

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2795038
T. FLANAGAN & ASSOCIATES, INC.
380 WESTWINDS DRIVE
PALM HARBOR FL 34683

RESPONDENT:

State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2010-161257L**

ORDER

This matter comes before me for final Agency 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 October 14, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **May, 2011**.



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2795038
T. FLANAGAN & ASSOCIATES, INC.
ATTN: THOMAS FLANAGAN
380 WESTWINDS DRIVE
PALM HARBOR FL 34683



**PROTEST OF LIABILITY
DOCKET NO. 2010-161257L**

RESPONDENT:

State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated October 14, 2010.

After due notice to the parties, a telephone hearing was held on January 27, 2011. The Petitioner's owner appeared and testified at the hearing. An attorney appeared on behalf of the Joined Party and called the Joined Party as a witness. A tax specialist appeared and testified on behalf of the Respondent.

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

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Findings of Fact:

1. The Petitioner is a subchapter S corporation, incorporated July 1, 2007, for the purpose of running a promotional marketing business.
2. The Petitioner placed an advertisement for a worker. The Petitioner interviewed multiple applicants including the Joined Party.

3. The Joined Party performed services for the Petitioner as an office manager from the Petitioner's inception through August 5, 2010.
4. The Petitioner instructed the Joined Party to report to work from 9 a.m. until 5 p.m., Monday through Friday. The Petitioner gave the Joined Party daily instructions as to what tasks needed to be performed that day.
5. The Joined Party was paid by the hour. The Joined Party was paid \$16 per hour by the end of her term of service. The rate of pay was set by the Petitioner. The Joined Party was required to use a time clock to keep track of her hours.
6. The Petitioner provided the Joined Party with a work space and office equipment needed to perform the work. The Joined Party chose to use her own software because it was more advanced than what the Petitioner had available. The Joined Party was provided with a company email address.
7. The Petitioner provided power-point training for the Joined Party.
8. The Joined Party received an end of year bonus. The Joined Party received paid time off. The Joined Party received a three week severance package at the time of separation.

Conclusions of Law:

9. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation 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.
10. 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).
11. 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).
12. 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.
13. 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.
14. Comments in the Restatement explain that the word “servant” does not exclusively connote manual labor, and the word “employee” has largely replaced “servant” in statutes dealing with various aspects of the working relationship between two parties. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often cannot be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.
15. The evidence presented at the hearing reflects that the Petitioner exercised control over where, when, and what work the Joined Party would perform. The Petitioner provided the Joined Party with a schedule, workplace, and daily direction as to the tasks that needed to be performed.
16. The Joined Party was paid an hourly rate, rather than by the job. The Petitioner determined the rate of pay.
17. The Joined Party received paid time off and a yearly bonus from the Petitioner.
18. The Joined Party was not required to provide any of her own tools, equipment, or materials.
19. The preponderance of the evidence presented at this hearing reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated October 14, 2010, be AFFIRMED.

Respectfully submitted on March 18, 2011.



KRIS LONKANI, Special Deputy
Office of Appeals