

Don't give up your rights

If you're misclassified as an independent contractor, you're losing money and benefits. Here's what to do...



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.

ARE MUSICIANS INDEPENDENT contractors or are they employees? Why should this matter anyway? These terms contain within them specific legal rights and obligations that strike at the very heart of an individual's employment relationship. While at first, it may seem beneficial for a musician to be categorized as an independent contractor (since no taxes are withheld), a careful review of the basic differences between these two categories of workers reveals that designation as an employee is almost always in the best interests of the musician.

So what are the differences between them? First, I think we need to understand how these terms are defined.

Under IRS regulations, the general rule is that workers are **independent contractors** if the person who pays them has the right to control or direct only the *result* of the work and not *what* will be done and *how* it will be done. Ex-

amples of independent contractors include roofers, attorneys and handymen. If you're an independent contractor, you have to pay self-employment tax.

On the other hand, the Supreme Court has defined an **employee** as a person who performs services for another under a contract of hire, subject to the other's *right of control*, which is often called the *agency test*.

Essentially, the determination of whether you are an independent contractor or an employee depends upon whether the person who contracts for your services has the right to direct *how* your services are performed or whether they instead only have the right to determine your end resulting product.

While this seems clear enough, in reality different agencies use different tests to determine if you're an employee or an independent contractor. The test described above is used by the IRS for tax purposes. A different test is used by the National Labor Relations Board. Unfortunately, because of this, an individual may be defined as an employee in one context but as an independent contractor in another!

For professional musicians, the way they perform music often mimics the way a independent contractors function. For instance, one of the standards used to ascertain if an individual is an independent contractor is whether they supply their own tools or instruments. Since almost every professional musician possesses or owns his or her own instrument, this indication of independent contractor status is always satisfied.

Furthermore, no one constantly directs how a professional musician actually operates his or her instrument. While a music director, bandleader or conductor may advise a musician to play louder or softer or employ a particular bowing technique, there is not the *consistent di-*

W-2 Wage and Tax Statement 2014

Form W-2 (2014) Department of the Treasury Internal Revenue Service

Do Not Cut, Fold, or Staple Forms on This Page

VS.

1099-MISC Miscellaneous Income 2014

Form 1099-MISC (2014) Department of the Treasury Internal Revenue Service

Do Not Cut or Separate Forms on This Page — Do Not Cut or Separate Forms on This Page

rection that one would expect in an employment relationship. Again, this fact is another indication that a musician may be deemed an independent contractor.

Why does this matter?

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

First, independent contractors are responsible to pay self-employment tax, which means that they pay a higher percentage for Social Security and Medicare than an employer does.

The self-employment tax is how an independent contractor pays into Social

Security and Medicare. 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.

Further, since there is no withholding, independent contractors must pay quarterly taxes, like any business owner has to. One advantage, however, is that a business owner can deduct business expenses from their adjusted gross income to lessen their tax liability. (However, for many musicians, the business

expense deduction would not offset the additional tax burden.)

Second, independent contractors are not entitled to receive unemployment benefits or workers' compensation, while employees are.

Third, independent contractors cannot organize a union or collectively bargain the terms and conditions of their employment.

Fourth, 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.

Make me an employee!

Whenever you're hired, you should tell your employer that you wish to be considered an employee and be paid on W-2's (not 1099's). If the gig is union, this is guaranteed. What if the employer says no? In New York, musicians have a distinct advantage. As a result of lobbying efforts by Local 802 in 1987, several important New York state statutes spe-

cifically define musicians as employees. Based upon these statutes, musicians have considerable leverage to insure that they are treated as employees.

For instance, the New York State Workers' Compensation Law, New York State Unemployment Compensation Law, New York State Labor Law and the recently-enacted New York City Sick Pay Law all define "employee" to include performing artists such as musicians. This is good ammunition for musicians but it's not a slam dunk. The employer can still fight it.

The good news is that musicians can win these battles. I have handled several proceedings before the unemployment compensation board in which the Department of Labor has concluded that musicians were in fact employees entitled to unemployment insurance benefits. For instance, I handled an appeal by a rehearsal pianist who had been deemed an independent contractor by an administrative law judge. The Unemployment Compensation Board overturned the decision, partially relying on the fact that the employer decided when the pianist would play, when the pianist would take a break and what type of music the pianist played. It was clear

that the employer exercised significant control over the means by which the pianist performed his duties.

In another case, I defeated a challenge by a Latin nightclub that contended that its musicians were independent contractors. The fact that the employer controlled the hours that the musicians played, the style of music they played and the volume they played at resulted in the determination that musicians were indeed employees.

Furthermore, about two years ago the National Labor Relations Board held that freelance musicians employed by the Lancaster (Pennsylvania) Symphony were employees who were entitled to organize and vote for union representation. The level of control the music director exercised over the musicians in the orchestra was great enough to outweigh any factor that would suggest the musicians were independent contractors, such as their infrequency of employment.

Perhaps the single most important factor determining whether or not musicians are considered independent contractors is if they have any economic stake in the outcome of their performance. Thus if musicians' pay is based

upon the level of ticket sales for their performance, that could very well render them an independent contractor. This led to an aberrant result several years ago, when the NLRB issued a determination that musicians who performed at Jones Beach were independent contractors because they would not be paid if a show was canceled due to inclement weather, despite being told that they were being paid a salary. The NLRB said that the fact that musicians would not receive compensation if the show did not occur meant they had an entrepreneurial interest in the performance.

Misclassified?

Misclassification of employees is a very serious issue for professional musicians with significant repercussions. The New York State Department of Labor has created a Joint Enforcement Task Force on Misclassification of Employees to rout out corrupt employment practices. Here is a shortcut to the relevant page: www.bitly.com/misclassification-help. Once there, open up the tab called REPORT FRAUD. I highly recommend that if you suspect that you are being misclassified by an employer that you stand up for your rights.

METORCHESTRA

MUSICIANS.org

FEATURES / INTERVIEWS / NEWS / UPDATES