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The Fashion Workers Act: Closing the Regulatory Loophole in the New York Fashion Industry

Kayleigh Ristuben

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The Fashion Workers Act: Closing the Regulatory Loophole in the New York Fashion Industry

Cover Page Footnote

* J.D. Candidate, Class of 2024, Fordham University School of Law, Staff Member, Volume XXXIII, Editor-in-Chief, Volume XXXIV, Fordham Intellectual Property, Media & Entertainment Law Journal; Bachelor of Music, Sound Recording Technology, the University of Massachusetts Lowell, 2015. I would like to thank Professor Doreen Small for inspiring me to dig into this important piece of legislation and the MullenLowe Business Affairs department for their unwavering support and advocacy throughout my law school career.

The Fashion Workers Act: Closing the Regulatory Loophole in the New York Fashion Industry

Kayleigh Ristuben*

The fashion industry in New York has largely been unregulated due to a loophole in current law. This has allowed fashion models to face difficulties that would otherwise be addressed by laws regulating other occupations within the entertainment industry. The New York state senate has introduced the Fashion Workers Act which is aimed at addressing these issues and closing the regulatory loophole. This Note analyzes the existing regulatory framework in both New York and California to compare them with the proposed bill. It then uses legislative history from past regulatory attempts to anticipate and address potential industry pushback while offering solutions to issues within the bill. With some equitable revisions, the Fashion Workers Act can be the much-needed vehicle for change.

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INTRODUCTION

While the outside world sees a polished and meticulously stylish depiction of the fashion industry, this image belies the realities of the people involved. Models increasingly speak out about the difficulties they face: sexual harassment,¹ working for free or being paid

¹ See, e.g., Elizabeth Paton, *Supermodels Speak out Against Sexual Harassment*, N.Y. TIMES (Sept. 14, 2021), <https://www.nytimes.com/2021/09/07/style/models-harassment-gerald-marie.html> [<https://perma.cc/6TRM-M96L>]; Jocelyn Elise Crowley, *Not Model*

only in trade,² not receiving payments,³ or getting caught in a cycle of debt to their modeling agencies.⁴ The New York State Senate has proposed a new bill entitled the Fashion Workers Act (“FWA”) aimed at addressing these issues.⁵ While the bill is much needed, the senate must address a number of issues to ensure the bill is impactful yet equitable for the affected parties. This Note examines the new bill in light of existing laws and past legislative attempts at regulating industry players in order to critique the bill’s weak points and offer potential solutions to push the bill forward.

The entertainment industry would not be what it is without the artists who create, perform, and bring artistic works to life, along with the people behind the scenes who help make it happen. Two leading figures are the talent agent and the personal manager.⁶ The

Behavior: The Pervasiveness of Sexual Harassment in the Fashion Industry, GENDER & SOC’Y (Sept. 30, 2021), <https://gendersociety.wordpress.com/2021/09/30/not-model-behavior-the-pervasiveness-of-sexual-harassment-in-the-fashion-industry/> [<https://perma.cc/W6NJ-5VAK>].

² Being “paid in trade” means payment in items, such as clothing, rather than monetary compensation. See Misty White Sidell, *Many Models Get Paid in Clothes, Not Cash, but That Might Be Changing*, DAILY BEAST (July 11, 2017, 11:54 PM), <https://www.thedailybeast.com/many-models-get-paid-in-clothes-not-cash-but-that-might-be-changing> [<https://perma.cc/3VY9-NQTR>]; Marc Sebastian (@marcsebastianf), TIKTOK (Sept. 15, 2022), https://tiktok.com/@marcsebastianf/video/7143771223569435950?is_from_webapp=v1&item_id=7143771223569435950 [<https://perma.cc/R7FU-NCJY>].

³ See, e.g., Caitriona Balfe, *Guest Column: Caitriona Balfe Urges N.Y. Lawmakers to Pass Fashion Workers Act to Protect Models*, HOLLYWOOD REP. (June 2, 2022, 6:00 AM), <https://hollywoodreporter.com/lifestyle/lifestyle-news/caitriona-balfe-fashion-workers-act-guest-column-1235156578> [<https://perma.cc/F65H-8URV>]; Lisa Lockwood, *The Model Conundrum: Waiting to Be Paid*, WOMEN’S WEAR DAILY (Sept. 11, 2019, 12:01 AM), <https://wwd.com/business-news/media/models-wait-to-be-paid-1203209908/> [<https://perma.cc/K4EX-L9EW>].

⁴ “Models end up racking up huge expenses for the gym, dermatologist’s appointments, test shoots, the web site, haircuts, etc., all of which are initially paid by their agencies and the models must repay. In addition, models are often charged fees and expenses they weren’t aware of—even though agencies claim they are outlined in their contracts and it’s up to the models to read the contracts carefully.” Lockwood, *supra* note 3.

⁵ S. 8638A, 2022 Gen. Assembly, Reg. Sess. (N.Y. 2022) [hereinafter N.Y. S.B. 8638A].

⁶ See James M. O’Brien, *Regulation of Attorneys Under California’s Talent Agencies Act: A Tautological Approach to Protecting Artists*, 80 CALIF. L. REV. 471, 478–84 (1992); see also 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. 381, 384 (2001). The terms “personal managers” and “talent

primary responsibility of an agent is to procure employment for the artists they represent.⁷ In contrast, the manager's responsibilities are to advise artists about those employment opportunities, as well as guide, coach, and help shape their career.⁸ However, the line between the duties of agents and managers is not so bright. Like managers, agents will also advise artists about their careers.⁹ However, agents do not typically represent artists that do not have prior experience.¹⁰ This is traditionally where the manager steps in.¹¹ Managers will often invest time and money into developing "fledgling" artists.¹² However, managers are not regulated like agents and thus often slip under the regulatory radar.¹³ Within the New York fashion industry, these roles are typically collapsed into one representative entity: the modeling management company ("modeling agency").¹⁴ Additionally, unlike the entertainment industry's motion picture

managers" have historically been used interchangeably in practice. *Compare* Greenberg, *infra* note 8; *with* Gutenkunst, *infra* note 10. For consistency, this Note uses "personal managers." The key distinction is between the roles of "agents" and "managers."

⁷ See O'Brien, *supra* note 6, at 478.

⁸ See Devlin, *supra* note 6; *see also* Heath B. Zarin, *The California Controversy over Procuring Employment: A Case for the Personal Managers Act*, 7 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 927, 937 (1997); Gary A. Greenberg, *The Plight of the Personal Manager in California: A Legislative Solution*, 6 *HASTINGS COMM'NS & ENT. L.J.* 837, 837 (1984).

⁹ See Devlin, *supra* note 6, at 385.

¹⁰ See Myles L. Gutenkunst, *Talent Managers Acting as Agents Revisited: An Argument for California's Imperfect Talent Agencies Act*, 37 *HASTINGS COMM'NS & ENT. L.J.* 113, 117 (2015).

¹¹ *Id.*

¹² *Id.*

¹³ The New York state legislature has recognized this issue in the fashion industry, as noted in the justification of the Models' Harassment Protection Act. S. S6681, 2021 Gen. Assemb., Reg. Sess. (N.Y. 2021) ("Though modeling agencies in New York State are licensed with other employment agencies under general business law, it is common practice for agencies to claim that they instead serve as management companies. Using the 'incidental booking exception,' modeling agencies assert that the bookings they secure for models are secondary to managing models' careers. As a result, agencies have escaped licensing requirements, caps on commissions, and accountability to the models whose interests they represent.").

¹⁴ *Id.*

sector,¹⁵ the fashion world is not unionized, often making it akin to the Wild West.¹⁶

The existing regulatory schemes for agents—and their effects on how personal managers may operate—are markedly different between California and New York. In California, agents are regulated primarily by the Talent Agencies Act (“TAA”).¹⁷ Under the TAA, unlicensed persons are prohibited from procuring *any* kind of employment unless working in conjunction with, and at the request of, a licensed talent agent.¹⁸ In New York, agents are similarly regulated as employment agencies under general business laws.¹⁹ However, the fashion industry in New York takes advantage of what is known as the “incidental booking exception” to the employment agency regulations.²⁰ New York modeling agencies stretch this incidental

¹⁵ For instance, other artists such as actors and musicians have unions such as the Screen Actors Guild—American Federation of Television and Radio Artists (“SAG–AFTRA”) and the American Federation of Musicians (“AFofM”), which heavily regulate the conduct of the agents who are allowed to represent its members. For more information about the interplay between state statutory regulation and guild regulation, see Neville L. Johnson & Daniel Webb Lang, *The Personal Manager in the California Entertainment Industry*, 52 S. CALIF. L. REV. 375, 412–18 (1979); *see also* Zarin, *supra* note 8, at 957–61.

¹⁶ *Frequently Asked Questions*, MODEL ALLIANCE, <https://www.modelalliance.org/faqs> [<https://perma.cc/QHF8-3CQ6>] (“The law is currently unclear on whether models can legally unionize. Because models are considered independent contractors under most laws, and independent contractors are prohibited from unionizing, it is likely that models are unable to officially unionize.”).

¹⁷ CAL. LAB. CODE § 1700.5 (West 2022).

¹⁸ *Id.* § 1700.44(d).

¹⁹ N.Y. GEN. BUS. LAW § 170 (McKinney 2022); *see also* N.Y. ARTS & CULT. AFFS. LAW § 37 (McKinney 2022); N.Y.C. ADMIN. CODE DEP’T. OF CONSUMER AFFS., tit. 6, § 5-249.

