

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2021-2022 Regular Session**

AB 437 (Kalra)  
Version: May 2, 2022  
Hearing Date: June 21, 2022  
Fiscal: Yes  
Urgency: No  
TSG

**SUBJECT**

Employee obligations: exclusivity requirements: actors

**DIGEST**

This bill prospectively bars motion picture and other audiovisual entertainment producers from using contractual provisions that prevent actors from working for multiple employers, with specified exceptions.

**EXECUTIVE SUMMARY**

Movie and television acting is largely a freelance industry. Actors enter into contracts to perform in individual productions or, occasionally, in a whole series. According to the author and sponsors of this bill, motion picture producers will often attempt to assure the availability of an actor by inserting provisions into the actor's contract that prevent the actor from working on other productions simultaneously. This prevents the actor from accepting other work while the actor is tied to the contract. According to the author and sponsors of this bill, such exclusivity means performers miss out on lucrative opportunities and these missed opportunities have only increased as the motion picture industry expands into new realms such as online streaming. To free actors from being tied down in these ways, this bill would bar motion picture producers from prohibiting their actors to work for multiple employers, with limited exceptions meant to help assure the actor's availability once filming begins.

The bill is sponsored by the Screen Actors Guild - American Federation of Television and Radio Artists. Support comes from other organized labor groups in the entertainment industry. Opposition comes from motion picture producers who contend that exclusivity provisions are vital to assuring the availability of performers during filming and to maintaining casting continuity. The bill passed out of the Senate Labor, Public Employment and Retirement Committee by a vote of 3-1. If the bill passes out of this Committee, it will next be heard in the Senate Appropriations Committee.

**PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Prohibits a contract to render personal service from being enforced against an employee beyond seven years from the commencement of service under the contract. (Lab. Code § 2855(a).)
- 2) Specifies that any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which cannot be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render the service, for a term not to exceed seven years from the commencement of service under it. (Lab. Code § 2855(a).)
- 3) Provides that every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void, with limited specified exceptions. (Bus. & Prof. Code § 16600.)

This bill:

- 1) Provides that a contract for the personal or professional services of an actor in connection with the production of motion pictures and other audiovisual entertainment, regardless of medium and excluding commercials, shall not prohibit an employee from working for multiple employers, unless the employer can show that the other employment would:
  - a) pose a direct scheduling conflict; or
  - b) materially interfere with the employer's business.
- 2) Permits the actor's contract to do any of the following:
  - a) require the employee to disclose to the existing employer any additional employment, provided the existing employer does not take any adverse action against the employee based solely on the employee having taken additional employment;
  - b) require that the employee wait 14 days after their current production ends to begin production with a different employer and complete all aspects of production with a different employer no fewer than 14 days before production with the existing employer resumes; or
  - c) include protections for trade secrets and confidential business information.
- 3) Specifies that these new contract provisions apply to contracts amended or entered into on or after January 1, 2023.
- 4) Provides that any provision in a contract that would deprive an employee of these protections shall be void.

## COMMENTS

### 1. Background on the problem the bill seeks to address

The filming of a movie, television show, or streaming series involves a tremendous amount of coordination. Among many other moving parts, the cast and crew need to be prepared and available when their scenes are going to be filmed. Yet filming does not always take place on a fixed schedule.

For years, motion picture production companies have dealt with this problem through the use of exclusivity provisions in their contracts with actors. In essence, these provisions require the performer not to accept any other work – absent the permission of the producer – so that the performer can be available for filming or other obligations related to the production at any time.

Such exclusivity provisions have apparently been a source of tension in the motion picture industry for many years as performers have often chafed at having to ask permission from producers in order to engage in other work, while producers insist that exclusivity is essential to their ability to complete project in a timely and cost effective manner. In relation to movies or shows that have multiple episodes, producers also utilize exclusivity provisions to help ensure the continuity of casting and audience identification of their product.

