# NOTE

# NOT SO GLAMOROUS: UNVEILING THE MISREPRESENTATION OF FASHION MODELS' RIGHTS AS WORKERS IN NEW YORK CITY

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## I. INTRODUCTION

"The lucrative careers of high-profile supermodels misrepresent the reality for most working models," explains fashion model Sara Ziff—especially the reality of the working conditions to which models are subject.[1] Because modeling is seen as a prestigious career in popular culture, the media has focused more on the perks associated with making it as a top model in the industry, rather than on the laws

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[1] Sara Ziff, *Introductory Note*, THE MODEL ALLIANCE, http://modelalliance.org/introductory-note (last visited Sept. 8, 2013).

protecting models as legitimate members of the workforce[2] —Ziff explains to *BBC News* that "[m]odelling is a seemingly glamorous profession, and models are certainly not the people you picture when you think of bad working conditions. But wipe off the sheen and another reality emerges."[3]

According to attorney and former model Paula Viola, there are "conceptions of . . . [the] modeling industry as a glamorous industry. . .[but] there are dark sides to every glamorous industry and. . .there are definitely concrete labor and employment issues that relate to models."[4] Just as the reporting of the glamorous end of the trade misrepresents the lives of most models,[5] the legal rights of models working in New York City are also inaccurately reported and harmfully misrepresented. In fact, while models working in the United States have many rights that mirror those of their European counterparts, such as models working in France,, many of those rights are not widely publicized nor enforced in New York.

Fashion is an international industry, and models are often booked for jobs in different countries, sometimes every week or even within a single day.[6] This is especially true during "fashion week" or "show" seasons,[7] when the most prominent designers show their latest collections in runway shows and presentations in the four fashion capitals of the world: New York City, London, Milan and Paris.[8] The international scope of modeling services means that models face a varying range of employment statuses[9] under the laws of the countries

2 Sara Ziff, *Viewpoint: Do Models Need More Rights?*, BBC NEWS MAGAZINE (Nov. 28, 2012), http://www.bbc.co.uk/news/magazine-20515337#TWEET402813.

3 *Id.*

4 Paula Viola, Assoc., Paul Weiss, Rifkind, Wharton & Garrison LLP, Address at Violations En Vogue? Labor and Employment Laws Concerning Fashion Models and Interns (Feb. 12, 2013).

5 Ziff, *supra* note 1.

6 Gina Neff et al., *Entrepreneurial Labor Among Cultural Producers: "Cool" Jobs in "Hot" Industries*, 15 SOC. SEMIOTICS 307, 325 (2005).

7 According to Sara Ziff, "show season is a *bi-annual* event that starts with New York Fashion Week, followed by London, Milan and finally Paris. Outside of show season there are many other kinds of modeling jobs (catalog, commercial, editorial, advertising) that take place throughout the year, but fashion week is important because it introduces the new trends of the season." E-mail from Sara Ziff, Dir., Model Alliance, to author (Mar. 3, 2013, 15:38 EST) (on file with author). *See also* Elysia Mann, *A Schedule of Fashion Weeks around the World*, FASHIONISTA (June 22, 2011, 18:30 EST), http://fashionista.com/2011/06/a-schedule-of-fashion-weeks-around-the-world/.

8 Jenna Sauers, *Marc Jacobs Doesn't Pay His Models, Says Model [Updated]*, JEZEBEL (Mar. 5, 2012, 11:00 EST), http://jezebel.com/5889757/marc-jacobs-doesnt-pay-his-models-says-model.

9 *Id.*

in which they work. Since the availability of legal recourse for systematic abuses in the modeling industry—including periods of unemployment,[10] nonpayment or late payment of services rendered,[11] and payment in "trade"[12] —is dependent upon a model's status under the law, inconsistent industry practices result across the globe.

This Note discusses the differences between the laws governing employees and independent contractors in Paris and New York City—the homes of Paris Fashion Week and New York Fashion Week, considered to be the two most influential events in the fashion industry[13]—and the legal protections stemming from the employment status of models working under those laws. Part II of this Note, *infra*, provides an overview of the occupation, specifically examining the role of modeling and talent agencies in models' careers and the international scope of models' work. In Part III, *infra*, the classification of workers as either independent contractors or employees in Paris and New York is discussed; additionally, provisions of the French labor laws pertaining to the employment of models in Paris are outlined in contrast to the labor laws pertaining to models working in New York City. Part IV, *infra*, proposes that the generally held notion that models in the United States are unequivocally independent contractors[14] is a fiction, and that many models working in New York City have actually been misclassified. It further proposes that employment relationships may exist between a number of models and their agencies, and that those models should have legal rights that are equivalent to those granted to models in France. By addressing the gap between law and practice, this Note seeks to bring attention to the legal recourse potentially available to models walking in New York Fashion Week, in order to further the protection of models and to eliminate the systematic abuses that persist within the modeling industry. Part V, *infra*, briefly introduces recent developments in the analysis of models' employment status in New York, such that the conversation within this Note is bound to continue

10 U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, MODELS (2012-2013), *available at* http://www.bls.gov/ooh/sales/models.htm.

11 Olivia Fleming, *Fashion Industry Initiative Cracks Down on Labels That Don't Pay Models (and That Includes You, Marc Jacobs)*, DAILY MAIL ONLINE (Mar. 27, 2012, 9:02 EST), http://www.dailymail.co.uk/femail/article-2120523/Fashion-industry-initiative-cracks-labels-dont-pay-models-includes-Marc-Jacobs.html.

12 Kit Johnson, *Importing the Flawless Girl*, 12 NEV. L.J. 831, 838 (2012).

13 Sara Bauknecht, *WhoWHATWhereWhy: Why Does New York Fashion Week Matter?*, PITTSBURGH POST-GAZETTE (Feb. 5, 2013), http://www.post-gazette.com/fashion/2013/02/05/WhoWHATWhereWhy-Why-does-New-York-Fashion-Week-matter/stories/201302050329.

14 Sauers, *supra* note 8.

post-publication thereof. And finally, Part VI, *infra*, concludes with recommendations on how to see that the findings of this Note are acknowledged in the American fashion industry.

## II. FASHION MODELING

Strictly speaking, "the job of modeling consists of showing clothes on a runway or posing for photographs."[15] As described in the U.S. Bureau of Labor Statistics' *Occupational Outlook Handbook*, models "pose for artists, photographers, or customers to help advertise a variety of products, including clothing, cosmetics, food, and appliances."[16] O*NET[17] describes the occupation as "[modeling] garments or other apparel and accessories for prospective buyers at fashion shows, private showings, or retail establishments. [Models] may pose for photos to be used in magazines or advertisements."[18] Models may be responsible for posing for artists and photographers; gathering information from agents concerning their jobs; traveling to castings to obtain jobs and attend fittings; and displaying clothing and merchandise in commercials, advertisements, and/or fashion shows.[19]

Although difficult to accurately measure, the number of individuals working as models in the United States has grown in recent years.[20] "In the never-ending search for new workers who can bring a unique 'look' to the industry, models are either picked off the streets or found in open calls or recruiting events that take place all over the world."[21] "Like fashion itself, the modeling industry moves in shorter cycles than ever before."[22] Because "the reservoir of fresh talent is enormous," and the

15 Neff et al., *supra* note 6, at 312.

16 U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *supra* note 10.

17 The Occupational Information Network (O*NET) is a database developed under the sponsorship of the U.S. Department of Labor/Employment and Training Administration and contains hundreds of occupational definitions. *About O*NET*, O*NET ONLINE, http://www.onetcenter.org/overview.html (last visited Mar. 3, 2013).

18 *Summary Report for: 41-0912.00 – Models*, O*NET ONLINE, http://www.onetonline.org/link/summary/41-9012.00 (last visited Oct. 1, 2013).

19 *Id.*

20 "[S]ince fashion models are constantly shuttling between 'shoots' and showing in cities around the world, no one know [sic] exactly how many models are working in New York City at any given time. In the past, some employment agencies provided fashion models as well as 'office personnel' (advertisement in Manhattan 'Yellow Pages' in 1970). Prior to 1991, the [Bureau of Labor Statistics] included models in the category 'sales personnel.'" Neff et al., *supra* note 6, at 313, n.5.

21 *Id.* at 324.

22 *Id.* at 325.

number of models has increased, models often feel easily substitutable and replaceable.[23] This feeling is especially true in the fashion industry, which is "all about change and the next big thing."[24]

A working relationship with a modeling or talent agency, also referred to as a management company, is often imperative for a model to book jobs.[25] Agencies typically represent models and earn their income via commission.[26] Agents will book jobs for models, bill clients for those jobs, and eventually pay models for their services.[27] After a model completes the job for which he or she was hired, the client (a fashion designer, for example) pays the agency, which then forwards the model his or her earnings (less the agency's standard twenty-percent commission and any expenses advanced by the agency to the model).[28] Agencies also collect fees from clients, normally consisting of a rate negotiated for the model's work and a standard twenty-percent service fee paid directly to the agency, for supplying the models.[29] Because agencies maintain significant control over the financial aspects of models' careers — in part because they collect the models' earnings from the clients and then cut the models a check, less their standard commission and fees[30] — they tend to be at the center of controversies within the industry. For example, one recent class-action lawsuit alleges top New York agencies including Wilhelmina, Ford and Elite Model Management, "gave inaccurate financial statements, concealed funds received on their clients' behalf, and used models' money for other expenses."[31]

Models frequently enter into fixed-term exclusive contracts with agencies (sometimes called "management companies"); these contracts have been described as "a model management company's most valuable assets."[32] The president of a top New York agency explains:

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23 *Id.* at 326 (quoting an unnamed fashion editor).

24 Johnson, *supra* note 12, at 857.

25 Neff et al., *supra* note 6, at 312.

26 Johnson, *supra* note 12, at 838.

27 *Id.*

28 Johnson, *supra* note 12, at 837.

29 *Id.*

30 Ziff, *supra* note 7.

31 Leonard Greene, *Suit Claims Looker Snooker*, N.Y. POST (Oct. 17, 2012, 3:45 AM), http://www.nypost.com/p/news/local/suit_claims_looker_snooker_LhNJC53VTyL2fdIumsQ67H.

32 Summons and Compl. at 8, Marilyn Model Mgmt., Inc. v. DNA Model Mgmt., LLC, No. 650129/2013 (N.Y. Sup. Ct. filed Jan. 14, 2013). In a recent complaint filed against model Constance Jablonski, DNA Model Management, LLC, and CJ Model Mgmt, LLC, agency Marilyn Model Management, Inc., seeks injunctive relief preventing DNA from managing Jablonski while she is under an exclusive contract with Marilyn and preventing Jablonski from utilizing the management services of any company in the Unites States other than Marilyn while

> The effective management and promotion of models require a significant investment of time and labor. Given these investments, and the losses that result from model departures, model management companies regularly enter into multi-year exclusive management agreements with their models. Under these agreements, the company manages and counsels the model in connection with modeling jobs and career development, and the model serves as an independent contractor and provides the company a commission. . . . The use of such multi-year exclusive contracts is a common and well-known practice in our industry.[33]

Agencies vary in size, and the number of models a single agency may potentially represent ranges from five models to several hundred.[34] An agency consisting of forty-five full-time agents and administrative employees is considered large by industry standards.[35] According to one source, the number of modeling agencies has steadily grown during the past five decades, with the Manhattan Yellow Pages listing "30 modeling agencies in 1950, 41 in 1965, 60 in 1979, 95 in 1985, 117 in 1998, 124 in 2000, and 132 agencies in 2002."[36]

While a modeling career is typically viewed as glamorous and deemed one of high-status, the reality is that very few working models actually can support themselves with modeling jobs alone: "[m]odeling work is structured in a typical status pyramid, with a small number of highly paid, highly visible jobs on top and larger numbers of lower paying jobs on the bottom."[37] At the top of the pyramid are jobs and campaigns held by supermodels, including representing "name" fashion designers or multi-national cosmetics firms in exclusive contracts for advertisements and runway work.[38] "Editorial" work[39] is also at the top

under contract with Marilyn (among other requests). *Id.* Although Jablonski is considered an independent contractor, her former agency Marilyn claims she does not have the freedom to provide her services to others in the industry. *Id.* The complaint states that

> [m]odel management companies like Marilyn regularly enter into multi-year exclusive management agreements with their models, wherein the company manages and counsels the model in connection with modeling jobs and career development, the model serves as an independent contractor, and the model provides the company commissions. The exclusivity and fixed durations of such model management contracts is well-known in the industry.

*Id.*

33 Chris Gay Aff., at 2, Marilyn Model Mgmt.

34 Neff et al., *supra* note 6, at 312.

35 *Id.*

36 *Id.*

37 *Id.* at 327.

