

Date of Hearing: April 4, 2018

ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, AND  
INTERNET MEDIA

Kansen Chu, Chair

AB 2388 (Chu) – As Introduced February 14, 2018

**SUBJECT:** Employment: minors.

**SUMMARY:** This bill would include employment of a minor in social media advertising, as defined, within the types of employment subject to the written consent of the Labor Commissioner. Specifically, **this bill:**

- 1) Clarifies that the existing law which requires permission of the Labor Commissioner for employment of minors under 16 years of age applies to employment of a minor in social media advertising.
- 2) Contains the following definitions:
  - a) “Social media advertising” includes the use, demonstration, or placement of a product through a social media communication.
  - b) “Social media” has the same meaning as in subdivision (a) of Section 980, which provides, “social media” means an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations.

**EXISTING LAW:**

- 1) Provides in Labor Code 1308, et seq., that for all minors under the age of 16 years the written consent of the Labor Commissioner in the form of a permit to employ a minor in the entertainment industry is required for any minor, as specified, for any of the following:
  - a) The employment of any minor, in the presentation of any drama, legitimate play, or in any radio broadcasting or television studio.
  - b) The employment of any minor 12 years of age or over in any other performance, concert, or entertainment.
  - c) The appearance of any minor over the age of eight years in any performance, concert, or entertainment during the public school vacation.
  - d) The appearance of any minor in any entertainment which is noncommercial in nature.
  - e) The employment of any minor artist in the making of phonograph recordings.
  - f) The employment of any minor as an advertising or photographic model.

- g) The employment or appearance of any minor pursuant to a contract approved by the superior court under Chapter 3 (commencing with Section 6750) of Part 3 of Division 11 of the Family Code.
- 2) Further requires a permit for any minor between the ages of 8 and 18 years, who is by any law of this state permitted to be employed as an actor, actress, or performer in a theater, motion picture studio, radio broadcasting studio, or television studio, before 10 p.m., in the presentation of a performance, play, or drama continuing from an earlier hour until after 10 p.m., to continue his or her part in such presentation between the hours of 10 p.m. and midnight.

**FISCAL EFFECT:** Unknown. This bill is keyed fiscal by the Legislative Counsel.

**COMMENTS:**

- 1) Author's stated need for legislation: Clarification of existing child performer protections.

According to the author, "The advent of the Internet and the explosive growth of online social media sites such as Instagram, YouTube and Facebook have given rise to a new form of fame based upon 'likes,' 'followers' and 'views.' The most popular social media figures have quickly become the newest tool that marketers employ to advertise their products, due to the huge impact a post on a popular site or promotion of a product by a famous individual such as Kim Kardashian can have on a brand's internet exposure. These social media advertisers are known as "influencers" for their ability to influence consumer behavior.

"A recent FTC crack-down points out that influencers are advertisers. On April 19, 2017 the Federal Trade Commission was forced to send 'educational letters' to 90 social media influencers who had failed to disclose that they were being paid for their posts on social media.

"While famous adults such as Beyoncé and the Kardashians are well known as social media influencers, a large and growing market for kid influencers is gaining attention. A recent New York Times article on kid influencers asks, "*Why Isn't Your Toddler Paying The Mortgage?*" Cosmopolitan Online ran a story about a 3 year old who earns thousands for every post, has worked with the Kardashians and even walked in New York Fashion Week entitled, "*What It's Like to Have an Instagram Famous Child,*" and a January 2018 BuzzFeed story on the Stauffer family (featuring Mila, a break-out Internet star), wherein InstaMom Katie Stauffer declares she earns more than her husband the doctor, and enough from posting images of her kids to quit her job and focus on her new career as a media mom. In the same article the CEO of an influencer ad agency MediaKix stated, "Instagrammers of her size (Katie Stauffer) can get paid anywhere from \$10,000-\$20,000 per post... Top Instagrammers with millions of followers can make \$500,000 or more in annual income from brand sponsorship."

Although existing law regulates the employment of minors in the entertainment industry and requires the written consent of the Labor Commissioner for a minor under 16 years of age to take part in certain types of employment, including, "employment of a minor as an advertising or photographic model," it is not well understood that social media influencers are engaged in advertising and therefore are covered under the law.

