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Little Known Law Can Lead to Large Liability: The Freelance Isn't Free Act

By Adam L. Browser and Brian Passarelle
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Have you heard of the Freelance Isn't Free Act ("Freelance Act" or the "Act")? This relatively unknown New York City law provides protections for freelance workers and imposes harsh penalties for those businesses that fail to comply with the Act's requirements. If your clients hire freelance workers, you should be aware of the Act and its requirements.

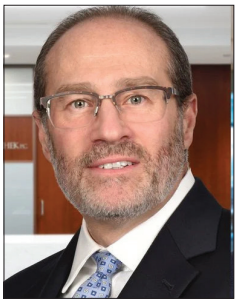
The Freelance Act

The New York City Council passed the Freelance Act in 2016. It took effect on May 15, 2017. One court described it as the first legislation in the nation that directly seeks to protect the labor rights of freelance workers.

The Act aims to provide protection to workers in an economy where workers are increasingly hired for discrete or short-term tasks rather than as full-time employees. The Act is a model for potential legislation by New York State (and other governmental entities) and deserves attention.

Under the Freelance Act, any contract with a freelance worker that exceeds $800 in compensation must be in writing. The $800 threshold is reached either by a single contract or when aggregated with all contracts for services provided by the freelance worker to the hiring party during the preceding 120 days. The Freelance Act defines "freelance worker" as:

any natural person or any 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 [persons or entities] to provide services in exchange for compensation.



Adam Browser

Brian Passarelle

A "hiring party" is defined as any person, organization, or entity other than a local, state, federal, or foreign government that retains a freelance worker to provide any service. The Act excludes employees, sales personnel, licensed attorneys, and licensed medical professionals from its requirements.

The written contract must include the name and mailing address of both the hiring party and freelancer, an itemization of the services the freelancer is providing, the compensation for those services, and the date for payment (or a mechanism for when payment will be due). If no specific date for payment is listed, the law requires that the freelancer be paid in full within 30 days of the completion of the work.

Any contract attempting to waive the requirements under the Freelance Act is void as a matter of law. Furthermore, a hiring party may not retaliate against a freelance worker that exercises rights under the Act. Prohibited retaliatory conduct includes attempts to penalize, threaten, blacklist, or otherwise deter workers from exercising their rights or obtaining future work.

Failure to abide by these requirements when dealing with freelancers can result in significant penalties. Besides statutory damages of $250.00 where there are violations of the contractual requirements, the freelance worker can recover double the amount owed, and reasonable attorneys' fees for payment violations or retaliatory conduct.

Injunctive relief is available for payment violations. There is a two-year statute of limitations for violations based on the contract requirements and a six-year statute of limitations for payment violations and retaliatory conduct.

Furthermore, where there is evidence of a pattern or practice of violating the Freelance Act's requirements, the New York City Corporation Counsel may bring a civil action to recover a penalty of up to $25,000.00 and other appropriate remedies. That has occurred at least once.

In *City of New York v. L'Officiel USA Inc.*, Index No. 453762/2021 (Sup. Ct. N.Y. Cnty.), corporation counsel alleged multiple violations of the Freelance Act, and sought injunctive relief, an award of double damages for each of the affected freelancers, per diem penalties of $100, appointment of a court monitor, and penalties of $10,000 for each future violation. The case is ongoing.

Administrative Process

The Freelance Act establishes a complaint procedure administered by the New York City's Office of Labor Policy & Standards (OLPS), part of the Department of Consumer Affairs. Upon receipt of a complaint by a freelancer, the commissioner will notify the hiring party, which has 20 days to respond with either: (i) proof that the freelancer has been paid in full; or (ii) the reasons for non-payment.

The commissioner will then advise the freelancer of the hiring party's response and that the freelancer can bring an action.

The commissioner also establishes a "navigation program" that provides a freelancer with resources, including model contracts and information on pursuing a civil action. While the commissioner cannot adjudicate the dispute or fine the hiring party, the failure of the hiring party to respond to the complaint gives rise to a rebuttable presumption that the hiring party violated the law. Thus, a hiring party is unwise to ignore an administrative complaint.

A freelancer has two years after the violation to file an administrative complaint. Moreover, the freelancer need not go through the OLPS process before filing suit. The freelancer is free to pursue litigation in the first instance. If the freelancer does so, or if the hiring party has commenced litigation against the freelancer, OLPS lacks jurisdiction, and the administrative process cannot continue while the civil action is pending.

The NYC Consumer and Worker Protection Department received 264 complaints within the first year after the Act took effect. //www.nyc.gov/assets/dca/downloads/pdf/workers/Demanding-Rights-in-an-On-Demand-Economy.pdf. The Department is required to issue a report on Nov. 1, 2023 (and every five years thereafter) that, among other things, quantifies the number of complaints received, the responses and non-responses, and recommendations for whether to exempt certain occupations from the definition of freelance worker.

