Make All the Right Moves: Legal Issues in Dance

June 22, 2020 7:00-9:00

Timed Agenda:

- Introduction (10 minutes)

- Dance As A Business: (30 minutes) (Joseph)/(Adam)
    1. Why should an independent contractor incorporate as a business?
    2. Business Formation (LLC vs. Corporation vs. non-profit): tax benefits

- Contracts – why they are imperative (30 minutes)
    1. Work-for-Hire - the employer owns the content created by employees
        - Ownership can also be determined by contract
    2. Protecting Your Intellectual Property
        - I.P. Licensing
        - How is working online affecting control over IP?
    3. Releases – can you say no?
        - What happens when old recordings are is being broadcast online?
            - What are the performers' rights?
            - Do they get compensated?
    4. Force Majeure:
        - Cancellation or Partial performance/how can performers protect themselves?
            - Do they get partial payment? No payment?

- Labor and Employment Issues (30 minutes)
    1. Freelance isn't Free Act (Joseph)
        - Requires contracts for work over $800; double damages for failure to pay
        - Issues for dancers (Griff)
    2. Employee Versus Independent Contractor
        - Pros/Cons
        - Miscategorization
        - What if you are both w-2 and 1099? Pros cons
            - How does this affect collecting unemployment?
    3. Benefits of Union Membership (Griff)
        - Collective bargaining
        - DANC: how can independent dancers to acquire collective benefits
    4. Safety issues: (Adam)
        - What if you are not comfortable going back to work?
        - Performing remotely in unsuitable spaces
        - Renting a space – who provides insurance?
            - Read the lease – who carries the liability for injuries?

- Q&A (20 minutes)

MATERIALS

Note: New York City businesses must comply with all relevant federal, state, and City laws and rules. All laws and rules of the City of New York, including the Consumer Protection Law and Rules, are available through the Public Access Portal, which businesses can access by visiting www.nyc.gov/dca. The Law and Rules are current as of May 2018.

Please note that businesses are responsible for knowing and complying with the most current laws, including any City Council amendments. The Department of Consumer Affairs (DCA) is not responsible for errors or omissions in this packet. The information is not legal advice. You can only obtain legal advice from a lawyer.

NEW YORK CITY ADMINISTRATIVE CODE TITLE 20: CONSUMER AFFAIRS CHAPTER 10: FREELANCE WORKERS

§ 20-927 Definitions.

For purposes of this chapter, the following terms have the following meanings:

Director. The term "director" means the director of the office of labor standards established pursuant to section 20-a of the charter.

Freelance worker. The term "freelance worker" means 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. This term does not include:

1. Any person who, pursuant to the contract at issue, is a sales representative as defined in section 191-a of the labor law;
2. 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 any court suspending, enjoining, restraining, disbarring or otherwise restricting such person in the practice of law; and
3. Any person who is a licensed medical professional.

Hiring party. The term "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) the city, including any office, department, agency or other body of the city, (iv) any other local government, municipality or county or (v) any foreign government.

Office. The term "office" means the office of labor standards established pursuant to section 20-a of the charter.

§ 20-928 Written contract required.

a. Whenever a hiring party retains the services of a freelance worker and the contract between them has a value of $800 or more, 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 contract shall be reduced to writing. Each party to the written contract shall retain a copy thereof.
b. The written contract shall include, at a minimum, the following information:
    1. The name and mailing address of both the hiring party and the freelance worker;
    2. 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; and

3. The date on which the hiring party must pay the contracted compensation or the mechanism by which such date will be determined.

c. The director may by rule require additional terms to ensure that the freelance worker and the hiring party understand their obligations under the contract.

§ 20-929 Unlawful payment practices.

a. Except as otherwise provided by law, the contracted compensation shall be paid to the freelance worker either:
   1. On or before the date such compensation is due under the terms of the contract; or
   2. 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 30 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.

§ 20-930 Retaliation.

No hiring party 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 freelancer worker from, exercising or attempting to exercise any right guaranteed under this chapter, or from obtaining future work opportunity because the freelance worker has done so.

§ 20-931 Complaint procedure; jurisdiction of director.

a. Complaint. A freelance worker who is aggrieved by a violation of this chapter may file a complaint with the director within two years after the acts alleged to have violated this chapter occurred. The director shall prescribe the form of the complaint, which shall include, at a minimum:
   1. The name and mailing address of the freelance worker and of the hiring party alleged to have violated this chapter;
   2. A statement detailing the terms of the freelance contract, including a copy of such contract if available;
   3. The freelance worker's occupation;
   4. A statement detailing the alleged violations of this chapter; and
   5. A signed affirmation that all facts alleged in the complaint are true.

b. Referral to navigation program. At the time the director receives a complaint alleging a violation of this chapter, the director shall refer the freelance worker to the navigation program identified in section 20-932.

c. Jurisdiction.
   1. The director does not have jurisdiction over a complaint if:
   (a) Either party to the contract has initiated a civil action in a court of competent jurisdiction alleging a violation of this chapter or a breach of contract arising out of the contract that is the subject of the complaint filed under subdivision a of this section, unless such civil action has been dismissed without prejudice to future claims; or
   (b) Either party to the contract has filed a claim or complaint before any administrative agency under any local, state or federal law alleging a breach of contract that is the subject of the complaint filed under subdivision a of this section, unless the administrative claim or complaint has been withdrawn or dismissed without prejudice to future claims.
   2. Where the director lacks jurisdiction over a complaint, the director shall notify the following, in writing, within 10 days of discovering the lack of jurisdiction:
      (a) The freelance worker; and
      (b) The hiring party, if the director discovered the lack of jurisdiction after sending a notice to the hiring party pursuant to subdivision d of this section.

d. Notice to hiring party. Within 20 days of receiving a complaint alleging a violation of this chapter, the director shall send the hiring party named in the complaint a written notice of complaint. Such

notice shall inform the hiring party that a complaint has been filed alleging violations of this chapter, detail the remedies available to a freelance worker for violations of this chapter by a hiring party and include a copy of the complaint and notice that failure to respond to the complaint creates a rebuttable presumption in any civil action commenced pursuant to this chapter that the hiring party committed the violations alleged in the complaint. The director shall send such notice by certified mail and shall bear the cost of sending such notice.

e. Response.
    1. Within 20 days of receiving the notice of complaint, the hiring party identified in the complaint shall send the director one of the following:
        (a) A written statement that the freelance worker has been paid in full and proof of such payment; or
        (b) A written statement that the freelance worker has not been paid in full and the reasons for the failure to provide such payment.
    2. Within 20 days of receiving the written response, the director shall send the freelance worker a copy of:
        (a) The response;
        (b) Any enclosures submitted to the director with the response;
        (c) Materials informing the freelance worker that he or she may bring an action in a court of competent jurisdiction;
        (d) Any other information about the status of the complaint; and
        (e) Information about the navigation program described in section 20-932.
    3. If the director receives no response to the notice of complaint within the time provided by paragraph 1 of this subdivision, the director shall mail a notice of non-response to both the freelance worker and the hiring party by regular mail and shall include with such notice proof that the director previously mailed the notice of complaint to the hiring party by certified mail. Upon satisfying the requirements of this paragraph, the director may close the case.