38 *Id.*

39 Neff et al., *supra* note 6, at 327. "Editorial" work is when a model poses for photographs to illustrate articles in top-tier fashion magazines such as Vogue and Harper's Bazaar. *Id.* Sara

of the pyramid.[40] One level lower are models who walk in runway shows for lesser-known designers and pose for catalogs of retailers or for print campaigns of lower-status designers.[41] The third tier jobs includes posing for "look books" and providing "looks," as designers refine their styles throughout the design process.[42] Finally, the lowest-status modeling work includes posing for catalogs of chain and downscale stores, working as "fit" or "parts" models, and modeling clothes to stores' customers in "trunk shows."[43]

Runway work, although only one of many types of modeling work,[44] motivates this Note's analysis. "Runway work" is generally defined as walking in a fashion show, an event put on by fashion designers to showcase their upcoming line or collection of clothing.[45] A *New York Times* contributing columnist describes the general construction of a fashion show:

> A designer works with a stylist to focus a collection into a series of looks that constitute the show. This process often involves a look model upon whom different combinations of clothes and accessories are tested. The look model can be the designer's muse or a fit model whose proportions suit the designer's style. (The number of looks in a show varies; most have between 20 and 40, though some have as many as 80 or 90.)
>
> Integral to the creation of the show is the hair and makeup test. Here the lead (or key) hair and makeup artists work with the designer and stylist to establish the show's character.
>
> While the designer and stylist work with producers and technicians to create the look, feel and sound of the show, a casting director is tasked with finding models.
>
> Casting directors generally work on a number of shows and are always scouting for models to suit a range of designers. To that end, aspiring and established models have go-sees with casting directors. As shows loom closer, pre-castings narrow a selection of models to be presented to the designer and stylist.

Ziff explains that editorial work is necessary to get "tear sheets" for a model's portfolio, which can lead to booking paid, or higher-paying jobs. Editorial jobs are considered "good exposure," beneficial for the model's image, and can be prestigious (e.g., *Vogue* and *Dazed & Confused*), but they often pay little to nothing. A typical day rate for an editorial job is reportedly $150, which is then subject to agency commissions and fees. Ziff, *supra* note 7.

40 *Id.*

41 Neff et al., *supra* note 6, at 327.

42 *Id.* "Look books" are in-store catalogs, produced seasonally, and "looks" are when models try on clothes to allow the designer to edit and refine the style. *Id.*

43 *Id.*

44 Ziff, *supra* note 7.

45 Bauknecht, *supra* note 13.

> Casting involves arbitrage with model agents. Casting directors will request an option (first or second) for each model – a tentative booking that allows both sides to hedge their bets. Directors want the best models for their shows; agents want the best shows for their models. Fees are negotiated, schedules juggled and the shows get cast.
>
> After casting, fittings are held to match each look to a model and adjust the clothes accordingly. (Attending a fitting, however, does not guarantee a model will appear in the show.) Fittings conclude with rotation, where the order of the looks is finalized, both to establish the narrative of the show and to allow changing time for models with multiple looks. Fittings and re-fittings take place in the days and hours before a show, placing further pressure on the schedules of popular models.[46]

During the shows, models walk the runway in the style they have been given and, if instructed, stop in front of photographers.[47] Not all shows involve a runway, however; some designers host presentations during fashion weeks, "in which the models are (to a greater or lesser extent) static and the spectators come and go."[48] Presentations are typically cheaper to stage, and more informal and flexible for audiences, but tend to be longer in duration, usually lasting an hour or two, compared to a runway show's typical ten to fifteen minutes.[49]

In 1943, fashion shows began to be organized in what is now referred to as a "fashion week."[50] Four major fashion weeks are held in New York, London, Milan, and Paris (consecutively), in addition to fashion weeks held in an expanding number of locations including Dubai, Hong Kong, Cape Town, Amsterdam, Toronto, Miami, Dusseldorf, Copenhagen, San Francisco, Bali, Perth, Hoboken, Ho Chi Minh City, and Rio de Janeiro.[51] Despite the increasing prevalence of these events across the globe, the most influential are still New York Fashion Week and Paris Fashion Week, both semiannual events.[52] More than 300 shows are held during New York Fashion Week: around

46 Ben Schott, *Op-Chart: A Fashion Week Miscellany*, N.Y. TIMES (Sept. 8, 2012), http://www.nytimes.com/2012/09/09/opinion/sunday/a-fashion-week-miscellany.html?pagewanted=all&_r=0.

47 *Id.*

48 *Id.*

49 *Id.*

50 *See* Amanda Fortini, *How the Runway Took Off: A Brief History of the Fashion Show*, SLATE (Feb. 8, 2006, 17:28 EST), http://www.slate.com/articles/arts/fashion/2006/02/how_the_runway_took_off.html.

51 For a schedule of fashion weeks around the world in 2011 and 2012, *see* Mann, *supra* note 7.

52 *Fashion Show*, *supra* note 13.

eighty comprise Mercedes-Benz Fashion Week, held in Lincoln Center; forty comprise Made Fashion Week, located at Milk Studios; with the remaining shows held in "off-site" locations around New York City.[53]

The glamour associated with fashion weeks does not translate into high salaries for fashion models at large; only elite top models earn millions of dollars for their services, while many other models are recurrently in debt to their agencies.[54] As former model and now-Assistant Professor of Sociology at Boston University Ashley Mears explains, "The 'moon and the stars' is a pretty good way of describing the heights of a modeling career, with top models grossing millions a year, traveling the world, and socializing with celebrities."[55] However, the U.S. Bureau of Labor Statistics' *Occupational Outlook Handbook* lists the median pay for models in 2010 at just $32,920 per year, or $15.83 per hour.[56] An individual model's average earnings are nearly impossible to predict, due to wildly fluctuating monthly incomes.[57] This unpredictability results in part from the structurally unstable nature of work in cultural industries, and in part from the acquisition of modeling jobs on per-project, freelance, and contractual bases.[58] One breakdown of models' compensation for runway work reports: inexperienced models are paid "$0-bags, shoes, etc.," "new faces" are paid $1,000-$1,500, editorially important models are paid $5,000-$10,000,[59] and "A-list/Marquee" models receive $20,000-$25,000.[60] Despite these rough figures, "some designers are notoriously parsimonious — and get away with paying little (or nothing) because of their reputation. Conversely, models can walk for free, or reduced rates, for their friends."[61] Further to the point of minimal compensation, it is not uncommon for models to be paid in "trade," meaning clothing, for runway work for particular designers.[62] "Fashion Week, despite bringing over $400 million to [New York City] each year, is

53 Schott, *supra* note 46.

54 Ashley Mears, *Why Modeling Is, Technically Speaking, A 'Bad Job,'* THE MODEL ALLIANCE, http://modelalliance.org/2012/1621/1621 (last visited Sept. 8, 2013).

55 *Id.*

56 U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *supra* note 10.

57 Mears, *supra* note 54.

58 *Id.*

59 Addressing these figures, Sara Ziff points out that editorially important models, who are "runway regulars," actually earn around $1,500-$5,000, though earning $5,000 is rare. Ziff, *supra* note 7.

60 Schott, *supra* note 46.

61 *Id.*

62 *See* Johnson, *supra* note 12, at 837.

unprofitable work for most of the people wearing the designs."[63] Payment in trade is just one workplace practice with which models struggle (after all, rent and bills cannot be paid with a tank top, for example); even if models are promised monetary compensation for their services, it often proves difficult to collect payments in a timely fashion or at all.[64] And, because jobs typically do not last for extended periods of time (and sometimes for only a few hours),[65] many fashion models face periods of unemployment, work part-time, and manage unpredictable schedules.[66] "Modeling schedules are very fluid, things change at the last minute, and everything from the price to the time to the place of a job is always in flux," explains model Lisa Cant.[67]

According to one high-level agent at a top international modeling agency, the fashion industry is "a business without boundaries. When you work in this business, you are international; you are forcibly international."[68] Services are often rendered internationally, and models' employment statuses vary according to the respective labor laws as a result thereof. As discussed in Part III, *infra*, the generally accepted understanding that models working in New York City are independent contractors stands in stark contrast to the determination of models as employees of their agencies in Paris.[69] Consequently, the protections afforded to models walking in New York Fashion Week differ immensely from the protections available to those models who walk in Paris Fashion Week, just a few weeks later in the season, even if the very same models are walking at both events.[70] Further complicating the discussion of the legal protections available to models as workers is the fact that minors are often engaged to model as "adults,"[71] thus implicating another set of laws regulating child labor in each country where minors work.[72] No matter the model's age, though,

63 Ashley Mears, *Poor Models. Seriously.*, N.Y. TIMES (Sept. 14 2011), http://www.nytimes.com/2011/09/15/opinion/its-fashion-week-poor-models.html?_r=0.

64 *See* Fleming, *supra* note 11.

65 "A photo shoot in a studio would normally last for a full day, whereas a runway show would last a few hours. Photo shoots on location can last 2-3 days." Ziff, *supra* note 7.

66 U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *supra* note 10.

67 Lisa Cant, *Scaling Back on Modeling to Pursue Higher Education*, THE MODEL ALLIANCE, http://modelalliance.org/2012/transition/transition (last visited Sept. 8, 2013).

68 Neff et al., *supra* note 6, at 325.

69 *See* Sauers, *supra* note 8.

70 Mann, *supra* note 7.

71 "The fashion industry has no restrictions regarding who can model clothing for adults." Sara Ziff, *Regardless of Age, It's About Rights*, N.Y. TIMES ROOM FOR DEBATE (Nov. 12, 2012, 3:17 PM), http://www.nytimes.com/roomfordebate/2012/09/13/sweet-16-and-a-runway-model/regardless-of-a-fashion-models-age-its-about-rights.

72 Only the employment statuses of models over the age of eighteen will be discussed for the

"[b]ecause the modeling industry is crossing so many different borders, and all the laws are different, there's not a unified force that's regulating (the industry)," explains filmmaker Ashley Sabin.[73] This creates difficulty for models when it comes to understanding the legal protections afforded to them, and the duties they are required to abide by, when their work takes them across the globe.

## III. LAWS GOVERNING WORKERS IN PARIS AND NEW YORK

### *A. Fashion Models in Paris*

While a fashion model (or "*mannequin*" in French)[74] is generally considered a contractor under United States law—and "[h]igh-profile New York designers can offer models as little compensation as they please, because there is no law or regulation that forces them to do otherwise"—that is "not the case in France, where models are generally considered employees," explains former model Jenna Sauers.[75]

Under French labor law, the primary factors that distinguish an independent contractor from an employee include: (1) the independent contractor does not carry out duties in a subordinate position to the employer; (2) the independent contractor does not belong to the employer's organization; (3) the independent contractor performs services with different equipment or from different premises from the employer's employees; (4) the independent contractor submits invoices for specific services rendered over specific periods of time; and (5) the independent contractor must have completed all registration and declaration formalities to act as a contractor.[76] As is the case under United States federal and state law, French labor law imposes a number of requirements and obligations on the employer and employee when an employment relationship is established; those obligations, including disciplinary regulations, working-time regulations and paid holidays, are not imposed on parties when an independent contractor is engaged

purposes of this Note.

73 Isabel Teotonio, *Documentary Girl Model Reveals Underbelly of Modelling World*, THESTAR.COM (Apr. 12, 2012), http://www.thestar.com/living/article/1159404—documentary-girl-model-reveals-underbelly-of-modelling-world.

74 *English Translation of Mannequin*, OXFORDDICTIONARIES.COM, http://oxforddictionaries.com/us/translate/french-english/mannequin (last visited Feb. 11, 2013).

75 Sauers, *supra* note 8.

76 FRANÇOIS VERGNE & ANTOINE JOUHET, MORGAN, LEWIS & BOCKIUS LLP, *France*, *in* GETTING THE DEAL THROUGH: LABOUR & EMPLOYMENT 2012 104 (2012), *available at* https://www.morganlewis.com/pubs/GTDT-France-2012.pdf.

to perform services.[77]

The main statutes and regulations governing employment relationships in France are the Labour Code, administrative regulations, and collective bargaining agreements.[78] French law does not permit "at will" employment; the two types of employment in France are indefinite-term and fixed-term.[79] Written employment contracts are mandatory when a worker is hired as a temporary employee or on a fixed-term or part-time contract.[80] Although not strictly required by law in other circumstances, written employment contracts are recommended for evidentiary reasons.[81] Additionally, the European Directive of 14 October 1991 requires employers to provide written agreements to employees, and the particular collective bargaining agreement in place may also impose this obligation.[82] In fact, the collective convention pertaining to the employment of models (Convention collective nationale des mannequins adultes et mannequins enfants de moins de 16 ans employés par les agencies de mannequins du 22 juin 2004. arrêté du 13 avril 2005 JORF 27 avril 2005, or IDCC (Identifiant des conventions collectives) 2397) requires a contract provision specifying the characteristics of the service to be provided by the model be concluded in writing.[83] Other essential terms of employment contracts in France generally include the starting date of employment, the duration of the notice period, the worker's job description, the determined salary, the working time, the trial period, and the contract's term.[84]

In France, a fixed-term contract may only be used to hire an

77 *Id.* at 104-05.

78 *Id.* at 103.

