THE Hollywood REPORTER
September 25, 2019

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MARGOT ROBBIE, ZENDAYA AND THE STARS WHOSE RED CARPET LOOKS (AND TIRELESS BEAUTY TEAMS) ARE LAUNCHING TRENDS

From left: hairstylist Bryce Scarlett, Margot Robbie and makeup artist Pati Dubroff

GUEST COLUMN | GREG ZBYLUT

Are Hollywood 'Loan Outs' Done For?

A new California law targeting independent contractors at Uber and Lyft also could realign entertainment industry relationships and threaten a financial strategy used by tons of creatives

When California Gov. Gavin Newsom signed AB5 into law on Sept. 18, it seemed as if the end of the Hollywood "loan out" corporation was here, with ripple effects throughout the industry.

But is that the case? Is the loan out — a separate business entity that "loans out" the services of a creative person and allows him or her to deduct expenses like agent commissions, manager fees and other business costs — really dead? Is it too late to do something? The short answer is that no one knows yet. But first, let's look at two sections of the law in particular — the "Professional Services" exemption and the "Business-to-Business (B2B)" exemption.

Each provision has several different criteria (six for Professional Services, 12 for B2B) that need to be established for the respective exemption to kick in. The Professional Services exemption lists 11 different occupations, including "fine artist," that qualify. The B2B exemption states that if a business (sole proprietorship, partnership, LLC, LLP or corporation) contracts to provide services to another business, whether a worker is an employee or independent contractor will be evaluated under the previous test, known as Borello. In other words, meet the exemption, and it's business as usual, move along, nothing to see here.

Both provisions also require that the individual/entity (Professional Services interprets "individual" to be both individuals and entities; B2B specifically excludes individuals) have a business location separate from the "contracting business." The Professional Services exemption specifically allows for one's residence to qualify as a business location. The B2B exemption doesn't have that language.

The first thing every lawyer learns in law school is that the answer to pretty much every legal question (except "what is your billing rate?") is, "It depends." And that maxim applies here. What qualifies as a "fine artist?" For some, that term applies only to painters and sculptors — no one else. But some sources include "music" in the definition. And others add "performing arts." Ultimately, it will take a court case (or six, or 10) to determine who falls under the penumbra of "fine artist." If you can fall under that umbrella, you might be off to a good start. You'll certainly have fewer hurdles to clear.

Then there's the issue of "business location." One section allows a person's residence to count, another is silent. Does that mean that one's residence doesn't count if you're using the B2B exemption? Do you have to have a physical location? And what makes it a "business location"? Is it enough to pay rent? Or do you need more? No clue, because the law doesn't specify. If you have a few employees working for you, you're probably in a better position than if your loan out is you and you alone. But that still doesn't answer the question of whether your home can qualify (as many of us know, the city of Los Angeles thinks so. But is "I pay the city business tax" a winning argument? No idea).

There are those who argue that the only exemption that applies to the entertainment industry is the B2B exemption. And if you accept the most restrictive definition of "fine artist," that's true. But there are others — the unions in particular — who take the position that Hollywood is exempt. They point to their standard agreements, which include loan out provisions. Are those provisions enough to avoid the impact of AB5? I don't know because I haven't read them all. You know who else hasn't? A judge. And his or her opinion counts more than mine does.

Finally, there's another big question that's unanswered by the bill: How far does one have to inquire to "establish" all of the criteria and what type of records/documentation will suffice to support that someone has "established" the criteria (and how long do you have to keep it)?

$7B
Amount the state of California says it's shorted in payroll taxes each year because of misclassification.

By now you can probably guess the answer — no idea because the bill doesn't say. Again, it will come down to the courts/Labor Department to set those standards. Is this all very frustrating? Yep. Can the law be changed or repealed? Nothing is permanent. But for now, this is our reality. So what should you do? Since every person's situation is different, and because we all are comfortable with different levels of risk, I can't say what you should do beyond simply saying, "Talk to your advisers," especially your lawyer and business manager.

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