

# BITING THE HAND THAT DIDN'T FEED US: HOW CORRECTLY CLASSIFYING MODELS AS EMPLOYEES WOULD CATALYZE FASHION INDUSTRY REFORM AND CLOTHE WORKERS IN BASIC PROTECTIONS

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## I. INTRODUCTION

*“Macey, will you please speak with me after class?” Macey’s freshman year language arts teacher asked. Standing almost five feet, ten inches tall in her highwater jeans, not to mention covered in the most ruthless variety of acne, Macey was a sight for small-town Georgia eyes. (Suffice it to say she was not competing in the Miss Wayne County pageant.) Her teacher unloaded a barrage of questions that thinly veiled the real one: Do you have an eating disorder?*

*Macey did not have anorexia and was unwilling to invent falsehoods for her teacher, who was trying to elicit the answer she had clearly anticipated—and had apparently hoped to receive within five minutes of finishing the class discussion on A Tale of Two Cities. Her teacher’s heart was in the right place, and the world needs teachers who care, Macey would realize years later. At the righteous age of fourteen, however, she felt uncomfortable. Macey was bony and underdeveloped for her age, and her long, gawky limbs made her appear even skinnier than she already was, but she did not have anorexia . . . yet. In fact, Macey would not have anorexia for another decade.*

*“It’s just apparent that you’ve lost weight recently, you know?” the teacher cajoled.*

*Macey had not known.*

. . .

If you asked the average American to name unprotected or vulnerable groups, “fashion models” would be unlikely to leave anyone’s lips. After all, models are living a life of plane tickets and Prada . . . right?

Our assumptions are unfounded. As a society, we sail on a voyeuristic voyage with our favorite models, scrolling from Paris Fashion Week to a stint in Tokyo, while the young women and men behind our glowing screens suffer from eating disorders, financial abuse, and lack of simple workplace protections.

While these dangers are multifaceted, they could all be mitigated through one change: recognizing models' status as employees. Models are currently classified as independent contractors; however, when one examines the relevant factors, it becomes evident that they should be classified as employees. The most important factor in determining employee status is control, and though agencies exercise far greater control over models than the average employer does over employees, the parties ostensibly do not share an employer-employee relationship. Without employee status, models (many of whom are underage) remain without the essential protections afforded to other U.S. workers. In fact, more legal protections exist for the sale of actual clothing hangers than for the workplace health and safety of the individuals known as "human clothing hangers."

Part II will provide background information that will illustrate the hazards and injustices models face on an everyday basis. Part III will examine the differences between an independent contractor and an employee, and then illustrate why models are incorrectly categorized as the former. Part IV will provide an overview of how recognizing models' status as employees would catalyze change and will briefly discuss the failed legislation that would have protected models. Part V will conclude.

## II. THE FASHION INDUSTRY: A "RUNWAY" TRAIN

The fashion industry remains almost completely unregulated. Though it has derailed countless young lives, the industry barrels forward, fueled by lack of regulation and emboldened by the replaceability of the models.<sup>1</sup>

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## A. A Powerful Industry is Born

A man named John Robert Powers opened the first modeling agency in the early 1920s.<sup>2</sup> Powers, an out-of-work (and, according to Powers himself, “lousy”) actor, had an epiphany when he was paid \$30 to pose for a photograph.<sup>3</sup> He began to focus on finding commercial photographers who needed models instead of on his failing acting career.<sup>4</sup> In about 1921, one of the photographers for whom Powers modeled asked him to hire seven additional men to form an ensemble.<sup>5</sup> Powers credited his wife for the actual idea to start a modeling agency.<sup>6</sup>

“There must be lots of commercial photographers looking for models,” Powers’ wife had said to him.<sup>7</sup> “And we know dozens of actors and actresses out of work. Why can’t we find a way of bringing them together?”<sup>8</sup>

The idea was a success, and Powers took ten percent from each of the bookings that soon flooded his innovative new business.<sup>9</sup> His success was further aided by the stock market crash of 1929 and subsequent Great Depression, as he quickly added a roster of debutantes whose fathers had all recently lost their jobs.<sup>10</sup> By 1935, Powers had hired several additional agents, together with whom he managed about two hundred models, most of them female.<sup>11</sup> Specifically, Powers prided himself on hiring girls and women who embodied “a natural wholesomeness,” as opposed to

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editing expertise and leadership. Many thanks to all the Editors and Associates of *Stetson Law Review*, both for their diligent work in preparing this Article for publication and for being my law school family. Thank you to my parents, who supported my writing from the days of Crayola poetry to today; my sons, who hosted blanket fort writing sessions for “Maya’s Law Report;” and to my husband, for calling me gritty, cherishing my words, and insisting I write this piece my way. I would like to dedicate this Article to my mother: a model of strength and the hands that always fed me.

1. See 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> (noting that models “are arbitrarily selected and easily dismissed”).

2. MICHAEL GROSS, MODEL: THE UGLY BUSINESS OF BEAUTIFUL WOMEN 31–34 (Harper Collins, 2003).

3. *Id.* at 31.

4. *See id.*

5. *Id.*

6. *Id.* at 32.

7. *Id.*

8. *Id.*

9. *Id.* at 35.

10. *Id.* at 35–36.

11. *Id.* at 37.

those who exuded too much sophistication.<sup>12</sup> He also once boasted: “Sometimes it seems to me that instead of a modeling agency, what I’m running is a matrimonial agency for millionaires.”<sup>13</sup>

## B. Sexual Assault and Inappropriate Workplace Behavior

Though Powers was reputed to have been a “genuine good guy,” he was succeeded by an “endless parade of unsavory others.”<sup>14</sup> Early agents Harry Conover and Walter Thornton were arrested and experienced public disgrace that marked the end of their respective careers.<sup>15</sup> After a generation of attempted image cleanup, the fashion industry traded crooks for sexual predators.<sup>16</sup>

### 1. Sexual Assault

One such predator was Claude Haddad, a French agent who was exposed for having sex with underage models.<sup>17</sup> Former model and clinical psychologist Dr. Laura Fielding<sup>18</sup> recounted that she woke up one morning to Haddad crawling into bed with her.<sup>19</sup> Fielding, who was fifteen years old at the time, ran out of the room and escaped the attempted attack.<sup>20</sup> However, she and a group of other models lived with Haddad in his Paris apartment, so the threat was imminent.<sup>21</sup> Fielding recalled the “booby trap” she implemented: she leaned a guitar against her door every night, so that if Haddad entered her room she would be alerted by the sound of it falling over and could hide.<sup>22</sup>

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12. *Id.* at 36.

13. *Id.* at 37.

14. *Id.* at 2.

15. *Id.*

16. *See id.* at 2–4.

17. Victoria Sambursky, *Model Turned Harvard Grad Psychologist Describes How Owning “Fear” Saved Her Life*, ROGUE HABITS, <https://roguehabits.com/former-model-turned-harvard-grad-psychologist-shares-dangers-of-young-women-in-the-modeling-industry-and-how-owning-fear-saved-her-life/> (last visited Aug. 11, 2023).

18. *Id.* Dr. Fielding studied at The University of California, Los Angeles, and Harvard University before earning her doctorate at Pepperdine University, where she is now an adjunct professor. Dr. Fielding also has a private practice in Beverly Hills, California.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

Marianne Shine was twenty-two years old when she was presented with the opportunity to model in Paris.<sup>23</sup> Over the course of her six months abroad, Shine was sexually assaulted multiple times by men in the fashion industry and ultimately raped by Jean-Luc Brunel, her agent and “the person entrusted with her care.”<sup>24</sup> Brunel was one of the most powerful people in the modeling industry at the time.<sup>25</sup> Shine returned home to California and buried the experience, but was visibly depressed and struggled to get through each day.<sup>26</sup> Her mother sent her to a therapist, but Shine told no one about the assaults until approximately thirty years later.<sup>27</sup> Shine blamed herself for years, recalling at the age of fifty-eight, “I felt like this dirty, vile, horrible thing.”<sup>28</sup> Brunel was eventually arrested by the police who were leading the Jeffrey Epstein investigation.<sup>29</sup> He killed himself in prison on February 19, 2022.<sup>30</sup>

One of the many injustices of this situation is that Brunel was a known predator and did not face consequences for his actions for decades.<sup>31</sup> In a 1988 episode of 60 Minutes, two dozen models accused Brunel or Haddad of drugging and raping them, yet shockingly, this did not prompt any legal actions against Brunel.<sup>32</sup> Though Brunel lost some reputable fashion industry connections like Eileen Ford in response to the news, “one person was willing to give him a go: a New York-based money-manager named Jeffrey Epstein.”<sup>33</sup>

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23. Lucy Osborne, *'I Woke Up and He Was on Top of Me': Six Women on Being Abused by Fashion Agent Jean-Luc Brunel*, THE GUARDIAN (May 28, 2022, 04:00 EDT), <https://www.theguardian.com/fashion/2022/may/28/jean-luc-brunel-abuse-six-women-epstein>.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. See *Jean-Luc Brunel: The French Modeling Honcho at the Center of Jeffrey Epstein's Web*, THE FASHION L. (Aug. 18, 2019), <https://www.thefashionlaw.com/jean-luc-brunel-at-the-center-of-jeffrey-epsteins-web-of-underage-girls/>.

