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Models of Confusion: Strutting the Line Between Agent and Manger, Employee and Independent Contractor in the New York Modeling Industry

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Models of Confusion: Strutting the Line Between Agent and Manger, Employee and Independent Contractor in the New York Modeling Industry

Cover Page Footnote

J.D. Candidate, 2015, Fordham University School of Law; B.A., 2012, Cornell University. The Author would like to thank Doreen Small for her invaluable guidance and expertise and the Volume XXV Fordham Intellectual Property, Media & Entertainment Law Journal Editorial Board for their hard work. The Author also thanks her family and friends for their unconditional love and support.

Models of Confusion: Strutting the Line Between Agent and Manager, Employee and Independent Contractor in the New York Modeling Industry

Ariel Sodomsky*

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INTRODUCTION

To most, the modeling world is one of glamour, glitz, and luxury.¹ In reality, modeling constitutes more than just “being really, really, ridiculously good looking”² and traveling the world; it is a

¹ Olivia Fleming, *Fashion Industry Initiative Cracks Down on Labels that Don’t Pay Models (and That Includes You, Marc Jacobs)*, DAILY MAIL ONLINE (Mar. 27, 2012), <http://www.dailymail.co.uk/femail/article-2120523/Fashion-industry-initiative-cracks-labels-dont-pay-models-includes-Marc-Jacobs.html> (explaining that many people have the opinion that modeling is “unequivocally a glamorous career”).

² ZOOLANDER (Paramount Pictures 2001).

job “like any other, where models are . . . hired to do a job they specialize in.”³ While model Linda Evangelista said that she would not get out of bed for less than \$10,000 a day,⁴ models in 2012 on average were only making \$18,750 a year.⁵ Fashion is a fickle industry where “one day you’re in and the next you’re out,”⁶ but modeling might be its most unpredictable and evolving area. On a daily basis, aspiring models are going to modeling agencies, and if selected, signing contracts to be represented by these agencies. Most new models will not question the provisions set forth in their contracts, and even if they did, “a fledgling unsigned model does not possess the leverage for negotiations.”⁷ In addition, these contracts likely contain ambiguities that will create issues for the models and the modeling agencies down the line. Eileen Ford, co-founder of Ford Models, “describes the modeling industry of the 1940s and 1950s as ‘chaotic’” but this term just as easily applies to the industry today.⁸

This Note discusses how New York employment law is ill-fitted to the modeling industry, specifically as to the employment relationship between a model and her agency. The law gives no clear answers as to whether modeling agencies are employment agencies or management companies in New York. In addition, much ambiguity exists as to whether models are employees or independent contractors of these agencies and of the agencies’ clients. Neither legislation nor court decisions have given clear answers, causing this uncertainty to persist for decades.

Part I of this Note describes how the modeling industry functions in New York—how the relationship between model and agency begins and the basic laws that govern these relationships.

³ Fleming, *supra* note 1.

⁴ Michael Gross, *Models*, N.Y. MAG., Mar. 1992, at 45 (quoting Evangelista as having told *Vogue*, “We have this expression, Christy [Turlington] and I. We don’t wake up for less than \$10,000 a day.”).

⁵ Bureau of Labor Statistics, U.S. Dep’t of Labor, Occupational Outlook Handbook, *Models (2012–2013)*, available at <http://www.bls.gov/ooh/sales/models.htm>.

⁶ *Project Runway Quotes*, IMDB, <http://www.imdb.com/title/tt0437741/quotes> (last visited Sept. 17, 2014).

⁷ Louis Tertocha, *Fashion Modeling from Contract Clauses to the Rigors of the Runway*, 17 ENT. & SPORTS LAW. 1, 19 (1999).

⁸ Rita S. Kohn, *The “Model” Contract*, 11 ENT. & SPORTS LAW. 9, 9 (1993).

New York law is full of ambiguities that allow for different interpretations of the classifications of both modeling agencies and models. This Part will show how different parties, including the models, agencies, and agencies' clients, interpret the applicable New York laws. This Part also discusses potentially helpful legislation that was vetoed in 2005,⁹ and the Model Alliance,¹⁰ an organization that was formed to stand up for models' rights.

Part II discusses how proposed legislation and court decisions have examined the legal classifications of modeling agencies, their clients, and models in New York. While many cases have discussed the question of whether modeling agencies are employment agencies or managers under New York law, none has thus far given a definitive answer. There has also been no clarification through cases or proposed legislation as to whether models are employees or independent contractors of either the agency or the agency's clients.

Part III discusses the direction that the modeling industry should move toward to resolve its issues and begin to treat models with at least the same protections that other workers already have under New York law. Model-specific legislation could give definitive classification to both modeling agencies and models and allow the industry to function to its fullest potential. There are many places to look, such as California law, French law, and federal law, to get ideas of what this model-specific legislation could look like. "[M]odeling is not a one-size fits all industry,"¹¹ and it is time that it starts getting treated like the unique, complex industry that it is.

I. MODELS, AGENTS, AND THE CONTRACTS THAT BIND

Eileen and Gerald Ford introduced contracts to the modeling industry in the late 1940s.¹² Today, almost all models work with agents, and the contracts govern their relationship.¹³ This part of

⁹ S. 5602, 228th Sess. (N.Y. 2005).

¹⁰ THE MODEL ALLIANCE, <http://modelalliance.org> (last visited September 14, 2014).

¹¹ *Top Agencies: New York/Women*, MODELS.COM, <http://models.com/agencies/top/> (last visited Sept. 17, 2014).

¹² Kohn, *supra* note 8, at 9.

¹³ *See id.*

discusses how the relationship begins, the laws that govern employment agencies and management companies in New York, and the distinction between employees and independent contractors under New York employment law. The main issues presented in this section derive from the lack of clarity in New York law, allowing for multiple interpretations of the classification of models, modeling agencies, and the agencies' clients. As seen below, modeling agencies could be considered employment agencies or management companies. Likewise, models could be classified as either employees or independent contractors of their agencies and of the agencies' clients.

A. How an Agency and Model Begin a Contractual Relationship

To be discovered and turned into a top model is a dream for many young girls.¹⁴ Models can be discovered in a vast range of places, from “the office of a talent scout, through open-call model ‘searches,’ to the proverbial corner drugstore.”¹⁵ One of the most iconic stories is of a young Kate Moss being discovered and immediately offered a contract by an agent “who saw her in the airport on the way home from a family vacation.”¹⁶ Twenty-five years later, Moss is still an industry titan, showing that long-lasting careers can come from these coincidental discoveries.¹⁷

Young girls dream of having similar stories, and with the increased popularity of street-style photographers and social media, the dream of being a model seems more attainable now than ever.¹⁸

¹⁴ See Steffi Fitter, *Top Models and the World of Being Skinny*, HAPPY HEALTHY HUB (June 29, 2012), <http://happyhealthyhub.com/2012/06/29/top-models-and-the-world-of-being-skinny/> (“The dream of many young girls is to become a top super model in the fashion world.”).

¹⁵ Tertocha, *supra* note 7 at 19; see also Zara Wong, *Spotted: the Best Model Discovery Stories*, VOGUE (July 22, 2013), <http://www.vogue.com.au/fashion/news/galleries/spotted+the+best+model+discovery+stories,25562?pos=4#top> (listing where some top models have been discovered).

¹⁶ Gina Neff, Elizabeth Wissinger & Sharon Zukin, *Entrepreneurial Labor Among Cultural Producers: “Cool” Jobs in “Hot” Industries*, 15 SOC. SEMIOTICS 307, 317 (2005).

¹⁷ See *The Money Girls*, MODELS.COM, <http://models.com/rankings/ui/MoneyGirls/2023#2023> (last visited Sept. 17, 2014) (naming Kate Moss the second highest paid model in the industry and calling her “an industry” and “a financial powerhouse while remaining the absolute epitome of editorial cool”).

¹⁸ See Suzy Menkes, *The Circus of Fashion*, T MAGAZINE (Feb. 10, 2013), http://tmagazine.blogs.nytimes.com/2013/02/10/the-circus-of-fashion/?_r=0.

Social networks such as Facebook, Instagram, and Snapchat make it easy for anyone to post pictures of themselves and their friends, allowing the average person to feel like a model on a regular basis.¹⁹ These mediums are also used to discover models, such as Kate Upton (often heralded as “the first in a new generation of internet-spawned models”).²⁰ Upton garnered enormous buzz from her YouTube videos, ultimately signing to IMG, a top agency, and becoming “the closest thing that fashion has to a supermodel right now.”²¹ Social media is also an important force for established models to stay relevant: Jason Wu recently cast Christy Turlington in his campaign after “getting to know her” on Instagram without ever meeting her in person.²² In these ways, social media serves as a popular gateway for those desiring to enter the modeling industry. Cindy Crawford says that her generation did not grow up thinking about becoming models but girls today do “because of *America’s Next Top Model* and Instagrams and selfies.”²³

While social media might be the newest place to discover models, Ms. Crawford’s mention of *America’s Next Top Model* (“*ANTM*”) certainly fits into the discussion. The debut of *ANTM* in May 2003 marked the beginning of the obsession with reality shows about modeling.²⁴ Tyra Banks—already one of America’s top models—is one of the creators of the show, which has filmed

¹⁹ See Charissa Coulthard, *Self-portraits and Social Media: The Rise of the ‘Selfie’*, BBC NEWS MAG. (June 6, 2013), <http://www.bbc.com/news/magazine-22511650> (“A search on photo sharing app Instagram retrieves over 23 million photos uploaded with the hashtag #selfie, and a whopping 51 million with the hashtag #me.”).

