

## New York City Expands Employment Protections for Freelancers and Independent Contractors and Clarifies Employer Coverage Threshold

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On October 13, 2019, New York City enacted [Int. 136-A](#) (“Law”), which will extend the employment protections of the New York City Human Rights Law (“NYCHRL”) to freelancers and independent contractors, thereby allowing these workers to file discrimination, harassment, and retaliation complaints with the New York City Commission on Human Rights (“Commission”), or bring suit in court. The Law, effective January 11, 2020, [is expected to](#) afford as many as 1.3 million more workers in New York City the protections of the NYCHRL. This is approximately one-third of the City’s total workforce.

### Applicability of the NYCHRL to Freelancers and Independent Contractors

As is currently true for interns, freelancers and independent contractors will be entitled to the rights and protections provided to traditional employees under the NYCHRL. This includes the right to be free from (and to seek redress for) discrimination, harassment, or retaliation based on any of the more than 20 characteristics protected under the NYCHRL, including race, age, disability, sex, sexual orientation, gender identity, marital status, religion, and status as a victim of domestic violence.

Further, whether intended or not, the broad wording of the Law may be read to mean that freelancers and independent contractors will receive the same protections as employees are granted pursuant to various laws falling under the umbrella of the NYCHRL, such as the [Fair Chance Act](#) (which restricts pre-job offer criminal background checks), the [Stop Credit Discrimination in Employment Act](#) (which bans most pre-employment credit checks), and the law prohibiting most [pre-hire salary history inquiries](#).<sup>1</sup> Additionally, existing laws concerning reasonable accommodation and the cooperative dialogue requirement, including accommodation mandates related to pregnancy and lactation, as well as to victims of domestic violence, sex offenses, and stalking, may also be interpreted as covering freelancers and independent contractors.

<sup>1</sup> It should be noted that, practically, enforcement of these protections would be more difficult because of the manner in which freelancers and independent contractors are compensated in connection with their engagements.

Another area of concern raised by the new Law is its potential impact on sexual harassment prevention training. Currently, the Commission's [guidance](#) states that "it is strongly advised that if independent contractors are working on-site at an employer's workplace, are interacting with the employer's staff, and are anticipated to work more than 80 hours in a calendar year AND for at least 90 days, they should be trained." In response to our inquiry, the Commission has informed us that this guidance currently remains in effect, and that, at this time, the expansion of protections under the NYCHRL does not require training for independent contractors. However, the Commission intends to issue guidance documents and FAQs in connection with the Law, and may change the interpretation of how the Law applies with respect to training or other NYCHRL provisions.

### **Clarification on Calculating the Four-Employee Threshold under the NYCHRL**

Except as noted below, the NYCHRL applies to employers with four or more employees. In addition to expanding protections under the NYCHRL, the Law also clarifies how employers should calculate the NYCHRL's four-employee threshold requirement. Under the Law, employers must count the following individuals when determining if they meet the four-employee threshold: (i) individuals working as freelancers and independent contractors (as well as interns), *and* (ii) the employer's parent, spouse, domestic partner, or child, if employed by the employer (though these relatives are not afforded the NYCHRL's protections). The Law further clarifies that the NYCHRL applies to any employer that employs four or more employees at any time during the period "beginning twelve months before the start of an unlawful discriminatory practice and continuing through the end of such unlawful discriminatory practice...." In other words, a 12-month look-back period will be applied.

As a reminder, the four-employee threshold mandate does not apply to sexual harassment claims, as the NYCHRL's prohibition on sexual harassment covers *all* New York City employers. Relatedly, employers should keep in mind that, with respect to the 15-employee threshold triggering the sexual harassment prevention training mandate, the Commission's current sexual harassment training [FAQs](#) instruct that freelancers and independent contractors *do* count in determining whether that threshold is met.

### **What New York City Employers Should Do Now**

The Commission is expected to release additional guidance once the Law goes into effect on January 11, 2020. We will continue to provide updates on any further guidance as it becomes available.

In the meantime, employers with employees in New York City should take the following steps:

- If you are a small employer, determine whether you meet the NYCHRL's four-employee threshold pursuant to the criteria set forth in the new Law.
- Ensure that the Commission's guidance is being followed with respect to properly calculating the 15-employee threshold for triggering the sexual harassment

prevention training mandate by including independent contractors in the calculation.

- Consider providing independent contractors and freelancers with sexual harassment training in light of the Commission's guidance (i.e., where they are anticipated to work on-site for more than 80 hours and at least 90 days).
- Consider creating handbooks for contractors and freelancers that include relevant harassment policies and procedures.
- Consider applying protections under the NYCHRL related to criminal and credit background checking and salary history bans to freelancers and independent contractors.
- Train managers and human resources staff on the new Law, including the expanded protections for freelancers and independent contractors.

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