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# A RUNWAY FOR CHANGE: HOW CALIFORNIA'S PROPOSITION 22 AND AN INSIDE-OUT APPROACH TO REFORM MAY PAVE THE WAY FOR LONG AWAITED CHANGE IN THE MODELING INDUSTRY

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> [W]e cannot promote healthy images without taking steps to protect the faces of this business… Correcting these abuses starts with seeing models through a different lens: not as dehumanized

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* If I know one thing to be true, it is that catalysts for change exist everywhere so long as we are willing to see and seize upon them. To that end, I thank Representative Mark Levine for spearheading California legislation in this area, and models Nikki DuBose and Sarah Ziff for your advocacy, vulnerability, and dedication to improving the industry. Thank you to Professor Ashley R. Brown of Fordham University for her class in Modeling Law, and to Professor Susan Scafidi for the gift of participating in the Fordham Law Fashion Law LLM program—something geography long prevented and ironically COVID-19 facilitated. Adam, Zach, and Gabby—this Note is dedicated to you as you are the reasons for everything I do. Thank you for your boundless love and support and understanding beyond measure. If anything, I hope you see from my endeavors that it's never too late to reinvent yourself—so remain curious; know that the only limits in life are the ones you set for yourselves; and that where there is a will, there is always a way. I love you all more. I also dedicate this Note to the young girls who have runway aspirations: may you know your worth and your rights; and never settle for less.

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images, *but as human beings who deserve the same rights and protections as all workers*.[1]

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## INTRODUCTION

Behind the toned enviable physiques, perfectly chiseled cheekbones, designer clothes, lights, cameras, and glamour, the modeling industry is a thinly veiled facade of perfection. One peek behind the proverbial curtain reveals a workforce deprived of the most basic protections workers deserve and the law otherwise provides. Remarkably, the only applicable law is the California Talent Association Act, which regulates modeling agencies' licensure and procedural business operations. It is notably silent as to models' rights and protections, thereby facilitating the "standard

[1] Sarah Ziff, *The Ugly Truth of Fashion's Model Behaviour*, THE GUARDIAN (Feb. 13, 2012, 11:28 EST) (emphasis added), https://www.theguardian.com/commentisfree/cifamerica/2012/feb/13/ugly-truth-fashion-model-behavior.

practice"[2] of models' exploitation and mistreatment. Absent any laws or regulations ensuring basic workplace protections, models are left with little leverage, no rights, and no means of recourse. Worse, recent legislative attempts to afford models more protection and a voice in the industry have elicited fierce opposition from the industry's power players, namely the modeling agencies, yielding legislation that barely moves the needle.

However, after decades trying to affect change from the outside, the change models seek may lie in an unlikely place: Proposition 22. The ballot initiative, approved by California voters in the Fall 2020 election, promulgated and paid for by Uber, DoorDash, and other technology and California based drivers and transportation businesses, constituted an attempt to thwart the California legislature's codification of the Supreme Court's decision in *Dynamex*.[3] Here, employers must classify "gig workers" as employees, and not as independent contractors. Proposition 22 established a hybrid third class of workers who maintained their "independent contractor" status but received benefits such as healthcare subsidies for drivers at specified hours, a calculated minimum wage, accident insurance, compensation for lost income, and protections such as sexual harassment and anti-discrimination policies.

A thinly veiled attempt by Uber, DoorDash, and Proposition 22 proponents to circumvent state taxes and other mandated costs associated with hiring "employees." The initiative nonetheless afforded minimum wage, benefits, and other basic protections which gig workers lacked. Though Proposition 22 was marketed as benefitting Uber and Lyft drivers, DoorDash deliverers, and other technology based "gig" part time workers, models clearly fall within the provision's bounds. In theory, this is what the modeling industry has longed for regarding employment benefits and labor reform. However, in practice, its application to the modeling industry may upend, instead of reform it.

Unlike the technology service companies "employing" the "gig workers," the modeling industry's infrastructure is not designed to support what either AB 5 or Proposition 22 mandate because: (1) there is no clear "employer;" (2) the industry's commission based fee structure cannot support an "employee

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[2] Isabel Cristo, *Fashion Week's Labor Problem is Our Labor Problem*, THE NEW REPUBLIC (Sept. 11, 2019), https://newrepublic.com/article/155020/fashion-weeks-labor-problem-labor-problem.

[3] Dynamex Operations West, Inc. v. Superior Court, 416 P.3d 1 (Cal. 2018).

business model;" (3) the increased costs associated with having "employees" raises antitrust concerns in driving out smaller agencies and discouraging competition; and (4) inclusivity and diversity would dissipate as agencies and clients would have to restrict their "employee model" roster to only "it" models, guaranteed sizeable contracts, to stay profitable.

Notwithstanding decades of valiant efforts, AB 5 and Proposition 22 afford models and model advocates one thing they have strived for but have not successfully generated on their own: momentum. The media attention and millions of campaign dollars invested into Proposition 22's passage (and opposition) has raised awareness. Coupled with COVID-19, it also cemented the independent contractors' plight as a critical issue in public discourse and the political arena. With the opportunity to piggyback on the momentum generated by the "gig worker" legislation, this Note addresses how this timely opportunity, bolstered by the number of models, could be the very momentum the modeling industry needs to begin paving the way to long awaited and desperately needed reform. This time, reform would come from the inside out.

Part I addresses the agency centric modeling industry infrastructure and the under-regulation of the industry overall. Part II addresses the California legislature's failed attempts to reform the Modeling Industry from the outside in through model specific legislation. Part III addresses how California legislature's promulgation and adoption of AB 5's ABC worker classification test, as applied to models, would force their reclassification from independent contractors to employees, and show how its application would ultimately upend the modeling industry. Part IV addresses how Proposition 22's creation of a hybrid worker classification model has finally created the momentum, legal precedent, and leverage, models and modeling advocates previously lacked in advocating for reform. Part V addresses how models' alignment with the "gig worker" movement allows them to capitalize on the movement to affect change in their industry from the inside out.

# I. THE MODELING INDUSTRY'S INFRASTRUCTURE, UNDER-REGULATION AND INDEPENDENT CONTRACTOR CLASSIFICATION LEAVE MODELS UNPROTECTED AND WITHOUT LEGAL LEGS TO STAND ON

## A. THE MODELING INDUSTRY'S FAILURE TO EVOLVE IS THE DIRECT RESULT OF AN AGENCY-CENTRIC INDUSTRY INFRASTRUCTURE

Insiders often describe the modeling world as the "wild west" in its inability to self-regulate.[4] The reason is simple: the industry's business infrastructure revolves around and filters through a single industry player—the agencies. This infrastructure, the agencies' under-regulation, and models' status as independent contractors are to blame for the industry's "dark side."[5] Agencies' industry positioning affords them seemingly unfettered power and influence as every industry player is beholden to them. Fashion, cosmetic, advertising, and consumer product brand clients rely on agencies to source models for their advertising or marketing campaigns, while aspiring models clamor to be signed by these employment gatekeepers. Relationships are the key to agencies' power and success. Why self-police when neither the clients nor models, who feel "totally replaceable,"[6] would ever dare whistle blow and jeopardize their precarious positions?

Moreover, minimal industry accountability further contributes to an agency's power and industry positioning. Unlike other contractual agreements, the agency-model representation agreement confers agents with exclusive rights to steer models' careers and image use.[7] They do so without any legal obligation to find models work or even pay them, let alone pay them minimum

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[4] Letter from Amy Lemons, In Support of A.B. 2539, March 31, 2016.

[5] Alexandra R. Simmerson, *Not So Glamorous: Unveiling the Misrepresentation of Fashion Models' Rights as Workers in New York City*, 22 CARDOZO J. INT'L & COMP. L. 153, 154 (2013) (citing 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)).

[6] Cristo, *supra* note 2.

[7] *See id.*

wage.[8] Aspiring models know "[j]ust like you wouldn't go into a courtroom without a lawyer, you shouldn't represent yourself as a model."[9]

With these employment gatekeepers, models are wholly dependent on an agent's discretion to submit their portfolio for clients' consideration, or as to which "go sees" or casting calls to attend.[10] The agent negotiates the model's pay,[11] dictates the model's schedule, advises the model as to the shoot's time and location, who they will be working with, the shoot's duration, as well as what the shoot requires of them.[12] The agent often arranges the models' transportation, or travel and accommodations if the shoot is out of town.[13] But, the agent's gatekeeper role only goes so far. Though agents can influence a client's hiring decisions, the decision ultimately rests with the client.[14] In sum, though the industry affords agencies great power and discretion, they bear little responsibility—or accountability—to those dependent on them.

Finally, the compensation structure further contributes to the industry's grim reality and agencies' adamance against an infrastructure overhaul. As it stands, the industry compensation structure affords agents dual revenue streams: agents receive 20 percent commission on a given booking from both the employer

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[8] Agency agreements under the California Labor Code only provide that licensed agents offer, procure, attempt to procure employment and engagements for their models without any legal or contractual obligation to do so. *Compare* CAL. LAB. CODE § 1700.4 (West 1986), *with* N.Y. GEN. BUS. L. § 172 (McKinney 1988) (requiring agents to procure a license in connection with employment agency work)*, and* N.Y. GEN. BUS. LAW § 171(8) (McKinney 2012) (defining an agency as "any person . . . who procures or attempts to procure employment or engagements for . . . models"). Unlike California, non-licensed managers in New York are permitted to procure employment engagements for models they represent where the procurement was incidental to their management duties. *See* N.Y. GEN. BUS. L. § 171(8).

[9] Vanessa Helmer, *Why Models Need an Agency*, LIVEABOUT, https://www.liveabout.com/reasons-for-modeling-agency-2379478 (Nov. 20, 2019).

[10] *Id.*

[11] *Moving Forward Together*, ASS'N TALENT AGENTS, https://www.agentassociation.com/frontdoor/index.php?src=gendocs&ref=FAQ&category=Main (last visited Oct. 28, 2020).

[12] *Professional Agency Modeling: How It Works*, NEWMODELS.COM, http://www.newmodels.com/works.html (last visited Nov. 24, 2020).

[13] Helmer, *supra* note 9.

[14] Cristo, *supra* note 2.

client and the model.[15] This double dipping affords little incentive for change—at least from the agency's perspective. With clients feeding them job opportunities, and a seemingly endless supply of young faces desperate to be signed, agencies have little incentive to seek or endorse reform absent oversight.[16] As such, the very nature of the industry's compensation structure reinforces the modeling agencies' stronghold.

### B. CALIFORNIA'S UNDER-REGULATION OF THE INDUSTRY AND ITS POWER PLAYERS IS ALSO TO BLAME

Though California promulgated legislation aimed at regulating modeling agencies, namely California Labor Code § 1700 et seq. (the California Talent Agencies Act),[17] its application and breadth are limited in scope. The Act addresses only (1) modeling agency licensure;[18] (2) procedural business requirements and permissible business dealings,[19] and (3) conferring the Labor Commissioner with oversight and dispute resolution power that is reactive, not proactive in application.[20] While the statute imparts general safeguards as to impermissible licensee or modeling agent conduct, such as imparting general safeguards in broadly requiring a model's health and safety, and generally defining permissible conduct,[21] it is devoid of any safeguards or proscriptions against inappropriate workplace conduct and affords models few avenues for recourse.

