



RESEARCH REPORT

# Arts Workers in California

## Creating a More Inclusive Social Contract to Meet Arts Workers' and Other Independent Contractors' Needs

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# Executive Summary

As the economy transforms because of technological advances and competitive market pressures, more workers find themselves working as independent contractors outside of traditional employment structures, without access to social insurance programs and worker protections designed for those with employee status. The COVID-19 pandemic has exposed the vulnerability of many people who are independent contractors and underscored the urgency of creating a more inclusive social contract—one that drives economic security, equity, and dignity for all workers, including independent contractors. Arts workers, who include artists and others who work in the arts, cultural, and entertainment industries, have been particularly affected by the pandemic’s economic effects on the arts and cultural sector and the sector’s reliance on nonstandard work arrangements.

California is on the forefront of efforts to address misclassification—when organizations treat workers who are legally entitled to be employees as independent contractors. By focusing on California, home to one of the world’s most prominent arts communities, this report aims to offer a better understanding of arts workers, their working arrangements, and the challenges they face, particularly when working as independent contractors. This information offers a lens to identify policy solutions to create a more inclusive social contract that provides freelance arts workers and other independent contractors with access to fundamental social insurance programs and worker protections. This framing of the social contract aims to empower workers and improve worker outcomes by (1) providing greater economic security through inclusion in social insurance programs, such as unemployment insurance, workers’ compensation, and paid leave; (2) increasing the equity, safety, and dignity of work through workplace standards, including antidiscrimination, health and safety, and wage and hour protections; and (3) strengthening workers’ ability to organize to improve working conditions.

## What Is Known about Arts Workers and How They Work?

Compared with the overall workforce, arts workers are far more likely to be self-employed and have higher levels of educational attainment. They are also less likely to have full-time jobs and are less racially and ethnically diverse than the overall workforce. Many artists have a strong desire for autonomy in the creative process as well as ownership of their work’s intellectual property rights. Although people often think of platform companies such as Uber or InstaCart when they think of the “gig workforce,” the term is rooted in short-term contracting work that artists and other arts workers in the creative industry have long performed.

# What Are the Critical Workforce Issues Arts Workers Face?

Arts workers' income-producing work circumstances make them particularly vulnerable to economic insecurity. Many of their challenges are shaped or exacerbated by independent contractor status, which is prevalent in the work arrangements of arts workers. These relationships raise similar workforce issues for those in other industries with large shares of independent contractors. Yet arts workers also face unique issues, which are exacerbated for arts workers of color because the profession has erected high barriers to entry, including requirements for bachelor's and master's degrees in some fields, compared with many other fields that pay low wages. These barriers combined with the precarity of the work create racial, ethnic, and socioeconomic disparities in the makeup of the arts workforce. Working without access to fundamental workplace protections and social insurance programs creates more hurdles to accessing work in the arts and cultural sector because it is riskier for those who lack generational wealth, which disproportionately includes communities of color, to pursue work arrangements with high volatility. Key issues arts workers face include the following:

- **Many arts workers work in nonstandard arrangements with lower pay and face higher risks of nonpayment and income volatility.** Self-employed arts workers in California earn less than those working as employees and other self-employed workers in the broader workforce.
- **Many artists do not consider themselves workers but rather as creatives who operate outside of standard employment contexts,** heightening risks of misclassification and abuse.
- **The COVID-19 pandemic has placed disproportionate strain on arts workers compared with the US workforce as a whole.** The national unemployment rate for arts workers peaked at 21.7 percent in July 2020, with estimated nationwide economic losses because of the pandemic totaling more than \$13 billion in the arts and cultural sector.
- **Many arts workers lack access to worker protections and social insurance programs that are critical to their stability.** Arts workers are exposed to risk in their jobs—including financial risk, physical risk, and interpersonal risk in the form of harassment. Exclusion from wage and hour, antidiscrimination, and health and safety laws as well as social insurance programs, such as unemployment insurance and paid leave, compounds these risks.

# What Policy Solutions Would Help Freelance Arts Workers and Other Independent Contractors?

Three sets of solutions would create a more comprehensive protection system for freelance arts workers and others working as independent contractors.

- **Strengthen classification laws to combat misclassification of employees as independent contractors.** This would ensure that more workers can access benefits and protections that flow from employee status. One prominent solution has been to create a stricter and more straightforward definition of “employee.” Although these efforts have extended vital protections to many more workers, they have also raised questions about the viability of certain work arrangements for some arts workers who have long worked independently as freelancers.
- **Extend worker protections and social insurance programs to freelance arts workers and others working as independent contractors.** Ensuring more workers are classified as employees rather than independent contractors extends access to key worker protections to a broader group of workers. Yet, even under stricter classification standards, those who remain categorized as independent contractors often are without enough protection from work-related risks. Promising and innovative policies to address these gaps include extending wage and hour, antidiscrimination, and health and safety laws to independent contractors, including those in unemployment insurance and paid leave programs.
- **Strengthen and scale collective efforts to rebalance power and support freelance arts workers.** Independent contractors do not have the right to organize in a union, but policy can support greater collective action to empower independent contractors to improve their terms of work. Increasingly, independent contractors are coming together to strengthen their bargaining power through worker cooperatives and other collective efforts to address the challenges freelance arts workers face.

## A More Inclusive Social Contract for Freelance Arts Workers and Independent Contractors

These solutions support the development of a more inclusive social contract that empowers workers by providing worker protections and social insurance to freelance arts workers and other independent contractors. This evolution of the social contract should place greater responsibilities on the hiring entities that benefit from the work performed by independent contractors, which are better positioned to absorb

work-related risks than individual workers. New policies can create more inclusive systems that require hiring entities to abide by worker protections and contribute to social insurance programs, as well as explore approaches that—where needed—rely on contributions from independent contractors. To build a more just and equitable future for all workers, policymakers must develop systems that do not tie fundamental protections to worker classification status.



# Glossary

Key terms used in this report are described below. Terms may be imperfect in how they apply to work, and legal tests that govern how workers are classified vary.

**Artists.** This report considers workers in each of the following occupations to be artists: artists and related workers (includes fine artists and multimedia artists); announcers; architects; designers (includes graphic, interior, and fashion); photographers; writers and authors; actors; dancers and choreographers; entertainers, performers, and related workers; musicians, singers, and related workers; and producers and directors. These occupations are based on categorizations used by the National Endowment for the Arts (NEA).

**Arts workers.** This term is used in this report to broadly encompass people employed in 11 artist occupations (artists) and six cultural occupations (cultural workers) with skill sets essential to producing creative work in the arts and entertainment industries. Arts workers earn income by selling their artistic and creative products and services, regardless of their for-profit and nonprofit sector participation. The included occupations are based on categorizations used by the NEA. Further clarification is provided in table 1.

**Classification.** The legal employment status of workers. Some legal classifications are defined below. States have different legal tests for determining employee classification.

**Cultural workers.** This report considers workers in each of the following six occupations—adapted based on categorizations used by the NEA—to be cultural workers: agents and business managers of artists, performers, and athletes; jewelers and precious stone and metal workers; editors; news analysts, reporters, and correspondents; misc. media and communication workers; and entertainment attendants and related workers.

**Employee.** The most common type of work relationship, in which a person is hired to work for an employer for compensation, and the employee is subject to the employer’s direction on how to perform the job. Employees may work full time, part time, or on a temporary or seasonal basis. Employers withhold taxes from their employees’ paychecks and pay the employer’s contribution for Social Security and Medicare taxes. Employers report employees’ wages and taxes to the government using a W-2 form, and employees file taxes using this form. Employees are often referred to as “W-2 workers.”

**Employer.** An employer in its legal definition—a business that hires people in employment relationships.

**Hiring entity.** A business that hires independent contractors.

**Independent contractor.** A form of nonstandard work that is the most common type of self-employed work, in which those in an independent trade, business, or profession offer their services on a contractual basis—not as employees. Generally, the hiring entities paying for the services of the contractors have the right to control or direct only the result of the work and not what will be done and how it will be done. Work is typically performed on a project basis for multiple clients or hiring entities rather than tied to a single entity. Many independent contractors are commonly referred to as **gig workers** or **freelancers**, and this report uses the terms interchangeably. Independent contractors carry the full burden of paying for their Social Security and Medicare contributions through self-employment taxes, equivalent to both the employer and employee contributions. Independent contractors file taxes using 1099 forms, which hiring entities, or clients, provide to the contractors. These workers are often referred to as “1099 workers.” Independent contractors could either be unincorporated (e.g., sole proprietors) or incorporated (e.g., LLC, or limited liability companies) entities.

**Nonstandard work.** Any work not performed by full-time employees. This includes part-time, temporary, and seasonal employees, as well as all self-employed workers, including independent contractors.

**Self-employed.** A form of nonstandard work where people earn money by working for themselves and not as employees for someone else. Working as an independent contractor is one way to be self-employed. Other forms of self-employment include when someone makes products and sells them directly to consumers, such as a sculptor or craftsperson. Broadly, the self-employed include business owners, sole proprietors, independent contractors, gig workers, and freelancers. In this report, all these workers are described as “self-employed” when referencing data.

**Social contract.** The agreement between the people and their government to secure mutual protection and welfare for its members.

**Social insurance programs.** Government programs that provide benefits to people who have paid into the program or whose employers have paid into the program on their behalf, often in the form of payroll taxes.<sup>1</sup> The major US social insurance programs include Social Security, Medicare, unemployment insurance, workers’ compensation, disability insurance, and paid leave (in the growing number of states and cities where mandated).

**Sole proprietor.** Someone who owns an unincorporated business by themselves with no distinction between the business and the owner. The proprietor is entitled to all the profits and earnings and is responsible for all debts. This is the simplest and most common form of self-employment. Sole proprietors can earn income either from selling goods or services and can employ workers.

**Traditional work.** Full-time work in which workers are classified as employees.

**Worker protections.** Laws that regulate the relationship between hiring entities and workers and protect workers' rights, including the right to organize, be free from discrimination, have a safe workplace, and obtain wage and hour protections.



# Introduction

Work is at the heart of the social contract—the agreement between the people and their government to secure mutual protection and welfare for its members.<sup>2</sup> In support of this social contract, society has developed a set of laws to provide social insurance programs and worker protections to employees. These laws have tied access to critical worker support and protections—such as unemployment insurance, a minimum wage, the right to organize, and freedom from discrimination—to traditional forms of employment that have historically involved full-time work in sustained employer-employee relationships. These laws have excluded independent contractors who are treated as running their own business, bearing all the risk of illness, injury, and unemployment. The rise in new gig economy models, such as rideshare and food delivery platforms, has renewed and elevated policy concerns about misclassification of independent contractors. Misclassification occurs when organizations treat workers who are legally entitled to be employees as independent contractors. This practice harms workers by denying them the rights and protections provided to employees. As the COVID-19 crisis has upended workers' economic security across industries, it has exposed the inadequacy of the existing social contract and underscored the urgency of creating a more inclusive one—a social contract that drives a more just and equitable future with better outcomes for all workers, including independent contractors.

Although arts workers are often invisible in or excluded from conversations about work, the arts and creative industries offer a valuable lens to understand solutions needed to provide fundamental protections for workers across an increasing diversity of work relationships. As the economy transforms because of technological advances and competitive market pressures, more people find themselves working the way many arts workers historically have—outside of traditional employment structures, whether by necessity or choice. Although many people may think of platform companies, such as Uber or InstaCart, when they think of the “gig workforce,” the term is rooted in the short-term work that arts workers and others in the creative industries have long performed. As the original gig workers, many musicians and other performing artists have historically lacked an ongoing relationship with a single or fixed employer. The platform economy is only a small part of a broader shift to independent contractor work relationships across various industries.<sup>3</sup> Yet technology has demonstrated the need to update and clarify how workplace laws apply to evolving work relationships. Technology has also made possible new ways for arts workers and others to collectivize to obtain benefits and protections.

The issue of misclassification garnered nationwide attention when the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court*<sup>4</sup> restricted the use of independent contractors through a

more rigorous and simplified standard for determining when workers are properly classified as employees rather than independent contractors for purposes of wage orders. In response to this decision, the California legislature passed Assembly Bill 5 (“A.B. 5”), effective January 2020, to codify the *Dynamex* decision and clarify its application given potentially broad implications. A.B. 5 applies this stricter employee classification standard uniformly across wage orders of California’s Industrial Welfare Commission, the Labor Code, and Unemployment Insurance Code.<sup>5</sup> In September 2020, the governor signed A.B. 2257, a clarification of A.B. 5, which exempted some occupations and business relationships from A.B. 5, including creative occupations, such as fine artists, recording musicians, and certain writers and photographers. In the November 2020 election, Uber, Lyft, Postmates, and Instacart prevailed on their California ballot initiative, Prop 22, which carves out app-based transportation and delivery companies from A.B. 5 so they can continue to be classified as independent contractors while providing some limited benefits and protections to drivers.

Across a wide range of industries, other than app-based transportation and delivery, employers are now required to convert their independent contractor workers to employees, which broadens access to the rights, benefits, and protections of employment. For decades, a lack of compliance, fueled by ambiguity in legal classification standards, has required misclassified workers to bring costly litigation, with often unpredictable outcomes, to obtain the protections of employee status. A.B. 5 has ignited a highly charged debate over how to preserve the livelihood and autonomy of long-time freelance workers, including arts workers and creative workers, while ensuring that misclassified workers obtain needed protections.

Creating a more protective and enforceable standard for determining who is an employee allows more workers to access social insurance programs, such as unemployment insurance and paid leave, and worker protections, such as the right to organize, be free from discrimination, have a safe workplace, and obtain wage and hour protections. But stronger enforcement and more protective classification standards alone would not fill the gaps in protections for the remaining independent contractors. Current workplace laws exclude independent contractors from coverage out of an assumption that independent contractors have enough bargaining power to protect themselves from work-related harms. In reality, many independent contractors often do not have sufficient power to protect themselves against labor market risks, particularly where they lack collective power. Well-protected independent work is vital for many arts workers and other freelancers to achieve greater financial security and career mobility, meet work-family and other obligations, and create opportunities to work in flexible ways that promote creativity.

The COVID-19 crisis has exacerbated economic insecurity for arts workers with substantial effects on employment and work and estimated economic losses of more than \$14 billion to the arts and cultural sector nationally.<sup>6</sup> As a result of the widespread financial harm facing a growing number of independent contractors, for the first time independent contractors have access to unemployment insurance through Pandemic Unemployment Assistance (PUA). This program addressed a critical need and highlighted the millions of workers in independent contractor relationships who are excluded from workplace structures that tie worker protections to employment. As the nation grapples with a dramatic rise in economic instability that is exacerbating stark inequities faced by Black, Latinx, Asian American and Pacific Islander, and Native American populations, the need to modernize systems to create long-term solutions that meet the realities of all workers is even more urgent.

This report's purpose is twofold: first, it aims to create a better understanding of the work circumstances and challenges of arts workers, particularly those who are working as independent contractors. Here, the definition of arts workers is broader than those considered "artists" and drawn from well-established definitions, such as those of artists and cultural workers in the arts and entertainment industries, as defined by the National Endowment for the Arts (NEA) and other analyses of arts workers. These sources view arts workers as those "responsible for the creative element of the arts and cultural products" (NEA 2013, 24). Artists, more narrowly defined, include professions most actively engaged in developing artwork and creative products, such as musicians, dancers, photographers, writers, painters, sculptors, and other fine artists.

Second, the report uses this information to identify broader policy options to meet the needs of freelance arts workers and other independent contractors and anchor an updated and more inclusive social contract that brings greater economic stability and dignity to work.

