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Deputy Lawyer; WGA Tries Preemption Route in ATA Dispute

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The ongoing dispute between the Writers' Guild of America ("WGA") and the Association of Talent Agencies ("ATA") took a new turn recently when the WGA announced that it would use the authority granted to it under the National Labor Relations Act ("NLRA") to "preempt" California state law and effectively "deputize" attorneys and managers to perform acts that only licensed talent agencies can provide under California state law. While an interesting and novel approach, the underpinnings of the argument appear to be flawed and could place managers and lawyers who attempt to provide licensable talent agency services in danger—to such an extent that lawyers (in particular) may find their "deputized" activities to be outside of the coverage of their malpractice insurance policies. [1]

The background of the ongoing dispute between the WGA and ATA, and the parties' respective positions, has been covered in many other publications and articles, so it won't be repeated here. However, the overwhelming WGA member vote in favor of the WGA's new Code of Conduct [2](which, among other things, will effectively eliminate package fees and the ability of talent agencies to have affiliated production companies), and the potential mass firing of agents by writers on or around April 6th [3], will give new urgency to the standoff, especially with the staffing season for TV show writers having recently commenced. [4]

The WGA, apparently cognizant of the significant disruption to its members that could result from firing agents during the height of the staffing season, advanced a novel argument to "fill some of the gap."[5] It announced it had the authority under the NLRA to seek employment for its writer members and, could further delegate that authority to managers and attorneys in order to permit them to "procure employment and negotiate over-scale terms and conditions of employment for individual writers … and purchases of literary material, consistent with … the MBA." [6]

While it may be true that a certified union is free to delegate its bargaining authority to "whomever it wants [7], including officers and members of other unions, as representatives in dealings with an employer," this purported deputization by the WGA places managers and attorneys at risk of violating the Talent Agencies Act, a California state law that prohibits procurement of employment without a state-issued license. [8]

The vitality of the WGA's action will likely turn on two issues: (1) whether the WGA actually has the authority to procure employment on behalf of its members and (2) whether federal law preemption

applies here.

1. Authority to Delegate under NLRA: Under 29 U.S.C. § 159(a) of the NLRA, a certified union may represent members for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment—but it does not expressly vest authority to *procure* employment. [9] As such, the "limited delegation of bargaining authority" by the Guild may exceed its authority as a bargaining representative.

2. Federal Preemption: Courts have generally held that the NLRA preempts state laws directed at conduct protected (whether implicitly or explicitly) by the NLRA so as to not frustrate the "congressional intent in enacting the comprehensive federal law of labor relations." [10] However, the NLRA may not apply at all because the issue of agency-talent relations is outside the scope of traditional employer-employee "labor disputes." Indeed, talent agencies do not employ their writer-clients. As a result, the entire subject of WGA/ATA member relations appears to fall outside of the jurisdiction of the National Labor Relations Board ("NLRB") [11]. Thus, any claim of possible federal preemption (and the associated "deputization") would appear to fail.

Based on the above, attorneys and managers should take caution when acting upon this purported "delegation of authority." There is an evident risk of liability under California's Talent Agencies Act which could result in civil penalties including forfeiture or disgorgement of commissions and cancellation of the underlying contract so long as the complaints are filed within one year of the contested payments. In fact, in a 2013 California Labor Commissioner case of first impression, the Commissioner ruled that a transactional attorney may not negotiate an artist's services agreement where the artist is not represented by a talent agent because "any active participation in a communication with a potential [employer] of the artist's services aimed at obtaining employment for the artist, regardless of who initiated the communication," constitutes "procurement" under the TAA. [12] The contract between the artist and attorney was declared to be illegal, void and unenforceable and the attorney was barred from enforcing or seeking to enforce the contract against the artist in any manner (e.g., seeking attorney's fees in restitution).

Without a legally effective way for writers to have a third party procure employment for them after the April 6 deadline, writers looking forward to new opportunities in the current staffing season may be left without any representation and forced to fend for themselves. While the WGA has recently launched two online databases for its members to submit samples to showrunners and for employers to have access to a searchable writer directory, these options are untested. Whether these stop-gap solutions will provide any relief to the disruption, or whether another solution that could fill the void will be developed, remains to be seen.

In all events, it appears that the most likely outcome will be fewer employment opportunities for writers and, as a result, less income for both writers and agents.

[1] Punitive damages are not covered by a typical malpractice policy and they can be awarded when a person acts in conscious disregard of the rights of others. Arguably, if an attorney knowingly ignored California state licensing requirements, that might be considered to be in conscious disregard.

[2] https://deadline.com/2019/03/wga-members-overwhelmingly-approve-new-agency-code-1202585826/.

[3] Only those agents who do not agree to the new WGA Code of Conduct will be subject to being fired. As of March 15th, it was reported that only one of the 113 ATA member agencies had agreed to the WGA Code of Conduct. None of the “big 4” agencies (CAA, ICM, UTA or WME) have agreed to the Code of Conduct, and the ATA reported that more than 100 of its members have pledged that they won’t sign the WGA’s code.

[4] For an offbeat blog on what staffing season is, see https://christopherming.com/2018/05/staff-television-writers/.

[5] https://variety.com/2019/film/news/wga-managers-lawyers-deals-agents-fired-1203168913/.

[6] https://deadline.com/2019/03/wga-deputizes-managers-and-lawyers-to-fill-the-gap-if-agents-are-fired-en-masse-1202579781/.

[7] Whisper Soft Mills, Inc. v. NLRB, 754, F.2d 1381 (9th Cir. 1085). https://law.justia.com/cases/federal/appellate-courts/F2/754/1381/319377/.

[8] Article 2 § 1700.5 of the California Labor Code. See also, https://www.dir.ca.gov/dlse/talent/talent_laws_relating_to_talent_agencies.pdf.

[9] https://www.law.cornell.edu/uscode/text/29/159.

[10] Machinists v. Wisconsin Emp. Rel. Commission, 427 U.S. 132, 140–48 (1976), available at https://supreme.justia.com/cases/federal/us/427/132/.

[11] https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1089&context=faculty_articles.

[12] Cal. Lab. Com. Sept. 30, 2013, available at http://hodgsonlegal.com/wp-content/uploads/2013/10/SOLIS-v.-BLANCARTE-LABOR-DECISION.pdf.

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