

## New York City Shakes Up the Freelance Sector

By: David S. Douglas, Esq.

**New York City has substantially** altered the ground rules governing companies and individuals who utilize independent contractors. The Freelance Isn't Free Act — enacted in May and the first of its kind in the nation — imposes severe penalties on those who retain the services of independent contractors without written agreements. The Act also provides independent contractors who are not properly paid with strong remedies, including the right to recover double damages and attorneys' fees.

### Written Contract

The new law requires that where an independent contractor is retained to perform services valued at \$800 or more the agreement between the parties must be in writing. Hiring parties cannot avoid

the written contract requirement by structuring their independent contractor relationships as a series of smaller value transactions. Rather, in assessing the value of the services at issue, the law takes into account the aggregate value of any arrangements between the parties over the course of the immediately preceding four months.

### Payment

The Act makes clear that full payment must be made to the independent contractor either by the date that such payment is due under the parties' agreement, or, if the agreement does not set forth such a date, by no later than 30 days after the work under the contract is completed. The Act prohibits the hiring party from requiring as a condition of timely

payment that the independent contractor accept less compensation than the contractually agreed-upon amount.

### No Retaliation

Additionally, the Act bans retaliation, which it defines as any attempt by a hiring party to exert pressure on an independent contractor for purposes of convincing the independent contractor to forgo his or her rights under the Act.

### Damages and Penalties

Where a hiring party violates any of these provisions, the independent contractor may sue and obtain a considerable recovery against the hiring party. Most notably, the Freelance Isn't Free Act gives the independent contractor the right to recover not only damages equal to twice the amount owed, but also attorneys' fees, remedies that previously had been

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## Assignments for the Benefit of Creditors

*There isn't anything you can do about them...or is there?*

By: Mark B. Brenner, Esq.

**Companies facing overwhelming** financial problems typically have 3 choices: i) lock the doors, dissolve the company and have the owners walk away, ii) file for bankruptcy, iii) assign the company's assets to a third party who, in turn, liquidates those assets and distributes the net proceeds to company creditors. This last option is known as an Assignment for the Benefit of Creditors, or an "ABC" proceeding.

When personal guarantees make walking away from a company impractical, and the cost of a bankruptcy filing for the company is too high, an ABC proceeding, which is often far less complicated and expensive than a bankruptcy, is a good option to consider. The advantages for a debtor company include the fact that, unlike a chapter 11 trustee, an Assignee is not au-

thorized to run a debtor's business. There is also no creditor's committee. A disadvantage for a debtor company is that, a state court in an ABC proceeding has less control over the debtor's out-of-state assets and creditors than a bankruptcy court. In particular, a state court order directing that all collection efforts stop does not have the scope and power of the "automatic stay" that goes into effect upon the filing of a bankruptcy petition.

Creditors who are obviously trying to maximize their payout often agree to comply with state court ABC proceeding liquidation rules, believing there is nothing they can do to oppose an ABC proceeding. They are mistaken.

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# Common Copyright Issues Facing New Businesses

By: David T. Azrin, Esq.

## How do I stop a competitor from copying my website or other materials?

You obtain copyright protection the moment that you create the work (whether it is a written work, or a photograph, picture, artwork, design, or other visual work), assuming that it is original and that the creation involved some creative effort.

But this is not enough to actually stop someone from copying your work. While you are not required to register a work with the U.S. Copyright Office to obtain copyright protection, you are required to register the work before you can sue anybody for violating your copyright. You are allowed to register a work "after the fact," even years after you created it, if you need to sue somebody.

Registering the work right away with the copyright office removes much of the uncertainty about when you created it. But if you like, you can wait to register the work until you need to sue somebody. The normal filing fee for registering a work is only \$35 and the process takes many months, but if you need to register it right away in order to sue somebody, you can request expedited service for an additional filing fee of \$750.

Bear in mind that you cannot copyright a name, title, slogan, or short phrase. These can only be protected by trademark law.