The study's findings are based on

- a review of the literature, laws and statutes, and relevant news articles;
- interviews with intermediary organizations in the creative economy and experts on worker support and protections models;<sup>7</sup> and
- publicly available survey data, including the American Community Survey and Current Population Survey.

First, this report provides background on the role of employment classification in extending worker protections and the effects of California's efforts to address misclassification. Second, it describes the arts workforce in the US and California, focusing on those most likely to be classified as independent

contractors. Third, the report examines the critical workforce issues affecting the arts workforce to better understand how they relate to employment classification issues. Fourth, it explores promising and innovative policies to

- strengthen classification laws to combat misclassification of employees as independent contractors;
- extend worker protections to independent contractors, such as the right to organize; expand wage and hour, antidiscrimination, and health and safety laws; and include independent contractors in social insurance programs, such as unemployment insurance and paid leave; and
- build collective efforts to rebalance power and support the needs of freelance arts workers and other workers.

California's A.B. 5 legislation served as a catalyst for this research effort. This report does not offer solutions specifically related to A.B. 5 but rather lays the foundation for considering what it will take to revitalize worker protections at a time when more are working outside conventional employer protections. This report is for both public officials and the general public in California and throughout the country, and for any sector facing shifts in the relationship between employers and employees.



# Background

Nationwide, 10.6 million workers are classified primarily as independent contractors—nearly 7 percent of the workforce.<sup>8</sup> The data available are not likely to capture the full scope of workers relying on independent contracting for at least some of their income because the data may exclude those relying on independent contracting to supplement other work (McKinsey 2016).<sup>9</sup> In recent years, the share of the workforce engaging in nonstandard work on a supplemental, often sporadic basis has increased. Most surveys and data sources estimate that 10 to 20 percent of the workforce earns supplemental income through nonstandard work, although a representative measure of supplemental nonstandard work is not available.<sup>10</sup>

As industries increasingly rely on business models that use an independent contractor workforce, more people find themselves working the way many arts workers historically have—going from gig to gig without access to benefits and protections. Independent contractors also carry the full burden of paying for their Social Security and Medicare contributions through self-employment taxes, equivalent to both the employer and employee contributions. Independent contractors file tax form 1099 and are often referred to as “1099 workers.” Employers report compensation paid and taxes withheld for employees using a W-2 tax form, and employees are often referred to as “W-2 employees” (box 1).

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## BOX 1

### Key Benefits and Protections Tied to Employee Status

Under most social insurance programs and worker protection laws in the US, only those defined as employees are eligible for the benefits and protections.

#### Social insurance programs provided to employees include

- unemployment insurance;
- workers’ compensation;
- employer contributions to Social Security and Medicare; and
- temporary disability and paid leave required by some states and localities.<sup>11</sup>

#### Worker rights and protections for employees include

- minimum wage, overtime, and other labor standards;
- protection from discrimination, including sexual harassment;
- the right to organize under the federal National Labor Relations Act;
- workplace safety protections; and
- unpaid family and medical leave.

## Employer-provided benefits for employees may include<sup>12</sup>

- contributions to health care insurance;
- retirement benefits;
- life insurance;
- disability insurance; and
- vacation, holiday, sick, family or other paid leave.

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Although some benefits and protections tied to employment, such as unpaid family and medical leave or the right to organize under the National Labor Relations Act (NLRA), do not readily extend to independent contractors, many core protections, such as unemployment insurance, workers' compensation, freedom from discrimination, the right to be paid a minimum wage, and the right to a safe workplace, can be tied to work rather than classification as an employee (Goldman and Weil forthcoming). Although independent contractors cannot organize in a union because the NLRA extends only to employees, and antitrust laws expose independent contractors to liability for organizing to improve their conditions (Paul 2016), public policy can support greater collective action and bargaining power to empower independent contractors to improve the terms of work.

California is home to many major businesses that classify their workers as independent contractors and not employees. New economy app-based companies have exacerbated long-standing concerns about business models that rely on misclassification of workers. Businesses can shed an estimated 30 percent of labor costs by classifying workers as independent contractors rather than employees, which creates an incentive for misclassification. Between 10 and 30 percent of audited employers misclassified workers, according to federal and state studies (NELP 2020).<sup>13</sup> For example, the California Economic Development Department (EDD) identified 4,338 misclassified workers in the music industry between July 1, 2018, and December 31, 2019, through 91 audits and investigations, and 1,908 misclassified workers in the theater industry through 123 audits and investigations in the same time period.<sup>14</sup> In addition, US Department of the Treasury economists studying tax data find that self-employment has risen by about 30 percent since 2001, and nearly all of that increase is from the growing number of self-employed workers who appear to be independent contractors or misclassified workers (Jackson, Looney, and Ramnath 2017).

Misclassification not only undermines workers' economic security and rights by denying them the protections of employee status, but it also affects society more broadly. Misclassification affects federal and state governments through billions of dollars in lost tax revenue for Social Security, Medicare, unemployment, and workers' compensation, because hiring entities do not contribute on behalf of

misclassified independent contractors. The Government Accountability Office has estimated that worker misclassification costs the Treasury \$4.7 billion annually in income tax revenues (Neal 2007). In addition, misclassification provides an unfair advantage to organizations that cut corners on labor costs over those that follow the law.

Nationally, a vociferous debate has ignited over the question of how to draw the line between independent contractors and employees. In April 2020, the National Labor Relations Board (NLRB)<sup>15</sup> and the US Department of Labor (DOL)<sup>16</sup> both issued determinations finding Uber drivers are independent contractors. On January 6, 2021, DOL announced a final rule, effective March 8, 2021, revising the standard for classifying employees versus independent contractors under the Fair Labor Standards Act (FLSA), with the effect of treating more workers as independent contractors.<sup>17</sup> The California Supreme Court in *Dynamex* took a fundamentally different approach in considering a challenge by same-day delivery truck drivers to Dynamex's decision to convert them from employees to independent contractors, requiring them to provide their own vehicles and pay for all expenses.<sup>18</sup> The court adopted a more rigorous test for employee status that Massachusetts has used since 2004 known as "the ABC test," which places the burden on the hiring entity to demonstrate three requirements:

- a. the person providing labor or services is free from the control and direction of the hiring entity in connection with the performance of the work;
- b. the person performs work outside the usual course of the hiring entity's business; and
- c. the person is customarily engaged in an independently established trade, occupation, or business.

In addition to Massachusetts, New Jersey and Connecticut already use a version of the ABC test in their wage and hour laws. About 26 states have adopted a version of the ABC test in their unemployment insurance laws, and approximately 10 states apply it broadly to labor laws within a specific sector, often construction or landscaping.<sup>19</sup>

In enacting A.B. 5, the California legislature codified the ABC standard for determining employee classification, applying the same standard uniformly across (1) the California Labor Code, which includes wage and hour laws and workers' compensation; (2) wage orders of the Industrial Welfare Commission (which include 17 orders regulating the wages and working conditions in specific industries or occupations); and (3) the Unemployment Insurance Code. For 30 years prior, California courts had applied the standard set forth by the California Supreme Court in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*<sup>20</sup> to decide if a worker is an independent contractor. Under the "Borello test," courts consider all potentially relevant facts, with the right to control the work as a key consideration

among at least 14 nonexclusive factors.<sup>21</sup> By moving away from this often unpredictable analysis used to define an “employee,” the simplified ABC standard makes misclassification easier to identify and harder to defend.<sup>22</sup> For decades, a lack of compliance, fueled by ambiguity in legal classification standards, and a lack of enforcement resources have required misclassified workers to bring costly litigation, with often inconsistent outcomes, to obtain the protections of employee status.

More than a million California workers may be extended protections as employees under the ABC test for employment status, spanning potentially hundreds of industries, professions, and trades.<sup>23</sup> Some long-standing independent contractor work relationships in both nonprofit and for-profit enterprises will not meet the ABC test, such as theater or dance companies that exercise substantial control over the performance of the work. Even before the *Dynamex* decision, many of these work relationships would have been unlikely to satisfy the Borello test, but organizations nonetheless relied on independent contractor relationships because of financial pressure to cut labor costs along with a low likelihood of an enforcement action or, alternatively, because organizations did not understand the law. By bringing greater clarity and attention to classification issues, A.B. 5 has had a powerful effect in ensuring that misclassification cannot be ignored—spurring organizations across industries to reclassify independent contractors as employees without workers having to resort to costly litigation. At the same time, the ABC standard has a potentially expansive application because it requires the hiring entity to demonstrate that the work at issue is not in the “usual course of the hiring entity’s business” to justify hiring someone as an independent contractor. This part of the ABC test could require the reclassification of many long-standing independent contractor relationships, such as a physician working for a hospital or a musician performing at a music venue. To address the potentially expansive effects of the *Dynamex* decision, the legislature enacted A.B. 2257, a clarification of A.B. 5, to exempt numerous occupations and business relationships from the ABC test, including professions such as physicians, real estate agents, and accountants, as well as creative jobs such as fine artists, recording musicians, and certain writers and photographers. Hiring entities in these exempt occupations and business relationships must still satisfy the Borello test to classify workers as independent contractors. The A.B. 2257 clarification did not exempt app-based rideshare or delivery drivers.

In the November election, Uber, Lyft, Postmates, and Instacart prevailed on their California ballot initiative, Prop 22, which carves out app-based transportation and delivery companies from A.B. 5 so they can continue to classify drivers and delivery workers as independent contractors while providing some limited benefits and protections.<sup>24</sup> In the most expensive ballot initiative in history, the companies spent more than \$200 million to promote what they have referred to as a “third way,”<sup>25</sup> which offers drivers some benefits and protections that are substantially lower than those provided by law to

employees. Prop 22 includes (1) a wage guarantee for “engaged time,” which is limited to driving time after accepting a fare; (2) a health care subsidy for workers with a sufficient number of engaged hours; (3) occupational accident insurance that covers medical expenses and a percentage of lost income, as well as car insurance for third-party injuries; and (4) limited antidiscrimination protections.

Unlike employees who are entitled to pay for all time worked, Prop 22 does not include payment for time waiting for rides or maintaining the vehicle, which Uber and Lyft’s own research shows is about one-third of drivers’ time.<sup>26</sup> Researchers at the University of California, Berkeley, found that Prop 22 would guarantee Uber and Lyft drivers only an estimated \$5.64 an hour when factoring in all time worked (Jacobs and Reich 2020). Prop 22 also narrows the scope of antidiscrimination protections available to employees by excluding drivers from protections against sexual harassment by passengers, limiting retaliation provisions, and declining to provide an enforcement mechanism.<sup>27</sup> Other gaps in Prop 22 protections include a lack of access to social insurance programs available to employees, such as unemployment insurance or overtime pay (Fuentes, Smith, and Chen 2020).

California earlier filed suit against Uber and Lyft to enforce A.B. 5 and require that the companies reclassify their drivers as employees. The lawsuit alleges that these app-based companies do not meet all three ABC conditions because (1) drivers work under the direction of their company, (2) drivers provide the primary service of the company, and (3) drivers may not perform their service customarily beyond this company. Uber and Lyft have the burden to prove that they meet all three requirements of this test. The state is continuing this action to pursue damages for the time period before the effective date of Prop 22.<sup>28</sup>

As other states and the federal government grapple with these questions,<sup>29</sup> understanding California’s approach to addressing the diverse work arrangements for arts workers provides a valuable foundation for structuring policy reforms. The work circumstances of arts workers highlight the central tension in applying the ABC test—ensuring misclassified workers in need of employment protections and social insurance programs obtain them while preserving self-employment relationships for those who run their own businesses in industries such as the arts. Many freelancers, including artists and writers, have sounded an alarm about the effect of A.B. 5 on their work. Some raised concerns about jobs leaving California, short-term gigs disappearing, or organizations closing because hiring entities cannot afford to put arts workers on their payrolls. Often, undercapitalized entities, especially in music and the performing arts, have relied on independent contract relationships to be viable.

The debate over employment classification standards has highlighted the need for broader solutions that promote well-protected independent contractor work, prevent misclassification, and

support industries to come into compliance when they use contract labor to afford operating (such as the nonprofit arts sector). In addition, for freelance artists, technology has opened up new opportunities for self-employment with online platforms that enable artists to distribute and sell their art to a broader audience. As technology has spurred new opportunities for arts workers to pursue the arts through self-employment, it has also meant these workers have fewer opportunities to accrue benefits and receive protections. The growing diversity of work relationships makes it increasingly vital to create a more inclusive social contract to ensure it supports everyone who works by extending the benefits and protections awarded to full-time employees to all workers. A cornerstone of this framework is that those entities benefiting from workers' labor should contribute to work-related social insurance programs and comply with fundamental worker protections that all workers need for economic stability and dignity.

# Understanding the Arts Workforce and Work Circumstances

Arts workers are a vital part of the American workforce. According to a 2016 report, the California arts and culture sector represents 7 percent of the state's GDP, compared with 4.5 percent nationally in 2017 (Americans for the Arts 2019). To develop appropriate policy solutions, it is essential for policymakers to understand the increasingly varied employment circumstances of this important sector of the economy. These unique circumstances of employment and work arrangements affect arts workers' need for access to social insurance programs. This section describes key characteristics of the arts workforce in California using original data collected from interviews and analysis of publicly available survey data. The data include both the employment circumstances of all workers in California and arts workers nationwide as context for designing policy solutions that work for arts and other workers facing similar issues.

## Data Snapshot of Arts Workers

For this report, American Community Survey five-year estimates (2014–18) are used to construct a set of 17 artist and cultural occupational categories that include jobs with skill sets essential to producing creative work in the arts, cultural, and entertainment industries (table 1).<sup>30</sup> The term “arts workers” encompasses occupations that fall within both artist and cultural occupation categories. Our identification of occupations draws heavily from research by the NEA, which identified relevant occupations by asking “if the considered occupation would cease to exist if the tasks and responsibilities of creative work were removed” (NEA 2013, 23).

Table 1 below includes the specific occupations in our data snapshot of arts workers, by category of occupation included in the analysis (i.e., artists and cultural workers). More information about this classification scheme and on data methodology and limitations can be found in appendix A.

TABLE 1

**Arts Worker Occupations**

Artists	Cultural Workers
<b>Artists and related workers</b> (includes fine artists and multimedia artists)	
Announcers	Agents and business managers of artists, performers, and athletes
Architects	Jewelers and precious stone and metal workers
Designers (includes graphic, interior, and fashion)	
<b>Media and news occupations</b>	
Photographers	Editors
Writers and authors	News analysts, reporters, and correspondents
	Miscellaneous media and communication workers
<b>Performing artist occupations</b>	
Actors	Entertainment attendants and related workers
Dancers and choreographers	
Entertainers, performers, and related workers	
Musicians, singers, and related workers	
Producers and directors	

Occupation-level data on arts workers allow us to identify characteristics such as arts workers’ race and education levels in specific occupations and draw comparisons between those groups of people and the characteristics of all workers in the state of California and nationally (tables 2 and 3).

The US workforce provides useful context for understanding the circumstances of employment for arts workers nationally. Key takeaways on arts workers in the US include the following:

- Approximately 3,715,500 people are arts workers in the US (1.9 percent of the overall workforce).
- Nationally, arts workers are highly educated. The percentage of arts workers with at least a bachelor’s degree is double that of the workforce as a whole. And among those with bachelor’s degrees, more than half of arts workers majored in a fine art or other creative degree (such as English literature).
- People of color are relatively underrepresented among the arts workforce (27 percent of arts workers compared with 36 percent of the national workforce are people of color). Arts workers tend to be slightly younger than the average worker.
- Nationally, arts workers are less likely to work full time than the workforce as a whole. Arts workers are more than three times as likely to be self-employed than the larger workforce; approximately 31 percent of arts workers are self-employed compared with approximately 10 percent of the broader workforce.
- Nationally, arts workers who are employees earn approximately the same median income as workers who are employees generally, but self-employed arts workers earn less than both traditionally employed arts workers and self-employed workers more broadly (table 3).



