

GETTING PAID ... THE RIGHT WAY

BY PAUL CIENNIWA

IN 1999, I WAS HIRED as a “Saturday organist” for a Roman Catholic parish in Connecticut. Having had some knowledge of how I might be treated, I created a letter of agreement that included a statement that I would be paid as an employee, not as an independent contractor. The letter of agreement was signed by the pastor without any fuss.

When I received my first paycheck, I saw immediately that I had been classified as an independent contractor. I spoke with the church’s accountant, and he said that I wasn’t an employee; I was like the guy who plows the snow or cuts the grass.

In 1999, I was 27, just out of school, recently engaged, and desperate for the \$85 I made each Saturday. I felt I was in no position to argue my employee status with a bottom-line accountant. I did not mention the letter of agreement, and I made no argument. I simply wanted to keep my job and not rock the boat.

In 2006, I was hired as director of music at First Church in Boston. As part of the position, I manage and direct a professional choir of twelve singers. I soon learned that choir members were paid as independent contractors.

Over the years, I explained to the leadership and accountants at First Church that the choir members were not contractors but employees, all to no avail. There was a breakthrough in spring 2014, when my comments were directed to an auditor. The auditor stated very clearly that I was correct: the choir members are employees. Following that, the church’s music committee moved to have the choir members instated as employees, starting in January 2015. One week before Jan-

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uary payroll was issued, the church’s standing committee questioned the employee status, bringing the issue before a lawyer affiliated with the church. After a few tense days of waiting, the lawyer responded with the following statement:

I agree that church choir members probably should be treated as employees and not as 1099 contractors. Massachusetts has an independent contractor law that requires (among other things) that anyone who works on the usual course of an organization’s business must be treated as an employee. Although I know of no Massachusetts court cases involving church choir members, the state’s courts have ruled that similar groups of people must be treated as employees. In short, al-

though the issue is not totally free from doubt, the prudent move for the church is to treat them as employees, especially since (i) the penalties for doing it wrong can be large (treble damages and attorney’s fees), and (ii) your auditors apparently want you to do this (which would make the church continuing to treat them as contractors into a “willful” violation of the law, should anyone challenge you on this in court in the future).

Whether you’re an organist or a choir member, being paid the right way is important. When classified as an independent contractor, it is the worker’s responsibility to pay 100% of FICA (the taxes that fund Social Security and Medicare). When classified as an em-

ployee, the worker pays only 50% of FICA, and the employer pays the remaining 50%. In short, it is economically disadvantageous for a worker to be classified as a

contractor. Granted, some contractors enjoy the ability to deduct expenses, such as travel and meals; but, back in 1999, I would rather have had 50% of my FICA paid by the church, and I know that my current student and recent graduate choir members would rather not have any additional tax liability.

According to the Office of the Attorney General in Massachusetts (known, ironically, as the AGO):

Entities that misclassify individuals are in many cases commit-



ting insurance fraud and deprive individuals of the many protections and benefits, both public and private, that employees enjoy. Misclassified individuals are often left without unemployment insurance and workers' compensation benefits. In addition, misclassified individuals do not have access to employer-provided healthcare and may be paid reduced wages or cash as wage payments.¹

The Massachusetts Conference of the United Church of Christ states:

Some churches regard their clergy, organists, sextons, childcare providers or other staff members as independent contractors rather than employees. Since this is seldom acceptable to the Internal Revenue Service or the Massachusetts Department of Labor, the Massachusetts Conference strongly recommends that a local church consult an accountant before classifying any regular service provider as an independent contractor.²

To take this out of Massachusetts and to the federal level, let's look at what the IRS says about employment classification:

Before you can determine how to treat payments you make for services, you must first know the business relationship that exists between you and the person performing the services. In determining whether the person providing service is an employee or an independent contractor, all information that provides evidence of the degree of control and independence must be considered.³

The IRS defines the degree of control and independence through three categories: behavioral, financial, and type of relationship. We need look no further than "behavioral" to see that it applies to church musicians, as the behavioral factors concern the type and degree of instruction given by the employer. "The more detailed the instructions, the more control the business exercises over the worker. More detailed instructions indicate that the

worker is an employee."⁴ Back in 1999, I was given plenty of instruction on when to play, what to play, and how softly to play. Today, my paid choir members face a limitless degree of instruction, from how and what to sing to when and where to walk. They are employees, just as church organists are employees.

As a 21st-century musician, I have a broad array of income sources, both as an employee and as a contractor. I am a long way from that \$85 Saturday service, but the memory of being treated like a contractor for employee work still stings. I suspect that many of us have lived similar stories and that some AGO members continue to be treated in this manner. Whether you have a professional choir or some regularly paid choir members, it is important to represent those musicians in the same manner we would like to be treated.

Having lived through my own fear of telling an employer that I was an employee, I fully understand the challenges of motivating a church to take the high ground. By using the example of paid choir members, however, I hope my experiences will help to guide churches and church musicians to do the right thing. It is in the Bible, after all: "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's."

NOTES

1. An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, s. 148B 2008/11, p.1.
2. *A Church Finance Handbook for Church Treasurers & Finance Committees*, Massachusetts Conference of the United Church of Christ, 2010, p. 82.
3. <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independent-Contractor-Self-Employed-or-Employee>, accessed Feb. 2, 2015.
4. <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Behavioral-Control>, accessed Feb. 2, 2015.

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