

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

**PETITIONER:**

Employer Account No. – 3220143  
MEDI-TRANSLATIONS  
ATTN: CEM KUS AND JANET KUS  
PO BOX 667140  
POMPANO BEACH FL 33066

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 0023 4524 38-02**

**ORDER**

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated May 19, 2014, is REVERSED.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this 7th day of **January, 2015**.



*Magnus Hines*

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

FILED ON THIS DATE PURSUANT TO § 120.52,  
FLORIDA STATUTES, WITH THE DESIGNATED  
DEPARTMENT CLERK, RECEIPT OF WHICH IS  
HEREBY ACKNOWLEDGED.

*Shanendra Y. Barnes*

DEPUTY CLERK

1-7-15  
DATE

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the 7th day of January, 2015.

*Shanendra Y. Barnes*

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

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

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

**PETITIONER:**

Employer Account No. – 3220143  
MEDI-TRANSLATIONS INC  
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PO BOX 667140  
POMPANO BEACH FL 33066-7140

**PROTEST OF LIABILITY  
DOCKET NO. 0023 4524 38-02**

**RESPONDENT:**

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

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

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

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

After due notice to the parties, a telephone hearing was held on September 24, 2014. The Petitioner, represented by the Vice President of Operations, appeared and testified. The Petitioner's attorney appeared as a consultant. The Respondent, represented by a Department of Revenue Senior Tax Specialist, appeared and testified. The Joined Party appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were received from the Petitioner.

**ISSUE:**

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

Whether the Petitioner's corporate officers received remuneration for employment which constitutes wages pursuant to §443.036(21); 443.036(40); 443.1216, Florida Statutes; Rule 73B-10.025(2), Florida Administrative Code.

Whether the Petitioner meets liability requirements for Florida reemployment assistance contributions pursuant to §443.036(19); 443.036(21); 443.1215, Florida Statutes.

### Findings of Fact:

1. The Petitioner is a Florida profit corporation which operates a business providing translation services for insurance companies that are the Petitioner's clients. The translation services are provided for non-English speaking individuals at workers' compensation medical appointments. The Petitioner's corporate officers are Cem Kus and Janet Kus.
2. The Petitioner has been in business since approximately 1992. The Petitioner provides translators for the medical appointments in several states including Florida with approximately 1851 translators performing the translation services. Approximately 30% of the translators perform services in Florida. All of the translators are classified by the Petitioner as independent contractors.
3. The Petitioner is one of a group of related corporations. Employees of other corporations in the group perform services for the Petitioner in positions such as Vice President of Operations, Vice President of Human Resource, Translation Manager, and Scheduling Coordinator and are compensated by the sister corporations for those services. The Petitioner does not have any workers that it acknowledges to be employees.
4. The Joined Party is a multi-lingual individual who performed services for one of the sister corporations as a driver in 2006 and was classified as an independent contractor. In 2012 the Joined Party contacted the Petitioner to determine if there was work available for a Croatian, Bosnian, Serbian, and Macedonian translator. The Petitioner and the Joined Party entered into a written *Translation/Interpretation Vendor Agreement* on October 9, 2012, to perform translation services as an independent contractor on an as-needed basis.
5. The Agreement specifies that the Petitioner will pay the Joined Party \$40 per hour for authorized translation services and will reimburse him for mileage at the rate of thirty-five cents per mile. The hourly rate is for a minimum of one hour. If a patient fails to appear for the appointment the Petitioner will pay the Joined Party for one hour. The Agreement specifies that the Petitioner will not withhold any taxes from the pay and will not provide any fringe benefits.
6. The Joined Party had the right to accept or decline any work assignment offered to him. The Agreement provides that if the Joined Party accepts a work assignment but does not provide the services as agreed the Petitioner has the right to apply a failure charge, or assess any cost resulting from the Joined Party's failure to complete the work assignment, as a deduction from earnings.
7. The Joined Party does not have any formal training as a language translator but he is fluent in the Croatian, Bosnian, Serbian, and Macedonian languages as well as the English language. The Petitioner did not provide any training to the Joined Party and did not instruct him concerning how to perform the translation services.
8. The Joined Party first performed services for the Petitioner as a translator on January 10, 2013. The Joined Party last performed services for the Petitioner on June 17, 2013.
9. Whenever the Joined Party accepted a work assignment the Petitioner provided the Joined Party with a *Translation Appointment Report* listing the patient's name, the name and address of the facility where the medical services were to be performed, the date and time of the scheduled medical services, and the type of medical services to be performed. Upon completion of the translation assignment the Joined Party was required to show the amount of time that he spent on the assignment

and the number of miles to and from the medical facility. The completed *Translation Appointment Report* was then returned to the Petitioner for payment to the Joined Party.

