STATE OF NEW YORK

8369

IN SENATE

February 17, 2022

Introduced by Sen. GOUNARDES -- read twice and ordered printed, and when printed to be committed to the Committee on Labor

AN ACT to amend the labor law, in relation to enacting the "freelance isn't free act"

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

Section 1. Short title. This act shall be known and may be cited as the "freelance isn't free act".

§ 2. Section 190 of the labor law is amended by adding four new subdivisions 10, 11, 12 and 13 to read as follows:

10. "Construction contractor" means any person, sole proprietor, partnership, firm, corporation, limited liability company, association or other legal entity who by oneself or through others offers to undertake, or holds oneself out as being able to undertake, or does undertake a construction project.

11. "Construction project" means the providing of any labor or services, and the use of any materials or equipment in order to alter, build, excavate, add to, subtract from, improve, repair, maintain, renovate, move, wreck or demolish any bridge, building, highway, road, railroad, land, tunnel, sewer, drainage or other structure, project, development, or improvement, or the doing of any part thereof, including the erection of scaffolding or other structures or works in connection therewith.

12. "Freelance worker" means 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 an amount equal to or greater than two hundred fifty dollars, either by itself or when aggregated with all contracts for services between the same hiring party and freelance worker during the immediately preceding one hundred twenty days, but does not include:

a. any person who, pursuant to the contract at issue, is a sales representative as defined in section one hundred ninety-one-a of this article;

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

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b. any person engaged in the practice of law pursuant to the contract at issue and who is a member in good standing of the bar of the highest court of any state, possession, territory, commonwealth or the District of Columbia and who is not under any order of court suspending, enjoining, restraining, disbarring or otherwise restricting such person in the practices of law;

c. any person who is a licensed medical professional; or

d. any person who is a construction contractor.

13. "Hiring party" means any person who retains a freelance worker to provide any service, other than:

a. the United States government;

b. the state of New York, including any office, department, agency, authority or other body of the state including the legislature and the judiciary;

c. a municipality, including any office, department, agency or other body of a municipality; or

d. any foreign government.

§ 3. Section 191 of the labor law is amended by adding a new subdivision 4 to read as follows:

4. a. Except as otherwise provided by law, the contracted compensation shall be paid to the freelance worker either:

(i) on or before the date such compensation is due under the terms of the contract; or

(ii) if the contract does not specify when the hiring party must pay the contracted compensation or the mechanism by which such date will be determined, no later than thirty days after the completion of the freelance worker's services under the contract.

b. Once a freelance worker has commenced performance of the services under the contract, the hiring party shall not require as a condition of timely payment that the freelance worker accept less compensation than the amount of the contracted compensation.

§ 4. Section 195 of the labor law is amended by adding a new subdivision 7 to read as follows:

7. (a) Whenever a hiring party retains the services of a freelance worker, as such terms are defined in section one hundred ninety of this article, the contract between such party and worker shall be reduced to writing. The hiring party must furnish a copy of such written contract, either physically or electronically, to the freelance worker and each party to the written contract shall retain a copy thereof.

(b) The written contract shall include, at a minimum, the following information:

(i) the name and mailing address of both the hiring party and the freelance worker;

(ii) an itemization of all services to be provided by the freelance worker, the value of the services to be provided pursuant to the contract, and the rate and method of compensation;

(iii) the date on which the hiring party must pay the contracted compensation or the mechanism by which such date will be determined; and

(iv) the date by which a freelance worker must submit a list of services rendered under such contract to the hiring party in order to meet any internal processing deadlines of such hiring party for the purposes of compensation being timely rendered by the agreed-upon date as stipulated in subparagraph (iii) of this paragraph.

(c) The commissioner may by rule require additional terms to ensure that the freelance worker and the hiring party understand their obligations under the contract.

