

Assisting Orchestras, Music-Centered, and Performing Arts Nonprofits

Presented by Californians for the Arts and the Association of California Symphony Orchestras



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ASSOCIATION OF CALIFORNIA
SYMPHONY ORCHESTRAS

Session Goals

- To help orchestras and other performing arts organizations understand the current status of California's employment law and public policy (AB 5 as modified by AB 2257 and Proposition 22)
- Know in what settings the “ABC Test” does not apply
- Develop policy and process plans to determine if a worker is an employee, independent contractor (IC), or volunteer.

Our time is very limited, so...

Stepping Back - What is our Context?

- CA's underlying approach to employment law today is to strive to assure fair treatment of employees
- Remember: for most nonprofits, employment-based issues create the most liability and litigation
- The lack of appropriate policies, non-adherence to policies, and the lack of timely and complete documentation create the greatest difficulties in the employment law area.

Your Multi-Part Task Post AB 5

- CA's starting point: *a worker is an employee unless the employer can prove otherwise - the burden of proof is on the employer!*
- Examine your organization's policy and procedures to review and document ALL current independent contractor or volunteer "hires" as well as new requests
- Update your policies and procedures as needed.
- Fully document all "hires" whether as an employee, IC, or volunteer.
- The determination of worker status controls who pays legally mandated "safety net" taxes (FICA, Medicare, UI, EE, etc.) + the applicability of federal, state, and local wage, hour and working conditions requirements + potential public burden for costs to support the worker and family. Your documentation for IC must make clear the IC's responsibility to pay all employee and employer taxes.

When Do Problems Occur?

- CA has endorsed Dynamex's use of the "suffer or permit" definition, as well as the application of alternative definitions from the IWC wage orders of the term "employ".
- Nothing in this act is intended to diminish the flexibility of employees to work part-time or intermittent schedules or to work for multiple employers.
- Almost all employee/IC/volunteer investigations occur when a worker complains to EDD.
- Whether the worker has been considered a volunteer or IC, the dispute arises when the worker feels they have been treated unfairly

Key to the employer prevailing: appropriate employment policies, including compensation and reimbursement policies, combined with contemporaneous documentation of all "employment" arrangements - regardless of whether the arrangement is for an employee, IC, or volunteer.

The Complications

- Burden of proof is on the employer
- Presumption is that the worker is an employee; the ABC Test is applicable for IC classifications in all IWC Wage Orders.
- AB 5 exempts specified occupations (but places them under the *Borello* test)
- AB 2257 simply says *Borello applies to an identified and limited set of jobs.*

Burden of Proof on Employer

- It is critical to point out that the court's holding clearly places the burden on the hiring entity to meet each ABC test factor in establishing an IC relationship. This burden should serve as a predicate for an employee relationship policy in doubtful compliance situations.
- This means it is the employer that must be able to demonstrate why someone is an IC via a detailed analysis of all 3 parts of the ABC test or other applicable test. If an employer cannot demonstrate this for any part, then the worker is an employee!
- And what is key to demonstrating a worker is an IC - **detailed contemporaneous documentation**
- Same is true of the limited set of jobs for which *Borello* applies

Recap

- **Step 1:** collate all positions your organization uses (with a position description for each)
- All workers can be employees or volunteers; only those positions that meet the ABC Test and/or Borello Test can be an IC
- **Step 2:** determine which position qualify to be an IC
- **Step 3:** comprehensive contemporaneous documentation
- **Step 4:** if you determine a worker is a volunteer, be certain you do not pay the worker (not even a token stipend). You may reimburse the worker for out-of-pocket expenses per policy
- Remember: what the worker wants is not controlling
- Key: follow the law

Key: A Risk Management Philosophy

- Reality – there is some level of risk in every action/decision – including doing nothing. Risk affects the organization's ability to compete, to maintain its financial strength, and to maintain the quality of its products or services. There is no practical way to reduce risk to zero but with appropriate controls in place, risk can be minimized.
- It is the board's responsibility to assure that management has in place an appropriate risk management plan for all facets of the organization. When developing controls (the specific implementation of components of a risk management plan), the organization should consider the amount of risk it considers acceptable. The less risk, the more restricting the control. Too restricting a control will reduce creativity, innovation and experimentation.
- Task – to understand the risk(s) inherent in a given situation (financial, ethical, human relations, public relations, injury to persons or property, etc.) + the value to our organization of the matter at hand + risk reductions strategies (ex: insurance) = what action to take.
- Your fiduciary responsibility: to make all decisions from the perspective of what is in the best interest of your organization – even if not in your personal best interest or your libraries best interest.

