Brooklyn Journal of Corporate, Financial & Commercial Law

Volume 12 | Issue 2 Article 8

6-1-2018

FREELANCE ISN'T FREE: THE HIGH COST OF NEW YORK CITY'S FREELANCE ISN'T FREE ACT ON HIRING PARTIES

Caitlin M. Baranowski

FREELANCE ISN'T FREE: THE HIGH COST OF NEW YORK CITY'S FREELANCE ISN'T FREE ACT ON HIRING PARTIES

ABSTRACT

Recently, the New York City Council enacted the Freelance Isn't Free Act (FIFA) to protect freelancers from non-payment. Among FIFA's protections is the requirement that hiring parties provide a written contract to freelancers for any work exceeding $800 over a 120-day period. As the nation's first legislation ensuring freelancers' rights, FIFA marks a major turning point in the development of protections for the gig economy's growing independent workforce. While its purpose is laudable and necessary, this Note argues that FIFA is currently too ambiguous. To resolve FIFA's ambiguity, this Note recommends, at the very least, amending FIFA to include: 1) a specific jurisdictional provision; 2) a clarification of the definition of a freelance worker; and 3) a good faith defense provision for hiring parties. Additionally, this Note suggests that all hiring parties—whether located in New York City or conducting business with freelancers located in New York City—take the following actions: 1) confirm whether their workers are acting as freelancers under FIFA's protections or employees; 2) enter into written contracts with any existing and future freelancers; 3) pay freelancers as agreed; and 4) be proactive if a complaint is received from a freelancer under FIFA.

INTRODUCTION

With the rise of the digitally-enabled gig economy,[1] employers today are relying less on traditional nine-to-five employees and more on freelance workers.[2] In fact, alternative work arrangements comprise nearly all of the net employment growth in the American economy since 2005.[3] Today,

1. The phrase "gig economy" refers to the recent emergence of business models based on non-traditional work relationships where workers accept short-term assignments from those who demand their services. *See The Sharing Economy: Creating Opportunities for Innovation and Flexibility: Hearing Before the H. Educ. & the Workforce Comm.*, 115th Cong. 1, 2–3 (2017) (statement of Sharon I. Block, Executive Director, Labor and Worklife Program, Harvard Law School), *available at* http://docs.house.gov/meetings/ED/ED00/20170906/106358/HHRG-115-ED00-Wstate-BlockS-20170906.pdf. This "gig economy" concept is also referred to as the "on-demand economy," "sharing economy," or "online platform economy." *Id.* at 2.

2. *See* Lawrence F. Katz & Alan B. Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015 7–8, 17–18 (Mar. 29, 2016) (unpublished manuscript), *available at* http://scholar.harvard.edu/files/lkatz/files/katz_krueger_cws_v3.pdf?m=1459369766.

3. *See The Future of Work: Diving into the Data*, U.S. DEP'T OF LAB. BLOG (June 17, 2017), https://blog.dol.gov/2016/06/17/the-future-of-work-diving-into-the-data (citing Katz & Kreuger, *supra* note 2, at 8).

approximately 55 million Americans earn a living through freelance work.[4] The 1.3 million freelance workers in New York City (N.Y.C.) are the driving force behind many businesses, notably the media, fashion, tourism, construction, and service industries.[5] These freelance workers[6] include many writers, musicians, accountants, translators, home contractors, day laborers, nannies, and more.[7]

Due to the fast-paced nature of freelance work, freelancers may not request a contract for their services because formal written documents could slow them down, causing them to lose out on work opportunities.[8] Consequently, estimates suggest that only 28% of freelancers operate under written contracts.[9] The lack of a written contract often leads to trouble for freelancers when seeking payment from hiring parties.[10]

4. *See* Press Release, Upwork, New Study Finds Freelance Econ. Grew to 55 Million Americans This Year, 35% of Total U.S. Workforce (Oct. 6, 2016), https://www.upwork.com/press/2016/10/06/freelancing-in-america-2016/.

5. Most sources state that there are 1.3 million freelancers in New York City. *See, e.g.*, Sara Horowitz & Mike McDerment, *Freelancers, Now Key to NYC's Economy, Merit Protection to Match*, CRAIN'S N.Y. BUS. (Dec. 22, 2015, 12:01 AM), http://www.crainsnewyork.com/article/20151222/OPINION/151219868/freelancers-now-key-to-nycs-economy-merit-protection-to-match. However, a few sources cite to a lower, 500,000 figure. *See, e.g.*, Press Release, N.Y.C. Off. of the Mayor, Freelancers Aren't Free: Mayor Announces First in Nation Protections for Freelance Workers (May 15, 2017), http://www1.nyc.gov/office-of-the-mayor/news/307-17/freelancers-aren-t-free-mayor-first-nation-protections-freelance-workers ("There are an estimated 500,000 freelance workers that will benefit from this legislation, based on a 2013 study by DOF of New Yorkers receiving 1099-MISC tax forms [a common income tax form for individuals operating as contingent 'freelance' workers]."). Historically, alternative work arrangements have been difficult to clarify and estimate because of complexity and the lack of statistical data. For a thorough explanation of the data gaps regarding freelancer statistics, *see* Annette Bernhardt, *Labor Standards and the Reorganization of Work: Gaps in Data and Research* 1–2 (Inst. for Res. on Lab. & Emp., Working Paper No. 100-14, Jan. 2014), http://irle.berkeley.edu/files/2014/Labor-Standards-and-the-Reorganization-of-Work.pdf.

6. "Freelance workers include independent contractors, part-time moonlighters, full-time self-employed workers and others." N.Y.C. COMM. ON CONSUMER AFFAIRS, N.Y.C. COUNCIL, COMMITTEE REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION 3–4 (Oct. 26, 2016), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2530972&GUID=61F8754B-80AF-493E-895E-D6D17209776E&Options=ID|Text|&Search=freelance [hereinafter N.Y.C. COMM. ON CONSUMER AFFAIRS, COMM. REP.].

7. *See, e.g.*, *Freelance Isn't Free Act, Frequently Asked Questions*, N.Y.C. OFF. OF THE MAYOR, CONSUMER AFF. 2 (June 2, 2017), http://www1.nyc.gov/assets/dca/downloads/pdf/workers/FAQs-Freelance.pdf [hereinafter *FIFA FAQ*]; N.Y.C. OFF. OF THE MAYOR, CONSUMER AFFAIRS, DO YOU HIRE FREELANCE WORKERS? KNOW NYC LAW (June 2017), http://www1.nyc.gov/assets/dca/downloads/pdf/businesses/Freelance-Info-for-Hiring-Parties.pdf.

8. *See* N.Y.C. COUNCIL, MINUTES OF THE PROCEEDINGS FOR THE STATED MEETING OF THURSDAY, OCTOBER 27, 2016, 1:55 PM (Oct. 27, 2016) (citations omitted) [hereinafter N.Y.C. COUNCIL MINUTES].

9. *Id.*

10. *See* 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 [hereinafter Scheiber, *As Freelancers' Ranks Grow*].

Statistics reveal that freelancers frequently struggle to collect payment from hiring parties.[11] Indeed, 71% of freelancers have had difficulties collecting payment during their careers.[12] The average freelancer is cheated out of approximately $5,968 each year, leading to financial stress.[13] Overall, estimates suggest that freelancers in New York State (N.Y.S.) are owed between $2.3 billion and $3.7 billion in unpaid wages annually.[14] While traditional employees are entitled to statutory protections regarding wage theft, complaint investigations, and damages enforcement by government agencies like the N.Y.S. Department of Labor,[15] freelancers do not enjoy such protections and are forced to either sue or forego their payments.[16] Despite non-payment, the majority of freelancers do not sue to recover payments owed to them; only 5% of freelancers pursue breach of contract claims in court, opting to eat their losses rather than endure the time and expense of litigation.[17]

Despite the risk of nonpayment, individuals are increasingly becoming freelancers, either by choice or necessity.[18] Hiring parties, from small businesses to international corporations, can now readily retain freelancers to perform specialized work at a reduced cost, given that freelancers do not receive employee benefits or unemployment insurance,[19] and freelancers impose less risk of third-party liability than employees.[20] Most significantly,

11. *See* Gillian Stoddard Letherberry & Zanib Ahmad, *Freelance Isn't Free Act: Free Webinar for Freelance Workers*, N.Y.C. DEP'T OF CONSUMER AFF. 10 (June 15, 2017), https://www1.nyc.gov/assets/dca/downloads/pdf/workers/WebinarTraining-FreelanceWorkers.pdf.

12. *See id.*

13. *See* Press Release, N.Y.C. Consumer Affairs Comm., Bill Protecting NYC Freelancers from Deadbeat Companies Moves Forward with Majority Support (Feb. 29, 2017), https://nycprogressives.files.wordpress.com/2016/03/2-29-16-freelance-act-final-release.pdf.

14. *See* Testimony of New York City Comptroller Scott M. Stringer in Support of Int. 1017-A Before Members of the Committee on Consumer Affairs of the New York City Council (Feb. 29, 2016), https://comptroller.nyc.gov/newsroom/testimony-of-new-york-city-comptroller-scott-m-stringer-in-support-of-int-1017-a-before-members-of-the-committee-on-consumer-affairs-of-the-new-york-city-council/.

15. *See generally* Katherine V.W. Stone, *Unions in the Precarious Economy*, 28 AM. PROSPECT 97 (2017).

16. *See* N.Y.C. COMM. ON CONSUMER AFFAIRS, COMM. REP., *supra* note 6, at 6.

17. *See* Testimony of Haeyoung Yoon, National Employment Law Project, Hearing Before New York City Council Committee on Consumer Affairs on Intro 1017-2015, In Relation to Establishing Protections for Freelance Workers 2, 3 (Feb. 29, 2016), http://www.nelp.org/content/uploads/NELP-Testimony-Protections-for-Freelance-Workers-New-York-City.pdf (citations omitted).

