



Freelance Isn't Free Act takes effect: first-of-its-kind legislation protecting independent contractors against non-payment

By Todd R. Shinaman and Christopher J. Moro

The manner in which people view work is changing. No longer are workers thinking about “pensions” or receiving a gold watch at a retirement party after a long and prosperous career. Many individuals now seek contract work or short-term working relationships with no strings attached or long-term commitment, resulting in what is now known as the “gig economy.” In response to this shift, the New York City Council unanimously passed the “Freelance Isn't Free” Act (the “Act”), the country's first payment protection measure for non-employee “freelance workers.” The Act took effect last week on May 15, 2017.

As defined under the Act, a “freelance worker” includes “any natural person or any organization composed of no more than one natural person, whether or not incorporated or employing a trade name, that is hired or retained as an independent contractor by a hiring party to provide services in exchange for compensation.” The definition excludes sales representatives (as defined by Section 191-a of the New York Labor Law), attorneys and licensed medical professionals.

The term “hiring party” is defined broadly to mean “any person who retains a freelance worker to provide any service.” Excluded from this definition, however, is the United States government, the State of New York, the City of New York, and any other local government, municipality or county and any foreign government. In other words, with very limited exceptions, any time a person or business retains an individual or any single-individual operation to perform a service, such arrangement will likely be covered by the Act.

The Act provides that agreements between hiring parties and freelance workers must be in writing if the value of the contract at issue—or the aggregate value of contracts entered into by the same parties in the preceding 120 days—exceeds \$800. The Act even goes so far as to dictate contract language and necessary terms, which include the name and address of both parties to the contract, a list of itemized services the freelancer is to perform, the value of the services to be provided, the rate/method of compensation and the date on which payment is due. The NYC Department of

Consumer Affairs (“DCA”) has posted sample contracts on its website that comply with the Act’s mandates for hiring parties to review.¹

Notably, hiring parties are required to remit payment to freelance workers by the date specified in the contract or, if no date is specified, 30 days after performance is complete. The Act also prohibits hiring parties from forcing freelancers to take less compensation as a condition of timely payment. The failure of a hiring party to make payment within these time frames is a violation of the Act.

Retaliation is also strictly prohibited under the terms of the Act. Specifically, hiring parties may not engage in conduct that would (i) penalize a freelance worker for exercising his or her rights under the Act or (ii) be reasonably likely to deter a freelance worker from exercising his or her rights.

Freelancers are afforded a private right of action for alleged violations of the Act and may recoup damages ranging from \$250 (for proving failure to reduce a contract to writing) to double the value of the underlying contract (for proving unlawful payment practices), as well as injunctive relief and such other remedies as may be appropriate, including reasonable attorney’s fees and costs. In fact, if a hiring party is proved to have engaged in retaliatory conduct, the freelancer will be entitled to statutory damages equal to the value of the underlying contract for *each* such violation. Further, the Office of the Corporation Counsel is authorized to prosecute large-scale “pattern and practice” violations of the Act, which may result in civil penalties up to \$25,000 or injunctive relief. The statute of limitations for a cause of action arising from the failure to have a written contract is two years, while a cause of action alleging retaliation or a failure to pay under the contract has a six-year statute of limitations.

In the event they feel aggrieved, freelancers also have the right to file a complaint within two years after the alleged violations of the Act with NYC’s recently created Office of Labor Standards, a division within the DCA. The Office of Labor Standards will not have jurisdiction over the complaint if either party has instituted a civil breach of contract action or a civil action alleging a violation of the Act in a court of competent jurisdiction or if either party has filed a complaint or claim with an administrative agency alleging a breach of the contract.

Given that this law is truly the first of its kind, there are certainly some unanswered questions. For instance, the law does not address whether the Act applies to businesses located outside NYC that contract with freelancers who live or work in NYC, and *vice versa*. Unhelpfully, DCA has declined to provide a definitive stance on that issue in its enforcement guidance.² So, as a result, NYC businesses that regularly contract with freelance workers—as well as businesses outside NYC that contract with NYC freelancers—should seek the advice of legal counsel to ensure that their agreements with independent contractors meet the requirements of the Act. Employers should also ensure timely payment of freelancers in order to avoid exposure to civil liability or DCA enforcement.

Also of note to those outside the five boroughs, the Freelancer’s Union—a not-for-profit labor organization whose membership includes independent contractors, consultants and freelancers—

¹ See New York City Department of Consumer Affairs, Freelance Work Agreement, <https://www1.nyc.gov/assets/dca/downloads/pdf/workers/Model-Contract-Freelance.pdf>.

² See New York City Department of Consumer Affairs, Freelance Isn’t Free Act—FAQs, <https://www1.nyc.gov/assets/dca/downloads/pdf/workers/FAQs-Freelance.pdf>.

has started a petition to bring similar legislation to other areas.³ As such, all businesses and individuals using independent contractors in New York (as well as beyond) should be on notice as similar legislation may be coming soon to your local jurisdiction.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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³ To date, this petition has garnered approximately 10,500 signatures. See <https://www.freelanceisntfree.org/>.