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"Freelance Isn't Free"
New Regulations Adopted in New York City Requiring Written Contracts with Independent Contractors

Attacks on employers for alleged misclassification of workers—*particularly independent contractors*—are continuing unabated, and the risk of liability for employers operating in New York City just increased. New York City has just adopted sweeping regulations requiring written contracts with certain freelancers and independent contractors. Anyone doing business in that jurisdiction should take notice and take action to comply with the law.

New York City's "Freelance Isn't Free Act," N.Y.C. Administrative Code §§ 20-927 et seq. ("FIFA") went into effect on May 15, 2017. This new law substantially regulates the relationship between a business and an independent contractor or "freelancer" working in New York City.

These regulations require that employers enter into a written contract with all independent contractors hired to provide services valued at $800 or more. The parties' written contract must establish the nature of the services being performed, the amount to be paid, and the date of payment (or a statement of the conditions that determine when payment is to be made). The law allows independent contractors to bring a civil action to enforce rights under the act, and to recover compensation owed, statutory damages and attorneys' fees.

Who is a "Freelance Worker" Under FIFA?

The act defines a "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 to provide services in exchange for compensation," excluding certain sales representatives, legal practitioners and medical professionals. "Hiring Party" covers all persons (including corporations) who retain freelancers to provide any service, excluding federal, state, local and foreign governments.

The Requirements for a Written Contract

The act provides that, where the value of services being performed exceed $800 or more (standing alone or aggregated across the immediately preceding 120 days), that contract must be reduced to writing, and must include, at minimum:

1. The name and mailing address of both the hiring party and the freelancer;

2. An itemization of all services to be provided by the freelancer, the value thereof, and the rate and method of compensation; and

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3. The date on which the hiring party must pay (or procedure for determining such date).

As noted above, plaintiffs can bring a civil action for alleged violations of these provisions. If a plaintiff prevails, s/he will receive statutory damages of $250 (and, if payment is owed under the contract, that sum) along with reasonable attorneys' fees and costs.

Employers need to be aware of some potentially problematic provisions in FIFA. For instance, the act says that the compensation required to be paid in the contract must be paid on or before the date set therein, or no later than 30 days "after the completion" of the freelancer's work where that contract is tied to performance. However, the act does not define "completion." Perhaps even more problematic is that the act states that once a freelancer has "commenced performance" of the contracted-for services, the hiring party cannot require, as a condition of timely payment, that the freelancer accept less compensation than is stated in the contract. Violations of these provisions may entitle the freelance to not only reasonable attorneys' fees and costs, but to double damages, injunctive relief and "other such remedies as may be appropriate."

Anti-Retaliation Provisions

The Act provides that hiring parties are prohibited from, among other things, "deny[ing] a work opportunity to or discriminat[ing] against" a freelancer, or "tak[ing] any other action that penalizes" a freelancer, or is reasonably likely to deter the freelancer from exercising rights. The statute of limitations on claims for violating such provision is long—six years—and the plaintiff who prevails will recover reasonable attorneys' fees and costs, as well as statutory damages equal to the value of the underlying contract for each violation.

The Act is New, But the Risks Are Clear and Unmistakable

Employers operating in New York City who use independent contractors should engage in an audit to be sure they are in compliance, as this new act could generate significant risk of litigation. The ambiguity in the law about compromising sums owed to independent contractors could generate litigation, as could the anti-retaliation provisions.

The New York City Council's actions are part of a growing trend in the United States to closely scrutinize the use of independent contractors. I've written previously about the United States Department of Labor (DOL)'s Misclassification Initiative and the efforts by a majority of states to impose their own misclassification laws, as well as the Equal Employment Opportunity Commission (EEOC)'s strategic enforcement plan placing a priority on addressing this issue.

The act is new, but the risks are clear and unmistakable. This highlights the importance of closely examining your company's contracts and procedures to ensure compliance with applicable law and guidelines to avoid prolonged and expensive litigation in the event of claims for unpaid wages. Our Labor Relations and Employment Law Department is available to counsel your business in these areas, so please feel free to contact us at any time.

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