10. No tools or equipment were needed to perform the work. The Petitioner did not provide the Joined Party with uniforms, an identification badge, or business cards.
11. The Joined Party had the right to perform translation services for others, including competitors of the Petitioner. The Joined Party did not perform translation services for other companies, however, he did assist friends and acquaintances if they needed a translator. He did not charge for those services but occasionally those individuals would give the Joined Party money as a gift for his assistance.
12. The Joined Party was not required to personally perform the translation services and he was free to hire others to perform the work for him. On one or more occasions the Joined Party was not able to perform the work and he asked a friend to perform the work for him. The Joined Party was not required to obtain permission from the Petitioner to hire a substitute translator and he did not notify the Petitioner that the assignment was not completed personally. The Joined Party received payment from the Petitioner and in turn paid his friend.
13. The Agreement specifies that the Agreement is for a one year period of time with automatic renewal for an additional one year term. Either party may terminate the Agreement upon thirty days prior written notice. However, in actual practice, a translator could stop accepting work assignments or the Petitioner could stop offering work assignments at any time without prior notice.
14. At the end of 2013 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation in the amount of \$5,883.65.
15. The Joined Party filed a claim for reemployment assistance benefits effective January 19, 2014. When the Joined Party did not receive credit for his earnings with the Petitioner an investigation was issued to the Department of Revenue to determine if the Joined Party performed services in covered employment.
16. On May 9, 2014, the Department of Revenue issued a determination holding that the Joined Party and other persons performing services for the Petitioner as translators are employees of the Petitioner retroactive to January 10, 2013. The determination holds the Petitioner liable for payment of reemployment assistance contributions retroactive to January 10, 2013, and holds that wages paid to corporate officers are reportable. The Petitioner filed a timely protest by letter dated May 28, 2014.

### **Conclusions of Law:**

17. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as translators constitute employment subject to the Florida Reemployment Assistance Program Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.
18. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).
19. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987). In Brayshaw v. Agency for Workforce Innovation, et al. 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the Department

is limited to applying only Florida common law in determining the nature of an employment relationship.


20. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.
21. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:
  - (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.
  - (2) The following matters of fact, among others, are to be considered:
    - (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
    - (b) whether or not the one employed is engaged in a distinct occupation or business;
    - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
    - (d) the skill required in the particular occupation;
    - (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
    - (f) the length of time for which the person is employed;
    - (g) the method of payment, whether by the time or by the job;
    - (h) whether or not the work is a part of the regular business of the employer;
    - (i) whether or not the parties believe they are creating the relation of master and servant;
    - (j) whether the principal is or is not in business.
22. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties.
23. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1<sup>st</sup> DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1<sup>st</sup> DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.
24. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995). The Translation/Interpretation Vendor Agreement, the agreement between the parties in this case, clearly reveals that it is the intent of the Joined Party and the Petitioner to establish an independent contractor relationship.
25. Although the Joined Party does not have any formal training to perform services as a language translator, he does have unique skill and special knowledge of multiple languages. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980).
26. No equipment or tools were needed to perform the work of language translator. The Joined Party provided his own transportation and was reimbursed for the mileage by the Petitioner at the rate specified in the Agreement.



27. Although the Agreement is in effect for one year with automatic renewal for a second year, in reality, nothing in the Agreement obligates the Petitioner to provide work assignments and nothing in the Agreement obligates the Joined Party to accept work assignments. Work was offered to the Joined Party on an as-needed basis and the Joined Party had the right of refusal without penalty. A possible penalty applied only if the Joined Party obligated himself by accepting a work assignment and then failed to perform the work which he agreed to perform. The Joined Party did not have a set work schedule. The work schedule was determined by the dates and times of the medical appointments for which the Joined Party agreed to provide translation services.
28. Although the Joined Party's pay was based on an hourly rate, he was paid by the job. The Joined Party did not receive paid holiday, sick, or vacation time. He was paid only if he worked. No payroll taxes were withheld from the pay and no fringe benefits normally associated with employment relationships, such as health insurance and retirement benefits, were provided. At the end of the year the Petitioner reported the earnings on Form 1099-MISC as nonemployee compensation.
29. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1<sup>st</sup> DCA 1984), the Court held that the basic test for determining a worker's status is the employing unit's right of control over the manner in which the work is performed. The Court, quoting Farmer's and Merchant's Bank v. Vocelle, 106 So.2d 92 (Fla. 1<sup>st</sup> DCA 1958), stated: "[I]f the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor; if he is subject to the control of the person being served as to the means to be used, he is not an independent contractor."
30. The evidence presented in this case reveals an almost total lack of control on the part of the Petitioner concerning the manner in which the Joined Party performed services. The work assignments, the date and time of the assignments, and the place of the assignments were determined by the date, time, and place of the medical appointments which were set by the insurance company and the patient. If an assignment was not to the Joined Party's satisfaction, the Joined Party had the right to refuse to accept the assignment without penalty. The Joined Party was not supervised by the Petitioner. The Petitioner did not provide any training or instruction concerning how to perform the work. The Joined Party had the right to hire others to perform the translation without the Petitioner's consent or knowledge. These facts reveal that the Petitioner was only concerned with the completed work and was not concerned with how the work was performed.
31. It is concluded that the Joined Party performed the translation services for the Petitioner as an independent contractor and not as an employee.
32. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.
33. The Petitioner's corporate officers did not participate in the hearing. Although testimony was received from the Petitioner's witness that the officers were active in the operation of the business, no evidence was provided to show the extent of the activity or whether the officers received compensation. Thus, there is insufficient evidence to establish that the officers received wages that constitute insured compensation.

**Recommendation:** It is recommended that the determination dated May 9, 2014, be REVERSED.

Respectfully submitted on November 21, 2014.


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R. O. Smith, Special Deputy  
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke Lòd Rekòmande a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anè a lan yon peryòd kenz jou apati de dat ke Lòd Rekòmande a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

*Shanendra Y. Barnes*

SHANEDRA Y. BARNES, Special Deputy Clerk

*Date Mailed:*

*November 21, 2014*

Copies mailed to:

Petitioner

Respondent

Joined Party

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