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PROMISING PROTECTION: AN ASSESSMENT OF NEW YORK CITY'S FREELANCE ISN'T FREE ACT

MICHAEL FAHNER*

"The freelance writer is a man who is paid per piece or per word or perhaps."

– Robert Benchley,
American Humorist & Freelancer[1]

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* J.D., 2017, New York University School of Law.

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INTRODUCTION

The freelance economy is on the rise.[2] Millions of workers are eschewing traditional employment for the alluring promise of flexibility, self-determination, and individuality that accompanies a freelance career.[3] Unfortunately, this promise is only as secure as the contractual promises made with hiring parties. It is an unfortunate fact that many hiring parties have an incentive to breach their contracts, leaving freelancers with late payment or no payment at all.[4] Hiring parties benefit from breaking their promises, as many freelancers are not in an economic position to file a civil action nor do they have the time or wherewithal to pursue relief in small claims court. Despite the freedom and flexibility of this new economy, it leaves freelancers and other contingent workers vulnerable to mistreatment, leading some to call it the "naked economy."[5]

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2. *Nonpayment Fact Sheet*, FREELANCERS UNION, https://d3q437fqezjn6j.cloudfront.net/content/advocacy/uploads/resources/FU_Nonpayment_FactSheet.pdf (last visited Apr. 16, 2016); *Twenty Trends that Will Shape the Next Decade*, INTUIT (Oct. 2010), http://http-download.intuit.com/http.intuit/CMO/intuit/futureofsmallbusiness/intuit_2020_report. pdf (last visited Apr. 16, 2016) [hereinafter Intuit Report]; *MBO Partners State of Independence in America 2015*, MBO PARTNERS, https://www.mbopartners.com/state-of-independence (last visited Apr. 16, 2016) (annual study with five years of consistent trend data showing that the independent workforce is broadening and getting younger).

3. Sara Horowitz, *America, Say Goodbye to the Era of Big Work*, L.A. TIMES (Aug. 25, 2014, 4:26 PM), http://www.latimes.com/opinion/op-ed/la-oe-horowitz-work-freelancers-20140826-story.html.

4. Lydia DePillis, *For Freelancers, Getting Stiffed is Part of the Job. Some in New York City Want to Fix It*, WASH. POST (Dec. 7, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/12/07/for-freelancers-getting-stiffed-is-part-of-the-job-some-in-new-york-city-want-to-fix-it/.

5. *See* Meredith R. Miller, *Getting Paid in the Naked Economy*, 32 HOFSTRA LAB. & EMP. L.J. 279, 295 (2015); RYAN COONERTY & JEREMY NEUNER, THE RISE OF THE NAKED ECONOMY: HOW TO BENEFIT FROM THE CHANGING WORKPLACE 1–10 (2013); DANIEL H. PINK, FREE AGENT NATION: HOW AMERICA'S NEW INDEPENDENT WORKERS ARE TRANSFORMING THE WAY WE LIVE 17 (2001).

There are nearly 54 million freelance workers in the United States, making up one third of the nation's workforce.[6] Some of these workers freelance full-time or part-time by choice, while others resort to freelance work when traditional employment is unavailable.[7] Some predict contingent workers (individuals working on a per-project basis) will make up 40% of the U.S. workforce by 2020.[8] Industries as diverse as film, television, publishing, information services, advertising, education, health care, writing, graphic design, web development, accounting, marketing, fashion and beyond rely on freelance work.[9] Throughout the country, freelance work drives many of today's startup companies, and has supported individuals and our economy in the wake of the Great Recession.[10] Indeed, many of us are indebted to freelancers.

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6. *Nonpayment Fact Sheet*, *supra* note 2; Daniel J. Edelman, *Freelancing in America: 2015*, http://www.slideshare.net/upwork/2015-us-freelancer-survey-53166722/1 (last visited Apr. 16, 2016); Some studies show a slightly more attenuated freelancer workforce. *See, e.g.*, MBO PARTNERS, *supra* note 2; Andrew Soergel, *Despite Blurred Lines, Fortune Favoring the Freelance Economy*, U.S. NEWS (Oct. 9, 2015, 12:40 PM), http://www.usnews.com/news/articles/2015/10/09/fortune-favoring-the-freelance-economy ("[T]he Bureau of Labor Statistics . . . projects the economy in September held less than 9.2 million self-employed workers at unincorporated establishments . . . . The technical definition of what is and isn't considered freelance labor helps explain the disparity. The government typically counts independent workers who have incorporated their services . . . as wage and salary workers. So consultants and freelancers who have filed that incorporation paperwork haven't historically been counted by the government as true independent workers.").

7. *Establishing Protections for Freelance Workers: Hearing on Int. No. 1017-A Before the New York City Council Comm. on Consumer Affairs* (2016) [hereinafter *Hearing*] (statement of Rafael Espinal, Chairperson).

8. Intuit Report, *supra* note 2, at 21.

9. Sara Horowitz, Althea Erickson & Gabrielle Wuolo, *Independent, Innovative, and Unprotected: How the Old Safety Net Is Failing America's New Workforce*, FREELANCERS UNION 2, https://fu-res.org/pdfs/advocacy/2010_Survey_Full_Report.pdf (last visited Apr. 16, 2016).

10. *See, e.g.*, John Rampton, *The Freelancer Generation: Why Startups And Enterprises Need To Pay Attention*, TECH CRUNCH (Dec. 27, 2015), http://techcrunch.com/2015/12/27/the-freelancer-generation-why-startups-and-enterprises-need-to-pay-attention/; Nancy Mann Jackson, *After Recession, Wave of 'Accidental' Entrepreneurs*, CNBC (Nov. 20, 2014), http://www.cnbc.com/2014/11/20/after-recession-wave-of-accidental-entrepreneurs.html; *8 Ways How Freelancers Can Launch Your Startup*, HONGKIAT, http://www.hongkiat.com/blog/using-freelancers-guide/ (last visited Apr. 16, 2016).

The extent to which nonpayment by hiring parties affects freelancers cannot be understated. In 2014, 50% of freelancers reported difficulty in collecting payment, and 71% of freelancers reported suffering client nonpayment at some point in their career.[11] Nonpayment cost the average freelancer 13% of her yearly income.[12] The time, money and energy spent chasing down payment impose additional costs on freelancers.[13] To make ends meet between payments, many freelancers must turn to credit cards or government assistance.[14]

New York State is home to more freelancers than anywhere else in the United States.[15] In the aggregate, the state's freelancers lost an estimated $4.7 billion dollars due to nonpayment in 2011, and the state lost an estimated $323 million in tax revenue.[16] In New York City alone, there are over 1.3 million freelance workers.[17] It is estimated that nonpayment costs New York City freelancers $1.1 billion annually.[18] Accordingly, some New Yorkers have put themselves at the forefront of the battle for freelancer payment protection.

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11. *Nonpayment Fact Sheet*, *supra* note 2 (81% of those who had payment trouble said they were paid late, 34% cited instances of not being paid at all). Late payment is far more common than nonpayment, but it also imposes enormous costs on freelancers. As with all workers, freelancers face fixed rent payments and bills. Furthermore, late payment deprives freelancers of the time value of their money, and benefits hiring parties who can delay payment to suit accounting needs. *See id.*

12. *The Costs of Nonpayment*, FREELANCERS UNION, https://d3q437fqezjn6j.cloudfront.net/content/advocacy/uploads/resources/FU_NonpaymentReport_r3.pdf (last visited Apr. 16, 2015) ($5,968 a year on average).

13. Horowitz, *supra* note 9, at 1. Respondents spent more than 17,000 hours pursuing unpaid wages over the course of 2014. *Id.* For example, Alex Maiorescu, an IT and marketing consultant in Brooklyn, faced nonpayment of $10,000 from a client and has spent "at least three full days worth of work" chasing his payment down. *Id.* at 7.

14. *All About the Freelancer Payment Protection Act (S4129/A6698)*, FREELANCERS UNION, http://fu-res.org/pdfs/advocacy/Unpaid-Wages-1-pager.pdf (last visited Apr. 24, 2018).

15. Horowitz, *supra* note 9, at 2 (New York 47%, followed by California 14%).

16. *All About the Freelancer Payment Protection Act*, *supra* note 14.

17. *Nonpayment Fact Sheet*, *supra* note 2.

18. *Id.*

On October 27, 2016, the New York City Council passed the "Freelance Isn't Free Act" ("FIFA") with 51 votes.[19] Mayor Bill de Blasio subsequently signed the bill into law on November 16, 2016, and began a 180-day period of preparation before the law went into effect.[20] City Councilman Brad Lander sponsored the bill, and Freelancers Union mobilized for over a year in support.[21] Under this first-of-its-kind law, hiring parties are required to enter a written contract with freelancers, and failure to pay under the contract can lead to civil penalties, including double damages, attorney's fees, and civil fees.[22]

While the vigor of the freelance economy may be a newer phenomenon, the issue of nonpayment or late payment by hiring parties is certainly not. Such nonpayment in the traditional employment context is called "wage theft" and governments have introduced various protections for employees.[23] Fortunately, according to Freelancers Union, "[j]ust as full-time employees are protected against wage theft, the Freelance Isn't Free Act [will] offer protections for freelance workers."[24]

For freelancers in New York City and beyond, the problem of nonpayment or late payment on completed contracts boils down to a more fundamental issue: the cost (in time and money) of enforcing their contractual rights in court is too high. A major reason this enforcement issue exists is that too many freelancers work under oral agreements or "handshake" agreements. In theory, FIFA's written contract requirement will make enforcement of contractual rights far more expedient than the "he said, she said" battles that often accompany

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19. Laura Murphy, *Freelance Isn't Free Act Passes in NYC with 51 Votes!*, FREELANCERS UNION (Oct. 27, 2016), https://blog.freelancersunion.org/2016/10/27/freelanceisntfreepassed/.

20. Laura Murphy, *Mayor de Blasio Signs Freelance Isn't Free Act into Law*, FREELANCERS UNION (Nov. 17, 2016), https://blog.freelancersunion.org/2016/11/17/mayor-de-blasio-signs-freelance-isnt-free-act-into-law/.

21. *See* Murphy, *supra* note 19; Laura Murphy, *5 Ways NYC Freelancers Got the Freelance Isn't Free Act Passed*, FREELANCERS UNION (Nov. 1, 2016), https://blog.freelancersunion.org/2016/11/01/5-ways-nyc/.

22. N.Y.C. Admin. Code §§ 20-927 to 20-936 (2017).

23. *See* Lauren K. Dasse, *Wage Theft in New York: The Wage Theft Prevention Act as a Counter to an Endemic Problem*, 16 CUNY L. REV. 97 (2012).

24. Sara Horowitz, *Freelance Isn't Free and the Future of Freelancing*, FREELANCERS UNION (Oct. 28, 2016), https://blog.freelancersunion.org/2016/10/28/sara-freelance-isnt-free-act/.

oral contracts. Unfortunately, hiring parties are unlikely to abide by the writing requirement, as FIFA's incentives are too weak to overcome the prevailing culture in the marketplace. FIFA is a laudable attempt to secure written contracts for freelancers, but the law is unlikely to eliminate all the targeted oral freelance contracts. As other jurisdictions across the nation look to implement similar protections for their freelancers, they must acknowledge this flaw and provide greater support.

This Note aims to show how jurisdictions looking to protect freelancers can improve on the FIFA model by adopting a provision from a proposal in the New York State legislature called the Freelancer Payment Protection Act ("FPPA"). While FPPA failed to gain support on the state level, it suggested a burden-shifting framework that would better incentivize hiring parties to establish written contracts. Part I of this Note is an overview of FIFA, its benefits, some criticisms and its major flaw. Part II of this Note will explain the importance of establishing freelancer contracts in writing and the role written contracts play in reducing instances of nonpayment. Part III explains the burden-shifting framework proposed in FPPA and how New York City and other jurisdictions might improve upon FIFA's foundation by incorporating a similar provision.

I.
The New York City Freelance Isn't Free Act (FIFA)

A. *Coverage*

Within New York City, FIFA covers contracts between freelance workers and hiring parties if they have "a value of $800 or more, either by itself or when aggregated with all contracts for services between the same hiring party and freelance worker during the immediately preceding 120 days."[25]

FIFA unambiguously defines "hiring party" as "any person who retains a freelance worker to provide any service," but excludes federal, state, city and foreign governments.[26] FIFA defines "freelance worker" as "any natural person or any 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

25. N.Y.C. Admin. Code § 20-928.
26. *Id.* § 20-927.

party to provide services in exchange for compensation."[27] The definition goes on to exclude sales representatives, lawyers and medical professionals.[28]

Notably, FIFA does not define "independent contractor." Rather, it uses the term in the definition of "freelance worker." In fact, FIFA makes clear that no provision of the act "shall be construed as providing a determination about the legal classification of any individual as an employee or independent contractor."[29] This leaves the door open for litigation over worker status. Additionally, limiting the definition of freelancer to "one natural person" in a contract might require clarifying litigation if two or more freelancers collaborate under a contract. Presumably, if a freelancer decides to hire a sub-contractor, she will take on the role of hiring party and must comply with FIFA's requirements.

B. *Protections*

Aiming to reduce instances of nonpayment, FIFA provides two major freelancer protections: (1) remedies for unlawful payment practices and (2) a requirement that freelancer contracts be in writing. Section 20-929 of FIFA outlines "unlawful payment practices."[30] It mandates that all freelance contracts be paid on the date specified by the terms of the contract or 30 days after the freelancer has completed the work.[31] The section also provides that hiring parties are not permitted to offer a freelancer less than the agreed-upon price in exchange for timely payment. Many freelancers are familiar with this scenario, and the law is clearly meant to prevent such shakedowns.[32] In essence, § 20-929 establishes a statutory default rule to backstop unclear or insubstantial freelance contracts.

Section 20-928 is FIFA's writing requirement.[33] It states that all contracts between a freelancer and a hiring party for $800 or more (aggregating all contracts between the parties over the preceding 120 days) must be reduced to writing.[34] At

27. *Id.*
28. *Id.*
29. *Id.* § 20-935(d).
30. *Id.* § 20-929.
31. *Id.*
32. *The Costs of Nonpayment*, *supra* note 12, at 2, 7.
33. N.Y.C. Admin. Code § 20-928.
34. *Id.*

a minimum, written contracts under FIFA must include the names and addresses of both parties, an itemization of all services to be provided, the rate of pay, the method of pay, and the date of payment or method of determining date of payment.[35]

In addition to these two core elements of the law, § 20-930 protects freelancers from retaliation.[36] Hiring parties are barred from threatening and discriminating against freelancers exercising any rights under FIFA. The law also covers any action by a hiring party that "is reasonably likely to deter a freelance worker from exercising or attempting to exercise any right [under FIFA]."[37] Freelance workers must sell their services in the marketplace, and there is reason to fear that freelancers who avail themselves of protection from nonpayment will be blacklisted by hiring parties. This anti-retaliation provision levels the playing field and allows freelancers to exercise their rights without losing business.

