

August 2, 2017

REMINDER: FREELANCE ISN'T FREE

New York City's new law protecting freelance workers became effective on May 15, 2017. The Freelance Isn't Free Act (the Act) is designed to assure that freelance workers, or independent contractors, are paid as promised and on a timely basis. Although independent contractors have always had the legal right to enforce their agreements in court, the Act establishes additional protections by:

- requiring that contracts valued at \$800 or more must be in writing;
- establishing the right to be paid in full in a timely manner;
- prohibiting retaliation for exercising rights under the Act;
- providing assistance by the new NYC Office of Labor Standards; and
- providing civil penalties, double damages, and attorney's fees for violations of the Act.

Since the implementation of the Act, the NYC Department of Consumer Affairs published final rules (the rules) intended to clarify provisions of the Act, as well as establish requirements to implement and meet the goals of the Act. Additionally, the rules hope to provide guidance to covered hiring parties and protected freelance workers. The new rules became effective on July 24, 2017. Accordingly, this legal alert covers both the original Act and the new final rules.

Who is covered?

The Act covers individuals engaged as independent contractors. However, the law specifically does not address how to determine whether an individual should be legally classified as an employee or an independent contractor.

A "freelance worker" is defined as any natural person, or an organization or incorporation composed of no more than one natural person, who is retained as an independent contractor. Sales representatives, lawyers, and medical professionals are excluded from the freelance worker definition. A freelance worker is entitled to protections of the Act regardless of immigration status.

A "hiring party" is anyone who retains a freelance worker for services, excluding governmental agencies.

Requirement for written contracts:

The Act requires a written contract for services valued at \$800 or more, or for all services over a 120-day period with the aggregate value of \$800 or more. The value of services shall include the reasonable value of all actual or anticipated services, costs for supplies, and any other expenses under the contract.

The minimum elements of this written contract are as follows:

1. The name and address of the hiring party and the freelance worker.
2. The itemization of the services to be provided, the value of the services, and the rate and method of payment.
3. The date on which the freelancer will be paid, or the mechanism to determine the date of payment. If this information is not provided, the freelance must be paid no later than 30 days after the completion of services under the contract.

Each party must keep a copy of this written contract.

Other protections for freelance workers:

No Unilateral Changes to Contract Midstream. Once work has started under the contract, a hiring party is specifically prohibited from requiring a freelancer to accept less as a condition of a timely payment.

No Retaliation. A hiring party, their actual or apparent agent, or any other person acting directly or indirectly on behalf of the hiring party, cannot take any adverse action to penalize a freelance worker for exercising rights under the Act. The term “adverse action” means any action that would constitute a threat, intimidation, discipline, harassment, denial of a work opportunity, or discrimination, or any other act that penalizes or deters a freelance worker from exercising any right guaranteed under the Act. Retaliation also includes any adverse action relating to perceived immigration status or work authorization.

Any person who denies a work opportunity to a freelance worker who exercises any right guaranteed under the Act, or engages in conduct reasonably likely to deter a freelance worker from exercising rights under the Act, shall be liable for retaliation, regardless of whether that person previously has been a party of a contract with the freelance worker or has been the subject of a complaint by the freelance worker.

A freelance worker may establish a causal connection between the exercise of rights guaranteed under the Act and a hiring party’s adverse action by presenting *circumstantial* evidence, such as evidence that the adverse action occurred shortly after the worker exercised an activity covered by the Act. The worker can also present *direct* evidence by proving that the hiring party *intended* to retaliate against the freelance worker because they exercised a right guaranteed under the Act.

For purposes of the Act, retaliation may also be established when a freelance worker shows that the exercise, or attempt to exercise, any right under the Act was a motivating factor for the adverse action, even if other factors also motivated the adverse action.

Waivers of Rights. The rules (effective July 24, 2017) place substantial limitations on the terms and conditions that may be included in a contract between a freelance worker and hiring party. Any such agreement may **not** include:

- a prospective waiver or limitation of rights under the Act;

- a waiver or limitation on the right of the freelance worker to participate in or receive money or any other relief from a class, collective, or representative action lawsuit or proceeding;
- a waiver of any other procedural right normally afforded to a party in a civil or administrative action, such as procedural rights under the federal or states rules of evidence or civil procedure (note that this provision attempts to prohibit arbitration clauses and clauses that shorten the Act's statute of limitations); and
- confidentiality provisions that restrict a freelance worker's ability to disclose the terms of the agreement to the Director of NYC's Office of Labor Standards.

Any such waiver or limitation included in a contract between a freelance worker and hiring party as described above is considered void.

Complaint procedures and remedies:

The Act provides freelance workers with remedies in the form of statutory damages, monetary damages, and injunctive relief. In addition, the prevailing party in an action is entitled to reasonable attorney's fees and costs. A freelance worker who pursues claims under the Act is not prevented from pursuing breach of contract or other claims.

Claims for failing to comply with the written agreement requirement must be filed within two years of the violation. The freelance worker who succeeds with such a claim will be entitled to statutory damages of \$250, and may also be eligible for other damages for the underlying contract. A freelancer who prevails on a claim for the failure to provide a written agreement and on other provisions of the Act may be awarded statutory damages equal to the value of the contract, in addition to other possible remedies.

Claims relating to violations of the payment or anti-retaliation provisions must be filed within six years of the violation. Freelancers who succeed with claims for violation of the payment provisions may be awarded double damages, along with injunctive relief. Freelancers who succeed in claims related to retaliation may also be eligible for statutory damages in the amount of the underlying contract for each violation of the anti-retaliation provisions of the Act, in addition to injunctive relief and other remedies.

For purposes of calculating damages, the value of the underlying contract between a freelance worker and hiring party shall include the reasonable value of all services performed and/or anticipated, reasonable costs for supplies, and any other expenses reasonably incurred by the freelance worker.

Finally, a hiring party found to have engaged in a pattern and practice of violations under the Act law may be subject to a civil penalty of not more than \$25,000. (Note: Such a civil penalty goes to the general fund of New York City and not to individual freelancers.)

Before filing a claim in court, a freelancer can file a complaint with the Director of New York City's Office of Labor Standards, but the director's authority will be limited to facilitating communications between the parties and providing non-legal assistance to help navigate the legal process, including explaining the legal process and providing templates for

court complaints and other forms. The navigation program will also provide general information about classifying individuals as employees or independent contractors.

What wise not-for-profits should do:

Organizations should review their arrangements with independent contractors, or freelancers, to determine whether a written contract will be required to comply with the Act. A system should be adopted to monitor the value of arrangements with the same independent contract over any 120-day period to determine if the \$800 limit is reached.

While the written contract requirement applies to arrangements with a value of \$800 or more, it is advisable to memorialize in writing any agreement with an independent contractor to assure a mutual understanding of the terms of the engagement.

Organizations should monitor the website of the New York City's Office of Labor Standards for a posting of model contracts, in English and six other languages most commonly spoken in the city, as well as for other guidance that may be provided.

Finally, it would be prudent to make sure that anyone who acts on behalf of, or contracts for, the organization understands the requirements of the Act and the anti-retaliation provisions.

This alert is meant to provide general information only, not legal advice. If you have any questions about this alert please contact Judith Moldover at (212) 219-1800 ext. 250 or visit our website at www.lawyersalliance.org for further information.

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