

Date of Hearing: June 22, 2021

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT

Ash Kalra, Chair

SB 805 (Rubio) – As Amended May 20, 2021

**SENATE VOTE:** 34-5

**SUBJECT:** Small nonprofit performing arts organizations: payroll and paymaster services  
grants: employment grants

**SUMMARY:** Requires the California Arts Council to establish and administer the California Nonprofit Performing Arts Paymaster for the purpose of providing low-cost payroll and paymaster services to small nonprofit performing arts organizations. Creates the Performing Arts Equitable Payroll Fund to, upon appropriation, award grants for the purpose of enabling these organizations to hire and pay employees at least minimum wage. Specifically, **this bill:**

*AS PROPOSED TO BE AMENDED*

- 1) Defines “council” to mean the Arts Council established pursuant to Section 8751 of the Government Code.
- 2) 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.
- 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 or presentation of performing arts.
- 4) Defines “small nonprofit performing arts organization” to mean a nonprofit performing arts organization with an average adjusted gross revenue equal to or less than one million four hundred thousand dollars (\$1,400,000), except that this amount shall be adjusted every five years based on the California Consumer Price Index as compiled and reported by the Department of Industrial Relations.
- 5) 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, excluding matching funds received pursuant to Section 8753.8 of the Government Code and excluding revenue earmarked by the grantor or donor solely for capital expenditures or any pass-through funds collected for the benefit of another organization that is received during an organization’s tax year.
- 6) Defines “California nonprofit performing arts paymaster” to mean a person or business entity, contracted by the council and an employer that is a small nonprofit performing arts organization or some other qualifying entity, that does all of the following:
  - a) Calculates, processes, and produces wage payments to the employer’s employees under the employer’s federal employer identification number.

- b) Withholds and remits applicable taxes to government agencies using the employer's federal employer identification number.
  - c) Issues federal and state income tax forms to the employer's employees using the employer's federal employer identification number.
  - d) Provides workers' compensation and unemployment insurance administration.
- 7) Requires, upon appropriation by the Legislature, the council to establish and administer the California Nonprofit Performing Arts Paymaster for the purpose of providing low-cost payroll and paymaster services to small nonprofit performing arts organizations. The council shall issue a request for proposals, establish criteria to rate and rank applicants, and award contracts on a competitive basis to two or more nonprofit contractors to provide these services.
  - 8) States that a contract entered into pursuant to 6) above shall require the nonprofit contractor to provide the payroll and paymaster services for at least ten years.
  - 9) Requires, upon appropriation by the Legislature, the council to provide a selected nonprofit contractor with a grant award in an amount necessary to fund the initial startup costs of providing payroll and paymaster services pursuant to this section.
  - 10) Authorizes a nonprofit contractor providing payroll and paymaster services pursuant to this section to charge a fee, as specified, to a small nonprofit performing arts organization that receives those services.
  - 11) Requires a selected nonprofit contractor to submit an annual report to the council by July 31 of each year that includes information about the number of nonprofit performing arts organizations served and the costs associated with providing the services from the preceding fiscal year.
  - 12) Authorizes the council to adopt regulations for the purpose of establishing and administering the above provisions.
  - 13) Creates the "Performing Arts Equitable Payroll Fund" within the State Treasury. Upon appropriation by the Legislature, the council shall 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 and pay employees at least minimum wage.
  - 14) Subjects small nonprofit performing arts organizations to reporting requirements upon application for a grant, including budget size, venue size, number of employees, and number of independent contractors.
  - 15) Requires a small nonprofit performing arts organization to include in its application a certification providing that funds shall only be used for the purposes of an organization's compliance with Chapter 38 of the Statutes of 2020 regarding the classification of employees and independent contractors.

- 16) Requires the council to award a grant to small nonprofit performing arts organizations in amounts pursuant to a matching schedule that is based upon adjusted gross revenue ranging from twenty-five thousand dollars (\$25,000) or less to one million four hundred thousand dollars (\$1,400,000).
- 17) States that nothing in the above provisions shall change a small nonprofit performing arts organization's status or its obligations as an employer under Chapter 38 of the Statutes of 2020.