How to Exercise Your Fiduciary Responsibilities

- Board: By setting policies for the organization within a risk management framework. This provides your CEO and the management team the parameters for delivery of services and programs.
- Senior Management: by compelling the Board to focus on matters of the highest order and giving you the needed policy & procedures framework.
- Both: By fulfilling the duties listed below and practicing risk management (per the Business Judgment Rule), you accomplish your fiduciary responsibilities.

* Duty of Due Care * Duty of Loyalty * Duty of Obedience

- Voting : (a) Must you/should you consult with ...? (b) Must you/should you follow the direction of others? (c) When is it appropriate to abstain?
- In CA it is the Board that has the legal authority to make decisions, not individual Board members. Boards can delegate most decision-making to management.
- When you act as a senior manager or board member, you no longer act as your private self!

Duty of Care, Defined:

- Duty of Due Care: A director/manager must carry-out his or her duties with the care an ordinary prudent person would take in similar circumstances. (Ex: California Corporations Code Section 5231). The director/manager does not have to always make the “right” decision, but must act with the common sense and judgment of a person making a reasonable decision. To exercise this duty properly a director/manager must be an active participant in the policy development of the organization by attending periodic board meetings, evaluating reports, reading minutes, and reviewing the performance of the chief executive officer. Furthermore a director should make reasonable inquiry into the status of the organization by requesting and receiving sufficient information to enable them to carry out their board member responsibilities. When a problem exists or a report does not make sense on its face, a director has an affirmative duty to inquire into the surrounding facts and circumstances.
- A director’s/manager’s obligation includes a duty to attempt in good faith to assure that an adequate corporate information and reporting systems exist, and failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards. This duty is broad. A director must know not only the finances and investments of the organization, but also have an understanding of the activities and status of the entity as a whole.
- This means that the staff of the organization is under a duty to provide the board with relevant information to fulfill its duties. But while the staff is arguably responsible to provide the board with relevant information to make it possible for the directors to fulfill their duties, directors must assure themselves that this information is being provided in an adequate manner.

Option 1: Volunteers

- If you engage a worker as a volunteer (with full documentation) – you do not need to address AB5, et al
- Any position can be held by a volunteer.
- If you have multiple workers engaged in the same role/position, there can be a mix of volunteers and paid workers. Be prepared for possible problems – if the uncompensated volunteer decides what was agreed to is not fair.
- Volunteers can be reimbursed for out-of-pocket expenses. Key: a contemporaneous writing specifying the individual will be a volunteer, the individual will receive no compensation other than permissible reimbursements – signed off by the volunteer
- Note: if the volunteer's assignment change, there must be a contemporaneous writing so stating
- Note: if the reimbursement policy changes –this must be in writing and shared with the volunteer. You can have a tiered reimbursement policy.
- Terminating a volunteer: as with paid employees, all volunteers do not work out. The employer must maintain the right to end the volunteer arrangement ... but may generate a complaint to EDD

Option 1: Volunteers, *Action Plan*

- Needed action steps
 - a. Have a comprehensive written volunteer policy
 - b. Have a clear, written volunteer form – making clear the individual is not being coerced, that the individual is taking on a given assignment(s) without getting any wages
 - c. The policy and form should clearly state those items for which the volunteer may request to be reimbursed (e.g., mileage, meal allowance, equipment allowance, clothing allowance, out-of-pocket expenses done at the request of the volunteer’s supervisor, etc.)
 - d. The policy and form should state the permissible level of reimbursement
 - e. The policy and form should state the process for requesting a reimbursement
 - f. Both the volunteer and employer should sign the form