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[15] Blake Ellis & Melanie Hicken, *The Outrageous Cost of Being a Model,* CNN MONEY (May 12, 2016, 10:15 AM), https://money.cnn.com/2016/05/09/news/runway-injustice-model-expenses/index.html.

[16] Blake Ellis & Melanie Hicken, *How the Modeling Industry Exploits Young and Vulnerable Workers*, CNN MONEY (May 12, 2016, 10:11 AM), https://money.cnn.com/2016/05/04/news/runway-injustice-modeling/index.html.

[17] *See* CAL. LAB. CODE § 1700.4 (defining models as "artists" and modeling agencies as "talent agencies").

[18] *See* CAL. LAB. CODE § 1700.5 (requiring talent agents to be licensed by the Labor Commission); CAL. LAB. CODE § 1700.6 (delineating the application disclosure requirements, which include fingerprinting, affidavits attesting to the applicant's good moral character and reputation for fair dealing).

[19] *See* CAL. LAB. CODE § 1700.4-00.5.

[20] *See* CAL. LAB. CODE § 1700.44 (authorizing the referral of all disputes arising under § 1700 to the Labor Commissioner, who shall hear and decide them; the Labor Commissioner's decisions are appealable within 10 days to the superior court where the matter is heard *de novo*).

[21] *See* CAL. LAB. CODE §§ 1700.9, 1700.21, 1700.33, 1700.35.

### C. MODELS' INDEPENDENT CONTRACTOR CLASSIFICATION DEPRIVES THEM OF BASIC LEGAL WORKER PROTECTIONS AND FOSTERS INDUSTRY-WIDE ABUSE AT THE HANDS OF UNREGULATED INDUSTRY PLAYERS

Finally, models' employment status leaves them with few options for legal recourse and fewer legal protections. Legally regarded as independent contractors, models are arguably afforded "inherent flexibility" in setting their work hours and schedule. However, the allure and supposed attractiveness [22] associated therewith is something agencies tout because the "models are not given a choice … [i]n order to book jobs, models must be part of a modeling or talent agency." [23] The harsh reality is "only the modeling agency benefits by classifying models as independent contractors" [24] because in so doing, modeling agencies skirt otherwise mandatory labor code tax obligations to their "employees." These obligations include federal, state, and social security taxes, workers' compensation, minimum wage, unemployment insurance and taxes, access to collective

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[22] *See e.g.*, CAL. LAB. CODE §1700.31 (prohibiting illegal contracts or provisions therein); CAL. LAB. CODE § 1700.33 (prohibiting talent agencies from sending an artist to any place where their health, safety, and welfare, could be adversely affected); CAL. LAB. CODE § 1700.35 (prohibiting agencies from knowingly employing people of bad character).

[23] Anais V. Paccione, *On Trend: Continuing the Effort to Inspire Fashion Industry Reform and Protect Underage Fashion Models,* 41 SETON HALL LEGIS. J. 413, 428 (2017) (citing Gina Neff et al., *Entrepreneurial Labor Among Cultural Producers: "Cool" Jobs in "Hot" Industries,* 15 SOC. SEMIOTICS 307, 307 (2005)).

[24] Paccione, *supra* note 23.

bargaining,[25] guaranteed breaks, maximum work hours,[26] among others. This worker classification structure undeniably deprives not only the government of significant tax revenue, but also deprives models of the safety net most workers enjoy if injured or unemployed.[27]

As independent contractors, models are tasked with ascertaining their state and federal tax liability—which is immensely difficult given how "modeling industry accounting can be quite opaque."[28] Moreover, models, in signing contracts with an agency, confer agents with power of attorney, or the "extraordinary power over a model's finances and career . . . the power to accept payments on behalf of the model, deposit checks and deduct expenses" [29] while essentially disclaiming any fiduciary obligations.[30] Models do not receive minimum wage or any pay for the casting calls for which the agency sends them, the hours spent traveling to and from the casting calls, and time spent waiting at the casting calls for bookings they are not even guaranteed.[31]

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[25] Elisabeth Schiffbauer, THE FASHION L., https://www.thefashionlaw.com/resource-center/models-employees-or-independent-contractors/ (last visited Sept. 6, 2021) (citing Steven Cohen & William B. Eimicke, *Independent Contracting Policy and Management Analysis*, (Aug. 2013) ) http://www.columbia.edu/~sc32/documents/IC_Study_Published.pdf); *see also* Matthew Bidwell & Forrest Briscoe, *Who Contracts? Determinants of the Decision to Work as an Independent Contractor Among Information Technology Workers*, 52 ACAD. MGMT. J. 1148, 1148 (2009).

[26] Models work excessive hours, with "many runway models performing in back-to-back shows, staying up until the wee hours of the mornings for fittings and pulling sixteen-hour days during Fashion Week." Elizabeth Cline, *Fashion Models Are Workers, Too*, THE NATION (Sept. 13, 2013), https://www.thenation.com/ article/archive/fashion-models-are-workers-too. *See also* Letter from Milla Jovovich to Marc Levine, Assemblyman, (Apr. 5, 2016) (on file with author) (others work "all day and all night, to go directly to another [unpaid] 'editorial' job . . . [so the workday] ends up being 36 hours long.")

[27] Cristo, *supra* note 2.

[28] Jenna Sauers, *Models Sue Agency for $3.75 Million*, JEZEBEL (Nov. 26, 2010, 1:00 PM), https://jezebel.com/models-sue-agency-for-3-75-million-5698562.

[29] Lisa Lockwood, *The Model Conundrum: Waiting to Be Paid,* WWD (Sept. 11, 2019, 12:01 AM) https://wwd.com/business-news/media/models-wait-to-be-paid-1203209908/.

[30] *Id.*

[31] Further, the median hourly wage for a model is well below the actual minimum wage. *See, e.g.*, Cristo, *supra* note 2.

In the rare instance models do book a gig, "[s]ame-day pay for agency-booked gigs are rare."[32] Models generally wait thirty days for payment, some waiting upwards of 120–250 days to be paid.[33] While agencies fault the client for payment delays, the clients blame the agencies in a game of finger pointing, all at the model's expense.[34] Worse, "the culture in the modeling industry is that unless you are asked to be paid, they [the agencies] won't take the initiative to pay you."[35] Models are afraid to take the initiative and ask to be paid "because of the power the agency has over their career."[36] Between delays and being paid in "trade,"[37] namely designer garments offered in lieu of payment for work performed, models find themselves in a "debt hole"[38] keeping them "in a perpetual state of dependence,"[39] "indentured to their agency."[40] Because after all, "you can't pay your rent with a tank top."[41]

Models' independent contractor status also deprives models of federal and California Occupational Safety and Health Act

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[32] Dania Denise, *How Models Get Paid*, A MODEL'S DIARY (Nov. 30, 2013), http://amodelsdiary.blogspot.com/2013/11/how-models-get-paid.html.

[33] *See* Lockwood, *supra* note 29.

[34] *Id.*

[35] *Id.*

[36] *See* Vanessa Padula, *White Washed Runways: Employment Discrimination in the Modeling Industry,* 17 BERK. J. AFR.-AM. L. & POL'Y, 117, 126 (2016); *see* Cristo, *supra* note 2 (noting that models' innate fear of rocking the boat with their agencies so much that many opted out of collecting their share of a $22 million dollar class action lawsuit for fear they would never work again or be dropped by their agency); *see also* Ashley Mears, *Poor Models. Seriously.*, N.Y. TIMES (Sept. 14, 2011), *https://www.nytimes.com/2011/09/15/opinion/its-fashion-week-poor-models.html*.

[37] Cristo, *supra* note 2; *see also* Elizabeth Cline, *Fashion Models Are Workers, Too*, THE NATION (Sept. 30, 2013) https://www.thenation.com/article/archive/fashion-models-are-workers-too/.

[38] Lockwood, *supra* note 29; *see also* Shannon Quinn, *10 Facts About the Ugly Side of the Modeling Industry,* LISTVERSE (Mar. 28, 2018), https://listverse.com/2018/03/28/10-facts-about-the-ugly-side-of-the-modeling-industry/ (discussing that when models are not timely paid, they are often forced to seek advances on their earnings from their agencies—which their agencies are happy to offer subject to high interest rates. Often times, what they end up owing the agency exceeds their earnings, whereby even after the model leaves the agency, she remains indebted to them).

[39] Ellis & Hicken, *supra* note 15.

[40] Cline, *supra* note 37.

[41] Sara Ziff, *Viewpoint: Do Models Need More Rights?*, BBC (Nov. 29, 2012), https://www.bbc.com/news/magazine-20515337.

protections, which assure "safe and healthful" working conditions.[42] Without healthy weight guidelines or regulations, the pressure "to fit into the tiny clothes of a famous designer, to lose weight so as to fulfill the demands of the modeling industry, to be chosen for castings, photo-shoots or runway shows . . . can lead to addictions or health problems."[43] Models are told to "go on a Diet Coke and cigarette diet;"[44] or to "eat one rice cake a day. And if this "diet" doesn't work, only half a rice cake."[45] In stark contrast to other countries[46] with established minimum Body Mass Index "thresholds

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[42] *See generally* Christine Baker & Juliann Sum, *Health and Safety Rights: Facts for California Workers*, DEP'T INDUS. REL. CAL./OSHA (June 2015), https://www.dir.ca.gov/dosh/documents/h ealth-and-safety-rights-for-workers.pdf.

[43] Ligia Carvalho Abreu, *The Work of Models Through a Fundamental Rights' Perspective,* FASHION L., http://www.fashionmeetsrights.com/page/viewp/the-work-of-models-through-a-fundamental-rights-perspective (last visited Sept. 7, 2020).

[44] Letter from Carolyn Kramer, President of the Academy for Eating Disorders, to Assemb. Marc Levine (Apr. 3, 2016).

[45] Ziff, *supra* note 41.

[46] Countries that have established minimum Body Mass Index thresholds include France, Spain, Denmark, and Israel. *See* Theresa Santoro, *The Pro's and Con's of France's New Eating Disorder Legislation*, NAT. EATING DISORDERS ASS'N, https://www.nationaleatingdisorders.org/blog/pros-cons-frances-new-eating-disorder-legislation (last visited Oct. 15, 2021); *see also* Priya Elan, *My Agents Told Me to Stop Eating - The Reality of Body Image in Modeling,* THE GUARDIAN (Apr. 7, 2016), https://www.theguardian.com/fashion/2016/apr/07/my-agents-told-me-to-stop-eating-the-reality-of-body-image-in-modelling (following the death of model Isabelle Caro due to anorexia, the French Assembly banned excessively thin models by requiring all working models have a minimum body mass index of 18; and requiring any photographic touch ups to be marked as "retouched"); *see also* Selina Sykes, *Six Countries Taking Steps to Tackle Super-Skinny Models*, EURO NEWS (June 9, 2017), https://www.euronews.com/2017/09/06/counties-fighting-underweight-modelling (noting that Madrid's regional government and the Spanish Association of Fashion Designers, which sponsors fashion shows, banned models with a body mass index of less than 18, in 2006, and has since continued to enforce this threshold); *see also* Abrehu*, supra* note 43 (describing that Denmark's Code of Conduct does not impose a BMI limit but in modeling agencies committed to the Danish Fashion Ethical Charter, there is an annual compulsory health check for all models under 25); *see also* Sykes*, supra* note 46 (citing Israel's adoption of legislation limiting model's access to work based on meeting a body mass index requirement of at least 18.5; and a law banning

and require doctors to certify models as "healthy" before working, no similar legislation exists in California, New York or at the federal level.[47]

Models' physical safety is further jeopardized by rampant workplace sexual harassment. Inappropriate touching and physical and sexual assaults occur routinely during photoshoots.[48] Models are dehumanized when deprived of basic privacy rights, like when they are forced to change in front of photographers and others during castings and events.[49] Told where to be, how to dress, how to behave, where to go or not to go, even "models' private lives have been recast as a kind of labor [which] contributes to the devaluation of their work."[50]

Some models consider these hardships "part of the job."[51] This is the case even after #MeToo, which spotlighted these issues and bolstered victims' credibility. However, the power disparity

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the use of underweight models in advertising and on the catwalk in requiring medical proof of a "healthy weight;" and noting in all photographs whether the photograph was "retouched" to make the model look thinner).

