Unemployment Insurance Tax Program

Appeals Board Decisions – 2015

1st QUARTER OF
CALENDAR YEAR 2015

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1461108-001-B

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STATE OF ARIZONA E S A TAX UNIT
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1275 W WASHINGTON ST SC 040A
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Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

March 30, 2015 ***.

DECISION

SET ASIDE (Department's Reconsidered Determination dated 6/10/2014)
SET ASIDE AND REMANDED (Determination of Liability for Employment or Wages dated 3/14/2014)
SET ASIDE AND REMANDED (Determination of Unemployment Insurance Liability dated 3/14/2014)

THE **EMPLOYER** petitioned for hearing from the Department's Reconsidered Determination letter issued on June 10, 2014, which affirmed the Determination of Liability for Employment or Wages and the Determination of Unemployment Insurance Liability issued on March 14, 2014. The Reconsidered

Determination held that "the services of [sales representative JN] were correctly determined to constitute employment and all forms of remuneration paid for such services constitutes 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, which was convened on **December 19, 2014,** before Appeals Board Administrative Law Judge Eric T. Schwarz. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the services performed by individuals as sales representatives constituted employment effective July 1, 2013, as defined in A.R.S. § 23-615.
2. Whether the services performed by individuals as sales representatives are exempt or excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat the individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
3. Whether all forms of remuneration paid to individuals for services as sales representatives constitutes wages as defined in A.R.S. § 23-622.

On the scheduled date of the hearing, the Employer appeared with two witnesses, one of whom testified. Counsel for the Department was present, and two witnesses for the Department appeared and testified. Board Exhibits 1 through 16 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS from the record that it is not possible to decide the issues presented because the Department has not established a rational or valid legal basis for the Department's disparate treatment of the two workers who were identified by the Department as having performed services as sales representatives for the Employer. As a result, the matter must be remanded to the Department for further action.

The Department issued a Determination of Liability for Employment or Wages on March 14, 2014, which specifically held that "sales representatives" were determined by the Department to be employees of the Employer (Bd. Exh. 4). That determination was prepared and issued by Department Field Auditor "CG" based upon CG's investigation into the employment status of the sales representatives (Bd. Exhs. 1, 2, 4).

In a narrative prepared by CG, she wrote, in part, as follows:

> No audit was conducted because the employer is based in New York. The employer does not have any presence in Arizona. All records are located in New York. ["ES"], Chief Financial Officer, ["TFG"] and authorized representative of the employer, emailed the information and documents with reference to **the workers here in AZ. According to him, they had two independent contractors who for a very short time performed services for them here in AZ. He further stated that they no longer have workers here in AZ. Copies of the contract agreements of the two workers were submitted. It was verified that the other worker owns a company called ["A LLC"]. Subject worker is determined to be a legitimate contractor** (Bd. Exh. 2B). [Emphasis added]

Additionally, we note that in a document entitled "Common Law Employment", CG indicated that "Services determined in employment" were "sales representatives", and she proceeded to use the plural term "sales representatives" seven more times in that document, along with using the plural term "workers" six times and the plural pronouns "they", "their", or "them" 11 times (Bd. Exhs. 2D, 2E).

Despite the fact that CG acknowledged that the Employer had two sales representatives providing services to the Employer in Arizona, CG only included one of the sales representatives, "JN", on the "REPORT OF WAGES PAID EACH EMPLOYEE" (Bd. Exh. 5B). In that report, CG did not include the second sales representative [hereinafter "sales representative X"] that she referenced in Board Exhibit 2B. We note that the Department's June 10, 2014 Reconsidered Determination only addresses sales representative JN and makes no reference to sales representative X.

CG did not appear at the Appeals Board hearing to explain or defend her investigation or her March 14, 2014 determinations. Based upon CG's written statements, the only logical conclusion to draw is that CG's only basis for simply declaring that sales representative X was a "legitimate contractor" was the fact that sales representative X had a Limited Liability Company [hereinafter "LLC"]. CG sets forth no other basis for this conclusion, and there is no indication that CG engaged in any type of thorough analysis regarding the actual working relationship between sales representative X and the Employer.

At the Appeals Board hearing, the Department was unable to articulate any basis for the disparate treatment of JN and sales representative X other than the fact that sales representative X had an LLC. This is illustrated by the following

exchange between the Administrative Law Judge and Department witness "TO", an Unemployment Tax Analyst:

> ALJ: 'It was verified that the other worker [sales representative X] owns a company called [A LLC]. [Sales representative X] is determined to be a legitimate contractor.' I'm just...I'm just trying to figure out here...did we have two people [JN and sales representative X] doing exactly the same thing under the exact the same agreement?
>
> TO: I do not know, your honor.
>
> ALJ: Did you think to look into that?
>
> TO: Well no, because we didn't...because the other person [sales representative X] I guess if you wanna call it that, the other one was a business and [A LLC] they actually had an LLC, and when I spoke to [JN] he said he didn't have a business. So he wasn't like [A LLC].
>
> ALJ: Well, my point I'm trying to get to is...if we have two people doing exactly the same thing, under exactly the same agreements, and exactly the same terms, and one is being paid directly in their name and one is being paid to an LLC, is it the Department's position that that factor alone, being paid to an LLC, makes it an independent contractor arrangement as opposed to an employer/employee relationship?
>
> TO: What I'm saying is we're not looking at the relationship with the [A LLC] because they are truly a legitimate business. So we don't question that relationship. When they don't have an LLC or corporation, we have to question the relationship.
>
> ALJ: **So anytime someone has an LLC, automatically they're not an employee?**
>
> TO: **Yes, your honor.** [Emphasis added]

Here, TO unequivocally admitted that the Department's position is that any worker who simply has an LLC is automatically considered not to be an employee by the Department, and that the Department does not even look at or

question the relationship between such a worker and any employer. TO reiterated this position later in the hearing when she testified that "if [the Employer] paid only LLC's they would have no more issues with the Department." Furthermore, these admissions substantiate the conclusion that CG never examined the actual relationship between sales representative X and the Employer before simply declaring that sales representative X was a "legitimate contractor".

The Department has failed to present any legal authorities to support this position, and the Board finds it untenable. Just as it is possible for a worker who does not have an LLC to be an independent contractor, it is also possible for a worker who has an LLC to be an employee. It is entirely dependent on the actual working relationship between the worker and the Employer, yet here the Department presented no evidence to establish that any such analysis was done regarding sales representative X.

The Department presented no evidence to establish that the circumstances under which JN provided services to the Employer differed in any way from circumstances under which sales representative X provided services to the Employer, other than the fact that sales representative X had an LLC while JN did not. The Board finds that that single difference alone is not sufficient to establish that JN and sales representative X should be treated differently by the Department when determining the employment status of the two workers. The Department established no rational basis for the disparate treatment of JN and sales representative X in this case and, therefore, the Department failed to establish a *prima facie* case sufficient to support the March 14, 2014 Determination of Liability for Employment or Wages.

Generally, the Board would set forth a detailed analysis of the 18 factors set out in Arizona Administrative Code, Sections R6-3-1723(D)(2) and R6-3-1723(E), regarding the relationship between the sales representatives and the Employer. However, the Board sees no reason to engage in that exercise here since the Department failed to carry its burden of proof and failed to establish a *prima facie* case to support the March 14, 2014 Determination of Liability for Employment or Wages, as the Department has failed to establish a rational basis for its disparate treatment of the two sales representatives who provided services to the Employer. Accordingly,

THE APPEALS BOARD **SETS ASIDE** the Department's Reconsidered Determination dated June 10, 2014, based upon the evidence of record.

THE APPEALS BOARD **SETS ASIDE** the Determination of Liability for Employment or Wages dated March 14, 2014, based upon the evidence of record.

THE APPEALS BOARD **SETS ASIDE** the Determination of Unemployment Insurance Liability dated March 14, 2014, based upon the evidence of record.

THE APPEALS BOARD **REMANDS** the matter to the Department for further investigation. We note that this matter involves, at most, two sales representatives who provided services to the Employer for a short period of time some years ago, and that the Employer no longer does business in Arizona. If the Department concludes that further expenditure of time and resources on this matter is warranted, it may issue a new determination from which a timely appeal may be taken by the party adversely affected. If the Department decides to follow that course of action, it should be prepared to explain in detail its analysis of the employment status of both JN and sales representative X, particularly if the Department treats them differently.

DATED: 2/27/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review 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 requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review 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 for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
   1. explains why the Appeals Board decision is wrong,
   2. cites the record, rules and other authority, and
   3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 2/27/2015
to:

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By: __RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1444791-001-B

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

February 19, 2015 ***.

DECISION
REVERSED

THE **EMPLOYER**, through counsel, petitioned for hearing from the Department's Reconsidered Determination issued on February 12, 2014, which affirmed the Determination of Liability for Employment or Wages issued on May 21, 2012. The Reconsidered Determination held that "the services of the homeworkers were correctly determined to constitute employment and all forms of remuneration paid for such services constitutes 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, which was convened on **July 24, 2014**, before Appeals Board Administrative Law Judge Eric T. Schwarz. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer had good cause for its nonappearance at the scheduled hearing on June 19, 2014.
2. Whether the services performed by individuals as homeworkers constituted employment effective January 1, 2011, as defined in A.R.S. § 23-615.
3. Whether the services performed by individuals as homeworkers are exempt or excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat the individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
4. Whether all forms of remuneration paid to individuals for services as homeworkers constitutes wages as defined in A.R.S. § 23-622.

We note that the May 21, 2012 Determination of Liability for Employment or Wages listed four categories of workers: homeworkers, mailroom workers, temporary customer service workers, and probationary workers (Bd. Exh. 3). The Department's February 12, 2014 Reconsidered Determination, however, only addressed the employment status of the category known as homeworkers, and cited the following basis for that decision:

> In your [i.e., counsel for the Employer] letter you concede at the outset that services performed by individuals as mailroom workers, temporary customer service workers and probationary workers constitute employment and all forms of remuneration paid for such services constitute wages (Bd. Exhs. 7, 8A-G).

At the July 24, 2014 Appeals Board hearing, counsel for the Employer acknowledged that the only category of workers still disputed by the Employer is the category known as homeworkers (Tr. pp. 15, 16). Additionally, the Department and the Employer agree that two out-of-state workers, "AJ" and "DH", were not employees of the Employer (Tr. pp. 15, 16; Exhs. 7, 8A-G).

Therefore, this decision will be limited to examining the employment status of those individuals who performed services as homeworkers, excluding AJ and HD.

On July 24, 2014, counsel for the Employer and one Employer witness appeared and testified at the hearing. Counsel for the Department was present, and one witness testified for the Department. Board Exhibits 1 through 13 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer is a company that handles rebate applications submitted to its clients (Tr. p. 78). When the Employer receives mail-in rebate forms, it puts the mail from each promotion into batches, which the homeworkers then pick up from the Employer's place of business (Tr. p. 79). The homeworkers then enter the rebate data into the Employer's Internet "application", submit the completed data to the Employer, and return the processed mail batches to the Employer (Tr. p. 79).

2. On May 21, 2012, the Department issued a Determination of Liability for Employment or Wages which held that the "[s]ervices performed by individuals as Homeworkers . . . constitute employment" for the quarters ending March 31, 2011 through December 31, 2011 (Bd. Exh. 3). The Department also issued a Notice of Assessment and a Report of Wages Paid Each Employee that identified specific persons held to be employees and their wages for this period (Bd. Exh. 4A-F).

3. The Employer did not prohibit the use of assistants by the homeworkers, and some of the homeworkers used assistants (Tr. pp. 81-85).

4. The homeworkers received no instructions from the Employer regarding when or where to complete the work (Tr. pp. 91, 92, 99, 122). The only instruction given by the Employer regarding "how" a homeworker was to work was the instruction that the homeworker enter the pertinent data into the Employer's Internet "application" for submission (Tr. pp. 87-90, 95, 96). The homeworkers, however, were free to enter the data into the Internet application in any order they wished (Tr. pp. 95, 96).

5. The homeworkers were not required to submit either written or oral reports to the Employer (Tr. p. 91).

6. While most of the homeworkers performed their work at home, the homeworkers were free to perform their work anywhere they

chose so long as it was not on the Employer's premises (Tr. pp. 91, 92, 122).

7. The Employer was indifferent as to who completed any particular job (Tr. pp. 81-85, 92-95).

8. The Employer gave the homeworkers no instruction as to work sequence, and the homeworkers set their own schedules (Tr. pp. 95, 96, 99).

9. The Employer maintained the right to end its relationship with any of the homeworkers at any time without notice (Tr. pp. 96-98). Additionally, the homeworkers were free to end the relationship with the Employer at any time without penalty (Tr. pp. 97, 98).

10. The homeworkers were not required by the Employer to work any set number of hours by the Employer. The homeworkers were free to set their own hours, and they could work as much, or as little, as they wished (Tr. pp. 89, 99, 101, 116-119). The homeworkers were free to manage their time to work elsewhere, and free to work for other entities (Tr. pp. 101, 116-119; Bd. Exh. 6).

11. The homeworkers were presumed to be skilled and proficient at data entry and were not given any data entry training by the Employer (Tr. pp. 101-104). The only training provided by the Employer dealt with showing the homeworkers how to log on to the Employer's Internet application and discussing mail handling procedures. This training typically lasted only one to two hours (Tr. pp. 90, 101-104, 120, 121). The Employer did not provide any on-going training to the homeworkers after that (Tr. pp. 103, 104).

12. The Employer did not furnish the homeworkers with tools or materials (Tr. pp. 105, 106). The homeworkers provided their own computer, Internet connection, and travel (Tr. p. 105). The only thing the Employer provided to the homeworkers was access to its Internet application (Tr. pp. 105, 106, 113-115).

13. The homeworkers were not reimbursed by the Employer for any business or travelling expenses in the course of their work (Tr. pp. 106, 107).

14. The Employer did not prohibit the homeworkers from working for others, and at least some of the homeworkers, in fact, worked for others (Tr. pp. 101, 108, 109; Bd. Exh. 6). The "Homeworker Agreement" that the Employer entered into with the homeworkers states, in part: "[The homeworker] is not required to perform the described services exclusively for [the

Employer], and may also perform any other work of [the homeworker's] choice" (Bd. Exh. 6).

15. The homeworkers were compensated solely on a piece rate basis, typically 10 cents per submission, and were not paid by the hour, week, or month (Tr. pp. 99, 110; Bd. Exh. 6).

16. On April 9, 2014, a Notice of Appeals Board Telephone Hearing [hereinafter "the Notice"] setting a hearing date and time for June 19, 2014, at 9:00 a.m. was mailed to the Employer's counsel, "BH" (Bd. Exh. 10). BH received the Notice in a timely manner (Tr. pp. 8, 9).

17. When BH received the Notice, he mistakenly entered into his computer's calendar that the hearing was on Monday, June 23, 2014, rather than on Thursday, June 19, 2014 (Tr. pp. 9, 10; Bd. Exh. 11).

18. The Employer did not appear at the June 19, 2014 Appeals Board hearing because BH had erroneously entered the hearing date into his calendar as June 23, 2014 (Tr. pp. 9-14; Bd. Exh. 11). BH did not discover his error until the afternoon of June 19, 2014, by which time a default had already been entered against the Employer for failing to appear at the hearing that morning (Tr. p. 10; Bd. Exh. 11).

19. On June 26, 2014, the Employer, through counsel, filed a timely request to reopen the June 19, 2014 Appeals Board hearing (Bd. Exh. 11).

The initial issue to be addressed by the Board is whether the Employer established good cause for its nonappearance at the June 19, 2014 Appeals Board hearing, such that the Employer's request to reopen this case should be granted.

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

> The department of economic security shall adopt rules to set standards under which a party may be excused for failure to attend a hearing for good cause.

Arizona Administrative Code, Section R6-3-1503, provides in pertinent part as follows:

* * *

B. Appeal Tribunal hearings

* * *

3. Failure of a party to appear

a. If there is no appearance on behalf of an interested party at a scheduled hearing, the Appeal Tribunal may:

i. Adjourn the hearing to a later date; or

ii. Proceed to review the evidence of record and other admissible evidence as may be presented at the scheduled hearing, and make a disposition or decision on the merits of the case.

b. If a decision is issued adverse to any party that failed to appear at a scheduled hearing, that party may file 1 written request for a hearing to determine whether good cause exists to reopen the hearing. The request to reopen shall be filed within 15 calendar days of the mailing date of the decision or disposition and shall list the reasons for the failure to appear.

c. The Appeal Tribunal shall hold a hearing to determine whether there was good cause for the failure to appear and, in the discretion of the hearing officer, to review the merits of the case. Upon a finding of good cause for failure to appear at the scheduled hearing, the disposition or decision on the merits shall be vacated and the case rescheduled for hearing under R6-3-1502, unless the hearing on the merits is held concurrently with the good cause hearing.

d. Good cause warranting reopening of a case shall be established upon proof that both the failure to appear and failure to

> timely notify the hearing officer were beyond the reasonable control of the nonappearing party.
>
> * * *

In Maldonado v. Arizona Department of Economic Security, 182 Ariz. 476, 897 P.2d 1362 (App., 1994), the Court of Appeals held that the language in Arizona Administrative Code, Section. R6-3-1503(B)(3)(d), must be interpreted in such a way as to allow an "excusable neglect" standard to be considered in determining whether to reopen a hearing, similar to the test under Arizona Rule of Civil Procedure 60(c).

In interpreting the term "excusable neglect", as expressly included in Ariz. R. Civ. P. 60(c), Appellate Courts have held that such standard does not apply if the action occurred because of a party's mere neglect, inadvertence or forgetfulness without a reasonable excuse therefor, Daou v. Harris, 139 Ariz. 353, 678 P.2d 934 (1984). The term "excusable neglect" is not synonymous with carelessness, Ulibarri v. Gerstenberger, 178 Ariz. 151, 871 P.2d 698 (App. 1993), and a party claiming excusable neglect must have promptly sought relief, Baker Intern. Associates, Inc. v. Shanwick Intern. Corp., 174 Ariz. 580, 851 P.2d 1379 (App. 1993). The standard for determining whether an action constitutes "excusable neglect" is whether the neglect involves an error such as might be made by a reasonably prudent person who attempted to handle a matter in a prompt and diligent fashion. Beal v. State Farm Mutual Automobile Insurance Co., 151 Ariz. 514, 729 P.2d 318 (App. 1986).

At the July 24, 2014 Appeals Board hearing, counsel for the Employer, "BH", testified credibly that the Employer failed to appear at the Appeals Board hearing scheduled for June 19, 2014, because he personally miscalendared the hearing date by erroneously entering into his computer's calendar that the hearing was scheduled for June 23, 2014 (Tr. pp. 8-14). BH's testimony was unrefuted.

In the Maldonado case cited above, the Arizona Court of Appeals specifically held that it was "excusable neglect", and therefore good cause for nonappearance, when a party's failure to appear at a scheduled hearing was caused by that party's error in entering on the party's calendar the incorrect time for a hearing. The Appeals Board follows the Arizona Court of Appeals' holding in Maldonado when such a fact pattern occurs.

Under the circumstances of this case, we conclude that the Employer has established good cause for its nonappearance at the Appeals Board hearing scheduled for June 19, 2014. The Employer's failure to appear was due to "excusable neglect" and involved an error such as might be made by a reasonably prudent person who attempted to handle a matter in a prompt and

diligent fashion. Therefore, under Maldonado, the Employer had good cause for its nonappearance at the June 19, 2014 Appeals Board hearing.

Having found that the Employer established good cause for its nonappearance at the hearing scheduled for June 19, 2014, the Board will now address the issue of the employment status of the homeworkers.

The Employer contends that the homeworkers were independent contractors and not employees. The employment status of the homeworkers, and whether their pay constituted wages, are in dispute in this case.

Arizona Revised Statutes § 23-615 defines "employment" as follows:

> "Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce, and includes:
>
> 1. An individual's entire service performed within or both within and without this state if:
>
> (a) The service is localized in this state. ...
>
> * * *

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

> 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, 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 provision of 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:

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 in pertinent part:

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 business person,

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.

* * *

The primary issue pertaining to the homeworkers is whether the services of the homeworkers were excluded from the definition of “employee” by qualifying as an “independent contractor” pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires application of the statutes and code provision cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Employer and the homeworkers. We further consider

the issues of control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

Under Arizona Administrative Code, Section R6-3-1723(A)(1), control includes the right to control as well as control in fact. Arizona Administrative Code, Section R6-3-1723(D)(2), identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor, enumerated in Arizona Administrative Code, Section R6-3-1723(E), are: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; and (6) whether the individual has simultaneous contracts with other persons or firms.

In the application of the guidelines set out in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes the following:

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.

The Employer did not prohibit the use of assistants by the homeworkers, and some of the homeworkers used assistants (Tr. pp. 81-85). There is no evidence in the record to indicate that the Employer paid for any assistants for the homeworkers. This factor shows an absence of control, and indicates an independent relationship.

b. Compliance with Instructions

Control is present when the individual is required to comply with instructions about when, where or 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 homeworkers received no instructions from the Employer regarding when or where to complete the work (Tr. pp. 91, 92, 99, 122). The only instruction given by the Employer regarding "how" a homeworker was to work was that the homeworker enter the data into the Employer's Internet "application" for submission (Tr. pp. 87-90, 95, 96). The homeworkers, however, were free to enter the data into the Internet application in any order they wished (Tr. pp. 95, 96). By a preponderance of the evidence of record, this factor shows an absence of control, and indicates an independent relationship.

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.

The homeworkers were not required to submit either written or oral reports to the Employer (Tr. p. 91). This factor shows an absence of control, and indicates an independent relationship.

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.

While most of the homeworkers performed their work at home, the homeworkers were free to perform their work anywhere they chose so long as it was not on the Employer's premises (Tr. pp. 91, 92, 122). This factor shows an absence of control, and indicates an independent relationship.

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.

The Employer was indifferent as to who completed any particular job (Tr. pp. 81-85, 92-95). This factor shows an absence of control, and indicates an independent relationship.

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 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.

The Employer gave the homeworkers no instruction as to work sequence (Tr. pp. 95, 96, 99). The homeworkers set their own schedules (Tr. pp. 95, 96, 99). As the homeworkers were free to establish their own work sequence, this factor shows an absence of control, and indicates an independent relationship.

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.

The Employer maintained the right to end its relationship with any of the homeworkers at any time without notice (Tr. pp. 96-98). Since the homeworkers

could be dismissed with no notice, they did not possess the rights that one would expect in a contractual relationship. This factor shows control, and indicates 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.

The homeworkers were free to set their own hours (Tr. pp. 99, 101, 116-119). The homeworkers could work as much, or as little, as they wished (Tr. pp. 89, 99, 101, 116-119). The evidence of record does not establish that the Employer had any control over when the homeworkers performed their work. This factor shows an absence of control, and indicates an independent relationship.

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.

The homeworkers were presumed to be skilled and proficient at data entry and were not given any data entry training by the Employer (Tr. pp. 101-104). The only training provided by the Employer dealt with showing the homeworkers how to log on to the Employer's Internet application and discussing mail handling procedures, which typically lasted only one to two hours (Tr. pp. 90, 101-104, 120, 121). The Employer did not provide any on-going training to the homeworkers after that (Tr. pp. 103, 104). A preponderance of the evidence of record does not establish that the Employer wanted the services performed in a particular method or manner. This factor shows an absence of control, and indicates an independent relationship.

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.

The evidence of record does not establish that the homeworkers were required to work any set number of hours by the Employer. The homeworkers

were free to work as much, or as little, as they wished (Tr. pp. 89, 99, 101, 116-119). The homeworkers were free to manage their time to work elsewhere, and free to work for other entities (Tr. pp. 101, 116-119; Bd. Exh. 6). This factor shows an absence of control, and indicates an independent relationship.

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.

The Employer did not furnish the homeworkers with tools or materials (Tr. pp. 105, 106). The homeworkers provided their own computer, Internet connection, and travel (Tr. p. 105). The only thing the Employer provided to the homeworkers was access to its Internet application (Tr. pp. 105, 106, 113-115). This factor shows an absence of control by the Employer, and indicates an independent relationship.

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.

The homeworkers were not reimbursed by the Employer for any business or travelling expenses in the course of their work (Tr. pp. 106, 107). This factor shows an absence of control by the Employer, and indicates an independent relationship.

The additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E), are equally appropriate for consideration in determining the relationship of the parties:

l. Availability to the 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.

The Employer did not prohibit the homeworkers from working for others, and at least some of the homeworkers, in fact, worked for others (Tr. pp. 101, 108, 109; Bd. Exh. 6). The "Homeworker Agreement" that the Employer entered into with the homeworkers states, in part: "[The homeworker] is not required to perform the described services exclusively for [the Employer], and may also perform any other work of [the homeworker's] choice" (Bd. Exh. 6). This factor shows an absence of control, and indicates an independent relationship.

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.

The homeworkers were paid on a piece rate basis, typically 10 cents per submission, and were not paid by the hour, week, or month (Tr. pp. 99, 110; Bd. Exh. 6). This factor shows an absence of control, and indicates an independent 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.

The record does not establish that the homeworkers were subject to any recurring liabilities or expenses connected with the work. As such, the homeworkers had no viable concerns of balancing receipts against expenditures. Therefore, this factor is neutral.

4. Obligation

An employee usually has the right to end his relationship with his employer at any time without incurring liability. 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.

The homeworkers were free to end the relationship with the Employer at any time without penalty (Tr. pp. 97, 98). This factor indicates an employment relationship.

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.

The evidence of record does not establish that either the Employer or the homeworkers made any real investment, much less a "significant" investment, "in facilities used" by the homeworkers in performing their services. This is because the nature of the services provided, data entry into an Internet application, does not require any such investment. Therefore, this factor is neutral.

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.

The "Homeworker Agreement" that the Employer entered into with the homeworkers states, in part: "[The homeworker] is not required to perform the described services exclusively for [the Employer], and may also perform any other work of [the homeworker's] choice" (Bd. Exh. 6). The Employer did not prohibit the homeworkers from working for others, and at least some of the homeworkers, in fact, worked for others (Tr. pp. 101, 108, 109; Bd. Exh. 6). The evidence of record does not establish that the Employer placed any limitations on where a homeworker may contract for their services. This factor shows an absence of control, and indicates an independent relationship.

The Arizona Court of Appeals, in the case of Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given its long

established liberal construction in an effort to include as many types of employment relationships as possible, when the Court stated:

> The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [*See* A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals, in the case of Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where the Court stated:

> The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation ... [Emphasis added].

In accord with the Employment Security Law of Arizona, we conclude that the evidence of independent contractor status far outweighs the evidence of employee status as to the homeworkers.

The homeworkers were not employees of the Employer, effective January 1, 2011. Rather, they performed services pursuant to an independent contractor relationship. We conclude that all payments to the homeworkers for their services did not constitute wages, by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD FINDS that the Employer established good cause for its nonappearance at the Appeals Board hearing scheduled for June 19, 2014.

THE APPEALS BOARD **REVERSES** the Department's Reconsidered Determination dated February 12, 2014.

From January 1, 2011 through December 31, 2011, services performed by individuals as homeworkers did not constitute employment, because the parties had an independent contractor relationship.

None of the remuneration paid to the homeworkers from January 1, 2011 through December 31, 2011, constituted wages.

DATED: 1/20/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

ROBERT NALL, Acting Member

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HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review 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 requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review 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 for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
2. cites the record, rules and other authority, and
3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 1/20/2015
to:

Er: ##### Acct. No: #####-000

(x) Er Rep: #####
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By: ____RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1444790-001-B

#####

STATE OF ARIZONA E S A TAX UNIT
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Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** April 24, 2015 *****.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for hearing from the Department's Reconsidered Determination issued on February 10, 2014, which affirmed the Determination of Liability for Employment or Wages issued on July 16, 2012. The Reconsidered Determination held that "services performed by individuals as counselors constitute employment and the remuneration paid for such services constitutes 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, which was originally convened on **May 1, 2014,** and was reconvened on **May 20, 2014,** before Appeals Board Administrative Law Judge Eric T. Schwarz. On those dates, all parties were given an opportunity to present evidence on the following issues:

1. Whether the services performed by individuals as counselors constituted employment effective January 1, 2010, as defined in A.R.S. § 23-615.
2. Whether the services performed by individuals as counselors are exempt or excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat the individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
3. Whether all forms of remuneration paid to individuals for services as counselors constitutes wages as defined in A.R.S. § 23-622.

On the scheduled dates of the hearing, one Employer witness appeared and testified. Counsel for the Department was present, and one witness for the Department appeared and testified. Board Exhibits 1 through 18 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer's company provided behavioral health services to clients through the services of its workers known as Behavioral Health Crisis Counselors [hereinafter "Counselors"] (Tr. pp. 20, 133, 134, 144-150; Bd. Exhs. 10, 12). The Counselors were required to comply with all of the requirements contained in the Employer's 29-page Crisis Services Agreement [hereinafter "CSA"] and the Employer's 80-plus-page Policies and Procedures [hereinafter "P&P"] (Tr. pp. 134, 135, 159, 160). The Employer ceased operations in March 2012 (Tr. p. 11).

2. The Counselors did not hire, supervise, or pay any assistants. The CSA states that the Counselors' "obligations under this Agreement may not be assigned or transferred to any other person, firm, or corporation without prior written consent of" the Employer (Bd. Exh. 10 p. 3). Each Counselor "was responsible for filling their own schedule" solely by contacting the Employer's other Counselors if he was unable to work a scheduled shift (Tr. p. 138).

