AB5 and the Arts Sector
Presented by Julie Baker, Executive Director
CFTA/CAA
California Arts Advocates (CAA), a nonprofit 501c(4) organization founded in 1996, and Californians for the Arts 501c(3), est. 2007, are the only comprehensive, multidisciplinary organizations focused on advancing and building public awareness of the value and impact of arts, culture and creativity across California.

With over 15,000 active subscribers and hundreds of members representing thousands of artists and arts and cultural organizations, we take on opportunities and challenges that no single organization or artist can represent alone. Our mission is to ensure that the arts are accessible to all Californians; are an ongoing part of the public dialogue and to encourage Californians to care about the arts as a critical component of their own lives and the lives of their communities. We fight for arts resources and policies that benefit our members and all residents of California.
BACKGROUND

• California Arts Advocates (CAA) is a 501(c)4 organization with a 24 person board, Executive Director and a lobbyist Jason Schmelzer, Partner in Shaw Yoder Antwih, Schmelzer & Lange

• In 2019-20, CAA worked with Senate Labor and several legislators for exemptions to be included in AB5 for workers providing services to the arts and creative sector

• In July we learned our more broad exemption language for all “Performing Artists” was rejected and “Fine Artists” was included

• “Fine Artists” is not defined in the bill and remains subject to interpretation at this time.
CFTA - Advocacy

BACKGROUND

• Californians for the Arts (CFTA) is a 501©3 organization with a 24 person board and Executive Director. Our mission is to build public awareness for the arts and advocate for legislation and public funding that supports the arts industries.

• Over the last year, CFTA has worked to educate the field about the consequences of AB5 and to educate legislators on how the arts do not fit into a one size fits all business model. We have created a template for the field to send letters to Representatives.

• CFTA continues to educate the field about compliance with AB5 in workshops and contribution to a white paper and a comprehensive section on our website with resources and gathers ongoing data through a survey to determine the impact of AB5.

• CFTA produces Arts, Culture & Creativity Month. This year to include a Cross-sector Convening in April, with professional development opportunities and advocacy workshops to support the field, and Advocacy Day on April 15.
On April 30, 2018, the California Supreme Court issued its opinion in Dynamex Operations West Inc. v. Superior Court, which retroactively changed the test for determining whether an individual is an employee or independent contractor within the state of California.

The Court adopted the “ABC Test,” under which workers are presumed to be employees unless all three of the following conditions are met.
Background

What is ABC Test?

(A) The individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

(B) The service is performed outside the usual course of the business of the employer; and,

(C) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.
Background

How Does ABC Test Affect Arts Professionals and What Clarifications are Needed
(excerpted from Sara Boyns of Fenton + Keller presentation 1/24/20)

1) You may be an employee; you may be an employer; you may be both. The statutory default is to define all workers as employees. It is up to the hirer to prove that a worker is correctly classified as an independent contractor.

1) Factors B and C are the most difficult for businesses to prove.
• Factor B- The service provided has to be “outside the usual course” of the hirer’s business. The statute does not provide guidance on how “the usual course of business” is defined. For example, does the hirer’s mission statement define its usual business? Does the service have to generate revenue for it to be a part of the usual course of business?

• Without guidance regarding how to define what is within a business’s “usual course of business,” this factor will be determined on a case by case basis.
• Factor C- The worker has to be “customarily engaged in an independently established trade, occupation, profession, or business” as the service the worker is being hired to perform.

• The statute does not define “customarily” and does not state if the worker merely needs to hold themselves out as available to perform services for others; or if the worker actually has to perform the same services for others. It also does not state whether the worker has to form a business entity to meet this requirement.
Background

What is AB5?

- Assembly Bill 5 (AB5) authored by Assm. Lorena Gonzalez codified the ABC test and expanded definition to include all rights and protections such as workmen’s comp, unemployment insurance, labor laws and wage claims.

- AB5 went into effect as State Law on January 1, 2020.

- The Division of Labor Standards Enforcement estimates that the misclassification of workers results in an estimated annual loss of $7 billion per year in payroll tax revenue to the state, that otherwise could have supported General Fund programs for public safety, education, and public infrastructure. (Author’s Fact Sheet)
Background

Exemptions

• AB5 also included professions which are exempt if they meet certain criteria, from ABC test and default to the existing Borello (1989 decision) test, a 11+ point checklist which determined the control over the means and manner of performing contracted work, and additional secondary factors, such as who provides work tools and the individual’s opportunity for profit or loss, to determine contractor status. Note: Be sure your IC’s satisfy Borello!
WHAT EXEMPTIONS IN AB-5 CURRENTLY APPLY TO NONPROFIT ARTS AND CULTURE ORGANIZATIONS?