32. *Id.*

33. *Id.*

## 2. *Inappropriate Workplace Behavior*

In addition to assaults, models also routinely face sexual harassment and demands while on the job and are often met with apathy by their agents.<sup>34</sup> Agents themselves are also known for making personally invasive or sexually inappropriate remarks in the name of counseling or even praising their models.<sup>35</sup> Retired *Sports Illustrated* model Melissa Baker's modeling agency recommended that she break up with her boyfriend who was serving in Afghanistan so that she could "replace him with an A-list celebrity or professional athlete."<sup>36</sup> Supermodel and entrepreneur Emily Ratajowski's agency told her as a teenager, "Now this is *the* look. This is how we know this girl gets [explicit sexual language redacted]!"<sup>37</sup> Another one of Ratajowski's agents affirmed the sentiment expressed by the first: "It's true. We always know which girls are having sex by their pictures."<sup>38</sup>

### C. Financial Exploitation

Despite their proclivity (and job requirement) to look expensive, models tend to struggle financially.<sup>39</sup> The U.S. Bureau of Labor Statistics reported that models received a median pay of \$31,910 per year in 2020.<sup>40</sup> Very few models make the type of

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34. *E.g.*, Sara Ziff, *Op-Ed: Why models need labor protections*, L.A. TIMES (Apr. 11, 2016, 5:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-0411-ziff-fashion-models-labor-rights-20160412-story.html>.

When I started modeling at 14, I was unprepared for the adult pressures I faced, like shoots with photographers who put me on the spot to take off all my clothes and "go-sees" with men who made sexual demands. When I raised my concerns to the president of one agency, he suggested I was being uptight and didn't see the problem.

*Id.*

35. EMILY RATAJKOWSKI, *MY BODY* 76–77 (Metropolitan Books 2021).

36. Charles Manning, *11 Horrifying Ways Agencies Exploit Their Models*, COSMOPOLITAN (Feb. 10, 2016), <https://www.cosmopolitan.com/style-beauty/fashion/news/a53455/new-model-lawsuit-agency-exploitation/>.

37. RATAJKOWSKI, *supra* note 35, at 76.

38. *Id.* at 76–77.

39. 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>; *see also* Manning, *supra* note 36.

40. *See Models*, U.S. BUREAU OF LAB. STATS., <https://www.bls.gov/ooh/sales/models.htm> (last visited Aug. 11, 2023). It is unclear whether this figure represents what a model makes before or after their agency charges them for fronted expenses, such as model apartment rent and plane tickets. *See id.*

money our society associates with the profession.<sup>41</sup> In fact, how little models actually make is frequently revealed in articles that flash words such as “myth”<sup>42</sup> or warn about things the author “wish[es] [they’d] known,”<sup>43</sup> before beginning their modeling journey. This is because a common misconception is that “most models are swimming in cash.”<sup>44</sup> While it could be easy to assume that only low-level models are not making a healthy income, and that the people writing about the low return on their respective career investments are the models who did not make it in the industry, this is not the case; notably, international supermodel Coco Rocha penned one of the many aforementioned “myth” style articles, revealing that she was \$30,000 in debt to her agency after two years of high-end runway work.<sup>45</sup> Rocha further explained that not all models secure runway work after traveling to New York for Fashion Week—some return home without booking a single show.<sup>46</sup> However, as Rocha herself experienced during the early years of her career, many models who make the cut still “end up in the red, even after walking in several shows.”<sup>47</sup> This is because runway shows generally command stipends that are too low to

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41. See Jann Seal, *Bad Aspects of Modeling*, CHRON (updated Oct. 9, 2020), <https://work.chron.com/bad-aspects-modeling-23375.html>.

42. E.g., Gabby Neal, *11 Model Myths Debunked*, ALL MY FRIENDS ARE MODELS, <https://www.allmyfriendsaremodels.com/11-model-myths-debunked/> (last visited Aug. 11, 2023).

[Myth number] 3. Models get paid millions – Unless you’re a super model, no. Most models don’t get paid that much at all. After the agency takes their percentage and flights and accommodation are paid for[, t]here isn’t much left. And if you’re only starting out, chances are you’re doing the gigs for free, purely for exposure. The average amount a model makes a year is only \$18,000.

*Id.* Please note that Neal’s yearly earnings estimate may be dated, as her article does not include information about when it was written, and the U.S. Bureau of Labor Statistics puts this figure at \$31,910. See U.S. BUREAU OF LAB. STATS., *supra* note 40. However, it may also be that Neal is accounting for accommodations and other agency charges, which, as she mentioned, are taken out by the modeling agency before a model’s paycheck is cut.

43. E.g., Jen Brook, *10 Things I Wish I’d Known Before I Started Modeling*, CREATIVE LIVE (Dec. 1, 2014), <https://www.creativelive.com/blog/10-things-wish-knew-before-started-modeling/> (Brock lists “[t]hey don’t actually get paid very much” as the first item on her wish-I’d-known list.).

44. Coco Rocha, *Five Myths About Modeling*, WASH. POST: OP. (Feb. 6, 2015, 1:21 P.M.), [https://www.washingtonpost.com/opinions/five-myths-about-modeling/2015/02/06/a81d30c0-acbb-11e4-abe8-e1ef60ca26de\\_story.html](https://www.washingtonpost.com/opinions/five-myths-about-modeling/2015/02/06/a81d30c0-acbb-11e4-abe8-e1ef60ca26de_story.html) (Rocha lists “Models make a lot of money” as the first myth.).

45. *Id.* (“The runway can jump-start a career but not a savings account. After my second year of runway work, walking for almost every major fashion house, I was \$30,000 in debt.”)

46. *Id.*

47. *Id.*

cover what the models likely spend on airfare, accommodations, and other expenses associated with travel.<sup>48</sup>

In addition to flights and accommodations, models are also responsible for expenses such as “show packages” and agency-recommended dermatologist visits,<sup>49</sup> making it impossible to ascertain what figures accurately represent a model’s true take-home income. Regardless of what number one might ultimately pin down as the official mean of models’ means, “[a]n individual model’s average earnings are nearly impossible to predict, due to wildly fluctuating monthly incomes.”<sup>50</sup>

#### D. Risky Business Practices

Not only is the compensation unpredictable and below average, but paycheck protocol is shrouded in ambiguity, as are other financial transactions between the typical agency and model.<sup>51</sup> Agencies tend to tell models as little as possible regarding how much fashion and commercial clients are paying for the models’ work.<sup>52</sup> Some modeling agencies “make their money at both ends of the pipeline” by taking 20 percent of the model’s payment *and* an additional 20 percent of the client’s fee.<sup>53</sup>

Agents also claim they are not at fault for paycheck delays.<sup>54</sup> Because models are classified as independent contractors, agents feel justified in charging them “monthly web site fees, composite cards, travel, use of a company apartment or car service around town.”<sup>55</sup> Agencies argue that models aren’t their employees, and therefore, the clients are the ones to blame for any delayed payments.<sup>56</sup> Unfortunately, models are not permitted to negotiate

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48. *Id.*

49. Ellis & Hicken, *supra* note 39.

50. Alexandra R. Simmeron, *Not So Glamorous: Unveiling the Misrepresentation of Fashion Models’ Rights as Workers in New York City*, 22 CARDOZO J. INT’L & COMPAR. L. 153, 161 (2013).

51. *See* Manning, *supra* note 36.

52. *Id.*

53. Lisa Lockwood, *The Model Conundrum: Waiting to Be Paid*, WOMEN’S WEAR DAILY, (Sept. 11, 2019, 12:01AM), <https://wwd.com/business-news/media/models-wait-to-be-paid-1203209908/>. For fairness and academic transparency, it should be noted that the Sample Contract, introduced *infra* Section III.B, includes only a ten percent agency commission rate. It is unknown whether the agency took out ten percent from the client’s side as well.

54. *Id.*

55. *Id.*

56. *Id.*



for themselves.<sup>57</sup> Even if they tried to negotiate, the odds are stacked against a model who is a) likely very young<sup>58</sup> and b) potentially dependent on her modeling agency for her work visa.<sup>59</sup>

Models do not have control over things as foundational as what bookings they take, what they wear, and even their very personality. Generally, their agencies dictate what castings they attend, and models go blindly.<sup>60</sup> Often, models do not know what a given booking would pay should they land it or even whether the job will pay at all.<sup>61</sup> Not only do they lack any kind of professional control, but they also lack control over personal topics, as their agencies orchestrate everything from mandatory hairstyles<sup>62</sup> to mandatory personalities. One model recalled:

“[My agency] had a lot of rules. They would always tell me how to dress. And they would always tell me—,” she stops and laughs, “I’ll never forget this. They would always tell me to ‘be mysterious but not all the way mysterious.’ I don’t know what that means. They would tell me to act cool and edgy in public even though that’s not really my personality. They would tell me that I shouldn’t go out to certain clubs, or that I shouldn’t go out with certain people.”<sup>63</sup>

Agencies do not deny this sway over their models’ personal lives; in fact, Wilhelmina booker Kevin Jones said, “[t]he career is plotted every day, not only go-sees and bookings, but the model’s social life as well. Events must be selected carefully.”<sup>64</sup>

In addition to controlling models’ professional and personal activities, agencies also often control models’ housing.<sup>65</sup> In so

57. See 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>.

58. *How to Get into Modeling*, BEST AGENCIES, <https://www.best-agencies.com/models/how-to-get-into-modeling/> (last visited Aug. 11, 2023) (“The typical age is 16-21.”).

59. Lockwood, *supra* note 53.

60. Cristo, *supra* note 57.

61. *Id.*

62. See, e.g., Alix Tunnell, *Would You Cut Your Hair if Your Job Depended on It?*, REFINERY 29 (Feb. 16, 2018, 9:30 AM), <https://www.refinery29.com/en-us/guido-palau-hair-marc-jacobs-models-nyfw-2018> (“Backstage, [at the Fall 2018 Marc Jacobs show, author Alix Tunnell] asked one of the models with a vivid bowl cut how long her hair had been before. She motioned to her waist. Why’d she get the cut? ‘It wasn’t my choice,’ she told [Tunnell].”).