79 INTERNATIONAL LABOR AND EMPLOYMENT LAW: A PRACTICAL GUIDE 66 (Philip M. Berkowitz et al. eds., 2d ed. 2006).

80 VERGNE & JOUHET, *supra* note 76.

81 *Id.*

82 *Id.*

83 Convention collective nationales des mannequins adultes et mannequins enfants de moins de 16 ans employés par les agencies de mannequins du 22 juin 2004 [National collective agreement on adult models and child models under 16 years old employed by modeling agencies on June 22, 2004], Apr. 13, 2005, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 27, 2005 (Fr.), *available at* http://legifrance.gouv.fr/affichIDCC.do;jsessionid=3C08CFDEF8C5781C9FE3B999F3CDA67E.tpdjo11v_1?idSectionTA=KALISCTA000005748750&cidTexte=KALITEXT000005671708&idConvention=KALICONT000005635138.

84 VERGNE & JOUHET, *supra* note 76. Further terms required by the collective convention to be included in models' contracts are available at: National collective agreement on adult models and child models under 16 years old employed by modeling agencies on June 22, 2004, *supra* note 83.

employee to perform a precise and temporary task under certain circumstances.[85] Those circumstances, strictly defined by law, include:

> to replace an employee who is temporarily absent or whose contract is temporarily suspended; to temporarily replace an employee whose job is being eliminated; to temporarily fill a vacant job position while awaiting the arrival of a new employee (for a maximum of nine months); to deal with a temporary increase in business activity; or to hire for seasonal work or in business sectors in which fixed-term contracts are standard practice.[86]

Morgan, Lewis & Bockius LLP report that the maximum duration of fixed-term employment contracts is typically eighteen months, with an extension to twenty-four months available under certain conditions.[87]

Ali Grace Marquart, former Deputy General Counsel and Director of Business & Legal Affairs at Wilhelmina International, Ltd., explains that fashion models working in France have two distinct employment statuses under French law: with regard to their physical work as models, they are considered employed workers and subject to the labor laws; with regard to the right to the use of their image, they are considered independent workers.[88] Consequently, models cannot provide services in France on a freelance basis but must be employed by a modeling agency.[89] The employment status of the model is limited to each single booking and is not considered long-term employment.[90] Models enter into two contracts with their agencies: one concerns collaboration with the model (known as the "convention de collaboration"), and the other concerns the conditions of the representation and the exploitation of the model's image (referred to as the "mandate civil de représentation").[91] The conditions of these contracts, ruled by the prescribed conditions of a collective convention registered with the Ministry of Labour, are the same for all French modeling agencies.[92] According to an English-

85 VERGNE & JOUHET, *supra* note 76.

86 *Id.*

87 *Id.*

88 Tax and social charges on the income derived from a model's physical work and from the transfer of the right to use a model's image will not be discussed for purposes of this Note. E-mail from Ali Grace Marquart, Deputy Gen. Counsel and Dir. of Bus. & Legal Affairs, Wilhelmina Int'l, Ltd., to author (Sept. 7, 2012, 16:40 EST) (on file with author). Tax and social charges on the income derived from a model's physical work and from the transfer of the right to use a model's image will not be discussed for purposes of this Note.

89 *Id.*

90 *Id.*

91 *Id.* A copy of the "mandate civil de representation" is *available at* http://legifrance.gouv.fr/affichIDCC.do;jsessionid=3C08CFDEF8C5781C9FE3B999F3CDA67E.tpdjo11v_1?idConvention=KALICONT000005635138&cidTexte=KALITEXT000005671722.

92 Marquart, *supra* note 88.

language translation of the collective convention pertaining to the employment of models (IDCC 2397),[93] its provisions supersede the terms within employment contracts when those terms are less favorable to the employee models.[94] Acting pursuant to the terms of the collective convention must not result in a restriction of benefits for models, including benefits acquired through business customs in place prior to the date of the convention's entry into force.[95] The collective convention further establishes that a model's gross salary cannot be less than the following prescribed rates: 33% for press; 36% for advertisements; and 31% for all services provided by minors.[96] In all cases, these percentages are not to be used to determine a model's gross remuneration.[97] The convention also establishes specific payment conditions for particular modeling services, including an increase of 50% of a model's gross salary level for lingerie services and a 100% increase in a model's gross wage level for nude photographs.[98] Further, it determines that models are covered by their modeling agency employers' insurance plans for on-the-job accidents that occur in the normal course of the modeling profession.[99]

The collective convention requires the "mandate civil de représentation" be in writing and signed by both parties.[100] Additionally, an English-language version of that contract is to be provided to models that do not speak French.[101] According to an English-language translation of its purpose and scope, the mandate civil de représentation aims to define the representation entrusted by the model to his or her agency.[102] In return for remuneration to be paid in accordance with the mandate, the agency is to assist the model with the promotion, sale, exploitation, or reproduction of the model's image, as well as with the promotion or sale of the model's services to the agency's clients throughout the world.[103] Pursuant to Articles 1984 through 2010 of the French Civil Code, the model vests his or her modeling agency with the following powers: authorization to use the

93 National collective agreement on adult models and child models under 16 years old employed by modeling agencies on June 22, 2004, *supra* note 83.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

model's image in the context of promoting the model; the ability to sell, exploit, or reproduce work created as a result of the model's employment contract with the agency; to negotiate with clients regarding assignment of the model's reproduction rights, use of the model's image in media, and use of the model's name and general attributes of his or her personality; to regulate contracts, order confirmations, and deeds of sale after the client provides details on the purpose of use of a particular image; to monitor execution of these contracts; to collect the proceeds of the model's rights; and to recover any debts owed by clients in the case of non-payment or misuse.[104] The mandate's terms also establish that the modeling agency will invoice its clients for a commission of 20% of the income derived ("commission received from the client/user"), and the agency will receive 20% of the net income derived from the rights, less the previous commission, from the model ("commission for representing the model").[105]

Because fashion models, including those that walk in Paris Fashion Week, enter into employment relationships with their agencies for work in France, they are covered by a number of French labor laws that independent contractors in France do not receive protection under.[106] Under French labor laws, a typical workweek is thirty-five hours (unless otherwise specified by the applicable collective bargaining agreement), and the number of overtime hours an employee is permitted to work is specifically limited by the collective bargaining agreement or by the law.[107] Additionally, an employee is prohibited from working more than ten hours in a single day.[108] Failure to abide by the applicable rules and regulations governing working hours may result in a maximum fine of €750 for individual employers or €3,750 for legal entity employers.[109] Employees are also entitled to statutory social security benefits and are covered against unemployment risk.[110] These benefits are paid through social security contributions by the employee (at a rate of approximately 20% of the employee's gross salary) and by the employer (at a rate of approximately 45% of the employee's gross

104 *Id.*

105 *Id.*

106 VERGNE & JOUHET, *supra* note 76, at 104-05.

107 "[B]eyond such limit, the employee must benefit from a mandatory compensatory rest period in addition to the overtime." *Id.* at 105.

108 *Id.*

109 These fines are multiplied by the number of employees involved by the violation of the law. *Id.*

110 *Id.* at 106.

salary).[111]

The Labour Code protects employees in France from harassment and discrimination in the workplace:[112]

> Pursuant to article L1132-1 of the Labour Code, an employer must not take into account an employee's origin; gender; morals; sexual orientation; age; family situation; pregnancy; genetic characteristics, real or assumed; belonging or non-belonging to an ethnic group, nation, or race; political opinions; union or mutual activitie [sic]; religious beliefs; physical appearance; family name; state of health; or handicap to hire, sanction, dismiss, promote or reward.[113]

Further, an employer may not discriminate against part-time or fixed-term employees on the basis that those employees are not employed permanently or full-time.[114] The Ministry of Labour, represented by regional and department directors and by labor inspectors organized through regional bodies, administers French labor law.[115] The labor courts judicially enforce those laws.[116]

One important distinction between a model's relationship with modeling agencies for work rendered in Paris and a model's relationship with his or her agency for work rendered in New York City is the agency's ease in and ability to terminate the working relationship with a model. In France, "[a]n employer must have a real and serious cause to terminate the employment agreement and must comply with all applicable dismissal procedures (on economic or personal grounds)."[117] While there is no legal definition for "real and serious cause," a judge will determine whether the dismissal was legitimate on a case-by-case basis.[118] Models cannot be "dropped" from their modeling agencies in France for any reason or no reason at all, as is done with models seemingly working as independent contractors in New York.[119] According to the French courts, the cause for dismissal must be "real" (i.e., exact, precise, and objective), and "serious" (i.e., justifying the termination of the employment contract).[120] Further, an employer must give a notice period prior to dismissing employees.[121] Models working

111 *Id.*
112 *Id.* at 103.
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.* at 107.
118 *Id.*
119 Mears, *supra* note 54.
120 VERGNE & JOUHET, *supra* note 76, at 107.
121 *Id.* at 108. Employers may release an employee from working during such notice period,

in New York City often fear retaliation for speaking out against improper or repressive agency practices,[122] in part due to the commonly held belief that models are independent contractors and thus have little to no recourse under the law.[123] However, the protection afforded by the "real and serious cause" requirement for dismissal in France may contribute to surmounting this type of fear.

Another key difference between the laws applicable to models when they work in Paris and those applicable when they work in New York City is the models' ability to bring a class-action lawsuit. Class actions, or collective actions, are not permitted under French law; employees may only assert labor and employment claims on an individual basis in France.[124] Several employees may, however, petition the court to join their claims into a single procedure.[125] While models in New York have the legal ability to bring class-action suits,[126] again, the fear of retaliation by the industry may prevent models from actually stepping forward to speak out against the complained-of practices. In 2004, a class-action lawsuit was brought against ten of the biggest modeling agencies in New York City—including Elite, Next, Wilhelmina, and Ford—for alleged price fixing.[127] The agencies settled the lawsuit for nearly $22 million, "to be divided among 'models who have or had a written or oral contract with one of the Settling Defendants.'"[128] In the end, the court was unable to find enough models to step forward and collect the money—either because too few models knew about the lawsuit, or because "most of the wronged parties decided that stepping forward wasn't worth the risk to their reputations in the industry"—and the uncollected several millions of dollars were donated to charitable causes, including Columbia Presbyterian Medical

however, and pay an indemnity in lieu of proper notice. *Id.* This indemnity equals the base salary, bonuses, and benefits that the employee would have received if working during the notice period. *Id.* The employee may also ask to be released from working during the period, with the contingency that he or she would forgo any indemnity. *Id.*

122 Mears, *supra* note 54.

123 Sauers, *supra* note 8; *see* discussion *infra* Part IV.

124 VERGNE & JOUHET, *supra* note 76, at 108. All claims regarding an employee's salary or discrimination are subject to a five-year statute of limitations following the date of the alleged violation or discrimination by the employer. *Id.* at 109. All other claims are subject to a thirty-year statute of limitations. *Id.*

125 *Id.* at 108.

126 Drew Grant, *The Sorrow and the Pretty: Model Alliance Looks to Empower the Ridiculously Good-Looking*, THE N.Y. OBSERVER (Sept. 4, 2012, 7:19 PM), http://observer.com/2012/09/the-sorrow-and-the-pretty-model-alliance-looks-to-empower-the-really-really-ridiculously-good-looking/.

127 *Id.*

128 *Id.*

Center's Eating Disorders Program.[129] The legal ability to bring a class action lawsuit in New York City appears to be a benefit for models on its face, but it is unlikely to serve as an effective means of attaining recourse for unjust industry practices, when the fear of replacement[130] and industry retaliation is so prevalent.

### *B. Fashion Models in New York City*

Fashion models working in the United States, including those walking in New York Fashion Week, are commonly perceived to be, and essentially are universally accepted as, independent contractors.[131] It is often stated that "[t]he modeling industry is largely unregulated: Models are independent contractors without basic employment rights like workplace protection and minimum age and wage requirements."[132] Former model Jenna Sauers describes the implications that stem from this widely held belief: "Models are generally considered independent contractors under U.S. law, which means that many basic provisions of employment law—including minimum wage, mandatory breaks, worker's compensation for injuries on the job site, and even protection from sexual harassment—do not apply."[133] Classifying a worker as an independent contractor, as opposed to as an employee, allows businesses to compensate those workers without withholding federal, state, and social security taxes.[134] Further, businesses are able to avoid paying workers' compensation and unemployment insurance, as well as employment taxes.[135] It has been said that, "[i]n an era of increasingly narrow profit margins, American companies have sought out various methods to cut costs without significantly affecting their profit making and production capabilities. One method companies have utilized to accomplish this goal is to change the composition of their

129 *Id.*

130 Mears, *supra* note 54.

131 Sara Ziff, *The Ugly Truth of Fashion's Model Behaviour*, THE GUARDIAN (Feb. 13, 2012, 11:28 EST), http://www.guardian.co.uk/commentisfree/cifamerica/2012/feb/13/ugly-truth-fashion-model-behavior. "[Because] models are considered to be 'independent contractors', [sic] the rule of law in terms of workplace standards does not exist," explains Ziff. *Id.*

132 Hayley Phelan, *The Model Alliance's Industry Survey Finds Nearly 30% of Models Have Been Sexually Harassed and 50% Exposed to Cocaine*, FASHIONISTA (Mar. 16, 2012, 5:45 PM), http://fashionista.com/2012/03/model-alliances-industry-survey-finds-nearly-30-of-models-have-been-inappropriately-touched-on-jobs-and-50-exposed-to-cocaine/.

