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June 2, 2022

The Honorable Assembly Member Latoya Joyner
Chairwoman
Standing Committee on Labor
LOB 524
Albany, NY 12248

RE: Letter in Opposition to New York A.9762 - The New York Fashion Workers Act

Dear Chairwoman Joyner,

The 4A's wishes to raise our **immediate concerns with A.9762 -The New York Fashion Workers Act.** In particular, **we ask you to delay a committee vote on A.9762,** so that we can help you address what we see are significant structural issues with the legislation. The 4A's would be happy to collaborate with you in a future legislative session to enact a bill that better reflects the true accountability structure of advertising industry employment contracting arrangements, while balancing the need to enact important new labor protections for those employed in the modeling and creative talent industry.

The 4A's, also known as the American Association of Advertising Agencies, was established in 1917 to promote, advance, and defend the interests of our member agencies, their employees, and the advertising and marketing industries overall. Today, the organization serves more than 600 member agencies across 1,200 offices, which help direct more than 85% of total U.S. advertising spend.

Advertising is a significant contributor to the U.S. economy. An August 2021 IHS Markit research report found that in 2020, advertising supported $7.1 trillion in US output and 28.5 million US jobs. The research also determined that every dollar of ad spending supported, on average, over $21 of economic output (sales). Collaborating closely with their nationwide and global advertiser clients, 4A's members are a critical part of the advertising ecosystem, serving as the creative visionaries and business strategists behind how ads resonate with and effectively reach New York consumers.

General Recommendations

In particular, if given an opportunity to work with you in 2023, we ask you to amend the language in A.9762 to better reflect how advertising agencies fit into the creative production pipeline, as contracted intermediaries who manage and execute client production projects, subject to the approved budget and payment schedules of their brand clients. A.9762 in its current form assumes that agencies have a direct contractual relationship with creative talent and models for the purposes of timely payment and other labor liability concerns, and disrupts typical agency contracting practices which often rely on sequential liability for large production expenses. While agencies sometimes directly contract with models and

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creatives, more often agencies will contract with a model or creative management agency who acts on the model's or creative's behalf. The current draft of this bill seems to lack clarity that such a relationship exists, thereby making an agency a party contracting directly with the model or creative talent.

Agencies are purchasers but not the end user of the services of models, hair and makeup artists, stylists, influencers, photographers, casting directors, and other behind-the-scenes creative talent; however A.9762 oversimplifies the typical multi-level production employer structure[1], and leaves agencies potentially financially liable for the unpaid talent costs of their clients.

The current version of the legislation should be amended to make the important distinction that if agencies themselves have not been paid for their contracted client production work and incurred talent expenses, then agencies should not be held liable for violations of delayed payment to models and creatives in A.9762 § 964. This is especially important because many agencies themselves are small businesses that cannot afford to accrue thousands of dollars of financial liability for their clients' unpaid talent costs.

According to a 2020 analysis from *Digital Information World*, 77% of the 6,000 marketing agencies surveyed employ between 10-40 employees, 18% of marketing agencies employ between 50-249 employees, 4% of marketing agencies employ between 250-999 workers, and only 1% of marketing agencies employ over 1,000+ workers.[2]

Specific Areas of Concern In A.9762-A

Specific areas of concern for agencies in the legislative text of A.9762 include:

§ 959. Definitions (Page 1)

> *Defines "client" as a retail store, a manufacturer, a clothing designer, an advertising agency, a photographer, a publishing company or any other such person or entity that receives modeling services from a model or other services related to the provision of modeling services from a creative, directly or through intermediaries.*

It is structurally problematic to group advertising agencies under the definition of "client". Advertising agencies are B2B businesses and are subject to the contractual requirements and payment terms of their

[1] While a model or creative can contract directly with an agency (on behalf of a client), more commonly, models or creatives contract with management companies and are considered secondary subcontractors to agencies and tertiary subcontractors to brand clients who are the ultimate payers and end users of creative or model talent services.

