

GUIDELINES FOR DETERMINING WORKER STATUS: PERFORMING ARTISTS

The following are guidelines used by the Unemployment Insurance Division, the Division of Labor Standards and the Division of Safety and Health to establish whether the relationship between a performing artist and the party engaging the services is an employment relationship or that of an independent contractor.

Independent contractors are excluded from coverage under the Unemployment Insurance Law and are not afforded the protections provided by Labor Standards and Safety and Health requirements. These are persons who are actually in business for themselves and hold themselves available to the general public to perform services. A person is an independent contractor only when free from control and direction in the performance of services. All factors concerning the relationship between the two parties must be taken into consideration to determine if the party contracting for the services exercises, or has the right to exercise supervision, direction or control over the performer. No one single factor is controlling, nor do all factors need to be present to establish the nature of the relationship.

For the purposes of these guidelines, the term "performer" will include, but is not limited to, services performed by a musician, singer, comedian, disc jockey, magician, karaoke player or dancer. These guidelines address performers' relationships with establishments, band or orchestra leaders, theatrical and film productions or symphony organizations and agencies. Refer to the section that applies to your type of organization.

Section 511.1(b)(1-a) of the Unemployment Insurance Law includes in the definition of employment the services of performing artists at certain establishments unless there is a written contract stipulating them to be employees of someone else. However, the courts and the Unemployment Insurance Appeal Board have held that the statute creates a presumption of employment which can be rebutted. Through application of common law tests of supervision, direction and control, an employer may rebut the presumption of employment and demonstrate that it was not the entity engaging the services, or that the relationship with the performer was that of an independent contractor.

Employers may request a formal determination of the status of individuals or groups performing services for unemployment insurance purposes by writing to the Liability and Determination Section and furnishing complete details of the relationship. An employer who assumes an individual performs services as an independent contractor and does not report and pay taxes based upon the assumption, may find they are subject to a retroactive assessment, interest, or increased tax rates, if it is later determined through an audit, benefit claim or some other review, that there was an employment relationship. Therefore, it is to the employer's advantage to request a determination when the status of performers is in question.

The Department of Labor is implementing these guidelines with an effective date of January 1, 1998. Therefore, employers may discontinue reporting individuals for unemployment insurance purposes where the application of the guidelines results in a status of independent contractor as of the first quarter of 1998. Please note the prospective nature of the implementation. As a result, the Unemployment Insurance Division will not issue redeterminations and refunds for previously reported individuals.

Employers with questions regarding the interpretation or application of the "indicators" outlined in the guidelines in relation to an unemployment insurance matter may contact the Liability and Determination Section at (518) 457-5807. Employers with questions in relation to a Division of Labor Standards issue should call (518) 457-4321. Division of Safety and Health issues may be referred to (518) 457-1212.

ESTABLISHMENTS (such as restaurant, tavern, night club, comedy club, fraternal organization)

INDICATORS OF INDEPENDENCE

The strong indicators a performer (or group) is an independent contractor when performing services for an establishment are:

1. The performers share in the fee received from the establishment for services performed.
2. The performer provides his own equipment for sound, lighting and stage design.
3. The performer has an investment in equipment utilized in the performance.
4. The performers are in business for themselves as evidenced by operating as a corporation or joint venture.
5. The performer retains the right to exercise artistic control over the elements of the performance.
6. The performer sets or negotiates the rate of pay received from the establishment.

Other indicators a performer (s) is an independent contractor when performing services for an establishment are:

7. The performer retains ultimate authority in establishing the type of music for the performance.
8. The performer dictates to the establishment the conditions of the engagement, for example the stage set up, security arrangements, transportation requirements, and food and beverage provisions.
9. The featured performer provides services under a single engagement arrangement.
10. The performer establishes when breaks will occur or duration.

INDICATORS OF EMPLOYMENT

The strong indicators a performer (or group) is an employee when performing services for an establishment are:

1. The performer is paid at a rate determined solely by the establishment.
2. The establishment makes standard withholding deductions from the performer's fee, e.g. income tax, social security, etc.

3. The performer is covered under the establishment's Workers' Compensation Policy.

Other indicators a performer is an employee when performing services for an establishment are:

4. The establishment provides substitutes or replacements when the performer is unable to participate at a scheduled performance.

ORCHESTRA/BAND LEADERS

INDICATORS OF INDEPENDENCE

The strong indicators a performer is an independent contractor when performing services for an orchestra/band leader are:

1. The band/orchestra is in business for itself as evidenced by operating as a corporation or joint venture and the performer is a principal of the corporation or joint venture.
2. The band/orchestra mutually agrees on the method of distributing profit or loss.
3. The band/orchestra members jointly retain the right to exercise artistic control over the elements of the performance.
4. The band/orchestra members jointly establish the music to be played at the performance.
5. The band/orchestra members jointly own, rent or lease equipment such as sound, lighting and stage design.
6. A replacement, added or featured performer sets or negotiates the rate of pay for a performance.

