

ADVERTISING, MARKETING & PROMOTIONS

>>ALERT

MODELS MUST BE PAID ON LAST DAY OF PHOTO SHOOT UNDER CALIFORNIA LABOR LAW

The California Labor Code provides that, with limited exception, when an employer “discharges” an employee who provided services in California, the wages earned and unpaid at the time of the discharge are due and payable immediately.

An employer generally may not wait until the next regular payday, or some other mutually-agreed upon length of time. An employee is considered “discharged” when he or she completes an assignment (no matter how short the duration might be) or an agreed upon period of employment. The waiting time penalty under the California Labor Code for failing to timely pay an employee his or her wages is that the wages continue to accrue at the employee’s daily rate of pay until the final wages are paid, up to a maximum of 30 days. If the employee is not paid until 30 days after the end of the assignment, then he or she is entitled to a penalty equal to 30 times his or her daily wage rate. For example, if an employee is paid \$1,000 for a one day assignment and does not receive payment until more than 30 days following the end of the assignment (a common practice), the employee may be entitled to up to \$30,000 plus attorneys fees.

MODELS HIRED BY ADVERTISING AGENCIES

California lawyers have become very aggressive in seeking to obtain waiting time penalties for models hired by advertising agencies (or a production company on their behalf) who are deemed to be “employees” for purposes of the applicable California final pay laws. Although the final pay law only applies to “employees” and not “independent contractors,” the determination as to whether a person is an employee or an independent contractor is not simply a choice to be made by the model and/or advertising agency. The distinction is a matter of law, and while the law that differentiates an “employee” and an “independent contractor” is complex and at times muddled, in general, an individual will be deemed to be an “employee” of the advertising agency whenever he or she is subject to the agency’s control and supervision.

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THE BOTTOM LINE

This California law is rigid and unforgiving with respect to final pay, and employers may face harsh penalties if they do not pay most employees immediately upon discharge. Since models on a photo shoot are typically deemed “employees” rather than “independent contractors” (and the advertising agency is often deemed the “employer”), agencies should take necessary steps to ensure that all workers brought on for a photo shoot or other short-term assignment in California are given a paycheck on the last day of the project.

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This typically applies to a model on a photo shoot – even if he or she is being provided through a loan-out company or by a talent agency. As such, the advertising agency will often be deemed the “employer” and will be responsible for ensuring that models (or other “employees” engaged as talent) are paid immediately upon discharge, even when these employees are being paid through a talent agency or payroll service provider. This is true even where a payroll service, talent agency or production company has agreed to be the “employer of record.”

BEST PRACTICES

In order to avoid potentially costly penalties and/or litigation, advertising agencies must ensure that all of their California “employees” are timely paid upon discharge. To this end, where applicable, the advertising agency should work closely with its payroll services and take whatever steps are

necessary to ensure that whomever is responsible for drafting the payment check has it ready for distribution immediately upon completion of the California assignment (or at the next payroll period if they qualify for the motion picture industry exception). Advertising agencies also should review their services agreements with talent payroll services to ensure that they are indemnified for any waiting time penalties caused by the other entity’s delay. And finally, advertising agencies should notify their payroll providers of payments needed for talent shoots in advance, so payment checks can be available at the conclusion of the project. In short, the best way to protect against waiting time penalties is to make sure that all temporary workers brought on for a photo shoot (or similar short-term project) are handed a paycheck at the conclusion of the project.

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