

SS-8 Determination—Determination for Public Inspection

Occupation

08PEN.2 Performer/Entertainer

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ 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 organization is a 501(c)(3) tax exempt organization providing symphonies to the public. The organization engaged the worker to perform services as a musician. There was a written agreement between the organization and the worker's union.

The organization provided the worker with his repertoire and the worker was instructed to come to rehearsals. The organization determines the assignments and the musicians are hired according to their expertise. The worker relied upon the union to resolve his problems and complaints. The organization set the rehearsal and concert times. The worker's services are performed at locations arranged by the organization. The worker was required to perform the services personally. The organization pays for any substitutes or helpers that might be needed.

The organization provides the venue, music stands, stage manager, tech support, and everything except the worker's instrument. The worker did not lease any space to perform the services. The firm reimbursed the worker for cartage expenses. The worker stated he was paid hourly and the firm stated the worker was paid according to union rates. The customers paid the firm directly. The union and the organization determine the rate of pay the workers would receive for their services.

The worker received no benefits. The organization can cancel the worker's services within a 21 day notice and the worker can cancel at any time. The organization stated the worker performed similar services for others but the worker stated he did not perform similar services for others at the same time he performed services for the firm. The worker was a member of a union. The worker did not advertise his services to the general public. The worker was represented as part of the organization's symphony. It appears the relationship is ongoing.

The organization states they have always treated the musicians as independent contractors. The organization sends the musicians an "A List" two months prior to the concerts which lists the dates and repertoire of each concert. The musicians can pick and choose what concerts they want and can opt out at a later date. The musicians are required to participate in three 2 ½ hour rehearsals and one 2 ½ performance. The organization would have would need to hire a payroll service if musicians were employees which would be a great burden on the organization.

The Collective Bargaining Agreement between the organization and the union Local 21 American Federation of Musicians Incorporated of Delaware includes the following:

- The organization recognizes the union as the sole and exclusive representative for bargaining with the respect to wages, hours, and other terms and conditions of employment for all musicians employed by the organization.
- Conditions of employment, all musicians covered & are members shall maintain membership in the union.
- The organization will deduct a percentage rate for work dues.
- Substitutes are not required to join the union until they have played two concert sets in a season bill will establish a membership before being hired for a third concert set in any season.
- The organization management rights include right to hire, right to plan, direct and control the operations, to schedule and assign work, to maintain efficiency, to determine the means, method process and schedule of operations, to determine locations, to establish, and require employees to observe, reasonable rules and regulations.
- The agreement outlined the service time for rehearsals and performance
- The agreement outlined the musicians protection for the elements and security
- The agreement outlined the musicians' grievance process.
- The agreement outlined dress code for performances.
- There was an outline of compensation to the musicians according to the year and time of each concert and rehearsals and amount paid for different types of cartage, overtime rate, lateness penalty and other applicable rates.

This was signed by the President of the union [REDACTED] and the Executive Director of the organization [REDACTED].

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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. See Rev. Rul. 55-695, 1955-2 C.B. 410.

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. See Rev. Rul. 56-694, 1956-2 C.B. 694.

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. 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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. See Rev. Rul. 55-144, 1955-1 C.B. 483.

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities. See Rev. Rul. 71-524, 1971-2 C.B. 346. Special scrutiny is required with respect to certain types of facilities, such as home offices.

The worker was an employee according to common law. The information provided by both firms show the organization did direct and control the worker as outlined in the agreement between the organization and the musicians' union. The organization set the performance and rehearsal times which showed control. The organization determined the dress code the musicians were required to follow which showed control over the worker. The organization set the amount to charge for the performances and then set the rate of pay to the musicians as negotiated with the union which showed financial control by the organization. The worker could not suffer a significant loss in the performance of their duties as the organization even reimbursed the musicians for cartage expenses. The worker's service as a musician was integrated into the organizations operating of providing performances to their customers.

Based on the above analysis, we conclude that the firm 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 go to www.irs.gov for further information.

Firm: Publication 4341

Worker: Notice 989