CONTACT
POLICY DEPARTMENT
MARIA CILENTI
212.382.6655 | mcilenti@nycbar.org
ELIZABETH KOCIENDA
212.382.4788 | ekocienda@nycbar.org

REPORT BY THE ENTERTAINMENT LAW COMMITTEE IN SUPPORT OF AMENDMENTS TO THE DEFINITION OF "THEATRICAL EMPLOYMENT AGENCY" UNDER NEW YORK STATE LAW AS PROPOSED BY THE NEW YORK STATE BAR ASSOCIATION ENTERTAINMENT, ARTS AND SPORTS LAW SECTION

1. INTRODUCTION

The Entertainment Law Committee[1] of the New York City Bar Association supports the introduction and enactment of State legislation that would amend the definition of "Theatrical Employment Agency," found in both the New York General Business Law and the Arts and Cultural Affairs Law, to specifically exempt duly licensed and actively practicing attorneys in the State of New York from licensing requirements applicable to "theatrical employment agencies" (commonly referred to as "talent agencies"). This amendment has been proposed by the Entertainment, Arts and Sports Law Section of the New York State Bar Association (EASL Section).

The amendment aims to preclude a potential overbroad reading of the law that in our view would improperly characterize the legal services routinely provided by New York entertainment lawyers as the "procurement" of employment. Such an overbroad reading of a similar statute has already occurred in California.

This proposed amendment will protect attorneys from possible civil and criminal sanctions and from unduly redundant licensing requirements when performing legal services for clients covered by the New York General Business Law § 171.8-a definition of "Artist." Such legal services may include procuring or attempting to procure employment or engagements for such Artists. Currently, personal managers who only incidentally procure employment for Artists are exempt from the licensing requirements of the General Business Law § 171.8 and Arts and Cultural Affairs Law § 37.01.3. Therefore, most managers do not obtain licenses as Theatrical Employment Agencies. The Entertainment Law Committees supports the proposal that attorneys at law should enjoy a similar exemption.

[1] The Entertainment Law Committee focuses on matters of interest to entertainment law practitioners who work in a variety of areas in the entertainment industry including television, independent and documentary film, theater, music, publishing and new technologies. Our diverse membership is made up of solo practitioners, law firm associates and partners, in-house and business affairs counsel, academics, law students and representatives from various non-profit organizations in media and the arts.

2. CONTEXT OF PROPOSAL: *SOLIS* CASE

The legislation is proposed in reaction to the confusing and unfair result under a California case. In *Solis v. Blancarte* (Cal.Lab.Com., Sept. 30, 2013) TAC No. 27089,[2] an attorney licensed to practice law in the State of California was found by the California Labor Commission to have violated the Talent Agencies Act (TAA) simply by negotiating an employment agreement for a sports broadcaster (who satisfied the legal definition of "Artist" in that state) without first procuring a license from the Labor Commission.

The TAA requires licensure for anyone engaged in or carrying on the occupation of a talent agency. The language of the TAA, as part of the California Labor Code, specifies that anyone engaged in such activities requires licensure, but does not provide exceptions for attorneys. This has created a concerning and damaging gap in the California law. Attorneys can provide routine legal services such as negotiating the terms of employment agreements, and, if the client falls under the legal definition of "Artist", the attorney could be subject to additional licensing requirements as a talent agent. In such instances, as in the *Solis* case, the engagement agreement between the attorney and the artist is then void, allowing the artist to avoid payment obligations and subjecting the attorney to liability for violating the statute.

3. LANGUAGE COMPARISON

As illustrated in **Table 1** below, the language and key definitions of the New York General Business Law § 171.8 and Arts and Cultural Affairs Law § 37.01.3 are similar to the language and key definitions found in the California Labor Code. The New York laws could therefore be interpreted and applied in a manner similar to the *Solis* case in California. Attorneys licensed to practice in the State of New York are thus potentially vulnerable to cases similar to *Solis* and the civil and criminal penalties imposed therewith.

Table 1.

CALIFORNIA	NEW YORK
Labor Code § 1700.5: "No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commission."	**General Business Law, Art. 11, § 172:** "License required. No person shall open, keep, maintain, own, operate or carry on any employment agency unless such person shall have first procured a license therefor as provided in this article. Such license shall be issued by the commissioner of labor, except that if the employment agency is to be conducted in the city of New York such license shall be issued by the commissioner of consumer affairs of such city. Such license shall be posted in a conspicuous place in said agency."

[2] *See* http://hodgsonlegal.com/wp-content/uploads/2013/10/SOLIS-v.-BLANCARTE-LABOR-DECISION.pdf.

CALIFORNIA	NEW YORK
Labor Code § 1700.4(a): "[t]alent agency" is defined as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist of artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter."	**General Business Law, Art. 11, § 171.8:** defines a "Theatrical Employment Agency" as "any person . . . who procures or attempts to procure employment or engagements for an artist, but such term does not include the business of managing. . . the artists. . . where such business only incidentally involves the seeking of employment therefor." **Arts and Cultural Affairs Law, Art. 37, § 37.01.3:** defines a "Theatrical Employment Agency" as "any person . . . who procures or attempts to procure employment or engagements for an artist" except for those acting as a manager for artists "where such business only incidentally involves the seeking of employment therefor."
Labor Code § 1700.4(d): defines "[a]rtists" in part as: "actors and actresses . . . , radio artists, . . . writers, . . . and other artists and persons rendering professional services in motion picture, theatrical radio, television and other entertainment enterprises."	**General Business Law, Art. 11, § 171.8-a:** defines "artist" as "actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, . . . writers, . . . and other artists and person rendering professional services in motion picture, theatrical, radio, television, and other entertainment enterprises.

