

4129--D

2011-2012 Regular Sessions

I N   S E N A T E

March 21, 2011

---

Introduced by Sens. GOLDEN, ADDABBO, AVELLA, BALL, BRESLIN, DILAN, DUANE, ESPAILLAT, GIANARIS, GRISANTI, KRUEGER, LANZA, McDONALD, MONTGOMERY, OPPENHEIMER, PARKER, PERALTA, PERKINS, RIVERA, ROBACH, SAVINO, SQUADRON, STAVISKY, STEWART-COUSINS, ZELDIN -- read twice and ordered printed, and when printed to be committed to the Committee on Labor -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Labor in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the labor law, in relation to independent contractors

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1     Section 1. The labor law is amended by adding two new sections 196-b  
2     and 196-c to read as follows:  
3     S 196-B. DEFINITIONS. FOR PURPOSES OF THIS SECTION AND SECTION ONE  
4     HUNDRED NINETY-SIX-C OF THIS ARTICLE, THE TERM:  
5     1. "COMPENSATION" MEANS THE EARNINGS OF AN INDEPENDENT CONTRACTOR.  
6     THE TERM "COMPENSATION" ALSO INCLUDES REIMBURSEMENT FOR EXPENSES.  
7     2. "INDEPENDENT CONTRACTOR" MEANS A SOLE PROPRIETOR WHO IS NOT AN  
8     EMPLOYEE AND WHO IS HIRED OR RETAINED BY A CLIENT FOR AN AMOUNT EQUAL TO  
9     OR GREATER THAN SIX HUNDRED DOLLARS; BUT SHALL NOT INCLUDE A  
10    CONSTRUCTION CONTRACTOR.  
11    3. "CLIENT" INCLUDES A CORPORATION, LIMITED LIABILITY COMPANY, PART-  
12    NERSHIP, ASSOCIATION OR NON-PROFITMAKING ORGANIZATION CONTRACTING WITH  
13    AN INDEPENDENT CONTRACTOR IN ANY OCCUPATION, INDUSTRY, TRADE, BUSINESS  
14    OR SERVICE FOR COMPENSATION EQUAL TO OR GREATER THAN SIX HUNDRED  
15    DOLLARS. THE TERM "CLIENT" SHALL NOT INCLUDE A GOVERNMENTAL ENTITY,

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets  
[ ] is old law to be omitted.

LBD10169-11-2

1 INCLUDING BUT NOT LIMITED TO, ANY AGENCY, BOARD, DEPARTMENT, COMMISSION  
2 OF THE STATE OR ANY POLITICAL SUBDIVISION THEREOF; AND CLIENT SHALL NOT  
3 INCLUDE A PERSON.

4 4. "CONSTRUCTION CONTRACTOR" MEANS ANY PERSON, SOLE PROPRIETOR, PART-  
5 NERSHIP, FIRM, CORPORATION, LIMITED LIABILITY COMPANY, ASSOCIATION OR  
6 OTHER LEGAL ENTITY WHO BY ONESELF OR THROUGH OTHERS OFFERS TO UNDERTAKE,  
7 OR HOLDS ONESELF OUT AS BEING ABLE TO UNDERTAKE, OR DOES UNDERTAKE A  
8 CONSTRUCTION PROJECT.

9 5. "CONSTRUCTION PROJECT" MEANS THE PROVIDING OF ANY LABOR OR  
10 SERVICES, AND THE USE OF ANY MATERIALS OR EQUIPMENT IN ORDER TO ALTER,  
11 BUILD, EXCAVATE, ADD TO, SUBTRACT FROM, IMPROVE, REPAIR, MAINTAIN, RENO-  
12 VATE, MOVE, WRECK OR DEMOLISH ANY BRIDGE, BUILDING, HIGHWAY, ROAD, RAIL-  
13 ROAD, LAND, TUNNEL, SEWER, DRAINAGE OR OTHER STRUCTURE, PROJECT, DEVEL-  
14 OPMENT, OR IMPROVEMENT, OR THE DOING OF ANY PART THEREOF, INCLUDING THE  
15 ERECTION OF SCAFFOLDING OR OTHER STRUCTURES OR WORKS IN CONNECTION THER-  
16 EWITH.

