

SS-8 Determination—Determination for Public Inspection

Occupation 08MUS Musicians	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

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Facts of Case

The firm's treasurer initiated the request for a determination of the worker's status as a conductor and musical director in tax years 2018 to 2020, for which the worker was issued Form 1099-MISC. The firm is a 501 (c) 3 non-profit organization. The worker assumes the responsibility for rehearsing and conducting the band. The worker works closely with the the firm's President, [REDACTED] Committee and Treasurer in planning and coordinating the artistic aspects of the concert season; and, is responsible for selecting principal players and arranging seating for the band, and other matters relating to the band personnel. The worker may schedule auditions or challenges for chair positions when necessary. The final decision of chair positions shall ultimately lie with the conductor.

The worker's response affirmed the position as a music director and conductor. The firm is a community concert band with 100 volunteer musicians.

The firm and worker acknowledge the firm does not provide training and instructions. The worker selects the dates, venues for rehearsals and concerts, and selects the content for the performances. The worker determines the methods by which he performs the services; The worker designs and approves all program and print layouts. Any problems or complaints encountered by the worker are directed to the firm operations committee for resolution. The worker's services are rendered 60% at his home, 30% at the rented rehearsal venue and 10% at the rented performance venue. The worker is required to attend monthly operations committee meetings, quarterly board meetings, and periodic (often monthly) rehearsals. The worker is required to perform the services personally; any substitute personnel would be hired and paid by the worker.

Both parties concur the firm provides the rental of rehearsal and concert venues, sheet music, and programs. The worker furnishes research materials, his oral presentation, the musical scores, wardrobe, baton, metronome, and tuner. The firm reimbursed for musicians' sheet music. The worker does not lease equipment, space, or a facility. The worker is paid on a per concert basis after submission of an invoice. The customers pay the firm. The worker is not covered under the firm's workers' compensation insurance policy. The worker's risk for a financial loss in this work relationship is the loss or damage to the items he provided, and his personal vehicle and belongings while performing and transporting to and from rehearsal and concert venues. The firm's management sets pricing for subscriptions, ticket prices, and sponsorships.

The firm and worker agree that there are no benefits extended to the worker and that either party can terminate the work relationship without incurring a liability or penalty. The worker does perform same or similar services for others during the same time frame. The worker is represented as the firm's musical director conductor with his biography/accomplishments posted to the firm's website.

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.

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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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.

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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

We have considered the information provided by both parties to this work relationship. In this case, the firm retains the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction and that its contractual obligations are met. The worker is not operating a separate and distinct business; the worker does not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. 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. In this case, the worker is not engaged in an independent enterprise, but rather the services performed by the worker are a necessary and integral part of the firm's business.

CONCLUSION

We conclude that the firm has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is a common law employee, and not an independent contractor operating a trade or business.

Please see www.irs.gov for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide.