

## New York City Factsheet Clarifies New Independent Contractor Protections, Including Training and Accommodations

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An [amendment](#) to the New York City Human Rights Law (“NYCHRL”) that expands “employment” protections for freelancers and independent contractors (“Law”) became effective January 11, 2020. The New York City Commission on Human Rights (“NYCCHR”) recently released a [factsheet](#) (“Factsheet”) on the new Law, providing some clarity for employers that retain freelancers and independent contractors. Importantly, the Factsheet provides that such workers are (i) required to receive annual sexual harassment prevention training if they meet certain thresholds for the amount of work performed, and (ii) entitled to reasonable accommodations under the NYCHRL. Some questions about the breadth of the Law, however, remain unanswered.

As described in our [earlier Advisory](#), the Law entitles freelancers and independent contractors to provide their services without being subject to discrimination, harassment, or retaliation based on the numerous protected characteristics under the NYCHRL, including, among others, race, age, disability, sex, sexual orientation, gender identity, marital status, religion, and status as a victim of domestic violence. Additionally, freelancers and independent contractors may file complaints of such conduct with the NYCCHR or in court.

### Guidance Provided by the Factsheet

The Factsheet provides the following new guidance for employers that engage freelancers and independent contractors:

#### *Discrimination and Harassment*

The Law expands protections (similar to the changes under the New York State Human Rights Law in late 2019) so that freelancers and independent contractors are protected from “employment” discrimination, harassment, and retaliation by the companies for which they are providing services.

Companies are liable for discriminatory conduct by freelancers and independent contractors if the conduct occurred in the course of the individual's work for the employer *and* the employer had actual knowledge of the discriminatory conduct and acquiesced in such conduct, such as letting the conduct continue without taking steps to stop it.

### *Reasonable Accommodations*

In addition to protection from discrimination, harassment, and retaliation, the Law provides freelancers and independent contractors with the right to receive reasonable accommodations for needs related to disabilities, pregnancy, lactation, religious observances, and status as victims of domestic violence, sexual offenses, or stalking. Although not specified in the Factsheet, since freelancers and independent contractors may request reasonable accommodations, such workers should be provided with the NYCCHR's [pregnancy accommodation notice](#) upon engagement.

### *Annual Sexual Harassment Prevention Training*

Freelancers and independent contractors are required to complete annual sexual harassment prevention training if they work in New York City (i) for an employer of 15 or more people (including both employees and freelancers/independent contractors), (ii) more than 80 hours in a calendar year, and (iii) for at least 90 days (not necessarily consecutive days). The training requirement for freelancers and independent contractors is a departure from the NYCCHR's previous guidance that such training was strongly recommended, but not required.<sup>1</sup>

Because training is now required for freelancers and independent contractors, these workers should also be provided with the New York City [sexual harassment prevention information sheet](#) when they are engaged. Additionally, companies should make sure the City's [sexual harassment prevention poster](#) is posted conspicuously in the workplace (which should already be posted for employees) or individually distributed for independent contractors and freelancers who do not come into a regular worksite.<sup>2</sup>

Such workers do not need to take the sexual harassment prevention training at each workplace where they provide services, and may provide proof of completion of training from another workplace. However, employers have a duty to establish that freelancers and independent contractors received training that meets the [legal requirements](#). Thus, employers may want to take a cautionary approach by requiring such workers to

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<sup>1</sup> The NYCCHR's [Frequently Asked Questions](#) relating to sexual harassment prevention training have been updated to follow the same language in the Factsheet. Previously, training for independent contractors was merely suggested.

<sup>2</sup> For more information on these notice requirements, see our *Act Now Advisory* entitled "[NYC Employers Must Post Required Sexual Harassment Notice and Provide Information Sheet to New Hires by September 6.](#)"

complete the employer's own training program<sup>3</sup> to ensure the training received was adequate, and that proper documentation is on file.

