT INSURANCE TAX PROGRAM

APPEALS BOARD DECISIONS

3RD QUARTER 2023

To request any of these documents in an alternative format, contact the Appeals Board at (602) 771-9019.

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1907915-001-B

[redacted]

STATE OF ARIZONA ESA TAX UNIT
C/O DONALD BAIER, ASST ATTORNEY GENERAL
2005 N CENTRAL AVE MAIL DROP 1911
PHOENIX, AZ 85004

Petitioner

Department

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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
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RIGHT TO REQUEST REOPENING

Under Arizona Revised Statutes, § 41-1993, the last date to file a request to reopen the hearing is *****August 14, 2023*****.

DECISION
DISMISSED DUE TO FAILURE TO APPEAR

The Petitioner filed a request for reassessment on February 20, 2023 from a Determination of Unemployment Tax Rate for Calendar Year 2023 issued by the Department on December 30, 2022. The Department issued a decision on March 24, 2023, holding that the Petitioner's petition was filed late. The Petitioner filed a request for a hearing with the Appeals Board on March 30, 2023.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing for July 14, 2023, at 1:00 p.m. Mountain Standard Time, before Appeals Board Administrative Law Judge Elizabeth Beatty.

The Petitioner did not appear at the scheduled Board hearing, nor did the Petitioner present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel and a witness for the Department appeared. As a result of the Petitioner not appearing at the scheduled Board hearing, a default was entered on the record.

Arizona Administrative Code, Section R6-3-1502(A), provides in part as follows:

> A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
>
> * * *
>
> 4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Petitioner's petition for hearing. The Petitioner did not appear at the scheduled Board hearing and no evidence was presented to support reversing or modifying the Department's decision issued on March 24, 2023. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. The Determination of Unemployment Tax Rate for Calendar Year 2023 issued on December 30, 2022 remains in full force and effect.

This decision does not affect any settlement agreement that may have been entered into between the Petitioner and the Department.

DATED: 7/14/2023

ELIZABETH BEATTY
Administrative Law Judge
For The Appeals Board

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

HOW TO REQUEST REOPENING OF THE HEARING

A. Within 30 calendar days after this decision is mailed to you, you may file a written request to reopen the hearing. We consider the request to reopen filed:

1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
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   - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
2. On the date it is received by the Department, if not sent by USPS.

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B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.

C. Your request to reopen the hearing must be in writing, must be signed by you or by your representative, and must be filed on time. Only if a request to reopen the hearing is granted upon a finding that you have established good cause for your nonappearance, will a new hearing be scheduled on the merits of the original request for hearing.

D. If you need more time in order to file a request to reopen the hearing, you must apply to the Appeals Board before the appeal deadline. You must show good cause for your requested extension of time. No extension past the statutory deadline date will exist, unless the Appeals Board grants permission.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 7/14/2023
to:

(x) Er: [redacted] Acct. No: [redacted]

(x) DONALD BAIER
ASSISTANT ATTORNEY GENERAL
2005 N CENTRAL AVE
PHOENIX, AZ 85004

(x) MARIA VANRAALTE, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1893532-001-B

[redacted]

Petitioner

STATE OF ARIZONA ESA TAX UNIT
c/o JASON CORLEY
ASST ATTORNEY GENERAL
2005 N. CENTRAL AVE.
MAIL DROP 1911
PHOENIX, AZ 85004

Department

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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***July 28, 2023***.

DECISION
AFFIRMED IN PART AND REVERSED IN PART

THE **PETITIONER** through counsel petitioned for a hearing from the Department's Reconsidered Determination issued on December 1, 2022, which affirmed the Department's Determination of Liability for Employment or Wages issued on June 22, 2021. The Reconsidered Determination held that the services performed by [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted]

constitute employment and all forms of remuneration paid for such services constitute wages.

In this case, the Petitioner contests the Reconsidered Determination holding as it pertains to [redacted], [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted]. The Petitioner does not contest the determination that the services performed by [redacted] constitute employment and that all forms of remuneration paid for his services constitute wages.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing for May 31, 2023. Appeals Board Administrative Law Judge Robert Irani presided over the hearing on that date, and all parties were given an opportunity to present evidence on the following issues:

(1) Whether the workers [redacted], [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted] (the "Workers") providing services for the Petitioner from January 1, 2019 through September 1, 2020 (the "audit period") were employees; and

(2) Whether payments the Petitioner made to the Workers during the audit period constitute wages.

The Petitioner and the Department appeared at the scheduled hearing and were represented by counsel. The Petitioner presented testimony from two witnesses and the Department presented testimony from one witness. Exhibits D1 through D7, and A1 were admitted into evidence.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Petitioner is a concrete and construction company that operated within the State of Arizona during the audit period.

2. The Workers provided construction related services, including concrete, tile, and demolition services, for the Petitioner during the audit period.

3. [redacted], [redacted], [redacted], and [redacted] provided concrete services for the Petitioner. [redacted] provided tile installation services for the Petitioner. [redacted] and [redacted] provided demolition services for the Petitioner.

4. The concrete and tile services comprised part of the Petitioner's regular business activity. The demolition services were not part of the Petitioner's regular business activity.

5. On December 1, 2022, the Department issued a Reconsidered Determination that held that the services performed by [redacted] and the Workers constitute employment and that all forms of remuneration paid for such services constitute wages.

6. On December 30, 2022, the Petitioner filed a timely petition for hearing from the December 1, 2022 Reconsidered Determination. The Petitioner contests the determination that the services performed by the Workers constitute employment and that all forms of remuneration paid for such services constitute wages. The Petitioner does not contest the determination that the services performed by [redacted] constitute employment and that all forms of remuneration paid for his services constitute wages.

7. The Workers and the Petitioner had agreed to an independent contractor relationship for the services provided by the Workers. The Workers had intended to perform their services as independent contractors.

8. The Petitioner did not have authority over any of the Workers' assistants or potential assistants, including the authority to discharge the assistants. The Workers could hire assistants without approval by the Petitioner.

9. The Workers did not have the authority to direct or supervise anyone other than their own assistants.

10. The Petitioner did not provide any training or instruction regarding how the Workers were to perform their services. The Workers drew from their own expertise to determine how they would provide their services.

11. The Petitioner would communicate to the Workers the location of the project jobsite and when the services should commence, based on the nature of the project.

12. The Workers were not required to submit reports to the Petitioner but verbally reported on the status and expected completion of their work to the Petitioner in an informal manner.

13. The Workers were not required to provide their services at the Petitioner's location for work.

14. The services were necessarily performed at the jobsite location of the project. The Petitioner did not provide any supervision.

15. The Workers were not required to personally provide their services. A substitute worker could be used in place of a worker without approval by the Petitioner.

16. The Petitioner did not establish a work schedule for the Workers.

17. The Workers were not required to work a set number of hours for the Petitioner and were not restricted from working for anyone else.

18. The sequence order for the performance of the services could be contingent on the nature of the project, including the progress and completion of other aspects of the project.

19. The Petitioner did not have a written policy that it required the Workers to follow.

20. The Workers used their own tools and equipment when providing their services.

21. The Petitioner could discharge the Workers without incurring legal liability.

22. There were no restrictions placed on the Workers to advertise or make their services available to the general public.

23. The Petitioner did not reimburse the Workers for any expenses that the Workers incurred.

24. The Workers were compensated by the Petitioner on a job basis.

25. The Workers had to make an investment in the purchase of a vehicle, as well as in tools and equipment required to perform their services.

26. [redacted] received payments from January 16, 2019 thru July 30, 2019, [redacted] received payments from December 17, 2019 thru July 29, 2020, [redacted] received payments from January 15, 2019 thru July 30, 2019, and

[redacted] and [redacted] received payments from January 11, 2019 thru September 29, 2020.

REASONING AND CONCLUSIONS OF LAW

The Petitioner contends that the Workers were independent contractors and not employees for the period from January 1, 2019 through September 1, 2020. The issues in dispute in this case are the employment status of the Workers from January 1, 2019 through September 1, 2020, and whether the pay earned by the Workers during that period constituted wages.

Arizona Revised Statutes, § 23-615, provides in pertinent part as follows:

Employment; definition

A. "Employment" means any service of whatever nature performed by an employee for the person employing the employee, including service in interstate commerce ...

Arizona Revised Statutes § 23-613.01 provides in pertinent part:

> Employee; definition; exempt employment
>
> A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Indications of control by the employing unit include controlling the individual's hours of work, location of work, right to perform services for others, tools, equipment, materials, expenses and use of other workers and other indicia of employment, except employee does not include:
>
> 1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.
>
> 2. An individual subject to the direction, rule or control or subject to the right of direction, rule or control of an employing unit solely because of a law regulating the organization,

trade or business of the employing unit.

3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

4. An individual if the employing unit demonstrates the individual performs services in the same manner as a similarly situated class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

Arizona Revised Statutes § 23-622(A) provides as follows:

Wages

A. "Wages" means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the department.

Arizona Administrative Code, Section R6-3-1723, provides as follows:

A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.

1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.

2. "Method" is defined as the way, procedure or process for doing something; the means used

in attaining a result as distinguished from the result itself.

B. "Employee" as defined in subsection (A) does not include:

1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent businessperson, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.

2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit "... solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.

a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.

b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.

c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the

same manner as if no such designated reference had been made.

* * *

D. In determining whether an individual who performs services is an employee under the general definition of subsection (A), all material evidence pertaining to the relationship between the individual and the employing unit must be examined. Control as to the result is usually present in any type of contractual relationship, but it is the additional presence of control, as determined by such control factors as are identified in paragraph (2) of this subsection, over the method in which the services are performed, that may create an employment relationship.

1. The existence of control solely on the basis of the existence of the right to control may be established by such action as: reviewing written contracts between the individual and the employing unit; interviewing the individual or employing unit; obtaining statements of third parties; or examining regulatory statutes governing the organization, trade or business. In any event, the substance, and not merely the form of the relationship must be analyzed.

2. The following are some common indicia of control over the method of performing or executing the services:

a. Authority over individual's assistants. Hiring, supervising, and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job. Sometimes, one worker may hire, supervise, and pay other workers. He may do so as the result of a contract in which he agrees to provide materials and labor and under which he is responsible only for the attainment of a result; in which case he may be independent. On the other hand, if he does so at the direction of the employing unit, he may be acting as an employee in the capacity of a foreman for or representative of the employer.

b. Compliance with instructions. Control is present when the individual is required to comply with instructions about when, where and how he is to work. Some employees may work without receiving instructions because they are highly proficient in their line of work and can be trusted to work to the best of their abilities; however, the control factor is present if the employer has the right to instruct or direct. The instructions may be oral or may be in the form of manuals or written procedures which show how the desired result is to be accomplished.

c. Oral or written reports. If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for his actions. Periodic progress reports relating to the accomplishment of a specific result may not be indicative of control if, for example, the reports are used to establish entitlement to partial payment based upon percentage of completion. Completion of forms customarily used in the particular type of business activity, regardless of the relationship between the individual and the employing unit, may not constitute written reports for purposes of this factor; e.g., receipts to customers, invoices, etc.

d. Place of work. Doing the work on the employing unit's premises is not control in itself; however, it does imply that the employer has control, especially when the work is of such a nature that it could be done elsewhere. A person working in the employer's place of business is physically within the employer's direction and supervision. The fact that work is done off the premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee. In some occupations, the services are necessarily performed away from the premises of the employing unit. This is true, for example, of employees in the construction trades, or employees who must work over a fixed route, within a fixed territory, or at any outlying work station.

e. Personal performance. If the services must be rendered personally it indicates that the employing unit is interested in the method as well as the result. The employing unit is interested not only in getting a desired result, but, also, in who does the job. Personal performance might not be indicative of control if the work is very highly specialized and the worker is hired on the basis of his professional reputation, as in the case

of a consultant known in academic and professional circles to be an authority in the field.
Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

f. Establishment of work sequence. If a person must perform services in the order of sequence set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the established routines and schedules of the employing unit. Often, because of the nature of an occupation, the employing unit does not set the order of the services, or sets them infrequently. It is sufficient to show control, however, if the employing unit retains the right to do so.

g. Right to discharge. The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control. The employing unit exercises control through the ever present threat of dismissal, which causes the worker to obey any instructions which may be given. The right of control is very strongly indicated if the worker may be terminated with little or no notice, without cause, or for failure to use specified methods, and if the worker does not make his services available to the public on a continuing basis. An independent worker, on the other hand, generally cannot be terminated as long as he produces an end result which measures up to his contract specifications. Many contracts provide for termination upon notice or for specified acts of nonperformance or default and may not be indicative of the existence of the right to control. Sometimes, an employing unit's right to discharge is restricted because of a contract with a labor union or with other entities. Such a restriction does not detract from the existence of an employment relationship.

h. Set hours of work. The establishment of set hours of work by the employing unit is a factor indicative of control. This condition bars the worker from being master of his own time, which is a right of the independent worker. Where fixed hours are not practical because of the nature of the occupation, a requirement that the worker work at certain times is an element of control.

i. Training. Training of an individual by an experienced employee working with him, by required attendance at

meetings, and by other methods, is a factor of control because it is an indication that the employer wants the services performed in a particular method or manner. This is especially true if the training is given periodically or at frequent intervals. An independent worker ordinarily uses his own methods and receives no training from the purchaser of his services.

j. Amount of time. If the worker must devote his full time to the activity of the employing unit, the employing unit has control over the amount of time the worker spends working and, impliedly, restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses. Full time does not necessarily mean an 8-hour day or a 5- or 6-day week. Its meaning may vary with the intent of the parties, the nature of the occupation and customs in the locality. These conditions should be considered in defining "full time". Full-time services may be required even though not specified in writing or orally. For example, a person may be required to produce a minimum volume of business which compels him to devote all of his working time to that business, or he may not be permitted to work for anyone else, and to earn a living he necessarily must work full time.

k. Tools and materials. The furnishing of tools, materials, etc. by the employing unit is indicative of control over the worker. When the worker furnishes the tools, materials, etc., it indicates a lack of control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

l. Expense reimbursement. Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses. Consideration must be given to the fact some independent professionals and consultants require payment of all expenses in addition to their fees.

