STATE OF NEW YORK

5772

2021-2022 Regular Sessions

IN ASSEMBLY

February 24, 2021

Introduced by M. of A. GLICK, DINOWITZ, COLTON, MAGNARELLI, SIMON -- read once and referred to the Committee on Labor

AN ACT to amend the labor law and the workers' compensation law, in relation to the employee status of an individual

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraphs (a) and (b) of subdivision 1 of section 511 of the labor law, as amended by chapter 607 of the laws of 1971, subparagraph 1-a of paragraph (b) as added by chapter 903 of the laws of 1986, subparagraph 1-b of paragraph (b) as added by chapter 418 of the laws of 2010, subparagraph 1-c of paragraph (b) as added by chapter 558 of the laws of 2013, and subparagraph 3 of paragraph (b) as added by chapter 668 of the laws of 1992, are amended to read as follows:

(a) any service under any contract of employment for hire, express or implied, written, or oral**;** and

(b) **(1) any service by a person providing labor or services for remuneration unless the hiring entity demonstrates that all of the following conditions are satisfied:**

(i) the person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and

(ii) the person performs work that is outside the usual course of the hiring entity's business; and

(iii) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(2) for the purposes of this section, any person providing labor or services for remuneration pursuant to subparagraph one of this paragraph shall be considered an employee rather than an independent contractor; and

(c) any service by a person for an employer**:**

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

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(1) as an agent-driver or commission-driver engaged in distributing meat, vegetable, fruit, or bakery products; beverages other than milk; or laundry or dry-cleaning services; or

(1-a) as a professional musician or a person otherwise engaged in the performing arts, and performing services as such for a television or radio station or network, a film production, a theatre, hotel, restaurant, night club or similar establishment unless, by written contract, such musician or person is stipulated to be an employee of another employer covered by this chapter. "Engaged in the performing arts" shall mean performing services in connection with the production of or performance in any artistic endeavor which requires artistic or technical skill or expertise; or

(1-b) as an employee in the construction industry unless the presumption of employment can be overcome, as provided under section eight hundred sixty-one-c of this chapter; or

(1-c) as an employee in the commercial goods transportation industry unless the presumption of employment can be overcome, as provided under section eight hundred sixty-two-b of this chapter; or

(2) as a traveling or city salesman engaged on a full-time basis in soliciting orders for merchandise for resale or supplies for use in the purchaser's business operations if the contract of service contemplates that substantially all of such services are to be performed personally by such person; such person does not have a substantial investment in facilities used in connection with the performance of such services, excepting facilities for transportation; and the services are not in the nature of a single transaction which is not part of a continuing relationship with the employer.

(3) as a professional model, where:

(i) the professional model performs modeling services for; or

(ii) consents in writing to the transfer of his or her exclusive legal right to the use of his or her name, portrait, picture or image, for advertising purposes or for the purposes of trade, directly to a retail store, a manufacturer, an advertising agency, a photographer, a publishing company or any other such person or entity, which dictates such professional model's assignments, hours of work or performance locations and which compensates such professional model in return for a waiver of his or her privacy rights enumerated above, unless such services are performed pursuant to a written contract wherein it is stated that the professional model is the employee of another employer covered by this chapter. For purposes of this subparagraph, the term "professional model" means a person who, in the course of his or her trade, occupation or profession, performs modeling services. For purposes of this subparagraph, the term "modeling services" means the appearance by a professional model in photographic sessions or the engagement of such model in live, filmed or taped modeling performances for remuneration.

§ 2. Subdivision 3 of section 160 of the labor law, the opening paragraph of such subdivision as amended by chapter 481 of the laws of 2010, is amended to read as follows:

3. **a.** For all other employees, except those engaged in farm work and those affected by subdivision four of section two hundred twenty of this chapter, eight hours.

b. For the purposes of this subdivision, an individual providing labor or services for remuneration has the status of an employee rather than an independent contractor unless the hiring entity demonstrates all of the following conditions:

(i) The individual is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(ii) The individual performs work that is outside the usual course of the hiring entity's business.

(iii) The individual is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

c. This subdivision shall not prevent an agreement for overwork at an increased compensation, except upon work by or for the state or a municipal corporation, or by contractors or subcontractors therewith, and except as otherwise provided in this chapter.

§ 3. Subdivision 5 of section 651 of the labor law is amended by adding a new closing paragraph to read as follows:

Unless otherwise excluded by the provisions of this subdivision or by regulations promulgated by the commissioner, an individual providing labor or services for remuneration has the status of an employee rather than an independent contractor unless the hiring entity demonstrates all of the following conditions:

(a) The individual is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(b) The individual performs work that is outside the usual course of the hiring entity's business.

(c) The individual is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

§ 4. Subdivision 6 of section 201 of the workers' compensation law is amended by adding a new paragraph E to read as follows:

E. (A) The term "employment" includes, unless specifically excluded by a provision of this subdivision, any service by a person providing labor or services for remuneration unless the hiring entity demonstrates that all of the following conditions are satisfied:

(i) the person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and

(ii) the person performs work that is outside the usual course of the hiring entity's business; and

(iii) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(B) For the purposes of this section, any person providing labor or services for remuneration pursuant to subparagraph (A) of this paragraph shall be considered an employee rather than an independent contractor.

§ 5. This act shall take effect immediately.