

SS-8 Determination—Determination for Public Inspection

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| Occupation 08MUS Musical Director | Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor |
| UILC | Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes |

I have read Notice 441 and am requesting:

- Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- Delay based on an on-going transaction
- 90 day delay

For IRS Use Only:

Facts of Case

The firm is a church who engaged the worker as its music director. She received a 2017 1099-MISC for her services and continued to provide those services in 2018 as well. There were written agreements provided.

Both the church and the worker agreed that the church provided no training. The worker received her work assignments based on the church service schedule from the church pastor once a month, at the convenience of the worker. Both parties agreed that the worker determined the methods by which the assignments were performed but would report any issues or problems to the pastor and the fellowship committee. There were no required reports. The worker's routine would include selecting and preparing choir music, service music, instrumental music, lyrics for songs for screens, and rehearsing. She worked at home and at the church. Both agreed that there were meetings and rehearsals. Both also agreed that she was to provide the services personally.

Both the church and the worker were in agreement on the following information. The church provided the sheet music; the worker supplied all music, instruments needed and her own computer. The worker incurred expenses such as travel, health insurance, power point presentations, instrument repair for which she received no reimbursement. She received a set salary/compensation and could incur loss or damage to her violin, cello or computer. The worker established the level of payment for services.

Both the church and the worker agreed that there were no benefits though the firm indicated personal days. Neither party could terminate the relationship without incurring a liability. The worker did perform similar services for others. The relationship has not ended.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the church retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its mission. The worker had filled out an application for the position of music director. While she was a skilled musician, her music director position had certain responsibilities. The worker remained responsible to and reportable to the church pastor, even if contact and meetings were at the worker's convenience. There was a church service schedule that the worker needed to adhere to. While the establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control, if the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. According to the church's job description position, there were also timelines for certain activities/responsibilities. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own patterns of work. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. However, if the person or persons retain the right to control the order or sequence of the work, this is sufficient to indicate an employer-employee relationship. While the church may have given the worker considerable latitude in the performance of her duties and responsibilities, it retained the right to redirect her activities, whether or not it exercised that right. In addition, the worker provided her services on a continuous basis and not just for a one-time event. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks when working for the church, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided for the church. The worker received a set monthly amount based on her annual compensation. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers.

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. There was a written agreement for each year that differed slightly. While musical endeavors/activities were undoubtedly part of the worker's business activities, they were also part of the church's mission for its members. The church required a music director to direct and coordinate its various music-related activities. When engaging the worker as its music director, the worker was not engaged in a separate business venture. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. It is acknowledged that the worker had a business presence for her other activities, but when engaged as the firm's musical director, the work relationship was that of employer-employee based on the above elements and circumstances in the work relationship. It does not matter that both parties wanted and agreed to the independent contractor designation for the worker. In *Bartels v. Birmingham*, 332 U.S. 126, 1947-2 C. B.174, the Supreme Court stated that whether there is an employment relationship is a question of fact and not subject to negotiation between the parties. In this case, the worker's services were an integral part of the church's operation and mission, thereby requiring a necessary degree of control by the church over the worker establishing an employer-employee relationship.

Based on the above analysis, we conclude that the church had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee and not an independent contractor operating a trade or business.

Please see Publication 4341 for guidance and instructions for payer compliance.