E. Among the factors to be considered in addition to the factors of control, such as those identified in subsection (D), when determining if an individual performing services may be independent when paragraph (1) of subsection (B) is applicable, are:

1. Availability to public. The fact that an individual makes his services available to the general public on a continuing basis is usually indicative of independent status. An individual may offer his services to the public in a number of ways. For example, he may have his own office and assistants, he may display a sign in front of his home or office, he may hold a business license, he may be listed in a business directory or maintain a business listing in a telephone directory, he may advertise in a newspaper, trade journal, magazine, or he may simply make himself available through word of mouth, where it is customary in the trade or business.

2. Compensation on job basis. An employee is usually, but not always, paid by the hour, week or month; whereas, payment on a job basis is customary where the worker is independent. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job at a fixed rate per hour. Payment on a job basis may involve periodic partial payments based upon a percent of the total job price or the amount of the total job completed. The guarantee of a minimum salary or the granting of a drawing account at stated intervals, with no requirement for repayment of the excess over earnings, tends to indicate that existence of an employer-employee relationship.

3. Realization of profit or loss. An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is an employee is not in such a position. Opportunity for profit or loss may be established by one or more of a variety of circumstances; e.g.:

> a. The individual has continuing and recurring significant liabilities or obligations in connection with the performance of the work involved, and success or failure depends, to an appreciable degree, on the relationship of receipts to expenditures.
>
> b. The individual agrees to perform specific jobs for prices agreed upon in advance, and pays expenses incurred in connection with the work, such as wages, rents or other significant operating expenses.

4. Obligation. An employee usually has the right to end his relationship with his employer at any time he wishes without incurring liability, although he may be required to provide notice of his termination for some period in advance of the termination. An independent worker usually agrees to complete a specific job. He is responsible for its satisfactory completion and would be legally

obligated to make good for failure to complete the job, if legal relief were sought.

5. Significant investment. A significant investment by a person in facilities used by him in performing services for another tends to show an independent status. On the other hand, the furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status on the part of the worker. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, etc., that are provided by employees as a common practice in their particular trade.

If the worker makes a significant investment in facilities, such as a vehicle not reasonably suited to personal use, this is indicative of an independent relationship. A significant expenditure of time or money for an individual's education is not necessarily indicative of an independent relationship.

6. Simultaneous contracts. If an individual works for a number of persons or firms at the same time, it indicates an independent status because, in such cases, the worker is usually free from control by any of the firms. It is possible, however, that a person may work for a number of people or firms and still be an employee of one or all of them. The decisions reached on other pertinent factors should be considered when evaluating this factor.

F. Whether the preponderance of the evidence is being weighed to determine if the individual performing services for an employing unit is an employee under the general definition of employee contained in subsection (A), or may be independent when paragraph (1) of subsection (B) is applicable, the factors considered shall be weighed in accordance with their appropriate value to a correct determination of the relationship under the facts of the particular case. The weight to be given to a factor is not always constant. The degree of importance may vary, depending upon the occupation or work situation being considered and why the factor is present in the particular situation. Some factors may not apply to particular occupations or situation, while there may be other factors not specifically identified herein that should be considered.

In weighing the evidence and applying the law to the facts in this case, the Appeals Board considered evidence of the substance, not merely the form, of the relationship between the Petitioner and the Workers, as required in A.A.C. Section R6-3-1723(D)(1), including the elements of control and independence within the meaning of A.A.C. Sections R6-3-1723(A)(1), (D), and (E). Additional considerations were also examined by the Appeals Board pursuant to

A.A.C. Section R6-3-1723(F) to determine whether an employer-employee relationship exists.

Common Indicia of Control

Arizona Administrative Code, Section R6-3-1723 provides guidance for determining whether an employer-employee relationship exists. Section R6-3-1723(D)(2) lists the common indicia of control to be considered in any determination.

In reaching its determination that an employer-employee relationship existed between the Workers and the Petitioner, the Department concluded that the Petitioner provided instructions to the Workers regarding when and where the services were to be performed; that the Workers were required to provide reports to the Petitioner on the progress of their work; that the Workers were required to provide their services at the Petitioner's jobsite; that the Petitioner established an order of sequence for the performance of the Workers' services; that the Petitioner had the right to discharge the Workers at any time without notice and without legal liability; that the Petitioner established set hours for the Workers to work; that the Workers were required to devote their full time to the Petitioner, and could not keep another job while working for the Petitioner; that the Petitioner furnished tools and materials to the Workers; and that the Petitioner reimbursed the Workers for expenses.

The evidence of record establishes that the Petitioner did not have authority over the Workers' assistants. The Workers also did not have the authority to direct or supervise anyone other than their own assistants. Witnesses for the Petitioner also testified that the Petitioner did not have any authority over the worker's assistants, and that the Workers could hire assistants without approval by the Petitioner. The Petitioner's witnesses also testified that the Workers did not have the authority to direct or supervise anyone other than their own assistants.

The evidence of record establishes that the Workers were not provided with any training or instruction by the Petitioner on how to perform their services. Additionally, the Petitioner did not have any written policies that it required the Workers to follow. Witnesses for the Petitioner credibly testified that the Workers relied on their own experience and expertise to determine how they would provide their services and were not provided with any training or instructions by the Petitioner. Any instructions provided by the Petitioner were typically communications regarding the location of the project jobsite and when the services were to be commenced. When the Workers were expected to provide their services could depend on the nature of a project, including the progress and completion of other aspects of the project.

The evidence of record establishes that the Workers would provide the Petitioner with verbal reports regarding the status and expected completion of

their work. Witnesses for the Petitioner credibly testified that the Workers were not required to report or submit a report to the Petitioner, but that they would periodically provide informal verbal updates regarding the status and expected completion of their work as a courtesy.

The evidence of record establishes that the Workers were not required to provide their services at the Petitioner's place of work. Due to the nature of their occupation, the services provided by the Workers were necessarily performed at the jobsite location of the project. As well, the Petitioner did not provide any supervision at the jobsite location. Witnesses for the Petitioner also testified that the Workers would not be at the Petitioner's premises during the normal course of their work and that the Petitioner did not provide supervision at the jobsite location. While one worker did receive transportation to the project jobsite from the Petitioner's premises, this was a temporary courtesy extended by the Petitioner, because the worker had been experiencing mechanical problems with his vehicle.

The evidence of record establishes that the Workers were not required to personally perform their services. Witnesses for the Petitioner credibly testified that personal performance was not required and that a substitute worker could be used without approval by the Petitioner. In the Reconsidered Determination, the Department also concludes that the Petitioner "was interested in getting the job done no matter the means".

The establishment of a work sequence for the Workers' services could be contingent on the nature of a specific project. Communications with the Petitioner regarding a sequence for the performance of the services could depend on the nature of a particular project, including the progress and completion of other aspects of the project. Consequently, the performance of a particular aspect of a project might necessarily rely upon the prior completion of another aspect of the project.

The Petitioner could discharge the Workers without incurring legal liability. In contrast, there is not sufficient evidence to conclude that the Workers did not make their services available to the public on a continuing basis during the audit period. In fact, witnesses for the Petitioner credibly testified that the Workers had made their services available to the public, including on social media, or were always free to do so.

With respect to training, the Department states in the Reconsidered Determination that "[redacted] stated that the laborers did not require or provided [sic] training because they were experienced in their field" and concluded that the factor was neutral. In this case, the evidence of record establishes that the Workers did not receive any training or instruction from the Petitioner on how the Petitioner wanted the services performed. The Workers drew from their own

expertise to determine how they would provide their services. The Petitioner also did not have any written policies that it required the Workers to follow.

The Department determined that the Workers had been working full time for the Petitioner and were unable to keep another job while working for the Petitioner. In its determination, the Department notes that one of the Workers had worked from 38 to 40 hours per week. However, witnesses for the Petitioner credibly testified that the Workers were not required to work a set number of hours and were not restricted from working for anyone else. It was also believed that the Workers were working for other clients during the audit period. Additionally, 38 to 40 hours of work per week was generally considered to be less than full time work for a given worker in the industry.

The Department determined that the Petitioner had furnished materials, heavy equipment, and tools for the Workers to perform their services. However, witnesses for the Petitioner credibly testified that the Workers used their own equipment and tools for the performance of their services. The Petitioner's witnesses also testified that the Workers could purchase additional supplies directly from the Petitioner at a favorable price for use on projects both related and unrelated to the Petitioner.

The Department determined that the Petitioner had reimbursed the Workers for gas expenses and materials such as knee pads. While the Department states in the Reconsidered Determination that there is "no evidence from the laborers that there was some sort of reimbursement from [redacted] to the laborers", the Department's witness testified that this statement may have been made in error and that the factor weighed in favor of an employer-employee relationship. The Petitioner, however, states in its appeal that the Workers had not been reimbursed for expenses. Additionally, witnesses for the Petitioner credibly testified that the Workers had never been reimbursed for any expenses.

Based on our review of all the evidence, we find that the common indicia of control factors considered favors a finding that the Workers were independent contractors.

Factors Indicative of Independence

Arizona Administrative Code, Section R6-3-1723 provides guidance for determining whether an employer-employee relationship exists. Section R6-3-1723(E) lists the common factors indicative of independence to be considered in any determination.

In reaching its determination that an employer-employee relationship existed between the Workers and the Petitioner, the Department concluded that the Workers did not advertise or make their services available to the public; that the Workers were compensated at an hourly rate; that the Workers could not realize a profit or a loss as a result of their services; that the Workers did not

have significant investment in business assets used in performing the services for the Petitioner; and that the Workers did not have other clients and did not work for any other company while working for the Petitioner.

The Department determined that the Workers did not advertise or make their services available to the public during the audit period. While the Department states in the Reconsidered Determination that "[i]n the present case, there is no evidence that the laborers did not advertising [sic] their services to the public. Per [redacted] interview, they stated that the laborers might advertise their services since they have other jobs", it concludes that "[t]his factor does not weigh in favor of independence". Witnesses for the Petitioner credibly testified that the Workers had in fact made their services available to the public, such as on social media, on a continuing basis during the audit period or were otherwise not restricted to do so. The Petitioner believed that the Workers had contracts with other parties during the audit period based on conversations with the Workers. As a result, the Petitioner would schedule around the Workers' availability and previous commitments. Consequently, there were no restrictions on the Workers advertising or making their services available to the general public on a continuing basis and there is not sufficient evidence to conclude that the Workers had not in fact done so during the audit period.

The Department determined that the Workers were paid at an hourly rate. The Department also determined that the Workers were not subject to an opportunity for profit or loss, including because the Workers were paid a set rate per hour. However, the Petitioner elaborated in its appeal that while the Workers may be paid regularly, they were in essence being compensated on a job basis, based on an estimate of the total job price. Witnesses for the Petitioner also testified credibly that the Workers were compensated on a job basis. Further, a Petitioner's witness also provided an instance in which an expected profit was unable to be realized due to an unanticipated circumstance at the job site.

In the Reconsidered Determination, the Department determined the laborers "could not terminate or be terminated by [redacted] without incurring legal liability" and concluded that the obligation factor was neutral. However, witnesses for the Petitioner believed that the Workers could end the working relationship prior to the conclusion of a project without incurring any legal liability.

