NEW YORK STATE'S "FREELANCE ISN'T FREE" ACT – WHAT EMPLOYERS NEED TO KNOW

Hodgson Russ Labor & Employment Alert
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New York has revised its new Freelance Isn't Free Act ("FIFA"). Although the new obligations under the law were initially expected to go into effect on May 20, 2024, the FIFA will now apply to contracts with freelancers on or after August 28, 2024. In addition, there were a number of other revisions. We will update the Alert below soon to reflect the recent changes in the statute.

On November 22, 2023, New York Governor Kathy Hochul signed into law the "Freelance Isn't Free" Act (the "Act"), a statute which provides new protections and recourses for "freelance workers" (*i.e.*, "independent contractors" or those whose compensation is reported on an IRS Form 1099) in New York State. The Act, codified as a new Section 191-d of the New York Labor Law, will take effect on May 20, 2024.

The Act should not surprise New York City employers. In November 2016, the New York City Council passed its own "Freelance Isn't Free" Act (the "NYC Act"). The NYC Act, which took effect on May 15, 2017, requires all freelance worker jobs, with a value of at least $800, to be memorialized in a written contract with certain terms and information. The Act largely mirrors the NYC Act.

What Will the Act Require?

The Act requires every New York State business, that retains the services of a freelance worker, memorialize the terms of its relationship with the freelance worker in a written contract if:

- the cost of a single project is equal to or exceeds $800, or
- the freelance worker has provided multiple services to the business within a 120-day period that equals or exceeds $800 in the aggregate.

What is a Freelance Worker?

The Act defines a "freelance worker" as "any natural person or 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. Thus, the Act applies to situations where a business retains the services of an individual to perform/

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provide any service/work for the business regardless if the individual performs the work under a separate corporation, LLC, LLP, trade name, DBA, or under their own legal name. However, excluded from the definition of a "freelance worker" are sales representatives, attorneys, licensed medical professionals, and construction contractors.

What Should Every Business Include in the "Freelance Worker" Written Contract?

Among other things, the Act requires that a freelance worker written contract include:

- The names and mailing addresses of the freelance worker and the hiring party.
- An itemized accounting of the services to be performed.
- The rate of pay.
- The payment date, and
- The date by which the freelancer worker must submit to the hiring party a list of services rendered under the contract to enable the hiring party to meet any internal processing deadlines to ensure timely payment.

The hiring party must provide the written contract in hard copy or electronic form to the freelance worker. However, the business does not need to give the freelance worker a written contract that is in his or her primary language. The hiring party must retain a copy of the written contract for at least six years. We expect that the New York State Department of Labor ("NYSDOL") will publish model contracts on its website, prior to May 20, 2024, which businesses may use to engage the services of freelance workers.

The Act also sets forth rules concerning pay and pay frequency. For example, once work has begun under the contract, a hiring party is prohibited from reducing the agreed upon rate of compensation. Additionally, freelance workers must be compensated on or before the date when compensation is due under the terms of the written contract, but no later than 30 days after the completion of the freelancer's services.

What Protections and Remedies Does the Act Provide?

Under the Act, a business that retains the services of a freelance worker may not threaten, intimidate, discipline, harass, deny a work opportunity to, discriminate against a freelance worker, or take any other action that "penalizes [the] freelance worker for, or is reasonably likely to deter [the] freelance worker from, exercising or attempting to exercise any right guaranteed under the Act, or from obtaining any future work opportunity because the freelance worker has done so." In other words, the Act prohibits retaliation against a freelance worker for exercising his or her rights under the Act.

Freelance workers who believe that a business has committed violations under the Act may file a complaint with the NYSDOL. The NYSDOL will investigate such complaints and, if appropriate, award relief, including civil and criminal penalties. Alternatively, a freelance worker alleging a violation of the Act may bring a claim in any court of competent jurisdiction. A freelance worker who prevails on a claim under the Act may receive double damages, reasonable attorneys' fees and costs, injunctive relief, and other remedies as may be appropriate. A freelance worker who prevails in a retaliation claim can recover statutory damages equal to the value of the underlying contract.

Finally, if reasonable cause exists to believe that a business has engaged in a pattern or practice of violations of the Act, the New York State Attorney General may commence a civil action on behalf of the State and seek fines of up to $25,000, injunctive relief and "any other appropriate relief."

How Should Employers Prepare?

Before May 20, 2024, New York employers should (1) review their existing workforce to determine if they are utilizing the services of freelance workers, and (2) review their existing independent contractor agreements.

Workforce Review

The Act's enactment serves as a good reminder for employers to ensure that they are properly categorizing their workers as either employees or independent contractors. Finding that a worker is improperly classified as an independent contractor can result in costly claims for unpaid overtime and minimum wages, liquidated damages, attorneys' fees, and costs. Additionally, the U.S. Internal Revenue Service ("IRS") can levy additional penalties for misclassification – including criminal charges – if the IRS suspects an employer intentionally misclassified its employees. Employers should ensure that newly hired workers are correctly categorized as either an employee or an independent contractor. Employers should also conduct routine audits to ensure that each worker is classified properly as either an employee or an independent contractor.

Existing Agreements

Employers that utilize freelancers should review their current independent contractor agreements to be sure that such contracts clearly define the terms of the arrangement with respect to the services to be performed, rate of compensation, and payment date.

If you have any questions about the Act, need help properly classifying your workforce, or would like to review your independent contractor agreements, please contact **Charles H. Kaplan** (646.218.7513), **Glen P. Doherty** (518.433.2433), **Kinsey A. O'Brien** (716.848.1287), **Meghan M. DiPasquale** (585.454.0711), or any other member of our **Labor & Employment Practice**.

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