STATE OF NEW YORK

1110

2021-2022 Regular Sessions

IN ASSEMBLY

January 7, 2021

Introduced by M. of A. BRONSON -- read once and referred to the Committee on Labor

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

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

Section 1. The labor law is amended by adding two new sections 191-d and 191-e to read as follows:

§ 191-d. Definitions relating to independent contractors. For purposes of this section and section one hundred ninety-one-e of this article, the term:

1. "Compensation" means the earnings of an independent contractor. The term "compensation" also includes reimbursement for expenses.

2. "Independent contractor" means a sole proprietor who is not an employee and who is hired or retained by a client for an amount equal to or greater than six hundred dollars; but shall not include a construction contractor.

3. "Client" includes a corporation, limited liability company, partnership, association or non-profitmaking organization contracting with an independent contractor in any occupation, industry, trade, business or service for compensation equal to or greater than six hundred dollars. The term "client" shall not include a governmental entity, including but not limited to, any agency, board, department, commission of the state or any political subdivision thereof; and client shall not include a person.

4. "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.

5. "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, rail-

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

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road, 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.

§ 191-e. Payment of independent contractors. 1. An independent contractor shall be paid the compensation earned in accordance with the agreed work terms. If an independent contractor and client did not agree on a date for payment of compensation earned, the independent contractor shall be paid the compensation earned not later than the last day of the month following the month in which the compensation is earned. The agreed work terms shall be reduced in writing, signed by both the client and the independent contractor, kept on file by the client for a period of not less than six years and made available to the commissioner upon request. Such writing shall include a description of how compensation earned and payable shall be calculated. The failure of a client to produce such written work terms, upon request of the commissioner, shall give rise to a presumption that the terms that the independent contractor has presented are the agreed terms.

2. The commissioner shall investigate and attempt to adjust equitably controversies between clients and independent contractors relating to this section.

3. The commissioner may take assignments of claims for compensation as defined in section one hundred ninety-one-d of this article from independent contractors or third parties in trust for such independent contractors or for the various funds for such independent contractors. All such assignments shall run to the commissioner and his successor in office. The commissioner may sue clients on compensation claims thus assigned. He may join in a single action any number of compensation claims against the same company.

4. Any independent contractor may file with the commissioner a complaint regarding a violation of this article for an investigation of such complaint and statement setting the appropriate remedy, if any. Failure of a client to keep adequate records shall not operate as a bar to filing of a complaint by an independent contractor. In such a case the client in violation shall bear the burden of proving that the complaining independent contractor was paid compensation.

5. On behalf of any independent contractor paid less than the compensation to which he or she is entitled under the agreed work terms under the provisions of this article, the commissioner may bring any legal action necessary, including administrative action, to collect such claim and as part of such legal action, in addition to any other remedies and penalties otherwise available under this article, the commissioner shall assess against the client an additional amount as liquidated damages, unless the client proves a good faith basis for believing that its underpayment of compensation was in compliance with the law. Liquidated damages shall be calculated by the commissioner as no more than one hundred percent of the total amount of compensation found to be due. In any action instituted in the courts upon a compensation claim by an independent contractor or the commissioner in which the independent contractor prevails, the court shall allow such independent contractor all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and, unless the client proves a good faith basis to believe that its underpayment of compensation was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of compensation found

to be due. The remedies provided by this article may be enforced simultaneously or consecutively so far as not inconsistent with each other.

6. Notwithstanding any other provision of law, an action to recover upon a liability imposed by this article must be commenced within six years. All independent contractors shall have the right to recover full compensation accrued during the six years previous to the commencing of such action, whether such action is instituted by the independent contractor or by the commissioner.

7. Each independent contractor who files a complaint regarding a violation of a provision of this article shall be provided with a written description of the anticipated processing of the complaint, including investigation, case conference, potential civil and criminal penalties, and collection procedures.

8. Each independent contractor and his or her representative shall be notified in writing of any case conference before it is held and given the opportunity to attend.

9. Each independent contractor and his or her representative shall be notified in writing of any award and collection of back compensation and civil penalties, and of any intent to seek criminal penalties. In the event that criminal penalties are sought the independent contractor and his or her representative shall be notified of the outcome of prosecution.

10. If the commissioner determines that a client has violated a provision of this article, or a rule or regulation promulgated thereunder, by failing to pay the compensation of their independent contractors, the commissioner shall issue to the client an order directing compliance therewith, which shall describe particularly the nature of the alleged violation, and order the payment of interest at the rate of interest then in effect as prescribed pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of the payment. In addition to directing payment of compensation found to be due, such order, if issued to a client who previously has been found in violation of those provisions, rules or regulations, or to a client whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due.

11. Every client who does not pay the compensation of all of its independent contractors in accordance with the provisions of this chapter, and the officers and agents of any client who knowingly permit the client to violate this chapter by failing to pay the compensation of any of its independent contractors in accordance with the provisions thereof, shall be guilty of a misdemeanor for the first offense and upon conviction therefor shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year, and, in the event that any second or subsequent offense occurs within six years of the date of conviction for a prior offense, shall be guilty of a felony for the second or subsequent offense, and upon conviction therefor, shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year plus one day, or punished by both such fine and imprisonment, for each such offense.

12. This section shall not apply to: (a) real estate brokers, associate brokers or salespersons licensed pursuant to article twelve-A of the real property law;

(b) work performed on one or two family dwellings; or

(c) construction contractors or construction projects.

§ 2. This act shall take effect immediately.