The Internal Revenue Service issues *Private Letter Rulings* related to questions presented to the IRS by taxpayers. These *Private Letter Rulings* do not have the force of law, but do indicate the position the IRS takes on the question it is asked.

One such ruling issued in 1985 related to whether a church choir director was an employee of the church, or an independent contractor. If an employee of the church, the church must issue IRS Form W-2 to the employee reflecting the appropriate amount of Medicare and Social Security taxes. However, if the choir director is deemed to be an independent contractor, the employee is issued a Form 1099-MISC and the employee is required to report such income as a self-employed person on his/her personal income tax return and pay all Social Security and Medicare taxes related to such income.

In March, 2010 the IRS issued another such ruling relative to a church organist with the same question, namely: Is a church organist an employee or a self-employed independent contractor?

In both of these documents the IRS strongly suggests that church organists and church choir directors are employees of the church, and that any compensation paid to such persons by the church for their services should be reported on Form W-2.

Even though the church issued to the choir director and/or organist a 1099-MISC and the choir director/organist reported such income on his/her tax return as self-employment income, the IRS can, nonetheless, issue penalties to the church for its failure to report such income as the income of an employee of the church.

The two *Private Letter Rulings* by the IRS are posted on The District's website should a congregation wish to read them in their entirety.

Walter Tesch, attorney
Milwaukee, WI
March 31, 2010

Internal Revenue Service
SB/SE Compliance
BIRSC, SS-8 Unit

Department of the Treasury
1040 Waverly Avenue-Stop 631
Holtsville, NY 11742

Release # SS8 2010020002
Release Date: 3-10-10
Index (UIL) No.: 3121.04-01

Third Party Communication: None

October 26, 2009

Form: SS-8
Person to Contact:

Telephone Number:

Fax Number:

Refer Reply to: Case # 67160

Dear Sir or Madam:

The purpose of this letter is to respond to a request for a determination of employment status, for Federal employment tax purposes, concerning the work relationship between , referred to as "the payer" in the rest of this letter, and , referred to as "the worker" in the rest of this letter. It has come to our attention that the services were performed in 2006, 2007, 2008, and 2009.

DETERMINATION RESULT

We hold the worker to be an employee of the payer. In the rest of this letter, we will explain the facts, law, and rationale that form the basis for this finding.

DESCRIPTION OF WORK RELATIONSHIP

The payer is a church and engaged the worker as a musician. The worker provides his services to the payer since 2006 and receives the Form 1099-MISC for these services. The worker states he received his instructions/assignments from the payer's pastor via e-mail. The worker performs his services personally, playing music on Sunday mornings from 10:30 AM to 11:30 AM, at the payer's premises. The payer added the worker would as well practice weekly for 2 hours.

The worker supplies his personal instrument, while the payer provides all the necessary supplies and materials the worker needs to complete his assignment. The worker receives a salary/stipend for his services. A stipend is defined as a fixed sum of money paid periodically for services or to defray expenses. The fact that remuneration is

termed a "fee" or "stipend" rather than salary or wages is immaterial. Wages are generally subject to employment taxes and should be reported on Form W-2. Refer to Publication 15, Circular E, Employer's Tax Guide, section 5, Wages and Other Compensation, for rules on accountable and nonaccountable plans for employee business expenses. The worker does not assume any financial risk in the relationship and therefore can not realize a profit or incur a loss as a result of the relationship.

There is no written contract describing the terms and conditions of the relationship. The worker's services are a necessary part of the payer's activities. Our research indicates the worker does not advertise his services, nor does he perform similar services for others. The worker performs his services under the payer's name. The worker has a continuous relationship with the payer as opposed to a single transaction. Both parties retain the right to terminate the relationship without incurring liability.

LAW

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law."

Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything

other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, co-adventurer, agent, or independent contractor must be disregarded.

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. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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.

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. See Rev. Rul. 55-695, 1955-2 C.B. 410.

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.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. See Rev. Rul. 73-591, 1973-2 C.B. 337.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. See Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56-694, 1956-2 C.B. 694.

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 payer 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 payer 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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. See Rev. Rul. 71-524, 1971-2 C.B. 346.

ANALYSIS

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral controls, financial controls, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did 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.

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of your

business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

CONCLUSION

Based on the above analysis, we conclude that the payer had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee, and not an independent contractor operating a trade or business.

TAX RAMIFICATIONS

Many religious, charitable, educational, or other nonprofit organizations are exempt from Federal income tax. However, they must withhold Federal income tax from their employees' pay and report each employee's compensation on Form W-2. If an employee is paid $100 or more during a calendar year, his/her wages are also subject to FICA taxes (social security and Medicare).