**EXISTING LAW:**

- 1) Establishes, under the Dixon-Zenovich-Maddy California Arts Act of 1975, the Arts Council in order to, among other things, encourage artistic awareness, participation, and expression, help independent local groups develop their own art programs, promote the employment of artists and those skilled in crafts in both the public and private sector, award prizes or direct grants to individuals or organizations, as specified, and establish grant application criteria and procedure.
- 2) Provides that the Arts Council is comprised of 11 members of which the Speaker of the Assembly and the Senate Rules Committee shall each appoint one member to represent the general public and the Governor shall appoint the remaining nine.
- 3) Provides that the Arts Council shall meet at the call of the chairperson no more than eight times each calendar year.
- 4) 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 Committee on Appropriations, the bill's fiscal parameters are not identified in the current version of the bill. Specifically, it does not specify the size of the grant program related to paying minimum wage to small nonprofit performing arts organizations staff, nor does it set the size of the Paymaster, thereby creating General Fund cost pressures, likely to be minimally in the millions of dollars over several years.

The California Arts Council indicates that it does not have the administrative capacity to implement the provisions of the bill. Consequently, it would require staff to manage and administer this program as proposed. The specific increase in staffing needs would depend on the size of the grant program.

**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."<sup>1</sup>

Creative industries<sup>2</sup> 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.<sup>3</sup> Specifically, in the Fine and Performing Arts industry, thirty percent of the workforce in 2017 was made up of contract workers.<sup>4</sup> In addition, the number of independent contractors in this industry grew by 48% from 2008 to 2017.<sup>5</sup> Notably, it is also one of the lowest paying creative industries along with the Fashion sector.

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' health and welfare."<sup>6</sup>

This bill seeks to address the employment status of workers in small nonprofit performing arts companies. Specifically, the intent of the bill, as mentioned by the author, is to ensure the proper classification of these workers by creating a statewide payroll and paymaster service as well as by establishing a sliding scale grant based program to assist with employee-associated payroll costs. The payroll grants provided in the bill are conditioned upon key applicant reporting requirements, such as budget size, venue size, and relevant workforce data.

According to the author, "This bill will create a critical funding infrastructure to help assist our small nonprofit performing arts companies (SNPAC) known as the "California Nonprofit Performing Arts Paymaster" which will provide low-cost payroll and paymaster services to SNPACs and establish the Performing Arts Equitable Payroll Fund to ensure that SNPACs can pay all workers' minimum wage.

California has historically lacked investment within the arts and unlike regular small organizations; SNPACs are 501(c)(3) charitable organizations established to bring culture, arts and education to all communities.

SNPACs contribute enormously to the economic growth, social well-being and cultural vitality of the local communities they serve.

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<sup>1</sup> The Creative Economy, 2020 Otis Report on the Creative Economy, p.8.

<sup>2</sup> 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.

<sup>3</sup> Ibid at 13.

<sup>4</sup> Ibid at 22.

<sup>5</sup> Ibid at 65.

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

Current operating costs are insufficient to allow SNPACs to pay all workers minimum wage. SB 805 is critical to help SNPACs create and preserve job opportunities for performers and people in the performing arts sector, particularly workers in marginalized communities.”

### **Arguments in Support**

The Victory Theatre states in support, “For the past 18 months, performing arts producers, creative workers, and arts advocacy organizations have been engaged in urgent dialogue with legislators, artist labor unions and each other to try to find a sustainable path forward in the wake of the pandemic and the new administrative and financial challenges of AB5. Senate Bill 805 represents, we believe, the best possible outcome of those conversations. It is bold transformational legislation, rising to the urgent demands of labor, providing relief to thousands of artists in the form of meaningful jobs, sustaining our small performing arts organizations, and answering the call for greater equity and inclusivity in the arts...”

SNPACs do not have full control over the size of their workforce, generally needing to hire dozens of creative workers to present each season. They serve their communities and choose seasons based on the stories that resonate with and reflect the community, the artists, and the social context of the times. For example, the size of cast, the need for designers, choreographers etc. is dependent upon the playwright and requirements of the story/production. Small nonprofit theaters serve as incubators for playwrights, actors, designers, directors and other artists. They have historically provided networking opportunities and mentorship for BIPOC artists facilitating connections necessary for career advancement and providing performance experience that helps to open doors to work in larger, less accessible companies.”

### **Arguments in Opposition**

The California Labor Federation is in an opposed unless amended position and states, “We recognize the importance that small performing arts companies play in our communities, not only to promote cultural diversity, but as an opportunity for individuals to begin careers in the performing arts. There is no disagreement of the need to support these critical institutions, particularly following the pandemic; however, we believe the workers at SNPACs deserve this support as well. Regrettably, despite several meetings with the author’s office and stakeholders, we have made little progress to ensure this bill uplifts these essential workers.