TABLE 2

## Key Characteristics of Arts Workers, 2018

	United States		California	
	Arts workers	Whole workforce	Arts workers	Whole workforce
Total in the labor force (thousands)	3.7 million	191 million	644,000	22 million
Total in the labor force (percent)	1.9%	100.0%	2.8%	100.0%
<b>Race or ethnicity</b>				
White	72.9%	63.7%	60.5%	40.3%
Black/African American	6.6%	11.7%	4.6%	5.4%
Latinx	11.2%	16.2%	17.7%	36.1%
AANHPI	6.3%	5.7%	13.3%	15.1%
American Indian and Alaskan Native	0.5%	0.6%	0.2%	0.3%
Multiracial or other race	2.6%	2.1%	3.7%	2.8%
<b>Age</b>				
Younger than 25	14.0%	14.8%	11.0%	13.8%
25 to 44	42.8%	40.4%	48.3%	43.4%
45 to 64	32.1%	36.3%	31.5%	35.3%
65 or older	11.1%	8.5%	9.2%	7.5%
<b>Educational attainment</b>				
Less than a high school degree	4.5%	8.8%	3.6%	13.0%
High school diploma/GED	20.0%	37.6%	17.2%	33.0%
Some college	27.9%	28.3%	28.6%	29.7%
Bachelor's/graduate/professional degree	47.6%	25.4%	50.7%	24.3%
<b>Degree field</b>				
Fine arts degree	26.6%	4.2%	29.6%	5.9%
Other creative degree	28.8%	8.1%	27.1%	9.2%
Other degree	44.6%	87.6%	43.3%	84.9%
<b>Hours worked</b>				
1 to 19 hours a week	16.1%	7.9%	13.7%	7.9%
20 to 39 hours a week	25.0%	22.8%	23.6%	22.5%
40 or more hours a week	58.9%	69.3%	62.7%	69.6%
<b>Worker classification</b>				
Employees (for primary job)	69.1%	90.3%	64.6%	88.3%
Self-employed (for primary job)	30.9%	9.7%	35.4%	11.8%
<b>Sources of income among self-employed</b>				
Wages from employers	22.2%	31.6%	20.2%	25.7%
Business income (non-W-2 wages)	64.6%	58.4%	66.9%	65.2%
Both employers and business income	13.2%	9.9%	12.8%	9.1%

**Source:** Authors' calculations using the American Community Survey (ACS) five-year estimates, 2014–18. The workforce includes every person assigned an occupation, including people at work and those who may have left the labor force during this period, including experienced unemployed persons, retirees, and other leavers.

**Notes:** "AANHPI" refers to people who identify as Asian American, Native Hawaiian, and other Pacific Islander. "Native American" refers to people who identify as American Indian and Alaska Native. "Latinx" refers to people who identify as Hispanic and can be in combination with any other race. For part-time and full-time workers, the ACS requests respondents to report the "usual hours worked" on their job. Because the ACS asked about the preceding year, many workers have held multiple jobs during that year.

Fine arts degrees include people who obtained bachelor's degrees and majored in fine arts (which includes visual arts, performing arts, commercial art, drama, film, photography, and art history). Creative degrees include architecture; communications and communications technology; culinary arts; and English language, literature, and composition.

Most questions about work in the ACS concern the "primary job"—either the only job held at the time of the survey or the one where the respondent spent the most hours if they held multiple jobs simultaneously. But income questions ask about earnings from all employment in the preceding year, so workers can report from other sources that either preceded the primary job or were held simultaneously as a secondary job.

TABLE 3

**Median Income of Arts and Other Workers by Worker Classification, 2018**

	United States		California	
	Arts workers	Whole workforce	Arts workers	Whole workforce
Employees	\$38,319	\$34,973	\$48,148	\$36,200
Self-employed	\$23,315	\$31,157	\$31,793	\$32,495
Total	\$32,844	\$34,141	\$41,372	\$36,033

**Source:** Authors' calculations using the American Community Survey five-year estimates, 2014–18.

**Notes:** Dollar amounts adjusted for inflation in 2020. Estimates reflect reported earnings and are unadjusted by hours or weeks worked.

In many ways, the arts workforce in California closely resembles the arts workforce nationally, particularly in age and education, but key differences include the following:

- Arts workers make up a larger share of the workforce in California when compared with workers nationally (2.8 percent to 1.9 percent, respectively), driven in part by the state's centrality in the entertainment industry, as well as its relation to the tech sector and tech-driven arts work (such as graphic design).
- Despite the state's diversity, arts workers of color are even more underrepresented in California's workforce than in the national workforce. Forty percent of arts workers in the state are people of color, compared with 60 percent of the state workforce.
- Compared with arts workers nationally, California arts workers are more likely to work part time, with 37.3 percent of arts workers working fewer than 40 hours a week in the state (compared with 30.4 percent of the state workforce more broadly).
- Not only are arts workers in California more likely to be self-employed than arts workers nationally (35.4 percent in California compared with 30.8 percent nationally), but arts workers in California also represent a larger share of all self-employed workers. In California, 8.6 percent of all self-employed workers are arts workers, compared with 6.1 percent nationally (not shown in table).
- Arts workers in California are better paid than arts workers nationally, earning approximately \$8,500 more at the median. Arts workers in California appear to see an earnings premium, earning more than the California workforce broadly, while the opposite is true of arts workers nationally, who earn less than the median worker in the US. However, both in the US broadly and in California, self-employed arts workers earn substantially less than arts workers employed in W-2 positions.

- The earnings estimates in table 3 reflect the reported experiences of employees and self-employed workers. However, part of why self-employed workers earn less is because they work less. After accounting for the usual hours worked a week and number of weeks worked in the previous year, self-employed workers broadly in the California workforce earn the same as employees. The gap between self-employed arts workers and arts workers who are employees in California falls substantially from approximately \$16,400 as reported to approximately \$3,100 after adjustments. In other words, although self-employed arts workers still earn less than arts workers who are employees, the primary driver of the gap is the lower number of hours and weeks worked. That smaller number of hours and weeks could result from the choice of self-employed workers or from the ability to immediately find additional work after completing a project or gig.

These data on arts workers reflect the experiences of workers whose artistic, cultural, and entertainment work is their primary job. However, many arts workers do that work as a second job, while holding a different primary job that may provide better pay, more stability, or other benefits. Limited data sources provide detailed information on employment beyond workers' primary jobs, and the ones that do tend to be national studies that do not give a representative picture of who works as an artist "on the side" at the state and local levels.

Research from the NEA on data from 2017 shows that, nationally, 12 percent of all artists perform their arts work as a second job (Iyengar et. al 2019).<sup>31</sup> More than half of those who "moonlight" work as musicians, designers, and photographers. Although people working as artists for their primary job are much more likely to be self-employed than the typical worker, people who are artists for their second job are even more likely to work in that arrangement. The majority of "moonlighting" artists—nearly 6 in 10—do these second jobs as self-employed workers, most likely through freelance or gig work, compared with 30 percent of self-employed artists who are arts workers as their primary occupation (Iyengar et al. 2019).

Given the bulk of the data presented above include people who are arts workers for their primary job, many artists are not covered in these analyses. Artists who are up and coming, just starting out, and working to expand their professional reach may be missed by these data. With the uncertainties around obtaining success and stability, becoming a professional artist requires more risk than other careers—risk that comes with financial cost. Because of long-standing wealth gaps and differences in access to education and greater student loan debt for those who do go on to postsecondary education, people of color and people from lower-income backgrounds have fewer financial resources from which to draw to support work and daily life in pursuing a sustainable artist career. For these reasons, people of color and

people with low incomes may not be able to access the formal arts economy and may not be represented in these data.

## Arts Workers' Circumstances and Workforce Issues

Understanding the key characteristics of arts workers in California helps inform policy solutions surrounding classification, broader worker protections, and social insurance programs for workers properly classified as independent contractors under applicable laws. Although artists are more likely to be satisfied with their work than other professionals, arts workers who are independent contractors often share characteristics of economic vulnerability with other independent contractors in low-paid work, highlighting a need for greater worker protections and social insurance for these workers. Addressing this precarity through improved worker support and protections might also enhance access to the arts as a profession for a broader and more diverse group of workers.

The importance of increased access to social insurance and worker protections regardless of employee classification status extends beyond California to other workers in independent contractor relationships who lack access to social insurance, worker protections, and employer-provided benefits. Below is a discussion of the key issues facing arts workers.

### **High Barriers to Entry from Education and Training Costs and Student Loan Debt Particularly Impact Arts Workers of Color**

Many artistic disciplines have erected high barriers to entry because of education and training costs and are thus unlike many fields with low-paid independent contractor relationships, such as construction, janitorial work, or home care work. For many artistic fields, a bachelor's degree is a prerequisite for entry into the field, with master's degrees preferred. More than half of those working as arts workers in California have a bachelor's degree or higher (51 percent), compared with 24 percent of the state workforce overall (table 1). The cost of completing this education and training—as well as the field's reliance on social networks—keep many people out, particularly people of color. For example, data from a 2013 report on inequality in arts training and careers describes results of surveying 66,000 arts alumni, which found that debt “is a key factor in the education and careers of arts graduates.” The report found that 76 percent of Black alumni and 72 percent of Latinx alumni accrued student loan debt to attend their institutions, compared with 52 percent of white alumni (SNAAP 2013, 21).

Many artists have significant student loan debt, especially those who attend graduate school, which many need to gain the credentials required for arts work (Lena 2014). As Lise Soskolne, core organizer at Working Artists and the Greater Economy (WAGE) observed, “Primary barriers to entry are unpaid internships and master’s in fine arts programs.” Artists are also expected to engage in and self-fund continuous training to maintain skills and compete for assignments across many disciplines, including actors, musicians, and singers (Lena 2014).

These barriers also contribute to a lack of racial and ethnic diversity compared with the overall labor force in some arts occupations (Lena 2014). A recent study in New York similarly found that factors that lead to racial and ethnic inequality include arts graduates’ fields and sectors of work and their levels of student loan debt, family lives, and access to advantages such as private lessons (Lena 2014).

Interviewees reported that arts workers of color face inequitable access to financial awards such as grants from government organizations and foundations. They viewed distribution of awards as skewed against artists and other cultural workers of color and felt that those working in emerging art forms such as new media/new technologies or traditional and folk arts faced additional hurdles (Lena 2014). Deana Haggag, president and CEO of United States Artists, described how “greater access to unrestricted funding in the form of grants and other philanthropy is needed” to combat these hurdles.

Respondents also indicated that money and opportunities to work in the arts flow to existing networks through college and graduate-level education and training programs, funding more established and affluent artists. Soskolne at WAGE shared, “The contemporary art field is largely operated by a professional-managerial class working in service of those whose financial wealth sustains it—a billionaire class represented by art collectors and private philanthropy. Acting as gatekeepers into the industry, this increasingly elite class composition reinforces existing economic, racial, and social barriers to entry into the field, effectively disenfranchising both working class artists and arts workers.” The opportunity to network with classmates, alumni, and other artists influences opportunities for artists seeking career advancement after graduation. Women and people of color are less satisfied with their ability to network, and graduates from lower economic strata are less likely to report that social networks are important (SNAAP 2013; Gray, Figueroa, and Barnes 2017).

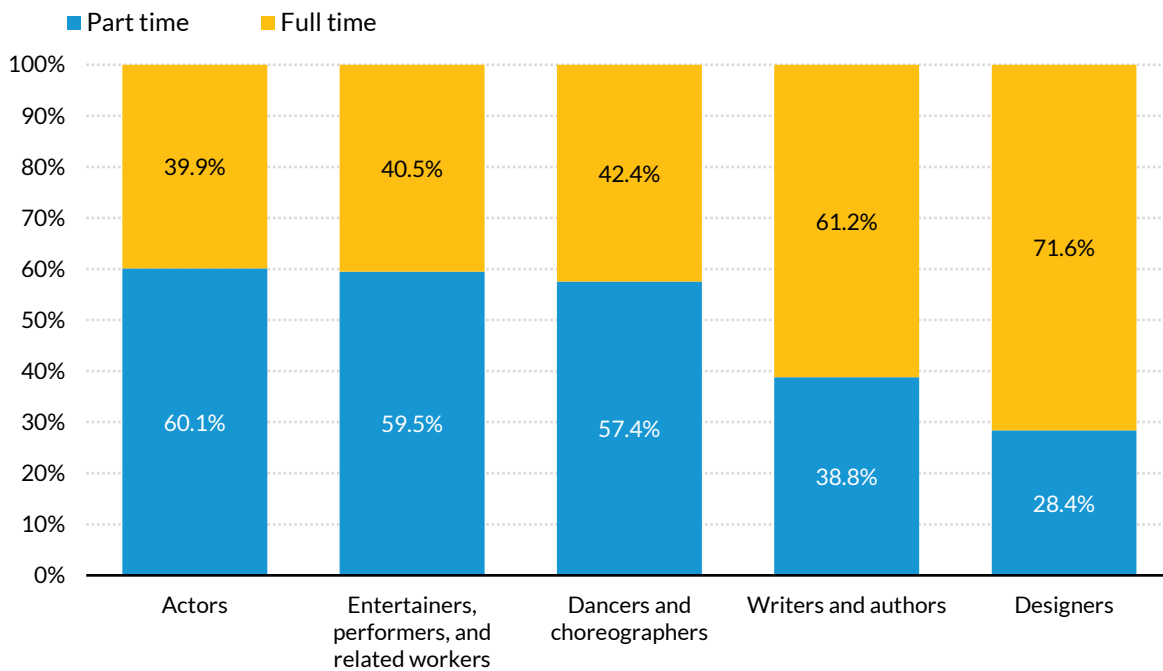
## **Nonstandard Work Arrangements and Less Than Full-Time, Full-Year Jobs**

Arts workers undertake a diverse array of work arrangements based on their discipline, making the classification analysis complex. For many arts workers, a lack of income stability is a defining characteristic of work. Many take a series of short-term gigs and switch between different forms of

work. Arts workers are less likely to work in full-time, full-year arrangements when compared with the broader workforce overall. The 2018 data snapshot in table 1 describes more about the work arrangements of California arts workers, including that

- approximately 37 percent of arts workers in California worked fewer than 40 hours a week, compared with roughly 30 percent of workers in the overall workforce; and
- arts workers often mix full- and part-time work, with 12.8 percent of arts workers in California mixing wages from employers and other income from self-employment in the same year; and
- among self-employed arts workers in California, part-time work (under 40 hours a week) is most common among actors, entertainers, performers, related workers, and dancers (figure 1).

**FIGURE 1**  
**Full-Time versus Part-Time Status among Select Arts Workers in California, 2018**



**Source:** Authors' calculations using the American Community Survey five-year estimates, 2014–18.

**Note:** "Part time" refers to artists working fewer than 40 hours a week, and "full time" refers to artists working at least 40 hours a week.

Many arts workers switch between traditional employment relationships and freelance or contract work or creative artistic production that is not compensated. This could include volunteer time or activities performed for skill development, academic study, or art created for personal enjoyment. Arts workers disproportionately freelance and frequently switch in and out of self-employment compared

with all other professional workers, according to a recent study predicting transitions from paid employment (traditional employment relationships) to self-employment in the arts (Woronkowicz and Noonan 2019). Artists also move to different geographic locations (e.g., cities and states) at a 15 percent higher rate than other workers to pursue their work (Iyengar et al. 2019). Even when more traditional employment structures form around a production (such as a Broadway musical or a documentary film), the employment structure often disbands once the show or film production ends.