[2] https://www.digitalinformationworld.com/2020/04/the-state-of-marketing-agencies-in-2020.html#:~:text=Our%20analysis%20showed%20that%2077,agencies%20employee%20over%201%2C000%2B%20workers.

clients for any associated production projects. By including agencies under the definition of client, it shifts payment requirements for creatives onto agencies, even though they themselves are routinely subject to delayed payments from their brand clients. Agencies should not have to front the talent costs of their clients who do not pay for their own production work on time. Many agencies are small businesses and do not have the capital to bankroll their clients' unpaid production fees that can amount to hundreds of thousands of dollars.

§ 960 Registration Requirements (Page 3)

> *The bill states that, "No person shall use the name or title 'modeling agency', 'model management company', 'creative agency', 'creative management company', or otherwise represent that it is registered under this article unless the entity or person is registered under this article."*

Many advertising agencies use the term "creative agency" in their name. This legislation implies no party can use the term "creative agency" unless they become a registered party with the state of New York under this legislation. This would require many advertising agencies to change their name. We ask that the word "creative agency" be struck from the bill for this reason.

§ 962. Duties of model management companies and creative management companies (Page 4).

> *Model management companies must "provide models and creatives with access to and copies, which may consist of digital copies, of all contracts and agreements the model management company or creative management company has entered into with a client involving rate of pay and scope of work, provide plain language summaries of the rate of pay and scope of work involved with such contracts and agreements, and disclose any relationship, contractual or otherwise, that may exist between the model management company or creative management company and the client other than the agreement relating specifically to modeling services or creative services."*

Agencies are very concerned about disclosing any proprietary information in their client contracts to creatives or other non-signatory parties. Many of these agreements are part of master service agreements. As it is currently written, the bill also seems to require an agency to share confidential information about other proprietary client arrangements that just so happen to use the same model management company vendor for contracted work. This seems superfluous and unnecessary and could violate existing client and agency confidentiality agreements.

§ 964. Duties of clients. (Page 6)

A client must "provide fees, payment, reimbursements for expenses and compensation due to a model or creative, including compensation required by subdivision two of this section, within thirty days of the end of any employment, engagement, entertainment, exhibition or performance."

As a production partner, agencies incur project costs on behalf of their clients and are themselves not the end users of production work. Agency contracts with their clients have varying payment terms of net 30 days, net 60 days, or net 90 days, and even then, many clients do not pay their project invoices on time. While production contracts between agencies and clients usually have payment terms of 30 days or less, this is not always the case. In addition, many agencies utilize "sequential liability" payment practices for client production projects.[3] It is very difficult for agencies to be expected to pre-bankroll payment to creative subcontractors or creative management companies when they themselves have not been paid by their own client. The language should be amended to ensure payment to models or creatives within 30 days after a client has paid an agency.

A client must "compensate models and creatives at an hourly rate at least fifty percent higher than the contracted hourly rate for any employment, engagement, entertainment, exhibition or performance that exceeds eight hours in any twenty-four hour period."

Production shoots or brand events tend to operate on a twelve- hour schedule. Proscribing an eight hour day for creatives and models before overtime payment begins does not mimic the realities of current agency production schedules and unreasonably incurs additional expenses for standard industry production shoots. Production shoots are very expensive to begin with, and by increasing the costs of shoots, this quickly is likely to lead to fewer production shoots, and fewer jobs.

Moreover, the level of detail for billing requirements in this section would seemingly be covered in any contract between the advertising agency and the modeling management or creative management company, not directly with the model or the creative. As it is currently drafted, this section assumes the advertising agency has a direct contractual relationship with the model or creative and is the ultimate client, which is often not the case.

A client must "provide at least one thirty-minute meal break for any employment, engagement, entertainment, exhibition or performance that exceeds eight hours in any twenty-four hour period."

[3] A Sequential Liability clause in an agency production agreement provides that the client – not the agency – is the party ultimately responsible for a failure to pay under the agreement. Typically, the agency only accepts primary financial responsibility once it has been paid by its client.

The section also assumes that an advertising agency has a contractual relationship with the model or creative and is the ultimate client and end user. The level of detail in this section for break requirements would seemingly be covered in the contract between the advertising agency and the modeling management/creative management company, not directly with the model or creative.

