Can an audition pianist file for unemployment benefits?

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It all depends on whether you're an employee or an independent contractor. Luckily, the law's on your side...

ARE MUSICIANS EMPLOYEES or independent contractors? Don't yawn: this is a crucial question that affects your rights and your wallet! It's such an important issue that I've covered it many times in this column. The last time I wrote about it was in February 2012, when the NLRB had just decided that freelance musicians employed by the Lancaster Symphony Orchestra were, in fact, employees – not independent contractors.

A case I recently handled also gave another victory to at least one musician.

A Local 802 member was employed as an audition pianist for La Comedia Enterprises Inc., an Ohio dinner theatre company that holds auditions in New York. The member was laid off and applied for unemployment benefits. But the employer asserted that the musician was an independent contractor, not an employee, and thus not eligible for benefits. An administrative law judge agreed, so the musician was initially denied benefits.

The judge's faulty decision was premised upon the fact that the musician was paid a flat daily rate and was not actually directed how to perform. However, I appealed the decision to the New York State Insurance Appeal Board. I argued that the employer had exercised sufficient direction and control over the musician to create an employment relationship. How? The company provided the musician with a piano and a space to perform. It also allowed him a one-hour lunch break and often supplied him with sheet music. As such, the appeal board held that the musician was a statutory employee entitled to benefits.

This decision was premised in large part upon favorable language contained in the unemployment compensation law. Several New York State labor statutes contain provisions highly favorable to professional musicians. These sections of the law, enacted over 30 years ago with the help of Local 802 and other New York entertainment unions, are highly beneficial to working musicians. It truly pays for anyone who has earned money working as a musician to be familiar with them. Two of them are the sections of the New York State Unemployment Compensation Law. Another is the New York State Workers Compensation Law, which specifically provides that professional musicians are presumed to be employees.

Under New York Unemployment Compensation Law Section 511(b)(1-a), the term "employee" is defined as "…a professional musician or a person otherwise engaged in the performing arts, and performing services as such for a television or radio station or network, a film production, a theatre, hotel, restaurant, night club or similar establishment unless, by written contract, such musician or person is stipulated to be an employee of another employer covered by this chapter. 'Engaged in the performing arts' shall mean performing services in connection with the production of or performance in any artistic endeavor which requires artistic or technical skill or expertise."

Under New York Workers Compensation Law Section 201(5), an "employee shall also mean, for purposes of this chapter, a professional musician or a person otherwise engaged in the performing arts who performs services as such for a television or radio station or network, a film production, a theatre, hotel, restaurant, night club or similar establishment unless, by written contract, such musician or person is stipulated to be an employee of another employer covered by this chapter. 'Engaged in the performing arts' shall mean performing service in connection with the production of or performance in any artistic endeavor which requires artistic or technical skill or expertise."

These laws create a presumption that musicians are employees rather than independent contractors. This is an important distinction since employees are entitled to unemployment compensation and workers' compensation benefits, whereas independent contractors are not. Under these laws, musicians do not have to prove that they are employees. Rather, employers must prove that they are independent contractors.

Still another important provision is found in the New York State Labor Relations Act, the statute that applies when the National Labor Relations Board does not have jurisdiction, such as when an employer does not have significant revenue. This statute has similar language to the prior statutes. Section 701(3)(b) of the act reads: "The term "employee" shall also include a professional musician or a person otherwise engaged in the performing arts who performs services as such. 'Engaged in the performing arts' shall mean performing services in connection with production of or performance in any artistic endeavor which requires artistic or technical skill or expertise."

Without this presumption, musicians cannot avail themselves of the protections of state representational and unfair labor practice proceedings in cases where the NLRB doesn't have jurisdiction.

Even under federal law, musicians are often deemed employees, even when the legal criterion used suggests otherwise.

Under federal law, a multi-factored "right of control" test is utilized. Under this test, an individual is considered an employee if the one for whom services are performed retains the right to control the manner and means by which he or she achieves the result sought.