§ 20-932 Navigation program.

a. The director shall establish a navigation program that provides information and assistance, as set forth in subdivision c of this section, relating to the provisions of this chapter. Such program shall include assistance by a natural person by phone and e-mail and shall also include online information.
b. The director shall make available model contracts on the website of the office for use by the general public at no cost. Such model contracts shall be made available in English and in the six languages most commonly spoken by limited English proficient individuals in the city as determined by the department of city planning.
c. The navigation program shall provide the following:
    1. General court information and information about procedures under this chapter;
    2. Information about available templates and relevant court forms;
    3. General information about classifying persons as employees or independent contractors;
    4. Information about obtaining translation and interpretation services and other courtroom services;
    5. A list of organizations that can be used for the identification of attorneys; and
    6. Other information, as determined by the director, related to the submission of a complaint by a freelance worker or the commencement of a civil action pursuant to this chapter by a freelance worker.
d. The navigation program shall include outreach and education to the public on the provisions of this chapter.
e. The navigation program shall not provide legal advice.

§ 20-933 Civil action.

a. Cause of action.

1. Except as otherwise provided by law, a freelance worker alleging a violation of this chapter may bring an action in any court of competent jurisdiction for damages as described in subdivision b of this section.
2. Any action alleging a violation of section 20-928 shall be brought within two years after the acts alleged to have violated this chapter occurred.
3. Any action alleging a violation of sections 20-929 or 20-930 shall be brought within six years after the acts alleged to have violated this chapter occurred.
4. Within 10 days after having commenced a civil action pursuant to subdivision a of this section, a plaintiff shall serve a copy of the complaint upon an authorized representative of the director. Failure to so serve a complaint does not adversely affect any plaintiff's cause of action.
5. A plaintiff who solely alleges a violation of section 20-928 must prove that such plaintiff requested a written contract before the contracted work began.

b. Damages.
1. A plaintiff who prevails on a claim alleging a violation of this chapter shall be awarded damages as described in this subdivision and an award of reasonable attorney's fees and costs.
2. Violation of section 20-928.
   (a) A plaintiff who prevails on a claim alleging a violation of section 20-928 shall be awarded statutory damages of $250.
   (b) A plaintiff who prevails on a claim alleging a violation of section 20-928 and on one or more claims under other provisions of this chapter shall be awarded statutory damages equal to the value of the underlying contract for the violation of section 20-928 in addition to the remedies specified in this chapter for the other violations.
3. Violation of section 20-929. In addition to any other damages awarded pursuant to this chapter, a plaintiff who prevails on a claim alleging a violation of section 20-929 is entitled to an award for double damages, injunctive relief and other such remedies as may be appropriate.
4. Violation of section 20-930. In addition to any other damages awarded pursuant to this chapter, a plaintiff who prevails on a claim alleging a violation of section 20-930 is entitled to statutory damages equal to the value of the underlying contract for each violation arising under such section.

§ 20-934 Civil action for pattern or practice of violations.

a. Cause of action.
1. Where reasonable cause exists to believe that a hiring party is engaged in a pattern or practice of violations of this chapter, the corporation counsel may commence a civil action on behalf of the city in a court of competent jurisdiction.
2. An action pursuant to paragraph 1 of this subdivision 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.
3. Nothing in this section prohibits:
   (a) A person alleging a violation of this chapter from filing a civil action pursuant to section 20-933 based on the same facts as a civil action commenced by the corporation counsel pursuant to this section.
   (b) The director from sending a notice of complaint pursuant to section 20-931, unless otherwise barred from doing so.

b. Civil penalty. In any civil action commenced pursuant to subdivision a of this section, the trier of fact may impose a civil penalty of not more than $25,000 for a finding that a hiring party has engaged in a pattern or practice of violations of this chapter. Any civil penalty so recovered shall be paid into the general fund of the city.

§ 20-935 Application; waiver; effect on other laws.

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

b. The provisions of this chapter 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 chapter 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 chapter shall be construed as providing a determination about the legal classification of any individual as an employee or independent contractor.

§ 20-936 Follow-up; data collection; reporting.

a. No later than six months after the director sends to a freelance worker either a hiring party's response and accompanying materials or a notice of non-response pursuant to paragraph 2 or 3 of subdivision e of section 20-931, the director 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 director shall collect and track information about complaints alleging violations of this chapter. The information collected shall include, at minimum:
    1. The identity of the hiring party alleged to have violated this chapter;
    2. The freelance worker's occupation;
    3. The section of this chapter that was alleged to have been violated;
    4. The value of the contract;
    5. The response or non-response from the hiring party; and
    6. Information from a completed survey identified in subdivision a of this section.
c. One year after the effective date of the local law that added this chapter, and every fifth year thereafter on November 1, the director shall submit to the council and publish on its website a report regarding the effectiveness of this chapter at improving freelance contracting and payment practices. That report shall include, at a minimum:
    1. The number of complaints the director has received pursuant to this chapter;
    2. The value of the contracts disaggregated into ranges of $500 and by section of this chapter alleged to have been violated;
    3. The numbers of responses and non-responses received by the director disaggregated by contract value into ranges of $500 and by section of this chapter alleged to have been violated;
    4. 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
    5. Legislative recommendations for this chapter, including consideration of whether certain occupations should be exempted from the scope of the definition of freelance worker in section 20-927.

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RULES OF THE CITY OF NEW YORK
TITLE 6: DEPARTMENT OF CONSUMER AFFAIRS
CHAPTER 7: OFFICE OF LABOR POLICY AND STANDARDS

SUBCHAPTER A: OFFICE OF LABOR POLICY AND STANDARDS

§ 7-101. Definitions.