3. The required instructions contained in the CSA included, but were not limited to, an 11-item list of what the Counselors' "crisis services will include", and the requirements that the Counselors "must furnish services that permit the [Employer] to comply with all applicable Medicare Conditions of Participation and Standards for contracted services for which [the Employer] is responsible" and "must meet the same standards for quality that [the Employer] would have to meet if services were provided by [the Employer]" (Bd. Exh. 10 pp. 1, 5). The P&P contained specific instructions that the Counselors were required to follow for providing such services identified as "Emergency Rooms Crisis Consult Protocol", "Protocol for Emergency Room Transfers to other providers", "Emergency Services", "Client Records", and "Admission Process and Delivery System" (Bd. Exh. 12 pp. 26-31, 41-43).

4. The CSA states, in part: "The assigned Clinical Care Coordinator is the direct supervisor to the COUNSELOR" [Emphasis in original] (Bd. Exh. 10 p. 18).

5. The Counselors were required to submit written reports to the Employer after every call they responded to on behalf of the Employer (Tr. pp. 149, 154, 177; Bd. Exhs. 10, 12). The Counselors primarily performed their services at locations other than the Employer's place of business (Tr. pp. 39, 40, 134, 173).

6. The Employer had the right to discharge the Counselors at any time and without any notice (Bd. Exh. 10 pp. 2, 3, 10, 17; Bd. Exh. 12 pp. 17-19). The P&P states that a Counselor "may be discharged 'at will' by the [Employer]" (Bd. Exh. 12 p. 17).

7. The Employer required the Counselors to commit to set hours of work every month, and those monthly schedules were set at least two weeks prior to the beginning of each month (Tr. pp. 137-140; Bd. Exh. 10 p. 2). Additionally, the Employer imposed discipline on the Counselors for failing to properly respond to calls from the Employer during their scheduled work hours, including placing Counselors on "probationary periods", dropping Counselors to "last in rotation" for scheduled weeks, or termination (Bd. Exh. 10 p. 17).

8. If a Counselor did not receive any calls from the Employer during a scheduled shift, then the Counselor would not be paid any money (Tr. pp. 141, 142). All full-time Counselors were required to work either Christmas or Thanksgiving every year (Tr. pp. 167, 168; Bd. Exh. 12 p. 23).

9. The Employer provided training to the Counselors during "orientation" and throughout the term of the working relationship between the Counselors and the Employer (Tr. pp. 161-163, 168-170; Bd. Exh. 10 pp. 16, 18; Bd. Exh. 12 pp. 8-16). Additionally, the Counselors were required by the Employer to attend mandatory meetings (Bd. Exh. 10 p. 18).

10. The Counselors could work either full-time or part-time for the Employer (Tr. p. 138; Bd. Exh. 10 p. 2). The Counselors were free to seek other employment when not working for the Employer (Tr. pp. 118, 119). The Counselors did not have independent businesses, but some of the Counselors were employees of other employers (Tr. pp. 61, 70).

11. The Counselors were generally paid 30% of the billable fees the Employer received from insurance companies for the services Counselors provided to clients (Tr. pp. 150, 151; Bd. Exh. 10 pp. 2, 23-29). If a client had no insurance and did not pay for the services, the Counselor received a flat fee from the Employer, while the Employer received nothing (Tr. p. 152).

12. The Counselors faced no meaningful expenses directly connected with the work, such as wages, rents, or other ongoing operating costs. The Counselors were subject to no significant recurring liabilities or obligations connected with the performance of the

work and, therefore, had no viable concerns of balancing receipts against expenditures.

13. The Counselors could terminate their working relationship with the Employer at any time without penalty (Tr. p. 120; Bd. Exh. 10 p. 2; Bd. Exh. 12 p. 17).

14. The Counselors did not make any significant investment to perform services for the Employer, other than maintaining their licenses. The Counselors were required to possess their licenses before they began performing services for the Employer. The Counselors provided their own vehicles for work, but those vehicles were also available for personal use (Tr. p. 117). The Employer did not provide any equipment for use by the Counselors (Tr. p. 117).

15. In the section entitled "Terminations", the Employer's P&P specifically states that Counselors are subject to "a layoff" when "a reduction in force is necessary or if one or more positions are eliminated" (Bd. Exh. 12 p. 18). Regarding "layoffs", the P&P also states that the Counselors have an "anniversary date" (Bd. Exh. 12 p. 18). Furthermore, the P&P specifically states that the Counselors may receive severance pay in the form of "one week pay ***for each year of employment with***" the Employer up to a maximum of four weeks [Emphasis added] (Bd. Exh. 12 p. 18).

16. The P&P states that Counselors "earn two (2) weeks of PTO per year" (Bd. Exh. 12 p. 22). PTO stands for "personal time off", and the Counselors do not actually "earn" PTO but are simply granted two weeks of unpaid PTO each year that they can use to request time off from their set schedules (Tr. pp. 164-167).

The Employer contends that the Counselors were independent contractors and not employees. The employment status of the Counselors and whether their pay constituted wages are in dispute in this case.

Arizona Revised Statutes § 23-615 defines "employment" as follows:

> "Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce, and includes:

1. An individual's entire service performed within or both within and without this state if:

(a) The service is localized in this state. ...

* * *

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

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, 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 provision of 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:

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 in pertinent part:

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 business person, 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.

* * *

To support its contention that the Counselors were independent contractors, the Employer provided a copy of the "Crisis Services Agreement" that the Counselors signed (Bd. Exh. 10). However, such a contract is not conclusive as to the nature of a work relationship, and we must look at the actual practice of the parties which supplemented the written agreement. *See* Arizona Department of Economic Security v. Employment Security Commission, 66 Ariz. 1, 182 P.2d 83 (1947). Therefore, we must analyze the circumstances of the Counselors.

The primary issue here is whether the services of the Counselors were excluded from the definition of "employee" by qualifying as an "independent contractor" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires application of the statutes and code provision cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Employer and the Counselors. We further consider the issues of control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

Under Arizona Administrative Code, Section R6-3-1723(A)(1), control includes the right to control as well as control in fact. Arizona Administrative Code, Section R6-3-1723(D)(2), identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any;

(b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor, enumerated in Arizona Administrative Code, Section R6-3-1723(E), are: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; and (6) whether the individual has simultaneous contracts with other persons or firms.

Applying the guidelines provided in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes the following:

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.

The Employer presented no evidence to establish that any of the Counselors hired, supervised, or paid their own assistants. Additionally, the CSA specifically states that Counselors' "obligations under this Agreement may not be assigned or transferred to any other person, firm, or corporation without prior written consent of" the Employer (Bd. Exh. 10 p. 3). Furthermore, at the Appeals Board hearing, the Employer admitted that each Counselor "was responsible for filling their own schedule", solely by contacting the Employer's other Counselors, if he was unable to work a scheduled shift (Tr. p. 138). This establishes that the Counselors were not able to simply send assistants in their place to cover assignments for the Employer. This factor shows control, and indicates an employment relationship.

b. Compliance with Instructions
Control is present when the individual is required to comply with instructions about when, where or 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.

At the Appeals Board hearing, the Employer admitted that the Counselors were required to comply with all of the requirements contained in the 29-page CSA and the 80-plus-page P&P (Tr. pp. 134, 135, 159, 160). On its face, it strains credulity for the Employer to contend that the Counselors were not required to comply with the Employer's instructions when the Counselors were bound by all of the requirements contained in over 100 pages of Employer-produced documents. The required instructions contained in the CSA included, but were not limited to, an 11-item list of what the Counselors' "crisis services will include", and the requirements that the Counselors "must furnish services that permit the [Employer] to comply with all applicable Medicare Conditions of Participation and Standards for contracted services for which [the Employer] is responsible" and "must meet the same standards for quality that [the Employer] would have to meet if services were provided by [the Employer]" (Bd. Exh. 10 pp. 1, 5).

Additionally, there were extensive, detailed, step-by-step instructions contained in the P&P that the Counselors were required to follow for providing such services identified as "Emergency Rooms Crisis Consult Protocol", "Protocol for Emergency Room Transfers to other providers", "Emergency Services", "Client Records", and "Admission Process and Delivery System" (Bd. Exh. 12 pp. 26-31, 41-43). Furthermore, the CSA specifically states: "The assigned Clinical Care Coordinator is the direct supervisor to the COUNSELOR" [Emphasis in original] (Bd. Exh. 10 p. 18). This factor shows control and the right to instruct or direct, and indicates an employment relationship.

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.

The Counselors were required to submit written reports to the Employer after every call they responded to on behalf of the Employer (Tr. pp. 149, 154, 177; Bd. Exhs. 10, 12). This factor shows control, and indicates an employment relationship.

d. Place of Work

The fact that work is performed off the Employer's 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.

The Counselors primarily performed their services at locations other than the Employer's place of business (Tr. pp. 39, 40, 134, 173). The work locations were based on necessity due to the nature of the Counselors' services. This factor suggests neither control nor lack of control, and is therefore considered neutral.

e. Personal Performance

> If the service must be rendered personally, this would tend to indicate that the employing unit is interested in the method of performance as well as the result and evidences concern as to who performs the job. Personal performance might not be indicative of control if the work is 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.

As set forth above, the Employer presented no evidence to establish that any of the Counselors hired, supervised, or paid their own assistants. Additionally, the CSA specifically states that Counselors' "obligations under this Agreement may not be assigned or transferred to any other person, firm, or corporation without prior written consent of" the Employer (Bd. Exh. 10 p. 3). Furthermore, at the Appeals Board hearing, the Employer admitted that each Counselor "was responsible for filling their own schedule" solely by contacting the Employer's other Counselors if he was unable to work a scheduled shift (Tr. p. 138). The evidence of record establishes that the Counselors were not able to hire a substitute without the Employer's knowledge or consent, and shows an expectation by the Employer that the work be performed personally by the Counselors as opposed to being assigned to a worker in the Counselors' employ. The Employer's expectation of personal performance shows control, and indicates an employment relationship.

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 routines and schedules of the employing unit.

The Counselors were professionals skilled in their jobs. However, for the reasons set forth in this decision regarding the factors in Arizona Administrative Code, Section R6-3-1723(D)(2)(b) and (h), a preponderance of the evidence of record establishes that the Counselors were not simply free to follow their own patterns of work and, instead, were required to follow routines and schedules of

the Employer. This factor shows control, and indicates an employment relationship.

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 Employer had the right to discharge the Counselors at any time and without any notice (Bd. Exh. 10 pp. 2, 3, 10, 17; Bd. Exh. 12 pp. 17-19). In fact, the P&P specifically states that a Counselor "may be discharged 'at will' by the" Employer (Bd. Exh. 12 p. 17). This is particularly damning for the Employer. The concept of "at will" is associated with employment relationships and not independent contractor relationships, and the Employer's inclusion of that term in the P&P further emphasizes the control the Employer exercised over the Counselors. Since the Counselors could not require advance notice that the relationship would end, they did not possess the rights an independent contractor would expect in a contractual relationship. This factor shows control, and indicates an employment relationship.

h. Set Hours of Work

The establishment of set hours of work by the employing unit is indicative of control. This condition bars the worker from being master of his own time, which is a right of the independent worker.

The Employer required the Counselors to commit to set hours of work every month, and those monthly schedules were set at least two weeks prior to the beginning of each month (Tr. pp. 137-140; Bd. Exh. 10 p. 2). Additionally, the Employer imposed discipline on the Counselors for failing to properly respond to calls from the Employer during their scheduled work hours, including placing Counselors on "probationary periods", dropping Counselors to "last in rotation" for scheduled weeks, or termination (Bd. Exh. 10 p. 17). Furthermore, the Employer admitted that if a Counselor did not receive any calls from the Employer during a scheduled shift, then the Counselors would not be paid any money (Tr. pp. 141, 142). Finally, all full-time Counselors were required to work either Christmas or Thanksgiving every year (Tr. pp. 167, 168; Bd. Exh. 12 p. 23).

The evidence of record establishes that the Counselors were not the masters of their own time. The Counselors were required to work set hours by the Employer and were entirely dependent upon the Employer providing them with calls during their scheduled shifts in order to earn any money. The Counselors were certainly unable to commit their scheduled shift times with the Employer to other work endeavors lest they be called by the Employer. This factor shows control, and indicates an employment relationship.

i. Training

Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, indicates control because it reflects that the Employer wants the services performed in a particular manner.

The Employer provided training to the Counselors during "orientation" and throughout the term of the working relationship between the Counselors and the Employer (Tr. pp. 161-163, 168-170; Bd. Exh. 10 pp. 16, 18; Bd. Exh. 12 pp. 8-16). Additionally, the Counselors were required by the Employer to attend mandatory meetings (Bd. Exh. 10 p. 18). This factor shows control, and indicates an employment relationship.

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.

The Counselors could work either full-time or part-time for the Employer (Tr. p. 138; Bd. Exh. 10 p. 2). As such an arrangement could be the same for either an employment or an independent relationship, this factor is neutral.

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.

The nature of the Employer's business did not generally require the Counselors or the Employer to furnish "tools" or "materials", as those terms are commonly defined. Therefore, this factor is neutral.

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.

The evidence of record does not establish that any expense reimbursement occurred. This factor shows an absence of control, and indicates an independent relationship.

The additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E), are equally appropriate for consideration in determining the relationship of the parties.

l. Availability to the 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.

The Counselors were free to seek other employment when not working for the Employer (Tr. pp. 118, 119). However, this circumstance does not indicate independence as it would hold true for any employment situation. The Department's witness testified that she found no evidence that any of the Counselors had independent businesses, but that some of the Counselors were employees of other employers (Tr. pp. 61, 70). The Employer presented insufficient credible evidence to refute that testimony. Additionally, although some of the Counselors performed other jobs as employees, the Employer presented insufficient credible evidence to establish that any of the Counselors had their own office or assistants, held a business license, advertised, or otherwise engaged in an independently established business. Based on the evidence of record, this factor indicates an employment relationship.

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.

Generally, the Counselors were paid 30% of the billable fees the Employer received from insurance companies for the services Counselors provided to clients (Tr. pp. 150, 151; Bd. Exh. 10 pp. 2, 23-29). If a client had no insurance and did not pay for the services, the Counselor received a flat fee from the Employer while the Employer received nothing (Tr. p. 152). While there is evidence to indicate that the fees collected were essentially based on hourly rates for various services rendered, the evidence of record weighs slightly in

favor of payment on a job basis and provides some indication of an independent 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.

The Counselors had no opportunity to realize a profit or a loss from the business. The Counselors faced no meaningful expenses directly connected with the work, such as wages, rents, or other ongoing operating costs. The Counselors were subject to no significant recurring liabilities or obligations connected with the performance of the work and, therefore, had no viable concerns of balancing receipts against expenditures. This factor shows control, and indicates an employment relationship.

4. Obligation
   An employee usually has the right to end his relationship with his employer at any time without incurring liability. An independent worker usually agrees to complete a specific job.

The Counselors could terminate their working relationship with the Employer at any time without penalty (Tr. p. 120; Bd. Exh. 10 p. 2; Bd. Exh. 12 p. 17). The lack of liquidated penalties for non-completion indicates an employment relationship.

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.

The evidence of record does not establish that the Counselors made any significant investment to perform services for the Employer, other than maintaining their licenses. We note that the Counselors were required to possess their licenses before they began performing services for the Employer, and there

was no evidence presented regarding any costs associated with maintaining those licenses. The Counselors provided their own vehicles for work, but those vehicles were also available for personal use (Tr. p. 117). The Employer did not provide any equipment for use by the Counselors, and the work performed by the Counselors was done almost exclusively at premises not owned or rented by the Employer or the Counselors (Tr. pp. 39, 40, 117, 134, 173). As neither the Counselors nor the Employer made a significant investment in facilities used by the Counselors, this factor is neutral.

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.

As previously discussed regarding Arizona Administrative Code, Section R6-3-1723(E)(1), the evidence of record does not establish that the Counselors had contracts with other companies for their services, although some appear to have been employees of other companies. This factor indicates an employment relationship.

Although the 18 factors set forth in Arizona Administrative Code, Section R6-3-1723(D)(2) and (E), strongly weigh in favor of employment on their own, pursuant to Arizona Administrative Code, Section R6-3-1723(F), there may be other factors not specifically identified in the rule that should be considered. We find one such factor to be the role of the Counselors within the Employer's business model. The Employer's business consists of providing behavioral health counselling services to clients. The services provided by Counselors are not ancillary to the services offered by the Employer, but rather their services constitute a vital and substantial component of the Employer's services. This degree of reliance upon the services of the Counselors indicates an employment relationship.

The Board also finds significant a number of provisions included by the Employer in its P&P. In the section entitled "Terminations", the Employer's P&P specifically states that Counselors are subject to "a layoff" when "a reduction in force is necessary or if one or more positions are eliminated" (Bd. Exh. 12 p. 18). Regarding "layoffs", inexplicably the P&P also states that the Counselors have an "anniversary date" (Bd. Exh. 12 p. 18). Furthermore, the P&P specifically states that the Counselors may receive severance pay in the form of "one week pay ***for each year of employment with***" the Employer up to a maximum of four weeks [Emphasis added] (Bd. Exh. 12 p. 18). In addition to

the obvious reference by the Employer to the Counselors' years "of employment with" the Employer, all of these factors indicate an employment relationship.

Finally, in a section entitled "Vacation Leave & Holiday Pay", the P&P states that Counselors "earn two (2) weeks of PTO per year" (Bd. Exh. 12 p. 22). At the Appeals Board hearing, the Employer testified that PTO stands for "personal time off" and that Counselors do not actually "earn" PTO but are simply granted 2 weeks of unpaid PTO each year that they can use to request time off from their set schedules (Tr. pp. 164-167). The fact that Counselors were required to request time off from the Employer, and were limited by the Employer as to how much time they could take off, is anathema to the concept of an independent contractor relationship and indicates control by the Employer and employment.

The Arizona Court of Appeals, in the case of Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given its long established liberal construction in an effort to include as many types of employment relationships as possible, when the Court stated:

> The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [*See* A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals, in the case of Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where the Court stated:

> The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation ... [Emphasis added].

In accord with the liberal interpretation required by the Employment Security Law of Arizona, we conclude that the evidence of employee status far outweighs the evidence of independent contractor status.

The Counselors were employees of the Employer, effective January 1, 2010. We conclude all payments to the Counselors for their services constituted wages, by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **AFFIRMS** the Reconsidered Determination dated February 10, 2014.

From January 1, 2010 through December 31, 2011, services performed by individuals as Counselors constituted employment.

All forms of remuneration paid to these individuals for such services constituted wages.

DATED: 3/25/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review 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 requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review 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 for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:

1. explains why the Appeals Board decision is wrong,
2. cites the record, rules and other authority, and
3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 3/25/2015
to:

(x) Er: ##### Acct. No: #####

(x) ELI D GOLOB
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(x) LULU GUSS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
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By: __RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1437870-001-B

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STATE OF ARIZONA E S A TAX UNIT
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Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

March 25, 2015 ***.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination issued on November 18, 2013, which affirmed the October 18, 2013 Determination of Unemployment Insurance Liability, and held that the Employer (hereinafter "TMS") was properly determined to have acquired or succeeded the organization, trade, or business of the predecessor #### and that the experience rating account of ####. was properly transferred to "TMS".

The petition for a hearing having been timely filed, the Appeals Board has jurisdiction in this matter under A.R.S. § 23-733(B).

THE APPEALS BOARD scheduled a telephone hearing for October 21, 2014, before Appeals Board Administrative Law Judge **Denise C. Sanchez**. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer was properly determined liable for Arizona Unemployment Insurance Taxes pursuant to A.R.S. § 23-613.

2. Whether the Employer's experience rating account was properly assigned a tax rate of "5.0" percent for coverage beginning August 19, 2013.

On the scheduled date of the hearing, two Employer witnesses appeared and testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 8 were admitted into evidence. We have carefully reviewed the record.

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

1. On August 16, 2013, Employer "TMS", a corporation, entered into a Private Sale Agreement for the acquisition of inventory, accounts and equipment of ####. (Bd. Exhs. 3B-3I).

2. Per the Private Sale Agreement, "TMS" acquired property belonging to ####, 36, 40- 42).

3. ####, an architectural sheet metal company, ceased operating its business on August 18, 2013. On August 19, 2013, "TMS" began its operation in the same trade (Tr. pp. 32, 40).

4. Prior to ceasing operations, #### had 56 employees on its payroll (Bd. Exh. 4A). On August 19, 2013, "TMS" hired 44 out of the 56 #### employees to continue operating the business (Tr. pp. 14, 15, 31, 32).

5. Initially, "TMS" used the same building facilities as ####. Unable to reach a leasing agreement with

the landlord, "TMS" moved out of the building after 22 days (Tr. p. 33, 34, 39).

6. At the time of acquisition, #### had approximately three or four projects that were unfinished. "TMS" approached those customers and negotiated new contracts to complete the outstanding projects (Tr. pp. 14, 34, 35).

7. On October 18, 2013, the Department issued a Determination of Unemployment Insurance Liability that held "TMS" was a successor to a liable employer. The determination also held that "TMS'" tax rate was based on its predecessor's experience rating (Bd. Exh. 2).

8. Following a request for reconsideration filed by "TMS" on November 4, 2013, the Department issued its Reconsidered Determination on November 18, 2013 (Bd. Exhs. 3A, 6A-6C). The Reconsidered Determination affirmed the October 18, 2013 Determination of Unemployment Insurance Liability, and held that "TMS" had "... succeeded to or acquired the organization, trade or business, or substantially all of the assets of ####, that the experience rating account of #### was properly transferred to TMS; and that TMS is equally liable for the Unemployment Insurance indebtedness of ####" (Bd. Exh. 6C).

9. On December 16, 2013, "TMS" filed a petition for hearing disputing the determinations. "TMS" also requested a waiver of liability (Bd. Exh. 7A).

Arizona Revised Statutes § 23-733, provides in pertinent part:

Transfer of employer experience rating accounts to successor employer; liability of successor

A. When any employing unit <u>in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets thereof</u>, excepting any assets retained by such employer incident to the liquidation of his obligations, whether or not such acquiring employing unit was an employer within the meaning of section 23-613, prior to such

acquisition, and continues such organization, trade or business, the account of the predecessor employer shall be transferred as of the date of acquisition to the successor employer for the purpose of rate determination [Emphasis added].

B. ... The predecessor and successor employers shall be promptly notified of the determination made upon the application which shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the parties files with the department a written request for reconsideration. When timely request for reconsideration is filed, a reconsidered determination shall be made. The reconsidered determination shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the employing units involved files with the department a written petition for hearing. When timely petition for hearing is filed, the parties shall be afforded an opportunity for hearing and thereafter furnished with a decision. The decision shall become final unless a petition for review is filed as provided in section 23-672.

C. If the successor employer was an employer subject to this chapter prior to the date of acquisition of an organization, trade or business, or substantially all of the assets thereof, his rate of contributions for the remainder of the calendar year in which the acquisition occurred shall be his rate as previously assigned for the calendar year in which the acquisition occurred. ...

* * *

D. Any individual or organization, including the types of organizations described in section 23-614, whether or not an employing unit, which in any manner acquires the organization, trade or business, or substantially all of the assets thereof, shall be liable, in an amount not to exceed the

reasonable value, as determined by the department, of the organization, trade, business or assets acquired, for any contributions, interest and penalties due or accrued and unpaid by such predecessor employer, except that the department may waive the successor's liability for such unpaid amounts if a determination that the predecessor was subject to this chapter had not been made as provided in section 23-724 prior to the date of acquisition, and such liability on the part of the successor would be against equity and good conscience.

Arizona Administrative Code, Section R6-3-1703(C), provides as follows:

C. Report of changes. Each employer as defined in A.R.S. § 23-613 shall promptly notify the Department in writing of any change in its business operations. Changes include: the acquisition or disposal of all or any part of the business operations or assets; a change in business name or address; bankruptcy or receivership; or any other change pertaining to the operation or ownership of the business operations. The notification shall include the date of change, and the name, address, and telephone number of the person, firm, corporation or official placed in charge of the organization, trade or assets of the business.

Arizona Administrative Code, Section R6-3-1713, provides in pertinent part as follows:

A. General

1. The manner in which an organization, trade or business is acquired or succeeded to is not determinative of successor status. Business may be acquired or succeeded to "in any manner" which includes, but is not limited to, acquisition by purchase, lease, repossession, bankruptcy proceedings, default, or through the transfer of a third party.

2. An "organization, trade or business" as used in A.R.S. §§ 23-613 and 23-733(A) through

(D) is acquired if the factors of an employer's organization, trade or business succeeded to are sufficient to constitute an entire existing operating business unit as distinguished from the acquisition of merely dry assets from which a new business may be built. The question of whether an organization, trade or business is acquired is determined from all the factors of the particular case. Among the factors to be considered are:

a. The place of business

b. The trade name

c. The staff of employees

d. The customers

e. The goodwill

f. The inventory

g. The accounts receivable/accounts payable

h. The tools and fixtures

i. Other assets.

3. For the purpose of determining successorship status under A.R.S. §§ 23-613(A)(3) and 23-733(A) or (B), an individual or employing unit who in any manner acquires or succeeds to all or a part of an organization, trade or business from an employer as defined in A.R.S. § 23-613 shall be deemed the successor employer provided the organization, trade or business is continued. Continuation of the organization, trade or business shall be presumed if the normal business activity was not interrupted for more than 30 days before or after the date of transfer. ... [Emphasis added].

B. Special provisions

1. An individual or employing unit shall be determined a successor under the provisions of A.R.S. § 23-733(A) and receive the experience rating account of the predecessor when the organization, trade or business acquired or succeeded to constitutes all of the predecessor's employment generating enterprise upon which the experience rating account was primarily established without regard to those factors retained by the predecessor which represent:

   a. Exempt employment; or

   b. Employment necessary for the liquidation of the trade or business; or

   c. Employment arising from the activities establishing another trade or business; or

   d. Employment as a result of an organization, trade or business succeeded to or acquired within two calendar days of the date of transfer of the enterprise upon which the experience rating account is based.

   * * *

C. Transfer of entire business

1. When the Department determines that an individual or employing unit is a successor and shall inherit the experience rating account of the predecessor as provided in A.R.S. § 23-733(A), the determination shall be subject to the same provisions as determinations made in accordance with A.R.S. § 23-724.

2. When the experience rating account is transferred to the successor, the successor's account shall be charged with benefits

determined chargeable as a result of the employment in the organization, trade or business acquired, and the successor's contribution rate shall be determined in accordance with A.R.S. § 23-733(C) for the calendar year beginning on the date of acquisition.

* * *

E. Liability for predecessor's debt

1. Notwithstanding subsections (A) and (B) above, when an individual or employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets of an employer as defined in A.R.S. § 23-613, the successor shall be equally liable along with the predecessor for the contributions, interest and penalties due or accrued and unpaid by the predecessor as provided in A.R.S. § 23-733(D).

Here, the only issue to be resolved is whether "TMS" was properly determined to be a successor employer, causing the experience rating account of #### to be transferred to "TMS". The evidence establishes that despite acquiring the business through a third-party lender, the transfer of ####'s business to "TMS" was of substantially all the assets of a liable employer. Analysis of the factors constituting acquisition or transfer of a business clearly supports this conclusion.

The tests for successor transition are set forth in A.R.S. § 23-733(A), and are supplemented by implementation factors in Arizona Administrative Code, Section R6-3-1713, and by case law including *Levy v. Arizona Department of Economic Security*, 132 Ariz. 1, 643 P.2d 704 (1982). Specifically, other factors that are considered in determining if a business has been acquired or succeeded to include the continuity of management, ownership, employees, or procedures; change of identity, capacity to continue a similar business; and interruption of the business during the transfer.

We conclude that there was a continuity of ownership and management between the two corporations. Both corporations operated in the architectural sheet metal trade. The business continued operating without interruption after the acquisition date.

We also conclude that "TMS" acquired substantially all of the assets previously held by ####. Included in the acquisition was the temporary use of the place of business, 44 out of 56 employees, customers, unfinished projects, goodwill, tools, and fixtures. These factors support a finding consistent with successorship because "TMS" continued the business that the predecessor, ####, had operated.

Therefore, we find that the transfer of ####' experience rating account to "TMS" is required. We conclude "TMS" has not presented sufficient evidence to refute the Department's finding of successor status. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's Reconsidered Determination dated November 18, 2013, regarding the successor status of the Employer.

The experience rating account of #### was properly transferred to "TMS".

DATED: 2/23/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

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HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
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D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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(x) LULU B GUSS
CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028
SITE CODE 911B

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1435179-001-B

#####

STATE OF ARIZONA E S A TAX UNIT
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Employer

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.

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** March 16, 2015 *****.

DECISION
DISMISSED

THE **EMPLOYER,** through counsel, 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].

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

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

DATED: 2/12/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

ROBERT NALL, Acting Member

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
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D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 2/12/2015
to:

Er: ##### Acct. No: #####-000

(x) #####

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(x) LULU B GUSS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
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PHOENIX, AZ 85005-6028

By: ___RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1435170-001-B

#####

STATE OF ARIZONA E S A TAX UNIT
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Employer

Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

February 5, 2015 ***.

DECISION
DISMISSED

THE **EMPLOYER** 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).

At the December 9, 2014 Appeals Board hearing, following a prehearing conference, the Employer requested to withdraw its petition.

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

THE APPEALS BOARD **DISMISSES** the petition. The scheduled hearing is cancelled.

This decision does not affect any agreement entered into between the Employer and the Department.

DATED: 1/6/2015

APPEALS BOARD

Gary R. Blanton

GARY R. BLANTON, Chairman

Janet L. Feltz

JANET L. FELTZ, Member

Eric T. Schwarz

ERIC T. SCHWARZ, 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.