All sides agree that the motion picture industry has changed dramatically in recent years. According to the proponents of this bill, these developments have exacerbated the problems associated with exclusivity provisions. In the past, production of television shows, in particular, took place according to a relatively predictable schedule. As a result, exclusivity provisions tended to leave performers with time between productions when they could freely pursue other work. Now, according to the proponents of the bill:

The advent of new forms of content distribution like streaming services has dramatically changed production schedules, eliminating the ability of annual work schedules that included consistent work for nine months, and only short breaks between seasons. Today, many TV and new media series shoot episodes for only 4-5 months per season and leave actors on hold, without work and pay, for an average of 12 months before the next season begins. These actors are prohibited by their contracts continue to perform and work until the next contracted season.

To address this problem and enable performers to have greater flexibility to pursue multiple projects and sources of income, this bill would generally restrict the use of exclusivity provisions in performers' contracts. The bill makes clear, however, that

producers could still require performers to work exclusively for them during the time of production and for a 14 day buffer on either side. The purpose of the buffer on the front end is to enable producers to insist, if they wish, that the performer focus solely on the production for two weeks in advance of it. The buffer on the back end is meant to allow for the possibility that the production will run longer than expected.

## 2. Exceptions designed to address motion picture producers concerns

This bill would greatly restrict the use of exclusivity provisions. However, in recognition of the legitimacy of producers' concerns about scheduling and the potential that a performer's other work might have a disruptive effect on the producer's ability to preserve the continuity of a cast over several episodes or movies, the bill provides for two scenarios in which exclusivity provisions could still be used. First, producers could insist upon exclusivity if the other work that the performer proposes to take would pose a direct scheduling conflict. Second, the producer could refuse to allow the performer to take on other work that would materially interfere with the employer's business.

Though these exceptions are intended to address the producer's primary reasons for seeking exclusivity agreements in the first place, the opposition contends that they are insufficiently clear to protect the producer's interests. As to the exception for a direct scheduling conflict, the Motion Picture Association argues that it is:

[...] simply unworkable in an industry where hundreds of people are often necessary for the filming of a single scene, and the absence of key talent can delay an entire production for hours or days, resulting in significant additional expenses. And film and TV production is unpredictable. A production may plan to film only Tuesday-Thursday, seemingly leaving Friday free for an actor to take on another project. However, because of delays due to unpredictable factors such as weather, illness, or even traffic, it may suddenly and unexpectedly become necessary to film on Friday as well. Thus, what didn't seem to be a "direct conflict" at the time a contract was signed can suddenly become one in the middle of a production.

This concern may overstate what the bill does. The bill does not appear to prevent a producer from demanding exclusivity from a performer during periods of production and, as mentioned, for a two week buffer period on either side of production. The author proposes to offer amendments in Committee that clarify and underscore this point. Those proposed amendments also expand the buffer periods to 30 days on either end of principal filming, to better account for producers' need to have actors available during those times.

With respect to the exception that allows producers to demand exclusivity when a performer's other proposed work would materially interfere with the producer's business, the MPA contends that it is:

[...] extremely vague and problematic—a highly fact-dependent inquiry that would be a recipe for lawsuits and intrusion into the creative process. An actor who is working on one production and simultaneously working for a competitor could severely undermine the first project's success and constitute, at least from the producer's perspective, material interference with its business. For example, a highly compensated judge of a singing competition show or performer in a soap opera on one television network might seek to work on a different network's singing competition show or soap opera on their days off. Typically, an exclusivity clause would prevent such a scenario, which would undermine the producer's legitimate interest in distinguishing its show from competitors'. But this Bill would arguably prohibit such exclusivity clauses, or at the very least foment legal disputes about whether the moonlighting judge's or soap opera actor's second job "materially interferes with the employer's business."

The opposition may be correct that there will sometimes be disputes over what additional work rises to the level of causing a material interference with the producer's business. As things stand now, however, the use of exclusivity provisions effectively assumes that *all* additional work will cause a problem for the producer's business. While this means fewer possible disputes, it also leaves performers at the mercy of the producer's approval in order to engage in other opportunities. It is that problem that the bill is intended to help resolve.

### 3. The relevance of collective bargaining agreements

In the past, there have been attempts to address what kind of exclusivity provisions are permissible in performers' contracts through collective bargaining, but apparently these efforts have proven unsuccessful. The opponents of this bill contend that discussion about exclusivity agreements should remain at the bargaining table, rather than becoming the focus of legislation.