(a) As used in this subchapter, the following terms have the following meanings:

"Employee" means any person who meets the definition of "employee," as defined by section 20-912 of the Code, "eligible grocery employee," as defined by section 22-507 of the Code, "fast food employee," as defined by section 20-1201 or 20-1301 of the Code, or "retail employee," as defined by section 20-1201 of the Code.

"Employer" means any person who meets the definition of "employer," as defined by section 20-912 of the Code, "successor grocery employer" or "incumbent grocery employer," as defined by section 22-507 of the Code, "fast food employer," as defined by section 20-1201 or 20-1301 of the Code, or "retail employer," as defined by section 20-1201 of the Code.

"Freelancers Law and rules" means Chapter 10 of Title 20 of the Code and subchapter E of this chapter.

"OLPS laws and rules" means chapters 8, 12, and 13 of Title 20 and section 22-507 of the Code and subchapters A, B, D, F, and G of this chapter.

"Transportation Benefits Law and rules" means Chapter 9 of Title 20 of the Code and subchapter C of this chapter.

(b) As used in the OLPS laws and rules, the following terms have the following meanings:

"Code" means the Administrative Code of the City of New York.

"Department" means the New York City Department of Consumer Affairs.

"Director" means the director of the office of labor standards established pursuant to section 20-a of the charter.

"Joint employer" means each of two or more employers who has some control over the work or working conditions of an employee or employees. Joint employers may be separate and distinct individuals or entities with separate owners, managers and facilities. A determination of whether or not a joint employment relationship exists will not often be decided by the application of any single criterion; rather the entire relationship shall be viewed in its totality.

"Office" means the office of labor standards established pursuant to section 20-a of the New York City Charter and referred to as the Office of Labor Policy and Standards.

"Supplements" means all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages' within the meaning of the New York State Labor Law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay, life insurance, and apprenticeship training.

"Temporary help firm" means an employer that recruits and hires its own employees and assigns those employees to perform work or services for another organization to: (i) support or supplement the other organization's workforce; (ii) provide assistance in special work situations including, but not limited to, employee absences, skill shortages, or seasonal workloads; or (iii) perform special assignments or projects.

"Work week" means a fixed and regularly recurring period of 168 hours or seven consecutive 24 hour periods; it may begin on any day of the week and any hour of the day, and need not coincide with a calendar week.

"Written" or "writing" means a hand-written or machine-printed or printable communication in physical or electronic format, including a communication that is maintained or transmitted electronically, such as a text message.

§ 7-102. Construction.

This chapter shall be liberally construed to permit the Office to accomplish the purposes contained in section 20-a of the New York City Charter. The provisions of this subchapter shall not be construed to supersede any other provision of the OLPS laws and rules, the Freelancers Law and rules, or the Transportation Benefits Law and rules.

§ 7-103 Severability.

The rules contained in this chapter shall be separate and severable. If any word, clause, sentence, paragraph, subdivision, section, or portion of these rules or the application thereof to any person, employer, employee, or circumstance is contrary to a local, state or federal law or held to be invalid, it shall not affect the validity of the remainder of the rules or the validity of the application of the rules to other persons or circumstances.

§ 7-104 Complainants and Witnesses.

(a) All people, regardless of immigration status, may access resources provided by the Office.

(b) Any person who meets the definition of employee in section 7-101 of this subchapter is entitled to the rights and protections provided by this subchapter to employees and any applicable provision of the OLPS laws and rules, regardless of immigration status.

(c) The Office shall conduct its work without inquiring into the immigration status of complainants and witnesses.

(d) The Office shall maintain confidential the identity of a complainant or natural person providing information relevant to enforcement of the OLPS laws and rules and the Transportation Benefits Law and rules, unless disclosure is necessary for resolution of the investigation or matter, or otherwise required by law, and the Office, to the extent practicable, notifies such complainant or natural person that the Office will be disclosing such person's identity before such disclosure.

(e) For purposes of effectuating subdivision (d) of this section, the Office shall keep confidential any information that may be used to identify, contact, or locate a single person, or to identify an individual in context.

§ 7-105 Joint Employers.

(a) Joint employers are individually and jointly liable for violations of all applicable OLPS laws and

rules and satisfaction of any penalties or restitution imposed on a joint employer for any violation thereof, regardless of any agreement among joint employers to the contrary.

(b) A joint employer must count every employee it employs for hire or permits to work, whether joint or not, in determining the number of employees employed for hire or permitted to work for the employer. For example, a joint employer who employs three workers from a temporary help firm and also has three permanent employees under its sole control has six employees for purposes of the OLPS laws and rules.

§ 7-106 Determining Damages Based on Lost Earnings.

(a) The following provisions apply to the extent necessary in circumstances described in paragraphs (1) and (2) below for the calculation of damages based on lost earnings in an administrative enforcement action:

(1) When an employer pays a flat rate of pay for work performed, regardless of the number of hours actually worked, an employee's hourly rate of pay shall be based on the most recent hourly rate paid to the employee for the applicable pay period, calculated by adding together the employee's total earnings, including tips, commissions, and supplements, for the most recent work week in which no sick time or other leave was taken and dividing that sum by the number of hours spent performing work during such work week or forty hours, whichever amount of hours is less.

(2) If an employee performs more than one job for the same employer or the employee's rate of pay fluctuates for a single job, the hourly rate of pay shall be the rate of pay that the employee would have been paid during the time that employee would have been performing work but for the employee's absence.

(b) If the methods for calculating the hourly rate described in subdivision (a) produce an hourly rate that is below the full hourly minimum wage, then the employee's lost earnings shall be based on the full hourly minimum wage.

§ 7-107 Required Notices and Postings.

(a) For any notice created by the Office that is made available on the City's website and that is then required by a provision of the OLPS laws and rules to be provided to an employee or posted in the workplace, an employer must provide and/or post such notice in English and in any language spoken as a primary language by at least five percent of employees at the employer's location, provided that the Director has made the notice available in such language. Employers covered by the Earned Safe and Sick Time Act, chapter 8 of Title 20 of the Code, are required to comply with this subdivision in addition to the requirement pursuant to section 20-919 of the Code that an employer provide the notice of rights in an employee's primary language.

(b) (1) For any notice that is not created by the Office and made available on the City's website, that is required to be provided to an employee and/or posted in the workplace by a provision of the OLPS laws and rules, an employer must provide and/or post such notice in English and in any language that the employer customarily uses to communicate with the employee.