²⁰ David Gardner, *From Cutie to £50 Million Beauty: How YouTube Sensation Kate Upton became Most In-Demand Supermodel and Her 20 Best Pictures*, MIRROR (July 22, 2012), <http://www.mirror.co.uk/news/world-news/kate-upton-the-youtube-sensation-whos-1153874> (“... she took a fame-game short cut by building up a fan base of millions through her fun YouTube dance videos Kate’s fast track to success came after she posted a video of herself at a Los Angeles Clippers basketball game doing the dougie . . . It became a YouTube sensation after going viral and attracting more than three million views plus winning her 170,000 Twitter followers.”).

²¹ Jonathan Van Meter, *Follow Me: Kate Upton Leads the Charge of Models Who’ve Gone Crazy for Social Media*, VOGUE (Apr. 2014), <http://www.vogue.com/magazine/article/kate-upton-model-social-media/#1>.

²² *Id.*

²³ Cindy Crawford, INTO THE GLOSS (May 12, 2014), <http://intothegloss.com/2014/05/cindy-crawford-2014/>.

²⁴ *America’s Next Top Model*, IMDB, <http://www.imdb.com/title/tt0363307/> (last visited Sept. 17, 2014).

twenty-one seasons and spawned *ANTM* programs in 170 countries.²⁵ The grand prize of the show always includes a modeling contract with a top modeling agency.²⁶ In 2011, the E! Network introduced a show called *Scouted*, another reality show about becoming a model.²⁷ *Scouted* follows the models in each episode as they are selected by local modeling scouts and given “quickie makeovers and modeling tips.”²⁸ The models with potential are flown to New York City to meet with people at One Management; the episode ends with the models “either getting assignments or being sent back into obscurity.”²⁹ Oxygen Network came out with its own modeling reality show, *The Face*, in 2013.³⁰ The first season included Naomi Campbell, Coco Rocha, and Karolina Kurkova—all successful models—as the aspiring model contestants’ mentors, with the winner becoming the face of Ulta, “a cosmetics chain store with locations across the country.”³¹ The plethora of television shows that delve into the modeling industry, as well as the success of the shows, demonstrates just how popular the industry has become to our culture.

While many aspiring models may be photographed for blogs or appear on a reality television show, signing with an agency is their ultimate goal.³² Modeling agencies only represent from a couple dozen to a hundred or so models at a time, which means the majori-

²⁵ *Id.*; Dodai Stewart, *Naomi Campbell Explains How The Face will be Different from ANTM, Which She’s Never Seen*, JEZEBEL, (Feb. 7, 2013), <http://jezebel.com/5982511/naomi-campbell-explains-how-the-face-will-be-different-from-antm-which-shes-never-seen>.

²⁶ *About the Show, America’s Next Top Model*, THE CW, <http://www.cwtv.com/shows/americas-next-top-model/about> (last visited Sept. 17, 2014) (noting that the prize for the most recent season of the show included a modeling contract with Next Model Management).

²⁷ Josef Adalian, *E! Will Air Scouted, a Reality Show About Modeling*, VULTURE (Oct. 5, 2011), http://www.vulture.com/2011/10/e_modeling_series.html.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See Stewart, *supra* note 25.

³¹ *Id.*

³² See Julia Rubin, *Fashion’s Latest Reality Series Is About Model Scouts*, STYLEITE (Oct. 6, 2011), <http://www.styleite.com/media/scouted-tv-show/> (explaining that the local scouts try to get their girls meetings at the agency, and then the agency ultimately decides if they sign the model, making or breaking her fashion career).

ty of aspiring models do not get signed.³³ The agencies select the models, train them, get them jobs, and represent them in talks with clients in return for a commission.³⁴ The rising popularity of modeling as an occupation³⁵ has correlated to an increase in the number of modeling agencies, showing a growth from about thirty agencies in Manhattan in 1950 to 132 agencies in 2002³⁶ and 193 in 2013.³⁷ This large number of agencies, though, spans the gamut from “power agencies . . . [with] impressive track records” to “boutique agencies” that can offer models more personal attention³⁸ to modeling scams that do nothing to further a model’s career.³⁹ If a model is signed to a legitimate agency, her biggest reason to adhere to her contract is that the agency now has an interest in helping her to achieve her potential.⁴⁰

While there is controversy over whether modeling agencies act as agencies or management companies under New York law (see below), the contract that the model signs with the agency is called a

³³ ROGER TALLEY, *THE PROFESSIONAL’S GUIDE TO MODELING: A COMPREHENSIVE LOOK AT THE BUSINESS OF A MODEL* 9, 33 (2007).

³⁴ Neff et al., *supra* note 16.

³⁵ See BUREAU OF LABOR STATISTICS, *supra* note 5 (“In 1994, the Bureau of Labor Statistics (BLS) counted 3,155 ‘demonstrators, promoters, and models’ working in the city [Manhattan]; in 2000, there were reportedly 3,700 models, and they estimate the number will rise to 4,000 by 2005.”).

³⁶ See Neff et al., *supra* note 16 (“The Manhattan business ‘Yellow Pages’ listed 30 modeling agencies in 1950, 41 in 1965, 60 in 1979, 95 in 1985, 117 in 1998, 124 in 2000, and 132 agencies in 2002.”).

³⁷ *New York Modeling Agencies*, YELLOW PAGES, <http://www.yellowpages.com/new-york-ny/modeling-agencies> (last visited Sept. 14, 2014) (listing 193 modeling agencies in New York City in 2013).

³⁸ *Top Agencies: New York/Women*, MODELS.COM, <http://models.com/agencies/top/> (last visited September 14, 2014) (listing nineteen power and boutique agencies as “representing models currently or recently listed in one of the top model rankings” on models.com).

³⁹ *Modeling Myths and Scams*, NEWMODELS.COM, <http://www.newmodels.com/myths.html> (last visited Sept. 14, 2014) (Model agency scams have existed “for nearly as long as there have been model agencies. What all the scams have in common is a plan to make money by taking it from the models, without having to go to the trouble of actually getting much work for the models.”).

⁴⁰ Tertocha, *supra* note 7, at 19 (“The supportive argument for strict adherence to the specified contractual terms is the fact that the agency will invest substantial advance expenditures for photographers, portfolios, testing, wardrobe, makeup, accommodations, travel, composite cards, headshots, and model showcases.”).

“personal management contract.”⁴¹ There might be slight differences in the contracts at various agencies, but most contracts “contain the same restrictions, grant the same powers, and incorporate the same clauses.”⁴² This is true unless there is competition over the model or the model is already very well established.⁴³ Once the contract is signed, the agents “advise and train models, and promote them to clients in return for a portion of the model’s earnings.”⁴⁴

B. *New York Employment Agency Law*

It is unclear under New York law whether modeling agencies are considered employment agencies or management companies.⁴⁵ The distinction has been questioned many times, but each time it has been raised before a judge, the case has been decided on another issue or settled before the issue is reached.⁴⁶ In 2005, there was proposed legislation that could have clarified the distinction, but it was vetoed and nothing else has been proposed in its place.⁴⁷

For most of the twentieth century there was no controversy over the classification of modeling agencies. The agencies, such as Ford, acted as employment agencies, obtaining a license and only taking a ten percent commission from the models.⁴⁸ Everything changed in the early 1970s, when a lawsuit alleged that several agencies “changed their corporate names (removing the word

⁴¹ Kohn, *supra* note 8, at 10.

⁴² *Id.*

⁴³ *Id.* (“[I]f a few agencies are engaged in a competition for a new girl, or a top model, her leverage increases dramatically. For a select few models, agencies have been known to permit “termination at will” provisions in their form contract. Agencies commonly lower their standard 20 percent commission for a supermodel.”).

⁴⁴ BUREAU OF LABOR STATISTICS, *supra* note 5.

⁴⁵ See *Shelton v. Elite Model Mgmt.*, 812 N.Y.S.2d 745, 758 (N.Y. Sup. Ct. 2005) (“The next issue is whether defendants [modeling agencies] are employment agencies subject to the licensing requirement [as opposed to modeling agencies not subject to the requirement].”).

⁴⁶ See *e.g.*, *Shelton*, 812 N.Y.S.2d at 762 (dismissing the case for other reasons, so the “jury never got to hear the important issue of whether the defendants are employment agencies or are subject to the incidental booking exception”); *Fears v. Wilhelmina Model Agency, Inc.*, No. 02Civ.4911(HB), 2007 WL 1944343 (S.D.N.Y. July 5, 2007) (ending in a settlement agreement).

⁴⁷ See S. 5602, 228th Sess. (N.Y. 2005).

⁴⁸ MICHAEL GROSS, *MODEL: THE UGLY BUSINESS OF BEAUTIFUL WOMEN* 197 (2011).

‘agency’), returned their employment agency licenses to New York City’s Department of Consumer Affairs, asserted that they were managers and not employment agents, and raised commissions.”⁴⁹ This was the beginning of the employment classification issues.

1) Employment Agencies

Employment agencies are covered under § 171 of the New York General Business Code.⁵⁰ An agency’s main duty is to “procure or attempt to procure . . . employment or engagements” for the client—the model.⁵¹ An employment agency’s duty “does not include the business of managing”⁵² If a person’s primary goal is procuring employment for a client, regardless of whether the language of the contract says otherwise, the person is considered an agent under New York law.⁵³ Modeling agencies have said procuring employment is not their main goal and have been operating as management companies since the early 1970s.⁵⁴ There are a couple reasons why modeling agencies would want to be considered management companies in New York as opposed to employment agencies.