Some independent arts workers have developed sole proprietorships or LLCs that allow them to deduct health benefits and other business expenses and remain self-employed. Some have expressed concern that being reclassified as a part-time employee would be less favorable than working as an independent contractor because they would not receive health care and other benefits reserved for full-time employees.

For independent contractors, lending and other financial services available to conventional small businesses may not meet arts workers' distinctive needs. Arts workers' unconventional income histories, their lack of familiarity with financial systems and business operations, and the fact that many lenders or investors do not understand their work's value proposition are all impediments to arts workers' ability to secure adequate financing (CCI 2016). One interview respondent shared that navigating the financial system is a crucial challenge because "how you get a business license, how to invoice, how you set the terms when you invoice...that's information a lot of artists don't have access to."

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*People work in odd jobs, Uber, restaurant gigs, and other unsustainable jobs to make art. The trade-off is not wasting your intellectual capital and having a flexible work schedule.*  
—Lauren Ruffin, co-CEO, *Fractured Atlas*; cofounder, *Crux Cooperative*

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## **Nonstandard Arrangements with Lower Pay and Higher Risks of Nonpayment and Income Volatility**

Arts workers report challenges making a living, including chronically low wages in much of the nonprofit sector, according to a report in 2016 by the Center for Cultural Innovation. The report notes that "Cultural institutions expect artists to work for free or for nominal fees. The expectation that artists will subsidize the work has many consequences, including diminishing the ability of many artists to work in the sector at all—especially artists without other sources of financial support" (CCI 2016).

Nonpayment via wage theft can also lead to weak compliance with worker protections, such as safe working conditions or nondiscrimination, and other challenges that stem from workers' difficulty holding the responsible parties accountable. Wage theft is the practice of employers (or hiring entities, in the case of independent contractors) failing to pay workers the full wages to which they are legally entitled (Cooper and Kroeger 2017).

Lise Soskolne of WAGE draws attention to the lack of compensation standards for arts workers, the lack of minimum wage standards for independent contractors, and the assertion of exposure as a fair exchange for artistic labor as drivers of inadequate compensation for many in the arts workforce.<sup>32</sup> As one interviewee shared, "There are no standards for contracts in many areas of the field, and too many cultural groups [arts organizations] rely on artists to discount their labor in order to survive themselves."

Arts workers themselves may not understand the difference between an independent contractor or an employee, putting them at higher risk of misclassification, which can lead to low pay and other work-related harms. Although many arts workers may believe they obtain higher pay through independent contractor relationships, they may not realize they are responsible for a higher tax burden because they pay both the employer and employee shares of Social Security as well as out of pocket costs. They also bear the risk of liabilities, injuries, and unemployment; yet they may not be aware of these costs and risks until disaster strikes. For example, more than 80 percent of nonunion actors and stage managers in California reported being misclassified as independent contractors and asked to work for less than minimum wage—in a February 2020 survey by the Actors Equity Association, the national union for actors and stage managers.<sup>33</sup>

Particularly in more collaborative art forms, arts workers may have difficulty identifying their employer or which entity holds responsibility for the terms of their contract. Barbara S. Davis, chief operating officer at the Actors Fund, shared, "If you are a small show or part of a tour, you may never meet the general manager, and you don't know who the employer is. The employer is generally managing a group of investors who came together for this show, and then [the employment structure] disbands when the show is over, and this corporation no longer exists." As independent workers without collectivized voice, arts workers are often left to fight for wages, worker protections, and payment on their own.



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*For performing artists, it is even harder to make a living than for other artists, such as visual artists, because it's live performance—you need a venue, host, and sponsoring theater company. That's a much harder road to haul in some ways.*

*—JD Beltran, founder and director, Center for Creative Sustainability*

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## **Strong Desire for Autonomy in the Creative Process and Ownership of Work Content**

One defining characteristic of arts workers is exercising creativity in their work. In employment relationships, the legal default is that the employer directs how the worker performs the work and therefore owns the work product's rights (e.g., work-for-hire arrangements). This default is negotiable—even in an employment relationship, arts workers can negotiate with an employer on contractual language of the terms of ownership, and not all employers require the rights over creative ownership. Nevertheless, as shared in the interviews, some people working as artists seek out less formal workplaces and thus independent contractor work to maintain freedom and independence in work production and ownership. Other artists working as independent contractors do not necessarily choose this work arrangement but rather lack alternatives that provide more stable employment (Lingo and Tepper 2013).

In addition to valuing the ability to maintain autonomy and control over the creative process, some in arts-related industries emphasize that they have a “calling” to engage in such work (Frenette and Dowd 2018; Miller, Dumford, and Johnson 2017). This may be one reason arts workers are more likely satisfied with their work than other professionals, even in the absence of social insurance programs. For arts and other cultural workers of color and many women and people of color who freelance in other industries, this arrangement allows for freedom in their artistic work from structures that might otherwise be oppressive. The unique work arrangements of arts workers as producers of goods and discrete works can lend them to create independent businesses (such as sole proprietorships), given the business structure affords ownership and licensing of rights that may lead to earning a sustainable living. These business structures can provide a means for arts workers to define their own terms and leave employment structures where they may face discriminatory barriers.

Technology has changed how arts workers reach new audiences through online platforms that enable artists to obtain work and sell their art to wider audiences. Tech platforms such as Upwork and

Fiverr connect freelancers, including arts workers, with businesses in need of short-term tasks or full-time contract work. Online marketplaces such as Etsy, ArtFire, and Zibbet have opened up new opportunities for self-employment, enabling artists to connect with a broader customer base to more easily earn income. For example, Etsy reported that 80 percent of its 1.5 million sellers are sole proprietors, and the platform generated more than \$1.7 billion in income for artists. These systems typically allow artists to set their prices, although platforms can put a downward pressure on wages by allowing customers to compare hourly rates. Artists oversee the creation of their artistic work while paying the platform a commission.

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*If you're an artist of color or marginalized identity, to know what you're worth and the value of your work is very important for you to set the terms of whatever exchange you want to do. That includes who owns the work, how much they are going to pay for it, and what the process is. I charge for sketches, and whether or not someone uses it, I still charge them.*

*—Favianna Rodriguez, president, Center for Cultural Power*

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## **Many Artists Consider Themselves Creatives Operating Outside of Traditional Employment Contexts, Rather Than Workers**

Some circumstances are specific to artists as a subset of arts workers. One challenge is that many artists do not think of themselves as workers, which can be a barrier to considering the needs of artists as workers. Some artists think art should not be tainted by money because it is about creativity and expression.<sup>34</sup> When artists and hiring entities do not consider artists as workers and their productivity goes unpaid, they can be taken advantage of—paid less or nothing, or coerced into situations they are not comfortable with to support their art. Hiring entities may view artists as pursuing art as a labor of love and not needing monetary compensation. Artistic exceptionalism may explain why arts workers often work in siloed and fractured micro-economies, leading some arts workers not to identify across disciplines. For example, the dance or music fields are often economies unto themselves; arts workers may rarely find common cause with each other regarding the nature of their work or the policies that shape how they do their work. Because artists may not identify with others outside their discipline and may lack identification as workers, they may not see the role that broader work-related policies play in their lives.

This exceptionalism has made it harder for artists to take collective action with other arts workers or workers as a whole. Moreover, it becomes harder to navigate and access social insurance programs if artists do not consider themselves eligible for them.

## **Disproportionate Pandemic-Related Strain on Arts Workers versus the US Workforce**

Arts organizations are among the many industries that have been upended by the pandemic as performing arts venues have been forced to suspend their operations and museums, galleries, and other artistic venues have temporarily closed or limited operations. Many arts workers are unemployed—losing expected income not only from their arts work, but also from their second or third jobs as well—for example, as waiters or drivers for app-based ridesharing services, which are often in industries that have been hit hardest by the pandemic.

Many of those interviewed described how the combination of arts work and other precarious gig work (non-arts work under independent contract) produced a “double whammy” effect for arts workers during the pandemic. Lauren Ruffin, co-CEO of Fractured Atlas and cofounder of Crux Cooperative, described this as follows: “The overlap of gig economy work and the artist sector is a disaster waiting to happen. It’s been that way for a long time, even pre-COVID-19.”

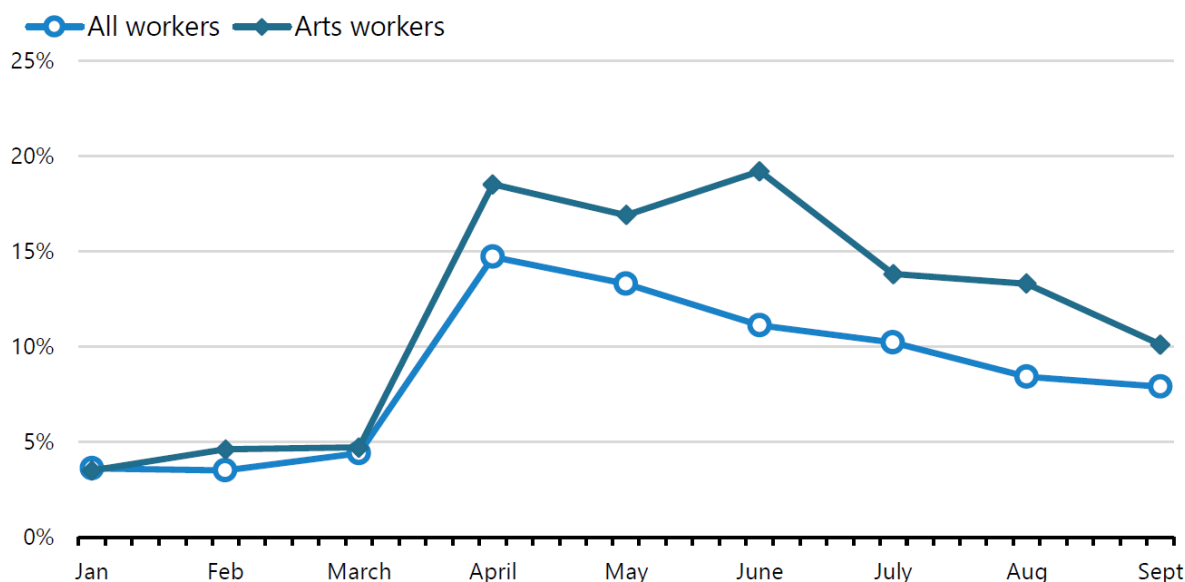
The economic shutdown as a result of COVID-19 has demonstrated how precarious the circumstances of employment for arts workers can be for people who experience income volatility and low earnings. The pandemic has highlighted the importance of a social safety net for arts workers working as independent contractors. Gaps of time between jobs also highlight the need to strengthen unemployment protections for arts workers who are independent contractors and those working as employees, such as employees of theater companies.

This past year, arts workers suffered substantial employment losses in the COVID-19 pandemic (figure 2). The unemployment rate among all US workers amid the COVID-19 pandemic peaked in April 2020 (14.7 percent) and has declined steadily since (to 7.9 percent in September 2020). The unemployment rate for arts workers has remained persistently higher than the national average, rising to 18.5 percent in April 2020, peaking in June 2020 at 19.2 percent, and falling to 10.1 percent by September 2020. As a result of the Coronavirus Aid, Relief, and Economic Security (or CARES) Act, the COVID-19 crisis is likely the first time some arts workers are eligible for unemployment insurance (UI) benefits, as the law specifically includes independent workers. However, it is unclear how long workers

will continue to have access to these temporary benefits and if other policy changes will follow that expand protections to independent workers.

FIGURE 2

Unemployment Rate among Arts Workers and All Workers in the US, January–September 2020



Source: Authors' calculations using the Current Population Survey (CPS), monthly files.

### Many Lack Power to Address Discrimination and Abuse and Are Without Access to Social Insurance Programs Critical to Their Stability

Often, limited recourse exists for arts workers in independent contractor relationships to resolve power imbalances, harassment, and other forms of discrimination. The fear of retaliation and withheld work from speaking up about discrimination or harassment is a persistent issue that can be particularly challenging in work environments where no formal channels exist with an employer to resolve the issue.

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*The performing arts is a reputation business...with sexual harassment, a primary reason for not reporting sexual harassment is not the ramifications with the current harasser/employer but the impact on [future] ability to get work.*

*—Barbara S. Davis, chief operating officer, The Actors Fund*

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Arts workers in independent contractor relationships face economic insecurity from a lack of access to unemployment insurance and workers compensation. Twenty-eight percent of California theatre actors reported being denied unemployment insurance coverage because of their classification as independent contractors, and 16 percent reported getting injured while working, according to a February 2020 survey of actors in Los Angeles by the Actor’s Equity Association.<sup>35</sup> These injuries, which included falls during dance lifts, were not covered by workers’ compensation because it only extends to employees.<sup>36</sup>

Worker benefits such as affordable health care and paid leave were also described by interview respondents as key to arts workers’ stability as independent contractors. Many explained how the Affordable Care Act had profoundly affected the arts industry and that the absence of such legislation—the inability to purchase insurance in the marketplace with subsidies—would mean greater insecurity for many.

The propensity for part-time work arrangements suggests that workers in the creative economy (including artists and other arts workers who are not eligible for benefits because of part-time status) have few opportunities to save money for retirement (van Liemt 2014). As a result, low earnings during their active careers can lead to inadequate income during retirement.

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*Public goods [like health care] cause people to go into debilitating debt because they can’t meet their basic needs. This is especially true for artists, many of whom make low wages, and particularly if they want to live in arts hubs (New York City or Los Angeles) where rent is expensive.*

*—Hannah Appel, associate professor, UCLA*

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Some sectors and disciplines in the arts industry have developed formal unions or worker advocacy structures that allow for collective bargaining for arts workers who are employees. Musicians, actors, and theater workers are more likely to be unionized than other disciplines (such as visual artists). However, many nonunionized actors employed under short-term contracts and earning 1099 income may not have the ability to join a union, which creates concerns about fairness for workers without organizing power.

In the absence of a formal unionized structure, coworking and cooperative organizations have sprung up to serve as laboratories to create and share work in ways that have been transformational for many. These innovative solutions that support collective organizing to enable workers to build power and access worker protections and supports are explored further in the next section.

A more inclusive social contract that would meet the needs of the significant number of freelance arts workers and other independent contractors requires comprehensive policy solutions that not only prevent widespread misclassification, but also offer worker protections and supports currently reserved for employees.

# Policy Options to Strengthen Protections for Arts and Other Workers

The allure of artistic work often obscures—from arts workers themselves and the public at large—the working conditions that arts workers face.<sup>37</sup> Freelance arts workers share challenges with other independent contractors, including income volatility, low pay, nonpayment, and a lack of power to confront harassment and discrimination. This section addresses these shared challenges by exploring policy solutions to address the needs of arts and other workers across industries—both those who are misclassified as independent contractors and those who legally operate as independent contractors under applicable standards.

In the policy discussion below, this report explores four sets of solutions to create a more comprehensive system of protections to meet the needs of freelance arts workers and those in independent contractor arrangements. The promising and innovative policies

- strengthen protections for workers misclassified as independent contractors;
- extend worker protections, such as wage and hour, antidiscrimination, and health and safety laws, to independent contractors;
- include independent contractors in social insurance programs, including unemployment insurance and paid leave; and
- build collective efforts to rebalance power and support the needs of freelance arts workers and other workers.

These solutions support the development of a more inclusive social contract that will protect more workers and create greater responsibilities for the hiring entities that benefit from the work performed by independent contractors. Where hiring entities contribute to social insurance programs and abide by workplace laws protecting workers, workers do not have to bear the full brunt of many work-related risks, such as loss of work, a work-related injury, or the harm of discrimination. Putting independent contractors on more equal footing with employees in terms of work-related protections and social insurance also reduces incentives for misclassification by eliminating the cost differential between hiring employees and independent contractors. By addressing the diverse needs of freelance arts

workers and independent contractors across industries, new policies can create systems that extend worker benefits and protections that all workers need to promote their economic security and stability.