Option 1: Volunteers, *Expense Reimbursement*

- The expenses being reimbursed must be directly related to the work or services provided by the volunteer. The IRS doesn't want people to get reimbursed for any personal, family, or other nonbusiness expenses along with their business expenses.
- Setting reimbursement rates: where one exists (EX: IRS mileage reimbursement rate) use this rate. For all other reimbursements, use a rate supported by standard accounting procedures.
- Receipts: the volunteer needs to have written records supporting all reimbursement – otherwise the reimbursement is taxable income and the organization must provide form 1099 at year-end. To avoid the 1099 requirement, the volunteer should be required to provide appropriate receipts, mileage log, etc.
- Per diem: if the organization chooses to provide a daily per diem form of reimbursement, then the organization must do the Form 1099 and the volunteer will have taxable income unless he/she has receipts to support what has been paid by the organization.

Option 1: Volunteers, *Expense Reimbursement*, cont.

- Can an organization set a rate higher than the IRS rate – yes, but the amount in excess of the IRS rate is taxable income.
- See:
<https://www.hawkinsash.cpa/reimbursing-volunteers-tips-to-avoid-negative-tax-consequences/#:~:text=1%20Volunteers%20receive%20an%20advance%20within%2030%20days,outstanding%20balances%20and%20that%20they%20comply%20with%20>
- See:
<https://www.nolo.com/legal-encyclopedia/reimbursing-volunteers-expenses-set-up-an-accountable-plan.html>
- Suggestion: acquire workers compensation insurance for your volunteers.

Option 1: Volunteers, cont

- 1988 Division of Labor Standards Enforcement finding: consistent with California Supreme Court rulings in YMCA and other property tax cases, when a California nonprofit corporation “operates an enterprise like a restaurant, thrift shop or when they contract to provide personal services to businesses, such enterprises are subject to IWC wage orders and volunteers are not permitted.” Note: these enterprises occur in addition to the nonprofits services recognized exempt purpose.
- 2021 Labor Commission Ruling – not appealed through the Courts – that an actor working under Actor’s Equity 99-seat Theater Plan was entitled to minimum wage
- Found Actor not a true volunteer, as Actor was required to work under the plan + Actor “paid” a small stipend (% of the box office receipts).
- One sentence citing 1988 Opinion Letter
- My view; 1988 Opinion Letter is a misinterpretation of California law and violate California public policy.

Worker Paid but at a Discount?

Facts: Worker A wants to be compensated but at a discounted rate. How does this impact things?

- Fact: a stipend is wages
- Cannot be a volunteer – if worker is being paid.
- Employee status: if under appropriate test (most likely ABC Test) the worker is an employee, must at least pay at minimum wage
- Independent Contractor: minimum wage law not applicable.
- An employee can choose to make a donation. But by an action separate from being paid.

Is a Worker an Employee or an IC?

- Step 1: does the ABC test or Borello test apply?
- ABC test applies to all workers covered by a CA Wage Order
- If a worker is not covered by the ABC test or is one of the few positions in AB 2257, then the Borello test applies
- Step 2: "Amusement and Recreation Industry" means any industry, business, or establishment operated for the purpose of furnishing entertainment or recreation to the public, including but not limited to theaters, dance halls, bowling alleys, billiard parlors, skating rinks, riding academies, racetracks, amusement parks, athletic fields, swimming pools, gymnasiums, golf courses, tennis courts, carnivals, and wired music studios.} Indicates ABC test will generally apply
- Note: fact one has an LCC or has operated as a sole proprietor is only of importance in Part C of the ABC test or to meet an AB 2257 exception.
- Union contract exception: if a worker is engaged under a union contract, AB 5 does not apply.

Applying the ABC Test: Employee or IC?