63. Cristo, *supra* note 57.

64. NATASHA ESCH WITH C.L. WALKER, THE WILHELMINA GUIDE TO MODELING 41 (Simon & Schuster, 1996).

65. See Manning, *supra* note 36.

doing, agencies charge premiums to live in model apartments in major fashion cities.<sup>66</sup> In the early 2000s, one model's agency charged her \$1,850 monthly to live with eight girls in a two-bedroom apartment.<sup>67</sup> The models slept in bunk beds, with four people in each room and the last one on the couch.<sup>68</sup> The same apartment building demanded rent prices starting at \$2,900 per month in 2016 (which is when the source article was written), meaning that the agency was making "as much as \$13,750 more per month than [the 2016] market rate."<sup>69</sup> Unfortunately, it is not as easy to walk away from such preposterous arrangements as one might think.<sup>70</sup> There is a high likelihood that the models occupying such apartments are foreign or underage.<sup>71</sup> Further, because models are "classified as freelancers without a steady income, it is not as if they can rent apartments on their own at a reasonable rate."<sup>72</sup> Additionally, a model who gets her own reasonably priced lease shoulders the risk that her agency may send her to another market at any moment, forcing her to either break her lease or pay for an unoccupied apartment.<sup>73</sup>

The harrowing result of this multifaceted financial exploitation is a situation that is "eerily evocative of indentured labor."<sup>74</sup> Many models never find the pot of gold at the end of the rainbow and are consequently "shipped off to 'secondary markets'—places like Japan or Australia"—to work off the debt they accrued while pursuing that all-too-evasive big break.<sup>75</sup>

Not only are the odds stacked against the model when it comes to active employment, but sometimes even after they are let go, the agency continues to generate income from the model's likeness by continuing to use its power of attorney.<sup>76</sup> For example, Model Louisa Raske "caught Next Inc. in the act after spotting a photo of herself on a L'Oreal hair color box in a CVS store in Florida after

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66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. Cristo, *supra* note 57.

75. *Id.*

76. *See Raske v. Next Mgmt., LLC*, No. 653619/2012, 2013 WL 5033149, at \*1–2 (N.Y. Sup. Ct. Sept. 12, 2013).

the agency had dropped her for underperformance.”<sup>77</sup> In 2013, Raske and a group of similarly aggrieved models sued their agencies and affiliated advertisers for an accounting, unjust enrichment, breach of fiduciary duty, fraud, fraudulent concealment, and conversion.<sup>78</sup> The plaintiffs did not allege breach of contract, and the court held that “[t]he complaint as drafted [was] flawed and [that the case] must be dismissed for that reason.”<sup>79</sup> That said, in an apparent display of sympathy, the court spent the rest of the paragraph explaining that models may have a remedy under “their contract rights,” and listed several other means by which this or similar cases could be more successfully established.<sup>80</sup> Unfortunately, as will be discussed in Part III, models’ purported contract rights are scant.

### E. Eating Disorders

Eating disorders are the second-deadliest mental illness, only surpassed by opioid overdose.<sup>81</sup> Each year, 10,200 deaths are the *direct* result of an eating disorder, which comes out to one death every fifty-two minutes.<sup>82</sup> Even when they do not result in death, “[e]ating disorders can harm the heart, digestive system, bones, and teeth and mouth . . . [and] lead to other diseases.<sup>83</sup> Unfortunately, in the fashion industry, eating disorders are a commonly accepted hazard of the job.<sup>84</sup> They are encouraged internally, swept under the rug externally, and even joked about. One agent wrote the following email to a model: “Hey, Little piece of advice with these clients, especially Prada. Low key energy, not big smiling American ya know. Keep it more European and

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77. Julia Marsh, *Cadre of Catwalk Stars Sue Agencies over Image Use*, N.Y. POST (Oct. 25, 2013, 9:39 AM), <https://nypost.com/2013/10/25/cadre-of-catwalk-stars-sue-agencies-for-co-opting-images/>.

78. *Raske*, 2013 WL 5033149, at \*1.

79. *Id.* at \*9, \*12.

80. *See id.* at \*12.

81. *Eating Disorder Statistics*, NAT’L ASS’N OF ANOREXIA NERVOSA & ASSOCIATED DISORDERS, <https://anad.org/eating-disorders-statistics/> (last visited Aug. 11, 2023).

82. DELOITTE ACCESS ECONOMICS, SOCIAL AND ECONOMIC COST OF EATING DISORDERS IN THE UNITED STATES OF AMERICA: REPORT FOR THE STRATEGIC TRAINING INITIATIVE FOR THE PREVENTION OF EATING DISORDERS 28 (2020).

83. *Eating Disorders*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/eating-disorders/symptoms-causes/syc-20353603> (last visited Aug. 11, 2023).

84. *See* Steff Yotka, *How Sara Ziff and More Than 40 Other Models Are Leading the Charge Against Eating Disorders*, VOGUE (Feb. 1, 2017), <https://www.vogue.com/article/model-alliance-eating-disorder-study>.

discreet. You know what I mean, should be easy since you are hungry! HA! joke.”<sup>85</sup>

### 1. *Sample Size*

The required fashion model measurements are typically around the following: between 5’9” and 6’1” feet tall, with a 23- to 24-inch waist and 33- to 34-inch hips and bust.<sup>86</sup> To put this in context, the average female fashion model weighs 113 pounds.<sup>87</sup> A 4’10” tall and 113-pound woman is considered healthy,<sup>88</sup> and a woman who is the height of a traditional runway model is about a foot taller than this, if not more. However, this combination of measurements is what the industry considers “sample size,” which is the size a model must be to fit clothes made for the runway.<sup>89</sup>

### 2. *Victoria’s Weight Loss Secret*

Some models report that pressure from their agents “changed [their] relationship with food forever.”<sup>90</sup> For example, model Charli Howard recounted, “eating orange juice-soaked cotton wool, and compulsively measuring her body ‘at least five times a day,’ desperate to achieve the 34” hip measurement her agency

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85. Email from Agent to Model, Pre-Casting Communication, Anonymous Agency and Model, (May 29, 2015) (on file with author).

86. Martin Luenendonk, *12 Types of Female Models: Which Type Are You?*, CLEVERISM (Nov. 1, 2020), <https://www.cleverism.com/12-types-of-female-models-which-type-are-you/>. “To meet the required measurements [for an editorial model], you have to be between 5’9” and 6’, with a 23-inch waist and 33-inch hips and bust.” *Id.* The article’s section on runway models says they “must be at least 5 feet 9 inches, and taller models are preferred. They should also have at least a 34-inch bust, 23-inch waist, and 34-inch hips.” *Id.* This is an odd distinction because, despite an editorial shoot and a runway show being different from one another in terms of the work performed, a model who is cast for high fashion editorials is typically the same body type as the model walking the runway.

87. Holly Riordan, *How Much Do Models Weigh?* THEHUB (Oct. 11, 2018), <https://thehub.com/2018/10/11/how-much-do-models-weigh/>.

88. *Id.*

89. See Ella Alexander, *Tom Ford Explains Why All Models Are the Same Size*, HARPER’S BAZAAR (Feb. 6, 2018), <https://www.harpersbazaar.com/uk/fashion/fashion-news/a16634248/tom-ford-model-sample-size/>; Alanah Joseph, *The Strict Workout Runway Models Do to Be Sample Size*, E! NEWS (Feb. 7, 2018), <https://www.eonline.com/news/912137/the-strict-workout-runway-models-do-to-get-34-inch-hips>.

90. *E.g.*, Megan Friedman, *Model Zuzanna Buchwald Says Her Agency Told Her to Stop Eating*, COSMOPOLITAN (Apr. 6, 2016), <https://www.cosmopolitan.com/style-beauty/fashion/news/a56427/zuzanna-buchwald-model-eating-disorder-story/>.

considered prerequisite.”<sup>91</sup> Howard is not the only model who has resorted to eating cotton balls in order to combat the severe hunger resulting from the fashion industry’s dangerous body standards.<sup>92</sup> Eating cotton balls “is extremely dangerous and can result in serious health consequences or death,”<sup>93</sup> but if one can believe it, it is not the most extreme measure models may take to attain (and maintain) extreme thinness.<sup>94</sup> For example, Victoria’s Secret Angel Erin Heatherton reported taking “bathwater meth” to combat the slight weight gain she experienced at age twenty-five.<sup>95</sup> “I went to see this nutritionist who started me on this diet pill called phentermine, which my therapist later called ‘bathwater meth,’” Heatherton said.<sup>96</sup> The model feared losing her job, so she was willing to, in her words, “Lance Armstrong” the situation.<sup>97</sup> In addition to the phentermine, Heatherton started injecting herself with human chorionic gonadotropin (HCG).<sup>98</sup> While Heatherton named a general fear of losing her job as the motivation for compromising her health, other models have experienced explicit pressure from their agents to do drugs.<sup>99</sup> For example, Australian model Bridget Malcolm, who also graced the once-celebrated Victoria’s Secret runway, said her agents actively encouraged her to do cocaine to lose weight.<sup>100</sup> Malcolm has since been diagnosed with PTSD and suffers from severe panic attacks, neither of which were in her life prior to her modeling career.<sup>101</sup>

Other commonplace model weight loss measures include “packs of cigarettes, daily colonics, laxatives, Phentermine diet

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91. Mary-Jane Wiltsher, Liam Arthur & Charlotte Holt, *Breaking the Model: How Charli Howard Reshaped Her Industry*, PHX. MAG., <https://www.phoenixmag.co.uk/article/breaking-the-model-how-charli-howard-reshaped-her-industry/> (last visited Aug. 11, 2023). It is interesting to note the word “prerequisite,” which is defined as “[s]omething that is necessary before something else can take place or be done.” *Prerequisite*, BLACK’S LAW DICTIONARY (11th ed. 2019).

92. See Jill Provost, *No, Honey, Cotton Balls Aren’t Food!*, TODAY (June 28, 2013, 2:23 PM), <https://www.today.com/health/oy-vey-day-models-eat-cotton-balls-feel-full-I540350>.

