



# Despite aggressive protests and consultations with California lawmakers, the bill known as “AB5” was recently signed into law by Governor Gavin Newsom without any music industry exemptions — without even a mention of the industry at all.

A&R Registry's **Peter Petro** spoke with some of California's leading music business attorneys to get their impressions of California's new AB5 Bill and its potential impact on the music industry.

## Ned Menoyo EEM Law

“ This is an anti-creative economy bill for California — and we're talking about the fifth largest economy in the world. I've often wondered what could knock the LA music scene off its game. I think we're looking at it.

The intent of the legislation was good but I can't imagine it will stay as it is. There's too much uncertainty, which is the enemy of good legislation. Good legislation is clear and thought-out, with time taken to consider everything that could happen when it passes. I don't understand why they would knowingly do it. They claimed it was because the music industry didn't agree with itself, but that's not a good reason to write legislation that's going to hurt California's economy.

AB5 will generate much more awareness of the potential threat posed by misclassifying someone as an independent contractor as opposed to an employee. That risk includes wage and hour violations, workers compensation-related violations, and tax and reporting obligations — all of which have risk of litigation from the person who was hired and from the government. In California, with expansive statutes to provide for the payment of attorney's fees to employees who have been misclassified and civil penalties that could be awarded to employees who have been misclassified, there's a real risk to hiring entities to get it right.

## David Wimmer Swerdlow Florence Sanchez Swerdlow & Wimmer

“ AB5 sets up a presumption of employment, so a company that hires an individual is presumed to be their employer. It's up to the hiring entity to prove that person is not an employee. For a risk averse company, the best course of action is to engage people as employees and properly handle that employment relationship.

I would ask: What are the expectations for the work being performed? Is there a written job description (which is usually indicative of employment)? Is there a written independent contractor agreement? In the best world, legal counsel would be involved in creating those documents; it's a lot easier to create the document and give advice than it is to defend something after the fact.

## Richard B. Jefferson M.E.T.A.L. Law Group

“ Unfortunately, the music industry couldn't come to a consensus on the language that would support an exemption because of competing interests. The industry didn't voice their opinion so they were not granted an exemption. In my opinion, that

was a mistake. They tried to fight the law, instead of accepting it and securing an exemption.

The American Federation of Music (AFM) didn't really benefit from a music industry exemption since their role is to govern union work for musicians and it aligns with the position of other guilds that AB5 does not affect collective bargaining agreements. AFM may even benefit from AB5 -- if it is easier for independent musicians to make music in California if they're part of AFM it could drive up their enrollment. The rest of the music industry should have come up with a compromise with AFM.

This will hurt the industry. The advice will be, “comply with AB5 or record in Nevada or Oregon so you don't get caught up in this detrimental law.” I'm getting lots of requests to revise contracts. The underlying case law to AB5 is already in effect so contracts need to be revised now.

## Ben Laski Law Offices of Benjamin Laski

“ The AB5 “A. B. C. test” to distinguish between an employee and an independent contractor doesn't provide enough guidance. It's based on a Dynamex case, which was decided in 2018 but is over 10 years old and originated way before Uber and Lyft. It revolves around 1) if the hiring company controls or directs the work done by someone they hire; 2) if that work is within the usual scope of the entity's business and 3) if that worker generally works independently. The second criteria impacts the music industry most. If a singer-songwriter hires a producer, they'll have a hard time saying the producer's work is outside their course of business — creating music. That means the producer should be treated as an employee with workers comp, minimum wage and other employee benefits. Research suggests that would increase costs 30 percent. It also implies infrastructure and lawyers or accountants to set up when it was much easier before.

## Henry Root Lapidus, Root & Sacharow LLP

“ The biggest obstacle to creating an exemption appears to be reaching an agreement with the American Federation of Musicians. I'm not sure why the RIAA, A2IM, Music Artists Coalition and AFM can't work together for the benefit of their common interest. If stakeholders can compromise on their positions, there's a chance we could have an exemption for the independent music industry before this bill goes into effect in January. There's certainly plenty of win-win here, we don't need to be at odds with one another. The best thing the independent community can do is lend their support for the organizations representing them - RIAA, A2IM and

Music Artists Coalition (MAC). They're the ones who have a seat at the table.

I haven't seen a lot of other independent music industry press about this issue. The word needs to be more widely disseminated that this is on the horizon and people need to start preparing for it. I don't know how educated independent artists, songwriters and producers are that this is a looming possibility for them.

If an independent artist, producer or musician hasn't already formed a corporate entity, they may want to discuss doing that with their accountant or business manager — securing a federal tax ID number and drilling down on the expense to comply.

**Matthew Warren** *Clinton & Clinton*

According to AB5, independent artists who hire a producer or engineer have to abide by minimum wage laws, pay into unemployment, provide benefits and more. Requiring an independent artist working from their home with multiple independent collaborators to abide by minimum wage laws, pay unemployment taxes or provide medical benefits makes absolutely no sense. For that reason (coupled with the fact there is no exemption for the trucking industry) I believe the Bill will be challenged in court and ultimately ruled unconstitutional — because it conflicts with federal law by excessively burdening interstate commerce.

**Jeffrey Brandstetter** *Brandstetter Law*

I thought for sure that California Governor Gavin Newsom wouldn't sign the bill in its present form or that the California Legislature would modify it substantially. Unfortunately, neither of those things happened. The number of exemptions in the bill is a sign that they didn't get the language of the underlying law correct. This may have to be decided through the courts or through an amendment to the legislation.

As an independent contractor, barring a work-for-hire contract or similar language in a services agreement, the work you create is yours and not owned by whoever hired you. On the other hand, work done as an employee in the course and scope of your employment is owned by the employer. That should concern artists, songwriters and composers since it jeopardizes their creations.

AB5 has such draconian implications. You could well see an exodus to entertainment hubs outside of California like New York or Atlanta, unless there are significant changes or limitations imposed on its implementation. Just as the film and TV industries suffered runaway production with various tax incentives wooing away productions to other states

and countries, companies may take their business out of state unless significant changes are made to AB5.

**John J. Tormey III, Esq.**  
*Law Office of John J. Tormey III, Esq.*

I think that the smaller independent music producers, bands of lesser renown and stature, and economically-leaner labels will likely suffer the greatest detrimental effect from AB5. Why? Because producers, bands, and labels that already have stature, significant assets, and infrastructure in place: (1) are more likely to use legal counsel to paper their way around AB5, and therefore (2) will more likely be successful circumnavigating AB5. Indeed, by analogy to the transportation sector, the well-heeled Ubers and Lyfts of the global "gig economy" have already indicated they feel that they comply with AB5 and are not afraid of it.

Even in the current pre-AB5 climate in the entertainment industries, larger, richer entities more likely already know how to properly use a "loan-out" entity structure to address related tax, independent contractor, and I.P. issues, and are therefore more likely to resolve them successfully. Many other people are going to need outside help solving the AB5 problem, though, since those others never really handled independent contractors correctly to begin with. A number of rock tours that hire roadies, provide just one collective example of that.

**Peter Petro** runs *First Choice Insights*, an innovation consultancy providing strategy and growth solutions for the music industry. Reach him at [peter@peterpetro.com](mailto:peter@peterpetro.com)



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