First, to be considered an agency under New York law, a license is necessary to “open, keep, maintain, own, operate or carry on” business.⁵⁵ In New York City, the Commissioner of the Department of Consumer Affairs issues the license.⁵⁶ Before a license is issued, the agency must deposit a bond with the commissioner, usually in the amount of five thousand dollars.⁵⁷ As stated in the statute, the primary purpose of requiring an employment agency to

⁴⁹ See *id.* at 311.

⁵⁰ See N.Y. GEN. BUS. LAW § 171 (McKinney 2014).

⁵¹ *Id.* § 171(2)(c)(1).

⁵² *Id.* § 171(8).

⁵³ *Russell-Stewart, Inc. v. Birkett*, 201 N.Y.S.2d 687, 688 (N.Y. Sup. Ct. 1960).

⁵⁴ See *Masters v. Wilhemina Modeling Agency, Inc.*, 473 F.3d 423, 426 (2d. Cir. 2007) (Plaintiffs’ counsel said “that they were ‘managers’ and only incidentally involved in procuring employment for their models”); see also Sample Modeling Contract I (on file with author) (Modeling agencies will often say in a contract that it “is not acting hereunder as an employment agent and does not represent that it is licensed as an employment agency under the General Business Law of the State of New York”).

⁵⁵ GEN. BUS. § 172 (McKinney 2014).

⁵⁶ *Id.*

⁵⁷ *Id.*

have a license “is to regulate employment agencies for the protection of the applicant for work against many possible abuses,”⁵⁸ such as “unfair and unreasonable fees.”⁵⁹

Second, New York employment-agency law states that for “theatrical employment agencies,”⁶⁰ “the gross fee shall not exceed, for a single engagement, ten per cent of the compensation”⁶¹ Because modeling agencies consider themselves management companies, they typically charge the model a twenty percent commission in the modeling contract.⁶² This has been a major point of contention with the models, who believe that the modeling agencies should only be able to charge ten percent commission from the model’s earnings for a job.⁶³ Agencies will often lower this twenty-percent commission for the top models.⁶⁴ In addition to this commission from the models, agencies also collect fees from clients, normally a standard twenty-percent service charge for supplying the models.⁶⁵ Thus, if a model is paid \$1,000 for one job, the agency would take \$200 of that as their commission from the model and an additional \$200 from the client, so that \$1,200 is actually being exchanged.⁶⁶

⁵⁸ Heyman v. Howell, 133 N.Y.S.2d 19, 21 (N.Y. Ct. Spec. Sessions 1954).

⁵⁹ Fears v. Wilhelmina Model Agency, Inc., No. 02Civ.4911(HB), 2003 WL 145556, *6 (S.D.N.Y. Jan. 17, 2003).

⁶⁰ See GEN. BUS. § 171.8 (defining a “theatrical employment agency” as “any person . . . who procures or attempts to procure employment or engagements for an artist”).

⁶¹ *Id.* § 185.8.

⁶² See Kit Johnson, *Importing the Flawless Girl*, 12 NEV. L.J. 831, 838 (2012) (stating that the agency’s commission is “typically 20 percent”).

⁶³ See Shelton v. Elite Model Mgmt., 812 N.Y.S.2d 745, 749 (N.Y. Sup. Ct. 2005) (“Plaintiffs lodge very serious accusations in their . . . complaint . . . [the agencies] denying to the models . . . the modeling agencies’ legal status as employment agencies in order to avoid the 10% limit on such fees . . . [and instead] charging models 20%”); *Masters v. Wilhelmina Modeling Agency, Inc.*, 473 F.3d 423, 426 (2d Cir. 2007) (“[P]laintiffs’ counsel purportedly developed evidence that the leading New York modeling agencies . . . falsely claimed exemption from the 10% commission rate cap imposed on ‘employment agencies’ under Article 11 of the New York general Business Law by asserting that they were ‘managers’ and only incidentally involved in procuring employment for their models and raised the ‘standard rate’ of model commissions from 10% to 20%”).

⁶⁴ Kohn, *supra* note 8, at 10.

⁶⁵ Johnson, *supra* note 62, at 838.

⁶⁶ GROSS, *supra* note 48, at 10.

Taking a twenty percent commission from the models becomes even more of an issue when one considers how little models are sometimes paid for jobs.⁶⁷ In 2009, *Vogue* Paris was paying a day rate of \$125, while American *Vogue* was paying \$250 a day.⁶⁸ Despite the fact that New York Fashion Week brings in over \$400 million to the city each year, some of the models that walk in the shows are not paid at all.⁶⁹ In addition, most models face unpredictable work schedules with periods of unemployment and have to work other part-time jobs to increase their earnings.⁷⁰ Based on all of this, whether or not a modeling agency is considered an employment agency under New York law, and thus only able to charge ten percent commission, makes a substantial financial difference in the lives of the models.

2) Personal Managers

As seen above, it is in modeling agencies' best interest to be considered management companies so that they do not have to comply with the provisions of General Business Law Article 11. Managers can continue to procure employment and still be exempted from regulation under § 171 through an incidental booking exception.⁷¹ Under the incidental booking exception, a manager is allowed to book jobs so long as the booking is only incidental to the manager's other job of managing the talent.⁷² Managers in California, however, cannot procure employment because California has

⁶⁷ Jenna Sauers, *What Vogue Actually Pays Its Models*, JEZEBEL (Nov. 30, 2010), <http://jezebel.com/5701608/exclusive-lawsuit-reveals-what-vogue-actually-pays-its-models> (“*Vogue* Paris pays crap, *Vogue* pays not much better, neither of them pays particularly quickly, and campaigns are worth a mint to everyone lucky enough to work on them.”).

⁶⁸ *Id.*

⁶⁹ See Ashley Mears, *Poor Models. Seriously.*, N.Y. TIMES (Sept. 14, 2011), http://www.nytimes.com/2011/09/15/opinion/its-fashion-week-poor-models.html?_r=1&.

⁷⁰ BUREAU OF LABOR STATISTICS, *supra* note 5.

⁷¹ N.Y. GEN. BUS. LAW § 171.8 (McKinney 2014) (providing that people whose “business only incidentally involves the seeking of employment” for a theatrical employment agency are not covered by the term “theatrical employment agency”).

⁷² *Id.*

no incidental booking exception.⁷³ New York's incidental exemption shields many managers in New York from "the harsh remedies associated with unlawful procurement of employment [in California], such as the forfeiture of past and future fees earned and the rescission of lucrative representation contracts."⁷⁴ The incidental exemption also creates a lot more confusion as to what procuring employment entails in New York without a hard line rule as to what is incidental and what is not.⁷⁵

Because managers are not covered under New York Employment Agency Law, a management company does not need to obtain a license by depositing a bond with the Commissioner. Management companies also have no cap on the commission they can take from their models, as they are not held to the ten percent commission in the Employment Law.⁷⁶ Thus, at least in these respects, it is much easier and cheaper to consider oneself a management company in New York rather than an employment agency.

3) 2005 Proposed Legislation

In 2005, there was a proposed bill that would have clarified "the difference between a personal manager and a theatrical employment agency," but despite both houses overwhelmingly passing the bill, Governor Pataki vetoed it.⁷⁷ The bill was not specific to the modeling industry, trying to clarify the distinction as to all applicable groups. The governor said he was "constrained" to veto the bill based on various concerns, such as those brought by the New York State Consumer Protection Board and the Screen Actors Guild (SAG), who felt that some in the entertainment industry might use the proposed definition of a personal manager to provide

⁷³ Gary E. Devlin, *The Talent Agencies Act: Reconciling the Controversies Surrounding Lawyers, Managers, and Agents Participating in California's Entertainment Industry*, 28 PEPP. L. REV. 384 (2001).

⁷⁴ *Id.* at 388.

⁷⁵ Bradley W. Hertz, *The Regulation of Artist Representation in the Entertainment Industry*, 8 LOY. L.A. ENT. L. REV. 55, 68 (1988) (stating that there "are obvious problems of degree" with an incidental booking approach").

⁷⁶ See *Shelton v. Elite Model Mgmt.*, 812 N.Y.S.2d 745, 749 (N.Y. Sup. Ct. 2005) ("[The agencies] denying to the models . . . the modeling agencies' legal status as employment agencies in order to avoid the 10% limit on such fees . . . [and instead] charging models 20% . . .").

⁷⁷ *Shelton*, 812 N.Y.S.2d at 759.

employment services outside the protection of the law.⁷⁸ The sponsor of the bill says that the bill's intention was to help the modeling industry clarify whether modeling agencies are employment agencies or management companies.⁷⁹ Despite talk of working on a new bill proposal, none has been presented yet.

The stated goal of the proposed bill in 2005 was “to amend the general business law and the arts and cultural affairs law, in relation to regulation of theatrical employment agencies” by “clarify[ing] the issue by more clearly defining personal managers and maintaining their exclusion from regulation as employment agencies.”⁸⁰ The bill stated that the “foremost task of the personal managers, unlike employment agencies, is to guide and oversee the careers of their clients but, consistent with the provisions of this act, parties who qualify as personal managers may seek employment opportunities and engagements for their artists, including models.”⁸¹ The lack of clarity in the law is due to the “incidental booking” exception of New York employment-agency law, and this proposal sought to address the ambiguity as to who is and is not a manager.⁸²

i. Proposed Amendments

The proposed bill set forth many amendments to the current definition of “theatrical employment agency.”⁸³ Instead of having everything in one paragraph under section 8,⁸⁴ as it is now, the

⁷⁸ *Id.*; see also Letter from Dan Petrie, Jr., President of the Writers Guild of America, West, Michael Apted, President of the Directors Guild of America, and Warren Leight, President of the Writers Guild of America East, to George E. Pataki, Governor of New York (Aug. 17, 2005) (on file with author) [hereinafter Letter from Dan Petrie, Jr.] (showing that the Directors Guild of America and Writers Guild of America were two other organizations that voiced their fears to the governor).