[47] Fashion trade organizations, such as the Council of Fashion Designers of America ("CFDA"), have formed a health initiative to address the health issues plaguing the modeling industry. Though the Guidelines set forth goals to educate the industry about eating disorders, encouraging models to seek professional counsel if they suffer from an eating disorder; discouraging the hiring of models under the age of 16; supplying healthy food for models at shoots, and encouraging healthy backstage environments by raising awareness about the impact of smoking and underage drinking, the CFDA Guidelines stop short of implementing minimum body mass indices to work or demanding the industry alter their sizing standards. *See* COUNCIL FASHION DESIGNERS AM., COUNCIL OF FASHION DESIGNERS OF AMERICA HEALTH INITIATIVE GUIDELINES (2011).

[48] Cristo, *supra* note 2.

[49] Michael Love Michael, *Edie Campbell: Lack of Model Changing Rooms is 'Humiliating*,*'* PAPER (Sept. 17, 2008), https://www.papermag.com/edie-campbell-changing-rooms-2605702191.html?rebelltitem=3#rebelltitem3.

[50] As a matter of fact, one model reported that her agent went so far as to direct her public behavior: "be mysterious but not all the way mysterious. . . they would tell me to act cool and edgy in public even though that's not my personality. They would tell me I shouldn't go out to certain clubs, or that I shouldn't go out with certain people." Cristo, *supra* note 2.

[51] *Id.*

remains.[52] "When exploitation is standard practice, when you are often the most subordinate worker in the room with no recourse to a human resources department and when compliance and agreeability are prized above all else, modeling, like other low wage work, fosters abuse."[53]

## II. THE CALIFORNIA LEGISLATURE'S ATTEMPTS TO REFORM THE MODELING INDUSTRY THROUGH MODEL SPECIFIC LEGISLATION DO LITTLE TO MOVE THE NEEDLE

Recognizing the industry's need for reform,[54] the California Legislature tried, but only modestly succeeded, in passing model-specific legislation – in large part due to agency opposition. Between 2016 and 2019, the California Legislature introduced three separate bills aimed at implementing worker protections for models. The first bill, AB 2539 (2016), mandated[55] (1) models be classified as employees of the service recipient; and (2) occupational safety and health standards be established to address eating disorders and their prevention, workplace safety, and protection from sexual

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[52] Janelle Okwodu, *Ending Harassment Backstage is Becoming a NYFW Priority*, VOGUE (FEB. 7, 2018), https://www.vogue.com/article/nyfw-fall-2018-changing-rooms-model-alliance-sara-ziff-interview.

[53] Cristo, *supra* note 2.

[54] Telephone Interview with Marc Levine, California Assemblyman, 10th District of California, (Sept. 8, 2020); Interview with Nikki Dubose, Former Model, Model Advocate, Writer and Activist (Sept. 5, 2020).

[55] A.B. 2539 also proposed that anyone engaged in the occupation of a modeling industry was required to obtain a license pursuant to Section 1700 of the California Labor Code. A.B. 2539, 2015-2016 Reg. Sess. (Cal. 2016). The Association of Talent Agents, the trade association representing talent agencies, under which modeling agents are "regulated," opposed the bill in toto, and argued this provision was "redundant." *See Modeling Agencies: Licensure: Models: Employees: Hearing on AB 2539 Before the Cal. Assemb. Comm. on Lab. and Emp.,* 2015-2016 Reg. Sess. 8, (Cal. 2016).

exploitation.[56] However, the Association of Talent Agents ("ATA") fiercely opposed AB 2539 on multiple grounds. First, the ATA believed the bill was overarching and contrary to law, as it disregarded "realities of the work environment and unfairly prejudice[d] models . . . who exhibit control over their work and structure their business as independent contractors."[57] Second, it challenged the proposed OSHA standards as to what constituted "healthy" on vagueness grounds.[58] The ATA also argued the bill impeded First Amendment rights to freedom of expression[59] and imposed burdensome duties on agencies to monitor models' health—duties falling outside the scope of their work.[60] Though the bill ultimately passed the Assembly Committee on Labor and Employment, it died in the Appropriations Committee.[61]

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[56] A.B. 2539, 2015-2016 Reg. Sess. (Cal. 2016) (emphasis added). The legislation was supported by California Labor Federation, AFL-CIO, multiple eating disorder associations, as well as the Model Alliance. The Model Alliance is non-profit labor group that advocates for model's rights. It was started by model turned advocate, Sara Ziff, with the support of other models and the Fashion Law Institute at Fordham Law School in 2012. *See Modeling Agencies: Licensure: Models: Employees: Hearing on AB 2539 Before the Cal. Assemb. Comm. on Lab. and Emp.,* 2015-2016 Reg. Sess. 8, (Cal. 2016).

[57] A.B. 2539, 2015-2016 Reg. Sess. (Cal. 2016); *Modeling Agencies: Licensure: Models: Employees: Hearing on AB 2539 Before the Cal. Assemb. Comm. on Lab. and Emp.,* 2015-2016 Reg. Sess. 8, (Cal. 2016).

[58] *Compare* Aja Frost, *How These Six Countries Are Making The Fashion Industry Safer, https://web.archive.org/web/20160115142444/https://groundswell.org/ethical-modeling/ (*April 17, 2015); (addressing legislation aimed at keeping models safe and healthy from countries such as Israel, Denmark, France, and Italy. Though some countries employ the specific word healthy in their statutory language, none take issue with the word specifically or allege it is vague); Selina Sykes, *Six Countries Taking Steps to Tackle Super Skinny Models,* EURONEWS (June 9, 2017), *https://www.euronews.com/2017/09/06/counties-fighting-underweight-modelling*.

[59] A.B. 2539. Specifically, the agencies disclaimed any responsibility for the oversight and/or management of models' health. *See* A.B. 2539, Leg. Hist., https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB2539. Some industry insiders speculate that the industry lobbies pressured the legislature to ultimately let the bill die in Appropriations.

[60] A.B. 2539, Leg. Hist., https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB2539.

[61] *See id.* Some industry insiders speculate that the industry lobbies pressured the legislature to ultimately let the bill die in Appropriations. *See also* Interview with Nikki Dubose (Sept. 5, 2020).

Concerned that AB 2539 was too far reaching in scope,[62] its successor, AB 1576, abandoned AB 2539's employee reclassification proposal. Instead, the bill focused squarely on models' health,[63] seeking still to implement OSHA health and safety standards[64] concerning the prevention of eating disorders. It further required modeling agencies to provide all agency employees with sexual harassment prevention and health standards training within 30 days of hiring.[65]

After AB 1576 also failed to pass the Appropriations Committee,[66] AB 2338 was introduced. Entitled the "Talent Agencies: Education and Training Bill,"[67] AB 2338 was the most "watered down"[68] of the three bills. What appeared as an attempt to placate the agencies, AB 2338 abandoned all previous attempts to codify health standards, proposing only that modeling agencies "make available educational materials regarding nutrition and eating disorders to an adult model artist within 90 days of agreeing to representation by the licensee or agency." Unsurprisingly, AB 2338 passed.[69] Proponents felt it was an effective "compromise" with "important components," paving the way "to pass . . . more complex legislation" in the future.[70] In reality it did little to move the needle. Practically speaking, the bill left models in virtually the same backseat position they found themselves prior to AB 2338's passage, with agencies still at the wheel.

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[62] Interview with Nikki DuBose, *supra* note 61; *See* Modeling Agencies: Licensure: Models: Employees, A.B. 1576, 2017-2018 Reg. Sess. (Cal. 2018).

[63] *See* A.B. 1576.

[64] *See id.* Proposed Section §1707.2(a) (2018).

[65] *See id.*

[66] *See* A.B. 2539, Leg. History, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB2539.

[67] Talent Agencies, Training, A.B. 2338, 2017-2018 Reg. Sess. (Cal. 2018).

[68] Interview with Nikki Dubose, *supra* note 61.

[69] The bill required, that at a minimum, the educational materials included components specified in the National Institute of Health's Eating Disorder Internet website and that materials be provided in the models' native language. It also required the agencies to keep a record for three years confirming said materials were provided. *See* A.B. 2338, *supra* note 67*,* codified on January 1, 2019, as CAL. LAB. CODE §1700.51: Nutrition and eating disorder materials to be provided to adult model artists; time limit; language and content of materials.

[70] Interview with Nikki DuBose, *supra* note 61.

## III. AB 5'S ABC TEST AS APPLIED TO THE MODELING INDUSTRY WOULD ARGUABLY FORCE THE RECLASSIFICATION OF MODELS AS EMPLOYEES AND IMPLEMENT LONG AWAITED REFORM IN THEORY, WHILE UPENDING THE INDUSTRY IN PRACTICE

### A. AB 5'S CODIFICATION OF THE CALIFORNIA SUPREME COURT'S *DYNAMEX* HOLDING ADOPTS THE ABC TEST TO DETERMINE WHETHER A WORKER IS AN EMPLOYEE OR INDEPENDENT CONTRACTOR UNDER CALIFORNIA LAW

Though models' direct attempts to legislate impactful worker protections proved largely unsuccessful, the California legislature's codification of the California Supreme Court's 2018 holding in *Dynamex Ops. West. v. Sup. Ct.*[71] in AB 5[72] may have indirectly achieved the reform they sought – at least in theory. In *Dynamex*, the Court applied the "ABC" test to determine whether a delivery driver was an employee or independent contractor per applicable wage order definition.[73] The Legislature adopted *Dynamex*'s ABC test as the applicable legal standard, but broadened its application to apply to all workers,[74] a "legislative fix"[75] to "create a clear and consistent definition for employment and raise . . . the working standards for millions of workers"[76] by affording them "minimum wage, paid sick leave, workers compensation benefits if they're injured on the job, or unemployment benefits if

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[71] *See* Dynamex Operations West, Inc. v. Superior Court, 416 P.3d 1 (Cal. 2018).

[72] *See* A.B. 5, 2018-2019 Reg. Sess. (Cal. 2019).

[73] *See Dynamex*, 416 P.3d at 7. Though the decision addressed other issues, including the appropriate test to distinguish an employee from an independent contractor, and the commonality of factual and legal issues of the drivers themselves under the ABC test in determining whether the lower courts' class certification was appropriate, the discussion of the case will be limited to the ABC test and its application as codified by A.B. 5.

