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Title 22@ Social Security

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Division 1@ Employment Development Department

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Subdivision 1@ Director of Employment Development

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Division 2.5@ WITHHOLDING TAX ON WAGES

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Chapter 1@ GENERAL PROVISIONS

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Section 4304-5@ Specific Application of Rules for Determination of Employment Status of Artists

4304-5 Specific Application of Rules for Determination of Employment Status of Artists

(a)

Determination of whether an artist is an employee or an independent contractor will be determined generally by the rules set forth in Section 4304-1. This section 4304-5 will describe application of those rules to artists. In situations where a specific application is not interpreted by this section, that specific application will be determined by the rules set forth in Section 4304-1 above. No one or more of the enumerated factors will necessarily indicate that a particular relationship exists.

(b)

An artist is an individual who creates, performs, or interprets works in the visual, literary or performing arts.

(c)

Application of the secondary factors described in Section 4304-1 to artists follows:

(1) An artist being engaged in a separately established business in the arts or who holds himself or herself out to the public as an entrepreneur in the arts is evidence of independence. Any of the following circumstances shall be evidence that an artist is engaged in a separately established occupation or business: (A) Performances, publications and exhibitions, including, but not limited to film, video tapes, recordings and visual arts. (B) Similar services for others at or about the

same time. (C) Advertising in print or electronic media or any other directory; public recognition, such as, awards, reviews, commissions, fellowships; significant reputation on which the artist can rely for income. (D) Having an artist's agent or representative. (E) Business cards, brochure and stationery demonstrating that one is available for work as an independent person whether or not one has registered a fictitious business name. (F) Substantial investment in facilities, tools, equipment, or inventory of products related to the artist's occupation or business.

(2) The following factors will describe whether particular artists usually performs services under the direction of a principal without supervision. However, evidence of control could separate a particular artist from the usual circumstances described below.

(A) Actors, dancers and musicians in a performing company are usually under supervision. (B) Actors, dancers and musicians as headlined artists are usually not under supervision. (C) Small groups performing under a group name are not usually under supervision. (D) Artists performing services in an institutional setting, such as an artistic performance or teaching, do not usually perform their services under supervision as to the specific artistic service, but the circumstances surrounding the specific artistic service may be subject to control. For whether such control is evidence of employment, see paragraph 9, below. (E) Artists performing services under a commission, such as a portrait painter or composer, are not usually under supervision. (3) Artists possess knowledge of techniques, artistic processes, and methodologies unique to the performance of the arts.

Evidence of this specialized knowledge and skill is demonstrated by personal exhibitions, significant studies in a recognized institution of higher learning or with a master teacher or is demonstrated through a substantial body of work which has been reviewed and approved or recommended by a panel of peers or experts in the artist's given field or discipline. A high degree of specialized knowledge and

skill is evidence of independence. (4) Facilities typically supplied by a principal to an artist are large items, such as space, photographic equipment, sound equipment, lights, stage facilities, and costumes. The provision of space, such as an auditorium or classroom, by the principal is not evidence that the artist is an employee unless it is likely that the principal will provide instruction in its use. The provision by the principal of other such large items is evidence of employment.

Where the facilities necessary for performance of an artistic service are provided by a principal because they are of a type required by law, the provision of the facilities is not evidence of employment. Tools of the trade, such as toe shoes, paints and brushes, hand cameras, tuxedo for a symphony, specific costume for a band or singer or dancer are generally supplied by the artist. If the artist provides the tools of the trade, it does not raise an inference of independence or employment. If an artist provides tools or equipment that are unique, it raises an inference of independence. Tools of the trade provided by the principal to an artist in lieu of pay do not raise an inference of employment or independence. If the principal provides the tools of the trade but not as part of the pay to the artist, it is evidence of employment. (5) The length of time for which the services are

performed by an artist may vary significantly. Services directed to an end result, such as a portrait or a finalized musical composition, which would reasonably be expected to require the time for which services are performed is not considered to be continuing and would not be evidence that an artist is an employee.