Churches or church-controlled organizations that are opposed to the payment of social security and Medicare taxes and that have filed Form 8274 for exemption do not pay social security and Medicare taxes. Their employees, however, are subject to self-employment tax.

Payments for services performed by an employee of a nonprofit that is other than a section 501(c)(3) organization, are also subject to FUTA tax if the payments are $50 or more in a calendar quarter.

This determination is based on the application of law to the information presented to us and/or discovered by us during the course of our investigation; however, we are not in a position to personally judge the validity of the information submitted. This ruling pertains to all workers performing services under the same or similar circumstances. It is binding on the taxpayer to whom it is addressed; however, Section 6110(k)(3) of the Code provides it may not be used or cited as precedent.

Internal Revenue Code section 7436 concerns reclassifications of worker status that occur during IRS examinations. As this determination is not related to an IRS audit, it does not constitute a notice of determination under the provisions of section 7436, nor is this an audit for purposes of entitling you to section 530 relief (further explained below) if you are not otherwise eligible for such relief.

OPTIONS AND ASSISTANCE

The SS-8 Program does not calculate your balance due and send you a bill. You are responsible for satisfying the employment tax reporting, filing, and payment obligations that result from this determination, such as filing employment tax returns or adjusting

previously filed employment tax returns. Your immediate handling of this correction and your prompt payment of the tax may reduce any related interest and penalties.

Section 530 of the 1978 Revenue Act established a safe haven from an employer's liability for employment taxes arising from an employment relationship. This relief may be available to employers who have misclassified workers if they meet certain criteria. This is explained more fully in the enclosed fact sheet. It is important to note that this office does not have the authority to grant section 530 relief in relation to this determination. Section 530 relief is officially considered and possibly granted by an auditor at the commencement of the examination process should IRS select your return(s) for audit. The SS-8 determination process is not related to an examination of your returns. There is also no procedure available to you by which you can request an audit for the purpose of addressing your eligibility for section 530 relief. You should contact a tax professional if you need assistance with this matter.

If you are not eligible for section 530 relief, and the failure to pay the correct amount of employment tax was due to the misclassification of a worker's status, you must use the rates outlined in section 3509 of the Code to calculate your liability. They are as follows:

IRC Section 3509(a) rates

The rates under IRC section 3509(a) total 10.68% of the wages paid up to the Social Security wage base for such year and 3.24% of the wages paid in excess of the Social Security wage base, and consist of the following:

- Income Tax Withholding - Your liability for federal income tax withholding is 1.5 percent of the wages you paid to your employee.

- FICA Taxes - Your liability for the **employee's** share of the social security and Medicare taxes is 20 percent of the full rate (20% of 6.20%=1.24% of wages up to the Social Security wage base; 20% of 1.45%=.29% of the total wages, including wages in excess of the Social Security wage base).

- FICA Taxes- Your liability for the **employer's** share of the social security and Medicare taxes is 100 percent of the full rate (6.20% of wages up to the Social Security wage base; 1.45% of the total wages, including wages in excess of the Social Security wage base).

IRC Section 3509(b) rates

If you did not file required information returns (e.g., Form 1099-MISC) consistent with treating the worker as not being an employee, you must use the rates under IRC section 3509(b). They total 13.71% of the wages paid up to the Social Security wage base for such year and 5.03% of the wages paid in excess of the Social Security wage base, and consist of the following:

- Income Tax Withholding - Your liability for federal income tax withholding is 3 percent of the wages you paid to your employee.

- FICA Taxes - Your liability for the **employee's** share of the social security and Medicare taxes is 40 percent of the full rate (40% of 6.20%=2.48% of wages up to the Social Security wage base; 40% of 1.45%=.58% of the total wages, including wages in excess of the Social Security wage base).
- FICA Taxes - Your liability for the employer's share of the social security and Medicare taxes is 100 percent of the full rate (6.20% of wages up to the Social Security wage base; 1.45% of the total wages, including wages in excess of the Social Security wage base).

Section 3509(c) provides that these rates do not apply in cases of intentional disregard of the requirement to deduct and withhold the tax, nor do section 3509 rates apply to taxes due on wages paid in any period within the current calendar year.
If you deem that the payer meets the criteria for section 530 relief as outlined in the enclosure, you do not have to file/adjust your employment tax returns to reflect this determination. Also, you may choose to reclassify this class of worker to employee status in accordance with this determination for future periods without jeopardizing your ability to claim section 530 relief for past periods.

