Better Safe than Sorry
Theater Groups and Independent Contractor Rules
By Gary S. Eisenkraft, CPA
(As Published in the Nonprofit Quarterly)

Recently, New York State created an interagency strike force to "address the problem of employers who inappropriately classify employees as independent contractors." The Joint Enforcement Strike Force includes staff from the Department of Labor, the Attorney General's Office, the Department of Taxation and Finance, the Workers' Compensation Board and the New York City Comptroller's office.

According to the New York State Department of Labor: "misclassification of workers occurs when an employer improperly treats an individual as an independent contractor instead of as an employee."

Actors, designers and other creative individuals may rather be known as artists and not employees. Although the debate has merits on either side, we should all be aware that their classification for business and tax purposes can have major consequences in regard to IRS and Department of Labor rules.

If deemed contractors are found to be employees the company may be liable for significant penalties for unpaid withholding and Social Security taxes as well as State and Federal unemployment insurance contributions, disability and workers compensation. Those responsible for payroll and officers of the company may also be held personally liable for some of these unpaid taxes. (This holds true, even for volunteers.)

During my interview with Charles Sullivan, an employment law expert and professor at Seton Hall University School of Law in New Jersey, he pointed out that the failure to properly pay statutory workers' compensation insurance could have severe effects on a theater company. They could be forced to compensate individuals injured on the job from company funds. The result can be catastrophic and lead to bankruptcy of the theater company.

According to IRS guidelines, "A general rule is that you, the payer, have the right to control or direct only the result of the work done by an independent contractor, and not the means and methods of accomplishing the result.

Under common-law rules, anyone who performs services for you is your employee if you can control what will be done and how it will be done. This is so even when you

give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed.

To determine whether an individual is an employee or independent contractor under the common law, the relationship of the worker and the business must be examined. All evidence of control and independence must be considered. In an employee-independent contractor determination, all information that provides evidence of the degree of control and degree of independence must be considered.

Facts that provide evidence of the degree of control and independence fall into three categories: behavioral control, financial control, and the type of relationship of the parties."

The New York State Department of Labor offers the following for help in determining independence and control:

"Indicators of control may include:

- determining when, where and how services will be performed
- providing facilities, equipment, tools and supplies
- directly supervising the services
- stipulating the hours of work
- requiring exclusive services
- setting the rate of pay
- requiring attendance at meetings and/or training sessions
- requiring oral or written reports
- reserving the right to review and approve the work product
- evaluating job performance
- requiring prior permission for absences
- reserving the right to terminate the services

Indicators of independent contractor status may include:

- having an established business
- advertising in the electronic and/or print media
- maintaining a listing in the commercial pages of the telephone directory
- using business cards, business stationery, and billheads
- carrying insurance
- maintaining a place of business and making a significant investment in facilities, equipment and supplies
- paying one's own expenses
- assuming risk for profit or loss in providing services
- determining one's own schedule
- setting or negotiating own pay rate
- providing services concurrently for other businesses, competitive or non-competitive

- being free to refuse work offers
- being free to hire help“

While the forgoing indicators are not conclusive, they are helpful in making proper worker classification determinations. Your CPA or attorney can help you make the correct decisions.

If you have union workers, the classification has been stipulated in their union contract. If you have both union and non union workers, you'll want to avoid inconsistent treatment by classifying the non-union workers the same as those under the contract. As a practical matter, I suggest that small and medium size theater groups classify non-union workers as their respective unions would. Union treatment provides a strong precedent that can usually be relied on. The sidebar points out various stage unions and their worker classification.

Small and medium theater groups face severe financial burdens as is. Do I suggest making an already difficult situation worse? My intention is that you get it right from the start. The added costs clearly outweigh the risks to your company, management and those in governance positions.