Companies should also ensure that temporary workers who are procured through staffing agencies receive training—either directly from the company or from the staffing agency. While the Factsheet is unclear on which entity ultimately has responsibility for providing such training, a contact at the NYCCHR advised that the Law provides protection for such workers regardless of how they were acquired, and a company can be held liable for training obligations, regardless of whether the worker was an employee of the staffing agency. As stated above, however, workers need not receive training from both the company where the worker is placed and the staffing agency.

If a company decides to rely on the training provided by a staffing agency, a requirement for that staffing agency to provide adequate training should be built into the contract with the agency, and the company should require documentation of the training for each temporary worker. For companies that provide their own training to non-employee workers, to avoid issues with misclassification, the training should be conducted separately from employee training, if held in person, and the workers should not be included on any “all employees” invitations to online training programs.

### *App and Platform Providers*

Companies that operate an online app or platform to allow customers to use freelancers or independent contractors to provide services, such as driving or cleaning, also have legal obligations under the NYCHRL. Such companies may be held liable if they directly engage in discrimination against the independent contractor who uses their app or platform. Additionally, such companies may also be liable if one of their customers uses the app or platform to engage an independent contractor but then participates in discriminatory or harassing conduct against the independent contractor and the company knew or should have known about the conduct and failed to take action. Thus, for example, if a company that operates an app through which independent contractors are engaged is aware of a customer who is known to harass independent contractors but fails to prohibit that customer from using the app, the company could be subject to liability under the NYCHRL.

### *Terminology*

The Factsheet clarifies that there is no difference between the terms “freelancer” and “independent contractor” as they relate to the protections under the NYCHRL, and that all such workers receive the same protections under the NYCHRL. Also, the Factsheet clarifies that if a worker is not an employee, then, in most cases, the worker is considered a freelancer or independent contractor and protected under the Law, regardless of whether there is a formal contract, and regardless of how often the worker

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<sup>3</sup> Employers can also use Epstein Becker Green's e-learning solution, [Halting Harassment](#), which complies with both the New York City and New York State sexual harassment prevention training requirements.

must be present at the employer's worksite. According to the City, it is also irrelevant whether the relationship is short-term or long-term.

### Questions Left Unanswered

As discussed in our [earlier Advisory](#), the new Law could be interpreted broadly such that it goes beyond the protections discussed above and affords such workers with *all* protections available under the NYCHRL. This could include coverage under the [Fair Chance Act](#) (which restricts pre-job offer criminal background checks) and the [Stop Credit Discrimination in Employment Act](#) (which bans most pre-employment credit checks). The Factsheet does not address whether the Law was meant to apply to these aspects of the NYCHRL. A different [factsheet](#) issued by the NYCCHR addressing the City's [salary history ban](#) was amended to provide that the ban protects independent contractors who do not have their own employees. The NYCCHR may provide further guidance on the Law's breadth in the future, and we will continue to provide updates on any such guidance as it becomes available.

### What New York City Employers Should Do Now

- Provide freelancers and independent contractors who meet the required work thresholds (i.e., working more than 80 hours and at least 90 days in a calendar year) with sexual harassment prevention training in light of the NYCCHR's new guidance. Employers needing harassment training that complies with the New York State and New York City requirements may wish to consider using Epstein Becker Green's e-learning solution, [Halting Harassment](#).
- Distribute the [sexual harassment prevention information sheet](#) to all freelancers and independent contractors at the outset of their engagements, and make sure they have access to the sexual harassment prevention poster.
- Ensure that the cooperative dialogue process is being used with freelancers and independent contractors who may need a reasonable accommodation related to disabilities, pregnancy, lactation, religious observances, and status as victims of domestic violence, sexual offenses, or stalking.
- Distribute the [pregnancy accommodation notice](#) to all freelancers and independent contractors at the outset of their engagements.
- Review any policies or procedures designed to comply with the City's salary history ban to ensure they indicate that they apply to freelancers and independent contractors.
- Create handbooks or stand-alone policies for freelancers and independent contractors that address relevant harassment policies and other policies applicable to such workers.

- Consider applying protections under the NYCHRL related to criminal and credit background checking to freelancers and independent contractors.
- Train managers and human resources staff on the new Law and the changes required when engaging freelancers and independent contractors.

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