⁷⁹ See *Shelton*, 812 N.Y.S.2d at 759.

⁸⁰ S. 5602, 228th Sess. (N.Y. 2005).

⁸¹ *Id.*

⁸² N.Y. GEN. BUS. LAW § 171.8 (McKinney 2014) (excluding managing “where such business only incidentally involves the seeking of employment” from the definition of “theatrical employment agency.”).

⁸³ See S. 5602, 228th Sess. (N.Y. 2005).

⁸⁴ GEN. BUS. § 171.8 (defining a “theatrical employment agency” as any who procures or attempts to procure employment or engagements for circus, vaudeville, the variety field, the legitimate theater, motion pictures, radio, television, phonograph recordings, transcriptions, opera, concert, ballet, modeling or other entertainments or exhibitions or performances. Exceptions to the scope of this definition include one engaged in the

proposed bill broke the section into part (a) and part (b).⁸⁵ The definition of a “theatrical employment agency” remained largely the same in part (a), except that the entire section about “the business of managing” was omitted.⁸⁶ Instead, section (b) explicitly set forth, in two parts, the duties and guidelines of a “personal manager.”⁸⁷

The first section of (b) provided five parts explaining whom the provision applies to.⁸⁸ A personal manager is someone who “primarily manages,” “engages in the occupation of advising and counseling,” is compensated “only out of artists’ future income,” has a contractual relationship for a specific period of time, and “has the authority to make recommendations about such artists’, including models’, careers.”⁸⁹

The second section of (b) set forth to whom the term “personal manager” does not apply.⁹⁰ A personal manager is not someone who “shares premises,” “receives money from or has an ownership or business interest in an acting/vocal/modeling/dance school, photographer, casting agency or employment agency,” “requires artists (including models) to subscribe to any publication or incidental service, or contribute to the cost of advertising,” “expressly or impliedly promises or guarantees employment or engagements for artists,” “falsely purports to act as a booking agent,” “solicits artists for jobs by advertising in the help wanted section of newspapers or other publications,” or “engages in seeking employment or engagements that are not secondary to and directly part of managing an artist’s, including a model’s career.”⁹¹ If someone meets the requirements of the first section and does not fall into any of the provisions of the second, the personal manager

business of managing such entertainments, exhibitions or performances, or the artists or attractions where such business only incidentally involves the seeking of employment.)

⁸⁵ S. 5602, 228th Sess. (N.Y. 2005).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

“may thereafter seek employment and engagements for his or her artists, including models.”⁹²

ii. Opposition to Amendments

As mentioned above, various groups opposed the bill’s passage.⁹³ In August 2005, the presidents of the Writers Guild of America, West, the Directors Guild of America, and the Writers Guild of America, East wrote a letter to Governor Pataki outlining their concerns with the proposed bill.⁹⁴ The presidents were writing “on behalf of the 2,097 members of the Directors Guild of America, the 8,000 members of the Writers Guild of America, West and the 4,000 members of the Writers Guild of America, East who reside in New York State.”⁹⁵ Their main concern was that defining personal managers in this way would permit the personal managers “to act as unlicensed, unbounded, and unsupervised talent agents” unconcerned with restraints of the law.⁹⁶

The presidents went on to explain in more detail why they did not want the bill to be passed in New York.⁹⁷ The director and writer members of these organizations rely on agents, who are required to have licenses under New York law, “to seek and negotiate employment on their behalf.”⁹⁸ If this bill were passed, managers would have been able to obtain this employment for the directors and writers, but the managers would do so without the law controlling their actions.⁹⁹ The provisions already in place for agencies provide “oversight and supervision . . . to protect film artists from any ‘abuse of power’ by those who seek to economically benefit from ‘representing them;’” the managers would be subject to no such provisions.¹⁰⁰ Thus, these members of the entertain-

⁹² *Id.*

⁹³ *See* Letter from Dan Petrie, Jr., *supra* note 78.

⁹⁴ *Id.* (noting that prior to this letter that the Screen Actors Guild and the American Federation of Television and Radio Artists had also written to the Governor to express similar concerns).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *See id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

ment industry felt that passing the bill would be a detriment to the industry as whole.¹⁰¹

The organizations included in the letter, as well as others such as the Screen Actors Guild and the American Federation of Television and Radio Artists, have unions that protect their interests.¹⁰² For example, SAG-AFTRA “brings together two great American labor unions: Screen Actors Guild and the American Federation of Television and Radio Artists” in order “to secure the strongest protections for media artists.”¹⁰³ These unions function under the New York law as it is now and feel that the proposed bill would only harm their members. These organizations do not need the law to be clarified because they already work with agencies and do not need managers interfering with the way that the employment of their members is procured and the way in which their businesses are conducted. Most importantly, the members of these organiza-

¹⁰¹ *Id.*

¹⁰² *Welcome to the Directors Guild of America Website*, THE DIRECTORS GUILD OF AMERICA, <http://www.dga.org/The-Guild.aspx> (last visited Sept. 14, 2014) (“Through the collective voice of more than 15,000 members that the DGA represents, the Guild seeks to protect directorial teams’ legal and artistic rights, contend for their creative freedom, and strengthen their ability to develop meaningful and credible careers.”); *What is the Guild?*, THE WRITERS GUILD OF AMERICA, EAST <http://www.wgaeast.org/index.php?id=43> (last visited Sept. 14, 2014) (“The Writers Guild of America, East (WGAE) is a labor union of thousands of professionals who are the primary creators of what is seen or heard on television and film in the U.S., as well as the writers of a growing portion of original digital media content. On joining the Guild, writers from an extraordinarily vast range of backgrounds and abilities unite to promote, protect, and maintain important artistic and professional principles. The Guild’s assistance is provided regardless of the writers’ degree of success.”); *Frequently Asked Questions*, THE DIRECTORS GUILD OF AMERICA, WEST, <http://www.wga.org/content/default.aspx?id=1019#general1> (last visited Sept. 14, 2014) (“The Writers Guild of America, West (WGAW) is a labor union composed of the thousands of writers who write the television shows, movies, news programs, documentaries, animation, videogames and new media content that keep audiences constantly entertained and informed.”).

¹⁰³ *Union Information*, SAG-AFTRA, <http://www.sagaftra.org/union-information> (last visited Sept. 14, 2014) (“SAG-AFTRA is committed to organizing all work done under our jurisdictions; negotiating the best wages, working conditions, and health and pension benefits; preserving and expanding members’ work opportunities; vigorously enforcing our contracts; and protecting members against unauthorized use of their work. A proud member of the AFL-CIO, SAG-AFTRA partners with our fellow unions in the U.S. and internationally to seek the strongest protections for media artists throughout the world. We work with governments at the international, federal, state and local levels to expand protections for American media professionals both at home and abroad.”).

tions do not need the law to be clarified because they have these unions looking out for their best interests.

The sponsor of the 2005 proposed bill explained that the bill was “intended to help the modeling industry, which has been involved in time consuming, distracting and costly litigations all arising from the definition of the term ‘model management’ and whether modeling agencies differ from employment agencies.”¹⁰⁴ Other areas of the entertainment industry do not have these issues with the current legislation, so they opposed the changes for fear of the negative impact it would have specifically on their members.¹⁰⁵ Although Governor Pataki and the legislature took “issue with litigation expenses incurred by modeling agencies” and the harms occurring against the models,¹⁰⁶ the Governor felt it necessary to veto the bill.¹⁰⁷ This left the modeling industry controlled by the current “one-size-fits-all” statute and ripe for more litigation and alleged wrongdoing.¹⁰⁸

4) The Model Alliance

One way that the modeling industry differs from other areas of the entertainment industry is that it has no formalized union to protect the models’ interests.¹⁰⁹ In the 1990s, Donna Eller, a model, started the Models Guild, which “sought to unionize models.”¹¹⁰ The effort ultimately failed, “as modeling agencies resisted the idea of unionizing and many models worried that agencies

¹⁰⁴ Shelton v. Elite Model Mgmt., 812 N.Y.S.2d 745, 759 (N.Y. Sup. Ct. 2005) (explaining that the sponsor believes there is a difference between modeling agencies and employment agencies).

¹⁰⁵ See *id.* (noting that the objections from the Screen Actors Guild and other organizations were based on the concern that personal managers under the proposed bill would work “outside the protection of the law”).

¹⁰⁶ *Id.* at 758–59.

¹⁰⁷ *Id.* at 756.

¹⁰⁸ See *id.* at 758–59.

¹⁰⁹ Sara Ziff, *Health Starts with Having a Voice*, THE MODEL ALLIANCE (Feb. 6, 2012), <http://modelalliance.org/introductory-note> (“Unlike actors in the U.S., who rely on strong unions like SAG and AFTRA, models in the U.S. lack union support and basic workplace protections.”).

¹¹⁰ Steven Greenhouse, *A New Alliance Steps Up to Protect a New Generation of Models*, N.Y. TIMES (Dec. 23, 2013), <http://mobile.nytimes.com/2013/12/24/business/a-new-alliance-steps-up-to-protect-the-next-generation-of-models.html?ref=business>.

would blacklist them for union ties.”¹¹¹ This left models without a union or any such group looking out for their best interests.