If you need further assistance in filing/adjusting your employment tax returns due to the reclassification of your worker, please call the IRS help line at 1-800-829-4933. Call 1-866-455-7438 for assistance in preparing or correcting Forms W-2, W-3, 1099, 1096, or other information returns. If you have any questions concerning this determination, please feel free to contact the person whose name and number are listed at the top of this letter. Please refer to your case number (67160) when contacting us about this case.

Sincerely,

Jan Sinclair

Jan Sinclair
Operations Manager

Enclosures: Section 530 Fact Sheet
Notice of IRS Compliance Expectations
Notice 441
Sanitized Determination Letter for Public Disclosure

*To order forms and publications, please call 1-800-TAX-FORM or visit us online at www.irs.gov/formspubs.

cc:

Checkpoint Contents
Federal Library
Federal Source Materials
IRS Rulings & Releases
Private Letter Rulings & TAMs, FSAs, SCAs, CCAs, GCMs, AODs & Other FOIA Documents
Private Letter Rulings & Technical Advice Memoranda (1950 to Present)
1985
PLR/TAM 8514099 - 8514001
PLR 8514077 -- IRC Sec(s). 3401

Private Letter Rulings

Private Letter Ruling 8514077, IRC Sec(s). 3401

UIL No. 3121.04-09; 3306.05-00; 3401.04-02

Headnote:

Reference(s): Code Sec. 3401;

Private Letter Ruling 8514077

Code Sec. 3401(c) WITHHOLDING -- scope of wage withholding -- employee and employment relationship -- choir director .

O hired A to be choir director for church. A performs most services for O on O's premises. Equipment is furnished by O at no cost to A. A doesn't offer her services as choir director to general public. O can terminate A's services at any time for unsatisfactory performance. A is O's employee for purposes of FICA, FUTA, and withholding. If employee is performing services in employ of Sec. 501(c)(3) organization, services for that organization aren't subject to FUTA taxes.

Full Text:

Jan. 10, 1985

This is in reply to O's request for a ruling, submitted on Form SS-8, concerning the status, for federal employment tax purposes, of A with respect to services performed for O as a choir director.

In cases involving the determination of an employer-employee relationship, it is our practice to solicit information from all parties concerned in order to gain an understanding of the situation. We have obtained this information from O and A.

O hired A to provide organ accompaniment for congregational singing and organ voluntary music for all church services, to plan, schedule and direct choir rehearsals, to secure guest musicians for selected services, and to select vocal musical scores.

Most of A's duties are performed at the church. Some administrative duties are performed at A's home. O furnishes a piano and organ to A at no charge.

A reports to the administrative board of O on an infrequent and informal basis. The administrative board has the right to terminate the services of A at any time should she fail to carry out her duties to the satisfaction of the board. A may terminate her services at any time.

A performs services under her own name. Although A provides musical accompaniment for other individuals, she does not perform services as a choir director for other churches and she does not advertise in the newspaper or telephone directory.

An individual is an employee for federal employment tax purposes if the individual has the status of an employee under the usual common law rules applicable in determining an employer-employee relationship. Guides for determining the existence of that status are found in sections 31.3121(d) 31.3306(i) and 31.3401(c) of the Employment Tax Regulations relating to the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and the Collection of Income Tax at Source on Wages, respectively.

Generally, the relationship of employer and employee exists if the person for whom the services are performed has the right to control and direct the individual who performs services not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That means an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is the employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if such a relationship exists, it is irrelevant that an employee is designated an independent contractor.

The facts presented indicate that a continuing employment relationship exists between O and A. O may terminate A's services at any time for unsatisfactory performance. Although the duties performed by A are not closely supervised by O, the facts indicate that O has the right to control and direct the manner in which A is performing her duties.

A performs most services for O on O's premises. Equipment is furnished by O at no cost to A. A does not offer her services as a choir director to the general public.

On the basis of these factors, we conclude that A is O's employee for purposes of the FICA, the FUTA, and federal income tax withholding.

However, with respect to the FUTA, section 3306(c)(8) of the Internal Revenue Code provides, in general, that services performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) of the Code that is exempt from income tax under section 501(a) are excepted from employment for FUTA purposes. Therefore, if an employee is performing services in the employ of a section 501(c)(3) organization, his or her services for that organization are not subject to FUTA taxes.

This ruling applies to other workers performing similar services for O under substantially similar conditions. You should make any such individuals aware of it.

No opinion is expressed as to the federal tax consequences of the transaction described above under any other provision of the Code.

This ruling is directed only to O. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.
END OF DOCUMENT -