

Freelance Isn't Free Act Free Webinar for Hiring Parties

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Agenda

- DCA Office of Labor Policy & Standards
- Freelance Isn't Free Act
 - Policy
 - Rights and Responsibilities
- Case Studies



Local Law 104 of 2015: DCA Office of Labor Policy & Standards (OLPS)



DCA's Office of Labor Policy & Standards (OLPS) is a **dedicated voice in City government for workers**. Charged with helping vulnerable workers, OLPS embraces our mandate to focus on issues affecting immigrants, people of color, and women in the workplace.



What we do:



Enforcement



Outreach and Education



Paid Care Division



Complaint Intake and Referral



Research, Advocacy, and Policy Development

OLPS Team



Robust staff of attorneys, investigators, outreach and education specialists, as well as research and policy analysts.



Interdisciplinary and data-driven.



Strong collaboration with workers, unions, and worker organizations.

We enforce key NYC workplace laws and rules, including:

- Paid Sick Leave Law
- Freelance Isn't Free Act
- Commuter Benefits Law
- Grocery Worker Retention Act
- Living and Prevailing Wage Laws
- Fair Workweek (*Law takes effect in November 2017*)

Policy Background: Worker Misclassification

When an employer inaccurately treats a worker as an independent contractor when he/she is an employee, it is a **misclassification**.

Employee Rights (and employer obligations)

- Wages; Required expenses
- Unemployment Insurance and Workers' Compensation
- Freedom from harassment and discrimination
- Concerted activity and union organizing
- Health insurance
- Family Medical Leave Act (FMLA)
- NYC Paid Sick Leave
- OSHA and NYS Health and Safety Standards
- FICA and FUTA Taxes

Policy Background: NYS Department of Labor

“The vast majority of New York businesses comply with the state’s wage laws. For those that do not, it is important for workers that we enforce the law, and important for businesses that we level the playing field. I applaud the Department of Labor for its efforts to educate businesses and protect workers’ rights.”

-Heather C. Briccetti, Esq., President and CEO, The Business Council of New York State, Inc.

NYS Joint Enforcement Task Force on Employee Misclassification in 2014

- Almost 26,000 instances misclassification
- Nearly \$316 million in unreported wages
- Assessed close to \$8.8 million in unemployment insurance contributions

Policy Background: Independent Contracting Work

- **By Choice:** Entrepreneurs; privacy; cooperatives; intellectual property
- **Main Question:** Is the person truly working for themselves or are they economically dependent on the employer?
- Note: Courts have created many fact-dependent tests to answer this question. Common factors include:
 - Employer supervision and control – scheduling and employment conditions; method and payment rate
 - Worker in business for themselves
 - Work is integral to employer's business
 - Degree of skill and initiative required
 - Provision of equipment; employment training

BEFORE Freelance Isn't Free Act:

- **71%** of freelance workers had trouble collecting payment during their careers.
- On average, nonpayment resulted in **13% loss of income**
- Only **28%** of freelance workers operated under written contracts.

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

Right to Get Paid for Work

Employers may prefer independent contracting because of **fewer employer responsibilities and less risk**.

BUT

No matter the classification, workers have a **right to get paid** for their work. Freelance Isn't Free Act **protects** freelance workers and **ensures predictability** for both freelance workers and hiring parties.



Freelance Isn't Free Act, first of its kind in nation, took effect on May 15, 2017

Hiring Party Obligations

Workers have rights regardless of their immigration status.

- Written Contract
- Timely Payment
- Freedom from Retaliation
- Right to File a Complaint
- Right to Sue for Double Damages + Attorney Fees
- Right to Court Navigation Services



Who is a hiring party?

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

Who is a freelance worker?

- Any **individual** hired or retained as an independent contractor by a hiring party to provide **services** for compensation. Individuals may qualify as freelance worker under the Law even if they are incorporated or use a trade name.
- **Freelance workers are covered by the Law regardless of their immigration status.**

Who is a not covered?

- Workers hired as employees
- Volunteers who agree to perform services for no pay.
- Sales representatives as defined in section 191-a of the New York Labor Law.
- Certain attorneys
- Licensed medical professionals.
- Freelance workers hired or retained by any federal, state, local, or foreign government.

Right to a Written Contract

- **All contracts worth \$800 or more must be in writing.** This includes all agreements between you and the freelance worker that total \$800 in any 120-day period. This applies to contracts entered on or after May 15, 2017 (*date the Law went into effect*).
- **Contracts must include:**
 - Name and mailing address of worker and hiring party
 - Itemization of all services
 - Value of the services provided
 - Rate & method of compensation
 - Pay date (or mechanism to determine payment date)
- **Download model contract at nyc.gov/dca**



Unfair Contract Terms

- Even if a freelance worker signs a contract that waives his/her rights under the Freelance Isn't Free Act, NYC considers it **void and ineffectual**.

