
SENATE COMMITTEE ON LABOR, PUBLIC EMPLOYMENT AND RETIREMENT
Senator Dave Cortese, Chair
2021 - 2022 Regular

Bill No: SB 1116 **Hearing Date:** April 27, 2022
Author: Portantino
Version: March 29, 2022
Urgency: No **Fiscal:** Yes
Consultant: Jake Ferrera

SUBJECT: Arts Council: The Performing Arts Equitable Payroll Fund

KEY ISSUE

Should the Legislature establish the Performing Arts Equitable Payroll Fund within the State Treasury to administer a grant to enable small nonprofit performing arts organizations to hire, retain employees, and comply with employment law?

ANALYSIS

Existing law:

- 1) Establishes a comprehensive set of protections for employees, including a time-sure minimum wage, meal and rest periods, workers' compensation coverage in the event of an industrial injury, sick leave, disability insurance (DI) in the event of a non-industrial disability, paid family leave, and unemployment insurance (UI).

(Labor Code §§201, 226.7, 246, 512, 1182.12, & 3600 and UI Code §§1251 & 2601)

- 2) Provides that, except as otherwise stated, a person providing labor or services for remuneration must be considered an employee unless the hiring entity demonstrates that all of the following conditions are satisfied:
 - a) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
 - b) The person performs work that is outside the usual course of the hiring entity's business.
 - c) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(Labor Code §2750.3)

- 3) Establishes the Office of the Small Business Advocate within the Governor's Office of Business and Economic Development. The Small Business Advocate is tasked with serving as the principal advocate in the state on behalf of small businesses, including, but not limited to, advisory participation in the consideration of all legislation and administrative regulations that affect small businesses, and advocacy on state policy and programs related to small businesses. (Government Code §12098.3)

This bill:

- 1) Defines “Adjusted Gross Revenue” to mean the average annual revenue received over the preceding 3 years, in whatever form, received or accrued from whatever source. This does not include revenue earmarked by donors solely for **capital expenditures** or any passthrough funds collected for the benefit of another organization.
- 2) Defines “Capital Expenditures” to mean funds used by a company to acquire, upgrade, or maintain fixed assets, including property, plants, buildings, technology, or equipment.
- 3) Defines “Nonprofit performing arts organization” to mean a performing arts organization that is exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code and whose primary mission is the creation of or presentation of performing arts.
- 4) Defines “Payroll expenses” to mean wages paid to employees, payroll taxes, workers’ compensation, unemployment insurance, paymaster fees, and pension, health, and welfare contributions.
- 5) Defines “Performing Arts” to mean the types of arts that are performed live for a remote or in-person audience, including, but not limited to, music, dance, and drama.
- 6) Defines “Small nonprofit performing arts organization” to mean a nonprofit performing arts organization with an adjusted gross revenue equal to or less than \$2,000,000. The Office of the Small Business Advocate shall adjust this amount every five years using the California Consumer Price Index as compiled and reported by the Department of Industrial Relations
- 7) Establishes the Performing Arts Equitable Payroll Fund within the State Treasury. Upon appropriation of the Legislature, the Office of the Small Business Advocate will do each of the following:
 - A) Establish and administer a grant program using moneys in the fund to award grants for the purpose of enabling small nonprofit performing arts organizations to hire, to retain, or to hire and retain employees. The organization must pay these employees at least the applicable minimum wages for the jurisdiction they reside in.
 - B) Administer each grant for a term of 1 year.
- 8) Requires recipients of grants from the Performing Arts Equitable Payroll Fund to provide the following to the Office of the Small Business Advocate:
 - A) Certification providing that funds will only be used for the compensation of qualifying employees or for maintaining compliance with all protections owed under state law to workers classified as employees. Qualifying employees include any actor, stage manager, or worker hired as an employee, but **does not include** independent contractors, volunteers, or interns.
 - B) Organizational information, including venue size, annual budget, the number of employees and independent contractors in the last budget year, the percentage of budget spent on payroll expenses, and the organization’s harassment policy and diversity, equity, and inclusion policy.
 - C) Certification that no tribunal of competent jurisdiction has issued a final judgment finding that the organization has, at any time after January 1st, 2023, misclassified an employee as an independent contractor.