133 Sauers, *supra* note 8.

134 Tracey A. Cullen, *What a Tangled Web We Weave: The Independent Contractor Snarl*, 15:5 N.Y. EMP. L. LETTER 1 (2008).

135 *Id.*

workforce."[136] The U.S. Bureau of Labor Statistics classifies more than ten million workers, or 7.4% of the United States workforce, as independent contractors.[137]

Even if a business genuinely believes that one of its workers is an independent contractor rather than an employee—and though signed agreements that include express statements that the worker is an independent contractor and not an employee of the company may serve to support this belief—proper classification necessarily "depends on the degree of supervision, direction, and control exercised over the worker, not only in regard to the results but also to the means, manner, and methods of the services provided."[138] "The mere designation by the employer of an independent contractor status, even if accepted by the individual, is not conclusive."[139] The Unemployment Insurance Division of the New York State Department of Labor has expressly stated that a written agreement purporting to establish a worker's employment status does not preclude examining the facts surrounding that working relationship to determine whether the worker is an employee or an independent contractor.[140] Former General Counsel of Ford Models Doreen Small reveals that "[t]he contracts [that models enter into with their agencies] are very clear. . .[T]hey take pain to point out the models are independent contractors."[141] However, as described above, the mere designation of a worker as an "independent contractor" is not conclusive of such a status.[142]

Unfortunately, in the United States, no single standard has emerged to distinguish between employee and independent contractor.[143]

136 FASHION LAW: A GUIDE FOR DESIGNERS, FASHION EXECUTIVES, AND ATTORNEYS 202 (Guillermo C. Jimenez & Barbara Kolsun eds., 1st ed. 2010).

137 Jeffrey A. Eisenach, *The Role of Independent Contractors in the U.S. Economy*, NAVIGANT ECONOMICS i (2010), *available at* http://www.itsmybusiness.com/wp-content/uploads/2012/07/Eisenach-Study_Navigant-Economics_Role-of-ICs.pdf.

138 Cullen, *supra* note 134.

139 N.Y. STATE DEP'T OF LABOR UNEMPLOYMENT INS. DIV., INDEPENDENT CONTRACTORS, IA 318.14 (6-93), *available at* http://www.labor.state.ny.us/ui/pdfs/ia31814.pdf.

140 N.Y. STATE DEP'T OF LABOR UNEMPLOYMENT INS. DIV., INDEPENDENT CONTRACTORS, IA 318.14 (7-12), *available at* http://www.labor.ny.gov/formsdocs/ui/ia318.14.pdf.

141 Doreen Small, Esq., Of Counsel, Golenbock Eiseman Assor Bell & Peskoe LLP, Address at Violations En Vogue? Labor and Employment Laws Concerning Fashion Models and Interns (Feb. 12, 2013).

142 Cullen, *supra* note 134.

143 SUSAN N. HOUSEMAN, U.S. DEP'T OF LABOR, *9.1 Who is an Employee? Determining Independent Contractor Status, in* FUTUREWORK: TRENDS AND CHALLENGES FOR WORK IN THE 21ST CENTURY (1999), *available at* http://www.dol.gov/oasam/programs/history/herman/reports/futurework/conference/staffing/9.1_contractors.htm#.UKBAeTmhDzI.

Further, workers classified by one governmental agency as employees may be classified by another agency as independent contractors.[144] Broadly speaking, three primary categories of tests are invoked to determine a worker's status as either an employee or a contractor: (1) the state common law standard; (2) the economic realities test; and (3) a hybrid or combination test.[145] Under any of these standards, regulatory agencies generally begin with the proposition that most, if not all, workers are employees, and then require the employer-entity to bear the burden of persuading the agency to the contrary.[146]

New York state courts and administrative agencies, including the New York State Department of Labor and Workers' Compensation Board, have applied traditional common law rules to determine employment status.[147] These common law principles are judge-made law, not statutory enactments. According to the Department of Labor, courts have found that no single factor or group of factors conclusively defines an employer-employee relationship, and all factors are reviewed to determine the degree of supervision, direction, and control exercised by the employee over his or her services.[148] The Department of Labor instructs that:

> [w]orkers may be employees if the employer *controls key parts* of the work done, other than results and means.
>
> For example, a referral agency usually does not directly supervise the people it refers for jobs. But, it could be their employer, if it controls: [c]lient contact, [w]ages, [b]illing and collection from clients.[149]

Independent contractors are described as free from supervision, direction, and control in the performance of their services, and as "in business for themselves, as they *offer their services* to the public."[150]

The New York State Department of Labor Unemployment Insurance Division issued a policy statement enumerating the factors it

144 DEAN L. SILVERBERG, EPSTEIN BECKER & GREEN, P.C., WHO IS YOUR EMPLOYEE?: INDEPENDENT CONTRACTORS AND OTHER CONTINGENT WORKERS 2 (2010).

145 Eisenach, *supra* note 137, at 5-6.; SILVERBERG, *supra* note 144.

146 SILVERBERG, *supra* note 144.

147 *Id.* at 3.

148 *Unemployment Insurance: Independent Contractors* [Independent Contractors], U.S. DEP'T OF LABOR, http://www.labor.ny.gov/ui/dande/ic.shtm (last visited Sept. 8, 2013).

149 *Unemployment Insurance: UI and Independent Contractors* [UI and Independent Contractors], U.S. DEP'T OF LABOR, http://www.labor.ny.gov/ui/claimantinfo/ui%20and%20independent%20contractors.shtm (last visited Sept. 8, 2013).

150 *Id.*

considers in determining employment status for unemployment insurance purposes.[151] This statement elaborates upon the determination of employment status through application of common law principles: "While the law does not define an independent contractor, court decisions have held that the common law tests of master and servant must be applied in making a determination of whether services rendered by an individual are in the capacity of an employee or an independent contractor."[152] Significant indicators of an employment relationship include: control over the worker's activities; requiring the worker to comply with instruction as to when, where, and how to perform the services; direct supervision over the services; providing facilities, equipment, or supplies for performance of the services; setting a rate of pay; providing compensation in the form of a salary, hourly rate of pay, or a drawing account against future commissions without required repayment of unearned commissions; providing reimbursement or allowance for business and travel expenses; providing fringe benefits; providing training; establishing territorial, monetary, or time limits within which the worker must operate; requiring services to be rendered personally; requiring reports; whether the services being performed are an integral part of the business; furnishing means of identification of the worker as a representative of the employer; restricting the worker from providing services for competitive businesses; reservation of the right to terminate the services on short notice; and the nature of the services.[153] The statement notes that it is "immaterial if the services are performed on a full-time, part-time, or casual basis."[154] The Internal Revenue Service ("IRS") has also adopted a common law standard[155] and invokes a test consisting of twenty criteria, with a primary focus on the "right-to-control" by the putative employer, where each factor is designed to evaluate who controls the performance of the service.[156]

151 SILVERBERG, *supra* note 144, at 3.

152 *Id.* at Appx A.

153 *Id.*

154 *Id.*

155 *Id.* at 3.

156 *Id.* According to the IRS, in determining whether the person providing the service is an employee or an independent contractor, all information providing evidence of the degree of control and independence while performing the services must be considered. *Id.* at Appx B. A worker does not have to meet all of the following criteria to qualify as an employee or independent contractor, and no single factor is determinative: (1) level of instruction; (2) amount of training; (3) degree of business integration; (4) extent of personal services; (5) control of assistants; (6) continuity of the relationship; (7) flexibility of schedule; (8) demands for full-time work; (9) need for on-site services; (10) sequence of work; (11) requirements of providing reports; (12) method of payment; (13) payment of business or travel expenses; (14) provision of

An economic realities test is utilized by some federal courts and agencies and focuses on how economically dependent the worker is on the business that he or she serves.[157] This test strongly suggests that a worker who is highly dependent on the business served, and who derives a substantial portion of his or her income from such business, is an employee.[158] This test also considers factors such as the skill required to perform the services, whether the work provided is an integral part of the business, the parties' intent, and whether the putative employer pays social security taxes or provides fringe benefits to the worker.[159]

Other federal courts and agencies employ a hybrid test, combining the factual control and financial dependence inquiries described above.[160] The court deciding Fair Labor Standards Act ("FLSA" is one federal law applicable to workers classified as employees) case, *Schultz v. Capital Int'l Sec., Inc.*,[161] identified and applied six factors used to determine security workers' status as employees: (1) the degree of control that the putative employer has over the manner in which the services are to be performed; (2) the worker's opportunity for profit or loss according to his or her managerial skill; (3) the worker's investment in materials or equipment; (4) the degree of skill required for the work; (5) the degree of permanence of the working relationship; and (6) the degree to which services rendered are an integral part of the putative employer's business.[162] The U.S. Department of Labor Wage and Hour Division also notes that the U.S. Supreme Court has indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for FLSA purposes: "The Court has held that it is the total activity or situation which controls."[163]

The application of numerous state and federal laws depends upon a

tools and materials; (15) investment in facilities; (16) realization of profit or loss; (17) work for multiple companies; (18) availability to the public; (19) control over discharge of the worker; and (20) right of termination. *Id. See also Independent Contractor (Self-Employed) or Employee?*, IRS.GOV, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-(Self-Employed)-or-Employee%3F (last visited Sept. 8, 2013).

157 *See, e.g.*, Brock v. Superior Care, Inc., 840 F.2d 1054, 1057-58 (2d Cir. 1988) (where nurses who worked for a healthcare business engaged in referring temporary personnel to locations such as hospitals and nursing homes were considered employees for FLSA purposes).

158 SILVERBERG, *supra* note 144, at 5.

159 *Id.*

160 *Id.* at 2.

161 Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298 (4th Cir. 2006).

162 Schultz, 466 F.3d at 304-05.

163 U.S. DEP'T OF LABOR WAGE AND HOUR DIV., FACT SHEET #13: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2009).

worker's classification as an employee.[164] The relevant New York state[165] laws include:[166] the New York State Labor Law provisions relating to the payment of wages, overtime, and unemployment compensation[167] and the New York State Workers' Compensation and Disability Benefits Law, which provides for the payment of medical care and salaries when employees are injured on the job..[168] Additionally, the New York Human Rights Law (NYHRL) protects against employment discrimination.[169] Federal laws applicable to workers classified as employees include:[170] the Fair Labor Standards Act (notably those provisions relating to wages, overtime and unemployment compensation),[171] Title VII of the Civil Rights Act of 1964,[172] the Employee Retirement Income Security Act of 1974 (ERISA),[173] the Age Discrimination in Employment Act (ADEA),[174] the Americans with Disabilities Act (ADA),[175] the Internal Revenue Code,[176] and the National Labor Relations Act (NRLA) (which regulates the rights of workers and unions under federal law).[177] Nearly all of the protections for workers under those laws apply only in the instance of an employment relationship; independent contractors are excluded from coverage.[178]

Misclassification of employees as independent contractors is of growing concern for various state and federal agencies in the United

164 SILVERBERG, *supra* note 144, at 1.

165 While this Note describes a number of New York State laws, many other jurisdictions have analogous statutes regulating the employee-employer relationship, and the fact that an employer is in compliance with federal law will not insulate it from liability under state and local laws. FASHION LAW, *supra* note 136, at 175.

166 SILVERBERG, *supra* note 144, at 1.

167 N.Y. LAB. LAW §§ 190-199-A (McKinney 2009) cover payment of wages, and N.Y. LAB. LAW §§ 500-643 (McKinney 2002) contain the Unemployment Insurance Law.

168 N.Y. WORKERS' COMP. LAW §§ 1-401 (McKinney 2005).

169 N.Y. EXEC. LAW §§ 290-301 (McKinney 2005).

170 SILVERBERG, *supra* note 144, at 1.

171 29 U.S.C. §§ 201-219 (2012). According to the U.S. Department of Labor Wage and Hour Division, "[a]n employment relationship under the FLSA must be distinguished from a strictly contractual one. Such a relationship must exist for any provision of the FLSA to apply to any person engaged in work which may otherwise be subject to the Act." U.S. DEP'T OF LABOR WAGE AND HOUR DIV., *supra* note 163.

172 42 U.S.C. §§ 2000e-2000e-17 (2012).

173 Pub. L. No. 93-406 (1974) (codifed as amended in scattered sections of 29 U.S.C.).

174 29 U.S.C. §§ 621-634 (2012).

175 42 U.S.C. §§ 12101-12213 (2012).

176 I.R.C. §§ 1-9834 (West 2013).

177 29 U.S.C. §§ 151-169 (2012).