## Am I allowed to use any photos or written materials that I find on the internet for free for my own website or marketing materials?

The answer is that it depends.

Just because something has been posted on the internet does not mean that you have the right to copy it and use it on your website or marketing materials. Your right to use the photos and written materials is still limited by the rights of the author who created the work and who may still have the exclusive right to sell, distribute, display, perform, or make copies of the work. Photographs are considered protectable works, and the copyright is owned by the person who took the photo. Simply acknowledging the source of the photo or material is not sufficient.

If you use a photo or written materials that you obtained from the internet, and if the copyright is still owned by the copyright holder, the copyright holder can sue you, and can seek and possibly obtain an award against you for an injunction, statutory damages, and attorney's fees.

What if you purchased a copy of the photo or the written materials? Can you then post a copy on your website? The answer is no. Under the "first sale" doctrine, if somebody purchases a work or a copy of the work from the author, the purchaser gets the right to sell, rent, or throw away that particular copy, but the purchaser does NOT get the right to make copies. This is the doctrine that gives video rental stores and Netflix the right to rent physical videos or DVDs they purchased, bookstores the right to sell used books, and book owners the right to re-sell their books on eBay. But the purchaser cannot turn around and sell, rent, or make available digital copies on its website, because any digital transmission or dis-

***Just because something has been posted on the internet does not mean that you have the right to copy it and use it on your website or marketing materials.***

play involves copying. The right to make copies still belongs to the original author.

*But there are exceptions. Generally speaking, you can only copy or use a digital copy of anything that you find on the internet, if it falls under one of the following general exceptions:*

**Older works.** Copyright rights do not last forever. All works go into the "public domain" after a certain amount of time. Works published before 1923 are considered in the public domain. Works published after 1922 but before 1978 are protected for 95 years from the date of publication, or if it was not published before 1978, the life of the author plus 70 years. For works published after 1977, the copyright lasts for the life of the author plus 70 years, except that if the work was done for hire or is published anonymously or under a pseudonym, the copyright will last between 95 and 120 years, depending on when it was published.

**Works owned by an organization that offers copies for free.** Certain organizations, such as Getty Images, Unsplash, or Shutterstock, collect and make available images which are either in the public

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- Intellectual Property
- International Business Law
- Litigation
- Mergers and Acquisitions
- Real Estate Law
- Tax Law
- Trusts and Estates
- White Collar Criminal Defense

# New Regulations Clarify NY's Upcoming Paid Family Leave Benefits Law

By: Pamela Gallagher, Esq.

**New York's Paid Family Leave** Benefits Law, which takes effect on January 1, 2018, creates a new state insurance program funded by employee payroll deductions. The law requires all employers to permit New York employees to take a period of leave to bond with a new child, care for a family member with a serious health condition or address matters arising from an immediate family member being called to active duty in the United States Armed Forces.

Since our previous reporting on this issue, the New York Workers' Compensation Board recently issued regulations clarifying eligibility and benefits requirements.

## Eligibility

The New York Paid Family Leave Benefits Law applies to nearly all New York employees, whether full-time or part-time. All employees who are regularly scheduled for 20 or more hours per week are eligible for paid leave benefits after 26 weeks of employment. Employees who are regularly scheduled for fewer than 20 hours per week are eligible after 175 days worked, irrespective of the number of hours worked on a given day. Because the benefit is employee-funded, all employers, regardless of size, must offer paid family leave.

The law does not provide leave for an employee's own health condition, but the employee may be entitled to leave or benefits under other programs, such as state disability insurance. Leave for one's own health condition under other programs does not reduce the benefits available for paid family leave. Employees do not have to exhaust other leave options such as sick leave or vacation before using paid family leave. While an employee may be permitted to use sick or vacation leave for full pay, the employer cannot require an employee to use this leave.