This test is usually satisfied because most musicians' performances are controlled by the music director or conductor of the organization for which they are engaged (even though the manner in which they play their instruments is not). The fact that the right of control test may be satisfied for musicians when many of the facts indicate independent contractor status was made clear by the National Labor Relations Board in a case involving our union: American Federation of Musicians (Royal Palm Theatre), 275 NLRB 677 (1985). There, the National Labor Relations Board held that freelance musicians who were hired to make

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MUSICIANS HAVE THE RIGHT TO UNEMPLOYMENT BENEFITS! But do you know how to get them? We've got all the info. See www.TinyURL.com/MusicUnemployment

recordings used at a dinner theatre were employees, even though the musicians were not selected by the employer, and were utilized for only a few hours with no real expectation of future employment.

The board held that these factors, which would normally indicate independent contractor status, were outweighed by the fact that the employer's musical director exercised complete control over the musicians, telling them when to appear, what to play, and how the music should sound.

The board concluded that the musicians were "under the continuous supervision and exercised control of the musical director and subject to his complete discretion and artistic interpretation and taste."

Also see Matter of Faze 4 Orchestra, Ltd., 245 A.D. 2d 929, 666 N.Y.S. 2d 857 (3rd Dept. 1997). In that case, musicians were ruled to be employees of their booking agent, who set their fee and instructed the band where and when to play.

It should be emphasized that one of the most significant factors used by the NLRB to determine if a musician is an employee rather than an independent contractor is whether they have any financial stake in the outcome of the performance. If they bear some economic risk, then the NLRB will not hesitate to deem the musicians independent contractors. Thus, while it may be financially beneficial for musicians to be paid a percentage of the house receipts, if they do so they always run the risk that they will be deemed independent contractors.

Likewise, the NLRB has determined that if musicians will not get paid if a show is cancelled due to inclement weather, they may be considered independent contractors. This happened in one incident to musicians who were under contract to perform at Jones Beach.

Those are the exceptions. In general, as a musician, you should be classified as an employee.

Why is this important? It comes down to a lot of things – but especially money.

First of all, independent contractors are not eligible for either workers' compensation (if they get hurt on the job) or unemployment checks (if they are laid off).

Secondly, independent contractors have to pay all of their taxes by themselves. Usually, employers cover 7.65 percent of your taxes. (The taxes are called FICA, and are made up of 12.4 percent of your wages for Social Security and 2.9 percent for Medicare. The total is 15.3 percent. It's supposed to be split between employer and employee.) When you are misclassified as an independent contractor, you are losing 7.65 percent of your wages. If you make $30,000 per year as a musician, you are losing $2,295 in taxes out of your own pocket that your employer should be paying for you!

Thirdly, independent contractors aren't eligible for legal protections that employees benefit from, such as protection from illegal discrimination based on race, age or sex.

Finally, independent contractors do not have the right to join or form unions.

You might think that being an independent contractor is better because it means you can deduct everything on your taxes: meals, travel, etc. You would have to crunch the numbers with an accountant, but in our view, it's always better to be an employee. Another good reason is: it's the law.

If you think you've been misclassified, contact the union's Organizing Department at (212) 245-4802. Local 802 needs to know when musicians are misclassified. Don't give up your rights!

NEW SICK PAY LAW

Thanks to the New York City Paid Sick Time Act, many workers in New York City will now be entitled to up to five paid sick days a year, with the right to carry over unused earned sick days. Sick leave will accrue at the rate of one hour per every 30 hours worked, so even part-time employees will be entitled to sick leave. How could this help you as a musician? Let's say you play music for a restaurant every Friday night from 8 p.m. to midnight. That's 4 hours a week. After a year of working there (208 hours total), you would be entitled to a bonus of almost 7 hours' pay. Now if you put that together with all of the other freelance work you do, it could really add up.

If you already enjoy sick pay under an existing union contract (like the Local 802 Broadway agreement), the new sick pay law won't give you new benefits, unfortunately. The law exempts collective bargaining agreements that contain sick pay provisions.

The new law also only covers employees who work in the city more than 80 hours in a calendar year.

One last thing: the first draft of this law didn't explicitly define musicians as employees, using the favorable statutes mentioned previously in this article. As Allegro goes to press, Local 802 and other advocates were attempting to refine the language of this law to make sure that musicians are definitely considered employees for the purpose of this law.