Performance of services by an artist at regular times or on a regular schedule imposed by the principal for any period of days, weeks or months is evidence that the artist is not independent (6) When an artist performs services and payment is measured by the time of services, such as hour, day, week, month, etc., it is evidence of employment. Payment by the job or piece of production is evidence of

independence. If payment is determined by the artist or through bona fide negotiations, it is evidence of independence. If the payment is determined by the principal or negotiations for the amount of payment are not truly bona fide, it is evidence of employment. (7) Whether or not the services performed by the artist are part of the regular business of the principal for whom the services are performed or whether the services are not within the regular business of the principal depends upon the purpose for which the services are being performed. Services that further the functions that are normal to the principal's business will be considered within the purpose of the principal and will be evidence of employment. The purposes of government and nonprofit entity operations are business purposes within the meaning of this subdivision. The purposes of such institutions and organizations are generally artistic, therapeutic, recreational, religious, charitable, educational, or for rehabilitation. Whether the purposes of a particular institution or organization are furthered by the services of an artist depends on the circumstances surrounding the institution and the services performed. Where the services are to carry out functions normally provided by the business, institution or organization, it will be evidence that the services are performed by an artist as an employee. Where the purpose of the product of creativity is above or beyond or different than the purpose of the business institution or organization for which the services are performed, it is evidence of independence. For example, in educational institutions where services are performed to carry out an adopted curriculum, there is evidence of employment. Where services are outside and beyond the adopted curriculum there is evidence of independence. (8) Belief of the parties regarding the relationship they intend may be determined by written agreement. The terminology used in an agreement between an artist and the principal for whom the services are performed is not

conclusive of the relationship, even in the absence of fraud or mistake. On the other hand, such an agreement is evidence of the relationship intended by the parties to the agreement. If the agreement provides for the relationship in which services are to be performed for a principal in such a way that the principal expresses interest only in the desired result and abandons the right to control the manner and means by which the result is achieved, such an agreement is evidence that the relationship intended was not that of employer and employee if the terms of the agreement are in fact carried out. If the factual relationship between the parties is different than that provided by the agreement it is evidence that the agreement does not express the intention of the parties. If the agreement between the artist and the principal for whom the services are performed specifically denies an employment relationship, but contains provisions which allow for the exercise of control by that principal over the manner and means of performing the services, the provisions denying the employment relationship do not express the intent of the parties. (9) Exercise of control is evidence of the right to control. That the service must be performed on designated premises or in a designated place or structure or structures by itself is not evidence of control. If the services are performed upon the premises of the principal for whom the services are performed and that principal is in business and the artist uses the facilities of the principal in performing the services in compliance with policies or rules for the conduct of workers on the premises, it would be evidence that the artist was performing services as an employee. On the other hand, if the particular rules or policies of the principal are made only for the general safety or security of the premises, and would be equally applicable to individuals whether they were clearly independent contractors or employees, adherence to such policies, rules or customs would not raise the inference that the artist was performing services as

an employee. (10) Services performed by an artist for a principal which is in business which are in furtherance of the purpose of the principal's business, as described in (7) above, are evidence that the artist is performing services as an employee. Services performed for an individual not in business do not raise an inference of employment. (11) If the artist's services can be terminated at will by the principal or the artist without cause related to the conduct of the principal or the artist and without the expectation of liability for damages for breach of contract, it is evidence of employment. (12) Designations of status contained in collective bargaining agreements shall be considered when and to the extent required by law. (13) When an artist receives remuneration for specific services from more than one principal or from a principal for whom the services are not directly performed, and the services are in employment, all remuneration is wages in employment. Whether a principal is an employer, regardless of the period of time for which the services are performed, shall be determined pursuant to Section of Title 224305-1(i) of Title 22 of the California Administrative Code. Payment of wages by a principal other than the employer is payment paid by an agent of the employer.