[74] *Worker Status: Employees and Independent Contractors: Hearing on A.B. 5 Before the Assemb. Comm. On Appropriations*, 2019-2020 Reg. Sess. (Cal. 2019) [hereinafter *Worker Status*].

[75] Bruce Sarchet et al., *Independent Contractor Issues in California: Summer 2020 Update*, LITTLER WPI REP. (Sept. 1, 2020), https://www.littler.com/publication-press/publication/independent-contractor-issues-california-summer-2020-update.

[76] *Worker Status*, *supra* note 74.

they are laid off, as well as the protection of other workplace health and safety rights."[77]

The ABC test presumes a worker is an employee *unless the hiring entity can prove that all three conditions are met:* (A) the individual is free from the control and direction of the hiring entity, in connection with the performance of the service, both under contract for the performance of service and in fact; (B) the service is performed outside the usual course of the business of the employer; and (C) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.[78] AB 5 excludes numerous categories[79] of workers from the test's application and instead subjects them to the *Borello* test[80] and other specified criteria.[81]

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[77] *See Gonzalez Bill Expands Employee Protections In Rigged Economy,* Official Website – Assemblyman Lorena Gonzalez Representing the 80th California Assembly District (Dec. 4, 2018), https://a80.asmdc.org/press-releases/20181205-gonzalez-bill-expands-employee-protections-rigged-economy.

[78] CAL. LAB. CODE § 2750.3(a)(1).

[79] Interestingly, AB 5 articulates the ABC test in approximately 130 words, and the exceptions with 27 times that number, or almost 3500 words. *See* Sarchet et al., *supra* note 75.

[80] The *Borello* test served as the test previous to *Dynamex's* ABC test, employed to distinguish employees from independent contractors emanated from the California Supreme Court case of the same name. Less strict than the ABC test, the key factor in *Borello* is whether the hiring entity has control or the right to control the worker both as to the work done and the manner and means in which it is performed. The test also considers eleven other factors: (1) whether the worker is engaged in an occupation different than the hiring firm; (2) whether the work is part of the hiring firm's regular business; (3) who supplies the equipment and tools to perform the work; (4) the worker's financial investment in the equipment materials used; (5) occupational skill; (6) if the occupation or work done is under the hiring firm's direction or by a specialist without supervision; (7) the worker's opportunity for profit or loss; (8) duration of services; (9) degree of the working relationship's permanence; (10) payment method, aka by time or by job; (11) whether the parties believe there is an employee or employer relationship. Unlike the ABC test, no single factor in *Borello* is determinative, but the first factor has the greatest weight. *See* S. G. Borello & Sons, Inc. v. Dept. of Indus. Relations, 769 P.2d 399 (Cal. 1989).

[81] *See* CAL. LAB. CODE § 2750.3 (C)*; see also Worker Status*, *supra* note 74.

## B. IF APPLIED TO MODELS, THE ABC TEST CLASSIFIES MODELS AS EMPLOYEES

Under the ABC test, models qualify as employees because the "employee" presumption cannot be rebutted. Prong (A) cannot be met because agents and clients control virtually every aspect of a model's finances, career, and work. Agents—not models—dictate which go-sees the model attends, the jobs for which a model may be hired.[82] Agencies bind models to multi-year, exclusive contracts—some with automatic renewals—and have power of attorney to control all financial aspects of the model's career.[83] In reality, the representation agreement confers agents with a "monopoly"[84] to the use of a model's image both during and after the contract period.[85] Similarly, fashion clients exercise a great deal of control over booked models, dictating every aspect of the model's look, behavior, posing, conduct, schedule, and can hire or fire the model at will.[86] Apart from deciding whether to accept a job or when to take vacation, every aspect of a model's work is subject to outside control[87]—weighing in favor of an employee classification under this prong.

The same is true as to Prong (B) because a model's work falls squarely within the agencies and clients' usual course of work. Models are the cornerstone of the agency's business as agencies represent models in an attempt to procure them work. Just as agencies need models to earn their commission-based income when clients book the agency's models for their marketing and advertising campaigns, models are equally integral to clients' business. Central to any company's profitability are advertising and marketing campaigns to drive consumer awareness and engagement. These campaigns are premised on the careful selection of models whose look and aesthetic convey the brand's messaging

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[82] Ellis & Hicken, *supra* note 16 (stating that "[M]odels say agencies control much of their lives (down to their eating habits and the pay they receive").

[83] *Id.*

[84] Sauers, *supra* note 28.

[85] *Id.*

[86] *See* Ariel Sodomsky, *Models of Confusion: Strutting the Line Between Agent and Manager, Employee, and Independent Contractor In the New York Modeling Industry*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 269, 289 (2014); *see e.g.,* Zaremba v. Miller, 113 Cal. App. 3d Supp. 1, 5 (1980) (finding that a model is subject to the complete control of whomever she is working, and of the photographer, in this case, who controlled all of the details concerning her work and performance, i.e., every movement, the dress, hours, and place of work, etc.).

[87] *See supra* Section II.

as the public face of the brand. This formula is what ultimately drives sales and plays a huge role in making or breaking the company's ultimate success and profitability. As models' work falls squarely within the marketing and promotional work of the fashion brand, Prong (B) similarly favors a model's employee classification.

Finally, Prong (C) also weighs in favor of an employee classification because there is no way to distinguish or separate a model from her work. They are one and the same: a model's work is how she utilizes her look, persona, presence, and physique to convey the brand aesthetic. Though one could argue performing modeling services for various clients would constitute "business activity existing independently of . . . the service relationship with hiring firm,"[88] models' work is transitory by nature and does not constitute the type of "stable, lasting enterprise that survives termination with the hiring firm" that the test requires.[89]

Except for the "it" supermodels of the moment, few models have ongoing, guaranteed work with a single client, let alone at all. Most work a few hours, or a day or two for a fashion brand and then go weeks to months without work. Moreover, models' ability to obtain work is wholly dependent on—and not independent of—their agent and the agency clients booking them. Without a separate business or office location, a financial investment in the business' equity or profit scheme, a business license, and most significantly, the ability to contract more than one agency at the same time due to their exclusive agency contracts,[90] models cannot be deemed independent contractors under Prong (C).

In sum, the ABC test's application fails to rebut the presumption that models are employees. Moreover, the fact neither the statutory language nor any delineated exception expressly or

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[88] Stephen Fishman, *California Passes Historic AB5 Gig-Worker Law*, NOLO, https://www.nolo.com/legal-encyclopedia/ca lifornia-gig-worker-law-AB-5.html (last visited Nov. 14, 2020).

[89] Indeed, Prong (C)'s usual steps to promote an independent business include incorporation and licensure. As models themselves do not incorporate, nor are they licensed, their working arrangement is transitory in nature. *See* Dynamex Operations West, Inc. v. Superior Court, 416 P.3d 1, 39 (Cal. 2018); *see also* LEGAL TESTS FOR INDEPENDENT CONTRACTOR CLASSIFICATION UNDER CALIFORNIA LAW (2020), Westlaw PLLE. *available at* Westlaw Practical Law Labor & Employment (discussing various tests for independent contractor status in California).

[90] Fishman, *supra* note 88.

impliedly refers to models bolsters this conclusion.[91] Though various businesses and industries have sued the State of California challenging AB's application,[92] no suit to date involved a model or challenged AB 5's application to the modeling industry. As the ATA has too remained silent on the issue,[93] an argument can be made that AB 5 affords models the employee status they legislatively sought but failed to directly achieve.

### C. ALTHOUGH AB 5 SEEMINGLY AFFORDS MODELS THE PROTECTIONS THEY SEEK, ITS APPLICATION WOULD UPEND THE MODELING INDUSTRY BECAUSE THE CURRENT INDUSTRY INFRASTRUCTURE SIMPLY CANNOT SUPPORT A MODEL EMPLOYEE BUSINESS MODEL

On its face, AB 5 seemingly provides a messiah-like solution for which the modeling world has long hoped. However, AB 5's employee status determination is only effective if the industry can and will support it—and it is clear that even if there is a will—the lack of industry infrastructure flexibility demonstrates that there is no way.

Although AB 5 confers employee status and the accompanying benefits and protections models sought under the

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[91] Even though the California Talent Agencies Act defines models as "artists," the statute accepts only fine artists. *See* CAL. LAB. CODE § 1700.4(b).

[92] A variety of companies sought (but were denied) injunctions against AB 5's enforcement including Postmates, a service-based delivery company (*see* Olson v. California, No. 19-cv-10956-DMG-RAO, 2020 WL 905572, (C.D. Cal. Feb. 10, 2020)); and independent non-fiction writers (*see* Am. Soc'y of Journalists and Authors, Inc. v. Becerra, No. 19-cv-10645 PSG-KSX, 2020 WL 1434933, (C.D. Cal. Mar. 20, 2020)). Other businesses, including data processing entities and the California Tricking Trucking industry, sought declaratory relief (*see* Crossley v. Cal. 479 F. Supp. 3d 901 (S.D. Cal. 2020); Cal. Trucking Ass'n v. Becerra, 438. F. Supp. 3d 1139 (S.D. Cal. 2020)); while others still challenged AB 5 on pre-emption grounds (*see* Western W. States Trucking Ass'n v. Becerra, No. 19-cv-02447-CAS-KKX, 2020 WL 2542062, (C.D. Cal. May. 18, 2020)).

[93] In response to a written inquiry regarding AB 2539's attempted classification of models as employees, and AB 5's application to models, the ATA's response was as follows: "ATA supported and worked with Assembly Member Levine to pass the legislation. ATA has not taken a position on behalf of employers as to the employment status of models as either employees or independent contractors. That determination is made and entered into between the 'talent' and the employer – models are not employees of the talent agency." E-mail from Karen Stuart, Exec. Dir., Ass'n of Talent Agents (Sept. 17, 2020) (on file with author).

Labor Code, its application to the industry will undermine its existence for several reasons. First, the current industry infrastructure presents no clear "employer." Models[94] and other U.S. jurisdictions and countries argue[95] agencies are the natural employer candidate[96] because "the agency selects which models it will represent, chooses which models to send to clients, generally establishes the models' fee after consultation with the client, requires the models to submit completed job vouchers and then directly pays the models their wages"[97] pursuant to their exclusive contracts—as a traditional employer would.[98] Agents' power of attorney, and their exclusive control over a model's financial affairs, use of her image, her career direction, and the like via exclusive contracts, provide a constant, emblematic characteristic of an employer-employee relationship.[99]

On the other hand, one can argue the client is better suited to employ the model. While agents act as "middle men"[100] in contracting with the client on behalf of the model for the model's services,[101] it is the fashion client who "takes control over the

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[94] Model Nikki Dubose believes that "the agency should be their [i.e., models'] employers. . . The agencies should be the ones to provide adequate protections to the models (health care, timely pay, etc.) and should be safe, structured business environments that made models feel safe and proud to work at." Interview with Nikki DuBose, *supra* note 54.

[95] Insurance Appeals Boards in New York have held that models should be regarded as employees of the agencies. *See, e.g.*, *In re* Chopik, 535 N.Y.S.2d 268, 270 (App. Div. 1988); *In re* Barnes, 627 N.Y.S.2d 479 (App. Div. 1995). Moreover, in France, models are agency employees protected under applicable Labor Laws. *See* Simmerson, *supra* note 5, at 163-65 (citing and explaining French modeling law).