18. *See* Fed. Res. Governor Lael Brainard, Speech at "Evolution of Work," *The "Gig" Economy: Implications of the Growth of Contingent Work* (Nov. 17, 2016), https://www.federalreserve.gov/newsevents/speech/brainard20161117a.htm.

19. *See* Robert W. Wood, *Independent Contractor or Employee? The Multiple Issues Involved in Independent Contractor Status*, N.Y. ST. B. ASS'N J., June 2008, at 28; *see also The Sharing Economy: Creating Opportunities for Innovation and Flexibility: Hearing Before the H. Educ. & the Workforce Comm.*, 115th Cong. 1, 11–12 (Sept. 6, 2017) (written statement of Arun Sundararajan, Professor at NYU Sch. of Bus.), *available at* https://edworkforce.house.gov/uploadedfiles/sundararajan_-_testimony.pdf.

20. While hiring parties are not liable for the acts of independent contractors under the doctrine of *respondeat superior*, legislation may expressly make hiring parties liable for independent

unlike employees who are paid on an hourly or salary basis, hiring parties only pay freelancers for the work performed.[21] While hiring parties must annually provide Form W-2 Tax and Wage Statements to employees,[22] hiring parties provide freelancers who worked "on the books"[23] with Form 1099-MISC Miscellaneous Income Statements.[24]

The use of freelancers has traditionally represented an administrative and operating cost savings to hiring parties;[25] however, new legislation has complicated the use of freelancers by hiring parties.[26] Recently, N.Y.C. sought to remedy some of the problems faced by freelancers with the passage of the Freelance Isn't Free Act (FIFA or the Act).[27] Passed in October 2016 and effective May 2017,[28] FIFA seeks to ensure basic protections for freelancers, aiming to reduce the time freelancers spend collecting payments and increase the time they spend developing their businesses and promoting their services.[29] Specifically, FIFA imposes stringent requirements on hiring parties,[30] who are broadly defined as any person who retains a freelance

contractors in certain scenarios. *See, e.g.*, N.Y.C. Admin. Code § 8-107(13)(c) (2017) (making an employer liable for an independent contractor's discrimination).

21. *See* Kaitlin Fox, *Gig Economy, Independent Contractors, and New York Law*, NAT'L L. REV. (June 8, 2017), https://www.natlawreview.com/article/gig-economy-independent-contractors-and-new-york-law.

22. U.S. INTERNAL REVENUE SERV., 2017 GENERAL INSTRUCTIONS FOR FORMS W-2 AND W-3, https://www.irs.gov/pub/irs-pdf/iw2w3.pdf (last updated May 2, 2017).

23. Paying "off the books" or "under the table" wages is fraud. *See Employer Misclassification of Workers*, N.Y. ST. DEP'T OF LAB., https://www.labor.ny.gov/ui/employerinfo/employer-misclassification-of-workers.shtm (last visited Dec. 26, 2017).

24. A hiring party must provide a Form 1099-MISC to, *inter alia*, someone who received at least $600 for services performed and is not an employee. *See* U.S. INTERNAL REVENUE SERV., 2018 INSTRUCTIONS FOR FORM 1099-MISC,
https://www.irs.gov/pub/irs-pdf/i1099msc.pdf (last updated Oct. 12, 2017).

25. *See* Noam Scheiber, *How Uber Uses Psychological Tricks to Push Its Drivers' Buttons*, N.Y. TIMES (Apr. 2, 2017), https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html (estimating that classifying drivers as independent contractors lowers direct costs for ridesharing companies by roughly 25%); s*ee also* David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138, 141 (2015) ("According to a study done in 2000 of nine states commissioned by the Department of Labor's Employment Administration, '[t]he number one reason employers use [independent contractors] and/or misclassify employees is the savings in not paying workers' compensation premiums and not being subject to workplace injury and disability-related disputes.'").

26. *See* Richard J. Reibstein et al., *Defects in NYC's Freelance Bill*, N.Y.L.J., Nov. 3, 2016, at 6 [hereinafter Reibstein et al., *Defects*].

27. FIFA (Local Law 140 of 2016) consists of laws located in Chapter 10, Title 20 of the N.Y.C. Admin. Code. FIFA was later augmented by rules located in Chapter 12, Title 6 of the Rules of the City of New York, which went into effect on July 24, 2017.

28. N.Y.C. DEP'T OF CONSUMER AFFAIRS, COURT NAVIGATION GUIDE FOR FREELANCE WORKERS 2, 3, http://www1.nyc.gov/assets/dca/downloads/pdf/workers/Court-Navigation-Freelance.pdf. [hereinafter N.Y.C. DEP'T OF CONSUMER AFFAIRS, COURT NAVIGATION GUIDE].

29. *See* N.Y.C. COUNCIL MINUTES, *supra* note 8.

30. *See* Fox, *supra* note 21.

worker to provide any service.[31] FIFA entitles freelancers to written contracts for any work exceeding $800 during a 120-day period, timely payment, and freedom from retaliation.[32] FIFA further provides freelancers with, *inter alia*, the right to file a complaint, the right to sue for double damages and attorney fees, and the right to court navigation services, which provide assistance with filing lawsuits against hiring parties, sample contracts, and information regarding the differences in the classification of a freelancer and an employee.[33]

Although N.Y.C.'s freelancers ought to receive statutory protections preventing payment theft, FIFA has serious issues.[34] The ambiguous language of FIFA will likely have many unintended adverse consequences for both freelancers and hiring parties, resulting in unnecessary confusion.[35] As this legislation is the first of its kind in the United States and "represents a major turning point for the gig economy,"[36] FIFA's successful implementation is critical.[37] This Note argues that while the protections for freelance workers are necessary, FIFA does not properly address the needs of freelancers or hiring parties.

This Note will explore and offer suggestions to resolve the ambiguity and potential adverse ramifications of FIFA. Part I provides an in-depth history of FIFA, its provisions, and its unique features. Part II discusses the unintended consequences of FIFA on hiring parties, particularly the inherent tension between FIFA and the N.Y.S. Court of Appeals' decision in *In re Yoga Vida NYC, Inc.*,[38] which interpreted the meaning of "independent contractor" just two days before FIFA was passed. Part II also explores the unintended consequences of FIFA on freelancers and why the issues faced by these workers will likely continue despite FIFA's passage. Part III provides suggestions for the N.Y.C. Council to consider when amending FIFA, as well as guidelines for hiring parties—including hiring parties located within N.Y.C. and hiring parties outside of N.Y.C. that contract with

31. *See* N.Y.C. Admin. Code § 20-927 (2017). This definition of a "hiring party" does not include any federal, state, local, and foreign government entities, all of which are exempt from FIFA. *See id.*

32. *Id.* §§ 20-928, 20-929, 20-930; R.C.N.Y. § 12-04 (2017).

33. N.Y.C. Admin. Code § 20-931, 20-932; *see generally* Letherberry & Ahmad, *supra* note 11.

34. *See, e.g.*, Reibstein et al., *Defects*, *supra* note 26.

35. *Id.*

36. Press Release, N.Y.C. Off. of the Mayor, Mayor Bill de Blasio Signs Legislation Strengthening Protections for Freelance Workers (Nov. 16, 2016), http://www1.nyc.gov/office-of-the-mayor/news/890-16/mayor-bill-de-blasio-signs-legislation-strengthening-protections-freelance-workers (quoting Freelancers Union Founder and Executive Director Sara Horowitz).

37. *See* Sidney Minter, *NYC's "Freelance Isn't Free Act" Might End Up Impacting Businesses Across the Country*, LEXOLOGY (June 22, 2017), https://www.lexology.com/library/detail.aspx?g=57e2c03d-28c3-4bcb-84a7-597a125d2018; *see also* Gabrielle Levin & Neta Levanon, *A Potentially Far-Reaching Impact for NYC Freelance Law*, LAW360 (May 12, 2017), https://www.law360.com/articles/923171/a-potentially-far-reaching-impact-for-nyc-freelance-law.

38. *See In re* Yoga Vida NYC, Inc., 28 N.Y.3d 1013 (2016).

freelancers located within N.Y.C.—to consider adopting until FIFA's issues are addressed.

I. FIFA'S LEGISLATIVE HISTORY AND PROVISIONS

In 2015, the Freelancers Union introduced FIFA as a proposed bill to the N.Y.C. Council.[39] The Freelancers Union is not an actual union, but rather a Brooklyn-based association established to promote the interests of its 350,000 members.[40] The Freelancers Union's proposed bill, Intro. 1017-2015,[41] was backed by Councilmember Brad S. Lander as an "opportunity to lead the nation in recognizing the vital contributions independent workers make to our economy – by ensuring freelancers get real protections against payment theft."[42] "The City Council determined that protecting freelance workers against non-payment would have a positive effect on the local economy, the freelance industry, and the financial security of freelance workers' families, and result in a more prosperous city."[43] Intro. 1017-2015, named the Freelance Isn't Free Act, was therefore unanimously approved by a vote of the N.Y.C. Council in October 2016 and effective starting May 15, 2017.[44] Later, in July 2017, the N.Y.C. Department of Consumer Affairs augmented FIFA to include additional rules, in an attempt to clarify certain provisions.[45]

Since its enactment, FIFA has garnered global attention for being the first law in the United States to ensure protections for freelancers against non-payment.[46] This publicity has magnified the calls for better protection for freelancers in the gig economy at the local, state, and federal levels.[47] The

39. *See* Laura Murphy, *Freelance Isn't Free Act Passes in NYC with 51 Votes!*, FREELANCERS UNION BLOG (Oct. 27, 2016), https://blog.freelancersunion.org/2016/10/27/freelanceisntfreepassed/.

40. *About Us*, FREELANCERS UNION, https://www.freelancersunion.org/ (last visited Dec. 26, 2017).

