

6698--B

Cal. No. 220

2011-2012 Regular Sessions

I N   A S S E M B L Y

March 24, 2011

---

Introduced by M. of A. SILVER, WRIGHT, BRENNAN, MILLMAN, LENTOL, GLICK, GOTTFRIED, ABBATE, KAVANAGH, LANCMAN, O'DONNELL, PRETLOW, ROSENTHAL, CASTRO, SCHIMEL, JAFFEE, P. RIVERA, V. LOPEZ, HEVESI, TITONE, JEFFRIES, FARRELL -- Multi-Sponsored by -- M. of A. GALEF, JACOBS, PERRY -- read once and referred to the Committee on Labor -- reported and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- advanced to a third reading, amended and ordered reprinted, retaining its place on the order of third reading

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

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

LBD10169-09-2

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

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

14 S 196-C. PAYMENT OF INDEPENDENT CONTRACTORS. 1. AN INDEPENDENT  
15 CONTRACTOR SHALL BE PAID THE COMPENSATION EARNED IN ACCORDANCE WITH THE  
16 AGREED WORK TERMS BUT NOT LATER THAN THE LAST DAY OF THE MONTH FOLLOWING  
17 THE MONTH IN WHICH THE COMPENSATION IS EARNED. THE AGREED WORK TERMS  
18 SHALL BE REDUCED IN WRITING, SIGNED BY BOTH THE CLIENT AND THE INDEPEND-  
19 ENT CONTRACTOR, KEPT ON FILE BY THE CLIENT FOR A PERIOD OF NOT LESS THAN  
20 SIX YEARS AND MADE AVAILABLE TO THE COMMISSIONER UPON REQUEST. SUCH  
21 WRITING SHALL INCLUDE A DESCRIPTION OF HOW COMPENSATION EARNED AND PAYA-  
22 BLE SHALL BE CALCULATED. THE FAILURE OF A CLIENT TO PRODUCE SUCH WRITTEN  
23 WORK TERMS, UPON REQUEST OF THE COMMISSIONER, SHALL GIVE RISE TO A  
24 PRESUMPTION THAT THE TERMS THAT THE INDEPENDENT CONTRACTOR HAS PRESENTED  
25 ARE THE AGREED TERMS.

26 2. THE COMMISSIONER SHALL INVESTIGATE AND ATTEMPT TO ADJUST EQUITABLY  
27 CONTROVERSIES BETWEEN CLIENTS AND INDEPENDENT CONTRACTORS RELATING TO  
28 THIS SECTION.

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

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

44 5. ON BEHALF OF ANY INDEPENDENT CONTRACTOR PAID LESS THAN THE COMPEN-  
45 SATION TO WHICH HE OR SHE IS ENTITLED UNDER THE AGREED WORK TERMS UNDER  
46 THE PROVISIONS OF THIS ARTICLE, THE COMMISSIONER MAY BRING ANY LEGAL  
47 ACTION NECESSARY, INCLUDING ADMINISTRATIVE ACTION, TO COLLECT SUCH CLAIM  
48 AND AS PART OF SUCH LEGAL ACTION, IN ADDITION TO ANY OTHER REMEDIES AND  
49 PENALTIES OTHERWISE AVAILABLE UNDER THIS ARTICLE, THE COMMISSIONER SHALL  
50 ASSESS AGAINST THE CLIENT AN ADDITIONAL AMOUNT AS LIQUIDATED DAMAGES,  
51 UNLESS THE CLIENT PROVES A GOOD FAITH BASIS FOR BELIEVING THAT ITS  
52 UNDERPAYMENT OF COMPENSATION WAS IN COMPLIANCE WITH THE LAW. LIQUIDATED  
53 DAMAGES SHALL BE CALCULATED BY THE COMMISSIONER AS NO MORE THAN ONE  
54 HUNDRED PERCENT OF THE TOTAL AMOUNT OF COMPENSATION FOUND TO BE DUE. IN  
55 ANY ACTION INSTITUTED IN THE COURTS UPON A COMPENSATION CLAIM BY AN  
56 INDEPENDENT CONTRACTOR OR THE COMMISSIONER IN WHICH THE INDEPENDENT

1 CONTRACTOR PREVAILS, THE COURT SHALL ALLOW SUCH INDEPENDENT CONTRACTOR  
2 ALL REASONABLE ATTORNEY'S FEES, PREJUDGMENT INTEREST AS REQUIRED UNDER  
3 THE CIVIL PRACTICE LAW AND RULES, AND, UNLESS THE CLIENT PROVES A GOOD  
4 FAITH BASIS TO BELIEVE THAT ITS UNDERPAYMENT OF COMPENSATION WAS IN  
5 COMPLIANCE WITH THE LAW, AN ADDITIONAL AMOUNT AS LIQUIDATED DAMAGES  
6 EQUAL TO ONE HUNDRED PERCENT OF THE TOTAL AMOUNT OF COMPENSATION FOUND  
7 TO BE DUE. THE REMEDIES PROVIDED BY THIS ARTICLE MAY BE ENFORCED SIMUL-  
8 TANEOUSLY OR CONSECUTIVELY SO FAR AS NOT INCONSISTENT WITH EACH OTHER.

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

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

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

23 9. EACH INDEPENDENT CONTRACTOR AND HIS OR HER REPRESENTATIVE SHALL BE  
24 NOTIFIED IN WRITING OF ANY AWARD AND COLLECTION OF BACK COMPENSATION AND  
25 CIVIL PENALTIES, AND OF ANY INTENT TO SEEK CRIMINAL PENALTIES. IN THE  
26 EVENT THAT CRIMINAL PENALTIES ARE SOUGHT THE INDEPENDENT CONTRACTOR AND  
27 HIS OR HER REPRESENTATIVE SHALL BE NOTIFIED OF THE OUTCOME OF PROSE-  
28 CUTION.

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

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

1       12. THIS SECTION SHALL NOT APPLY TO: (A) REAL ESTATE BROKERS, ASSOCI-  
2       ATE BROKERS OR SALESPERSONS LICENSED PURSUANT TO ARTICLE TWELVE-A OF THE  
3       REAL PROPERTY LAW;  
4       (B) WORK PERFORMED ON ONE OR TWO FAMILY DWELLINGS; OR  
5       (C) CONSTRUCTION CONTRACTORS OR CONSTRUCTION PROJECTS.  
6       S 2. This act shall take effect immediately.