93. Kristen Fuller, *What Is the Cotton Ball Diet?*, VERY WELL MIND (June 30, 2022), <https://www.verywellmind.com/what-is-the-cotton-ball-diet-5115569>.

94. See Nicki Gostin, *Victoria’s Secret Model Resorted to Bathwater Meth to Stay Skinny: New Podcast*, N.Y. POST (October 19, 2021, 7:20 PM), <https://nypost.com/2021/10/19/victorias-secret-models-reveal-brands-dark-side-new-podcast/>.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

pills, Adderal [sic], [and other] prescription drugs that suppress the appetite,” according to fashion model Kira Dikhtyar.<sup>102</sup> Dikhtyar further noted that she knew of agents “encourag[ing] girls to do speed and cocaine in order to speed up metabolism and eat less” and that “all kinds of injections are becoming more and more popular, from HCG injections that go with a 500-calorie diet plan to T3 thyroid injections that healthy models inject in an attempt to speed up their thyroid function, which results in a faster metabolism.”<sup>103</sup> Dikhtyar is pictured in the plastic sweatsuit she wears while working out “so she can get down to a size zero,” and an accompanying photograph showcases the bones that ripple through her décolleté area.<sup>104</sup> Though eating generally is discouraged, humiliation is a dish that the fashion industry prefers to serve hot. Former model Madison Schill was once asked by her agent whether her measurements had increased because she was “drinking butter for water.”<sup>105</sup> Schill ultimately left the industry after having a nervous breakdown.<sup>106</sup>

#### F. Are You My Mother [Agent]?

It is interesting to note the familial terminology and emotional intimacy present within the fashion industry. The first agency with which a model signs is known as her or his “Mother Agency.”<sup>107</sup> The title is more than just figurative; in fact, powerhouse agency Wilhelmina Models acknowledges that the relationship between a model and their agent is often one that feels parental in nature: “Some models adopt their bookers as both friends and surrogate parents.”<sup>108</sup>

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102. Hollie McKay, *Pills, Injections, and Plain Starvation: The Dangerous Extremes Models Go to for the Fashion Week Runways*, FOX NEWS (Apr. 13, 2016, 8:24 AM), <https://www.foxnews.com/entertainment/pills-injections-and-plain-starvation-the-dangerous-extremes-models-go-to-for-the-fashion-week-runways>.

103. *Id.*

104. *See id.*

105. *E.g.*, Madison Schill, *A Former Model's Story of Quitting the Industry*, GLAMOUR (Feb. 16, 2016), <https://www.glamour.com/story/one-former-models-tale-of-the>.

106. *See id.*

107. Manning, *supra* note 36.

108. ESCH, *supra* note 63. In the name of academic honesty, it feels important to note that Esch, the author and then-president of Wilhelmina, adds: “Some are satisfied with a purely professional relationship.” *Id.* It seems implied however, that being merely “satisfied” is secondary when the relationship is called “vital” and “important[er]” in the same paragraph. *Id.* Interestingly, Esch has since left the fashion industry and now owns a luxury antique furniture and home decor brand called MONC XIII. *See About Us*, MONC XIII BY NATASHA ESCH, <https://www.monc13.com/pages/about-us> (last visited Aug. 11, 2023).

Though agencies expect obedience from their “surrogate children,” agencies have no legal accountability. While organizations such as schools might shoulder the responsibility of *in loco parentis*, exchanging their authority for certain legal liabilities, there is no such consideration on the agency’s end of the deal.<sup>109</sup> Despite the magnitude of a parent-child relationship, or any relationship that shares even some of the characteristics thereof, the relationship between a model and her agency ostensibly “lack[s] the requisite level of trust or confidence between them necessary to give rise to a fiduciary obligation.”<sup>110</sup> This means that models and the agents they adopt as parental figures merely share an “arm’s length commercial relationship.”<sup>111</sup>

Interestingly, a commonly shared feature among anorexic children is that they tend to believe that it is their responsibility to make their parents “feel good, successful, and superior.”<sup>112</sup> Many suffer under parents’ projections of their own unrealized own goals and high, specific expectations.<sup>113</sup> Such children develop anorexia to fulfill the need for control they feel they lack and, counterintuitively, even as an “escape from [their] overwhelming situation.”<sup>114</sup> This relationship between eating disorders, control, and parental relationships is striking, and provokes thought as to whether the interplay between the topics compounds each of the three when applied to the proverbial “mother” relationship that a model has with her agency.

The model-agent relationship has also been compared to marriage. According to vice president of Major Model Management Nadia Shahrik, “When [models] sign a contract it’s all in black and white. It’s like a marriage license.”<sup>115</sup> While Shahrik was presumably making a point about the precise nature of models’ contracts, it is interesting that she compared them to marriage licenses: another serious familial relationship. Not only is it difficult to obtain what, as an extension of Shahrik’s metaphor,

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109. See *In Loco Parentis*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/in\\_loco\\_parentis](https://www.law.cornell.edu/wex/in_loco_parentis) (last visited Aug. 11, 2023).

110. *Raske v. Next Mgmt., LLC*, No. 653619/2012, 2013 WL 5033149, at \*8 (N.Y. Sup. Ct. Sept. 12, 2013).

111. *Id.*

112. HILDE BRUCH, *THE GOLDEN CAGE: THE ENIGMA OF ANOREXIA NERVOSA* 25 (Harvard Univ. Press 1978).

113. See *id.* at 26.

114. *Id.*

115. Lockwood, *supra* note 53.

would be a “divorce” from an agency, but the modeling contract is also the bar to recovery when an agency does some of the very things that may make a model want to get out.<sup>116</sup> Furthermore, unlike a real marriage or an actual parent/child relationship, the model/agency relationship is not sacred or in any way significant in the eyes of the law. Instead, it is one—purportedly—between an independent contractor and a business partner.

### III. “INDEPENDENT CONTRACTOR”: A KNOCKOFF LABEL

*“One of these days, I am going to eat what I want and become a curve model,” Macey’s friend Cheyenne announced.*

*“Our agent said I would never be as small-boned as some of the girls, but that I could potentially make up for it by having extra intense abs. I’ve been going to three workout classes per day, plus my long runs, but it’s still not like I can eat much. This leaves me just as hungry as when I worked out less and just didn’t eat at all. You know . . . one of the curve girls in my model apartment is a size four.”*

*“Size four is ‘curve’?!” Macey marveled.*

*Despite being three years Macey’s junior, Cheyenne had been a model for longer and knew the industry better. The 6’1 Californian was what Macey envisioned when old books referenced “a handsome woman”: the best parts of masculine and feminine in the form of a chiseled jawline, mint green doll eyes, and sheet of wholesome brown hair. Macey frequently leaned on her insight and counsel.*

*“Well, they can’t always use her for curve at a size four,” Cheyenne explained. “But they just put her in partial fat suits for shoots when they need her in a size most people would consider ‘curve.’ They keep her waist a size four but make her bigger in her hips and bra, you know?”*

*Macey had not known.*

. . .

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116. See *infra* note 175 (text accompanying note referencing the block quote of the Sample Contract’s autorenewal clause).



## A. A Fashion (Re)Statement

This Article utilizes the Restatement of Employment Law, which provides a clean, high-level synopsis of overarching employment law principles.<sup>117</sup> According to the *Restatement*, a worker is an employee if:

1) their actions are at least partially motivated by their employer's interests,

2) the employer has consented to their services, and

3) the employer either controls the "manner and means" by which these services are provided or prevents the employee from rendering these services independently.<sup>118</sup>

However, a worker is an independent contractor if they exert "entrepreneurial control over important business decisions."<sup>119</sup> Such business decisions include those regarding hiring, buying or deploying equipment, and working with additional customers.<sup>120</sup>

1. *Interests of the Employer*

The first of the three requirements a worker must satisfy in order to be considered an employee is that they "[m]ust act at least in part to serve the interests of the employer."<sup>121</sup> The bar for serving the employer's interests is low.<sup>122</sup> For example, if a restaurant owner hires a maître d' and they accept with the covert intention of driving customer traffic to a competing restaurant, the maître d' is still an employee of the restaurant owner.<sup>123</sup> Despite the fact that the maître d' actively tried to siphon off business from their employer, the maître d' nonetheless served the restaurant owner's interests while working in the restaurant.<sup>124</sup> On the other hand, if a businessperson hires a driver to transport their car from Los Angeles to New York, yet the driver instead veers up to Seattle

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117. Joseph Garrison, *The New Restatement of Employment Law: An Analytical Synopsis*, 100 JUDICATURE 30, 30 (2016) ("The result is a sharp, concise, and comprehensive overview of employment law.").

118. RESTATEMENT (THIRD) OF EMP. L. § 1.01(a) (AM. L. INST. 2015).

119. *Id.* § 1.01(b).

120. *Id.*

121. *Id.* § 1.01, cmt. b.

122. *See id.*

123. *Id.* § 1.01, illus. 1.

124. *Id.* § 1.01 cmt. b, illus. 1.

and abandons the businessperson's car, the driver has not served sufficient interests to qualify as an employee.<sup>125</sup>

## 2. *Employer Consent*

The second of the three requirements a worker must satisfy in order to be considered an employee is that the employer must have consented to receiving the employee's services.<sup>126</sup> Consent may be expressed through action, acquiescence, or statement.<sup>127</sup> In the event that an employee has misrepresented their qualifications, the employer's consent is not negated.<sup>128</sup> Until the employee is lawfully discharged for making the misrepresentation (should the employer choose to discharge them) the employee retains their employment status.<sup>129</sup> For example, an electrician who does not disclose their status as a union organizer during the hiring process is still an employee.<sup>130</sup> Despite this omission, and the possibility that it may have affected the employer's decision to hire them, the employer consented to receive the electrician's services nonetheless.<sup>131</sup> Further, if an employee lies during the hiring process about a significant skill or requisite knowledge, their employer's consent is not negated. For example, someone hired to build a website who lies about their advanced computer programming skills retains his or her employee status even after the business owner who commissioned the website learns the employee does not actually possess this expertise.<sup>132</sup> However, if the same hypothetical employee who does not possess the requisite programming skills secretly hired *someone else* to build the business owner's website, the secret hire would not be the business owner's employee.<sup>133</sup> The business owner does not know that the secretly hired individual is working on their new website; therefore, there is no consent.<sup>134</sup>

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125. *Id.* § 1.01 illus. 2.