(c) (2) For any notice that is not created by the Office and made available on the city's website, that is required to be posted in the workplace by a provision of the OLPS laws and rules, an employer must post such notice in English and in any language that the employer customarily uses to communicate with any of the employees at that location.

(d) Any notice, policy, or other writing that is required by a provision of the OLPS laws and rules to be personally provided to an employee must be provided by a method that reasonably ensures personal receipt by the employee and that is consistent with any other applicable law or rule that specifically addresses a method of delivery.

(e) Any notice, policy or, other writing that is required to be posted pursuant to a provision of the OLPS laws and rules must be posted in a printed format in a conspicuous place accessible to employees where notices to employees are customarily posted pursuant to state and federal laws and, except for

notices created by the Office, in a form customarily used by the employer to communicate with employees.

(f) An employer that places employees to perform work off-site or at dispersed job-sites, such as in private homes, building security posts, or on delivery routes, must comply with any applicable requirement to post a notice, policy or other writing contained in the OLPS laws and rules by providing employees with the required notice personally upon commencement of employment, within fourteen (14) days of the effective date of any changes to the required posting, and upon request by the employee, in addition to the requirements in subdivision (c) of this section.

§ 7-108 Retaliation.

(a) No person shall take any adverse action against an employee that penalizes an employee for, or is reasonably likely to deter an employee from, exercising or attempting to exercise rights under the OLPS laws and rules or interfere with an employee's exercise of rights under the OLPS laws and rules.

(b) Taking an adverse action includes, but is not limited to threatening, intimidating, disciplining, discharging, demoting, suspending, or harassing an employee, reducing the hours of pay of an employee, informing another employer than an employee has engaged in activities protected by the OLPS laws and rules, discriminating against the employee, including actions related to perceived immigration status or work authorization, and maintenance or application of. an absence control policy that counts protected leave as an absence that may lead to or result in an adverse action.

(c) An employee need not explicitly refer to a provision of the OLPS laws and rules to be protected from an adverse action.

(d) The Office may establish a causal connection between the exercise, attempted exercise, or anticipated exercise of rights protected by the OLPS laws and rules and an employer's adverse action against an employee or a group of employees by indirect or direct evidence.

(e) For purposes of this section, retaliation is established when the Office shows that a protected activity was a motivating factor for an adverse action, whether or not other factors motivated the adverse action.

§ 7-109 Enforcement and Penalties.

(a) The Office may open an investigation to determine compliance with laws enforced by the Office on its own initiative or based on a complaint, except as otherwise provided by section 20-1309 of Chapter 13 of Title 20 of the Code.

(b) Whether it was issued in person, via mail, or, on written consent of the employer, email, an employer must respond to a written request for information or records by providing the Office with true, accurate, and contemporaneously-made records or information within the following timeframes, except as provided in subdivision (c) of this section, subdivision (c) of section 20-924 of the Code, section 7-213 of this title or other applicable law:

(1) For an initial request for information or records, the employer shall

i. Within ten (10) days of the date that the request for information was received by the employer provide the following information, if applicable:

A. the employer's correct legal name and business form;
B. the employer's trade name or DBA;
C. the names and addresses of other businesses associated with the employer;
D. the employer's Federal Employer Identification Number;
E. the employer's addresses where business is conducted;
F. the employer's headquarters and principal place of business addresses;
G. the name, phone number, email address, and mailing address of the owners, officers, directors, principals, members, partners and/or stockholders of more than 10 percent of the outstanding stock of the employer business and their titles;
H. the name, phone number, email address, and mailing address of the individuals who have operational control over the business;

I. the name, phone number, email address, and mailing address of the individuals who supervise employees;
J. the name and contact information of the individual who the office should contact regarding an investigation of the business and an affirmation granting authority to act; and

ii. Within fourteen (14) days of the date of that the initial request for information or records was received, provide the remaining information or records requested in that initial request.

(2) For all requests for information or records after the initial request, an employer must respond within the timeframe prescribed by the Office in the request, which shall not exceed fourteen (14) days from the date that the request was received by the employer, unless a longer timeframe has been agreed to by the Office.

(3) Upon good cause shown, the Director may extend response timeframes required pursuant to this subdivision.

(c) An employer shall respond to a written request for information or records by providing the Office with true, accurate, and contemporaneously-made records or information in a lesser amount of time than provided in paragraphs 2 and 3 of subdivision b of this section if agreed to by the parties or the Office has reason to believe that:

(1) The employer will destroy or falsify records;

(2) The employer is closing, selling, or transferring its business, disposing of assets or is about to declare bankruptcy;

(3) The employer is the subject of a government investigation or enforcement action or proceeding related to wages and hours, unemployment insurance, workers' compensation, discrimination, OLPS laws and rules, the Freelancers Law and rules, or the Transportation Benefits Law and rules; or

(4) More immediate access to records is necessary to prevent or remedy retaliation against employees.

(d) In accordance with applicable law, the Office may resolve or attempt to resolve an investigation at any point through settlement upon terms that are satisfactory to the Office.

(e) The Office may issue a notice of violation to an employer who fails to provide true and accurate information or records requested by the Office in connection with an investigation.

(f) An employer who fails to timely and fully respond to the request for information or records that is the subject of a notice of violation issued under subdivision (e) of this section on or before the first scheduled appearance date is subject to a penalty of five hundred dollars, in addition to any penalties or remedies imposed as a result of the Office's investigation.

(g) The employer may cure a notice of violation issued in accordance with subdivision (e) of this section without the penalty imposed in connection with subdivision (f) by:

(1) producing the requested information or records on or before the first scheduled appearance date; or

(2) resolving, to the satisfaction of the Office on or before the first scheduled appearance date, the investigation that is the basis for the request for information or records.

(h) A finding that an employer has an official or unofficial policy or practice that denies a right established or protected by the OLPS laws and rules shall constitute a violation of the applicable provision of the OLPS laws and rules for each and every employee subject to such policy or practice.

§ 7-110 Service.

Service of documents issued by the Office to employers, including written requests for information or records and notices of violation, shall be made in a manner reasonably calculated to achieve actual notice to the employer. The following are presumed to be reasonably calculated to achieve actual notice: (i) personal service on the employer; (ii) personal service on the employer by regular first-class mail, certified mail, return receipt requested, or private mail delivery services, such as UPS, to an employer's last known business address; or (iii) if an employer has so consented, facsimile, email, including an attachment to an email.