²⁰ GEN. BUS. § 171(8) (“‘Theatrical employment agency’ means any person . . . who procures or attempts to procure employment . . . but such term does not include the business of managing entertainments, exhibitions or performances, or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefor.”). The incidental booking exception was added in 1917. GEN. BUS. § 171(3) (1917), Chap. 770. As Ariel Sodomsky has expounded:

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. Everything changed in the early 1970s, when a lawsuit alleged that several agencies “changed their corporate names (removing the word ‘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.”

booking exception beyond its logical limit by substantially performing the same duties as agents, but labeling themselves as managers.²¹ As a result, they operate largely unchecked because there are no laws regulating personal managers.²²

To fill this regulatory loophole, the New York State Senate, together with the Model Alliance,²³ has proposed the Fashion Workers Act.²⁴ While a bill that accomplishes this goal is greatly needed, the current draft has substantial flaws and will likely face significant lobbying against it. However, adjustments to the bill can address these concerns and grant much needed protections to models while also setting up an equitable regulatory system for all the parties involved. This Note addresses specific issues relating to modeling agencies, and offers potential solutions by analyzing past legislative attempts at regulating talent managers to anticipate and address the

Ariel Sodomsky, *Models of Confusion: Strutting the Line Between Agent and Manager, Employee and Independent Contractor in the New York Modeling Industry*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 269, 277–78 (2014).

²¹ As of publication, out of the top modeling agencies in New York only a handful are licensed through the Department of Consumer Affairs. Compare Lisa-Marie, *New York Model Agency: The Best Agencies for Models*, MODEL AGENCY ONE, <https://www.modelagency.one/new-york-models> [<https://perma.cc/YK7R-7NM6>], with *Check a DCA License*, N.Y.C. DEP'T OF CONSUMER & WORKER PROT. (DCWP/DCA) ONLINE SERVS. PORTAL, <https://a858-elpaca.nyc.gov/CitizenAccess/GeneralProperty/PropertyLookUp.aspx?isLicensee=Y&TabName=APO> [<https://perma.cc/VX7K-MSJV>] (select “Employment Agency” from drop down under “License Type,” then enter the name of the agency into the “Business Name” field and hit “search”) (Bella Agency, IMG, and possibly Elite). These agencies, even the unlicensed ones, still perform substantial procurement activities for the models they represent. For instance, vice president of Major Model Management (an unlicensed agency based on a general DCA search) has been quoted as saying “[Models] would love to think they’re employees, but they’re not. *We help them find jobs and that’s it.*” Lockwood, *supra* note 3 (emphasis added); see also discussion, *supra* note 13.

²² Modeling contracts typically state that the services are purely for management services and employment is not guaranteed. Courts have found that this has been sufficient. However, it is still up to the jury to determine whether a manager is operating beyond the incidental booking limit. See Gutenkunst, *supra* note 10, at 127 (citing *Washington v. Escobar*, No. 103027/09, 2009 WL 2912383, at *14 (N.Y. Sup. Ct. Aug. 28, 2009)).

²³ “Through strategic research, policy initiatives, and campaigns, the Model Alliance aims to promote fair treatment, equal opportunity, and more sustainable practices in the fashion industry, from the runway to the factory floor.” *About Us*, MODEL ALL., <https://modelalliance.org> [<https://perma.cc/H7NY-4JKM>].

²⁴ N.Y. S. 8638A, *supra* note 5.

likely arguments against regulation, both generally and within the specific provisions of the Fashion Workers Act.

Part I compares the current regulatory frameworks in both California and New York with the Fashion Workers Act. Part II explores previous attempts at regulating personal managers in both New York and California and why they have ultimately failed. Part III addresses common arguments against personal manager regulation generally and their applicability to the Fashion Workers Act. Part IV critiques specific provisions of the bill before offering equitable solutions that would still substantially improve the lives of models.

I. CURRENT REGULATORY FRAMEWORKS

Because agent regulation different between New York and California it should influence the provisions that are included in the Fashion Workers Act. Setting aside the incidental booking provision under which modeling agencies in New York work, the requirements within each of these three schemes have similar foundations: the goal of the regulations was to protect artists from predatory agents and the dangers of the industry.²⁵ However, the provisions of each regulatory scheme differ to varying degrees. Addressing these differences is essential to anticipate the likely pushback from managers against the FWA. This section will briefly describe notable provisions in each regulatory scheme before setting a more detailed comparison side by side.

A. California Talent Agent Regulations

In California, agent regulations are primarily covered by the TAA, which applies to any person or entity that procures employment for an artist.²⁶ This includes managers if they act in that

²⁵ See, e.g., Zarin, *supra* note 8, at 943; Koh Siok Tian Wilson, *Talent Agents as Producers: A Historical Perspective of Screen Actors Guild Regulation and the Rising Conflict with Managers*, 21 LOY. L.A. ENT. L. REV. 401, 403–04 (2001); *Fact Sheet: Fashion Workers Act*, MODEL ALL., <https://static1.squarespace.com/static/5f539f9f0055833393928efb/t/623cacdc1e19050cbcc0be47/1648143580870/Fashion+Workers+Act+Fact+Sheet.pdf> [<https://perma.cc/GBW4-57W8>].

²⁶ CAL. LAB. CODE §§ 1700–1700.54 (West 2022); see also Johnson & Lang, *supra* note 15, at 385 (“[In 1978], the Artists’ Managers Act was altered, the major change being in nomenclature: it is now the Talent Agencies Act. After a minor change in definition ‘artists’

capacity.²⁷ To obtain a license, an agent must pay an upfront filing fee and annual license fees,²⁸ place a \$50,000 surety bond with the state,²⁹ create and maintain a trust fund with detailed accounting records for payments received on behalf of talent,³⁰ and submit all form contracts for approval by the state commissioner.³¹ While not explicitly prescribed, “California agents’ fees are limited in practice to ten percent [of an artist’s earnings] by guild franchising agreements and by the Commissioner’s review power during licensure.”³² Non-compliance with the TAA can result in disgorgement of all commissions from improperly procured employment as well as contract nullification.³³ Over time, the act has been amended to add in an exception for when employment was procured in tandem with a licensed agent.³⁴ Thus, in California, modeling agencies that are not directly licensed under the TAA must work in tandem with licensed agents to procure employment for models.

B. *New York Talent Agent Regulations*

In contrast with the TAA, the laws currently regulating agents in New York fall under §§170-190 of the General Business Laws and §37 of the Law of New York Arts and Cultural Affairs. The regulations are similar to the TAA in that licensing is required to act as a

managers’ have become ‘talent agents.’). Models are considered artists under the TAA. CAL. LAB. CODE § 1700.4.

²⁷ LAB. § 1700.4; see *Marathon Entertainment, Inc. v. Blasi*, 174 P.3d 741, 747 (Cal. 2008) (holding that the TAA regulated persons acting like a talent agency, regardless of labels).

²⁸ LAB. § 1700.12.

²⁹ *Id.* § 1700.15.

³⁰ *Id.* §§ 1700.25–1700.27.

³¹ *Id.* § 1700.23.

³² See Donald E. Biederman, *What Hath Ovitz Wrought: Agents v. Managers Revisited*, 1 VAND. J. ENT. & TECH. L. 5, 8 (1999).

³³ See, e.g., Chip Robertson, *Don’t Bite the Hand that Feeds: A Call for a Return to an Equitable Talent Agencies Act Standard*, 20 HASTINGS COMM’NS & ENT. L.J. 223, 234–35 (1997); Adam B. Nimoy, *Personal Managers and the California Talent Agencies Act: For Whom the Bill Toils*, 2 LOY. L.A. ENT. L. REV. 145, 151 (1982) (citing *Buchwald v. Katz*, 503 P.2d 1376 (1970)).

³⁴ See, e.g., William A. Birdthistle, *A Contested Ascendancy: Problems with Personal Managers Acting as Producers*, 20 LOY. L.A. ENT. L. REV. 493, 512 (2000).

talent agent,³⁵ a surety bond of \$10,000 must be paid to the state,³⁶ records of all payments received must be kept,³⁷ form contracts must be approved by the commissioner,³⁸ and commissions are explicitly capped at ten percent of an artist's earnings.³⁹ Intentional non-compliance with the act may lead to license revocation or a fine of up to \$2,500 and/or imprisonment for up to one year.⁴⁰ Unlike the TAA, the commissioner does not have the power to nullify contracts or order disgorgement of fees.⁴¹ New York general laws also do not require agents to set up trust accounts for artists. Uniquely, § 37.05 of the Law of New York Arts and Cultural Affairs places an affirmative duty on theatrical employment agents to investigate whether potential employers pay fees regularly (and on time), and prohibits agents from procuring employment from employers who do not meet those conditions.⁴² However, the law explicitly states that “[t]he provisions of this section shall not apply to employment or engagements in modeling.”⁴³ This carve-out—coupled with the incidental booking exception—allows the fashion industry to operate without the limitations that exist to protect talent in other entertainment sectors.

C. *The Fashion Workers Act*

There are four primary sections of the Fashion Workers Act. The first imposes licensing requirements onto modeling agencies and onto “creative management companies.”⁴⁴ The second imposes duties and prohibitions onto those same entities.⁴⁵ The third imposes

³⁵ N.Y. GEN. BUS. LAW § 172 (McKinney 2022).

³⁶ *Id.* § 177.

³⁷ *Id.* § 181.

³⁸ *Id.*

³⁹ *Id.* § 185(8).

⁴⁰ *Id.* §§ 189–90.

⁴¹ *See* Biederman, *supra* note 32, at 7.

⁴² *See* N.Y. ARTS & CULT. AFFS. LAW § 37.05 (McKinney 2022).

⁴³ *Id.* The carve out was initially introduced in 1963. *See* 1963 N.Y. LAWS, 2061 (repealed 1983). Further research into the legislative history of this provision is outside the scope of this Note. However, this may have been influenced by modeling agency lobbyist at the time. *See* discussion Sodomsky, *supra* note 20.

⁴⁴ *See* N.Y. S. 8638A, *supra* note 5, §§ 960–61.