41. *See Legislative History Report*, N.Y.C. COUNCIL (Nov. 17, 2016), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2530972&GUID=61F8754B-80AF-493E-895E-D6D17209776E.

42. *First-of-its-Kind Legislation Will Crack Down on Nonpayment Epidemic Facing NYC's 1.3 Million Independent Workers*, N.Y.C. COUNCILMEMBER BRAD LANDER (Dec. 7, 2015), http://bradlander.nyc/news/updates/first-of-its-kind-legislation-will-crack-down-on-nonpayment-epidemic-facing-nyc-s-13-mi.

43. *Notice of Public Hearing and Opportunity to Comment on Proposed Rules*, N.Y.C. OFF. OF THE MAYOR, DEP'T OF CONSUMER AFF. 2 (Apr. 18, 2017), https://www1.nyc.gov/assets/dca/downloads/pdf/media/DCAPublicHearing-053117.pdf.

44. *See* Bill Protecting NYC Freelancers from Deadbeat Companies Moves Forward with Majority Support, *supra* note 13; *see also* N.Y.C. DEP'T OF CONSUMER AFFAIRS, COURT NAVIGATION GUIDE, *supra* note 28, at 3.

45. *See Implementation of Freelance Isn't Free Act*, N.Y.C. RULES, http://rules.cityofnewyork.us/content/implementation-freelance-isnt-free-act (last visited Dec. 26, 2017).

46. *See, e.g.*, Emma Koehn, *Calls for Australia to Follow "Home of Free Enterprise" New York on Strict Late Payments Laws*, SMARTCOMPANY (May 16, 2017), https://www.smartcompany.com.au/finance/calls-for-australia-to-follow-new-york-on-late-payments/.

47. *See* Levin & Levanon, *supra* note 37.

state of New Jersey, for example, currently has an assembly bill and a state bill pending which would establish timely payment for freelancers.[48] Utilizing language similar to FIFA, this New Jersey legislation—namely, Assembly Bill 4410 and Senate Bill 3530—requires a written contract between freelancers and hiring parties for work exceeding a statutorily-defined amount of money, and creates a procedure for payment enforcement as well as a court navigation program.[49]

At the federal level, the U.S. Equal Employment Opportunity Commission's (EEOC) 2017 Strategic Enforcement Plan indicates its "new priority to address issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on . . . independent contractor relations[] and the on-demand economy."[50] The EEOC's characterization of the gig economy as an "emerging and developing issue" and its identification of employee misclassification as an enforcement priority is not surprising,[51] in light of emerging statutes, regulations, and the well-publicized court cases against on-demand rideshare companies like Uber and Lyft.[52] According to Senator Mark Warner (D-VA), who recently introduced federal legislation that will act as a test drive for portable health benefits for freelancers, "[p]olicymakers need to discuss whether government and industry's 20th Century definitions still work for a 21st Century economy . . . . The decision about whether on-demand workers are independent contractors or employees is too important to leave to the courts on a case-by-case, state-by-state basis."[53] Public support and national attention suggest that initiatives protecting freelancers in the gig economy will soon be passed throughout the nation, thereby making FIFA's effective implementation critical.[54]

48. Unlike FIFA, however, the proposed New Jersey legislation avoids many of the ambiguities and issues found in FIFA that are discussed in this Note, like a good faith defense for hiring parties who believed that they were in compliance with the law.
See Assemb., Bill No. A4410, 217th Leg. (N.J. 2016); S., Bill No. S3530, 217th Leg. (N.J. 2017).

49. *See* Jeannie O'Sullivan, *NJ Lawyers, Others Exempt from Proposed Freelancer Law*, LAW360 (Nov. 20, 2017), https://www.law360.com/articles/986718?scroll=1.

50. U.S. EEOC, STRATEGIC ENFORCEMENT PLAN, FISCAL YEARS 2017-2021 2, https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf.

51. *See id.*

52. *See, e.g.*, Mike Isaac & Noam Scheiber, *Uber Settles Cases with Concessions, But Drivers Stay Freelancers*, N.Y. TIMES (Apr. 21, 2016), https://www.nytimes.com/2016/04/22/technology/uber-settles-cases-with-concessions-but-drivers-stay-freelancers.html; Rachel Emma Silverman, *Uber, Lyft Cases Focus on Drivers' Legal Status*, WALL ST. J. (Mar. 15, 2015, 5:55 PM), https://www.wsj.com/articles/uber-lyft-cases-could-help-clarify-drivers-legal-status-1426456519.

53. Nancy Collamer, *What Clinton And Trump Would Do for Gig Economy Workers*, FORBES (July 11, 2016, 4:00 PM), https://www.forbes.com/sites/nextavenue/2016/07/11/what-clinton-and-trump-would-do-for-gig-economy-workers/#1146d14e92dbl.

54. *See* Minter, *supra* note 37, at 5.

FIFA is administered by the Office of Labor Policy & Standards (OLPS) within the N.Y.C. Department of Consumer Affairs.[55] OLPS accepts complaints from freelance workers alleging that hiring parties violated FIFA, notifies hiring parties of complaints filed against them, and requests written responses from the implicated hiring parties.[56] OLPS cannot issue determinations or penalties,[57] but it can promote dispute resolution to keep freelance claims outside the courts.[58] While it cannot provide legal advice,[59] OLPS provides information regarding rights and responsibilities under FIFA and attorneys' contact information for freelancers seeking to pursue claims in court.[60]

FIFA defines a "freelance worker" as "any natural person or any organization composed of no more than one natural person, whether or not incorporated or employing a trade name, that is hired or retained as an independent contractor by a hiring party to provide services in exchange for compensation."[61] A supplemental rule added to FIFA in July 2017 provides that qualifying freelancers are protected regardless of immigration status.[62] Sales representatives, as defined by section 191-a of the New York Labor Law, attorneys, and licensed medical professionals are explicitly excluded and are not protected by FIFA.[63] Additionally, freelancers hired by any federal, state, local, or foreign government are not protected by FIFA.[64]

A. FREELANCER RIGHTS UNDER FIFA

The rights provided to qualifying freelancers under FIFA include the right to 1) a written contract, 2) timely payment, 3) freedom from retaliation, 4) legal recourse, 5) double damage and attorney's fees, 6) a court navigation programs, and 7) subsequent rights added by supplemental rules.[65] Each of these rights will be discussed in greater detail below.

1. Right to a Written Contract

Under FIFA, a written contract is required for any transaction where 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 parties during the

55. OLPS is referred to as the "office of labor standards" within FIFA. *See* N.Y.C. DEP'T OF CONSUMER AFFAIRS, COURT NAVIGATION GUIDE, *supra* note 28.
56. *See FIFA FAQ*, *supra* note 7, at 1.
57. *See* N.Y.C. Admin. Code § 20-931 (2017).
58. *See id.* § 20-936.
59. *Id.* § 20-932(e).
60. *See FIFA FAQ*, *supra* note 7, at 1.
61. N.Y.C. Admin. Code § 20-927.
62. R.C.N.Y. § 12-02 (2017).
63. N.Y.C. Admin. Code § 20-927.
64. *Id.* § 20-927; *see FIFA FAQ*, *supra* note 7, at 2.
65. N.Y.C. Admin. Code §§ 20-927–20-936; R.C.N.Y. §§ 12-01–12-05.

subsequent 120 days.[66] The hiring party must provide the written contract which, at a minimum, must include: the name and mailing address of the freelancer and the hiring party; an itemization of all services to be provided by the freelancer; the value of the services to be provided; the rate and method of the freelancer's compensation; the date on which the freelancer must be paid or the mechanism to determine the date of payment; and any additional terms that OLPS may deem necessary in the future.[67] The requirement for a written contract is satisfied by any writing that contains FIFA's required terms and N.Y.S.' requirements for a written contract.[68] According to the Committee Report accompanying the bill prior to its passage, "an email, a letter, an advertisement or a text message, or some combination of those" that includes the required information will suffice.[69]

2. Right to Timely Payment

FIFA provides that a hiring party must provide payment to a freelancer in full (as stipulated by their written contract), either on or before the due date specified in the written contract or, if no due date was specified, no later than thirty days after the freelancer completes the work.[70]

3. Right to Freedom from Retaliation

Under FIFA, hiring parties may not retaliate against freelancers by penalizing, threatening, or blacklisting freelancers who exercise their rights.[71] According to the Committee Report accompanying FIFA:

> Examples of retaliation include blacklisting a freelance worker from an industry, discrediting a freelance worker to other potential hiring parties or canceling a multipart contract after the contracted work has begun. . . . [A] claim of retaliation may 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.[72]

To prove retaliation under FIFA, a freelancer may present direct or circumstantial evidence related to the hiring party's intent to retaliate, such as "evidence that the protected activity was closely followed by the adverse action."[73]

66. N.Y.C. Admin. Code § 20-928.
67. *See id.*
68. *See* N.Y.C. COMM. ON CONSUMER AFFAIRS, COMM. REP., *supra* note 6, at 6.
69. *Id.*
70. *See* N.Y.C. Admin. Code § 20-929.
71. *Id.* § 20-930.
72. N.Y.C. COMM. ON CONSUMER AFFAIRS, COMM. REP., *supra* note 6, at 7.
73. R.C.N.Y. § 12-04(b) (2017).

