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A t t o r n e y s a t L a w

Employment Law for Artists



Overview

- General Employment Law Basics
 - Employee versus Independent Contractor
 - Employee Entitlements – Minimum wage, entitlement to overtime, etc.
- Protections for Freelancers
 - Overview of NYC Freelancers & NYC Freelancer Artists
 - Protection from nonpayment – Freelance Isn't Free Act (NY Admin. Code § 20-927 – 936)
 - Antidiscrimination Laws- overview Federal, State and NYC
 - New York State Human Rights Law (NYSHRL) – New York Exec. § 296
 - New York City Human Rights Law (NYCHRL) – NYC Admin Code § 8-107

Independent Contractors Versus Employees

- Why is it important?
 - Legal implications, tax implications, etc.
 - Misclassification=liability for employer
 - There is no universal standard regarding difference.
 - Biggest distinction is that employers have the right to control an employee but not an independent contractor.



Independent contractor?

- No set schedule
- Paid a day rate or per contract
- No benefits, sick pay or vacation pay
- Allowed to work for competitors
- Bound by employment contract
- 1099 tax form



*You are not necessarily an independent contractor because you are paid with a 1099 form.



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Employees

Employees

- Set working schedule
- Paid a salary or hourly rate
- Receives benefits, sick pay or vacation pay
- W-2 tax form
- Not allowed to work for competitors
- Subject to company policies and procedures



WEEKLY TIMESHEET			
	Mon	Tu	Wed
Start Time	9 AM	9 AM	
End Time	5 PM	6 PM	
Reg Time	8 -	8 -	
Over Time		1 -	



How do I know if I'm an independent contractor or an employee?

Economic Realities Test – Utilized by Federal Courts under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(e)(1)

- Extent that work is an integral part of employer's business
- Worker's opportunity for profit or loss
- Extent of investments of the employer vs. worker
- Work requires special skills and initiative
- Permanency of the relationship

Degree of control exercised or retained by employer

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How do I know if I'm an independent contractor or an employee? (Continued)

- For New York State wage and hour cases brought under New York Labor Law (NYLL), a similar test is utilized as Economic Realities Test, but focus more on control.

- Factors relevant to assessing control are whether worker:
 - (1) worked at his own convenience;
 - (2) was free to engage in other employment;
 - (3) received fringe benefits;
 - (4) was on the employer's payroll; and
 - (5) was on a fixed schedule.

See generally Bynog v. Cipriani Group, Inc., 1 N.Y.3d 193 (2003).

Misclassification Case Examples

Agerbrink v. Model Serv. LLC, 787 Fed. Appx. 22 (2d Cir. 2019)

Facts: Plaintiff is a fit model, meaning she did not pose for advertising campaigns or walk in runway shows, as fashion models do. Clothing and apparel designers rely on fit models to test and fit their designs and fit models are hired based on their body proportions. Plaintiff had a management company who classified her as an independent contractor. Plaintiff brought a lawsuit under both the FLSA and NYLL arguing that her modeling management company misclassified her, and that she was an employee as she had no ability to control her work schedule, accept or decline a project or negotiate her pay.

The Southern District of New York granted Defendant (the management company's) motion for summary judgment, holding that Plaintiff was properly classified as an independent contractor. Plaintiff appealed to the Second Circuit....

Agerbrink Continued....

- The Second Circuit overturned the District Court, finding that there was a genuine issue of material fact as to whether Plaintiff or her modeling agency controlled her work schedule, accepted or declined projects and negotiated Plaintiff's rate of pay.
- Second Circuit focused on control and opportunity for profit or loss in *Agerbrink v. Model Service, LLC*, by relying on several disputed material facts.
 - *Agerbrink v. Model Service, LLC*, 787 F. App'x 22, 25-27 (2d Cir. 2019).