⁴⁵ *See id.* §§ 962–963.

duties and prohibitions onto “clients.”⁴⁶ And the fourth contains penalties for violations.⁴⁷ The licensing requirements and affirmative duties largely reflect the same categories as are included under both New York and California laws.⁴⁸ The prohibitions section primarily addresses the fashion industry-specific issues models face.⁴⁹

1. Affirmative Duties & Licensing Requirements

The Fashion Workers Act, as currently written, draws more from the TAA than existing New York business laws. For instance, the Fashion Workers Act requires managers to pay a \$50,000 surety bond to the state,⁵⁰ to set up client trust accounts,⁵¹ and to pay models within 30 days after receipt of client funds.⁵² However, the Fashion Workers Act is different from both the TAA and New York laws because under it, modeling agencies must pay models no more than 45 days after services are rendered, regardless of whether the agency has received payment from the client.⁵³ The payment requirement addresses models’ complaints about not receiving payments for work they have completed⁵⁴ by shifting the liability and responsibility from clients onto modeling agencies. Additionally, the bill explicitly states that managers have a fiduciary duty to their clients,⁵⁵

⁴⁶ “‘Client’ means a retail store, a manufacturer, a clothing designer, an advertising agency, a photographer, a publishing company or any other such person or entity that receives modeling services from a model . . . directly or through intermediaries.” *Id.* §§ 964–65.

⁴⁷ *See id.* § 966.

⁴⁸ *See infra* Figure 1.

⁴⁹ *See* discussion *infra* II(C)(2).

⁵⁰ *See* N.Y. S. 8638A, *supra* note 5, § 961(4).

⁵¹ *See id.* § 962(7).

⁵² *See id.* §§ 962(7)–962(8).

⁵³ *See id.*

⁵⁴ As model Simone Aptekman explains

Unfortunately the culture in the modeling industry is unless you ask to be paid, they won’t take the initiative to pay you You have to badger and say, ‘Hey, it’s been 90 days, where’s my check?’ Once you complete the job . . . it’s basically out of your hands. There’s language in contracts that say that agencies have up to 90 days to pay you, but even with that cushion period they have to collect from their clients, so often it exceeds 120 days. I had experiences where I’ve waited 250 days to get paid.

See Lockwood, *supra* note 3.

⁵⁵ *See* N.Y. S. 8638A, *supra* note 5, § 962(1).

a duty of reasonable inquiry into the working conditions of bookings,⁵⁶ and a duty to make reasonable efforts to procure employment.⁵⁷ These duties aim to rebalance the relationship between models and modeling agencies by reestablishing the principal-agent relationship that modeling agencies have avoided by labeling themselves as management companies rather than employment agencies.⁵⁸ Figure 1 outlines a more detailed comparison between the affirmative duties and requirements of the Fashion Workers Act and existing California and New York laws.

Figure 1. Affirmative Duties of Management Companies in the Fashion Workers Act Compared to Talent Agents in California and New York

	California Statutes	New York Statutes	Fashion Workers Act
Provide artist contract copies	Yes ⁵⁹	Yes ⁶⁰	Yes ⁶¹

⁵⁶ See *id.* § 962(2).

⁵⁷ See *id.* § 962(3).

⁵⁸ See discussion, *infra* IV(E); see also Alexandra Simmerson, Note, *Not So Glamorous: Unveiling the Misrepresentation of Fashion Models' Rights as Workers in New York City*, 22 CARDOZO J. INT'L & COMP. L. 153, 178 (2013); Smith, *infra* note 74.

⁵⁹ See CAL. CODE REGS. tit. 8, § 12001.1.

⁶⁰ See N.Y. GEN. BUS. LAW § 181 (McKinney 2022); N.Y. ARTS & CULT. AFFS. LAW § 37.03 (McKinney 2022).

⁶¹ See N.Y. S. 8638A, *supra* note 5, §§ 962(6), (13).

	California Statutes	New York Statutes	Fashion Workers Act
Duty of reasonable inquiry into clients and/or engagements	Yes ⁶²	No, but modified ⁶³	Yes ⁶⁴
Form contract approval	Yes ⁶⁵	Yes ⁶⁶	Yes ⁶⁷
Reasonable efforts to procure employment	Yes ⁶⁸	No	Yes ⁶⁹
Exclusivity enforcement period	Termination of contract after 4 months ⁷⁰	Not mentioned	120 days ⁷¹

⁶² See CAL. LAB. CODE § 1700.33 (West 2022) (“No artist agency shall send . . . any artist to any place where the health, safety, or welfare of the artist could be adversely affected, the character of which place the artist agency could have ascertained upon reasonable inquiry.”); N.Y. ARTS & CULT. AFFS. LAW § 37.05.

⁶³ N.Y. GEN. BUS. LAW §§ 187(5), (6) (“An employment agency shall not . . . send or cause to be sent any person to any place which the employment agency knows or reasonably should have known is maintained for immoral or illicit purposes; nor knowingly permit persons of bad character . . . to frequent such agency.”).

⁶⁴ N.Y. S. 8638A, *supra* note 5, § 962(2) (“A model management company . . . shall . . . conduct reasonable inquiries into clients, employment, engagements, entertainments, exhibitions and performances to ensure the health, safety and welfare of models.”).

⁶⁵ CAL. LAB. CODE § 1700.23.

⁶⁶ N.Y. GEN. BUS. LAW § 181(2)(a); N.Y. ARTS & CULT. AFFS. LAW § 37.03.

⁶⁷ N.Y. S. 8638A, *supra* note 5, § 962(12).

⁶⁸ A contract between agency and artist must include a provision that agency shall “use all reasonable efforts to procure employment for the artist.” CAL. CODE REGS., tit. 8, §12001(d).

⁶⁹ N.Y. S. 8638A, *supra* not 5, § 962(3).

⁷⁰ CAL. CODE REGS. tit. 8, § 12001(e).

⁷¹ N.Y. S. 8638A, *supra* note 5, § 962(4).

	California Statutes	New York Statutes	Fashion Workers Act
Consent to Nudity - § 52(c)(3)	Not mentioned	Not mentioned ⁷²	Yes ⁷³
Fiduciary Duty	Not explicit ⁷⁴	Not explicit ⁷⁵	Yes ⁷⁶

⁷² While consent to nudity is not mentioned—in New York laws on business and arts and culture as a responsibility of employment agencies, N.Y. CIV. RIGHTS LAW § 52-c (McKinney 2022) requires consent in a written agreement for any work involving nudity. The statute alludes to the role agents and managers may play in this requirement by noting that consent can be withdrawn within three business days unless an authorized personal manager or agent “provides additional written approval of the signed agreement.” *Id.*

⁷³ N.Y. S. 8638A, *supra* note 5, § 962(5).

⁷⁴ “Under common law, talent agents and their clients are engaged in an agent-principal relationship. ‘Accordingly, fiduciary responsibilities attach to the relationship, encompassing the duty to act loyally for the principal’s benefit in all matters related to that relationship.’ Brian T. Smith, *Sending Agents to the Principal’s Office: How Artist Agency Packaging and Producing Breach the Fiduciary Duties Agents Owe their Artist-Clients*, 27 UCLA ENT. L. REV. 173, 194 (2020); *see also id.* at 195 n.103; *Jones v. William Morris Agency*, No. TAC 16396, 2012 WL 5359503, at *11 (Cal. Labor Comm’r Oct. 10, 2012) (“The sole issue is whether the alleged acts and omissions by WME and argued by [agency client Tommy Lee] Jones, constitute a material breach of the implied covenant of good faith and fair dealing in an agency relationship.... An alternative although similar way to describe the issue is whether WME engaged in acts [materially breaching its duty and nullifying the contract].”). Smith further notes that while the TAA doesn’t acknowledge a fiduciary relationship, the lack of express language may be due to the guild agreements that do have the language acknowledging the relationship. Smith, *supra* at 194.

⁷⁵ While not explicit, artist-client relationships are used as examples in the Restatement (Third) of Agency. *See* Smith, *supra* note 74, at 194 n.97 (“[S]ection 1.01 cmt. c ‘Authors, performers, and athletes often retain specialized agents to represent their interests in dealing with third parties’; § 8.08 cmt. c, illus. 2 (using the example of a relationship between a talent agent and a performer as an example of an agent-principal relationship).”).

⁷⁶ N.Y. S. 8638A, *supra* note 5, § 962(1).

	California Statutes	New York Statutes	Fashion Workers Act
Payment of fees to artist	30 days after receipt – with exceptions ⁷⁷	Based on contract terms ⁷⁸	30 days after receipt, but no more than 45 days after services – with exceptions ⁷⁹
Trust Accounts	Yes ⁸⁰	No ⁸¹	Yes ⁸²
Late payment consequences	Reasonable attorney’s fees and/or 10% interest on funds wrongfully withheld ⁸³	Not included ⁸⁴	Model may sue for actual damages and punitive damages + fees ⁸⁵
Accountings / Records	Yes ⁸⁶	Yes ⁸⁷	No ⁸⁸

⁷⁷ CAL. LAB. CODE § 1700.25 (West 2022).

⁷⁸ See N.Y. GEN. BUS. LAW § 181(2)(a) (McKinney 2022).

⁷⁹ N.Y. S. 8638A, *supra* note 5, §§ 962(7), (8).

⁸⁰ CAL. LAB. CODE § 1700.25.

⁸¹ While trust accounts are not required under existing New York statutes, union regulations often require agents to set up trust accounts for talent or an aggregated trust account for all talent funds. See SCREEN ACTORS GUILD, CODIFIED AGENCY REGULATIONS RULE 16(g)(IV)(K) (1991); AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, CODIFIED AGENCY REGULATIONS RULE 12(c)(VIII)(A)(3) (2002); see also discussion *infra* IV(B).

⁸² N.Y. S. 8638A, *supra* note 5, § 962(7).

⁸³ CAL. LAB. CODE § 1700.25.

⁸⁴ While not explicit, the absence of a statutory remedy within the statutes implies that late payment consequences would be based on contract terms. However, if the Freelance Isn’t Free Act passes, it may affect payment requirements and consequences. See S. S8369B, 2022 Gen. Assemb., Reg. Sess. (N.Y. 2022).

⁸⁵ N.Y. S. 8638A, *supra* note 5, § 966(8).

⁸⁶ CAL. LAB. CODE §§ 1700.25–1700.27.

⁸⁷ N.Y.C. ADMIN. CODE DEP’T. OF CONSUMER AFFS., tit. 6, § 5-241.

