

**AGENCY FOR WORKFORCE INNOVATION  
Unemployment Compensation Appeals**

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

**PETITIONER:**

Employer Account No. - 2275653  
TROWELL TRUCKING INC  
KAY TROWELL  
PO BOX 75  
LAKE BUTLER FL 32054-0075

**PROTEST OF LIABILITY  
DOCKET NO. 2010-26413L**

**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 November 25, 2009.

After due notice to the parties, a telephone hearing was held on September 22, 2010. The Petitioner's office manager appeared and testified at the hearing. A tax specialist II appeared and testified on behalf of the Respondent. The Joined Party did not appear at the hearing.

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 constitute insured employment, and if so, the effective date of the petitioners liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

**Findings of Fact:**

1. The Petitioner is a corporation created for the purpose of running a trucking business.
2. The Joined Party purchased a truck from the Petitioner. The Joined Party and the Petitioner signed a written agreement titled Equipment Lease Contract and Agreement. The agreement was signed February 14, 2005. The agreement was a standard document, created and supplied by the Petitioner. The relationship between the parties ended in August 2009.
3. The written agreement indicates that the Joined Party was leasing his vehicle to the Petitioner and supplying a driver for the vehicle. The Petitioner had the right to reject any driver that did not meet its approval. The agreement gave the Petitioner control over the appearance of the vehicle,

including repainting or placing a company logo on the vehicle. The agreement further held that the Joined Party would be responsible for maintenance of the vehicle as well as, for any state licensing or fees. The agreement gave the Petitioner exclusive use of the vehicle and complete direction and control over the hours of use and location of loading and unloading of the vehicle.

4. The written agreement indicated that an independent contractor relationship would exist between the parties. The agreement went on to indicate that the Joined Party was responsible for paying the supplied driver. The agreement required that the Joined Party have an occupational accident insurance policy supplied by the Petitioner or that the Joined Party provide a workmen's compensation insurance policy acceptable to the Petitioner. The Petitioner maintained all records between the parties.
5. The written agreement allowed either party to end the agreement with five days notice. The agreement further gave the Petitioner the right to end the agreement without notice if the Joined Party violated any laws or any of the Petitioner's policies.
6. The Petitioner would dispatch jobs to the Joined Party. The jobs could range in duration from a day job to a job lasting a number of weeks. The Joined Party had the right to refuse a job. Once the Petitioner had accepted the job, the dispatch would control the order of the loads along with the times and locations for pickups and deliveries. The Joined Party was allowed to select his own route.
7. The Joined Party was not allowed to work for a competitor.
8. The Petitioner would negotiate a value for the loads with the client. The Petitioner would receive 25% of the negotiated value. The percentage received by the Petitioner was determined by the Petitioner. The Petitioner would then deduct any fuel and insurance costs from the remainder. The net pay would be paid to the Joined Party. The Joined Party was paid on Fridays.
9. The Petitioner provided the trailer to the Joined Party. This impacted the percentage the Petitioner received for each load. The Petitioner provided insurance for the trailer and the cargo.
10. The Joined Party was required to submit a load sheet, a fuel sheet, and a maintenance log to the Petitioner each week.
11. Complaints about a driver could result in the Petitioner issuing a written reprimand.
12. Either party could end the relationship without liability.

### **Conclusions of Law:**

13. 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.
14. 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).
15. 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).

16. 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.
17. 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.
18. 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. 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 cannot be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.
19. The evidence presented in this case reveals that the Petitioner exercised control over where and when the Joined Party performed services. While the Petitioner would allow the Joined Party to refuse work, the agreement signed by the parties, allowed the Petitioner full control over the Joined Party's vehicle should the Petitioner decide to exercise that right.
20. The Petitioner had control over the financial aspects of the relationship. The value of any load was determined by the Petitioner and the Petitioner's client. The amount of that value received by the Joined Party was determined by the Petitioner dependent upon the exact terms of the relationship between the parties.
21. There was a written agreement between the parties that indicated an independent contractor relationship. The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

22. There is no evidence that the Joined Party had any particular skill or specialty beyond that of a normal truck driver employed by a carrier in the trucking business.
23. The Joined Party's work delivering loads for clients was a regular part of the day to day business of the Petitioner's trucking company.
24. The relationship was terminable at will. Either party had the right to end the relationship at anytime and without liability. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."
25. A preponderance of the evidence presented in this case reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the Petitioner and the Joined Party.

**Recommendation:** It is recommended that the determination dated November 25, 2009, be AFFIRMED.

Respectfully submitted on October 28, 2010.



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KRIS LONKANI, Special Deputy  
Office of Appeals

**AGENCY FOR WORKFORCE INNOVATION  
TALLAHASSEE, FLORIDA**

**PETITIONER:**

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**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 November 25, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this \_\_\_\_\_ day of **January, 2011**.



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TOM CLENDENNING  
Assistant Director  
AGENCY FOR WORKFORCE INNOVATION