With knowledge of what did not work, Sara Ziff started the Model Alliance, a not-for-profit organization that works “with progressive modeling agencies to give models in the U.S. a voice in their workplace” and “. . . to improve their basic working conditions in what is now an almost entirely unregulated industry.”¹¹² The group does not look “to unionize agencies or bargain contracts,” eliminating these as worries for the modeling agencies.¹¹³ The Model Alliance focuses on various grievances throughout the modeling industry, such as lack of financial transparency by the agencies, prevalence of sexual abuse, and pressure for models to be thin.¹¹⁴ The organization “aims to enhance the vitality and moral standing of the fashion business as a whole” by seeing models “as workers who deserve the same rights and protections as anyone else.”¹¹⁵ One such right the Model Alliance has considered tackling is whether or not models should be considered employees under New York law, a complex topic that is discussed below.¹¹⁶

C. *Employees and Independent Contractors*

The issue of whether models are employees or independent contractors is treated differently around the world. The major difference between being an employee and an independent contractor is that “[i]ndependent contractors are free from supervision, direction, and control in the performance of their duties” and work for themselves.¹¹⁷ In the United States, models “are commonly perceived to be, and essentially are universally accepted as, independent contractors.”¹¹⁸

¹¹¹ *Id.*

¹¹² Ziff, *supra* note 109.

¹¹³ Greenhouse, *supra* note 110.

¹¹⁴ Ziff, *supra* note 109.

¹¹⁵ *Id.*

¹¹⁶ Greenhouse, *supra* note 116.

¹¹⁷ Tracey A. Cullen, *What a Tangled Web We Weave: The Independent Contractor Snarl*, 15 N.Y. EMP. L. LETTER 1 (2008).

¹¹⁸ Alexandra R. Simmerson, *Not So Glamorous: Unveiling the Misrepresentation of Fashion Models' Rights as Workers in New York City*, 22 CARDOZO J. INT'L & COMP. L. 153, 170 (2013); see also Jenna Sauers, *Models Sue Agency for \$3.75 Million*, JEZEBEL (Nov. 26, 2010), <http://jezebel.com/5698562/models-sue-agency-for-375-million> (“Modeling

Just because a contract states that a model is an independent contractor does not mean that she necessarily is one, though.¹¹⁹ Classification of someone as an independent contractor versus employee

depends on degree of supervision, direction, and control exercised over the worker, not only in regard to the results but also to the means, manner, and methods of the services provided . . . Courts in New York have found that no single factor or group of factors will conclusively define whether a worker should be classified as an employee or an independent contractor, and specific definitions vary under federal and state statutes and regulations.¹²⁰

Some indicators of whether a model is an employee of her agency or of a client is if the agency or client is “determining when, where, and how services will be performed”; “providing facilities, equipment, tools, and supplies”; “stipulating the hours of work”; “requiring exclusive services”; “setting the rate of pay”; and “reserving the right to terminate services.”¹²¹ Indicators of independent contractor status can include “having an established business,” “maintaining a place of business and making a significant investment in facilities, equipment, and supplies,” “determining his own schedule,” and “setting or negotiating his own pay.”¹²²

1) The Differences Between Independent Contractor and Employee Status

Whether a person is classified as an employee or independent contractor makes a difference to both that person and the person they are lending their services to in terms of time, money, and many other areas. Because there is no strict test in New York to determine the classification, “in close cases the law creates a significant gray area that leads to complexity, with the potential for inad-

agencies do not employ models – models are independent contractors who are paid by their clients.”).

¹¹⁹ Cullen, *supra* note 117, at 1.

¹²⁰ *Id.*

¹²¹ *Id.* at 1–2.

¹²² *Id.* at 2.

vertent errors and abuse.”¹²³ There is also no clear cut determination of which classification is better for those involved: “[s]ome consequences favor employee status, while others favor independent contractor status.”¹²⁴

Agencies and clients prefer models to be independent contractors so that they can pay the models “without withholding federal, state, and social security taxes and avoid paying workers’ compensation insurance, unemployment insurance, and employment taxes,” all of which they could not do if the models were employees.¹²⁵ In addition, independent contractors are not entitled to benefits, such as “health insurance, paid vacation time, life insurance, disability insurance, stock options, and 401(k) retirement plans,” from the agency.¹²⁶

While this independent contractor relationship may seem like it’s only in the agency’s or client’s best interest, the model can benefit, too, as she has more control over her life.¹²⁷ An independent contractor “has greater ability to deduct work-related expenses” and “can establish his or her own pension plan and deduct contributions to the plan.”¹²⁸ While some desire this independence, there are also many benefits for the worker if she is considered an employee, such as that “an employee may exclude from gross income employer-provided benefits such as pension, health, and group-term life insurance benefits.”¹²⁹

2) Agency and Client Relationships

Proper classification of models is even more difficult because of the nature of their work: the models could be considered employees of not only the agency but also of the clients of the agen-

¹²³ JOINT COMMITTEE ON TAXATION, INTERNAL REVENUE SERVICE, PRESENT LAW AND BACKGROUND AND RELATING TO WORKER CLASSIFICATION FOR FEDERAL TAX PURPOSES (May 7, 2007), available at <http://www.irs.gov/pub/irs-utl/x-26-07.pdf>.

¹²⁴ *Id.*

¹²⁵ Cullen, *supra* note 117, at 1.

¹²⁶ *Id.*

¹²⁷ See JOINT COMMITTEE ON TAXATION, *supra* note 123 (“Workers sometimes argue that they prefer independent contractor status because it gives them more control over their own lives.”).

¹²⁸ *Id.*

¹²⁹ *Id.*

cies, such as photographers, designers, and brands. Clients often control many of the aspects of their relationship with the model. The client decides the date of the work, provides the facilities, equipment, tools and supplies, stipulates the hours, often requires exclusive services and can terminate the model's services. The clients do not set the rate of pay but the lack of one factor does not decide the status. If models are considered employees of clients the practice of paying models solely in "trade," or clothing, would likely cease, as employees are subject to minimum wage laws.¹³⁰

The transitory nature of modeling work, though, makes it more difficult for each client to be seen as an employer. The agency is the constant, while the clients may come and go with job assignments. Thus, a model is more likely to be seen as the employee of the agency. In addition, the agency sets the rate of pay and often requires an exclusive agreement with the model. As seen *infra* in Part II, though, nothing has been settled in terms of the model's employment status as to agency or client.

3) New York Law and Unemployment Insurance

In New York, it seems that models should at least fall under the definition of an employee as to unemployment insurance,¹³¹ yet many modeling agency contracts explicitly set forth that models are solely independent contractors rather than employees of the agen-

¹³⁰ Fleming, *supra* note 1.

¹³¹ See N.Y. LAB. LAW § 511 (McKinney 2014) ("'Employment' means (a) any service under any contract of employment for hire, express or implied, written, or oral and (b) any service by a person for an employer . . . (3) as a professional model, where: (i) the professional model performs modeling services for; or (ii) consents in writing to the transfer of his or her exclusive legal right to the use of his or her name, portrait, picture or image, for advertising purposes or for the purposes of trade, directly to a retail store, a manufacturer, an advertising agency, a photographer, a publishing company or any other such person or entity, which dictates such professional model's assignments, hours of work or performance locations and which compensates such professional model in return for a waiver of his or her privacy rights enumerated above, unless such services are performed pursuant to a written contract wherein it is stated that the professional model is the employee of another employer covered by this chapter. For the purposes of this subparagraph, the term 'professional model' means a person who, in the course of his or her trade, occupation or profession, performs modeling services. For purposes of this subparagraph, the term 'modeling services' means the appearance by a professional model in photographic sessions or the engagement of such model in live, filmed or taped modeling performances for remuneration.").

cies.¹³² When a model performs modeling services for an entity, she is an employee for unemployment insurance purposes if that entity “dictates . . . assignments, hours of work or performance locations and which compensates such professional model.”¹³³ This area is especially important to models, as “most models have periods of unemployment” and “many models work part time, often with unpredictable work schedules.”¹³⁴ As seen in the following Part, many agencies do not treat models as employees as to unemployment insurance despite the seeming clarity of the law.

II. HOW PROPOSED LEGISLATION AND LITIGATION HAVE TRIED TO CLARIFY THE ISSUES WITHIN THE MODELING INDUSTRY

The modeling industry, as it is known today, began in the 1940s,¹³⁵ but despite this long history, there are still many disputes over how the industry is run. This section delves into the litigation in the modeling industry, discussing both the distinction between employment agency and management company, as well as the differences between employee and independent contractor. The main dispute in the former set of cases is whether or not modeling agencies are employment agencies or management companies under New York law. The latter set of cases deals with the conflict of whether models are considered employees or independent contractors under New York law. This Part also discusses the pending legislation that could help clarify the employment relationship between models and their modeling agencies and the agencies’ clients.

¹³² See, e.g., Sample Modeling Contract I (on file with author) (“It is understood and agreed that the relationship between MANAGER and TALENT is that of independent contractors and not an employment relationship.”); Sample Modeling Contract II (on file with author) (“I acknowledge that Manager shall be performing its services hereunder as an independent contractor and not as my employer.”).

¹³³ LAB. LAW § 511.

¹³⁴ BUREAU OF LABOR STATISTICS, *supra* note 5.

¹³⁵ See Kohn, *supra* note 8, at 9.

*A. Litigation: The Agency-Manager Dispute*1) *Fears v. Wilhemina*

In 2005, *Fears v. Wilhelmina*¹³⁶ became a seminal case for the modeling industry. Caroline Fears, along with a class of other models, sued “some of the industries’ most powerful” modeling agencies for being involved in “an alleged price-fixing scheme.”¹³⁷ Specifically, the models claimed that the defendants fixed prices of models’ commissions and clients’ service fees, as well as terms and conditions of models’ employment, and that the defendants were structuring themselves as management companies when they should be employment agencies.¹³⁸ The ambiguities in New York law, specifically whether modeling agencies are employment agencies or management companies, set the stage for a dispute of this nature.