The Department determined that the Workers did not have a significant investment in business assets used in the performance of services for the Petitioner. However, witnesses for the Petitioner credibly testified that the Workers had invested in business assets consistent with the nature of the occupation. In this case, the Workers had to make an investment in the purchase of a vehicle, such as a truck, as well as in tools and equipment required to perform their services.

Based on our review of all the evidence, we find that the factors indicative of independence favors a finding that the Workers were independent contractors.

Additional Considerations

Arizona Administrative Code, Section R6-3-1723(F) provides guidance on additional considerations for determining whether an employer-employee relationship exists.

In support of its conclusion that mandated a finding of an employer-employee relationship between the Workers and the Petitioner, the Department concluded that the services provided by the Workers were integral to the Petitioner's business and that the Workers had provided services to the Petitioner on a long-term basis.

As the Petitioner operates as a concrete and construction company, the concrete and tile related services provided by [redacted], [redacted], [redacted], [redacted], and [redacted] were integral to the Petitioner's regular business activity. However, the demolition services provided by [redacted] and [redacted] were not integral to the Petitioner's regular business activity.

The Department determined that a continuing relationship existed between the Petitioner and the Workers, and that the Workers had provided their services on a long-term basis. However, the services provided by the Workers to the Petitioner were on a project-to-project basis. Further, [redacted] and [redacted] were involved with only one project, providing their services for a period of approximately two weeks. Records show that [redacted] received payments from January 16, 2019 thru July 30, 2019, [redacted] received payments from December 17, 2019 thru July 29, 2020, [redacted] received payments from January 15, 2019 thru July 30, 2019, and [redacted] and [redacted] received payments from January 11, 2019 thru September 29, 2020. Additionally, witnesses for the Petitioner credibly testified that the Workers did not provide their service on a continuing basis, but rather, provided services to the Petitioner on a project-to-project basis.

Additionally, the Workers had intended to provide their services as contractors and there had been contractual agreements between the Workers and the Petitioner that established such a relationship. Such intent was also evidenced through the credible testimony of the witnesses for the Petitioner. As noted earlier, the Petitioner also did not at any time monitor the Workers' job performance and the Workers were available to provide the same services to other clients or employers without any restrictions from the Petitioner.

Consequently, we find that the additional considerations reviewed favor a finding that the Workers were independent contractors.

We conclude that the preponderance of evidence of independent contractor status outweighs the evidence of employee status. Therefore, we find that the Workers were not employees of the Petitioner from January 1, 2019 through September 1, 2020, but rather, the Workers performed services for the Petitioner pursuant to an independent contractor relationship. We further conclude that all payments to the Workers for their services from January 1, 2019 through September 1, 2020, did not constitute wages by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **AFFIRMS** THAT PART of the Department's December 1, 2022 Reconsidered Determination that found that services performed by [redacted] constitute employment and that all forms of remuneration paid for his services constitute wages.

THE APPEALS BOARD **REVERSES** THAT PART of the Department's December 1, 2022 Reconsidered Determination that found that from January 1, 2019 through September 1, 2020, services performed by the workers [redacted] constituted employment. From January 1, 2019 through September 1, 2020, services performed by these workers did not constitute employment, because the parties had an independent contractor relationship. All forms of remuneration paid to these workers for such services did not constitute wages.

DATED: 6/28/2023

APPEALS BOARD

NANCY MILLER, Chair

WILLIAM G. DADE, Member

DENISE MOORE, Member

, Acting Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See,* Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures for filing an appeal, you must contact

the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3442**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

> C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
>
> D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
>
> 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
>
> 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
>
> 3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 6/28/2023
to:

(x) Er: [redacted] Acct. No: [redacted]

(x) JASON CORLEY
ASST ATTORNEY GENERAL
2005 N CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

(x) MARIA VANRAALTE, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1908603-001-B

[redacted]

STATE OF ARIZONA ESA TAX UNIT
c/o JASON CORLEY
ASST ATTORNEY GENERAL
2005 N. CENTRAL AVE.
MAIL DROP 1911
PHOENIX, AZ 85004

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

DECISION
DISMISSED

THE **PETITIONER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

> A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:

1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

We have carefully reviewed the record.

THE APPEALS BOARD FINDS there is no reason to deny the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. The hearing scheduled for August 16, 2023 is cancelled. This decision does not affect any agreement entered into between the Petitioner and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 8/11/2023

APPEALS BOARD

Robert Irani, Administrative Law Judge

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See,* Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3442**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

> C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
>
> D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
>
> 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
>
> 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
>
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Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 8/11/2023
to:

(x) Er: [redacted] Acct. No: [redacted]

(x) JASON CORLEY
ASST ATTORNEY GENERAL
2005 N CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

(x) MARIA VANRAALTE, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1913613-001-B

[redacted]

STATE OF ARIZONA ESA TAX UNIT
C/O DONALD BAIER, ASST
ATTORNEY GENERAL
2005 N CENTRAL AVE MAIL DROP
1911
PHOENIX, AZ 85004

Petitioner

Department

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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
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DECISION
DISMISSED

THE **PETITIONER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

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1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

We have carefully reviewed the record.

THE APPEALS BOARD FINDS there is no reason to deny the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. Any scheduled hearing is cancelled. This decision does not affect any agreement entered into between the Petitioner and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 8/24/2023

Elizabeth Beatty
Administrative Law Judge
For The Appeals Board

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See,* Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3442**.

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> D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
>
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>
> 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
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> 3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 8/24/2023
to:

(x) Er: [redacted] Acct. No: [redacted]

(x) DONALD BAIER
ASSISTANT ATTORNEY GENERAL
2005 N CENTRAL AVE
PHOENIX, AZ 85004

(x) MARIA VANRAALTE, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: __LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1909476-001-B

[redacted]

STATE OF ARIZONA ESA TAX UNIT
C/O DONALD BAIER, ASST
ATTORNEY GENERAL
2005 N CENTRAL AVE MAIL DROP
1911
PHOENIX, AZ 85004

Petitioner

Department

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The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** October 10, 2023 *****.

DECISION
REQUEST TO REOPEN GRANTED AND DEPARTMENT DECISION AFFIRMED

THE **PETITIONER**, through counsel, has filed a request to reopen the Appeals Board hearing that was scheduled for April 17, 2023 in Arizona Appeal No. T-1892088-001-B. The Appeals Board issued a decision in that case dismissing the Petitioner's appeal on April 17, 2023.

The request to reopen the hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-724 and 23-738.

The Petitioner previously petitioned for hearing from the Department's Reconsidered Determination issued on December 1, 2022, which held that the services performed by the Massage Therapists constitute employment and that all forms of remuneration paid for such services constitute wages.

Following notification to the parties, a telephone hearing was conducted before ELIZABETH BEATTY, an Administrative Law Judge in Phoenix, Arizona, on Wednesday, June 21, 2023.

STATEMENT OF ISSUES

At that time, all parties were given an opportunity to present evidence on the following issues:

> Whether the Petitioner had good cause for failing to appear at the April 17, 2023 hearing.
>
> Authority: Arizona Revised Statutes ("A.R.S.") §23-681 and Arizona Administrative Code ("A.A.C") Section R6-3-1503.
>
> Whether the Department properly and correctly concluded that services performed by the Massage Therapists constitute employment and all forms of remuneration paid to the Massage Therapists constitute wages.
>
> Authority: A.R.S. §§23-613, 23-613.01, 23-614, 23-615, 23-622, 23-724 or 23-738; and A.A.C. Sections R6-3-1705 and R6-3-1723.

GOOD CAUSE

The first issue is whether the Petitioner had good cause for failing to appear at the April 17, 2023 hearing.

FINDINGS OF FACT

THE APPEALS BOARD FINDS the facts pertinent to the issues before us and necessary to our decision are:

1. On December 1, 2022, the Department issued a Reconsidered Determination that held that the services performed by the Massage Therapists constitute employment and that all forms of remuneration paid for such services constitute wages.

2. On December 31, 2022, the Petitioner filed a timely request for an Appeals Board hearing of the December 1, 2022 Reconsidered Determination. The Petitioner contests the determination that services

performed by the Massage Therapists constitute employment and that all forms of remuneration paid for such services constitute wages.

3. On February 6, 2023, the Appeals Board mailed the parties a Notice of Hearing stating that a hearing was scheduled for March 20, 2023 at 9:00 a.m. The Notice of Hearing advised the parties that they were required to register for the hearing and provided instructions on how to do so.

4. On March 7, 2023, the Petitioner, without objection by the Department, filed a request to postpone the March 20, 2023 hearing.

5. On March 13, 2023, the Appeals Board issued an Order granting the Petitioner's motion to postpone the hearing. In that Order, the parties were informed of the new hearing date of April 17, 2023 at 9:00 a.m. However, that Order did not contain the registration instructions, nor did it reference the instructions previously provided in the Notice of Hearing issued on February 16, 2023.

6. On April 17, 2023 at 9:00 a.m., the Department was the only party registered for the hearing. As a result of the Petitioner's non-appearance, a Dismissal of Appeal was issued that same day.

7. On May 4, 2023, the Petitioner filed a timely Request to Reopen the hearing. In their request, the Petitioner stated that they were prepared to participate at the April 17, 2023 hearing but were unaware of the requirement to register.

REASONING AND CONCLUSIONS OF LAW

Arizona Revised Statutes, § 23-681(C) provides as follows:

> C. The department of economic security shall adopt rules:
>
> 1. To set standards under which a party may be excused for failure to attend a hearing for good cause.
>
> 2. To allow a party who failed to attend a hearing to file a written or electronic request to reopen the hearing.

Arizona Administrative Code, Section R6-3-1503(B), provides in part as follows:

> B. Appeal Tribunal hearings
>
> * * *

3. Failure of a party to appear

* * *

b. If the Appeal Tribunal issues a decision adverse to any interested party that failed to appear at a scheduled hearing, that party may file one written request for a hearing to determine whether good cause exists to reopen the hearing. The interested party shall file the request to reopen within 15 calendar days of the mailing date of the decision or disposition, and shall list the reasons for the failure to appear.

* * *

d. A party shall establish good cause warranting reopening of a case upon proof that both the failure to appear and failure to timely notify the hearing officer were either beyond the reasonable control of the nonappearing party or due to excusable neglect. [Emphasis added].

As cited in the rule above, to establish good cause for nonappearance, a party must establish that the failure to appear was caused by circumstances beyond the party's reasonable control or by excusable neglect.

In the present case, the Petitioner filed an unopposed Motion for Continuance to postpone the hearing scheduled for March 20, 2023. The Appeals Board issued an Order granting the continuance, and rescheduled the hearing for April 17, 2023. However, the Order failed to contain the registration instructions or a reference to the registration instructions contained in the February 16, 2023 Notice of Hearing. As a result, the Petitioner was unaware that they needed to register for the hearing which resulted in their non-appearance.

DECISION

We conclude that the Petitioner has established by a preponderance of the evidence that they had good cause for failing to appear at the April 17, 2023 hearing. THE APPEALS BOARD **GRANTS** the Petitioner's request to reopen the April 17, 2023 hearing.

Good cause having been established, the Appeals Board has jurisdiction to consider the Petitioner's appeal of the December 1, 2022 Reconsidered Determination.

INDEPENDENT CONTRACTOR ISSUE

We now turn to the issue of whether the Department properly and correctly concluded that services performed by the Massage Therapists constitute employment and all forms of remuneration paid to the Massage Therapists constitute wages.

FINDINGS OF FACT

1. The Petitioner is a massage therapy business that operated within the State of Arizona during the audit period, March 31, 2019 through December 31, 2020.

2. The Massage Therapists provided massage therapy services on behalf of the Petitioner during the audit period.

3. The Massage Therapists did not have assistants; however, the Petitioner did not prevent or prohibit the Massage Therapists from hiring assistants.

4. The Massage Therapists were required to perform services at the Petitioner's business location and within operating hours. The Petitioner's operating hours were generally six to seven days a week from 9:30 a.m. to 8:00 p.m. There were a few occasions where the Petitioner altered the hours of operation to accommodate appointments, however, this was not normal practice.

5. The Petitioner did not provide the Massage Therapists with instructions on how to perform services, either orally or in writing. The Petitioner did not have any manuals on the performance of services or sequences of work.

6. The Massage Therapists obtained training outside of the Petitioner's business and prior to their relationship with the Petitioner. The Petitioner did not provide formal or informal training, with the exception of two individuals related to the owner. Any conversations regarding methods or training were not facilitated by the Petitioner.

7. The Petitioner did not supervise the Massage Therapists during the performance of services, and was otherwise unaware of the methods or sequences used to perform massages.