⁸⁸ It is unclear if this was intentionally omitted.

	California Statutes	New York Statutes	Fashion Workers Act
Notification of royalties	Not explicit ⁸⁹	Not explicit	Yes ⁹⁰
Surety Bond	\$50,000 ⁹¹	\$10,000 ⁹²	If greater than 5 employees, then \$50,000 ⁹³
Yearly License Fee	\$225 + \$50 per office ⁹⁴	If 4 or fewer employees, then the minimum is \$500; If greater than 4 Employees, then the minimum is \$700 ⁹⁵	None listed ⁹⁶

⁸⁹ While not explicit, CAL. CODE REGS. tit. 8, § 12001(b) indicates that such a provision may be contracted for.

⁹⁰ N.Y. S.B. 8638A, *supra* note 5, § 962(9).

⁹¹ CAL. LAB. CODE § 1700.15.

⁹² N.Y. GEN. BUS. LAW § 177 (McKinney 2022).

⁹³ N.Y. S.B. 8638A, *supra* note 5, § 961(4).

⁹⁴ CAL. LAB. CODE § 1700.12.

⁹⁵ N.Y. GEN. BUS. LAW § 177.

⁹⁶ It is unclear if this was intentionally omitted.

	California Statutes	New York Statutes	Fashion Workers Act
Non-compliance Consequences	Set by commissioner - typically rescission of contracts and disgorgement of fees ⁹⁷	License revocation; fee for first time up to \$1,000, and up to \$5,000 for each subsequent violation; intentional non-compliance may result in a fee up to \$2,500 and/or imprisonment for up to 1 year ⁹⁸	Fee for first time up to \$3,000, and up to \$5,000 for each subsequent violation; intentional non-compliance Class B misdemeanor; model may sue for actual damages ⁹⁹

1. Prohibitions

The prohibitions outlined in the Fashion Workers Act directly address a number of the issues plaguing models within the fashion industry. For instance, because models all-too-often enter a cycle of debt due to agencies' advancing costs (often without approval or transparency),¹⁰⁰ the bill prohibits charging higher than market rate for model accommodations,¹⁰¹ advancing travel costs without consent or interest,¹⁰² or deducting anything except for commissions from payments received for the model's services.¹⁰³ The prohibitions address the reported issues of models unknowingly going into debt to their modeling agencies due to modeling agencies fronting out of pocket expenses for things like housing, promotional

⁹⁷ See Biederman, *supra* note 32, at 7–8; see also Robertson, *supra* note 33.

⁹⁸ N.Y. GEN. BUS. LAW §§ 189–190.

⁹⁹ N.Y. S. 8638A, *supra* note 5, §§ 966(4)–966(8).

¹⁰⁰ See discussion *infra* IV(D).

¹⁰¹ N.Y. S. 8638A, *supra* note 5, § 963(2). In practice, this could mean that modeling agencies cannot charge a model more than the original contracted rental rate or average rental market value of a comparable property and prorated based on the number of models residing in the apartment.

¹⁰² *Id.* § 963(4).

¹⁰³ *Id.* § 963(3).

materials, personal care, and travel to and from jobs.¹⁰⁴ The bill also limits agency commission amounts,¹⁰⁵ contractual term lengths,¹⁰⁶ and automatic contract renewals.¹⁰⁷ Further, the bill extends common employment protections not typically afforded independent contractors to models, such as prohibitions against retaliation and discrimination.¹⁰⁸ The prohibitions are more fully compared to the existing California and New York laws in Figure 2.

Figure 2. Fashion Workers Act (“FWA”) Modeling Management Prohibitions Compared with Existing California and New York Laws

FWA Management Prohibitions	California Statutes	New York Statutes
No up-front fees - § 963(1)	Yes - § 1700.40(a). Registration fees.	Yes - § 185
No charging higher than market rate for accommodations - § 963(2)	Not mentioned	Not mentioned
No deductions except commissions - § 963(3)	Not mentioned	Not mentioned
No advancing travel unless consent in writing with no interest - § 963(4)	Not mentioned	Not mentioned

¹⁰⁴ See Lockwood, *supra* note 4 and accompanying text; see also Jenna Sauer, *What I Owe: The Financial Exploitation of Models*, DIS MAG., <http://dismagazine.com/discussion/16801/what-i-owe-the-financial-exploitation-of-models/> [<https://perma.cc/Y4ZJ-WKW6>].

¹⁰⁵ N.Y. S. 8638A, *supra* note 5, § 963(7).

¹⁰⁶ *Id.* § 963(6).

¹⁰⁷ *Id.* This term also reflects a settlement term several modeling agencies in New York had to implement prior to this legislation. See discussion *infra* III(C).

¹⁰⁸ *Id.* §§ 963(8)–963(9).

FWA Management Prohibitions	California Statutes	New York Statutes
No advancing visa costs where statute requires agency to cover - § 963(5) ¹⁰⁹	Not mentioned	Not mentioned
No term more than 3 years - § 963(6)	Not mentioned	Not mentioned
No automatic renewal - § 963(6)	Not mentioned	Not mentioned
Commission cap 20% - § 963(7)	Set by commissioner & guilds – typically 10% ¹¹⁰	10% ¹¹¹
No retaliation - § 963(8)	Not mentioned	Not mentioned
No discrimination under Title VII of Civil Rights Act - § 963(9)	Yes ¹¹²	Yes ¹¹³

II. LEGISLATIVE HISTORY

To date, there has been no successful legislation in either New York or California that substantially regulates personal managers. However, legislative history for past failed attempts should be analyzed to compare the reasoning for their failure to the current proposed legislation. This section will first address the limited past

¹⁰⁹ Lockwood, *supra* note 3 (“[V]ery often an agency will sponsor an international model’s work visa—charging them for it, of course—making it difficult for a model to complain too loudly about slowness in being paid for fear of endangering their working papers.”).

¹¹⁰ Biederman, *supra* note 32, at 7.

¹¹¹ N.Y. GEN. BUS. LAW § 185(8) (McKinney 2022).

¹¹² CAL. LAB. CODE § 1700.47 (West 2022).

¹¹³ N.Y. GEN. BUS. LAW § 174.

attempts at regulating managers in New York before analyzing the more robust attempts in California.

A. *New York – 2005 Bill*¹¹⁴

In 2005, the modeling industry sought to clarify the incidental booking exception by pushing for legislation that would have made personal managers explicitly exempt from the New York general business laws licensing requirements.¹¹⁵ It sought to change the definition of “theatrical employment agent” to remove mention of managing artists and to separately define personal managers.¹¹⁶ The proposed new definition specified that personal managers may seek employment for clients so long as it was secondary to the managers primary tasks.¹¹⁷ The bill’s justification was that modeling agencies were incurring high litigation costs due to models accusing them of acting as unlicensed employment agencies.¹¹⁸ If a modeling agency was found to be an employment agency, it would consequently be subject to the licensing regulations. Proponents of the bill argued that

¹¹⁴ Assemb. A8381A, 2002 Leg. Sess. (N.Y. 2005).

¹¹⁵ Letter from Lisa R. Harris, General Counsel to the State Consumer Protection Board, to James Walsh, Assistant Counsel to the Governor (Aug. 4, 2005) [hereinafter General Counsel Letter], <https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/28589>.

¹¹⁶ Assemb. A8381A.

¹¹⁷ *Id.*

¹¹⁸ See State of N.Y. Executive Chamber Albany 12224, Veto #70 (Aug. 19, 2005) [hereinafter Veto #70]; see also General Counsel Letter, *supra* note 115 (“IMG strongly asserts that these lawsuits have a detrimental economic effect on their business and continuously defending these lawsuits may cause them to reconsider their participation in New York’s economy. Clearly, the modeling industry has a financial impact on consumers through employment, commercial advertising, designers, retail clothing outlets, runway shows and events such as Fashion Week, held in New York City . . . The passage of this bill would allow model management companies to have more leverage in the courtroom when defending their position that they are not in fact an employment agency and did more for their clients than just ‘get them a job.’ For example, model managers could argue that they provided housing, training, plastic surgery, stylist and all at no charge to the model, which justifies the fees the model may be required to pay under the contract to the model management company. The proponents assert that the additional services provided by model management companies or personal managers sets them apart from theatrical employment agencies.”).

modeling agencies function primarily as personal managers engaged in the development and promotion of models and their careers, often at significant expense to the agencies, and [were] therefore exempt from regulation [B]y clarifying the qualifications and limitations of personal managers, the bill would [have] avoid[ed] the need for costly and disruptive litigation.¹¹⁹

The bill was met with significant pushback. The Actors' Equity Association argued that the change would "allow personal managers to act as unlicensed, unbonded and unsupervised talent agents."¹²⁰ Others further alleged that "[i]t appear[ed] as if Modeling agencies [were] calling for this legislative change because they [were] hit with 'time-consuming, distracting and costly legal actions.'"¹²¹ Even more, they argued that "such legal actions [were] most likely due to the fact that they refuse to abide by the law, not because of any 'lack of clarity' about what the law says."¹²² On the other side, IMG, a prominent modeling agency, argued that because personal management was an economically different and more financially risky operation than a theatrical employment agency, it should not be regulated in the same way.¹²³ IMG also argued that the bill would actually regulate managers, rather than de-regulate, because the bill would have eliminated advance fees and prohibited both guaranteeing employment and soliciting employment in newspapers.¹²⁴ However, these arguments in favor of the bill were unconvincing in light of the pushback from other industry players and led to New York Governor Pataki vetoing it.¹²⁵

¹¹⁹ Veto #70, *supra* note 118.

¹²⁰ Letter from Patrick Quinn, President and Eastern Reg'l Dir., Actors' Equity Ass'n to George E. Pataki, Governor, State of N.Y. (Aug. 15, 2005).

¹²¹ Letter from Paul Christie, New York President, Screen Actors Guild to George E. Pataki, Governor, State of N.Y. (Aug. 12, 2005).