## Policy Solutions for Misclassified Workers: Clarifying the Definition of Employee to Include More Arts and Other Workers

Providing a clearer and more protective definition of an employee is a prominent solution to ensure that more workers can access the benefits and protections of employment status. California has sought to advance this objective through A.B. 5, which applies a more rigorous ABC test for determining employee status by codifying and extending the judicially adopted *Dynamex* standard. Although this new test has a powerful effect that requires the classification of many more workers as employees, it also raises difficult questions for those arts and other workers who have long worked independently without a defined or single employer.

### Applying A.B. 5 to Arts Worker Relationships

The varied nature of arts worker relationships has highlighted difficult questions in determining how to classify arts workers. The central challenge is distinguishing between (1) workers who run their own business and are appropriately classified as independent contractors and (2) workers who should be classified as employees because the entities that hire them direct their work and should be responsible for the benefits and protections of employment. The California legislature addressed this tension in A.B. 2257, follow-up legislation to A.B. 5, which expands the professions and industries exempt from the ABC test, which are subject to the less restrictive Borello standard instead (box 2).

The exemption includes a broad definition of a “fine artist,” encompassing “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.”<sup>38</sup> A.B. 2257 also creates new exemptions for musicians and performing artists, including performance artists presenting an original creative work that depends primarily on the person’s invention, imagination, or talent, as well as artists leading a master class. Although numerous arts workers are now exempt from the ABC standard, organizations must still satisfy the Borello test to justify independent contractor relationships. Some long-standing arts worker independent contractor



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## BOX 2

### Occupations Exempt from A.B. 5

The California legislature limited the ABC test’s application by initially exempting approximately 50 professions and occupations including “fine artists” from the new standard. Effective September 4, 2020, A.B. 2257, a clarification of A.B. 5, expands the list of occupations exempt from the ABC test, including some types of arts workers. The hiring entity must satisfy factors specified in A.B. 2257 to be exempt from the ABC test—including that the professionals at issue can set or negotiate their rates. The employer must still satisfy the Borello test, focusing on the hiring entity’s “right to control” the work, as well as all other relevant factors earlier set forth by the California Supreme Court.<sup>39</sup>

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relationships would not satisfy the Borello standard, such as where the hiring entity exercises control over the work’s performance—for example, a school hiring an arts teacher or a theater hiring actors. By elevating issues of misclassification, A.B. 5 has raised awareness among hiring entities and workers on the legal rules governing classification, which may lead to greater compliance—and less frequent misclassification—across industries, even those exempt from the ABC test that still must satisfy Borello.

In most artistic fields, hiring entities value arts workers for their creativity and expertise, but their work arrangements vary in the level of autonomy they have in performing the work. The exemptions attempt to distinguish work that is creative, where arts workers have considerable autonomy over how to perform the work and the ability to set or negotiate prices, from those situations where a hiring entity would exercise substantial direction over workers (such as musicians performing with a symphony orchestra or in a musical theater production), which do not qualify for the exemption.

Because musicians often collaborate to create musical works, a series of exemptions include musicians creating sound recordings or performing in a single-engagement live performance. Also, for writers and photographers and related freelancers, the clarification eliminates a prior provision that enabled freelancers to submit up to 35 articles or photographs to a publication a year on an independent contractor basis before the law required the entity to hire them as employees. The new exemption removes the 35-submission limit and instead requires a contract that specifies in advance the rate of pay and intellectual property rights, among other terms.

The legislation expanded the exemption for business-to-business relationships to enable contracting between two business entities from the ABC test. This provision allows contractors to use the Borello test for employee status if they establish sole proprietorships or another corporate form and meet specific criteria. A.B. 2257 also revises the criteria for exemption of referral agencies, which

refer independent contractors or business entities to clients. The categories of referral agencies now enumerated that may qualify for an exemption from A.B. 5 include graphic design, web design, and photography. This nonexclusive list of exempt referral agencies supports the continuation of referral relationships where artists are typically acting as self-employed entrepreneurs, offering their expertise or creations on terms they negotiate.

Arts workers' circumstances highlight the reality that even those who fall within these exemptions and satisfy the Borello test to legally operate as independent contractors may nonetheless lack bargaining power to negotiate contractual terms that provide economic stability and worker protections. A.B. 5 and its exemptions help address this issue by specifying key terms that hiring entities must demonstrate to establish independent contractor relationships. In this way, the law works to incentivize the creation of contracts that provide greater power and negotiating ability for arts workers and other freelancers—particularly where arts workers have not had well-established standards for contracts to protect workers (Center for Cultural Innovation 2016).

## **Hurdles for Arts Organizations in Complying with A.B. 5**

Many California businesses and nonprofit organizations, including those in the arts, are actively working to comply with the law by converting former independent contractors to employees. Arts organizations that hire arts workers present a broad spectrum of business structures with differing market power, illuminating a range of issues employers and hiring entities face. In some industries, strong labor unions and well-resourced hiring entities exist. Across arts disciplines there are also many small nonprofit arts organizations with limited resources. For undercapitalized nonprofit organizations, A.B. 5 presents more significant challenges, because some of these organizations have historically classified workers as independent contractors to make the operation viable.

Even before the pandemic, many arts workers performed services in industries that operate with tight budgets and struggle to develop the revenue streams sufficient to pay benefits and meet employment obligations. In contrast, other industries with high misclassification rates, such as delivery drivers and trucking or janitorial services, are (at least in more typical times) in a market position to generate sufficient profits to fund benefits and provide worker protections. For these industries, the concerns center on issues of market structure and the asymmetry of power for workers more than the industry's ability to absorb employment and benefit costs.

In smaller nonprofit organizations, absorbing employment and benefit costs can create operational hurdles when there is not a ready means to raise prices or revenue to support the additional labor costs.

For example, some small theaters and dance and opera organizations have reported that the cost of converting independent contractors to employees can be prohibitively high. For example, annual expenses for a small theater are typically below \$1 million, with the smallest theaters operating with less than \$500,000. These smaller theaters tend to spend proportionally more on artistic payroll and occupancy expenses compared with larger theaters (Giraud Voss et al. 2018). Sources estimate that hiring arts workers as employees rather than independent contractors could increase labor costs by 20 percent to 30 percent with Social Security and Medicare taxes, unemployment and disability insurance, workers' compensation, and other costs.<sup>40</sup> Those running organizations as well as performers for those entities are concerned it may lead some organizations to close—an even more significant concern given the COVID-19 crisis. In addition, some arts workers fear A.B. 5 may limit these career development opportunities because they are eager for opportunities to perform at small nonprofit theaters because they want to gain exposure and may be willing to work for low pay.

These unique challenges arts organizations face create a need for greater public funding to support nonprofit arts organizations in making this transition to more economically stable work arrangements for arts workers.<sup>41</sup> Including independent workers in social insurance programs would ultimately help small arts organizations comply with labor laws and enable arts workers to move more freely across sizes and types of hiring entities.

## **Lessons Learned for Policy Solutions Focusing on Classification**

In developing solutions to provide more workers with the protections of employee status, the challenge for policymakers is to ensure that efforts to reduce misclassification for some workers do not eliminate valuable opportunities for others. By calling attention to the importance of appropriate classification, A.B. 5 has raised awareness in the arts community about the need for more resources to support artists' work and the economic security of arts workers more broadly.

A.B. 5 has also underscored the need to invest more in the arts to create conditions where arts workers can work with economic security. Brad Erickson, executive director of Theatre Bay Area, mentioned that some theaters that previously classified performers as independent contractors are now deeming performers “volunteers” and paying them, often far less than before, through reimbursement for travel and other expenses. Such models, which may face legal challenges of their own, demonstrate the need for comprehensive solutions that do not incentivize using other work arrangements that are ultimately worse for workers.

In California, legislators had proposed a one-time \$20 million state budget appropriation for grants to help small arts organizations “that make a good-faith effort to comply with A.B. 5.” State budget shortfalls as a result of the pandemic create immediate challenges to passing such legislation, but as a longer-term solution, providing greater government support for the arts is an important part of addressing challenges for arts workers. Although the actual cost of compliance for arts organizations is estimated to be substantially higher than the \$20 million proposed,<sup>42</sup> this legislative effort acknowledges the need for additional resources to support small nonprofit arts organizations to afford the higher costs of compliance. Additional resources are especially critical given the pandemic to help arts organizations strengthen their worker practices as they come into compliance with the law.

Interviewees often told us they do not see themselves as workers or aligned with other non-arts business owners. This was true even when they faced similar challenges and had similar needs such as unconventional income histories or lack of access to worker protections. As more people work in the short-term and gig arrangements that arts workers long have, those in the arts community have an opportunity to build a broader coalition across arts professions as well as across industries to create systems that meet their shared needs.

## Moving Beyond Classification to Create a More Inclusive Social Contract

America’s social contract and workplace laws provide numerous protections to mitigate the power that employers exercise over employees. Independent contractors have been excluded from these laws because they are assumed to have sufficient bargaining power to decide when, where, and how they work. An understanding of the work relationships of arts workers highlights the flaw in this approach. Even if more workers are reclassified as employees, many freelance arts workers who work independently will still be left without fundamental protections. Arts workers who are independent contractors often face even greater income volatility than employees because freelancers have little guarantee of work and are not in a position to bear all the risk of injury, illness, or unemployment on their own.

To address the needs of freelance arts workers and independent contractors across industries, this report explores promising and innovative policies to: (1) provide avenues to extend to independent contractors worker rights and protections, such as wage and hour, antidiscrimination, health and safety, and the right to collectively organize; (2) provide social insurance programs, including unemployment

insurance and paid leave that include independent contractors; and (3) promote worker cooperatives and other models for building collective power for workers. These policies can support a more inclusive social contract that promotes a livable wage and takes a comprehensive approach to provide core rights and protections that cover all workers.

## Extending Worker Protections to Independent Contractors

As revealed in the interviews, freelance arts and creative workers lack recourse against low pay, discrimination, or workplace safety risks because legal protections extend only to employees. The COVID-19 pandemic has intensified the challenges freelance arts workers face given the greater economic instability and worker vulnerability that can lead to nonpayment of wages and unsafe or discriminatory work environments. Although not all workplace laws may be readily extended to all self-employed workers, the discussion below highlights a few worker protections that would provide critical supports to the independent contractor workforce.

### COLLECTIVE BARGAINING RIGHTS FOR FREELANCERS

Unions have historically played a critical role in enabling employees to organize to rebalance power disparities by allowing them to advocate for better pay and working conditions from their employers, and unions have been especially important for reducing racial and gender wage inequities (Mishel 2012). As described above, strong unions do exist for some arts work, such as acting, music, and entertainment, but organizing arts workers into unions has been more challenging than in other fields.<sup>43</sup> Many arts workers do not engage in collective bargaining for various reasons: those who are independent contractors are excluded from the right to unionize; unions are generally less accessible than they were before the 1980s because of state laws aimed at eroding organizing; and unions in many arts industries are highly exclusive. This has made it very difficult for arts workers, and those who are freelancers especially, to build collective power to raise working conditions. The right to collectively bargain is tied to employee status under the federal National Labor Relations Act. In addition, antitrust laws expose independent contractors to liability for organizing to improve their conditions (Paul 2016). Thus, the only way to extend traditional collective bargaining rights to at least some independent contractors under current law is to reclassify workers as employees. California's A.B. 5 approach will enable more workers—except for app-based transportation and delivery drivers, which Prop 22 carved out from A.B. 5—to obtain the right to organize. At the federal level, the proposed Protecting the Right to Organize (PRO) Act takes a similar approach, requiring that employers extend collective bargaining rights to workers according to the ABC test.<sup>44</sup>

States and cities have also begun to experiment with extending collective bargaining rights to independent contractors, though they have been met with opposition. A proposed law in California, A.B. 1727 or the 1099 Self-Organizing Act, would allow independent contractors to indirectly collectively bargain by forming employee associations that, on behalf of the independent contractors, could negotiate working conditions and contractor pay.<sup>45</sup>

Nontraditional organizing efforts among independent contractors have taken a sector-based approach to organizing. Because independent contractors often do not have a specific employer, organizing at the sector level is likely to lead to greater involvement—and therefore greater power—than organizing at the enterprise level.<sup>46</sup> For example, the California App-Based Drivers Association represents owners and drivers of Uber, Lyft, Sidecar, and others, and works with the regional Teamsters union to support app-based drivers in an effort to secure fairness, justice, and transparency in the industry.<sup>47</sup> Additionally, the National Domestic Workers Alliance advocates for better working conditions for domestic workers—such as nannies, house cleaners, and care workers—nationwide and has championed a National Domestic Workers Bill of Rights, introduced in Congress in 2019.<sup>48</sup> Although many domestic workers are classified as employees, they are still formally and informally excluded from antidiscrimination, wage, overtime, and workplace organizing protections, putting many in the same position as independent contractors.<sup>49</sup> The Bill of Rights would amend federal labor laws to include domestic workers while also extending new benefits, such as guaranteed paid time off and a written employment contract.<sup>50</sup>

Sectoral bargaining may be a promising option for freelance arts workers because work circumstances vary widely by sector. By changing the law to enable collective bargaining—not only at one employer at a time, but also at the sectoral level—worker organizing can better address systems of independent contracting, which otherwise cannot be addressed by unionization at the employer level (Andrias 2016). Sectoral bargaining for a group of freelance arts workers who work in the same or adjacent fields, such as freelance writers and photographers, could set standards for the industry, ensuring a minimum wage rate, worker protections, and paid leave, among other terms. The National Writers Union, for example, is a trade union that represents freelance writers, which more recently launched a Freelance Solidarity Project to organize freelance writers, while working in solidarity with staff writers classified as employees, to set better industry standards for all writers.<sup>51</sup>

Wage boards provide another avenue for raising working conditions of a sector without putting individual employers or hiring entities at a competitive disadvantage. Wage boards, also called workers' standards boards or industry committees, address working conditions in a particular industry or sector. These governmental bodies may convene worker representatives, employers, and the public to set

minimum standards for jobs in specific occupations and sectors (Andrias, Madland, and Wall 2019). By including independent contractors as well as employees, these boards can ensure that standards are not undercut (Madland 2018). These boards investigate working conditions and challenges to make recommendations on issues including minimum pay standards by sector and occupation, benefits, training standards, and worker standards.

At the state level, at least five states, including California, Arizona, Colorado, New Jersey, and New York, have long-standing legislation authorizing the creation of wage boards by industry or occupations. Although these boards have not been used frequently, in the 1990s, California used this mechanism to raise state minimum wages, and more recently New York used wage boards to establish a fast food minimum wage. The wage board approach can better reach industries that pay low wages but above the minimum wage (Dube 2018). For arts disciplines, this can be a potent avenue to address the lack of clear compensation standards and terms of work by setting a floor of agreed-upon protections to raise standards that address the needs of a specific sector or occupations.

#### WAGE PROTECTIONS FOR FREELANCERS

Independent contractors, including freelance arts workers, are not protected by federal or state wage and hour laws, which provide employees with a right to a minimum wage and overtime as well as additional protections. This can result in freelance arts workers receiving sub–minimum wages as a way to gain entry into a field or because of work instability.<sup>52</sup> The California minimum wage increased from \$13 an hour to \$14 an hour on January 2, 2021, and will increase to \$15 an hour in 2022. Newer gig workers, such as Amazon Flex delivery drivers who have been classified as independent contractors, are reported to have been earning sub–minimum wages of \$5 to \$10 an hour, as tips can be unpredictable and arbitrary according to workers (Restaurant Opportunities Centers United 2019).