4. Right to Legal Recourse

Prior to seeking judicial action, an aggrieved freelancer may choose to first file a complaint with OLPS within two years of an alleged violation.[74] Once an action is filed, the OLPS Director will send a certified letter to the hiring party within twenty days, explaining how the hiring party allegedly breached FIFA.[75] Within twenty days of receipt, the hiring party must provide a written response to OLPS that either provides proof of payment to the freelancer in full, or explains why the freelancer was not paid in full.[76]

If the hiring party denies the allegations or fails to respond, OLPS will notify the freelancer of his or her right to file a civil lawsuit in court.[77] If the hiring party does not respond to the complaint, there is a rebuttable presumption that the hiring party committed the alleged violations.[78] Consequently, when the freelancer then initiates a lawsuit, the judge will presume that the hiring party committed the violation alleged in the freelancer's complaint, and the hiring party will bear the burden to show that it did not violate FIFA.[79]

An aggrieved freelancer may decide to skip OLPS and immediately file a civil lawsuit alleging FIFA violations in court.[80] The statute of limitations varies based on the claim: a claim for no written contract must be filed within two years of the alleged violation,[81] while a claim for nonpayment, underpayment, or retaliation must be filed within six years of the alleged violation.[82] A freelancer may commence an action to collect on small claims of up to $5,000 in the N.Y.C. Civil Court.[83] Larger claims must be filed in N.Y.C. Civil Court or the N.Y.S. Supreme Court.[84]

5. Right to Double Damages and Attorney's Fees

A freelancer who successfully asserts a claim under FIFA is entitled to damages, including payments owed for the services provided by the freelancer, double damages, attorney's fees, and costs.[85] The damages awarded will vary based on the claims asserted under FIFA.[86] A freelancer

74. *See* N.Y.C. Admin. Code § 20-931(a); *see generally* N.Y.C. DEP'T OF CONSUMER AFFAIRS, COURT NAVIGATION GUIDE, *supra* note 28, at 5 (providing the benefits of first filing a complaint with OLPS).

75. N.Y.C. Admin. Code § 20-931(d).

76. *Id.* § 20-931(e)(1)(a)–(b).

77. *See* N.Y.C. COUNCIL MINUTES, *supra* note 8, at 3381, n.4 (citations omitted).

78. N.Y.C. Admin. Code § 20-931(d).

79. *See id.*

80. *See id.* § 20-933; *see also* N.Y.C. DEP'T OF CONSUMER AFFAIRS, COURT NAVIGATION GUIDE, *supra* note 28, at 5.

81. N.Y.C. Admin. Code § 20-933(a)(2).

82. *Id.* § 20-933(a)(3).

83. N.Y.C. DEP'T OF CONSUMER AFFAIRS, COURT NAVIGATION GUIDE, *supra* note 28, at 10.

84. *Id.*

85. N.Y.C. Admin. Code § 20-933(b).

86. *Id.*

who commences a lawsuit solely alleging the hiring party's failure to have a written contract, and who can prove that the hiring party refused to enter into a written contract, may recover statutory damages of $250 from the hiring party.[87] A freelancer who commences and prevails on a claim alleging the hiring party's failure to have a written contract, plus another claim under FIFA, such as failure to provide payment or retaliation, may be awarded statutory damages equal to the value of the contract, as well as any other available relief.[88] If, for example, a freelancer prevails on a claim alleging the hiring party's failure to have a written contract and another claim alleging the hiring party's failure to make full payment, the freelancer is entitled to double damages, injunctive relief, and "such other remedies as may be appropriate."[89] Additionally, a freelancer who prevails on a claim of retaliation may receive statutory damages equal to the value of the contract.[90]

FIFA also provides increased statutory damages against hiring parties with patterns of abuse.[91] Under FIFA, the Corporation Counsel of the N.Y.C. Law Department (Corporation Counsel) may pursue a claim against hiring parties with repeated violations.[92] If the Corporation Counsel decides that there is reasonable belief that a hiring party is engaged in a pattern or practice of violating its obligations under FIFA, the Corporation Counsel may commence a civil action against that hiring party.[93] FIFA provides that a hiring party may face a civil penalty of up to $25,000 for repeated FIFA violations, along with all other available penalties.[94]

6. Right to a Court Navigation Program

FIFA established a Court Navigation Program run by OLPS, which provides the public with general information regarding FIFA's requirements, classification of workers as employees as opposed to independent contractors, how to initiate a court case, court forms, a sample written contract, and how to find an attorney.[95]

7. Subsequent Rights Added by Supplemental Rules

On July 24, 2017, the N.Y.C. Department of Consumer Affairs augmented FIFA with additional rules intended to "clarify provisions in the law, establish requirements to implement and meet the goals of the law, and provide guidance to covered hiring parties and protected freelance

87. *See id.* § 20-933(b)(2)(a).
88. *Id.* § 20-933(b)(3)–(4).
89. *See id.* § 20-933(b)(3).
90. *See id.* § 20-933(b)(4).
91. *See id.* § 20-934(b).
92. *See id.* § 20-934(a)(1)–(3).
93. *See id.*
94. *Id.* § 20-934(b).
95. *See id.* § 20-932.

workers."[96] These rules significantly expanded FIFA's coverage.[97] For example, the rules broaden the definition of retaliation by extending liability to hiring parties for adverse actions taken by that "hiring party, their actual or apparent agent, or any other person acting directly or indirectly on behalf of a hiring party . . . ."[98] The rules further allow a freelancer to establish that the "cause" element of a retaliation claim was an exercise of rights under FIFA that was "a motivating factor" for the adverse action, even if it was not the sole factor.[99] In other words, a "motivating factor" standard, rather than a "but-for" standard, will be applied in FIFA retaliation claims.[100]

Importantly, the rules also limit the rights that a freelancer can waive in a contract.[101] While FIFA's initial legislation indicated that any contractual provision waiving rights granted under FIFA would be void,[102] the rules expansively provide that the following contractual limitations will be declared void: any prospective waiver or limitation of rights under FIFA;[103] a waiver of class or collective actions;[104] a waiver of "any procedural right normally afford to a party in a civil or administrative action;"[105] or any confidentiality provision that would prevent a freelance worker from disclosing the contract's terms to the OLPS Director.[106]

II. FIFA'S UNINTENDED CONSEQUENCES

As noted by Sara Horowitz, the founder and executive director of the Freelancers Union, the landmark protections provided to freelancers under FIFA will hopefully "have a prophylactic effect of making sure" that hiring parties stop shortchanging freelancers.[107] However, as discussed below,

96. *Implementation of Freelance Isn't Free Act*, *supra* note 45.

97. *See* Leni D. Battaglia & Richard G. Rosenblatt, *NYC Consumer Affairs Department Adopts Final Rules on Freelance Isn't Free Act*, MORGAN, LEWIS & BOCKIUS LLP (July 20, 2017), https://www.morganlewis.com/pubs/nyc-consumer-affairs-department-adopts-final-rules-on-freelance-isnt-free-act; *see also* Cindy Schmitt Minniti & Mark S. Goldstein, *United States: NYC Agency Publishes Rules for New Independent Contractor Law*, REED SMITH LLP (July 19, 2017), https://www.employmentlawwatch.com/2017/07/articles/employment-us/new-york-employment-beat/nyc-agency-publishes-rules-for-new-independent-contractor-law/?utm_source=Mondaq&ut.

98. R.C.N.Y. § 12-01(b) (2017).

99. *Id.*

100. *See id.*; Ned Bassen et al., *New NYC Rules for Hiring Domestic Workers and Other Freelancers as Independent Contractors*, HUGHES, HUBBARD & REED LLP (July 27, 2017), https://www.hugheshubbard.com/news/new-nyc-rules-for-hiring-domestic-workers-and-other-freelancers-as-independent-contractors.

101. *See* Battaglia & Rosenblatt, *supra* note 97.

102. N.Y.C. Admin. Code § 20-935 (2017) provides, in relevant part, that "[e]xcept as otherwise provided by law, any provision of a contract purporting to waive rights under this chapter is void as against public policy."

103. R.C.N.Y. § 12-05(a).

104. *Id.* § 12-05(b).

105. *Id.* § 12-05(c).

106. *Id.* § 12-05(d).

107. *See* Rebekah Mintzer, *Freelancers Hail Safeguards in Bill Passed by NYC Council*, N.Y.L.J., Oct. 31, 2016, at 1.

FIFA currently contains ambiguities which will impede its effectiveness. If the ambiguous language is not amended or clarified, FIFA will have many adverse and unintended consequences on both hiring parties and freelancers.

A. UNINTENDED CONSEQUENCES FOR HIRING PARTIES

1. Misclassification of "Independent Contractor" Arising from Unclear Statutory and Judicial Interpretations

Employee misclassification occurs when a hiring party improperly labels an employee as an independent contractor or fails to report the employee in any capacity (i.e., paying workers "off the books").[108] FIFA disclaims that it does not provide a determination about the legal classification of any individual and does not address what will occur in misclassification disputes.[109] However, a hiring party must first and foremost be aware of whether the worker retained is an independent contractor subject to FIFA or if that worker is, in fact, acting as an employee.

Classification as an independent contractor versus an employee has major consequences for both workers and employers because workers classified as "independent contractors" are not guaranteed the critical benefits and protections awarded to employees.[110] In particular, independent contractors do not receive benefits such as: minimum wage, overtime, rest breaks, expense reimbursement, family and medical leave, unemployment insurance, workers' compensation, or the right to form a union.[111] On a broader scale, employee misclassification generates substantial losses to the government in the form of lower tax revenues, as well as to state unemployment insurance funds and workers' compensation funds.[112]

Hiring parties found to have misclassified workers are consequently punished with both federal and state penalties through the Internal Revenue Service, U.S. Department of Labor, and various N.Y.S. agencies.[113] Hiring parties in N.Y.S. must be especially careful to properly classify their workers, as N.Y.S. aggressively investigates, identifies, and prosecutes independent contractor misclassification.[114] Since its establishment in 2007, the New York State Joint Enforcement Task Force on Employee Misclassification

108. N.Y. DEP'T OF LAB., ANNUAL REPORT OF THE JOINT ENFORCEMENT TASK FORCE ON EMPLOYEE MISCLASSIFICATION 2 (Feb. 1, 2015), https://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2015.pdf.

109. *See* N.Y.C. Admin. Code § 20-935(d) (2017).

