

Date of Hearing: June 22, 2022

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT

Ash Kalra, Chair

SB 1116 (Portantino) – As Amended June 16, 2022

SENATE VOTE: 29-5

SUBJECT: Arts Council: The Performing Arts Equitable Payroll Fund

SUMMARY: Establishes the Performing Arts Equitable Payroll Fund (fund) to provide grants to small performing arts organizations (SPAOs) for the purpose of hiring and retaining employees. Specifically, **this bill:**

- 1) Defines “adjusted gross revenue” to mean the average annual revenue received over the preceding three years, in whatever form, received or accrued from whatever source, subject to certain exclusions.
- 2) 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 the performing arts organization’s primary mission is the creation of or presentation of performing arts.
- 3) Defines a SPAO to mean a nonprofit performing arts organization, or a fiscally sponsored performing arts organization, with an adjusted gross revenue equal to or less than two million dollars (\$2,000,000). The Office of the Small Business Advocate (CalOSBA) shall adjust this amount every five years using the California Consumer Price Index as compiled and reported by the Department of Industrial Relations.
- 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) Establishes the fund in the State Treasury.
- 6) Requires, upon appropriation by the Legislature, the SPAO to establish and administer a grant program using moneys in the fund to award grants for a term of one year for the purpose of enabling SPAOs to hire and retain employees. The organization shall pay these employees not less than the minimum wage of the city, county, or city and county of which it is subject to jurisdiction or not less than the state minimum wage, whichever is greater.
- 7) Requires the CalOSBA to develop criteria to evaluate eligibility for the grant program in accordance with this bill. Included in that criteria, a SPAO shall be deemed eligible by the OSBA if it submits the following:
 - a) At least three of the following documents from three of the SPAO’s productions to demonstrate its production and advertisement of performing arts events:

- i) A box office report.
 - ii) Evidence of paid advertisements.
 - iii) Social media posts and website listings advertising the production.
 - iv) Email blasts advertising the production.
 - v) Reviews of the production.
 - vi) A copy of the playbill for the production.
- b) All of the following information about, policies of, and statements of the organization:
- i) Anti-racism statement.
 - ii) Certification of compliance with state sexual harassment training requirements.
 - iii) Cultural equity and inclusion policy.
 - iv) Diversity, equity, and inclusion policy.
 - v) Harassment policy.
 - vi) Internet website hyperlink.
 - vii) Mission statement.
- c) Financial information depending on the SPAO's status as either a nonprofit or a fiscally sponsored SPAO that includes, among other things:
- i) For a nonprofit SPAO:
 - (1) The IRS determination letter recognizing the organization as tax-exempt under the subsection for which it applied.
 - (2) The founding documents of the organization, including, but not limited to, the Articles of Incorporation for the organization.
 - (3) A certified Business Entity Certificate of Status showing an active status of the organization from the California Secretary of State.
 - (4) Financial records, including the organization's filed IRS Form 990 documents from the previous three years, as specified.
 - ii) For a fiscally sponsored performing arts organization:
 - (1) A letter evidencing the agreement between the organization and its fiscal sponsor.
 - (2) The board minutes of the fiscal sponsor that show the date the fiscal sponsor approved the sponsorship.
 - (3) A certified Business Entity Certificate of Status showing an active status of the fiscal sponsor from the California Secretary of State.
 - (4) An attestation by the fiscal sponsor that the sponsored organization is a performing arts organization.

- (5) Financial records, including, among other things, detailed information for pass through funds going through the fiscal sponsor, profit and loss statements, and filed IRS Form 990 documents.
- 8) Deems specified arts programs with an educational purpose or related to youth instruction ineligible for the grant program.
- 9) Requires a recipient of a grant to provide the following information to the CalOSBA:
- a) Certification providing that the funds shall be used for only the following purposes:
 - i) The compensation of any qualifying employee. A qualifying employee shall include, but shall not be limited to, any actor, stage manager, or worker hired by the organization as an employee. An independent contractor, volunteer, or intern shall not be considered a qualifying employee for the purposes of a grant awarded.
 - ii) Maintaining compliance with all protections owed under state and federal law to workers classified as employees.
 - b) Organizational information, including venue size where applicable, 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, as specified.
 - c) Certification that the organization has no final judgments relating to employee misclassification, as specified.
- 10) Provides that any organization that has received a grant from the fund may apply for grants in any future years for which the organization maintains eligibility.
- 11) Requires the CalOSBA to adopt regulations for the purpose of ensuring compliance with the eligibility and grant recipient requirements of the bill, as specified.
- 12) Requires the CalOSBA to award a grant to a SPAO in amounts pursuant to a matching schedule that is based upon adjusted gross revenue ranging from up to two-hundred fifty thousand dollars (\$250,000) to not more than two million dollars (\$2,000,000).

EXISTING LAW:

- 1) Establishes the CalOSBA within the Governor's Office of Business and Economic Development.
- 2) Requires the director of the CalOSBA to serve as the principal advocate in the state on behalf of small businesses, and to, among other things, represent the views and interests of small businesses before other state agencies and enlist the cooperation and assistance of public and

private agencies, businesses, and other organizations in disseminating information about the programs and services provided by state government that are of benefit to small businesses.