AB5 exempts a number of “professional services” from the requirement to satisfy the ABC test, including:

- Freelance writers
- Grant writers
- Graphic designers
- Marketing
- Photographers
- Human resources administrators
- Fine artists
“Fine Artists” Exemption – No definition in AB5
(excerpted from Sara Boyns, Esq. of Fenton + Keller presentation 1/24/20)

It remains to be seen how the Legislature, enforcement agencies, and courts will define this term. The Federal Bureau of Labor Statistics defines a fine artist as one who “...uses a variety of materials and techniques to create art for sale and exhibition.”

For purposes of determining exemptions from certain wage and hour laws, the California Industrial Welfare Commission Wage Orders define an employee working in a “learned or artistic profession” as performing work that is original and creative in character in a recognized field of artistic endeavor that depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the above work; and that is predominantly intellectual and varied in character and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.
There is no definition of fine arts, it was intentionally broad. If the labor commissioner has put that out we will continue to work on refining next year. We will continue to work with organizations to make changes to the law to protect workers and the arts.
Business to Business Exemption
(excerpted from Sara Boyns, Esq. of Fenton + Keller presentation 1/24/20)

Requires a “bona fide business-to-business contracting relationship.” If a business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation (“business service provider”) contracts to provide services to another such business (“contracting business”), the Borello test will apply if the 11+ requirements of the business-to-business exemption are met.

The requirement that is most difficult to satisfy for many businesses is the one that requires that the services are provided to the contracting business’s business, not the customers of that business. So in most arts settings, the performers or artists will be providing services to the audience (“customers”), not directly to the hiring business, and the business-to-business exemption will not apply.
A note on “Honorariums”  
(from Sara Boyns, Esq. of Fenton + Keller)

An analysis of definitions of honorariums in statutory law (though all in the context of judges, people political office, or government employees accepting payments for services), reveals that term is defined as a gratuitous payment or a symbol of thanks for the person’s service, rather than remuneration.

If this is the case, AB5 would likely not apply because the parties would not be entering into a relationship for remuneration, which is what is contemplated under AB5. (See Cal Lab Code § 2750.3(a).) So it would be important to carefully word the arrangement regarding the honorarium so it is characterized as a gratuitous payment or a symbol of thanks.
Background

I Can’t Meet the ABC Test and None of The Exemptions Apply- What are My Options?
(excerpted from Sara Boyns, Esq. of Fenton + Keller presentation 1/24/20)

1. Convert all or some workers to employee status- The safest approach is to convert all workers to employees. Set up or add workers to payroll, workers compensation insurance, provide sick leave and other benefits, provide sexual harassment prevention training, and comply with all other obligations of an employer in California.

2. Hire through a hiring agency or third party. This does not eliminate all risk due to joint employer liability. However, it can minimize liability with proper practices and safeguards in place.

3. Continue to classify workers as independent contractors and see how it plays out this year. “Clean up” legislation (AB 1850 and others) are pending this legislative session that may provide additional exemptions and clarification.
AB5 NEXT STEPS

- As of 2/21, there are 26 pieces of legislation introduced to repeal or amend AB5 including AB 1850, Gonzalez(D) follow up/clarifying AB5; AB1928, Kiley(R) Repeal AB5; SB 881 Jones(R), exempt musicians; SB 1039, Galgiani (D), create a 3rd classification of independent workers; SB 1236, Stern (D), placeholder.

- Timeline: 8/21/20 last day to amend bills on the floor, 9/30 Governor veto or signs.
Background

EXEMPLARY FROM USA TODAY 1/21/2020-

For other industries, lawmakers are still considering changes to the law. Along with clarifying certain provisions, legislators are planning new language for musicians and the entertainment industry amid growing concerns over whether artists will be cast as employers under the new law, and be unable to work with the teams of people typically involved in production.

“We always knew we would have to come back and provide some clarity on musicians,” Gonzalez said, explaining that the language lawmakers hoped to include in the bill on the sector didn’t make it due to a breakdown in talks between the music industry and the entertainment unions.

“We are still waiting for compromise language between the two groups, but whether they come to compromise or not we are going to have to put something in there to protect musicians but also allow them to operate in their course of business,” she added.
Why this is Urgent

• Many seasons and programs are already announced but they may not be in compliance with the ABC test. In order to continue programs, new funds are needed to cover the increase in expenses.

• There are weekly reports of Programs and organizations either closing or reducing/ceasing programs.