110. *See* Wendi S. Lazar, *The Gig Economy: A Threat to Basic Employment Rights; Employees in the Workplace*, N.Y.L.J., May 2, 2017, at 3.

111. *See, e.g.*, Leevson v. Aqualife USA, Inc., No. 14-CV-6905, 2017 U.S. Dist. LEXIS 181388, at *22–25 (E.D.N.Y. Nov. 1, 2017), *appeal filed*, No. 17-3868 (2d Cir. 2017).

112. *See id.* at *10 (citing *Misclassification of Employees as Independent Contractors*, U.S. DEP'T OF LAB., https://www.dol.gov/whd/workers/misclassification/).

113. *See* Fox, *supra* note 21.

114. *See id.*

(JETF) has fought worker exploitation and employee misclassification by prosecuting employers who break the law.[115] In 2014, the JETF identified nearly 26,000 instances of employee misclassification, almost $316 million in unreported wages, and nearly $8.8 million in unemployment insurance contributions.[116]

Hiring parties must carefully determine a worker's classification to properly provide benefits where required and avoid penalties, but determining one's worker classification is no easy task. No single determinative test for worker classification exists.[117] Instead, several different tests may be used to distinguish independent contractors from employees.[118] The applicable legal tests for making this determination changes from context to context, keeping in mind that different courts and agencies apply different definitions, rules, and tests.[119] Particularly for gig economy workers, the existing tests for classification determinations inconsistently apply independent contractor and employee designations.[120] According to scholars Seth D. Harris and Alan B. Krueger, the new workforce arising from the gig economy does not easily fit into the existing legal definitions of "independent contractor" and "employee."[121] Issues surrounding worker classification in the gig economy have perhaps been most publicized regarding application-based, on-demand ridesharing

115. N.Y. COMP. CODES R. & REGS. tit. 9, § 8.159 (2016).

116. N.Y. DEP'T. OF LAB., *supra* note 108, at 2.

117. Pamela A. Izvanariu, *Matters Settled But Not Resolved: Worker Misclassification in the Rideshare Sector*, 66 DEPAUL L. REV. 133, 145–46 (2016); *see* Fox, *supra* note 21 (explaining that "there is no 'magic combination' for ensuring the factors will weigh in favor of the workers being classified as independent contractors").

118. Courts and administrative agencies will apply different tests when determining worker classification, depending on the type of claim alleged. In New York, courts may apply the "totality of circumstances/economic reality test," the "common law right to control test," or a hybrid of both. *Compare* Saleem v. Corp. Transp. Grp., Ltd., 854 F.3d 131, 144, 149 (2d Cir. 2017) (utilizing the economic reality test in a Fair Labor Standards Act claim to find that drivers were independent contractors and thus not entitled to overtime pay), *with In re* Yoga Vida NYC, Inc., 28 N.Y.3d 1013, 1015–16 (2016) (utilizing the right to control test in an unemployment insurance claim to find that yoga instructors were independent contractors and thus not entitled to unemployment insurance).

119. Izvanariu, *supra* note 117, at 145–46.

120. Seth D. Harris & Alan B. Krueger, A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker" 2 (Dec. 2015) (discussion paper), *available at* http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf.

121. *See id.* at 2, 5, 7 (proposing a new legal category called "independent workers" who would qualify for many of the protections that employees receive, including the freedom to organize and collectively bargain, civil rights protections, tax withholding, and employer contributions for payroll taxes, but would not qualify for hours-based employee benefits such as overtime, minimum wage, and unemployment insurance benefits); *but see* Ross Eisenbrey & Lawrence Mishel, *Uber Business Model Does Not Justify a New 'Independent Worker' Category*, ECON. POL'Y INST. (Mar. 17, 2016), http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/. Eisenbrey and Mishel refute Harris and Krueger's argument because "[r]ather than pursue a legislative fix . . . a better approach is simply to establish that Uber and Lyft drivers and similar workers are employees with all attendant rights." *Id.*

companies, like Uber and Lyft, which have faced lawsuits from drivers challenging their classification as independent contractors.[122]

When determining whether to classify a party as an independent contractor or an employee, N.Y.C. employers must consider federal law, N.Y.S. statutes, and more recently, city laws established under FIFA, as well as courts' future interpretations of FIFA. Because worker classification is a complex area of law,[123] hiring parties—particularly individual employers and small companies lacking the resources to regularly consult legal experts—struggle to determine whether to classify their workers as employees or freelancers.[124] Even hiring parties that can afford to consult attorneys may still face employee-independent contractor classification issues due to the tension between FIFA and the *Yoga Vida* decision entered by the N.Y.S. Court of Appeals on October 25, 2016, only two days before FIFA was passed.[125]

In *Yoga Vida*, the N.Y.S. Court of Appeals considered whether certain yoga instructors in a Manhattan yoga studio were independent contractors or employees.[126] The yoga instructors argued that they were employees and thereby entitled to unemployment insurance from the yoga studio.[127] Reversing the Unemployment Insurance Appeal Board and the intermediate appellate court's finding that the yoga instructors were employees, the Court of Appeals held that the yoga instructors were independent contractors, not

122. In a 2015 decision holding that whether a Lyft driver is an employee or an independent contractor is a question to be resolved by a jury, the judge wrote:

> [T]he jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem. . . . Perhaps Lyft drivers who work more than a certain number of hours should be employees while the others should be independent contractors. Or perhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections. But absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this. And because the test provides nothing remotely close to a clear answer, it will often be for juries to decide.

Order Denying Cross-Motions for Summary Judgment, Cotter v. Lyft, 60 F. Supp. 3d 1067, 1081–82 (N.D. Cal. 2015).

123. *See* Elizabeth A. Harlan, *Service Providers as Independent Contractors or Employees—The Yoga Vida Decision*, 2017 LEXISNEXIS: EMERGING ISSUES 7502 (Jan. 11, 2017).

124. *See* N.Y. DEP'T OF LAB., *supra* note 108, at 2 (noting that in 2014, the state government "identified nearly 26,000 instances of employee misclassification; discovered nearly $316 million in unreported wages; and assessed nearly $8.8 million in unemployment insurance contributions").

125. Nina K. Markey, *Continuing Uncertainty for Employers Seeking to Navigate Joint Employment Liability*, LEGAL INTELLIGENCER (Nov. 14, 2017, 12:45 PM), https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2017/11/14/continuing-uncertainty-for-employers-seeking-to-navigate-joint-employment-liability/.

126. *See In re* Yoga Vida NYC, Inc., 28 N.Y.3d 1013, 1014–15 (2016).

127. *See id.*

employees, of the studio.[128] The yoga studio was thus not liable for the alleged unpaid unemployment contributions.[129]

In its decision, the Court of Appeals examined multiple factors to determine whether the workers were independent contractors or employees under N.Y.S. law.[130] The most important factors were whether the yoga studio exercised supervision, direction, and control over the workers.[131] In *Yoga Vida*, on-staff yoga instructors created their own schedules; they chose whether to be paid hourly or on a percentage basis; they did not have to attend staff meetings; they could work for competitors; and, notably, they were paid only if a certain number of students attended their classes, unlike staff instructors who were paid regardless of attendance.[132] The Court of Appeals explained that the yoga studio did not exercise sufficient supervision, direction, and control to constitute an employer-employee relationship.

The Court of Appeals' fact-intensive analysis in *Yoga Vida*, as well as the dissenting opinion asserting that the yoga instructors should have been deemed employees, demonstrates that worker classification is a subjective, fact-specific analysis that is often difficult to ascertain.[133] Accordingly, the analysis employed by the Court of Appeals in *Yoga Vida* will likely not assist hiring parties in determining classifications in different contexts, particularly those hiring parties who may be engaged in the gig economy's online platforms.

2. Tension with *Yoga Vida* Regarding Payments for Freelancers

Even when it is clear that an individual was acting as a freelancer and not as an employee, and the parties properly entered into a written contract pursuant to FIFA, payment issues may arise if the freelancer completes work that does not meet the hiring party's approval.[134] FIFA requires payment to any freelancer regardless of work product.[135] Section 20-929 of FIFA does not include a good faith defense for hiring parties and instead requires that

128. *See id.* at 1014–16.
129. *See id.*
130. *See id.* at 1015–16.
131. *See id.*
132. *See id.* at 1015.
133. *See id.* at 1016–18 (Fahey, J., dissenting) (agreeing with the Unemployment Insurance Appeal Board and the Appellate Division's finding that the yoga instructors should have been classified as employees based on the facts).
134. *See* Loren Lee Forrest Jr. & Katherine H. Marques, *Why NY Employers Should Carefully Consider Freelancers*, LAW360 (Jan. 6, 2017), https://www.law360.com/articles/875140/why-ny-employers-should-carefully-consider-freelancers; *see also* Loren Forrest, Jr. & Katherine H. Marques, *Employers' Use of Independent Contractors Restricted By New Law and Court Decision*, HOLLAND & KNIGHT LLP (Dec. 12, 2016), https://www.hklaw.com/publications/Employers-Use-of-Independent-Contactors-Restricted-by-New-Law-and-Court-Decision-12-12-2016/.
135. *See* N.Y.C. Admin. Code § 20-929 (2017).

hiring parties pay freelancers, even if the freelancers' work is substandard.[136] This provision of FIFA directly conflicts with the Court of Appeals' decision in *Yoga Vida*.[137] When explaining why some of *Yoga Vida*'s instructors were independent contractors, the Court of Appeals noted that "[u]nlike staff instructors, who are paid regardless of whether anyone attends a class, the non-staff instructors are paid only if a certain number of students attend their classes."[138] In accordance with *Yoga Vida*, hiring parties are not obligated to pay independent contractors who do not perform the work that the parties had agreed upon.[139] This directly conflicts with the FIFA provision that requires hiring parties pay independent contractors, regardless of performance or quality.[140] Because FIFA lacks a provision for resolving performance issues, hiring parties are left with no power regarding performance and quality control, thereby conflicting with the *Yoga Vida* decision.[141]