8. The Petitioner did not require the Massage Therapists to submit either written or oral reports.

9. When the need arose, the Massage Therapists were able to substitute another therapist to cover their appointment. However, the replacement therapist had to have an existing relationship with the Petitioner and could not be an individual outside of the Petitioner's business.

10. The Petitioner maintained that the relationship between themselves and the Massage Therapists was 'at-will' and either party could terminate the relationship at any time. The Petitioner was unaware of any legal recourse or requirements should either party terminate the relationship.

11. The Petitioner did not require the Massage Therapists to work a minimum number of hours, nor did they require the Massage Therapists to work full-time hours. The Massage Therapists were not required to remain on the Petitioner's premises between appointments, and often would leave. Additionally, the Massage Therapists controlled their time-off without the permission of the Petitioner.

12. The Petitioner provided massage beds and linens, while the Massage Therapists provided consumable products such as lotions and oils and small wooden tools. The Massage Therapists were not reimbursed for any of their costs associated with the consumable products and small tools.

13. The Massage Therapists did not pay a rental rate for the use of the Petitioner's property nor any utility fees. The Massage Therapists did not invest in, maintain, or improve the Petitioner's facilities.

14. The Massage Therapists did not maintain any business licenses with either the Arizona Corporation Commission or the Secretary of State. There is no evidence that the Massage Therapists incurred any expenses related to the maintenance of business licenses.

15. The Massage Therapists engaged in minimal word-of-mouth advertising. There is no evidence that the Massage Therapists incurred any expenses related to advertising.

16. The Massage Therapists were paid a 50% commission of the services provided. The Massage Therapists were not given the opportunity to

negotiate the commission rate, and they were paid their portion of the commission on a bi-weekly basis.

17. The prices for massage services were set by the Petitioner, without input by the Massage Therapists.

18. The Massage Therapists were not prevented from performing work outside of the Petitioner's business. The Petitioner was aware that some Massage Therapists performed work outside of the Petitioner's business and the Petitioner did not take actions to prevent it.

REASONING AND CONCLUSIONS OF LAW

Arizona Revised Statutes, § 23-615, provides in pertinent part as follows

Employment; definition

A. "Employment" means any service of whatever nature performed by an employee for the person employing the employee, including service in interstate commerce ...

Arizona Revised Statutes § 23-613.01 provides in pertinent part:

Employee; definition; exempt employment

A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Indications of control by the employing unit include controlling the individual's hours of work, location of work, right to perform services for others, tools, equipment, materials, expenses and use of other workers and other indicia of employment, except employee does not include:

1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.

2. An individual subject to the direction, rule or control or subject to the right of direction, rule or control of an employing unit solely because of a law regulating the organization, trade or business of the

employing unit.

3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes, as established by the outcome of an audit or other affirmative treatment by the internal revenue service of any taxpayer whose tax returns include income from the independent contractor relationship.

4. An individual if the employing unit demonstrates the individual performs services in the same manner as a similarly situated class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

* * *

Arizona Revised Statutes § 23-622(A) provides as follows:

Wages

A. "Wages" means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the department.

Arizona Administrative Code, Section R6-3-1723, provides as follows:

A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.

1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.

2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.

B. "Employee" as defined in subsection (A) does not include:

1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent businessperson, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.

2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit"....solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.

a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.

b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.

c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

* * *

D. In determining whether an individual who performs services is an employee under the general definition of subsection (A), all material evidence pertaining to the relationship between the individual and the employing unit must be examined. Control as to the result is usually present in any type of contractual relationship, but it is the additional presence of control, as determined by such control factors as are identified in paragraph (2) of this subsection, over the method in which the services are performed, that may create an employment relationship.

1. The existence of control solely on the basis of the existence of the right to control may be established by such action as: reviewing written contracts between the individual and the employing unit; interviewing the individual or employing unit; obtaining statements of third parties; or examining regulatory statutes governing the organization, trade or business. In any event, the substance, and not merely the form of the relationship must be analyzed.

2. The following are some common indicia of control over the method of performing or executing the services:

a. Authority over individual's assistants. Hiring, supervising, and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job. Sometimes, one worker may hire, supervise, and pay other workers. He may do so as the result of a contract in which he agrees to provide materials and labor and under which he is responsible only for the attainment of a result; in which case he may be independent. On the other hand, if he does so at the direction of the employing unit, he may be acting as an employee in the capacity of a foreman for or representative of the employer.

b. Compliance with instructions. Control is present when the individual is required to comply with instructions about when, where and how he is to work. Some employees may work without receiving instructions because they are highly proficient in their line of work and can be trusted

to work to the best of their abilities; however, the control factor is present if the employer has the right to instruct or direct. The instructions may be oral or may be in the form of manuals or written procedures which show how the desired result is to be accomplished.

c. Oral or written reports. If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for his actions. Periodic progress reports relating to the accomplishment of a specific result may not be indicative of control if, for example, the reports are used to establish entitlement to partial payment based upon percentage of completion. Completion of forms customarily used in the particular type of business activity, regardless of the relationship between the individual and the employing unit, may not constitute written reports for purposes of this factor; e.g., receipts to customers, invoices, etc.

d. Place of work. Doing the work on the employing unit's premises is not control in itself; however, it does imply that the employer has control, especially when the work is of such a nature that it could be done elsewhere. A person working in the employer's place of business is physically within the employer's direction and supervision. The fact that work is done off the premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee. In some occupations, the services are necessarily performed away from the premises of the employing unit. This is true, for example, of employees in the construction trades, or employees who must work over a fixed route, within a fixed territory, or at any outlying work station.

e. Personal performance. If the services must be rendered personally it indicates that the employing unit is interested in the method as well as the result. The employing unit is interested not

only in getting a desired result, but, also, in who does the job. Personal performance might not be indicative of control if the work is very highly specialized and the worker is hired on the basis of his professional reputation, as in the case of a consultant known in academic and professional circles to be an authority in the field. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

f. Establishment of work sequence. If a person must perform services in the order of sequence set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the established routines and schedules of the employing unit. Often, because of the nature of an occupation, the employing unit does not set the order of the services, or sets them infrequently. It is sufficient to show control, however, if the employing unit retains the right to do so.

g. Right to discharge. The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control. The employing unit exercises control through the ever present threat of dismissal, which causes the worker to obey any instructions which may be given. The right of control is very strongly indicated if the worker may be terminated with little or no notice, without cause, or for failure to use specified methods, and if the worker does not make his services available to the public on a continuing basis. An independent worker, on the other hand, generally cannot be terminated as long as he produces an end result which measures up to his contract specifications. Many contracts provide for termination upon notice or for specified acts of nonperformance or default and may not be indicative of the existence of the right to control. Sometimes, an employing unit's right to discharge is restricted because of a contract with a labor union or with other entities. Such a

restriction does not detract from the existence of an employment relationship.

h. Set hours of work. The establishment of set hours of work by the employing unit is a factor indicative of control. This condition bars the worker from being master of his own time, which is a right of the independent worker. Where fixed hours are not practical because of the nature of the occupation, a requirement that the worker work at certain times is an element of control.

i. Training. Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, is a factor of control because it is an indication that the employer wants the services performed in a particular method or manner. This is especially true if the training is given periodically or at frequent intervals. An independent worker ordinarily uses his own methods and receives no training from the purchaser of his services.

j. Amount of time. If the worker must devote his full time to the activity of the employing unit, the employing unit has control over the amount of time the worker spends working and, impliedly, restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses. Full time does not necessarily mean an 8-hour day or a 5- or 6-day week. Its meaning may vary with the intent of the parties, the nature of the occupation and customs in the locality. These conditions should be considered in defining “full time”. Full-time services may be required even though not specified in writing or orally. For example, a person may be required to produce a minimum volume of business which compels him to devote all of his working time to that business, or he may not be permitted to work for anyone else, and to earn a living he necessarily must work full time.

k. Tools and materials. The furnishing of tools, materials, etc. by the employing unit is indicative

of control over the worker. When the worker furnishes the tools, materials, etc., it indicates a lack of control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

l. Expense reimbursement. Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses. Consideration must be given to the fact some independent professionals and consultants require payment of all expenses in addition to their fees.

E. Among the factors to be considered in addition to the factors of control, such as those identified in subsection (D), when determining if an individual performing services may be independent when paragraph (1) of subsection (B) is applicable, are:

1. Availability to public. The fact that an individual makes his services available to the general public on a continuing basis is usually indicative of independent status. An individual may offer his services to the public in a number of ways. For example, he may have his own office and assistants, he may display a sign in front of his home or office, he may hold a business license, he may be listed in a business directory or maintain a business listing in a telephone directory, he may advertise in a newspaper, trade journal, magazine, or he may simply make himself available through word of mouth, where it is customary in the trade or business.

2. Compensation on job basis. An employee is usually, but not always, paid by the hour, week or month; whereas, payment on a job basis is customary where the worker is independent. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job at a fixed rate per hour. Payment on a job basis may involve periodic partial payments based upon a percent of the total job price or the amount of the

total job completed. The guarantee of a minimum salary or the granting of a drawing account at stated intervals, with no requirement for repayment of the excess over earnings, tends to indicate that existence of an employer-employee relationship.

3. Realization of profit or loss. An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is an employee is not in such a position. Opportunity for profit or loss may be established by one or more of a variety of circumstances; e.g.:

   a. The individual has continuing and recurring significant liabilities or obligations in connection with the performance of the work involved, and success or failure depends, to an appreciable degree, on the relationship of receipts to expenditures.

   b. The individual agrees to perform specific jobs for prices agreed upon in advance, and pays expenses incurred in connection with the work, such as wages, rents or other significant operating expenses.

4. Obligation. An employee usually has the right to end his relationship with his employer at any time he wishes without incurring liability, although he may be required to provide notice of his termination for some period in advance of the termination. An independent worker usually agrees to complete a specific job. He is responsible for its satisfactory completion and would be legally obligated to make good for failure to complete the job, if legal relief were sought.

5. Significant investment. A significant investment by a person in facilities used by him in performing services for another tends to show an independent status. On the other hand, the furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status on the part of the worker. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, etc., that are provided by employees as a

common practice in their particular trade. If the worker makes a significant investment in facilities, such as a vehicle not reasonably suited to personal use, this is indicative of an independent relationship. A significant expenditure of time or money for an individual's education is not necessarily indicative of an independent relationship.

6. Simultaneous contracts. If an individual works for a number of persons or firms at the same time, it indicates an independent status because, in such cases, the worker is usually free from control by any of the firms. It is possible, however, that a person may work for a number of people or firms and still be an employee of one or all of them. The decisions reached on other pertinent factors should be considered when evaluating this factor.

F. Whether the preponderance of the evidence is being weighed to determine if the individual performing services for an employing unit is an employee under the general definition of employee contained in subsection (A), or may be independent when paragraph (1) of subsection (B) is applicable, the factors considered shall be weighed in accordance with their appropriate value to a correct determination of the relationship under the facts of the particular case. The weight to be given to a factor is not always constant. The degree of importance may vary, depending upon the occupation or work situation being considered and why the factor is present in the particular situation. Some factors may not apply to particular occupations or situation, while there may be other factors not specifically identified herein that should be considered.

The Petitioner contends that the Massage Therapists were independent contractors and not employees for the period from March 31, 2019 through December 31, 2020. The Petitioner also contends that the Department's audit was erroneous because the Petitioner was not given the opportunity to have an attorney or interpreter present during the interview process. In our analysis of the factors under A.A.C. Section R6-3-1723, the Appeals Board has considered only the testimony presented by the Petitioner during the hearing, which was provided in the presence of both an interpreter and the Petitioner's attorney. The Appeals Board has not considered any prior statements made by the Petitioner or interviewees during the Department's audit. For this reason, we will not specifically address the Petitioner's contention regarding the Department's interview process.

In weighing the evidence and applying the law to the facts in this case, the Appeals Board considered evidence of the substance, not merely the form, of the relationship between the Petitioner and the Massage Therapists, as required by A.A.C. Section R6-3-1723(D)(1), including the elements of control and independence within the meaning of A.A.C. Sections R6-3-1723(A)(1), (D), and (E). Additionally, pursuant to A.A.C. Section R6-3-1723(F), the Appeals Board determined that several factors should be given greater weight in analyzing whether an employer-employee relationship existed between the Petitioner and the Massage Therapists.

(D)(2) Common Indicia of Control

Arizona Administrative Code, Section R6-3-1723 provides guidance for determining whether an employer-employee relationship exists. Section R6-3-1723(D)(2) lists the common indicia of control to be considered in any determination. Below is our analysis of each factor.

a. Authority Over Individual's Assistants

Pursuant to A.A.C. Section R6-3-1723(F), we find that this factor does not apply to this particular occupation or situation. The evidence of record establishes that although they were not prohibited from doing so, the Massage Therapists did not hire assistants.

