

Date of Hearing: June 21, 2021

ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, AND
INTERNET MEDIA

Sharon Quirk-Silva, 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: This bill would task the California Arts Council with the creation and administration of a California Nonprofit Performing Arts Paymaster for the purpose of providing low-cost payroll services to small nonprofit performing arts organizations, as defined. Specifically, **this bill:**

- 1) Contains the following definitions:
 - a) “Nonprofit performing arts organization” means 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.
 - b) “Small nonprofit performing arts organization” mean as nonprofit performing arts organization with an average adjusted gross revenue (AGR) equal to or less than \$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.
 - c) “Adjusted gross revenue” means 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 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.
 - d) “Capital expenditures” means funds used by a company to acquire, up-grade, and maintain fixed assets such as property, plants, buildings, technology, or equipment.
- 2) Authorizes the council, upon appropriation of the Legislature, to establish and administer the California Nonprofit Performing Arts Paymaster for the purpose of providing low-cost payroll services to small nonprofit performing arts organizations.
- 3) Establishes a process by which the council will award a contract to a nonprofit contractor to provide low-cost payroll and paymaster services. This includes an annual report to the council each year on July 31 which details the organizations receiving services, an agreement to provide services for at least 10 years and a cap on the amount the contractor may charge for their services.
- 4) Establishes the Performing Arts Equitable Payroll Fund within the State Treasury. Upon appropriation, the council shall establish and administer a grant program to enable small

nonprofit arts organizations to hire and pay employees minimum wage according to the following awards schedule:

- \$0-25,000 AGR -- the lesser of 4.5 times payroll contributions or \$25,000.
- \$25,000-\$50,000 AGR -- the lesser of 4.5 times payroll contributions or \$50,000.
- \$50,000-\$75,000 AGR -- the lesser of 4.25 times payroll contributions or \$75,000.
- \$75,000-\$100,000 AGR -- the lesser of 4.25 times payroll contributions or \$100,000.
- \$100,000-\$150,000 AGR -- the lesser of 4 times payroll contributions or \$150,000.
- \$150,000-\$200,000 AGR -- the lesser of 4 times payroll contributions or \$200,000.
- \$200,000-\$250,000 AGR -- the lesser of 4 times payroll contributions or \$250,000.
- \$250,000-\$350,000 AGR -- the lesser of 3.75 times payroll contributions or \$280,000.
- \$350,000-\$450,000 AGR -- the lesser of 3.5 times payroll contributions or \$350,000.
- \$450,000-\$550,000 AGR -- the lesser of 3 times payroll contributions or \$375,000.
- \$550,000-\$650,000 AGR -- the lesser of 2.5 times payroll contributions or \$375,000.
- \$650,000-\$750,000 AGR -- the lesser of 2 times payroll contributions or \$350,000.
- \$750,000-\$850,000 AGR -- the lesser of 1.5 times payroll contributions or \$300,000.
- \$850,000-\$1,000,000 AGR -- the lesser of 1 times payroll contributions or \$225,000.
- \$1,000,000-\$1,200,000 AGR -- the lesser of .5 times payroll contributions or \$135,000.
- \$1,200,000-\$1,400,000 AGR -- the lesser of .25 times payroll contributions or \$80,000.

- 5) Requires that the categories of organizations based on adjusted gross revenue be adjusted every five years based on the California Consumer Price Index, as reported by the Department of Industrial Relations.
- 6) Makes various legislative findings and declarations.