126. *Id.* § 1.01 cmt. c.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* § 1.01 illus. 3.

131. *Id.*

132. *Id.* § 1.01 illus. 4.

133. *Id.* § 1.01 illus. 5.

134. *Id.* § 1.01 cmt. c, illus. 5.

### 3. *Manner and Means*

The third and final of the three requirements that a worker must satisfy in order to be considered an employee is that his or her “employer controls the manner and means by which the individual renders services.”<sup>135</sup> Generally, if a principal has the “right or ability to control how an agent’s work is performed,” they are deemed an employer and the agent is categorized as an employee.<sup>136</sup> The *Restatement (Second) of Agency* incorporates the common-law “right to control” test into employment law for the purpose of ascertaining employee status.<sup>137</sup> This test reads as follows:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

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135. *Id.* § 1.01 cmt. d.

136. *Id.*

137. *Id.*

- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.<sup>138</sup>

In Florida, this ten-factor *Restatement of Agency* test controls (pun intended).<sup>139</sup> The factors “are all to be considered in determining the question which will depend on the existence vel non of a sufficient group of favorable factors to establish the relation.”<sup>140</sup> In other words, these factors are not all mandatory; rather, items (a)–(j) are potential ways of evaluating control, and thereby determining whether a worker is an employee or independent contractor. The court’s first step should be to examine the contract between the parties if one exists.<sup>141</sup> It should “honor that agreement, unless other provisions of the agreement, or the parties’ actual practice, demonstrate that it is not a valid indicator of status.”<sup>142</sup> The extent of control the employer must possess before a worker is deemed an employee as opposed to an independent contractor “cannot be stated in terms of mathematical precision and various aspects of the relationship may be considered in arriving at the conclusion in a particular case.”<sup>143</sup> One consideration governing control is whether the worker was free to enter into other work contracts.<sup>144</sup> When a worker is bound exclusively to one employer, this weighs in favor of employee status, while a worker who is free to contract with other employment providers is more likely to be an independent

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138. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958).

139. *Cantor v. Cochran*, 184 So. 2d 173, 174 (Fla. 1966) (applying the “tests formulated by 1 Restatement of the Law, Agency (2nd ed.) § 220 in determining whether an employer-employee relationship exists”).

140. *Id.*

141. *Keith v. News & Sun Sentinel Co.*, 667 So. 2d 167, 171 (Fla. 1995).

142. *Id.*

143. *In re Morton*, 30 N.E.2d 369, 371 (N.Y. 1940) (citing RESTATEMENT (FIRST) OF AGENCY § 220 (AM. L. INST. 1933)).

144. *VIP Tours of Orlando, Inc. v. State, Dep’t of Lab. & Emp. Sec., Div. of Emp. Sec.*, 449 So. 2d 1307, 1310 (Fla. 5th DCA 1984) (“In addition, the guides were free to contract with other tour companies . . . further indicating a lack of control by VIP over the guides.”).

contractor.<sup>145</sup> As will be addressed later within this Part, models are typically bound exclusively to one agency.

## B. Economic Reality and “ABC” Tests

To categorize a worker as either an employee or an independent contractor, courts use one of three tests: (1) the common law agency test, (2) the economic reality test, or (3) the “ABC” test. The common law agency test can be found in the *Restatement (Second) of Agency* and was covered in the previous Part. It is used by the National Labor Relations Board (“NLRB”), “an independent federal agency that protects the rights of private sector employees to join together, with or without a union, to improve their wages and working conditions.”<sup>146</sup> The aptly named economic reality test deemphasizes control in favor of a more holistic look at a worker’s economic reality and asks whether they are financially dependent on their putative employer.<sup>147</sup> The “ABC” test is the most worker-friendly of the three, operating under the rebuttable presumption that all workers are employees and only changing this default status from employee to independent contractor if three elements (A, B, and C) are satisfied.<sup>148</sup>

### 1. *The Economic Reality Test*

The economic reality test arose as an alternative to the common law agency test, which some courts believed placed too much emphasis on the control factor. Instead, this test focuses on “economic reality” instead of “technical concepts.”<sup>149</sup> Practically speaking, this means that “an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves.”<sup>150</sup> The economic reality test is used to ascertain whether a worker is in an employer-employee relationship under the Fair

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145. *See id.*

146. *Introduction to the NLRB*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/what-we-do/introduction-to-the-nlr> (last visited May 28, 2023).

147. *See id.*

148. *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 7 (Cal. 2018).

149. *Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEP’T OF LAB., WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship> (last visited Aug. 11, 2023).

150. *Id.*

Labor Standards Act (“FLSA”).<sup>151</sup>This means it is determinative regarding the economic matters of minimum wage and overtime compensation, as required by the FLSA.<sup>152</sup>

## 2. The “ABC” Test

Under the “ABC” test, workers are classified as independent contractors only if three elements (A, B, and C) are satisfied. The “ABC” test is an “and” test rather than an “or” test—all three elements are mandatory. Moreover, employee status is assumed, and the worker only re-labeled an independent contractor if the alleged employer establishes:

(A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;

(B) that the worker performs work that is outside the usual course of the hiring entity’s business; and

(C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.<sup>153</sup>

The nuances of the respective “independent contractor vs. employee” tests have been discussed and litigated over the years; however, control is a constant and critical factor.<sup>154</sup> When it comes to models and their agencies, there is nothing a traditional employer could feasibly control that a modeling agency does not control to a far greater degree.<sup>155</sup> A traditional employer may control where their employees must be from nine-to-five on weekdays, but a modeling agency likely controls what country a model is in for months at a time, not to mention their day-to-day schedule within that country.<sup>156</sup> A traditional employer may control whether their workers must wear suits or scrubs, and whether they may wear jeans on Fridays, but a modeling agency

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151. *Id.*

152. *Id.*

153. *Dynamex Operations W., Inc. v. Superior Ct. of Los Angeles Cnty.*, 416 P.3d 1, 7 (Cal. 2018).

154. *See Bowerman v. Field Asset Servs., Inc.*, 39 F.4th 652, 658 (9th Cir. 2022).

155. *See generally supra* Part II.

156. *See supra* text accompanying notes 60–75.

controls not only what models are to wear daily, but also what the body beneath those garments must measure and what the head that rises above them should look like.<sup>157</sup> A traditional employer neither fronts its employees thousands of dollars nor lets them don the shackles of debt.<sup>158</sup> A traditional employer may occasionally become a parental figure for an employee, but this is neither assumed nor typically couched in any other industry's jargon.<sup>159</sup> A traditional employer does not tend to possess the power of attorney for its employees.<sup>160</sup> Therefore, the question is not whether a modeling agency possesses the requisite control to form an employer-employee relationship. The question is: since agencies possess the nearly unfettered control that they do, why are models still categorized as independent contractors? The answer—at least a significant part of it—is reminiscent of the recent Internet phenomenon “Instagram vs. reality.”<sup>161</sup> In this case, it is a matter of “contract vs. reality.” A model's contract communicates an arrangement starkly different from the ultimate realities of her employment relationship with her agency.

#### B. A Sample Contract for the Sample-Sized

This Article will utilize parts of a real modeling contract (“Sample Contract”) that serves as representation of an average, run[way]-of-the-mill agreement between an agency and a fashion

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157. See *supra* text accompanying notes 62–64, 86–89.

158. *E.g.*, a realtor who is not making sales must eventually cut her losses on her commission-based job. She is not loaned thousands of dollars by her broker while she waits for the big deal that will hopefully turn things around.

159. *E.g.*, an associate attorney works for a *partner*, not a “mother attorney.” Even if a partner and her associate were to develop a personal relationship and quip that one is the other's “second mom” or “honorary daughter,” this would not bleed into any official firm depictions of the relationship. Of course, there are exceptions to the author's overall proposition that the business world does not utilize familial terminology, such as, for example, the term “parent company,” however, the author notes that even an exception such as “parent company” differs from “mother agency” in that it applies to corporations' relationships with one another, as opposed to a natural person's relationship to his or her employer.

160. It is standard practice for modeling agencies to have power of attorney for models. See *Raske v. Next Mgmt., LLC*, No. 653619/2012, 2013 WL 5033149, at \*1 (N.Y. Sup. Ct. Sept. 12, 2013).

161. See Rachel Hosie, *8 Influencers Whose Side-by-Side Photos Prove Instagram Isn't Real Life*, BUS. INSIDER (Sept. 15, 2019), <https://www.insider.com/influencers-instagram-vs-reality-side-by-side-photos-real-life-2019-9>.

model.<sup>162</sup> While contracts inevitably differ somewhat between agencies, these variances are slight and inconsequential.<sup>163</sup> The Sample Contract begins with the following preamble:

This Agreement dated the [redacted] day of [redacted], 2014, by and between [agency and address redacted] (hereinafter called “[agency’s abbreviated name redacted—the Article will simply use “Agency”] and [model’s name redacted] Talent or Model, hereinafter called “Talent”).