We find that this factor is neutral.

b. Compliance with Instructions

In analyzing this factor, the question is whether the employing unit maintains the right to instruct or direct a worker on when, where, and how the work is performed, indicating an interest in a desired result.

In this case, although the Massage Therapists were instructed on where and when to perform services to the extent that they had to be performed at the Petitioner's business and within operating hours, the Petitioner did not instruct the Massage Therapists how to perform their services. The evidence of record established that the Massage Therapists had prior training, were not given written or oral instructions, and were not supervised during the performance of their massage services. While there is a level of control exhibited by the Petitioner, we find that the lack of instruction over how services are performed to be determinative in our analysis.

We find that this factor weighs in favor of an independent contractor relationship.

c. Oral or Written Reports

It is uncontroverted that the Massage Therapists did not provide the Petitioner with oral or written reports.

We find that this factor weighs in favor of an independent contractor relationship.

d. Place of Work

In determining whether control existed, another factor is whether the employing unit determined where the work was to be completed. While the parties agree that the Massage Therapists can perform services outside of the Petitioner's business, we read the factor to mean services performed for the employing unit and not services in general, as to distinguish this factor from A.A.C. Section R6-3-1723(E)(6) regarding simultaneous contracts. Therefore, the relevant question in analyzing this factor is whether the Massage Therapists were able to perform services for the Petitioner outside of the Petitioner's place of business.

Independent contractors exhibit a degree of freedom that would allow them to perform services at their desired location. The exception is when the work is of a nature that necessitates that it be done at a specific location. That has not been established in this case. As stated above, the Massage Therapists performed massage services separate from the Petitioner and outside of the Petitioner's business location. However, as the Petitioner testified, work completed by the Massage Therapists for the Petitioner was required to be performed at the Petitioner's business location.

We find that this factor weighs in favor of an employer-employee relationship.

e. Personal Performance

In analyzing personal performance, the question is whether the employing unit had an interest in who performed the services or in the method the services were performed. A lack of control is exhibited when a worker has the right to hire a replacement without the knowledge or consent of the employing unit.

In this case, although the Massage Therapists were able to switch appointments with one another, they were not able to hire any replacement. As the Petitioner testified, the replacement therapist had to be one with an existing relationship with the Petitioner. Thus, the Massage Therapists were not free to hire a replacement without the consent of the Petitioner.

We find that this factor weighs in favor of an employer-employee relationship.

f. Establishment of Work Sequence

In analyzing this factor, the question is whether the worker is required to perform their work in a particular sequence or order. An employing unit has sufficient control if they maintain the right to direct such routine or method.

As previously discussed, the Massage Therapists were not instructed on how to perform their services, including in any particular manner or sequence. The Petitioner did not supervise the Massage Therapists and did not provide any manuals. Additionally, there is no evidence to establish that the Petitioner maintained the right to control the Massage Therapists' work sequences or methods.

We find that this factor weighs in favor of an independent contractor relationship.

g. Right to Discharge

As stated in the rule, the right to discharge is distinct from the right to terminate a contract and is an important factor in determining whether the employing unit maintains control. An independent contractor relationship is subject to the terms of a contract.

The Petitioner argues that although they could terminate the relationship between themselves and the Massage Therapists at any time, without notice, and without cause, they could not terminate the relationship for failure to use specified methods because the Petitioner never maintained that control. The Petitioner also adds that the Massage Therapists made themselves available to the public. While the Petitioner reads the regulation as an "and-or" test, we disagree. The rule states that control is "very strongly indicated" if the employing unit may dismiss a worker with little to no notice, without cause, or for failure to use specified methods. This is not a test but rather a non-exhaustive list of examples of when control is exhibited. Conversely, as the regulation also provides, an independent contractor is generally controlled by the terms of a contract which may provide for termination upon notice or for specified acts of nonperformance or default.

In this case, as stated in the Petitioner's request for a hearing, the Petitioner maintained the relationship between themselves and the Massage Therapists was 'at-will' and could be terminated by either party without notice and without cause. Therefore, the termination of the relationship was not controlled by the terms of a contract.

We find that this factor weighs in favor of an employer-employee relationship.

h. Set Hours of Work

In analyzing this factor, the question is whether the employing unit fixed the hours of work or schedule as to exhibit control and prevent a worker from being the "master of his own time," which is distinguished from A.A.C. Section R6-3-1723(D)(2)(j), amount of time.

In this case, the Massage Therapists did not have access to the Petitioner's business location outside of operating hours, with the limited exception of the Petitioner occasionally altering their hours to accommodate appointments. Although there were occasional exceptions, the evidence of record did not establish that this was normal practice. Therefore, the Massage Therapists were confined to performing their services within the Petitioner's set business hours.

We find that this factor weighs in favor of an employer-employee relationship.

i. Training

Another factor of control includes the training of a worker because it indicates that the employing unit has an interest in services being performed in a particular method or manner.

As discussed earlier, the Massage Therapists received training prior to and outside of the Petitioner's business, with the exception of two individuals related to the owner. The Petitioner did not provide formal or informal trainings or training materials. Additionally, any conversations relating to the method of performance were not facilitated by the Petitioner or owner.

We find that this factor weighs in favor of an independent contractor relationship.

j. Amount of Time

Control also includes the employing unit's requirement that the worker work a minimum number of hours or full-time work as to prevent him or her from seeking other gainful work, which is distinguished from A.A.C. Section R6-3-1723(D)(2)(h), set hours of work. The question is whether the employing unit required the workers to work a certain number of hours per day or week.

In this case, the Petitioner does not require the Massage Therapists to work full-time or a minimum number of hours. Rather, the Massage Therapists were able to work as little or as much as they liked, were able to take time-off

without permission, and were not required to remain on the Petitioner's premises between appointments. Therefore, the Massage Therapists freedom established that they were able to work when and for whom they chose.

We find that this factor weighs in favor of an independent contractor relationship.

k. Tools & Materials

The furnishing of tools and materials can also be indicative of the employing unit's control over the worker. Additionally, a lack of control is not established when a worker provides tools or supplies that are customarily furnished by the workers in the particular trade.

In this case, the evidence establishes that the Petitioner provided larger items such as massage beds and linens while the Massage Therapists provided consumable materials such as lotions and oils and small wooden tools. We find that the materials provided by the Massage Therapists are more in line with tools that are customarily furnished by workers in the trade, and therefore, are not indicative of a lack of control. However, we find that the Petitioner's furnishing of larger items is indicative of control.

The Petitioner argues that the massage beds and linens were rented by virtue of the commission kept by the Petitioner. We are not persuaded by the Petitioner's argument because commission is separate from a rental fee. Furthermore, there was no evidence provided that there was an understanding between the parties that the commission included a rental fee for such tools.

We find that this factor weighs in favor of an employer-employee relationship.

l. Expense Reimbursement

The last factor in analyzing whether the employing unit maintained control over the worker is whether the worker is reimbursed for expenses incurred during the performance of services. A lack of control is exhibited when the worker is paid on a per job basis and is not reimbursed for incidental expenses.

In this case, as stated above, the only incidental expenses incurred by the Massage Therapists were for small tools and consumable products. The Massage Therapists were paid a set commission rate and were not reimbursed for any incidental expenses.

We find that this factor weighs in favor of an independent contractor relationship.

(E) Factors Indicative of Independence

Arizona Administrative Code, Section R6-3-1723 provides guidance for determining whether an employer-employee relationship exists. Section R6-3-1723(E) lists the common factors indicative of independence to be considered in any determination. Below is our analysis of each factor.

1. Availability to Public

In this factor, independence is exhibited when the worker makes his or her services available to the general public on a continuing basis. Examples of availability to the public include having an office, hiring assistants, displaying signs, holding business licenses, having business listings in directories, advertising in print materials, or engaging in word-of-mouth advertising when it is customary.

In this case, the Petitioner suggests that the Massage Therapists engaged in word-of-mouth advertising. The Petitioner also contends that this is customary in the industry. Aside from the Petitioner's testimony, there is no other evidence that the Massage Therapists engaged in advertising. Department records establish that the Massage Therapists were not licensed with either the Arizona Corporation Commission or the Secretary of State. Additionally, as previously discussed, the Massage Therapists did not hire assistants. Thus, aside from the Petitioner's testimony, there is no evidence to establish that the Massage Therapists held themselves out as separate entities from the Petitioner or otherwise made themselves available to the public.

We find that this factor weighs in favor of an employer-employee relationship.

2. Compensation on Job Basis

An independent contractor is generally paid on a per job basis, while an employee is usually paid by the hour, week or month. Payment on a per job basis can involve either a lump sum or periodic partial payments based on the percentage of the job completed, and is generally outlined within the terms of the contract. We also considered other factors with regard to compensation, including how prices were set and how payment was made in order to determine whether independence was present.

The evidence of record establishes that the Massage Therapists were paid bi-weekly and received a 50% commission for services performed. The Petitioner set both the commission rate and the price for services without input from the Massage Therapists.

The Petitioner contends that the commission is evidence that the Massage Therapists were paid on a per job basis, however, we are not persuaded by this argument. In analyzing A.A.C. Section R6-3-1723(E)(2), the question is not solely whether a worker was paid on a per job basis, but whether the worker displayed a sense of independence through the method of compensation. In this case, the Massage Therapists lacked independence because they were not free to set their own commission rates or prices for services, nor is there evidence that they were able to negotiate either term. Additionally, the payment schedule for the Massage Therapists is more consistent with traditional employment.

We find that this factor weighs in favor of an employer-employee relationship.

3. Realization of Profit or Loss

Generally, an independent contractor can realize a profit or suffer a loss, while employees do not experience either. Considerations include whether the worker has recurring liabilities or obligations and whether the worker pays expenses such as wages, rent or other significant operating expenses.

In this case, the evidence of record establishes that the Massage Therapists were not charged for rent, utilities, and had minimal operating expenses in relation to their services performed for the Petitioner. The only expenses established were that associated with the use of consumable products and small tools. Additionally, the Massage Therapists did not have any costs associated with advertisements, maintenance of business licenses, payment of wages, or other operational expenses associated with a business. While the Massage Therapists could experience a realization of profit by virtue of minimal expenses, the lack of expenses make it difficult or impossible for the Massage Therapists to suffer a loss.

We find that this factor weighs in favor of an employer-employee relationship.

4. Obligation

Similar to our analysis of A.A.C. Section R6-3-1723(D)(2)(g), an employee usually has the right to end their employment without incurring liability, whereas an independent contractor is controlled by the terms of a contract.

As discussed previously, the Petitioner maintained that the relationship between themselves and the Massage Therapists was ‘at-will’ and that either party could walk away at any time without incurring any known liabilities.

We find that this factor weighs in favor of an employer-employee relationship.

5. Significant Investment

Independence is also exhibited when a worker invests in facilities used to perform services. Conversely, the employing unit's furnishing of the facilities tends to exemplify a lack of independence by the worker. This factor does not include tools, instruments, or clothing.

As previously established, the Massage Therapists only invested in small tools of the trade and consumable products. The Massage Therapists were not responsible for furnishing the Petitioner's facilities, nor were they charged for rent or utilities. Additionally, there is no evidence that the Massage Therapists made any investments in maintaining or upgrading the Petitioner's facilities.

We find that this factor weighs in favor of an employer-employee relationship.

6. Simultaneous Contracts

The last factor in analyzing whether the worker exhibits independence is whether the workers was able to enter into contracts for work with other individuals or employing units. However, it is noted that a worker's ability to work for a number of people or employing units is not indicative of independence alone, but rather other factors should be considered in evaluating this factor.

As the Petitioner testified, the Massage Therapists were not prevented from performing work outside of the Petitioner's business. In fact, the Petitioner was aware of some of the Massage Therapists conducting the same type of work outside of the Petitioner's business, and made no attempts to prohibit the Massage Therapists from doing so.

We find that this factor weighs in favor of an independent contractor relationship.

(F) Additional Considerations

The Department, at the hearing and during the audit period, considered two additional factors pursuant to A.A.C. Section R6-3-1723(F). First, the Department found that the Massage Therapists' services were integral to the Petitioner's business indicating an employer-employee relationship. The Department also found that the Massage Therapists and Petitioner had long-term, continuing relationships, which they argue is also indicative of an employer-employee relationship.

The Department has not sufficiently established how either factor would be determinative of an employer-employee relationship. As evidenced in other

industries like construction, work performed by independent contractors may be integral to the employing unit, however, it does not suggest that the workers are not independent contractors. Additionally, independent contractor and employee relationships can extend over various amounts of time, and neither a short nor long-term relationship would be indicative of either.