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

A copy of the foregoing was mailed on 1/6/2015 to:

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Acct. No: #####-000

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SITE CODE 040A

(x) LULU GUSS
CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
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SITE CODE 911B

By: ___RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1416761-001-B

#####

STATE OF ARIZONA E S A TAX UNIT
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Employer

Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

March 16, 2015 ***.

DECISION
DISMISSED

THE **EMPLOYER**, through counsel, 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).

THE APPEALS BOARD FINDS there is no reason to withhold granting 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 Employer and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 2/13/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

MORRIS L. WILLIAMS III, Acting Member

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.

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(x) LULU GUSS, CHIEF OF TAX
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PHOENIX, AZ 85005-6028

By: __RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1413601-001-BR

#####

STATE OF ARIZONA E S A TAX UNIT
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Employer

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS --- 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 SOBRE SUS BENEFICIOS --- 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 OF APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes § 41-1993, the last date to file an Application for Appeal is ***** March 30, 2015 *****.

DECISION
AFFIRMED UPON REVIEW

THE **EMPLOYER**, through counsel, requests review of the Appeals Board decision issued on May 14, 2014, which affirmed the Reconsidered Determination issued on April 3, 2013, and held:

> From January 1, 2010 through March 31, 2012, services performed by individuals as technicians constituted employment.
>
> All forms of remuneration paid to these individuals for such services constituted wages.

The request was filed on time, and the Appeals Board has jurisdiction in this matter under A.R.S. § 23-672(F).

In the request for review, the Employer, through counsel, contends that the Board "failed to rule" on three separate "issues" it describes as "Tax Rate", "Interest", and "Penalty". The Board is at a loss to understand these contentions. The Board did not "rule" on these issues because they are not before the Board at this time. That is why these issues were not included in the Notice of Appeals Board Telephone Hearing (Bd. Exh. 8), and why no attempt was made to develop a record regarding these issues at the Appeals Board hearing.

The Employer also contends that it was denied due process simply because the Board's prior decision did not specifically discuss every "factor" set forth in Arizona Administrative Code, Section 6-3-1723(D)(2) and (E). The Employer cites no legal authority to support this contention, and we find no basis in the record to support the Employer's contention that due process of law was denied.

The United States Supreme Court has stated that the fundamental requirement of due process is the "opportunity to be heard at a meaningful time and in a meaningful manner". Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed. 2d 18 (1976). Inherent in that fundamental requirement is the right to a hearing and notice of the issues to be addressed. There is no specific requirement, however, that a decision rendered after the hearing be issued in any particular manner so long as the basic requirements of the right to present evidence, cross-examine witnesses, and have an impartial administrative law judge are satisfied. The essential elements of due process were observed. The Employer was given the opportunity to be heard before an impartial administrative law judge, and the opportunity to respond to any allegations, rebut any unfavorable testimony, cross-examine witnesses, and object to the admission of documentary or other evidence.

Under A.R.S. § 23-672, the Appeals Board is a legislatively constructed component of the Department. The legislature has directed, in A.R.S. § 23-724, that the Board's duties include entertaining appeals of reconsidered liability determinations. The Board has acted in accordance with its statutorily prescribed duties.

In a related contention, the Employer contends that the "Board must reveal the weighing process" regarding every factor set forth in Arizona Administrative Code, Section 6-3-1723(D)(2) and (E), "[o]therwise, it is impossible to know how best to exercise one's right to challenge the decision." Again, the Employer cites no legal authority to support this contention, and it is without merit. It seems self-evident that the best way to challenge the Board's prior decision would be to actually address, and to attempt to refute, the Board's analysis

contained in that decision. In this case, however, the Employer's request for review is silent regarding the clear and explicit reasoning and conclusions set forth by the Board.

The primary basis for the Board's prior decision is quite simple. The Employer's owner freely admits, and the Employer's Technician Handbook confirms, that the technicians are prohibited from working with any other garage door repair company while they are working for the Employer (Feb. 19, 2014 Tr. pp. 108, 116, 123, 124; Bd. Exh. 11, p. 4). The Board concluded that it is not possible for a technician to be classified as an "independent contractor", rather than an "employee", when the Employer prohibits the technicians from providing their services to any other business. As clearly expressed in the Board's prior decision:

> The hallmark of being an "independent contractor" is the ability to perform one's particularized services for multiple businesses simultaneously. Here, the Employer's own testimony, and the Employer's own Technician Handbook, establish that the technicians are entirely *dependent* on the Employer. The Employer has absolute control over the technicians' ability to perform their services, as they are prohibited from providing those services to anyone other than the Employer. No serious argument can be made that the technicians are "independent contractors" in any sense of that term, given the control the Employer has over the technicians' ability to ply their services.

In the request for review, the Employer has not even attempted to refute this position. The Employer has not offered a single legal argument, or even an explanation, for how it believes a worker who is prohibited by a business from providing services to any other businesses can actually be an "independent contractor" for Unemployment Insurance Tax purposes. The only logical explanation for the Employer's failure to specifically address this key question is that the Employer recognizes that there is no valid argument to make to the contrary.

Therefore, instead of addressing the Board's reasoning head on, the Employer's only attack against the Board's reliance on the "non-compete" stranglehold that the Employer has on the technicians is to contend that the Board's prior decision "assigned 'dispositive' weight to a factor that was not enumerated" in Arizona Administrative Code, Section 6-3-1723(D)(2) and (E), and to contend that "[n]othing in the Board's regulations allows the Board to assign dispositive weight to a factor nowhere mentioned in the regulations . . . ." These contentions fail.

First, the undisputed fact that the Employer prohibits the technicians from providing their services to any other garage door repair companies while they are working for the Employer clearly falls under at least two of what the Employer refers to as the "enumerated" factors: Arizona Administrative Code, Section 6-3-1723(E)(1) "Availability to public" and Arizona Administrative Code, Section 6-3-1723(E)(6) "Simultaneous contracts". Second, the Employer's implication that the factors "enumerated" in Arizona Administrative Code, Section 6-3-1723(D)(2) and (E), are an all-inclusive list and sacrosanct is contrary to the law.

Arizona Administrative Code, Section 6-3-1723(F), provides in pertinent part as follows:

> ...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 situations, *while there may be other factors not specifically identified herein that should be considered*.** [Emphasis added]

Contrary to the Employer's contention, Code Section 6-3-1723(F) clearly allows for "factors" not specifically "enumerated" in Arizona Administrative Code, Section 6-3-1723(D)(2) and (E), to be considered.

We note that, in the request for review, the Employer makes a passing reference to the fact that the Board set forth three additional reasons, other than the "non-compete" reason, for why the Board found the technicians to be employees rather than independent contractors. The Employer wrote: "Here, all of the indicia that the Board's Decision relied upon (non-compete, uniform shirts, [Employer] advertisements on trucks, and on-call for one day per week) are mere indicia of a **generalized control** by [the Employer] . . . ." [Emphasis in original] However, the Employer fails to mention "uniform shirts, [Employer] advertisements on trucks, and on-call for one day per week" again, fails to dispute the Board's finding of their existence, and fails to set forth any argument regarding how the Board erred in any way by relying on those factors.

Furthermore, the Employer's use of the term "generalized control" is puzzling. The Employer attempted to contrast that with yet another term it invented, "specialized control". The Employer uses these terms as if they were terms of art with some special, recognized meaning. They are not. The Employer does not define the terms, and cites no legal authority to support its use of these terms. The Employer has failed to establish any validity or applicability of these manufactured terms to the case at hand.

Finally, the Employer contends that, even if the technicians are not "independent contractors", they should be considered to be "agents" and not "employees". This is the first time in these proceedings that the Employer has raised this argument, and it is without merit. From the request for review, we infer that the Employer is referring to language contained in Arizona Revised Statutes § 23-613.01(A)(1) and Arizona Administrative Code, Section R6-3-1723(B)(1).

Arizona Revised Statutes § 23-613.01(A)(1) states:

> 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.

Arizona Administrative Code, Section R6-3-1723(B)(1), states:

> 1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, 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.

First, the Employer misstates the law. In the request for review, the Employer contends that the "exception" contained in the statute and rule applies to "agents working in a capacity characteristic of an independent profession, trade, skill, or occupation." In fact, neither the statute nor the rule states that. Second, it is immaterial in any event.

It is instructive to note that Arizona Revised Statutes § 23-613.01(A)(1) clearly emphasizes the word "independent". Additionally, Arizona Administrative Code, Section R6-3-1723(B)(1), which closely mirrors yet expands on the language contained in Arizona Revised Statutes § 23-613.01(A)(1), uses the term "independent" five times in its first sentence, and the term "independence" in its second sentence. This perfectly illustrates the crucial issue in this case, which is whether the technicians were truly "independent" of the Employer. As explained in the Board's prior decision, the technicians are not "independent" in any sense of that term. The technicians are not independent contractors, they are not independent business persons, they are not independent agents, they are not independent consultants, and they do not perform services in a capacity characteristic of an independent profession, trade, skill or occupation.

The Employer has yet to specifically address the Board's reasoning in the Board's prior decision. The Employer has failed to make a persuasive argument for how these technicians can be considered "independent" when they are prohibited from working for any other garage door repair companies while they work for the Employer, while they are required to wear uniform shirts bearing the Employer's logo (and required to pay for the shirts), while they are required to drive vehicles bearing the Employer's logo (and required to pay for the advertisements), and while they are required to be "on call" for the Employer one night per week.

The Employer has presented nothing in its request for review that would cause the Board to reconsider its prior decision. The undisputed facts and reasoning set forth in the Board's prior decision so overwhelmingly establish an employment relationship that it is not possible to conceive of any constellation of the other factors that could overcome them and result in finding an independent contractor relationship.

The hallmark of being an "independent contractor" is the ability to perform one's particularized services for multiple businesses simultaneously. Here, the technicians are entirely *dependent* on the Employer for their livelihood. The Employer has absolute control over the technicians' ability to perform their services, as they are prohibited from providing those services to any business other than the Employer. The technicians are not "independent" in any sense of that term, given the control the Employer has over the technicians' ability to ply their services.

Additionally, the fact that the technicians are required to be walking, driving advertisements for the Employer, and that they must pay for that privilege out of their own pockets, further demonstrates the extensive control the Employer exercises over the technicians. A true independent contractor would be free to market his own services, not to advertise or market for another. Likewise, the fact that the technicians are required to be "on call" to service the Employer's customers one night per week until midnight is anathema to the concept of being an independent contractor. A true independent contractor is the master of his own time, while an employee is subject to the scheduling controls of his employer such as mandated weekly late night "on call" duty.

In arriving at the prior decision, the Appeals Board applied the appropriate law, A.R.S. §§ 23-724(B), 23-615, 23-613.01, and 23-622(A), as well as Arizona Administrative Code, Section R6-3-1723, and case law, to the facts in this case and found the services performed by individuals as technicians constitute employment, remuneration paid to such individuals by the Employer constitutes wages, and the Employer is liable for Arizona Unemployment Insurance taxes on wages for the quarters ending March 31, 2010 through March 31, 2012.

The Board thoroughly examined the factors established by the facts in this case, and considered the relevant law and administrative rules as they are applicable to those facts. The Board has considered the evidence as it relates to the factors set out in Arizona Administrative Code, Subsections R6-3-1723(D) and (E). In reaching its decision, the Board is mindful of the holdings in Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), and Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975) which provide for a liberal interpretation of the Arizona Employment Security Act. The Board concludes that the weight of the evidence establishes that the services performed by technicians constituted employment of these individuals by the Employer.

The Board's prior decision is fully supported by the greater weight of the credible and probative evidence of record.

THE APPEALS BOARD FINDS that:

1. The **EMPLOYER** has not submitted any newly discovered material evidence which, with reasonable diligence, could not have been discovered and produced at the time of any hearing;

2. There was no prejudicial irregularity in the administrative proceedings on the part of the Department. Specifically, there was no material or prejudicial error in the admission or exclusion of evidence and no prejudicial errors of law were made at any hearing or during the progress of this matter;

3. There was no accident or surprise in the proceedings which could not have been prevented by ordinary diligence;

4. The Appeals Board's decision involved no abuse of discretion depriving any party of a full and fair hearing, and it was supported by the greater weight of the credible evidence and by applicable law;

5. All interested parties were notified of the filing of the request for review, and were allowed at least 15 days in which to respond. Accordingly,

THE APPEALS BOARD **AFFIRMS** its decision, there having been established no good and sufficient grounds which would cause us to reverse or modify that decision, or to order the taking of additional evidence.

DATED: 2/27/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, 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 on review 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 on filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

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

> C. Any party aggrieved by a decision on review 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 of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review 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 of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review 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.
>
> 4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request

for review under section 23-672 or 41-1992 and a decision on review has been issued.

A copy of the foregoing was mailed on 2/27/2015 to:

Er: ##### Acct. No: #####-000

(x) Er Rep: #####

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) LULU GUSS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: ___RR_____
For The Appeals Board

2nd QUARTER OF
CALENDAR YEAR 2015

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1424451-001-BR

XXXX

STATE OF ARIZONA E S A TAX UNIT
% ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
PHOENIX, AZ 85007-2926

Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

July 2, 2015 ***.

DECISION
SET ASIDE UPON REVIEW (Appeals Board No. T-1424451-001-B)
SET ASIDE AND REMANDED (Department's decision letter dated September 5, 2013)

THE **EMPLOYER**, through counsel, requests review of the Appeals Board decision issued on July 10, 2014, which dismissed the Employer's petition for hearing because the Employer failed to appear at the Appeals Board hearing scheduled for July 8, 2014. The Appeals Board decision held that the Department's "September 5, 2013 Decision Letter remains in full force and effect." Employer's counsel also requests reopening of the July 8, 2014 Appeals Board hearing.

The request having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-672(F).

THE APPEALS BOARD scheduled a hearing, which was convened on March 31, 2015**,** before Appeals Board Administrative Law Judge **DENISE C. SANCHEZ**. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer had good cause for its nonappearance at the July 8, 2014 Appeals Board hearing.

2. Whether the Employer filed a timely appeal for reassessment by the Department.

3. Whether the Notice of Estimated Assessment for Delinquent Reports became final during the interim period before the Employer filed an appeal for reassessment.

On the date of the scheduled hearing counsel for the Employer appeared and testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 18 were admitted into evidence. We have carefully reviewed the record.

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

1. On January 15, 2013, the Department issued by certified mail, a Notice of Estimated Assessment for Delinquent Reports to the Employer's address of record (Tr. pp. 26, 27; Exhs. 3, 4). The notice printed by the Department on January 15, 2013, contains an incomplete private mailbox number (PMB) for the Employer (Tr. p. 68; Bd. Exhs. 3, 18).

2. The Employer filed a Report of Changes form, dated January 27, 2013, to notify the Department that the Employer's business had ceased paying wages to its employees as of August 2011 (Tr. pp. 66, 67, 70; Bd. Exh. 18). Written on the Report of Changes form, the Employer printed its address in Scottsdale, Arizona with the suite number "105-14" (Bd. Exh. 18).

3. On June 12, 2013, the Employer, through counsel, filed an appeal from the Department's "tax assessment". Counsel did not explain the reason for its late appeal (Bd. Exhs. 5A, 5B).

4. On September 5, 2013, the Department issued a decision letter that found counsel's "letter requesting an appeal was received on June 12, 2013, which is approximately 133 days past the deadline for the appeal to be considered timely. Consequently, the Notice must be held to be final and binding on [the Employer]" (Bd. Exh. 6B).

5. On October 4, 2013, Employer's counsel filed a timely petition for a hearing before the Appeals Board (Bd. Exhs. 7A-7C).

6. On April 17, 2014, a Notice of Appeals Board Telephone Hearing was issued to the parties setting a hearing date and time for July 8, 2014, at 9:00 a.m. (Bd. Exhs. 8A-8G). Employer's counsel did not receive the notice (Tr. pp. 13-15).

7. On June 25, 2014, in preparation for the July 8, 2014 Appeals Board hearing, counsel for the Department submitted additional documents to both the Appeals Board and Employer's counsel for consideration as evidence (Bd. Exhs. 9A-9P).

8. Employer's counsel received the Department's additional documents, but counsel assumed the documents were further discovery prior to the Appeals Board scheduling the hearing. Counsel did not take any action to determine whether a hearing had been scheduled by the Appeals Board (Tr. p. 16).

9. On July 8, 2014, the date of the Appeals Board hearing, counsel for the Department and a Department witness were present. The Employer did not appear at the hearing.

10. On July 10, 2014, the Appeals Board issued a decision dismissing the Employer's petition for hearing because the Employer failed to appear at

the July 8, 2014 Appeals Board hearing (Bd. Exh. 10).

11. On August 11, 2014, Employer's counsel filed a timely request for review of the July 10, 2014 Appeals Board decision (Bd. Exh. 11). Counsel also requested reopening of the July 8, 2014 Appeals Board hearing.

The initial issue to be addressed by the Appeals Board is whether the Employer established good cause for its nonappearance at the July 8, 2014 Appeals Board hearing.

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

> The department of economic security shall adopt rules to set standards under which a party may be excused for failure to attend a hearing for good cause.

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

> B. Appeal Tribunal hearings
>
> 1. Manner of holding hearings. The Appeal Tribunal shall conduct all hearings in accordance with A.R.S. § 23-674, in a manner that will ascertain the substantial rights of the persons involved. The Appeal Tribunal shall require all testimony to be taken under oath or affirmation.
>
> * * *
>
> 3. Failure of a party to appear
>
> a. If there is no appearance on behalf of an interested party at a scheduled hearing, the Appeal Tribunal may:
>
> i. Adjourn the hearing to a later date; or
>
> ii. Proceed to review the evidence of record and other admissible evidence as may be presented at

the scheduled hearing, and make a disposition or decision on the merits of the case.

b. If a decision is issued adverse to any party that failed to appear at a scheduled hearing, that party may file 1 written request for a hearing to determine whether good cause exists to reopen the hearing. The request to reopen shall be filed within 15 calendar days of the mailing date of the decision or disposition and shall list the reasons for the failure to appear.

c. The Appeal Tribunal shall hold a hearing to determine whether there was good cause for the failure to appear and, in the discretion of the hearing officer, to review the merits of the case. Upon a finding of good cause for failure to appear at the scheduled hearing, the disposition or decision on the merits shall be vacated and the case rescheduled for hearing under R6-3-1502, unless the hearing on the merits is held concurrently with the good cause hearing.

d. Good cause warranting reopening of a case shall be established upon proof that both the failure to appear and failure to timely notify the hearing officer were beyond the reasonable control of the nonappearing party.

At the March 31, 2015 Appeals Board hearing, Employer's counsel testified that his office did not receive the April 17, 2014 Notice of Appeals Board Telephone Hearing packet. Employer's counsel testified that once a notice is received by his office, the hearing date is notated into two separate calendars within the office. However, because he did not receive the April 17, 2014 Notice of Appeals Board Telephone Hearing packet he was unaware that a hearing was scheduled for July 8, 2014 (Tr. pp. 13-15; Bd. Exh. 8). There is no credible evidence in the record to refute counsel's testimony.

Under Arizona Administrative Code, Section R6-3-1503(B)(3)(d), good cause warranting the reopening of a case shall be established when both the failure to appear, and the failure to timely notify the hearing officer, were beyond the reasonable control of the nonappearing party. Here, Employer's counsel was unaware of the scheduled July 8, 2014 Appeals Board hearing and, therefore, the Employer's failure to appear at that hearing, and its failure to timely notify the hearing officer of its nonappearance, was beyond the Employer's reasonable control. We conclude that the Employer established good cause for its nonappearance at the July 8, 2014 Appeals Board hearing.

Having found that the Employer established good cause for its nonappearance at the July 8, 2014 Appeals Board hearing, the Board will now address the issue of the timeliness of the Employer's request for reassessment of the Department's January 15, 2013 Notice of Estimated Assessment for Delinquent Reports.

Arizona Revised Statutes § 23-738 provides:

> A. If an employer neglects or refuses to make a return as required by this chapter, the department shall make an estimate based upon information in its possession of the amount of contributions due from the employer for the period for which he failed to make a return, and shall assess the estimated amount against the delinquent employer. The department shall add to the delinquency assessment made under this section the penalty provided in section 23-723 and interest as prescribed by section 23-736. If the neglect or refusal to file a return is due to fraud or an intent to evade payment of contributions, there shall be added to the amount due a penalty equal to twenty-five per cent thereof. The department shall promptly notify the delinquent employer of any estimate.
>
> B. An employer against whom any delinquency assessment is made may petition for reassessment within fifteen days after written notice of the assessment is served personally or sent by certified mail to the employer's last known address. If the petition for reassessment is not filed within fifteen days the amount of the assessment shall become final and the lien imposed by section 23-745 shall attach.

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

> A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
>
> 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
>
> 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.
>
> * * *
>
> B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change. [Emphasis added].
>
> 1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

Here, the issue to be decided is whether the late filing of the Employer's request for reassessment can be attributed to a reason recognized under Arizona Administrative Code, Section R6-3-1404(B), which would excuse a late filing.

The evidence of record establishes that on January 15, 2013, the Department issued by certified mail, a Notice of Estimated Assessment for Delinquent Reports to the Employer's address of record (Tr. pp. 26, 27; Exhs. 3, 4). The notice printed by the Department on January 15, 2013, contains an incomplete address for the Employer (Tr. p. 68; Bd. Exhs. 3, 18). However, Department records establish that the notice was not returned as undeliverable to the Department, but was delivered to the Employer's address of record (Tr. p. 69; Bd. Exh. 4). In addition, the evidence presented is inconclusive to determine whether the Department was provided a complete address, and erred in its mailing of the Department documents, or whether the Employer's owner provided the Department with an incomplete address. Furthermore, during the Appeals Board hearing, Employer's counsel had the opportunity to call the Employer as a witness and provide clarification of whether the January 15, 2013 Notice of Estimated Assessment for Delinquent Reports was ever received at the Employer's address of record. Employer's counsel declined to call his witness (Tr. pp. 54, 55). Without substantial evidence to refute the proper delivery of the January 15, 2013 Notice of Estimated Assessment for Delinquent Reports, we conclude that the Employer received the Department's notice properly and within a timely manner.

However, the evidence of record raises questions regarding whether the Report of Changes form dated January 27, 2013, may be considered a timely petition for reassessment from the January 15, 2013 Notice of Estimated Assessment for Delinquent Reports (Bd. Exhs. 3, 18).

Pursuant to Arizona Administrative Code, Section R6-3-1404(A)(1):

> ...any ... request ... submitted to the Department shall be considered received by and filed with the Department: If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if

> not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. [Emphasis added].

During the Appeals Board hearing, the Department's witness testified that she reviewed the Report of Changes form and noticed that the form did not have an envelope to identify the date that it was postmarked or mailed by the Employer. Despite the lack of an envelope, the Department's witness acknowledged that it was "possible the Department received that Report of Change ... in the 15-day appeal period" because it was stamped received by the Department on February 1, 2013 (Tr. p. 61; Bd. Exh. 18). We conclude that because the Report of Changes form did not include a copy of the envelope, Arizona Administrative Code, Section R6-3-1404(A)(1), applies, and the date entered onto the document establishes the date the form was received by and filed with the Department.

During the Appeals Board hearing, the Department also questioned whether the January 27, 2013 Report of Changes form could be considered a petition for reassessment. The Department's witness testified that the information provided by the Employer within the form, regarding it not having paid any wages as of August 2011, was inaccurate. Therefore, the Department concluded that the Report of Changes form "was null and void because [it was not] true" (Tr. pp. 63, 67; Bd. Exh. 18). We do not agree.

Printed within the January 15, 2013 Notice of Estimated Assessment for Delinquent Reports (Bd. Exh. 3), the notice provides the following language:

> This assessment becomes final unless a petition for reassessment is filed with this Department at the address shown above within 15 days of the date of this notice.

Furthermore, Arizona Revised Statutes, § 23-738(B) provides:

> An employer against whom any delinquency assessment is made may petition for reassessment within fifteen days after written notice of the assessment is served personally or sent by certified mail to the employer's last known address. If the petition for reassessment is not filed within fifteen days the amount of the assessment shall become final and the lien imposed by section 23-745 shall attach.

The January 27, 2013 Report of Changes form contained the Employer's signature, the business name and address, and as previously established, the date the document was signed and filed with the Department (Bd. Exh. 18). In addition, the Employer filed the document to notify the Department that the:

"Business is operating in Arizona, but ceased paying wages, as of August 2011." Upon review of the evidence, we liberally construe the document as a protest of the January 15, 2013 Notice of Estimated Assessment for Delinquent Reports.

Pursuant to Arizona Administrative Code, Section R6-3-1404(B), a late request for reassessment will be considered timely filed when the delay in filing is attributable to Department error. Here, the Department erred by failing to accept the January 27, 2013 Report of Changes form as a timely petition for reassessment. Therefore, pursuant to Arizona Administrative Code, Section R6-3-1404(B), the Employer's request for reassessment shall be considered timely filed. Accordingly,

THE APPEALS BOARD **SETS ASIDE UPON REVIEW** the decision of the Appeals Board issued on July 10, 2014, in Appeals Board No. T-1424451-001-B based upon the evidence of record.

The Employer established good cause for its nonappearance at the Appeals Board hearing scheduled for July 8, 2014.

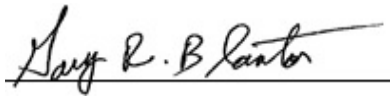
THE APPEALS BOARD **SETS ASIDE** the Department's decision letter dated September 5, 2013, based upon the evidence of record.

The Employer filed a timely request for reassessment from the Notice of Estimated Assessment for Delinquent Reports issued on January 15, 2013. The Employer is entitled to a reconsidered assessment by the Department addressing the merits of the Employer's request.

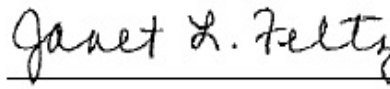
THE APPEALS BOARD **REMANDS** the matter to the Department to reconsider its assessment and render a decision, pursuant to A.R.S. § 23-740, addressing the merits of the Employer's petition for reassessment. If adversely affected by the Department's reconsidered assessment decision, the Employer may file a written request for review by the Appeals Board with payment of the amount assessed. In the absence of such written request, the Department's reconsidered assessment decision becomes final and the lien imposed by A.R.S. § 23-745 attaches.

DATED: 6/2/2015

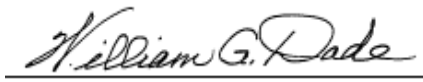
APPEALS BOARD



GARY R. BLANTON, Chairman



JANET L. FELTZ, Member



WILLIAM G. DADE, Member

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review 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 requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review 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 for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:

1. explains why the Appeals Board decision is wrong,
2. cites the record, rules and other authority, and
3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 6/2/2015 to:

Er: XXX
Acct. No: XXX-000

(x) Er Rep: XXX

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL
CFP/CLA
1275 W WASHINGTON
PHOENIX AZ 85007-2926
SITE CODE 040A

(x) LULU B. GUSS
CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028
SITE CODE 911B

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1426084-001-BR

XXX

STATE OF ARIZONA E S A TAX UNIT
% ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
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PHOENIX, AZ 85007-2926

Employer

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS
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 SOBRE SUS BENEFICIOS
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 COURT OF APPEALS

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** June 22, 2015 *****.

DECISION
AFFIRMED BUT MODIFIED UPON REVIEW

The **EMPLOYER**, through its authorized representative, requests review of that portion of the Appeals Board decision issued on September 2, 2014, which affirmed the Department's decision letter dated September 18, 2013, and held that because the Employer's request for reconsideration was filed late, the Determination of Liability for Employment or Wages dated June 27, 2013, remains in full force and effect.

The request was filed on time and the Appeals Board has jurisdiction in this matter under A.R.S. § 23-672(F).

We note that, on page 2 and page 7 of our prior decision, the Appeals Board inadvertently identified that the June 27, 2013 Determination of Liability covered remuneration paid for services constitutes wages during the calendar quarters ending March 31, 2011 through December 31, 2011. However, the June 27, 2013 determination actually held that remuneration paid for services constitutes wages during the calendar quarters ending March 31, 2011 through December 31, 2012 (Bd. Exh. 1). Therefore, we modify our prior decision to correct this typographical error.

In the request for review, the Employer's representative does not rely upon, or cite to the evidence of record. The Employer does not cite any legal authorities and does not ascribe any specific error to the Appeals Board. The Employer simply contends that: "the Appeals Board made an incorrect decision in regards to the timely filing of the employer's request for reconsideration." The Employer's representative also requests that "due process [be allowed] by setting this case to review." From the representative's contention, we infer an expectation that another hearing will be held to gather additional evidence. The time to present evidence was at the July 29, 2014 Appeals Board hearing. On review, the Appeals Board elects to hold another hearing and supplement the record only when the record is incomplete. Our examination of the record shows the record is complete and another hearing is not justified.

The issue properly before the Board is whether the Employer's request for reconsideration dated September 14, 2013 was filed on time.

In its prior decision, the Appeals Board made findings of fact and reasoning and conclusions of law. In arriving at the decision, the Appeals Board applied the appropriate law, A.R.S. § 23-724(B), as well as Arizona Administrative Code, Section R6-3-1404(B), to the facts in this case. The Appeals Board found that the Employer's representative did not file a timely request for reconsideration within the statutory time period allowed.

The credible and probative evidence of record establishes that on June 27, 2013, the Department sent, by certified mail, a Determination of Liability for Employment or Wages to the Employer's address of record (Bd. Exhs. 1, 2). The determination held that remuneration paid for services during the calendar quarters ending March 31, 2011 through December 31, 2012, constituted wages paid by the Employer (Bd. Exh. 1). The determination also read in part: "This determination becomes **FINAL** as provided by A.R.S. § 23-724 unless written request for reconsideration is filed with this Department within sixty (60) days after the Determination Date indicated above" (Bd. Exh. 1). To be timely, a request for reconsideration of that decision had to be filed by August 26, 2013 (Bd. Exh. 4A). In response to the determination, the Employer submitted by fax

transmission on September 14, 2013, a letter to the Department requesting reconsideration of the determination (Bd. Exh. 3A).