In combination with New York disability benefits, employees cannot take more than a combined total of 26 weeks in any 52-week period. One caveat is that leave

*The law does not provide leave for an employee's own health condition, but the employee may be entitled to leave or benefits under other programs, such as state disability insurance.*

taken by an employee due to his or her own serious health condition under the federal Family and Medical Leave Act (FMLA) is not "family leave" and does not reduce the amount of paid family leave for which an employee is eligible. For example, a new mother may elect to take Family Medical Leave under the federal FMLA for maternity benefits, followed by the new program's bonding leave. The difference is that the unpaid federal Family Medical Leave is for the mother's own condition, while the Paid Family Leave Benefits are for bonding with the child.

If foreseeable, the employee must provide the employer with 30 days' notice in advance of taking leave. If the employee fails to do so, the employer may file a partial denial of the paid family leave claim for up to 30 days. If the leave is not foreseeable, the employee must notify the employer as soon as possible.

## Benefits

Under the new program, an employee can take up to 8 weeks per calendar year in 2018, increasing to 10 weeks in 2019 and to 12 weeks in 2021. When the employee returns to work at the end of the leave period, the employer has to restore the employee to his or her previous position or a comparable position.

An employee taking paid family leave will receive a percent of his or her regular wage during the leave, subject to caps. In 2018, the employee will receive 50 percent of the employee's regular weekly wage, capped at 50 percent of the state's average weekly wage. Based on 2016 figures, this calculates to a cap of \$652.96, based on the state's current average weekly wage of \$1,305.92. The percent of the employee wage and the percent of the cap both increase to 55

percent in 2019, 60 percent in 2020, and 67 percent in 2021. Because the cap is based on a percentage of the state's average weekly wage at that time, in future years, the average weekly wage may be higher than the current \$1,305.92.

This program is paid for by increased employee payroll deductions. For 2018, the amount to be deducted from employee payroll to pay for the program is 0.126% of an employee's regular weekly wage, capped at the statewide average weekly wage. For 2018, that calculates to a maximum of \$1.65 per week. Employers are permitted to begin collection of the payroll deductions as of July 1 of this year, but employers are required to do so as of January 1, 2018. Going forward, the Superintendent of Financial Services will determine the following year's rate on September 1.

## Additional Employer Requirements

Employers are required to post a notice concerning the benefits and to give employees written notice of the benefits within five business days after the employee takes such leave. Employers cannot take retaliatory action against employees who take leave.

For those who have more specific questions, there is a Paid Family Leave Helpline at 844-337-6303.

## ABOUT THE AUTHOR



**Pamela Gallagher** is an associate at Gallet Dreyer & Berkey, LLP. She is an experienced civil litigator with a wide-ranging practice, from coops and condos to intellectual property to pro bono work. In 2017, she was named by Super Lawyers magazine a Rising Star for the New York metro area. Ms. Gallagher can be reached at [pg@gdbl.com](mailto:pg@gdbl.com).

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# A Commercial Retail Landlord's Checklist

By: Scott M. Smiler, Esq.

**You've finally found** a tenant willing to lease your space and can now pivot to drafting the lease. Here are some points you should consider when negotiating with your tenant.

## Renewals

From a landlord's point of view, it is best not to grant the tenant a renewal option. Since most renewal options are one-sided in favor of the tenant (i.e., it is the tenant who unilaterally decides whether to exercise the renewal option, not the landlord), it's preferable to level the playing field and remove the renewal option in its entirety. Certainly, both parties can agree to extend the lease without an express renewal option. However, most tenants, especially if they are making a significant investment into the space, insist upon a renewal option. In such cases it is advisable to limit the number of renewal options and the length of each renewal and also to provide that the tenant waives its renewal option if the tenant defaults under the lease.