- 3) Provides that for purposes of the Labor Code and the Unemployment Insurance Code, where another definition of “employee” is not otherwise specified, and for the wage orders of the Industrial Welfare Commission (IWC), a person providing labor or services for remuneration shall be considered an employee unless the hiring entity satisfies the 3-part ABC test:
- 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.

FISCAL EFFECT: According to the Senate Appropriations Committee, “This bill would result in a cost pressure to the Governor’s Office of Business and Economic Development (GO-Biz) to fund and administer the grant program. Specifically, GO-Biz anticipates that the fiscal impact of the bill is unknown, and would depend on the size of the grant pool, eligibility criteria, and other factors which the bill does not define.”

COMMENTS: There are over 11,500 arts nonprofits in California, representing a higher number than in many of the world’s largest economies. Their economic contributions cannot be underscored—“in 2018, they collectively maintained assets valued at nearly \$19 billion and brought in over \$5 billion in revenue.¹”

Creative industries² in California make up about 8 percent of the state’s workforce. These industries have increasingly turned to the independent contractor model to meet their labor needs. In fact, four in ten workers in creative industries are independent contractors.³ Specifically, in the Fine and Performing Arts industry, thirty percent of the workforce in 2017 was made up of contract workers.⁴ In addition, the number of independent contractors in this industry grew by 48% from 2008 to 2017.⁵

Workers in the creative industry who are classified as independent contractors are excluded from a number of important employment benefits and job protections. As independent contractors, they are exempted from or ineligible for minimum wage and overtime pay, workers’ compensation, unemployment compensation, a number of anti-discrimination protections, and the right to organize and bargain collectively. When a creative worker is classified as an independent contractor they risk losing “the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect the workers’

¹ The Creative Economy, 2020 Otis Report on the Creative Economy, p.8.

² Creative industries/sectors as defined by the 2020 Otis Report are: (1) Architecture and Related Services; (2) Creative Goods and Products; (3) Entertainment & Digital Media; (4) Fashion; (5) Fine Arts and Performing Arts.

³ Ibid at 13.

⁴ Ibid at 22.

⁵ Ibid at 65.

health and welfare.⁶” This bill seeks to ensure that workers of small nonprofit performing arts organizations are hired and retained as employees.

According to the author, “Our vibrant arts community drives much of our creative economy. Despite strong community support, neighborhood theaters, operas, symphonies & choirs, have suffered from under-investment and pandemic shutdown impacts. An investment in the arts helps all generations of Californians. In many cases, they introduce young people to the arts and create opportunities for excellent careers with good living wages.”

Committee Comments

As currently drafted, a SPAO is required to submit a harassment policy and a diversity, equity and inclusion policy at *both* the time of grant application and as a condition of receiving the funds. The author may wish in the future to only require submission of these policies at the application/eligibility stage.

Arguments in Support

Actors’ Equity Association, sponsor of the bill, states, “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 [U.S. Bureau of Economic Analysis]. 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.”

Arguments in Opposition

None on file.

Prior Legislation

SB 805 (Rubio) of 2021 would require the Arts Council to establish and administer the California Nonprofit Performing Arts Paymaster program for the purpose of providing low-cost payroll and paymaster services to small nonprofit performing arts organizations. The bill was vetoed by Governor Newsom.

AB 5 (Gonzalez) Chapter 296, Statutes of 2019 codified the decision of the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) that presumes a worker is an employee unless a hiring entity satisfies a three-factor test, and exempted from the test certain professions and business-to-business relationships.

⁶ *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 952.

REGISTERED SUPPORT / OPPOSITION:**Support**

Actors' Equity (Co-Sponsor)
Theatre Producers of Southern California (Co-Sponsor)
5-star Theatricals
Acme Performance Group: DbA Moving Arts
Airedanse Fitness & Arts
Alliance of Desert Theatres
American Guild of Musical Artists
Arts for LA
Artspace INC (Center Stage Theater)
Association of California Symphony Orchestras
Boston Court Pasadena
Boxtales Theatre Company
California Arts Advocates
California Forward Action Fund
California Labor Federation
CASA 0101
Celebration Productions Corporation
Chance Theater
Company of Angels, INC
Desert Ensemble Theatre Company
Dezart Performs
Dramadogs, a Theater Company
Dramatic Women
El Teatro Campesino
Evidence Room Theate Project
Iama Theatre Company
International City Theatre
Jabberwocky Theatre DbA Rogue Machine
Lobero Theatre Foundation
NCRT, INC.
New Los Angeles Repertory Company
Numerous Individuals
OMGArtsplus
Ophelia's Jump Productions
Playwrights' Arena
Rogue Artists Ensemble
Roustabout Theater, INC.
San José Arts Advocates
Santa Barbara French Festival
Santa Barbara Reader's Theater
Sierra Madre Playhouse
Six Individuals With Resurrection Theatre Company
Skylight Theatre Company
Solo Opera
Teatro Visión

The Aresis Ensemble INC.
The Chance Theater
The Fountain Theatre
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 West
Theatrical Producers League of Los Angeles

Opposition

None on file.

Analysis Prepared by: Megan Lane / L. & E. /