(1)

An artist being engaged in a separately established business in the arts or who holds himself or herself out to the public as an entrepreneur in the arts is evidence of independence. Any of the following circumstances shall be evidence that an artist is engaged in a separately established occupation or business: (A) Performances, publications and exhibitions, including, but not limited to film, video tapes, recordings and visual arts. (B) Similar services for others at or about the same time. (C) Advertising in print or electronic media or any other directory; public recognition, such as, awards, reviews, commissions, fellowships; significant reputation on which the artist

can rely for income. (D) Having an artist's agent or representative. (E) Business cards, brochure and stationery demonstrating that one is available for work as an independent person whether or not one has registered a fictitious business name. (F) Substantial investment in facilities, tools, equipment, or inventory of products related to the artist's occupation or business.

(A)

Performances, publications and exhibitions, including, but not limited to film, video tapes, recordings and visual arts.

(B)

Similar services for others at or about the same time.

(C)

Advertising in print or electronic media or any other directory; public recognition, such as, awards, reviews, commissions, fellowships; significant reputation on which the artist can rely for income.

(D)

Having an artist's agent or representative.

(E)

Business cards, brochure and stationery demonstrating that one is available for work as an independent person whether or not one has registered a fictitious business name.

(F)

Substantial investment in facilities, tools, equipment, or inventory of products related to the artist's occupation or business.

(2)

The following factors will describe whether particular artists usually performs services under the direction of a principal without supervision. However, evidence of control could separate a particular artist from the usual circumstances described below. (A)

Actors, dancers and musicians in a performing company are usually under supervision.

(B) Actors, dancers and musicians as headlined artists are usually not under supervision. (C) Small groups performing under a group name are not usually under supervision. (D) Artists performing services in an institutional setting, such as an artistic performance or teaching, do not usually perform their services under supervision as to the specific artistic service, but the circumstances surrounding the specific artistic service may be subject to control. For whether such control is evidence of employment, see paragraph 9, below. (E) Artists performing services under a commission, such as a portrait painter or composer, are not usually under supervision.

(A)

Actors, dancers and musicians in a performing company are usually under supervision.

(B)

Actors, dancers and musicians as headlined artists are usually not under supervision.

(C)

Small groups performing under a group name are not usually under supervision.

(D)

Artists performing services in an institutional setting, such as an artistic performance or teaching, do not usually perform their services under supervision as to the specific artistic service, but the circumstances surrounding the specific artistic service may be subject to control. For whether such control is evidence of employment, see paragraph 9, below.

(E)

Artists performing services under a commission, such as a portrait painter or composer, are not usually under supervision.

(3)

Artists possess knowledge of techniques, artistic processes, and methodologies unique to the performance of the arts. Evidence of this specialized knowledge and skill is

demonstrated by personal exhibitions, significant studies in a recognized institution of higher learning or with a master teacher or is demonstrated through a substantial body of work which has been reviewed and approved or recommended by a panel of peers or experts in the artist's given field or discipline. A high degree of specialized knowledge and skill is evidence of independence.

(4)

Facilities typically supplied by a principal to an artist are large items, such as space, photographic equipment, sound equipment, lights, stage facilities, and costumes. The provision of space, such as an auditorium or classroom, by the principal is not evidence that the artist is an employee unless it is likely that the principal will provide instruction in its use. The provision by the principal of other such large items is evidence of employment. Where the facilities necessary for performance of an artistic service are provided by a principal because they are of a type required by law, the provision of the facilities is not evidence of employment. Tools of the trade, such as toe shoes, paints and brushes, hand cameras, tuxedo for a symphony, specific costume for a band or singer or dancer are generally supplied by the artist. If the artist provides the tools of the trade, it does not raise an inference of independence or employment. If an artist provides tools or equipment that are unique, it raises an inference of independence. Tools of the trade provided by the principal to an artist in lieu of pay do not raise an inference of employment or independence. If the principal provides the tools of the trade but not as part of the pay to the artist, it is evidence of employment.