¹²² *Id.*

¹²³ Letter from Wilson, Elser, Moskowitz, Edeman & Dicker LLP on behalf of IMG to George E. Pataki, Governor, State of N.Y. (Aug. 17, 2005) [hereinafter Letter on Behalf of IMG].

¹²⁴ *Id.*; Letter from Wilson, Elser, Moskowitz, Edelman & Dicker LLP, on behalf of IMG to Richard Platkin, Counsel to the Governor (July 25, 2005).

¹²⁵ Veto #70, *supra* note 118.

B. *California – Talent Agencies Act Legislative History – Assembly Bill 2535*

When the Talent Agencies Act was developing, one version of the bill included a separate licensing scheme for personal managers.¹²⁶ In this version, personal managers would be regulated under a similar licensing scheme as agents, but the bill still would not let managers independently procure employment.¹²⁷ Personal managers argued against that licensing scheme because they would have consequently become subject to “direct or indirect regulation by various entertainment trade unions,” and that “[t]hese union regulations and restrictions [were] chiefly responsible for the plight of the personal manager.”¹²⁸ Because managers invest money into the artists they represent,¹²⁹ they argued that restrictions on commissions and fees by the TAA or union regulations would put a burden on managers, as they would be at risk of being unable to capitalize on their investment.¹³⁰ Further, managers had avoided becoming licensed agents because the costs of licensing can be expensive.¹³¹ Ultimately, due to a lack of compromise between industry players and the intense lobbying efforts of personal managers, the portion of Assembly Bill 2535 that related to personal managers was removed.¹³²

¹²⁶ See Johnson & Lang, *supra* note 15, at 405–06 (“At the 1977-78 regular session of the California Legislature, the personal manager issue prompted the introduction of four bills, of which Assembly Bill 2535 was ultimately signed by the Governor as the Talent Agencies Act. As originally introduced, Assembly Bill 2535 would have required a separate personal manager’s license for all personal managers, irrespective of whether the procured employment. This version of the bill encountered heavy opposition from the personal manager lobby.”); David F. Charles, *The Personal Manager in California: Riding the Horns of the Licensing Dilemma*, 1 HASTINGS COMM’N & ENT. L.J. 347, 361–62 (1978).

¹²⁷ Charles, *supra* note 126, at 362.

¹²⁸ Johnson & Lang, *supra* note 15, at 411–12; see also *id.* at 408 n.175 (citing Testimony on Behalf of the Conference of Personal Managers Regarding [A.B.] 2535 before the Assembly Standing Comm. For Labor, Employment, and Consumer Affairs (Apr. 25, 1978)) (“Finally, the Conference of Personal Managers noted that its major objections were not related to existing law, or the proposed legislation, but rather ‘to many union franchise requirements . . .’”).

¹²⁹ Greenberg, *supra* note 8, at 840.

¹³⁰ Johnson & Lang, *supra* note 15, at 417.

¹³¹ Greenberg, *supra* note 8, at 840.

¹³² Johnson & Lang, *supra* note 15, at 407.

C. *California – Personal Managers Bill - Senate Bill 686*¹³³

In 1972, the California legislature introduced a bill that would mirror existing New York regulations by adding an “incidental booking exception” for personal managers to the TAA without the need to be licensed.¹³⁴ Managers argued that this exception was needed because the only way to further burgeoning artists’ careers was for them to get experience.¹³⁵ However, because agents typically would not sign an artist unless they had experience,¹³⁶ it created a Catch-22.¹³⁷ Thus, managers argued that in order to best serve their clients, they needed to be able to procure some employment for them.¹³⁸ There was significant pushback from talent agents and unions.¹³⁹ They argued that if managers were allowed to procure employment, even incidentally, that managers should be subject to the same regulations as agents.¹⁴⁰ Harry Sloan from the Screen Actors Guild (“SAG”) deftly noted

[i]t would create two different sets of rules for individuals performing essentially the same function As long as personal managers . . . [were] allowed under any circumstances to solicit employment, the result in . . . [their] industry would resemble a football game where two teams were competing against

¹³³ This bill was re-introduced in 1978 under Senate Bill 1764. *See, e.g.*, Edwin F. McPherson, *The Talent Agencies Act: From Humble Beginnings to the Regulation of Attorneys—Has It Gone Too Far?*, MCPHERSON LLP, <https://mcperson-llp.com/articles/the-talent-agencies-act-from-humble-beginnings-to-the-regulation-of-attorneys-has-it-gone-too-fat/> [https://perma.cc/C6N2-SANQ].

¹³⁴ *See The Licensing and Regulation of Artists Managers, Personal Managers, and Musicians Booking Agencies: Hearings Before the Cal. Senate Committee on Industrial Relations*, 1975 Leg. 48–49 (Cal. 1975) (statement of Harry Sloan, Assistant National Executive Secretary, Screen Actors Guild) [hereinafter *Hearings*]; *see also* Charles, *supra* note 126, at 349–50.

¹³⁵ *See Hearings, supra* note 134, at 173 (statement of Arnold Mills).

¹³⁶ *See* Gutenkunskt, *supra* note 10.

¹³⁷ *See* Gregory Albert, *Taking Away an Artist’s ‘Get Out of Jail Free Card:’ Making Changes and Applying Basic Contract Principles to California’s Talent Agencies Act*, 8 PIERCE L. REV. 383, 384 (2010).

¹³⁸ *See* Johnson & Lang, *supra* note 15, at 406 n.174.

¹³⁹ *Id.* at 404–05.

¹⁴⁰ *See Hearings, supra* note 134; *see also* Charles, *supra* note 126, at 365.

each other but only one team had to keep the ball in bounds and stay on sides.¹⁴¹

Thus, the bill was rejected.¹⁴² Currently, managers in California still cannot procure employment without either being licensed under the TAA or working in conjunction with a licensed agent.¹⁴³

D. California – 1999 Kuehl Amendment

In 1999, the California state legislature attempted to regulate managers with the Kuehl Amendment.¹⁴⁴ It originally would have imposed similar licensing requirements, form contract, fee schedule, trust fund, and disbursement rules that agents must comply with under the TAA onto personal managers.¹⁴⁵ The bill was initially created in response to “a news exposé chronicl[ing] the exploitation of children, their families, and their hopes and dreams [by] [p]eople posing as artist managers [who] would request hefty deposits and promise things they couldn’t deliver.”¹⁴⁶ However, the bill was drastically changed to remove the general requirements for managers after receiving pushback from a coalition of management companies.¹⁴⁷ At a meeting on the topic, Kuehl relented and told a group of personal managers that the bill would be substantially narrowed to focus on the fraudulent behavior of the bad apples.¹⁴⁸ Despite recognizing the pervasive issue between personal managers and agents,¹⁴⁹ ironically, Kuehl still maintained that she was “not

¹⁴¹ See *Hearings*, *supra* note 134.

¹⁴² See Charles, *supra* note 126, at 363.

¹⁴³ See discussion *supra* II(B).

¹⁴⁴ Assemb. 884, 1999 Reg. Sess. (Cal. 1999) [hereinafter “Assemb. 884”]. The amendment is named after Assemblywoman Sheila Kuehl, who sponsored the bill.

¹⁴⁵ See Gutenkunst, *supra* note 10, at 118; see also Biederman, *supra* note 32, at 16; AB 884.

¹⁴⁶ Hearing on Assemb. 884 before the Comm. on Labor & Employment (Apr. 21, 1999) (bill analysis).

¹⁴⁷ See Birdthistle, *supra* note 34, at 545-46. Compare Assemb. 884 (Feb. 25, 1999), with Assemb. 884 (Apr. 26, 1999).

¹⁴⁸ See David Robb, *Kuehl Placates Managers’ Fears – Legislator Says Her Bill to Regulate Talent Managers Will Focus on Fraud, not Business as Usual*, BACKSTAGE (last updated Nov. 4, 2019), <https://www.backstage.com/magazine/article/kuehl-placates-managers-fears-legislator-says-bill-regulate-24047/> [<https://perma.cc/Y2Q2-9N54>].

¹⁴⁹ *Id.*

interested in regulating an industry that doesn't need to be regulated."¹⁵⁰ The enacted version of the bill only regulated advance-fee talent services and not the general conduct of managers.¹⁵¹ Thus, other than the limitation on procuring employment,¹⁵² the conduct of personal managers continues to be largely unregulated in California.

III. DEBUNKING COMMON ARGUMENTS AGAINST PERSONAL MANAGER REGULATION AS APPLIED TO THE FASHION MODELING INDUSTRY IN NEW YORK

Considering past legislative attempts, the reasoning against regulation centers around potential inequality between the regulations of personal managers and agents for similar work, as well as concerns about consequent financial impacts. This section examines and debunks three common arguments against general regulation of personal managers.

A. *"Managers Should Not Be Regulated Because It Will Subject Them to Union Regulations."*

A common argument against personal manager regulation is that becoming licensed under existing regulations would subject managers to stricter union regulations.¹⁵³ Unions such as SAG-AFTRA require all persons procuring employment for its members to be

¹⁵⁰ *Id.* Kuehl also noted that "unless the Hollywood community could present a unified voice as to why managers should be regulated, she planned for the bill to focus solely on protecting child actors and other Hollywood innocents from the clutches of immoral representatives." See Laura Weinert et al., *The Year in News: All the Performance News that was Fit to Print in 1999*, BACKSTAGE (last updated Nov. 5, 2019), <https://www.backstage.com/magazine/article/year-news-performance-news-fit-print-50322/> [<https://perma.cc/3A8P-LX4X>].

¹⁵¹ CAL. LAB. CODE § 1700.

¹⁵² See discussion *supra* II(C).

