

Blog Post

New York City Expands Independent Contractor Rights Amidst a Budding National Trend

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By Andrew C. Karter

Last month, New York City joined an emerging national trend toward increased protections for independent contractors and freelance workers, adopting a new law, Int. 136-A, extending to independent contractors and freelancers the protections afforded to employees under the city's Human Rights Law (NYCHRL).

Effective January 11, 2020, the NYCHRL will apply to employers that employ four or more persons – now defined to include independent contractors and freelancers – during the twelve (12) month period before the start of an unlawful discriminatory practice, and continuing through the end of that practice.

As a result, independent contractors and freelancers will be able to file complaints with the city's Commission on Human Rights, and they will be protected against retaliation for reporting discrimination or harassment. Employers should be prepared to apply the NYCHRL's protections to independent contractors and freelancers, including: New York City's salary history question ban, preventing employers from inquiring into an applicant's salary history before extending an offer; the Fair Chance Act, which prevents employers from inquiring into an applicant's criminal record before

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making a job offer; and the Stop Credit Discrimination in Employment Act, restricting employers' ability to conduct credit checks on applicants and employees.

A Growing National Trend

The new rights for contractors in New York are in keeping with a budding trend toward protecting independent contractors and freelancers. Most notably, this past September California approved Assembly Bill 5, which effective January 1, 2020, will codify the "ABC Test" for classifying individuals as employees or independent contractors. Under the ABC Test, individuals are employees unless they: (A) are free from the "control and direction of the hiring entity"; (B) perform work "outside the usual course of the hiring entity's business"; and (C) generally "engage in an independently established trade, occupation, or business." This bill is expected to reclassify nearly 65% of California's independent contractors as employees.

Similarly, last month the Philadelphia City Council unanimously passed a "Domestic Worker Bill of Rights," which guarantees in-home workers paid leave and sick days even if they work for more than one employer. Observers have noted that this idea of tying benefits to the worker, rather than the employer, could be a solution for independent contractors or freelancers in a similar position, such as individuals driving part-time for both Uber and Lyft.

Likewise, New Jersey's state labor department recently announced that Uber, a company marked by its long-held position that its drivers should be classified as independent contractors, owes the state past-due unemployment and disability insurance taxes worth approximately \$650 million. A successful outcome for New Jersey, which uses a version of the "ABC Test" in classifying workers, could lead to a requirement for Uber drivers to be paid minimum wage and overtime under state law.

Recent protections for non-employees have not just been limited to reclassification efforts. The 2017 Tax Act, which went into effect last year, allowed a 20 percent tax deduction on independent contractor income for those making less than \$157,500 (or \$315,000 if married and filing jointly). In a similar vein, U.S. Representative Eleanor Holmes Norton recently introduced a bill that would “require that individuals who perform work for employers as independent contractors be treated as employees.” While this particular bill is not expected to gain any traction, it represents a growing emphasis on protecting non-employees in a constantly growing gig economy.

Takeaway for Employers

The increased emphasis on protecting independent contractors and freelancers is particularly notable given that such workers are generally not covered by the protections by, for example, the Fair Labor Standards Act, Title VII, the Equal Pay Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Family and Medical Leave Act. Thus, for example, in cities such as New York where independent contractors and freelancers are gaining increased protections, employers are well-advised to ensure that these individuals are properly trained and versed on company anti-discrimination, harassment, and retaliation policies and procedures. This may include, for example, providing such workers with the same introductory guidelines, policies, and/or handbooks that are offered to full-fledged employees.

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