(5)

The length of time for which the services are performed by an artist may vary significantly. Services directed to an end result, such as a portrait or a finalized musical composition, which would reasonably be expected to require the time for which services are performed is not considered to be continuing and would not be evidence that an

artist is an employee. Performance of services by an artist at regular times or on a regular schedule imposed by the principal for any period of days, weeks or months is evidence that the artist is not independent

(6)

When an artist performs services and payment is measured by the time of services, such as hour, day, week, month, etc., it is evidence of employment. Payment by the job or piece of production is evidence of independence. If payment is determined by the artist or through bona fide negotiations, it is evidence of independence. If the payment is determined by the principal or negotiations for the amount of payment are not truly bona fide, it is evidence of employment.

(7)

Whether or not the services performed by the artist are part of the regular business of the principal for whom the services are performed or whether the services are not within the regular business of the principal depends upon the purpose for which the services are being performed. Services that further the functions that are normal to the principal's business will be considered within the purpose of the principal and will be evidence of employment. The purposes of government and nonprofit entity operations are business purposes within the meaning of this subdivision. The purposes of such institutions and organizations are generally artistic, therapeutic, recreational, religious, charitable, educational, or for rehabilitation. Whether the purposes of a particular institution or organization are furthered by the services of an artist depends on the circumstances surrounding the institution and the services performed. Where the services are to carry out functions normally provided by the business, institution or organization, it will be evidence that the services are performed by an artist as an employee. Where the purpose of the product of creativity is above or beyond or different than the purpose of the business institution or organization for which the services are

performed, it is evidence of independence. For example, in educational institutions where services are performed to carry out an adopted curriculum, there is evidence of employment. Where services are outside and beyond the adopted curriculum there is evidence of independence.

(8)

Belief of the parties regarding the relationship they intend may be determined by written agreement. The terminology used in an agreement between an artist and the principal for whom the services are performed is not conclusive of the relationship, even in the absence of fraud or mistake. On the other hand, such an agreement is evidence of the relationship intended by the parties to the agreement. If the agreement provides for the relationship in which services are to be performed for a principal in such a way that the principal expresses interest only in the desired result and abandons the right to control the manner and means by which the result is achieved, such an agreement is evidence that the relationship intended was not that of employer and employee if the terms of the agreement are in fact carried out. If the factual relationship between the parties is different than that provided by the agreement it is evidence that the agreement does not express the intention of the parties. If the agreement between the artist and the principal for whom the services are performed specifically denies an employment relationship, but contains provisions which allow for the exercise of control by that principal over the manner and means of performing the services, the provisions denying the employment relationship do not express the intent of the parties.

(9)

Exercise of control is evidence of the right to control. That the service must be performed on designated premises or in a designated place or structure or structures by itself is not evidence of control. If the services are performed upon the premises of the principal for whom the services are performed and that principal is in business and the

artist uses the facilities of the principal in performing the services in compliance with policies or rules for the conduct of workers on the premises, it would be evidence that the artist was performing services as an employee. On the other hand, if the particular rules or policies of the principal are made only for the general safety or security of the premises, and would be equally applicable to individuals whether they were clearly independent contractors or employees, adherence to such policies, rules or customs would not raise the inference that the artist was performing services as an employee.

(10)

Services performed by an artist for a principal which is in business which are in furtherance of the purpose of the principal's business, as described in (7) above, are evidence that the artist is performing services as an employee. Services performed for an individual not in business do not raise an inference of employment.

(11)

If the artist's services can be terminated at will by the principal or the artist without cause related to the conduct of the principal or the artist and without the expectation of liability for damages for breach of contract, it is evidence of employment.

(12)

Designations of status contained in collective bargaining agreements shall be considered when and to the extent required by law.

(13)

When an artist receives remuneration for specific services from more than one principal or from a principal for whom the services are not directly performed, and the services are in employment, all remuneration is wages in employment. Whether a principal is an employer, regardless of the period of time for which the services are performed, shall be determined pursuant to Section 224305-1(i) of Title 22 of the California Administrative Code. Payment of wages by a principal other than the employer is

payment paid by an agent of the employer.