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Companies Beware When Using Models and Spokespeople in Advertisement Campaigns

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Due to a recent increase in wage and hour claims in the entertainment industries, companies using models and spokespeople for their advertising campaigns need to be conscious of how they treat talent who are not covered under a collective bargaining agreement. (This excludes celebrity spokespeople and supermodels that are covered under a SAG-AFTRA agreement, or one with the American Association of Advertising Agencies and/or the Association of National Advertisers). Failure to do so may expose a company to unnecessary, costly California Labor Code claims.

Companies often retain the services of talent through a talent agency. At times, a company will rely on an independent contractor photographer, advertising agency or director to obtain talent for a photo shoot or commercial advertisement. Typically, a claim filed by the plaintiff's bar will assert that the model or spokesperson who provided these advertisement services, even if only for a few hours, a day or a few days, was an employee of the company and not an independent contractor. Thus, he is not only entitled to overtime pay and all pay by a date established under the California Labor Code for employees, but also penalties related to violations of the pay provisions of the California Labor Code..

A company that terminates an *employee* must pay him all wages on the day of termination under Labor Code section 201. If it can be established the "*employee* is engaged in the production or broadcasting of motion pictures" or whose "job duties relate to or support the production or broadcasting" and who is hired "for a period of limited duration" including on the basis of one or more daily or weekly calls," then the Company must pay the *employee* by the "next regular payday" under Labor Code section 201.5. Under Labor Code section 201.5, "*production or broadcasting of motion pictures*" is further defined to include "*commercial advertisements*." Should an employer fail to make such payment, an *employee* is entitled to a continuation of wages for up to 30 days. Hence, if a model charges a fee of $1,000 per day and was not paid within 30 days of the end of the shoot, the model, if found to be an *employee*, arguably would be entitled to penalties in the amount of $30,000.

Attorneys for models and spokespeople are using Labor Code sections 201 and 203 and 201.5 and even Labor Code section 204 (sets forth a limitation on how often and when pay days must occur), as tools to squeeze exorbitant penalties out of companies, often offering to "settle" these cases for a much lesser amount than the full amount alleged to be owed.

To support their arguments, Plaintiffs rely primarily on a 1980 California Court of Appeal's case, *Zaremba v. Miller*, which held that professional photography models generally render their services as employees. That case involved a model who was hired by a photographer for a photo shoot that lasted two hours. The model obtained the job through her agent and her agent billed the photographer for the services once the model completed the shoot. The photographer failed to pay the model for five months. In defense of the claim, the photographer argued the model was an independent contractor and that it was customary in the industry to pay the model once the photographer was paid by the company. The *Zaremba* court did not accept these arguments and awarded the model waiting time penalties.

Hence, companies that use the services of a model or spokesperson, directly or through a photographer, director, or talent agency, should take important steps to avoid or minimize a finding by a court, or the California Division of Labor Standards Enforcement, that the company is actually the employer of the model.

The most typical defense a company can assert is that the model or spokesperson is not an employee, but an independent contractor. In determining this, the most important factor a court or labor commissioner will analyze is whether the company had the right to control the means and manner of the job. In other words, if the

company tells the model or spokesperson where to go, when to show up, what to wear, how to model or present whatever product the company manufacturers, what make-up to wear, what hairstyle to wear, and when to leave, it will be more likely that a plaintiff will be able to argue the company exerted enough control for it to be considered the employer.

Obviously, every case is different, so the decision will turn on specific facts. In some cases, a company will have very strong arguments the model or spokesperson truly is an independent contractor, and therefore, litigating the issue would be appropriate, particularly if the company sees this as an ongoing issue. In other cases, defense counsel's role would be to make the best possible arguments with the hope of gaining as much leverage as possible to force a more palatable settlement. Since these cases are fact intensive and many could go either way, the results of the independent contractor analysis will be the primary factor in determining whether or not a company will be liable for wages still owed and/or waiting time penalties.

Another defense companies can assert in waiting time penalty cases is that the failure to pay was not willful (i.e. Labor Code section 203 requires a "willful" failure to pay by the employer) and that they had a "good faith belief" that the model was not an employee of the company. While asserting the "lack of willfulness" and "good faith belief" are proper defenses to penalties, labor commissioners who find that a company exerted enough control over a model or spokesperson to warrant a conclusion that they were, indeed, an employee are less likely to reduce or eliminate a sought-after penalty based upon these arguments. However, such defenses under the right set of facts are more likely to be given greater credence in a court proceeding.

In order to protect against these types of claims altogether, a company should exert as little control as possible over the model or spokesperson for an advertisement campaign. If that is not possible, a company should make arrangements with the talent agency or photographer to make payment to the model immediately or as otherwise required under the Labor Code (i.e. Labor Code section 201.3 allows for payment by a "temporary services employer" on a weekly basis and Labor Code 501.5, if applicable, the "next regular payday"). Companies should also have written agreements with the talent agencies and photographers supplying them with the model or spokesperson. These agreements should contain indemnity provisions in the event they fail to make a timely payment to the model or spokesperson.

Thus, the best practice is to make sure a company does not exert overly broad control over the model's or spokesperson's services. When this is unavoidable and a company could potentially be found to be an employer of the model or spokesperson, it is important to compensate them as quickly as possible upon completion of the assignment.

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