Most important to consider is what rent to charge during the renewal option. Most tenants prefer to continue the same annual increase formula that was used during the initial term. However, from a landlord's perspective, it is often difficult to predict the fair market rental value after the expiration of the initial lease term. Therefore, a landlord may consider some alternatives for rent escalation during the renewal term, such as a percentage increase based on the actual increase in the landlord's operating, maintenance and insurance expenses, and real estate taxes, with a minimum increase. Alternatively, a landlord could engage the services of commercial real estate brokers to opine on the fair market rent. The formula is limited only by your imagination, though it should be agreed upon by the parties at the outset of the lease.

*From a landlord's perspective, it is often difficult to predict the fair market rental value after the expiration of the initial lease term.*

## Additional Rent

Most commercial leases obligate the tenant to pay a portion of various building-related expenses in addition to the monthly base rent, commonly referred to as "Additional Rent." Additional Rent is a catch-all term for all other payments and charges and may include the tenant's share of real estate taxes, common area maintenance, operating expenses, security services, sprinkler services, fire monitoring services and other incidental charges. However, tenants only pay their proportionate share of these expenses. Accordingly, if the building is only partially rented, the landlord will remain responsible for the proportionate share of these expenses attributed to the vacant space. It is also important to remember that most commercial leases only obligate the tenant to pay its proportionate share of an increase in real estate taxes over the base tax year. Therefore, the landlord is still responsible to pay a bulk of the real estate taxes (i.e., the base tax).

## Security Deposit

The security deposit can take the form of a letter of credit, but most often commercial landlords request cash in the amount of two to three times the monthly base rent. Therefore, when the rent increases, the amount of the security deposit must increase as well. Since most rent tends to increase annually, in lieu of an annual increase in the security deposit, the landlord may find it more convenient simply to request that two to three times the rent in the last year of the lease be tendered upon signing.

## Guaranty

If the tenant is a corporation or a limited liability company, it is preferable from the landlord's perspective to obtain a full personal guaranty from an individual who is an owner or affiliated with the tenant and who has a substantial financial worth. However, most tenants request a limited "Good Guy" guaranty. This guaranty provides that the guarantor can be released from all or part of his/her personal obligations if the guarantor is a "Good Guy," which traditionally means that all arrears are brought current, the tenant provides the landlord with advance written notice of its intended vacancy date, and the tenant actually vacates the space by such date. A longer notice period is more beneficial to the landlord as it will provide the landlord with more time to find a replacement tenant.

Even if there is a limited "Good Guy" personal guaranty, the entity that is the tenant remains responsible for the tenant's obligations for the remainder of the lease. Only the individual guarantor is released from his/her personal obligations by being a "Good Guy." However, if the tenant is a shell entity specifically formed only to lease the space, the landlord may be left with an entity that has few assets to collect against in the event of a lease default.

These are just a few of the many issues a commercial retail landlord should consider when drafting a commercial lease.

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## ABOUT THE AUTHOR



**Scott M. Smiler** is partner at Gallet Dreyer & Berkey, LLP. His practice focuses on real estate law, corporate law, and cooperative and condominium law. He represents buyers and sellers of commercial and residential properties, commercial and residential landlords and tenants, and corporate and private borrowers in connection with purchases, refinances and construction loans. Mr. Smiler is also involved in representing co-op and condominium boards on matters ranging from minor quality of life issues to major capital improvement projects. Mr. Smiler can be reached at [sms@gdbl.com](mailto:sms@gdbl.com).

## FIRM NEWS AND HONORS

### David L. Berkey



In June, senior partner David L. Berkey became a delegate representing the Real Property Law Section in the New York State Bar Association House of Delegates.

In September, Mr. Berkey was a lecturer at the New York City Bar Association program titled "Residential Real Estate Closings: What You Need to Know from Pre-Contract to Closing."

### Asher Rubinstein



In June, senior partner Asher Rubinstein was the speaker at the following Strafford webinar: "FBAR and U.S. Tax Reporting and Compliance Requirements for Foreign Assets."

In July, Mr. Rubinstein was the speaker at the ClearLaw Institute webinar titled "Offshore Accounts, IRS Compliance and the Streamlined Voluntary Disclosure Procedures: Lower Penalties, but Bigger Risks."