BizParents add in their support for the measure, "As a non-profit organization concerned with the safety of young performers, we recognize that the landscape of advertising has changed. Today, many more children are being employed outside the traditional corporate framework of production companies and studios as their employers. Instead, advertisers are contracting with families directly to post on social media, in hopes of gaining the child's social media following. These child "influencers" can be making significant money for promoting brands or allowing advertising on Instagram, Facebook, Snapchat, Musical.ly, and Youtube for example.

"This new business model has exciting potential for young performers, but the pitfalls exist. For example:

- Finances: the Stauffer family (AZ residents) have been interviewed repeatedly about the videos of their 3 year old twins, stating that they have received significant advertising per-click revenue, appearance fees, travel and merchandise, yet it does not appear that the children themselves are benefiting from their appearances.
- Education is most often accomplished via homeschooling and is repeatedly noted as a concern for influencer families. This was discussed in a January 2018 Atlantic article, "Raising a Social Media Star: The Parents of Teen Internet Celebrities Get a Crash Course in a New Kind of Fame While Trying to Maintain Boundaries for Their Newly Rich and Powerful Children."
- Physical safety has risen to the top of the list of concerns, highlighted by the murder of social media superstar Christina Grimmie in 2016.

"These children deserve the same protections as those professional child performers already covered by California law. This bill accomplishes that by expanding the current definition to include 'social media advertising' as a work venue."

2) Where to draw the line between a child who is "working" and one who is "participating in a documentary type performance" aka being a kid: Reality TV Model.

This day and age there are so many individuals posting images of themselves and their families, including uploads by children themselves, of subjects captured at home or play and not on a set, which are placed onto a social media platform through an account controlled by the subject and/or their parents and not an employer. The question is begged whether these children are "working" which is covered activity under the Labor Code protections for minors in entertainment and Family Code's "Coogan Act," or simply having everyday life documented.

Similar issues raised in the regulation of child performers in reality television programming may be instructive in parsing this issue. The similarities between reality television and social media influencers are many: loose if any scripted content, cameras set up in the home or in family situations rather than on a traditional "set," and working hours which are not defined, to name a few.

In response to concerns about the welfare of children featured on a show entitled *Jon and Kate Plus 8*, a reality series focused on a large family in Pennsylvania which included toddler sextuplets, the court contrived a test of sorts to determine whether or not the eight Gosslin

children were subject to child labor laws. The Pennsylvania Department of Labor and Industry found that the children were in fact "employed" and therefore required work permits based upon the direction they sometimes received, because of their continued and ongoing participation in the series and because the Gosselins and others were paid for the show. (Associated Press, *Pennsylvania opts for no legal action against 'Jon & Kate Plus 8' producers over child-labor issue*, April 14, 2010 accessed at: [http://www.pennlive.com/midstate/index.ssf/2010/04/pennsylvania\\_opts\\_for\\_no\\_legal.html](http://www.pennlive.com/midstate/index.ssf/2010/04/pennsylvania_opts_for_no_legal.html))

On February 25, 2003, David Gurley, staff attorney for the California Labor Commissioner's Office, issued an opinion letter addressing numerous questions regarding a then-upcoming reality series "The Swap" which would feature rotating families with children of various ages who would be filmed for 10 days per episode. The questions and answers may be instructive to the challenges raised by AB 2388.

Q: How should we define Set, Work, School and R&R? For instance, when shooting a family in the context of their own lives "reality", what is work? If a child is enjoying Rest & Relaxation and we videotape that, does it become work?

A: We look to the Order to determine what is "work". IWC Order 12 section 2(H) defines "hours worked" as: "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."

Once again we are faced with whether or not the director and/or producers are controlling the participant and to what extent. We believe these questions may only be answered by an on set investigation. Without further details, we conclude that any time a participant is being filmed, they are subject to the control of the employer and therefore all filming time will be considered "hours worked." Of course, if a child is truly resting (i.e., sleeping), that time period would not be considered hours worked.