C. *Enforcement & Damages*

FIFA establishes an administrative complaint procedure and a private right of action to enforce its protections.[38] Successful claims entitle an unpaid freelancer to damages, reasonable attorney's fees, and costs.[39] These provisions are critical as they empower freelancers to bring their claims of nonpayment to court or to seek redress through the Office of Labor Standards (OLS). Previously, the expense of litigation prevented many freelancers from pursuing unpaid contracts in court.[40] Under the law, a freelancer can file an action against a hiring party for violating the requirement that all contracts be in writing (§ 20-928), for unlawful payment practices (§ 20-929), and for retaliation (§ 20-930).

Hiring parties found to be in violation of the § 20-928 writing requirement will be liable for a $250 penalty (and for any damages for breach if applicable, and attorney's fees and costs).[41] In other words, even if there is no issue of nonpay-

35. *Id.*
36. *Id.* § 20-930.
37. *Id.*
38. *Id.* § 20-931.
39. *Id.* § 20-933.
40. *The Costs of Nonpayment*, *supra* note 12.
41. N.Y.C. Admin. Code § 20-933(b)(2)(a).

ment, if a hiring party fails to secure a written contract, they are liable for $250 in damages. Freelancers who succeed in a § 20-929 claim for unlawful payment practices are entitled to double damages, injunctive relief or other remedies, attorney's fees, and costs.[42] Successful retaliation claims under § 20-930 entitle freelancers to contractual damages, attorney's fees, and costs.[43] Repeat offenders under any provision may face a civil penalty of up to $25,000, payable to the city's general fund.[44]

If a freelancer decides to pursue the administrative route, she can file a complaint against a hiring party with the OLS, but the OLS is not empowered to enforce any remedies under the complaint.[45] The OLS will seemingly take on the role of non-binding arbitrator; but its oversight is not entirely without teeth as repeat offenders face the hefty civil penalty up to $25,000. It is the responsibility of the city's Corporation Counsel to commence a civil action against repeat offenders based on the OLS complaint records. Should the OLS complaint procedure prove unsuccessful, a freelancer can file a civil action in court.[46] Once a freelancer files a claim in court, she is no longer permitted to file a claim with the OLS.[47]

Upon receiving a complaint through the OLS, hiring parties will have the opportunity to respond with "(a) [a] written statement that the freelance worker has been paid in full and proof of such payment; or (b) [a] written statement that the freelance worker has not been paid in full and the reasons for the failure to provide such payment."[48] Curiously, these options do not address a hiring party's ability to respond to retaliation or oral contract complaints. At the same time, if a hiring party does not respond to a complaint, it "creates a rebuttable presumption in any civil action commenced pursuant to

42. *Id.* § 20-933(b)(3).
43. *Id.* § 20-933(b)(4).
44. *Id.* § 20-934.
45. *Id.* § 20-931. The statute is silent on administrative remedies and does not seem to empower OLS to enforce damages. The remedies referred to in the statute are only available in a civil action. *See id.* § 20-931(d) (mandating OLS to advise the parties of the remedies available).
46. *Id.* § 20-933.
47. *Id.* § 20-931.
48. *Id.*

[FIFA] that the hiring party committed the violations alleged in the complaint."[49]

Notably, FIFA does not address the treatment of mandatory arbitration clauses in freelancer contracts. If a freelancer faces nonpayment but her contract subjects her to mandatory arbitration, is she bound to exhaust the arbitration process before filing a claim with the Office of Labor Standards or filing a civil action? This question is left open, but it could have major implications for freelance contract negotiations.

Overall, these protections and remedies work together to make it easier for freelancers to enforce contractual rights in court. As noted earlier, the core issue had been that the cost of enforcing contracts (in time and money) was too high for freelancers to bear. The enhanced remedies provide freelancers with greater economic compensation for their efforts, and, as discussed in later sections, the writing requirement leads to more efficient and timely adjudication of disputes.

D. *Navigation Program*

The Director of the OLS is now required to establish an information and assistance program for freelancers.[50] The program must provide outreach, education and "assistance by a natural person by phone and e-mail."[51] The Director is further required to provide certain information online: (1) model contracts, (2) general court information and information about procedures under FIFA, (3) information about templates and court forms, (4) information on classifying persons as employees or independent contractors, (5) information about translation and interpretation services, (6) a list of organizations that can identify attorneys, and (7) other information related to freelance worker complaints.[52] The program appears to be an attempt at providing freelancers with an informational safety net. Because the freelance economy does not provide the same structural support, sense of association, and routine as traditional employment, this type of program helps inform and educate the diffuse sector of workers. In ad-

49. *Id.*
50. *Id.* § 20-932.
51. *Id.*
52. *Id.*

dition to the OLS navigation program, Freelancers Union provides a great deal of information on forming and enforcing contracts.[53]

E. *Data Collection*

FIFA is first-of-its-kind legislation and the drafters has included a "follow up" provision in order to monitor the law's impact on freelancers and hiring parties.[54] This provision recognizes the evolving nature of the freelance economy, and requires the OLS to submit reports to the New York City Council and publish reports on FIFA's progress. The reports will include data on the number of complaints submitted to the OLS, the value of the contracts disputed, surveys from freelancers, and any legislative recommendation the Director deems appropriate.[55] The data will be invaluable as New York City works to improve its freelancer services and Freelancers Union works to promote FIFA in other jurisdictions. Undoubtedly, the freelance economy is rapidly growing and changing. FIFA's recognition of the need for flexibility and reflection is appropriate in this evolving economic environment.

