April 18, 2019

Re: WGA Attempted "Delegation" of Authority to Managers and Lawyers

Dear Members,

I write regarding the issue of the WGA's purported "delegation of authority" directing talent managers and attorneys to violate California and New York statutes holding that only licensed talent agents may procure employment for clients. Yesterday, the WGA West sent a message stating that it would pay any damages awarded against managers or attorneys for violating California law and procuring employment without a license. It further threatened to sue any managers and attorneys who choose to act in accordance with state law for "antitrust" violations.

The WGA's position is shocking and disturbing. The laws in question were enacted decades ago and have served throughout history as an important protection for artists, requiring that those who represent them meet minimum requirements and subject themselves to state regulation. That the WGA's leadership would now try to deny this protection to its own members, and literally ***pay third parties to violate a law*** that has protected writers for 80 years, should be of grave concern to all who believe unions should act in the interests of their members.

We are evaluating all legal options to address this unlawful conduct. We request that, to the extent you are aware of managers and attorneys who are embracing the WGA's request to procure and negotiate employment in violation of the law, you track this information and the names of those who are participating in unfair competition, and provide that information to ATA's attorneys. You can send the information by email to Jessica Stebbins Bina (jessica.stebbinsbina@lw.com), with a copy to me.

I want to reiterate that we are confident in our position—***the law is crystal clear***. As the ATA's attorney Marvin Putnam of Latham & Watkins explained to the WGA in a letter last week, there are multiple decisions from the California Labor Commissioner holding that ***no one*** other than a licensed talent agent—not a manager, not an attorney—can procure employment on behalf of an artist.

It is important to note that "procure" in this situation includes ***all*** negotiations on behalf of an artist. The Labor Commissioner defines procurement to encompass "any active participation in a communication with a potential purchaser of the artist's services aimed at obtaining employment for the artist, regardless of who initiated the communication."

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Doughty v. Hess, No. TAC 39547 (Cal. Lab. Comm'r 2017); *see also Danielewski v. Agon Investment Co*., No. TAC 41-03, 15-16 (Cal. Lab. Com. 2005). This is the case even if the talent initially contacts the employer personally and negotiates a portion of the deal herself. *Solis v. Blancarte*, No. TAC-27089 (Cal. Lab. Comm'r 2013). And it is the case even if the procurement is "incidental" or "occasional." *See, e.g., Waisbren v. Peppercorn Prods., Inc*., 41 Cal. App. 4th 246, 249 (1995); *Park v. Deftones*, 71 Cal. App. 4th 1465, 1470-71 (Cal. Ct. App. 1999).

We have heard that some employers may be attempting to circumvent this issue by adopting contractual language stating that the managers and attorneys are not offering "procurement" services. They should be aware that there is legal authority holding that a manager or lawyer can be subject to remedies for illegal procurement ***even if a contract explicitly states that the manager or lawyer will not "procure."*** For example, in *Doughty v. Hess*, No. TAC 39547 (Cal. Lab. Comm'r 2017), the California Labor Commissioner determined that an attorney, who served as a talent manager, had engaged in unlawful procurement when he negotiated compensation on behalf of his client and discussed potential projects with production companies. The Commissioner reached this conclusion even though the attorney and artist had a contract specifically stating that the attorney would not "procure" employment.

Moreover, the idea being advanced by the WGA that managers, lawyers, or anyone else would be subject to "antitrust" liability for making individual decisions to comply with the law is patently false. Antitrust law, in general, prevents illegal combinations and concerted activity in restraint of trade. It does not—and cannot—prevent managers and employees taking individual actions to comply with legal mandates.

The WGA leadership's letter is just their latest tactic to flout established law and take for themselves uncharted power at the expense of not just agents, but of their members, and other stakeholders throughout the industry. As many of you will recall, last month AMPTP Carol Lombardini sent a letter to the WGA leadership declining their request to take actions that would have violated federal antitrust and labor laws. And, of course, as I discussed at our membership meeting this month, WGA leadership has repeatedly asked the ATA to agree to a new AMBA that would disregard agents' fiduciary duties to their members.

For reference, I have enclosed our counsel's prior letter to the WGA leadership as well as AMPTP President Carol Lombardini's letter.

We will continue to fight on behalf of all agents, our clients' best interests, and the law.

Best regards,

Karen Stuart

Karen Stuart
Executive Director

Enclosures

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April 12, 2019

VIA EMAIL

WGA West Board of Directors
Attn: David Young, David Goodman
7000 West 3rd Street
Los Angeles, CA 90048

WGA East Council
250 Hudson Street, Suite 700
New York, New York 10013

Re: WGA Purported Delegation of Authority

Dear Board and Council Members,

On March 20, 2019, the Writers Guild of America, West, Inc., on behalf of itself and the Writers Guild of America, East, Inc. (collectively, "WGA") issued a notice to talent managers and attorneys purporting to "delegate" to those managers and attorneys the authority to procure employment and negotiate the terms of that employment on behalf of WGA members.

