

Management Alert



“Freelance Isn’t Free” Says the New York City Council

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Seyfarth Synopsis: The “Freelance Isn’t Free Act,” passed by the New York City Council on October 28, 2016 requires, among other things, a written contract for services between a hiring party and a freelance worker in most circumstances, prohibits failure to pay the freelancer worker in accordance with the written contract or otherwise as set forth by statute, prohibits retaliation, and creates a private right of action for violation of the Act. Although Mayor DiBlasio has not yet signed the Act, his signature is expected.

If signed by Mayor DiBlasio, the “Freelance Isn’t Free Act,” passed by the New York City Council on October 28, 2016, will extend freelance workers’ significant protections, as follows.

Freelance workers are defined as “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 explicitly excludes commissioned salespersons, lawyers engaging in the practice of law, and licensed medical professionals. The term “independent contractor” is not defined under the Act.

A “hiring party” is ambiguously defined as “any person” who retains a freelance worker to provide any service.

The Act will be enforced by the New York City Office of Labor Standards (“OLS”), and has several requirements, as follows.

First, when a hiring party engages a freelancer and the contract has a value of \$800 or more, either by itself or when aggregated with all agreements between the parties during the preceding 120 days, the parties must execute a written contract including the following provisions:

- Names and mailing addresses of both parties;
- Itemization of services to be provided by the freelance worker;
- Value of the service to be provided and the rate and method of compensation; and
- The date on which the compensation is due or method by which the date will be determined.

Despite the foregoing, the Act provides no recourse for a hiring party’s failure to provide a written contract. Rather, a freelance worker may only state such a claim if he or she requested a written contract and such a request was denied.

Second, the law makes certain pay practices unlawful, including refusing to pay the freelance worker on or before the agreed upon date, or in cases where the date of payment or method of determining such date was not set forth in the contract, failing to pay more than 30 days after the completion of services, or conditioning timely payment on less compensation than previously agreed.

Third, the law includes a prohibition on retaliation, including prohibiting retaliation with respect to denial of future work opportunities because the freelance worker has made a complaint under the law.

Fourth, the law includes a non-binding complaint resolution mechanism and a navigation program, with seemingly no enforcement ability. Under this statutory framework, a freelance worker may file a complaint with OLS alleging a violation of the Act within two years from the alleged violation.

Complaint Procedure

After receiving notice of the complaint, the hiring party will have twenty days to respond. Although a complaint regarding any alleged violation of the Act may be filed (including, e.g., violation of the anti-retaliation provision or a hiring party's failure to provide a written contract after one was requested), the law contemplates only one of two responses by the hiring party: "(a) A written statement that the freelance worker has been paid in full and proof of such payment; or (b) A written statement that the freelance worker has not been paid in full and the reasons for the failure to provide such payment." A hiring party's failure to respond gives rise to a rebuttable presumption in a civil action that the hiring party committed the violation alleged in the complaints.

Upon receiving the hiring party's response, OLS will provide a copy to the freelance worker and advise of the right to bring an action in a court of competent jurisdiction.

Navigation Program

Further, after a complaint is filed, OLS will refer it to a navigation program, which will provide the freelance worker with information and assistance relating to the law, as well as general court information, templates and required forms, and information regarding litigation.

Fifth, a freelancer is free to bring a private right of action in a court of competent jurisdiction. Any action for failure to provide a written contract upon request may be brought within two years of the alleged violation. A freelance worker may recover statutory damages of \$250 for such a violation.

An action for unlawful payment practices or retaliation may be brought within six years of the alleged violation. Potential damages include damages equal to the value of the underlying contract for each violation and injunctive relief. A prevailing plaintiff may also be awarded reasonable attorney's fees and costs. Recovery under the Act is not determinative of proper classification of a freelancer as an independent contractor.

The New York City Corporation Counsel may also bring a civil action on behalf of the City alleging pattern or practice violations, with a potential civil penalty of up to \$25,000. An action by Corporation Counsel does not preclude a freelancer from bringing his or her own claim.

The Freelance Isn't Free Act will go into effect 180 days after it is signed into law by Mayor DeBlasio, which is likely considering the Mayor's employee-friendly outlook. We will continue to track further developments as the law comes closer to enactment.

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