

**FOCUS:
LABOR LAW**

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In 2017, New York City passed the Freelance Isn't Free Act, which established certain requirements for contracts between freelance workers and hiring parties.¹ These requirements apply to contracts or a series of contracts worth \$800 or more, entered into within 120 days of each other. It also imposes penalties for non-compliance and failure to pay the freelance worker, as well as an administrative mechanism for enforcement. That law, only six years old, has spawned additional, similar legislation in other cities and states across the country. Cities like Los Angeles, Seattle, Minneapolis, and Columbus, Ohio, have passed their own laws safeguarding freelance workers. Additionally, states such as New York, Illinois, Kansas, and Missouri have pending bills aimed at providing similar protections.²

Why is this now a thing?

The Rise of Freelance Work

According to Upwork, the rise of freelance work has been significant, with 60 million Americans engaging in freelancing in 2022, comprising 39% of the total workforce. Upwork reports that freelance workers contributed \$1.35 trillion to the US economy last year. This growing trend is expected to continue due to technological advancements, economic factors, and societal changes.³

Bills Passed in the State Legislature

Using New York City's law as a model, in 2022, the New York State legislature passed Senate Bill 8369, also called the "Freelance Isn't Free Act." The bill proposed the addition of a new section, 191-d, to New York's Labor Law, establishing state-wide requirements similar to those already in place in New York City. Governor Hochul vetoed that bill. However, the bill was reintroduced in February of this year as Senate Bill 5026 and Assembly Bill A6040. It has successfully passed through both chambers of the legislature and

Freelance Isn't Free

now awaits further action by the Governor.

When the bill was introduced, the sponsor highlighted the following points:

- Between 2018 and 2019, 1,191 cases were filed with the New York City Department of Consumer and Worker Protection regarding freelance work;
- Over \$1.3 million was recovered in restitution and penalties as a result; and
- In 2020, 490 complaints were filed.⁴

The sponsor also noted that freelance workers lack the protections that employees have with respect to wage theft and intentionally sought to replicate those protections. Governor Hochul, in her veto of the similar bill the previous year, cited two reasons for her decision: First, she expressed that it would cost several million dollars annually and require an increase of Department of Labor staff, and those costs were not accounted for in the state budget. Second, she stated it would make the Department of Labor responsible for a form of regulation of private contracts between companies and non-employees, which is outside the Department's statutory charge to enforce labor protections for employees.⁵

The Text of the Legislation

The bill is loosely organized into several sections, including definitions, contract requirements, penalties, and miscellaneous provisions.

The bill defines a freelance worker as:

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 \$800, either by itself or when aggregated with all contracts for services between the same hiring party and freelance worker during the immediately preceding 120 days.

The definition excludes sales representatives who solicit orders in New York State, persons engaged in the private practice of law, licensed medical professionals, and construction workers. The last item,



the exclusion of construction workers from the scope of the proposed act, is a key difference between the New York City law and New York State bill. However, the same low \$800 threshold for the act applies, including that contracts between the same parties that are entered into within 120 days of each other can be aggregated together to reach the \$800 threshold.

The bill defines a hiring party as any person who retains a freelance worker to provide any service. All governmental entities at the state, local, federal, and foreign levels are explicitly excluded from the definition of a hiring party. This definition aligns in substance with the definition used in the New York City law.

The bill requires that the contract must be reduced to a writing and provided to the freelance worker. The contract must include:

- the name and mailing address of both parties;
- a list of all services to be provided by the freelancer;
- the value of the services to be provided and the rate and method of compensation;
- the date or mechanism when payment will be made;
- the date by which the freelancer must submit a list of services rendered to meet any internal processing deadlines of the hiring party; and
- additional terms as required by the Commissioner of Labor.

Protections for Freelancers

The bill requires that the hiring party must pay the freelance worker the agreed-upon compensation as per their contract. If the contract does not

specify a time frame, the hiring party must pay the freelancer within 30 days of the freelancer's services. Each party is required to retain a copy of the contract, with the hiring party keeping it for at least six years. The freelancer is not subject to a specific time frame for maintaining the contract. Furthermore, if the hiring party fails to produce the contract upon request of the Commissioner of Labor, it gives rise to a presumption that the contract terms the freelancer presented to the Commissioner are what was agreed upon by the parties.

The bill declares that any provision in a contract attempting to waive rights under the proposed statute is void as against public policy. Section 4 of the bill prohibits the hiring party from engaging in actions that penalize or deter a freelance worker from exercising their rights under the proposed law or obtaining future work opportunities. This encompasses actions such as threatening, intimidating, disciplining, harassing, or discriminating against the freelance worker.

Penalties for Violations

Violations, or potential violations, of the statute can be pursued by the freelance worker, the Commissioner of Labor, and the New York State Attorney General. The freelancer can file a complaint with the Commissioner of Labor and can file a civil action in court. If a civil lawsuit is commenced, the freelancer is required to serve a copy of the Complaint on the Commissioner of Labor but failure to do so is not a bar or defense to the action. A freelancer who alleges only that the hiring party violated the contractual requirements of the legislation must prove that he or she requested a copy of the contract before beginning work.