[96] Schiffbauer, *supra* note 25.

[97] Sodomsky, *supra* note 86, at 294 (citing *In re* Chopik, 535 N.Y.S.2d 268, 270 (App. Div. 1988); *In re* Barnes, 627 N.Y.S.2d 479 (App. Div. 1995)).

[98] *See* Sauers, *supra* note 28; *see also id.* Sodomsky, *supra* note 86, at 293-94 (noting that all of the Unemployment Appeals Board cases found that models should be employees of the agencies).

[99] *See also* Sodomsky, *supra* note 86.

[100] Lockwood, *supra* note 29.

[101] *See* E-mail Interview with Karen Stuart, Exec. Dir. of Ass'n of Talent Agents, (Sept. 17, 2020) ("[D]etermination is made and entered into between the 'talent' and the 'employer' – models are not employees of the talent agency," explaining the ATA Executive director believes clients are the model's employer) (on file with author); *see also* Padula, *supra* note 36, at 128 (explaining that the agency books jobs for the model but is not likely the model's employer).

assignment"[102] with respect to the model's work. "[D]esigners and photographers, as clients, exercise far-reaching control over the models"[103] as "the client decides the date of the work, provides the facilities, equipment tools, and supplies, stipulates the hours, often requires exclusive services and can terminate the model's services."[104] Most importantly, the client—not the agent—pays the model and agent for their respective services.[105] As the industry deep-pockets with ultimate financial responsibility and steadier revenue streams, fashion brand clients are better positioned financially to "employ" models.[106] However, without a clear "winner" and no volunteers, any employee reclassification would be rendered moot in practice, despite being effective in theory.

Second, even if an employer emerges, the current industry commission structure could not support a "model employee" business model. Agencies and models both work on commission. Accordingly, they are not paid until the model is booked and completes the work. To increase placement odds with clients, agencies contract with established, rising, and up-and-coming models but neither bookings nor commission are guaranteed. Agencies routinely contract and then terminate model contracts because not all agency-signed models get booked. If models were agency employees, agencies would be required to pay every model they sign minimum wage and benefits, as well as state social security, unemployment taxes, and other benefits regardless of whether the model ever gets booked.

Based on the current compensation structure, this would not sustain a profitable business. To financially support "model employees," the agency compensation structure would require an overhaul—something agencies would vehemently oppose, as evidenced by their opposition to AB 2539 and AB 1576. While some would argue that clients' deeper pockets could afford model "employees," their business models also cannot accommodate an employer-employee relationship because of the "transitory nature of

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[102] Padula, *supra* note 36, at 128.

[103] *Id.* (citing Interview with Ali Grace Marquart, Marquart & Small, LLP (Apr. 2, 2014); *see also* Zaremba v. Miller, 113 Cal. App. 3d Supp. 1, 5 (1980).

[104] Sodomsky, *supra* note 86, at 290.

[105] Padula, *supra* note 36, at 121.

[106] *See Zaremba*, 113 Cal. App. 3d Supp. at 5.

modeling work . . . [that] makes it more difficult for each client to be seen as an employer"[107] in California and the US.[108]

Third, the adoption of an employee business model necessitates a complete restructuring of how agencies and clients do business—something the industry has historically been reluctant to even consider.[109] Agencies would no longer be able to sign models simply because they "have potential." They would be unable to afford to keep them on their payroll while also remaining profitable. Forced to slash some models they represent, agencies would be limited to signing only established, top models who could "guarantee" bookings. This would drastically limit opportunities in the modeling industry, making the industry more exclusive and competitive and drive models to greater extremes to remain competitive.[110] Similarly, if fashion brand clients became the employers, the brands would be pigeonholed into relying on a few select models. This reliance would inhibit the brand's business prospects and target audience, creativity in devising marketing strategies and campaigns, and their ability to pivot or rebrand with ease.

Fourth, increased financial responsibilities would drive smaller agencies out of business, leaving only larger corporate entities left to service the industry. In eliminating smaller agencies, and ultimately competition, the industry would be concentrated in the hands of a few large companies—which could potentially raise antitrust issues under the Clayton and Sherman Acts.[111] It would also further constrict opportunity in an already hyper-competitive industry. Furthermore, with increased financial demands, agencies would be deprived the freedom to think outside the box in selecting their model pool. Their decisions would be bottom line driven, forcing them not only to scale back their boards but to limit them only to a models' "guaranteed" bookings. Gone would be the days

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[107] Sodomsky, *supra* note 86, at 290.

[108] Models working in France—also working in a transitory nature—become agency employees with a limited contract for said purposes. *See* Simmerson, *supra* note 5, at 165.

[109] *See supra* note 55 and accompanying text.

[110] Interview with Roman Young, Founder/Owner, Nomad Mgmt. (Sept. 16, 2020).

[111] *See* Fears v. Wilhelmina Model Agency, Inc., No. 02 Civ. 4911 (HB), 2007 WL 1325297, at *2 (S.D.N.Y. Jun. 20, 2005) (establishing a ten-year consent decree creating defining clear contract language all modeling contracts must contain, in holding that various Model Management companies engaging in schematic price fixing that violated antitrust law, to promote transparency and competition).

of models with diverse sizes and ethnicities. This would hinder industry diversity and inclusion—something the modeling industry certainly cannot afford from a public relations standpoint. As such, while industry reform is needed, dictating change in the form of employee reclassification may ultimately do more harm than good.

## IV. CALIFORNIA'S PROPOSITION 22 MAY BE THE CATALYST FOR CHANGE IN THE MODELING INDUSTRY

As AB 5, in application, proves not to be the conduit for change models hoped for, its aftermath may offer that beacon. In response to the California legislature's adoption of AB 5, technology-based transportation and delivery service application companies like Uber, Lyft, DoorDash and others sought a compromise in promoting the most expensive ballot measure in California history.[112] Namely, Proposition 22, the Protect App-Based Drivers and Services Act.

Proposition 22 constituted the gig worker industry's attempt to circumvent AB 5's mandatory reclassification of their gig workers from independent contractors to employees. AB 5 was concerned the reclassification would bankrupt their industry by requiring these companies to pay state taxes, insurance, benefits, workers compensation and other employee mandated fees and costs. Proposition 22 instead created a third category of workers that could still function independently, but who would be provided "with certain minimum welfare standards and to set minimum consumer protection and safety standards to protect the public."

This hybrid "employment structure exempted gig workers from AB 5's ABC test by classifying them as independent contractors; but simultaneously afforded limited "employee" benefits. These limited benefits include maximum work hours, healthcare subsidies for drivers working an average of 25 hours per week, a calculated minimum wage, accident insurance, and compensation for lost income, among others.[113] While workers were afforded worker's compensation insurance, independent

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[112] Technology giants—Uber, Lyft, and DoorDash, among others—spent over $200 million dollars defending Proposition 22, which was approved in the November 2020 election by over 58 percent of California voters. *See* Kimberly Valladaras, *Uber, Lyft Win on Prop 22: The Most Expensive Ballot Measure in California's History*, BERKELEY L. (Nov. 16, 2020, 5:47 AM),

https://sites.law.berkeley.edu/thenetwork/2020/11/16/uber-lyft-win-on-prop-22-the-most-expensive-ballot-measure-in-californias-history/.

[113] *See* 2020 Cal. Legis. Serv. Prop. 22 (West).

contractors lacked access to worker's compensation by virtue of their independent contractor status.[114] Proposition 22 also mandated companies' development of anti-discrimination and sexual harassment policies.[115] Advocates urged its passage because it was about "starting to move into the best of two worlds."[116]

In application, Proposition 22 enabled Uber, Lyft, and DoorDash to sidestep more comprehensive, costly obligations imposed by the Labor Code, such as full benefits and minimum wage.[117] Viewed as both a bellwether[118] and a compromise (on the tech companies' terms), the proposition seemingly achieved a hybrid solution Uber, Lyft, DoorDash and independent contractors themselves sought, knowing these companies would fight AB's full application to their industries to the bitter end.[119]

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[114] *See* Castellanos v. State, No. RG21088725, 2021 LEXIS 7285, at *2-3 (Cal. Super. Aug. 20, 2021).

[115] *See id.* (citing CAL. BUS. & PROF. CODE § 7450(c) (Deering 2020)).

[116] *See* Our Wkly. L.A., *Proposition 22 Helping or Hurting Independent Contract-Drivers*, OUR WKLY. L.A. (Oct. 22, 2020), https://ourweekly.com/news/2020/10/22/proposition-22/.

[117] *See* Kari Paul, *Prop 22 Explained: How California Voters Could Upend the Gig Economy*, THE GUARDIAN (Oct. 15, 2020, 6:00 AM), https://www.theguardian.com/us-news/2020/oct/15/proposition-22-california-ballot-measure-explained, (noting the cost of Proposition 22 dwarfed the combined costs of compliance with the Labor Code mandates, previously incurred litigation costs as well as pending litigation costs and fees concerning AB 5's application).

[118] *Id.*

[119] In truth, Uber, Lyft, DoorDash and others, would have continued to challenge AB 5's application. Pending litigation, which spanned the course of 2020, up until 2 weeks before the election, enabled these companies to avoid complying with AB 5. Perhaps facing a losing battle, or simply being prepared to fight one on all fronts, Proposition 22 was their attempt to provide some benefits and worker protections short of what the Labor Code otherwise mandated. *See, e.g.*, The People v. Uber Technologies, 270 Cal. Rptr. 3d 290, 296 (2020); Paul, *supra* note 117. While it is true that some independent contractors working for Uber, Lyft, and DoorDash did support Proposition 22, many felt cheated by the meek benefits it afforded in comparison to what they were otherwise legally entitled to under AB 5 and the California Labor Law as employees. *See* Alissa Walker, *Uber and Lyft Just Bought a Law in California*, N.Y. MAG.: CURBED, (Nov. 5, 2020), https://www.curbed.com/2020/11/california-uber-lyft-prop-22.html.

Despite overwhelming voter support for Proposition 22,[120] there are still legal hurdles ahead. Drivers for Uber, Lyft and DoorDash, together with Service Employees International Union, sued the State of California in California state court and prevailed on their constitutional challenges to Proposition 22.[121] Most recently, the Alameda Superior Court ruled Proposition 22's designation of workers as independent contractors for purposes of worker's compensation ineligibility and ability to organize, unconstitutionally restricted the California legislature's right to make those designations.[122] As a result, Proposition 22 was held to be unconstitutional in its entirety because these provisions were deemed inseverable from the remainder of the statute.[123] Although its provisions remain in effect as the case is appealed, its future as currently drafted remains uncertain as a result of the "unusual provisions in it."[124]

Proposition 22, especially in the wake of the Coronavirus pandemic, shines a long overdue spotlight on the plight of independent contractors and has raised awareness about the need for

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[120] California voters passed Proposition 22 with a 58 percent majority. *See* Danielle Abril, *Uber, Lyft, and Gig Companies Win Big After Prop 22 Passes in California,* FORTUNE (Nov. 4, 2020, 12:42 AM), https://fortune.com/2020/11/04/prop-22-california-proposition-uber-lyft-gig-companies-workers-passes/.