In the end, the court created a settlement agreement that “provides for a more transparent process” between models and their agents.¹³⁹ Under the settlement agreement, each agency agreed to: “(1) disclose all compensation received by it on all bookings including service charges, mother agent fees, gross fee received for booking and any other charges or deduction; (2) use clear contracts which disclose all compensation terms and practices; and (3) use contracts that are not automatically renewable.”¹⁴⁰

While this was a victory for the modeling industry, the court did not determine how the agencies should be classified under New York law. Moreover, the provisions to be followed in this case only last for ten years, providing a quick fix rather than a long lasting one.¹⁴¹

¹³⁶ *Fears v. Wilhelmina Model Agency, Inc.*, No. 02-Civ.4911(HB), 2005 WL 1041134 (S.D.N.Y. May 5, 2005).

¹³⁷ *Id.* at *3.

¹³⁸ *Id.* at *7.

¹³⁹ *Id.* at *2.

¹⁴⁰ *Shelton v. Elite Model Mgmt.*, 812 N.Y.S.2d 745, 756 (N.Y. Sup. Ct. 2005) (citing *Fears*, 2005 WL 1041134 at *2).

¹⁴¹ *See Fears*, 2005 WL 1041134 at *2.

2) Shelton v. Elite

Also in 2005, *Shelton v. Elite* discussed but did not answer whether modeling agencies are employment agencies or managers.¹⁴² This case dealt with the ambiguity in the term “incidental booking exception,” with Elite Model Management saying it fit within the exception and the plaintiffs, a class of models represented by Elite, saying the opposite.¹⁴³ The plaintiffs claimed that Elite’s only service was securing employment for the models, thus making the exception inapplicable.¹⁴⁴ While this might have seemed like the time to decide once and for all where modeling agencies fall, the case was ultimately dismissed for other reasons.¹⁴⁵

In the Afterword, Judge Ramos wrote that “[a] jury is not likely to ever hear the important issues of whether defendants are” employment agencies or management companies, and whether they are subject to the incidental booking exception.¹⁴⁶ His worry is that too much focus has been put on the facial distinction between the terms agency and manager while “the serious allegations of institutional predation made by the models against the modeling agencies” have been overlooked.¹⁴⁷ New York employment law “is simply intended to protect vulnerable employees from more powerful and unscrupulous employers,” but it seems to be failing in this regard toward models.¹⁴⁸ Judge Ramos suggests that “[p]erhaps the solution is not to modify the employment agency statute by exempting modeling agencies and thus leaving models unprotected but to enact a modeling agency statute which prohibits the abuses which are abhorred by all”¹⁴⁹ As of yet, no such statutes have been suggested, let alone enacted. The decision also suggested that Governor Pataki and his staff could look to the settlement in the

¹⁴² *Shelton*, 812 N.Y.S.2d at 756.

¹⁴³ *See id.* at 758–59.

¹⁴⁴ *See id.*

¹⁴⁵ *Id.* at 758 (dismissing “because none of the remaining named plaintiffs allege a relationship with any of the remaining nonsettling defendants”).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

Fears decision when considering legislative options for the modeling industry.¹⁵⁰

B. Litigation: The Employee-Independent Contractor Dispute

As mentioned in Part I, models are often considered independent contractors under New York law.¹⁵¹ This means that models are not entitled to “many basic provisions of employment law – including minimum wage, mandatory breaks, workers’ compensation for injuries on the job site, and even protection from sexual harassment.”¹⁵² A number of cases have discussed the employee/independent contractor divide, but as of yet there is no consensus as to whether the models are correctly labeled as one or the other.

1) Agency as Employer?

All of the Unemployment Insurance Appeals Board cases finding that models should be considered employees focused on the amount of control the agencies exerted over the models. Some indications that agencies were acting as an employer were that “the agency selects which models it will represent, chooses which models to send to clients, generally establishes the models’ fee after consultation with the client, requires the models to submit completed job vouchers and then directly pays the models their wages.”¹⁵³ In addition, the court found that the model was not an independent contractor because “[s]he was not in business for herself, incorporated or clothed with any significant indicia of an indepen-

¹⁵⁰ *See id.*

¹⁵¹ *See supra* note 132 and accompanying text.

¹⁵² Jenna Sauers, *Marc Jacobs Doesn’t Pay His Models, Says Mode*, JEZEBEL, (Mar. 5, 2012), <http://jezebel.com/5889757/marc-jacobs-doesnt-pay-his-models-says-model>.

¹⁵³ *In re Chopik*, 535 N.Y.S.2d 268, 270 (N.Y. App. Div. 1988); *see also In re Barnes*, 627 N.Y.S.2d 479, 479 (N.Y. App. Div. 1995) (finding the fact that the agency “coordinated claimant’s work schedule, negotiated with clients on claimant’s behalf, instructed claimant on the appropriate dress and behavior, and received a portion of claimant’s modeling fees” to be substantial evidence that the model was not an independent contractor); *In re McDonald/Richards, Inc.*, 649 N.Y.S.2d 75, 75–76 (1996) (“Given McDonald/Richards’ involvement in coordinating the models’ work assignments, negotiating their fees and responding to clients’ complaints, we find substantial evidence supporting the Board’s finding that McDonald/Richards exercises sufficient degree of direction and control over the models to be deemed their employer.”).

dent contractor.”¹⁵⁴ These cases found that the model was an employee of the agency and “was entitled to receive unemployment insurance benefits.”¹⁵⁵ The cases did not decide, however, that all models were employees for the purpose of unemployment insurance or for any other purposes; the decisions were specific to the model in each case.

This became clear in the New York Department of Labor’s audit of Elite Model Management in 2007.¹⁵⁶ Gary Friedman, a partner at Weil, Gotshal & Manges, the firm that represented Elite in the audit, said the NYDOL came in to the audit with the position that every model was an employee of the agency as to unemployment insurance.¹⁵⁷ After working on the audit for a little under a year, Mr. Friedman says the NYDOL was persuaded to change this position as to Elite.¹⁵⁸

One tactic which Mr. Friedman said was particularly helpful in getting to this determination was using the NYDOL’s own words against it.¹⁵⁹ According to Mr. Friedman, the NYDOL had conceded that there is only one employer as to unemployment insurance, and Elite argued that this employer is the client.¹⁶⁰ Elite introduced the fact that the clients file the models’ W-2 forms as strong prima facie evidence that the modeling agencies’ clients should be the employers as to unemployment insurance.¹⁶¹ In addition, Elite’s lack of supervision, direction, and control over their models on a job are all common law indicia of an independent contractor status.¹⁶² Modeling agencies are not even listed as one of the employers in the amendment to the NYDOL’s Practice Pointers.¹⁶³ Even though it came in with a very different view, the NYDOL

¹⁵⁴ *Chopik*, 535 N.Y.S.2d at 270.

¹⁵⁵ *Id.* at 268.

¹⁵⁶ *Wage and Hour Litigation and Counseling*, WEIL, http://www.weil.com/practice_areas/Transactions.aspx?service=2583; Telephone Interview with Gary Friedman, Partner, Weil, Gotshal & Manges LLP (Jan. 30, 2014).

¹⁵⁷ Phone Interview with Gary Friedman, *supra* note 156.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

found these arguments persuasive and declared the models to be independent contractors in this audit.

With this decision, the question of whether models are employees or independent contractors became even more unsettled. Mr. Friedman believes that other modeling agencies could procure the same outcome as Elite, but only time will tell what the NYDOL will do with these decisions.¹⁶⁴ The NYDOL's determination that models are independent contractors as to unemployment insurance is specific to this case.¹⁶⁵ Nothing has changed in New York law since this audit.¹⁶⁶

2) Client as Employer?

As suggested in the Elite audit, the question of whether the client—as opposed to the agency—can be the employer is another issue. In 1942, the Supreme Court of New York held that “the photographer does not reserve or exercise such control and supervision over the model as to constitute” the employer of the model as to Unemployment Insurance Law.¹⁶⁷ Models were explicitly said to be independent contractors as to the client.¹⁶⁸ It mattered in this case that there was “no degree of regularity or continuity in the employment [arrangement between the photographer and model] and they [models] are not employed on a permanent or periodical engagement.”¹⁶⁹ If models are independent contractors, minimum wage laws do not apply to them, and the clients can pay the models in “trade, meaning just clothes, not cash.”¹⁷⁰ If models are not employees, there are no laws or regulations to require designers to pay

¹⁶⁴ *Id.* (The NYDOL published nothing about the outcome of this audit and did not want to be wedded to this determination.).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *In re Barnaba Photographs Corp.*, 263 A.D. 915, 916 (N.Y. Sup. Ct. 1942).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Sara Ziff, *Viewpoint: Do Models Need More Rights?*, BBC NEWS MAG. (Nov. 28, 2012), <http://www.bbc.co.uk/news/magazine-20515337#TWEET402813> (“[T]here is something deeply unsettling about some of fashion’s wealthiest, most powerful brands hiring minors and not compensating them financially.”); see also Sauer, *supra* note 152 (finding that seventeen-year old model Hailey Hasbrook worked over thirty hours for Marc Jacobs during New York Fashion Week in February 2013 and was only given a bag, dress, jacket and shoes for her work—no money).

models for their work, so there is no incentive for the designers to do so.¹⁷¹

D. Legislation: The Employee–Independent Contractor Dispute

There is currently a bill pending with the New York Assembly Labor Committee that would clarify which models are considered employees under New York law as to unemployment insurance.¹⁷² The bill seeks to change New York labor law “in relation to the definition of employment as it concerns professional models and the individuals and entities which encourage them”¹⁷³ More specifically, the bill seeks to exclude “professional models” as employees and “a model manager, advertiser, person, corporation or other entity” from being an employer under section 511 of New York labor law if the model: “has the right to negotiate his or her compensation and the basis for reimbursement for expenses; has the right to accept or reject job assignments, hours of work and performance locations; has the right to perform services for other advertisers, persons or entities; incurs his or her own expenses, including expenses for portfolios; bears his or her own risk of loss if a client fails to pay its bill; and receives no fringe benefits.”¹⁷⁴ A “professional model” as to this section is someone who “performs modeling services.”¹⁷⁵ This bill was referred to the Labor Committee in February 2013, but no moves have since been made.¹⁷⁶

III. HOW TO BEST CLARIFY THE MODELING INDUSTRY’S EMPLOYMENT ISSUES

The disputes that this Note focuses on arise from the ambiguity in New York employment law. Drawing distinctions in the relationships between modeling agencies and models is difficult, and there does not seem to be a happy medium that would make both sides content. This Note suggests that the best solution may be to

¹⁷¹ Sauers, *supra* note 152.