The Commissioner of Labor can investigate claims and seek an equitable resolution between the parties. It can also take an assignment of claims and sue hiring parties civilly. The Commissioner can aggregate any number of claims that are lodged against a hiring party and join them in a single action.

The Commissioner of Labor can also enter into reciprocal agreements with the labor departments of other states and pursue civil claims against hiring parties in those other states or assign claims to the other state's labor department for enforcement. Similarly, provided it is in the reciprocal agreement, the Commissioner is authorized to take an assignment of claims from a labor department of another state and pursue civil actions in New York courts to collect that foreign state's claim.

This is a remedy that is not available under the New York City law and can have far wider consequences than New York City's version. There are questions about the geographical scope and applicability of the New York City law. However, based on the language of the New York State proposed law, it applies to any situation where either the hiring party or the freelancer is a New York resident.

If it appears that a hiring party is consistently violating the provisions of the proposed act, the New York State Attorney General has the authority to initiate legal action. The commencement of an action by the Commissioner of Labor or the Attorney General does not prevent a freelancer from pursuing their own civil action, and vice versa.

Damages

The damages or penalties that can be awarded differ depending on the type of claim asserted and by whom it is brought. In an action brought by the Attorney General, a court may impose a civil penalty of no more than \$25,000, which gets paid to New York State. The Attorney General is also authorized to seek injunctive relief and obtain other appropriate relief.

A freelancer can recover:

- a) actual damages measured as the value of the underlying contract, double damages, reasonable attorneys' fees and injunctive relief on a compensation-based claim;
- b) statutory damages equal to the value of the underlying contract for a violation based on discrimination, harassment, or intimidation; and
- c) statutory damages of \$250

based on the absence of a written contract or omission of required information in the contract.

Compensation-based claims should not be treated lightly. The availability of double damages and recovery of attorney's fees gives the bill real bite and what makes it attractive as a source of business for contingency-based lawyers.

The applicable statutes of limitations depend on the type of violation alleged. Claims based on violations of the contractual requirements must be brought within two years after the violation occurred. Claims based on violations of the payment requirements must be brought within six years after the acts or omissions occurred. An action based on the hiring party's discrimination, harassment, intimidation, or the like of the freelancer must also be brought within six years after the act occurred.

If passed, the bill goes into effect 180 days after it becomes law. It applies to contracts entered into after the effective date and is not retroactive. It would not supersede or preempt the New York City law but would be in addition to. Thus, a hiring party could be investigated simultaneously by the labor departments of New York State and New York City.

Violation of the proposed statute does not invalidate the contract between the freelance party and the hiring party. A hiring party can still enforce the contract. It is no defense by a freelance worker that the contract violates the statute. Of course, a hiring party should think long and hard about the possible collateral consequences of attempting to enforce a contract that violates the statute.

Department of Labor Involvement

The Department of Labor is required to conduct a public awareness campaign about the obligations and rights that exist under the statute and provide assistance via phone and email. It is also required to survey freelance workers that file claims and gather data about how claims are being resolved. On the first anniversary of passage of the statute and every five years thereafter, the Commissioner of Labor must issue a report about the effectiveness of improving freelance contracts and payment practices, including recommendations for changes to the statute.

Other States' Freelance Laws

Other states, Illinois, Kansas, and Missouri have also introduced

bills that are modeled on the New York City law.⁶ Surprisingly, some provisions of those bills provide greater protections than those of the New York City law or the New York State bill. For example, the Illinois and Kansas bills apply to contracts with a value of \$500, while Missouri's threshold is \$250.⁷ Furthermore, Illinois would impose criminal penalties for willfully refusing to pay or falsely denying the amount or validity of the claim.⁸ The Kansas bill grants standing to non-profit organizations to bring an action on behalf of freelance workers.⁹

Conclusion

To conclude, New York City's law and New York State's proposed law carry significant risk for the uninformed business owner or lawyer who renders advice without knowing the consequences for violations of the freelance law. Recovery of double damages and attorneys' fees make the New York City law and New York State bill a powerful tool for freelancers to ensure they get paid. Moreover, those provisions are attractive for contingency lawyers seeking new litigation opportunities. ⚖️

1. See NYC Admin Code §20-927 et seq.

2. See Freelance Worker Protection Act, 2023 Illinois

Senate Bill No. 2041; Freelance Isn't Free Act, 2023 Kansas House Bill No. 2399; and Freelance Isn't Free Act, 2023 Missouri House Bill No. 1331.

3. See Upwork, 2022, December 13, Freelance Forward 2022, <https://www.upwork.com/research/freelance-forward-2022>.

4. See Sponsor Memo to 2022 New York Senate Bill No. S8369B.

5. See Hochul, Kathy, 2022, December 23, Veto #170 of 2022, Senate Bill Number 8369-B.

6. Illinois' Freelance Workers Protection Act (HB 122); Kansas' Freelance Isn't Free Act (HB 2399); Missouri's Freelance Isn't Free bill (HB1331).

7. See Section 5 of Illinois Senate Bill No. 2041; section 3(a) of Kansas House Bill No. 2399; and section 2(4) of 2023 Missouri House Bill No. 1331.

8. See Section 35 of 2023 Illinois Senate Bill No. 2041.

9. See Section 8(a)(2) of the 2023 Kansas House Bill No. 2399.



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