178 SILVERBERG, *supra* note 144, at 2.

States.[179] As author Steven Greenhouse explains in the *New York Times*, "[o]ne federal study concluded that employers illegally passed off 3.4 million regular workers as contractors, while the Labor Department estimates that up to 30 percent of companies misclassify employees."[180] Because there is no bright-line test establishing whether an employment relationships exists, many workers are improperly classified as independent contractors; employers are consequentially exposed to liability arising from the various federal and state labor, employment, and tax laws implicated by a worker's true "employee" status.[181] New York State in particular has had a renewed focus on misclassifications.[182] On September 5, 2007, then-Governor Eliot Spitzer signed an executive order creating the Joint Enforcement Task Force on Employee Misclassification, which has centralized the efforts of various agencies in investigating misclassifications.[183] In 2010, the National Employment Law Project determined that more than 300,000 low-wage employees in New York City were victims of wage theft.[184] Wage theft includes, but is not limited to, the failure to pay minimum wage and overtime, requiring off-the-clock work, pilfering tips, and notably, misclassifying workers.[185] Recent developments in New York, such as the introduction of the Wage Theft Prevention Act,[186] illustrate that the issues of wage nonpayment and employment status misclassification are at the forefront of both legislative and enforcement initiatives in the state.[187]

Despite this "crackdown" on misclassification, it has been argued that workers actually have become *more* reluctant to challenge the practice of being passed off illegally as independent contractors when employer-employee relationships do exist.[188] This reluctance may be especially prevalent within a particular occupation—such as fashion

179 Steven Greenhouse, *U.S. Cracks Down on 'Contractors' as a Tax Dodge*, N.Y. TIMES (Feb. 18, 2010), http://www.nytimes.com/2010/02/18/business/18workers.html?pagewanted=all.

180 *Id.*

181 SILVERBERG, *supra* note 144, at 1.

182 Cullen, *supra* note 134, at 2.

183 *Id.* The task force is comprised of the Commissioner of the New York Department of Labor, the New York State Attorney General, the Commissioner of Taxation and Finance, the Chair of the New York State Workers' Compensation Board, and the Comptroller of the City of New York. *Id.*

184 Ian Gabriel Nanos, *Crackdown on Wage Theft: If You Don't Pay the Time, You Might Be Committing a Crime*, 17:10 N.Y. EMP. L. LETTER 5 (2010).

185 *Id.*

186 2010 N.Y. Sess. Laws Ch. 564 (S. 8380) (McKinney).

187 Nanos, *supra* note 184, at 1-2.

188 SILVERBERG, *supra* note 144, at 1.

modeling—that is perceived (without question or skepticism), by its industry and the public at large, as being comprised of independent contractors.[189]

## IV. POTENTIAL MISCLASSIFICATION OF MODELS IN NEW YORK

Although consistently accepted as true, the notion that all fashion models in New York City are necessarily independent contractors[190] is a fiction. Many models may have been misclassified as independent contractors when, in reality, they have established employment relationships with their agencies.[191] If a model has been misclassified, U.S. federal and state laws should provide such a model with many of the protections that models receive as employees under French labor laws.[192] Those protections would address the problems stemming from independent contractor status, and should include compensation during periods of unemployment,[193] the timely receipt of earnings,[194] and freedom from payment in trade[195] – all systematic industry practices that many fashion models in New York struggle with, particularly in the early stages of their careers.

Models' access to legal recourse for these industry-wide practices is dependent upon models being employees.[196] It is not the case that models are always considered employees, though.[197] In fact, the employment statuses of models walking during the two largest fashion weeks in the world are starkly different.[198] Attorney Doreen Small explains:

> In France, models are actually deemed to be employees of their agencies by virtue of French law, but here [in New York], the agencies and clients go to great pains to say that the models are independent contractors. As independent contractors, the modeling agencies and clients don't have to give models any benefits, [and the] model is not entitled to unemployment compensation.[199]

189 Sauers, *supra* note 8.

190 *Id.*

191 Summons and Compl., Marilyn Model Mgmt., Inc.; Chris Gay Aff., Marilyn Model Mgmt., Inc.

192 Sauers, *supra* note 8.

193 U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *supra* note 10.

194 Fleming, *supra* note 11.

195 Johnson, *supra* note 12.

196 SILVERBERG, *supra* note 144, at 1.

197 Small, *supra* note 141.

198 *Id.*

199 *Id.*

When asked if any legal obligations exist without the establishment of an employment relationship, that constrain what agencies are able to do, or that regulate the agencies in any way, Small answered with a succinct, "No."[200] She continued:

> [There is] not even a fiduciary obligation . . . there is the contract, [but] we talk about it quite a bit in the context of modeling—a lot has to deal with the [parties'] leverage . . . [when] you're just starting out you don't have any leverage and you basically have to take the contract as it is given to you . . . [I]f you go to your agent here in New York and say they haven't gotten you a job in six months, they can hold you to the contract.[201]

This is the understanding of the working relationship between model and agency, and the industry has accepted it without question: models are not employees of their agencies, and thus the only instrument regulating the working relationship is the contract the models enter into, often with little or no bargaining power.

This Note proposes that the widely accepted conclusion that all models in New York City are unquestionably independent contractors[202] is a fiction. Many models may actually be employees of their modeling agencies, and have been consistently misclassified as independent contractors by their agencies, in part as a result of models' lack of bargaining power stemming from the often short-lived life-spans of their careers.[203] Previous Unemployment Insurance Appeal Board decisions issued in New York have also reached the conclusion that certain models are actually employees,[204] in reliance on Appellate Division cases.[205] The New York State Department of Labor has additionally determined that models have the ability to be employees of their agencies and are not independent contractors in any and all circumstances.[206] Whether an employment relationship exists is an

200 *Id.*

201 *Id.*

202 Sauers, *supra* note 8.

203 Ziff, *supra* note 2.

204 *See* Appeal Bd. No. 549524 (N.Y. Unemployment Ins. Appeal Bd. July 14, 2010); Appeal Bd. No. 540808 (N.Y. Unemployment Ins. Appeal Bd. July 8, 2008).

205 *See* In re Caufield-Ori, 233 A.D.2d 558 (1996); In re McDonald/Richards, Inc., 232 A.D.2d 916 (1996); In re Szymanski, 89 A.D.2d 691 (1982).

206 In *In re Lerczak*, 156 A.D.2d 882, 882 (1989), the New York State Supreme Court, Appellate Division Third Department mentions that during Rosalind Lerczak's predecessor's ownership of June II Model Agency, "the Department of Labor, following an audit, determined that the models were the Agency's employees and not independent contractors." The website of law firm Weil, Gotshal & Manges states that it defended Elite Model Management Corp. and its parent company, The Trump Group, in a New York Department of Labor investigation and audit that determined whether models are employees or independent contractors of a modeling agency;

issue of fact, and various criteria must be balanced against each other[207]—so while no hard-and-fast rule applicable to all fashion models' employment statuses can exist, it is highly probable that a factual analysis of the working conditions of many models in New York would result in the herein-proposed conclusion that an employment relationship exists between a number of those models and their modeling agencies.[208]

While the idea of working as an independent contractor may appear promising—including the prospect of "being one's own boss" by having the ability to perform services free from supervision, direction and control[209] — these vague generalizations of the contractor status ought not form the basis of an argument against discussing potential misclassifications of workers, especially in the case of fashion models. In reality, fashion models often are unable to control any details surrounding the modeling jobs they book,[210] and may even be unable to offer their services to the public at large, due to the terms of the exclusive agreements models frequently enter into with agencies.[211] In fact, attorney Doreen Small notes that models often do not have control over decisions at the core of their occupation, including setting fees or terms for their services: the "model doesn't negotiate the fees; the agency negotiates the fee."[212] Ashley Mears explains further: "Because modeling is freelance work done on a per-project basis, models don't receive benefits, have little control over the conditions of their work and never know when their next job is coming. They are arbitrarily selected and easily dismissed."[213] A model's relationship with his or her agency

the investigation ultimately concluded that the Elite models were independent contractors. *Wage and Hour Litigation and Counseling*, WEIL, GOTSHAL & MANGES LLP, http://www.weil.com/practiceareas/Transactions.aspx?service=2583 (last visited Mar. 3, 2013). However, this conclusion does not impact the legal classification of all models, and only speaks to enforcement. The determination of employment status is fact-specific, and the Elite audit does not preclude a future finding that a model is an employee of his or her agency in any way. *See Independent Contractors*, *supra* note 148.

207 Appeal Bd. No. 540808, *supra* note 204, at 2.

208 Trial Attorney for the U.S. Department of Labor Tracy Agyemang noted that "questions [that come to the Department of Labor Wage and Hour Division] are going to be addressed on a model-by-model basis." Tracy Agyemang, Trial Attorney, U.S. Dep't of Labor, Address at Violations En Vogue? Labor and Employment Laws Concerning Fashion Models and Interns (Feb. 12, 2013). Hence, this Note does not purport to establish a blanket rule that all models have been misclassified as independent contractors in New York.

209 *Independent Contractors*, *supra* note 148.

210 Small, *supra* note 141.

211 Summons and Compl., at 8, Marilyn Model Mgmt., Inc. v. DNA Model Mgmt., LLC, No. 650129/2013 (N.Y. Sup. Ct. filed Jan. 14, 2013).

212 Small, *supra* note 141.

213 Mears, *supra* note 63.

may vary and can certainly take a number of forms; however, many models find they are prohibited from booking jobs outside of those contracted for through their agencies, despite the models being coined "contractors," who, in turn, should have the ability to offer services to the public at large.[214] The control held by models may be minimal compared to the control held by agents over models' careers.[215] Sara Ziff has spoken out against agents' control over many models' career decisions:

> Models have exclusive contracts with their agencies. I'm represented . . . and I can only do jobs if [my agency books] me with those clients. They have the contacts. I don't. Their primary role — even if they say it is not — is booking us jobs. To be considered managers, not agencies, they say, "We do all these other things . . . we give advice about your appearance . . . this and that." Well, come on, the reality is the main thing they're doing is booking us jobs. When agents book us on jobs, I'm almost never given the opportunity to turn a job down. They call [with little notice] in advance . . . won't tell whether or what the job is paying. It's quite common to do shows at Fashion Week and find out only after the fact, when you're $10,000 in debt, that none of those jobs are paying. Well, it would be nice to know that . . . If you ask any model, "Do you work for your agency, or does your agency work for you?" they would say they work for their agency.[216]

Other fashion industry professionals attest to this lack of control held by models. Famed casting director Jennifer Starr[217] stated,

> [The agencies] are completely in control of the model's career, and unless you reach a certain level, do those women actually have a say in their career? 'Oh, I wouldn't want to do that job, that's too little money.' . . . There's no doubt in my mind that the agency is the employer.[218]

Although being hired as an independent contractor generally offers the promises of flexibility and control to workers,[219] those promises are

214 *Independent Contractors*, *supra* note 148.

215 Sara Ziff, Dir., Model Alliance, Address at Violations En Vogue? Labor and Employment Laws Concerning Fashion Models and Interns (Feb. 12, 2013).

216 *Id.*

217 "Veteran casting director Jennifer Starr has been in the business for over eighteen years, working alongside legends like Richard Avedon and Herb Ritts, as well as contemporaries like Steven Meisel and Mario Testino." James Lim, *Jennifer Starr on Kate Middleton's Imaginary High Fashion Campaign, Working With Richard Avedon*, N.Y. MAGAZINE: THE CUT (Aug. 30, 2011, 3:10 PM), http://nymag.com/thecut/2011/08/jennifer_starr_on_kate_middlet.html.

218 Jennifer Starr, Address at Violations En Vogue? Labor and Employment Laws Concerning Fashion Models and Interns (Feb. 12, 2013).

219 *Independent Contractors*, *supra* note 148.

not part of the reality within which many fashion models work,[220] and thus the discussion of models' potential misclassification is worth pursuing.

### *A. Availability of Unemployment Insurance Benefits*

If a model is determined to be an employee, he or she may be able to receive unemployment insurance benefits from his or her modeling agency employer.[221] The availability of these benefits is especially valuable for workers (like models) that frequently experience stretches of time without any work.[222]

In 2008, the Unemployment Insurance Appeal Board of the State of New York (hereinafter referred to as "the Board") issued a decision concluding that the employer-modeling agency, "exercised sufficient supervision, direction, and control over the claimant's services to establish an employer-employee relationship."[223] In that case, all models entered into an agreement with their employer explicitly stating that the employer was responsible for arranging interviews, negotiating pay rates, booking engagement dates, settling disputes, signing releases, and collecting fees for the models' services.[224] The agreement also specified that the employer agency would receive a commission from work obtained through it.[225] The Board relied on previous decisions, including *Matter of McDonald/Richards*,[226] where an employer-employee relationship was found to exist because the agency "provided models to various clients for advertisements coordinated the models' work assignments, paid the models directly after deducting its commission, responded to client complaints, and client payments for the assignment were made to the employer."[227] In *McDonald/Richards*, the

220 Ziff, *supra* note 215.

221 *See* Appeal Bd. No. 549524 (N.Y. Unemployment Ins. Appeal Bd. July 14, 2010); Appeal Bd. No. 540808 (N.Y. Unemployment Ins. Appeal Bd. July 8, 2008).