- Part A : Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the terms of the contract for the performance of the work and in fact? (Similar to Borello test)
- Part B : Does the worker perform work that is outside the usual course of the hiring entity's business?
- Part C: Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?
- Precedent: In *Dynamex*, Section III. Background of Relevant California Judicial Decisions (pp. 22-44) the CA-SC goes to great length to review prior decisions to demonstrate the ABC Test is the right vehicle to make employee vs. independent contractor determinations under relevant wage orders. Note: the ABC test is used by two-thirds of the states. (NFBI Guide, p.11)

Lessons to Implement: AB 5 & the ABC Test

- Part A has two sub-factors, both of which must be satisfied: (1) the contract must state that the worker is free from the control or direction of the hiring entity; and (2) actual performance under the contract must evidence such freedom.
- The “what business are you in” question: Only workers integral to your business purpose are covered. How does your Article, Bylaws and Mission statement define your business? (Part B)
- To meet Part C, the employer must be able to demonstrate: The worker must have: 1) made an independent decision to engage in an established business, trade or occupation; in which 2) he/she is customarily engaged; and 3) that the hiring entity can prove it.
- The following steps taken independently by an individual into a business, trade or occupation include:
 - a. Forming a company (e.g., as a sole proprietor, in partnership, or by incorporation or LLC);
 - b. Obtaining and maintaining required licensure;
 - c. Advertising or promoting the business (e.g., website, resume, brochure);
 - d. Maintaining a list of recent clients or customers; and
 - e. Routinely offering services to known or new customers.

The *Borello* Test

- For those workers not covered by the ABC Test, you must apply the Borello Test.
- An employer needs a comprehensive independent contractor agreement form that demonstrates compliance with all components of the ABC test + Borello test.
- As with outsourcing, you must answer the question: is your organization truly ready to give up implementation control of the task(s) to be performed? (Part A)
- The factors of the Borello test are as follows:
 1. Whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result. The Borello Court referred to this as the “principal test” of an employment relationship.
 2. Whether the hiring party has the right to discharge at will, without cause.
 3. Whether the person performing work is engaged in an occupation or business that is distinct from that of the company;
 4. Whether the work is part of the company’s regular business;
 5. Whether the company or the worker supplies the equipment, tools, and the place for the person doing the work;
 6. The worker’s financial investment in the equipment or materials required to perform the work;

The *Borello* Test, cont.

6. The skill required in the particular occupation;
7. The kind of occupation, with reference to whether, in the locality, the work is usually done under the company's direction or by a specialist without supervision;
8. The worker's opportunity for profit or loss depending on his or her own managerial skill (a potential for profit does not include bonuses);
9. How long the services are to be performed;
10. The degree of permanence of the working relationship;
11. The payment method, whether by time or by the job; and
12. Whether the parties believe they are creating an employer/employee relationship.

How Does the *Borello* Test Differ from the ABC Test?

- The main point of difference between the Borello and ABC tests is with Borello test the focus is on employer's control of the process and work by the hiring entity whereas the ABC test provides a predictable set of standards under the presumption that workers are employees. Under the ABC test, the hiring entity's right to control is not the most important factor in determining whether an independent contractor relationship is present, but only one of three required factors.
- Although the Borello test has a greater number of requirements, the ABC test is actually more rigorous for hiring entities with all three prongs required to prove the independent contractor status of workers.

AB 2257: Limited, but Perhaps Important Applicability

- AB 2257 creates a limited set of worker positions for which the Borello test applies
- For musicians in many circumstances – making recordings; bands doing a single engagement event (see sole proprietor slide 30; not associated with orchestras)
- Performing artists for single engagements
- Specialized performers teaching master classes
- A definition of fine artists (essentially visual arts)
- Modification to business to business exemption
- Clarifies relationship of individuals acting as sole proprietors
- Professional services (marketers, graphic designers, grant writers, photographers, photojournalists, videographer, photo editor, freelance writer, translator, editor, copy editor)
- Note: many requires meeting specific criteria.

Single Performance Exception

- Musical group for the purpose of a single-engagement live performance event – employee or IC status governed by Borello, unless:
 - A. The musical group is performing as a symphony orchestra, the musical group is performing at a theme park, or musician is performing in a live musical theater production
 - B. The musical group is an event headliner for a performance taking place in a venue location with more than 1,500 attendees.
 - C. The musical group is performing at a festival that sells more than 18,000 tickets per day.
- Tied to Performance Artist exception (next slide)

Performance Artist Exception

The determination of employee or independent contractor status shall be governed by Borello if:

- An individual performance artist presenting material that is their original work and creative in character and the result of which depends primarily on the individual's invention, imagination, or talent, given all of the following conditions are satisfied:
 - a. The individual is free from the control and direction of the hiring entity in connection with the performance of the work, both as a matter of contract and in fact. This includes, and is not limited to, the right for the performer to exercise artistic control over all elements of the performance.
 - b. The individual retains the rights to their intellectual property that was created in connection with the performance.
 - c. Consistent with the nature of the work, the performer sets their terms of work and has the ability to set or negotiate their rates.