WHEREAS, Talent desires to obtain advice, counsel and direction in the development and enhancement of his/her career in the industries and fields of modeling, photography, entertainment, advertising, commercials, motion pictures, television, radio and similar and related industries and fields (the “Industries”); and

WHEREAS, the parties desire to enter into this agreement by which Agency shall act as the Talent’s exclusive agent;<sup>164</sup>

The exclusivity clause is elaborated upon in the Sample Contract’s first section, entitled “Engagement and Services”:

Talent hereby appoints [Agency] as the Talent’s exclusive Agent for the term of this Agreement and [Agency] hereby consents and agrees to act as such exclusive Agent for the term of this Agreement. The Talent acknowledges and agrees that [Agency] may and shall render the services set forth herein to others during the term hereof. This Agreement includes all professional activities of Talent. As and when requested by Talent during the term of this Agreement, [Agency] shall advise and counsel Talent in matters relating to Talent’s professional career and Talent agrees that he/she shall not use the services of any other manager, agent or agency for the term of this Agreement.

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162. Sample Contract, General Services Agreement, Anonymous Agency and Model, (Date Redacted) [hereinafter “Sample Contract”] (on file with author). The contract, signed in 2014, is between a California agency and a first-time model. This makes the agency the model’s “mother agency,” as discussed *supra* Section II.F.

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

164. Sample Contract, *supra* note 162.



[Agency] agrees to use all reasonable efforts to procure bookings, contracts, and engagements for Talent, by performing, but not limited to, the following services:

(a) Advise and counsel in the selection or consideration of career opportunities, photographers, advertisers, and the selection or creation of vehicles for Talent's talents;

(b) Advise and counsel Talent in all matters pertaining to publicity, public relations, advertising, adoption of a proper format for presenting Talent, and the general practices of the industries;

(c) Set and coordinate Talent's schedules and arrange, negotiate, accept and consummate agreements for Talent's services;

(d) On behalf of Talent, accept billings, send invoices and statements to clients in connection with billings for Talent's services and collect fees;

(e) Advise on make-up, hair, headshots, and the formation of materials;

NOTE: Talent understands and acknowledges that Talent's income and the availability of work for him/her is based in large part upon his/her general physical appearance being consistent with that of a top working model and Talent agrees to rely upon agency's reasonable advice and opinion in that regard, and further agrees to keep Agency advised of any change in weight or appearance.

(f) Advise, counsel and attempt to arrange international representation for Talent

(g) Other \_\_\_\_\_<sup>165</sup>

The contract seems reasonable on its face, and for many models, seeing her name on the page is a dream come true. Little does she know that what she just signed is markedly different from what she signed up for.

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165. *Id.*

### 1. *Contract vs. Reality*

The section excerpted above conveys a dichotomy between the ambiguous yet telling claim that the Agreement governs “all professional activities of Talent” and the false sense that the agent is summoned at the model’s request, as opposed to the other way around.<sup>166</sup> While the phrase “as and when requested by Talent” could ostensibly protect a signing model from an unresponsive or absentee agent who does not perform on their promise to “advise and counsel Talent in matters relating to Talent’s professional career,” this language also implies a control dynamic that is antithetical to how the relationship actually works.<sup>167</sup> In reality, and in inverse to the contract’s language, it is the model who performs “as and when requested by” the agency.<sup>168</sup> Therefore, the sweeping assertion that the Agreement will govern “all professional activities of Talent” is far more accurate.<sup>169</sup> Moreover, what remains unsaid is that in actuality the agency will govern *all* the activities of Talent, from the professional to the personal to the vast grey area where-for someone whose livelihood is their looks-the personal and the professional invariably intersect.<sup>170</sup>

The contract language connotes a relationship wherein the model exercises autonomy over her career decisions while the agency humbly advises, counsels, and coordinates.<sup>171</sup> However, what the Sample Contract packages as a promise to “[a]dvice and counsel in the selection or consideration of career opportunities” becomes the directive update, “We’re going to send you to Milan next!”<sup>172</sup> What the Sample Contract proffers as the commitment to “[a]dvice and counsel Talent in all matters pertaining to publicity” becomes a 9:00 p.m. text reading, “Hey, take down that Instagram! I don’t like what today’s stylist did with your hair.”<sup>173</sup> Much like a photo of a model taking a bite out of a burger she subsequently

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166. *See id.*

167. *See id.*; *see also supra* Part II (describing the extent of an agent’s control).

168. *See generally supra* Part II.

169. *See generally supra* Part II.

170. *See generally supra* Part II.

171. *See supra* text accompanying note 165 (block quote from Sample Contract).

172. *See supra* text accompanying note 165. *See generally supra* Part II. Hypothetical is author’s own.

173. *See supra* text accompanying note 160. *See generally supra* Part II. Fictionalized text message is author’s own.

throws away,<sup>174</sup> the appearance of the contract does not accurately reflect the newly minted model's reality.

## 2. *How to Lose an Agency in 90 Days*

When a model signs with an agency, she binds herself to a contract that not only requires her one-sided exclusivity, but also requires significant effort and foresight to terminate.

The first paragraph of the second section, "Term of Agreement," reads as follows:

The term of this agreement shall be for a period of 1 year(s) commencing on the date hereof. Upon the expiration of the original term of this Agreement and any subsequent term as provided herein, it is agreed that this Agreement shall automatically be renewed and extended on the same terms and conditions for successive additional periods equal to the initial period, or the most recent renewal period, as applicable, commencing immediately following the expiration of the prior term, unless either the Talent or Agency gives written notice to the other, by registered or certified mail, return receipt requested, of intention not to renew this Agreement at least 90 days prior to the expiration of the current term.<sup>175</sup>

The Sample Contract is valid for one year from the date of signing, which is perfectly reasonable.<sup>176</sup> However, it renews automatically, unless either the Talent or the Agency gives written notice by registered or certified mail "at least *ninety (90)* days prior to the expiration of the current term."<sup>177</sup> While the ninety-day provision applies to both parties, it has a far more profound effect on the Talent than the Agency, as the latter represents hundreds of models—perhaps even thousands<sup>178</sup>—and therefore does not

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174. See, e.g., @YouDidNotEatThat, Instagram, <https://www.instagram.com/youididnoteatthat/> (last accessed Oct. 15, 2022).

175. Sample Contract, *supra* note 162.

176. See *id.*

177. *Id.* (emphasis added).

178. The anonymous agency's online "Women" section totals over one hundred fifty models. This does not include curve models, new faces (inexperienced models), lifestyle models (what we might consider more "normal" or "commercial" looking models), classic (older) models, fit models (this does not actually mean "sporty" or more "fit"—it refers to models who are booked to serve essentially as human mannequins for a fashion school, designer, or other client when the client needs to see their work on a real, walking person,

ever depend on one person.<sup>179</sup> On the other hand, an unhappily bound model who misses the ninety-day deadline makes a far more costly mistake. Of course, the onus is technically on the model for missing her window, but fashion models tend to be young people going “on stay” in fashion markets throughout the world.<sup>180</sup> At the time of this writing, a 20-year-old model would have been born in 2001 or 2002, raised entirely in the digital age.<sup>181</sup> One might argue that the models should be able to get themselves out if they got themselves in (and that point is not without merit), but the reality is that it is difficult for a young person living overseas to provide notice via certified mail to her or his agency ninety or more days before the yearly auto-renewal date. If the model does not have a unique way out, such as an industry powerhouse for a parent,<sup>182</sup> there is a good chance she may be stuck. While a model might prevail if a jury’s definition of “reasonable efforts” entered the picture, the mandatory arbitration clause in her contract would invariably bar her day in court, shielding her agency’s behavior from the noonday light.<sup>183</sup>

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as opposed to a mannequin), child models, or body part models (such as hand or foot models), or of course male models. Agencies may also temporarily take down models who are working in a different market or not currently working for personal or medical reasons. Given this cursory count includes only the main category of women models, it is safe to conclude that, once one were to factor in all the other categories and models not currently on the website, the agency’s model total is, at minimum, in the multi-hundreds and likely over one thousand.

179. *Id.*

180. See Manning, *supra* note 36.

181. This Article was written in 2022. As noted within the corresponding in-line text, a model who is twenty years old in 2022 was born in either 2001 or 2002. The first social media websites were founded when these individuals were infants or toddlers. See Nicholas Carlson, *At Last – the Full Story of How Facebook Was Founded*, BUS. INSIDER (Mar. 5, 2010, 4:10 AM), <https://www.businessinsider.com/how-facebook-was-founded-2010-3>; see also Nicholas Jackson & Alexis C. Madrigal, *The Rise and Fall of Myspace*, THE ATLANTIC (Jan. 12, 2011), <https://www.theatlantic.com/technology/archive/2011/01/the-rise-and-fall-of-myspace/69444/>. Further, the first iPhone was released when they were in preschool or early elementary school. See Avery Hartmans, *Apple Just Unveiled Its iPhone 14 Line. Here’s How Apple’s Iconic Smartphone Has Changed the World Forever Since 2007*, BUS. INSIDER (Sept. 22, 2022, 4:49 PM), <https://www.businessinsider.com/apple-iphone-evolution-first-iphone-every-model-2019-12>.

182. See Julia Marsh, *Model Threatens to Call Mom to Get out of Contract*, N.Y. POST (Sept. 15, 2017, 12:53 PM), <https://nypost.com/2017/09/15/model-threatens-to-call-mom-to-get-out-of-contract/>.

183. The Sample Contract used throughout this Article contains a mandatory arbitration clause, as do most modeling contracts. Though this portion of the Sample Contract is not included, and a discussion of mandatory arbitration is outside the scope of the piece, this limitation is significant.

### 3. *The Constitution Does Not Speak of Freedom of Contract*

The U.S. Supreme Court has long established that employees and employers cannot simply contract for whatever they decide between themselves; rather, their arrangements are still subject to the law.<sup>184</sup> In 1937, the Court “emphasized the need of protecting women against oppression despite her possession of contractual rights.”<sup>185</sup> The notion that women’s “disposition and habits of life . . . will operate against a full assertion of [her] rights” rings somewhat antiquated today.<sup>186</sup> However, the same hesitance to assert ones rights may readily apply to an intimidated underage model, a model whose agency controls her work visa,<sup>187</sup> a model who is in debt to her agency, a model whose “disposition and habits” are influenced by an eating disorder or other industry-induced mental illness, a model who sacrificed her education in favor of her fashion career, or a model to whom a combination of the aforementioned considerations apply. Therefore, as the Court so aptly put it, today’s models, “will still be where some legislation to protect [them] seems necessary to secure a real equality of right.”