The Employer bears the burden of proving that the late filing of its request for reconsideration should be excused under Arizona Administrative Code, Section R6-3-1404(B). During the Appeals Board hearing, the Employer's witness acknowledged that he was not conducting business at the Employer's address of record at the time the June 27, 2013 Determination of Liability for Employment or Wages was mailed to the Employer's address of record (Tr. p. 28). The Employer's representative also testified that he did not become aware that the Department issued the determination until the Employer hand-delivered it to his office in late July 2013 (Tr. pp. 29, 31). The representative could not explain the reason for the delay in submitting the September 14, 2013 response to the Department (Tr. p. 31; Bd. Exhs. 3A-3F). Therefore, the Employer failed to prove that the late filing of its request for reconsideration was caused by Department error or misinformation, by delay or other action by the United States Postal Service, or by a change of address by the Employer at a time when there would have been no reason to notify the Department of the address change. Under the provisions of Arizona Administrative Code, Section R6-3-1404(B), these are the only recognized reasons that would excuse a late filing.

The Employer failed to carry its burden of proof and has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the request for reconsideration timely filed.

The Board's prior decision, as modified, is fully supported by the greater weight of the credible and probative evidence of record.

THE APPEALS BOARD FINDS that:

1. The **EMPLOYER** has not submitted any newly discovered material evidence which, with reasonable diligence, could not have been discovered and produced at the time of any hearing;

2. There was no prejudicial irregularity in the administrative proceedings on the part of the Department. Specifically, there was no material or prejudicial error in the admission or exclusion of evidence and no prejudicial errors of law were made at any hearing or during the progress of this matter;

3. There was no accident or surprise in the proceedings which could not have been prevented by ordinary diligence;

4. The Appeals Board's decision, as modified, involved no abuse of discretion depriving any party of a full and fair hearing, and it was supported by the greater weight of the credible evidence and by applicable law;

5. All interested parties were notified of the filing of the request for review, and were allowed at least 15 days in which to respond. Accordingly,

THE APPEALS BOARD **AFFIRMS, BUT MODIFIES UPON REVIEW** the Appeals Board's prior decision, to correct our reference to December 31, 2012, as the ending calendar quarter identified in the June 27, 2013 Determination of Liability for Employment or Wages, there having been established no good and sufficient grounds which would cause us to reverse or further modify that decision, or to order the taking of additional evidence.

DATED: 5/21/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision on review 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 on filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

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

> C. Any party aggrieved by a decision on review 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 of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review 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 of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review 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.

4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

A copy of the foregoing was mailed on 5/21/2015 to:

Er: XXX
Acct. No: 7036390-000

(x) Er Rep: XXX

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL
CFP/CLA
1275 W WASHINGTON
PHOENIX, AZ 85007-2926
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(x) LULU B GUSS
CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028
SITE CODE 911B

By: __LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1430184-001-B

XX

STATE OF ARIZONA E S A TAX UNIT
℅ ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
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Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

May 15, 2015 ***.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for hearing from the Department's decision letter issued on November 13, 2013, which held that the Department's Notice of Estimated Assessment for Delinquent Reports, dated March 18, 2013, was final, because the Employer's petition for reassessment was filed late.

The Employer filed a timely petition for hearing on November 15, 2013. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-738(B).

THE APPEALS BOARD scheduled a telephone hearing for November 18, 2014, before Appeals Board Administrative Law Judge **Denise C. Sanchez**. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely request for reassessment by the Department.

2. Whether the Notice of Estimated Assessment for Delinquent Reports, UC-060, became final during the interim period before the Employer filed a request for reassessment.

On the scheduled date of the hearing, one Employer witness appeared and testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 7 were admitted into evidence. We have carefully reviewed the record.

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

1. On March 18, 2013, the Department mailed to the Employer a Notice of Estimated Assessment for Delinquent Reports (Bd. Exh. 2). The notice was sent by certified mail to the Employer's address of record. The notice listed the estimated assessments for the first quarter of 2012 (Bd. Exh. 2).

2. The notice stated in pertinent part: "The assessment becomes final unless a petition for reassessment is filed with this Department at the address shown above within 15 days of the date of this notice" (Bd. Exh. 2).

3. In a letter received by the Department on August 29, 2013, the Employer requested that the Department review and adjust the assessment (Bd. Exhs. 4A, 4B).

4. On November 13, 2013, the Department mailed the Employer a decision letter that stated in pertinent part: "As previously stated, on March 18, 2013, the Department sent the Notice via certified mail number ... to [the Employer's] address of record at that time .... The Notice was returned [to the

Department] by the United States Postal Service" (Bd. Exh. 5B).

5. The Department's decision letter further stated: "Accordingly, it is the Department's Decision that the Notice of Estimated Assessment for Delinquent Reports issued March 18, 2013 is final" (Bd. Exh. 5B).

6. In a letter received by the Department on November 15, 2013, the Employer requested a hearing before the Appeals Board (Bd. Exh. 6A).

The issue properly before this Board is whether the Employer filed a timely request for reassessment from the Notice of Estimated Assessment for Delinquent Reports dated March 18, 2013.

Arizona Revised Statutes, Section 23-738(B) provides in pertinent part:

> B. An employer against whom any delinquency assessment is made may petition for reassessment within fifteen days after written notice of the assessment is served personally or sent by certified mail to the employer's last known address. If the petition for reassessment is not filed within fifteen days the amount of the assessment shall become final and the lien imposed by § 23-745 shall attach.

Arizona Administrative Code, Section R6-3-1703(C), provides in pertinent part:

> C. Report of changes.
>
> Each employer as defined in A.R.S. § 23-613 shall promptly notify the Department in writing of any change in its business operations. Changes include: the acquisition or disposal of all or any part of the business operations or assets; a change in business name or address; bankruptcy or receivership; or any other change pertaining to the operation or ownership of the business operations. The notification shall include the date of change, and the name, address, and telephone number of the person, firm, corporation or official placed in

charge of the organization, trade or assets of the business. [Emphasis added].

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change. [Emphasis added].

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

* * *

C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. However, when it is established the interested party changed his mailing address at a time when there would have been no reason to

> notify the Department, it shall be considered as having been served on the addressee on the date it is personally delivered or remailed to his current mailing address. The date mailed shall be presumed to be the date of the document, unless otherwise indicated by the facts. [Emphasis added].

The Employer bears the burden of proving that the late filing of its petition for reassessment should be excused under Arizona Administrative Code, Section R6-3-1404(B). Pursuant to Arizona Administrative Code, Section R6-3-1404(B), a petition for reassessment filed beyond the statutory period shall be considered timely filed if the delay is the result of: (1) Department error or misinformation, (2) delay or other action by the United States Postal Service, or (3) the individual having changed his mailing address at a time when there would have been no reason to notify the Department of the address change.

Here, the evidence of record establishes that the Notice of Estimated Assessment for Delinquent Reports was mailed to the Employer's mailing address of record on March 18, 2013 (Bd. Exh. 2). In the Employer's August 29, 2013 petition for reassessment, the Employer explained that it ceased using a third-party payroll service to provide information to the Department. After terminating its agreement with the third-party payroll service, the Employer updated its address with several Arizona agencies, including the Arizona Corporation Commission and the Arizona Department of Revenue (Bd. Exhs. 4F, 4I). The Employer insisted that the Department could have located the Employer's correct mailing address through one of those agencies (Bd. Exh. 4A).

During the November 18, 2014 Appeals Board hearing, the Employer's witness testified that the Employer's business address was changed in 2007 when the owner of the business moved from his residential address. The witness testified that she filed several forms with various state agencies to report the business' change of address. However, she acknowledged that she did not provide the Department of Economic Security (D.E.S.) with a change of address form. The witness assumed that their third-party payroll representative would have updated the address with D.E.S. or that the Tax Unit would have researched other state agencies and found the Employer's correct mailing address.

The Department's witness explained that the D.E.S. Tax Unit does not have access to records that belong to other agencies. The Department's witness further testified that, pursuant to Arizona Administrative Code, Section R6-3-1703, the Employer has an obligation to maintain an updated address with D.E.S. Furthermore, the Tax Unit would not update an Employer's address without written notification from the Employer of a change of address.

Under the provisions of Arizona Administrative Code, Section R6-3-1404(C), "[a]ny ... assessment ...mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person." The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the Employer's petition for reassessment timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision letter dated November 13, 2013, regarding the late filing of the Employer's petition for reassessment.

The Employer did not file, within the time period allowed, a petition for reassessment from the March 18, 2013 Notice of Estimated Assessment for Delinquent Reports, pursuant to Arizona Revised Statutes § 23-738(B).

The Notice of Estimated Assessment for Delinquent Reports dated March 18, 2013, remains in full force and effect.

DATED: 4/15/2015

APPEALS BOARD

Gary R. Blanton

GARY R. BLANTON, Chairman

Janet L. Feltz

JANET L. FELTZ, Member

William G. Dade

WILLIAM G. DADE, Member

---

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 ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review 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 requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review 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 for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
   1. explains why the Appeals Board decision is wrong,
   2. cites the record, rules and other authority, and
   3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 4/15/2015 to:

(x) Er: XXX
Acct. No: XXX-000

(x) ELI D GOLOB
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CFP/CLA
1275 W WASHINGTON
PHOENIX AZ 85007-2926
SITE CODE 040A

(x) LULU B GUSS
CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028
SITE CODE 911B

By: _RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1483727-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
% ELI GOLOB CFP/CLA
ASST ATTORNEY GENERAL
1275 W WASHINGTON ST SC #040A
PHOENIX, AZ 85007-2926

Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is

*****May 7, 2015*****.

DECISION
DISMISSED

THE **EMPLOYER,** through counsel, 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).

THE APPEALS BOARD FINDS there is no reason to withhold granting 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 Employer and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 4/7/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

, Acting Member

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 ASK FOR REVIEW OF THIS DECISION

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   1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
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   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 for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
   1. explains why the Appeals Board decision is wrong,
   2. cites the record, rules and other authority, and
   3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 4/7/2015
to:

Er: XXX Acct. No: XXX-000

(x) Er. Rep:

XXX

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA
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PHOENIX, AZ 85007-2926

(x) LULU B GUSS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1485068-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
℅ ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
PHOENIX, AZ 85007-2926

Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

June 8, 2015 ***.

DECISION
DISMISSED

THE **EMPLOYER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A), as well as 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].

On May 4, 2015, the Employer submitted a written request to withdraw its petition for hearing.

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

THE APPEALS BOARD **DISMISSES** the petition for hearing, there being no good cause to refuse the Employer's request to withdraw. Therefore, a hearing will not be scheduled in this matter. This decision does not affect any agreement entered into between the Employer and the Department.

DATED: 5/7/2015

APPEALS BOARD

William G. Dade

WILLIAM G. DADE, Acting Chairman

Janet L. Feltz

JANET L. FELTZ, Member

Denise Sanchez

DENISE SANCHEZ, Acting Member

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review 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 requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review 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 for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
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3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 5/7/2015 to:

(x) Er: XXX
Acct. No: XXX-000

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL
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1275 W WASHINGTON
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SITE CODE 040A

(x) LULU B GUSS
CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028
SITE CODE 911B

By: _LS_____
For The Appeals Board

3rd QUARTER OF
CALENDAR YEAR 2015

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1485054-001-B

xxx

STATE OF ARIZONA E S A TAX UNIT
% ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
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PHOENIX, AZ 85007-2926

Employer

Department

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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** September 23, 2015 *****.

DECISION
DISMISSED

THE **EMPLOYER** 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 Employer and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 8/24/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

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 ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review 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 requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review 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 for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
   1. explains why the Appeals Board decision is wrong,
   2. cites the record, rules and other authority, and
   3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 8/24/2015 to:

(x) Er: xxx Acct. No: xxx-000

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) LULU GUSS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1482169-001-B

xxx

STATE OF ARIZONA E S A TAX UNIT
% ELI GOLOB ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
PHOENIX, AZ 85007-2926

Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***

October 13, 2015 ***.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination letter issued on September 19, 2014, which held in part as follows:

> ... After a review of the facts, statutes, regulations, and case law, it was not err [sic] for the Field Auditor to conclude that [the firm] controlled or had the right to control the Drivers per A.R.S. § 23-613.01 wherein the services performed by the Drivers constituted employment and remuneration paid for such services constituted wages.

> Accordingly, this Reconsidered Determination affirms the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages both issued to [the firm] on July 3, 2014. ...
>
> * * *

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

THE APPEALS BOARD scheduled a telephone hearing for September 3, 2015, before Appeals Board Administrative Law Judge **Robert T. Nall,** with written notice to the parties. The issues set for the hearing were:

1. Whether the Reconsidered Determination properly affirmed the July 3, 2014 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES and the July 3, 2014 DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY.
2. Whether the Employer is liable for Arizona Unemployment Insurance (UI) taxes due to gross payroll of at least $1,500 in a calendar quarter or employment of one or more employees for 20 weeks (including corporate officers), effective April 1, 2011.
3. Whether the services performed by individuals as "Driver" constitute "employment", and whether all forms of remuneration paid to Drivers for these services constitute "wages" for the quarters ending 2nd Quarter 2011 through 1st Quarter 2014.
4. Whether any of the individuals performing services as "Drivers" performed work that is exempt or is excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or under a decision of the federal government to not treat that individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
5. Whether any of the individuals performing services as "Drivers" factually and legitimately were independent contractors for the quarters ending: 2nd Quarter 2011 through 1st Quarter 2014.

Authorities: The Employment Security Law of Arizona, specifically: A.R.S. §§ 23-613, 23-613.01, 23-614, 23-615, 23-617, 23-622, 23-724, or 23-727, and Arizona Administrative Code, Sections R6-3-1705 and R6-3-1723.

The Employer did not appear at the scheduled Board hearing. The Employer did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department was present, and a witness for the Department was present. Because the Employer did not appear at the September 3, 2-15 Appeals Board hearing to pursue its appeal, a default is 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 Employer's petition for hearing. The Employer did not appear at the scheduled Board hearing to present evidence.

The Employer's default means that insufficient evidence was presented in order to support reversing or modifying the Department's September 19, 2014 Reconsidered Determination letter. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's request for hearing.

The Department's September 19, 2014 Reconsidered Determination letter remains in full force and effect.

This Dismissal does not affect any agreement entered into between the Employer and the Department.

DATED: 9/10/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

PETER J. LANSDOWNE, Acting 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, 1951 W. Camelback Road, Suite 465, 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. A request for review will not be considered unless the Appeals Board sets aside this dismissal, and then issues a decision upon the merits of the 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 9/10/2015
to:
(x) Er: xxx Acct. No: xxx-000

(x) Dept. Counsel:

ELI D GOLOB, ASSISTANT ATTORNEY GENERAL CFP/CLA

(x) LULU B GUSS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1476549-001-B

xxx

STATE OF ARIZONA E S A TAX UNIT
℅ ELI GOLOB
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Employer

Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** September 21, 2015 *****.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's decision letter issued on September 25, 2015, which held that the Determination of Liability for Employment or Wages dated August 6, 2013, is final because the Employer's request for reconsideration was not filed within the 60-day appeal period.

The Employer filed a timely petition for hearing to the Appeals Board. The Appeals Board has jurisdiction to consider this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, for **August 13, 2015**. Appeals Board Administrative Law Judge Morris L. Williams, III presided over the hearing on that date, and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely written request for reconsideration of the Determination of Liability for Employment or Wages dated August 6, 2013.
2. Whether the Determination of Liability for Employment or Wages became final during the interim period before the Employer filed a request for reconsideration.

On the scheduled date of the hearing, two Employer witnesses appeared by telephone to testify. Counsel for the Department appeared in-person and a witness for the Department appeared in-person to testify. Board Exhibits 1 through 10 were admitted into evidence. We have carefully reviewed the record.

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

1. On August 6, 2013, the Department sent, by certified mail, a Determination of Liability for Employment or Wages to the Employer's correct address of record (Bd. Exh. 1).
2. The determination was delivered to the Employer on August 23, 2013 (Bd. Exh. 4).
3. On August 6, 2014, the Employer submitted its request for reconsideration (Bd. Exh. 3). The request for reconsideration was filed more than 60 days after the August 6, 2013 Determination of Liability for Employment or Wages.
4. On September 25, 2014, the Department issued a decision letter regarding the timeliness of the Employer's request for reconsideration (Bd. Exh. 6). The Department's decision held that, because the Employer's request for reconsideration was not filed within 60 days, the Determination of Liability for Employment or Wages dated August 6, 2013, had become final (Bd. Exh. 4).
5. The Employer filed a petition for hearing on October 23, 2014 (Bd. Exh. 5).

Arizona Revised Statutes, § 23-724, provides in part as follows:

> A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit sixty days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.
>
> B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. The reconsidered determination shall become final with respect to the employing unit thirty days after written notice of the reconsidered determination is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files with the appeals board a written petition for hearing or review. The department may for good cause extend the period within which the written petition is to be submitted. If the reconsidered determination is appealed to the appeals board and the decision by the appeals board is that the employing unit is liable, the employing unit shall submit all required contribution and wage reports to the department within forty-five days after the decision by the appeals board. [Emphasis added].

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

> A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
>
> 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
>
> 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.
>
> * * *
>
> B. <u>The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.</u>
>
> 1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
>
> 2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

> 3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case. [Emphasis added].
>
> * * *

On August 6, 2013, the Department mailed, by certified mail, a Determination of Liability for Employment or Wages to the Employer's correct address of record at that time (Bd. Exh. 1). The Employer witness, Ms. R, testified that the Employer's request for reconsideration was filed late because she was not aware of the determination. The determination was delivered to the Employer on August 23, 2013 (Bd. Exh. 2). Accordingly to postal service records, the determination was retrieved at the post office by a former employee of the Employer (Bd. Exh. 5). The Employer witnesses testified that the mail service in their area is not reliable, but neither witness could say definitively that the mail was not retrieved by the former employee on August 23, 2013, as indicated by the documentary evidence. The Employer did not attempt to have the former employee appear for the hearing.

Under the provisions of Arizona Administrative Code, Section R6-3-1404(B), the only reasons that will allow this Board to consider the Employer's request for reconsideration as timely filed include: delay or other action of the United States Postal Service, Department error or misinformation, or a change of the Employer's address at a time when there would have been no reason for it to notify the Department of the address change. The reason provided by the Employer for its late request for reconsideration does not support a finding that the Employer's late request was due to delay or other action of the United States Postal Service, Department error or misinformation, or a change of the Employer's address at a time when there would have been no reason for the Employer to notify the Department of the address change. As a result, the Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding that the request for reconsideration was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision letter dated September 25, 2014.

The Employer did not file a timely written request for reconsideration within the statutory time period allowed.

The Determination of Liability for Employment or Wages dated August 6, 2013, remains in full force and effect.

DATED: 8/21/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, 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.

HOW TO ASK FOR REVIEW OF THIS DECISION

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

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1. explains why the Appeals Board decision is wrong,
2. cites the record, rules and other authority, and
3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 8/21/2015
to:

(x) Er: xxx Acct. No: xxx-000

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) LULU GUSS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1476508-001-B

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xxx

STATE OF ARIZONA E S A TAX UNIT
% ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
PHOENIX, AZ 85007-2926

Employer

Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** September 28, 2015 *****.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's decision letter issued on July 22, 2014, which held that the Department's "Determination of Unemployment Insurance Tax Rate(s) issued on December 30, [2013] is final."

The Employer's petition for hearing was filed, as indicated by the postmark, on August 22, 2014. The Appeals Board has jurisdiction to consider the timeliness of the petition for hearing filed in this matter pursuant to A.R.S. § 23-732(A).

THE APPEALS BOARD scheduled a telephone hearing for August 25, 2015, before Appeals Board Administrative Law Judge **Denise C. Sanchez**. The issues set for the hearing were:

1. Whether the Employer filed a timely petition for a hearing from the Department's decision letter dated July 22, 2014.

2. Whether the Department's July 22, 2014 decision letter became final during the interim period before the Employer filed a written petition for a hearing.

The Employer did not appear at the scheduled Board hearing. The Employer did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department was present, and a witness for the Department was also present. Because the Employer did not appear at the August 25, 2015 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 Employer's petition for hearing. The Employer did not appear at the scheduled Board hearing to present evidence. The Employer's default means that no evidence was presented to support reversing or modifying the Department's July 22, 2014 decision letter. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's petition for hearing.

The Department's July 22, 2014 decision letter remains in full force and effect.

This decision does not affect any agreement entered into between the Employer and the Department.

DATED: 8/27/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, 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.

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

A copy of the foregoing was mailed on 8/27/2015 to:

(x) Er: xxx
Acct. No: xxx-000

(x) ELI D GOLOB
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1275 W WASHINGTON
PHOENIX, AZ 85007-2926
SITE CODE 040A

(x) LULU B GUSS
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P O BOX 6028
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SITE CODE 911B

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1449681-001-B

---

xxx

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℅ ELI GOLOB
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1275 W WASHINGTON ST SC 040A
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Employer

Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** October 28, 2015 *****.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's April 2, 2014 denial letter. The Department's denial letter held in part as follows:

> ... Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated 01-17-2014 must be held to be final. ...

The request for review or appeal having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-732(B).

At the direction of the Appeals Board and following written notice to the parties, a telephone hearing was conducted before **ROBERT T. NALL**, an Administrative Law Judge, on November 13, 2014. At the scheduled time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely, written request for reconsideration following the January 17, 2014 Notice of Benefit Charges.
2. Whether the Notice of Benefit Charges became final during the interim period before the Employer filed a request for reconsideration.

The Employer's Executive Director appeared and testified. Counsel for the Department appeared, with a witness who did not testify. Five Board Exhibits were admitted into evidence.

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

1. On January 17, 2014, the Department mailed a BENEFIT CHARGE NOTICE (UC-602A) to the Employer's last known address of record. A particular former employee's name, Social Security Number, and wage history was listed, with "NET CHARGES TO YOUR ACCOUNT" of $435.69 (Bd. Exhs. 1, 2). A 15-day appeal period applied.
2. On February 6, 2014, the Employer filed by mail an application for redetermination, which he hand-wrote upon the Employer's copy of the BENEFIT CHARGE NOTICE (Bd. Exh. 2).
3. The Employer had received the BENEFIT CHARGE NOTICE by January 22, 2014, but its Executive Director mistakenly assumed that it was an update to a previous BENEFIT CHARGE NOTICE that had involved a different former employee. He did not read it carefully for several days, but he filed an application for redetermination upon realizing that the January 17, 2014 BENEFIT CHARGE NOTICE specified another former worker.
4. On April 2, 2014, the Department issued its letter stating that the January 17, 2014 BENEFIT CHARGE NOTICE "must be held to be final" because the Employer had not established a good and sufficient reason for the delay in submitting the application for redetermination (Bd. Exh. 3).

5. The Employer filed a timely petition for hearing, explaining that the delay was due to "... an oversight" (Bd. Exh. 4).

Arizona Revised Statutes § 23-732, provides in part as follows:

> A. The department shall promptly notify each employer of the employer's rate of contributions as determined for any calendar year. The determination shall become conclusive and binding on the employer unless, within fifteen days after the mailing of notice of the determination to the employer's last known address or in the absence of mailing, within fifteen days after delivery of the notice, the employer files an application for review and redetermination, setting forth the employer's reasons for application for review and redetermination. ...
>
> B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding on the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery of the redetermination or denial an appeal is filed with the appeals board. ... [Emphasis added].
>
> * * *

The record reveals that a copy of the BENEFIT CHARGE NOTICE was sent by mail on January 17, 2014, to the Employer's last known address of record. The document included the following instructions (Bd. Exhs. 1, 2):

> The charges shown will become conclusive and binding, pursuant to A.R.S. § 23-732(B), unless a written request for reconsideration is filed within 15 days of the mailing date shown above. ... If a protest is filed by mail, the postmark date is considered the date of the protest.

The Employer filed an application for reconsideration on February 6, 2014, which is more than 15 days after the date of the BENEFIT CHARGE NOTICE. The Employer's application for reconsideration, therefore, was not filed within the statutory time.

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

> A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
>
> 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
>
> 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.
>
> * * *
>
> B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
>
> 1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
>
> 2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
>
> * * *
>
> C. Any notice, report form, determination, decision, assessment, or other document mailed by the

> Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. ... [Emphasis added].

The Employer's delay is attributable to its internal procedures. The Employer did not meet the statutory requirement to permit reconsideration of the benefit charges, because its protest was not filed before the deadline to request redetermination. The reasons advanced amount to requesting that "good cause" should be found for this late filing. There is no "good cause" exception to the 30-day deadline for filing appeals found in A.R.S. § 23-671(D) or in Arizona Administrative Code, Section R6-3-1404. In *Roman v. Arizona Department of Economic Security*, 130 Ariz. 581, 637 P.2d 1084 (App. 1981), the Arizona Court of Appeals specifically held at page 1085:

> The language of A.R.S. § 23-671(C) [now A.R.S. § 23-671(D)], unambiguously states that the Appeals Tribunal decision shall become final unless within fifteen days an appeal is filed. There is no statutory authority for a "good cause" exception to this rule. Thus, to interpret A.C.R.R. [now A.A.C.] R6-3-1404 as appellant urges would amount to an amendment of the statute contrary to the legislative intent. *Ferguson v. Arizona Department of Economic Security*, 122 Ariz. 290, 594 P.2d 544 (App. 1979).

Further, in *Wallis v. Arizona Department of Economic Security*, 126 Ariz. 582, 617 P.2d 534, 537 (App. 1980), the Court of Appeals stated:

> We must assume that the legislature meant what it said, and therefore hold that where the statutory prerequisites for finality to a deputy's determination are established, that decision becomes 'final' unless a timely appeal is perfected.

We conclude that similar rationale applies to the late filing of an application to redetermine a benefit charge notice, under the similar deadline imposed by a different statute. The Employer has not alleged and established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and permit finding that the Employer's application for redetermination was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's April 2, 2014 decision letter that the January 17, 2014 BENEFIT CHARGE NOTICE became final before the Employer filed its application for redetermination.

The January 17, 2014 BENEFIT CHARGE NOTICE is final, because the Employer did not file a timely application for redetermination.

DATED: 9/28/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review 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 requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review 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 for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
2. cites the record, rules and other authority, and
3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 9/28/2015
to:

(x) Er: xxx Acct. No: xxx-000

(x) ELI D GOLOB, ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) LULU B GUSS, CHIEF OF TAX
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1449676-001-B

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xxx

STATE OF ARIZONA E S A TAX UNIT
% ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
PHOENIX, AZ 85007-2926

Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** September 28, 2015 *****.

DECISION
AFFIRMED, IN PART
AND REVERSED, IN PART

THE **EMPLOYER**, through counsel, petitioned for a hearing from the Department's Reconsidered Determination issued on April 2, 2014, which affirmed the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued on April 8, 2011. The Reconsidered Determination held that "services performed by the painters and telemarketers were correctly determined to constitute employment and all remuneration paid for such services to 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, which was convened on June 9, 2015, before Appeals Board Administrative Law Judge **Denise C. Sanchez**. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the services performed by the individuals as painters and telemarketers constitute employment as defined in A.R.S. § 23-615.

2. Whether the services performed by the individuals as painters and telemarketers are exempt or excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat the individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.

3. Whether all forms of remuneration paid to the individuals for services as painters and telemarketers constitute wages as defined in A.R.S. § 23-622.

On the scheduled date of the hearing, the Employer was represented by counsel, and one witness testified for the Employer. The Department was also represented by counsel and one witness testified for the Department. Board Exhibits 1 through 15 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer is a painting contracting company. The Employer formed the company in November 2007 (Tr. p. 31).

2. On April 8, 2011, the Department issued a Determination of Unemployment Insurance Liability which held that the Employer has "been determined liable for Arizona Unemployment Insurance Taxes under A.R.S. § 23-613." The Determination also stated: "BASIS FOR

LIABILITY: Gross payroll of at least $1500 in a calendar quarter or employment of one or more employees for 20 weeks (including corporate officers) (Bd. Exh. 2).

3. On April 8, 2011, the Department also issued a Determination of Liability for Employment or Wages which stated: "Services performed by individuals as painters and telemarketers/appointment setters constitute employment. All forms of remuneration paid to these individuals constitute wages. This Determination includes the individuals and amounts shown on the attached Notice of Assessment Report(s) for the quarters ending: 03/31/08 through 12/31/09" (Bd. Exh. 3).

4. The Notice of Assessment reports reflected the Employer's tax liability for the first, second, third, and fourth quarters of 2008; and the first, second, third, and fourth quarters of 2009 (Bd. Exhs. 4A, 5A). A Report of Wages Paid Each Employee was also issued that identified the names of the alleged employees and the total wages paid by the Employer during the 2008 and 2009 calendar years (Bd. Exhs. 4B, 5B).

Telemarketers:

5. Upon formation of the company in 2007, the Employer hired telemarketers/appointment setters. The telemarketers were hired to perform "cold calls" to potential clients, and schedule appointments for estimates of the Employer's services (Tr. pp. 12, 17; Bd. Exh. 7).

6. Upon hire, the telemarketers were provided with a script to use when placing cold calls to potential clients (Tr. pp. 15, 28). Industry standards prohibited telephone calls between the hours of 10:00 p.m. and 8:00 a.m. (Tr. pp. 31, 35).