Performance Artist Exception, cont.

- The performer is free to accept or reject each individual performance engagement without being penalized in any form by the hiring entity.
- In all events, the terms and conditions of any current or future collective bargaining agreements or contractual agreements between the applicable labor unions and respective employer shall govern the determination of employment status.
- This subdivision does not apply to an individual participating in a theatrical production, or a musician or musical group as defined in subdivision
- “Individual performance artist” shall include, but is not limited to, an individual performing comedy, improvisation, stage magic, illusion, mime, spoken word, storytelling, or puppetry

Master Class Exception

Added to Professional Services;

- A specialized performer hired by a performing arts company or organization to teach a master class for no more than one week. “Master class” means a specialized course for limited duration that is not regularly offered by the hiring entity and is taught by an expert in a recognized field of artistic endeavor who does not work for the hiring entity to teach on a regular basis.

Fine Artist

Added, definition of “Fine Artist”

- For the purposes of this subparagraph, “fine artist” means an individual who creates works of art to be appreciated primarily or solely for their imaginative, aesthetic, or intellectual content, including drawings, paintings, sculptures, mosaics, works of calligraphy, works of graphic art, crafts, or mixed media.

Sole Proprietorship Exception

1. Neither individual is subject to control and direction by the other, in connection with the performance of the work, both under the contract for the performance of the work and in fact.
2. Each individual has the ability to negotiate their rate of pay with the other individual.
3. The written contract between both individuals specifies the total payment for services provided by both individuals at the single-engagement event, and the specific rate paid to each individual.
4. Each individual maintains their own business location, which may include the individual's personal residence.
5. Each individual provides their own tools, vehicles, and equipment to perform the services under the contract.

Sole Proprietorship Exception, cont.

1. If the work is performed in a jurisdiction that requires an individual to have a business license or business tax registration, then each individual has the required business license or business tax registration.
2. Each individual is customarily engaged in the same or similar type of work performed under the contract or each individual separately holds themselves out to other potential customers as available to perform the same type of work.
3. Each individual can contract with other businesses to provide the same or similar services and maintain their own clientele without restrictions.
 - a. “Single-engagement event” means a stand-alone non-recurring event in a single location, or a series of events in the same location no more than once a week.

B2B Modification

If an individual acting as a sole proprietor, or a business entity formed as a partnership, limited liability company, limited liability partnership, or corporation (“business service provider”) contracts to provide services to another such business or to a public agency or quasi-public corporation (“contracting business”), goes to Borello if:

- The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
- The business service provider is providing services directly to the contracting business rather than to customers of the contracting business. This subparagraph does not apply if the business service provider’s employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses.
- The contract with the business service provider is in writing and specifies the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services.

For Orgs Following CA Wage and Hour Law

Rules addressing exempt vs. non-exempt employees

- Overtime rules
- CA and Local Government minimum wage laws
- Required breaks

See Attachment California Wage and Hour Law (Slide 48)

Independent Contractors

- Key: you have a standard agreement that specifies, among other things: the worker is an independent contractor, engaged to perform the specified tasks, for a specified amount and IC is responsible for all legally required employer and employee taxes (FICA, Medicare, FUTA, Workers Comp, ETT, UI); and document which test has been applied and why this worker meets the applicable test
- What about insurance: a risk management issue – if the IC has workers comp and liability insurance, then your organization has far less risk – including filing complaint with EDD. Note: some nonprofits require a level of insurance and a certificate of insurance. Some nonprofits also have non-cancellation/notice clauses in their IC contract. Lowers the nonprofit's risk.

Independent Contractors, Cont.

- Applying AB5 as amended and/or Borello tests:
 - a. (1) Determine which test is applicable, (2) then calmly apply the test. Safest – apply ABC test as it is the most restrictive.
 - b. Those incorporated – heighten ability to meet ABC or Borello test
 - c. Unions: that one is a Union members is of interest if their employment is under a union contract. Otherwise – not terribly relevant.