[121] *See* Castellanos v. State, No. RG21088725, 2021 LEXIS 7285, at *17-18 (Cal. Super. Aug. 20, 2021).

[122] *Id.* at *6.

[123] *Id.* at *18. Note that Judge Frank Roesch's opinion also stated that Ca. Bus. & Prof. Code § 7465, which required a 7/8 supermajority approval, would be unconstitutional because it limited the Legislature's ability to pass future legislation that does not constitute an "amendment" under Article II, Section 10, Subdivision (c) of the California Constitution. However, the opinion narrowly construed the requirement to apply only to non-referendum procedures in order to avoid the constitutional conflict, severing it from the remaining part of the statue.

[124] Kate Conger, *California's Gig Worker Law Is Unconstitutional, Judge Rules*, N.Y. TIMES (Aug. 20, 2021), https://www.nytimes.com/2021/08/20/technology/prop-22-california-ruling.html.

protections and benefits for independent contractors. [125] In following the fourteen other states whose definition of employee includes "gig workers," [126] Massachusetts recently instituted litigation against Uber and Lyft to challenge their independent contractor misclassification, while the Albany legislature contemplates legislation that provides for a limited form of unionization for its gig workers.[127] The Department of Labor is also taking note as U.S. Labor Secretary, Marty Walsh, recently announced a Department of Labor policy shift in favor of classifying gig workers as employees.

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[125] *See* Rebecca Smith, *Independent Contractors & COVID-19: Working Without Protections*, NAT'L. EMP. L. PROJECT (Mar. 24, 2020), https://www.nelp.org/publication/independent-contractors-covid-19-working-without-protections/ (highlighting that the pandemic painfully highlighted the critical shortcomings in gig work as gig workers were deprived of "financial and physical security" as a result of their "independent contractor status." It also noted the disparate impact the pandemic had on gig workers of color who comprised almost half the gig worker workforce at companies such as Uber, Postmates and Amazon).

[126] Such states include Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Nebraska, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Vermont, and Washington. *See* National Employment Law Project, *Independent Contractors & COVID-19: Working Without Protections* (Mar. 24, 2020), https://www.nelp.org/publication/independent-contractors-covid-19-working-without-protections/#_ftn5.

[127] For example, Massachusetts sued Uber and Lyft over the status of drivers, arguing that drivers should be classified as employees with the right to receive benefits on the grounds that the "business model is unfair and exploitive…. [D]rivers have a right to be treated fairly." Kate Conger & Daisuke Wakabayashi, *Massachusetts Sues Uber and Lyft Over the Status of Drivers*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/07/14/technology/massachusetts-sues-uber-lyft.html?referringSource=articleShare. The case remains pending in the Massachusetts courts as of the date of this article. Moreover, lawmakers in New York are evaluating whether to pass a bill that would create a structure for bargaining among gig workers that labor experts regard as "a watered-down version of union representation, closely controlled by the companies . . . [that strips] away essential worker rights and protections." Kate Andrias et al., *Lawmakers Should Oppose New York's Uber Bill: Workers Need Real Sectoral Bargaining Not Company Unionism*, ON LAB. (May 26, 2021), https://onlabor.org/lawmakers-should-oppose-new-yorks-uber-bill-workers-need-real-sectoral-bargaining-not-company-unionism/https://onlabor.org/lawmakers-should-oppose-new-yorks-uber-bill-workers-need-real-sectoral-bargaining-not-company-unionism/.

Believing companies' misclassification of gig workers as independent contractors results in their unfair treatment in favor of companies' profits, the Department of Labor took notice. Secretary Walsh made an announcement that followed the Labor Department's Wage and Hour Division's proposal to rescind rules making it easier for companies to classify workers as independent contractors. He did so for one simple reason: to address the need to ensure "workers have access to consistent wages, sick time, health care and 'all of the things that an average employee in America can access.'"[128]

While modeling industry advocates acknowledge important differences exist between Uber drivers and models, "many of the kinds of abuses that models face, financial and otherwise, [are] strikingly similar to those faced by other low wage workers in the gig economy." [129] Like tech-based gig workers, models lack minimum wage, access to subsidized healthcare, maximum hour limits, protections from workplace harassment, insurance benefits, among others. A modified, broader construction of independent contractor should include models. As models lack the resources to fund an independently funded and similarly sized campaign, [130] Proposition 22 affords models both a template and an opportunity to piggyback off its momentum and political attention.

As Uber, Lyft and DoorDash continue to face both legal and political challenges ahead in their attempts to seemingly usurp the

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[128] *See* Nandita Bose, *Exclusive: U.S. Labor Secretary Supports Classifying Gig Workers as Employees*, REUTERS (Apr. 29, 2021, 8:50 AM), https://www.reuters.com/world/us/exclusive-us-labor-secretary-says-most-gig-workers-should-be-classified-2021-04-29/.

[129] Cristo, *supra* note 2.

[130] Companies in support of Proposition 22 spent almost $200 million in marketing and advertising, making it the most costly ballot measure marketing campaign in California's history. *See* Ryan Menses et al., *Billions Have Been Spent on California's Ballot Measure Battles. But This Year is Unlike Any Other*, L.A. TIMES, (Nov. 13, 2020), https://www.latimes.com/projects/props-california-2020-election-money/. Interestingly, the campaign costs paled in comparison to the cost of employing its independent contractors and speak to what's at stake for these companies. To comply with A.B. 5, employment costs would rise up to 30 percent or more. *See* Salvador Rodriguez, *Uber and Lyft Pledge $60 Million to Ballot Measure in Fight to Keep Drivers' Classification as Contractors*, CNBC, (Aug. 29, 2019, 8:15 PM) https://www.cnbc.com/2019/08/29/uber-and-lyft-pledge-60-million-to-fight-california-ballot-measure.html; Michelle Cheng, *A Ballot Measure Backed by Uber and Lyft Is Now the Most Expensive in California History,* QUARTZ.COM, (Sept. 23, 2020), https://qz.com/1907040/uber-lyft-doordash-are-spending-millions-on-california-prop-22/.

government's right to classify workers as evidenced by the California Supreme Court's recent decision, models now have the leverage to utilize the political process to expand Proposition 22's language. The language should include models and similarly situated independent contractors within its parameters and definitions. Indeed, whether by coincidence or otherwise, the industry has begun to respond. On the precipice of Proposition 22's passage, Elite Model Management USA introduced "Insurance for Models." [131] The program affords models reduced rates for insurance plans for medical coverage, third party liability coverage, and limited travel insurance.[132]

While optimists see this as a positive step in the direction of reform, with workers' rights issues at the forefront in California voters' minds, it is only a matter of time until models find themselves center stage for this long overdue battle worth fighting.

## V. THE GREATEST CHANGE OFTEN COMES FROM WITHIN: WAYS MODELS CAN START TO IMPLEMENT REFORM BY HARNESSING THEIR OWN POWER AND RESOURCES, AND CAPITALIZING ON INDUSTRY SHIFTS

Recognizing the modeling industry is slow to innovate, the law often fails to keep pace with social change, and policies can only go so far.[133] Regardless of legal and social change, the key to *immediate* change actually lies in the models' own hands. Despite its origins as a cost saving measure for tech-based transportation and delivery companies, the breadth of Proposition 22's application has shifted independent contractors' overall approach to change. While independent contractors and models have long sought to change the industry from the outside in, Proposition 22's passage revealed the key to change may be from the inside out. In harnessing one of their

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[131] Lisa Lockwood, *Elite Model Management to Offer Insurance for Models*, WOMEN'S WEAR DAILY, (Nov. 12, 2020, 12:01 AM), https://wwd.com/business-news/media/elite-model-management-to-offer-insurance-for-models-1234655121/.

[132] *Id.*

[133] *See* Maya Singer, *The Model Alliance Will Receive CFDA's Positive Social Influence Award, But Founder Sara Ziff is Still "at the Beginning of a Very Long Fight,"* VOGUE (Nov. 10, 2021), https://www.vogue.com/article/sara-ziff-model-alliannce-cfda-positive-social-change-award (interviewing Sara Ziff).

most valuable assets—their numbers[134]—models can affect industry change by moving the needle from within, through: (1) education and mentorship; (2) strategic organization; (3) disruptive entrepreneurship; and (4) ballot initiatives.

### A. EDUCATING AND MENTORING MODELS CAN IMPROVE THEIR INDUSTRY EXPERIENCE AND EMPOWER THEM TO SELF-ADVOCATE

Simply stated, knowledge is power. Educating and mentoring young models can facilitate fundamental industry change by teaching them about their rights, and about how the industry *really* operates. The more models know and understand, the better armed they are to navigate the business, its challenges, and pitfalls.[135] Models need to better understand the complex provisions set forth in agency representation contracts, and they deserve more than the mere suggestion that outside counsel review it for them. For all intents and purposes, models need to know what questions to ask, what rights they retain versus relinquish (like rights to use their image), and how the compensation structure truly works before they sign on the dotted line with an agency. [136]

While imparting industry knowledge and insight may not wholly correct the industry's inherent power imbalance, it will cause models to fear less[137] and question more. Moreover, an industry-wide shift in this regard, with a more educated and knowledgeable model population, can eradicate any risk of models

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[134] *See* Sara Ziff, *A New Model for Fashion*, Mission Statement, THE MODEL ALL., https://www.modelalliance.org/our-mission (last visited Nov. 25, 2020); Cristo*, supra* note 2.

[135] Interview with Brad Lemack, Owner/President, Lemack and Co. Talent Mgmt./Pub. Rels. (Sept. 21, 2020).

[136] *See* Vanessa Helmer, *5 Questions You Should Ask a Modeling Agency Before Signing*, LIVEABOUTDOTCOM, (Oct. 31, 2019), https://www.liveabout.com/signing-with-a-modeling-agency-2379373.

[137] *See generally*, R. Sebastian Gibson, *Modeling Contracts - Answers to common Questions of How Models Can Protect Themselves*, HG.ORG, https://www.hg.org/legal-articles/modeling-contracts-answers - to-common-questions-of-how-models-can-protect-themselves-5597 (last visited Nov. 17, 2020).

being "labelled as difficult if [they] ask questions,"[138] thereby facilitating improved industry transparency and workplace equality.

Mentoring will prove instrumental in achieving this with the Model Alliance's Mentorship Program[139] being one such example. There, the Model Alliance, in partnership with some participating agencies, pairs experienced models with younger ones to afford young models support and career guidance.[140] In addition, these programs facilitate community and comradery by opening channels of communication, promoting leadership skill development, and instilling confidence in younger models, arming models with the lessons only industry experience afford. The success of these mentorship programs will ideally spur the creation of similar independent or inter-intra agency programs. Programs that will not only support and guide models as they traverse their careers, but also create a new generation of models whose enhanced understanding and knowledge will force agencies to finally come to the table.