222 U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *supra* note 10.

223 Appeal Bd. No. 540808.

224 *Id.*

225 *Id.*

226 In re McDonald/Richards, Inc., 232 A.D.2d 916 (1996).

227 Appeal Bd. No. 540808, at *3. In *In re McDonald/Richards, Inc.*, the New York Supreme Court, Appellate Division Third Department discussed that, while the clients paid all expenses and often provided the necessary makeup and hair dressings and while modeling agency McDonald/Richards, Inc. does not evaluate the performance of its models or provide them with training, the agency's involvement in coordinating the models' work assignments, negotiating their fees, and responding to clients' complaints supports a finding that the agency exercised a sufficient degree of direction and control over the models to be deemed their employer. In re McDonald/Richards, 232 A.D.2d at 916-17.

agency did not prevent the models from working for other agencies, and the employment relationship was still found to exist, though the agency could terminate the representation.[228] "while McDonald/Richards does not prevent the models from working for other agencies, it may decide to no longer represent them."[229] McDonald/Richards' decision to grant models the freedom to work for other agencies is strikingly different from the discussion, *infra*, in Part II of this Note, describing fixed-term exclusive contracts. Many models in New York today are required to enter into exclusive contracts with their agencies,[230] restricting their ability to simultaneously book jobs through other agencies.

The Board also discussed *Claim of Caufield-Ori*,[231] where there was a finding of an employment relationship where a modeling agency selected models it chose to represent, determined which models were appropriate for assignments, and paid the models directly.[232] There, too, the models were permitted to work for other agencies.[233] Because the Board in Appeal No. 540808 found the employer in that case exercised sufficient control over the claimant model's services, and that supported a finding that the relationship was one of employer-employee, the claimant model was eligible to receive benefits and the agency was liable for "additional contributions based on remuneration paid to the claimant and to all other models similarly situated as employees."[234] It logically follows that, if a model signs an exclusive contract and is prohibited from being represented by another agency simultaneously, the control exerted by the modeling agency over the model's services weighs even more heavily in favor of finding that an

228 In re McDonald/Richards, 232 A.D.2d at 916.

229 *Id.*

230 Summons and Compl., at 8, Marilyn Model Mgmt., Inc.

231 In re Caufield-Ori, 233 A.D.2d 558 (N.Y. App. Div. 3d Dep't 1996).

232 Appeal Bd. No. 540808, at *4. In *In re Caufield-Ori*, the New York Supreme Court, Appellate Division Third Department disagreed with Abbott Blumberg's challenge that models represented by Blumberg were not employees but rather independent contractors; the court explained that Abbott Blumberg

> operates a business in which he refers models to companies in the garment industry. . . . [He] maintains a list of models, . . . calls companies to inform them of models which he has available and sends the models to the companies if they are needed. He charges the models a 10% commission which he takes from their fee. He pays the models directly and deducts his commission from the amount he receives from the companies.

In re Caufield-Ori, 233 A.D.2d at 558-59. Even though the models were permitted to work for agencies other than Blumberg's, the Court still found that Blumberg exercised a sufficient amount of control to be deemed the models' employer. *Id.*

233 In re Caufield-Ori, 233 A.D.2d at 559; Appeal Bd. No. 540808.

234 Appeal Bd. No. 540808, at *4.

employment relationship exists.

More recently, in 2010, the Board again concluded that a claimant model and "all those similarly situated" worked as employees for their talent agency employer, Center for the Productions Plus, Inc.[235] Thus, the agency was held liable for contributions to unemployment insurance benefits.[236] The opinion states in relevant part:

> The credible evidence establishes that the claimant and others similarly situated, worked as professional models for a talent agency which controlled important aspects of their work, rather than the results or means. . . . The agency could not control the models' delivery of services. However, we find it significant that the agency interviews, screens and categorizes its models according to various criteria. While models such as the claimant are free to turn down assignments, the agency controls which models are referred to its clients depending upon the clients' needs on a given assignment. The models provide unique, personal services and cannot find their own substitutes. This is controlled by the agency. The fact that the models may have websites advertising their talents and showing they have relationships with other talent agencies is not dispositive of the relationship between the model and this agency. While she may have used the website to advertise herself, there is no evidence such as a corporate entity that may indicate the claimant was in business for herself. The models agree to follow behavioral guidelines and client policies. However, the mere fact that the agency agreement labels them as independent contractors is not controlling. The models cannot negotiate their own fees and must provide written vouchers to the agency in order to get paid for their services. The models had no power to negotiate their own fees. The agency tried to resolve any problems arising between clients and models. The fact that the client controlled the times, places and appearances of the models as well as on-site performance expectations does not detract from the agency's overall control over selection of screening and selection of models for clients as well as accountability for billing and payment between the models and the clients . . .[237]

The Board recognized the existence of certain indicia of independence, but nonetheless overruled the agency's objection that the models were independent contractors, and concluded that "the factors indicating an employment relationship outweigh those indicating a contrary result."[238]

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235 Appeal Bd. No. 549524 (N.Y. Unemployment Ins. Appeal Bd. July 14, 2010).

236 *Id.*

237 *Id.* at *3.

238 *Id.*

It is probable that the situation discussed within the Board's decision (cited above) is illustrative of many model-agency relationships in New York. It follows that agencies controlling similar aspects of models' work also would be found liable for contributions for unemployment insurance benefits—payments models may assume are unavailable to them.

Courts have also ruled on this issue, concluding that models are capable of being employees of their modeling agencies.[239] In *In re Szymanski*,[240] the New York Supreme Court, Appellate Division Third Department affirmed a lower-court decision holding that the evidence presented was sufficient to support the finding that an employment relationship existed between the agency, Yvonne Meyer Model Service, and the claimant, Penelope Szymanski, who demonstrated cosmetics at retail establishments under the aegis of the agency.[241] The evidence revealed that the agency determined Szymanski's hours and place of work and required her to submit completed time cards, and that she was paid by the agency, not the retail establishments.[242] Szymanski was prohibited from soliciting work on her own and was contractually bound to work exclusively for the agency.[243] The Third Department distinguished *In re Barnaba Photographs Corp.*,[244]—where professional freelance models were "free to pose for anyone who desires their services or for anyone who may engage them"[245] and therefore were found to be independent contractors—on the ground that Szymanski testified that such freedom was unavailable to her.[246] In *In re Barnes*,[247] the Third Department again affirmed a Board decision

239 *See* In re Caufield-Ori, 233 A.D.2d 558 (N.Y. App. Div. 3d Dep't 1996); In re McDonald/Richards, Inc., 232 A.D.2d 916 (N.Y. App. Div. 3d Dep't 1996); In re Szymanski, 89 A.D.2d 691 (N.Y. App. Div. 3d Dep't 1982).

240 89 A.D.2d 691.

241 *Id.*

242 *Id.*

243 *Id.*

244 263 A.D. 915 (N.Y. App. Div. 3d Dep't 1942), *aff'd*. 289 N.Y. 587 (1942).

245 263 A.D. at 916.

246 In re Szymanski, 89 A.D.2d 691, 691 (N.Y. App. Div. 3d Dep't 1982). Although the *Barnaba* court observed that "[m]odelling is a profession requiring ability, skill and experience, and models are persons engaged in the pursuit of an independent profession or vocation," and the *Szymanski* court concluded that this observation was not applicable to cosmetics demonstrators who have duties that differ from professional models, many professional models are arguably not engaged in the pursuit of an independent profession when they are bound to exclusive contracts with talent and modeling agencies, even if their profession requires ability, skill and experience. The *Barnaba* court's observation relates to the models in that particular matter and cannot be generalized to prohibit a finding that any individual model is an employee. *See* In re Barnaba, 263 A.D. at 915; In re Szymanski, 89 A.D.2d at 691.

247 216 A.D.2d 619 (N.Y. App. Div. 3d Dep't 1995).

finding the fashion model claimant was not an independent contractor.[248] In that matter, the model was determined to be an employee of USA Models, Inc., because the record revealed that the agency coordinated the model's work schedule, negotiated with clients on the model's behalf, instructed the model on appropriate dress and behavior, and received a portion of the model's fees.[249]

The proposition that many New York models may actually be employees is further supported by discussions of professional models' coverage under the Unemployment Insurance Law. As described in *New York Jurisprudence*,

> [t]he term 'employment,' for the purpose of the Unemployment Insurance Law, includes any service by a person for an employer as a professional model where the professional model performs modeling services for, or consents in writing to the transfer of his or her exclusive legal right to the use of his or her name, portrait, picture, or image, for advertising purposes or for purposes of trade, directly to a retail store, a manufacturer, an advertising agency, a photographer, a publishing company, or any other such person or entity, which dictates the professional model's assignments, hours of work, or performance locations, and which compensates the professional model in return for a waiver of his or her privacy rights, unless the services are performed pursuant to a written contract in which it is stated that the professional model is the employee of another employer covered by the statute.[250]

Accordingly, the fashion model in *In re Barnes* was considered an employee of her modeling agency, and not an independent contractor.[251] Further to this point, the Unemployment Insurance Division of the New York State Department of Labor explains that, while the Unemployment Insurance Law excludes independent contractors from coverage, certain "persons are employees by law even though the circumstances under which they work may not meet the common law tests of an employer-employee relationship."[252] One category of those persons is professional models,[253] according to New York Labor Law § 511(1)(b)(3).[254] For purposes of the law, the term "professional model" is defined as "a person who, in the course of his or her trade, occupation

248 *Id.*

249 *Id.*

250 107 N.Y. JUR. 2D *Unemployment Insurance* § 46.

251 *Id. See also* In re Barnes, 216 A.D.2d at 619.

252 N. Y. STATE DEP'T OF LABOR UNEMPLOYMENT INS. DIV., *supra* note 140.

253 *Id.*

254 N.Y. LAB. LAW § 511(1)(b)(3) (McKinney 2002).

or profession, performs modeling services[, further defined as] the appearance by a professional model in photographic sessions or the engagement of such model in live, filmed or taped modeling performances for remuneration."[255] While many fashion models may not see themselves as entitled to unemployment insurance benefits, the New York laws pertaining to unemployment insurance seem to contemplate otherwise.

An argument could be made that, if any employment relationship exists in the context of modeling, it would be one in which the client is the employer (since the client controls the services actually rendered), and not the agent; however, this claim is unlikely to prevail upon application of a common law standard by agencies or the court.[256] The Board explicitly stated in 2008 that, "while the employer's clients controlled to some extent the times, places and appearance of the models, lack of control over these kinds of details does not preclude the finding of an employment relationship where . . . professional services are being rendered."[257] Although agencies do not typically exert control over the results of the modeling services—or the means by which a model actually performs or walks down a runway, for example—agencies do control significant aspects of their work,[258] including access to clients and the negotiation of fees. Control over aspects such as these supports a finding of a common law employment relationship.[259] The New York Supreme Court, Appellate Division Third Department in *In re Chopik*, affirmed the lower court's decision that the modeling agency, rather than the client, was the model's employer, based on the extent of agency control.[260] Model Maxine Chopik had applied for unemployment insurance benefits from client Laurence H. Kaye Furs after Models Service Agency had no further referrals for Chopik.[261] On

255 N.Y. LAB. LAW § 511(1)(b)(3)(ii) (McKinney 2002).

256 *See, e.g.* Appeal Bd. No. 549524 (N.Y. Unemployment Ins. Appeal Bd. July 14, 2010) (finding that the agency was the employer). A worker could be considered an employee of two entities at the same time; for example, a model could be considered an employee of his or her agency *and* of the client (referred to as the "joint employer issue"), however this will not be discussed for purposes of this Note as it is, again, a fact-specific inquiry. Small, *supra* note 142.

257 Appeal Bd. No. 540808, at *3 (N.Y. Unemployment Ins. Appeal Bd. July 8, 2008). *See also* In re Affiliate Artists, 132 A.D.2d 805, 806 (N.Y. App. Div. 3d Dep't 1987); In re Concourse Ophthalmology Assocs., 60 N.Y.2d 734, 736 (N.Y. App. Div. 3d Dep't 1983).

258 Ziff, *supra* note 215.

259 "The credible evidence establishes that the claimant and others similarly situated, worked as professional models for a talent agency which controlled important aspects of their work, rather than the results or means . . ." Appeal Bd. No. 549524, at *3.

260 145 A.D.2d 747 (N.Y. App. Div. 3d Dep't 1988).

261 *Id.* at 748.

appeal, the court affirmed the Board's finding that Chopik was an employee of her agency, and not the client: "While it is true that the agency's clients controlled to some extent the times, places and appearances of the models, lack of control over these kinds of details does not preclude the finding of an employment relationship where, as here, professional services are being rendered."[262] The record revealed significant indicia of the agency's control, including that it selected which models it would represent, chose which models to send to clients, established the models' fees after client consultation, and directly paid the models their wages.[263] These have all been reported as common practices within New York City modeling agencies.[264]

### *B. Ensuring the Timely Receipt of Payments*

The probable availability of unemployment insurance benefits to models properly determined to be employees of their agencies addresses just one of the realities of a professional modeling career: likelihood of periods without work.[265] The decisions discussed above, pertaining to the availability of unemployment insurance benefits, employed a common-law approach to determine employment status, ultimately concluding that a number of models were employees of their agencies.[266] Various courts and governmental bodies, including the New York State Department of Labor and the IRS, also employ a common law approach.[267] It follows that the Department of Labor's Division of Labor Standards—which enforces the New York State Labor Laws that govern, among other things, minimum wage, hours of work, and payment of wages[268]—would employ a similar common law principles analysis in its enforcement of those provisions relating to wage payment.

"[U]nfortunately, trying to re-coup their wages is an uphill battle many models face," says one reporter.[269] Model Caitriona Balfe recounts her struggle to get paid for her work for clothing company BCBG:

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262 *Id.* at 749.