17 S 196-C. PAYMENT OF INDEPENDENT CONTRACTORS. 1. AN INDEPENDENT  
18 CONTRACTOR SHALL BE PAID THE COMPENSATION EARNED IN ACCORDANCE WITH THE  
19 AGREED WORK TERMS. IF AN INDEPENDENT CONTRACTOR AND CLIENT DID NOT  
20 AGREE ON A DATE FOR PAYMENT OF COMPENSATION EARNED, THE INDEPENDENT  
21 CONTRACTOR SHALL BE PAID THE COMPENSATION EARNED NOT LATER THAN THE LAST  
22 DAY OF THE MONTH FOLLOWING THE MONTH IN WHICH THE COMPENSATION IS  
23 EARNED. THE AGREED WORK TERMS SHALL BE REDUCED IN WRITING, SIGNED BY  
24 BOTH THE CLIENT AND THE INDEPENDENT CONTRACTOR, KEPT ON FILE BY THE  
25 CLIENT FOR A PERIOD OF NOT LESS THAN SIX YEARS AND MADE AVAILABLE TO THE  
26 COMMISSIONER UPON REQUEST. SUCH WRITING SHALL INCLUDE A DESCRIPTION OF  
27 HOW COMPENSATION EARNED AND PAYABLE SHALL BE CALCULATED. THE FAILURE OF  
28 A CLIENT TO PRODUCE SUCH WRITTEN WORK TERMS, UPON REQUEST OF THE COMMIS-  
29 SIONER, SHALL GIVE RISE TO A PRESUMPTION THAT THE TERMS THAT THE INDE-  
30 PENDENT CONTRACTOR HAS PRESENTED ARE THE AGREED TERMS.

31 2. THE COMMISSIONER SHALL INVESTIGATE AND ATTEMPT TO ADJUST EQUITABLY  
32 CONTROVERSIES BETWEEN CLIENTS AND INDEPENDENT CONTRACTORS RELATING TO  
33 THIS SECTION.

34 3. THE COMMISSIONER MAY TAKE ASSIGNMENTS OF CLAIMS FOR COMPENSATION AS  
35 DEFINED IN SECTION ONE HUNDRED NINETY-SIX-B OF THIS ARTICLE FROM INDE-  
36 PENDENT CONTRACTORS OR THIRD PARTIES IN TRUST FOR SUCH INDEPENDENT  
37 CONTRACTORS OR FOR THE VARIOUS FUNDS FOR SUCH INDEPENDENT CONTRACTORS.  
38 ALL SUCH ASSIGNMENTS SHALL RUN TO THE COMMISSIONER AND HIS SUCCESSOR IN  
39 OFFICE. THE COMMISSIONER MAY SUE CLIENTS ON COMPENSATION CLAIMS THUS  
40 ASSIGNED. HE MAY JOIN IN A SINGLE ACTION ANY NUMBER OF COMPENSATION  
41 CLAIMS AGAINST THE SAME COMPANY.

42 4. ANY INDEPENDENT CONTRACTOR MAY FILE WITH THE COMMISSIONER A  
43 COMPLAINT REGARDING A VIOLATION OF THIS ARTICLE FOR AN INVESTIGATION OF  
44 SUCH COMPLAINT AND STATEMENT SETTING THE APPROPRIATE REMEDY, IF ANY.  
45 FAILURE OF A CLIENT TO KEEP ADEQUATE RECORDS SHALL NOT OPERATE AS A BAR  
46 TO FILING OF A COMPLAINT BY AN INDEPENDENT CONTRACTOR. IN SUCH A CASE  
47 THE CLIENT IN VIOLATION SHALL BEAR THE BURDEN OF PROVING THAT THE  
48 COMPLAINING INDEPENDENT CONTRACTOR WAS PAID COMPENSATION.

