

STATE OF NEW YORK

9368--A

IN ASSEMBLY

February 23, 2022

Introduced by M. of A. BRONSON, CRUZ, ROZIC, SIMON, REYES, BICHOTTE HERMELYN, CYMBROWITZ, SEAWRIGHT, DICKENS, HEVESI, GALLAGHER, GOTTFRIED, DINOWITZ, BURGOS, KELLES, GALEF, MITAYNES, BURDICK, GONZALEZ-ROJAS, EPSTEIN, FORREST, LAWLER, GLICK, FERNANDEZ -- read once and referred to the Committee on Labor -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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:

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

3 § 2. The labor law is amended by adding a new section 191-d to read as
4 follows:

5 § 191-d. Payment of wages for freelance workers. 1. (a) "Construction
6 contractor" means any person, sole proprietor, partnership, firm,
7 corporation, limited liability company, association or other legal
8 entity who by oneself or through others offers to undertake, or holds
9 oneself out as being able to undertake, or does undertake a
10 construction project.

11 (b) "Construction project" means the providing of any labor or
12 services, and the use of any materials or equipment in order to alter,
13 build, excavate, add to, subtract from, improve, repair, maintain, reno-
14 vate, move, wreck or demolish any bridge, building, highway, road, rail-
15 road, land, tunnel, sewer, drainage or other structure, project, devel-
16 opment, or improvement, or the doing of any part thereof, including the
17 erection of scaffolding or other structures or works in connection ther-
18 ewith.

19 (c) "Freelance worker" means any natural person or organization
20 composed of no more than one natural person, whether or not incorporated
21 or employing a trade name, that is hired or retained as an independent
22 contractor by a hiring party to provide services in exchange for an
23 amount equal to or greater than eight hundred dollars, either by itself

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

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1 or when aggregated with all contracts for services between the same
2 hiring party and freelance worker during the immediately preceding one
3 hundred twenty days, but does not include:

4 (i) any person who, pursuant to the contract at issue, is a sales
5 representative as defined in section one hundred ninety-one-a of this
6 article;

7 (ii) any person engaged in the practice of law pursuant to the
8 contract at issue and who is a member in good standing of the bar of the
9 highest court of any state, possession, territory, commonwealth or the
10 District of Columbia and who is not under any order of court suspending,
11 enjoining, restraining, disbaring or otherwise restricting such person
12 in the practices of law;

13 (iii) any person who is a licensed medical professional; or

14 (iv) any person who is a construction contractor.

15 (d) "Hiring party" means any person who retains a freelance worker to
16 provide any service, other than:

17 (i) the United States government;

18 (ii) the state of New York, including any office, department, agency,
19 authority or other body of the state including the legislature and the
20 judiciary;

21 (iii) a municipality, including any office, department, agency or
22 other body of a municipality; or

23 (iv) any foreign government.

24 2. (a) Except as otherwise provided by law, the contracted compen-
25 sation shall be paid to a freelance worker either:

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

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

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

36 3. (a) Whenever a hiring party retains the services of a freelance
37 worker, as such terms are defined in this section, the contract between
38 such party and worker shall be reduced to writing. The hiring party must
39 furnish a copy of such written contract, either physically or electron-
40 ically, to the freelance worker and each party to the written contract
41 shall retain a copy thereof.

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

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

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

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

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

1 (c) The commissioner may by rule require additional terms to ensure
2 that the freelance worker and the hiring party understand their obli-
3 gations under the contract.

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

10 3-a. The commissioner shall make available model contracts on the
11 website of the department for use by the general public at no cost. Such
12 model contracts shall be made available in English and in the twelve
13 languages most commonly spoken by limited English proficient individuals
14 in the state.

15 4. No hiring party, as defined in this section, shall threaten,
16 intimidate, discipline, harass, deny a work opportunity to, or discrimi-
17 nate against a freelance worker, or take any other action that penal-
18 izes a freelance worker for, or is reasonably likely to deter a free-
19 lance worker from, exercising or attempting to exercise any right
20 guaranteed under this article, or from obtaining any future work oppor-
21 tunity because the freelance worker has done so.

22 5. (a) Any freelance worker or his or her authorized representative
23 may file with the commissioner a complaint regarding a violation of this
24 article for an investigation of such complaint and statement setting the
25 appropriate remedy, if any. The commissioner shall keep the names of
26 freelance workers who are the subject of an investigation confidential
27 until such time that disclosure is necessary for resolution of an inves-
28 tigation or a complaint. Failure of a hiring party to keep adequate
29 records or provide a written contract as required under this section, in
30 addition to exposing such hiring party to penalties authorized under
31 this section, shall not operate as a bar to filing of a complaint by a
32 freelance worker. In such a case the hiring party in violation shall
33 bear the burden of proving that the complaining employee was paid in
34 accordance with this section.

35 (b) Each freelance worker who files a complaint regarding a violation
36 of this article or a rule or regulation promulgated thereunder, shall
37 be provided with a written description of the anticipated proc-
38 essing of the complaint, including investigation, case conference,
39 potential civil and criminal penalties, and collection procedures.

40 (i) Each freelance worker and his or her authorized representative
41 shall be notified in writing of any case conference before it is held
42 and given the opportunity to attend.

43 (ii) Each freelance worker and his or her authorized representative
44 shall be notified in writing of any award and collection of civil
45 penalties.