### 4. *Human Clothing Hangers, Hung Out to Dry*

Models are often referred to as “human clothing hangers.”<sup>188</sup> In the industry, use of this reverse personification is at times lighthearted<sup>189</sup> yet other times revealing.<sup>190</sup> Sadly, protections for

184. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (“What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law.”).

185. *Id.* at 394.

186. *See id.* at 395.

187. *See* Lockwood, *supra* note 53.

188. *E.g.*, The Associated Press, ‘60s Icon Twiggy Launches Fashion Line, TODAY (Mar. 30, 2010, 10:27 AM), <https://www.today.com/news/60s-icon-twiggy-launches-fashion-line-wbna36096607>. One of the most famous times the phrase was used was when 1960s icon Twiggy declared, “You can’t be a clothes hanger for your entire life!” upon her retirement from modeling. *Id.*

189. *E.g.*, A model may use the term in a tongue-in-cheek reference to herself.

190. *See* Friedman, *supra* note 90 (Models do not have a lot of control “because in today’s world, models are ‘interchangeable clothes hangers,’ not people with personalities.”); *see also* *Why Top Runway Fashion Models Never Smile*, FASHIONUNITED (Sept. 30, 2016), <https://fashionunited.uk/news/fashion/why-top-runway-fashion-models-never-smile/2016093021984> (“Now [models] are seen as walking clothes hangers. It’s all about effacing their personality . . . the clothes are it.” Anthropologist Leyla Neri, the director of fashion at the New School Parsons Paris, agreed.”).

someone purchasing *actual* clothing hangers are more stringent than protections for “human clothing hangers,” or models.

Article 2 of the Uniform Commercial Code, which governs “transactions in goods”<sup>191</sup> requires that a “lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.”<sup>192</sup> The Sample Contract would fall into this category if the contract were for the sale of actual clothing hangers, because the model is exclusively bound (i.e. the contract is “exclusive dealing in the kind of goods concerned”<sup>193</sup>) to the agency.<sup>194</sup> This means the agency would need to use its “best efforts to promote their sale,” which is, in this case, the model’s career.<sup>195</sup> However, in the Sample Contract, the agency makes no such promise.<sup>196</sup> Instead, the modeling agency agrees only to “all reasonable efforts to procure bookings, contracts, and engagements for Talent.”<sup>197</sup> There follows a nonexclusive list of how the agency will do this, and none of the list items state or even imply active promotion of the model.<sup>198</sup> Over half of the list items begin with the word “advise and counsel” the Talent.<sup>199</sup> The model, on the other hand, supplies the requisite goods through her presence at shoots, shows, and commercials, and by maintaining her general availability to work.

Once an exclusive modeling contract is signed, models cannot “just go work with whatever agency they want.”<sup>200</sup> On the contrary, the agency now possesses “exclusive rights to arrange modeling gigs for them, thus tying them to [the] agency.”<sup>201</sup> In the Sample Contract, the Agency has promised only to make “all reasonable efforts” to book jobs for the model.<sup>202</sup> In an unregulated industry

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191. U.C.C. § 2-102 (AM. L. INST. & UNIF. L. COMM’N 2022) (“Unless the context otherwise requires, this article [2] applies to transactions in goods.”).

192. U.C.C. § 2-306 (2).

193. *See id.*

194. *See* Sample Contract, *supra* note 162 (stating that “Agency shall act as the Talent’s exclusive agent”).

195. *See* U.C.C. § 2-306 (2); Sample Contract, *supra* note 162.

196. *See* Sample Contract, *supra* note 162.

197. *Id.*

198. *See id.*

199. *See id.*

200. Manning, *supra* note 36.

201. *Id.*

202. Sample Contract, *supra* note 162.

where an agent may advise anything from eating “one rice cake a day and if that [doesn’t] work, only half of one”<sup>203</sup> to breaking up with a military boyfriend serving our nation to instead date a celebrity,<sup>204</sup> it is hard to tell what “reasonable” means—and what an agent might consider “reasonable efforts” regarding a model who chooses to eat more than rice cakes or keep her current boyfriend.

### 5. *Dependent Contractors*

In sum, “getting signed” may be an aspiring model’s dream, but the coveted contract ultimately confines her to a workplace without protections, indefinitely ensnares her to her agency’s demands, and renders her a very *dependent* contractor indeed.<sup>205</sup>

The Sample Contract concludes thus: “The parties hereto agree, and the talent acknowledges, that he/she is an independent contractor. This contract and the relationship between the parties do not constitute employment.”<sup>206</sup>

## IV. “EMPLOYEE”: A DESIGNER LABEL

*“I was looking at your Instagram,” the photographer said. “There’s a clear line between your old stuff and when you started modeling. I thought to myself, ‘Yeah, there’s another girl from the South whose agency is trying to make her cool.’”*

*Macey had just confessed, apparently needlessly, that her New York modeling agency was trying to brand her as the Edgy European type. Raised by alternative, somewhat hippy-ish parents—an intense German mother and rebellious Midwestern father—Macey did not consider herself “another girl from the South.” Her patchwork life story took place everywhere from Key West to Boston. Yes, it included pit stops in Tennessee and a tiny highway town in southern Georgia, but she never felt she fit in.*

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203. Jessika Walsten, *Eating One Rice Cake a Day, Starvation and Self Hatred: Crystal Renn & Other Models Share Eating Disorder Horrors, Pressure to Be a Size Zero*, RADAR (Feb. 28, 2013, 4:54 PM), <https://radaronline.com/exclusives/2013/02/anorexic-models-crystal-renn-starve-themselves-sample-size-zero/>.

204. Manning, *supra* note 36.

205. In stark contrast to the image the Sample Contract evokes of an independent contractor running her own business with the guidance of her agency, the model is entering an industry wherein her position has instead been compared to indentured servitude. See *supra* text accompanying note 73. See generally, Sample Contract, *supra* note 162.

206. Sample Contract, *supra* note 162.

*People like the photographer, living in Bushwick in his concrete-floored, high-ceilinged warehouse loft with a record player and black-and-white prints of his photos and a predictably wild beard . . . people like that fit in, Macey thought. They had an identity, a brand, a neatly wrapped box (even if their “box” was that they lived outside of it).*

*“Another thing,” the photographer added, “You’re too heterosexual. I’m not saying, like, pretend you’re a lesbian or something. I’m saying just maybe don’t make it quite so apparent what team you bat for. The industry wants androgyny, a little mystery. Give off a vibe where people can’t just immediately tell you’re straight the moment you walk in the room, you know?”*

*Macey had not known.*

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#### A. What’s in a name?

Any fashion enthusiast knows there is more to a name than meets the eye, and in this case, the stakes are higher than whether someone has a Chanel or a knockoff. Whether a model is labeled as an employee, or an independent contractor has enormous consequences for her life.

##### 1. *Let Them (Not) Eat Torts*

As models are incorrectly classified as independent contractors, they are not protected by the general principles of employer-employee law. This affects everything from a model’s ability to receive unemployment compensation to her right to bring a Title VII claim.<sup>207</sup> It also affects a variety of important safety considerations, since an employer is liable to an employee—but not to an independent contractor—for certain torts.<sup>208</sup> “Except as precluded by a workers’ compensation statute or other law, “employers are liable to employees for injury during the course of employment caused by:

- 1) the employer’s tortious conduct,
- 2) the employer’s employees’ tortious conduct, and

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207. U.S. Equal Emp. Opportunity Comm’n, NVTA-2021-1, Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity (2021) (“Title VII generally does not apply to individuals who are found to be independent contractors.”).

208. See RESTATEMENT (THIRD) OF EMP. L. § 4.01 (AM. L. INST. 2015).



3) the employer's breach of its "tort-based affirmative duties."<sup>209</sup>

For many models, it may have been years since they have helped themselves to a "tort," but sadly, the chances are high that they have experienced one far more recently. The resounding reply from modeling agencies, which currently operate free of any fiduciary duty and the accompanying responsibilities, tends to be "Let them eat cake."<sup>210</sup>

If models were employees instead of independent contractors, agencies would be accountable for responsible hiring practices and ensuring a safe workplace. They would also have a duty to warn of risks associated with the job and have a limited duty to rescue.<sup>211</sup> This means agencies would be subject to liability if they failed "to provide a reasonably safe workplace, including reasonably safe equipment"<sup>212</sup> or failed "to warn of the risks of dangerous working conditions that the employer, but not the harmed employee, knew or should have known about."<sup>213</sup> This is critical, because in an industry where the many wide-eyed "Macey Buchanan" types did not know anything about the unregulated industry, the agencies knew.

. . .

*Macey sat in a metal chair in the corner laundromat. A weary mother scolded her four-year-old in Spanish as he tried to run out the door before she'd scooped the last of her sheets from the dryer. The orange glow of the evening hour blanketed his glossy brown hair. He ran unabashed back to his mom, vibrant, pure, and still living in a world where nothing had yet diluted his sense of worth. He was adorable. Macey smiled at him.*

*"Children . . . what a typical girly-girl thing to like," she thought ruefully, feeling that perhaps she knew what the photographer was talking about when he'd implied that she was one of the replaceable, too-smiley millions. Macey herself had been a quiet, serious child. It was the multiple moves and consequent need to repeatedly make friends that had beaten the "bubbly" into*

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209. *Id.* "Tort-based affirmative duties" includes "those set forth in §§ 4.05 and 4.05." *Id.*

210. See *Did Marie-Antoinette Really Say 'Let Them Eat Cake'?*, THE HISTORY CHANNEL (Aug. 31, 2018), <https://www.history.com/news/did-marie-antoinette-really-say-let-them-eat-cake>.