49 5. ON BEHALF OF ANY INDEPENDENT CONTRACTOR PAID LESS THAN THE COMPEN-  
50 SATION TO WHICH HE OR SHE IS ENTITLED UNDER THE AGREED WORK TERMS UNDER  
51 THE PROVISIONS OF THIS ARTICLE, THE COMMISSIONER MAY BRING ANY LEGAL  
52 ACTION NECESSARY, INCLUDING ADMINISTRATIVE ACTION, TO COLLECT SUCH CLAIM  
53 AND AS PART OF SUCH LEGAL ACTION, IN ADDITION TO ANY OTHER REMEDIES AND  
54 PENALTIES OTHERWISE AVAILABLE UNDER THIS ARTICLE, THE COMMISSIONER SHALL  
55 ASSESS AGAINST THE CLIENT AN ADDITIONAL AMOUNT AS LIQUIDATED DAMAGES,  
56 UNLESS THE CLIENT PROVES A GOOD FAITH BASIS FOR BELIEVING THAT ITS

1 UNDERPAYMENT OF COMPENSATION WAS IN COMPLIANCE WITH THE LAW. LIQUIDATED  
2 DAMAGES SHALL BE CALCULATED BY THE COMMISSIONER AS NO MORE THAN ONE  
3 HUNDRED PERCENT OF THE TOTAL AMOUNT OF COMPENSATION FOUND TO BE DUE. IN  
4 ANY ACTION INSTITUTED IN THE COURTS UPON A COMPENSATION CLAIM BY AN  
5 INDEPENDENT CONTRACTOR OR THE COMMISSIONER IN WHICH THE INDEPENDENT  
6 CONTRACTOR PREVAILS, THE COURT SHALL ALLOW SUCH INDEPENDENT CONTRACTOR  
7 ALL REASONABLE ATTORNEY'S FEES, PREJUDGMENT INTEREST AS REQUIRED UNDER  
8 THE CIVIL PRACTICE LAW AND RULES, AND, UNLESS THE CLIENT PROVES A GOOD  
9 FAITH BASIS TO BELIEVE THAT ITS UNDERPAYMENT OF COMPENSATION WAS IN  
10 COMPLIANCE WITH THE LAW, AN ADDITIONAL AMOUNT AS LIQUIDATED DAMAGES  
11 EQUAL TO ONE HUNDRED PERCENT OF THE TOTAL AMOUNT OF COMPENSATION FOUND  
12 TO BE DUE. THE REMEDIES PROVIDED BY THIS ARTICLE MAY BE ENFORCED SIMUL-  
13 TANEOUSLY OR CONSECUTIVELY SO FAR AS NOT INCONSISTENT WITH EACH OTHER.

14 6. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, AN ACTION TO RECOVER  
15 UPON A LIABILITY IMPOSED BY THIS ARTICLE MUST BE COMMENCED WITHIN SIX  
16 YEARS. ALL INDEPENDENT CONTRACTORS SHALL HAVE THE RIGHT TO RECOVER FULL  
17 COMPENSATION ACCRUED DURING THE SIX YEARS PREVIOUS TO THE COMMENCING OF  
18 SUCH ACTION, WHETHER SUCH ACTION IS INSTITUTED BY THE INDEPENDENT  
19 CONTRACTOR OR BY THE COMMISSIONER.

20 7. EACH INDEPENDENT CONTRACTOR WHO FILES A COMPLAINT REGARDING A  
21 VIOLATION OF A PROVISION OF THIS ARTICLE SHALL BE PROVIDED WITH A WRIT-  
22 TEN DESCRIPTION OF THE ANTICIPATED PROCESSING OF THE COMPLAINT, INCLUD-  
23 ING INVESTIGATION, CASE CONFERENCE, POTENTIAL CIVIL AND CRIMINAL PENAL-  
24 TIES, AND COLLECTION PROCEDURES.

25 8. EACH INDEPENDENT CONTRACTOR AND HIS OR HER REPRESENTATIVE SHALL BE  
26 NOTIFIED IN WRITING OF ANY CASE CONFERENCE BEFORE IT IS HELD AND GIVEN  
27 THE OPPORTUNITY TO ATTEND.

28 9. EACH INDEPENDENT CONTRACTOR AND HIS OR HER REPRESENTATIVE SHALL BE  
29 NOTIFIED IN WRITING OF ANY AWARD AND COLLECTION OF BACK COMPENSATION AND  
30 CIVIL PENALTIES, AND OF ANY INTENT TO SEEK CRIMINAL PENALTIES. IN THE  
31 EVENT THAT CRIMINAL PENALTIES ARE SOUGHT THE INDEPENDENT CONTRACTOR AND  
32 HIS OR HER REPRESENTATIVE SHALL BE NOTIFIED OF THE OUTCOME OF PROSE-  
33 CUTION.