We are not compelled by either of the Department's additional factors, and thus, we will not consider either additional factor in our analysis.

DECISION

We conclude that the greater weight of the credible evidence establishes that the Department correctly determined that the relationship between the Petitioner and the Massage Therapists constituted employment. Therefore, we find that the Massage Therapists were employees of the Petitioner from March 31, 2019 through December 31, 2020. We further conclude that all payments to the Massage Therapists for their services from March 31, 2019 through December 31, 2020 constituted wages by operation of A.R.S. §23-622(A). Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's December 1, 2022 Reconsidered Determination that found that services performed by Massage Therapists constitute employment and that all forms of remuneration paid for his services constitute wages.

DATED: 9/8/2023

APPEALS BOARD

NANCY MILLER, Chairman

DENISE E. MOORE, Member

WILLIAM G. DADE, Member

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color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See,* Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3442**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

> C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
>
> D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
>
> 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
>
> 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission

of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 9/8/2023
to:

Er: [redacted] Acct. No: [redacted]

(x) [redacted]

(x) DONALD BAIER
ASST ATTORNEY GENERAL
2005 N CENTRAL AVE
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PHOENIX, AZ 85004

(x) MARIA VANRAALTE, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: ____LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1907306-001-B

[redacted]

Petitioner

STATE OF ARIZONA ESA TAX UNIT
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Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

DECISION
DISMISSED

THE **PETITIONER**, [redacted], through counsel, pursuant to a Stipulated Motion to Dismiss filed on September 19, 2023, has asked to withdraw its Petition for Hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

> A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an

appeal or petition without further appellate review on the merits:

1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; (emphasis added).

We have carefully reviewed the record.

THE APPEALS BOARD FINDS there is no reason to deny the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. This decision does not affect any agreement entered into between the Petitioner and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 5/3/2024

APPEALS BOARD

ROBERT IRANI,
Administrative Law Judge

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 5/3/2024
to:

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By: ___LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1905657-001-B

[redacted]

Petitioner

STATE OF ARIZONA ESA TAX UNIT
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Department

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DECISION
DISMISSED

THE **PETITIONER**, [redacted], through counsel, pursuant to a Joint Motion to Dismiss the Petition for Hearing filed on September 25, 2023, has asked to withdraw its Petition for Hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

> A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an

appeal or petition without further appellate review on the merits:

1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; (emphasis added).

We have carefully reviewed the record.

THE APPEALS BOARD FINDS there is no reason to deny the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. This decision does not affect any agreement entered into between the Petitioner and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 9/28/2023

APPEALS BOARD

ROBERT IRANI,
Administrative Law Judge

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 9/28/2023
to:

(x) [redacted] Acct. No: [redacted]

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By: LS
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1912121-001-B

[redacted]

STATE OF ARIZONA ESA TAX UNIT
c/o DONALD BAIER
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Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
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RIGHT TO REQUEST REOPENING

Under Arizona Revised Statutes, § 41-1993, the last date to file a request to reopen the hearing is ***** October 30, 2023 *****.

DECISION
DISMISSED DUE TO FAILURE TO APPEAR

The Petitioner timely filed a request for hearing on the Department's March 30, 2023 Reconsidered Determination of the December 2, 2021 Determination of Liability for Employment or Wages.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing for September 27, 2023, at 9:30 a.m. Mountain Standard Time, before Appeals Board Administrative Law Judge Robert Irani.

The Petitioner did not appear at the scheduled Board hearing, nor did the Petitioner present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel and witnesses for the Department appeared. As a result of the Petitioner not appearing at the scheduled Board hearing, a default was entered on the record.

Arizona Administrative Code, Section R6-3-1502(A), provides in part as follows:

> A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
>
> * * *
>
> 4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Petitioner's petition for hearing. The Petitioner did not appear at the scheduled Board hearing and no evidence was presented to support reversing or modifying the Department's decision issued on March 30, 2023. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. The March 30, 2023 Reconsidered Determination remains in full force and effect.

This decision does not affect any settlement agreement that may have been entered into between the Petitioner and the Department.

DATED: 9/28/2023

APPEALS BOARD

ROBERT IRANI,
Administrative Law Judge

of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

HOW TO REQUEST REOPENING OF THE HEARING

A. Within 30 calendar days after this decision is mailed to you, you may file a written request to reopen the hearing. We consider the request to reopen filed:

1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
   - If there is no postmark, the postage meter-mark on the envelope in which it is received.
   - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.

2. On the date it is received by the Department, if not sent by USPS.

You may send a request to reopen the hearing to the Appeals Board, 1990 W. Camelback Road, Suite 200, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request to reopen the hearing in person at the above locations.

B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.

C. Your request to reopen the hearing must be in writing, must be signed by you or by your representative, and must be filed on time. Only if a request to reopen the hearing is granted upon a finding that you have established good cause for your nonappearance, will a new hearing be scheduled on the merits of the original request for hearing.

D. If you need more time in order to file a request to reopen the hearing, you must apply to the Appeals Board before the appeal deadline. You must show good cause for your requested extension of time. No extension past the statutory deadline date will exist, unless the Appeals Board grants permission.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 9/28/2023
to:

(x) Er: [redacted] Acct. No: [redacted]

(x) DONALD BAIER
ASST ATTORNEY GENERAL
2005 N CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

(x) MARIA VANRAALTE, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: ___LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

UNEMPLOYMENT INSURANCE TAX PROGRAM

APPEALS BOARD DECISIONS

4TH QUARTER 2023

To request any of these documents in an alternative format, contact the Appeals Board at (602) 771-9019.

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1931826-001-B

[redacted]

STATE OF ARIZONA ESA TAX UNIT
C/O DONALD BAIER
ASST ATTORNEY GENERAL
2005 N CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

DECISION
DISMISSED

THE **PETITIONER,** [redacted]., pursuant to a Joint Motion to Dismiss filed on December 14, 2023, has asked to withdraw its Petition for Hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

> A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an

appeal or petition without further appellate review on the merits:

1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

We have carefully reviewed the record.

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. This decision does not affect any agreement entered into between the Petitioner and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 12/18/2023

APPEALS BOARD

ROBERT IRANI,
Administrative Law Judge

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 12/18/2023
to:

(x) Er: [redacted] Acct. No: [redacted]

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PHOENIX, AZ 85005-6028

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1910553-001-B

[redacted]

STATE OF ARIZONA ESA TAX UNIT
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Petitioner

Department

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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** January 22, 2024 *****.

DECISION
REVERSED

THE **PETITIONER**, through counsel, petitioned for a hearing from the Department's Reconsidered Determination issued on April 5, 2023, which affirmed the Department's Determination of Liability for Employment or Wages issued on March 2, 2022. The Reconsidered Determination held that services performed by estheticians and nurses constitute employment and all forms of remuneration paid for such services constitute wages.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing for October 4, 2023 and October 18, 2023. Appeals Board Administrative Law Judge Robert Irani presided over the hearing on those dates, and all parties were given an opportunity to present evidence on the following issues:

(1) Whether the services performed by estheticians and nurses (the "Workers") for the Petitioner from January 1, 2019 through March 31, 2021 (the "audit period") were employees; and

(2) Whether payments the Petitioner made to the Workers during the audit period constitute wages.

The Petitioner and the Department appeared at the scheduled hearing and were represented by counsel. The Petitioner presented testimony from two witnesses and the Department presented testimony from one witness. Exhibits D1 through D12, P1 through P9, and A1 through A2 were admitted into evidence.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Petitioner is a medical spa that operated within the State of Arizona during the audit period.

2. The Workers are estheticians or nurses licensed in the State of Arizona who provided services for the Petitioner during the audit period.

3. The services provided by the Workers comprised part of the Petitioner's regular business activity.

4. On May 4, 2023, the Petitioner filed a timely petition for hearing from the Department's Reconsidered Determination dated April 5, 2023. The Petitioner contests the determination that the services performed by the Workers constitute employment and that all forms of remuneration paid for such services constitute wages.

5. The Workers and the Petitioner had agreed by written contract to an independent contractor relationship.

6. The Petitioner employed front desk staff whose duties included answering the phones and the scheduling of client appointments.

The Workers did not have the authority to direct or supervise the front desk staff.

7. The Workers had the authority to hire, supervise and pay other individuals to assist in providing services to clients without approval by the Petitioner.

8. The Petitioner did not provide any training or instruction on how the Workers were to perform their services. The Workers drew from their own expertise and followed required procedures and protocols.

9. The Workers paid for their own training without reimbursement by the Petitioner.

10. The Workers provided their services at the business location of the Petitioner.

11. The Workers could work outside the Petitioner's normal business hours. The Petitioner provided the Workers with a key to its business office to allow for services to be performed by the Workers outside of the Petitioner's normal business hours.

12. The Petitioner did not provide any supervision of the Worker's services.

13. The Workers were not required to personally perform their services. A replacement could provide the services without the approval of the Petitioner.

14. The Workers were not required to submit an oral or written report to the Petitioner. The Workers submitted a written workflow report on a weekly basis to the Petitioner that tracked the treatments performed and products sold, for the purpose of receiving compensation from the Petitioner.

15. The Petitioner did not establish a work schedule for the Workers.

16. The Workers were not required to work a set number of hours for the Petitioner and were not restricted from working for anyone else.

17. The Petitioner did not control the sequence order for the services performed by the Workers.

18. The Petitioner did not have a written policy that it required the Workers to follow.

19. The Petitioner did not provide the Workers with all the equipment, tools, materials, and supplies necessary to perform their services. The Petitioner was compensated for the use of any equipment that the Workers did not own and paid a needle disposal fee by way of a deduction in their compensation.

20. The Petitioner could not discharge the Workers at any time without notice or liability. The Petitioner's right to terminate the relationship was controlled under the terms of an independent contractor agreement.

21. The Workers could not quit at any time without notice or liability. The Workers' right to terminate the relationship was controlled in accordance with the terms of an independent contractor agreement.

22. There were no restrictions placed on the Workers to advertise or make their services available to the general public.

23. The Workers paid their liability insurance coverage and professional license fees without reimbursement from the Petitioner.

24. The Petitioner did not reimburse the Workers for any professional expenses the Workers incurred.

25. The Workers were compensated bi-weekly by the Petitioner on a per job basis for services performed for clients and on a commission basis for product sales.

26. The Department interviewed [redacted], [redacted], [redacted], and [redacted] who were considered to have provided services as estheticians or nurses for the Petitioner during the audit period. The Department also interviewed [redacted], a corporate officer for the Petitioner.

27. [redacted] is a licensed cosmetic nurse, and [redacted] and [redacted] are licensed estheticians. [redacted] performed front desk and management services for the Petitioner during the audit period and was not an esthetician or nurse.

REASONING AND CONCLUSIONS OF LAW

The Petitioner contends that the Workers were independent contractors and not employees for the period from January 1, 2019 through March 31, 2021. The issues in dispute in this case are the employment status of the Workers from January 1, 2019 through March 31, 2021, and whether the pay earned by the Workers during that period constituted wages.

Arizona Revised Statutes, § 23-615, provides in pertinent part as follows:

Employment; definition

> A. "Employment" means any service of whatever nature performed by an employee for the person employing the employee, including service in interstate commerce ...

Arizona Revised Statutes § 23-613.01 provides in pertinent part:

Employee; definition; exempt employment

> A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Indications of control by the employing unit include controlling the individual's hours of work, location of work, right to perform services for others, tools, equipment, materials, expenses and use of other workers and other indicia of employment, except employee does not include:
>
> 1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.
>
> 2. An individual subject to the direction, rule or control or subject to the right of direction, rule or control of an employing unit solely because of a law regulating the organization, trade or business of the employing unit.

Arizona Revised Statutes § 23-622(A) provides as follows:

Wages

A. "Wages" means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the department.

Arizona Administrative Code, Section R6-3-1723, provides as follows:

A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.

1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.

2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.

B. "Employee" as defined in subsection (A) does not include:

1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent businessperson, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.

2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit "... solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the

employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.

a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.

b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.

c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

* * *

D. In determining whether an individual who performs services is an employee under the general definition of subsection (A), all material evidence pertaining to the relationship between the individual and the employing unit must be examined. Control as to the result is usually present in any type of contractual relationship, but it is the additional presence of control, as determined by such control factors as are identified in paragraph (2) of this subsection, over the method in which the services are performed, that may create an employment relationship.

1. The existence of control solely on the basis of the existence of the right to control may be established by such action as: reviewing written contracts between the individual and the employing unit; interviewing the individual or employing unit; obtaining statements of third parties; or examining regulatory statutes governing the organization, trade or business. In any event, the substance,

and not merely the form of the relationship must be analyzed.