(d) Such hiring party shall be required to keep such contract for a period of no less than six years and shall make such contract available to the commissioner upon request. The failure of a hiring party to produce such contract, upon request of the commissioner, shall give rise to a presumption that the terms that the freelance worker has presented are the agreed upon terms.

§ 5. Subdivision 1 of section 196 of the labor law is amended by adding a new paragraph f to read as follows:

f. The commissioner shall have the same duties, powers, and authority described in this section for freelance workers and hiring parties, as defined in section one hundred ninety of this article. In the event that the commissioner shall sue a hiring party for wages due a freelance worker, pursuant to paragraph b of this subdivision, he or she shall provide such freelance worker with a written description of the anticipated processing of such claim, including investigation, case conference, potential civil and criminal penalties, and collection procedures. Each freelance worker and his or her authorized representative shall be notified in writing of any case conference before it is held and given the opportunity to attend. Each freelance worker and his or her authorized representative shall also be notified in writing of any award and collection of back wages and civil penalties, and of any intent to seek criminal penalties. In the event that criminal penalties are sought the freelance worker and his or her authorized representative shall be notified of the outcome of prosecution.

§ 6. Subdivision 2 of section 196 of the labor law, as amended by chapter 564 of the laws of 2010, is amended to read as follows:

2. Nothing in this section shall be construed as requiring the commissioner in every instance to investigate and attempt to adjust controversies, or to take assignments of wage claims, or to institute criminal prosecutions for any violation under this article or article five, seven, nineteen or nineteen-A of this chapter, but he or she shall be deemed vested with discretion in such matters. This subdivision shall not apply, however, to freelance workers filing a complaint pursuant to section one hundred ninety-six-a of this article, in which case the commissioner shall be required to investigate such complaint pursuant to such section.

§ 7. Section 196-a of the labor law is amended by adding a new subdivision (c) to read as follows:

(c)(i) A freelance worker who is aggrieved by a violation of this article may file a complaint with the commissioner within two years after the acts alleged to have violated this article occurred. The commissioner shall prescribe the form of the complaint, which shall include, at a minimum:

(A) the name and mailing address of the freelance worker and of the hiring party alleged to have violated this article;

(B) a statement detailing the terms of the freelance contract, including a copy of such contract if available;

(C) the freelance worker's occupation;

(D) a statement detailing the alleged violations of this article; and

(E) a signed affirmation that all facts alleged in the complaint are true.

(ii) At the time the commissioner receives a complaint alleging a violation of this article, the commissioner shall refer the freelance worker to the navigation program identified in subdivision two of section one hundred ninety-nine-b of this article.

(iii) Within twenty days of receiving a complaint alleging a violation of this article, the commissioner shall send the hiring party named in the complaint a written notice of complaint. Such notice shall inform the hiring party that a complaint has been filed alleging violations of this article, detail the remedies available to a freelance worker for violations of this article by a hiring party, and include a copy of the complaint and notice that failure to respond to the complaint creates a rebuttable presumption in any civil action commenced pursuant to this article that the hiring party committed the violations alleged in the complaint. The commissioner shall send such notice by certified mail and shall bear the cost of sending such notice.

(iv) (A) Within twenty days of receiving the notice of complaint, the hiring party identified in the complaint shall send the commissioner one of the following:

(1) a written statement that the freelance worker has been paid in full and proof of such payment; or

(2) a written statement that the freelance worker has not been paid in full and the reasons for the failure to provide such payment.

(B) Within twenty days of receiving the written response, the commissioner shall send the freelance worker a copy of:

(1) the response;

(2) any enclosures submitted to the commissioner with the response;

(3) materials informing the freelance worker that he or she may bring an action in a court of competent jurisdiction;

(4) any other information about the status of the complaint; and

(5) information about the navigation program described in subdivision two of section one hundred ninety-nine-b of this article.