### David I. Faust



In June, partner David I. Faust was a speaker at the annual STEP-Israel Conference in Tel Aviv regarding trusts in marital planning and disputes. Mr. Faust also presented a paper on the topic.

In June, Mr. Faust also spoke to the Tel Aviv Bar Association on tax and inheritance issues for non-U.S. holders of U.S. assets. He also presented a paper on this topic.

### Mark B. Brenner



In September, senior partner Mark B. Brenner was the speaker at a program on bankruptcy at the New York County Lawyers' Association.

### Jay L. Hack



In September, senior partner Jay L. Hack was a featured panelist at the Practising Law Institute seminar "Just When You Thought it Was Safe to Go Back to the Keyboard."

### Michelle P. Quinn



In October, senior associate Michelle P. Quinn was the speaker at a seminar presented by Lorman regarding valuable techniques on interpreting and implementing New York's landlord and tenant law.

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# Assignments for the Benefits of Creditors

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A recent case in the United States Bankruptcy Court for the Southern District of New York, *In re Scandia Seafood* (New York) Inc., demonstrates that creditors can successfully challenge a company's decision to file an ABC proceeding if the debtor company cannot show that it made a good faith effort to obtain a fair price for the company's assets.

Scandia was a New York corporation with a New Jersey office that filed an ABC proceeding in New Jersey after choosing a person to serve as the "Assignee." To commence the ABC proceeding, a "Deed of Assignment" of the debtor's assets to the Assignee was filed in New Jersey Superior Court, and creditors received notice of the assignment from the Assignee together with his petition seeking proposed court orders. This first notice was followed by an Assignee motion to approve a proposed sale of the assigned assets. Creditors of the company did not object to the ABC proceeding at first. Then the Assignee commenced proceedings known as "preference" actions to claw back payments made to certain company creditors, but not others, within 120 days before the ABC proceeding started. The ostensible purpose of a preference case is to allow all creditors to share payments rather than permit "preferred" payees to receive an exclusive benefit.

Following service of the preference actions, the targeted creditors hired defense counsel who carefully reviewed

*If you own a company that files an ABC proceeding, be sure that the assignment of the company's assets and the selection of an Assignee are undertaken in good faith.*

Scandia's ABC filings in New Jersey Superior Court. Those papers revealed that the proposed sale of the company was for a very low price and that the buyer was a new company created by the former owners of the same company whose assets the Assignee was selling.

Based on this information, defense counsel filed an involuntary bankruptcy proceeding against Scandia on behalf of his clients in the US Bankruptcy Court for the Southern District of New York. Scandia responded by filing motions to dismiss the proceeding and to impose sanctions on the petitioning creditors and their attorney for bringing the involuntary bankruptcy case in bad faith. During the hearing on the creditors' petition and the debtor's motions, evidence presented showed that the Assignee had discussed with Scandia's prior owners the terms of the proposed sale transaction before the Assignee was appointed, that the Assignee at no time considered other bids for Scandia's assets, and that a Scandia trademark somehow was never transferred to the Assignee.

After trial, US Bankruptcy Judge Michael D. Wiles denied Scandia's motions to dismiss the bankruptcy filing, and to impose sanctions, finding that "there was an appalling lack of diligence in ensuring that [Scandia's] prior owners paid a fair price for keeping the business and its assets." Although the petitioning creditors had "some responsibility to pay attention to legal proceedings, they also had the right to assume that an Assignee, who is appointed as the representative of their interests, will act diligently to protect those interests."

The lesson of this case is that if you are served with notice of an ABC proceeding, it is up to you to promptly hire counsel to review the paperwork that has been filed and to take prompt action to protect your rights. If you own a company that files an ABC proceeding, be sure that the assignment of the company's assets and the selection of an Assignee are undertaken in good faith for the benefit of all creditors pursuant to the requirements of state and federal law.