4. POTENTIAL INTERPRETATION OF NEW YORK LAWS

Although there has not yet to our knowledge been an equivalent *Solis* case in New York in which an attorney negotiating an employment agreement or providing other routine legal services is considered to be a "Theatrical Employment Agency" as defined by current statutes, the potential for such a ruling exists. The language of the New York statutes creates a risk of liability to attorneys much the same way as the risk manifested itself in the *Solis* case under the California Labor Code. As the law is currently drafted, attorneys negotiating employment agreements or otherwise procuring employment for their clients could be held to violate the New York General Business Law, which is a misdemeanor crime, in addition to suffering the damages caused by having an otherwise enforceable attorney-client agreement rendered void and unenforceable. New York regulatory agencies and courts are not bound by the *Solis* decision in California. However, there is potential under current New York law for a similar imposition of civil and/or criminal penalties upon attorneys who may negotiate employment agreements on behalf of their artist clients without an employment agency license.

5. EASL SECTION PROPOSAL

The Entertainment Law Committee supports the EASL Sections proposed legislation that would add the following proposed sentence to the end of both General Business Law, § 171.8 and Arts and Cultural Affairs Law § 37.01.3:

> The provisions of this subdivision shall also not apply to persons duly engaged in and admitted to the practice of law in the State of New York, pursuant to the rules of the Court of Appeals of the State of New York and in good standing in accordance with the provisions of the New York State Judiciary Law § 468 and the rules of the Chief Administrator of the Courts.

6. SUPPORT

The original purpose of the New York General Business Law was to prevent unscrupulous individuals or agencies engaging in unethical or illegal behavior from preying on Artists. The law requires that employment agencies submit to background checks and maintain appropriate records, and prohibits them from publishing any false, fraudulent or misleading information, representation, promise, notice or advertisement.[3] Section 187 includes numerous other provisions that create accountability for the employment agency and protection for the artist, such as the prohibition against sending any person to any place which the employment agency knows or reasonably should have known is maintained for immoral or illicit purposes, or knowingly permit persons of bad character, prostitutes, gamblers, procurers or intoxicated persons to frequent such agency.

Exempting attorneys from the definition of "Theatrical Employment Agency" and thus allowing attorneys to represent "Artists" as defined under New York law without a theatrical employment agency license would not undermine the purpose of the law. Attorneys undergo significant vetting through the attorney licensure process. To obtain a license to practice law in the State of New York, an attorney must graduate from an accredited law school, pass a demanding bar examination, pass the Multistate Professional Responsibility Examination, and submit multiple character and legal employer affidavits during a character and fitness assessment. These are the steps to simply apply for a license to practice law. Once admitted, attorneys have continuing obligations throughout the term of their licensure, including attending regular continuing legal education courses, observing the ethical obligations owed to clients and potential clients, and remaining subject to disciplinary action by the Appellate Division in the event of any failure to comply with the rules of conduct.

Licensed attorneys are therefore at all times held to strict requirements to ensure the protection of clients and potential clients. The protective intent of Article 11 of the New York General Business Law is thoroughly satisfied by the attorney licensing regulations. The necessity of an additional Theatrical Employment Agency license with lesser standards is both burdensome and redundant. The exemption of attorneys from such Theatrical Employment Agency requirements would not frustrate the purpose of the law.

[3] New York General Business Law § 187.2

There is precedent in New York for attorney exemptions from licensing requirements. For example, under Real Property Law § 442-f, attorneys are exempted from obtaining a real estate broker's license on the basis of their legal credentials. Similarly, under Executive Law § 130.2 attorney licensure is sufficient to serve as a notary public without the need for further examination to establish moral character and prove educational credentials, as is normally required.

Finally, personal managers are already specifically exempted from the definition of "Theatrical Employment Agency" and can engage in procuring employment for the artists they represent without obtaining a license, so long as such procurement is "incidental." This exemption reflects the realities of the entertainment industry. Personal managers procure employment for their clients even if it is not the main thrust of their work. This exemption was granted despite the fact that such personal managers are not required to have any formal training or licensure to become qualified as a personal manager, nor are they subject to any ongoing ethical obligations. Likewise, the law should reflect the reality of the overlap in responsibilities that can occur between Theatrical Employment Agencies and attorneys. For instance, attorneys may, as part of their legal services, provide employment contract drafting and negotiation services on behalf of a client who qualifies as an artist. Moreover, the law should reflect that such attorneys are already more than sufficiently vetted through the legal licensure process to satisfy the obligations of a Theatrical Employment Agency without additional licensure under the General Business Law or Arts and Cultural Affairs Law.

7. CONCLUSION

Until adoption of an express exemption for attorneys from the employment agency licensing requirements, New York attorneys will remain potentially liable for criminal and civil sanctions for providing routine legal services in the entertainment industry. This may hinder the attorney client relationship when the client is an artist, and may limit the attorney from engaging in the vigorous representation to which clients are entitled. This situation is counter to the underlying purpose of the statutes and the licensing requirements themselves. For these reasons, the Entertainment Law Committee supports the introduction and enactment of the EASL Section's proposed legislation as outlined in Section 5 above to expressly exclude attorneys from applicable definitions of "Theatrical Employment Agency."

Entertainment Law Committee
Jaime Wolf, Chair
Randy Friedberg, Primary Drafter

September 2017