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 California Arts Council with the following duties:

- a) Encourage artistic awareness, participation and expression.
- b) Help independent local groups develop their own art programs.
- c) Promote the employment of artists and those skilled in crafts in both the public and private sector.
- d) Provide for the exhibition of art works in public buildings throughout California.
- e) Enlist the aid of all state agencies in the task of ensuring the fullest expression of our artistic potential.
- f) Adopt regulations in accordance with the provisions of the Administrative Procedure Act necessary for proper execution of the powers and duties granted to the council by this chapter.
- g) Employ such administrative, technical, and other personnel as may be necessary.
- h) Fix the salaries of the personnel employed pursuant to this chapter which salaries shall be fixed as nearly as possible to conform to the salaries established by the State Personnel Board for classes of positions in the state civil service involving comparable duties and responsibilities.
- i) Appoint advisory committees whenever necessary. Members of an advisory committee shall serve without compensation, but each may be reimbursed for necessary traveling and other expenses incurred in the performance of official duties.
- j) Request and obtain from any department, division, board, bureau, commission, or other agency of the state such assistance and data as will enable it properly to carry on its power and duties.
- k) Hold hearings, execute agreements, and perform any acts necessary and proper to carry out the purposes of this chapter.
- l) Accept federal grants, for any of the purposes of this chapter.
- m) Accept only unrestricted gifts, donations, bequests, or grants of funds from private sources and public agencies, for any of the purposes of this chapter. However, the council shall give careful consideration to any donor requests concerning specific dispositions.
- n) Establish grant application criteria and procedure.
- o) Award prizes or direct grants to individuals or organizations in accordance with such regulations as the council may prescribe. In awarding prizes or directing grants, the council shall notify the offices of the legislators in whose district the recipient resides.
- p) Have the authority to appoint peer review panels whenever necessary. Each member of a peer review panel may, at the discretion of the council, receive a per diem and honorarium for each day of service and be reimbursed for necessary travel and other expenses incurred in the performance of official duties.
(Government Code §8751 & §8753).

4) Prohibits the CAC from making any grants or fund any program which has not been established pursuant to the powers granted to it by the Government Code. (Government Code §8753.5).

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:

- 1) *Author and supporter's statement of need for legislation: to provide relief from financial burden of complying with AB 5 for small nonprofit performing arts companies.* 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. 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."

California Arts Advocates supports AB 805, stating it is "an innovative solution to address the impact of AB 5 on small nonprofit performing arts companies (SNPAC), who act as incubators and onramps for emerging performing arts workers particularly in traditionally underserved and under resourced communities. Our goal is to see arts workers valued for their significant contributions and for there to be corresponding investment to pay arts workers a living wage." Homeboy Industries, adds in their support, "SB 805 is critical to help SNPACs create and preserve job opportunities for people in the performing arts sector, particularly workers in marginalized communities. These small nonprofit theatres contribute enormously to the economic growth, social well-being and cultural vitality of the local communities they serve."

- 2) *Opposition: three outstanding issues with current version of SB 805.* Most opposition stakeholders applaud the decision to move the bill's provisions away from an ABC test exemption and towards a payroll grant program. But implementation issues remain. As the California IATSE Council (CIC) writes in opposition to SB 805 unless the bill is amended to ensure "it lifts up and protects workers in small nonprofit performing arts companies (SNPACs)," saying, "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. Our members, who work in live theater, have been particularly hard by the Pandemic—out of work for over 16 months and even now only slowly able to return. We strongly believe that funding can't be fully divorced from how workers in these smaller performing arts organizations are treated; after all they are the foundation that

brings a theater to life. Regrettably, despite several meetings with the author's office and stakeholders, we have made little progress to ensure this bill uplifts these essential workers.”

Opposition at this point have sought clarifying language that theaters would still be the employers of any people working in the theater, rather than a payroll company in charge of payroll services. Labor stakeholders have also requested language that would grant a preference to SNPAC grant applicants with a collective bargaining agreement in place and require the CAC to collect and report data on the grant recipients and workforce composition of those grant recipients.

- 3) *Committee comment: The author and opposition seem close to agreement on most outstanding issues.* The author has agreed to address the employer of record issue and CAC data collection. One issue remains outstanding, whether a state agency may give a preference to a grant application based on their having a collective bargaining agreement.

As noted above, Labor advocates recognize that the paymaster proposed in SB 805 will likely be unable to provide these services to all eligible SNPACs. Therefore, they are requesting an amendment that would prioritize or give preference to SNPACs that have entered into or determine they will enter into collective bargaining agreements. The author reports that she and her staff are working on language in an attempt to also satisfy these concerns.