By explicitly overriding the CBA, A.B.437 upends what has been settled at the bargaining table by sophisticated parties on both sides who know the practicalities of the business. The Legislature should not allow itself to be drawn into matters that are routinely discussed and negotiated by the parties in a collective bargaining process that has resulted in the creation of a vibrant middle class of entertainment-industry workers in this state.

The proponents of the bill respond that:

We have tried to bargain the growing problem of performers being held off the market, unable to work for longer and longer periods of time, for well over a decade. Performers' agents and attorneys have also tried, in vain, to slow the development of this unconscionable practice. It has only worsened, and without action by the State of California, the industry will regress into an imbalance of power between industry and worker not seen for decades. The issue demands legislative action.

During consideration of this bill in the Senate Labor, Public Employment and Retirement Committee, the suggestion was made that perhaps a compromise solution could be crafted in relation to this point. Under this compromise, this bill would create a statutory default setting for the handling of exclusivity provisions, but the bill would also allow the parties to make contractual exceptions to the statutory rules provided that those exceptions are consistent with a collective bargaining agreement. The idea, in essence, is to empower the parties to hash out this issue through the collective bargaining process but to effectively foreclose the possibility that no resolution would be reached once again. The author proposes to offer amendments in Committee that are intended to effectuate this concept.

#### 4. Proposed amendments

In order to address some of the issues set forth in the Comments, above, the author proposes to incorporate amendments into the bill that would:

- clarify that an actor's contract may include an exclusivity provision covering the period of principal photography, as defined, and a 30 day buffer on either side;
- allow parties to a collective bargaining agreement to supersede the terms of the bill by contract, provided that the superseding terms are consistent with a collective bargaining agreement executed after the effective date of this bill.

A mock-up of the amendments in context is attached to this analysis.

#### 5. Arguments in support of the bill

According to the author:

The landscape of the entertainment industry has dramatically changed, yet companies still benefit from outdated laws that allow them to wield an overwhelming amount of control over artists through exclusivity contracts. No worker should ever be bound to an unreasonable and excessively lengthy contract that holds them back from making decisions about their own livelihood. AB 437 updates existing law to reflect the new reality today's creators are

facing. The bill limits the length of time that employers can unilaterally control actors and hold them off the job market without pay or the ability to pursue other work. AB 437 will level the playing field for actors and empower them to freely practice their craft and seek out opportunities doing what they love.

As sponsor of the bill, the Screen Actors Guild - American Federation of Television and Radio Artists writes:

In California, workers have a right to work multiple jobs and this bill clarifies that this right applies to actors as well. It will open new earning opportunities for actors, recording artists, and all Californians. Actors have limited windows of opportunity to practice their craft, earn a living, and support their families. Prohibitions on their ability to work between television seasons leave no room to establish and sustain a career. The advent of new forms of content distribution like streaming services has dramatically changed the business. Actors are now spending well over 12 months held to an employer without the ability to work or provide for their families. This is wrong and we need your help to change this practice.

In support, the California IATSE Council writes:

Actors are faced with obstacles unique to the entertainment industry. [...] AB 437 stops production studios from unilaterally holding actors off the market which in turn negatively affects their earning power and careers.

6. Arguments in opposition to the bill

For example, in opposition to the bill, the Motion Picture Association writes:

This bill, if enacted, will disrupt the long-standing business practices and legal principles that have made California home to the vibrant motion picture, TV and streaming business. A.B. 437 undermines both private contracts and the collective bargaining process that are hallmarks of the entertainment industry. Moreover, the bill is preempted, since it addresses an issue that is the subject of collective bargaining between SAG-AFTRA and motion picture, television and streaming producers. California enjoys a robust middle class of citizens who earn their living as employees in the film, TV and streaming industry and countless small and large businesses that are part of the entertainment ecosystem. The

prohibition on exclusive contracts, in A.B. 437, will upend this vital sector.