7. The Employer required its telemarketers to provide daily communication with the Employer via e-mail. The purpose of the daily e-mails was to notify the

Employer that the telemarketer was working (Tr. pp. 37, 38; Bd. Exh. 7B).

8. The Employer's job advertisement for telemarketers posted on AZjobz.com states that the telemarketers were able to work from home (Bd. Exh. 7A). In addition, the Employer did not regulate where the telemarketers performed their services. The telemarketers were able to work from any location, as long as they had access to a phone (Tr. p. 29).

9. The Employer did not require written reports from the telemarketers (Tr. p. 28). However, after scheduling an appointment, the telemarketers provided the Employer with a report of the client's name, address, phone number, and time of the appointment (Tr. p. 34). This communication was provided to the Employer either verbally or in written form.

10. The Employer's job advertisement for telemarketers posted on AZjobz.com states: "YOU MUST BE ABLE TO COMMIT TO checking your email and respond to any and all emails sent to you DAILY. Part Time hours we ask you (sic) are able to commit to atleast (sic) 10-15 hours or more if possible per week. Full Time hours we ask you (sic) are able to commit to atleast (sic) 20 hours or more per week" (Bd. Exh. 7B).

11. The Employer maintained the right to discharge the telemarketers at any time with little or no notice (Tr. pp. 39, 40). In addition, the telemarketers were free to end the relationship with the Employer at any time (Tr. pp. 16, 34). The telemarketers were not subject to a penalty for non-completion of the job.

12. Prior to performing their services, the telemarketers participated in a two-hour unpaid training class that consisted of information and guidelines on how to perform their services (Tr. pp. 15, 27, 36; Bd. Exh. 7A).

13. Telemarketers were free to work for other entities while performing services for the Employer. Some telemarketers performed services for the Employer as a means to supplement their incomes (Tr. p. 31).

14. Each telemarketer was provided with a directory of phone numbers called a "cold calling list". The cold calling lists were replenished for the telemarketers on an as-needed basis (Tr. pp. 15, 17, 35).

15. The telemarketers did not receive reimbursement for any expenses incurred during the normal course of their duties (Tr. p. 15). The telemarketers were not subject to any recurring liabilities or expenses connected with their work. As a result, the telemarketers did not have the ability to realize a profit or loss during the course of their duties.

16. The Employer did not prohibit the telemarketers from hiring assistants (Tr. pp. 15, 40, 43). The telemarketers did not advertise their services or make their services available to the public (Tr. p. 15).

17. The telemarketers were unable to negotiate their pay rates. The Employer's job advertisement for telemarketers posted on AZjobz.com specified the pay scale (Bd. Exh. 7B). The telemarketers were paid at a commission rate of $40 per lead for the first four leads. For five to nine leads, the telemarketers were paid $50 per lead. For 10 leads, the telemarketers were paid $600 (Tr. pp. 31-33; Bd. Exh. 7B).

18. The telemarketers were required to own a personal computer and obtain Internet access for the purpose of remaining in daily contact with the Employer through e-mail. They were also required to have a phone line for placing cold calls (Tr. p. 15; Bd. Exh. 7B). The telemarketers did not have any significant investments in order to perform their services.

Painters:

19. For safety purposes, the Employer required the painters to work with at least one assistant while working at a job site (Tr. pp. 58, 60). The painters hired, trained, supervised, and paid their assistants with no input from the Employer (Tr. pp. 66, 67, 79, 80).

20. The Employer did not provide training or require the painters to follow a specific method or procedure when performing their services (Tr. p. 68).

21. Other than invoices for payment of services, the Employer did not require the painters to provide verbal or written reports regarding the job assignments (Tr. p. 68).

22. Due to the nature of their work, the painters provided their services at various job sites. The painters' services were not provided at the Employer's place of business (Tr. pp. 68, 69).

23. The Employer only hired painters with 10 years or more experience in the field (Tr. pp. 60, 70). The Employer did not provide the painters with instruction as to the manner or sequence of performing their services (Tr. p. 69).

24. The Employer maintained the right to discharge the painters at any time with little or no notice. If the Employer was dissatisfied with the services provided by a painter, the Employer would simply cease providing the painter with job assignments (Tr. pp. 65, 66).

25. The Employer did not establish set hours of work for the painters. The painters worked on their own schedules with no input from the Employer (Tr. p. 69).

26. The painters were free to accept or decline the assignments provided by the Employer (Tr. pp. 67, 73). Some of the painters worked for other painting companies (Tr. p. 69).

27. The Employer provided the painters with paint, tape, plastic, stucco patch, and drywall patch (Tr. p. 77). The painters were each responsible to furnish their own tools and equipment to provide their services (Tr. pp. 71, 72). The painters were also responsible to pay for non-incidental damages (Tr. pp. 78, 79).

28. The Employer did not reimburse the painters for any expenses associated with their services (Tr. pp. 73, 78). The painters were paid “on a job basis”. The painters had the ability to negotiate their pay rate for each job (Tr. pp. 64, 73, 76).

29. The painters made significant investments in their trade based on the value of the necessary equipment that was needed to perform their services (Tr. pp. 71, 72).

The Employer contends that the telemarketers and painters were independent contractors and not employees from the period of January 1, 2008 through December 31, 2009. The issues in dispute in this case are the employment status of the telemarketers and painters from the period of January 1, 2008 through December 31, 2009, and whether the pay earned by the telemarketers and painters during that period constituted wages.

Arizona Revised Statutes § 23-615 defines "employment" as follows:

> "Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce, and includes:
>
> 1. An individual's entire service performed within or both within and without this state if:
>
> (a) The service is localized in this state. ...

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

> 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, 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 provision of 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:

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 in pertinent part:

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 business person, 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.

The primary issue in this case is whether the services that were provided by the telemarketers and painters from January 1, 2008 through December 31, 2009, were excluded from the definition of "employee" by qualifying as "independent contractors" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires application of the statutes and code provisions cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Employer and the telemarketers and painters. We

further consider the issues of control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

Under Arizona Administrative Code, Section R6-3-1723(A)(1), control includes the right to control as well as control in fact. Arizona Administrative Code, Section R6-3-1723(D)(2), identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor, enumerated in Arizona Administrative Code, Section R6-3-1723(E), are: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; and (6) whether the individual has simultaneous contracts with other persons or firms.

In the application of the guidelines set out in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes the following:

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.

The Employer did not prohibit the telemarketers from hiring assistants (Tr. pp. 15, 40, 43). However, during the Appeals Board hearing, the Employer testified that due to the nature of the telemarketer’s job duties, he did not believe it was necessary for the telemarketers to hire an assistant (Tr. p. 40). Therefore, regarding the telemarketers, we find this factor neutral.

For safety purposes, the Employer required the painters to work with at least one assistant while working at a job site (Tr. pp. 58, 60). The painters hired, trained, supervised, and paid their assistants with no input from the Employer (Tr. pp. 66, 67, 79, 80). Therefore, regarding the painters, we find this factor neutral.

b. Compliance with Instructions

> Control is present when the individual is required to comply with instructions about when, where or 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.

Upon hire, telemarketers were provided with a script to follow while placing cold calls to potential clients (Tr. pp. 15, 28). The Employer required its telemarketers to provide daily communication with the Employer via e-mail. The purpose of the daily e-mails was to notify the Employer that the telemarketer was "breathing" and working (Tr. pp. 37, 38). However, the telemarketers were free to work from any location, as long as they had access to a phone (Tr. p. 29). We find that the fact the telemarketers were required to follow a script, and were required to provide daily communication with the Employer, weighs heavily in favor of control. Therefore, regarding the telemarketers, this factor shows control, and indicates an employment relationship.

For safety purposes the painters were required to hire an assistant and work with at least a two-man crew when working at the various job sites (Tr. p. 80). However, other than requiring each painter to work with an assistant, and to follow the Universal Painter's Code, the common industry standard of performance, the Employer did not require the painters to follow a specific method or procedure when performing their services (Tr. p. 68). Therefore, regarding the painters, this factor shows an absence of control, and indicates an independent relationship.

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.

The Employer did not require written reports from the telemarketers (Tr. p. 28). However, after scheduling an appointment, the telemarketers provided the Employer with a report of the client's name, address, phone number, and time of the appointment (Tr. p. 34). This communication was provided to the Employer either verbally or in written form. We find that these oral and written reports do not bear upon the method by which the services were performed, but are simply reports of performance and an accounting of services. Therefore, regarding the telemarketers, this factor shows an absence of control, and indicates an independent relationship.

Other than invoices for payment of services, the Employer did not require the painters to provide oral or written reports regarding the job assignments (Tr. p. 68). Therefore, regarding the painters, this factor shows an absence of control, and indicates an independent relationship.

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.

The Employer's job advertisement for telemarketers posted on AZjobz.com states that the telemarketers were able to work from home (Bd. Exh. 7A). In addition, the Employer did not regulate where the telemarketers performed their services. The telemarketers were able to work from any location, as long as they had access to a phone (Tr. p. 29). Regarding the telemarketers, this factor shows an absence of control, and indicates an independent relationship.

Due to the nature of their work, the painters provided their services at various job sites (Tr. pp. 68, 69). Therefore, regarding the painters, we find this factor neutral.

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.

The Employer's job advertisement for telemarketers posted on AZjobz.com states: "YOU MUST BE ABLE TO COMMIT TO checking your email and respond to any and all emails sent to you DAILY. Part Time hours we ask you (sic) are able to commit to atleast (sic) 10-15 hours or more if possible per week. Full Time hours we ask you (sic) are able to commit to atleast (sic) 20 hours or more per week" (Bd. Exh. 7B). In evaluation of these requirements, we find it unlikely that the telemarketer would be able to hire a substitute or sublet their services without the Employer's knowledge or consent. Therefore, regarding the telemarketers, this factor shows control, and indicates an employment relationship.

The Employer only hired painters with 10 years or more experience in the field (Tr. pp. 60, 70). Therefore, we conclude that the Employer would discourage the painters from delegating or assigning their job assignments to a less experienced painter. Therefore, regarding the painters, this factor shows control, and indicates an employment relationship.

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 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.

Upon hire, the telemarketers were provided with a script to follow when placing cold calls to potential clients (Tr. p. 27). Furthermore, per the AZjobz.com advertisement, telemarketers must commit to working a minimum amount of hours per week depending upon whether they are working full-time or part-time (Tr. p. 28; Bd. Exh. 7B). In evaluation of these requirements, we find that the telemarketers had to perform services in the manner provided by the Employer and had to follow the schedules of the employing unit. Therefore, regarding the telemarketers, this factor shows control, and indicates an employment relationship.

The Employer did not provide the painters with instruction as to the manner or sequence of performing their services. Once the job was assigned to a particular painter, the painter would discuss the job details with the client (Tr.

p. 69). Therefore, regarding the painters, this factor shows an absence of control, and indicates an independent relationship.

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.

The Employer maintained the right to discharge the telemarketers at any time with little or no notice (Tr. pp. 39, 40). Since the telemarketers could be dismissed without notice or cause, they did not possess the rights that one would expect in a contractual relationship. Therefore, regarding the telemarketers, this factor shows control, and indicates an employment relationship.

The Employer maintained the right to discharge the painters at any time with little or no notice. If the Employer was dissatisfied with the services provided by a painter, the Employer would simply cease providing the painter with job assignments (Tr. pp. 65, 66). Therefore, regarding the painters, this factor shows control, and indicates 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.

The Employer requested that the telemarketers commit to full-time or part-time hours (Tr. p. 26; Bd. Exh. 7B). Therefore, regarding the telemarketers, this factor shows control, and indicates an employment relationship.

The Employer did not establish set hours of work for the painters (Tr. p. 69). During the Appeals Board hearing, the Employer acknowledged that the painters were required to adhere to the client's homeowner's association's regulations (Tr. p. 71). Otherwise, the painters worked on their own schedules

with no input from the Employer. Therefore, regarding the painters, this factor shows an absence of control, and indicates an independent relationship.

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.

Prior to performing services, the telemarketers participated in a two-hour unpaid training class that consisted of information and guidelines on how to perform their services (Tr. pp. 15, 27, 36; Bd. Exh. 7A). Therefore, regarding the telemarketers, this factor shows control, and indicates an employment relationship.

As previously stated, the Employer only hired painters with 10 years or more experience in the field (Tr. pp. 60, 70). Therefore, it was unnecessary for the Employer to instruct or provide training for the painters. Therefore, regarding the painters, we find this factor is neutral.

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.

During the Appeals Board hearing, the Employer testified that its telemarketers were free to work for other entities while performing services for the Employer. The Employer testified that many of the telemarketers had full-time or part-time jobs elsewhere, and merely performed services for the Employer as a means to supplement their incomes (Tr. p. 31). Therefore, regarding the telemarketers, this factor shows an absence of control, and indicates an independent relationship.

During the Appeals Board hearing, the Employer testified that the painters were free to accept or decline the assignments provided by the Employer (Tr. p. 67). Some of the painters worked for other painting companies (Tr. p. 69). Therefore, regarding the painters, this factor shows an absence of control, and indicates an independent relationship.

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.

Upon hire, each telemarketer was provided with a directory of phone numbers called a "cold calling list" (Tr. pp. 15, 17, 35). The cold calling lists were replenished for the telemarketers as needed. The telemarketers were also provided with a script to follow when placing phone calls to potential clients. The script was used as a guideline and informed the telemarketers what they were required to say when speaking to the potential clients (Tr. p. 28). Therefore, regarding the telemarketers, this factor shows control, and indicates an employment relationship.

In order to perform their services, the Employer provided the painters with paint, tape, plastic, stucco patch, and drywall patch (Tr. p. 77). The painters were each responsible to furnish their own tools and equipment to use at the various job sites (Tr. pp. 71, 72). Therefore, regarding the painters, we find that this factor is neutral.

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.

No evidence was presented that the telemarketers received reimbursement for any expenses incurred during the normal course of their duties (Tr. p. 15). However, no evidence was presented that the telemarketers incurred business expenses during the normal course of their duties. Therefore, regarding the telemarketers, we find that this factor is neutral.

During the Appeals Board hearing, the Employer testified that on occasion a piece of equipment will break, or a painter's truck will require maintenance. The Employer testified that his company never reimburses the painters for these expenses (Tr. p. 78). Therefore, regarding the painters, this factor shows an absence of control, and indicates an independent relationship.

The following are additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E), and are equally appropriate for consideration in determining the relationship of the parties.

l. Availability to the 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.

No evidence was presented that the telemarketers advertised their services or made their services available to the public while working for the Employer. Furthermore, no evidence was presented that any of the telemarketers were working for the Employer as a business entity (Tr. p. 15). Therefore, regarding the telemarketers, this factor shows control, and indicates an employment relationship.

During the Appeals Board hearing, the Employer testified that many of his painters worked for other entities, and advertised their services with magnets on their work trucks (Tr. pp. 69, 81, 82). Therefore, regarding the painters, this factor indicates an independent relationship.

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.

The Employer's job advertisement for telemarketers posted on AZjobz.com specified the pay scale (Bd. Exh. 7B). The telemarketers were paid at a commission rate of $40 per lead for the first four leads. For five to nine leads, the telemarketers were paid $50 per lead. For 10 leads, the telemarketers were paid $600 (Tr. pp. 31-33; Bd. Exh. 7B). Regarding the telemarketers, we find this factor is neutral.

The painters were paid "on a job basis". During the Appeals Board hearing, the Employer testified that each job assignment was unique, and therefore the pay rate was not set at a flat rate. If additional labor was required, the painters had the ability to negotiate the pay rate for their services (Tr. pp. 64, 73, 76). Therefore, regarding the painters, this factor shows an absence of control, and indicates an independent 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.

The telemarketers were unable to negotiate their pay rates (Bd. Exh. 7B). Furthermore, no evidence was presented to suggest that the telemarketers were subject to any recurring liabilities or expenses connected with their work. As a result, the telemarketers did not have the ability to realize a profit or loss during the course of their duties. Therefore, regarding the telemarketers, this factor shows control, and indicates an employment relationship.

As previously stated, the painters were responsible to furnish their own equipment for their services (Tr. p. 78). In addition, the painters were responsible for any damages that were not incidental to their services (Tr. pp. 78, 79). Therefore, depending on the job and circumstances, the painters were in a position to earn a profit or suffer a loss. Therefore, regarding the painters, this factor shows an absence of control, and indicates an independent relationship.

4. Obligation

An employee usually has the right to end his relationship with his employer at any time without incurring liability. 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.

The telemarketers were free to end the relationship with the Employer at any time (Tr. pp. 16, 34). No evidence was presented that the telemarketers had a legal obligation to complete the job or would suffer a penalty for an early termination of their services. Although the Employer testified that a contract between the Employer and telemarketers existed (Tr. p. 41), the Employer failed to produce a copy of the contract for the Appeals Board hearing. Therefore, we find that the telemarketers had the ability to leave the job without incurring a penalty. Therefore, regarding the telemarketers, this factor indicates an employment relationship.

Insufficient evidence was presented to establish that the painters had a legal obligation to complete their job assignments. Although the Employer testified that a contract between the Employer and painters existed (Tr. p. 82), the Employer failed to produce a copy of the contract for the Appeals Board hearing. Therefore, we find that the painters had the ability to leave a job

unfinished without incurring a penalty. Therefore, regarding the painters, this factor indicates an employment relationship.

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.

The telemarketers were required to own a personal computer and obtain Internet access for the purpose of remaining in daily contact with the Employer via e-mail. The telemarketers were also required to have a phone line for placing cold calls to potential clients (Tr. p. 15; Bd. Exh. 7B). The utilization of a personal computer and phone line are not tools or instruments specific to the duties of telemarketing or for business purposes alone. Therefore, we find that neither the Employer nor the telemarketers made any significant investments in the performance of the telemarketer's services. Therefore, regarding the telemarketers, this factor is neutral.

As previously stated, the Employer did not reimburse the painters for any expenses incurred during the course of their duties (Tr. p. 78). During the Appeals Board hearing, the Employer testified that the painters made significant investments based on the value of the necessary equipment required to perform their services. The Employer testified the painters: "need a truck, uh, power washer, power sprayer, five-six-seven different ladders, um, [they are going to] continually have to rebuild, uh, the power washer and power sprayers, anywhere from seven to eight times a year at $300 a pop" (Tr. pp. 71, 72). The Employer also testified: "a power sprayer could be $3,000. Power washer could be eight - $800 for a professional grade one. Um, all the paint brushes, rollers, and all that, uh, all the things to clean your equipment at the end of the day. I mean, there – it could easily be a five to ten thousand dollar investment before the truck" (Tr. p. 72). Therefore, regarding the painters, this factor shows an absence of control, and indicates 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.

Insufficient evidence was presented to show that the telemarketers worked for other clients while working for the Employer. During the Appeals Board hearing, the Department's witness testified that many of the telemarketers showed a history of employment (Tr. p. 15). Although the Employer believed that some of the telemarketers worked with other clients to supplement their income (Tr. p. 31), no evidence was presented to establish that the telemarketers worked under simultaneous contracts. Therefore, regarding the telemarketers, this factor shows control, and indicates an employment relationship.

As previously stated, during the Appeals Board hearing, the Employer testified that many of the painters worked for other clients, and advertised their services while on job assignments (Tr. pp. 69, 81, 82). Therefore, regarding the painters, this factor shows an absence of control, and indicates an independent relationship.

The Arizona Court of Appeals, in the case of Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given its long established liberal construction in an effort to include as many types of employment relationships as possible, when the Court stated:

> The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [See A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals, in the case of Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where the Court stated:

> The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section,

> should be given a liberal interpretation ... [Emphasis added].

Telemarketers:

In accordance with the liberal interpretation required by the Employment Security Law of Arizona, we conclude that the Department met its burden to establish that the telemarketers/appointment setters were employees of the Employer from the period of January 1, 2008 through December 31, 2009. We conclude all payments to the telemarketers for their services constituted wages, by operation of A.R.S. § 23-622(A).

Painters:

Pursuant to Arizona Administrative Code, Section R6-3-1723(F), there are other factors not specifically identified in the rule that may be considered in evaluating this issue. Regarding the painters, one such factor has been identified by the Department, namely, the manner in which the Employer holds itself out to the public through the Employer's own marketing on its website. On the Employer's website (as evidenced from a printout dated March 18, 2011), the Employer identified its services and stated: "We are a fully licensed; (#ROC******) bonded and insured paint contracting company. ... Our painters are proud honest crews that are always drug/cigarette/alcohol free" (Bd. Exh. 6A). Also, in a job advertisement posted on the website Angie's List.com (again as evidenced from a printout dated March 18, 2011), the Employer also asserts that its company carries worker's compensation insurance (Tr. p. 56; Bd. Exh. 8). The Department's witness testified that the Employer is proclaiming the painters as "[o]ur painters" meaning that the Employer considers the painters as employees (Tr. p. 55). The Department's witness also testified that independent contractors carry their own worker's compensation insurance, and if the Employer is utilizing non-licensed contractors, the Employer is essentially "aiding and abetting" those contractors (Tr. p. 53). The Department's witness emphasized: "[t]he company that you work for doesn't provide Workman's Comp (sic). If you're self-employed you carry your own" (Tr. p. 56).

During direct testimony, the Employer acknowledged that it held worker's compensation insurance for its painters, but only during the period from 2010 through the middle of 2011 (Tr. pp. 63, 74). Since the period at issue here is from January 1, 2008 through December 31, 2009, we are not persuaded by the Department's contention.

In addition, the Employer testified that under the Registrar of Contractor's requirements, a non-licensed contractor may perform services if the value of the labor is less than $1,000 (Tr. p. 70). Though considered by the Department as indicative of an employment relationship, the Board does not find the

Employer's website marketing tactics sufficient to demonstrate control over the painters.

The painters were not employees of the Employer from January 1, 2008 through December 31, 2009, but rather the painters performed services for the Employer pursuant to an independent contractor relationship. We conclude that all payments to the painters for their services from January 1, 2008 through December 31, 2009, did not constitute wages by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **AFFIRMS, IN PART** the Reconsidered Determination issued April 2, 2014.

From January 1, 2008 through December 31, 2009, services performed by individuals as telemarketers/appointment setters, constituted employment.

All forms of remuneration paid to the telemarketers for such services from January 1, 2008 through December 31, 2009, constituted wages.

THE APPEALS BOARD **REVERSES, IN PART** the Reconsidered Determination dated April 2, 2014.

From January 1, 2008 through December 31, 2009, services performed by individuals as painters did not constitute employment, because the parties had an independent contractor relationship.

None of the remuneration paid to the painters for such services from January 1, 2008 through December 31, 2009, constituted wages.

DATED: 8/27/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, 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.

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review 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 requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review 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 for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:

1. explains why the Appeals Board decision is wrong,
2. cites the record, rules and other authority, and
3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 8/27/2015 to:

Er: xxx
Acct. No: xxx-000

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By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1449667-001-B

xxx

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Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

October 13, 2015 ***.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination letter issued on January 17, 2014, which affirmed the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued on September 25, 2013, and held that services performed by the drivers at issue constituted employment and remuneration paid for such services constituted wages.

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

THE APPEALS BOARD scheduled a telephone hearing for September 10, 2015, before Appeals Board Administrative Law Judge **Morris L. Williams, III,** with written notice to the parties. The issues set for the hearing were:

1. Whether the Reconsidered Determination affirmation of the September 25, 2013 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES and the September 25, 2013 DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY was proper.
2. Whether the services performed by individuals as "taxi cab drivers" constitute employment, as defined in A.R.S. § 23-615.
3. Whether remuneration paid to individuals as "taxi cab drivers" constitutes "wages", as defined in A.R.S. § 23-622.
4. Whether any of the individuals performing services as "taxi cab drivers" performed work that is exempt or is excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or under a decision of the federal government to not treat that individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
5. Whether any of the individuals performing services as "taxi cab drivers" factually and legitimately were independent contractors for the quarters ending: 7/1/10 through 6/30/13.

See: A.R.S. §§ 23-613.01, 23-615, 23-617, 23-622, 23-724 and Arizona Administrative Code, Sections R6-3-1705 and R6-3-1723.

The Employer did not appear at the scheduled Board hearing. The Employer did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department was present, and a witness for the Department was present. Because the Employer did not appear at the September 10, 2015 Appeals Board hearing to pursue its appeal, 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 Employer's petition for hearing. The Employer did not appear at the scheduled Board hearing to present evidence.

The Employer's default means that insufficient evidence was presented to support reversing or modifying the Department's January 17, 2014 Reconsidered Determination letter. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's request for hearing.

The Department's January 17, 2014 Reconsidered Determination letter remains in full force and effect.

This Dismissal does not affect any agreement entered into between the Employer and the Department.

DATED: 9/11/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

ROBERT NALL, Acting 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, 1951 W. Camelback Road, Suite 465, 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. A request for review will not be considered unless the Appeals Board sets aside this dismissal, and then issues a decision upon the merits of the 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 9/11/2015
to:

(x) Er: xxx Acct. No: xxx-000

(x) ELI D GOLOB
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(x) LULU GUSS, CHIEF OF TAX
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By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1449661-001-B

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xxx

STATE OF ARIZONA E S A TAX UNIT
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Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

September 3, 2015 ***.

DECISION
REVERSED

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination issued on March 14, 2014, which affirmed the Determination of Liability for Employment or Wages issued on January 27, 2014. The Reconsidered Determination held that "services, categorized herein as a project manager, were properly determined to represent employment and that the $15 per hour pay for services rendered constituted wages for unemployment insurance purposes."

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, which was convened on March 10, 2015, before Appeals Board Administrative Law Judge **Denise C. Sanchez**. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the services performed by an individual as a project manager constituted employment as defined in A.R.S. § 23-615.

2. Whether the services performed by an individual as a project manager are exempt or excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat the individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.

3. Whether all forms of remuneration paid to an individual for services as a project manager constitutes wages as defined in A.R.S. § 23-622.

On the scheduled date of the hearing, one Employer witness appeared and testified. Counsel for the Department was present, and one witness testified for the Department. Board Exhibits 1 through 13 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer is a non-profit 501(c)(3) organization that partners with local businesses and governmental agencies to promote economic growth (Tr. p. 34).

2. Following a routine verification audit assignment, on January 27, 2014, the Department issued a Determination of Liability for Employment or Wages which held that the Employer was identified as: “THE EMPLOYER of workers performing services according to A.R.S. § 23-613.01 or A.R.S. 23-614” (Bd. Exh. 5).

3. The Determination also stated: "All forms of remuneration paid for this service constitute wages. This Determination includes the individual and amounts shown on the attached Notice of Assessment Report(s) for the quarters ending: 12/31/12 through 6/30/13" (Bd. Exh. 5).

4. The Notice of Assessment reports reflected the Employer's tax liability for the fourth quarter of 2012, and the first and second quarters of 2013 (Bd. Exhs. 6A, 7A). A Report of Wages Paid Each Employee was also issued that identified "xxx" (hereinafter M.G.) and her wages for the 2012 and 2013 calendar years (Bd. Exhs. 6B, 7B).

5. On August 24, 2012, a Consultant/Independent Contractor Agreement (hereinafter I.C.A.) was signed by the Employer and M.G. (Tr. pp. 42, 59; Bd. Exh. 4). The Employer contracted with M.G. "to provide project management of the Innovation Summit for the [Employer]" (Bd. Exh. 4A).

6. The Employer hired M.G. to plan and organize the Innovation Summit, a conference that was scheduled to be held on October 9, 2012 (Tr. pp. 34, 41, 59; Bd. Exh. 4). Accordingly, the I.C.A. specifically identified that the Employer contracted for M.G.'s services from "August 24, 2012 through October 12, 2012" (Bd. Exh. 4A).

7. M.G. set her pay rate at $15 per hour. She did not have set work hours or a required amount of hours that she needed to work per week (Tr. pp. 20, 25, 36, 39). M.G. recorded the number of hours that she worked per week, and she provided the Employer with an invoice of her charges at the end of each month (Tr. p. 39).

8. For the duration of the I.C.A. (approximately six weeks), M.G. met with the Employer's executive director or her assistant on a weekly basis to provide updates on her progress in planning and organizing the conference. The weekly meetings lasted from 30 minutes to one hour (Tr. pp. 19, 23, 32, 38, 49, 55). Written reports were not required (Tr. p. 52).

9. The Employer did not prohibit M.G. from hiring assistants. Under the I.C.A., M.G. was required to receive the Employer's approval before assigning or sub-letting any of her services to an assistant or third party (Tr. pp. 52, 61; Bd. Exh. 4B).

10. Upon her hire, the Employer provided M.G. with a flow chart to use as guidance for planning and organizing the Innovation Summit (Tr. pp. 25, 36).

11. The flow chart provided a broad, general outline of the necessary tasks needed to organize the conference such as hiring speakers, and securing a location (Tr. pp. 48, 49). M.G. did not receive specific instructions from the Employer regarding when, where, or how to complete her assignment (Tr. pp. 36, 48, 49, 56).

12. While M.G. was working under the I.C.A., the Employer rented office space that contained a number of unused cubicles (Tr. pp. 50, 51). Despite the available cubicles, M.G. performed her services from her home office and only reported to the Employer's place of business for the weekly meetings with the executive director (Tr. p. 51).

13. The Employer gave no instruction to M.G. as to work sequence. She was not required to work a set number of hours during the workday, and she had the ability to set her own schedule (Tr. pp. 20, 25, 36, 39, 56).

14. M.G. was free to work for other clients while working under the I.C.A. (Tr. pp. 26, 38, 54; Bd. Exh. 4).

15. The Employer had the right to terminate the I.C.A. for any reason with 30-days' advance written notice (Tr. p. 25; Bd. Exh. 4B). There was no legal obligation for M.G. to complete the contract (Tr. pp. 27, 40, 53).