F. *Additional Criticisms of FIFA*

The "market" argument against such proposals as FIFA is that reputational concerns incentivize actors to keep their contractual promises. In short, "[r]eputational enforcement works by spreading true information about bad behavior, information that makes it in the interest of some who receive it to modify their actions in a way which imposes costs on the person who has behaved badly."[56] As evidenced earlier, reputational pressure in the freelance marketplace seems insufficient. Because freelancers are diffuse and unlikely to communicate meaningfully, the freelance marketplace resembles an

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53. *Resources for Freelancers: Client Nonpayment*, FREELANCERS UNION, https://www.freelancersunion.org/resources/?qN%5Enpayment (last visited Apr. 25, 2018).

54. N.Y.C. Admin. Code § 20-936.

55. *Id.*

56. David D. Friedman, *From Imperial China to Cyberspace: Contracting Without the State*, 1 J.L. ECON. & POL'Y 349, 357 (2005).

"anonymous market."[57] In an anonymous market, reputation is a weak constraint on hiring parties.[58]

Before FIFA was enacted, Freelancers Union and other online organizations had attempted to create better information flow in the freelance marketplace. "The World's Longest Invoice," for example, was an initiative by Freelancers Union to bring attention to client nonpayment.[59] While it did not name the clients, the World's Longest Invoice represented a "shout it from the rooftops" approach to shaming deadbeat clients. Many freelancers and organizations have recognized the utility of "shaming," and social media provides a great platform for such discussion.[60] Unfortunately, such efforts as this have not done enough to help shield freelancers from nonpayment. The freelance marketplace is still closer to an "anonymous" market than to a market of "perfect reputation."[61] Reputation in the marketplace is insufficient, and such legislation as FIFA is thus necessary.

One concern has arisen from FIFA's failure to limit enhanced damages to freelancers who prevail on all claims. The potential "compromise verdicts" might result in significant liability. This concern may be exaggerated since the courts will use their judgment to determine such awards. Other concerns include the possibility that FIFA may limit the ability of hiring

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57. Lewis A. Kornhauser, *Reliance, Reputation, and Breach of Contract*,?26 J.L. & ECON. 691, 692 (1983) ("Tourists shopping for souvenirs, particularly in an 'open air' market, would most closely approximate an anonymous market.").

58. Walton H. Hamilton, The Ancient Maxim Caveat Emptor, 40 YALE L.J. 1133, 1152–53 (1931) ("The devices in which greatest reliance was put were publicity and prevention. The deceitful maker and the dishonest vendor were paraded through the streets with their fraudulent wares, exposed in the stocks with their false products burned beneath their feet, and denied the community of their trades and of the liberty; the maker and his ware were alike advertised to the town.").

59. Dan Lavoie, *The World's Longest Invoice: Shout It from the Rooftops*, FREELANCERS UNION (Apr. 26, 2012), https://blog.freelancersunion.org/2012/04/26/worlds-longest-invoice-shout-it-rooftops/.

60. *See, e.g.*, Karen E. Klein, *A Risky Way to Get Deadbeat Clients to Pay: Shame Them Online*, BLOOMBERG BUS. (June 10, 2014, 6:24 AM), http://www.bloomberg.com/news/articles/2014-06-10/a-risky-way-to-get-deadbeat-clients-to-pay-shame-them-online.

61. Kornhauser, *supra* note 57, at 692 ("Contracts 'between merchants' in a tightly-knit community would approximate a market in which perfect reputation prevailed.").

parties to modify the terms of payment in their freelancer contracts. This concern is also unlikely to pose a serious problem as FIFA's language is very narrow with respect to what a hiring party can and cannot offer after the contract is signed: "the hiring party shall not require as a condition of timely payment that the freelance worker accept less compensation than the amount of the contracted compensation."[62] This only prevents hiring parties from refusing to pay in full and forcing the freelancer into an unfavorable position. FIFA does not regulate any other reasonable modifications.

Yet another argument against FIFA is that some less scrupulous freelancers may apply for contracts in hopes of being denied so they may file a claim under the anti-retaliation provisions (similar arguments have arisen with respect to union "salting" efforts). However, this issue is likely to be insignificant in relation to the injustice of freelancer nonpayment. There are many ways to police this type of litigation, and the OLS is permitted to make legislative recommendations based on the data collected under FIFA.[63]

While FIFA does impose some additional legwork on hiring parties, it will not significantly hamper well-meaning businesses. The requirements are fairly straightforward—establish written contracts and pay on time. Businesses can contract around the 30-day payment default rule, and companies that frequently hire freelancers should be able to take this legislation in stride. FIFA has been widely publicized in the mainstream media and it is not a trap for unwary businesses.[64] At the end of the day, freelancers are running personal businesses, and they need security in their transactions to function properly. The Brooklyn Chamber of Commerce agrees and testifies in favor of FIFA: "We believe the on-demand or project-based workforce is the future of work . . . . The long-term effects [of the bill will be] a more productive and sustainable business environment."[65]

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62. N.Y.C. Admin. Code § 20-929.

63. *Id.* § 20-936.

