



AFM Local 99, Musicians • IATSE Local 28, Stagehands

February 24th, 2021

Re: Public Comment on HB 2205

Dear members and staff of the House Subcommittee On Civil Law,

We, the American Federation of Musicians, Local 99, and International Alliance of Theatrical Stage Employees, Local 28, submit the following comments in support of [HB 2205](#) as it relates to arts workers in both the non-profit and for-profit sectors.

The most impactful workplace law violation in the arts industry, by far, is that of worker misclassification; and misclassification leads to violations of many other laws that protect employees but not contractors. The misclassification is so rampant that some workers don't know the law and don't realize that their wages are being stolen or that their workplaces are illegally unsafe. Those that do know better are at increased risk of retaliation because employment in our industry is usually temporary and often quite short-termed. While enforcement from state agencies lags, these workers need advocates who can enforce the laws that protect their wages and workplaces. HB 2205 would allow worker advocacy organizations to do that work and begin to create a culture of compliance that would help all workers AND the state agencies that are assigned to protect them.

## Enforcement

A lack of enforcement has led to widespread misclassification in our industry. Some misclassification is by companies that do know the law, but willfully misclassify their workers. They do so for two reasons: 1) they otherwise will be at a competitive disadvantage against employers doing things the wrong (read: cheap) way, and 2) there is virtually no consequence for breaking the law. We have even heard of companies being advised by their lawyers to misclassify their workers as contractors because the company will reduce its liabilities.

A lack of enforcement has also led to a decreased understanding of the law: some companies think their employees SHOULD be classified as contractors. If companies are allowed to misclassify their workers for years on end, it's understandable for the companies to assume they are conducting business properly. Even worse, the employees themselves think they are being classified properly. They don't even know to complain about it. How can they file complaints to the state if they don't know they are being taken advantage of?

## The consequences of misclassification

The consequences for workers being misclassified are vast and varied. To be clear, misclassification is always in one direction—employees are misclassified as independent contractors. These misclassified workers lose a myriad of protections and benefits guaranteed to them by law, including:

- Minimum wage
- Overtime pay
- Equal pay for equal work (no pay discrimination based on any protected class)
- Protection against discrimination
- Protection against retaliation for reporting workplace misconduct or violations
- The right to form a union
- Workers Compensation Insurance
- Unemployment Insurance (UI)
- Paid sick leave

The wage theft caused by the avoidance of minimum wage laws is compounded by the fact that self-employed people have to pay the employer half of Social Security and Medicare taxes as well as the employee half, doubling that tax from 7.65% to 15.3%.

### Minimum wage & overtime pay

Workers in the arts are especially exploited when it comes to wage & hour violations. We are often paid by the project, and expected to put in long hours (“for the art’s sake”), leading to earning WELL below minimum wage.

### Unemployment Insurance

This year shone a bright light on the broader issue of contractors/unemployment, and luckily people who had been classified as independent contractors (correctly or not) were able to apply for the new Pandemic Unemployment Assistance (PUA) program, which provided some level of UI support for “self-employed” people. However, the process for these workers who presented their 1099 income for PUA was full of obstacles as they faced targeting by the Oregon Employment Department (OED) for not having reported this income previously—instead of assisting people in great need, some at the OED chose to report workers, flagging their accounts for investigation and cruelly delaying benefits. Workers in the Entertainment Industry often face the dilemma of taking 1099 work versus pushing back to have employers properly classify them as employees. If the worker reports the income for UI Benefits, the investigation process outs them to their employers, putting a target on their back. Without anonymity the worker faces retaliation from the employer which is hard to prove as the result is that retaliation comes in the form of the worker never again being hired by that employer. Without reforms to the system, when the pandemic is over these emergency programs will end, and we will presumably be back where we were a year ago, with contractors ineligible for UI, and misclassified workers stuck in an end game where they are silenced by the threat of losing future work if they report misclassification.