• Artists who want to remain freelancers/independent contractors need access to tools and resources to create a business which may allow them to continue independently. (law is also unclear on best way to manage this for the arts sector)

• Many smaller budget arts organizations have never managed employees and lack the tools and expertise needed to make the transition, Adhering to the law is confusing and professional guidance is needed.
Why this is Urgent

Excerpted statement from the Executive Director Solo Opera, San Francisco

“Our budget is under $100,000 and after consulting 2 employment attorneys we found in order to comply with the new law, it would cost us at least $10,000. We feel there is no choice but to comply through our next upcoming show because we already have so many commitments and contracts out. We are trying to follow the law. But after that we cannot sustain the cost. We will have to go dark. We usually hire about 20-30 independent contractors a year. These include opera singers, designers, directors, musicians, etc. Yearly we serve our community in the following ways: our local parade (thousands), a free Opera in the Park (1000), an opera at theater (between 600-900 depending on how many performances), and also outreach to youth and seniors (100 plus). “
"The mission of Sierra Madre Playhouse is to foster an appreciation of live performance in people of all ages. Our Theater for Young Audiences program, started six years ago, focuses on high-quality experiences for young audiences. Charlotte's Web had 36 confirmed and paid-for bookings for over 2,600 children and 400 teachers and parents. The newly adopted California Assembly Bill 5 (AB-5) changes employee and independent contractor classifications in many ways, some that have yet to be realized. It does not, however, allow for any transition period to adapt to these changes. In the case of Charlotte's Web, the new AB-5 regulations quite unexpectedly added more than $38,000 to the budget of a production planned under previous regulations. The sudden financial impact of AB-5 forced the Playhouse Board of Directors to reluctantly make the difficult decision to cancel this year's Theater for Young Audiences' production of Charlotte's Web."
Why this is Urgent

Excerpted statement from the Executive Director of Rhythmix Cultural Works in Alameda, CA

“Crucial to RCW’s operating budget is the organization’s reliance on foundations, corporate sponsorships and government funding from the California Arts Council. An important criteria for funders is the proportion of our budget used for programs versus administrative costs. In order to implement AB5, RCW’s budget devoted to administrative costs will rise substantially, leaving us with fewer resources to devote to programming. RCW estimates it would have a deficit of approximately $90,000-$100,000 as a direct result of AB5 in its first year.

A deficit operating budget not only jeopardizes RCW’s chances of securing future grants and sponsorships, but if funders and sponsors see that a high percentage of our budget is used for administrative costs, and not programming, the organization’s efficiency would be questioned. This will have a negative impact on our fundraising ability, as the vast majority of foundations and individuals want to see their donations used for programs, and not administrative costs.”
News from the Field

Survey Results—close to 450 respondents

Of the employers

• 88% nonprofit orgs;
• 55% hire more than 20 IC in a year
• 73% AB5 will affect ability to offer programs
• 60% will have to close business or cease to offer certain programs
• About 50% receive funding from CAC

Of the workers

• 62% are IC, 30% both;
• IC: 30% 20+ contracts in a year,
• 43% 1-5 in a year, rest in between;
• 95% feel AB5 will result in less work

Some AB5 Related Facts:

According to the IRS, 38% of employers in the U.S. misclassify workers as independent contractors; so in one out of three cases, the employment classification is wrong.

According to SMU Data Arts Research data set dated October 17, 2019

Number of nonprofits arts organization in CA: 3,391

Number of independent contractors working at the total number of arts organizations: 131,514

Number of total employees working at the total number of arts organizations: 449,900
New Survey Results - over 250 respondents

Of the hiring entities

- 80% nonprofit orgs;
- 81% will reclassify some workers
- 13% reducing programs
- 18% financial impact
- 55% too soon to tell
- 76% do not have the tools/resources to comply

Hybrid: hire and also get hired

- 8% reducing programs
- 16% ceasing programs
- 8% closing organization
- 76% do not have the tools/resources to comply

Of the people being hired

- 41% services no longer needed
- 45%: already suffered a loss in income
- 84% do not have the tools/resources to comply
Conclusion

• We understand the goals of the legislation to end misclassification of workers and support protections and fair pay.

• We also understand the complexities of the arts ecosystem and the financial fragility of many smaller budget tax-exempt organizations who deliver valuable programs and services to their communities.

• We acknowledge that many people in our sector are accustomed to being hired as independent contractors and many choose this path for flexibility, protection of their intellectual property rights and the ability to deduct expenses incurred to produce creative works.
Conclusion

• We also understand that AB5 was not intended to cause harm for the arts and creative sector. As some of the unintended results have been a reduction in programs and work opportunities for our sector, it is important lawmakers are made aware of these circumstances so they can make the appropriate steps to consider the arts and culture sector that contributes so much to our state and local economies and to the quality of life of our communities.
Conclusion

• We’ve encouraged the field to share their stories with their elected officials so lawmakers are clear on the impact of the legislation and what is needed to shift an industry that has traditionally relied on one-third of their workforce to be independent contractors into employees.

• We are aware the was not enough time between Dynamex and AB5 for case law to be determined and there is still much to be clarified in AB5. We encourage lawmakers to take into consideration the arts and culture sector as the corrections bills to AB5 including AB1850 are written.
Conclusion

• We encourage the State and private funders to acknowledge there is a financial and administrative impact, as much as 30-40% increase in expenses, to make the appropriate changes to be in compliance with AB5. There is clear need for funding, technical assistance and resources for the changeover.