34 10. IF THE COMMISSIONER DETERMINES THAT A CLIENT HAS VIOLATED A  
35 PROVISION OF THIS ARTICLE, OR A RULE OR REGULATION PROMULGATED THERE-  
36 UNDER, BY FAILING TO PAY THE COMPENSATION OF THEIR INDEPENDENT CONTRAC-  
37 TORS, THE COMMISSIONER SHALL ISSUE TO THE CLIENT AN ORDER DIRECTING  
38 COMPLIANCE THEREWITH, WHICH SHALL DESCRIBE PARTICULARLY THE NATURE OF  
39 THE ALLEGED VIOLATION, AND ORDER THE PAYMENT OF INTEREST AT THE RATE OF  
40 INTEREST THEN IN EFFECT AS PRESCRIBED PURSUANT TO SECTION FOURTEEN-A OF  
41 THE BANKING LAW PER ANNUM FROM THE DATE OF THE UNDERPAYMENT TO THE DATE  
42 OF THE PAYMENT. IN ADDITION TO DIRECTING PAYMENT OF COMPENSATION FOUND  
43 TO BE DUE, SUCH ORDER, IF ISSUED TO A CLIENT WHO PREVIOUSLY HAS BEEN  
44 FOUND IN VIOLATION OF THOSE PROVISIONS, RULES OR REGULATIONS, OR TO A  
45 CLIENT WHOSE VIOLATION IS WILLFUL OR EGREGIOUS, SHALL DIRECT PAYMENT TO  
46 THE COMMISSIONER OF AN ADDITIONAL SUM AS A CIVIL PENALTY IN AN AMOUNT  
47 EQUAL TO DOUBLE THE TOTAL AMOUNT FOUND TO BE DUE.

48 11. EVERY CLIENT WHO DOES NOT PAY THE COMPENSATION OF ALL OF ITS INDE-  
49 PENDENT CONTRACTORS IN ACCORDANCE WITH THE PROVISIONS OF THIS CHAPTER,  
50 AND THE OFFICERS AND AGENTS OF ANY CLIENT WHO KNOWINGLY PERMIT THE  
51 CLIENT TO VIOLATE THIS CHAPTER BY FAILING TO PAY THE COMPENSATION OF ANY  
52 OF ITS INDEPENDENT CONTRACTORS IN ACCORDANCE WITH THE PROVISIONS THERE-  
53 OF, SHALL BE GUILTY OF A MISDEMEANOR FOR THE FIRST OFFENSE AND UPON  
54 CONVICTION THEREFOR SHALL BE FINED NOT LESS THAN FIVE HUNDRED NOR MORE  
55 THAN TWENTY THOUSAND DOLLARS OR IMPRISONED FOR NOT MORE THAN ONE YEAR,  
56 AND, IN THE EVENT THAT ANY SECOND OR SUBSEQUENT OFFENSE OCCURS WITHIN

1 SIX YEARS OF THE DATE OF CONVICTION FOR A PRIOR OFFENSE, SHALL BE GUILTY  
2 OF A FELONY FOR THE SECOND OR SUBSEQUENT OFFENSE, AND UPON CONVICTION  
3 THEREFOR, SHALL BE FINED NOT LESS THAN FIVE HUNDRED NOR MORE THAN TWENTY  
4 THOUSAND DOLLARS OR IMPRISONED FOR NOT MORE THAN ONE YEAR PLUS ONE DAY,  
5 OR PUNISHED BY BOTH SUCH FINE AND IMPRISONMENT, FOR EACH SUCH OFFENSE.  
6 12. THIS SECTION SHALL NOT APPLY TO: (A) REAL ESTATE BROKERS, ASSOCI-  
7 ATE BROKERS OR SALESPERSONS LICENSED PURSUANT TO ARTICLE TWELVE-A OF THE  
8 REAL PROPERTY LAW;  
9 (B) WORK PERFORMED ON ONE OR TWO FAMILY DWELLINGS; OR  
10 (C) CONSTRUCTION CONTRACTORS OR CONSTRUCTION PROJECTS.  
11 S 2. This act shall take effect immediately.