

How the 2004 Independent Contractor Law Change is Negatively Impacting Massachusetts Artists of Disciplines and the State's Arts & Creative Economy Sector

Background

The vast majorities of living/contemporary artists of all disciplines-- with the exception of the few who have become "stars" -- usually can not and do not earn a living entirely from their work as artists and must have supplementary jobs whether those jobs are teaching positions and/or jobs in fields not related to their artistic discipline. Those artists that are managing to earn their income entirely from their art, and are not "stars", are usually at the very low end of the income bracket.

Artists pay out a significant amount of their gross income to their art making. These are not optional expenses. The largest subsidy to the arts in this country does not come from the government or private sector but from artists' unpaid labor and underpaid labor, and from them subsidizing their art making with their own income (and credit cards). Many artists do not hold one 9-5 job, but have combination sources for their income (multiple part-time jobs that are semester based and not yearly based, freelance income, 1099/contract jobs, self employed income, grants etc.) and their income not only fluctuates from year to year, but from month to month.

Artists are the working poor of the art world. They are the foundation of creative economy that everyone benefits from. Artists are resourceful and they are survivors. They don't like to accept charity and also don't tend to think of themselves as poor. In general, artists live on the edge economically, like how so many of our small arts organizations and small businesses do, and any major shift or new unforeseen cost could severely and negatively impact artists and by extension the arts community and the creative economy. The foundation of the creative economy is a very fragile and fluid one. Presently, the vast majority of artists working in all disciplines in the Commonwealth are weighing whether it makes sense to stay in the state due to the high costs of living here. The 10/29/06 Boston Globe Sunday Magazine's cover story demonstrates how RI is successfully courting our artists, arts organizations, and other businesses that make up our creative economy to relocate in their state.

These realities were documented in a Fall 2009 report, **Stand Up and Be Counted- A Survey of Massachusetts Artists on Their Work Lives, Socioeconomic Status, Access to Healthcare and Medical and Non-Medical Debt**. The report was funded by the Blue Cross Blue Shield Foundation of Massachusetts and is available on www.artistsunderthedome.org

The Impact of the 2004 Massachusetts Independent Contract Law Change

The 2004 Independent Contractor Law Change has and will continue to cause financial harm to artists of all disciplines and to self-employed freelancers. It is negatively impacting our arts organizations and by extension our creative economy. Essentially, it is now next to impossible for someone to be 1099/independent contractor in the Commonwealth. It is the consensus understanding that it was the carpenter's union who backed this law change to control the abuses in the construction industry (clearly

an important issue that does need to be addressed, but this change had bad unintended consequences). Most of the those in the arts community and creative economy are unaware of this law change and are learning about this law change via the Massachusetts Health Care Reform Law.

It has become very clear that this 2004 law change has the exact opposite intended impact on the artists community and the creative economy which are both based on the generation of intellectual property of all kinds. It is having a negative and exploitative impact as once someone is classified as an employee they lose all rights (moral, financial control/ownership) to the intellectual property they generate. The law change is also destroying needed income streams for artists of all disciplines, freelancers of all kinds and the self employed.

Key Negative Consequences of the 2004 Law Change:

1. Intellectual Property Issues: A major problem with getting a “W-2” and being classified as an employee vs getting a “1099” and being an independent contractor, is that as an employee the company has claim to **all** rights to the work produced (ie the artist does not retain the right to sell their work in other markets or even the copyright to the work). While as an independent contractor those rights can be negotiated. Sometimes “work for hire” makes sense, sometimes not. Copyright is always with the creator as an independent contractor and the sale, use, and ownership of the work can be negotiated and compensated for. Many artists of all disciplines create intellectual property and then resell it or license it to earn more needed income. Another example: If you are a photographer and you are “w-2ed” for your work- you have no rights to the photographs you take or to any money earned from the use of those photographs. Nor do you own the copyright. The employer owns them outright. For national example see the recent federal court decision on Mattel (Barbie) vs MGA Entertainment (Brats): <http://www.mahalo.com/mattel-bratz-lawsuit>

NOTE: Adjunct professors are also being exploited by having to be classified as “employees”. They do not receive any benefits and ALL courses they develop to teach automatically becomes the property of the university/college who is their “employer”. This is worthy of its own discussion as to how to correct this far reaching and common problem that many artists of all disciplines find themselves in.

2. Costs Incurred: Artists of all disciplines earn a significant proportion of their income (this includes our independent film makers, graphic designers, illustrators, cartoonists, photographers, writers, dancers, theater crews and actors) as independent contractors. They need to have this type of income to be able to legally write off some of their expenses incurred from making their art. Our independent film makers, visual artists of all kinds, and photographers are particularly vulnerable to this 2004 law change as the costs they incur to create their art form are very high. It is important to understand that even though they now have to be reclassified as an employee under the 2004 Independent Contractor Law change they still have to financially incur all their costs to create their work, but now can not legally write them off as a W-2 employee. Their “employer” does not and will not compensate them for these costs.