Q: Once Work is defined in our case, we need to understand how it applies to documenting our participants. There will be a mixture of spontaneous activities on the part of the families and some preplanned events (e.g., dinner out, bowling, etc.) There will be multiple occasions throughout the day when it would be important to document activities (e.g., sharing household chores, making lunch, doing homework, etc.) Is this an instance where we need to define a Split Call and its application to cumulative Work Time?

A: Again, any time the minor is being filmed other than for bona fide rest periods, will be considered "hours worked."

Q: The videotaping will not be taking place on a traditional Sound Stage, like a Sit-Com, and it seems that much of the structure of Child Labor Law revolves around "Set Time." In this case the "Set" is the children's home, backyard, school, etc.

A: Whether or not the "set" is on a traditional "studio lot" or "on location" is also an insignificant distinction for application of laws governing minors in the entertainment industry... Wherever the participants are being filmed is considered the "set."

(See Gurley, February 25, 2003, Division of Labor Standards Enforcement Legal Division, *Opinion Letter-Reality Television: The Swap*, accessed at: [http://www.thestudioteachers.com/wp-content/uploads/2014/06/Reality-shows\\_Labor-Laws.pdf](http://www.thestudioteachers.com/wp-content/uploads/2014/06/Reality-shows_Labor-Laws.pdf))

In looking at the analogous situation of children acting as social media influencers, we find children "working" at home, parents acting on behalf of contracted employers staging videos, feeding their children lines, dressing their toddlers and teens in clothing for compensation and photographing them for various video and social media platforms, all with the expectation and time pressures of a designated number of posts daily. For instance, Katie Stauffer, mother of internet breakout star 3 year old Mila, shared in a recent article, "I have two photos due today that I have to get to advertisers. I haven't taken them and they're due by the end of the day today and it's totally stressing me out." The article continues, "Mila's videos are easily the most profitable...The videos can take as long as three days to make, with Kaitlin feeding Mila lines to repeat." (Smidt, Buzzfeed News, *This Mom's full time job is posting to Instagram and this is what it's like*, Posted January 25, 2018).

In addition to the apparent application of the Labor Code to the activities of professional social media influencers, the Family Code "Coogan Act" which protects working minors' financial assets would also seem to cover "influencers" income, as its scope reaches earnings through, "use of a person's likeness, voice recording, performance, *or story of or incidents in his or her life, either tangible or intangible, or any rights therein for use in motion pictures, television, the production of sound recordings in any format now known or hereafter devised, the legitimate or living stage, or otherwise in the entertainment field.*" California Family Code, Section 6750 (a) (2), emphasis added.

- 3) *Ongoing discussions regarding future amendments to focus scope of bill:* While this legislation has no opposition, concerns have been raised that the language as drafted may encompass activities or actors beyond the author's intention. The author states that he has been working with the Department of Industrial Relations (DIR) and Motion Picture Association of America (MPAA), and others to assure that the structure of the proposed legislation is not overly broad. Toward this end, he has committed to address two specific concerns with future amendments; one is the triggering activity which will bring a person under the scope of the bill, and the other is the responsibility placed on companies who are not in a direct employer relationship with a social media influencer.

With regard to the former, the author is crafting language in consultation with the MPAA and DIR which will provide that the term social media advertising, as defined in the bill, would be clarified to require that social media advertising includes the use, demonstration, or placement of a product *pursuant to a contract for the promotion of that product* through a social media communication. This change would address concerns that the free goods and services influencers often receive without any agreement attached would be included in the bill.

As to the latter concern, the author is working on language to clarify that entities who engage employment agencies to solicit social media influencers to promote their products, or use independent contractors rather than employees, are not bound by the requirements of this measure so long as they include in their contracts with the agency or independent contractor language which expressly references child labor laws and the need for compliance.

- 4) Double-referral: Should this bill pass out of this committee, it will be re-referred to the Assembly Committee on Labor and Employment.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

BizParentz

**Opposition**

There is no opposition on file.

**Analysis Prepared by:** Dana Mitchell / A.,E.,S.,T., & I.M. / (916) 319-3450