¹⁵³ "However, personal managers who become licensed as 'talent agents' or 'employment agents' are also governed by entertainment trade union regulatory schemes that establish limits on their compensation and those activities that are incongruous with their occupation, and unacceptable to most personal managers." Johnson & Lang, *supra* note 15, at 383.

franchisees which imposes substantial regulations on such persons.¹⁵⁴ However, this concern is inapplicable to the fashion industry because there are no modeling unions.¹⁵⁵ There are organizations, such as the Model Alliance, whose goal is to promote union-like industry standards; however, their standards are not binding.¹⁵⁶ There may be times where models perform work that would be covered under a union agreement.¹⁵⁷ To do so, the model would need to work with a franchised agent or representative who procures that employment per union rules.¹⁵⁸ However, because union members cannot work with an unfranchised agent to begin with, unlicensed modeling agencies are already unable to book those engagements anyway.¹⁵⁹ Therefore, this line of reasoning against regulation can be set aside because the Fashion Workers Act only covers traditional modeling services.

B. “The Commission Cap Will Be Unduly Harmful.”

Managers typically argue that they should not be regulated because imposed commission caps would be unfair, due to the financial risks associated with possibly not recouping their investment.¹⁶⁰ Their argument is that this could lead to fewer personal managers willing to take on new talent.¹⁶¹ Since personal managers invest a significant amount of initial capital establishing a fledgling artist,

¹⁵⁴ *Id.* at 417–18 (“The AF of M, SAG, and AFTRA each preclude their franchisees from engaging in any business conduct other than advising, counselling, and procuring labor for artists Prohibitions of this type, perhaps the most offensive to personal managers, ignore the manner in which personal managers function in the entertainment industry. Numerous personal managers, in addition to performing personal management functions, also act as music publishers, record producers, concert promoters, and production companies for film, television, and records.”).

¹⁵⁵ See *Frequently Asked Questions*, *supra* note 16.

¹⁵⁶ See *The Respect Program*, MODEL ALL., <https://www.modelalliance.org/respect> [<https://perma.cc/QMV3-NK5F>].

¹⁵⁷ For instance, if a model books a broadcast television commercial, that work would be covered by SAG-AFTRA. See Johnson & Lang, *supra* note 15, at 417–18.

¹⁵⁸ See Zarin, *supra* note 8, at 959–60.

¹⁵⁹ See Birdthistle, *supra* note 34, at 520–21.

¹⁶⁰ See, e.g., Letter from Walter Lorimer, Loeb & Loeb LLP, to George N. Zenovich, *in Hearings*, *supra* note 134, at A-33.

¹⁶¹ *Id.* (“The personal manager, of course, expects a reasonable return on his investment, and hopes for a bonanza. If, because of union regulations or state law, the personal manager cannot reap where he has sowed, he will simply stop sowing.”).

they typically argue they are at risk of being taken advantage of.¹⁶² These up-front costs can include grooming costs, housing, lessons, travel, and the like.¹⁶³ These arguments imply that the income from the higher commission is used to recoup those costs. However, in the modeling industry, those fronted costs are charged back to the models.¹⁶⁴ This practice is so common that models have reported going into significant debt to their modeling agencies because the money that they earn gets applied against their outstanding balance and the money spent is often more than the money earned.¹⁶⁵

Because models are responsible for paying back these expenses,¹⁶⁶ one could question the reasoning behind the industry's standard 20% commission, if not to offset the fronted costs.¹⁶⁷ Further, model management companies typically charge an additional fee to the client on top of the model's fee for placing them.¹⁶⁸ However, this is not necessarily so one-sided. Models often have what is known as a "mother agent" who may have initially "discovered" the model.¹⁶⁹ It is industry practice that the mother agent splits the

¹⁶² David Zelenski, *Talent Agents, Personal Managers, and Their Conflicts in the New Hollywood*, 76 U.S. CAL. L. REV. 979, 991 (2003).

¹⁶³ See Lockwood, *supra* note 3.

¹⁶⁴ *Id.*

¹⁶⁵ See Sauers, *supra* note 104; see also Lockwood, *supra* note 3.

¹⁶⁶ See *supra* note 4 and accompanying text.

¹⁶⁷ See Erica Gonzales, *How Much Modeling Really Pays (If You're Not Gigi or Kendall)*, HARPER'S BAZAAR (May 12, 2016), <https://www.harpersbazaar.com/fashion/models/a15585/how-much-modeling-costs/> [<https://perma.cc/BV72-6AYP>]. Even IMG has stated that the high commission costs were intended to recoup fronted costs. See discussion *supra* note 115 ("[M]odel managers could argue that they provided housing, training, plastic surgery, stylist and all at no charge to the model, which justifies the fees the model may be required to pay under the contract to the model management company.").

¹⁶⁸ The standard commission structure for print models is "[p]lus-20%-[l]ess 20%," meaning that if a model is booked for \$1,000 the client pays \$1,200. The modeling agency pockets the additional \$200 and also deducts \$200 from the remaining \$1,000. In the end, with this standard commission structure, the model receives \$800 and the management company receives \$400." Anna Vocino, *Agent Commissions: Union & Non-Union*, ACTORS' NETWORK, <https://actors-network.com/agent-commissions-union-non-union/> [<https://perma.cc/AKA5-P6FR>]; see also Gutenkunst, *supra* note 10, at 116–17; Lockwood, *supra* note 3 ("Agencies make their money at both ends of the pipeline—they take 20 percent of the model's fee as well as 20 percent of the client's fee for the job.").

¹⁶⁹ Lockwood, *supra* note 3.

commission with the modeling agency.¹⁷⁰ In those instances, the modeling agency does not keep the full 20% commission.¹⁷¹ Regardless, because the bill includes the industry standard commission, there should not be much pushback from modeling agencies. One may even argue that higher commission fees are needed as a safety net so that models do not leave the management company with substantial debt. However, this can be adequately addressed with a breach of contract claim against a model who materially breaches the contract by not repaying the debt or working out a deal with a model's new agency.¹⁷² Therefore, given that the proposed commission structure matches current industry practices, an argument against regulation because of the commission cap is largely inapplicable to the Fashion Workers Act.

C. *“Regulating Personal Managers Will Only Make Them Move Elsewhere.”*

Modeling agencies will likely argue that regulation will cause them to uproot and move business out of New York. However, this threat has been made before—without follow through. For instance, in advocating for the 2005 New York bill, IMG implied that if modeling agencies were not explicitly excluded from regulation, the consistent litigation costs associated with disputes over employment agency status would render doing business in New York untenable.¹⁷³ However, despite the sustained risk, modeling has remained a thriving industry in New York.¹⁷⁴

¹⁷⁰ *Id.*; Carlianna Dengel, *What You Need to Know About Modeling Agency Contracts*, ROMANO L. (Jan. 26, 2022), <https://www.romanolaw.com/2022/01/26/what-you-need-to-know-about-modeling-agency-contracts/> [<https://perma.cc/7FC9-MN9U>].

¹⁷¹ Lockwood, *supra* note 3.

¹⁷² *Id.*

¹⁷³ See Letter on behalf of IMG, *supra* note 123 (“The litigation expenses imposed as a cost of doing business in New York can not be justified when this exposure does not exist in any other state.”); see also General Counsel Letter, *supra* note 115 (“IMG strongly asserts that these lawsuits have a detrimental effect on business and continuously defending these lawsuits may cause them to reconsider their participation in New York’s economy.”).

¹⁷⁴ As the Model Alliance has noted

[t]he fashion industry is a \$2.5 trillion global industry, and New York is its center in the United States. Boasting world-class creative artist and best-in-class production companies and fashion and design schools, New York’s fashion industry employs 180,000, accounting

Another way of debunking this myth is to look at the effects of the underlying cases that influenced IMG's push for the 2005 bill. In *Fears v. Wilhelmina*, models sued a number of powerful modeling agencies, including IMG, claiming that the agencies should be considered employment agencies.¹⁷⁵ Models also accused the agencies of widely fixing fees, contract terms, and commissions.¹⁷⁶ While not settling the legal status of modeling agencies,¹⁷⁷ the court did create a settlement agreement based on the other accusations that required the modeling agencies to "(1) disclose all compensation received by it on all bookings including service charges, mother agent fees, gross fees 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."¹⁷⁸ The settlement lasted for 10 years.¹⁷⁹ Because the terms of the settlement foreshadowed some provisions of the Fashion Workers Act,¹⁸⁰ the settlement essentially acted as a regulation of the industry prior to any official legislation. Given the continued prevalence of most of these modeling agencies in New York

for 6 percent of the city's workforce and generating \$10.9 billion in total wages. New York Fashion Week—a semiannual event – draws more than 230,000 visitors to the city and has long been a major economic driver, generating close to \$600 million in income each year. That's more than the economic impact of Milan, Paris and London's fashion weeks combined.

The Fashion Workers Act, MODEL ALL., <https://www.modelalliance.org/fashionworkersact> [<https://perma.cc/267R-DV7C>]. Further, New York City offers a number of Fashion Programs with a variety of incentives for designers and production companies located in New York. See *Fashion Programs After Arrival in NYC*, NYC INT'L BUS., <https://www.nyc.gov/site/internationalbusiness/programs/fashion-programs.page> [<https://perma.cc/K9SV-D3WQ>].

¹⁷⁵ See Sodomsky, *supra* note 20, at 292 (citing *Fears v. Wilhelmina Model Agency, Inc.*, No. 02-Civ.4911(HB), 2005 WL 1041134 (S.D.N.Y. May 5, 2005)). The modeling agencies in the settlement were Wilhelmina Model Agency, Ford Models, Elite Model Management, Click Model Management, Next Management Corp, Company Management, Boss Models, Zoli Management, Que Model Management, DNA Model Management, IMG Models, and International Model Managers. See *Fears*, 2005 WL 1041134, at *7.

¹⁷⁶ See Sodomsky, *supra* note 20; *Fears*, 2005 WL 1041134, at *7.

¹⁷⁷ Sodomsky, *supra* note 20.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See *supra* Figure 1.

throughout the settlement term,¹⁸¹ regulation itself would likely not cause modeling agencies to uproot and leave New York.