3. Issues with Freelancers Operating under Trade Names and Legal Entities

In addition to the general issues surrounding employee versus independent contractor classification, the definition of a freelancer under FIFA is complicated because a hiring party may not realize that an individual is a freelancer.[142] FIFA defines a freelance worker as any natural person or organization.[143] But, an independent contractor may operate individually or under a trade name or legal entity (such as an LLC). Importantly, FIFA applies to individuals regardless of whether they have incorporated a business for their operation.[144] Therefore, an LLC will be covered as a "freelance worker" under FIFA when that LLC consists of one individual.[145]

The N.Y.C. Department of Consumer Affairs has confirmed that "[i]ndividuals may qualify as freelance workers under [FIFA] even if they

136. *See id.*; *see also* Richard J. Reibstein et al., *New York City Freelancer Law May Have Nationwide Impact on Independent Contractor Relationships*, 42 EMP. REL. L. J. 30, 30–31 (2016) [hereinafter Reibstein et al., *Nationwide Impact*] (noting that FIFA lacks a good faith defense to the double damages penalty in the law); Todd Lebowitz, *New NYC Law Requires Written Agreements for Solo Contractors, Even Nannies and Babysitters!*, BAKER HOSTETLER (May 19, 2017), https://www.employmentlawspotlight.com/2017/05/new-nyc-law-requires-written-agreements-for-solo-contractors-even-nannies-and-babysitters/ (explaining that "it is unclear whether the Act [FIFA] will recognize a good faith defense for a hiring party who believes the contractor failed to perform").

137. *Employers' Use of Independent Contractors Restricted By New Law and Court Decision*, *supra* note 134.

138. *In re Yoga Vida*, 28 N.Y.3d at 1016.

139. *See id.*

140. *Why NY Employers Should Carefully Consider Freelancers*, *supra* note 134.

141. *See* Reibstein et al., *Nationwide Impact*, *supra* note 136.

142. *See* Lebowitz, *supra* note 136.

143. *See* N.Y.C. Admin. Code § 20-927 (2017).

144. *See id.*

145. *See id.*; *see also FIFA FAQ*, *supra* note 7, at 2.

are incorporated or use a trade name."[146] As noted by legal practitioners, many freelancers operating under trade names are reluctant to disclose that they are one-person operations; these individual freelancers strategically state that "'we' have done this or that, or that 'our' services include this."[147] To an outsider, freelancers using trade names appear to be outside of FIFA's scope. Hiring parties may later encounter issues if they fail to enter into a written contract simply because they were not aware of the freelancer's status due to the freelancer's use of a trade name or entity.[148]

4. Lack of Jurisdictional Scope

Critically, FIFA lacks jurisdictional limitations since it does not precisely identify whom it covers and whom it regulates.[149] FIFA's definitions of freelance workers and hiring parties are ambiguous and the scope of FIFA's coverage is not currently defined.[150] FIFA does not clarify whether individuals must have physical locations in N.Y.C., mailing addresses in N.Y.C., or simply conduct business regularly in N.Y.C., in order to meet FIFA's definition of freelance workers or hiring parties.[151] FIFA may apply to work performed outside N.Y.C. depending on the particular circumstance, including whether some of the work is performed in N.Y.C., whether the freelance worker was hired or retained in N.Y.C., and whether the hiring party's operations are within N.Y.C..[152]

Moreover, FIFA does not address any of the issues that will inevitably arise when hiring parties retain freelancers via the Internet. Future litigation will likely determine whether FIFA applies to N.Y.C. freelancers who are retained over the Internet by hiring parties located in other states, or even other countries.

The N.Y.C. Department of Consumer Affairs has recognized FIFA's ambiguity and noted that its scope will need to be addressed by the courts.[153] Specifically, in response to the question, "Can the Law apply outside of New York City?," the N.Y.C. Department of Consumer Affairs acknowledged:

> It depends. The Freelance Isn't Free Act is a New York City law. While judges will decide how the Law applies in each case, the Law does apply to

146. *See FIFA FAQ*, *supra* note 7, at 2.

147. Reibstein et al., *Nationwide Impact*, *supra* note 136, at 31.

148. *See id.*

149. *See id.*

150. *See id.*; *see also* Scheiber, *As Freelancers' Ranks Grow*, *supra* note 10 (noting the proposed bill "would cover workers who live in New York City; there is some ambiguity about whether it would apply to workers who live outside the city but work for companies based in the city").

151. *See* Reibstein et al., *Defects*, *supra* note 26; *see also FIFA FAQ*, *supra* note 7, at 3.

152. *See* Matthew Lampe et al., *Avoid the Pitfalls of NYC Freelancer Law*, JONES DAY (June 2017), http://www.jonesday.com/files/Publication/a0ac8b81-677e-4c94-932e-815c19023a33/Presentation/PublicationAttachment/4a0b7641-c0da-4b69-bf5b-9eb5f40145c2/Avoid%20the%20Pitfalls%20of%20NYC%20Freelancer%20Law-.pdf.

153. *See FIFA FAQ*, *supra* note 7, at 3.

> work performed inside New York City and may apply to work performed outside New York City depending on the overall circumstances. For example, whether the Law applies may depend on whether some, but not all, of the work is performed in New York City, the freelance worker is hired or retained in New York City, or the hiring party has significant operations in New York City.[154]

Judicial and administrative decisions may find that "[t]he law applies to any business that has a freelance worker located in New York City, and the hiring party need not be based or doing business in New York City."[155] Thus, because of FIFA's ambiguities, even individuals outside of N.Y.C.'s jurisdiction may unknowingly be subject to FIFA's requirements.

5. No Waivers and Potential Preemption

FIFA provides that any contract purporting to waive or limit a freelancer's rights under the Act will automatically be deemed void as a matter of law pursuant to public policy.[156] FIFA furthers that a contract may not waive or limit a freelancer's right to participate in a class action.[157] These provisions would therefore prohibit a contractual provision which states, for example, that the parties must proceed with arbitration instead of litigation in the event of a dispute.[158] However, the Department of Consumer Affairs may not have the authority to void contractual arbitration provisions, as FIFA's limit on contractual waivers is likely pre-empted by the Federal Arbitration Act (FAA).[159] The FAA supports the use of arbitration agreements for the arbitration of commercial contracts claims.[160] In *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court held that when a "state law prohibits outright the arbitration of a particular type of claim, . . . [t]he conflicting rule is displaced by the FAA . . . . States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated purposes."[161]

154. *Id.*

155. Danielle Manley, *FIFA: This New Law May Affect Businesses Nationwide*, MULTIBRIEFS (May 15, 2017) (quoting David Singer, Esq., Partner and labor and employment expert at the international law firm Dorsey & Whitney, LLP), http://exclusive.multibriefs.com/content/fifa-this-new-law-may-affect-businesses-nationwide/business-management-services-risk-management.

156. N.Y.C. Admin. Code § 20-935(a) (2017); R.C.N.Y. § 12-05(a) (2017).

157. "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." R.C.N.Y. § 12-05(b).

158. *See* Gena B. Usenheimer & Meredith-Anne Berger, *Newly Adopted "Freelance Isn't Free" Rules Rife with Preemption Issues Under FAA*, SEYFARTH SHAW LLP (July 13, 2017), http://www.seyfarth.com/publications/MA071317-LE.

159. *See id.*; *see also* Battaglia & Rosenblatt, *supra* note 97.

160. 9 U.S.C. § 2 (2012).

161. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341, 351 (2011).

Under *Concepcion*[162] and ensuing cases,[163] the Supreme Court has aggressively enforced arbitration agreements containing class action waivers.[164] The exact scope of FIFA's prohibition on waivers is unclear[165] and will likely need to be resolved by the courts.

6. Unnecessary Confusion, Litigation, and Forced Settlements

The expansive and potentially crippling statutory remedies that may be awarded against hiring parties will likely result in increased litigation.[166] Because FIFA does not specify the jurisdiction regarding its coverage, hiring parties with N.Y.C. mailing addresses or physical locations in N.Y.C., and hiring parties who use freelancers from N.Y.C., may face liability under FIFA.[167] At the public hearing prior to FIFA's passage, proponents testified that legal action is onerous, expensive and time-consuming with the results too uncertain.[168] FIFA therefore aimed to lessen the need for litigation.[169] Unfortunately, however, litigation will likely continue as the public attempts to determine FIFA's scope through judicial interpretation, resulting in breach of contract cases which could have been avoided through clearer drafting. FIFA may lead many hiring parties, seeking to avoid additional expenses and an uncertain outcome in the courts, to settle. Settlements beneficially keep breach of contract cases out of the courts; however, hiring parties should not be forced to settle when they have a good faith defense or when they are not certain if FIFA applies to them.

B. UNINTENDED CONSEQUENCES FOR FREELANCERS

Undoubtedly, the legislative protections offered by FIFA are necessary.[170] As noted by FIFA's lead sponsor, Councilmember Brad S. Lander, existing laws are "so badly outdated they don't give the basic protections all workers expect, much less broader support and benefits to all

162. *Id.*; *see generally* Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703 (2012).

163. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013) ("courts must 'rigorously enforce' arbitration agreements according to their terms").

164. *See* Frankel v. Citicorp Ins. Servs., No. 11-CV-2293 (NGG) (RER), 2015 WL 6021534, at *2 (E.D.N.Y. Oct. 13, 2015) (noting that the rule established by the Supreme Court in *Concepcion* and *Italian Colors Restaurant* "applies just as strongly to class action waivers within arbitration agreements").

165. Usenheimer & Berger, *supra* note 158.

166. *See* Reibstein et al., *Defects*, *supra* note 26.

167. Reibstein et al., *Nationwide Impact*, *supra* note 136, at 30–31.

168. *See* Hearing of the N.Y.C. Consumer Affairs Committee, Hearing Transcript 7, 143 (Feb. 29, 2016) [hereinafter N.Y.C. Consumer Affairs Committee Hearing].