What Happens if the Employer Messes Up?

- Individuals and companies that knowingly misclassify their workers as independent contractors may be subject to "a civil penalty of not less than five thousand dollars (\$5,000) and not more than fifteen thousand dollars (\$15,000) for each violation, in addition to any other penalties or fines permitted by law" per California Labor Code section 226.8.

IC Action Plan: Process

- Identify all existing independent contractors and volunteers, as well as all relevant documentation
- Going forward, all requests for engaging an independent contractor must be reviewed per policy – each request must include all required documentation
- Reviewing a request to engage an independent contractor
 - a. Is the work under an IWC Wage Order? If YES,
 - i. Apply, document and follow the ABC Test factors (all must be satisfied)
 - ii. Worker is free from hiring entity work performance control (per contract and in fact);
 - iii. Worker performs work outside hiring entity’s usual course of business; and
 - iv. Worker is customarily engaged in an independently established trade, occupation, or business.
 - b. If worker is not under a Wage Order or included in AB 2257: apply, document and follow other applicable standards (Borello test), and entity policy to determine if worker may be hired as an independent contractor.
- Note: one option is to review each request using the ABC Test
- Establish a standard timeline to review the continued appropriateness of engaging the worker as an independent contractor.
- Have a standard independent contractor agreement addressing all relevant tests and concerns of the State (e.g., who pays for employer taxes, who does the appropriate reporting).

IC Action Plan: Policy

- Collate all existing written policies for independent contractors.
- Enumerate and implement written policies your organization needs. This includes:
 - a. A statement of what business you are in
 - b. Determine the level of risk the organization will take, and then
 - i. Create a statement as to what test the organization will use: one option – use the most restrictive
 - ii. The process for determining whether a worker is an employee or an independent contractor, including who may make the request, who makes the determination
 - c. The required review process
 - d. Consistently adhere to the Policies and Procedures you have developed.

Volunteer Action Plan: Process and Policy

- Simple – mirrors the process for Independent Contractors!
- Employer need not apply any test – but be certain there is NO salary/stipend

Is a Standard Definition of your Business Useful?

- How will this most likely become an issue? Someone who has been an independent contractor or volunteer becomes upset and takes action.
- Were I a CEO, I would want to construct the best scenario – starting point – a mission statement declaring what your business is.
- Excellent resource - California Chamber of Commerce web site – multiple sets of HR material including HR California sub-sit: but must be a member (<https://hrcalifornia.calchamber.com/>)

The \$600 Exception

- If you pay a worker less than \$600 in a given calendar year (this issue here is the worker's fiscal year), the employer need not report (no 1099 form) this payment to EDD or the IRS/SSA.
- As the employer, you should inform the employee that she/he must file an income tax return, it is still required that they include this income.
- But: at least technically, the employee/IC issue is still present.

Role-Specific Questions: Employee or IC?

- Starting point: what is our fact situation? Must look at your specific organization and facts as to this job/worker.
- Some of you have a core function of just doing public performances. Others do this + work with community groups and/or courses/workshops and/or contract with others to perform under your sponsorship...
- Some of you are membership companies
- You are impacted by external entities – e.g., Actors' Equity Association, SAG-AFTRA, other labor organizations
- Means you must use the lens of your situation – so outcome may differ based on how your organization is structured and your mission/core business
- If “hiring” a worker as a volunteer, no need to work through the tests – BUT be certain to fully document..

