

New Rights For New York City Freelancers Effective May 15, 2017

The Bottom Line

- *New York City employers should: (a) review and update template independent contractor agreements to ensure they comply with FIFA; (b) engage with counsel before taking action that could be perceived as retaliatory with regard to a freelancer; and (c) respond in a timely manner to any administrative or civil action complaint initiated by a freelancer under FIFA.*
- *Moreover, employers should continue to carefully assess independent contractor classifications to avoid risk of misclassification claims. Misclassification claims are now even more costly to employers in light of civil fines under FIFA against employers that exhibit a pattern or practice of violations.*

New York City freelancers hired by private employers will have new rights and protections under the New York City Administrative Code pursuant to the “Freelance Isn’t Free Act” (FIFA). The new law will govern all freelance agreements entered into on or after May 15, 2017 (with no retroactive effect).

Who is a “Freelancer”?

The new law applies to individual freelancers and organizations composed of one person, whether or not the organization is incorporated or uses a trade name, that is hired or retained as an independent contractor by a hiring party to provide services in exchange for compensation.

New Freelancer Rights

Under FIFA, for all contracts valued at \$800 or more, hiring parties will have to enter into written contracts with freelancers. This requirement covers freelancers who may work on several smaller projects which, in the aggregate within a 120-day period, adds up to a value of \$800 or more. Since hiring parties may not always know at the inception of a relationship whether a freelancer will work on additional projects, entering into written contracts with all freelancers is recommended.

Under FIFA, the contract must include, at a minimum:

- The name and mailing address of the hiring party and freelance worker
- An itemization of all services to be provided by the freelance worker
- The value of the services to be provided by the freelance worker
- The rate and method of compensation
- The date on which the hiring party must pay the freelancer, or the mechanism by which such date will be determined.

As a best practice, freelancer contracts should also include language governing confidentiality/non-disclosure of information, intellectual property ownership, and representations and warranties by the freelancer that, among other protections, the freelancer understands and agrees that he/she/it:

- is an independent contractor and not an employee,
- is responsible for all taxes relating to payment for services rendered,
- has tools and equipment to perform the services and will not use those of the hiring party;
- will determine hours and location of services to be rendered.

The new law also guarantees freelancers the right to timely and full payment for services rendered. Timely payment must be made either pursuant to the timetable set forth in the contract between the parties, or, if the contract is silent, no later than 30 days after the completion of the freelancer's services under the contract. The law also specifies that once a contractor has commenced services, a hiring party cannot require as a condition of timely payment, that the freelancer accept less compensation than the previously agreed-upon amount.

As a best practice, since hiring parties may sometimes have a good faith dispute regarding the value or performance of the services rendered, hiring parties should include clear language in freelancer contracts concerning timing of payment of undisputed invoices, and provide a mechanism for good faith disputes.

New Retaliation Protections

Under the new law, a hiring party cannot threaten, intimidate, discipline, harass, discriminate against, deny a work opportunity to, or take any action to penalize or deter a freelancer from exercising rights under FIFA.

Complaint Procedure and Remedies for Violation

The New York City's Office of Labor Standards (OLS) will be responsible for enforcing FIFA. Freelancers who believe their FIFA rights have been violated can either file a complaint with OLS within 2 years, or initiate a lawsuit in court within the applicable statute of limitations period(s). Notably, the statute of limitations to proceed in court is 2 years for a violation of FIFA's written contract requirement, but is 6 years with regard to the FIFA provisions governing timely payment and retaliation. If a hiring party receives notice of an OLS complaint, it should make sure to respond in a timely manner within 20 days. Failure to timely respond creates a rebuttable presumption of liability.

A prevailing freelancer can recover damages and attorneys' fees. The amount of damages will vary depending on the nature of the claim, but could include damages equal to the value of the underlying contract, double damages, injunctive relief, and reasonable attorneys' fees and costs. Additionally, the City can also impose a civil fine on the hiring party for up to \$25,000 (to be paid into a general city fund), upon a determination that the hiring party has engaged in a pattern or practice of violating FIFA.

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