Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

A Potentially Far-Reaching Impact For New NYC Freelance Law

By **Gabrielle Levin and Neta Levanon, Gibson, Dunn & Crutcher LLP**

Gabrielle Levin

Neta Levanon

Law360, New York (May 12, 2017, 11:51 AM EDT) -- New York City's "Freelance Isn't Free Act" (FIFA), N.Y.C. Administrative Code §§ 20-927 et seq., goes into effect on May 15, 2017, and will substantially impact companies that retain independent contractors in New York City. FIFA requires, among other things, that employers enter into a written contract with all independent contractors hired to provide services valued at $800 or more. The contract must set forth the services to be provided, the compensation to be paid, and the date that payment is due (or the conditions that determine that date). Independent contractors are permitted to bring civil actions to enforce the act, and can recover compensation owed, statutory damages and attorneys' fees.

Companies operating in New York City should be aware of this law, not only because it imposes additional costs and burden on businesses, but also because it imposes additional legal risk on companies that hire independent contractors in New York City.

Moreover, the act's protections have been described as "the first of their kind in the country," and may be a harbinger of what's to come.[1] As national attention on the "gig economy" intensifies, we anticipate that similar laws will be passed in other state or local jurisdictions across the nation.

FIFA's Requirements

Definitions

FIFA defines a "freelance worker" ("freelancer(s)" herein) 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. (Emphases added.) "Hiring Party" covers all persons (which includes corporations) who

retain freelancers to provide any service, excluding federal, state, local and foreign governments.

Written Contract Requirement

Whenever the value of the services to be provided by a freelancer is $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:

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

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

- The date on which the hiring party must pay (or the mechanism by which such date will be determined).

The act empowers the director of the newly-created Office of Labor Policy & Standards (OLPS) — within the NYC Department of Consumer Affairs (DCA) — to issue rules requiring additional contractual terms, so companies will need to comply with both the law and any subsequently issued regulations. FIFA also requires that the director make available model contracts for use by the general public, which will serve as a useful (though likely insufficient) resource for companies.

Freelancer plaintiffs can bring a civil action for alleged violations of this provision within two years thereafter (though if this is the only provision they allege was violated, the freelancer must prove they requested a written contract before the contracted work began). If a plaintiff prevails, he or she would receive, in addition to reasonable attorneys' fees and costs, statutory damages of $250 (or, if they prevailed not only under this provision but under one or more of the act's other provisions, they would receive statutory damages equal to the value of the underlying contract plus the available remedies for the other provisions).

Unlawful Payment Practices

The act further requires that the compensation provided for in the written contract be paid either on or before the date set therein, or (if the written contract does not include either the payment due date or the mechanism by which such date will be determined, meaning that the contract is in violation of the act's written contract requirement) no later than 30 days "after the completion" of the freelancer's services under the contract. What constitutes "completion" of the services is undefined in the act.

FIFA further stipulates 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 the amount stated in the contract.

Freelancer plaintiffs can commence a civil action for alleged violations of this provision within six years thereafter. Should a plaintiff prevail, he or she would be entitled, in addition to reasonable attorneys' fees and costs, to double damages, injunctive relief and “other such remedies as may be appropriate.”

Retaliation

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 them from, exercising or attempting to exercise any right guaranteed by the act, or from obtaining future work opportunity for having done so.

Freelancers who believe they have been aggrieved under this provision can bring a civil claim within six years after the alleged violation. Prevailing plaintiffs are entitled to reasonable attorneys' fees and costs, as well as statutory damages equal to the value of the underlying contract for each violation.

Pattern or Practice Violations

In addition to freelancer plaintiffs’ private remedies, where there is “reasonable cause” to believe that a hiring party is engaged in a pattern or practice of violations of the act, New York City corporation counsel may commence a civil action on behalf of the city, in which a finding that a hiring party has engaged in a pattern or practice of violations of the act can result in the imposition of civil penalties of up to $25,000, paid into the general fund of the city. Injunctive relief and “other appropriate relief” are also available.

Other Provisions

The act also creates a complaint procedure through the director, under which a freelancer can, within two years after an alleged violation, file a complaint with the director. These freelancers are then referred to a navigation program that the director is to establish, which is meant to provide “[g]eneral court information and information about procedures under [the act],” as well as, among other things, “[g]eneral information about classifying persons as employees or independent contractors.” A hiring party’s failure to respond to the complaint creates, in any civil action brought under the act, a rebuttable presumption that the hiring party committed the violations alleged in the complaint.

The director is also required to publish periodic reports regarding the effectiveness of the act at improving freelance contracting and payment practices.