We request the committee not support this bill unless the following amendments are agreed to:

**Employment Status** – As introduced, SB 805 began as a bill to require nearly all small theater employees to become independent contractors. Unlike other AB 5 exemption bills, SB 805 would have forced these workers to become their own business via legislative fiat. While we appreciate the move away from that misguided concept, the author has thus far refused to clarify that these workers remain employees of the performing arts organization. Given the origins of the bill, it is deeply troubling that this issue remains unresolved.

**Partnering with Workers** – As mentioned earlier, we view SB 805 as an opportunity to not only uplift important cultural institutions, but also the workers that make these small performing arts organizations so critical. We recognize that the paymaster proposed in SB 805 will likely be unable to provide these services to all eligible SNPACs. Therefore, we are requesting an amendment that would prioritize or give preference to SNPACs that have

entered into collective bargaining agreements. There are many SNPACs throughout the state that have entered into agreements and demonstrated a commitment to high-road employment well before the prospect of receiving taxpayer funded services. To be clear, we are not suggesting that a CBA be a prerequisite to receive services under SB 805, and we remain open about how applications from SNPACs with CBAs could be prioritized. However, to date, the author has been unwilling to seriously consider this concept.

Additional Reporting Information – We have requested an amendment to SB 805 to require some basic information from any SNPAC seeking paymaster services. We have been mindful not to impose burdensome and onerous requirements on these SNPACs. Specifically, we are asking SNPACs to include the following information:

- Venue size of the SNPAC (if applicable).
- Annual budget of SNPAC.
- Number of employees of the SNPAC.
- Recent workplace Safety History of the SNPAC.
- Number of independent contractors (if applicable).
- Do they have a diversity, equity, and inclusion policy and for how long has it been in place?"

### **Related and Prior Legislation**

AB 1227 (Levine) would exempt from the 3-part ABC test for employment status seasonal live theater workers. The measure is pending in this Committee.

AB 5 (Gonzalez) Chapter 296, Statutes of 2019, codifies 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 exempts from the test certain professions and business-to-business relationships.

### **REGISTERED SUPPORT / OPPOSITION:**

#### **Support**

24th Street Theatre  
About...productions  
Acme Performance Group: DbA Moving Arts  
Actors Co-op Theatre Company  
Anaheim Ballet  
Artists At Play  
Arts Orange County  
Asian Pacific Americans Friends of The Theater  
Boston Court Pasadena  
Breath of Fire Latina Theater Ensemble  
California Arts Advocates  
Casa 0101  
Celebration Productions Corporation  
Chicanas, Cholas, Y Chisme Theater Collective  
Circle X Theater Company

Claremont Chamber of Commerce  
 Coin & Ghost Theatre Company  
 Company of Angels, INC  
 Cornerstone Theater Company, INC.  
 Dezart Performs  
 Donna Morong Casting  
 El Teatro Campesino  
 Ferocious Lotus Theatre Company  
 Foolsfury Theater  
 Iama Theatre Company  
 Impro Theatre  
 Infinite Jest Theatre Company  
 Jabberwocky Theatre DbA Rogue Machine  
 Numerous Individuals  
 Odyssey Theatre Foundation  
 Ophelia's Jump Productions  
 Playwrights' Arena Theater  
 Rogue Machine Theatre  
 Sacred Fools Theater Company  
 San José Arts Advocates  
 Several: Theatre Bay Area, Neighborhood Stories, Bay Area Womens Theatre Festival  
 Sierra Madre Playhouse  
 Skylight Theatre Company  
 South Valley Civic Theatre  
 Svcreates  
 Teatro Visión  
 The Chance Theater  
 The Fountain Theatre  
 The Group Repertory Theatre  
 The Inkwell Theater  
 The Latino Theater Company  
 The New American Theatre  
 The Open Fist Theatre Company  
 The Robey Theatre Company  
 The Sacred Fools Theater  
 The Victory Theatre  
 Theatre Bay Area  
 Theatre of Note  
 Theatre West  
 Theatrical Producers League of Los Angeles  
 Towne Street Theatre  
 Watts Village Theater Company  
 Westside Council of Chambers of Commerce (WC3)

### **Oppose**

Alameda Labor Council  
 California Iatse Council  
 California Labor Federation, Afl-cio

Entertainment Union Coalition

Iatse Local 107

Iatse Local 119

Iatse Local 122

Iatse Local 134

Iatse Local 16

Iatse Local 33

Iatse Local 50

Iatse Local 784

Iatse Local 874

Iatse Local B18

Iatse USA 829

San Francisco Building and Construction Trades Council

San Francisco Labor Council, Afl-cio

The Pkg Project, INC.

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