§ 7-111 Recordkeeping.

(a) An employer's failure to maintain, retain, or produce a record that is required to be maintained under the OLPS laws and rules that is relevant to a material fact alleged by the Office in a notice of violation issued pursuant to a provision of the OLPS laws and rules creates a reasonable inference that such fact is true, unless a rebuttable presumption or other adverse inference is provided by applicable law.

(b) An employer that produces records to the department or Office in response to a request for information affirms that the records produced are true and accurate.

SUBCHAPTER E: FREELANCE WORKERS

§ 7-501 Definitions.

(a) As used in this chapter, the terms “director,” “freelance worker,” and “hiring party” shall have the same meanings as set forth in section 20-927 of the Administrative Code.

(b) As used in this chapter, the term “adverse action” means any action by a hiring party, their actual or apparent agent, or any other person acting directly or indirectly on behalf of a hiring party, that would constitute a threat, intimidation, discipline, harassment, denial of a work opportunity, or discrimination, or any other act 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 chapter 10 of Title 20 of the Administrative Code (“the Freelance Isn't Free Act”).

§ 7-502 Coverage.

A freelance worker is entitled to the protections of the Freelance Isn't Free Act regardless of immigration status.

§ 7-503 Contract Value.

(a) For purposes of section 20-928(a) of the Administrative Code, the value of a contract between a freelance worker and hiring party, either by itself or when aggregated with all other agreements for services between the same hiring party and freelance worker during the 120 days immediately preceding the agreement that constitutes the contract, shall include the reasonable value of all actual or anticipated services, costs for supplies, and any other expenses under the contract.

(b) For purposes of section 20-933(b) of the Administrative Code, the value of the underlying contract between a freelance worker and hiring party shall include the reasonable value of all services performed and/or anticipated, and reasonable costs for supplies and any other expenses reasonably incurred by the freelance worker.

§ 7-504 Retaliation.

(a) Retaliation shall include but is not limited to any adverse action relating to perceived immigration status or work authorization.

(b) A freelance worker may establish a causal connection between the exercise of rights guaranteed under the Freelance Isn’t Free Act and a hiring party’s adverse action either circumstantially, such as with evidence that the protected activity was followed closely by the adverse action, or directly, with evidence of an intention by a hiring party to retaliate against a freelance worker. For purposes of section 20-930 of the Administrative Code, retaliation may be established when a freelance worker shows that the exercise or attempt to exercise any right under the Freelance Isn’t Free Act was a motivating factor for an adverse action, even if other factors also motivated the adverse action.

(c) Any person who denies a work opportunity to a freelance worker who exercises or attempts to exercise any right guaranteed under the Freelance Isn’t Free Act, or that takes any action reasonably likely to deter a freelance worker from exercising or attempting to exercise any such right, shall be liable for retaliation regardless of whether that person previously has been a party to a contract with the freelance worker or has been the subject of a complaint by the freelance worker.

§ 7-505 Waiver of Rights.

(a) Any contract entered into by a hiring party and freelance worker shall not include any prospective waiver or limitation of rights under the Freelance Isn't Free Act. Any such waiver or limitation shall be invalid as a matter of law.

(b) If a contract includes language that waives or limits a freelance worker's right to participate in or receive money or any other relief from any class, collective, or representative proceeding, said waiver or limitation is void.

(c) Wherever a hiring party asks a freelance worker to waive or limit, via contract, any other procedural right normally afforded to a party in a civil or administrative action, any such contractual waivers and limitations are void under section 20-935 of the Administrative Code. Such rights include but are not limited to procedural rights of parties to a civil action established by the New York Civil Practice Law and Rules, the Federal Rules of Evidence, and the Federal Rules of Civil Procedure.

(d) A freelance worker has the right to disclose the terms of a contract with a hiring party to the director. Any private contractual agreement that purports to waive or limit a freelance worker's right to communicate the terms of such a contract to the director is void as against public policy.

FREELANCE WORK AGREEMENT

The following is a Freelance Work Agreement ("Agreement") between the Freelance Worker and Hiring Party named below.

1) PARTIES

Both parties should include the information applicable to them. Having a specific Contact Person can help both parties. The Contact Person can make sure that work is completed and payment is made.

Freelance Worker information:

Name:	
Name of Business:	
Contact Person:	
Address:	
Phone:	
Email:	

Hiring Party information:

Name:	
Name of Business:	
Contact Person:	
Address:	
Phone:	
Email:	

Hiring Party will be available and respond to Freelance Worker in a reasonable manner and within 3 days of contact.

I have reviewed this page:

Freelance Worker initials _____ Hiring Party initials _____

Be clear about the work to be done; for example, writing an article, selling the right to a photo, developing a program, or working for a certain number of hours. Be sure to factor preparatory work and revisions into the price. By being specific, Freelance Workers and Hiring Parties will know what work is owed for the amount being paid.

2) SCOPE OF WORK

Freelance Worker will provide the following services to Hiring Party in exchange for payment:

Services to be provided by Freelance Worker (include any costs or expenses to be reimbursed)	**Rate or amount of payment**

3) PAYMENT

How much $ per

- *Hour*
- *Part*
- *Draft or*
- *Piece*

Total amount ($) to be paid to Freelance Worker for work under the contract: _____

Method of payment (check one): ☐ CASH ☐ CHECK ☐ OTHER: _____

Date or timing of payment: _____

_____

Note: If no date or mechanism for determining the payment date is provided, payment is due within 30 days of the work being completed.

Terms 1-3 MUST be included in contracts under the Law. The remaining terms may help preserve the parties' rights and avoid disputes, but the Agreement should not include any terms that both parties do not understand. Both parties should still sign the Agreement even though you may agree to terms in multiple documents (for example, emails, text messages, etc.). Make sure that both parties are clear about the Agreement.

PAGE 3 ARE OTHER POSSIBLE TERMS FOR CONSIDERATION. *Note*: The *OPTIONAL* terms are not required by the Freelance Isn't Free Act. Whether both parties include any of these or other terms may depend on the specific work situation. Only include terms that both parties understand in a contract.

I have reviewed this page:

Freelance Worker initials _____ Hiring Party initials _____

Determine if you want this term and what the late fee should be. Generally, late fees can help encourage payment, but if a late fee is too high, it may not be valid. Indicate that the late fee is separate from and does not affect any rights or remedies under the Freelance Isn't Free Act.