16. Planning and organizing conferences was not part of the Employer's normal business practice. M.G.'s services were retained for her expertise and educational background in this area. She did not

receive or require training from the Employer (Tr. pp. 36, 41, 46-48).

17. Other than the flow chart, the Employer did not provide M.G. with tools or materials to perform her services (Tr. pp. 26, 36, 37, 48, 49, 53, 54).

18. M.G. did not receive reimbursements for any expenses incurred during the course of her duties (Tr. pp. 26, 37, 64).

19. M.G. did not require any significant investments in order to perform her services under the I.C.A. M.G. used her personal computer, that she purchased prior to the I.C.A., and she mainly performed her services by driving her personal vehicle, and working out of her apartment (Tr. p. 27).

20. M.G. did not have recurring liabilities or expenses connected with the work. As a result, M.G. did not realize a profit or loss during her time working under the I.C.A. (Tr. pp. 26, 27, 39).

21. Under the I.C.A., M.G. ceased performing services for the Employer upon conclusion of the Innovation Summit on October 9, 2012 (Tr. pp. 54, 59; Bd. Exh. 4A).

22. During the first and second quarters of 2013, M.G. was hired by xxx (hereinafter T.B.) a non-profit organization (Tr. p. 43).

23. T.B. had been awarded a $5,000 grant to further its educational work in the local school system. Upon awarding of the grant, T.B. hired M.G. to perform services (Tr. p. 43).

24. Although T.B. was a non-profit organization, T.B. was not identified as a 501(c)(3) organization. Consequently, T.B. was unable to process the awarded grant money without the aid of the Employer. T.B. needed the Employer to act as a physical agent and process the grant money (Tr. p. 43).

25. As a result, the Employer paid M.G. for the services that she performed for T.B. (Tr. pp. 43, 66; Bd. Exh. 7). There is no evidence that the Employer had any direction or control over the services M.G. provided to T.B. during this time period.

26. In June 2013, M.G. scheduled a one-hour consultation meeting with the Employer's executive director to speak about future potential projects (Tr. p. 45).

27. Upon conclusion of the meeting, M.G. billed the Employer $20 for her consultation services. The Employer paid M.G.'s consultation fee, but did not hire M.G. to perform additional services (Tr. pp. 45, 67; Bd. Exh. 7). There is no evidence that the Employer had any direction or control over M.G.'s services during this one-hour consultation meeting.

The Employer contends that M.G. was an independent contractor and not an employee. The issues in dispute in this case are the employment status of M.G. during the fourth quarter of 2012, and the first and second quarters of 2013, and whether the pay earned by M.G. constituted wages.

Arizona Revised Statutes § 23-615 defines "employment" as follows:

> "Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce, and includes:
>
> 1. An individual's entire service performed within or both within and without this state if:
>
> (a) The service is localized in this state. ...

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

> 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, 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 provision of 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:

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 in pertinent part:

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 business person, 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.

The primary issue in this case is whether the services that were provided by M.G. during the fourth quarter of 2012, and the first and second quarters of 2013, were excluded from the definition of "employee" by qualifying as an "independent contractor" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires application of the statutes and code provisions cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Employer and M.G. We further consider the issues of

control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

Under Arizona Administrative Code, Section R6-3-1723(A)(1), control includes the right to control, as well as control in fact. Arizona Administrative Code, Section R6-3-1723(D)(2), identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor, enumerated in Arizona Administrative Code, Section R6-3-1723(E), are: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; and (6) whether the individual has simultaneous contracts with other persons or firms.

In the application of the guidelines set out in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes the following:

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.

The Employer did not prohibit M.G. from hiring assistants. However, under the I.C.A., M.G. was required to receive the Employer’s approval before assigning or sub-letting her services to an assistant or third party (Tr. pp. 52, 61; Bd. Exh. 4B). This factor shows control over who M.G. could hire as assistants, and indicates an employment relationship.

b. Compliance with Instructions
Control is present when the individual is required to comply with instructions about when, where or 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.

Upon her hire, the Employer provided M.G. with a flow chart to use as guidance for planning and organizing the Innovation Summit (Tr. pp. 25, 36). The flow chart provided a broad, general outline of the necessary tasks needed to organize the conference such as hiring speakers, and securing a location (Tr. pp. 48, 49). However, M.G. did not receive specific instructions from the Employer regarding when, where, or how to complete her assignment (Tr. pp. 36, 48, 49, 56). This factor shows an absence of control, and indicates an independent relationship.

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.

The Employer required M.G. to provide verbal progress reports on a weekly basis (Tr. pp. 19, 23, 32, 38, 49, 55). Written reports were not required (Tr. p. 52). We find that these weekly progress reports related to M.G.'s weekly accomplishments toward the ultimate goal of planning and organizing the Innovation Summit conference. The weekly progress reports were not utilized as a means for M.G. to account for her actions, nor for the Employer to provide direction. Therefore, this factor shows an absence of control, and indicates an independent relationship.

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.

While M.G. was working under the I.C.A., the Employer rented office space that contained a number of unused cubicles (Tr. pp. 50, 51). Despite the available cubicles, M.G. performed her services from her home office and only reported to the Employer's place of business for the weekly meetings with the executive director. During the Appeals Board hearing, the Employer's witness testified that M.G. had no reason to perform her services from the [Employer's] office, when she had a home office that she was capable of working from (Tr. p. 51). This factor shows an absence of control, and indicates an independent relationship.

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.

While working under the I.C.A., M.G. was expected to personally provide consultant services. M.G. was also prohibited from allowing anyone not a party to the I.C.A. to perform the services, except those persons approved by the Employer (Bd. Exh. 4B). This factor shows control over whether or not M.G. may hire a substitute, and indicates an employment relationship.

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 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.

The Employer gave M.G. no instruction as to the manner or sequence of performing her work. She had the ability to set her own schedule. M.G. was not required to work a set number of hours during the workday (Tr. pp. 20, 25, 36, 39, 56). As M.G. was free to establish her own work sequence, this factor shows an absence of control, and indicates an independent relationship.

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.

The I.C.A. states in part: "This Agreement shall terminate on the completion date, provided that: (a) [the Employer] may earlier terminate this agreement at any time if Consultant does not perform, refuses to perform, or if, in the professional judgment of the [Employer's] contract representative named herein, Consultant's performance is unsatisfactory as to the manner or performance or the product of said performance and fails to meet the [Employer's] requirements as specified in this agreement, and (b) [the Employer] may terminate this agreement at any time and for any reason with thirty (30) days advance written notice to Consultant" (Bd. Exh. 4B).

Although M.G. could be relieved from her responsibilities under the agreement "at any time", per the terms of the I.C.A. she could only be relieved without notice if she failed to perform, refused to perform, or performed unsatisfactorily (Bd. Exh. 4B). Otherwise, under the terms of the I.C.A., M.G. would receive 30 days' advance written notice prior to the termination of the contract. This factor shows an absence of control, and indicates an independent 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.

M.G. was not required to work a set number of hours during the workday, and she had the ability to choose her own schedule (Tr. pp. 20, 25, 36, 39). There is insufficient evidence in the record to establish that the Employer had any control over when she performed her work. This factor shows an absence of control, and indicates an independent relationship.

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.

Planning and organizing conferences was not part of the Employer's normal business practice. M.G.'s services were retained for her expertise and educational background in this area. She did not receive or require training from the Employer (Tr. pp. 36, 41, 46-48). This factor shows an absence of control, and indicates an independent relationship.

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.

The evidence of record does not establish that the Employer required M.G. to work any set number of hours (Tr. pp. 20, 25, 36, 39, 56). In addition, M.G. was free to work for other entities, although there is no evidence in the record that she did so (Tr. pp. 26, 54). Through calculations of M.G.'s reported earnings in 2012, the Department's witness concluded that M.G. worked part-time hours for the Employer (Tr. p. 26; Bd. Exh. 6). Presumably, M.G.'s part-time hours would have allowed her the opportunity to provide her services elsewhere. This factor shows an absence of control, and indicates an independent relationship.

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.

Under the I.C.A, the Employer indicated that it intended to provide M.G. with the "necessary equipment and supplies" to perform her services (Bd. Exh. 4A). However, other than the flow chart, the Employer did not provide M.G. with tools or materials to perform her services (Tr. pp. 26, 36, 37, 48, 49, 53, 54). M.G. worked from her home with her own equipment (Tr. pp. 23, 24, 26, 36-38, 51, 54, 55). This factor shows an absence of control, and indicates an independent relationship.

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.

Under the I.C.A, the Employer indicated that it intended to reimburse M.G. for "[o]ffice supplies and materials purchased for purposes of completing the services" (Bd. Exh. 4A). However, during the Appeals Board hearing, the Employer testified that M.G. did not receive reimbursements for any expenses incurred during the course of her duties (Tr. pp. 26, 37, 64). This factor shows an absence of control, and indicates an independent relationship.

The following are additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E), and are equally appropriate for consideration in determining the relationship of the parties.

l. Availability to the 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.

During the Appeals Board hearing, the Employer testified that M.G. was free to work for other clients while working under the I.C.A. (Tr. pp. 38, 54; Bd. Exh. 4). However, there is no evidence in the record to establish that M.G.

advertised her services or made her services available to the public while working under the I.C.A. As we stated above, through calculations of M.G.'s reported earnings in 2012, the Department's witness concluded that M.G. worked part-time hours for the Employer (Tr. p. 26; Bd. Exh. 6). Presumably, M.G.'s part-time hours would have allowed her the opportunity to provide her services elsewhere. This factor shows an absence of control, and indicates an independent relationship.

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.

During the Appeals Board hearing, the Employer testified that M.G. was paid an hourly rate for the services that she performed under the I.C.A. The Employer also testified that M.G. set the pay rate for her services (Tr. p. 38). However, M.G. was hired for the single purpose of planning and organizing the Employer's Summit Innovation conference scheduled to be held on October 9, 2012 (Tr. p. 59; Bd. Exh. 4A). Therefore, we conclude that M.G. was paid "on a job basis", and that M.G.'s compensation was negotiated between herself and the Employer. This factor shows an absence of control, and indicates an independent 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.

Although M.G. set her pay rate and determined the number of hours that she needed to work to complete her work assignment, there is no evidence to suggest that M.G. was subject to any recurring liabilities or expenses connected with the work. As a result, M.G. did not have the ability to realize a profit or loss during her time working under the I.C.A. (Tr. pp. 26, 27, 39). This factor shows control, and indicates an employment relationship.

4. Obligation
   An employee usually has the right to end his relationship with his employer at any time without incurring liability. 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.

The I.C.A. did not address an obligation for M.G. to fulfill the contract (Bd. Exh. 4). Furthermore, M.G. was free to end the relationship with the Employer without incurring a penalty (Tr. pp. 27, 40, 53). This factor indicates an employment relationship.

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.

Although M.G. did not require any significant investments in order to perform her services under the I.C.A., the Employer did not furnish any facilities or equipment for M.G. to perform her services. M.G. used her personal computer, that she purchased prior to the I.C.A., and she mainly performed her services by driving her personal vehicle, and working out of her apartment (Tr. p. 27). Therefore, this factor is neutral.

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.

As identified previously, there is no evidence in the record to establish that M.G. advertised her services or made her services available to the public while working under the I.C.A. (Tr. pp. 38, 54; Bd. Exh. 4). Although M.G. was free to work for other clients, there is no evidence in the record to establish that she did so. However, because M.G. was not prohibited from working under simultaneous contracts, we find this factor shows an absence of control, and indicates an independent relationship.

The Arizona Court of Appeals, in the case of Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given its long established liberal construction in an effort to include as many types of employment relationships as possible, when the Court stated:

> The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [See A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals, in the case of Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where the Court stated:

> The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation ... [Emphasis added].

In accord with the Employment Security Law of Arizona, we conclude that the evidence of independent contractor status far outweighs the evidence of an employee status.

M.G. was not an employee of the Employer, during the fourth quarter of 2012, but rather, she performed services pursuant to an independent contractor relationship. Therefore, we conclude that all payments to M.G. for her services during that period did not constitute wages, by operation of A.R.S. § 23-622(A).

With regard to the first and second quarters of 2013, the uncontroverted evidence of record establishes that the Employer acted solely as a third-party agent for another entity, T.B., to enable the payment of grant monies to that organization. M.G. provided no services to the Employer during those quarters. We also note that the Employer did compensate M.G. for a consultation meeting during which potential future projects were discussed, but the Employer elected not to retain M.G. for those projects. The single one-hour meeting did not constitute employment.

The Department has failed to present sufficient evidence to establish that M.G. was an employee of the Employer during the first and second quarters of 2013. Therefore, we conclude that all payments to M.G. for her services during that period did not constitute wages, by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **REVERSES** the Department's Reconsidered Determination dated March 14, 2014.

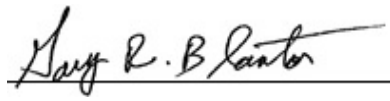
During the fourth quarter of 2012, services performed by M.G. did not constitute employment, because the parties had an independent contractor relationship.

During the first and second quarters of 2013, services performed by M.G. did not constitute employment, because the Employer lacked direction or control over M.G.'s services.

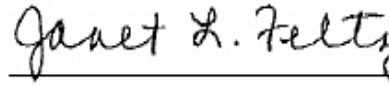
Therefore, none of the remuneration paid to M.G. from October 1, 2012 through June 30, 2013, constituted wages.

DATED: 8/4/2015

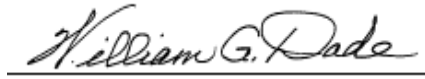
APPEALS BOARD



GARY R. BLANTON, Acting Chairman



JANET L. FELTZ, Member



WILLIAM G. DADE, Member

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By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1437907-001-B

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xxx

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Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

August 26, 2015 ***.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for hearing from the Department's Reconsidered Determination issued on December 31, 2013, which affirmed the Determination of Liability for Employment or Wages issued on November 4, 2011, and the Determination of Unemployment Insurance Liability issued on November 4, 2011. The Reconsidered Determination held that services performed by individuals as cosmetologists constitute employment and all remuneration paid for such services constitutes 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, which was convened on **March 19, 2015**, before Appeals Board Administrative Law Judge Morris L. Williams, III. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Reconsidered Determination affirming of the November 4, 2011 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES was proper.
2. Whether the services performed by individuals as "cosmetologists" constitute employment, as defined in A.R.S § 23-615.
3. Whether remuneration paid to individuals as "cosmetologists" constitute "wages," as defined in A.R.S § 23-622.
4. Whether the services performed by individuals as cosmetologists are exempt or excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat the individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
5. Whether any of the individuals performing services as "cosmetologists" factually and legitimately were independent contractors for the quarters ending: 4/2008 through 3/2011.

At the hearing, the Employer appeared by telephone, and two witnesses testified for the Employer. The Department was represented by counsel, and one witness testified for the Department. Board Exhibits 1 through 9 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer operated a salon, wherein cosmetologists performed various services on behalf of the Employer for the Employer's clients.
2. The Employer and the cosmetologists had signed Independent Contractors Agreements (Exh. 6). These agreements allowed

either party to terminate the agreement at any time for any reason (Exh. 6).

3. Also, pursuant to the agreement, the cosmetologists were given instruction and advice from the Employer, and the cosmetologists were expected to conduct their "business so as to maintain and increase the goodwill and reputation of the OWNER" (Bd. Exh. 6).

4. The Employer provided the cosmetologists with salon chairs, a work stations and other equipment. The Employer did not charge the cosmetologists a rental fee for the use of its equipment.

5. The Employer set the prices for the various services rendered by the cosmetologists, and the prices were displayed on the wall of the Employer's premises.

6. The cosmetologists submitted their receipts for services rendered to the Employer, and the Employer paid the cosmetologists a 60% commission the following Friday.

7. The cosmetologists did not have an investment in the Employer's business. The services provided by the cosmetologists were integral to the Employer's business as a salon.

8. The cosmetologists were required to personally perform their services, and these services were performed during the Employer's business hours. The Employer set the business hours.

9. The cosmetologists did not operate their own independent businesses with their own clients.

10. Following a tax audit, the Department issued a Determination of Liability for Employment or Wages on November 4, 2011, that held the "[s]ervices performed by individuals as cosmetologist constitute employment" for the quarters April 2008 through March 2011. (Bd. Exh. 4). The Department issued Notices of Assessment and Reports of Wages Paid Each Employee corresponding to the Determination of Liability for Employment or Wages (Bd. Exh. 5).

11. The Employer filed a timely request for reconsideration from the November 4, 2011 Determination of Liability for Employment or Wages, and the Determination of Unemployment Insurance Liability issued on November 4, 2011 (Bd. Exh. 6).

12. On December 31, 2013, the Department issued its Reconsidered Determination letter. The Department affirmed the Determination of Liability for Employment or Wages, and the

Determination of Unemployment Insurance Liability and held that the cosmetologists were properly determined to be employees and that their remuneration constituted wages (Bd. Exh. 7).

13. The Employer filed a timely petition for hearing from the Department's Reconsidered Determination.

Arizona Revised Statutes § 23-615 defines "employment" as follows:

> "Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce, and includes:
>
> 1. An individual's entire service performed within or both within and without this state if:
>
> (a) The service is localized in this state. ...
>
> * * *

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

> 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, 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 provision of 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:

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 in pertinent part:

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 business person, 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.

* * *

To support its contention that the cosmetologists were independent contractors, the Employer submitted some of the signed Independent Contractor Agreements between the Employer and the cosmetologists (Bd. Exh. 6). However, such contracts are not conclusive as to the nature of a work relationship, and we must look at the actual practice of the parties which supplemented the written agreement. *See* Arizona Department of Economic Security v. Employment Security Commission, 66 Ariz. 1, 182 P.2d 83 (1947). Therefore, we must analyze the nature of the work relationship between the Employer and the cosmetologists.

The primary issue presented is whether the services of cosmetologists were excluded from the definition of "employee" by qualifying as an "independent contractor" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires application of the statutes and code provision cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Employer and the cosmetologists. We further consider the issues of control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

Under Arizona Administrative Code, Section R6-3-1723(A)(1), control includes the right to control as well as control in fact. Arizona Administrative Code, Section R6-3-1723(D)(2), identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor, enumerated in Arizona Administrative Code, Section R6-3-1723(E), are: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; and (6) whether the individual has simultaneous contracts with other persons or firms.

In the application of the guidelines set out in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes the following:

a. <u>Authority over Individual's Assistants</u>
Hiring, supervising and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job.

In this case, the cosmetologists did not use assistants. Therefore, we find that this factor is neutral.

b. Compliance with Instructions

Control is present when the individual is required to comply with instructions about when, where or 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 Independent Contractor Agreement directed that the "OWNER shall assist the SALESPERSON in her work by advice, instruction and cooperation" (Bd. Exh. 6). Accordingly, we find that the Employer had the right to instruct or direct the cosmetologists. Therefore, this factor demonstrates a right to control, and indicates an employment relationship.

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. 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.

The cosmetologists were not required to submit reports. However, the cosmetologists were required to submit receipts for services rendered on a daily basis in order to be paid on the following Friday (Tr. p. 16). This factor demonstrates a right to control, and indicates an employment relationship.

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 performed off the Employer's 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.

The cosmetologists rendered their services at the Employer's place of business, during the business hours set by the Employer (Tr. p. 17). This factor demonstrates a right to control, and indicates an employment relationship.

e. Personal Performance

If the service must be rendered personally, this would tend to indicate that the employing unit is interested in the method of performance as well as the result and evidences concern as to who performs the job. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

The cosmetologists were required to personally perform their services (Tr. p. 27). The cosmetologists did not have substitutes or assistants to aid them in the performance of their services. Therefore, we find that this factor demonstrates a right to control, and indicates an employment relationship.

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 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.

The Employer did not establish the sequence of the cosmetologists' work (Tr. p. 26). Therefore, this factor shows an absence of control, and indicates an independent relationship.

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.

The Independent Contractor Agreement provided that "this agreement may be terminated by either party hereto, at any time upon notice to the other party" (Bd. Exh. 6). Based on the agreement, we conclude that the Employer did, in fact, have a right to terminate the cosmetologists without cause, at any time, without liability (Tr. p. 27; Bd. Exh. 6). Accordingly, this factor demonstrates a right to control, and indicates an employment relationship.

h. Set Hours of Work

The establishment of set hours of work by the employing unit is indicative of control. This condition bars the worker from being master of his own time, which is a right of the independent worker.

The Employer set the business hours for its salon, and the cosmetologists had to perform their services during these set hours (Tr. p. 14). This factor demonstrates a right to control, and indicates an employment relationship

i. Training

Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, indicates control because it reflects that the Employer wants the services performed in a particular manner. An independent worker ordinarily uses his own methods and receives no training from the purchaser of his services.

The cosmetologists were licensed in cosmetology prior to establishing a work relationship with the Employer. Therefore, the Employer did not provide training to the cosmetologists (Tr. p. 26). This factor shows an absence of control, and indicates an independent relationship.

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.

The cosmetologists were not required to work any set number of hours (Tr. p. 26). This factor shows an absence of control, and indicates an independent relationship.

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.

The Employer provided the salon chairs and stations to the cosmetologists (Tr. pp. 12, 14, 19). The Employer did not charge a rental fee for the use of its equipment (Tr. p. 12, 27). The cosmetologists provided their own hand tools,

which is common practice for cosmetologists (Exh. 7). This factor demonstrates a right to control, and indicates an employment relationship.

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.

The cosmetologists did not incur any expenses. Therefore, we find that this factor is neutral.

The additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E), are equally appropriate for consideration in determining the relationship of the parties.

l. Availability to the 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

Following an investigation by the Department, the Department witness concluded that no cosmetologists had their own separately operated business with their own clients (Tr. p. 20). The Department witness also determined that the cosmetologists were not advertising in any way (Tr. p. 20). Therefore, this factor demonstrates a right to control, and indicates an employment relationship.

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.

The cosmetologists were paid a 60% commission based on the receipts they submitted to the Employer (Tr. pp. 20, 26). The Employer paid the cosmetologists in cash each Friday (Tr. p. 27; Bd. Exh. 6). Accordingly, this factor demonstrates a right to control, and indicates an employment 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.

The cosmetologists did not incur expenses, and they did not invest in the Employer's business (Tr. p. 21). Therefore, the cosmetologists were not in a position to realize a profit or suffer a loss. Therefore, this factor demonstrates a right to control, and indicates an employment relationship

4. Obligation

An employee usually has the right to end his relationship with his employer at any time he wishes without incurring liability. An independent worker usually agrees to complete a specific job.

Cosmetologists had the right to terminate the working relationship at any time without penalty (Bd. Exh. 6). As a result, the cosmetologists bore no obligation to the Employer to complete any services. This factor indicates an employment relationship

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.

The cosmetologists had no investment in the Employer's equipment, or the Employer's facilities (Tr. p. 21). As noted earlier, the Employer furnished all of the necessary equipment and the facilities to the cosmetologists, free of charge (Tr. pp. 12, 27). This factor demonstrates a right to control, and indicates an employment 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

Following an investigation by the Department, the Department witness was unable to determine whether the cosmetologists had other contracts, or worked for other salons (Tr. p. 22). The Independent Contractor Agreement did not address this issue. The Employer witness, however, testified that one cosmetologist worked out of her home (Tr. p. 28). Based on the information provided, or lack thereof, we find that this factor suggests neither control nor a lack of control, and is therefore considered neutral.

Pursuant to Arizona Administrative Code, Section R6-3-1723(F), there may be other factors not specifically identified in the rule that should be considered. We find such a factor to be the role of the cosmetologists within the Employer's business model, because without the services provided by the cosmetologists the Employer's business as a salon could not have existed. This degree of reliance upon the services of the cosmetologists indicates an employment relationship.

The Arizona Court of Appeals, in the case of Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given its long established liberal construction in an effort to include as many types of employment relationships as possible, when the Court stated:

> The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [*See* A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals, in the case of Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where the Court stated:

> The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation ... [Emphasis added].

In accord with the liberal interpretation required by the Employment Security Law of Arizona, we conclude that the evidence of employee status far outweighs the evidence of independent contractor status.

The cosmetologists were employees of the Employer, effective April 1, 2008 through March 31, 2011. We conclude all payments to the cosmetologists for their services constituted wages, by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **AFFIRMS** the Reconsidered Determination dated December 31, 2013.

Effective April 1, 2008, services performed by individuals as cosmetologists constituted employment.

All forms of remuneration paid to these individuals for such services constituted wages.

DATED: 7/27/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

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By: __LS_____
For The Appeals Board

4th QUARTER OF
CALENDAR YEAR 2015

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1476556-001-B

T2 xxxx

STATE OF ARIZONA E S A TAX UNIT
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Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

November 5, 2015 ***.

DECISION
AFFIRMED ON DIFFERENT GROUNDS

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination issued on September 19, 2014, which held in part as follows:

> ... due to [the firm's] voluntary election to file as a Sub S corporation with the IRS, [the firm] is liable for Unemployment Insurance taxes because the SMLLC is not disregarded as a reporting entity. Accordingly, [the firm] was properly assigned an employer account number ... and a tax rate of 2.00% commencing on January 1, 2012. ...

* * *

> ... this Reconsidered Determination affirms the Determination of Unemployment Insurance Liability issued ... on June 20, 2014 and will become final unless a written petition for a hearing is filed ...

The request for review or appeal having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B). At the direction of the Appeals Board and following proper notice to all parties, a Board hearing was held on September 3, 2015, in Phoenix, Arizona, before ROBERT T. NALL, an Appeals Board Administrative Law Judge, for the purpose of considering the following issues:

1. Whether the June 20, 2014 DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY was properly affirmed.
2. Whether the Employer is an organization or entity with "GROSS PAYROLL OF AT LEAST $1,500 IN A CALENDAR QUARTER OR EMPLOYMENT OF ONE OR MORE EMPLOYEES FOR 20 WEEKS (INCLUDING CORPORATE OFFICERS)", effective January 1, 2012.
3. Whether any federal ruling impacts the business relationships or status of the Employer and any member or person working for, at the direction of, or receiving payments from the Employer since January 1, 2012.
4. Whether any and all persons, including any officer of the employing entity, received gross payroll or wages during the pertinent time period in an amount sufficient to trigger liability for Arizona Unemployment Insurance Taxes under A.R.S. § 23-613.

Two witnesses for the Taxpayer were present at the Board hearing, and each testified. A witness for the Department appeared and testified, and the Department's counsel also appeared. Board Exhibits 1 through 9 were admitted into the record as evidence. The parties stipulated and agreed that the pertinent authorities included A.R.S. § 23-615.

The APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer was established as a "DOMESTIC L.L.C." in Arizona on January 29, 2008, by filing Articles of Organization. The filing listed a wife residing in Glendale, Arizona as "Agent Name", and her husband as "MEMBER" and "President" who took

office on January 9, 2008. An amendment and "Agent Appointment" were filed on January 2, 2009. The Employer and both spouses share the same address of record (Bd. Exhs. 7, 9).

2. The MEMBER owns a truck, which he has operated as a licensed commercial truck driver hauling freight loads in interstate commerce (Bd. Exh. 5A).

3. The Employer's business consists of "long distance trucking" for various customers, with the MEMBER as its only driver. His wife serves as bookkeeper, tracking expenses and revenue (Bd. Exhs. 4B, 9).

4. On behalf of the Limited Liability Company, its owner or owners notified the Internal Revenue Service of an election to be taxed as a corporation (Bd. Exh. 4B).

5. On April 30, 2012, the wife as "Bookkeeper" signed an UNEMPLOYMENT TAX AND WAGE REPORT that reported total wages paid in the calendar quarter ending March 31, 2012, in the amount of $3,000 to one employee who was the MEMBER. The Employer tendered $78 in payment of taxes at a 2.0000% tax rate. The Employer never applied for an Arizona Unemployment Insurance (UI) Tax account (Bd. Exhs. 5, 6).

6. The Employer also submitted a "941" report to the Internal Revenue Service during 2012, which reported wages paid to its MEMBER for his driving services. The Internal Revenue Service (IRS) subsequently returned the Employer's payment of UI Tax contributions as "Fed 941 employment tax" (Bd. Exh. 4B).

7. Although no formal papers or amendments were filed with the Arizona Corporation Commission, the Employer considered that its ownership structure "... changed from single member LLC to a multi-member LLC" on January 1, 2012. The intended ownership was 40% to the wife, 40% to the MEMBER, and 10% to each of their two children (Bd. Exh. 4B).

8. On January 21, 2013, the Employer sent a letter to the Department noting that: "I know we sent in money last year to be applied to AZ Unemployment Insurance, but again we were misinformed ..." (Bd. Exh. 5A).

9. In response to the Employer's report that it had paid $3,000 in wages to its MEMBER for his driving services during the first quarter of 2012, the Department issued a June 20, 2014 Determination of Unemployment Insurance Liability (Bd. Exh. 1) on the basis of:

> GROSS PAYROLL OF AT LEAST $1,500 IN A CALENDAR QUARTER OR EMPLOYMENT OF ONE OR

MORE EMPLOYEES FOR 20 WEEKS (INCLUDING CORPORATE OFFICERS).

10. On July 30, 2014, the Employer requested reconsideration and explained in part: "As a corporation officer he receives a 1099 Schedule C. He pays income tax as being self-employed individual." (Bd. Exh. 2).

11. The MEMBER consistently draws $1,000 each month as a cost of doing business, which the corporation listed on its 2014 U.S. CORPORATION INCOME TAX RETURN, Form 1120 "Other Deductions Statement" was deducted from revenue as $12,000 of "CONTRACT LABOR" (Bd. Exh. 9).