Right to Timely Payment

- **You must pay freelance worker for all completed work.** You must make payment on or before the date that is in the contract. If the contract does not include a payment date, then you must pay freelance worker within 30 days after he/she completes the work.
- **Once freelance worker begins the work, you can not require worker to accept less than the agreed-upon amount.**



Freedom from Retaliation

- **It is illegal for a hiring party to penalize, threaten, or blacklist freelance workers for exercising their rights.**
 - Preventing the worker from procuring work by telling other employers not to hire them.
 - Sending the worker a letter threatening unwarranted legal action.
 - Delaying or reducing payment, or refusing to pay.



Questions?

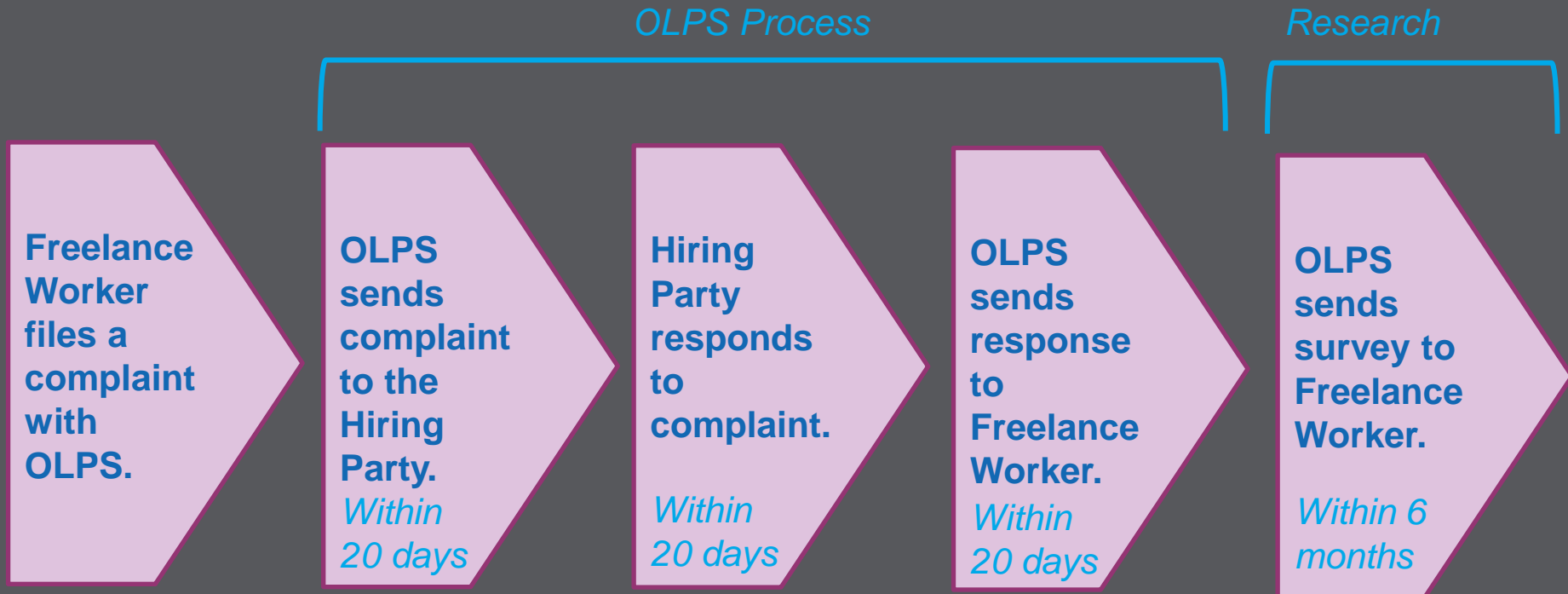


Right to File a Complaint

- **Freelance workers can file a complaint with DCA's Office of Labor Policy & Standards (OLPS).**
- Freelance workers must file complaint **within two years** of the date of violation.



Complaint Process



Online resources for freelance workers and hiring parties are available at nyc.gov/dca

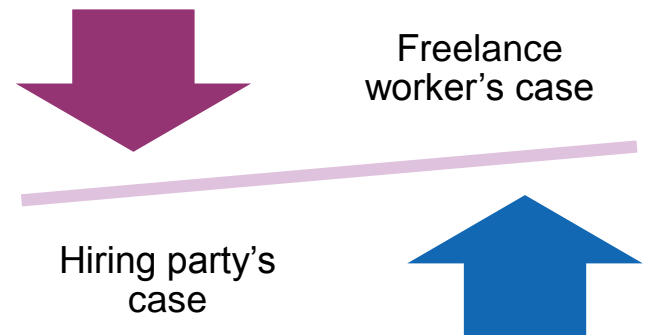
After the Complaint Process

If the matter is not resolved through OLPS, freelance worker can:

- Pursue the matter in court, and they may avail themselves of the assistance of the Court Navigator.
- Engage a private or pro bono attorney to handle the case for them.

**No response to complaint:
Freelance worker receives a
presumption in their favor in
court.**

Hiring party shows they DID NOT violate the law.



Right to Sue

- **Freelance workers can sue the hiring party in court to seek damages.**
- Freelance workers must file claim in court for no written contract **within two years** of the date of violation.
- Freelance workers must file claim in court for nonpayment, underpayment, or act of retaliation **within six years*** of the date of violation.