Other Things To Know As An Employee

- Minimum wage
 - Federal law: \$7.25 per hour
- NY State law: Minimum Wage – **\$15/hour in NYC; \$13/hour Nassau, Suffolk, and Westchester Counties; \$11.80/hour Rest of State**
- **\$1125/week Salary Basis in NYC; \$975/week Nassau, Suffolk, and Westchester Counties; \$885/week Rest of State**
- Must be paid for all hours worked
 - Work not requested but suffered or permitted by employer is compensable



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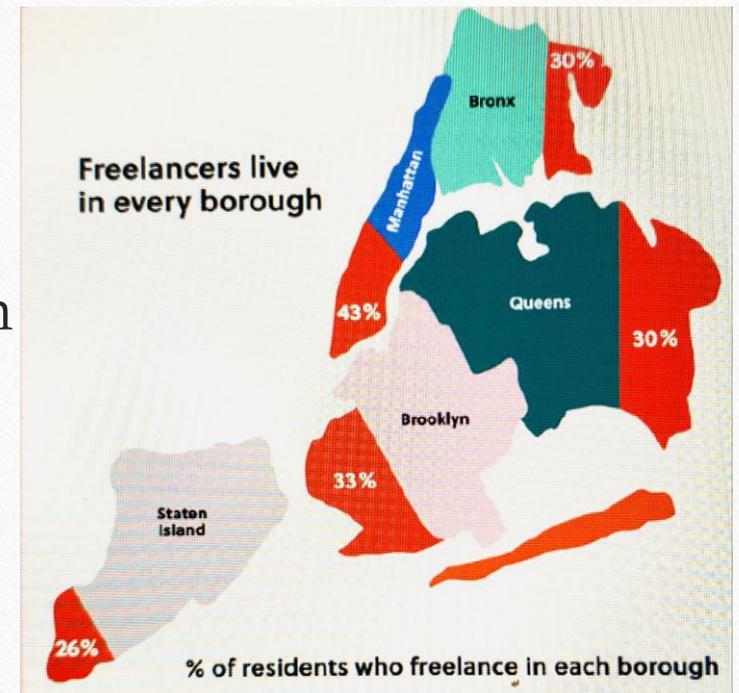
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Overview: Protections for Freelancers

- Protected from non-payment – The Freelance Isn't Free Act (New York City Admin. Code §§ 20-927 – 936)
- Protected from discrimination –
 - New York State Human Rights Law (NYSHRL) – New York Exec. § 296
 - New York City Human Rights Law (NYCHRL) – NYC Admin Code § 8-107

NYC Freelancers Facts -2019

- More than 1/3 of NYC workers are freelancers.
 - 1.3 million New Yorkers have worked freelance jobs in the past 12 months.
 - This equals 34% of NYC's workforce, with an estimated annual economic impact of \$31.4 billion in earnings from freelancing.
 - Tend to be young: 46% of recent college grads (20-26) enter workforce as freelancers.



Source: "Freelancing in New York City 2019," Independent Study Commissioned by Freelancers Union, Upwork, and the New York City Mayor's Office of Media and Entertainment, <https://www1.nyc.gov/assets/mome/pdf/freelancing-ny-report-09062019.pdf>

Freelance Artists

“The Supreme Accomplishment is to blur the line between work and play.” – Arnold J. Toynbee

- 9% of NYC’s workforce is workers in media or entertainment, who earned more than \$9 billion in 2019.
- Media and entertainment freelancers are more likely to see freelance work as pursuing their passions and consider freelance long term.
- During 2019, a majority of these sectors’ workers engaged in freelance work:
 - 68% of journalism or digital media workers
 - 67% of music or performing arts workers
 - 60% of marketing or advertising workers
 - 52% of film/television workers
 - 54% of publishing workers
- Source: “Freelancing in New York City 2019,” Independent Study Commissioned by Freelancers Union, Upwork, and the New York City Mayor’s Office of Media and Entertainment, <https://www1.nyc.gov/assets/mome/pdf/freelancing-ny-report-09062019.pdf>

Passage of the Freelance Isn't Free Act (FIFA)

Before the passage of FIFA, a 2015 Study of NYC Freelancers found that:

- 28% of freelance workers operated under written contracts.
- A freelancer's average annual unpaid income was \$5,968.