12. The Employer timely petitioned for a hearing, following the Department's September 19, 2014 Reconsidered Determination, which explained that the Limited Liability Company (LLC) is not disregarded as a reporting entity due to its voluntary election to file for corporate tax status with the IRS and, therefore, the member's wages are subject to FUTA and Arizona Unemployment Tax as a corporate officer (Bd. Exhs. 3, 4).

In essence, the Employer disputes that it should be considered an "employer" because the person who is identified in its Articles of Organization as the "MEMBER", is its "corporate officer" and, thus, is its “employee” for purposes of the Employment Security Law of Arizona. The Employer's status is the only dispute subject to consideration in this case. In the petition for hearing, the Employer contended that: "We still do not believe that we are obligated to be responsible for unemployment insurance due to [the employing entity] being a C-Corporation not a Sub-chapter S corporation." (Bd. Exh. 4A). No legal authority has been cited to support a distinction between C-corporation status, and Subchapter S corporation status, when identifying whether the person who is paid to conduct its business is owner, MEMBER, and a "corporate officer". Rather, credible testimony established that no such distinction exists and the MEMBER is a statutory employee of an entity claiming corporate status.

Arizona Revised Statutes § 23-615 defines "employment" as follows:

> "Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce, and includes:
>
> 1. An individual's entire service performed within or both within and without this state if:
>
> (a) The service is localized in this state. ...
>
> * * *
>
> 4. Service performed by any officer of a corporation.
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> * * *

Arizona Revised Statutes § 23-613(A) provides in part as follows:

> A. "Employer" means:
>
> * * *
>
> 2. Any employing unit:
>
> (a) That after December 31, 1971 for some portion of a day in each of twenty different calendar weeks, whether or not the weeks are or were consecutive, in either the current or the preceding calendar year, has or had in employment at least one individual irrespective of whether the same individual was in employment in each day.
>
> (b) That after December 31, 1971 in any calendar quarter in either the current or preceding calendar year, paid for service in employment wages of one thousand five hundred dollars or more.
>
> * * *

Arizona Revised Statutes § 23-614 provides in part as follows:

> Employing unit; temporary services employer; professional employer organization; definitions
>
> A. "Employing unit" means an individual or type of organization, including a partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor of any of the foregoing, or the legal representative of a deceased person, which has, or subsequent to January 1, 1936 had, one or more individuals performing services for it within this state. ...
>
> * * *
>
> C. Each individual employed to perform or to assist in performing the work of any person in the service of an employing unit is engaged by the employing unit for all the purposes of this chapter, whether the individual was hired or paid directly by the employing unit or by such person, provided the employing unit had actual or constructive knowledge of the work.
>
> * * *

Arizona Revised Statutes § 23-725(A) provides as follows:

> Employer coverage; termination; election of coverage
>
> A. Except as provided in subsections D and E of this section, an employing unit that is or becomes an employer subject to the provisions of this chapter within any calendar year shall be deemed an employer during the whole of the calendar year.

Arizona Revised Statutes § 29-601 provides in part as follows:

> Definitions.
>
> In this chapter, unless the context otherwise requires:
>
> 1. "Articles of organization" means the initial articles of organization as amended or restated from time to time.
>
> * * *
>
> 6. "Domestic limited liability company" or "limited liability company" means a limited liability company organized and existing under this chapter.
>
> * * *
>
> 12. "Member" means a person who is admitted as a member in a limited liability company pursuant to this chapter until an event of withdrawal occurs with respect to the person and, if reference is made to members, that reference means a member in the case of a limited liability company that has a single member. A member includes a noneconomic member of a limited liability company who:
>
> (a) Does not own a member's interest in the company.
>
> (b) Does not have an obligation to contribute capital to the company.
>
> (c) Does not have a right to participate in or receive distributions of profits of the company or an obligation to contribute to the losses of the company.
>
> (d) May have voting rights and other rights and privileges as prescribed by the articles of organization or operating agreement.
>
> * * *

14. "Operating agreement" means either:

(a) Any written or oral agreements among all members concerning the affairs of a limited liability company or the conduct of its business.

(b) In the case of a limited liability company that has a single member, any written or oral statement of the member made in good faith purporting to govern the affairs of a limited liability company or the conduct of its business as of the effective time of the statement.

* * *

The United States Code, § 3121(d), provides in part as follows:

(d) Employee

For purposes of this chapter, the term ‘‘employee’’ means—

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

(3) any individual (other than an individual who is an employee under paragraph (1) or (2)) who performs services for remuneration for any person—

(A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his principal; [Emphasis added].

* * *

Arizona Administrative Code, Section R6-3-1723(A) provides in pertinent part 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.

* * *

From the credible and probative evidence of record, we conclude that the Employer meets the definition of an employing unit. It has paid its MEMBER for his services in an amount of at least $1,500 in a calendar quarter, and for a period of at least 20 weeks in a calendar quarter. It elected corporate tax filing status, for which a consequence must be that its MEMBER is a corporate officer and, therefore, a statutory employee by operation of A.R.S. § 23-615(4). This outcome is consistent with Internal Revenue Code, §§ 3306(a)(1) and (i), and 3121(d). This outcome is required by the information within the reports of wages filed by the taxpayer, and acknowledged during the hearing.

The question of whether any payment to an officer for services constituted "wages", by operation of A.R.S. § 23-622(A), is not before this Board.

The Arizona Court of Appeals, in the case of *Arizona Department of Economic Security v. Little*, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given its long established liberal construction in an effort to include as many types of employment relationships as possible, when the Court stated:

> The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [See A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals, in the case of *Warehouse Indemnity Corporation v. Arizona Department of Economic Security*, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where the Court stated:

> The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. <u>All sections, including the taxing section</u>, should be given a liberal interpretation ... [Emphasis added].

Nobody has expressed any disagreement with the analysis, expressed within the Reconsidered Determination, that a "single-member LLC" is disregarded as a taxable entity. However, the Employer is an LLC that has elected to be taxed as a corporation. Thus, its MEMBER is a statutory employee. In accord with the liberal interpretation required by the Employment Security Law of Arizona, we affirm the Reconsidered Determination of the

Department (Exh. 4B). This ruling is compelled by the reported payment of wages filed by or on behalf of the Employer for a calendar quarter, because the wages paid exceeded $1,500 in that calendar quarter.

We note that the tax rate of 2.0% may be subject to adjustment on an annual basis, based upon years of operation and experience rating. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's Reconsidered Determination dated September 19, 2014.

The June 20, 2014 Determination of Unemployment Insurance Liability was properly affirmed, effective January 1, 2012.

The Department's assignment to the LLC of an employer account number and a tax rate was proper.

DATED: 10/6/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review 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 requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review 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 for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
   1. explains why the Appeals Board decision is wrong,
   2. cites the record, rules and other authority, and
   3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 10/6/2015
to:

(x) Er: xxxx Acct. No: xxxx

(x) Dept. Counsel:
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By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1395982-001-B

T1 xxxx

STATE OF ARIZONA E S A TAX UNIT
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Employer

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

November 23, 2015 ***.

DECISION
AFFIRMED IN PART, MODIFIED IN PART
REVERSED IN PART

THE **EMPLOYER,** through counsel, petitioned for a hearing from the Department's Reconsidered Determination issued on January 11, 2013, which held in part as follows:

> ... Under the foregoing discussion, the relationship between the workers and [the Employer] meets all of the prerequisites of A.R.S. § 23-614(G)(I)(2) regarding the definition of a temporary services employer. ...

* * *

> Accordingly, this Reconsidered Determination affirms the Determination of Liability for Employment or Wages issued December 16, 2011, and will become final unless a written petition for hearing is filed ...

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

With proper notice to the parties, a telephone hearing was convened before JOSE R PAVON, an Administrative Law Judge, on June 17, 2013 and July 23, 2013. All parties were given an opportunity to present evidence on the following issues:

1. Whether the employing unit is liable for Arizona Unemployment Insurance taxes under A.R.S. § 23-613, pursuant to:
   a. The DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES dated December 16, 2011, for the fourth quarter 2008 through the third quarter 2011.
   b. The DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES dated April 14, 2011, for the quarters ending June 30, 2009 through December 31, 2010.
2. Whether services performed by individuals as "auto parts delivery drivers, warehouse workers, bookkeeper, maintenance staff, clerical workers, marketing manager, and office administrator" constituted "employment" effective October 1, 2008 to present, as defined in A.R.S. § 23-615, and are not "exempt" or excluded from coverage under A.R.S. §§ 23-613.01, 23-615, or 23-617.
3. Whether the Employer is a temporary service employer pursuant to A.R.S. § 23-614 with regard to the services of the "parts puller" and "warehouse laborer".
4. Whether remuneration paid to individuals for such services constitutes "wages", as defined in A.R.S. § 23-622, which must be reported and upon which State taxes for Unemployment Insurance (UI) are required to be paid.

We amend the issues to conform to the evidence. Specifically, we follow the lead of counsel in their post-hearing memoranda by also including the "auto parts delivery drivers" in the temporary service employer category of issue #3 (July Tr. p. 13).

Board Exhibits 1 through 29 were admitted into evidence on June 17, 2013. Other Exhibits "A", "B", and "C" were admitted into evidence on July 23, 2013.

Two witnesses testified for the Department, which was represented by counsel. One witness testified for the Employer, which was represented by counsel.

In a post-hearing brief, the Employer's counsel contends that:

> A.R.S. § 23-774 places the burden of proof upon the parties claiming the entitlement. Thus, to the extent DES seeks to establish the existence of such entitlement it must bear the burden of proof. ...
>
> [The Employer requests that] ... Board Exh. 4, holding that A.R.S § 23-614 applied to [the Employer] and that all independent contractors labeled drivers are considered employees ..., be overturned as contrary to proper statutory construction and violative of [the Employer's] due process rights, and that even if correct in its statutory construction, the Department nevertheless failed to meet its burden to prove that [the Employer] was a Temporary Service Employer under A.R.S. § 23-614(i)(2); ...

We disagree with the logical premise of a blanket statement that the Department must do more than establish a *prima facie* case, in order to support its reconsidered determination in UI Tax cases. We disagree with the contended construction that the UI Tax Section of the Department is claiming that any "entitlement" to benefits exists in this case. A.R.S. § 23-774(C) deals primarily with an individual claimant's UI benefits eligibility, is indexed among a group of statutes dealing with "Eligibility" in Article 6, and specifically shifts to the individual the burden of providing documentation to determine that individual's eligibility for benefits, after an employer has presented certain elements. A.R.S. § 23-774(C) has no direct connection to this case, which does not involve any individual's eligibility for benefits of any kind.

By contrast, A.R.S. § 23-619 provides an elegantly simple definition: "'Insured work' means employment for employers." This statute impacts upon the scheduled issues. In this case, and for certain classes of workers, the Employer expressly is seeking an exception from the general rule and, therefore, must sufficiently prove its contentions that the workers in question were in an independent contractor relationship rather than employees earning wages.

The UI Tax Section of the Department is tasked by specific statutory authority to ascertain whether a particular working relationship constitutes insured work, with timely appeals from its reconsidered determinations set directly by the Appeals Board for hearings and decisions. As the Department's witnesses testified, such analysis may be triggered by various means, including a wage credits issue arising if any worker applies for UI benefits, but the "Insured work" analysis by the UI Tax Section does not extend to considering or ruling upon whether any such person is eligible for UI benefits.

In common with other "classification" issues, the burden of proof is upon the party who seeks to benefit by fitting into an exception to the well-established legal presumption. Regarding allegations that an independent contractor exception to insured work applies to a particular set of factual circumstances, the presumptions must be that services and work are performed under "employment", and remuneration for such services constitutes "wages". The Arizona Court of Appeals, in the case of *Arizona Department of Economic Security v. Little*, 24 Ariz. App 480, 539 P.2d 954 (1975), clearly ruled that all sections of the Employment Security Law should be given the long-established liberal construction, in an effort to include as many types of employment relationships as possible. The Court held:

> The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [*See*, A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals in the case of *Warehouse Indemnity Corporation v. Arizona Department of Economic Security*, 128 Ariz. 504, 627 P.2d 235 (App. 1981). The Court ruled:

> The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. <u>All sections, including the taxing section</u>, should be given a liberal interpretation ... [Emphasis added].

The Court in *Dearing v. Arizona Dep't of Economic* Security,121 Ariz. 203, 205(Ariz. Ct. App.1978), cited legal presumptions of long standing and intent:

> The Arizona Supreme Court has held that the words defined in the Act, such as "employer", "employment" and "wages", are used as broad terms of description, <u>indicative of the legislative intent to give a wide and liberal effect to the Act's goal of alleviating unemployment</u>. *Gaskin v. Wayland*, 61 Ariz. 291, 148 P.2d 590 (1944). As such, they have a much broader meaning than when they are used by the majority of the states in their unemployment acts and in the Federal Unemployment Tax Act, 26 U.S.C. Sec. 3301, *et seq.*, which follow the common law definitions. *Arizona Department of Economic Security v. Little*, 24 Ariz.App. 480, 539 P.2d 954 (1975). [Emphasis added].

The concepts of urging an exception to the general rule, and statutory construction, also were addressed more recently in *Robbins v. Arizona*

Department of Economic Security, 232 Ariz. 21, 300 P.3d 556 (2013). The Court of Appeals dealt with pertinent statutes and ruled that the meaning of the exclusion language is found by using the legislative intent and wording. The Court found:

> ... a legislative intent to treat tribal employment the same as 'other service' when it comes to both benefit amounts and benefit conditions.

In *Robbins*, the Court found that the pertinent statutes provided an exclusion from UI Insured work, and reasoned that reference to one statute within another statute did not show an intent to create an exception to the exclusion, as follows:

> Among the services that states may exclude from coverage under FUTA are those performed as "a member of a legislative body, or a member of the judiciary, of a State or political subdivision thereof, or of an Indian tribe." 26 U.S.C. § 3309(b)(3)(B).
>
> Had the Arizona legislature intended to exempt tribal employment from the legislative body exclusion, it need not have addressed § 23-615(6)(d)(iii) in the text of § 23-751.01(I)(1) at all. ... "We presume the legislature is aware of existing statutes when it enacts new statutes," W*ashburn v. Pima County*, 206 Ariz. 571, 576, ¶ 11, 81 P.3d 1030, 1035 (App. 2003), and we do not interpret statutes to contain "useless provisions" unless no other construction is possible, City of Tucson v. Clear Channel Outdoor, 209 Ariz. 544, 553, ¶ 34, 105 P.3d 1163, 1172 (2005).

In the post-hearing brief, counsel for the Employer contends further that the application of A.R.S. § 23-614 to the drivers in this case inaccurately construes the relationship with A.R.S. § 23-613.01, because "... whether an individual or class of individuals is in fact an employee(s) covered by the statute must still be established". Counsel for the Employer contends further:

> Therefore, regardless of whether an employer is characterized as a temporary service employer under A.R.S. § 23-614(E) and the definition in subsection (I)(2), the Agency bears the burden of analyzing the characteristics of the purported employee under A.R.S. § 23-613.01 to demonstrate the proper status of any particular employee or class of employees.

We do not interpret the interplay of these statutes in this manner. We concur with the witnesses and with the position stated by counsel for the Department that, if the evidence establishes a relationship which meets the

requirements to constitute employment by a temporary services employer, then the potential for finding another exception to the presumption of employment no longer exists. The validity of A.R.S. § 23-614 would be compromised if, once employment is established as a temporary services employer meeting its statutory factors, then an exhaustive further evaluation also would be expected of approximately twenty common law factors for an independent contractor status exception. We conclude that this analysis is fully consistent with the principles set forth in *Robbins, supra.* The extended analysis urged by the Employer is inappropriate, and is unnecessary regarding the drivers.

The key to proper statutory construction, and to the issue of which statute applies to the drivers in this case, is found within A.R.S. § 23-614(D), which unequivocally specifies certain exceptions to A.R.S. § 23-613.01 for a temporary services employer. We conclude these exceptions are exclusive, as follows:

> Notwithstanding any other provision of this chapter, whether an individual or entity is the employer of specific employees shall be determined by section 23-613.01, except as provided in subsections E and G of this section with respect to a professional employer organization or a temporary services employer. The exceptions to the definition of employee prescribed in section 23-613.01, subsection A apply to determinations made pursuant to subsections E, F, G and H of this section. [Emphasis added].

In essence, the Employer contends that each driver whom it sends to its clients, and whom it pays directly instead of its clients paying anything to that driver, remains an independent contractor regardless of what unrelated, non-delivery or non-driving tasks its clients assign these workers to do and regardless of whether the Employer operates in the manner of a "temporary services employer". The contention by the Employer's counsel that A.R.S. § 23-613.01 analysis also is required regarding the drivers is contradicted by the limitations upon exceptions, as specified within the statutes themselves.

The Employer's counsel acknowledged that at least nine current drivers out of 300 drivers "... did not spend more than 80% of their time driving to deliver parts." The Employer's counsel acknowledged that, when the Employer realized that a particular driver was working in warehouses or sweeping premises or cleaning toilets more than 20% of his time, that driver "... was incorrectly considered an independent contractor." Counsel describes this evidence as "an infinitesimal minority". The source of specifying an "80%" threshold measurement is not adequately explained, and it appears to have no origin in the Employment Security Law of Arizona. We conclude that all of the drivers contacted by the Department's workers acknowledged they had spent substantial time doing unrelated tasks, which were neither parts driving nor delivery. These acknowledgements signify a material change in information available to the

Department, because the pool of drivers maintained by the Employer clearly no longer could be deemed 100% "independent contractor".

Contrary to the Employer's contentions that the Department was precluded from changing its prior rulings and from updating the basis for its prior rulings, the uncontradicted evidence establishes that the Department needed to resolve discrepancies when it became aware of a material change in the facts upon which it had relied in its prior rulings. The latest report by a former driver that he also worked in "the warehouse" raised questions about his status because the Employer does not have a warehouse. The new information triggered further analysis under A.R.S. § 23-613.01(D) and other statutes and administrative rules, and it led to a field audit and a different outcome.

We conclude that the Department was not bound in perpetuity by its initial rulings that the drivers were independent contractors at the time and under the circumstances of prior rulings, due to the Department's eventual discovery that at least some drivers were spending substantial time doing warehouse-type work for the Employer's clients, or sweeping premises, or even cleaning toilets. Indisputably, none of the previous determinations by the Department had involved a field audit. The Department was confronted by a substantial and material change in the factual assumptions upon which the previous rulings had been based, and the Department possessed jurisdiction both to investigate such situations further and to update its rulings with a different conclusion.

The Employer also contends that the December 16, 2011 ruling went back too far in time, notably "... the attached Notice of Assessment Report(s) for the quarters ending: 08/4 – 11/3." (Bd. Exh. 22). The Department went back three years in time, which included the fourth quarter of 2008. In the post-hearing brief, the Employer's counsel contends that the Employer "... never had an opportunity to present evidence to support its contention that drivers were not employees for purposes of the Economic Security Statute".

We conclude that the Appeals Board hearing afforded precisely such an opportunity for the Employer to present its evidence. In Subpart "C", the Employer contends further that it was deprived of due process, on occasions prior to the hearing. Because the hearing was *de novo*, the prior rulings by the Department were merely exhibits in evidence and a basis for questions (July Tr. pp. 70, 73, 75). We find no basis in the record to support the contentions by counsel that due process of law was denied. The essential elements of due process were observed. The parties received advance notification of the issues to be considered at the scheduled hearing. The Employer was given the opportunity to be heard at a hearing conducted by an impartial administrative law judge, and the opportunity to respond to any allegations, present evidence, rebut any unfavorable testimony, cross-examine any witnesses, object to the admission of documentary or other evidence, and present closing statements.

Upon consideration, we conclude that the Department backdated too far its most recent, but different, conclusion. More than ten prior rulings had led the Employer to its expectation that its drivers were deemed to be independent contractors. We conclude that the proper effective starting date of the Department's new analysis, that the drivers actually were employees, is the date when the Department commenced its audit process on March 29, 2011. A later effective date would be inconsistent with the factual circumstances revealed during the audit process and, after the inquiry involving an audit, the Employer no longer could rely upon prior rulings to believe that all of the drivers were deemed independent contractors. We modify the Reconsidered Determination accordingly.

The APPEALS BOARD FINDS the following facts pertinent to the issues under consideration:

1. The Employer has been an employing unit since December 5, 2002, on the basis of gross payroll to its corporate officers. The Employer does business as a "logistical services supplier", focusing upon the logistics of auto part pickups and deliveries in Arizona. Its clientele predominately are 90% auto dealerships and 10% auto parts distributors. The range of service offerings include delivery and pickup of parts for shop use and wholesale for resale to customers, using dispatch software that helps to process the orders and to set up and monitor delivery routes. The Employer also offers "independent contractors" to perform driving functions of delivering and picking up the auto parts (July Tr. pp. 100-102).

2. The Employer offered drivers "various engagements" as delivery drivers for its clients. From 180 to 250 drivers were engaged at any time. "Hot jobs" also are offered to the drivers for moving a product from point A to point B expeditiously (July Tr. pp. 102, 103, 147).

3. The Employer requires all vehicle drivers to possess a valid driver's license and insurance. Drivers supply all of their own tools, their own vehicle, straps, a GPS system, and a wireless phone. A fuel surcharge may be charged to the client and paid to the driver for gas. The Employer optionally will provide a wireless phone at a lease rate (July Tr. pp. 103, 202).

4. The Employer offers to each driver a billing rate or "settlement rate", as a three-party process involving the Employer's client, the Employer, and the driver. The Employer is aware of and considers factors that would affect the driver's ability to make money, such as miles driven and "... the average work day for that particular engagement." Varying settlement rates for multiple engagements are reflected by an addendum to the

initially agreed-upon settlement rate for each engagement, and the Employer pays drivers from its own accounts at rates it sets (July Tr. pp. 104, 105, 169, 173-175; Bd. Exhs. 26-28).

5. Typically, the Employer would discuss the needs of a particular auto dealership and would estimate their delivery volume, then recommend a number of hours to be worked by its drivers. Then, drivers would be "offered engagements" and would be told, "you could work for" a person at a particular auto dealer, at tasks that would be assigned by the dealer's parts department (July Tr. pp. 137-142). All three participants retained a right to terminate the relationship without substantial penalty to the driver, the client, or the Employer (July Tr. pp. 144, 160, 178).

6. Over time, several drivers filed claims seeking UI benefits after separating from the Employer. On December 13, 2011, the first field audit report was completed following review of records including: "941's, A-1's, W-2's, check register, detailed general ledger, tax return and payroll journal", for a time period during which "177 1099's were issued." Discussions or interviews also were conducted by the Department's UI Tax personnel (Bd. Exh. 21-25).

7. The Department previously had issued multiple rulings that drivers were independent contractors, based upon the information provided at such times. The Department did not conduct a field audit until one of the drivers reported that he was both driving and working in a "warehouse", which triggered questions because the Employer has no warehouse. A field audit to clarify this situation was commenced by a Wage/Employment Investigation Request" dated March 29, 2011 (Bd. Exh. 23).

8. On April 14, 2011 "... a UC-016-A [Determination of Liability for Employment or Wages] was issued for parts pullers and warehouse laborers. The company didn't appeal the determination and paid the assessments." Further exchange of information resulted in a December 16, 2011 Determination of Liability for Employment or Wages, which ruled that "auto parts delivery drivers, warehouse workers, bookkeeper, maintenance staff, clerical workers, marketing manager and office administrator" are employees whose remuneration is by wages (Bd. Exh. 21-25).

9. Individuals working in "... maintenance staff, clerical workers, marketing manager and office administrator" positions are paid directly by the Employer for services performed on the Employer's premises in Arizona, in the manner and time as directed by the Employer's owners and management. These

positions do not require specific licensing in order to perform their tasks legally. Persons in these positions are not required to present invoices for work performed in order to receive payment. Nothing established that any person in these positions maintained separate premises, advertised separately, or held themselves out to the public for such services.

10. The person who performed bookkeeping services, "LS", worked for her father's accounting firm and for other clients. She performed bookkeeping services for the Employer on a contract basis at an hourly rate, without receiving instruction on how and where to accomplish those services. Annually, the Employer issued to her a Form 1099 reflecting payments for her services (June Tr. pp. 86, 90, 92; July Tr. pp. 80, 115-117, 148-150, 155, 181-186, 200).

11. Another person, "KJ", started providing marketing and website services for four or five months until he was offered the job and he became an undisputed employee at an unspecified date. The Employer never asked KJ whether he had other clientele. Through the hearing date, he was not required to work specific hours (July Tr. pp. 117-120, 151, 157, 192-196).

12. Another person, "DP", provided bookkeeping work to help the owner's mother in the Employer's office or from home, on a project basis. She was offered employment as "Administration Manager" and she became an undisputed employee during January 2012. Through the hearing date, she was not required to work specific hours (July Tr. pp. 124, 125, 148-150, 157, 186-192).

13. The Employer also pays a cleaning lady, a lawn service, and a pest control service (July Tr. pp. 125, 151-153).

14. The Department assessed wages for many individuals. The Employer's counsel filed a timely request for reconsideration following the December 16, 2011 Determination of Liability for Employment or Wages. The Employer's counsel also filed a timely request for hearing following the Department's reconsidered determination (Bd. Exhs. 2, 4, 5, 15, 22).

The Employer contends that "auto parts delivery drivers, warehouse workers, bookkeeper, maintenance staff, clerical workers, marketing manager and office administrator" are all independent contractors and never were its employees, and that remuneration paid to these workers was not "wages" (Bd. Exhs. 2, 22-24). Their employment status, and whether their pay constituted wages, remains in dispute in this case. For clarity and because the Department applied different analysis and statutes, we review the "auto parts delivery drivers" and "warehouse workers" category separately from the other

"bookkeeper, maintenance staff, clerical workers, marketing manager and office administrator" positions.

Arizona Revised Statutes § 23-561 provides in part as follows:

> Definitions
>
> In this article, unless the context otherwise requires:
>
> * * *
>
> 11. "Temporary help services" means services by a person consisting of:
>
> (a) Recruiting and hiring the person's own employees.
>
> (b) Finding other organizations that need the services of employees who are recruited and hired by the person.
>
> (c) Assigning employees to perform work for other organizations to support that organization's workforces, including covering employee absences, skill shortages or seasonal workloads or performing special assignments or projects.
>
> (d) Customarily attempting to reassign the employees to other organizations when the employees complete each assignment.
>
> * * *

Arizona Revised Statutes § 23-613.01(A) and (E) provide in part as follows:

> 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, 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, 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.

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.

* * *

E. The following services are exempt employment under this chapter, unless there is evidence of direction, rule or control sufficient to satisfy the definition of an employee under subsection A of this section, which is distinct from any evidence of direction, rule or control related to or associated with establishing the nature or circumstances of the services considered pursuant to this subsection:

1. Services which are not a part or process of the organization, trade or business of an employing unit and which are performed by an individual who is not treated by the employing unit in a manner generally characteristic of the treatment of employees.

2. Services performed by an individual for an employing unit through isolated or occasional transactions, regardless of whether such services are a part or process of the organization, trade or business of the employing unit. ... [Emphasis added].

Arizona Revised Statutes § 23-614 provides in part as follows:

Employing unit; temporary services employer; professional employer organization; definitions

A. "Employing unit" means an individual or type of organization, including a partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or

foreign, or the receiver, trustee in bankruptcy, trustee or successor of any of the foregoing, or the legal representative of a deceased person, which has, or subsequent to January 1, 1936 had, one or more individuals performing services for it within this state. ...

* * *

C. Each individual employed to perform or to assist in performing the work of any person in the service of an employing unit is engaged by the employing unit for all the purposes of this chapter, whether the individual was hired or paid directly by the employing unit or by such person, provided the employing unit had actual or constructive knowledge of the work. Notwithstanding any other provision of this chapter except for section 23-612.01, an individual who performs services in or for a particular employing unit is not in the employment of such employing unit if such individual's wages for services in or for the particular employing unit are paid by another employing unit, and if the contributions required by this chapter on such wages are paid by such other employing unit.

D. Notwithstanding any other provision of this chapter, whether an individual or entity is the employer of specific employees shall be determined by section 23-613.01, except as provided in subsections E and G of this section with respect to a professional employer organization or a temporary services employer. The exceptions to the definition of employee prescribed in section 23-613.01, subsection A apply to determinations made pursuant to subsections E, F, G and H of this section.

E. A professional employer organization or a temporary services employer that contracts to supply a worker to perform services for a customer or client is the employer of the worker who performs the services. A customer or client who contracts with an individual or entity that is not a professional employer organization or a temporary services employer to engage a worker to perform services is the employer of the worker who performs the services. Except as provided in subsection F of this section, an individual or entity that is not a

professional employer organization or a temporary services employer, that contracts to supply a worker to perform services to a customer or client and that pays remuneration to the worker acts as the agent of the employer for purposes of payment of remuneration.

F. In circumstances that are in essence a loan of an employee to another employer and the direction and control of the manner and means of performing the services changes to the employer to whom the employee is loaned, the loaning employer continues to be the employer of the employee if the loaning employer continues to pay remuneration to the employee, whether or not reimbursed by the other employer. If the employer to whom the employee is loaned pays remuneration to the employee for the services performed, that employer is considered the employer for the purposes of any remuneration paid to the employee by the employer, regardless of whether the loaning employer also pays remuneration to the employee.

G. A professional employer organization shall report and pay all required contributions to the unemployment compensation fund using the state employer account number and the contribution rate of the professional employer organization.

H. On termination of a contract between a professional employer organization and a client or the failure by a professional employer organization to submit reports or make tax payments as required by this chapter, the client shall be treated as a new employer without a previous experience record if the client has been subject to a professional employer agreement for at least two years or if the client is not otherwise eligible for an experience rating.

