DON'T GIVE AWAY YOUR RIGHTS!

WARNING: Musicians who work under Local 802 contracts should not get paid as "corporations"

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THERE IS AN alarming trend among musicians. Many have decided to form corporations and work under the guise of corporate entities rather than as individuals. This trend has become especially prevalent among music directors and conductors who work on Broadway productions.

At first blush, the decision to incorporate may seem warranted, and in some very specific cases it is appropriate and legally sound. For instance, when musicians are engaged in side businesses like instrument repair, composing or music coaching – which are separate and apart from their actual performance jobs – then incorporating is a very wise decision, especially given the ease with which it can now be accomplished through formation of limited liability entities.

Running a small business or sole proprietorship as a corporation shields the principals from individual liability for corporate debt in most circumstances. Further, it allows the business owner to receive deductions from tax liability for the necessary and ordinary operating expenses of the business. Expenses such as purchasing equipment may be deductible under Schedule C of the corporation's tax return. This is not an option for an individual who is paid on a W-2 by an employer.

So while there are some limited circumstances where a musician can appropriately function as a corporate entity, performing musical services under the terms of a collective bargaining agreement is definitely not one of them.

My research has shown that 98 percent of the time when faced with incorporated workers, an auditor (either from the IRS or the state) will deem them to be independent contractors rather than employees. (See **www.workerstatus.com/inc/ic-inc.html**.) This is, of course, unfortunate for musicians, since they and other performers in New York State are presumed to be employees under Section 701 of the New York State Labor Relations Act.

When musicians are determined to be independent contractors, there are significant adverse consequences. Musicians will be responsible for their own employment taxes and social security taxes. They will not be eligible for unemployment benefits and workers' comp. Finally, they will be excluded from laws that protect employees from workplace discrimination and retaliation. (For a more complete discussion concerning the pitfalls of being misclassified as an independent contractor, see my article at **www.HarveyMarsAttorney.com/documents/Allegro-June-2014.pdf**)

IT GETS WORSE

Now for the worst part. Musicians who work under Local 802 agreements as corporate entities may be excluded from all the protections of the National Labor Relations Act, which specifically excludes independent contractors. Music directors and conductors have long been protected under the Local 802 Broadway agreement. But if a music director, conductor or any musician is deemed an independent contractor, the real possibility exists that he or she can be excluded from the agreement and lose those protections.

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This possibility is not simply an academic one. The National Labor Relations Board has rendered decisions that "severed off" independent contractors who were previously included in a bargaining unit. For instance, in *Peerless Publications, Inc. v. Newspaper Guild of Greater Philadelphia, Local 10, 190 NLRB 658 (1971)*, the NLRB severed off an employee in the advertising department of a newspaper who had chosen to work as a corporation. The same fate could await music directors, conductors and others who choose to operate as corporate entities.

Exclusion from the bargaining unit would have devastating consequences for both the individual and the union. All union contract protections, including discipline for just cause, would be lost to musicians who were severed off from the bargaining unit. These musicians would suddenly lose considerable leverage with producers if there was ever a dispute between them. The union itself would lose bargaining unit density – a necessary element of bargaining strength.

CONCLUSION

While some musicians might find economic advantages to be paid as corporations in very limited, specific circumstances, musicians who are actually working under Local 802 union contracts should never be paid as corporations and should always receive their paychecks in their own names. If you've chosen to be paid as a corporation, we suggest that you reconsider that decision and cease doing so as soon as possible. If you find yourself in this situation and need assistance, please call me or call the president's office at (212) 245-4802.