3. Noncompete Issues: In many industries when one is a W-2 employee, even as a part-time one or even as a temporary employee, they have to sign non competing clauses (think design, news outlets, etc.) for the timeframe as an employee and usually for a timeframe after they are no longer an employee of the company. The 2004 law change will certainly cause needed income streams to disappear for Massachusetts artists of all disciplines and for our freelancers due to noncompete clauses they will now be forced to sign from their “employers”.

4. Structure of the “art world”: Also needing to be pointed out is the fact that artists often work for other artists. Sometimes artists barter with each other and/or they try to pay each other when they can. For example, if an artist is awarded a grant, they may pay another artist to help them (visual artists and performing artists do this often). That “hiring” artist is not set up as business per say (ie they are not incorporated) and would not W-2 the other artist as it is a one time situation (grants are rare as is being able to pay each other). Nor would they be able to incur such costs. The same would hold true for an artist living with disabilities and/or is experiencing issues around aging and needs some extra help with their artistic practices from time to time. Often in our industry, young artists seek out being a studio assistants with a more accomplished artist. This is key for them for skill learning and to gain access to equipment and work space as most younger artists can not afford such things early in their careers (ie they work for a print maker to be able to use the print presses for free to make their own work, etc.). This law will stifle these very important need relationships of artists working for each other and needed income streams as the artists will not be able to afford to pay their fellow artists as W-2 employees. Now the young artists will no longer be paid to be an assistant, but will have to always volunteer. This in turn will cause them to lose needed income and will also make it harder for them to establish themselves in the eyes of the IRS as a professional artist.

5. V.A.R.A/Protection Art Work and of Artists’ Moral Rights: There is another key issue regarding the Federal V.A.R.A law (Visual Artist Right Act that was established by the late Senator Kennedy) as it relates to being a classified as an W-2 employee. V.A.R.A does not protect work created by a W-2 employee. There was a recent court case where a MA muralist was W-2ed /treated as an employee for the painting of a mural. Their employer wanted to destroy the mural and the artist went to court to prevent their employer from doing so under V.A.R.A. The courts ruled that their mural was not covered under V.A.R.A and it could be destroyed due to them being an employee of the company. This is obviously very problematic as the 2004 Law change is now forcing many visual artists to be “classified as employees”. Being treated as an employee is highly problematic as you lose **all** the moral rights and the right of the protection of your art work from being destroyed or compromised.

6 Loss of Needed Income:

a) Artists of all disciplines, freelancers and those who are self-employed (even if they hold other types of employer based jobs) do not usually incorporate and thus are not eligible for unemployment benefits. This holds true even for those who are freelancers under the 2004 independent contractor law change now have to be reclassified as employees. Nor are they eligible for worker compensation. Yet they are going to have such taxes taken out of their pay in the form of lower wages due to their “employer”

having to compensate paying for these payroll costs. These independent contractors who now have to be classified as employees will also not receive sick pay or vacation compensation.

b) Artists of all disciplines will lose paying jobs and income streams as out of state companies will stop hiring Massachusetts based artists and freelancers due to the 2004 Independent Contractor Law.

c) Artists of all disciplines, due to now having to be classified as employees, will lose all their rights to their intellectual property and will lose key ways to generate needed income from the art work via licensing, reselling, publishing, etc.

7. Results of Enforcement: This law change is having and will continue to have a negative impact on arts organizations and those businesses who employ artists. Instead of using this law to monitor construction companies, DOR tested this law in 2007 by investigating two non profit opera companies (as random audit we are told). If the opera companies were forced to reclassify all their independent contractors as W-2 employees, they will have to pay the back taxes they owe and will have to close their doors (one of the companies is receiving probono from the Volunteer Lawyers for the Arts an organization). Nor does this real scenario take into account what happens to the opera companies under Health Care Reform Law requirements for businesses if their independent contractors are now considered employees (The Fair Share Contribution requirement is one such unforeseen liability). It is important to stress that there will not be any new opera companies to replace these ones if they close. If these companies close, many artists will loose their needed 1099 income and rights to their intellectual property, performers and composers will lose venues to create and perform in, and the public will lose venues to see existing opera works and new opera works in. This issue will not only impact the opera companies, but all of our arts organizations who depend on contract/1099 staff.

Conclusion

This 2004 law change has and will continue to hurt artists of all disciplines, arts organizations and small businesses of all sizes, and the private sector employment opportunities that artists depend on. This 2004 Independent Contractor Law Change will need to be repealed, or amended. Our community is more than willing to work on possible solutions to this issue. Our fear is that many artists will have to leave Massachusetts for needed work opportunities and we may also loose or financially devastate many of our arts organizations and small businesses. The negative unintended consequences of 2004 Independent Contractor Law Change are too great for our community to bear.

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