I. For the purposes of this section:

1. "Professional employer organization" has the same meaning prescribed in section 23-561.

2. "Temporary services employer" means an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer and that performs all of the following:

(a) Negotiates with clients or customers for such matters as the time of work, the place of work, the type of work, the working conditions, the quality of services and the price of services.

(b) Determines assignments or reassignments of workers, even though workers retain the right to refuse specific assignments.

(c) Retains the authority to assign or reassign a worker to other clients or customers if a worker is determined unacceptable by a specific client or customer.

(d) Assigns or reassigns the worker to perform services for a client or customer.

(e) Sets the rate of pay of the worker, whether or not through negotiation.

(f) Pays the worker from its own account or accounts.

(g) Retains the right to hire and terminate workers. [Emphasis added].

Arizona Revised Statutes § 23-615 defines "employment" as follows:

"Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce, and includes:

1. An individual's entire service performed within or both within and without this state if:

(a) The service is localized in this state.

(b) The service is not localized in any state but some of the service is performed in this state and:

(i) The individual’s base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled is in this state, or

* * *

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

> 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.

A.R.S. § 23-774 provides in part as follows, for comparison purposes:

> Documentation of benefit eligibility
>
> A. The department shall require an individual who files a claim for benefits to provide documentation or information sufficient for the department to determine the individual's eligibility for benefits. If an individual who files a claim for benefits has the ability to produce documents or information and fails to produce the documents or information, the department may find the individual's claim for unemployment benefits invalid until the documents or information are produced.
>
> B. On request by the department, an employer shall provide relevant documentation to the department to allow the department to determine the individual's eligibility for benefits.
>
> C. If an employer provides documentation that an individual either voluntarily resigned from employment or abandoned the individual's employment, the burden of providing documentation to determine an individual's eligibility for benefits shifts to the individual.
>
> * * *

Arizona Administrative Code, Section R6-3-1723 provides in pertinent part:

> D. "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.

E. "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 business person, 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. [Emphasis added].

Auto Parts Delivery Drivers and Warehouse workers, A.R.S. § 23-614 analysis:

From the credible and probative evidence of record, we conclude that the services as "Auto Parts Delivery Drivers and Warehouse workers" do not qualify as exempt from employment status, largely because pulling and delivering parts are tasks germane to the business activity of the Employer. The involvement by at least 177 persons in such activities was too extensive to be considered "isolated or occasional transactions". From the credible and probative evidence of record, we conclude that these services are not solely subject to a provision of law regulating the organization, trade or business. No specific instance was presented of a federal agency treating any similar business relationship as "independent contractor" status nor as "exempt employment". No instance was presented of any identified employee receiving pay by another employing unit which reported contributions by that employing unit as its employee, pursuant to A.R.S. § 23-614(C). No employee "on loan" arrangement was established.

The Employer's contentions, however, bring into issue whether the services of the "Auto Parts Delivery Drivers and Warehouse workers" were excluded from the definition of “Employment” because the factors pertaining to a "temporary services employer" listed in A.R.S. § 23-614(I) did not exist. Our analysis requires consideration of the statutes cited above. The Department's counsel specified: "We're proceeding solely under 23-614 ... Temporary Service Employer" with regard to "Auto Parts Delivery Drivers and Warehouse workers" (July Tr. pp. 204-205).

We conclude that the Employer's operation took the form of a "Temporary Services Employer" with regard to the "Auto Parts Delivery Drivers and Warehouse workers". The Employer negotiated with clients or customers, and allowing each worker the right to refuse specific assignments does not vitiate the Employer's involvement in determining assignments to a particular client or customer. The Employer retained the authority to reassign a worker to other clients, and to set the pay of the worker. The Employer paid the worker from its own accounts, and retained the rights to hire and to terminate each worker. In many circumstances, the clients or customers allowed "Auto Parts Delivery Drivers and Warehouse workers" to perform unrelated duties, which is a hallmark of allowing the clients to whom the worker was assigned to control the tasks. According to the credible and probative evidence of record, the Employer customarily attempted to reassign the drivers to other organizations or customers, rather than leave them idle.

Regarding a particular worker, "EB-R", who may have used a substitute on occasion, for any such services the Department is expected to remove those amounts paid from the assessment because this worker did not actually perform the work (July Tr. pp. 80-85, 196-199). The proper amount of assessment is not an issue before this Board upon review.

The overall relationships with "Auto Parts Delivery Drivers and Warehouse workers" that are established by the evidence of record, are not independent contractor relationships. The relationships are employment in the manner of a "Temporary Services Employer", and all remuneration paid to the "Auto Parts Delivery Drivers and Warehouse workers" is wages subject to reporting as employment. According to the evidence and testimony, the Employer itself did not realize precisely what services actually were being performed by drivers, as directed by the Employer's clients.

However, the starting date of this analysis is the commencement of the audit process on March 29, 2011, without relating back to prior calendar quarters and, thereby, effectively rescinding the Department's several previous determinations before applying the A.R.S. § 23-614 analysis to these workers. We note that approximately six times within the two years prior to the audit, Claimants were told by the Department that they were classified as independent contractors. These and other similar persons should not be affected, and the Department's ruling should not cover any quarter prior to the 2nd Quarter of 2011. We modify the Reconsidered Determination accordingly.

Bookkeeper, maintenance staff, clerical workers, marketing manager, and office administrator. A.R.S. § 23-613.01 analysis:

The person identified as a bookkeeper, LS, operated from her father's professional accounting office, under contract and on an hourly basis. She performed services for other accounting clients. From the evidence, LS is not a common law employee of the Employer. We reverse accordingly.

Few details were presented regarding the maintenance workers. We conclude that the Department did not adequately present a *prima facie* case for employment status regarding the maintenance workers, clerical workers. The same analysis applies to the office manager prior to being hired on a part-time basis during 2012, and to the marketing manager prior to being hired during 2012. The Employer does not dispute their employment status, once hired into their positions. We conclude these persons were not employees until hired.

From the credible and probative evidence of record, we conclude that the services performed by "maintenance staff, clerical workers, marketing manager and office administrator" do not qualify as “exempt employment” listed in A.R.S. § 23-613.01(E) and Arizona Administrative Code, Section R6-3-1723(C),

largely because these tasks comprise the business activity of the Employer and the involvement was too extensive to be considered "isolated or occasional transactions". We conclude from the evidence that these services are not solely subject to a provision of law regulating the organization, trade or business as specified in Arizona Administrative Code, Section R6-3-1723(B)(2). The Employer's contentions, however, bring into issue whether the services of the "Bookkeeper, maintenance staff, clerical workers, marketing manager and office administrator" were excluded from the definition of "Employee" by qualifying as an "independent contractor" relationship, pursuant to A.R.S. § § 23-613.01(A)(1) and Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires consideration of the statutes cited above, plus the factors specified in Arizona Administrative Code, Section R6-3-1723(A), (D), and (E).

Arizona Administrative Code, Section R6-3-1723(D)(2) identifies common indicia of control over the method of performing or executing services that may create an employment relationship as: (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors for determining whether an individual may be an independent contractor are enumerated in Arizona Administrative Code, Section R6-3-1723(E), as follows: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; (6) whether the individual has simultaneous contracts with other persons or firms.

We apply the guidelines of Arizona Administrative Code, Section R6-3-1723(D)(2), by the following analysis:

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.

In the normal course of business, some of the "maintenance staff, clerical workers, marketing manager, and office administrator" assisted each other. These tasks seem to have been delegated on a project basis. No evidence was presented that any "maintenance staff, clerical workers, marketing manager and

office administrator" was precluded from hiring any helpers. This factor favors an independent relationship.

b. Compliance with Instructions

Control is present when the individual is required to comply with instructions about when, where or how he is to work. The control factor is present if the Employer has the right to instruct or direct.

The evidence establishes that the Employer delegated tasks on a project basis without instructing or directing “when, where, or how” the "maintenance staff, clerical workers, marketing manager and office administrator" did their work. This factor favors an independent relationship.

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 favors control and an employment relationship indicates control in that the worker is required to account for his actions.

Nothing indicates that the "maintenance staff, clerical workers, marketing manager and office administrator" were required to submit any reports, such as an invoice to be paid for work performed or with receipts to be reimbursed. This factor is neutral because, although each worker may be asked to account for his or her actions on occasion, the record does not establish a report requirement.

d. Place of Work

The fact that work is performed off the Employer's premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee.

The evidence establishes that "maintenance staff, clerical workers, marketing manager and office administrator" performed all tasks at the Employer's premises. This facilitates control, and indicates both Employer control and an employment relationship.

e. Personal Performance

If the service must be rendered personally, this would tend to indicate that the employing unit is interested in the method of performance as well as the result and evidences concern as to who performs the job. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

Testimony established that the Employer expected personal performance, but did not prohibit any "maintenance staff, clerical workers, marketing manager

and office administrator" from hiring their own assistants. This factor favors an independent relationship.

f. Establishment of Work Sequence

If a person must perform services in the order 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 routine and schedules of the employing unit.

The Employer had the right to establish work sequence. This factor indicates control and an employment relationship.

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.

We conclude the Employer possessed the right to terminate its agreement with "maintenance staff, clerical workers, marketing manager and office administrator", with no limitation upon penalties. This factor favors an independent relationship.

h. Set Hours of Work

The establishment of set hours of work by the employing unit is indicative of control. This condition bars the worker from being master of his own time, which is the right of an independent worker.

The "maintenance staff, clerical workers, marketing manager and office administrator", were allowed to schedule their own work times. This factor favors an independent relationship.

i. Training

Training of an individual by an experienced employee working with him, or by required attendance at meetings, is indicative of control because it reflects that the Employer wants the service performed in a particular manner.

Nothing establishes that the "maintenance staff, clerical workers, marketing manager and office administrator", received training from the Employer, relying instead upon their own expertise or experience in their fields. This factor favors an independent relationship.

j. Amount of Time

If the worker must devote his full time to the activity of the employing unit, it indicates 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.

The Employer did not expressly preclude these workers from any other employment elsewhere. The Employer seemed to utilize these services part-time. Regarding the "maintenance staff, clerical workers, marketing manager and office administrator", this factor favors an independent relationship.

k. Tools and Materials

If an employing unit provides the tools, materials and wherewithal for the worker to do the job, it indicates control over the worker. Conversely, if the worker provides the means to do the job, a lack of control is indicated.

The evidence did not establish that the Employer provided either materials or tools to the "maintenance staff, clerical workers, marketing manager and office administrator". This factor favors an independent relationship.

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.

Expense reimbursement was not expressly discussed. This factor is neutral, according to the evidence of record.

The additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E) also are appropriate for consideration in determining the relationship of the parties.

1. Availability to the Public

Generally, an independent contractor makes his services available to the general public, while an employee does not.

The "maintenance staff, clerical workers, marketing manager and office administrator", were never prevented from holding themselves out to the public for services, nor from advertising their services beyond those tasks assigned by the Employer. This factor favors an independent relationship.

2. Compensation

Payment on a job basis is customary where the worker is independent, whereas an employee is usually paid by the hour, week or month.

Payment appears to have been negotiated on a project or job basis. This factor favors an independent relationship.

3. Realization of Profit or Loss

An employee is generally not in a position to realize a profit or loss as a result of his services. An independent contractor, however, typically has recurring liabilities in connection with the work being performed. The success or failure of his endeavors depends in large degree upon the relationship of income to expenditures.

No person in the position of "maintenance staff, clerical workers, marketing manager and office administrator", shared in the Employer's profit or loss. They bore the risk of profit or loss from their own efforts. This factor favors an independent relationship.

4. Obligation

An employee usually has the right to end the relationship with an Employer at any time without incurring liability. An independent worker usually agrees to complete a specific job.

No early-termination penalty was presented. This lack of an early-termination penalty or a specific term of an agreement shows lack of negotiations. This factor indicates control and an employment relationship, as the factors of independence and negotiation were not established by the evidence.

5. Significant Investment.

A significant investment in equipment and facilities would indicate an independent status of the individual making the investment. The furnishing of all necessary equipment and facilities by the employing unit would indicate the existence of an employee relationship.

The evidence does not establish that the Employer provided anything to the "maintenance staff, clerical workers, marketing manager and office administrator", who provided their own equipment or materials. This factor favors an independent relationship.

6. Simultaneous Contracts

An individual who works for a number of people or companies at the same time may be considered an independent contractor

> because he is free from control by one company. However, the person may also be an employee of each person or company depending upon the particular circumstances.

No evidence was presented to establish a restriction from working anywhere else. Potentially, the "maintenance staff, clerical workers, marketing manager and office administrator", operated their own independent businesses. This factor favors an independent relationship.

Pursuant to Arizona Administrative Code, Section R6-3-1723(F), there may be other factors not specifically identified in the rule that should be considered. One such factor is the maintenance of their own credentials by the "maintenance staff, clerical workers, marketing manager and office administrator", which is not established by the evidence of record.

Therefore, the relationship is an "independent contractor" situation regarding the "maintenance staff, clerical workers, marketing manager and office administrator". We conclude that remuneration paid to the "maintenance staff, clerical workers, marketing manager and office administrator" did not constitute wages. The evidence establishes that such remuneration was for periodic, upon-request services.

THE APPEALS BOARD **REVERSES IN PART** the Reconsidered Determination dated January 11, 2013.

Services performed by LS were bookkeeping, as part of her services for other clients of her father's professional accounting office, as assigned by that professional office. She was not a common law employee of the Employer. Remuneration paid to LS for bookkeeping services was not wages.

Services performed by "maintenance staff, clerical workers, marketing manager and office administrator" did not constitute employment by the Employer until the marketing manager and office administrator were hired. The names "included" on the Notice of Assessment are not necessarily the only persons affected. Remuneration paid to the "maintenance staff, clerical workers, marketing manager and office administrator" did not constitute wages, until two persons were hired.

THE APPEALS BOARD **AFFIRMS IN PART AND MODIFIES** the Reconsidered Determination dated January 11, 2013.

Effective with the Second Quarter of 2011, services performed by "Auto Parts Delivery Drivers and Warehouse workers" constituted employment by the Employer. The names "included" on the Notice of Assessment are not necessarily the only persons affected. Remuneration paid to the "Auto Parts Delivery Drivers and Warehouse workers" constituted wages.

THE APPEALS BOARD **REMANDS** this matter for further action consistent with this decision.

DATED: 10/22/2015

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

William G. Dade

WILLIAM G. DADE, Member

Robert Nall

ROBERT NALL, 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.

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review 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 requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review 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 for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
2. cites the record, rules and other authority, and
3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 10/22/2015
to:

Er: xxx Acct. No: xxx-000

(x) Er rep: xxx

(x) ELI D GOLOB, ASSISTANT ATTORNEY GENERAL CFP/CLA – SC 040A

(x) CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1444787-001-B

T1 xxxx

STATE OF ARIZONA E S A TAX UNIT
% ELI GOLOB
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1275 W WASHINGTON ST SC 040A
PHOENIX, AZ 85007-2926

Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

November 6, 2015 ***.

DECISION
REVERSED

THE **EMPLOYER**, through counsel, petitioned for a hearing from the Department's Reconsidered Determination issued on February 14, 2014, which affirmed the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued on May 17, 2012. The Department's February 14, 2014 Reconsidered Determination held that "services performed by the process servers at issue were correctly determined to constitute employment and all remuneration paid for such services to 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, which was convened on May 11, 2015, before Appeals Board Administrative Law Judge **Denise C. Sanchez**. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the services performed by the individuals as process servers constitute employment as defined in A.R.S. § 23-615.

2. Whether the services performed by the individuals as process servers are exempt or excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat the individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.

3. Whether all forms of remuneration paid to the individuals for services as process servers constitute wages as defined in A.R.S. § 23-622.

On the scheduled date of the hearing, counsel for the Employer was present and two Employer witnesses appeared and testified. Counsel for the Department was present, and one witness testified for the Department. Board Exhibits 1 through 22 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer is a process service company that provides service of legal documents related to the debt collection industry (Tr. p. 82).

2. On May 17, 2012, the Department issued a Determination of Unemployment Insurance Liability which held that the Employer has "been determined liable for Arizona Unemployment Insurance Taxes under A.R.S. § 23-613." The Determination also stated: "BASIS FOR LIABILITY: Gross payroll of at least $1500 in a calendar quarter or employment of one or more

employees for 20 weeks (including corporate officers)" (Bd. Exh. 2).

3. On May 17, 2012, the Department also issued a Determination of Liability for Employment or Wages which stated: "Services performed by individuals as process servers constitute employment. All forms of remuneration paid to these individuals constitute wages. This Determination includes the individuals and amounts shown" on the attached Notice of Assessment Reports for the quarters ending: March 31, 2011 through March 31, 2012 (Bd. Exh. 3).

4. The Notice of Assessment reports reflected the Employer's tax liability for the first, second, third, and fourth quarters of 2011; and the first quarter of 2012 (Bd. Exhs. 4A, 5A). A Report of Wages Paid Each Employee was also issued that identified the names of the alleged employees and the total wages paid by the Employer during the calendar year of 2011, and the first quarter of 2012 (Bd. Exhs. 4B, 5B).

5. Upon hire, the Employer and process servers signed a Process Server Agreement (hereinafter "P.S.A.") (Bd. Exh. 9). Upon entering into the P.S.A., each process server had the ability to negotiate their fee for services (Tr. p. 90). Once the process server's fee was agreed upon, the amount was fixed for the duration of the agreement (Tr. pp. 89-91).

6. Process servers were free to hire assistants or other employees without prior approval from the Employer (Tr. pp. 110, 115).

7. When serving legal documents, the process servers were required to record their attempts or efforts to serve the legal documents using the Employer's software and/or a handwritten worksheet (Tr. p. 17, 100, 101; Bd. Exh. 9D). The Employer required that the handwritten worksheets be submitted to the Employer by electronic mail or fax transmission on a daily basis (Tr. p. 17; Bd. Exh. 9D). For documentary purposes, the process

servers were also required to take photos of the service locations using an electronic device (Tr. pp. 15, 118, 119).

8. Due to the nature of their work, the process servers provided their services at various sites. Their services were not provided at the Employer's place of business (Tr. pp. 20, 21, 95).

9. Per the terms of the P.S.A., process servers were prohibited from assigning or delegating "the performance of any of [his or her] duties hereunder, without prior written consent of the Company" (Bd. Exh. 9C).

10. For convenience, the Employer's software provided the process servers with a map identifying various routes that the process server could utilize when serving legal documents. However, the process servers were not required to follow the given routes (Tr. pp. 107, 108).

11. Per the terms of the P.S.A., the Employer had the right to terminate the agreement with little or no notice provided to the process servers (Bd. Exh. 9B). In addition, the process servers were free to end the relationship with the Employer at any time (Tr. pp. 108, 109). The process servers were not subject to a penalty for non-completion of the assignments (Tr. pp. 74, 75).

12. The Employer required the process servers to attempt service of "open papers" at least three times within seven days. For "Non-serve" papers the Employer required the process servers to attempt service at least 10 times within a three week period. Of the 10 attempts, the process servers were required to have "2 A.M. attempts – 2 Daytime Attempts – 2 Evening Attempts – and 2 Weekend Attempts" (Bd. Exh. 9D). Other than those guidelines, the Employer did not require the process servers to work a set number of hours during the day, week, or month (Tr. pp. 92, 93).

13. The Employer provided the process servers with a short training on how to use the Employer's

software (Tr. pp. 26, 101). The Employer also provided the process servers with a pamphlet regarding the Fair Debt Collection Practices Act (Tr. pp. 96, 97, 116-118). However, because the Employer required the process servers to be previously certified and licensed to serve legal documents in the State of Arizona, training on how to perform the duties of a process server was not provided (Tr. p. 86).

14. The Employer did not prohibit the process servers from working for other employers. Additionally, the Employer did not prohibit the process servers from forming their own companies (Tr. p. 93).

15. The process servers did not receive reimbursement for any expenses incurred during the normal course of their duties (Tr. pp. 94, 95).

16. Since the process servers were not reimbursed for gas mileage, and the nature of their duties required travel, it was in the best interest of the process servers to invest in an economically feasible vehicle. The process servers were also required to invest in an electronic device for recording their service attempts and taking photographs of the service locations (Tr. pp. 94, 95, 118).

Employer's counsel contends that the individuals identified as process servers were independent contractors and not employees. The issues in dispute in this case are the employment status of the process servers during the first, second, third, and fourth quarters of 2011, and the first quarter of 2012, and whether the pay earned by the process servers constituted wages.

Arizona Revised Statutes § 23-615 defines "employment" as follows:

> "Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce, and includes:
>
> 1. An individual's entire service performed within or both within and without this state if:
>
> (a) The service is localized in this state. ...

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

> 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, 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 provision of 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:

> 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 in pertinent part:

> 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 business person, 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.

The primary issue in this case is whether the services that were provided by the process servers during the first, second, third, and fourth quarters of 2011, and the first quarter of 2012, were excluded from the definition of "employees" by qualifying as "independent contractors" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires application of the statutes and code provisions cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Employer and the process servers. We further consider the issues of control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

Under Arizona Administrative Code, Section R6-3-1723(A)(1), control includes the right to control, as well as control in fact. Arizona Administrative Code, Section R6-3-1723(D)(2), identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor, enumerated in Arizona Administrative Code, Section R6-3-1723(E), are: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; and (6) whether the individual has simultaneous contracts with other persons or firms.

In the application of the guidelines set out in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes the following:

a. <u>Authority over Individual's Assistants</u>
Hiring, supervising and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job.

The Employer did not prohibit the process servers from hiring assistants or other employees (Tr. pp. 110, 115). Therefore, this factor shows an absence of control, and indicates an independent relationship.

b. Compliance with Instructions

> Control is present when the individual is required to comply with instructions about when, where, or 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.

When serving legal documents, the process servers were required to record their attempts or efforts to serve the legal documents using the Employer's software and/or a handwritten worksheet (Tr. pp. 17, 100, 101; Bd. Exh. 9D). The Employer required that the handwritten worksheets be submitted to the Employer by electronic mail or fax transmission on a daily basis (Tr. p. 17; Bd. Exh. 9D). For documentary purposes, the process servers were also required to take photos of the service locations using an electronic device (Tr. pp. 15, 118, 119). However, because Arizona rules require valid service and documentation of the service is necessary, and the compliance with instructions is necessary for authentication, we find that the process servers' compliance was controlled by the Arizona rules, and not necessarily by the Employer. Therefore, this factor shows an absence of control, and indicates an independent relationship.

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.

As we previously stated, the Employer required that the handwritten worksheets be provided to the Employer by electronic mail or fax transmission on a daily basis (Tr. p. 17; Bd. Exh. 9D). Documentation of service is required to provide authentication of valid service per Arizona rules and is not meant as a means of controlling the actions of the process server (Tr. pp. 101, 111).

Therefore, this factor shows an absence of control, and indicates an independent relationship.

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.

Due to the nature of their work, the process servers provided their services at various sites (Tr. pp. 20, 21, 95). Therefore, we find that this factor is neutral.

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.

The Employer requires the process servers to be licensed and certified to serve legal documents in the State of Arizona. Although the process servers were prohibited from delegating or assigning their job assignments to unlicensed process servers, the process servers could assign their job assignments to other licensed process servers upon the Employer’s written consent (Tr. p. 115; Bd. Exh. 9C). Therefore, this factor shows control, and indicates an employment relationship.

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 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.

For convenience, the Employer's software provided the process servers with a map identifying various routes that the process server could utilize when providing service of the legal documents. However, the process servers were not required to follow the given routes (Tr. pp. 107, 108). The Employer did not provide the process servers with any other instructions regarding the order in which process must be served. Therefore, this factor shows an absence of control, and indicates an independent relationship.

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.

The Employer maintained the right to discharge the process servers at any time with little or no notice (Tr. p. 23). The P.S.A. entered into by the parties, states in part: "The Company may terminate this Agreement at any time by written notice to the process Server. In addition, if the process Server ... fails or refuses to comply with the written policies or reasonable directives of the Company, is guilty of serious misconduct with performance hereunder, or materially breaches provisions of this Agreement, the Company at any time may terminate the engagement of the Contractor immediately and without prior written notice to the process Server" (Bd. Exh. 9B). This factor shows control, and indicates 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.

The Employer did not establish set hours of work for the process servers (Tr. pp. 92, 93). Under the terms of the P.S.A., the Employer required the process servers to attempt service of "open papers" at least three times within seven days. For "Non-serve" papers, the Employer required the process server to attempt service at least 10 times within a three-week period. Of the 10 attempts, the process servers were required to have "2 A.M. attempts – 2 Daytime Attempts – 2 Evening Attempts – and 2 Weekend Attempts" (Bd. Exh. 9D). Otherwise, the process servers worked on their own schedules with no input from the Employer. Therefore, this factor shows control, and indicates an employment relationship.

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.

The Employer provided the process servers with a short training on how to use the Employer's software (Tr. pp. 26, 101). The Employer also provided the process servers with a pamphlet regarding the Fair Debt Collection Practices Act (Tr. pp. 96, 97, 116-118). However, because the Employer required the process servers to maintain certification to serve legal documents in the State of Arizona, training on how to be a process server was not provided (Tr. p. 86). Therefore, we find that this factor shows an absence of control, and indicates an independent relationship.

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.

During the Appeals Board hearing, the Employer testified that the process servers were free to work for other entities while performing services for the Employer. The Employer testified that some of the process servers worked for multiple companies. The Employer also testified that some of the process servers worked for the Employer through their own independent companies (Tr. p. 93). Therefore, this factor shows an absence of control, and indicates an independent relationship.

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.

As we previously stated, when serving legal documents, the process servers were required to record their attempts or efforts to serve the legal documents using the Employer's software and/or a handwritten worksheet (Tr. pp. 17, 100, 101; Bd. Exh. 9D). For documentary purposes, the process servers were also required to take photos of the service locations using the process servers' personal electronic device (Tr. pp. 15, 118, 119). Therefore, this factor is neutral.

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.

During the Appeals Board hearing, the Employer testified that the process servers did not receive reimbursement for any expenses incurred during the normal course of their duties (Tr. pp. 94, 95). Therefore, this factor shows an absence of control, and indicates an independent relationship.

The following are additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E), and are equally appropriate for consideration in determining the relationship of the parties.

l. Availability to the 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.

As previously stated, while working under the terms of the P.S.A., the Employer did not prohibit the process servers from working for other employers. Additionally, the Employer did not prohibit the process servers from forming their own businesses (Tr. p. 93). During the Appeals Board hearing, the Department witness testified that the Department interviewed at least one individual that worked for the Employer and maintained a bona fide business (Tr. p. 18; Bd. Exhs. 1E, 1F). Therefore, this factor indicates an independent relationship.

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.

Process servers were paid a flat fee per assignment (Tr. pp. 89-91). Upon hire, the process servers had the ability to negotiate their fee for services (Tr. p. 90). Once the process server's fee was agreed upon, the amount was fixed for the duration of the P.S.A. (Tr. p. 91). Therefore, we find that the process servers were paid "on a job basis". This factor indicates an independent 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.

As previously stated, the process servers did not receive reimbursement for any expenses incurred during the normal course of their duties (Tr. pp. 94, 95). Because the nature of the process servers' job duties required travel, and the process servers were not reimbursed for gas mileage, the process servers were subjected to recurring liabilities connected with their work. Therefore, depending on the job and circumstances, the process servers were in a position to realize a profit or loss during the course of their duties. Therefore, this factor indicates an independent relationship.

4. Obligation

> An employee usually has the right to end his relationship with his employer at any time without incurring liability. 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.

The process servers were free to end the relationship with the Employer at any time (Tr. pp. 108, 109). No evidence was presented that the process servers had a legal obligation to complete the job or would suffer a penalty for an early termination of their services. Therefore, this factor indicates an employment relationship.

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.

As previously stated, the Employer did not reimburse the process servers for any expenses incurred during the course of their duties (Tr. p. 78). Since the process servers were not reimbursed for gas mileage, and the nature of their duties required travel, it was in the best interest of the process servers to invest in an economically feasible vehicle. The process servers were also required to invest in an electronic device for recording their service attempts and taking photographs of the service locations (Tr. p. 94, 95, 118). Therefore, this factor indicates 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.

While working under the terms of the P.S.A., the Employer did not prohibit the process servers from working for other employers. Additionally, the Employer did not prohibit the process servers from working for the Employer

through their own businesses (Tr. p. 93). Therefore, this factor indicates an independent relationship.

The Arizona Court of Appeals, in the case of Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given its long established liberal construction in an effort to include as many types of employment relationships as possible, when the Court stated:

> The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [See A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals, in the case of Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where the Court stated:

> The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation ... [Emphasis added].

In accordance with the Employment Security Law of Arizona, we conclude that the evidence of independent contractor status far outweighs the evidence of an employee status.

The process servers were not employees of the Employer during the first, second, third, or fourth quarters of 2011, or the first quarter of 2012, but rather, the process servers performed services pursuant to an independent contractor relationship. Therefore, by operation of A.R.S. § 23-622(A), we conclude that all payments to the process servers for their services during that period did not constitute wages.

THE APPEALS BOARD **REVERSES** the Department's Reconsidered Determination dated February 14, 2014.

During the first, second, third, and fourth quarters of 2011, and the first quarter of 2012, services performed by process servers did not constitute employment because the parties had an independent contractor relationship.

Therefore, none of the remuneration paid to the process servers from January 1, 2011 through March 31, 2012, constituted wages.

DATED: 10/7/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review 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 requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review 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 for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
   1. explains why the Appeals Board decision is wrong,
   2. cites the record, rules and other authority, and
   3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 10/7/2015
to:

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For The Appeals Board