

5472

2013-2014 Regular Sessions

I N   A S S E M B L Y

February 27, 2013

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Introduced by M. of A. SILVER, HEASTIE, MORELLE, FARRELL, WRIGHT, BRENNAN, MILLMAN, LENTOL, GLICK, GOTTFRIED, ABBATE, KAVANAGH, O'DONNELL, PRETLOW, ROSENTHAL, CASTRO, SCHIMEL, JAFFEE, HEVESI, TITONE -- Multi-Sponsored by -- M. of A. COLTON, CYMBROWITZ, ENGLEBRIGHT, GALEF, GIBSON, JACOBS, LAVINE, MARKEY, PERRY, RIVERA, ROBERTS, SEPULVEDA, SKARTADOS, SWEENEY -- read once and referred to the Committee on Labor

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.

19     4. "CONSTRUCTION CONTRACTOR" MEANS ANY PERSON, SOLE PROPRIETOR, PART-  
20 NERSHIP, FIRM, CORPORATION, LIMITED LIABILITY COMPANY, ASSOCIATION OR  
21 OTHER LEGAL ENTITY WHO BY ONESELF OR THROUGH OTHERS OFFERS TO UNDERTAKE,

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

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1 OR HOLDS ONESELF OUT AS BEING ABLE TO UNDERTAKE, OR DOES UNDERTAKE A  
2 CONSTRUCTION PROJECT.

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

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

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

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

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

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

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

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

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

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

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

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

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