- 9) Requires the Office of the Small Business Advocate to adopt necessary regulations for each of the following:
- A) Ensuring that grant recipients have not used grant funds for purposes other than those included above.
 - B) Validating the accuracy of certifications provided under the requirements of this bill.
 - C) Any organization found by the Office of the Small Business Advocate to have violated A) or B) will be ineligible for future grants from the fund. The office may also require the organization to repay these grant funds.
- 10) Establishes the following reimbursement schedule for grants for small nonprofit performing arts organizations:
- A) For organizations with an adjusted gross revenue of up to two hundred fifty thousand dollars (\$250,000), the fund shall reimburse 80 percent of the first ten thousand dollars (\$10,000) of the organization's payroll expenses for work performed in the State of California per employee per quarter.
 - B) For organizations with an adjusted gross revenue of not less than two hundred fifty thousand one dollars (\$250,001) and not more than four hundred fifty thousand dollars (\$450,000), the fund shall reimburse 75 percent of the first ten thousand dollars (\$10,000) of the organization's payroll expenses for work performed in the State of California per employee per quarter.
 - C) For organizations with an adjusted gross revenue of not less than four hundred fifty thousand one dollars (\$450,001) and not more than six hundred fifty thousand dollars (\$650,000), the fund shall reimburse 70 percent of the first ten thousand dollars (\$10,000) of the organization's payroll expenses for work performed in the State of California per employee per quarter.
 - D) For organizations with an adjusted gross revenue of not less than six hundred fifty thousand one dollars (\$650,001) and not more than eight hundred fifty thousand dollars (\$850,000), the fund shall reimburse 60 percent of the first ten thousand dollars (\$10,000) of the organization's payroll expenses for work performed in the State of California per employee per quarter.
 - E) For organizations with an adjusted gross revenue of not less than eight hundred fifty thousand one dollars (\$850,001) and not more than one million dollars (\$1,000,000), the fund shall reimburse 50 percent of the first ten thousand dollars (\$10,000) of the organization's payroll expenses for work performed in the State of California per employee per quarter.
 - F) For organizations with an adjusted gross revenue of not less than one million one dollars (\$1,000,001) and not more than one million two hundred fifty thousand dollars (\$1,250,000), the fund shall reimburse 40 percent of the first ten thousand dollars (\$10,000) of the organization's payroll expenses for work performed in the State of California per employee per quarter.
 - G) For organizations with an adjusted gross revenue of not less than one million two hundred fifty thousand one dollars (\$1,250,001) and not more than one million five hundred thousand dollars (\$1,500,000), the fund shall reimburse 30 percent of the first ten thousand dollars (\$10,000) of the organization's payroll expenses for work performed in the State of California per employee per quarter.
 - H) For organizations with an adjusted gross revenue of not less than one million five hundred thousand one dollars (\$1,500,001) and not more than one million seven hundred fifty thousand dollars (\$1,750,000), the fund shall reimburse 25 percent of the first ten

thousand dollars (\$10,000) of the organization's payroll expenses for work performed in the State of California per employee per quarter.

- D) For organizations with an adjusted gross revenue of not less than one million seven hundred fifty thousand one dollars (\$1,750,001) and not more than two million dollars (\$2,000,000), the fund shall reimburse 20 percent of the first ten thousand dollars (\$10,000) of the organization's payroll expenses for work performed in the State of California per employee per quarter.

COMMENTS

1. Need for this bill?

In the wake of the passage of AB 5, which established the ABC test for determining employment status, many employers are facing major periods of adjustment to the new law. An example of this is the numerous small nonprofit theaters in many communities. These institutions have regularly entered into agreements with employees that are somewhat at odds with the ABC test and, as a result, small theaters are facing the prospect of exhausting a large amount of their limited resources simply creating payroll systems that can track their employees.