***OPTIONAL:* LATE PAYMENT**

If Hiring Party fails to submit payment on time, Freelance Worker may impose a late fee in the amount of _____% of the total amount unpaid every month.

A retainer functions as an up-front payment for anticipated work and can be drawn upon. The specified amount ($) from the Hiring Party also compensates a Freelance Worker who does not accept other offers of work to be available to do the Hiring Party's work.

***OPTIONAL:* RETAINER**

In consideration for Freelance Worker agreeing to provide services to Hiring Party and foregoing other work opportunities, Hiring Party agrees to pay $_____ to Freelance Worker on [DATE]. Hiring Party understands that this payment is nonrefundable.

If Hiring Party is to submit payments in installments, the installment amounts ($) to be paid and dates due must be detailed in the contract.

***OPTIONAL:* PAYMENT TERMS**

Hiring Party agrees to pay Freelance Worker the following amounts ("Installments") on the dates listed:

Amount due: $ _____ Date due: _____
Amount due: $ _____ Date due: _____
Amount due: $ _____ Date due: _____

***OPTIONAL:* DURATION, MODIFICATION, OR TERMINATION OF AGREEMENT**

This Agreement begins on the date it is signed by both parties.

If both parties agree to extend, modify, or terminate this Agreement, they may do so, but only [with a written agreement signed by both parties] OR [in a writing that specifically refers to this agreement].

Upon termination, Hiring Party will pay Freelance Worker for all work completed at that time, and for any unpaid reimbursable expenses.

Arbitration clauses requiring parties to bring a case in a private venue may be inconvenient and expensive for Freelance Workers.

***OPTIONAL:* CHOICE OF LAW**

This Agreement and any disputes arising under it shall be governed by New York State and City law.

***OPTIONAL:* LIMITATIONS ON LIABILITY**

Either party's liability at common law under this Agreement is limited to the value of the contract.

Hiring Party will not hold Freelance Worker in breach for failure to complete work according to deadlines due to Freelance Worker's need for care or rest for mental or physical illness, injury, or health condition, or that of a Freelance Worker's family member. If the opportunity to complete work was limited to a specific time or place, Hiring Party's damages shall be limited to withholding Freelance Worker's payment for services under this Agreement.

Permissible recovery: Only the amount due under and specified in the contract.

Neither party can be asked to pay for unforeseen damages.

This applies to common law claims and does not affect claims under the Freelance Isn't Free Act.

I have reviewed this page:

Freelance Worker initials _____ Hiring Party initials _____

The Intellectual Property clause is for contracts for artistic or creative content for publication but can be considered when a Freelance Worker turns over a final product that can be copied. Unless the Freelance Worker agrees to or includes a clause to waive intellectual property rights to the Hiring Party, the Hiring Party cannot assume the rights to the Freelance Worker's intellectual property without facing penalties, such as court fees and fines.

***OPTIONAL:* OWNERSHIP**

Freelance Worker agrees to transfer **[CHOOSE ONE]**

☐ **OWNERSHIP** ☐ **COPYRIGHT** ☐ **LICENSE**

of **[DESCRIPTION OF WORK PRODUCT BEING TRANSFERRED]**

to Hiring Party upon final payment. By making this transfer, Freelance Worker gives Hiring Party permission to use the final product for the following purposes:

_____

_____

_____

Hiring Party understands that it may incur penalties for using the Freelance Worker's work product improperly beyond compensating Freelance Worker for the value of the use. Penalties include _____% of the value of the use and court and attorneys' fees.

***OPTIONAL:* CONFIDENTIAL INFORMATION**

Both parties shall maintain as confidential any information that the parties designate as Confidential Information in their communications to each other. Both parties will limit their use of Confidential Information to fulfilling their obligations under the Agreement.

***OPTIONAL:* GENERAL**

This Agreement, including any attachments, represents the entire agreement between Hiring Party and Freelance Worker. Both parties' performance is limited to only those items that are listed in the Agreement.

Hiring Party Signature:

_____ _____

Print Name Date

Freelance Worker Signature:

_____ _____

Print Name Date

I have reviewed this page:

Freelance Worker initials _____ Hiring Party initials _____

The Dichotomy of Dancers

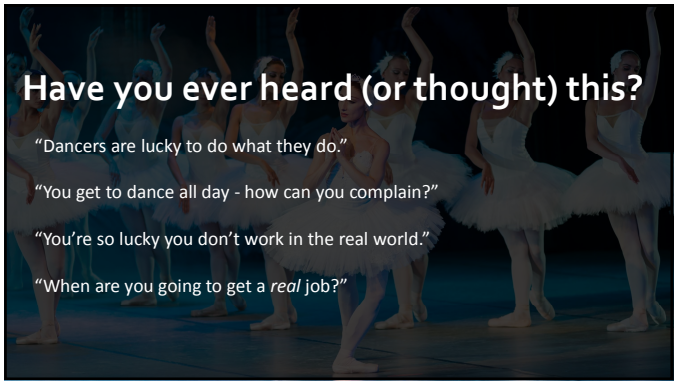
Revered and exulted, idolized and obsessed over, for their grace, beauty, artistry, and humanity..

Often treated as a fungible resource

The Dichotomy of Dancers

Millions of dollars spent each year on the idea of dance and the dream of being a dancer

Almost impossible to make a living as a dancer



Have you ever heard (or thought) this?

"Dancers are lucky to do what they do."

"You get to dance all day - how can you complain?"

"You're so lucky you don't work in the real world."

"When are you going to get a *real* job?"

Dancers = Workers

- 10 – 15 years of education and training
- Physically and mentally demanding
- High pressure / performance-based / constant judgment
- High sacrifice
- Difficult hours
- Episodic / Insecure
- Exploitative…

Copyright
United States Copyright Office

Works Made for Hire

Copyright law protects a work from the time it is created in a fixed form. From the moment it is set in a print or electronic manuscript, a sound recording, a computer software program, or other such concrete medium, the copyright becomes the property of the author who created it. Only the author or those deriving rights from the author can rightfully claim copyright.

There is, however, an exception to this principle: "works made for hire." If a work is made for hire, an employer is considered the author even if an employee actually created the work. The employer can be a firm, an organization, or an individual.

The concept of "work made for hire" can be complicated. This circular refers to its definition in copyright law and draws on the Supreme Court's interpretation of it in *Community for Creative Non-Violence v. Reid*, decided in 1989.