211. See RESTATEMENT (THIRD) OF EMP. L. § 4.05 cmt. e (AM. L. INST. 2015).

212. *Id.*

213. *Id.* cmt. a.

her. When she was four, Macey would have never run joyfully to the door of the laundromat. She would have sat with a pensive look on her face and would have hidden behind her mother if a stranger tried to smile at her. As a child Macey wore only dresses and cried if anyone tried to make her wear pants. She had an affinity for symmetry, a penchant for poetry, and a serious demeanor her teachers found laudable yet unnerving. She exuded an aura of quiet discontent. Macey had been quiet, intense, and frankly a little high maintenance: every bit the “high fashion model” personality that the photographer and her agents tried to instill in her now.

Macey sighed and took out her phone. She would write a short story one about this one day. It would be called, “The Day I Was So Heterosexual I Had to Delete My Instagram.” A click-bait-y title, to be sure . . . perhaps she should tone it down. It seemed that after a lifetime of encouragement to “come out of [her] shell,” Macey was now being told to go back inside it. Macey’s threadbare fingers moved over her iPhone, methodically deleting one college-era Instagram picture at a time. Her bright filters and outfits now seemed unsophisticated, and her captions seemed dorky when read through the lens of her agent’s recent constructive counsel: “Play it cool. Just stick to just a breezy one-liner or emoji, you know?”

Macey had not known.

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## B. A Note About Agencies

To be clear, this Article is not meant to villainize modeling agencies. Many agents consider themselves facilitators of big dreams, and some were once models themselves. In fact, the career transition from model to agent is known in the industry as “transitioning to the other side of the desk.” However, the small, exclusive nature of the profession makes it all the more dangerous. The fashion industry is largely *not* comprised of bad people. However, it is still comprised of inevitably fallible humans who may accept “how we’ve always done things” as the status quo and not question anything that the Land of the Free has not made illegal. And when a small group of people within an industry that our society has deemed glamorous live within a silo, the echo

chamber becomes uproarious. Legislation is needed to cut through the noise.<sup>214</sup>

### C. Attempts at Legislation

There have been some attempts at such legislation. For example, in 2016, California rejected California AB 2539, a bill that would have, *inter alia*, classified models as employees instead of independent contractors.<sup>215</sup> The bill read:

As with all workers, professional fashion models are entitled to safe working conditions. The time, place, and means of the services provided by professional models are typically controlled by the company paying their compensation. Therefore, professional models are typically required to be classified as employees rather than independent contractors according to existing federal and state law. Clarifying their classification as employees will enhance their workplace protections.<sup>216</sup>

While it is disheartening that the bill did not pass, it is encouraging that—despite not having the support it needs—the proposition that models should be classified as employees has been seriously considered.

Additionally, in early 2022, at the time that work on this Comment began, there was an active bill in the New York Senate called the Fashion Worker's Act that proposed what could have been a “watershed regulation for the fashion industry, which has traditionally enjoyed low regulation around labor and environmental issues.”<sup>217</sup> The Fashion Workers Act would have required modeling agencies to register with the state of New York

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214. This section is comprised of the author's personal opinions.

215. Nikki Dubose, *Changing the Modeling Industry: Have You Heard About Bill AB 2539?*, RECOVERY WARRIORS, <https://recoverywarriors.com/bill-ab-2539-modeling-industry/> (last accessed May 30, 2022); *California AB 2539*, HARV. T.H. CHAN SCH. OF PUB. HEALTH: STRIPED, <https://www.hsph.harvard.edu/striped/policy-translation/california-ab-2539/> (last visited May 30, 2022); Nora Crotty, *New Bill Seeks to Protect Models from Being Abused at Work*, YAHOO! ENT. (Apr. 14, 2016), <https://www.yahoo.com/entertainment/new-bill-seeks-to-protect-models-from-being-abused-165825883.html>.

216. Cal. State Assemb., 2015–16-2539, Reg. Sess. (2016), <https://legiscan.com/CA/text/AB2539/id/1345784>.

217. Melissa Gamble, *Fashion, Sustainability, and the New York Fashion Act*, THE REGUL. REV., (Feb. 28, 2022), <https://www.theregreview.org/2022/02/28/gamble-fashion-sustainability-new-york-fashion-act/>.

and report their ownership.<sup>218</sup> It also would have codified protections that are self-evident in most other professions, including “good-faith representation and more reliable payment schedules.”<sup>219</sup> The bill’s proponents pointed to many of the topics discussed in this Comment, such as the “lack of transparency on contracts and fees; garnished wages for housing, photography, and other expenses; and payments that can take months and even years to materialize.”<sup>220</sup> The bill was not passed during the 2022 session, but proponents of the Fashion Worker’s Act are rallying and regrouping.<sup>221</sup> The “runway” train has been without a conductor long enough; and it is time our government gets the fashion industry onto the right track.

## V. CONCLUSION

*How would she write about her experiences without her agent knowing? Macey knew writing anything negative about the industry would never fly. It was hard enough to book shoots and shows without biting the hand that did not feed her.*

*Macey thought of a teenage girl at one of the four schools she attended over the course of her high school experience. Her classmate had been pretty in that “apple pie and baseball” way that straight men loved, and the fashion industry—at least the editorial and runway sector—generally thumbed its nose at. She had become a nurse and married her college sweetheart in a traditional church ceremony. She would soon have sweet blonde daughters born the ideal “stair step” two years apart. Her husband was known in the community as a good man.*

*“Macey’s husband is just the best guy,” everyone proclaimed.*

*Next, Macey Buchanan thought of her favorite novel—also a representation of the American Dream. She thought of the character whose voice sounded like money and who was a normal height and never had acne. A character capable of feeling paralytic happiness*

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218. Ella Ceron, *New York Bill Would Give Fashion Models More Labor Protections*, PHILA. INQUIRER (March 26, 2022), <https://www.inquirer.com/business/fashion-models-rights-contracts-workers-20220326.html> [<https://web.archive.org/web/20220326083928/https://www.inquirer.com/>].

219. *Id.*

220. *Id.*

221. Roxanne Robinson, *Karen Elson rallies to further push Fashion Worker’s Act through New York State Legislature*, FASHION NETWORK (Sept. 14, 2022), <https://www.fashionnetwork.com/news/Karen-elson-rallies-to-further-push-fashion-workers-act-through-new-york-state-legislature,1438501.html>.

*and who had a vast selection of whose “Mrs.” she could be. A beauty who was just foolish enough to think she could have it all as Mrs. Buchanan.*

*Years ago, in a sun-dusted Brooklyn laundromat, my pen name was born.*

*I did not know I would never write my short story about deleting the photos on my Instagram page. I did not know I would return home from Milan Fashion Week a few months later bedecked in cystic acne and cynicism, never to return to the fashion industry.*

*I did not know how one short year would require years of healing. I did not know how long it would take to recover from my eating disorder or to restore my hope in the American Dream. I did not know it would one day take every ounce of courage I had to apply to law school because I feared soaring close to the sun might once again melt my tentatively rebuilt identity. I did not know I would become almost completely paralyzed by the fear that ever dreaming big again would leave me broken.*

*I did not know I would struggle with whether, and how often, to mention my time as a model. I did not know I would be crippled by imposter syndrome. I did not know that a friend would ask, “Why do you avoid saying you were a model, Maya? It seems like you’re almost ashamed of it.” I did not know the answer would be that I feared appearing vain and feared making “retired model” my entire identity. I did not know I would be downright petrified that modeling would remain the most remarkable thing I ever did in my life.*

*I did not know how proud I would become of all I accomplished and overcame. I did not know that my modeling career—despite all the ways it broke me down—would also lift me up. I did not know that it would help me release the shackles of a lifelong inferiority complex. I did not know that it would make me more proactive, more worldly, and more confident.*

*I did not know that when I stopped relying on worldly hands to feed me, I would no longer feel starved. I did not know that when I identified as neither Ugly Duckling nor Swan, I would fly. I did not know I would one day find rest for my soul.*

*I did not know.*

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What I do know is that I am one of the lucky ones. I got out of an industry that exploits young people: women in particular. I was never sexually harassed or assaulted, I have a healthy relationship

with food again, and I am living a life that makes me happy every day.

Other young women are not so lucky. And they should not have to be “lucky.” A model should not need to have a caring, financially stable parent or spouse to feel safe enough to leave their fashion industry “mother” or break the “marriage contract” with her agency. A model should not have to rely on “at least I have a college education” for the courage to move on. While I feel fortunate that I had (and have) those things, it makes me sad to think how things routinely turn out for young women (and men) who are not so fortunate.

It makes me sad when another day goes by and Nicole,<sup>222</sup> one of my Milan roommates, whose loving mother was a waitress and whose father abandoned them both long ago, does not post on social media. Nicole has not posted for years, and sometimes I wonder what happened to her. Was she like Cheyenne,<sup>223</sup> in and out of rehab and the hospital for anorexia and heart conditions arising from anorexia, for her entire mid-twenties? Did she just leave the industry like most of us did? Does she regret making what was for her the obvious financial choice at the time and dropping out of college? When my imagination gets the better of me, I wonder: is she even still alive?

Models should not live in fear of agents who control almost every facet of their lives, yet ostensibly do not rise to employer status. They should not consider eating disorders hazards of the job. They should not be subjected to inappropriate personal remarks and sexual harassment. Models should be able to rely on the same lawmakers who protect workers across our nation. They should have fundamental human rights, and they should have standing for a cause of action when those rights are violated. Every model is taught wardrobe “basics” when she signs: black jeans, tight-fitting black tank tops, and chic yet comfortable casting heels. It is time that basic worker protections were added to the proverbial wardrobe.

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222. Name has been changed.

223. Cheyenne’s name was also changed. Macey Buchanan made her debut through this Article, and all the experiences recounted under my pen name are my own.