¹⁷² A. 5263, 236th. Sess. (N.Y. 2013).

¹⁷³ *Id.* Current New York law provides that all “professional models” are employees for the purposes of unemployment insurance. N.Y. LAB. LAW § 511 (McKinney 2014).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

create model-specific legislation to govern the diverse and complex relationships within the modeling industry.

The modeling industry has been misunderstood for a long time. From the outside looking in, modeling looks like a glamorous world of excess, travel, and luxury.¹⁷⁷ Those with more insight, however, know that this is not always the case. Model Dunja Knezevic, a sixteen-year veteran of the modeling industry, notes:

For such a long time this [the modeling] industry has acted as if it's crazy, wild and glamorous, and as if commonplace laws don't apply to it. But I and a lot of other models do believe that the laws should apply to it. We've had enough and we're determined to change things for the general safety of the models, especially the young girls, who are vulnerable.¹⁷⁸

This Part discusses possible ways to resolve the many conflicts and injustices within the modeling industry.

A. Enacting a Modeling-Agency Statute

One potential resolution deals with changing the New York Employment Agency Law. As discussed in *Shelton v. Elite*, “[p]erhaps the solution is not to modify the ‘employment agency’ statute by exempting modeling agencies and thus leaving models unprotected, but to enact a modeling agency statute which prohibits the abuses which are abhorred by all”¹⁷⁹ The New York employment law, as it is written now, does not make sense for the modeling industry. Therefore, the industry needs its own provi-

¹⁷⁷ See Denis Campbell, *Models Reveal Why They Need Union*, THE GUARDIAN (Dec. 15, 2007), <http://www.theguardian.com/uk/2007/dec/16/fashion.lifeandhealth> (“[The models] stressed the many positive aspects of being a model: the opportunity to travel, meet interesting people and earn good money.”); see also Ziff, *supra* note 170 (“Modeling is a seemingly glamorous profession, and models are certainly not the people you picture when you think of bad working conditions. But wipe off the sheen and another reality emerges . . . [M]ost people don’t want to consider these things when they flip through a magazine.”).

¹⁷⁸ Campbell, *supra* note 177 (explaining that Knezevic is a Bosnian-born model who started in the industry in 1997 and has worked for Topshop, Levi’s, and *Vogue*, as well as many other brands).

¹⁷⁹ *Shelton v. Elite Model Mgmt.*, 812 N.Y.S.2d 745, 759 (N.Y. Sup. Ct. 2005)

sions to effectively protect against the various abuses that the models, as well as the agencies, suffer. To figure out what provisions would work best in this new legislation, one could look to the recent inclusion of underage models as child performers, California law, French law, federal law, and the *Fears* settlement.

1) Legislation Covering Underage Models as Child Performers

One example of how modeling industry-specific legislation can work is the new law governing models under the age of eighteen as child performers.¹⁸⁰ Susan Scafidi, the academic director of the Fashion Law Institute at Fordham University, believes that “in terms of labor law and the fashion industry,” the passage of this bill is “one of the biggest developments in a century, bringing a whole new group under legal protection.”¹⁸¹ The bill “will now protect models under 18 with the same health and education requirements that govern other child performers, like actors and dancers.”¹⁸² Like the proposed bill that tried to clarify the agency/manager distinction in 2005, the underage model legislation was “quickly passed by nearly unanimous margins” by both houses of the New York state legislature.¹⁸³ Unlike the 2005 proposed bill, however, other areas of the entertainment industry did not raise objections because this bill was specific to the modeling industry.

While being covered by the one-size-fits-all child performer provisions is arguably the right step for the modeling industry,¹⁸⁴ an all-inclusive law does not seem to work with regard to modeling

¹⁸⁰ S. 5486, 236th Sess. (N.Y. 2013) (“AN ACT to amend the labor law and the arts and cultural affairs law, in relation to expanding the definition of ‘artistic and creative services’, for purpose of the employment and education of child performers, to include the services of runway and print models; and to repeal section 35.05 of the arts and cultural affairs law relating to employment of children as models . . .”).

¹⁸¹ Eric Wilson, *New York Sets Work Rules for Young Models*, N.Y. TIMES (Oct. 22, 2013), http://www.nytimes.com/2013/10/23/fashion/new-york-sets-work-rules-for-young-models.html?_r=0,

¹⁸² Charlotte Cowles, *Sara Ziff’s Underage-Model Bill Gets Signed Into Law*, THE CUT (Oct. 22, 2013), <http://nymag.com/thecut/2013/10/sara-ziffs-child-model-bill-signed-into-law.html>.

¹⁸³ *Id.*

¹⁸⁴ Because the legislation was just enacted on November 20, 2013, its effects on the modeling industry remain to be seen.

agents and managers. Thus, one way to have a bill enacted as law would be to differentiate the modeling industry under the employment law provisions. Instead of changing the current law to clarify the role of managers throughout the entire entertainment industry, a bill could be proposed that would only clarify their role in the modeling industry.

2) California Law: Licenses with Higher Commissions

Modeling agencies in California are licensed employment agencies that are subject to statutory requirements.¹⁸⁵ Unlike in New York, however, the licensed California agencies can charge more than ten percent commission and retain service charges from the client.¹⁸⁶ Similar provisions could be included in model-specific legislation in New York to require a license but not cap the agency's commission at ten percent. This way, agencies would be able to maintain their standard twenty percent commission while the models would gain the protections of the law. California law also requires that the talent agency "shall, subject to the availability of the artist, use all reasonable efforts to procure employment for the artist in the field or fields of endeavor specified in the contract"¹⁸⁷ Similar language could be an interesting addition to New York law to incentivize agencies to obtain employment for their models.

3) The Legacy of the *Fears* Settlement

Legislation could also be passed as to the transparency with which modeling agencies should act with in respect to their models. An idea of what could be included in this model-specific legislation can be seen in the *Fears* settlement agreement.¹⁸⁸ By requiring

¹⁸⁵ CAL. LAB. CODE § 1700.4(a) (West 2014) ("‘Talent agency’ means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists").

¹⁸⁶ CAL. CODE REGS. tit. 8, § 12001(b) (2014) (stating that the contract will contain a "provision containing a blank space for the insertion of the compensation or rate of compensation to be paid by the artist to the talent agency which compensation shall not exceed the maximum compensation or maximum rate of compensation set forth in the schedule of fees filed with the Labor Commissioner by the talent agency.").

¹⁸⁷ *Id.* § 12001(d).

¹⁸⁸ *See* Shelton v. Elite Model Mgmt., 812 N.Y.S.2d 745, 759 (N.Y. Sup. Ct. 2005) (citing *Fears v. Wilhelmina Model Agency Inc.*, No. 02-Civ.4911(HB), 2005 WL 1041134,

agencies to use clear wording in contracts and accounting statements and disclose all compensation, the models could be more aware of what they are owed and what they are earning. If models have this knowledge, they are more likely to be adamant about being paid the correct amount and there will be fewer financial discrepancies between agency and model. In addition, by including the provisions of the *Fears* settlement in new legislation, models would have these safeguards well after the ten-year time period of the settlement runs out. Even with this financial transparency, there will still be an issue of the agency having much more leverage power than the model. This is where an organization to stand up for the models' rights is much needed.

A. *The Model Alliance*

In addition to legislation, another idea is to create a union for models like those that exist in other areas of the entertainment industry, such as for actors and directors. By having an organization looking out for the models' best interests, it would be much more difficult for agencies to take advantage of the models, and even if the agencies tried to take advantage, it would be much more difficult for the agencies to get away with it. A large issue within the industry is that models stay silent about indiscretions committed against them.¹⁸⁹ A union is one way to make models feel more comfortable talking about these transgressions, as the models would know that they have an organization standing behind them and protecting them.

Sara Ziff realized that the modeling industry needed its own unique type of union. As opposed to trying to unionize agencies and bargain contracts, like the unsuccessful Models Guild did in

at *2 (S.D.N.Y. May 5, 2005)) (“[E]ach settling modeling agency agreed to (1) disclose all compensation received by it on all bookings, including service charges, mother agent fees, the gross fee received for booking and any other charge or deduction; (2) use clear contracts which disclose all compensation terms and practices; and (3) use contracts that are not automatically renewable.”).