We write to advise you that the WGA's purported delegation violates both California's Talent Agency Act ("TAA") and New York's General Business law, and to demand its immediate retraction.

California Labor Code section 1700.5 states that "No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." Cal. Lab. Code § 1700.5; *see id.* §§ 1700.6-1700.22 (setting forth procedures and standards regarding licenses); *id.* §§ 1700.23-1700.47 (regulating talent agency operations and management). The California courts and Labor Commissioner have consistently held that the TAA "requires anyone who solicits or procures artistic employment or engagements for artists to obtain a talent agency license," and has consistently required individuals who receive money in violation of this law to disgorge those earnings.[1] Similarly, New York General

[1] *See, e.g.*, *Marathon Entm't, Inc. v. Blasi*, 42 Cal. 4th 974, 985 (2008); *Doughty v. Hess*, TAC No. 39547 (Cal. Labor Comm'r April 4, 2017) (TAA applied to attorney and manager, contract voided *ab initio*); *Menefee v. Octagon, Inc.*, TAC No. 42950 (Cal. Labor Comm'r March 24, 2017) (contract voided, and manager ordered to repay artist commissions); *Transeau v. 3 Artist Management*, TAC No. 7306 (Cal. Labor Comm'r June 16, 2009) (management company engaged in procuring engagements, contract voided).

Business Law, Article 11, section 172 states that "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." N.Y. Gen. Bus. Law Art. 11 § 172; *see id.* § 171(d) (defining "theatrical employment agency" as an employment agency); *id.* §§ 173-178 (setting forth procedures and standards regarding licenses); *id.* §§ 179, 181, 185, 186-194 (regulating talent agency operations and management).

We understand that the WGA has informed managers and attorneys that they (and the producers who engage talent through such unlawful methods) are free to disregard state licensing laws because the WGA has the power to override such laws as a matter of federal labor law. **This is patently false.** Well-established law demonstrates the opposite. The flaws in the WGA's legal theory are many. To note just a few:

- Federal labor law is primarily concerned with employment after hiring, not procurement, which is subject to state regulation and which, pursuant to that regulation, can be performed only by licensed talent agents.

- The state regulatory schemes are not in direct or indirect conflict with federal labor law, and in fact, have coexisted for many decades. Such conflict, which does not exist here, is required under the relevant preemption doctrines. This is critical because—absent preemption—state law applies in full to these managers and attorneys, who risk both their businesses and their professional status if they willfully violate the law at the WGA's behest.

- The WGA cannot "delegate" authority it does not have. The WGA, like all unions, is empowered to bargain collectively on behalf of its members. The WGA cannot, consistent with its duties under federal labor law, negotiate individual deals to the benefit of some members and the detriment of others, *or delegate the right to do so.*

The Association of Talent Agents ("ATA") considers any and all unlawful procurement entered into at the behest of the WGA to be unfair and unlawful competition that will harm the ATA and its member agencies. Accordingly, we demand the immediate retraction of the WGA's purported "delegation." **ATA will take appropriate action as needed, against any person engaged in unfair competition, to protect the lawful interests of its members.**

Very truly yours,

Marvin S. Putnam
of LATHAM & WATKINS LLP

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Carol A. Lombardini
President

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March 25, 2019

Via Email and U.S. Mail

David Young
Executive Director
Writers Guild of America, West, Inc.
7000 West Third Street
Los Angeles, California 90048

Re: WGA Request for Addition of "*Collins*" Clause to MBA

Dear David:

On February 4, 2019, the WGA asked the AMPTP to reopen negotiations during the term of the 2017-2020 Minimum Basic Agreement ("MBA") to address the subject of talent agents. Specifically, the WGA requested that a clause be added to the MBA prohibiting AMPTP-represented companies from doing business with any talent agency that fails to reach a new agreement with the WGA. Furthermore, this request was made without regard to the terms the Guild would demand of the agents, essentially asking us to blindly accept whatever terms might ultimately be incorporated in that talent agency agreement.

The AMPTP-represented Companies have discussed your proposal at length and have also consulted labor and litigation counsel. Based upon that review, as well as reports of the agreement that the Guild is demanding of talent agents, the Companies have concluded that agreeing to your proposal would require them to participate in a group boycott of talent agencies that do not meet with Guild approval. We believe that doing so would subject them, the WGA *and* individual writers to a substantial risk of liability for antitrust violations, including claims for treble damages. The Companies would also be at risk for violation of federal labor laws as well as state laws.

For these reasons, we respectfully decline your invitation to reopen the Basic Agreement to negotiate a provision such as the one you have suggested. We remain hopeful that the WGA and

the talent agencies will reach a successful resolution of their negotiations for a new WGA/talent agency agreement.

Sincerely,

Carol A. Lombardini

CAL:mb

cc: AMPTP Board of Directors
Companies Signatory to 2017 MBA