Worker Engagement Options

- Option 1: is this worker a volunteer? If yes –
 - a. Get signed volunteer agreement
 - b. Possible monetary assistance via Volunteer Reimbursement Policy
- Option 2: is the worker an employee? Eligible to be an independent contractor?
 - a. Assumption: worker is an employee unless the worker qualifies as an independent contractor?
 - b. Assumption: the ABC test applies unless this person falls within one of the AB2257 exceptions
 - c. If AB 2257 exception applies, then must meet the Borello test
- Note: for every worker your organizations needs to have a signed written agreement.
- Note: fact worker has an LLC or has reported taxes as a sole proprietor only a data point in analyzing ABC or Borello test as applicable

Position Analysis: Volunteers with Extra Duties

- Historically, concert masters, section leaders, volunteer musicians taking on special duties (school educational programs) – receiving a stipend
- Option 1: engage as a volunteer – no stipend
- Option 2: employee or independent contractor
- Meet AB 2257 exception? If yes, apply Borello
- Otherwise apply the ABC test based on your facts
 - a. Part A: Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact? Highly likely the answer is NO.
 - b. Part B : Does the worker perform work that is outside the usual course of the hiring entity’s business? Must look to your mission statement, et al. Highly probable the answer is NO.
 - c. Part C: Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity? Even if an actor has an LLC or corporation, this will not be relevant.
- Outcome: only need to “fail” one part of the test and the worker is an employee.

Position Analysis: Paid Workers - Employees or IC?

- Historically, music director/conductor, assistant conductor, librarian/assistant librarian, and musicians: usually part-time and may work for multiple orchestras
- Option 1: engage as a volunteer – no stipend
- Option 2: employee or independent contractor
 - a. Meet AB 2257 exception? If yes, apply Borello
 - b. Otherwise apply the ABC test based on your facts
 - i. Part A: Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact? Highly likely the answer is NO.
 - ii. Part B : Does the worker perform work that is outside the usual course of the hiring entity’s business? Must look to your mission statement, et al. Highly probable the answer is NO.
 - iii. Part C: Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity? Even if an actor has an LLC or corporation, this will not be relevant.
- Outcome: only need to “fail” one part of the test and the worker is an employee.

Position Analysis: Short Term Staff

- Historically, music festival production staff (site manager or crew, etc.) front of house staff, festival clean-up/setup staff, housing coordinator, other production staff (videographer, audio engineer, stage manager, lighting designer), guest professional music coach/lecturer, orchestra musician who coach/teach youth musician, musicians who judge competitions, etc.
- Option 1: engage as a volunteer – no stipend
- Option 2: employee or independent contractor
 - a. Meet AB 2257 exception? If yes, apply Borello
 - b. Otherwise apply the ABC test based on your facts
 - i. Part A: Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact? Highly likely the answer is NO.
 - ii. Part B : Does the worker perform work that is outside the usual course of the hiring entity’s business? Must look to your mission statement, et al. Highly probable the answer is NO.
 - iii. Part C: Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity? Even if an actor has an LLC or corporation, this will not be relevant.
- Outcome: only need to “fail” one part of the test and the worker is an employee.

Position Analysis: Guest Hires (One-Off)

- Historically, guest soloists or guest ensemble, guest conductor, substitute musician filling in for absent regular musician, specialty performer (ex: harpist)
- Key: AB 2257 exception for one-off/short-term engagement
- Representation by agent only a factor when applying appropriate test
- Option 1: engage as a volunteer – no stipend
- Option 2: employee or independent contractor
 - a. Meet AB 2257 exception? If yes, apply Borello
 - b. Otherwise apply the ABC test based on your facts
 - i. Part A: Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact? Highly likely the answer is NO.
 - ii. Part B : Does the worker perform work that is outside the usual course of the hiring entity’s business? Must look to your mission statement, et al. Highly probable the answer is NO.
 - iii. Part C: Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity? Even if an actor has an LLC or corporation, this will not be relevant.
- Outcome: only need to “fail” one part of the test and the worker is an employee.

California's Wage & Hour Law

Employee: Must Address Wage & Hour Law

- Exempt vs. non-exempt employees
- California overtime rules do not apply to certain employees, known as “exempt employees.”
- The most important group of exempt employees under California hour and wage law are executive, administrative and professional employees. In order to be considered part of this category of exempt employee, an employee must:
 - a. Spend more than half of his/her work time doing intellectual, managerial or creative work;
 - b. Regularly exercise discretion and independent judgment in performing those duties; and
 - c. Earn a monthly salary equivalent to at least twice the state minimum wage for full-time employment (that is, employment for 40 hours/week).

Employee: Must Address Wage & Hour Law, cont.