(C) If the commissioner receives no response to the notice of complaint within the time provided by this subdivision, the commissioner shall mail a notice of non-response to both the freelance worker and the hiring party by regular mail and shall include with such notice proof that the commissioner previously mailed the notice of complaint to the hiring party by certified mail. Upon satisfying the requirements of this paragraph, the commissioner may close the case.

§ 8. Section 198 of the labor law is amended by adding a new subdivision 5 to read as follows:

5.(a) (i) A freelance worker alleging a violation of this article may bring an action in any court of competent jurisdiction for damages.

(ii) Any action alleging a violation of subdivision seven of section one hundred ninety-five of this article shall be brought within two years after the acts alleged to have violated this article occurred.

(iii) Any action alleging a violation of subdivision four of section one hundred ninety-one or subdivision one of section one hundred ninety-nine-b of this article shall be brought within six years after the acts alleged to have violated this article occurred.

(iv) Within ten days after having commenced a civil action pursuant to this subdivision, a plaintiff shall serve a copy of the complaint upon an authorized representative of the commissioner. Failure to so serve a complaint does not adversely affect any plaintiff's cause of action.

(v) A plaintiff who solely alleges a violation of subdivision seven of section one hundred ninety-five of this article must prove that such plaintiff requested a written contract before the contracted work began.

(b) (i) A plaintiff who prevails on a claim alleging a violation of this article shall be awarded damages as described in this subdivision and an award of reasonable attorneys' fees and costs.

(ii) (A) A plaintiff who prevails on a claim alleging a violation of subdivision seven of section one hundred ninety-five of this article shall be awarded statutory damages of two hundred fifty dollars.

(B) A plaintiff who prevails on a claim alleging a violation of subdivision seven of section one hundred ninety-five of this article and on one or more claims under other provisions of this article shall be awarded statutory damages equal to the value of the underlying contract for the violation of such subdivision seven in addition to the remedies specified in this article for such other violations.

(iii) In addition to other damages awarded pursuant to this article, a plaintiff who prevails on a claim alleging a violation of subdivision four of section one hundred ninety-one of this article is entitled to an award of double damages, injunctive relief, and other such remedies as may be appropriate.

(iv) In addition to any other damages awarded pursuant to this article, a plaintiff who prevails on a claim alleging a violation of subdivision one of section one hundred ninety-nine-b of this article is entitled to statutory damages equal to the value of the underlying contract for each violation arising under such subdivision.

§ 9. The labor law is amended by adding a new section 199-b to read as follows:

§ 199-b. Additional powers and responsibilities relating to freelance workers. 1. Retaliation. No hiring party, as defined in section one hundred ninety of this article, shall threaten, intimidate, discipline, harass, deny a work opportunity to, or discriminate against a freelance worker, or take any other action that penalizes a freelance worker for, or is reasonably likely to deter a freelance worker from, exercising or attempting to exercise any right guaranteed under this article, or from obtaining any future work opportunity because the freelance worker has done so.

2. Navigation program. (a) The commissioner shall establish a navigation program that provides information and assistance, as set forth in subdivision (c) of section one hundred ninety-six-a of this article, relating to the provisions of this article. Such program shall include assistance by a natural person by phone and e-mail and shall also include online information.

(b) The commissioner shall make available model contracts on the website of the department for use by the general public at no cost. Such model contracts shall be made available in English and in the twelve languages most commonly spoken by limited English proficient individuals in the state.

(c) The navigation program shall provide the following:

(i) general court information and information about procedures under this article;

(ii) information about available templates and relevant court forms;

(iii) general information about classifying persons as employees or independent contractors;

(iv) information about obtaining translation and interpretation services and other courtroom services;

(v) a list of organizations that can be used for the identification of attorneys; and

(vi) other information, as determined by the commissioner, related to the submission of a complaint by a freelance worker or the commencement of a civil action pursuant to this article by a freelance worker.

(d) The navigation program shall include outreach and education to the public on the provisions of this article.

(e) The navigation program shall not provide legal advice.