In further opposition to the bill, Netflix writes:

Film and series production comes with immense logistical challenges. As a studio employing thousands of behind-the-scenes workers in California, and supporting the thousands of businesses that supply equipment, services and facilities to our productions, we rely upon – and routinely pay handsomely for – exclusivity to ensure that key employees are available to work on our productions (taking into account that productions are subject to many unforeseen events outside of our control such as pandemic outbreaks, inclement weather, location unavailability, and illness to cast or crew). The financial guarantees we make to employees and businesses working on productions are co-dependent; we can only make firm commitments because we know we have the ability to align schedules and actually produce the film or series we are financing. Under this bill, we would not be able to ensure that key talent is available when needed, even when key talent is compensated for that right.

### SUPPORT

California Labor Federation (sponsor)

Screen Actors Guild - American Federation of Television and Radio Artists (sponsor)

California IATSE Council

LiUNA! Local 724

Music Artist Coalition

Teamsters Local 399

### OPPOSITION

20<sup>th</sup> Television

ABC Signature, LLC

BET Studios

Cartoon Network Studios

CBS News and Stations – Bay Area

CBS News and Stations – Los Angeles

CBS Television Studios

FX Productions, LLC

HBO and HBO Max

Los Angeles County Business Federation

Motion Picture Association

NBC Universal



Netflix  
New Line Cinema  
Nickelodeon  
Paramount Media  
Paramount Pictures  
Paramount Television Studios  
Paramount +  
Sony Pictures Entertainment  
TBS, TNT and TRUTV  
Walt Disney Company  
Walt Disney Studios  
Warner Brothers Animation, Inc.  
Warner Brothers Pictures  
Warner Brothers Television

### **RELATED LEGISLATION**

Pending Legislation: None known.

Prior Legislation:

AB 2926 (Kalra, 2022) would have, among other things, restricted the use of exclusivity provisions in performers' contracts in the motion picture industry. AB 2926 died without a vote in the Assembly Committee on Arts, Entertainment, Sports, Tourism, and Internet Media.

AB 1385 (Gonzalez, 2021) was nearly identical to AB 2926. AB 1385 died without a vote in the Assembly Labor and Employment Committee.

### **PRIOR VOTES:**

Senate Labor, Public Employment and Retirement (Ayes 3, Noes, 1)

As this bill was recently gutted and amended on May 2, 2022, all votes prior to the new version of this bill are irrelevant.

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**Amended Mock-up for 2021-2022 AB-437 (Kalra (A))**

**Mock-up based on Version Number 97 - Amended Senate 5/2/22**

**THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:**

**SECTION 1.** Section 2855.1 is added to the Labor Code, to read:

**2855.1.** (a) Notwithstanding any other provision of law, a contract for the personal or professional services of an employee as an actor in connection with the production of motion pictures and other audiovisual entertainment, regardless of medium, excluding commercial advertising, shall not prohibit the employee from working for multiple employers unless the employer can show that the other employment would pose a direct scheduling conflict or the employer can show that it would materially interfere with the employer's business. The contract may do the following:

(1) Require the employee to disclose to the existing employer any additional employment, provided the existing employer shall not take any adverse action against the employee based solely on the employee having taken additional employment.

(2) Require that the employee refrain from any additional employment during any of the following:

(A) 30 days before principal photography begins.

(B) During principal photography, wait 14 days after

(C) 30 days after all aspects of principal photography is complete.

~~their current production ends to begin production with a different employer and complete all aspects of production with a different employer no fewer than 14 days before production with the existing employer resumes.~~

(3) Include protections for trade secrets and confidential business information. Nothing in this section shall supersede any rights the employer may have under any other section with respect thereto.

(b) This section shall apply to a contract for the personal or professional services of an employee as an actor amended or entered into on or after January 1, 2023.

(c) (1) Any provision in an employment contract amended or entered into on or after January 1, 2023, that would deprive an employee of the protections of this section shall be void.

(2) Notwithstanding paragraph (1), parties to a valid collective bargaining agreement may agree to exceptions or alterations to the obligations of this section if the exception or alteration is consistent with the collective bargaining agreement and is agreed upon on or after the effective date of this section.

(d) For purposes of this section, "principal photography" means the period of time when the motion picture is being shot and does not include pre-production and post-production timeframes.