- 4) *Double referral.* Should this bill pass out of this Committee, it will be re-referred to the Assembly Committee Labor and Employment. Due to the Covid 19 truncated committee hearing schedule, there is not time between our hearing June 21, 2021 and the scheduled hearing of the Labor Committee on June 22, 2021, for any amendments to be processed through the Arts, Entertainment, Sports, Tourism and Internet Media Committee.
- 5) *Prior and related legislation.*
 - a) AB 2257 (Gonzalez), Chapter 38, Statutes of 2020, A follow up measure which clarified existing exemptions under AB 5 the ‘ABC’ employment test and added youth sports coaches, specialized performers teaching master classes, appraisers, and insurance field services, as specified, and strikes the existing limitations on the referral agency language, as specified.

In relevant part, AB 2257 provided that the ABC test and Dynamex do not apply, and instead the Borello test applies, to the following occupations: Recording artists, as specified; songwriters, lyricists, and composers; Managers of recording artists; Record producers; Musical engineers and mixers engaged in the creation of sound recordings; Musicians engaged in the creation of sound recordings as provided; Vocalists as provided; Photographers working on recording photo shoots, album covers, and other press and publicity purposes; Independent radio promoters; Any other individual engaged to render any creative, production, marketing, or independent music publicist services related primarily to the creation, marketing, promotion, or distribution of sound recordings or musical compositions, unless otherwise stated in the terms and conditions of any current or future collective bargaining agreement or agreement between the applicable and respective parties, in which case those terms and conditions shall govern.

- b) AB 5 (Gonzalez), Chapter 296, Statutes of 2019 codifies the 2018 *Dynamex* decision, requiring that employers prove that their workers can meet a 3-part (ABC) test in order to be lawfully classified as independent contractors.

REGISTERED SUPPORT / OPPOSITION:

Support

24th Street Theatre	Open Fist Theater Company
About...Productions	Ophelia's Jump Productions
Acme Performance Group: DBA Moving Arts	Playhouse Merced
Actors Co-op Theatre Company	Playwrights' Arena
Altadena Arts	Playwrights' Arena Theater
Anaheim Ballet	Plotline Theatre Company
Artists at Play	Rogue Machine Theatre
Arts Orange County	Sacred Fools Theater Company
Asian Pacific Americans Friends of the Theater	San José Arts Advocates
Boston Court Pasadena	Sierra Madre Playhouse
Breath of Fire Latina Theater Ensemble	Skylight Theatre Company
California Arts Advocates	Skypilot Theatre Company
Casa 0101	South Bay Musical Theatre
Celebration Productions Corporation	South Valley Civic Theatre
Chicanas, Cholas, Y Chisme Theater Collective	Svcreates
Circle X Theatre Co.	Teatro Visión
Claremont Chamber of Commerce	The Chance Theater
Coin & Ghost Theatre Company	The Fountain Theatre
Company of Angels, INC	The Group Repertory Theatre
Cornerstone Theater Company, INC.	The Inkwell Theater
Dezart Performs	The Latino Theater Company
Donna Morong Casting	The New American Theatre
El Teatro Campesino	The Open Fist Theatre Company
Ferocious Lotus Theatre Company	The Robey Theatre Company
Foolsfury Theater	The Sacred Fools Theater
Homeboy Industries	The Victory Theatre
Iama Theatre Company	Theatre Bay Area
Impro Theatre	Theatre of Note
Infinite Jest Theatre Company	Theatre West
Jabberwocky Theatre DbA Rogue Machine	Theatrical Producers League of Los Angeles
Los Altos Stage Company	Town Hall Theatre Company
Novato Theatre Company	Towne Street Theatre
Odyssey Theatre Foundation	Watts Village Theater Company
	Westside Council of Chambers of Commerce (WC3)

Opposition

Alameda Labor Council
 California IATSE Council
 California Labor Federation, AFL-CIO

Entertainment Union Coalition (UNREG)

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 PGK Project, INC.

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