

SS-8 Determination—Determination for Public Inspection

Occupation 08MUS Music 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 payer submitted a request for a determination of worker status in regard to services performed by the worker from September 2019 to December 2020 as a music director. The services performed included directing an amateur community orchestra for a fixed number of rehearsals and concerts each year. The worker was also responsible for working with the payer's board. The payer is a 501(c)(3) non-profit amateur community orchestra. It issued the worker Form W-2 for 2019 and 2020. The payer filed Form SS-8 to obtain a worker classification determination related to the services performed by the worker for the purposes of Federal employment tax and income tax withholding. Services were performed under a written agreement.

The worker's response states he was responsible for conducting weekly rehearsals, selecting and preparing music for the orchestra, and working with the payer's board on community outreach. The payer's mission statement is to offer amateur musicians an opportunity for mutual growth and understanding through the experience of musical performance in a supportive and collaborative setting. Both parties acknowledged the worker performed similar services in 2017 through August 2019 as an unpaid volunteer.

The payer stated it did not provide the worker specific training or instruction. The contract provided general guidelines of the work to be done. The worker determined the details and methods of how the work was performed. If problems or complaints arose, the worker was required to contact the payer's board. The payer and worker were responsible for resolution. The worker was responsible for the rehearsal schedule and concert programming, which was posted on the payer's website. The worker's routine consisted of leading a fixed number of weekly rehearsals and a fixed number of annual concerts. Prep and post work for rehearsals and concerts was solely determined by the worker, who was not required to submit a schedule or hours. Services were performed at the rehearsal or concert venue for approximately two hours a week. Variable hours per week were worked by the worker at his home office. The payer required the worker to attend board meetings and orchestra meetings. The payer required the worker to personally perform services. The payer ultimately hired substitutes or helpers. The worker was responsible for paying substitutes or helpers without reimbursement from the payer. The worker stated instructions were contained in the written agreement and the payer's mission statement. Work assignments were jointly agreed upon between he and the payer. The payer's board was contacted and assumed responsibility for problem resolution. The payer required he also attend its annual meeting. He had not hired substitutes or helpers; however, thought the payer's approval would be required. It is unknown who would pay the substitute or helper.

The payer stated it provided the rehearsal venue, musicians, and some music. The worker provided rehearsal music scores. The worker did not lease equipment, space, or a facility. The payer reimbursed the worker for expenses related to paper and ink for music scores and programs. Customers paid the payer. The payer paid the worker salary; a drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The level of payment for services provided was negotiated between the payer and the worker. The worker stated he had access to the payer's debit card for the purchase of paper, supplies, etc. Establishing the level of payment for services provided was not applicable.

Both parties agreed benefits were not made available to the worker. The work relationship could be terminated by the payer or the worker without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The payer represented the worker as a music director and conductor to its customers.

The written agreement states, in part, contract renewal was subject to review of the year's performance taking into consideration the board's position as well as the players perspective. In addition to assuming responsibility for rehearsals and concerts, including the right of first refusal for any additional concerts added to the season, the worker would be present for all rehearsals and other such times as deemed necessary to meet the artistic needs of the orchestra as mutually agreed upon by the payer and the worker. The worker would select music for each concert and guest soloists, in consultation with the payer. The worker would not make any financial commitment on behalf of the payer without the payer's express written permission. The worker, in conjunction with the payer's members, would promote, assist, develop, and evaluate the payer's outreach programs. The worker would work closely with the payer to ensure the best possible concerts and to ensure that all arrangements for the presentation of each performance had been handled completely and on a timely basis. The payer empowered the board to assist and keep in close contact with the worker and to provide all non-artistic support. Through its various committees, the payer would assist the worker in performing his responsibilities as outlined in the written agreement. The agreement could be terminated by either party by providing a three-month prior written notice. The worker could request a hearing with the payer's board regarding any matter in the written agreement.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, a statement that a worker is an independent contractor pursuant to a written or verbal agreement is without merit. For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. In this case, the payer required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the payer's operational mission. The payer ultimately determined the music and soloist chosen and assumed responsibility for problem resolution. The services performed were subject to the payer's annual performance review. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retained the right to do so if needed.

Payment by the hour, day, 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 payer 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 payer has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. In this case, the worker did not invest capital or assume business risks. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. As acknowledged by the payer, the worker did not incur economic loss or financial risk. Based on the salary rate of pay arrangement the worker could not realize a profit or incur a loss.

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. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of the payer's mission. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

Based on the above analysis, we conclude that the payer 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.

The payer can obtain additional information related to worker classification in Publication 15 and Publication 15-A, available at www.irs.gov.