Should you have any questions about bankruptcy or ABC proceedings, please do not hesitate to contact the attorneys at our firm who are available to assist you.

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## ABOUT THE AUTHOR



**Mark B. Brenner** is a senior partner at Gallet Dreyer & Berkey, LLP. He serves as general counsel to business and real estate clients and represents debtors and creditors in bankruptcy court in the Southern and Eastern Districts of New York. His litigation background and transactional experience provide Mr. Brenner with a valuable skill set that permits him to identify and address a comprehensive array of client issues and concerns. Mr. Brenner can be reached at [mbb@gdblaw.com](mailto:mbb@gdblaw.com).



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## Freelance Sector

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available only to actual employees. A hiring party found to have retaliated against an independent contractor is further liable for damages that equal the total value of the underlying contract. The Act permits independent contractors to file complaints with the Office of Labor Standards as an alternative to commencing suit in court.

The Act also establishes a \$250 penalty for entering into an independent contractor arrangement without a written contract where the independent contractor had requested it be in writing. Any hirer found to have repeatedly violated the Freelance Isn't Free Act's requirements may be subject to an additional civil penalty of up to \$25,000 as part of a suit brought by New York City Corporation Counsel.

The Freelance Isn't Free Act governs the engagement of any person or organization as an independent contractor, where either the employer or independent con-

***The Act provides independent contractors who are not properly paid with strong remedies, including the right to recover double damages and attorneys' fees.***

tractor has ties to New York City. The law, however, does not apply to the retention of commission salespersons, lawyers, licensed medical professionals, or independent contractors who are performing work for government entities.

Anyone in the New York City area who has utilized or is considering utilizing the services of independent contractors (or anyone across the country looking to retain New York City-based independent contractors) should consult with an experienced employment attorney to analyze exactly how to structure these arrangements. Through careful consideration of written contract terms and payment provisions, and adherence to them, one should be able to avoid running afoul of

the new restrictions that New York City has imposed, and at the same time maintain the added flexibility and economic benefits generally associated with engaging independent contractors.

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**David S. Douglas** is a partner at Gallet Dreyer & Berkey, LLP. His practice focuses on complex commercial litigation. In addition, he is the chair of the

Town of Cortlandt's Zoning Board of Appeals, as well as the chair of the Town's Conservation Advisory Council. Mr. Douglas can be reached at [dsd@gdbl.com](mailto:dsd@gdbl.com).

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## Copyright Issues (continued from page 2)

domain or for which the author has granted all copyright to the organization.

**Fair use.** Copyright law creates an exception for "fair use." However, the determination whether your use qualifies as "fair use" depends on a number of factors, and the dividing line for "fair use" is not always clearly drawn. The courts will weigh the following factors: 1) whether you are using it to make money? (If you

are using it only for educational or non-profit purposes, a court is more likely to consider it "fair use"); 2) whether you are using the entire work? (If you are only using a small part, a court is more likely to consider it "fair use"); 3) whether you are making any changes to it? (If you are making your own original "transformative" changes to the work, a court is more likely to consider it "fair use"); and 4) whether you are using it for public benefit? (Critic-

cism, commentary, news reporting, and research are more likely to be considered "fair use"). Most importantly, each situation is examined on a case by case basis.

If the work does not fall under one of these general exceptions above, then you must get written consent from the copyright owner, before using a copy of the work on your website or marketing materials.

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**David T. Azrin**, a partner at Gallet Dreyer & Berkey, LLP, represents a range of business clients and individuals on employment, trademark, and franchise law matters. Mr. Azrin is the organizer of the International Franchise Association's franchise business network program in the New York City area, and has been named by Super Lawyers magazine as one of the top attorneys in franchise and distribution law in the New York metropolitan area, and by the editorial board of Franchise Times magazine as one of the top franchise attorneys ("Legal Eagle") in the United States. Mr. Azrin can be reached at [dta@gdbl.com](mailto:dta@gdbl.com).



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