64. *See, e.g.*, Noam Scheiber, *As Freelancers' Ranks Grow, New York Moves to See They Get What They're Due,* N.Y. TIMES (Oct. 27, 2016), https://www.nytimes.com/2016/10/28/nyregion/freelancers-city-council-wage-theft.html.

65. Rosa Goldensohn, *Bill to Require Freelance Contracts and Impose Penalties is Set to Pass,* CRAIN'S N.Y. BUS.: THE INSIDER (Oct. 25, 2016), http://www

However, some freelancers might find the written contract requirement initially objectionable. Written contracts increase transaction costs and may force a freelancer to hire an attorney to draft or review a contract. As explained below, these increased transaction costs pale in comparison to the costs of nonpayment and nonpayment litigation. Furthermore, the vast array of resources and technology available to freelancers makes drafting contracts far simpler than it may seem.[66] A fear might be that since the written contract requirement places the liability for failure to comply on the hiring party, hiring parties will insist on drafting contracts.[67] They are unlikely to draft terms favorable to the freelancers. This problem is exacerbated by the fact that freelancers are often in a relatively weak bargaining position. Again, the resources provided by technology and organizations such as Freelancers Union could overcome this problem. The OLS navigation program will become a valuable resource as well. Furthermore, freelancers tend to do similar business across hiring parties. As repeat players, informed freelancers will be able to recognize key terms and language in their agreements. While consultation with an attorney may be necessary at some point, legal insurance companies such as LegalShield can help defray the costs.[68]

G. *FIFA's Major Flaw*

FIFA's framework does an excellent job of enhancing the remedies available to freelancers. There is little doubt that double damages and attorney's fees will incentivize a greater number of freelancers to pursue payment. It is also likely that a plaintiff's bar will develop around freelancers seeking redress for nonpayment. Unfortunately, the fair and efficient adjudication of nonpayment claims hinges on the presence of a

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.crainsnewyork.com/article/20161025/BLOGS04/161029930/bill-to-require-freelance-contracts-and-impose-penalties-is-set-to-pass.

66. *Client Nonpayment*, *supra* note 53; Glory Edim, *5 Important Legal Resources for Freelancers*, FREELANCERS UNION (May 14, 2015), https://blog.freelancersunion.org/2014/05/15/5-important-legal-resources-freelancers/.

67. Miller, *supra* note 5, at 295–96.

68. *How it Works*, LEGALSHIELD, https://www.legalshield.com/how-it-works-personal (last visited Apr. 3, 2018). LegalShield is a longstanding legal insurance company that provides for document review and on-call legal services. *Id.*

written contract, and FIFA's writing requirement is not strong enough to ensure that all contracts will be in writing. The maximum penalty for a first-time offender who fails to establish a written contract is $250.[69] The average freelancer loses out on $6,000 a year due to nonpayment, and some freelance contracts can be for thousands or hundreds of thousands of dollars.[70] With high-value contracts, the risk of paying an additional $250 is unlikely to deter hiring parties from insisting on oral contracts. Furthermore, the cost of drafting and negotiating a written contact will often cost more than $250. It is also not difficult to imagine a scenario where the flexibility of an oral contract would be more valuable to a hiring party than the risk of paying $250. Hiring parties who deal with less sophisticated freelancers will likely be able to insist on oral contracts with relative ease.

Repeat offenders are subject to the civil penalty of up to $25,000, which is substantial. Nevertheless, for the fine to be imposed, the hiring party must be a repeat offender and must be pursued by the City's Corporation Counsel. This requires the government to search records for nonpayment history and pursue claims individually. It is uncertain how large a workload this responsibility will present, but there is a reasonable chance that the government will face underreporting and a heavy workload. Even if a hiring party is found guilty of repeat offenses, they may be subject to fines far lower than the $25,000 limit.

If the sanctions are insufficient to ensure that every freelancer gets a written contract, many freelancers will still operate under oral contracts. Freelancers need to work to live, and work under an oral contract is often better than no work at all. What happens if the freelancer and the hiring party do not sign a written contract? Under FIFA, it seems that freelancers who fail to enter into written agreements will be forced to engage in "he said, she said" battles. In many instances, this leaves the freelancer in nearly the same position as she was in before FIFA. FIFA seems to assume all freelance contracts will now be in writing, but this is unlikely to be true. Before discussing the solution to this loophole in FIFA's protections, it is

69. N.Y.C. Admin. Code § 20-933.
70. *Nonpayment Fact Sheet*, *supra* note 2.

important to understand the extent to which oral contracts pose a problem for freelancers.

II.
The Importance of Written Contracts

For many hiring parties, there is a strong impetus to insist on an oral contract. In some industries, such as film, requiring a written freelance contract is a non-starter.[71] In 2009, only 33% of freelancers reported always getting a contract in writing, and the percentage dropped to 21% in 2011.[72] The data also shows that freelancers in New York City are less likely to get a written contract than freelancers outside the state.[73] It seems unlikely that freelancers in New York are simply more trusting; rather, there is market pressure against written contracts. Unfortunately, oral contracts leave freelancers exposed. A written contract requirement is essential to protecting freelancers from nonpayment.