2. The following are some common indicia of control over the method of performing or executing the services:

   a. Authority over individual's assistants. Hiring, supervising, and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job. Sometimes, one worker may hire, supervise, and pay other workers. He may do so as the result of a contract in which he agrees to provide materials and labor and under which he is responsible only for the attainment of a result; in which case he may be independent. On the other hand, if he does so at the direction of the employing unit, he may be acting as an employee in the capacity of a foreman for or representative of the employer.

   b. Compliance with instructions. Control is present when the individual is required to comply with instructions about when, where and how he is to work. Some employees may work without receiving instructions because they are highly proficient in their line of work and can be trusted to work to the best of their abilities; however, the control factor is present if the employer has the right to instruct or direct. The instructions may be oral or may be in the form of manuals or written procedures which show how the desired result is to be accomplished.

   c. Oral or written reports. If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for his actions. Periodic progress reports relating to the

accomplishment of a specific result may not be indicative of control if, for example, the reports are used to establish entitlement to partial payment based upon percentage of completion. Completion of forms customarily used in the particular type of business activity, regardless of the relationship between the individual and the employing unit, may not constitute written reports for purposes of this factor; e.g., receipts to customers, invoices, etc.

d. Place of work. Doing the work on the employing unit's premises is not control in itself; however, it does imply that the employer has control, especially when the work is of such a nature that it could be done elsewhere. A person working in the employer's place of business is physically within the employer's direction and supervision. The fact that work is done off the premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee. In some occupations, the services are necessarily performed away from the premises of the employing unit. This is true, for example, of employees in the construction trades, or employees who must work over a fixed route, within a fixed territory, or at any outlying work station.

e. Personal performance. If the services must be rendered personally it indicates that the employing unit is interested in the method as well as the result. The employing unit is interested not only in getting a desired result, but, also, in who does the job. Personal performance might not be indicative of control if the work is very highly specialized and the worker is hired on the basis of his professional reputation, as in the case of a consultant known in academic and professional circles to be an authority in the field. Lack of control may be indicated when an individual has the

right to hire a substitute without the employing unit's knowledge or consent.

f. Establishment of work sequence. If a person must perform services in the order of sequence set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the established routines and schedules of the employing unit. Often, because of the nature of an occupation, the employing unit does not set the order of the services, or sets them infrequently. It is sufficient to show control, however, if the employing unit retains the right to do so.

g. Right to discharge. The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control. The employing unit exercises control through the ever present threat of dismissal, which causes the worker to obey any instructions which may be given. The right of control is very strongly indicated if the worker may be terminated with little or no notice, without cause, or for failure to use specified methods, and if the worker does not make his services available to the public on a continuing basis. An independent worker, on the other hand, generally cannot be terminated as long as he produces an end result which measures up to his contract specifications. Many contracts provide for termination upon notice or for specified acts of nonperformance or default and may not be indicative of the existence of the right to control. Sometimes, an employing unit's right to discharge is restricted because of a contract with a labor union or with other entities. Such a restriction does not detract from the existence of an employment relationship.

h. Set hours of work. The establishment of set hours of work by the employing unit is a factor indicative of control. This condition bars the worker from being master of his own time, which is a right of the independent worker. Where fixed hours are not practical because of the nature of the occupation, a requirement that the worker work at certain times is an element of control.

i. Training. Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, is a factor of control because it is an indication that the employer wants the services performed in a particular method or manner. This is especially true if the training is given periodically or at frequent intervals. An independent worker ordinarily uses his own methods and receives no training from the purchaser of his services.

j. Amount of time. If the worker must devote his full time to the activity of the employing unit, the employing unit has control over the amount of time the worker spends working and, impliedly, restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses. Full time does not necessarily mean an 8-hour day or a 5- or 6-day week. Its meaning may vary with the intent of the parties, the nature of the occupation and customs in the locality. These conditions should be considered in defining "full time". Full-time services may be required even though not specified in writing or orally. For example, a person may be required to produce a minimum volume of business which compels him to devote all of his working time to that business, or he may not be permitted to work for anyone

else, and to earn a living he necessarily must work full time.

k. Tools and materials. The furnishing of tools, materials, etc. by the employing unit is indicative of control over the worker. When the worker furnishes the tools, materials, etc., it indicates a lack of control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

l. Expense reimbursement. Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses. Consideration must be given to the fact some independent professionals and consultants require payment of all expenses in addition to their fees.

E. Among the factors to be considered in addition to the factors of control, such as those identified in subsection (D), when determining if an individual performing services may be independent when paragraph (1) of subsection (B) is applicable, are:

1. Availability to public. The fact that an individual makes his services available to the general public on a continuing basis is usually indicative of independent status. An individual may offer his services to the public in a number of ways. For example, he may have his own office and assistants, he may display a sign in front of his home or office, he may hold a business license, he may be listed in a business directory or maintain a business listing in a telephone directory, he may advertise in a newspaper, trade journal, magazine, or he may simply make himself available through word of mouth, where it is customary in the trade or business.

2. Compensation on job basis. An employee is usually, but not always, paid by the hour, week or month; whereas, payment on a job basis is customary where the worker is independent. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job at a fixed rate per hour. Payment on a job basis may involve periodic partial payments based upon a percent of the total job price or the amount of the total job completed. The guarantee of a minimum salary or the granting of a drawing account at stated intervals, with no requirement for repayment of the excess over earnings, tends to indicate that existence of an employer-employee relationship.

3. Realization of profit or loss. An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is an employee is not in such a position. Opportunity for profit or loss may be established by one or more of a variety of circumstances; e.g.:

   a. The individual has continuing and recurring significant liabilities or obligations in connection with the performance of the work involved, and success or failure depends, to an appreciable degree, on the relationship of receipts to expenditures.

   b. The individual agrees to perform specific jobs for prices agreed upon in advance, and pays expenses incurred in connection with the work, such as wages, rents or other significant operating expenses.

4. Obligation. An employee usually has the right to end his relationship with his employer at any time he wishes without incurring liability, although he may be required to provide notice of his termination for some period in advance of the termination. An independent worker

usually agrees to complete a specific job. He is responsible for its satisfactory completion and would be legally obligated to make good for failure to complete the job, if legal relief were sought.

5. Significant investment. A significant investment by a person in facilities used by him in performing services for another tends to show an independent status. On the other hand, the furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status on the part of the worker. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, etc., that are provided by employees as a common practice in their trade. If the worker makes a significant investment in facilities, such as a vehicle not reasonably suited to personal use, this is indicative of an independent relationship. A significant expenditure of time or money for an individual's education is not necessarily indicative of an independent relationship.

6. Simultaneous contracts. If an individual works for a number of persons or firms at the same time, it indicates an independent status because, in such cases, the worker is usually free from control by any of the firms. It is possible, however, that a person may work for a number of people or firms and still be an employee of one or all of them. The decisions reached on other pertinent factors should be considered when evaluating this factor.

F. Whether the preponderance of the evidence is being weighed to determine if the individual performing services for an employing unit is an employee under the general definition of employee contained in subsection (A), or may be independent when paragraph (1) of subsection (B) is applicable, the factors considered shall be weighed in accordance with their appropriate value to a correct determination of the relationship under the facts of the particular case. The weight to be given to a factor is not always constant. The degree of importance may vary, depending upon the occupation or work situation being

considered and why the factor is present in the situation. Some factors may not apply to occupations or situation, while there may be other factors not specifically identified herein that should be considered.

In weighing the evidence and applying the law to the facts in this case, the Appeals Board considered evidence of the substance, not merely the form, of the relationship between the Petitioner and the Workers, as required in A.A.C. Section R6-3-1723(D)(1), including the elements of control and independence within the meaning of A.A.C. Sections R6-3-1723(A)(1), (D), and (E). Additional considerations were also examined by the Appeals Board pursuant to A.A.C. Section R6-3-1723(F) to determine whether an employer-employee relationship exists.

Common Indicia of Control

Arizona Administrative Code, Section R6-3-1723 provides guidance for determining whether an employer-employee relationship exists. Section R6-3-1723(D)(2) lists the common indicia of control to be considered in any determination.

In reaching its determination that an employer-employee relationship existed between the Workers and the Petitioner, the Department concluded that the actions by the Petitioner demonstrated control over the Worker's services; the Petitioner had authority over the Worker's assistants; the Workers who were nurses were required to work at the Petitioner's business location and were subject to the established routines and schedules set by the Petitioner; the Petitioner had the right to discharge the Workers at any time without notice and without legal liability, and there was no evidence that the Workers advertised their services to the public; the Petitioner established set hours for the Workers to work; the Petitioner had trained the Workers or had paid for training for the Workers, without reimbursement from the Workers; and that the Petitioner had provided the Workers with the tools and materials necessary to perform their services.

The Workers and the Petitioner had agreed to an independent contractor relationship as evidenced through a signed written contract between the parties. During the hearing, a witness for the Petitioner credibly testified that the Petitioner had hired legal counsel to draft the independent contractor agreements, to help ensure that the agreements would be lawful and legally binding. The Workers had also intended to perform their services as independent contractors. A second witness for the Petitioner, who had provided services as an esthetician, testified that she had also retained legal counsel to assist her in the review and negotiation of the agreement, and had even made several amendments to the agreement prior to signing it. The witness further testified that she believed that all the Workers understood and intended to perform their services

as independent contractors. Consequently, this factor weighs in favor of an independent contractor relationship.

The Petitioner employed front desk staff whose duties included answering the phones and scheduling client appointments. While the Workers did not have the authority to direct or supervise these front desk employees, witnesses for the Petitioner credibly testified that the Workers did have the authority to hire, supervise, and pay their own assistants to assist the Workers in the performance of their esthetician or nursing services. Witnesses for the Petitioner also testified that the Workers could hire their own assistants without approval, and without any authority or control by the Petitioner. Consequently, this factor weighs in favor of an independent contractor relationship.

The evidence of record establishes that the Workers were not required to comply with any instruction from the Petitioner in the performance of their services. Additionally, the Petitioner did not have any written policy that it required the Workers to follow. Witnesses for the Petitioner credibly testified that the Workers relied on their own experience and expertise to determine how they would provide their services. Witnesses for the Petitioner also testified that certain procedures and protocols were necessarily followed pursuant to the Workers' professional licensing requirements. Consequently, this factor weighs in favor of an independent contractor relationship.

The evidence of record establishes that the Workers were not required to submit an oral or written report to the Petitioner. Witnesses for the Petitioner testified that while the Workers did submit a written workflow report on a weekly basis to the Petitioner, the report did not bear on the method that the services were to be performed. The report instead kept track of the treatments that were performed and the products that were sold by the Workers for the purpose of receiving compensation. In the Reconsidered Determination, the Department also concluded that the "written reports do not bear on the method in which the services are to be performed, but are merely completion forms, i.e., time or workflow sheets". Consequently, this factor weighs in favor of an independent contractor relationship.

The evidence of record establishes that the Workers performed their services at the location of the Petitioner's medical spa business. Due to the nature of their occupation, the services provided by the Workers were necessarily performed at the Petitioner's business location. However, the Petitioner did not provide any supervision at the location. Witnesses for the Petitioner also testified that the Petitioner did not supervise the Workers during the normal course of their work, and that they were also not required to provide their services during the Petitioner's regular business hours. Witnesses for the Petitioner also testified that the Workers were given keys to the medical spa by the Petitioner, with instructions on how to disable the alarm, to allow the Workers to perform their services at any time or day outside the Petitioner's

regular business hours. Consequently, this factor weighs in favor of an independent contractor relationship.

The evidence of record establishes that the Workers were not required to personally perform their services and that the Petitioner was interested in getting the desired result no matter the means. Witnesses for the Petitioner credibly testified that personal performance was not required of the Workers, and that a substitute could be used as a replacement without approval by the Petitioner. In the Reconsidered Determination, the Department also determined that "in the event a worker was not available, [the Petitioner] would simply replace or reschedule with someone else, this shows that [the Petitioner] was interested in the end result, and not necessarily interested in who performed the services". Consequently, this factor weighs in favor of an independent contractor relationship.

The establishment of a work sequence for the Workers' services could be contingent on the nature of the service provided. Witnesses for the Petitioner credibly testified that the Workers relied on their own experience and expertise to determine the sequence of the services provided. Further, the Petitioner's witnesses also testified that specific procedures and protocols, including the sequence of performance, were sometimes required for certain services, to protect the Workers' professional licenses. Consequently, this factor weighs in favor of an independent contractor relationship.