- Other groups of employees exempt from wage/hour overtime requirements include:
 - a. Employees in the computer software field who are highly skilled and engage primarily in intellectual or creative work requiring the exercise of discretion and independent judgment. (Starting January 1, 2022, California employers must pay their computer professional employees a salary of at least \$104,149.81 annually [\$8,679.16 monthly] or an hourly wage of \$50.00 every hour worked in order to remain exempt from paying such employees overtime compensation.)

Employee: Must Address Wage & Hour Law, cont.

- The California minimum wage as of January 1, 2022 is:
 - a. fourteen dollars (\$14.00) per hour for employers with twenty-five (25) or fewer employees, and
 - b. fifteen dollars (\$15.00) per hour for employers with twenty-six (26) or more employees.
 - c. That minimum wage is scheduled to rise annually until it reaches fifteen dollars (\$15) per hour for all employers in 2022.

Of course, that is only the state minimum wage. Many California cities and counties have a higher minimum wage.

Employee: Must Address Wage & Hour Law, cont.

- Overtime: California overtime laws only apply to non-exempt employees. California employers may not get around overtime requirements by requiring or pressuring employees to “work off the clock.”
- Time and a half overtime:
 - a. Employers must pay non-exempt employees “time and a half” overtime (that is, one and a half times their regular rate of pay) for any work in excess of eight (8) hours in one workday, or forty (40) hours in one workweek.
 - b. Employees are also entitled to “time and a half” overtime for the first eight (8) hours of work that they do on the seventh day of a workweek.

Employee: Must Address Wage & Hour Law, cont.

- Double time overtime:
 - a. CA law requires employers to pay employees “double time” overtime (that is, twice their regular rate of pay) for any work in excess of twelve (12) hours in one workday, or
 - b. any work in excess of eight (8) hours on the seventh day of a workweek.
- Meal breaks: Most non-exempt California employees who work more than five (5) hours in a workday must be given a meal break of at least thirty (30) minutes. However, if the employee will work no more than six (6) hours in the day, s/he may agree to waive the meal break.
 - a. employees who will work more than ten (10) hours in a day must receive a second thirty (30) minute meal break and will work no more than twelve (12) hours in the day.

Employees: Must Address Wage & Hour Law, cont.

- Rest breaks:
 - a. Non-exempt employees are entitled to ten (10) minutes of rest period for each four (4) hours, or substantial fraction thereof, that they work. However, employees are not entitled to rest breaks for work shifts that are less than three-and-a-half (3 1/2) hours long.
 - b. During these rest periods, the employer may not require the employee to perform any duties or to remain “on call.”
- Note: CTO – not applicable to entertainment and amusement industry employee.

CA Nonprofit Performing Arts Grants Program



CA Nonprofit Performing Arts Grants Program

\$49.5 million to CAL OSBA (Office of Small Business Advocate) for grants to help with workforce development.

Grants up to \$75,000 based on budget size.

- (4) a registered 501(c)(3) nonprofit entity, without regard to its annual gross revenue, may be eligible for funds if they serve as a fiscal sponsor for entities that are qualified small business pursuant to subdivision (f) of Section 12100.82, with no more than \$2,000,000 in annual gross revenue, and that is in one of the following North American Industry Classification System codes:
 - (A) 711110 - Theater Companies and Dinner Theaters.
 - (B) 711120 - Dance Companies.
 - (C) 711130 - Musical Groups and Artists.
 - (D) 711190 - Other Performing Arts Companies.

Grants shall be awarded on a first-come, first-served basis in the following amounts:

- \$25,000 for applicants with annual gross revenue greater than \$1,000 to \$100,000 in the 2019 taxable year.
- \$50,000 for applicants with annual gross revenue greater \$100,000, and up to \$1,000,000 in the 2019 taxable year.
- \$75,000 for applicants with annual gross revenue greater than \$1,000,000, and up to \$2,000,000 in the 2019 taxable year.

Grant money awarded under this section shall only be used for the following:

- Employee expenses, including payroll costs, health care benefits, paid sick, medical, or family leave, and insurance premiums.
- Contributions or payments to a centralized payroll service.
- Recruitment, training, development, and other human resources related expenses.
- Other operating expenses or equipment for employees.

Thank You for Attending!

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