169. *See id.* at 53–54.

170. According to a LinkedIn study, 75% of its "ProFinder professionals" surveyed agreed that legislation like FIFA is needed for the freelance workforce. *LinkedIn ProFinder Reveals Brand New Findings on Freelance Economy*, LINKEDIN (Sept. 14, 2017), https://www.linkedin.com/profinder/blog/linkedin-profinder-reveals-brand-new-findings-on-freelance-economy.

workers in the growing gig economy."[171] However, FIFA will likely have many unintended consequences, which may ultimately harm the freelancers it sought to protect.[172] First, FIFA does not actually save freelancers from the inconvenient requirement of having to turn to the court system.[173] FIFA still requires that freelancers turn to the court system to collect fees,[174] but going through the courts is timely and costly, and can be a reputational risk for both freelancers and hiring parties. Freelancers need more than just another way to get into the court system.

Among FIFA's many supporters were union organizations that commended FIFA's laudable goals,[175] although unions often believe that the best protection for workers is through classification as an employee, and the ultimate legislative push should be towards classifying more individuals as employees.[176] Indeed, some on-demand companies have willingly, and successfully, opted to classify their independent contractors as "employees," which ensures rights and protections for workers better than independent contractor designations.[177] For example, the on-demand food preparation and delivery service, Munchery, opted to classify its drivers as employees after its first two years of existence.[178] Because of their initial classification as independent contractors, Munchery's drivers were not eligible for minimum wage and overtime protections, unemployment insurance, or workers' compensation.[179] In 2013, Munchery willingly decided to switch its drivers'

171. *See* Scheiber, *As Freelancers' Ranks Grow*, *supra* note 10.

172. Amit S. Bagga, Deputy Commissioner of External Affairs for the N.Y.C. Department of Consumer Affairs, raised several concerns regarding FIFA's effect on freelancers prior to the FIFA's passage. *See* N.Y.C. Consumer Affairs Committee Hearing, *supra* note 168, at 38–48.

173. *See* Reibstein et al., *Defects*, *supra* note 26.

174. *See id.*

175. A few of FIFA's many supporters were the United Federation of Teachers, National Writers Union, and Service Employees International Union Local 32BJ (SEIU 32BJ). *See In Landmark Victory, Millions of NYC Gig Economy Workers Win Wage Theft Protections*, N.Y.C. COUNCILMEMBER BRAD LANDER (Oct. 27, 2016), http://bradlander.nyc/news/updates/in-landmark-victory-millions-of-nyc-gig-economy-workers-win-wage-theft-protections.

176. For example, FIFA was supported by the Service Employees International Union Local 32BJ (SEIU 32BJ). *See id.* The SEUU 32BJ is a national union consisting of 163,000 property service workers in the United States. But, SEIU has noted in the past that it encourages broader protections for workers, aiming to have workers classified as employees rather than freelancers. In opposition to a New Jersey state bill that would provide portable benefits to freelancers, SEIU 32BJ Vice President Kevin Brown explained, "[w]hile we appreciate . . . trying to make sure these workers are paid a decent living and have access to health benefits, it takes away their employee status . . . while we would want [workers] to be treated fairly . . . in terms of their compensation, we can't compromise their rights as workers in the process." Michael Hill, *Assembly Bill Would Create Benefits System for Contract and Freelance Workers*, NJTV NEWS (June 22, 2017), https://www.njtvonline.org/news/video/assembly-bill-create-benefits-system-contract-freelance-workers/.

177. *See, e.g.*, Noam Scheiber, *A Middle Ground Between Contract Worker and Employee*, N.Y. TIMES (Apr. 2, 2017), https://www.nytimes.com/2015/12/11/business/a-middle-ground-between-contract-worker-and-employee.html?_r=1.

178. *See id.*

179. *See id.*

classification to employees.[180] Although the upfront costs of classifying its drivers as employees were high, Munchery recognized that classifying its workers as employees was best in the long-term to prevent turnover.[181] Today, this successful on-demand company is still in operation and delivers meals to over 1,000 cities.[182]

III. POTENTIAL SOLUTIONS TO RESOLVE FIFA'S AMBIGUITY

A. SUGGESTED AMENDMENTS TO CLARIFY FIFA

To evaluate whether amendments to this landmark legislation are required, the N.Y.C. Council included a provision within FIFA allowing the N.Y.C. Department of Consumer Affairs—through OLPS—to "examine the trends in New York City's gig economy and to promote policies that will benefit our evolving workforce."[183] This provision specifically requires that OLPS prepare reports based on collected data regarding the resolutions obtained as a result of FIFA, which will be presented to the N.Y.C. Council for the first time one year after enactment and on the first of November every five years thereafter.[184] Councilmember Brad S. Lander explained, in response to critics, "[s]ince this legislation is the first of its kind, we wrote into the law an opportunity for a 'check-in,' one year from the enactment date, in which the Department of Consumer Affairs will report the results of its complaint procedure, and make recommendations for any legislative changes."[185] Therefore, on or about May 15, 2018, OLPS will report FIFA's results and make recommendations for potential legislative changes.[186] At that time or prior, policymakers should, at the very least, consider amending FIFA to include a specific jurisdictional provision, an unambiguous definition of a freelance worker, and a good faith defense provision for hiring parties regarding work quality.

180. *See id.*

181. According to Munchery's Vice-President for Operations Kris Fredrickson, "on a 1099 model, it's tougher to compel [the drivers] to show up." *Id.*

182. MUNCHERY, https://munchery.com/food-near-me/ (last visited Dec. 26, 2017).

183. Press Release, N.Y.C. Off. of the Mayor, Mayor Bill de Blasio Signs Legislation Strengthening Protections for Freelance Workers (Nov. 16, 2016) (quoting N.Y.C. Dep't of Consumer Affairs Commissioner Lorelei Salas), http://www1.nyc.gov/office-of-the-mayor/news/890-16/mayor-bill-de-blasio-signs-legislation-strengthening-protections-freelance-workers.

184. *See* N.Y.C. Admin. Code § 20-936 (2017).

185. Brad S. Lander, *Freelancer Bill is Smart Law*, N.Y.L.J., Nov. 3, 2016, at 6 (responding to Reibstein et al., *Defects*, *supra* note 26).

186. N.Y.C. Admin. Code § 20-936(c).

1. Amending FIFA to Include a Specific Jurisdictional Provision

FIFA must be amended to confirm whether it applies to the hiring parties and/or freelancers within N.Y.C. Both hiring parties and freelancers should not be forced to wait for court determinations to confirm FIFA's jurisdictional limits.

2. Amending FIFA to Clarify the Definition of a Freelance Worker

The definition of a "freelance worker" should be amended so that hiring parties are not inappropriately penalized for failure to prepare a written contract when the hiring parties were unaware because the freelancers operated under an entity or trade name and did not disclose their status.

3. Amending FIFA to Include a Good Faith Provision

FIFA should be amended to include a good faith provision pertaining to work quality and performance disputes, which would be consistent with the N.Y.S. Court of Appeals' decision in *Yoga Vida*. Specifically, there should be a good faith defense to protect hiring parties with a good faith belief that the freelancers' services were not performed satisfactorily.[187] Additionally, a good faith defense should exist for hiring parties who were not aware that the freelancers qualified for FIFA protections. For example, this would apply when a freelancer operates under a trade name and does not disclose that to the hiring party and as a result, the hiring party does not provide a written contract to the freelancer based on a good faith belief that a written contract pursuant to FIFA was not required. Notably, the pending New Jersey state legislation pertaining to freelance workers includes a good faith provision which will protect hiring parties when necessary.[188] The proposed New Jersey statute provides: "In addition to any remedies provided pursuant to any other laws of this State, the commissioner may assess against the client an additional amount as liquidated damages, *unless* the client proves a good faith basis for believing that its violation was in compliance with this act."[189]

Other existing statutes pertaining to employees provide employers with good faith defenses that allow the employers to dispute payments owed to employees.[190] For example, N.Y.S. Labor Law provides a defense for employers facing a double damages penalty if the employer can prove that it had a good faith basis for believing that it did not owe the employee

187. *See* Reibstein et al., *Nationwide Impact*, *supra* note 136, at 33–34.

188. *See* Assemb., Bill No. A4410, 217th Leg. (N.J. 2016); S., Bill No. S3530, 217th Leg. (N.J. 2017).

189. S., Bill No. S3530, 217th Leg. (N.J. 2017) (emphasis added); Assemb., Bill No. A4410, 217th Leg. (N.J. 2016).

190. *See, e.g.*, N.Y. LAB. LAW § 198.1-a (McKinney 2016); 29 U.S.C. § 259 (2012).

compensation.[191] Similarly, the federal Fair Labor Standards Act includes a good faith provision allowing a defendant-employer to avoid liability for failure to pay overtime if the defendant-employer "pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation" of the administrator of the Wage and Hour Division of the Department of Labor.[192] FIFA should be amended to include a good faith provision, like those incorporated within other federal and state laws related to employment.[193]

The original proposed draft of FIFA included a good faith provision to protect hiring parties; however, this provision was removed from the final adopted legislation.[194] This original good faith provision specified: "This provision does not preclude the settlement of a good faith dispute regarding performance under the contract or preclude a modification for a contract in accordance with other applicable law."[195] A similar good faith provision should be added into FIFA.

B. SUGGESTED ACTIONS FOR HIRING PARTIES UNTIL FIFA IS AMENDED

Until FIFA is amended or the courts clarify FIFA's jurisdictional coverage, hiring parties with any connection to N.Y.C. should assume that FIFA applies to them.[196] As legislation, rule-making, and litigation surrounding FIFA continues, hiring parties should consider taking the following preventative measures to limit liability, such as confirming whether prospective hires and current workers are freelancers or employees, execute written contracts with freelancers, pay freelancers timely, and take proper action if a complaint is filed with OLPS.