Definition in Law

Section 101 of the Copyright Act (title 17 of the *U.S. Code*) defines a "work made for hire" in two parts:

a a work prepared by an employee within the scope of his or her employment

or

b a work specially ordered or commissioned for use

1 as a contribution to a collective work,

2 as a part of a motion picture or other audiovisual work,

3 as a translation,

4 as a supplementary work,

5 as a compilation,

6 as an instructional text,

7 as a test,

8 as answer material for a test, or

9 as an atlas,

if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

The law defines a "supplementary work" as a work prepared for a publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes.

The law defines an "instructional text" as a literary, pictorial, or graphic work prepared for publication and intended to be used in systematic instructional activities.

Supreme Court Interpretation

Determining whether a work is made for hire can be difficult because it is not always easy to apply the legal definition of "work made for hire."

The Supreme Court's decision in *Community for Creative Non-Violence v. Reed* addressed that definition. The Court held that one must first ascertain whether a work was prepared by (a) an employee or (b) an independent contractor.

If an employee created the work, part 1 of the definition above applies, and the work will generally be considered a work made for hire.

But note that the term "employee" in the definition differs from the common understanding of the term. For copyright purposes, "employee" means an employee under the general common law of agency. See the subheading "Agency Law" below.

If an independent contractor created the work, and the work was "specially ordered or commissioned," part 2 of the definition above applies. An "independent contractor" is someone who is not an employee under the general common law of agency.

A work created by an independent contractor can be a work made for hire only if (a) it falls within one of the nine categories of works listed in part 2 above *and* (b) there is a written agreement between parties specifying that the work is a work made for hire.

Agency Law

To help determine who is an employee, the Supreme Court in *Community for Creative Non-Violence* identified factors that make up an "employer-employee" relationship as defined by agency law. The factors fall into three broad categories.

1 *Control by the employer over the work*. For example, the employer determines how the work is done, has the work done at the employer's location, and provides equipment or other means to create the work.

2 *Control by employer over the employee*. For example, the employer controls the employee's schedule in creating the work, has the right to have the employee perform other assignments, determines the method of payment, or has the right to hire the employee's assistants.

3 *Status and conduct of employer*. For example, the employer is in business to produce such works, provides the employee with benefits, or withholds tax from the employee's payment.

These factors are not exhaustive. The Court left unclear which of these factors must be present to establish the employment relationship under the work-for-hire definition. Moreover, it held that supervision or control over creation of the work alone is not controlling.

However, all or most of these factors characterize a regular, salaried employment relationship, and it is clear that a work created within the scope of such employment is a work made for hire (unless the parties involved agree otherwise).

Examples of works made for hire created in an employment relationship include:

- A software program created by a staff programmer within the scope of his or her duties at a software firm
- A newspaper article written by a staff journalist for publication in the newspaper that employs the journalist (who is not a freelance writer)
- A musical arrangement written for a music company by a salaried arranger on the company's staff
- A sound recording created by salaried staff engineers of a record company

The closer an employment relationship comes to regular, salaried employment, the more likely it is that a work created within the scope of that employment will be a work made for hire. But because no precise standard exists for determining whether a work is made for hire under part 1 of the definition in section 101 of the copyright law, consultation with a lawyer may be advisable.

If a work is made for hire, the employer or other person for whom the work was prepared is the author and should be named as the author on the application for copyright registration. Respond "yes" to the question on the application about whether the work is made for hire.

Owner of the Copyright in a Work Made for Hire

If a work is made for hire, the employer or other person for whom the work was prepared is the initial owner of the copyright unless both parties involved have signed a written agreement to the contrary.

Term of Copyright Protection

The term of copyright protection of a work made for hire is 95 years from the date of publication or 120 years from the date of creation, whichever expires first. (A work not made for hire is ordinarily protected by copyright for the life of the author plus 70 years.) For information about terms of copyright protection, see Circular 15a, *Duration of Copyright*.

Termination Rights

The copyright law provides that certain grants of the rights in a work that were made by the author can be terminated 35 to 40 years after the grant was made or after publication, depending on the circumstances. However, the termination provisions of the law do not apply to works made for hire.

For Further Information

The Internet

Circulars, announcements, regulations, copyright application forms, and related materials are available on the Copyright Office website at *www.copyright.gov*.

By Telephone

For general information about copyright, call the Copyright Public Information Office at (202) 707-3000 or 1-877-476-0778 (toll free). Staff members are on duty from 8:30 AM to 5:00 PM, eastern time, Monday through Friday, except federal holidays. Recorded information is available 24 hours a day. Request application forms and informational circulars 24 hours a day at (202) 707-9100 or 1-877-476-0778 by leaving a recorded message.

By Regular Mail

Write to:

Library of Congress
Copyright Office–COPUBS
101 Independence Avenue SE
Washington, DC 20559

Unemployment Insurance Division
Harriman State Office Campus
Albany, NY 12240

WE ARE YOUR DOL

NEW YORK STATE OF OPPORTUNITY. Department of Labor

www.labor.ny.gov

Independent Contractors

The Unemployment Insurance Law excludes independent contractors from coverage.

Independent contractors:

- Are in business for themselves **and**
- Make their services available to the public

An independent contractor performs services free from:

- Supervision
- Direction **and**
- Control

The law does not define an independent contractor. Court decisions hold that we must apply the common law tests of master and servant to make a determination of whether services an individual provides are that of an employee or an independent contractor. Under the common law tests, we must consider all factors about the relationship between the two parties. We need to determine if the party who has the contract for the services provides, or has the right to provide, supervision, direction and control over the person who performs the services.

If an employer designates a worker as an independent contractor and the worker agrees, it does not mean the worker is an independent contractor under the law. A written agreement does not mean we do not examine the facts of the relationship. A contract term that outlines the right of control may establish an employment relationship even if the employer allows the individual significant freedom of action. If the employer provides, or has the right to provide, supervision, direction or control, an employer-employee relationship exists. It does not matter if the services are full time, part time, or on a casual basis.

In general, an officer of a corporation is an employee. The officer, who performs usual management activities, or services for the corporation, is not an independent contractor.