### B. POWER IN NUMBERS: INNOVATIVE ALLIANCES THAT ORGANIZE MODELS AND HARNESS THEIR COLLECTIVE POWER IS CRITICAL TO IMPLEMENT INDUSTRY REFORM

Secondly, innovative model organization will facilitate moving the needle. Models have long "grappled with the difficulties of organizing"[141] in large part because their efforts, historically, resembled shoving a square peg into a round hole.[142] As demonstrated by the Model's Guild, attempts to unionize as

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[138] AFP, *'Slaves to Debt': Fashion Models Speak Out About Catwalk Misery*, FASHIONUNITED UK (Sept. 27, 2018), https://fashionunited.uk/news/fashion/slaves-to-debt-fashion-models-speak-out-about-catwalk-misery/2018092739173; *see also* Mears, *supra* note 36 (discussing how in spite of a $22 million dollar settlement, the court had to donate most of it because they could not find enough models willing to cross their agencies and identify themselves to collect their share).

[139] Since amalgamated into the RESPECT program, *infra* note 159.

[140] *See, e.g.*, Ziff, *supra* note 134.

[141] Cristo, *supra* note 2.

[142] The fight to allow independent contractors to unionize continues be an expensive uphill legal battle as evidenced by a recent 9th Circuit case whereby the U.S. Chamber of Commerce successfully challenged a Seattle City Council Ordinance that permitted for-hire drivers (e.g., Uber drivers) to unionize. *See* Chamber of Com. v. City of Seattle, 890 F.3d 769, 775-76 (9th Cir. 2018).

independent contractors—who cannot legally unionize—have failed. The "proto-union,"[143] which achieved only some short-lived success,[144] could neither withstand the "overwhelming might" of the agencies[145] nor eradicate models' "legitimate concerns about agency blacklisting"[146] should they affiliate. As "a union makes a strong oppositional statement that scares off people,"[147] the road to reform lies not in collective bargaining, but rather in "vigorously promoting a long-time labor strategy—strength in numbers—to press for better conditions."[148]

On the heels of #MeToo, and in following in the footsteps of other emerging freelancer "unions'" work, [149] the Model Alliance's establishment may be the industry's fighting chance at organized reform. Serving as an industry "voice and a guardian,"[150] the Alliance recognizes the path to effective change and longevity requires working with, not against, the industry.[151] In so doing, within the span of a few short years, the Model Alliance gained more traction than any other organization in growing its membership. [152] The Alliance was successful in establishing a

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[143] Cristo, *supra* note 2.

[144] Former model, Donna Eller, founded the Model's Guild in 1995, and after securing labor backing, managed to secure insurance and credit union financial services for models. *See* Steven Greenhouse*, Models Join Together to Make Unionism a Thing of Beauty*, N.Y. TIMES (Nov. 20, 1995), https://www.nytimes.com/1995/11/20/nyregion/models-join-together-to-make-unionism-a-thing-of-beauty.html; Cristo, *supra* note 2. However, the Guild struggled to find a foothold in the industry because of the agencies' resistance and inclination to blacklist models who joined. Cristo, *supra* note 2.

[145] Cristo, *supra* note 2.

[146] *See* Steven Greenhouse, *A New Alliance Steps Up to Protect a New Generation of Models,* N.Y. TIMES (Dec. 23, 2013), https://www.nytimes.com/2013/12/24/business/a-new-alliance-steps-up-to-protect-the-next-generation-of-models.html.

[147] *Id.*

[148] *Id.*

[149] *See, e.g.*, *About Freelancers Union*, FREELANCERS UNION, https://www.freelancersunion.org/about/ (last visited Nov. 27, 20). The Freelancers Union is a non-profit, started in 1995, that uses the power of numbers to affect change, through policy advocacy work. *See id.*

[150] Greenhouse, *supra* note 144.

[151] *See* Ziff, *supra* note 134.

[152] *See generally,* THE MODEL ALLIANCE (last visited Nov. 26, 2020), https://modelalliance.org/our-team (demonstrating that the Model Alliance quickly boasted a membership of over 400 models, overseen by a board of directors of industry veterans); *see also* Greenhouse, *supra* note 146.

Modeling Bill of Rights,[153] educating and empowering models to demand fair treatment, and partnering with agencies to create mentorship programs through the Model Alliance Mentorship Program.[154] Externally, the Alliance also successfully tackled the following "winnable" issues:[155] persuading New York Fashion Week to bar photographers from model changing areas; working with designers and agencies to fight model anorexia; and getting fashion publications, like Vogue, to cease hiring models under the age of 16.[156]

The Alliance also achieved political success in its work with legislators and the New York Department of Labor to pass the New York child model law, which incorporated models into the "child performer" definition.[157] This affords them better workplace protections. Most significantly, in 2018 and with the support of over 100 models and a handful of industry players, the Alliance established the "Respect Program."[158] This global initiative program was regarded by the New York Times as a "most ambitious solution."[159] The Respect Program calls on brands and agencies to sign legally binding agreements with the Model Alliance[160] to follow "a set of comprehensive industry standards developed by

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[153] Tracey Lomrantz Lester, *The Models' Bill of Rights: Check Out the Demands of the New Model Alliance, Bill of Rights*, GLAMOUR (Feb. 8, 2012), https://www.glamour.com/story/the-models-bill-of-rights-chec (outlining the Bill of Rights, including a models' right to professionalism, transparent accounting practices, and control of their career).

[154] THE MODEL ALLIANCE, *supra* note 152.

[155] Greenhouse, *supra* note 146.

[156] *Id.*

[157] THE MODEL ALLIANCE, *supra* note 152.

[158] *The RESPECT Program*, THE MODEL ALLIANCE (last visited Nov. 16, 2020), https://programforrespect.org/learn.

[159] *A Comparative Analysis of the Model Alliance's RESPECT Program*, WORKER-DRIVEN SOCIAL RESPONSIBILITY NETWORK (last visited Nov. 29, 2020), https://wsr-network.org/model-alliance-respect-program/ (presenting the RESPECT Program as a significant improvement from previous industry initiatives).

[160] As recently as February 2020, over 100 models signed a letter calling out Victoria's Secret's detrimental work environment, calling on the company to sign on to the RESPECT Program's Pledge. *See* Shoshy Ciment, *Over 100 models signed an open letter to Victoria's Secret's CEO decrying a 'culture of misogyny, bullying, and harassment' at the lingerie company,* BUS. INSIDER (Feb. 5, 2020), https://www.businessinsider.com/models-criticize-victorias-secret-open-letter-to-ceo-2020-2.

models to govern behavior, rights, payment, and recourse, as well as a detailed list of consequences and processes"[161] intended to train and educate industry members "to prevent abuses from happening in the first place."[162]

The Alliance and its initiatives are designed not only to raise industry and global awareness, but to also affect incremental reform that other attempts at "organizing" failed to achieve through vis a vis industry player partnership.[163] Though models have successfully unionized in countries such as Great Britain,[164] they succeeded because both their market and country embraced the need for reform.[165]

Regrettably, the modeling industry in the United States lags far behind, as evidenced by decades of contemplation as to why the fashion and modeling industry has not—and cannot—create a fashion or modeling counterpart to the Screen Actors Guild.[166] Some attribute it to the fact "[m]odels are younger, less securely employed and more interchangeable than workers in other non-arts and entertainment-related professions."[167] Others contend that unlike Hollywood, where the film and television industry hubs reside, the modeling industry is international. Since "models are working all over the world without knowing [] schedules and without there being a place to congregate,"[168] organization is difficult.[169] Instead of continually trying to fit a square peg into a round hole, acknowledging and embracing these industry challenges is the key to reform, as alliances and partnerships have affected thus far.

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[161] *The RESPECT Program*, *supra* note 158.

[162] Lisa Lockwood, *Model Alliance Releases Video About Fashion Industry Abuses and the Respect Program,* FAIRCHILD MEDIA WWD (Sept. 17, 2020), https://wwd.com/fashion-news/fashion-scoops/model-alliance-releases-video-about-fashion-industry-abuses-and-the-respect-program-1234589589/.

[163] Abreu, *supra* note 43.

[164] Ariel Sodomsky, *Models of Confusion: Strutting the Line Between Agent and Manager, Employee and Independent Contractor in the New York Modeling Industry*, 25 Fordham Intell. Prop. Media & Ent. L.J. 269, 302 (2014).

[165] Denis Campbell, *Models Reveal Why They Need a Union*, THE GUARDIAN (Dec. 16, 2007), https://www.theguardian.com/uk/2007/dec/16/fashion.lifeandhealth.

[166] *See generally,* Paccione, *supra* note 23, at 425.

[167] *Id.* at 434.

[168] Cristo, *supra* note 2.

[169] *Id.*

Moreover, in light of the #MeToo movement and the awareness it cultivated in and around 2017,[170] it seems that models may likewise find an ally in the fashion client brands themselves. Actually, the movement seemingly prompted individual brands, fashion conglomerates and fashion trade organizations to pledge commitments, and to develop and announce initiatives and charters in an effort to protect models. For instance, building on its 2007 Health Initiative to address "the overwhelming concern about unhealthily-thin models and whether or not the industry should impose restrictions," [171] the Council of Fashion Designers of America, [172] in partnership with Sara Ziff's Model Alliance, established the Initiative for Health, Safety, and Diversity. This initiative comprehensively addressed additional issues like the lack of diversity and inclusion in the modeling industry, as well as establishing a no-tolerance policy for sexual harassment and assault.[173]

The association's industry-specific educational efforts, standards, mental and physical health awareness programs, support systems, and evaluation and treatment options that the CFDA offers reflects the recognition that "designers share a responsibility to protect women, and very young girls in particular, within the business, sending the message that beauty is health."[174] The CFDA also adopted both a zero-tolerance policy for unsafe environments and for abuse in the workplace and partnered with the Model Alliance in affording models recourse in the case of abuse, unwelcomed advances or other inappropriate conduct.[175]

In addition to the over 500 brand members of the CFDA, two of the largest fashion conglomerates, Louis Vuitton Moet Hennessey ("LVMH") (which includes brands such as Celine, Stella McCartney, Christian Dior, Givenchy, among others, including the namesake brands) and the Kering Group (which

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[170] *See* Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *The Silence Breakers*, TIME (Dec. 6, 2017), https://time.com/time-person-of-the-year-2017-silence-breakers/.

[171] *Initiative for Health, Safety, and Diversity*, CFDA, https://cfda.com/philanthropy/initiative/initiative-for-health-safety-and-diversity (last visited Oct.16, 2021).

[172] The CFDA is a not-for-profit fashion trade organization, comprised of 477 fashion brands, whose mission is to strengthen the impact of American fashion in the global economy. *See* CFDA, https://cfda.com/about-cfda (last visited Oct.16, 2021).

[173] *Initiative for Health, Safety, and Diversity*, *supra* note 171.

[174] *Id.*

[175] *Id.*

includes luxury brands such as Gucci, Balenciaga, Alexander McQueen, and Bottega Venetta), also sought to address model health and safety in 2017 and 2018. LVMH and Kering collaborated to develop an initiative comprising both a charter on working relations with models, and established a website dedicated to the same, entitled "wecareformodels.com."[176]

The charter, adopted by both conglomerates' respective brands, commits to provide safe working conditions and healthy standards for models by: (1) banning extremely thin models from casting; (2) requiring models to present valid medical records attesting to their good health within six months of the booking; (3) banning the casting of any model under the age of 16; (4) mandating education requirements, work hours and the presence of a chaperone for any model ages 16-18; (5) affording models a means of recourse in the case of disputes with an agency, casting director, or brand; (6) requiring private spaces for models to change without public access; (7) requiring a model's explicit consent to any nudity or changes in appearance; and (8) prohibiting alcohol consumption during work (except as permitted by the brand because of the nature of the shoot, or after the shoot) and providing models access to healthy food and drink, as well as information about maintaining a healthy diet.[177]

These brands' recognition of the pervasive issues plaguing the modeling industry, and their attempts to bring awareness to them and create accessible means for models to seek assistance and recourse, demonstrates the allies that models have in these brands. Capitalizing on these by forming alliances that harness models' power and influence, in partnerships that tackle universal industry issues in ways less undermining will yield change—one tiny step forward at a time. Moreover, a model-fashion brand alliance may to afford models the industry leverage they need, in the face of the agencies, to affect the greater change models ultimately seek.