1. Confirm Whether Workers Are Freelancers under FIFA's Protections or Employees

Hiring parties should consider reviewing their relationships with workers to confirm whether they are correctly identified as independent contractors or whether an employee status is more appropriate. Pursuant to the *Yoga Vida* decision, the actual duties performed by the worker should be examined,[197]

191. N.Y. LAB. LAW § 198.1-a.
192. 29 U.S.C. § 259.
193. *See, e.g.*, N.Y. LAB. LAW § 198.1-a; 29 U.S.C. § 259.
194. *See* N.Y.C. COMM. ON CONSUMER AFFAIRS, N.Y.C. COUNCIL, COMMITTEE REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION 12 (Feb. 29, 2016); *see also New York City's "Freelance Isn't Free Act (FIFA)" is a Trap for Unwary Employers*, DDK & COMPANY, LLP (Feb. 23, 2017), https ://www.ddkcpas.com/new-york-citys-freelance-isnt-free-act-fifa-is-a-trap-for-unwary-employers.
195. COMMITTEE REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION, *supra* note 194, at 12.
196. Reibstein et al., *Nationwide Impact*, *supra* note 136, at 36.
197. *See In re* Yoga Vida NYC, Inc., 28 N.Y.3d 1013, 1016 (2016).

rather than the title or position that may have been contractually agreed upon between the parties.[198] While FIFA disclaims that it does not provide a determination about the legal classification of any individual and does not address what will occur in misclassification disputes,[199] hiring parties should ensure that they meet FIFA's minimum requirements as well as the strict federal and state laws pertaining to worker classification.[200]

Courts and agencies may consider a variety of factors, but as demonstrated by *Yoga Vida*, the following factors play a critical role in determining whether an individual is an independent contractor versus an employee: the degree to which the employer controls or directs the manner in which the work is performed; whether the worker can simultaneously perform services for other companies; the extent of the worker's duties; the opportunity for profit or loss; whether the worker's duties are performed for the employer on an ongoing or permanent basis; whether the worker hires supervisors or subordinates; whether the services performed by the worker are an integral part of the employer's business; whether the service performed by the worker is for a fixed term; and, the extent of the worker's investment in equipment or materials needed to perform the job.[201] Employers should therefore review their independent contractor versus employee job descriptions, actual job duties and functions, and the degree of day-to-day control exerted by management. An employer who is uncertain about a worker's classification should err on the side of caution and identify the worker as an employee, given that one study commissioned by the U.S. Department of Labor found that 95% of workers who claimed they were misclassified as independent contractors were reclassified as employees following review.[202]

198. *See In re* Hertz Corp., 2 N.Y.3d 733, 735 (2004) (ultimately holding that an individual was an employee, despite a written agreement that he was an independent contractor, but considering the written agreement when weighing the factors); *see also In re* Pepsi Cola Buffalo Bottling Corp., 144 A.D.2d 220, 222 (N.Y. App. Div. 1988) (holding that a driver was an employee, despite a written agreement that he was independent contractor, because the hiring party had sufficient supervision, control, and direction over him).

199. *See* N.Y.C. Admin. Code § 20-935(d) (2017).

200. *See* Markey, *supra* note 125; Reibstein et al., *Nationwide Impact*, *supra* note 136, at 30–31, 35–38.

201. *In re Yoga Vida*, 28 N.Y.3d at 1016.

202. NAT'L EMP. L. PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 2 n.5 (July 2015) (citing Lalith De Silva et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, Planmatics, Inc., prepared for the U.S. Department of Labor Employment and Training Administration (2000), http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf), http://nelp.org/content/uploads/Independent-Contractor-Costs.pdf. Note that this study was issued in 2000, which some may argue is "outdated" in the constantly-evolving gig economy. However, similar statistical data pertaining to the gig economy is currently limited. *See* Bernhardt, *supra* note 5, at 42, 54.

2. Enter into Written Contracts with any Existing, and Future, Freelancers

Hiring parties should ensure that they provide written contracts for any freelancers receiving $800 or more over a 120-day period since they, not the freelancers, bear the burden of providing the written contract.[203] Although OLPS' website provides a sample contract for hiring parties to use,[204] hiring parties will likely need to supplement any written contracts to ensure that they properly address any gaps that may expose them to liability. Employers should consider preparing template language for contracts resembling the language on page three of the sample contract provided by OLPS.[205] Template contracts should also include FIFA's required terms, while balancing the tension between FIFA and *Yoga Vida*.[206] Specifically, written contracts should explain the results that the hiring party expects the freelancer to produce rather than detailing the "manner" or the "means" to be used by the freelancer.[207] This will mitigate concerns that the hiring party is directing or controlling the services in question.[208]

The written contracts must not contain any prohibited ancillary terms, including class action waivers, arbitration agreements, or confidentiality provisions that would prohibit the freelancer from contacting the OLPS Director.[209] Additionally, hiring parties should revise any contracts with outside staffing agencies to include indemnification provisions since FIFA extends liability to hiring parties for adverse actions taken by the respective "hiring party, their actual or apparent agent, or any other person acting directly or indirectly on behalf of a hiring party . . . ."[210]

3. Pay Freelancers as Required

Pursuant to FIFA, a hiring party must provide payment in full to the freelancer on or before the date that payment is owed pursuant to the written contract, or within 30 days from the completion of services if no date is specified within the written contract.[211] Hiring parties should be aware that FIFA does not currently have a good faith defense which would allow the hiring party to escape liability if a freelancer produces sub-standard work or if the hiring party mistakenly does not provide a written contract to a freelancer who operated under a trade name.

---

203. N.Y.C. Admin. Code § 20-928; *see The Freelance Isn't Free Act*, FREELANCERS UNION, https://www.freelancersunion.org/plain/ (last visited Dec. 26, 2017).

204. N.Y.C. DEP'T OF CONSUMER AFFAIRS, FREELANCE WORK AGREEMENT, https://www1.nyc.gov/assets/dca/downloads/pdf/workers/Model-Contract-Freelance.pdf.

205. *See id.*

206. *Compare* N.Y.C. Admin. Code § 20-929, *with In re Yoga Vida*, 28 N.Y.3d at 1015.

207. *See In re Yoga Vida*, 28 N.Y.3d at 1014.

208. Battaglia & Rosenblatt, *supra* note 97.

209. R.C.N.Y. § 12-05 (2017).

210. *Id.* § 12-04(b).

211. *See* N.Y.C. Admin. Code § 20-929.

4. Be Proactive if a Complaint from OLPS Is Received on Behalf of a Freelancer

If the hiring party does not respond to a complaint filed with OLPS, a freelancer may file a claim against the hiring party in court, and a rebuttable presumption that the hiring party committed the alleged violations arises; the hiring party will have the burden to prove that it should not have to pay the freelancer.[212] To avoid this rebuttable presumption, hiring parties should immediately respond to any OLPS complaints. Further, hiring parties should take OLPS complaints seriously because hiring parties may face a civil penalty of up to $25,000 for repeated FIFA violations, along with all other available penalties.[213] Because FIFA does not clarify how many violations are required to constitute "repeated" violations, the Corporation Counsel appears to have broad discretion and can potentially proceed against a hiring party with as few as two violations. Thus, hiring parties must cautiously ensure their compliance with FIFA's provisions.

CONCLUSION

The rise of the gig economy, along with the increasing number of freelancers in the American workforce, has led to unique questions about employment structures in the United States, forcing policymakers to reconsider the traditional notions of employment and benefits provided to the American workforce. As the nation's first legislation enshrining freelancers' rights, FIFA undoubtedly marks a major turning point in that reconsideration process, as FIFA seeks to develop protections for the growing independent workforce. Under FIFA, freelancers are entitled to payment from hiring parties, which ensures a degree of economic security for freelancers. However, FIFA is currently brimming with ambiguities that threaten its effectiveness.

FIFA cannot properly address the needs of both freelancers and hiring parties unless these ambiguities are resolved. FIFA requires that hiring parties pay freelancers, regardless of performance or quality, which conflicts with the N.Y.S. Court of Appeals' decision in *Yoga Vida*. Further, FIFA does not adequately define the individuals covered by the Act or what occurs if a hiring party, unaware that a freelancer operated under an entity or trade name, fails to provide a written contract. Additionally, the scope of FIFA's prohibition on waivers, such as arbitration agreements, is unclear and could be preempted by the FAA. Without additional clarification, both hiring parties and freelancers will struggle to determine FIFA's scope, resulting in unnecessary confusion, increased settlement costs by hiring parties seeking to avoid an uncertain outcome in the courts, or costly litigation wherein the

212. *See id.* § 20-931(d).
213. *Id.* § 20-934(b).

courts may ultimately be forced to interpret the ambiguities embedded within FIFA contrary to the legislature's intentions.

Hiring parties that retain freelancers from N.Y.C. or operate in N.Y.C., whether individuals or large corporations, should assume that FIFA applies to them and take preventative measures to limit their liability. Hiring parties should also review their relationships with their workers, starting by confirming that their workers are properly classified as freelancers rather than employees. Hiring parties should then enter into written contracts with any existing, and future freelancers, and carefully ensure compliance with FIFA's requirements. To resolve FIFA's ambiguity, N.Y.C. policymakers should amend FIFA to clearly define who the Act covers and add a good faith defense provision for hiring parties that addresses work quality and performance disputes, consistent with *Yoga Vida*. These proposed amendments are within the spirit of FIFA and further its laudable purposes of preventing payment theft and protecting freelancers.

Caitlin M. Baranowski[*]

* B.A., Siena College, 2014; J.D. Candidate, Brooklyn Law School, 2019. Thank you to the talented staff and editors of the Brooklyn Journal of Corporate, Financial & Commercial Law for their efforts in preparing this Note for publication.