Prepared Comments - Oversight Hearing - the Assembly Arts, Entertainment, Sports, Tourism and Internet Media Committee

October 19, 2011

Chair Campos and Members:

Introduction

I am pleased to be here today on behalf of the Association of Talent Agents. My name is Robert Roginson, and I am special counsel to the ATA. I also served until March 2010, as the chief counsel for the California Labor Commissioner's Office. As you know, the Labor Commissioner's Office, or Division of Labor Standards Enforcement, is the state agency responsible for regulating talent agencies under the Talent Agencies Act.

The ATA appreciates the opportunity to address this Committee concerning the Committee's desire to increase diversity within the entertainment industry. The ATA shares that goal and embraces talent with wide diversity.

The ATA was established in 1937, and is a Los Angeles-based nonprofit trade association comprised of over 100 licensed talent agencies in California. ATA's membership includes agencies of all sizes representing the vast majority of

working artists, including actors, directors, writers, and other artists in film, stage, television, radio, commercial, literary work, and other entertainment enterprises. As talent agents, ATA agencies are responsible for procuring employment and negotiating and servicing employment agreements for their clients, in addition to counseling and directing artists in the development of their professional careers. The talent agents are not employers of their clients. Talent agents assist artists in finding work.

As this Committee is aware, there have been legislative efforts both this year and last year directed at the talent agencies that appeared aimed at increasing diversity in the employment of talent. These legislative efforts, as well meaning as they are, however, are based upon a misunderstanding of the role talent agents play in the process of an artist obtaining work. And it is the role that agents actually play that is what I'd like to talk about today, Madame Chair and Members. The ATA is grateful that you have taken a pause with your own AB 1364, Madame Chair, and the amendments you were contemplating. We believe most sincerely and respectfully, that AB 1364 as proposed to be amended, is not necessary, and in fact, may burden the state's labor enforcement agency with responsibilities that it is not equipped or funded to handle, and will, in short, not accomplish the Committee's goals of increasing diversity in the entertainment industry.

Talent Agents Are Not Gate Keepers

At the heart of the matter, these legislative efforts, which include AB 2242, authored by Member Davis last year (which he dropped shortly after introduction after extensive discussions with the ATA), and your AB 1364, Madame Chair, are based upon a misunderstanding of the role talent agents play. The materials that accompanied the agenda for today's hearing contend that talent agents are "gate keepers" who have control over which artists are selected for employment. Indeed, it is not the case. Employers (studios, production companies, advertisers, etc.) control the performance, hours, manner of performance, and the hiring and firing of the talent.

Talent agents represent a broad spectrum of artist clients who rely on the talent agents to find employment with the thousands of employers doing theatrical, television, film, advertising and related business in California and elsewhere. Much of the employment is governed by union contracts with employers. These union agreements govern the minimum terms and conditions of employment. The talent agents procure and negotiate employment terms for artists in excess of the union minimums. In short, talent agents stand in a fiduciary relationship with their artist clients. Talent agents are employed by the artists in ways that other

professionals such as lawyers, business managers, and publicists are employed by artists. Simply put, they render services for a client.

The Process Of Procuring Work For An Artist

We believe it is helpful to the Committee that it understand how the process of procuring work for an artist works in the real world. In the typical casting scenario, the production entity or employer engages a casting director who is responsible for identifying for the employer the potential candidates in the available roles. The casting director advertises the available roles by including descriptions of the project and roles in "breakdowns" which are distributed to talent agents. I have copies of the breakdowns for your review, and I will give those to the sergeant now. Please take a look at this with me, because this is how the business actually works. Talent agents read scripts, create opportunities and review the breakdowns with their artist clients. Talent agents often represent or submit more than one client for the same role.

Make no mistake about it; the decision-maker is the employer or buyer, not the talent agent. The fundamental problem with these legislative efforts is that they seek to equate talent agents, and their ability to obtain a license, with the

employers who do the actual hiring of talent. Again, talent agents are not employers of their clients.

