DOUBLE TROUBLE

How the law protects musicians when they have "joint employers"

LEGAL CORNER
HARVEY MARS, ESQ.

Harvey Mars is counsel to Local 802. Legal questions from members are welcome. E-mail them to **HsmLaborLaw@HarveyMarsAttorney.com**. Harvey Mars's previous articles in this series are archived at **www.HarveyMarsAttorney.com**. (Click on "Publications & Articles" from the top menu.) Nothing here or in previous articles should be construed as formal legal advice given in the context of an attorney-client relationship.

PHOTO: HJALMEIDA VIA ISTOCKPHOTO.COM

ONE OF THE many conundrums professional musicians must grapple with is whether or not they are actually employees. Although this may seem like a dry legal point, it is actually quite crucial.

There are a host of important reasons why a musician should desire to be classified as an employee instead of as an independent contractor.

As I've written before, independent contractors are responsible for paying self-employment tax, which means that they pay a higher percentage for Social Security and Medicare than an employer does. In the case of employees, the employer and employee split the cost of these payroll taxes, each paying 7.65 percent of eligible wages. An independent contractor, by contrast, is both the employer and the employee, so a self-employed person pays both halves, or 15.3 percent total. That's thousands of dollars a year that you're losing from your own pocket. (It's true that independent contractors can deduct business expenses from their adjusted gross income to lessen their tax liability. Talk to your accountant about this, but in our experience, the deductions you can take do not offset the additional tax burden.)

Another thing: independent contractors are not entitled to receive unemployment benefits or workers' compensation, while employees are. Also, independent contractors cannot organize a union or collectively bargain the terms and conditions of their employment. Independent contractors cannot take advantage of any federal civil rights statutes, including Title VII, the ADEA or the ADA. This means they are not protected against discrimination.

Finally, due to a quirk in the law, independent contractors who are paid in cash are not eligible to use those cash payments to establish eligibility for affordable housing.

After all that, the good news is that in New York state, professional musicians are statutorily deemed to be employees. But the next question is: as a musician, who is your employer? This is not as simple as you may think.

Many times, freelance musicians are hired by a bandleader, who in turn is contracted by a third party (a booking agent, for instance), who in turn is paid by a venue. Who then is the employer: the bandleader, the booking agent, or the owner of the venue itself?

Well – it is possible to have more than one employer! More on that below. But consider this: Local 802's hotel contract says that when club date musicians perform at a hotel, they are employees of both the hotel and the club date agency. And recent rulings from the National Labor Relations Board, which have been reinforced by federal case law, support the concept of "joint employers" of musicians.

A joint employer is just what it sounds like. Rather than one entity, there are two or more who are responsible for payment of wages, benefits, unemployment, workers' comp, taxes and any other obligations to workers.

Furthermore, joint employers can *both* be deemed jointly responsible if *either* party violates the law or commits an unfair labor practice.

Essentially, the determination of whether a joint employer relationship exists is dependent upon whether the two entities share sufficient control over employees so that both may be considered the employer. In joint employer relationships, there is no single integrated enterprise. The conclusion that employers are "joint" means that though they are separate independent entities, they have jointly chosen that certain aspects of the employer-employee relationship

will be handled in tandem. The legal analysis required for employers to be deemed joint is that they are demonstrated to have "immediate control" over employees. To make this determination, courts have relied upon a five-factor test. Both employers must have control in some respect over hiring and firing, discipline, pay, insurance and records, supervision and participation in collective bargaining. See *Chelsea Grand, LLC v. New York Hotel and Motel Trades Council, 2014 WL 4813028 (S.D.N.Y, Sept. 29, 2014)*. In this decision, the U.S. District Court for the Southern District of New York held that the Chelsea Grand Hotel was a joint employer with Interstate Hotels & Resorts because it had entered into a contract through which Interstate would manage its hotels. Through this contractual relationship, Chelsea became subject to a labor agreement that Interstate had entered into with the hotel workers' union, and thus was bound by the labor agreement's arbitration clause.

Quite recently, the NLRB has indicated its willingness to liberalize the standards by which joint employer status can be created. Specifically, the labor board is poised to adopt a new standard that would no longer rely upon the formal five-part test, but instead would examine economic reality: how dependent are the employers on each other and on the employees? The immediate direct control test would be abandoned. This is a far easier and simpler standard to satisfy.

The effects could be dramatic. How dramatic? Consider this: on July 29, 2014, the NLRB General Counsel's office announced that it was going to issue unfair labor practice complaints against the McDonald's restaurant company in 43 cases in which it was alleged that McDonald's was a joint employer of the franchises' employees. The significance of this announcement cannot be overstated. As you may know, each McDonald's restaurant is managed by a franchise owner. The McDonald's corporation would like that to mean that the corporation itself is never the actual employer of McDonald's workers. This means that if workers want to form a union, they would have to do it restaurant by restaurant. But now the NLRB has indicated that it will extend the reach of the National Labor Relations Act to a franchise's parent organization even though the parent does not have direct day-to-day control over the franchise. This is turn will make unionization of the entire franchise easier since representational proceedings will not have to brought against each individual franchise. If enough union authorization cards can be amassed, the entire entity can be subject to a bargaining order after a representation election that all McDonald's employees could participate in.

Joint employment relationships are also significant to musicians. Many orchestras and other nonprofit entities are actually governed by parent organizations, who may be deemed joint employers under the NLRB's redefined analysis. For instance, the Atlanta Symphony's parent organization is the Woodruff Arts Center. The arts center and the symphony would most likely be deemed joint employers by the NLRB had there had been any unfair labor practice charges filed during the recently resolved lockout of its musicians. While it is truly a welcome development that the recent labor strife has been resolved in Atlanta, it is comforting to know that the arts center could have also been held responsible for symphony's unfair labor practices.

In summary, sometimes it's not enough to know that you are an employee. It's just as important to know who your actual employers are!