## Retaliation

Retaliation is a huge problem for our industry and we feel it is important to highlight here the specifics of our industry that increase the danger of retaliation and the reticence for workers to report violations. In our workplaces, employment is more often short-term—workers in the performing arts and digital media production frequently work for employers for a month, a week, or even a single afternoon—thus, workers are more concerned about being *re*-hired than being fired or disciplined while on the job. The law is clear that employers cannot fire or discipline employees who report workplace violations; it is unclear whether they can refuse to hire them again in the future, as well as less provable if they do. Moreover, much of the hiring in our industry is done by contractors/producers who work for multiple employers/production companies—one contractor/producer can thus easily blacklist a worker, keeping them from being hired by many different employers, without any way to track or prove this retaliation.

Fear of retaliation, therefore, is a real and present contributor to a lack of reporting workplace violations. Workers need their advocates to be able to fight for them, especially while state enforcement agencies are underfunded and unable to properly track down violations and enforce the law.

### Retaliation stories

- An actor at a local theatre company (~\$2 million annual budget) fell and broke her knee on stage—she missed about 20 performances. When she filed for workers compensation insurance, it was discovered that the company had been misclassifying the actors as independent contractors. The state determined the company was liable for workers comp. The general manager was furious with the actor and will not hire her again. This same theatre company routinely underreports hours, but actors we've spoken to either 1) don't know their wages are being stolen, or 2) are not willing to report them and "never be hired again".
- "In my own life, I've had jobs where I pointed out work rule/contract violations with regard to my own employment as they would impact my pay and safety. In those cases, I was not hired again by those companies, and marked as a 'trouble-maker'."
- "I wanted to file OSHA complaints multiple times and didn't because I was afraid [the Executive Director] would know it was me; I had watched them systematically try to destroy the reputations of anyone they thought spoke up. In one instance a co-worker filed an OSHA complaint, but [the Executive Director] badmouthed the person he *thought* filed the complaint."
- "Another person in the building reported a workplace violation to the government, the company got in trouble, and they thought it was me who had complained. They have not hired me since."

Note: fear of retaliation is a great disincentive for workers reporting violations, but so is the impermanence of our employee relationship—when one's gig is going to end in a week anyway, one is much less inclined to report violations. This is one reason workers, especially in our industry, would be served by letting worker advocacy organizations file complaints on their behalf.

## Union-specific comments

### American Federation of Musicians, Local 99

A lack of enforcement of classification laws directly threatens our ability to enforce collective bargaining agreements. Years of non-enforcement have led to widespread misunderstanding; many mistakenly believe that musicians are by nature independent contractors. In recent years, on *multiple occasions*, during bargaining sessions employers have questioned whether our collective bargaining agreement was even valid because, as they put it, “aren’t these musicians contractors?” We have been able to push back against that argument, but it is a real threat to those musicians’ union contracts.

### International Alliance of Theatrical Stage Employees, Local 28

Theaters employ electricians, carpenters, show crew and more as 1099 per show or even have them commit per season. Often they are offered 1099. Often they are given a flat fee for their services. For example a follow spot operator is hired and offered \$300 for the run of a show. If you divide out the hours the employer schedules them it is often less than minimum wage and the employer refuses to be considered the employer. Pixie Dust production was paying crew by personal check and we could not see any social security withheld, comp paid etc. Basically it appears paid “under the table”. The Broadway Show *Legally Blonde* toured through Salem at the Elsinore in 2019. The crew was paid cash. The Elsinore receives Oregon Cultural Trust money and other taxpayer money—they need to be following the current laws and also not allow promoters to use the venue who do not follow current laws.

## Conclusion

Arts workers suffer from workplace law violations that lead to misclassification, lost wages, dangerous working conditions, union busting, lost tax revenue, and an erosion of the social safety net. Fear of retaliation and widespread misunderstanding of the law prevents workers from advocating for themselves, and underfunding of stage agencies keeps enforcement lax. HB 2205 would give those workers the advocates they need, and give the agencies the funding they need, to guarantee arts workers the same strong protections that every worker deserves.

Sincerely,

American Federation of Musicians Local 99 ([www.afm99.org](http://www.afm99.org))  
IATSE Local 28, Stagehands ([www.iatse28.org](http://www.iatse28.org))

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