46 6. The commissioner shall have the following duties, powers and
47 authority:

48 (a) The commissioner shall investigate and attempt to adjust equitably
49 controversies between freelance workers and hiring parties relating to
50 this article.

51 (b) The commissioner may take assignments of claims for wages under
52 this article from freelance workers or third parties in trust for such
53 freelance workers or for the benefit of various funds for such freelance
54 workers. All such assignments shall run to the commissioner and his or
55 her successor in office. The commissioner may sue hiring parties on wage
56 claims thus assigned, with the benefits and subject to the provisions of

1 existing law applying to actions by freelance workers for collection of
2 wages. He or she may join in a single action any number of wage claims
3 against the same hiring party.

4 (c) (i) The commissioner is hereby authorized and empowered to enter
5 into reciprocal agreements with the labor department or corresponding
6 agency of any other state or with the person, board, officer, or commis-
7 sion authorized to act on behalf of such department or agency, for
8 the collection in such other states of claims and judgments for wages
9 based upon claims assigned to the commissioner.

10 (ii) The commissioner may, to the extent provided for by any recip-
11 rocal agreement entered into by law or with any agency of another state
12 as herein provided, maintain actions in the courts of such other state
13 for the collection of claims and judgments for wages and may assign such
14 claims and judgments to the labor department or agency of such other
15 state for collection to the extent that such an assignment may be
16 permitted or provided for by the law of such state or by reciprocal
17 agreement.

18 (iii) The commissioner may, upon the written consent of the labor
19 department or other corresponding agency of any other state or of
20 any person, board, officer, or commission of such state authorized to
21 act on behalf of such labor department or corresponding agency,
22 maintain actions in the courts of this state upon assigned claims and
23 judgments for wages arising in such other state in the same manner
24 and to the same extent that such actions by the commissioner are
25 authorized when arising in this state. However, such actions may be
26 maintained only in cases where such other state by law or reciprocal
27 agreement extends a like comity to cases arising in this state.

28 (d) Nothing in this section shall be construed as requiring
29 the commissioner in every instance to investigate and attempt to
30 adjust controversies, or to take assignments of wage claims, but he or
31 she shall be deemed vested with discretion in such matters.

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

34 (ii) Any action alleging a violation of subdivision three of this
35 section shall be brought within two years after the acts alleged to have
36 violated this article occurred.

37 (iii) Any action alleging a violation of subdivision two of this
38 section or subdivision four of this section shall be brought within six
39 years after the acts alleged to have violated this article occurred.

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

44 (v) A plaintiff who solely alleges a violation of subdivision three of
45 this section must prove that such plaintiff requested a written contract
46 before the contracted work began.

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

50 (ii) (A) A plaintiff who prevails on a claim alleging a violation of
51 subdivision three of this section shall be awarded statutory damages of
52 two hundred fifty dollars.

53 (B) A plaintiff who prevails on a claim alleging a violation of this
54 section and on one or more claims under other provisions of this article
55 shall be awarded statutory damages equal to the value of the underlying

1 contract for the violation in addition to the remedies specified in this
2 article for such other violations.

3 (iii) In addition to other damages awarded pursuant to this article, a
4 plaintiff who prevails on a claim alleging a violation of subdivision
5 two of this section is entitled to an award of double damages, injunc-
6 tive relief, and other such remedies as may be appropriate.

7 (iv) In addition to any other damages awarded pursuant to this arti-
8 cle, a plaintiff who prevails on a claim alleging a violation of subdivi-
9 vision four of this section is entitled to statutory damages equal to
10 the value of the underlying contract for each violation arising under
11 such subdivision.

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

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

20 (iii) Nothing in this paragraph prohibits:

21 (A) a person alleging a violation of this article from filing a civil
22 action based on the same facts as a civil action commenced by the attor-
23 ney general pursuant to this section; or

24 (B) the commissioner from sending a notice of complaint, unless other-
25 wise barred from doing so.

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

31 9. (a) Except as otherwise provided by law, any provision of a
32 contract purporting to waive rights under this section is void as
33 against public policy.

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

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

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

45 10. The department shall conduct a public awareness outreach campaign,
46 which shall include making information available on its website, other-
47 wise informing hiring parties of the provisions of this section, and
48 establishing a means for assistance by a natural person through phone
49 and e-mail.

50 11. (a) No later than six months after the commissioner sends to a
51 freelance worker either a hiring party's response and accompanying mate-
52 rials or a notice of non-response pursuant to section one hundred nine-
53 ty-six-a of this article, the commissioner shall send the freelance
54 worker a survey requesting additional information about the resolution
55 of the freelance worker's claims. Such survey shall ask whether or not
56 the freelance worker pursued any such claims in court or through an

1 alternative dispute resolution process and whether or not the hiring
2 party ultimately paid any or all of the compensation the freelance work-
3 er alleged was due or if the matter was resolved in a different manner.
4 Such survey shall state clearly that response to the survey is volun-
5 tary.

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

9 (i) the identity of the hiring party alleged to have violated this
10 article;

11 (ii) the freelance worker's occupation;

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

14 (iv) the value of the contract;

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

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

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

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

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

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

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

37 (v) legislative recommendations, including consideration of whether
38 certain occupations should be exempted from the scope of the definition
39 of freelance worker in this section.

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

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