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### Music Entertainer Who Performed Regularly at Resort Entitled to Unemployment

In a recent decision, Niadni, Inc. d/b/a Indian Head Resort Motel, the New Hampshire Supreme Court held that a musician who performed as part of live entertainment offered by a resort on 60 to 70 percent of the nights it was open, was an employee and not an independent contractor and accordingly, he was entitled to unemployment benefits.

In 1980 the musician began appearing in solo and group performances at the resort. Though he performed at other venues, in the two years prior to the termination of the relationship between the parties, he had appeared at the resort nearly 300 times and he was paid on a weekly basis. The musician provided his own instruments and selected the songs to play during the performances. After his last booking with the resort in June 2012, the relationship was terminated and the musician filed for unemployment benefits.

The Court's decision hinged on whether the musician's services were "outside the usual course of business" for the resort pursuant to RSA 282-A:9, III(b). RSA 282-A:9, III excludes certain contract workers from employment status if they meet all three of the following factors: (a) the individual is free from control or direction over the performance of services; (b) the service is outside the usual course of business; and (c) the individual is customarily engaged in an independently established trade, occupation, profession or business.

In determining that the musician was an employee of the resort, the Court dismissed the resort's argument that the musician's performances were not essential to its business, holding that the regular and continuous nature of such entertainment belied such an argument.

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Further, the Court gave no credence to the resort's argument that "it does not itself provide live music and it is not a band or a group of musicians or singers" but simply coordinates independent musicians to play in the lounge. The Court observed that in addition to the regularity of live entertainment, the resort maintains a stage and public address system to facilitate live entertainment and advertises upcoming performances to attract patrons to the resort.

Though the resort described the musician's services as part of the ambience, similar to the flowers on a restaurant table, the Court held that the live entertainment was not simply ambience but a service used to attract new business to the resort. The advertisements from the resort featured the musician's likeness and the name of his musical acts. Therefore, the Court concluded the musician's services were not incidental, but an integral part of the resort's business. The Court did not address the other two factors in RSA 282-A:9, III as the resort failed to meet the requirement under paragraph b of the statute.

The Court's decision underscores the need for employers to be cautious when making worker classifications.

*Your Jackson Lewis Attorney can answer questions regarding this and other employment law issues.*