263 *Id.*

264 Johnson, *supra* note 12, at 838.

265 U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *supra* note 10.

266 SILVERBERG, *supra* note 144, at 3.

267 *Id.*

268 *Labor Standards: Employment Laws Known as Labor Standards*, U.S. DEP'T OF LABOR, http://www.labor.state.ny.us/workerprotection/laborstandards/labor_standards.shtm (last visited Sept. 8, 2013).

269 Fleming, *supra* note 11.

> [A]fter several months of being paid promptly for my work, things started to change. BCBG's checks took longer and longer to arrive. Several more months went by and then I was not being paid at all.
>
> I repeatedly inquired with my agency about the troubling delay. . . . Despite the months of non-payment and the risk of loss, the agency was still booking me and other models to work for BCBG. . . .
>
> . . . After multiple inquires [sic], and after the better part of a year had passed since BCBG ceased paying me and other models for our work, I finally received an email from my agency's accounting department notifying me that the client would begin making partial payments towards the amount it owed.[270]

Model Sara Ziff has also incurred difficulties in recovering payments:

> [A]s a model, I know firsthand that simply getting paid can be a major issue. Early in my career, I shot multiple days of catalogue for Olive and Bettes, a clothing retailer in Manhattan. When months went by and I had not received a paycheck, I followed up with my agency's accountant, who informed me that the client was unable to pay.
>
> When a client doesn't pay, the model takes the loss, not the agency.[271]

Even more troubling than the inability to collect compensation for one's work is the reality that, despite instances of non-payment by a client, some agencies will knowingly book models with those same clients that may be "in dire financial straits or . . . outright insolvent."[272] Further, it is claimed that some agencies may be reluctant to seek payment from those non-paying clients, out of a concern for future

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270 Caitriona Balfe, *€240,000 of Lost Wages in Italy and a Year to Pay in LA*, THE MODEL ALLIANCE, http://modelalliance.org/2012/240000-euros-of-lost-wages-in-italy-and-a-year-to-pay-in-la/240000-euros-of-lost-wages-in-italy-and-a-year-to-pay-in-la (last visited Sept. 8, 2013).

271 Sara Ziff, *Model Alliance Announces Participation in the Unpaid Wages Campaign*, THE MODEL ALLIANCE, http://modelalliance.org/2012/model-alliance-announces-participation-in-the-unpaid-wages-campaign/model-alliance-announces-participation-in-the-unpaid-wages-campaign (last visited Sept. 8, 2013). Ziff elaborated on this further at "Violations En Vogue?," a panel sponsored by the Model Alliance, Dorsey & Whitney LLP, and the Fashion Law Committee of the New York State Bar Association:

> Another issue is difficulty getting paid the money we are owed by our agencies. When I left my first agency they owed me over $50,000 and just refused to pay me. Many models have come to us since I formed the Alliance [because] often the agencies when you leave will refuse to pay you . I think that's a very common problem even at the better agencies.

Ziff, *supra* note 215.

272 Johnson, *supra* note 12, at 839.

bookings of other models represented by the agency.[273] When agencies do resort to legal action or outsourced debt collection, the model often is considered responsible for the costs,[274] even though he or she is not typically a party to the negotiations with clients, and is not usually the ultimate decision-maker booking the job.

New York Labor Law § 191[275] outlines the frequency by which employees must be paid; therefore, if the Division of Labor Standards were to conclude that a particular model was an employee of his or her agency, payment of that model's wages would be governed by §191.[276] A fashion model would likely be considered a "clerical or other worker" under New York State Labor Law, a classification that essentially describes any employee who does not fall within another statutory category of workers noted by the law.[277] "A clerical and other worker shall be paid the wages earned in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer."[278] According to those provisions, models should be paid earned wages no less frequently than semi-monthly. This is often not the practice occurring within the industry, as evidenced by the testimonies of Balfe[279] and Ziff[280] above; fashion models frequently must wait weeks or months to collect earnings, or may never recover payments at all.[281] It is also worth

273 *Id.*

274 *Id.*

275 N.Y. LAB. LAW § 191 (McKinney 2009).

276 N.Y. STATE DEP'T OF LABOR, FREQUENCY OF PAY FREQUENTLY ASKED QUESTIONS 1, *available at* http://www.labor.ny.gov/legal/counsel/pdf/frequency-of-pay-frequently-asked-questions.pdf (last visited Sept. 8, 2013).

277 N.Y. LAB. LAW § 191(1)(d). The statutory categories of workers include: "manual workers" under N.Y. Lab. Law § 190(4); "railroad workers" under § 190(5); "commission salesmen" under § 190(6); and "clerical workers" under § 190(7), which are defined as all employees other than manual workers, railroad workers, and commission salesmen, except those persons employed in a "bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars a week." N.Y. LAB. LAW § 190(7). Fashion models do not likely qualify as bona fide professional employees as they must meet all of the prescribed tests in the Labor Law, and it is arguable that their work may not produce a result that depends primarily on the invention, imagination, or talent of the employee, their work may not be predominantly intellectual and varied in character, and models may not be paid in excess of $900 per week. The creativity of models in creating their own "look" (a performance that can be changed for specific clients, designs and situations) is discussed in Neff et al., *supra* note 6, at 315, but it is still unlikely that a large number of models would qualify as bona fide professional employees under the Labor Law.

278 N.Y. LAB. LAW § 191(1)(d).

279 Balfe, *supra* note 270.

280 Ziff, *supra* note 271.

281 The inability to recover wages led the Model Alliance to support the Freelancer Payment Protection Act in 2012. *Id.* Model Alliance founder and director Sara Ziff explains:

noting that agencies do not pay their models unless the models ask for their money, according to Sara Ziff: "If you don't ask, you don't get paid."[282] Agencies that engage in this practice earn interest on the earnings they hold, sometimes over months and years.[283]

Because of the pervasive belief that models working in New York are necessarily independent contractors,[284] this group of workers does not believe they have any recourse with the Department of Labor to assist in the collection of unpaid monies owed to them. Statements like Sara Ziff's demonstrate this assumption on the part of models:

> [A]s an independent contractor, I was dismayed to learn that I was not protected by state or federal labor laws. While employees' unpaid wage complaints are handled by the Department of Labor at no cost, freelancers lack the Department of Labor's support and are left with few options for recovering their money.[285]

If a common-law principles analysis results in a finding of an employment relationship between a particular model and agency, though, there *is* support available. The Department of Labor helps collect wages owed to workers who have not received the minimum wage after the worker files a claim with the Department.[286] The Division of Labor Standards then "investigates and endeavors to collect" on claims for unpaid wages, withheld wages, and illegal

> Models are not alone in this fight. . . . [A]lmost 80% of independent workers will be stiffed by clients in their careers—but unlike employees, freelancers have few legal protections.
>
> . . . The proposed law would allow freelancers to file complaints against deadbeat clients with the New York State Department of Labor. If the complaint is upheld after an investigation, the client can be ordered to pay 100% of the money owed to the freelancer, plus attorney's fees and interests.

*Id.* An anonymous photographer also urged the New York State Senate to pass the Act, "so that independent workers who have been victims of nonpayment will have some legal recourse via the Department of Labor to recoup their fees." Anonymous, *A Photographer Brings Deadbeat Clients and Shady Agents into Focus*, THE MODEL ALLIANCE, http://modelalliance.org/2012/a-photographer-brings-deadbeat-clients-and-shady-agents-into-focus/a-photographer-brings-deadbeat-clients-and-shady-agents-into-focus (last visited Sept. 8, 2013). The Assembly Bill passed in June 2012, and the Senate Bill is currently in the Labor Committee, according to the Freelancers Union PAC, *available at* http://www.freelancersunion.org/political-action/paymentprotection.html.

282 Ziff, *supra* note 7.

283 *Id.*

284 Neff et al., *supra* note 6, at 318. One booker was quoted as saying "models 'have always been independent contractors.'" *Id.*

285 Ziff, *supra* note 271.

286 *Labor Standards: Wage and Hour Law*, N.Y. STATE DEP'T OF LABOR, http://www.labor.state.ny.us/workerprotection/laborstandards/workprot/lshmpg.shtm (last visited Sept. 8, 2013).

deductions[287]—problems many models experience.

### *C. Freedom from Payment in Trade*

Another industry practice reality that models, particularly those walking during New York Fashion Week, have grappled with over time is payment in "trade" or clothing.[288] Sara Ziff explains:

> [a]s a model, simply getting paid can be a major issue, and, of the models who achieve a coveted spot walking in New York fashion week, many in fact are never paid at all, instead working for free or for 'trade,' meaning just clothes. (Note it's not that models 'get to keep the clothes' as is commonly thought.)[289]

Jenna Sauers discusses this industry "tradition":

> Designer clothing is nice, but you know what's even better? Getting paid for your work. . . .
>
> . . . [Marc] Jacobs is just one of many New York designers [who] don't pay their runway models; this reality means that girls can become ubiquitous for a fashion week, working for some of the most high-profile names in the business, and still end the season heavily in debt to their agencies.[290]

Sauers further points out that:

> [m]any New York designers do not pay the majority of their runway models. They do this not because they don't have the money—Jacobs' total show budget exceeded $1 million last year, and the company is backed by the world's largest fashion conglomerate, LVMH Moët Hennessy Louis Vuitton—but because they can.[291]

Freedom from payment in trade is a guarantee perceived to be unavailable for many models walking in New York Fashion Week, particularly those models without the bargaining power to negotiate otherwise in their contracts: "High-profile New York designers can offer models as little compensation as they please, because there is no law or regulation that forces them to do otherwise. That's not the case in France, where models are generally considered employees," says Sauers.[292] Top model Coco Rocha,[293] addressing freedom from

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287 *Id.*

288 Sauers, *supra* note 8.

289 Ziff, *supra* note 1.

290 Sauers, *supra* note 8.

291 Jenna Sauers, *Marc Jacobs Didn't Always Refuse to Pay His Models*, JEZEBEL (Mar. 6, 2012, 4:15 PM), http://jezebel.com/5890985/marc-jacobs-didnt-always-refuse-to-pay-his-models.

292 Sauers, *supra* note 8.

293 "For far too long, modeling has been like the wild Wild West," announced Coco Rocha as co-host of the Model Alliance's launch party. Shakthi Jothianandan, *Coco Rocha, Doutzen*

payment in trade, quipped, "In Paris and Milan isn't it *fascinating* that we get paid during the shows?"[294]

If a particular employee model has indeed been misclassified as an independent contractor, he or she will be able to legally request monetary compensation from his or her employer agency.[295] The agencies, then, presumably would be incentivized to negotiate with and book for clients only those jobs that pay monetary wages and not in trade. The condition precedent for this incentive is the finding of an employment relationship, though; because minimum wage laws do not apply to independent contractors, the practice of paying in trade is not illegal if a model is truly an independent contractor.[296] Sauers points out that, "[w]hen Marc Jacobs shows his Louis Vuitton collections in Paris, he pays his models, because the law says he has to."[297] Unless the blanket assumption that all models are independent contractors is questioned and rejected, the illegality of payment in trade to a number of actual employees may go unaddressed.[298]

### *D. Combating Systematic Abuses in the Modeling Industry*

These practices—lack of availability of unemployment benefits, failure to pay wages in a timely matter, and payment in "trade"—are "systemic abuses,"[299] rarely questioned by the New York models experiencing them first-hand. Due, in part, to a fear of substitutability within the fashion industry, many models have appeared seemingly complacent in accepting these long-standing practices.[300] Model Lisa Davies makes the case for greater financial transparency in modeling, and explains why professional models seemingly "sit by" and do not

*Kroes, and Shalom Harlow Talk Models' Rights*, N.Y. MAGAZINE (Feb. 7, 2012, 6:15 PM), http://nymag.com/thecut/2012/02/coco-rocha-doutzen-kroes-talk-models-rights.html.

294 Amy Odell, *The Struggles of Girl Models*, BUZZFEED (Sept. 10, 2012, 2:49 PM), http://www.buzzfeed.com/amyodell/the-struggles-of-girl-models%20 (emphasis in original).

295 *Labor Standards: Wage and Hour Law*, *supra* note 286.

296 Ziff, *supra* note 2.

297 Sauers, *supra* note 8.

298 Amy Odell of BuzzFeed Shift reported in the fall of 2012 that

> [a] rumor is now going around that the label [Marc Jacobs] will pay its models in real money for the first time ever this season. (The brand did not respond to BuzzFeed Shift's request for comment.) But one model who did not want to be named told [Odell] Marc Jacobs 'says they're going to pay every season and never do.'

Odell, *supra* note 294.