Local governments have led the way in pioneering new wage floor protections for independent contractors. New York City became the first jurisdiction to set a wage floor, effective February 1, 2019, for the approximately 80,000 drivers of Uber, Lyft, Juno, and Via. The city’s Taxi and Limousine Commission (TLC) created this minimum earning structure, which is estimated to raise the wage floor by 22.5 percent, providing drivers in New York City with a minimum wage of more than \$17 an hour, which encompasses the local minimum wage of \$15 an hour plus coverage for drivers’ additional fees, such as fuel and car maintenance and other expenses related to independent contracting. The wage floor accounts for time spent driving, even without a passenger. Researchers at the University of California, Berkeley, found that a majority of the city’s drivers work full time, and before the adoption of the wage floor 85 percent made less than the proposed pay standard, while an estimated 10 percent of

all taxi and platform drivers were on food stamps and 40 percent relied on Medicaid (Parrott and Reich 2018).<sup>53</sup>

On September 29, 2020, Seattle became the second city to set a minimum pay standard for ridesharing services such as Uber and Lyft, with regulations modeled after New York City's law. Effective January 2021, ridesharing services are required to pay drivers at least \$16.39 an hour. Although this strategy focuses on extending protections to app-based workers, these approaches could provide a model to strengthen protections for those classified as independent contractors in other industries.

Another substantial challenge for freelance arts workers and independent contractors is nonpayment for services performed under a contract. For example, in a 2019 survey, 60 percent of freelancers reported being somewhat or very concerned with “non-payment or late payment for work” (Upwork and Freelancers Union 2019, 38). A Minneapolis survey of independent contractors found that more than 33 percent reported lost income in the past 12 months because of a hiring party's failure to pay, underpayment, or late payment for work performed.<sup>54</sup> Unlike employees who must be paid immediately and on a regular basis under wage and hour laws, freelancers have limited recourse to secure unpaid compensation and typically cannot obtain assistance from government enforcement agencies in recovering payment. To recover owed wages, independent contractors need to file a breach of contract claim in court. For most contractors, this would be a last resort. Not only is the legal process costly and time consuming, but by pursuing legal action, freelance arts workers may also foreclose future work. As a result, freelancers often wait months for payment or agree to lower payments as a condition of receiving any money owed.

A more inclusive social contract should support independent contractors who face challenges in effectively enforcing their right to payment. Government enforcement can help to level the playing field by assisting independent contractors in obtaining payment owed. Systemic enforcement where the government identifies and prosecutes larger patterns of nonpayment of wages can encourage broader compliance by bringing greater attention to the problem on nonpayment by a business or industry. Challenging patterns of nonpayment also relieves individual workers of the risk of coming forward individually against entities they depend on for their livelihood.

New York City's Freelance Isn't Free Act, effective May 2017, provides a model for addressing these issues. It is the first law of its kind to provide protections for the city's hundreds of thousands of independent workers—people retained as independent contractors—regardless of immigration status. Requirements include mandatory contracts when hiring a freelancer for more than \$800 and payment



within 30 days of work completion, unless the contract provides otherwise. In addition, hiring entities cannot require freelancers to accept less than the amount owed in exchange for timely payment. The law is designed to make it easier for freelancers to initiate and win lawsuits alleging breach of contract for failure to pay for services. By authorizing double damages and attorneys' fees when freelancers prevail, relatively small cases are more viable.

This law has served as a model for other states and localities in addressing the needs of freelancers. Minneapolis adopted the Freelance Worker Protection Ordinance, which went into effect on January 1, 2021, and provides the right to a written contract and requirements for timely payment, along with retaliation protections.<sup>55</sup> The Labor Standards Enforcement Division of the City's Civil Rights Department will enforce the ordinance by investigating claims and imposing remedies including damages and penalties.

#### ANTIDISCRIMINATION PROTECTIONS FOR FREELANCERS

A significant concern shared by interviewees is that arts workers who work as independent contractors had little recourse to resolve abuses that stem from power imbalances, particularly harassment and discrimination. Under federal and state law, independent contractors have few protections from discrimination. They face exclusion from the major federal antidiscrimination laws, which only cover employees, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA). These laws presume that independent contractors, including freelance arts workers, have sufficient bargaining power in contracting relationships to prevent harmful conduct. Yet many independent contractors need antidiscrimination protections as much as employees do.

The one federal law that extends to independent contractors is the Civil Rights Act of 1866, Section 1981, which ensures the right to make and enforce contracts free from discrimination on the basis of race. These protections have been extended to discrimination based on ethnicity, but they do not protect against sex discrimination or other forms of discrimination such as age, religion, or disability. This law provides a robust body of case law that demonstrates the feasibility of extending antidiscrimination protections to independent contractors. At the federal level, the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace (BE HEARD) Act, introduced in April 2020, would extend protections under several federal laws, including Title VII, the ADEA, and the ADA, to independent contractors.<sup>56</sup> In addition, the BE HEARD Act would also amend Title VII to change the minimum covered employer size from 15 employees to 1 employee.

At the state level, although A.B. 5 did not extend the more rigorous ABC test for employee status to antidiscrimination laws, a strong argument exists for applying the same standard to antidiscrimination protections. Doing so would ensure more workers have the right to be free from discrimination while creating one unified standard that applies across California’s workplace laws and not just to its wage and hour rules, unemployment insurance, and workers’ compensation laws, which are explicitly covered by A.B. 5. For this reason, the California Department of Fair Employment and Housing as well as courts considering these issues may decide to apply the ABC test to antidiscrimination claims, which would provide more workers with access to equal opportunity protections.

Most state antidiscrimination laws, like their federal counterparts, exclude independent contractors from protections, but some states have begun to fill the gaps in protections for independent contractors. California’s antidiscrimination statute includes independent contractors in the definition of “employee” for purposes of harassment but not other forms of discrimination such as pay or pregnancy discrimination. New York and Maryland fully protect independent contractors under their antidiscrimination laws by including them in the definition of “employee.” Minnesota and Rhode Island protect independent contractors from discrimination under laws that prohibit discrimination in contracting similar to Section 1981 but extend beyond race discrimination to include other bases.<sup>57</sup> New Jersey and Washington provide some more limited protections for independent contractors, and Pennsylvania provides protections for certain licensed contractors.

#### HEALTH AND SAFETY PROTECTIONS FOR FREELANCERS

Independent contractors also confront significant health and safety risks because only employees and not independent contractors are covered by the federal Occupational Safety and Health Act of 1970 (OSH Act). As a result, the Occupational Health and Safety Administration (OSHA) does not have authority to protect independent contractors.<sup>58</sup> In contrast, in November, the United Kingdom’s highest court found that the government must act under the European Union’s directives on health and safety to ensure the country’s estimated 4.7 million independent contractors are entitled to the same health and safety protections as employees.<sup>59</sup>

Many arts workers, including muralists, fabricators, and performing artists, particularly dancers, face high rates of injury on the job.<sup>60</sup> An artist working as an independent contractor on a set would have the same need for protections against known health and safety hazards as would employees. Although contractual agreements can provide health and safety protections for independent contractors, many independent contractors do not have sufficient power in work relationships to negotiate and enforce such terms. In addition, although independent contractors can pursue personal

injury claims for illness or injuries under state tort law, unlike employees, independent contractors do not have protections against retaliation for raising concerns or the backing of an enforcement agency that can set standards, provide training, and issue fines. Nor do independent contractors have the right to personal protective equipment where it is necessary to protect employees from job-related injuries and illnesses. Independent contractors are on their own to protect themselves and will typically need to hire a lawyer and marshal considerable evidence to pursue a legal action.

The COVID-19 pandemic has created a workplace health and safety crisis for essential workers, which has had a tragic disproportionate effect on workers of color; yet the federal government has not acted to provide mandatory requirements to better protect workers from airborne infectious diseases.<sup>61</sup> Federal protections should extend not only to employees but also independent contractors because the safety of all workers on a worksite is intertwined regardless of their classification. Under existing law to determine who qualifies as an “employee” under OSHA, courts have applied the traditional common law test that considers multiple factors—most importantly, who controls the way workers perform their assignments. Given the complex, fact-specific nature of the classification analysis, when conducting onsite inspections, it is important that federal and state OSHA agencies carefully evaluate claims of independent contractor status to ensure misclassified workers are protected.

In the absence of federal action, states and localities are stepping in to fill the void. More than 20 states have workplace safety and health agencies and have authority to pass standards specific to COVID-19.<sup>62</sup> This includes California, which approved an emergency temporary standard regarding COVID-19, effective November 30, 2020 (DIR, n.d.).<sup>63</sup> These state protections have generally paralleled federal law and limited protections to employees. State and local governments have the power to extend protections to independent contractors, subject to state preemption issues affecting local action. For example, in April, Los Angeles County passed an ordinance requiring companies such as Instacart, DoorDash, and Shipt, as well as retail groceries and drugstores, to provide delivery workers—even where classified as independent contractors—with face coverings, hand sanitizer, and a “no contact” option so workers can make deliveries without interacting with customers.<sup>64</sup> Similarly, the City and County of San Francisco passed an emergency ordinance requiring grocery store, drug store, restaurant, and on-demand delivery service companies to provide health and scheduling protections for workers to help prevent the spread of COVID-19. The emergency ordinance defines on-demand delivery drivers and shoppers as “employees,” even if they may be classified and treated as “independent contractors” for other purposes.<sup>65</sup> To further address gaps in protections for independent

contractors, states and localities can take action to require that everyone on a worksite obtains protections and safety training.

## **Extending Critical Social Insurance Programs to Self-Employed Workers**

Updating the social contract to provide greater economic security to independent contractors requires expanding social insurance programs to include more workers who fall outside of traditional employment relationships. Freelance arts workers, like other independent contractors, and self-employed workers are excluded from employment-based social insurance programs despite the precarious nature of their jobs. As a result, the loss of a job, illness, or injury can be detrimental to the well-being of workers and their families. Two social insurance programs in particular—unemployment insurance and paid leave—have proven especially critical during the economic and health crises presented by COVID-19 and have been a central focus of federal relief packages in the short term. The remainder of this section focuses on designing long-term solutions for these two programs.

Early evidence from these emergency benefits, existing policy proposals, and current state and federal programs provides a blueprint for strengthening unemployment and paid leave protections for independent contractors. New models should consider how systems can be structured to require hiring entities to contribute to worker unemployment benefits to avoid incentives for using independent contractor structures as a way to circumvent employer responsibility. In addition, systems should be built to ensure equal uptake by freelance arts workers and other independent contractors, as voluntary contribution systems or higher contribution rates for independent contractors may lead to limited participation by independent contractors. The solutions presented here stand to benefit not only freelance arts workers, but all independent contractors, and reflect a refreshed approach to create a more inclusive social contract that promotes economic security and dignity for all workers, including the growing numbers of those outside conventional employer models.

### **EXPANDING AND STRENGTHENING UNEMPLOYMENT PROTECTIONS**

Unemployment insurance (UI) is a critical component of social insurance programs. UI creates economic security, promotes economic mobility, reduces income volatility, and helps stabilize the economy during downturns; yet many freelance arts workers remain excluded. A joint state-federal program, UI provides cash benefits to replace a share of lost wages during periods of unemployment, making it an important income smoothing mechanism, particularly for people with low incomes and who lack savings. Each state administers a separate unemployment insurance program, but all states follow guidelines established by federal law. To be eligible for UI benefits, workers almost always must have

paid into the system through their employers' payroll taxes, have lost a job through no fault of their own, have sufficient earnings history and meet a minimum income threshold, and be actively seeking work. These requirements leave freelance arts workers or otherwise self-employed workers categorically ineligible (West et al. 2016).

When the UI system was designed in 1935, most work existed within traditional employer-employee relationships. As a result, key elements of its structure—namely, how the systems are financed, how involuntary unemployment is demonstrated, and how the size of the benefit is determined—are not designed to enable a straightforward inclusion of independent contractors.

First, the UI system is currently financed by experience-rated taxes on employer payrolls, meaning that employers contribute to the system at a tax rate determined by the amount of unemployment for which the employer is responsible. Freelance arts workers and other independent contractors often work for one or more employers for short periods of time, making it difficult to identify which employer would be responsible for paying into the system and the tax rate at which they would contribute to the UI system. Second, in the current system, benefits are triggered by the demonstration of involuntary unemployment. For employees, a layoff is clear evidence of involuntary unemployment, but for freelance arts workers and other independent contractors, who may engage in gig work for the flexibility it allows, making that distinction is more difficult. Relatedly, calculating a weekly wage—which determines the size of the UI benefit in the current system—is more difficult to do for those engaged in contract work. Finally, while many arts workers engage in part-time work as an additional source of income, this part-time work often does not guarantee them access to UI because their incomes may not meet monetary eligibility thresholds or because searching for part-time (as opposed to full-time) work excludes workers from UI eligibility in some states.

COVID-19 has highlighted the need to extend UI benefits to independent contractors. As discussed, arts workers have been hit especially hard by the economic effects of the pandemic, as have independent contractors more generally, with the Freelancers Union reporting that more than 80 percent of freelancers surveyed have each lost thousands of dollars because of COVID-19's economic effects.<sup>66</sup> Several interviewees for this study stressed that the Pandemic Unemployment Assistance (PUA) program, established under the Coronavirus Aid, Relief, and Economic Recovery (or CARES) Act, has been a critical lifeline for arts workers working as independent contractors who would not have otherwise had access to benefits. PUA is providing temporary unemployment benefits to workers who do not qualify for traditional UI during the COVID-19 pandemic, including independent contractors, freelancers, part-time workers, and workers without a long enough work history to qualify for UI.<sup>67</sup> However, because PUA is federally funded and the trigger for involuntary unemployment is the

pandemic, it does not provide a model for how a sustainable program for independent contractors might be designed.

Emerging evidence on PUA's effectiveness highlights the breadth of gaps in the UI system and reinforces the need for a permanent solution. At the height of the pandemic, nearly half of workers receiving unemployment benefits had gotten them through PUA, meaning that absent PUA, they would not have had access at all.<sup>68</sup> Additionally, the absence of a system for calculating unemployment benefits for 1099 workers has meant that, in most states, workers with both W-2 and 1099 income have received far lower UI payouts than their incomes would otherwise indicate, as they can only receive benefits resulting from their W-2 income. For example, workers who made 95 percent of their income from independent contracting work and 5 percent of their income from W-2 work last year would be paid unemployment benefits based on only that 5 percent of their income earned through W-2 work.<sup>69</sup>

Several approaches can be taken to modernize the UI system to reach independent contractors. One is to complement the existing employer-based benefits system with a new portable benefits model for independent contractors that includes UI as part of a suite of work-related benefits. The three main characteristics of portable benefits models that make them a good fit for independent contractors' work circumstances are that they are portable, meaning they can be carried between jobs because they are connected to a person rather than an employer; they are prorated, so they are provided in proportion to work; and they are universally accessible by all workers (Reder, Steward, and Foster 2019).

However, designing a system of portable UI benefits for independent contractors requires a sustainable system for financing unemployment benefits. As described, an ideal system will ensure that contributions are shared by the hiring entity and worker. Two Aspen Institute reports provide insight into the various ways that a portable benefits system could be structured and financed (Reder, Steward, and Foster 2019; Rolf, Clark, and Bryant 2016), and proposals from author Steven Hill, economist Jonathan Gruber, and labor leader David Rolf, and investor Nick Hanauer argue for individual savings accounts in which workers would accrue employment benefits that they could carry between jobs. These accounts could provide unemployment benefits as well as other benefits traditionally provided by full-time, salaried jobs, such as workers' compensation, paid leave, a matching retirement contribution, and a health insurance premium contribution (Reder, Steward, and Foster 2019; Hill 2015; Gruber 2016; Hanauer and Rolf 2015).