Implications for Employers

The act is likely to increase the burdens on and costs for businesses. Though the DCA will provide model contracts that comply with the act, businesses retaining independent contractors will likely need to supplement them (or retain in-house or outside counsel to do so) to ensure that these contracts address the gaps in the act that could expose companies to significant liability. For example, FIFA’s unlawful

payment practices provision does not provide businesses with any leeway in settling disputes about the amounts owed under a written contract. The provision stipulates that once a freelance worker has "commenced performance" of the services under the contract, the hiring party cannot require, as condition of timely payment, that the freelancer accept less compensation than the bargained-for amount. But the act does not address the business's recourse if, for example, the freelancer's performance stalls (e.g., the freelancer only partially performs, or his or her performance is defective).

The version of the act that was ultimately enacted excluded language from an earlier draft that would have provided a safe harbor for businesses: "[t]his [unlawful payment practices] provision does not preclude the settlement of a good faith dispute regarding performance under the contract or preclude a modification of a contract in accordance with other applicable law."[2] Companies will need to provide for this and other contingencies in their written contracts, and ensure that their financial systems can make timely payment thereunder.

Companies will also likely face an increase in freelancer litigation, both under the act and for breach of contract. In defending against these suits, businesses should keep in mind that FIFA appears to permit liability for violations of the act simultaneously with potential independent contractor misclassification liability. The act covers individuals "hired or retained as an independent contractor," but FIFA does not itself define "independent contractor," nor does it limit the scope of coverage to those individuals properly classified as independent contractors. Thus, a company that, in good faith, misclassified an individual as an independent contractor and retained his or her services for a contract exceeding $800 pursuant to an oral contract, for example, could potentially be liable simultaneously for violations of FIFA's written contract provision and for misclassification under federal and state law, with its attendant penalties and damages. That the act specifies that its provisions "supplement, and do not diminish or replace, any other basis of liability or requirement established by statute or common law," only underscores this possibility. Therefore, companies should very carefully evaluate whether workers are truly independent contractors that fall within the ambit of FIFA, or they risk exposure to misclassification penalties and damages, on top of the act's penalties and damages and potential breach of contract damages.

Finally, it is not clear to what extent companies can insulate themselves from these burdens by, for example, retaining the services of freelancers who do not opt to exercise their rights under the act, or by hiring W-2 at-will employees to perform the services at issue. FIFA's retaliation provision prohibits a hiring party from, among other things, "deny[ing] a work opportunity" to freelancers in response to the freelancers exercising or attempting to exercise their rights under the act. And according to the committee report that accompanied the final version of the act: "[s]ubject to surrounding circumstances, a claim of retaliation might also exist if, having established the terms of a contract for freelance services, the hiring party cancels the agreement in response to a request by the freelance worker to memorialize the agreement in a written contract."

Thus, a business could potentially be liable for retaliation where, for example, in screening multiple applicants for a job valued at over $800, and having one candidate demand a written contract while another did not, the company opted to retain the services of the latter candidate, or converted the position in question from an independent contractor to an at-will employee.

What's Next?

FIFA may be the beginning when it comes to regulation of the so-called "gig economy." In the initial Feb. 29, 2016, hearing before the New York City Council's Committee on Consumer Affairs, the chairperson testified that freelance "is a sector of work that will continue to grow, and that is in need of regulation." The U.S. Equal Employment Opportunity Commission appears to agree with this sentiment. In its strategic enforcement plan for fiscal years 2017 through 2021, the EEOC included as one of its "Emerging and Developing Issues" a "new priority to address issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on ... independent contractor relationships[] and the on-demand economy."[3]

Given the increasing focus on the "gig economy," we expect that federal, state and/or local governments may enact similar regulation of freelancers and independent contractors, imposing further burdens and costs on employers large and small. It will therefore be necessary for businesses to stay apprised of federal, state and local developments in this area.

Gabrielle Levin is a partner and Neta Levanon is an associate at Gibson, Dunn & Crutcher LLP in New York.

[1] Noam Scheiber, As Freelancers' Ranks Grow, New York Moves to See They Get What They're Due, N.Y. Times, Oct. 27, 2016, https://www.nytimes.com/2016/10/28/nyregion/freelancers-city-council-wage-theft.html?_r=1.

[2] This earlier draft, appended to the Committee Report of the Governmental Affairs Division of the New York City Council's Committee on Consumer Affairs, is available at http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2530972&GUID=61F8754B-80AF-493E-895E-D6D17209776E&Options=ID|Text|&Search=freelance, as are the other legislative history materials cited herein.

[3] U.S. EEOC, Strategic Enforcement Plan Fiscal Years 2017 – 2021, at 1, 5, available at https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.