LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
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Appellate Division's Interpretation of New York City's Freelance Law

The First Department of the Supreme Court, Appellate Division, in a matter of first impression, interpreted New York City's Freelance Isn't Free Act (FIFA) in the context of a motion to dismiss (*Chen v. Romona Keveza Collection LLC*).[1] The Plaintiffs (a photographer and a model), sought to recover payments for services rendered to the Defendant (a high-end luxury fashion brand), claiming the defendant violated FIFA by improperly withholding payments. The Appellate Division ruled that an individual's representation by an agency or agent does not necessarily disqualify the worker from FIFA's freelance worker protections.

What is the Freelance Isn't Free Act?

Enacted Nov. 16, 2016 and effective as of May 15, 2017, FIFA is "the first act of its kind in this country to provide legal protections for freelance workers against nonpayment for work performed."[2] FIFA established protections for freelance workers, including, but not limited to, a requirement for 1) a written contract for certain freelance projects; 2) timely and complete payment for services; and 3) protection from retaliation for exercising rights under this law.

Under FIFA, a freelance worker may file an administrative complaint before bringing an action in court. However, filing an administrative complaint is not a pre-requisite to filing an action in court. In order to be protected under FIFA, an individual must meet the definition of a "freelance worker" and the employer must qualify as a "hiring party." A central issue before the Appellate Division in Chen was whether the plaintiff model could be classified as a "freelance worker" because she was represented by a modeling agency.

What is a "Freelance Worker"?

FIFA defines a freelance worker as "any natural person or 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."

The defendant in *Chen* argued that the plaintiff was not a freelance worker, but rather an employee of a modeling agency and that the modeling agency was the "hiring party", not the defendant. The court held that the plaintiff's status as a freelance worker would ultimately be a question of fact and that the plaintiff had sufficiently pled facts in her complaint to have standing to sue the fashion brand.

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1 See *Chen v. Romona Keveza Collection LLC*, No. 153413/20, 2022 WL 2923476 (N.Y. App. Div. July 26, 2022).

2 https://www1.nyc.gov/assets/dca/downloads/pdf/workers/Court-Navigation-Freelance.pdf [last updated Mar. 15, 2021]).

What companies are impacted by FIFA as a "Hiring Party"?

FIFA defines a hiring party as "any person who retains a freelance worker to provide any service" with certain exceptions.[3] If a hiring party violates FIFA, then a freelance worker may file a complaint either with the New York City Department of Consumer and Worker Protection's Office of Labor & Policy Standards (OLPS) or may file a complaint in court.

In *Chen*, the court discussed that FIFA's literal text is "silent as to how to factor an agent into the calculus of whether someone is a freelance worker," and that FIFA does not explicitly include persons who are represented by an agent within its list of individual workers excluded from the freelancer definition. Accordingly, the court implied that an agent-represented worker may be considered a freelance worker and it is a factual matter based on the work performed, among other factors.

Recommendations and Key Takeaways

Employers across all industries hiring freelance workers must consider potential implications and employee protections under FIFA, especially when utilizing a talent agency or staffing company. The Chen decision and the potential enactment of a similar bill (Senate Bill S8369B), which would mandate contractual forms and additional terms for businesses that use freelance workers, make it more likely that legal issues surrounding the use of freelancers will grow. All employers or "hiring parties" should consider taking protective steps to analyze current and future contracts for any freelance workers, particularly in the fashion, arts and related industries, to limit potential FIFA-based complaints, risk and exposure.

If you have any questions, please contact Samuel Dobre, any attorney in Bond's New York City office or the Bond attorney with whom you are regularly in contact.

3 FIFA categorically excludes from its definition of a freelance worker "1. [a]ny person who . . is a sales representative as defined in section 191-a of the labor law; 2. [a]ny person engaged in the practice of law. . . and 3. [a]ny person who is a licensed medical professional"(§ 20-927). None of these exceptions applied in *Chen*.

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