> *A client must "ensure that any employment, engagement, entertainment, exhibitionor performance which requires nudity or other sexually explicit material shall comply with the requirements of subdivision three of section fifty-two-c of the civil rights law, as added by chapter three hundred four of the laws of two thousand twenty.*

Additional clarification is needed in the legislation to better describe the specific duty of care to show good faith compliance for agencies. Agencies would not object to including this but would want additional clarity to know what it actually means to "ensure the covered agent containing nudity et. al, complies with existing law."

> *A client must provide adequate levels of liability insurance to cover and safeguard the health and safety of models and creatives.*

Agencies will need more clarification to better define "adequate level of liability insurance…" and duty of care. This should not be required if models or creatives are contracted with agencies via agreements with model or creative management companies. These management companies would seemingly already have creatives or models covered under their own worker's compensation and similar blanket liability policies and that an additional liability responsibility should not fall directly to agencies. If agencies are directly contracting with creatives or models, then we have no objection to this provision.

§ 966. Violations, penalties and procedures (Page 7-8)

> *"Any client who enters into an agreement with a model management company or creative management company or person purporting to be a model management company or creative management company, who is required to register, but whom the client knows or should have known has failed to register, failed to renew its registration or had its registration revoked by the commissioner shall be deemed to have violated this article."*

This section needs clarification to better understand the duty of care for agencies to confirm that their contracted model management companies or creative management companies are registered. Is a visual check of registration information on the employment agency's website enough? Does a statement in a

signed contract between an agency and creative management company certifying registration absolve the agency of potential violations?

> *"The commissioner may impose a civil penalty upon any client described in subdivision three of this section that has been deemed to have violated this article, for no more than three thousand dollars for the initial violation, and for no more than five thousand dollars for a second or subsequent violation."*

This section appears to mean that a model or creative will have the right to sue an advertising agency directly for actual and punitive damages. It is unclear if this right only applies if there is a direct contractual relationship between a creative and an agency (in the absence of a contract between an agency and a creative management company employer).

The legislation indicates that the fees for law violations are the same for agencies as they are for creative management agencies (actual creative employment agencies) who break registration requirements or payment deadlines. This doesn't seem reasonable, particularly if agencies are not paying talent because they themselves have not been paid on time by their client.

> *"An order issued under this section shall be final and not subject to review by any court or agency unless review is had pursuant to section one hundred one of this chapter."*

There should be an appeals process established in the bill to allow agencies to demonstrate that they've attempted to comply with the law in good faith. This is particularly important because the duty of care client requirement to ensure that a creative management company is registered (and other requirements) is ill-defined in the current version of the bill.

This section also continues to assume a direct relationship between an agency "client" and a model or creative. An inadvertent scenario could emerge where an agency pays a creative management company on time (within 30 days) and then a creative management company doesn't pay the creative on time (within 45 days) and an agency then could still be held liable without the ability to prove their innocence in an appeal.

> *"A model or creative may bring and maintain an action in a court of competent jurisdiction to enforce the provisions of this article. Model management company or creative management company, person purporting to be a model management company or creative management company, or client that violates this article shall be liable for actual damages to any model or*

creative that has suffered damages due to such violation, and the court may, in its discretion, award punitive damages."

This penalty is difficult to understand. What is the measurable financial harm to the model or creative if an agency "client" did not adequately confirm that their contracted management company was unregistered as long as a creative or model was paid and paid within legal limits of the law?

* * *

We thank the chairwoman and the committee for the opportunity to submit our written comments on A.9762.

We wish to emphasize that advertising agencies incontrovertibly value the significant contributions provided by models and creative talent to the overall execution of the creative vision of client production shoots, events, and other advertising media. As is a customary practice in the advertising industry, we will continue to work with our members to ensure models and creatives are being given meaningful labor protections and fair payment terms subject to their own talent management contracts.

We ask you to consider delaying a committee vote on A.9762 until a future session so that a more thoughtful deliberative process, one which includes vetting the aforementioned serious concerns posed by our member agencies, can be potentially incorporated into an amended bill.

Thanks for your consideration,

Alison Pepper
Executive Vice President of Government Relations and Sustainability
American Association Of Advertising Agencies (the 4A's)

CC:

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