The superiority of written contracts over oral contracts is by no means a novel concept. Contract law has always recognized an oral "meeting of the mind" as an enforceable contract.[74] In some cases however, policy concerns prompt legislative action. Indeed, legislative action to require written contracts in specific instances is quite common. The statute of frauds is a well-known example and it requires written contracts for the sale of land, contracts with performance beyond one year, assumptions of debt, marriage, the sale of goods over $500, and other instances.[75] The statute of frauds is found in various forms across the states, but the federal government has also recognized the necessity of written contracts in many instances. For example, the "contract bar rule" of labor law prevents an incoming union from usurping an existing union if there is a written agreement between the existing union and

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71. *Hearing*, *supra* note 7. DePillis, *supra* note 4.

72. William M. Rogers III, Sara Horowitz & Gabrielle Wuolo, *The Impact of Client Nonpayment on the Income of Contingent Workers: Evidence from the Freelancers Union Independent Worker Survey*, 67 Cornell I.R.L. Rev. 702, 715–16 (2014).

73. *Id.* at 725.

74. *See, e.g.*, Rooney v. Tyson, 91 N.Y.2d 685 (1998) (holding that the oral agreement was sufficiently definite to constitute an enforceable contract).

75. James Acret & Annette Davis Perrochet, Construction Litigation Handbook § 1:13 (3d ed. 2017).

the employer.[76] An oral agreement between the union and the employer is deemed insufficient to bar another union's advances. Why do legislatures sometimes interfere with the firmly established principle that oral contracts are enforceable?

A. *The Problem with Oral Contracts*

The typical rationale for the statute of frauds is that it serves a cautionary function and an evidentiary function.[77] The cautionary rationale posits that when parties work to establish a written contract they will be more careful and thoughtful regarding the matter.[78] Written contracts tend to be more detailed and less hastily crafted. The evidentiary rationale aligns with the statute's role in preventing fraud.[79] A written contract prevents parties from entering court and lying about the existence of the terms of an agreement. While the statute of frauds is by no means a solution for freelancer nonpayment, its existence shows how the cautionary and evidentiary benefits of written contracts have long been recognized. Oral contracts pose the same problems for freelancers: oral contracts often leave ambiguity in terms and provide little evidence for court battles. They make it difficult to prove the terms of the agreement or whether an agreement existed at all.

The evidentiary function of a written agreement is critical, as many attorneys are loath to engage in the "he said, she said" arguments that arise in oral contract disputes. As a result, freelancers without written contracts are often left without much recourse. At a minimum, the presence of a written contract makes it easier for an attorney to hunt down payment.[80] When a freelancer presents a written contract, an attorney can rely on the written terms to argue for payment, which saves billable hours. In the event that the freelancer must go to court, a written contract is critical to quickly resolving her claim. Even when both parties are operating in good faith, misunderstand-

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76. Joseph DeGiuseppe, Jr., *Basic Labor Law*, BLEAKLEYPLATT 18 (Feb. 23, 2010), http://www.bpslaw.com/files/20120614105631-pub-Basic%20Labor%20Law.pdf.

77. Richard Warner, *Statute of Frauds* (Fall 2003), http://www.kentlaw.edu/faculty/rwarner/classes/contracts/statute_of_frauds_notes.htm.

78. *Id.*

79. *Id.*

80. Miller, *supra* note 5, at 286.

ings can arise and a written contract does a better job of setting expectations. Indeed, even agreements among friends and family are more dependable when reduced to writing. A well-drafted document makes for a better relationship as it prevents major surprises and gives both parties a level of security and peace of mind.[81] If a disagreement or misunderstanding does occur, the parties can look to the document for clarity. This greatly reduces the chance of costly and time-consuming litigation.

In short, relief under a written contract is more easily attained. From an economic standpoint, "wealth will be maximized through social efficiency where there is honest and reliable enforcement of promises between buyers and sellers."[82] In 1913, Roscoe Pound famously identified the importance of an accessible and efficient dispute resolution system in a modern economy.[83] Pound identified several problems with the administration of justice in the United States, leading him to advocate for a small claims court system.[84] Some of the problems Pound identified are directly applicable to freelancers in the modern economy: the need for "security of acquisitions and the security of transactions," an "efficient machine to dispose of the great volume of litigation in the modern city," and "adequate provision for petty litigation in communities where there is a huge volume of such litigation which must be dealt with adequately on pain of grievous denial of justice."[85] Such efficient enforcement of promises is critical to a successful freelance economy, but oral contracts invite uncertainty and delay.

The cautionary function of written contracts also greatly benefits freelancers. Negotiating a written contract provides freelancers with an opportunity to discuss terms and conditions that might not be discussed in the often-briefer oral contracting process. For example, sitting down to discuss the project in more detail might provide an opportunity for the freelancer to upsell her services. Furthermore, oral agreements

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81. *See id.* at 286–87.

82. Arthur Best et. al., *Peace, Wealth, Happiness, and Small Claim Courts: A Case Study*, 21 FORDHAM URB. L.J. 343, 343 (1994).

83. Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302 (1913).

84. *See, e.g.*, *id.* at 315.