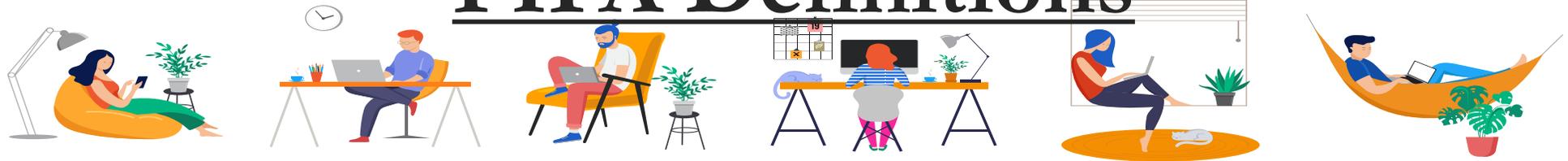
Source: 2015 Freelancers Union Report, *The Costs of Nonpayment*.



What is FIFA?

- A New York City Law which protects freelancers from underpayment, non-payment, or late payment. Additionally, FIFA protects freelancers from hiring parties who do not provide a contract, or provide a contract which is non-compliant under FIFA (i.e. it does not contain essential terms).
- If a hiring party is in violation of FIFA, a freelancer may: (1) choose to file a complaint with the Office of Labor and Policy Standards (OLPS); (2) choose to file a complaint in court; or (3) choose to file a complaint with OLPS, and, if unsuccessful, file a complaint in court.

FIFA Definitions



Who is considered a “freelancer”?

- Any individual hired or retained as an independent contractor by a hiring party to provide services for compensation.
 - Individuals may qualify as freelance workers under the law even if they are incorporated or use a trade name.
 - Covered by FIFA regardless of their immigration status.
 - **EXCEPTIONS:** Certain sales representatives, attorneys, licensed medical professionals, and workers hired/retained by any government agency.

Who is considered a “Hiring Party?”

- A hiring party is any person, organization, or entity other than a local, state, federal, or foreign government that retains a freelance worker to provide any service for compensation.

Freelance Isn't Free Act (FIFA)

- Since May 2017, all New York City freelancers have had additional protections from hiring parties under the law. Now freelancers are entitled to:

 - **Written Contract**
 - Agreements over \$800 in any 120-day period.
 - **Timely Payment**
 - Hiring party must pay per contract, or, if no set date, within 30 days of the work's completion.
 - **Freedom from Retaliation**
 - **Right to File a Complaint with the Office of Labor and Policy Standards**
 - **Right to Sue for Double Damages + Attorney Fees**
 - **Right to Court Navigation Services**
 - **** Additionally, provision that OLPS can bring “pattern and practice” violations**

Department of Consumer Affairs Office of Labor and Policy

- In 2015 the Department of Consumer Affairs (DCA) created the Office of Labor and Policy Standards (OLPS) to specifically help NYC's workforce.
- The Office of Labor and Policy Standards helps freelancers with hiring parties who have violated FICA.
 - Complaint intake and referral, research, advocacy and policy development, amongst other tasks.

How to File Complaint with OLPS

- Simple complaint form to fill out with basic facts: name of the hiring party, work performed, outstanding payment owed, etc.
- OLPS Notifies the hiring party that a complaint has been filed against it, and the hiring party's response time of 20 days.
- OLPS notifies freelancer of the response from the hiring party, or, if 20 days has passed and there is no response, notifies the freelancer,
- If a freelancer does not get paid, navigators can provide further assistance, including guidance about pursuing an action in court.
 - If a freelancer pursues a case in court, under FIFA the freelancer is entitled to double damages, attorneys fees, and a rebuttable presumption in their favor that the hiring party violated FIFA.

Scenarios Contract and Nonpayment Violations

- A fashion boutique commissions an artist paint a mural on the ceiling of their shop. There is a written contract which requires payment of \$5,000 to be paid to the artist within 30 days of completion. The painter reaches out to the owner of the shop many times but has not received any payment.
- After 30 days, the artist files a complaint with the office of labor and policy standards. OLPS sends the complaint to her and the hiring party does not respond. The artist receives a Notice of No Response in the mail and may now be granted a rebuttable presumption in court if she brings a lawsuit.

