STATE OF NEW YORK

8369--B

IN SENATE

February 17, 2022

Introduced by Sens. GOUNARDES, BIAGGI, CLEARE, HOYLMAN, JACKSON, KRUEGER, MYRIE, RAMOS, RIVERA, RYAN, SALAZAR, SEPULVEDA, SKOUFIS -- read twice and ordered printed, and when printed to be committed to the Committee on Labor -- reported favorably from said committee and committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- 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:

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

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

§ 191-d. Payment of wages for freelance workers. 1. (a) "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.

(b) "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.

(c) "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

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

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amount equal to or greater than eight hundred 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:

(i) 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;

(ii) 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;

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

(iv) any person who is a construction contractor.

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

(i) the United States government;

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

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

(iv) any foreign government.

2. (a) Except as otherwise provided by law, the contracted compensation shall be paid to a 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.

3. (a) Whenever a hiring party retains the services of a freelance worker, as such terms are defined in this section, 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.

3-a. 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.

4. No hiring party, as defined in this section, 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.

5. (a) Any freelance worker or his or her authorized representative 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. The commissioner shall keep the names of freelance workers who are the subject of an investigation confidential until such time that disclosure is necessary for resolution of an investigation or a complaint. Failure of a hiring party to keep adequate records or provide a written contract as required under this section, in addition to exposing such hiring party to penalties authorized under this section, shall not operate as a bar to filing of a complaint by a freelance worker. In such a case the hiring party in violation shall bear the burden of proving that the complaining employee was paid in accordance with this section.

(b) Each freelance worker who files a complaint regarding a violation of this article or a rule or regulation promulgated thereunder, 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.

(i) 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.

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

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

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

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

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

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

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

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

(d) 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, but he or she shall be deemed vested with discretion in such matters.

7. (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 three of this section shall be brought within two years after the acts alleged to have violated this article occurred.

(iii) Any action alleging a violation of subdivision two of this section or subdivision four of this section 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 three of this section 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 subdivision two of this section 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 three of this section shall be awarded statutory damages of two hundred fifty dollars.

(B) A plaintiff who prevails on a claim alleging a violation of this section 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 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 two of this section 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 four of this section is entitled to statutory damages equal to the value of the underlying contract for each violation arising under such subdivision.

8. (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 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, unless otherwise barred from doing so.

(b) In any civil action commenced pursuant to 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.

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

(b) The provisions of this section 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 section 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 section 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.

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

11. (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 article;

(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 this section.

§ 3. 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.

§ 4. 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.