

Hollywood Faces “Devastating” Costs From California Bill Targeting Gig Economy

The California state legislature is considering a proposal, AB 5, that takes aim at the booming gig economy — but it could render the entertainment industry's tax-lucrative loan-out companies useless.

By Ashley Cullins

June 19, 2019



This fall, Hollywood studio executives may be in for a shock when it comes to their budgets. A bill winding through California’s legislature that takes aim at gig-fueled companies like Uber and Postmates may upend long-standing showbiz practices by reclassifying scores of independent contractors as employees, and could render tax-lucrative loan-out companies useless.

The bill, AB 5, which the state assembly passed May 29, is designed to protect workers from being misclassified as independent contractors and therefore denied such employee

protections as minimum wage, overtime pay and workers' compensation. It seeks to codify and expand the California Supreme Court's 2018 *Dynamex* decision, and would presume every worker is an employee — with a few exceptions for people like barbers and real estate agents — unless a company can show that the worker meets three criteria under the so-called ABC Test. The requirement that makes Hollywood nervous is that the independent contractor must perform duties outside the usual course of the company's business. "That test will necessarily lock talent out of being an independent contractor if it passes in its current form," says talent lawyer Rick Genow, whose clients include Debra Messing, Anthony Anderson and Henry Golding. "The economic impact would be somewhat devastating to both talent and the studios."

A doomsday scenario for Hollywood would look like this: A law is enacted with no exemption for entertainment workers; companies opt to treat everyone as employees for all purposes to avoid complications; and loan-outs are effectively dead in the water. The last bit would be especially painful because 2017's Trump tax cuts killed business deductions for employees.

Tax rules are independent of [labor](#) rules and aren't directly addressed by the legislation, which means the status quo could remain for workers in that regard. But Hollywood business manager Bob Jason of NKSFB is dubious about whether many companies would opt to treat someone as an employee for one purpose (labor) and an independent contractor for another (tax) — especially when a misclassification carries financial penalties. "The studios, like everybody, act in their own self-interest," says Jason. "If they feel they have exposure, they will unquestionably act to protect themselves, and that would be by treating many, many more people as employees."

Entertainment litigator Tricia Legittino of Frankfurt Kurnit says it's unlikely a star would bring a claim for misclassification for being labeled an independent contractor, but that doesn't mean the studios should roll the dice in the face of ambiguity. Government officials could choose to check in at any time. "You never know when and where they're going to do audits," she says. "It will really turn the structure of the entertainment industry from an employment law perspective completely on its head."

It's often financially beneficial for talent to form their own corporation, and then that company loans out their services to other employers instead of those employers hiring them directly. Adds business manager Harley Neuman, who represents Ellen DeGeneres and Scarlett Johansson: "It would be catastrophic to our business if loan-outs went away." Neuman used to recommend that anyone bringing in at least \$250,000 a year from multiple sources should form a loan-out to reap tax benefits. Now he sets that bar at \$100,000 — in no small part because it allows the person to deduct commissions paid to agents,

managers and other reps. “It would be a double whammy to lose the employee business deduction and lose the ability to use a loan-out,” says Neuman.

It’s unclear how much this bill would cost the entertainment business in total, but the state of California estimates it loses out on \$7 billion in payroll tax revenue each year because of alleged misclassification across all industries. Economist Chris Thornberg of Beacon Economics says the bill aims to solve a problem that’s been overblown. “California’s economy has the lowest unemployment rate it has ever had,” he says. “People have options, and they’re still choosing to drive Uber or Lyft. The idea these people are being exploited and need help just doesn’t fly.” He expects film and TV productions would either leave the state or find ways to cut costs. “The reaction is typically lower base pay,” Thornberg says. “For the industry to shake out, ultimately people are going to get more in the way of benefits, more in the way of comfort, and less in the way of take-home pay.”

In California at large, and especially in the ride-sharing and delivery industries, it’s often presumed that companies are the ones angling for workers to be classified as independent contractors. But entertainment is unique and attorney Ivy Kagan Bierman, who represents Hollywood businesses in labor matters, says it’s incorrect to make that assumption in this industry. “In reality, in many of those situations it is the talent and its reps who are pushing for the status,” says Kagan Bierman. “On numerous occasions I’ve had a client call me to say, ‘We’re getting a lot of pressure to classify this person as an independent contractor.’”

She says the entertainment industry has been carefully looking at worker classification for decades, and her clients will refuse to designate a person as an independent contractor if it isn’t appropriate. “Even if someone is working only a day, the individual might still be an employee,” she says. “For my clients, it’s not about the length of the employment. It’s about whether they fit the test.”

Economist Kevin Klowden of the Milken Institute identified one Hollywood worker subset that could see an upside to this particular test: people who don’t work quite enough in California to qualify for benefits through a guild or union. Under this bill, they could be entitled to health benefits if they’re working full-time. But, there’s nothing to stop a company from terminating its “employees” at the end of any production.

Meanwhile, Thornberg says it’s “the lawyers” who would benefit most from AB 5. “I think that’s obvious,” he says, adding, “Hollywood has operated in a very specific way for a long time. I’m hard-pressed to assume they got it wrong.”

The language of the bill isn’t final, so some of the potential negative impacts could be avoided through amendments. The deadline to pass legislation before sending it to Gov. Gavin Newsom’s desk is Sept. 13. The California Chamber of Commerce is lobbying

lawmakers to add an exemption for business-to-business contracts — a potential life raft for loan-outs — and another that would allow people to subcontract for short-term projects. CalChamber suggests broader exemptions for people who want to set their own schedule, and calls out videographers, freelance writers and musicians.

The Writers Guild of America on June 12 sent a letter to the bill's author in support of AB 5, expressing its concern that misclassification leads to unfair competition for responsible employers. (Under the WGA's collective bargaining agreement, writers who use loan-outs are guaranteed to be treated at least as well as employees already.) IATSE Local 80 business agent Thom Davis says his union's 3,600 members are already treated as employees and likely won't be affected, and SAG-AFTRA declined to comment.

Many of the lawyers, business managers and economists who spoke with *THR* say the industry could face collateral damage in the fight against employee misclassification if the law passes in its current form. "It's always easier to correct course rather than trying to undo something that's already been done," says Genow. Adds Singer Burke tax manager Greg Zbylut, "I don't think anyone in Hollywood should be ignoring it. They say bad facts make bad law, and here we have something nightmarish."