• We advocate for California Arts Council to address some of the urgent issues with existing unencumbered monies. We presented at the February 5 CAC meeting and made the following recommendations.
Recommendations

• To address the pressing issues, we respectfully asked CAC to create an emergency grant to provide funds to arts organizations and artists to be in compliance with AB5 including the hiring of consultants for Human Resources management, Employment lawyers, Insurance and more. It is not realistic to expect all of this to come in pro bono support or boards/staff.

• We respectfully asked CAC to create an emergency grant fund to offset immediate costs of increased operating costs for current programs/seasons that have already been announced and budgeted for 2020.
Recommendations

• We suggested the mechanism for funding go through the organizational development grant program and ASAP.
• We suggested the funds range from $5,000-$15,000 (or more!).
• We also recommended a new grant program for general operating support for ongoing funds to aid in the transition and the new cost to do business in order for organizations to continue to deliver valuable programs to communities.

Sign our petition before March 25!
What is our common goal?

• We need increased private & public investment in the arts in order for arts to be accessible for all Californians and to build systems for a sustainable, supported and prospering industry.

• Artists should be valued for their work and there needs to be a paradigm shift from starving artist to thriving artist.

• Arts and culture have been systemically undercapitalized. We need to advocate for significant funding.
We support Governor Newsom’s budget proposal of $10 million in one-time funds, including $9 million for the Cultural Districts program and $1 million for disaster preparedness to protect cultural artifacts.

Both programs are worthy of state investment. The benefits of cultural districts include an increase in property values, tourism, incomes, employment, and turnover. They also create places for educational and social development.
We also support Assemblymembers Gonzalez’s and Smith’s proposal for $20 million to help small community non-profit arts organizations comply with AB 5, however, we respectfully request this funding be ongoing and include increased staffing for the California Arts Council.

Stats...

- California currently ranks 26th among the states in per capita ongoing general fund support for the arts with .71 cents per capita in spending, according to the National Assembly of State Arts Agencies.
Appropriations Overview

➤ From 2003-2014, funding for the arts was $1 million.

➤ Over the last 6 years, we’ve helped to increase funding in California by over eight hundred percent.

2020 BUDGET NEWS: CA receives largest increase in state arts funding in 20 years.
• The historic high for CAC funding was in 2000-01 at $30.7 million. Factoring for inflation, we would need a total of $44.7 million in ongoing funding to match where we were twenty years ago.

• The U.S. Bureau of Economic Analysis reports that in 2016, the arts and culture sector contributed $174.6 billion to California’s economy, representing 7% of the state’s GDP—a larger share of the state’s economy than Construction ($93.3 billion), or Education Services ($24.4 billion).
• The 2020 Otis Report on the Creative Economy states that 2.68 million, or 15.4%, of all jobs in California are in the creative industries, these jobs generate $650.3 billion in annual output. In 2018, non-profit arts sector brought in $5.03 billion in revenue.

• There are over 11,000 non-profit arts organizations in California delivering programs to our state of 40 million people. However, CAC was only able to fund 12% of the total arts organizations in California by June of 2019. There is a funding gap and therefore arts are not equitably available or accessible for all.
• Even before AB 5, many of our small budget non-profit arts organizations were financially fragile and struggling to be sustainable.

• Without these subsidies, arts programs would only be available to those who can afford a high-ticket price or private tuition. Educational and outreach programs without funding cannot be delivered at a low cost or free.
If the State is going to make this an ongoing requirement for our sector, we will need increased and ongoing funding to address the increase in costs.

This is not a one-year problem but an ongoing issue for our sector that a permanent increase for the CAC can help address.
Why we remain hopeful.....

- Arts sector is being seen by the legislature and public. We are being talked about and our value is being discussed.

- More lawmakers are talking about the need for investment in the arts.

- Grassroots advocacy is working. Lawmakers are listening. Media coverage is increasing. Keep it up!

- Advocacy comes in many forms. From the disrupters to the negotiators we need them all! This is a long game...don’t give up, get involved!
What can you do?

• Visit our resource page and complete survey and sign our petition: https://www.californiansforthearts.org/ab-5

• Join our mailing list for latest news and action alerts: http://www.californiansforthearts.org

• Let your elected officials know about the unintended consequences of AB5 on your business or livelihood. See template on our resource page.

• Work with us to advocate for arts to be valued and join us at the arts convening (April 14) and Arts Advocacy Day April 15, 2020

• Support our efforts by joining our organization!

• If non-profit, speak to your funders.
Raise your Voice for the Arts

JOIN US! Contact: Julie Baker, membership@californiansforthearts.org