The legislature and this committee take instances of payment below the minimum wage very seriously; however as the theaters covered by this bill are nonprofit and are relatively small operations, new requirements taken immediately would be exceedingly difficult to comply with. The solution proposed is the creation of a grant program that would reimburse small nonprofit community theaters a set percentage of their expenditures on payroll services. This allows the theaters to transition in a way that prioritizes worker rights, while not eliminating the valuable cultural contribution that theaters bring to their communities.

2. Proponent Arguments

Actors' Equity Association, a co-sponsor of the bill, writes in support:

“When properly funded, the live arts can be an economic engine that drives spending in local communities and allows workers to prosper. Unfortunately, years of underinvestment has meant that SNPAOs barely had the resources to support hourly wages – financially or administratively. The vast majority of SNPAOs in California have adjusted gross revenues below \$250K. Furthermore, the lion's share of any SNPAOs production costs are incurred during the rehearsal period when there is no revenue. This is why ticket revenue is never enough to cover operating costs with contributed revenue (grants, donations etc.) typically make up about half of an SNPAO's operating budget. However, contributed revenue has never been distributed equitably, which makes operations especially challenging when there is a funding shortage.

While California has made important gains on arts funding under Gov. Newsom it still only ranked 28th on a per capita basis prior to the pandemic. SB 1116 is one of the few bills in any state legislature that **exclusively and directly supports arts workers** – the people who make California an arts leader worldwide. This bill could not be more timely as Equity members still face far fewer work opportunities than before the pandemic. Arts and cultural employment declined 12.1 percent in California between 2019 and 2020, according to new

data from the BEA. A March study from the National Endowment from the Arts found that unemployment rate in the arts in 2021 (7.2 percent) was still more than double the pre-pandemic level. Johns Hopkins University reports that, as of October 2021, the percentage of job losses at nonprofit arts organizations remains more than three times worse than the average of all nonprofits. Nationally, the unemployment rate for actors in 2021 was 33 percent – well above the 19 percent level in 2019.

The EPF, created by SB 1116, will provide reimbursement to the SNPAOs to fully invest in jobs where the workers have the protections that come with being classified as employees and continue to help the circulation of capital in neighborhoods.”

3. Opponent Arguments:

None received.

4. Prior Legislation:

SB 805 (Rubio, 2021) **Vetoed by Governor Newsom:** would have established the California Nonprofit Performing Arts Paymaster for the purpose of providing low-cost payroll services to small nonprofit performing arts organizations.

5. Double Referral

SB 1116 was previously heard in the Senate Business, Professions and Economic Development Committee and, should it pass out of the Senate Labor Committee, will be sent to the Senate Appropriations Committee for hearing.

SUPPORT

Actors' Equity Association (Co-Sponsor)
Theatre Producers of Southern California (Co-Sponsor)
5-star Theatricals
Actors' Equity
Airedanse Fitness & Arts
Alliance of Desert Theatres
American Guild of Musical Artists, AFL-CIO
Arts for La
Artspace INC (center Stage Theater)
Boxtales Theatre Company
California Arts Advocates
California Labor Federation, Afl-cio
Casa 0101
Celebration Productions Corporation
Chance Theater
Coachella Valley Repertory
Company of Angels, INC
Desert Ensemble Theatre Company
Dezart Performs

Dramadogs, a Theater Company
Dramatic Women
El Teatro Campesino
Iama Theatre Company
International City Theatre
Jabberwocky Theatre Dba Rogue Machine
Lobero Theatre Foundation
National Independent Venue Association of California
New Los Angeles Repertory Company
Ojai Playwrights Conference
Omgartsplus
Opera Santa Barbara
Ophelia's Jump Productions
Playwrights' Arena
Rogue Artists Ensemble
San José Arts Advocates
Santa Barbara French Festival
Santa Barbara Reader's Theater
Sierra Madre Playhouse
Solo Opera
Teatro Visión
The Aresis Ensemble INC. (city Garage)
The Chance Theater
The Ghost Road Company
The Initiative for New and Reimagined Work
The Inkwell Theater
The New American Theatre
The Open Fist Theatre Company
The Road Theatre Company
The Victory Theatre Center
Theatre Producers of Southern California
Theatre Unleashed, INC.
Theatre West
Theatrical Producers League of Los Angeles

OPPOSITION

None received.

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