Other indicators a performer(s) is an independent contractor when performing services for an orchestra/band leader are:

7. The members of the orchestra/band jointly dictate conditions of engagement such as stage setup, security arrangements, transportation requirements, and food and beverage provisions.
8. The musician provides his/her own replacement if unable to participate at a scheduled performance.

INDICATORS OF EMPLOYMENT

The strong indicators a performer is an employee when performing services for an orchestra/band leader are:

1. The orchestra/band is in the name of the orchestra/band leader and the leader contracts with the customer in the name of the orchestra/band leader.
2. The orchestra/band leader pays the musicians even if the customer fails to pay the band leader.
3. The orchestra/band leader provides the substitute or replacement if a performer is unable to participate at a scheduled performance.
4. The performer is covered under the orchestra/band leader's Worker's Compensation Policy.
5. The orchestra/band leader retains ultimate right to exercise artistic control over the performance.
6. The performer is paid to attend, or required to attend rehearsals.
7. The orchestra/band leader makes standard withholdings from the performer's fee, e.g. income tax, social security, etc.

Other indicators a performer is an employee of the orchestra/band leader are:

8. The performer is provided through a local union.
9. The performer is provided with a music stand by the orchestra/band leader.
10. The orchestra/band leader dictates the music to be performed.
11. The orchestra/band leader dictates the attire to the performer.
12. The orchestra/band leader auditions the musician (live or by tape) for the position.
13. The orchestra/band leader establishes break times or length.
14. The orchestra/band leader dictates conditions of engagement, for example stage setup, food and beverage provisions.
15. The orchestra/band leader establishes the fee paid to the performer.

THEATRICAL AND FILM PRODUCTIONS AND SYMPHONY ORGANIZATIONS

INDICATORS OF INDEPENDENCE

In most film and theatrical production cases, performers would not be determined to be independent contractors.

The indicators a performer is an independent contractor when performing services for a Symphony Organization are:

1. The performer or featured performer negotiates the rate of pay.
2. The performer retains the right to exercise artistic control over the performance.
3. The performer negotiates or controls the conditions of the engagement, e.g. stage set up, security, transportation, food, beverage, etc.
4. The featured performer provides services under a single engagement arrangement.

INDICATORS OF EMPLOYMENT

The strong indicators a performer is an employee when performing services for a theatrical or film production, or symphony organization are:

1. The performer is paid at a rate established solely by the production company or organization.
2. The production company or organization makes standard withholdings from the performer's pay, e.g. income tax, social security, etc.
3. The performer is covered under the production company or organization's Worker's Compensation policy.
4. The production company or organization retains artistic control of the performance.
5. The performer is paid to attend, or is required to attend rehearsals.

Other indicators a performer is an employee when performing services for a theatrical or film production, or symphony organization are:

6. The production company or organization provides substitutes or replacements if the performer is unable to provide services.

7. Attire is dictated by the production company or organization.
8. The production company or organization establishes breaks.
9. The performer is provided with music or other materials for the performance.

AGENCIES

These indicators are intended to assist in determining if the agency is the employer. If the agency is not the employer, consult the preceding sections of this guide as appropriate to determine the identity of the employer or the status of the performer as an independent contractor.

INDICATORS OF INDEPENDENCE

The strong indicators a performer (or group) is not an employee of the agent are:

1. The client makes the final choice of who the performer will be for the engagement.
2. The performer negotiates the rate of pay with the client, or the performer authorizes the agent to negotiate the rate of pay with the client but retains the right of final approval.
3. There is no requirement for the performer to report to the agent if services cannot be performed.
4. The performer is well known, a recognized "name" who is specifically sought by the client through the agent.

NOTE:

A band operating as a joint venture and meeting other indicators of independence as described in preceding sections will not be considered employees of the agent unless the agent has control over all aspects of the band, including artistic control over performances.

Other indicators a performer (or group) is not an employee of the agent are:

5. The performer or client has the responsibility to provide or obtain a replacement. This would also include situations where the client can request the agency to send a replacement.
6. No reports are required to be filed with the agent, or any reports required are filed directly with the client.

INDICATORS OF EMPLOYMENT

The strong indicators the performer (or group) is an employee of the agent are:

1. The agent makes the final choice of the performer who will perform the service.
2. The agent negotiates and decides the rate of pay with the client and negotiates and decides the performer's rate of pay.
3. The services are exclusively performed for the agent, e.g. the performer cannot work for other agents or for the agent's clients.
4. The agent organizes the band and/or selects individual band members.

Other indicators the performer (or group) is an employee of the agent are:

5. The agent has responsibility to furnish a replacement.
6. The performer must report to the agent if services cannot be performed.
7. The performer is paid even if the customer does not pay.
8. Reports must be filed with the agent, e.g. time sheets, record of nature of services, etc.