Additional experimentation is needed. At the state level, proposed legislation in Washington, New Jersey, and Georgia that establishes ways for independent contractors to access health care, paid, leave, and retirement benefits could experiment with offering unemployment insurance as well.<sup>70</sup> At the federal level, in July 2020, Senator Mark R. Warner (D-VA) and House Representative Suzan DelBene (D-WA) introduced legislation to establish a \$500 million emergency portable benefits fund for states to assist them with setting up a portable benefits program for independent workers. The federal funds would also pay for a share of the costs associated with modernizing states' UI technology systems to expand benefits eligibility and would provide funding for states—in partnership with cities, localities, and worker advocate nonprofits—to experiment with innovative proposals for portable benefits, such as paid leave, retirement plans, and the longer-term expansion of UI eligibility.<sup>71</sup>

In the absence of a universal solution, benefits could be extended to some independent contractors through an opt-in provision within the existing employer-based UI framework. A proposal for a “Freelance Worker Pilot” from The Century Foundation, modeled after California’s program, would seek to better understand how independent contractors would use UI if they had access to it. The pilot would allow some permanent self-employed workers to opt into traditional UI coverage, and they would be eligible to receive benefits after contributing for a set period, similar to employees (McKay, Pollack, and Fitzpayne 2018).

Additionally, new Jobseeker’s Allowance (JSA), proposed by the Center for American Progress, the National Employment Law Project, and the Georgetown Center on Poverty and Inequality could help stabilize the incomes of independent contractors. The JSA would be a small, short-term weekly allowance to support work search and preparation for workers who do not qualify for traditional UI, such as independent contractors and new labor market entrants or re-entrants. It would be a uniform benefit of \$170 a week—well-suited to independent contractor work, because the benefit size is not calculated based on hours or earnings. The JSA’s maximum duration would be 13 weeks (compared with 26 weeks for UI). The JSA would be similar to UI in that it would provide a weekly cash benefit to unemployed workers who are engaged in job searching but different in that it would be federally administered and federally funded through general revenues with potential offsets from other sources (West et al. 2016).

## GUARANTEERING UNIVERSAL PAID LEAVE

Many arts workers are also among the independent contractors who lack access to paid sick leave and paid family and medical leave (PFML). These are critical pieces of the safety net, allowing workers the flexibility to care for themselves and their families without risking income or job loss. Although many

traditional employees—disproportionately workers of color and paid low wages—do not receive paid leave from their employers either, independent contractors have very limited or nonexistent access to these protections. Nine states and DC have passed mandatory PFML laws, and in seven of those (including California), independent contractors can opt in.<sup>72</sup> Fifteen states, DC, and more than 20 localities have passed laws that guarantee paid sick leave or passed broader paid time off laws that can be used for paid sick leave, but none of these cover independent contractors.<sup>73</sup>

The COVID-19 pandemic has made visible the need to have national leave policies in place. The Families First Coronavirus Response Act, implemented by Congress at the beginning of the pandemic, provides the first federal right to paid time off in the private sector and includes emergency paid sick days and emergency PFML policies through 2020. The provisions provide compensation to eligible self-employed workers for time they are not working through an advanced refundable tax credit that reimburses them for the cost of taking paid leave.<sup>74</sup> This legislation is temporary, but the model could be expanded to other emergency situations.

As with unemployment benefits, the ultimate design of any permanent paid leave program should ensure that contributions are shared by the employer and worker and that the cost of participation for independent contractors is no greater than for traditional employees. It should also create mechanisms to ensure uptake among employees and independent contractors. Proposed and enacted local, state, and federal paid leave laws provide helpful clues for how universal paid leave programs that include independent contractors might be structured.

The primary federal proposal to guarantee paid sick leave, the Healthy Families Act, would adopt the model used by state and local paid sick time laws, where employers pay employees for the sick time they have accrued when they use it.<sup>75</sup> However, straightforward inclusion of independent contractors is difficult under this model because there is no employer to fund the benefits. The Philadelphia Domestic Workers' Bill of Rights created a portable benefits model that provides paid sick time to domestic workers, including independent contractors and employees, through a fund that is administered by the city and paid into by those hiring domestic workers.<sup>76</sup>

State and local laws that provide PFML fund benefits through employer contributions, employee contributions, or both. Washington State's PFML law, which allows independent contractors to opt in, may serve as a model: employers and employees share the program's cost, but for independent contractors the state fund absorbs the employer share, equalizing the cost of participation for all workers. In contrast, in the New York and Massachusetts PFML laws, independent contractors pay both shares, which makes it more expensive for independent contractors to gain access (Williamson,



Leiwant, and Kashen 2019). California’s paid family leave program, which is fully worker funded, may also disincentivize independent contractors’ participation because self-employed workers who opt in to coverage must pay a far higher contribution rate (5.25 percent) than employees (1 percent).<sup>77</sup>

Additionally, PFML laws that offer coverage to independent contractors typically do so through a voluntary opt-in process, which may lower uptake. Massachusetts has attempted to address this by requiring businesses that hire 50 percent or more of their workers as independent contractors to automatically provide coverage to workers (Williamson, Leiwant, and Kashen 2019). The leading federal proposal to provide PFML, the Family and Medical Insurance Leave (FAMILY) Act, would provide automatic coverage for both employees and independent contractors, but independent contractors would pay both shares of the cost, making it more expensive for them to participate.<sup>78</sup> Under the FAMILY Act, PFML would operate as a social insurance program in which risk would be shared by all workers, which would make establishing a sustainable, affordable program easier than in an independent contractor-only program.

In the wake of the COVID-19 pandemic that began in late March 2020, federal paid leave legislation was introduced in the House and Senate to help fill the paid leave gap for freelance arts workers and other independent contractors. The Providing Americans Insured Days of Leave Act builds on the Healthy Families Act and the FAMILY Act. It would guarantee all workers, including independent contractors, paid sick days and PFML throughout the pandemic and in future public health emergencies. It would also permanently ensure that all workers can accrue seven paid sick days a year and access PFML. If passed, the cost would be fully covered by the federal government through 2021. Beginning in 2022, hiring entities would be required to provide paid sick leave to independent contractors. Also beginning in 2022, independent contractors would be entitled to PFML but would pay both the employer and employee shares.<sup>79</sup> Innovative approaches like Massachusetts’s state PFML fund described above could be considered so the cost burden is similar for all workers, regardless of classification. Absent federal legislation, freelance arts workers and other independent contractors can benefit from state and local paid leave legislation.

## Supporting Collective Action

Collective action can be a powerful tool for freelance arts workers and other independent contractors to hold hiring entities accountable, fill gaps in the safety net, and increase job quality in their professions. Yet independent contractors do not have collective bargaining rights. Further, alternative modes of organizing arts workers are made more difficult because they are often not working together

in the same physical space or sharing the same employers, and because many artists do not see themselves as workers. In recent years, efforts have increased to strengthen the bargaining power of independent contractors, as well as an emerging movement of worker cooperatives and other collective efforts to address some of these challenges. Innovative efforts inside and outside of the US—some of which are highlighted here—provide examples that can be strengthened and scaled with support by government, foundations, and private corporations.

## **Nontraditional Organizing Efforts**

Many nonprofit member-based organizations are advocating on behalf of freelance arts workers and others working as independent contractors to help fill the gap in collective bargaining rights. For example, WAGE is a solidarity union and certification program based in New York City that provides working artists with the necessary collective agency to negotiate compensation or withhold content from contracting organizations.<sup>80</sup> Nationwide nonprofit organizations also advocate on behalf of their members, both independent contractors and employees, to help compensate for their lack of individual bargaining power. These organizations represent members' interests in the policy arena, fighting for better pay, working conditions, and benefits, and have secured important policy changes for workers. For example, the Freelancers Union (which includes arts workers) was instrumental in helping pass New York City's Freelance Isn't Free law. In addition, the National Domestic Workers Alliance has played a key role in the passage of labor protections for domestic workers in nine states and in the adoption of a federal rule change that granted two million domestic workers who provide companionship services the right to a minimum wage and overtime pay.<sup>81</sup>

## **Supporting Worker Cooperatives**

As worker-owned and democratically governed businesses, worker cooperatives (or “co-ops”) hold the potential to build collective power for all workers. However, they hold particular promise for arts and other workers who prefer to work as independent contractors because they allow workers to maintain more autonomy over their work while also gaining access to supports—and in some cases benefits and protections—that are difficult to access alone. More broadly, co-ops have the potential to more equitably distribute power and profits throughout the economy because co-ops are structured so that workers drive decisionmaking and share financial surplus from business operations.

Artist co-ops have their roots in artisan guilds in medieval Europe, where artists in various professions worked collaboratively to meet their common needs. Today, worker cooperatives

represent a very small share of the artist economy, but they bring important benefits to their members. Typically, they are created to market products and as a cost-effective way to obtain studio, gallery, or retail space and expensive equipment or supplies.<sup>82</sup> As of 2020, nearly 500 worker co-ops operate across all industries nationwide, and they are most common in the retail and service sectors (though their presence in the technology and home care sectors has been growing over the past decade).<sup>83</sup> Some worker co-ops are part of the growing “platform cooperativism” movement, which enables online participation in worker co-ops for gig workers who may not physically be together (Scholz 2016).

The legal structure that arts workers adopt when creating a worker co-op has implications for accessing social insurance programs because the way that work is performed determines what benefits and protections workers can access. Nationwide, nearly half of worker cooperatives (46 percent) are incorporated as cooperative corporations, though only about half of states recognize these entities. A quarter (26 percent) are structured as limited liability companies (LLCs). LLC owners are not generally considered employees in California, but workers in cooperative corporations are typically considered employees.<sup>84</sup> In this sense, forming cooperative corporations that designate workers as employees may help address tensions raised by A.B. 5, as workers retain a significant degree of control and ownership over their work but receive the employment benefits and protections associated with employee status. However, workers such as freelance artists who place a high value on autonomy may prefer the additional flexibility of LLCs.

Regardless of entity type, the worker cooperative structure makes it easier for freelance arts workers and other independent contractors to access benefits and protections than they could alone. Even if the co-op is not legally compelled to provide benefits, it is more cost-effective for the co-op to purchase benefits at scale than it would be for workers to purchase them individually. Additionally, workers in both cooperative corporations and LLCs are not subject to double taxation (paying taxes only at the individual level, not the corporate level), leaving larger profits to invest in benefits, minimum wages, and overtime pay if the co-op so chooses.

Additional experimentation will be needed to determine which entity type is most conducive to the way that workers operate in various arts sectors and in other industries with large shares of independent contractors. The Smart cooperative in Europe offers a promising model. It started as a nonprofit organization in Belgium in 1998 to address the administrative burden and economic pressures creative professionals face and now functions as a cooperative intermediary, employing more than 100,000 artists, creatives, and freelancers in other industries in nine European countries. It provides its members with benefits and protections by making freelancers employees of the cooperative (which confers them with government-funded benefits and protections), an upfront

payment guarantee, and invoicing and payment collection services to alleviate the administrative burden of freelance work, but allows workers to maintain their autonomy and work independently.<sup>85</sup> A similar model has been proposed in California in the wake of A.B. 5. Labor and worker co-op advocates have drafted the Cooperative Economy Act, which would create and incentivize cooperative labor contractors (CLCs), structured as worker co-ops, in California. These staffing firms would employ those classified as independent contractors, allowing them to access full employment protections, control of their own labor, and receive a share of the profits that their labor creates.<sup>86</sup> Additionally, the US Federation of Worker Cooperatives recently launched an entity called Guided that will create an online-based worker cooperative for freelancers, inspired by those in the creative field, to experiment with providing benefits and protections.<sup>87</sup>

At scale, worker co-ops hold promise to create better quality jobs in arts and other freelance work, but concerted investment and efforts to remove barriers to access would be needed. Local, state, and federal governments have increasingly expressed interest in doing so in recent years. Since 2014, the New York City Council has approved more than \$10 million in discretionary funding to fund the development of worker cooperatives, the largest to date by a city government, and other cities have passed similar initiatives since. And in 2015, Governor Jerry Brown signed the California Worker Cooperative Act, which removed barriers to the creation of co-ops and improved operations for some existing co-ops.<sup>88</sup> At the federal level, Congress passed the bipartisan Main Street Employee Ownership Act in 2018—the first federal legislation to spotlight worker cooperatives—which eases financial barriers to their formation.<sup>89</sup> Two other federal bills have been proposed that would provide technical assistance and loans to employees who want to become owners, but tax incentives at the federal and state levels to support the conversion of businesses to co-ops will also be necessary.<sup>90</sup>

To scale co-ops, a national-level regulatory framework that provides a universal definition for worker co-ops, financial support mechanisms, and cross-sector partnerships—not only among cooperatives, but with other labor and social movements—will likely be necessary. Italy’s experience of successfully expanding its co-op sector provides valuable guidance on how to do so. Italy is home to more than 29,000 worker cooperatives, compared with nearly 600 in the United States.<sup>91</sup> The Italian government has created a policy environment that allows worker co-ops to thrive by implementing tax privileges and subsidies for co-ops and creating cooperative federations that provide capital and services such as payroll and legal assistance, collective bargaining, and skills development to their members (Adeler 2014).

Community Development Financial Institutions (CDFIs) and worker cooperative development organizations already play a vital role in the development of worker co-ops and can help scale co-ops by

making capital accessible to arts workers who want to form them. To be maximally effective, capital must be structured to be consistent with cooperative principles. Cooperative-specific lenders such as the Cooperative Fund of New England, Shared Capital Cooperative, The Working World/Seed Commons, and the Southern Reparations Loan Fund generally provide more efficient financing for worker co-ops than traditional lenders. Equity instruments that structure capital to be consistent with cooperative principles, such as preferred stock, direct public offerings, and profit-sharing returns, are still rare but are garnering interest throughout the worker co-op community (Kerr 2015). Finally, nonprofits dedicated to worker co-ops provide various forms of support, including paying for start-up costs, providing education and technical assistance to workers, providing payroll services, and advocating on behalf of co-ops. Philanthropy can fund and support organizations like these, such as the California Center for Cooperative Development, the Sustainable Economies Law Center, and the US Federation of Worker Cooperatives and its sister organization the Democracy at Work Institute.

## **Other Collective Efforts to Meet Workers' Needs**

Many arts and other workers in precarious economic situations are organizing outside of their workplace to secure basic needs that support economic stability yet have been out of reach for many. According to Lauren Ruffin, co-CEO of Fractured Atlas and cofounder of Crux Cooperative, the sharing resource economy has “dramatically decreased the cost of production and space by coordinating resources.” A few of the many interesting models of collective action that have emerged among arts workers are discussed here and include efforts to address basic needs, professional development, and debt.

When businesses began to close because of COVID-19, Theatre Bay Area launched the Performing Arts Worker Relief Fund, a mutual aid initiative for artists facing income loss. Donations from individual donors have enabled the fund to distribute hundreds of thousands of dollars to hundreds of artists.<sup>92</sup> Across California and the nation, similar mutual aid funds have been emerging to provide emergency funds to artists and other workers in nonstandard arrangements for whom unemployment benefits are inaccessible or insufficient.