The possible effects of regulating modeling agencies in New York will likely be similar to the effects of the TAA on modeling agencies in California. As noted above, modeling agencies can only procure employment if they are licensed directly or if they work in conjunction with a licensed talent agent.¹⁸² Based on a survey of top modeling agencies in California, most of them are licensed under the TAA.¹⁸³ The modeling agencies in California closely mirror those in New York.¹⁸⁴ Given many of these modeling agencies in New York are licensed in California, and some agencies have already been subject to similar settlement provisions, it can reasonably be inferred that New York agencies would likely continue operating in New York if subjected to similar regulatory provisions.¹⁸⁵

IV. ISSUES THAT NEED TO BE ADDRESSED WITHIN THE FASHION WORKERS ACT & SOLUTIONS

While the standard reasoning for non-regulation of managers may not be applicable to the fashion industry, there are still provisions within the bill itself that need to be addressed. While well meaning, many of the affirmative duties in the FWA would not be

¹⁸¹ For instance, six of the agencies from the settlement are still considered some of the best modeling agencies in New York City. *Compare Fears*, 2005 WL 1041134, at *7, with Lisa-Marie, *supra* note 21 (Wilhelmina, Ford Models, Elite, Next Management, DNA Model Management, and IMG Models).

¹⁸² See discussion *supra* II(A).

¹⁸³ Top modeling agencies include Elite, Wilhelmina, Next Management, Ford Models, IMG Models, Bella Agency, L.A. Models, and Two Management. See Lisa-Marie, *Los Angeles Model Agency: The Best Agencies for Models*, MODEL AGENCY ONE, <https://www.modelagency.one/los-angeles-models> [https://perma.cc/G9R3-XEZW]. These agencies are all registered under the TAA. See State of California Department of Industrial Regulations, Labor Commissioner's Office, *License and Registration Search*, <https://cadir.secure.force.com/RegistrationSearch/> [https://perma.cc/2P4J-5R7F] (select "Talent Agency License Search," then "Talent Agency License Search" again. Under "Registration Type" select "Talent Agency." Then input modeling agency name in the "Legal Entity Name" or "DBA Name" field and hit "Search.").

¹⁸⁴ Compare Lisa-Marie, *supra* note 183, with Lisa-Marie, *supra* note 21 (The following agencies are on both lists: Wilhelmina, CM Models, Next Management, Ford Models, IMG Models, State Management, and Bella Agency).

¹⁸⁵ *Id.* See also discussion *supra* note 21; discussion *supra* note 183.

equitable because they impose higher burdens on managers than existing New York laws do for agents. As shown in Figure 1, the affirmative duties more closely follow those in the TAA rather than existing New York laws.¹⁸⁶ Some of these are easily fixable, such as lowering the surety bond amount to match what is required under New York law, adding in similar accountings requirements, and matching the penalty fees because there are clear equivalents under New York law.¹⁸⁷ This section analyzes those duties that need to be addressed: reasonable efforts to secure employment, trust accounts, payment terms, expense withholding prohibitions, and fiduciary duties.

A. *Duty to Make Reasonable Efforts to Secure Employment*

The duty to put forth reasonable efforts to secure employment should be removed from the Fashion Workers Act because it conflicts with existing New York law in two different ways. First, such a duty is not prescribed in the regulations for agents.¹⁸⁸ Second, it would be contradictory to the incidental booking exception. As to the former, there should not be a burden on modeling agencies that is not explicitly prescribed for agents, as it would make one set of regulations more favorable than the other. As to the latter, modeling agencies argue that they are exempt from regulation under the general business laws because their procurement activities are only incidental and that many of their duties are typical management activities.¹⁸⁹ While there has been little case law interpreting the scope of the incidental booking provision,¹⁹⁰ placing an affirmative duty on managers to make reasonable efforts to procure employment would shift the managers' duties to focus more on procurement than on managing. If that were the case, procuring employment would no longer be incidental and would effectively render the incidental

¹⁸⁶ See *supra* Figure 1.

¹⁸⁷ *Id.*

¹⁸⁸ See *id.*

¹⁸⁹ See Models' Harassment Protection Act. S. S6681, 2021 Gen. Assemb., Reg. Sess. (N.Y. 2021).

¹⁹⁰ See Roger Armbrust, *In L.A. and N.Y., Managers May Lose Commissions*, BACKSTAGE (Nov. 4, 2019), <https://www.backstage.com/magazine/article/laand-ny-managers-may-lose-commissions-26640/> [<https://perma.cc/QC8U-7C6M>].

booking exception meaningless.¹⁹¹ Additionally, the provision is not needed because modeling agencies are already incentivized to procure employment to enforce the exclusivity provisions of their contracts with models.¹⁹² Therefore, this provision should be struck entirely.

B. *Trust Accounts*

The mandate for management companies to set up trust accounts for models may be controversial but, based on the unique nature of the fashion industry in New York, accountability requires it. Managers will likely argue that this provision is unfair because, under New York law, agents are not required to have trust accounts set up for clients.¹⁹³ However, while there is no statutory requirement, due to union mandates, many agents likely already do this.¹⁹⁴ Managers may also argue that this would be unfair because managers in California are not required to set up trust accounts for clients.¹⁹⁵ Although, as mentioned above, because many modeling agencies in California are licensed under the TAA or must work with a licensed agent,¹⁹⁶ they likely abide by these requirements already. Because

¹⁹¹ This notion about the limitations and assumptions underlying what would not constitute incidental booking has come up in the discussion regarding the incompatibility of adding the incidental booking exception to the TAA because it would conflict with the TAA safe harbor provision of working with a licensed agent.

New York law actually discourages managers and agents from working together, as it rebuts the incidental booking exception. By collaborating with an agent in procuring employment for the artist, it is presumed that the manager is engaged in too much of the employment procurement activity and employment procurement is not incidental to the manager's regular duties.

Gutenkunst, *supra* note 10, at 129 (citing Heath B. Zarin, Note, *The California Controversy over Procuring Employment: A Case for the Personal Managers Act*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 927 (1997)).

¹⁹² See Simmerson, *supra* note 58, at 157; N.Y. S. 8638A, *supra* note 5, § 962(4).

¹⁹³ See *supra* Figure 1.

¹⁹⁴ SCREEN ACTORS GUILD, *supra* note 81, at 16(g)(IV)(K) ("The moneys belonging to the actor shall not be commingled with moneys belonging to the agent but shall be segregated and kept in a separate account which may be known as a 'client's account' or 'trust account', or an account similar in nature. Each agent may have one or more of such client's accounts or trust accounts and may keep all moneys of all clients in one or more of such client's accounts or trust accounts.").

¹⁹⁵ See discussion *supra* II(B) and (D).

¹⁹⁶ See discussion *supra* II(A).

modeling agencies control models' fees received for jobs, there should be protections in place to prevent intermingling of funds.¹⁹⁷ This provision was included because of reports of modeling agencies misusing models' funds.¹⁹⁸ While this may be difficult for modeling agencies to accomplish and may be compounded by the realities of models frequently moving companies, it is a price that must be paid to restore faith and accountability in the relationships between models and managers.

That being said, the requirements of the trust accounts could be more equitable. Because setting up individual trusts may be cost prohibitive and difficult to maintain due to banking fees for each account, the bill could mirror union rules, which permit collection of artist payments into a general trust that is separate from the modeling agency's business account.¹⁹⁹ This way the issue of modeling agencies coopting funds for its own use is addressed while ensuring that the solution is not overly burdensome.

C. *Unfair Payment Terms*

Even though setting up trusts will be essential to fixing issues within the industry, the FWA goes too far in its payment provision, and parts of it should be removed. While payment of funds within 30 days of receipt of client payment matches the obligations of agents in California, payment terms are up to the contracting parties in New York.²⁰⁰ But similar to the trust accounts, many agents likely abide by stricter payment terms due to union obligations.²⁰¹ This requirement should be kept in the bill, as it is significantly more

¹⁹⁷ Agencies contend that slow payments are not their fault and that "it's the clients that are to blame for slow payments, not them." Model, Simone Aptekman, states "one word that comes to mind that really encapsulates how models are made to feel when they ask to be paid: Shame." Aptekman also asserts that she has proof that "[i]t's not like the funds aren't available to the models . . . There's kind of like fraudulent behavior where that money just gets recycled or reused for the agency purposes, because it's definitely not going to the model." Lockwood, *supra* note 3.

¹⁹⁸ See Balfe, *supra* note 3; see also Lockwood, *supra* note 3.

¹⁹⁹ See SCREEN ACTORS GUILD, *supra* note 81, 16(g)(IV)(K).

²⁰⁰ See *supra* Figure 1.

²⁰¹ See SCREEN ACTORS GUILD, *supra* note 81, 16(g)(III)(K) ("All moneys belonging to the actor received by the agent shall be . . . promptly paid over to the actor." "Promptly paid over" means paid within three to seven calendar days depending on the type of work).

lenient than the timeframe imposed by unions,²⁰² yet guarantees that models do not need to chase their agencies for funds the agency has already received on their behalf but not dispersed. This problem could be solved with a regular payment schedule that disperses available funds.

Despite the foregoing, the payment of funds within 45 days regardless of whether the client has paid is not fair, because it places all the liability on the management company and would force such companies to operate as banks. For instance, if a model completes a job that pays \$20,000, under this provision, the agency would be responsible for fronting the money to the model if they have not received payment from the client within 45 days. If many of those payments arise, it would be impracticable for modeling agencies to continue to pay out large sums of money they may not have. This is not to say that this issue of non-payment does not need to be addressed. New York state already has a law in place that could result in a similar outcome. As mentioned above, § 37.05 of the Law of New York Arts and Cultural Affairs mandates that theatrical employment agents investigate clients to determine whether they regularly make timely payments and prohibits agents from procuring employment from clients who do not.²⁰³ However, the law conveniently exempts modeling.²⁰⁴ If this exception is repealed and § 37.05 is also added into the Fashion Workers Act (for an avoidance of doubt), this would put the pressure back onto clients as they would be held accountable if agencies refrained from booking models with them unless they paid on time.²⁰⁵

Some indicate that limiting employment with certain clients due to their lack of reliable payments is seen as unreasonable.²⁰⁶ There

²⁰² *Id.*

²⁰³ N.Y. ARTS & CULTURAL AFFS. LAW § 37.05 (McKinney 2022).