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[176] *See LVMH and Kering Have Drawn Up a Charter on Working Relations with Fashion Models and Their Well-Being*, LVMH (Sept. 6, 2017), https://www.lvmh.com/news-documents/press-releases/lvmh-and-kering-have-drawn-up-a-charter-on-working-relations-with-fashion-models-and-their-well-being/ [hereinafter *LVMH and Kering Have Drawn Up a Charter*]; *see also* Shweta Gandhi, *Fashion's Biggest Rivals LVMH and Kering Launch A Wellness Website For Models to Combat Abuse*, ELLE (Feb. 20, 2018), https://elle.in/article/lvmh-and-kering-wellness-website-for-models/; *We Care*, WE CARE FOR MODELS, https://www.wecareformodels.c om/we-care/ (last visited Oct. 17, 2021).

[177] *See LVMH and Kering Have Drawn Up a Charter*, *supra* note 176.

### C. MODEL BUSINESS ENTERPRISES, NAMELY ENTREPRENEURIAL START-UPS AND WORKER COOPERATIVE PARADIGMS, MAY AFFORD MODELS WITH OPPORTUNITIES TO CIRCUMVENT THE AGENCIES ALL TOGETHER

A third alternative means of achieving industry reform is circumventing the agencies altogether through the advent of a model-owned and -run enterprise. Industry veterans have long recognized agencies' failure to evolve along with the industry.[178] As the industry's business has "moved online and the culture of celebrity has created massive changes [as m]ost jobs pay less, few jobs pay a lot, and only a handful of supermodels and 'it girls' book these high-paying jobs," a market gap has emerged.[179]

In trying to "keep the good of the traditional agency system and leave out the bad," and leveraging technology to allow models to book their own jobs, models are founding their own start-ups, such as UBOOKER.[180] Offering a more "democratic" approach to booking model jobs,[181] UBOOKER enables models to book their jobs independently, allowing them to have "control over their careers, including full transparency, access to more jobs and a way

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[178] *See* Laura Jones, *Sarah Ziff and Her Model Alliance*, THE FRONTLASH, https://www.thefrontlash.com/sara-ziff-and-her-model-alliance/ (last visited Nov. 22, 2020).

[179] Rachel Deeley, *The Future of the Modelling Industry*, BUS. FASHION, (Aug. 11, 2020, 5:20 AM), https://www.businessoffashion.com/articles/workplace-talent/future-of-the-modelling-industry-agencies-img-elite-amck?from=2020-08-10&to=2020-08-11.

[180] *Id.*; *see also* Amelia Heathman, *UBOOKER: This Digital Modelling Agency Wants to Transform the Fashion World*, EVENING STANDARD (Sept. 13, 2019), https://www.standard.co.uk/tech/ubooker-digital-modelling-agency-change-fashion-a4236336.html; *see also* UBOOKER, https://u-booker.com/ (last visited Nov. 8, 2021).

[181] *See* Heathman, *supra* note 180. Another similar business is Agent, Inc. It is a web-based app whereby models can create a unique link to their body of work and profile to market themselves to clients and set their own rates, thus "deliver[ing] a more transparent, safer environment for models." AGENT, https://joinagent.com/models (last visited Nov. 8, 2021). Agent launched in March 2018 after two years of beta testing, and it is intended to "disrupt" the industry by empowering models to manage their own careers in connecting directly with clients without an agent intermediary. *See* Lisa Lockwood, *Agent Inc., a New Modeling Platform, Seeks to Disrupt Status Quo*, WWD (Mar. 28, 2018, 4:23 PM), https://wwd.com/fashion-news/fashion-features/agent-inc-new-modeling-platform-to-disrupt-status-quo-1202640074/.

to increase their earning potential, including supplemental income." [182] Unlike traditional agencies, UBOOKER charges models low, fixed commission rates without requiring exclusive representation contracts, affording models true independent contractor status.[183] With modeling agencies slow to innovate, and the industry moving online, start-ups such as UBOOKER allow models to grow in the direction of the industry while affording them business ownership opportunities, flexibility, and career self-determination.

Additionally, worker cooperatives, such as the Cooperative Labor Contractor (CLC) paradigm, are also emerging as agency alternatives. Building on the 2016 California Worker Cooperative Act, [184] which was legislation that promulgated the creation and infrastructure for worker-owned cooperative businesses in California, and in the wake of AB 5, union and labor organizations are exploring the hybrid alternative business structures, where workers can receive employee worker protections while owning and governing their workplaces.[185]

These efforts culminated in the Cooperative Economy Act ("CEA"), or AB 1391. California State Assemblywoman Lorena Gonzalez first introduced AB 1391 in February 2021 and subsequently amended it in March 2021, the amendment to which remains pending in committee to date.[186] In an attempt to address the hardships independent contracts suffered during COVID-19, and even prior due to the insecurities around "gig work," the CEA is designed to "scale up the worker co-op model" whereby workers

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[182] *See* Heathman, *supra* note 180.

[183] *See How it Works*, UBOOKER, https://u-booker.com/how-it-works (last visited Oct. 17, 2021).

[184] A.B. 816, The California Worker Cooperative Act was the result of a multi-year effort to remove barriers to the creation of worker cooperatives in California and to improve operations for existing ones. With a goal of empowering small businesses that are democratically owned and operated by their workers, it eases barriers to raising capital investment from within the community, and mandates that a worker cooperative have a class of worker-members who control the cooperative. *See* Christina Oatfield, *Governor Brown Signs California Worker Cooperative Act, AB 816*, SUSTAINABLE ECONOMIES L. CTR. (Aug. 12, 2015), https://www.theselc.org/governor_brown_signs_california_worker_cooperative_act.

[185] *See generally* UPSIDE DOWN CONSULTING, https://www.upside-down.co / (last visited Nov. 8, 2021).

[186] *See* The Cooperative Economy Act, A.B. 1319, 2021-2022 Assem. (Cal. 2021), https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=202120220AB1319; E-mail from Ra Criscitiello to author (Sept. 28, 2020) (on file with author).

"share in the profits, oversight, and governance using the democratic process."[187]

Indeed, the CEA promotes the formation and growth of worker co-ops and establishes additional incentives for working with co-ops.[188] In creating a new labor market intermediary, worker co-ops can serve as staffing firms that are designed to employ workers, including those in the gig economy.[189] Workers at worker co-ops, who prior to AB 5's enactment would be classified as independent contractors, are instead classified as W2 employees who both own and govern the business, working to maximize profits for, and not at, the workers' expense.[190]

Whereas AB 5 would necessitate that a business whose workforce consisted of independent contractors classify them as employees, under the CEA, the same businesses can contract with worker co-ops, who pay the workers as employees. [191] This relieves the contracting company of the required gig-employee reclassifications and other AB 5 mandated employment responsibilities.[192]

In sum, the CEA affords companies whose business models dictate hiring independent contractors or whose business otherwise prefers the opportunity and ability to exist without having to directly

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[187] *The Future of Work*, COOP. ECON. ACT, https://www.cooperativeeconomyact.org/about (last visited Oct. 17, 2021).

[188] *Id.*; *see also FAQs*, COOP. ECON. ACT, https://www.cooperativeeconomyact.org/faqs (last visited Oct. 17, 2021).

[189] *FAQs*, *supra* note 188.

[190] *Id.*

[191] *See* Ra Criscitiello, *Anchoring America's Solidarity Economy Helps to Heal Pandemic Inequality Challenges*, 1WORKER1VOTE (Apr. 5, 2020), http://1worker1vote.org/anchoring-americas-solidarity-economy-helps-to-heal-pandemic-inequality-challenges/?fbclid=IwAR26SSfDPmajXUZ-ey9r53pLtWRKdzKOOEb8l61mT5AevDmDB1i3wm6wIX4.

[192] *Id.*

employ their workers[193]—something that may further incentivize companies to work with co-ops in this manner.[194]

As applied to the modeling industry, the CEA would not only resolve the employer-employee question but could also strike the balance that agencies and clients need to comply with AB 5. It could also provide an alternative to bypass the agencies completely. Working within the current industry infrastructure, a model-run and -operated worker co-op could, for example, contract with the agencies (who would join the FCWC), who would in turn contract with clients on models' behalf. This option affords models more protection and leverage as the co-op would negotiate with agencies on their behalf. Moreover, with a compensation structure mirroring between agencies and mother agents, models would receive additional oversight in holding agencies accountable.

Alternatively, models could create their own worker co-op type agency under the ATA and bypass the agencies completely. The Model worker co-op could directly contract with fashion brands to secure work for their employees. Given the industry shift to conducting business online, model worker co-ops provide models with a viable industry infrastructural alternative.

## VI. CONCLUSION

Like models on a runway, Proposition 22 commands attention. Its future, as currently drafted, remains uncertain. However, what is certain is the attention it garners will no longer allow companies to continue to misclassify their workers, skirt financial obligations they owe to employees and the state, and avoid offering employee benefits and protections. Designed as a means to circumvent AB 5's mandate for gig worker employee classification, Proposition 22 offers more viable solutions for models while preventing the industry's upending that applying AB 5 would inevitably cause.

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[193] *See id.*

[194] *Id. See also* The Cooperative Economy Act, A.B. 1319, 2021-2022 Assem. (Cal. 2021), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB1319 *(*explaining that to work with a worker co-op, the entity would need to become a member of the Federation of California Worker Cooperatives ("FCWC"). By statute, the Labor Commissioner would organize the FCWC, require the Governor to appoint a Board of Directors to maintain the federation, and afford voting power proportionate to the workers' owner's share of the total federation workforce. The FCWC would also set labor policy and manage and oversee FCWC operations and those its members.)

Undeniably, the current modeling industry infrastructure—with agencies as the lynchpins—affords few clear answers or volunteers as to which industry player would serve as the "employer." The commission-based compensation structure is not only incapable of supporting an "employee" business model but being forced to embrace one would further stymie diversification and inclusion in a hyper-competitive industry; an industry already reluctant to embrace anyone shorter than 5'10" and a size zero.

Short of dismantling and rebuilding the industry from scratch—which an industry already slow to change would not readily allow—reform lies elsewhere. It lies in the models' hands and in harnessing the momentum that Proposition 22 has garnered, as well as models' inherent power in their numbers. Through strategic alliances and organizations working alongside the industry, small wins, like ones the Model Alliance has achieved, can affect comprehensive change one success at a time. Moreover, California's cooperative legislation as well as models' entrepreneurial efforts, may further turn the tides by competing with the agencies in bypassing them altogether, all the while affording models more control, business ownership, and true flexibility. In combination, the will to change will ultimately create the runway for it, even if it occurs at a walking, instead of running pace.