299 Ziff, *supra* note 2.

300 Lisa Davies, *The Case For Greater Financial Transparency*, THE MODEL ALLIANCE, http://modelalliance.org/2012/financial-transparency-by-lisa-davies/financial-transparency-by-lisa-davies. *See also* Mears, *supra* note 54.

question certain practices by agencies:

> I turned a blind eye to opaque agency bookkeeping. I did this because of the power dynamic that exists between the agency and the model: I felt I was not in a position to question or challenge unexplained charges because I was dependent upon the agencies to procure work for me to be able to afford to live. . . . Models, unless they have "celebrity" status or bring in a lofty income, have no voice, no power, and no platform to question their agencies' unclear and unexplained accounting procedures. . . . Sadly, most models are made to feel stupid or like they are inconveniencing the accountant by asking questions relating to the business side of the industry.[301]

Davies is not alone in feeling as though she lacked bargaining power in her relationship with her agency. Ashley Mears agrees that models and their agents are on drastically unequal footing:

> Additionally difficult are the day-to-day ambiguities of trying to keep in favor with [the] very people models pay to look out for them. Glamour combined with low entry criteria means that the model market attracts more people than it should, resulting in overcrowding and steep competition. A steady stream of new faces enters into an agency, while old ones are filtered out, and models can be "dropped" by their agencies with little or no warning. This creates a sense of substitutability—the sense that if you don't like the terms of [the] market, there are tons of competitors eager to take your place.[302]

Even as independent contractors, models presumably have protections stemming from the contracts they enter into; however, if the bargaining power is as unequal as Davies[303] and Mears[304] describe, those contracts likely won't contain provisions prohibiting these practices. As a result of the widely held notion that models are independent contractors, and the reality that models are often dropped by their agencies at any time, many professional models fear replacement and refrain from questioning practices such as waiting months to collect payments from jobs completed, or accepting tank tops for walking in a New York Fashion Week show as the sole form of compensation.[305]

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301 Davies, *supra* note 300.

302 Mears, *supra* note 54.

303 Davies, *supra* note 300.

304 Mears, *supra* note 54.

305 "By maintaining an independent contractor relationship, agencies are able to deflect market risks like expenses and delinquent clients as a model's individual responsibility. Yet in such a relationship, we should expect models to have more say over their expense accounts, the kinds of jobs they have access to pursue, their clients' payment histories, and, if nothing else, a voice to express these concerns without fear of replacement," says Mears. *Id.*

Fashion models work within what has been described as "an industry that has a culture of tiptoeing around the delicate feelings of powerful people who could be offended by their demands."[306] As previously revealed, risk to models' reputations can be such a powerful deterrent to publicly questioning these practices that millions of dollars in a class-action lawsuit brought by models against their agencies went unclaimed in 2004.[307] The *New York Observer*'s Drew Grant has even gone so far as to describe the industry as possessing a "climate of fear."[308] Regardless of whether a model is determined to be an employee or a contractor, this fear presumably dissuades models from bringing breach of contract claims in general. Doreen Small describes this fear as a possible deterrent to speaking out:

> One serious problem in the modeling business is fear. And fear of retaliation. You [can see in a clip of the documentary *Girl Model*] that they like them young because they don't speak up and they don't express themselves. Many models see that as a necessary evil in the garment food chain. I think if a model brings a case there is a likelihood that her agency will drop her, that she will be black-balled, that she will be a pariah. . . . That being said, it is important to take a stand. The Model Alliance is trying to encourage people. They are trying to build a protective network to encourage people.[309]

On February 6, 2012, Sara Ziff launched the Model Alliance[310] to provide models working in the American fashion industry a platform to organize to improve their industry and to give "the faces of this business a unified voice."[311] Ziff explains that "[c]orrecting these abuses starts with seeing models through a different lens: not as dehumanized images, but as workers who deserve the same rights and protections as anyone else."[312] In its first thirteen months, the Model Alliance

306 Odell, *supra* note 294.

307 Grant, *supra* note 126.

308 *Id.*

309 Small, *supra* note 141.

310 The Model Alliance was not formed as a trade union, but rather as a not-for-profit organization. Amy Silverstein, *Models Say Fashion Industry Breaks Child Labor and Sexual Harassment Laws*, GLOBALPOST.COM (Feb. 8, 2012), http://www.globalpost.com/dispatch/news/regions/americas/united-states/120208/models-say-fashion-industry-breaks-child-labor-a. "[M]odels are independent contractors and therefore unable to form a trade union under United States law." *Id.*

311 Ziff, *supra* note 1. Ziff further explains that, after talking to fellow models, she "realized that [they] could do better, and that [they] would be stronger collectively than as individuals." Ziff, *supra* note 2. She formed the Model Alliance in February 2012, with the support of other models and the Fashion Law Institute at Fordham Law School. *Id.*

312 Ziff, *supra* note 1.

established a confidential grievance reporting service for members, known as "Model Alliance Support"; created an online forum for models to share their stories, in an effort to raise awareness about the realities of the modeling industry; raised awareness of the existing child labor laws in place for minor models; and engaged its members to speak out against the practice of payment in trade, contributing to the decision of certain fashion designers who ordinarily paid in trade to agree to pay models actual money.[313]

While the Alliance has proven successful in its efforts to improve working conditions over the past year,[314] the industry continues to unequivocally declare all models as independent contractors,[315] when this blanket classification is arguably untrue. If the potential for legal recourse as proposed in this Note were realized, individual models may be motivated to look at their own employment relationships with their agencies—beyond their "contractor" labels. Whether a model would *outwardly* question the nature of his or her working relationship with an agency, though, is unknown; there is a strong likelihood that the industry's "climate of fear" will keep models from speaking out, as it may have similarly kept models from collecting settlement awards from their agencies in the past.[316]

For those models that have been injured by industry practices, not all may find this reputational risk stronger than a desire to remedy the harms. The fact that fashion models have brought claims seeking unemployment insurance benefits from agencies in the past, and have pursued a number of those claims through multiple levels of appeal,[317] demonstrates that the fears of retaliation and replacement may not be as strong of a deterrent as contemplated in Part IV. If this is true, and models are willing to bring claims in their own names for recovery of payments or for receipt of unemployment insurance benefits, perhaps all that is necessary to produce more of those claims is awareness.[318] The message dominating the popular media and American fashion industry is that models are necessarily independent contractors,[319] and until that

313 *Year in Review: Model Alliance turns ONE!*, Newsletter from Model Alliance (Feb. 6, 2013, 8:37 EST).

314 *Id.*

315 Small, *supra* note 141.

316 Grant, *supra* note 126.

317 *See* In re McDonald/Richards, Inc., 232 A.D.2d 916 (N.Y. App. Div. 3d Dep't 1996); In re Caufield-Ori, 233 A.D.2d 558 (N.Y. App. Div. 3d Dep't 1996); In re Szymanski, 89 A.D.2d 691 (N.Y. App. Div. 3d Dep't 1982).

318 Starr, *supra* note 218.

319 Sauers, *supra* note 8.

fiction is debunked and proclaimed in a pervasive way reaching the industry at large, models who are potentially willing to bring claims will not realize that their grievances may be substantiated by federal and state laws applicable to them as employees.

Initiating actions for unemployment insurance benefits and bringing wage and hour claims are not the only means by which models can determine whether they have been misclassified; the New York State Department of Labor allows for allegations of employer fraud, including fraud committed through misclassification, to be submitted to the Joint Enforcement Task Force *anonymously*: complainants do not need to identify themselves, and the Task Force purports to keep all provided information confidential to the extent permitted by law.[320] However, until fashion models recognize that being coined "independent contractors" does not necessarily make them such, even anonymous means of securing protections models may legally be entitled to will go unrealized and unused.

## V. RECENT DEVELOPMENTS

Subsequent to the completion of this Note, it became apparent through efforts of the Model Alliance that the labor law classifies fashion models as employees under Section 511 of the New York State Labor Law.[321] Despite what has been said, and in accordance with the theory of this Note, it appears that the premise that models are necessarily independent contractors is incorrect.

According to § 511,

> "Employment" means (a) any service under any contract of employment for hire, express or implied, written, or oral and (b) any service by a person for an employer. . . (3) as a professional model, where: (i) the professional model performs modeling services for; or (ii) consents in writing to the transfer of his or her exclusive legal right to the use of his or her name, portrait, picture or image, for advertising purposes or for the purposes of trade, directly to a retail store, a manufacturer, an advertising agency, a photographer, a publishing company or any other such person or entity, which dictates such professional model's assignments, hours of work or performance locations and which compensates such professional model in return for a waiver of his or her privacy rights enumerated

320 *Unemployment Insurance: Employer Misclassification of Workers*, N.Y. STATE DEPT. OF LABOR, http://www.labor.ny.gov/ui/employerinfo/employer-misclassification-of-workers.shtm (last visited Sept. 8, 2013).

321 N.Y. LAB. LAW § 511 (McKinney 2009).

> above, unless such services are performed pursuant to a written contract wherein it is stated that the professional model is the employee of another employer covered by this chapter.[322]

"Professional model" is defined by the law as, "a person, who, in the course of his or her trade, occupation or profession, performs modeling services."[323] "Modeling services," for purposes of the law is "the appearance by a professional model in photographic sessions or the engagement of such model in live, filmed or taped modeling performances for remuneration."[324] In addition to the determination subsequent to an independent contractor analysis, it appears as though many, if not all, fashion models would be considered employees under § 511.[325]

The question then arises as to whom the employer would be – the model's agency, or the client. The language of the law could potentially point to either entity, and there is always the possibility of a determination of joint employment of the model once the law is interpreted.

## VI. CONCLUSION

There is no obvious way to actualize this Note's proposition; however, through the efforts of the Model Alliance, a long-overdue conversation about the working conditions within the modeling industry has begun. The time is ripe to draw attention to the systematic abuses in modeling (including the unavailability of unemployment insurance, late and non-payment of monies owed for jobs, and the long-standing

322 *Id.*

323 *Id.*

324 *Id.*

325 New York Assemblyman Wright introduced bill A05263-2013 on February 21, 2013, to amend the labor law and the workers' compensation law, "in relation to the definition of employment as it concerns professional models and the individuals and entities which engage them; and to repeal certain provisions of the labor law and the workers' compensation law relating thereto." A. 5263-2013, (N.Y. 2013). In effect, A05263-2013 would exclude models, model managers, advertisers, persons, corporations, or other entities potentially considered to be "employers" of professional models from the labor law, when the professional model meets the following criteria: has the right to negotiate his or her rate of compensation and the basis for reimbursement for expenses; has the right to accept or reject job assignments, hours of work and performance locations; has the right to perform services for other advertisers, persons or entities; incurs his or her own expenses; bears his or her own risk of loss if a client fails to pay its bill; and receives no fringe benefits. *Id.* It follows that if this bill passed, a number of models that would otherwise be considered employees under §511 would no longer be subject thereto. The latest activity regarding this bill is its referral to the Labor Committee on February 21, 2013. *NY State Legislature page for A05263*, http://legiscan.com/NY/bill/A05263/2013 (last visited Oct. 23, 2013).

tradition of payment in trade), alongside a message that these practices may very well be illegal if experienced by a model that has been misclassified. The true nature of what constitutes an employment relationship ought to be revealed to this industry, which seemingly has been operating within the legal fiction that all fashion models are independent contractors.[326] The real common law distinction between an employee and a contractor depends upon the level of supervision, direction, and control exercised by the person engaging the worker's services; the relationship is *not* defined by what [it] is called by the participants.[327] Further, Section 511 of the New York State Labor Law seems to explicitly indicate that many professional fashion models *are* employees in New York; now it is just a matter of determining employees of whom.[328]

According to casting director Jennifer Starr, "[i]t's such a lawless place, the modeling industry."[329] If this Note's proposition is true, however, a number of models walking during New York Fashion Week are not workers in a lawless place — there are a number of laws to protect and govern their working conditions and relationships with agencies, clients, and potentially with both. Perhaps through a unified voice like the Model Alliance, the message that New York laws may do most of what French labor laws do to remedy the unemployment and wage and hour issues that models face will be delivered to an industry currently unable, or perhaps unwilling, to escape from the notion that models are unequivocally independent contractors. Shedding light on the control exerted by many agencies over models' services — through media and news outlets, personal stories on platforms like the Model Alliance's Forum, and perhaps even through instituting unemployment insurance benefits claims, wage and hour claims, and anonymous fraud allegations — could attract the attention of the U.S. and New York Department of Labor, and possibly lead to an industry-wide investigation, or even change the way agencies approach their working relationships with models and allow models greater control over their own career choices. "I think awareness is the number one thing to getting somewhere," says Starr.[330] Especially in a state that seems "prepared to champion the cause of victims of wage theft,"[331]

326 Sauers, *supra* note 8.
327 N. Y. STATE DEP'T OF LABOR UNEMPLOYMENT INS. DIV., *supra* note 140.
328 N.Y. LAB. LAW § 511, *supra* note 325.
329 Starr, *supra* note 218.
330 Starr, *supra* note 218.
331 Cullen, *supra* note 134.

governmental interest in the possible misclassification of models walking in New York Fashion Week is not unlikely.

Just as the reporting of the glamorous end of the modeling profession misrepresents the lives of most models,[332] the legal rights of models working in New York have been inaccurately reported and harmfully misrepresented. "Fashion models are more than just pretty faces. They are a valuable part of the American workforce,"[333] and in the same way that the legal rights of models working in France are recognized, the rights that models may receive as employees in New York ought to be recognized and exercised as well.

332 Ziff, *supra* note 1.

333 Johnson, *supra* note 12, at 866.