FIFA Statute of Limitations



- **OLPS:**

- Filing a complaint with OLPS – within 2 years of alleged violation

- **COURT:**

- Filing a claim in court for no written contract within 2 years of violation
- Filing a claim in court for nonpayment, underpayment or act of retaliation - within 6 years
- ***Non-FIFA claims: breach of contract (6 years), also quasi-contractual claims of unjust enrichment and quantum merit (6 years)

Employment Discrimination Overview



- Covers group of people group of people who share a **common characteristic** that entitles them to **protection** from **discrimination**

Federal (employees)

- Title VII of Civil Rights Act- **Race, color, religion, national origin, sex, age, sexual harassment, sexual orientation, citizenship status, genetic predisposition; ADA & ADEA – Disability**
- Enforced by the EEOC

New York State (employees, trainees and independent contractors) –

- New York State Human Rights Law (NYSHRL)- All of the Above + **marital status, prior conviction or arrest**
- Enforced by NYS Commission on Human Rights

New York City (employees, trainees and independent contractors)

- New York City Human Rights Law –All of the above + **Gender identity, pregnancy, unemployment status, credit history**
- Enforced by New York City Commission on Human Rights

ANTIDISCRIMINATION LAWS
NYSHRL and NYCHRL

Protections for Freelancers

New York State Human Rights Law (NYSHRL)

- New York Division of Human Rights (NYDHR) is the administrative agency tasked with enforcement of the NYSHRL.

- Violations of NYSHRL can be brought in Court or in front of the NYSHR
- **Protection of non-employees:** NY. Exec. Law § 296-d
- **All employers are covered regardless of size.**
- **Expanded pay equity (expanded restrictions on pay disparities based on being a member of many protected classes)**
- **Salary history ban:**
 - This does not apply for freelancers however (but see NYCHRL)- NYLL 194-A
- **Lower standard for proving harassment** N.Y. Exec. Law § 296(1)(h)
 - No more "severe or pervasive" standard
- **Non-disclosure provisions-** N.Y. Gen. Oblig. Law 5-336.
- **Elimination of the "Faragher-Ellerth" defense** N.Y. Exec. Law § 296(1)(h).
- **Extended statute of limitations for sexual harassment claim with NYDHR from one year to three years-:** N.Y. Exec. Law § 297(5).
- **Punitive damages and attorney's fees:** NY. Exec. Law § 297(9) and (10).

New York City Human Rights Law



- Expansive and liberal workplace anti-discrimination laws.
- Affords workers (including freelancers) unique protections not conferred by federal or NYSHRL
 - Additional protected class based on caregiver status and unemployment status
 - Fair Chance Act - prohibits inquiries into the criminal history of job applicants until after a conditional offer & sets strict limitations on using credit checks in hiring process.
 - Lowest standard plaintiff/petitioner needs to establish (*Williams v. New York City Hous. Auth*, 61 A.D.3d 62 [1st Dept 2009])[lowering standard for establishing liability for harassment and discrimination under NYCHRL, holding that a victim of harassment or discrimination need only demonstrate that she is treated “less well” than others.

Protections for Freelancers and NYCHRL

- January 2020 Guidance from NYCHRR states that the broad language of NYCHRL Section 8-107 should be read to extend additional protections to freelancers and independent contractors.
 - May receive reasonable accommodations for needs related to: Disability pregnancy, lactation, religious observances, and status as victims of domestic violence, sexual offenses, or stalking.
 - Apps and platforms that Freelancers can be held liable if they directly engage in discrimination against freelancer who uses their services
 - Stop Sexual Harassment in NYC Prevention Training is now extended to independent contractors if: (1) provides work for an employer of 15 or more people, (2) works more than 80 hours in a calendar year, and (3) for at least 90 days

How to File a Discrimination Claim in NYC



Q & A

Thank You



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