²⁰⁴ *Id.*; see note 43 and accompanying text.

²⁰⁵ While outside the scope of this paper, the Fashion Workers Act as currently written requires clients to pay within 30 days after completion of the work. There are also additional labor requirements such as paying hourly wages and overtime. See N.Y. S.B. 8638A, *supra* note 5, § 964 and accompanying text. The section is substantially flawed because it does not consider the realities of the business and the entities that fall under the “client umbrella.”

²⁰⁶ See Balfe, *supra* note 3 (describing how after previously not receiving payments from another modeling agency due to the agency’s mishandling of funds, she “did something

will likely be opposition to this for fear of brands blacklisting either the model, the agency, or both. However, despite what some may argue, it is unlikely that the fashion industry in New York would vanish if clients were held accountable. Because New York is such an important entertainment hub generally and many fashion designers are based there, the larger industry forces would likely continue to require the fashion modeling sector to remain in New York.²⁰⁷ Further, self-regulation would allow for the flexibility the fast-paced (and often small-budgeted) fashion industry needs. Therefore, these adjustments would make the bill more equitable for all.

D. Expense Withholdings

Modeling agencies will likely push back on the fee and expense withholdings prohibitions; however, parties will need to reach a compromise. New models who are just starting off may require upfront financial support before they start picking up work.²⁰⁸ Because of this, there must be some concessions for such an arrangement to be equitable. As to the first condition prohibiting modeling agencies from charging higher than market rate for accommodations,²⁰⁹ it is likely the easiest concession for to make. There are numerous and consistent stories of models being packed into small apartments filled with bunkbeds yet charged beyond the amount the whole apartment would cost.²¹⁰ Agencies may argue that limiting the

models are told never to do: [she] told [her] agency that [she] refused to continue working for another brand who never paid on time until [she] received all the money [she] was owed. It took a year to get [her] earnings.”).

²⁰⁷ See Gutenkunst, *supra* note 10, at 134 (“California and New York are the undisputed kings of the entertainment industry, leaving a sizeable impact on the United States economy as a whole.”); see also *Fashion Industry*, NYC INT’L BUS., <https://www.nyc.gov/site/internationalbusiness/industries/fashion-industry.page> [<https://perma.cc/3KS6-W3WY>] (last visited April 11, 2023) (“NYC is . . . home to more headquarters of fashion designers and fashion retailers than any other city in the United States An estimated 900 fashion companies are headquartered in New York City, which is also home to more than 75 major fashion trade shows and thousands of showrooms.”).

²⁰⁸ See discussion *supra* IV(B).

²⁰⁹ N.Y. S.B. 8638A, *supra* note 5, § 963(2).

²¹⁰ Federico Pignatelli, owner of The Industry Model Mgmt and Pier 59 Studios has stated

[Some agencies] crowd the apartment six, eight, or 10 models and charge \$1,000 a model, \$1,200 a model, or even \$1,500 a model. You

housing fees to market rate does not adequately compensate for ancillary costs or labor involved. This could be solved by calculating the fair market rate plus the fair average costs of maintenance, so long as there is informed consent from the models. This limit would give those models protection against being taken advantage of by their agencies.

Similarly, the prohibition on advancing travel unless a model consents in writing is a fair concession to enhance transparency and trust between the model and the agency.²¹¹ Models are often shocked to find out that if they are sent somewhere for a job, the agency automatically books everything and charges it back with interest.²¹² Models report going into debt because the travel and accommodations end up being more than the fee for the job.²¹³ Modeling agencies may argue that it is impracticable because it will open the door for inefficiencies and conflicts due to increased communication from models pushing for less expensive accommodations. However, this could be solved by applying the same market rate restrictions as housing. This could look like an email or text message outlining the costs for travel for a job and attesting that the rates are at market. Agencies will likely argue that this will increase operating costs as it will take additional time and legwork. However, *any* new process will inherently require more work for agencies. Because the goal is to increase communication and transparency, this concession is needed and is unlikely to impose an unreasonable burden on either party.

A prohibition on taking out non-commission-based fees from model payments would likely be overly burdensome and unfair to

see the apartments generating \$10,000, \$12,000, \$15,000 for an apartment that may be \$5,000 or \$6,000 a month. They have these bunk beds in the rooms that can sleep four girls.

Lockwood, *supra* note 3.

²¹¹ N.Y. S. 8638A, *supra* note 5, § 963(4).

²¹² See, e.g., Sebastian (@marcsebastianf), *supra* note 2. (“It’s honestly shocking if people don’t know this, but you do not get paid to shoot for magazines You don’t even get paid to be on the cover of magazines You could actually end up paying to be on the cover of a magazine because if you’re in New York and the shoot is in London and the magazine doesn’t have the budget to fly you over, your agency will fly you over if they think it’s good for your book, but on your dime babe.”).

²¹³ See Sauer, *supra* note 104.

modeling agencies. Like the issues with advanced payments,²¹⁴ this would essentially require modeling agencies to act as banks issuing loans without sufficient recourse for repayment enforcement, because the onus would be on models to take out the modeling agency's fees to repay them. Further, because models often move to different agencies,²¹⁵ a modeling agency may be left with substantial financial losses because the model left before securing a job that would have covered those expenses. Modeling agencies are not always made whole if a model does not repay their debt.²¹⁶ The provision as written could be interpreted to mean that modeling agencies should front expenses without payback.²¹⁷ However, this would also be an unreasonable burden on modeling agencies because it would subject them to significantly more risk for taking on new models and would likely lead to fewer models being represented. However, a compromise could be met by limiting the circumstances where interest may be applied. The purpose of these regulations is to protect models against unfair business practices, and this can be adequately accomplished by significantly enhancing the transparency in models' financial matters but still allowing for the current business model to stay substantially intact.

E. *Fiduciary Duty*

Lastly, there is an issue regarding fiduciary duty, because this is not an explicit duty for agents in either California or New York.²¹⁸

²¹⁴ See discussion *supra* V(C).

²¹⁵ See, e.g., Lockwood, *supra* note 3.

²¹⁶ In some instances, if the model breaches their contract and goes to another agency, the modeling agency will use debt repayment as leverage to settle rather than bringing a lawsuit. Other times, if a model leaves behind significant debt, the modeling agency will write it off on taxes. See Lockwood, *supra* note 3; see also Sauer, *supra* note 104 ("When a model goes into debt to an agency, one of several things can happen. For example, if a model is in demand but in debt—a not uncommon situation, when expenses are high and rates for the most prestigious jobs can be low—a competing agency might buy her debt and thus acquire her contract. Come tax season, an agency might write down or write off the debt as a legitimate business expense.").

²¹⁷ Similar to what IMG noted in the 2005 legislation. See General Counsel Letter, *supra* note 115.

²¹⁸ See discussion *supra* Figure 1.

However, some argue this duty has been established indirectly.²¹⁹ Modeling agencies claim that they do not owe a fiduciary duty to their models.²²⁰ However, most modeling contracts give the power of attorney to the agency.²²¹ Under New York law, “an agent acting under a power of attorney has a fiduciary relationship with the principal.”²²² Many argue that the fiduciary duty should be made explicit for both agents and personal managers rather than relying on common law.²²³ Despite the valid need for the fiduciary duty to be explicit rather than relying on common law, this provision should be struck—unless the duty is also made explicit for agents, so that one regulatory scheme is not more favorable than the other.

CONCLUSION

It is clear that change is greatly needed in the fashion industry to protect the individuals who bring the industry to life. While the Fashion Workers Act needs substantial adjustments, it can be the tool that shepherds in the needed paradigm shift in the fashion industry. While managers have argued against regulation generally

²¹⁹ See Johnson & Lang, *supra* note 15, at 425 (“[A]gency law may already hold personal managers to such a duty, this should be explicitly prescribed.”); *id.* at 425 n.236 (“Personal managers function as agents and are therefore subject to the law of agency.”).

²²⁰ See Lockwood, *supra* note 3.

²²¹ *Id.*

²²² N.Y. GEN. OBLIGATIONS LAW, § 5-1505 (McKinney); see also Robertson, *supra* note 33, at 265 (“The dominant party in a relationship—in this case, the personal manager—owes a high level of duty towards the vulnerable party, the artist.”) (citing Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 800 (1983)); Devlin, *supra* note 6, at 409 (“Significantly, in the context of the entertainment industry, this high level of care is evidenced by the fact that the representative often has a monopoly over the artist’s needs for a particular aspect of the artists affairs.”).

²²³ See Devlin, *supra* note 6, at 410. (“[T]his new Act should delineate a non-exhaustive list of traditional abuses that artists endure. This list should include provisions that address a representative’s potential mismanagement of income, excessive fees, conflicts of interest, disruption of existing contractual relationships, and misappropriation of funds, among others. Although such abuses would already be accounted for by the new Act through application of its fiduciary principles, a non-exhaustive list would put representatives on notice and promote clarity in a number of instances. Such a list would alert representatives to the fact that certain named activities have been attempted in the past and will not be tolerated under the new Act. Notably, this section will provide the Legislature with the opportunity to explicitly respond to a plethora of controversies and confusions that have been troubling industry managers, agents, and lawyers for decades.”).

because of the financial burdens and externalities associated with the existing agent regulatory schemes, much of those reasons are not applicable to the fashion industry. Because the scope of the Fashion Workers Act can be narrowed to the players that need regulating, it likely will not face backlash from the rest of the talent manager and agent communities because they would not be affected.²²⁴ Still, the bill should be adjusted to match the existing relevant New York laws to ensure equity between managers and agents. However, modeling agencies will need to bend in other areas, particularly regarding model finances, to ensure that the purpose of the bill is upheld. Once issues such as these are addressed, the Fashion Workers Act can be a powerful vehicle for change.

²²⁴ See Johnson & Lang, *supra* note 15, at 412 n.189 (“These three unions have jurisdiction over actors, vocalists, and musicians who comprise the overwhelming majority of those serviced by personal managers.”). While outside the scope of this Note, many parties are implicated in the existing bill that will need substantial input to create a workable bill.