In the Reconsidered Determination, the Department concluded that "the workers could be terminated at any time and there is no evidence that the workers advertised their services to the public". However, the Petitioner's right to terminate the relationship was controlled under the terms of the independent contractor agreement between the parties. In addition, there is not sufficient evidence to conclude that the Workers did not make their services available to the public on a continuing basis during the audit period. In fact, during the hearing, witnesses for the Petitioner credibly testified that it was believed that the Workers had made their services available to the public, including on social media. Witnesses for the Petitioner also testified that no restrictions were placed on the Workers to advertise or make their services available to the public and that the Workers had always been free to do so. Consequently, this factor weighs in favor of an independent contractor relationship.

The Petitioner did not establish set hours that the Workers were required to perform their services. During the hearing, witnesses for the Petitioner credibly testified that there were no restrictions placed by the Petitioner on the number of hours or when the Workers were required to work. Witnesses for the Petitioner further testified that the Workers were provided keys to the Petitioner's medical spa to allow the Workers the option of providing their services outside of the Petitioner's regular business hours. Consequently, this factor weighs in favor of an independent contractor relationship.

The Workers were not provided training by the Petitioner and did not receive any training that was reimbursed by the Petitioner. In the Reconsidered Determination, the Department states that "[p]er the Field Auditor, [the Petitioner] trained the Estheticians and Nurses as well as sent them to be trained, if necessary, without reimbursement from the workers". In the Auditor's Report, the field auditor states that in an interview conducted on June 17, 2020, [redacted] had stated that "she is an esthetician who performed skincare, facials, and waxing services" and that "[t]he business trains her and pays for the training". However, [redacted] was neither an esthetician or a nurse. [redacted] was instead an employee of the Petitioner, who had provided front desk and management services during the audit period. The Benefit Assignment report states that during an interview conducted on June 16, 2020, "[[redacted]] said she is a front desk and management services [sic]". During the hearing, a witness for the Petitioner also confirmed that [redacted] was not an esthetician or nurse and that she had only provided front desk related services as an employee of the Petitioner. With respect to the actual estheticians and nurses, the witness testified that the Petitioner had not provided or paid for any of the Workers' training. Further, a second Petitioner witness, an esthetician, testified that the Petitioner had not provided or paid for any training for herself or for any of the Workers. The Petitioner's witnesses also testified that the Workers did not require training or receive training by the Petitioner because the Workers were experienced in their field and drew from their own expertise to determine how they would provide their services. Consequently, this factor weighs in favor of an independent contractor relationship.

The evidence of record establishes that the Workers were not required to provide their services on a full-time basis for the Petitioner. Witnesses for the Petitioner credibly testified that the Workers were not required to work a set number of hours and were not restricted from working for anyone else. In the Reconsidered Determination, the Department also determined that "there was no evidence that the workers were required to provide their services on a full-time basis for [the Petitioner]; the appointment schedule was dictated solely by the needs of the customers and the availability of the workers". Consequently, this factor weighs in favor of an independent contractor relationship.

The Department determined that the Petitioner had furnished all the equipment, tools, materials and supplies necessary for the Workers to perform their services. However, the Petitioner neither furnished nor paid for all the equipment, tools, materials, and supplies that the Workers used. During the hearing, witnesses for the Petitioner credibly testified that the Workers used their own tools, materials and supplies when providing their services. The Petitioner's witnesses also testified that when a Worker did not own, for example, a particular piece of heavy equipment, the Workers could pay to use the equipment owned by the Petitioner by way of a reduction in their compensation. The Workers also paid the Petitioner a needle disposal fee by way

of reduction in compensation. The Auditor's Report also identified "4x4's, rubber gloves, distilled water, and Barbicide" as items that were supplied by a Worker for which "[t]here is no reimbursement". Consequently, this factor weighs in favor of an independent contractor relationship.

Based on our review of all the evidence, we find that the common indicia of control factors considered favors a finding that the Workers were independent contractors.

Factors Indicative of Independence

Arizona Administrative Code, Section R6-3-1723 provides guidance for determining whether an employer-employee relationship exists. Section R6-3-1723(E) lists the common factors indicative of independence to be considered in any determination.

In reaching its determination that an employer-employee relationship existed between the Workers and the Petitioner, the Department concluded that the Workers did not advertise or make their services available to the public; the Workers were compensated in a manner that did not weigh in favor of independence; the Workers did not realize a profit or a loss as a result of their services; the Workers did not have an obligation to complete the job and that both parties could terminate the relationship without legal consequence; the Workers did not have a significant investment in the business assets needed to perform their services; and that there was no evidence that the Workers provided their services to others as independent contractors.

The Department concluded that the Workers did not advertise or make their services available to the general public on a continuing basis. The Department states in the Reconsidered Determination that "based on a search of the internet, the Estheticians and Nurses do not advertise their services" and that "[p]er the interview with the Field Auditor and workers, it was brought up that the workers did not advertise for themselves" and "[t]herefore, there is no evidence that the workers advertised their independent business generating enterprises to the public". However, witnesses for the Petitioner credibly testified that the Workers were not restricted from advertising or providing their services to the public and it was believed that some had in fact done so on a continuing basis during the audit period. Consequently, as the Workers were not restricted from advertising or making their services available to the general public on a continuing basis and because there is not sufficient evidence to establish that the Workers had not done so, we find this factor to be neutral based on the evidence available.

The Department concluded that the Workers were compensated in a manner that did not weigh in favor of independence. The Department states in the Reconsidered Determination that the Workers were "paid per service and/or a flat rate" but that "[s]ome of the Estheticians and Nurses are paid hourly when

they are clocked in and working at the front desk" and that the nature of their services included those services performed "off the clock"". However, during the hearing, witnesses for the Petitioner credibly testified that the Workers had not, at any time, worked at the front desk when "clocked off" and had only provided services as estheticians or nurses. Further, witnesses for the Petitioner also confirmed that the Workers were compensated on a job basis for any services provided, and on a commission basis for any product they sold. Consequently, this factor weighs in favor of independence.

The Department concluded that the Workers did not realize a profit or a loss as a result of their services. In the Reconsidered Determination, the Department states that "the Estheticians and Nurses do not have any significant, ongoing, recurring expenses" and "[t]herefore cannot realize a profit or suffer a loss" as a result. However, witnesses for the Petitioner testified that the Workers could experience a loss or have the amount of their profit impacted by a variety of factors. A witness for the Petitioner, who was an esthetician, provided examples as to how any expected profit could be impacted by a number of factors. Such factors included the number and types of services being performed, and the occurrence of a variety of recurring expenses, such as the cost of cosmetology and medical tools and equipment, work attire/medical scrubs, liability insurance coverage and professional license fees, that the Petitioner did not reimburse the Workers for. Consequently, this factor weighs in favor of independence.

In the Reconsidered Determination, the Department concluded that the Workers could "quit at any time with no notice and no legal liability". However, the Workers could not end their working relationship with the Petitioner at any time without incurring legal liability. The Workers' right to terminate the relationship was governed under the terms of the independent contractor agreement that the parties had entered. During the hearing, witnesses for the Petitioner confirmed that the Workers could not end the working relationship at any time without legal liability, and that the independent contractor agreement stipulated the conditions for the termination. Consequently, this factor weighs in favor of an independent contractor relationship.

The Department concluded that the Workers did not have a significant investment in business assets necessary to perform their services. In the Reconsidered Determination, the Department states that "[t]he Estheticians and Nurses are provided what they need to do the work. Therefore, they do not have a significant investment in business assets". In this case, the Workers did not have their own commercial offices or facilities, and in some cases, did not own certain pieces of heavy equipment, which the Workers would need to compensate the Petitioner to use. However, the Workers, being licensed professionals, had invested in certain assets consistent with the nature of their profession. During the hearing, witnesses for the Petitioner credibly testified that the Workers had made an investment in professional expenses, including liability insurance

coverage and professional fees, in addition to the cost of cosmetology and medical tools and equipment, and work attire/medical scrubs. Consequently, we find this factor to be neutral based on the evidence available.

Based on our review of all the evidence, we find that the factors indicative of independence favors a finding that the Workers were independent contractors.

Additional Factors

Arizona Administrative Code, Section R6-3-1723(F) provides guidance on additional considerations for determining whether an employer-employee relationship exists.

In support of its conclusion that mandated a finding of an employer-employee relationship between the Workers and the Petitioner, the Department concluded that the services provided by the Workers were integral to the Petitioner's business and that the Workers had provided services to the Petitioner on a long-term basis.

As the Petitioner operates as a medical spa, the esthetician and nursing services provided by the Workers formed an integral part of the Petitioner's regular business activity. Consequently, we agree with the Department's determination that the integration of the Worker's services favor a finding that supports an employer-employee relationship.

The Department determined that a continuing relationship existed between the Petitioner and the Workers, and that the Workers had provided their services on a long-term basis. In making its determination, the Department also concluded that the "estheticians also must wear a uniform". However, the duration of the working relationship between the Petitioner and the Workers varied and the Petitioner did not require the Workers to wear a uniform. During the hearing, witnesses for the Petitioner credibly testified that the Workers were not required to wear uniforms, and instead would wear medical scrubs while performing their services. Consequently, we disagree with the Department's determination that the relationship that existed between the Petitioner and the Workers favor a finding that supports an employer-employee relationship.

In this case, the Workers had intended to provide their services as contractors and there had been contractual agreements between the Workers and the Petitioner that established such a relationship. Such intent was also evidenced through the credible testimony of each of the Petitioner's witnesses. In addition, the Petitioner did not at any time monitor the Workers' job performance, and the Workers were available to provide the same services to other parties without any restriction by the Petitioner.

The Department's determination originated from a benefit assignment regarding the services of [redacted], that subsequently turned into an audit for the services provided by the estheticians and nurses. The Field Auditor stated in the Transmittal Report that "[a]ll of the factors in [A.A.C.] R6-1723 were considered and based on the facts obtained from the interview with the Employer and from the individuals providing services as **Estheticians & Nurses**; the following are the relevant factors that were relied upon for the determination".

The Department interviewed [redacted], [redacted], [redacted], and [redacted], who had provided services to the Petitioner, and also interviewed [redacted], a corporate officer of the Petitioner.

In the Auditor's Report, the field auditor stated that she "purposely limited what I asked [redacted] because he was not truthful when he stated the estheticians and nurse injectors were not provided training even though at least one of them stated they were. Therefore, I concluded that if he was disingenuous with me in that response then he would continue to do so with other questions that I asked him".

Based on the available record, [redacted] had stated that the Petitioner had provided training or paid for training for the Workers. In the Auditor's Report, the field auditor stated that during an interview conducted on June 17, 2020, "[redacted] said she is an esthetician who performed skincare, facials, and waxing services". However, [redacted] was not an esthetician or a nurse. During the audit period, Anna Mendicino was an employee of the Petitioner who had provided front desk and management services. Conversely, the Benefit Assignment report correctly identifies the services [redacted] provided, and states that during an interview conducted on June 16, 2020, "[redacted] said she is a front desk and management services [sic]". During the hearing, a witness for the Petitioner also confirmed that [redacted] was not an esthetician or a nurse and had provided only front desk related services as an employee. The witness further testified that the Petitioner had not provided or paid for any training for the Workers. A second witness for the Petitioner, an esthetician, testified that the Petitioner had not provided or paid for any training for herself or for any of the Workers.

On May 7, 2020, through an email communication to the Petitioner, [redacted] stated that she had worked for the Petitioner as a contractor and that she had found her independent contractor agreement. [redacted] also acknowledged in the email that she had been stressed trying to survive the pandemic, and that she was no longer pursuing unemployment benefits.

Consequently, we find that the additional considerations reviewed favor a finding that the Workers were independent contractors.

We conclude that the preponderance of evidence of independent contractor status outweighs the evidence of employee status. Therefore, we find that the Workers were not employees of the Petitioner from January 1, 2019 through March 31, 2021, but rather, the Workers performed services for the Petitioner pursuant to an independent contractor relationship. We further conclude that all payments to the Workers for their services from January 1, 2019 through March 31, 2021, did not constitute wages by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **REVERSES** the Department's April 5, 2023 Reconsidered Determination that found that from January 1, 2019 through March 31, 2021, services performed by the estheticians and nurses constituted employment. From January 1, 2019 through March 31, 2021, services performed by these workers did not constitute employment, because the parties had an independent contractor relationship. All forms of remuneration paid to these workers for such services did not constitute wages.

DATED: 12/22/2023

APPEALS BOARD

NANCY MILLER, Chairman

DENISE E. MOORE, Member

WILLIAM G. DADE, Member

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See,* Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3442**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

A. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.

B. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:

1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.

2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section

reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 12/22/2023 to:

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For The Appeals Board