3. Civil action for pattern or practice of violations. (a)(i) Where reasonable cause exists to believe that a hiring party is engaged in a pattern or practice of violations of this article, the attorney general may commence a civil action on behalf of the state in a court of competent jurisdiction.

(ii) An action pursuant to subparagraph (i) of this paragraph shall be commenced by filing a complaint setting forth facts relating to such pattern or practice and requesting relief, which may include injunctive relief, civil penalties, and any other appropriate relief.

(iii) Nothing in this paragraph prohibits:

(A) a person alleging a violation of this article from filing a civil action pursuant to section one hundred ninety-eight of this article based on the same facts as a civil action commenced by the attorney general pursuant to this section; or

(B) the commissioner from sending a notice of complaint pursuant to section one hundred ninety-six-a of this article, unless otherwise barred from doing so.

(b) In any civil action commenced pursuant to paragraph (a) of this subdivision, the trier of fact may impose a civil penalty of not more than twenty-five thousand dollars for a finding that a hiring party has engaged in a pattern or practice of violations of this article. Any civil penalty so recovered shall be paid into the general fund.

4. Application; waiver; effect on other laws. (a) Except as otherwise provided by law, any provision of a contract purporting to waive rights under this article is void as against public policy.

(b) The provisions of this article supplement, and do not diminish or replace, any other basis of liability or requirement established by statute or common law.

(c) Failure to comply with the provisions of this article does not render any contract between a hiring party and a freelance worker void or voidable or otherwise impair any obligation, claim or right related to such contract or constitute a defense to any action or proceeding to enforce, or for breach of, such contract.

(d) No provision of this article relating to freelance workers shall be construed as providing a determination about the legal classification of any such worker as an employee or independent contractor.

5. Data collection and reporting. (a) No later than six months after the commissioner sends to a freelance worker either a hiring party's response and accompanying materials or a notice of non-response pursuant to section one hundred ninety-six-a of this article, the commissioner shall send the freelance worker a survey requesting additional information about the resolution of the freelance worker's claims. Such survey shall ask whether or not the freelance worker pursued any such claims in court or through an alternative dispute resolution process and whether or not the hiring party ultimately paid any or all of the compensation the freelance worker alleged was due or if the matter was resolved in a different manner. Such survey shall state clearly that response to the survey is voluntary.

(b) The commissioner shall collect and track information about complaints alleging violations of this article. The information collected shall include, at minimum:

(i) the identity of the hiring party alleged to have violated this chapter;

(ii) the freelance worker's occupation;

(iii) the section of this article that was alleged to have been violated;

(iv) the value of the contract;

(v) the response or non-response from the hiring party; and

(vi) information from a completed survey identified in paragraph (a) of this subdivision.

(c) One year after the effective date of this section, and every fifth year thereafter by November first, the commissioner shall submit to the legislature and publish on its website a report regarding the effectiveness of the applicable provisions of this article at improving freelance contracting and payment practices. Such report shall include, at a minimum:

(i) the number of complaints the commissioner has received pursuant to such provisions;

(ii) the value of the contracts disaggregated into ranges of five hundred dollars and by section of this article alleged to have been violated;

(iii) the numbers of responses and non-responses received by the commissioner disaggregated by contract value into ranges of five hundred dollars and by section of this article alleged to have been violated;

(iv) the proportion of surveys received from freelance workers that indicate that they pursued their claims in court and the proportion of surveys received from freelance workers that indicate that they pursued their claims through an alternative dispute resolution process and a summary of the outcomes of such cases; and

(v) legislative recommendations, including consideration of whether certain occupations should be exempted from the scope of the definition of freelance worker in section one hundred ninety of this article.

§ 10. The provisions of this act shall not be construed or interpreted to override or supplant any of the provisions of chapter 10 of title 20 of the administrative code of the city of New York.

§ 11. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply only to contracts entered into on or after such effective date. Effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of this act on its effective date are authorized to be made on or before such effective date.