Additionally, community land trusts (CLTs), nonprofit organizations that hold land on behalf of a community, are a promising model for arts and other workers paid low wages to secure affordable housing. Currently, 225 CLTs operate across the country, and they are growing in popularity as housing costs soar in many cities.<sup>93</sup> In New York City, To Be Determined is an intergenerational collective of artists working toward a CLT for a broad range of artists and creatives.<sup>94</sup> Also in New York City, 3B and

Fourth Arts Block in New York City are examples of artist-led land trusts that will provide long-term sustainability for arts workers.<sup>95</sup> And in California, the East Bay Permanent Real Estate Cooperative is fighting displacement of people of color by combining elements of both the CLT and co-op models to allow residents to purchase cooperative ownership shares in properties.<sup>96</sup>

Indi McCCasey, creative education consultant and executive director of the Arts Education Alliance of the Bay Area, also described a local initiative that aims to address a pervasive lack of compensation for professional development time among teaching artists. The initiative collaborated on a yearly professional development conference that required participating organizations to pay teaching artists a minimum amount to attend. The organizations pooled funds and resources to put on the conference and pay teaching artists who led workshops as well as those who attended the conference. In the future, young people will also be involved in cocreating and codesigning professional development opportunities.

Finally, debt collectives offer a promising pathway to debt negotiation or forgiveness. This stands to greatly benefit arts workers, who often take on large student loans or other credit card debt to afford necessities. The Debt Collective, launched in 2014, organizes debtors into groups that can effectively bargain with creditors or even develop the power to strike against predatory and illegitimate debts, and envisions transforming the way that education, health care, and housing are provided.<sup>97</sup> The Debt Collective was instrumental in securing a 2016 Department of Education rule that provides a mechanism for student loan borrowers to demonstrate that their loan does not need to be repaid because of their school's fraudulent or misleading conduct.<sup>98</sup>

## Conclusion

This report has highlighted the unique circumstances of arts workers but also revealed they are not alone in their challenges. As more industries shift to independent contractor business models, and the gig economy grows, more workers are facing similar economic instability and insecurity that arts workers have long endured. Independent contracting work is not inherently bad for workers, but as long as it lacks the benefits and protections that employee status guarantees, an increasing share of American workers will be excluded from the core protections of the social contract.

A social contract that includes all workers will require that hiring entities take greater responsibility for a range of work-related risks now borne primarily by people working as independent contractors. New policies should address misclassification to extend employment protections to more workers, but

also move beyond classification questions to ensure that employers bear their fair share of responsibility for workers whose labor they rely on. As many arts workers and others work independently, stronger mechanisms for collective organizing and support for new collectivizing structures are critical to ensure that workers have the power to shape decisions that affect them and hold their employers accountable. The federal government has an important role to play in creating a unified national standard that protects all workers, but state and local leaders also have a critical role in testing innovative solutions and filling gaps in protections at the federal level.

The COVID-19 crisis has clarified that the country's economic well-being is dependent on the well-being of all workers. But it has also shown that too many workers are left behind by existing systems. Bold reforms, like those laid out in this report, can move us closer to an economy that works for arts workers and, therefore, for all.

# Appendix A. Data Methodology and Data Analysis Approach

No one uniform definition of “artist” or “cultural worker” exists, nor is there consensus in the field about what these definitions should be. The distinction of an arts worker is not exclusively tied to one specific discipline, required credential, job, process, or place. This variation has led to debates among artists, cultural organizations, researchers, and others about who is an “artist” and has meant that the size and employment circumstances of the arts workforce are not understood in a uniform way nationally or across states. Research analyses can range by sector, subsector, occupation, and discipline, and be skill-set specific.

Our definition of arts workers used in this report draws heavily from artist and cultural occupations used by the National Endowment for the Arts (NEA 2013). The NEA identified core artist and cultural occupations with skill sets essential to producing creative work in the arts and entertainment industries. Table a.1 below includes the specific occupations used in our data snapshot of arts workers—indicators for which occupations are included in NEA’s standard list of artists and cultural occupations—and the 2018 Standard Occupational Code (SOC) referenced in the data.

**TABLE A.1.**  
**Arts Worker Occupations Included in Data Analysis for This Report**

Arts worker occupations	Artist occupations	Cultural worker occupations	NEA core artist and cultural occupations	SOC, 2018
Agents and business managers of artists, performers, and athletes		X	X	13-1011
Artists and related workers (includes fine artists and multimedia artists)	X		X	27-1010
Announcers	X		X	27-301
Architects	X		X	17-101
Designers (includes graphic, interior, and fashion)	X		X	27-102
Education and library occupations		*	X*	*
Jewelers and precious stone and metal workers		X	X	51-9071
Media and news occupations Editors		X	X	27-3041



<b>Arts worker occupations</b>	<b>Artist occupations</b>	<b>Cultural worker occupations</b>	<b>NEA core artist and cultural occupations</b>	<b>SOC, 2018</b>
News analysts, reporters, and correspondents		X	X	27-302
Misc. media and communication workers		X	X	27-309
Photographers	X		X	27-4021
Writers and authors	X		X	27-3043
<b>Performing Artists</b>				
Actors	X		X	27-2011
Dancers and choreographers	X		X	27-2030
Entertainers, performers, and related workers	X		X	27-2099
Entertainment attendants and related workers		X	X	39-30XX
Musicians, singers, and related workers	X		X	27-204
Producers and directors	X		X	27-2012

\*Note that education and library occupations are excluded from analysis in the report. The dataset used—ACS—does not provide breakdowns specifically for art teachers, art-specific librarians, or curators. Given the size and breadth of the education and library workforce, their inclusion would skew the analyses to a substantial degree.

Although the NEA does conduct research on an artist-specific subset of these workers, the data in this report focus broadly on artists and cultural workers who may engage in creative work often conducted outside of traditional employer-employee relationships. The specific list of occupations was drawn primarily from the following reports on arts workforce research, including the *NEA Guide to the U.S. Arts and Cultural Production Satellite Account (2013)*, *Artists and Other Cultural Workers: A Statistical Portrait* (Iyengar et al. 2019), and the *State of the Artist Report: Challenges to the New York State Arts and Entertainment Industry and its Workforce* (Gray, Figueroa, and Barnes 2017).

The data in the report (table 1; figure 1) are drawn primarily from the 2014–18 Public Use Microdata Samples (PUMS) of the American Community Survey conducted by the US Census Bureau. Estimates based on these data are subject to sampling and nonsampling errors.

Other government databases used (e.g., for the national unemployment rate) include the Current Population Survey (CPS), sponsored jointly by the US Census Bureau and Bureau of Labor Statistics (BLS). These data were used to analyze artist unemployment, as shown in figure 2.

# Data Limitations

## Limitations of ACS data

Selecting for arts workers occupationally based on federal statistics, as done in the report, has some important limitations. Occupational definitions of the arts workforce may undercount the number of people working as creatives and underrepresent their contributions working in the creative industries. For example, newer occupations such as computer graphic artist or video game maker are not considered arts professions in the ACS data used for this report and thus are not represented in the data analyses. Another important limitation to consider is these arts workers are categorized as “professionals” in the US occupational taxonomy, although “artist” is not a designation owned exclusively by those with professional certification.

In recognition of these limitations, one alternative approach considered was a creative industry analysis, which includes all workers in creative industries, adapted from the *2019 Otis Report on the Creative Economy* (Otis College of Art and Design 2019) and *Creative State Michigan: 2016 Creative Industries Report*. Creative industries were grouped into affinity clusters—that is, industries related to architecture such as architectural services and landscape architectural services were grouped together in one cluster. However, the creative industry analysis was imprecise because not all people employed in creative industries are engaged in creative occupations. Using more expansive categorization schemes to understand the contributions of workers in the creative industries and creative occupations would lead to imprecise estimates and overcounting.

After considering all data limitations, the authors determined that the artist occupation categorization scheme used in the report best met three standards that guided the analysis:

1. It drew from publicly available data used in the most relevant reports.
2. It used a coding scheme that was internally consistent (i.e., consistent in how it is measured and discussed in the data used in the report).
3. It was grouped into categories that were both intuitive and drew from schemes used in relevant source reports and throughout the field of researchers in this space.

## Limitations of Current Population Survey (CPS) data

This report uses the CPS to provide statistics on the unemployment rate of arts workers at the national level, rather than the state level. The sample sizes used at the state level do not provide sufficient power

to do state level analyses for these grouping of industries and occupations. For instance, for arts worker occupations, only approximately 100 people are in this occupational group in California for any particular month, which is too small to accurately report on the more than half-million arts workers in this category.

Although the ACS and CPS are some of the most powerful and substantive data sources on employment, these data do not cover with any or sufficient detail several other important topics and considerations for the report:

- work turnover (e.g., how frequently do you change jobs)
- income volatility (e.g., how frequently do you go from paying jobs to periods of no pay or from one job that pays substantially differently from another job)
- additional details on work arrangements (e.g., contractual arrangements, experiences with discrimination)
- benefits (e.g., limited information on health insurance)

These data from other sources, such as national-level analyses of the Contingent Worker Supplement, which provides some detail on people in contingent work arrangements by industry and occupation, have been explored in other research (e.g., NEA 2019) but are outside this report's scope.

# Appendix B. List of Expert Respondents

- Amy Kitchener, executive director, Alliance for California Traditional Arts
- Barbara Davis, chief operating officer, Actors' Fund
- Brad Erickson, executive director, Theatre Bay Area
- Caitlin Pearce, consultant and former executive director, Freelancers Union
- Deana Haggag, president and CEO, United States Artists
- Esteban Kelly, executive director, US Federation of Worker Cooperatives
- Favianna Rodriguez, president, Center for Cultural Power
- Hannah Appel, associate professor, University of California, Los Angeles
- Indi McCasey, creative education consultant and executive director, Arts Education Alliance of the Bay Area
- JD Beltran, founder and director, Center for Creative Sustainability
- Lauren Ruffin, cofounder of Crux Cooperative and co-CEO of Fractured Atlas
- Lise Soskolne, core organizer, WAGE
- Lloyd Esperance, chief of staff, Freelancers Union
- Michelle Evermore, senior researcher and policy analyst, National Employment Law Project
- Rafael Espinal, executive director, Freelancers Union
- Rebecca Smith, director, Work Structures, National Employment Law Project
- Wayne Vroman, senior fellow, Urban Institute

# Notes

- <sup>1</sup> “Social Insurance Programs,” Institute for Research on Poverty, accessed November 30, 2020, <https://www.irp.wisc.edu/research/economic-support/social-insurance-programs>.
- <sup>2</sup> “Social Contract,” Dictionary.com, accessed November 30, 2020, <https://www.dictionary.com/browse/social-contract>; and “Social Contract Theory,” Internet Encyclopedia of Philosophy, accessed November 30, 2020, <https://iep.utm.edu/soc-cont/>.
- <sup>3</sup> “Electronically Mediated Employment,” US Bureau of Labor Statistics, accessed October 21, 2021, <https://www.bls.gov/cps/electronically-mediated-employment.htm>; and “How Many Gig Workers Are There?” Gig Economy Data Hub, accessed October 21, 2021, <https://www.gigeconomydata.org/basics/how-many-gig-workers-are-there>.
- <sup>4</sup> *Dynamex Operations West, Inc. v. Superior Court*, S222732, 4 Cal. 5th at 903 (2018).
- <sup>5</sup> A.B. 5, 2020 Leg., Reg. Sess. (CA, 2020).
- <sup>6</sup> “The Economic Impact of the Coronavirus on the Arts and Culture Sector,” Americans for the Arts, accessed November 30, 2020, <https://www.americansforthearts.org/by-topic/disaster-preparedness/the-economic-impact-of-coronavirus-on-the-arts-and-culture-sector>.
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- <sup>9</sup> See also the website for the Gig Economy Data Hub at <https://www.gigeconomydata.org>.
- <sup>10</sup> Analyses of public data includes tax returns and US Census Nonemployer Statistics; private surveys including those conducted by MBO Partners and Freelancers Union in partnership with Upwork; and private administrative data, such as that from JPMorgan Chase Institute. For an analysis of these sources and more information, see the “Gig Economy Data Hub,” Aspen Institute Future of Work Initiative and Cornell ILR School, accessed December 15, 2020, <https://www.gigeconomydata.org>.
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- <sup>12</sup> Employers are a significant source of health insurance, with the Affordable Care Act setting minimum requirements for employers with 50 or more full-time employees. Although not required by law, employers are the main sponsors of retirement benefits. Many workers classified as employees, especially those in part-time or jobs paid low wages, do not have access to many of the voluntarily provided benefits.
- <sup>13</sup> New Jersey found misclassification increased by approximately 40 percent in the 10 years from 2009 to 2019. The US General Accounting Office saw an increase in misclassification by 42 percent between 2000 to 2007.
- <sup>14</sup> “Understanding AB 2257, Follow Up Legislation to AB 5, and its Impact on the Arts Sector,” Californians for the Arts, October 7, 2020, <https://www.californiansforthearts.org/calendar/2020/10/7/understanding-ab-2257-the-follow-up-legislation-to-ab-5-and-its-impact-on-the-arts-sector>.
- <sup>15</sup> On May 14, 2020, the NLRB released an Advice Memorandum which concluded that UberX and UberBLACK drivers were independent contractors. Applying the 10- factor common-law agency, the NLRB emphasized only

two of these factors: level of control by the company over the worker and how the workers are paid in relation to the company.

- <sup>16</sup> DOL found that under FLSA rideshare drivers were not employees, deploying a similar analysis as the NLRB, under a six-part test, finding the platforms lacked control over workers, workers could look for work elsewhere, and that workers have to pay for and furnish the necessary equipment to do their work.
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- <sup>19</sup> Rebecca Smith, “Washington State Considers ABC Test for Employee Status,” National Employment Law Project, January 28, 2019, <https://www.nelp.org/blog/washington-state-considers-abc-test-employee-status/>.
- <sup>20</sup> *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d at 341, 256 (1989).
- <sup>21</sup> “Frequently Asked Questions on AB 5,” California Labor and Workforce Development Agency, accessed November 30, 2020, <https://www.labor.ca.gov/employmentstatus/faq/>.
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- <sup>25</sup> Melissa Daniels, “Prop 22: Mixed Feelings from Uber, Lyft Drivers after Successful \$200 Million Ballot Fight,” *USA Today*, November 5, 2020, <https://www.usatoday.com/story/money/business/2020/11/05/uber-drivers-have-mixed-feelings-prop-22/6164784002/>
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- <sup>28</sup> Carolyn Said, “Uber and Lyft Won Exemptions from California’s Gig-Work Law through Prop. 22. Here’s Who’s Still Affected,” *San Francisco Chronicle*, November 9, 2020, <https://www.sfchronicle.com/business/article/Uber-and-Lyft-won-exemptions-from-California-s-15714305.php>.
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- <sup>30</sup> For a full list of artist occupational categories, see appendix A.
- <sup>31</sup> The research cited here is specifically on artists (see the 11 artists occupations in Appendix A), and not the broader arts worker group, and thus excludes other cultural workers. The cited research report does not include analysis on arts and cultural workers more broadly.
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- <sup>39</sup> S. G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal. 3d at 341 (1989).
- <sup>40</sup> Lily Janiak and Carolyn Said, “California Loves the Arts. But Its New Gig Law Could Decimate Theater,” *San Francisco Chronicle*, October 19, 2020, <https://www.sfchronicle.com/business/article/California-loves-the-arts-But-its-new-gig-law-15659509.php>; Margot Roosevelt and Ryan Raughnder, “California Has a New Law for Contract Workers. But Many Businesses Aren’t Ready for Change,” *Los Angeles Times*, September 29, 2019, <https://www.latimes.com/business/story/2019-09-27/ab5-independent-contractors-how-businesses-are-responding>; and Jeremy Raymond Pierce, “California’s AB 5: Not as Easy as ABC,” *American Theatre*, February 21, 2020, <https://www.americantheatre.org/2020/02/21/californias-ab-5-not-as-easy-as-abc/>.
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- <sup>44</sup> Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. (2019).
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## STATEMENT OF INDEPENDENCE

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