Based on court decisions, an **employer-employee relationship** exists when an employer:

- Requires full-time work
- Sets work hours
- Requires attendance at meetings and / or training
- Requires prior permission for absences
- Tells the individual when, where, and how to do the job
- Directly supervises the job
- Provides facilities, equipment, tools, or supplies
- Sets the rate of pay
- Provides compensation in the form of:
  - Salary
  - An hourly rate of pay **or**
  - A draw account against future commissions with no requirement to repay unearned commissions
- Provides reimbursement or allowance for business or travel expenses
- Provides fringe benefits
- Sets time, money, or territorial limits
- Requires services to be rendered personally
- Requires oral or written reports
- Makes the services an integral part of the business, particularly when performed on a continuing basis
- Furnishes business cards, or other identification of the individual as a representative of the employer
- **Does not** allow the individual to perform services for competitive businesses
- Reserves the right to end services on short notice
- Supervises unskilled labor (or is subject to supervision)

Based on court decisions an **independent contractor** has:

- An independent business:
  - Offers services to the public
  - Media advertising
  - Commercial telephone listing
  - Business cards, stationery and billheads
  - Carries business insurance
  - Maintains own establishment
- Significant investment in facilities (Hand tools and personal transportation are not significant)
- Risk of profit or loss in providing services
- Freedom to work own hours and to schedule own activities
- No requirement to:
  - Attend meetings or training sessions
  - Provide oral or written reports
- Freedom to provide services for other businesses (competitive or non-competitive)

The following persons are employees by law even though the circumstances under which they work may not meet the common law tests of an employer-employee relationship:

1. An agent or commission-driver who delivers:
   a. Meat, vegetables, fruit or bakery products
   b. Beverages (other than milk)
   c. Laundry or dry-cleaning services

2. A full-time salesperson that solicits orders for merchandise for resale or supplies for use in the purchaser's business. The salesperson must work in a continuing relationship with an employer and perform all the work. The salesperson must have no substantial investment in the facilities used in the performance of the services, except the facilities for transportation.

3. Professional musicians or persons “engaged in the performing arts”, who perform services for a television or radio station or network, a film production, theater, hotel, restaurant, night club or similar establishment unless, by written contract, such musicians or persons are employees of another employer.

   “Engaged in the Performing Arts” means performing services in connection with the production of, or performance in, any artistic endeavor that requires artistic or technical skill or expertise.

4. Professional models who model for, or who consent in writing to transfer use of their name or likeness for advertising or trade to, a person or entity that controls assignments, hours of work or performance location and that compensates them, in return for a waiver of their privacy rights, unless they perform services under a written contract that states the model is an employee of another covered employer.

5. Certain workers in the construction industry. Effective October 26, 2010 the New York State Construction Fair Play Act was enacted. The law creates a new standard to determine whether a worker is an employee or an independent contractor in the construction industry. Information about the Construction Fair Play Act can be found on form IA318.29 available on the department’s web site at www.labor.ny.gov.

Employers can request a determination of the status of any individual. Write to the Liability and Determination Section and provide complete details of the relationship. Failure to report earnings and pay contributions due on the earnings of persons on the assumption that they are an independent contractor may result in additional assessments and interest if they are later determined to be employees.

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Contact Us

English: 917-935-4951
Español: 917-832-1927

lrs@nycbar.org

New York City Bar
Legal Referral Service
42 West 44th Street,
New York, NY 10036
Monday - Friday 8:30 AM to 5:30 PM
Closed on all national holidays.

Employment Classification

There are a few different categories of employees or workers. Figuring out which type of employee or worker you are is important because the laws are different for each type.

Employee or Independent Contractor

Your employment case may be about whether you are an employee or an independent contractor. In some cases, your employer will try to say you are an independent contractor because independent contractors have fewer legal rights, and your employer must pay more taxes and provide more benefits to employees. For example, the Fair Labor Standards Act and certain other wage laws do not apply to independent contractors. Also, and in general, employers do not need to pay unemployment insurance contributions or provide workers' compensation coverage for independent contractors.

Request A Lawyer (https://www.nycbar.org/get-legal-help/our-services/request-a-lawyer/)

Independent contractors are self-employed and do not receive most of the rights and benefits that employees receive from employers. For example, as an independent contractor, you will be paid according to the terms of your own agreement, not according to a regularly scheduled payroll. Also, independent contractors are responsible for paying all local, state and federal taxes on their own from their income.

In general, if you sign a contract to do specific work for an employer, and you do the work your own way and are out of the day-to-day direction, control and supervision of your employer, you may be an independent contractor.

In order to figure out if you are an independent contractor, ask yourself the questions listed below. The more questions you answer "yes" to, the more likely you are an independent contractor and not an employee:

- Do you control the style, content, creation and completion of the work?
- Are you allowed to subcontract any of your work?
- Are your job duties and obligations negotiated by you and your employer (salary, due dates, hours, etc.)?
- Are you doing just a project or two instead of fulfilling a key part of your employer's overall business?
- Do you work at home instead of using an office at your employer's business location?
- Do you own and use your own tools, business equipment and supplies?
- Is your work temporary?
- Does your work require special skills instead of routine work that any typical employee can do?

At-will Employee or Contractual Employee

Your employment case may be about whether or not you are an employee "at-will" or an employee with a written employment contract. If you work on an "at-will" basis, your employer can fire you at any time, with or without prior notice, and for any reason or no reason at all, except when federal, state or municipal law prevents your employer from firing you for that reason.

Most employees are employed at-will, and your employer may ask you to sign an agreement that says so. If you do not have a written employment contract with your employer that makes it clear that you are NOT an at-will employee, then you probably are an at-will employee.

There are some employees who work under a contract that is negotiated and signed by both employer and employee. Employees working under employment contracts generally are not at-will employees. In general, these types of contracts are usually provided to executives, doctors and other professional or high-level employees. The contract may describe, among other things, the rights and responsibilities of the employee and the employer and the terms of employment, including salary, how long you will be working, possible reasons for termination, as well as any rights to severance pay upon termination of employment.

Union Member

In New York, if your particular job is covered by a union agreement, you have to join the union for your profession and pay dues. As a union member, your union agreement will control most of the terms of your job, including your wages, benefits, promotion and firing. Of course, the union agreement cannot violate federal, state or any other applicable laws.

Civil Service Employee

If you work for the government, then you may be a civil service employee. The New York Civil Service Law spells out your rights as a civil service employee, including hours, wages, benefits, suspension, promotion, transfer, termination and reinstatement. Also, under the New York State Constitution, you have the right to be considered for a civil service job based on your merit and fitness for a specific job, which may include having you take an exam as part of your application process.

Legal Editor: Daniel S. Braverman, January 2015 (updated June 2020)

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