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The Art of the Labor Deal

BY [ANNE BREDIN](#)/ ON FEBRUARY 19, 2020

On January 1, 2020, a landmark California law called Assembly Bill 5—also known by its shorthand AB 5—took effect. The law dramatically redefines how the state classifies independent contractors versus employees, with the default view being that a worker is an employee unless an employer can prove by using a three-part test that the person working for them is an independent contractor.^[1] The test involves showing that the work performed is not controlled by the employer, is outside the employer's usual course of business, and is customarily performed by the worker on an independent basis.^[2] For example, if a shopkeeper hires a plumber after a water pipe breaks at their store, this plumber is an independent contractor under AB 5.

To say that the law has been controversial is an understatement. Recent headlines include: "California's AB 5 Leaves Women Business Owners Reeling"^[3] and "California Runs Off the Road."^[4] Companies like Uber and Lyft, whose entire businesses rely on hundreds of thousands of contract drivers,^[5] simply cannot argue that their drivers are not employees under the law. These concerns notwithstanding, the art world is one industry that will welcome the change.

But first of all, why does the distinction between an employee and independent contractor even matter? Interestingly, Congress has failed to offer only one definition of what constitutes an "employee."^[6] Currently, courts and government agencies use ten different tests, depending on which federal or state statute is invoked, to determine whether an individual is an employee or not.^[7] The result of that test can significantly impact both businesses and workers. For example, if an individual who was previously classified as an independent contractor is determined to be an "employee," that individual receives the benefit of civil rights and labor laws,^[8] and gains access to "minimum wage, overtime compensation, family and medical leave, unemployment insurance, and [a] safe workplace."^[9] While the worker benefits, a business' costs may rise due to minimum wage requirements, overtime payments, and needing to provide other fringe benefits.

Despite the benefits of being an employee, an increasing number of Americans are working as "independent contractors" in a growing "gig economy." A 2019 survey estimated that about 57 million Americans now freelance.^[10] Furthermore, freelancing income exceeds \$1 trillion, which is nearly five percent of the US GDP.^[11] Supporters of the gig economy cite its flexibility,^[12] and the opportunity for workers to choose what work feels right to them and on what terms.^[13] The art world has used the gig economy for years, with one art handler calling

himself a “permalancer,” due to working for the same company over an extended period without ever becoming a full-time employee.^[14]

However, labor practices in the art world are changing, in part due to employees’ discontent. Everywhere you turn, journalists report a “booming” art market,^[15] with artwork realizing astronomical amounts at auction.^[16] Major financial institutions advertise to wealthy clients how art is an asset class,^[17] and a growing number of baby boomers and millennials are investing in art accordingly.^[18] However, the financial well-being of the workers who help sell or otherwise manage artwork does not reflect this boom.

In June 2019, an assistant curator at the Philadelphia Museum of Art created a google spreadsheet which went viral, with museum workers across the world adding their salary along with their employer’s name.^[19] It revealed that many even highly coveted positions had starting salaries that made living barely possible.^[20] As one employee described, “I worked for so little for so long, I need to make more money now. . . . [i]t’s a horrible job once the realization dawns that your dream job will never materialize.”^[21]

Unsurprisingly, the art world is a rapidly unionizing industry.^[22] During the last year alone, the New Museum, the Solomon R. Guggenheim Museum, the Museum of Tolerance in Los Angeles, and the Frye Art Museum in Seattle have unionized.^[23] The Shed in New York City announced just last month their push to unionize.^[24] These efforts have not been without struggle. On November 1, 2019, the visitor services employees at the Marciano Art Foundation (MAF) announced that they had petitioned the NLRB to hold an election to unionize.^[25] The following week, MAF laid off all 70 employees, and closed the museum to the public.^[26] Naturally, the affected employees’ union filed an unfair labor practice with the NLRB,^[27] but the fact remains that these individuals are no longer working, and it is clear that art world employers are hesitant to bargain with unions.

If individuals classified as employees suffer systemic low wages, and the threat of dismissal should they attempt to improve their working conditions through collective bargaining, life as an independent contractor is worse. In September 2019, *Hyperallergic* published a fantastic series about the hardships faced by art handlers in the art world.^[28] One art handler interviewed describes how he slipped and fell violently to the ground while transferring artwork from an artist’s studio to a rental truck.^[29] He shattered his shoulder bone and dislocated his arm. The art handler had worked steadily for the art group he was providing a service for, but was only considered a “freelancer.” Consequently, even though the art handler litigated to win worker’s compensation insurance, the judge refused to grant his request because the art handler was not “an employee.”^[30]

Accidents are almost inevitable when manual work like art handling is involved. Had AB 5 been in place, this art handler would have received health insurance and/or workers

compensation. In an industry suffering from general labor discontent, this law protecting workers is undeniably going to be welcomed by the greater community of employees.

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[4] *California Runs Off the Road*, WALL ST. J. (Jan. 23, 2020 7:19pm), <https://www.wsj.com/articles/california-runs-off-the-road-11579825145>.

[5] *Judge Refuses to Block California's Gig Worker Law During Suit*, THE NEW YORK TIMES (Feb. 10, 2020), <https://www.nytimes.com/2020/02/10/business/uber-gig-california-AB5.html>.

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[7] *Id.*

[8] Richard Frankel, *The Federal Arbitration Act and Independent Contractors*, 2018 Cardozo L. Rev. de novo 101, 103 (2018).

[9] *Misclassification of Employees as Independent Contractors*, DEPARTMENT OF LABOR, <https://www.dol.gov/whd/workers/misclassification> (last visited Feb.7, 2020).

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[11] *Id.*

^[12] Adam Ozimek, *Report: Freelancing and the Economy in 2019*, UPWORK, <https://www.upwork.com/press/economics/freelancing-and-the-economy-in-2019/> (last visited Feb. 7, 2020).

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^[14] Zachary Small, *The Museum Wall That Broke the Art Handler's Back*, HYPERALLERGENIC (Sept. 2, 2019), <https://hyperallergic.com/515321/the-museum-wall-that-broke-the-art-handlers-back/>.

^[15] See, e.g., Nate Freeman, *The Art Market Grew to \$63.7 Billion in 2017, and Other Key Takeaways from Art Basel Report*, ARTSY (Mar. 13, 2018, 8:19 PM), <https://www.artsy.net/article/artsy-editorial-art-market-hit-637-billion-2017-key-takeaways-art-basel-report>.

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^[26] *Id.*

^[27] *Id.*

^[28] Zachary Small, *The Art Handler Whose Shoulder Shattered at the Loading Dock*, HYPERALLERGENIC (Sept. 3, 2019), <https://hyperallergic.com/515322/the-art-handler-whose-shoulder-shattered-at-the-loading-dock/>.

^[29] *Id.*

^[30] *Id.*