Judicial Treatment

To date, relatively few published decisions have discussed the Freelance Act. We have uncovered only eight reported decisions and only one from an appellate court, not surprisingly, the First Department. Claims under the Freelance Act have been raised in at least one Federal case, *Varn v. Orchestrade, Inc.*, 2022 WL 900855 (E.D.N.Y. 2022), and the Act has been mentioned in another, *Cortes v. DS Brooklyn Portfolio Owner LLC*, 2022 WL 4482299 (S.D.N.Y. 2022).

This dearth of case law is presumably because the Act is still relatively new and not well-known. The case law to date does not give much guidance on how expansively the Act will be applied, both geographically and who qualifies as a freelancer or a hiring party. Of course, both of those conditions will change as time goes by. Some questions not answered by the statutory language are:

• must the freelance worker be a New York City resident for the Act to apply;

• must the work be performed in New York City for the Act to be applicable;

• if a New York City-based freelance worker is hired *via* the Internet and the hiring party is unaware of that, does the hiring party have a defense;

• is substantial compliance with the Act a valid defense, or a factor to avoid double damages.

The limited case law has not answered these questions.

The only appellate decision to date, *Chen v. Romona Kezeva Collection LLC*, 208 A.D.3d 152 (1st Dept. 2022), involved claims brought by a photographer and a model. The photographer entered into a written agreement with a hiring party for a photoshoot.

It appears that the model did not have a written contract with the hiring party, but her modeling agency did, and she performed modeling services for two years. Two of the issues on appeal for the First Department to decide were whether the photographer or the model met the definition of a freelance worker under the Act.

The hiring party claimed that the photographer did not because he provided four people for the photoshoot, and the Act defined a freelance worker as one person. As to the model, the hiring party claimed it had a contract with her modeling agency to provide models on an as-needed basis, and hence she lacked privity with and standing to sue the hiring party.

In finding that the record was inconclusive, the First Department allowed both the photographer's and the model's claims to proceed. In part, the First Department based its decision on the hiring party's failure to respond to the model's OLPS complaint, which led to a rebuttable presumption that the hiring party violated the law.

Of note, and concern to hiring parties, is the First Department's comment that:

[t]he Act does not mandate contracting between a freelance worker and the hiring party. While FIFA does not explicitly address its applicability to workers represented by agents, the plight of such workers was certainly before the City Council when it passed FIFA in the form of testimony from FIFA proponents in various industries sharing that freelance workers utilize agents. FIFA identifies specific categories of individual workers who are not freelancers under the Act. Notably, persons who are represented by an agent are not included in that finite list.

Id. at 159.

The implications of this are vast. Hiring parties may have exposure to a whole assortment of individuals with whom they did not directly hire.

Moreover, the hiring party may be exposed to the Act's protections even if the freelancer resides outside New York City. In *Turner v. Sheppard Grain Enterprises, LLC*, 68 Misc.3d 385 (Sup. Ct. 2020), the New York County Supreme Court held that the Freelance Act did not apply when a NYC based company hired a consultant who lived and performed his freelance work outside of NYC.

However, relying on guidance provided by the NYC Consumer Affairs, the Court stated, in *dicta*, that the Freelance Act would likely protect non-residents of NYC who are hired to perform work within NYC.

According to the NYC Consumer Affairs, the Freelance Act may also apply to work performed outside NYC. The Act's applicability depends on the overall circumstances of the agreement, including whether some of the work is performed in NYC, whether the worker was hired or retained in NYC, and the hiring party's operations within NYC.

In other words, it is unclear at this point the extent of the law's applicability. *See* NYC Consumer Affairs, Freelance Isn't Free Act: Frequently Asked Questions, http://www1.nyc.gov/assets/dca/downloads/pdf/workers/FAQs-Freelance.pdf.

Hiring parties may take some comfort in the fact that, unlike certain wage and hour claims, the Freelance Act does not, as of now, impose personal liability upon owners or officers of a hiring party that do not contract in their individual capacity.

In *St. Clair v. Sansal,* 73 Misc.3d 492 (Civ. Ct. NY County 2021), an independent contractor sued a hiring party and its president and CEO, alleging violations of the Freelance Act. The Civil Court ruled in favor of the independent contractor and awarded double damages against the corporate entity. However, the court dismissed the claims asserted against the president and CEO.

What Does the Future Hold

The Freelance Act took effect only a little more than five years ago. Many attorneys are unaware of it. However, this legislation has the potential to spawn litigation akin to the wage and hour laws. A quick Google search uncovers attorneys prominently promoting the Freelance Act on their websites. Considering the double damages and attorney fees available under the Act, hiring parties must be vigilant to avoid running afoul of the Act, or face the financial consequences.

Furthermore, the Freelance Act is a harbinger of additional, similar legislation. A New York State version of the Freelance Act (S8369-B) was passed last year but vetoed by Governor Hochul. It has been reintroduced (S5206) but yet to be voted on. Whether or not the state-wide law passes, hiring parties must know about the Freelance Act and ensure they comply with its requirements.

Adam L. Browser *is of counsel at Ruskin Moscou Faltischek and a member of the firm's litigation, financial services, banking & bankruptcy departments, and the insurance litigation and construction practice groups.* **Brian Passarelle** *is an associate at the firm and a member of the its commercial litigation department and insurance practice group.*