¹⁸⁹ See, e.g., Campbell, *supra* note 177 (“[B]ecause of the globalisation of the industry in recent years ‘the mass supply of models has increased so much that models have become disposable labour. Models know this and often don’t complain about mistreatment by their agency, or even if a photographer sexually abuses them, because they fear they may be blacklisted in the industry.’”).

the 1990s, the Model Alliance “is vigorously promoting a longtime labor strategy – strength in numbers – to press for better conditions.”¹⁹⁰ With its membership now around 400, the Model Alliance “might find it hard to achieve some of its more ambitious, longer-term goals.”¹⁹¹ While working to build numbers, the Model Alliance could also try to get more big name models to join them. With well-known models such as Coco Rocha, Milla Jovovich, and Shalom Harlow¹⁹² already part of the organization, the Model Alliance would gain much more publicity by bringing other big names to the cause.

One place the industry can look for an example of a model union is the United Kingdom. As of 2009, British Equity accepted models and thus became “the first independent representation of its kind for models in the fashion industry.”¹⁹³ The goal is “to improve working conditions and to inspire everyone in the industry to make the necessary changes to achieve a working environment based on respect, support, and understanding.”¹⁹⁴ Membership in the union is “available to any working model without fear of black-listing or discrimination” and provides the model with “facial disfigurement insurance, health insurance, and injury compensation, legal support and advice, nutritionists, counseling, accounting services, confidentiality protection”¹⁹⁵ The union also has a Code of Conduct, as the product of the union negotiating, that is the “first transparent agreement documenting models’ basic rights”¹⁹⁶

¹⁹⁰ Greenhouse, *supra* note 110.

¹⁹¹ *Id.*

¹⁹² *Our Team*, THE MODEL ALLIANCE, <http://modelliance.org/our-team> (last visited Sept. 6, 2014).

¹⁹³ *International Unions*, THE MODEL ALLIANCE, <http://modelliance.org/international-unions> (last visited Sept. 6, 2014) (“British Equity is a member of the International Federation of Actors, a network of entertainment unions of which U.S. Actors’ Equity, the Screen Actors Guild, and the American Federation of Television and Radio Actors are also members.”).

¹⁹⁴ *Id.*; see also *Welcome to Equity’s Models’ Area*, EQUITY, <http://www.equity.org.uk/models/> (last visited Sept. 6, 2014).

¹⁹⁵ *International Unions*, *supra* note 193.

¹⁹⁶ *Id.* (finding that the Code is “supported by the British Fashion Council, the Association of Model Agencies, and the Greater London Authority”); see also *Welcome to Equity’s Models’ Area*, *supra* note 194 (“Equity models have developed a ten point code of conduct in response to unfair treatment models received while working. Models hired by

B. *Enacting Model-Specific Employee Legislation*

One of the most important things that Equity provides models with is workers' rights, which are not guaranteed to models in the United States. When Marc Jacobs was called out for only paying his models in "trade," he responded via Twitter saying: "Models are paid in trade. If they don't want to work w/ us, they don't have to."¹⁹⁷ It is easy for Marc Jacobs, "one of the biggest names in the fashion industry,"¹⁹⁸ to make such a dismissive statement, but are models, especially ones just starting out and trying to make a name for themselves, supposed to turn down a chance to be in his show? Is it fair to portray these models as "disposable" and force "them to choose between putting up with a designer's unfair labour practices or not model at all"?¹⁹⁹ Model-specific legislation could be passed to help to stop this type of indiscretion from occurring. Not paying models for their hard work is not okay, yet it is a pervasive part of the modeling industry. Two ways to clarify the role of models are to look to French law and federal law; another is to write model-specific legislation clarifying that models are independent contractors with some of the rights of employees.

1) French Law: More Contracts, Less Confusion

French laws consider models both independent contractors and employees. The model is considered an employed worker "with regard to their physical work as models" but an independent contractor "with regard to the right to the use of their image."²⁰⁰ Consequently, the model is required to enter into two separate contracts with their agencies: "one concerns collaboration with the model [as an employee] (known as the 'convention de collabora-

companies signed up to the code of conduct, which includes UK Vogue, Next and Debenhams, get assurances on hours of work, breaks, food, transport, nudity and semi-nudity, temperature, changing rooms and prompt payment.").

¹⁹⁷ Jenna Sauer, *Marc Jacobs Responds to Allegations of Non-Payment: 'If Models Don't Want To Work With Us, They Don't Have To'*, JEZEBEL (Mar. 5, 2012), <http://jezebel.com/5890580/marc-jacobs-responds-to-allegations-of-non-payment-if-models-dont-want-to-work-with-us-they-dont-have-to>.

¹⁹⁸ *Marc Jacobs to Step Down At Louis Vuitton*, CBSNEWS.COM, (Oct. 2, 2013), <http://www.cbsnews.com/news/marc-jacobs-to-step-down-at-louis-vuitton/>.

¹⁹⁹ Fleming, *supra* note 1.

²⁰⁰ Simmerman, *supra* note 118, at 165.

tion'), and the other concerns the conditions of the representation and the exploitation of the model's image [as an independent contractor] (referred to as the 'mandate civil de représentation')."²⁰¹ Models in France can reap the benefit of French labor laws because they enter into these employment relationships.²⁰² As model Coco Rocha has said, "In Paris . . . isn't it *fascinating* that we get paid during the [fashion week] shows?"²⁰³ Including a straightforward contractual relationship like this in New York, setting forth the exact relationship between the parties as to different aspects of a model's career, could lessen the frequency of litigation and help to ensure that models have the same rights that other employees already have.

2) Federal Law: The Economic Realities Test

The "economic realities test" is used to determine employee status under a few federal acts, such as the Family and Medical Leave Act, the Fair Labor Standards Act, and the Worker Adjustment and Retraining Act.²⁰⁴ The five factors involved in the economic reality test are:

- (1) the degree of control exercised by the employer over the workers,
- (2) the workers' opportunity for profit or loss and their investment in the business,
- (3) the degree of skill and independent initiative required to perform the work,
- (4) the permanence or duration of the working relationship, and
- (5) the extent to which the work is an integral part of the employer's business.²⁰⁵

²⁰¹ *Id.*

²⁰² See Françoise Vergne & Antoine Jouhet, *Getting the Deal Through: Labour & Employment* (Morgan, Lewis & Bockius, France), 2012, at 105-06 (2012), available at <https://www.morganlewis.com/pubs/GTDT-France-2012.pdf> (stating that employees are "entitled to statutory social security benefits," "covered against unemployment risk," get benefits "through social security contributions," and have maximum working hours and a minimum amount of paid annual vacation time).

²⁰³ Amy Odell, *The Struggle of Girl Models*, BUZZFEED (Sept. 10, 2012, 1:49 PM), <http://www.buzzfeed.com/amyodell/the-struggles-of-girl-models>.

²⁰⁴ SUSAN N. HOUSEMAN, U.S. DEP'T OF LABOR, WHO IS AN EMPLOYEE? DETERMINING INDEPENDENT CONTRACTOR STATUS (Aug. 1999).

²⁰⁵ *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988).

This test makes it more difficult to classify a worker as an independent contractor because “in addition to considering the degree of control the employer exercises, it takes into account the degree to which the workers are economically dependent on the business.”²⁰⁶

Incorporating this dual approach by looking at both sides of the relationship could work in the modeling industry. The potential employer—both agency and client—exercises varying degrees of control over the model, and the models may have different levels of investment in the agency or client. The fifth factor works in favor of the models, as the work that they are doing is often an integral part of the agency or client’s business. The third and fourth factors, though, lean in favor of the agency or client. As to the third factor, there is a great deal of skill and independent initiative required for models to perform their work. Also, many models move from agency to agency with often short durations at each, making it less likely that the agency would be an employer. Models’ work with clients is usually even shorter than their relationship with agencies, making the client an even less likely employer under this test. This economic reality test is just one more tool that could help to clarify the classification of models in New York.

3) A New Classification: The Best of Both Worlds

Model-specific legislation could work to classify the models as independent contractors with a few caveats. The proposed employment legislation to clarify the classification of models in New York is heading in the right direction, but it does not go far enough. First of all, it is only specific to unemployment insurance. Secondly, most models do not have the necessary relationship with their agencies or clients to meet the six criteria in the proposed bill, meaning that models would be considered employees as to unemployment insurance. Thus, the bill would not have much of an effect on the modeling industry as models are already considered employees as to unemployment insurance. It could be interesting to more clearly classify models as independent contractors as to the clients with some of the benefits of employees, such as minimum

²⁰⁶ HOUSEMAN, *supra* note 204.

wage laws and the right to sue for sexual harassment or discrimination.²⁰⁷ This way, the models could be more in control of their careers, while still having the law to protect them from some of the most egregious offenses.

New York law, while lacking in some areas in regards to models, clearly sets forth that models are employees as to unemployment insurance. Thus, agencies must start treating them as employees at least in this regard even without any changes to the current law. The Model Alliance “is discussing whether to push for a law in New York that would make models employees, rather than independent contractors,” as to all aspects of the law.²⁰⁸ It will be exciting to see whether or not the organization decides to move forward with this after its success in helping to pass the underage child model legislation.

CONCLUSION

This Note, more than anything, proposes that the modeling industry deserves a closer look from the legal community as well as from the population at large. Models in New York should not be grouped with other entertainers as to all aspects of the law. They are a unique group of workers that need a unique set of provisions to protect them. Other entertainers, such as actors and directors, historically have had agents and managers in New York, but models do not have this background to guide their employment relationships today. Models, modeling agencies, and their clients have complex, symbiotic relationships that need to be explored more deeply to better classify them under New York employment law. After all, “[f]ashion models are more than just pretty faces. They are a valuable part of the American workforce,” and it’s about time they start getting treated as such.²⁰⁹

²⁰⁷ See Greenhouse, *supra* note 110 (“Under federal law, contractors cannot sue for sexual harassment or discrimination.”).

²⁰⁸ *Id.*

²⁰⁹ Johnson, *supra* note 62, at 166.