**Six years is the New York State statute of limitations under contract law.*

Violations and Damages

Hiring party action		Freelance worker recovery
Refuses written contract	No other violation →	\$250
	+ other violation →	Value of the contract
Nonpayment or underpayment	By due date on contract OR within 30 days of completion →	Double damages, injunctive relief, other appropriate remedies
Retaliation	Examples: Blacklisting, intimidation, harassment →	Value of contract for <i>EACH</i> retaliation violation

Attorneys' fees and costs are available for all successful claims.

Patterns of Abuse

- **If a Hiring Party has a “pattern or practice” of violating the Freelance Isn’t Free Act, the City of New York may sue the Hiring Party.** NYC may pursue any appropriate relief and civil penalties of up to \$25,000.
- When a hiring party demonstrates such a pattern:
 - City Law Department may file a civil suit against the hiring party.
 - Freelance workers may still file a complaint and a civil suit for the same violations.

Proposed Regulations

Contract value

- Reasonable value of actual or anticipated services, costs for supplies, and any other expenses

Retaliation

- Adverse action relating to perceived immigration status or work authorization
- Circumstantial or direct evidence
- Denial of work opportunity to party that attempted to exercise Freelance isn't Free Act right

Waivers

- Void – waivers of rights in class action, procedural rights, or the right to disclose contract to OLPS

Questions?



Case Study #1a: Shirley & Gerald

Shirley is a fantastic baker and can make a presentable cake, but she is no artist. Her old friend from cooking school, Gerald sometimes adds artistry to her wedding cakes. Gerald is an odd bird, working late nights, and refusing to share his secret fondant recipe. On May 16th, Shirley contacted Gerald for a wedding scheduled for June 10. Gerald asked for a contract for his work. Shirley said they had a long history of working together, and he could trust her. But, then the wedding was canceled at the last minute. Shirley was trying to get payment for the cake that she delivered, as requested. She offers Gerald half his price to get paid while she is still negotiating with the unhappy couple.

Case Study #1b: LLC & Gerald

Shirley sells her company to Cakes and Co. Corporation Inc., LLC (“Cakes”). Cakes wants to ramp up production, but has no interest in bringing Gerald on as an employee. Management is concerned that reducing the profit margin on their cakes will bring too much oversight from the owner. Gerald also likes controlling his schedule and keeping his fondant recipe secret. Cakes and Gerald enter into a written contract with payment due 30 days after Gerald completes his projects. But, Cakes drags its feet on payment. When Gerald asks for prompt payment, Cakes threatens not to pay Gerald for the work he has completed and to publish Gerald’s fondant recipe online.

Case Study #2a: Art Director

The New Yorkers' Times magazine has a reputation for publishing cutting edge silhouette portraits alongside their fawning celebrity profiles. It is tough to stay ahead in the cutthroat world of silhouette portraiture in today's publishing world. Art Director, George, has started commissioning multiple silhouette images ahead of time to make sure that the portraits accompanying articles are a cut above the rest. George asks Martha, Betsy, and Ross to create images for the upcoming article profiling "Jefferson, the Musical" star Franklin Allen Revere. Each artist has a written contract for \$1,000 for their work. George, who cut up a demo version himself before hiring the freelance artists, uses that image with the story. George stops responding to Martha and Betsy's emails and calls, cutting them out of his life completely. George does offer Ross a cut of \$100, so they can work together in the future.

Case Study #2b: OLPS Complaint

Two months later, George starts getting letters from the Office of Labor Policy and Standards demanding payment for Martha's work. He shreds those. He does not want his employer to know how he cut costs on the Revere piece. Betsy engages a pro bono attorney, who sends a demand letter to the New Yorkers' Times publisher directly. George's job gets cut, and Martha wins a default \$1,000 judgment against the New Yorkers' Times magazine.

Case Study #3: Live-in Nanny

Katrin is a live-in nanny for a New York City family living on the Upper East Side. Katrin was a teacher in her home country of Iceland. Because she overstayed a tourist visa and does not know how she would get certified to teach, Katrin sticks to the childcare industry. Her employers pay her cash, \$70 per day. Katrin works 12-hour days, 7 days per week. In 2017, her employers tell her that they will keep her earnings in a bank account and pay her at the end of the year. Katrin believes that her employers are doing her a favor. She would have to pay taxes if she were paid more, or her employers documented the payments. On June 1, 2017, Katrin asks her employer for her pay for 2017, and a contract for her work going forward. Her employers refuse. They say that they could report Katrin to ICE, and she should be grateful to them.

Questions?



The Department of Consumer Affairs (DCA) Office of Labor Policy & Standards is NYC's central resource for workers.

How to reach us:

- Call **311** (212-NEW-YORK outside NYC). Ask for Freelance Workers.
- Email **Freelancer@dca.nyc.gov**
- Visit **[42 Broadway, 9th Floor, in Lower Manhattan.](#)**
- Visit **nyc.gov/dca**