Mr. Davis' AB 2242 sought to charge talent agents with the responsibility of understanding and presumably acting on the legal standards governing employers. Specifically, AB 2242 would have required talent agencies applying for a license from the Labor Commissioner's Office to attest as part of the license application process that he or she, like an employer, was familiar with the legal standards governing employment inquiries under FEHA. ATA opposed the bill principally on the grounds that talent agents are not employers of the artists, and the bill's effort to impose such employment-related requirements on talent agents was misguided. After one amendment, the author pulled the bill.

Madame Chair, your AB 1364 was originally presented to ATA this year as a proposal to update the protections identified in Labor Code section 1700.47, dealing with the representation of artists. Since 1986, Labor Code section 1700.47 listed seven (7) protected classifications, and it was proposed that the list of protections should be expanded to include several classifications, such as marital status, sexual orientation, disability, and other classifications which have been recognized in other California laws over the last 20 or so years. We believe case law makes that change unnecessary but we had no problem with that proposed

revision. However, AB 1364, as proposed to be amended in the Senate Labor Committee, sought to link representation by talent agents with employment related statutes. As talent agents are not employers, ATA is now opposed to AB 1364 for reasons similar to its opposition to AB 2242.

At no time since 1986, has Labor Code section 1700.47, or any section of the Talent Agencies Act, been identified as based upon or connected in any way with the Unruh Act or FEHA. Indeed, there is not a single identified court case interpreting section 1700.47 or applying section 1700.47 in this or any fashion. Nor is there any legislative history or case law indicating that 1700.47 is related to FEHA or the Unruh Act in any manner.

It is suggested by some proponents that bills like AB 2422 and AB 1364 are necessary to inform agents of the application of FEHA and the Unruh Act, which was the subject of a recent, well-publicized class action lawsuit and settlement involving an age discrimination claim by writers against several studios and agencies. It is important to note that the Court in that case made no findings of ANY wrongdoing by any talent agent. In fact, several companies named in that lawsuit, including all of studios, have settled and none admitted any liability or wrongdoing. The lawsuit remains pending against another ATA member.

Accordingly, the application of FEHA and the Unruh Act to agencies is well known.

More importantly, however, FEHA and the Unruh Act are comprehensive statutory schemes and such notice provisions, if truly necessary, should be part of those laws, respectively, and not made part of the Talent Agencies Act. Indeed, no other instances of cross-referencing of FEHA or the Unruh Act to other licensed industries has been presented. This would be a unique application of such a principle to the talent agency industry.

The Talent Agencies Act, including Section 1700.47, are enforced by the California Labor Commissioner's Office. FEHA and the Unruh Act are enforced by the Department of Fair Employment and Housing, an entirely distinct agency. In this era of substantially strained budgets, the California Labor Commissioner's Office, which is tasked with the overwhelming burden of enforcing California's minimum labor standards and battling the underground economy, should not also be called upon to enforce FEHA and the Unruh Act, which rightfully belong under the enforcement jurisdiction of DFEH. Simply put, the Labor Commissioner's Office does not have the expertise, experience, or resources to enforce and regulate the Unruh or FEHA requirements, particularly with respect to talent agencies which have been recognized by the courts are not the employers of the artists.

Conclusion

In conclusion, the ATA supports increased diversity in the entertainment industry. The ATA will gladly participate in industry programs with its partners and the Legislature in efforts to enhance diversity in the industry. We already represent, as a matter of fact, all of the protected classes delineated under the Unruh Civil Rights Act and FEHA. We want to find them jobs. This is a subject area that will not be enhanced by state legislation. In our view, most respectfully, Madame Chair, AB 1364 as it is proposed to be amended will not achieve the objective sought, but will in fact, harm this important California industry and hamper the California Labor Commissioner from meeting the other very important objectives that agency is responsible for achieving.

Thank you.