85. *Id.* at 310, 315.

and relative bargaining power can make it difficult for a freelancer to negotiate effectively with a hiring party. If the contract is in writing, a freelancer can seek the counsel of an experienced attorney. Importantly, it provides the opportunity to lace the agreement with "trust mechanisms."[86] Trust mechanisms are terms and conditions in a contract that help the parties ensure that their counter-party will follow through on their promises.[87] These include monitoring and bonding strategies. For the same reasons that a landlord might require a security deposit or a lender might require yearly audits, a freelancer should try to establish trust mechanisms in their contracts. For a freelancer, trust mechanisms might include breaking payment into stages, late payment penalty clauses, indemnification for collection, a deposit, or a personal guarantee from the hiring party.[88] Other terms are common in written freelancer contracts and provide specific protections, but are not common in oral contracts. Freelancers should be particularly insistent on terms such as exclusivity and licensing questions, right to attribution, plagiarism and authenticity guarantees, confidentiality, jurisdiction, attorney's fees and court costs, implied licenses, revisions, scope of the work, deadlines, payment, late fees, reimbursement of expenses, modification, and termination.[89] It is unlikely that all, or even most, of these terms will be discussed in an oral contract. Even if there is agreement on these terms, oral contracts provide no evidence.

B. *Illustrating the Problem with Oral Contracts*

In an effort to raise awareness of freelancer nonpayment, and to drum up support for FIFA, Freelancers Union has compiled stories of stiffed freelancers and posted them on their

86. Seth Freeman, *Solving the Trust Problem*, SETH FREEMAN, http://www.professorfreeman.com/solving-the-trust-problem/ (last visited Apr. 17, 2018).

87. *Id.*

88. *Next Level Contract Clauses*, FREELANCERS UNION, https://fu-web-prod-media.s3.amazonaws.com/content/None/FU_NextLevelContractClauses.pdf (last visited Apr. 17, 2018).

89. *8 Contract Provisions Every Freelancer Should Know*, FREELANCERS UNION (Sept. 11, 2013), https://blog.freelancersunion.org/2013/09/11/8-contract-provisions-every-freelancer-should-know/; Jonathan Bailey, *7 Reasons Why You Should Always Have a Written Contract*, FREELANCE WRITING JOBS (Sept. 10, 2010), http://www.freelancewritinggigs.com/2010/09/7-reasons-why-you-should-always-have-a-written-contract/.

website.[90] The stories come from diverse individuals in an array of industries, but they are bound together by the same struggle to get paid for work performed. For example, Deborah Cowell is a freelance writer who decided to share her nonpayment story with the New York City Council.[91] Deborah relayed how she entered into an oral agreement with a hiring party in 2015. After she completed the project, the hiring party "slightly altered the work . . . claimed everything as her own intellectual property, and failed to pay . . . ."[92] Deborah tried to hunt down payment, but she was ultimately unsuccessful. Deborah's claim was small, and FIFA's $800 threshold might not seem like much, but to a freelancer who works many gigs a year, these situations add up. Pursuing each small claim in court can be costly in time and money, and there is no guarantee of success. Unfortunately, this is just one example and freelancers across the economic spectrum face nonpayment. As Deborah explained, "There are best-selling authors who can tell stories of checks taking months to process!"[93]

Imagine that a freelancer in Deborah's position decided to pursue payment in court. In one scenario, the hiring party might argue that there was never a contract for work in place at all. As the contract was never put in writing, the parties must bring forth whatever evidence is under their control. The freelancer would present the completed work and perhaps emails or other written exchanges that tend to show an agreement. The hiring party would likely dismiss this evidence. Unless there is clear evidence of an agreement, and clear evidence of the key terms to such an agreement, *quantum meruit*, literally "as much as he has deserved," is the equitable process of determining proper payment.[94] *Quantum meruit* arises when a defendant has been unjustly enriched at the expense of the

90. *E.g.*, *This Freelancer Shared Her Nonpayment Story with the City of New York*, FREELANCERS UNION (Mar. 3, 2016), https://blog.freelancersunion.org/2016/03/03/freelancer-shared-her-nonpayment-story-city-new-york/.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Let's Be Reasonable: Quantum Meruit and Asian Equivalents,* TANNER DEWITT SOLICITORS (May 5, 2006), http://www.tannerdewitt.com/lets-be-reasonable-quantum-meruit-and-asian-equivalents/ ("When a contractor carries out works at the Employer's request in the absence of a contract, the law may impose on the Employer an obligation to pay a reasonable sum for the work done in response to that request.").

plaintiff.[95] In such cases, the plaintiff is entitled to a "reasonable price" for the work completed.[96] While this principle backstops a freelancer who can produce evidence of completed yet uncompensated work, it leaves the freelancer in an undesirable position. Not only must the freelancer now go through the lengthy process of showing how much is deserved for the work, but there is also a fair degree of speculation involved in determining a "reasonable price" for a freelance contract. Freelancers operate in an open market, and there is a great degree of variation in fees charged for similar work. An individual's skill is what differentiates their services on the market, and it is difficult to compare pricing from one freelancer to the next. As a result, a freelancer must produce evidence of what she has charged in the past for similar work (if she has such evidence). Hiring parties might bring their own independent appraisals for the work or other evidence to rebut the freelancer's claim. For a freelancer like Deborah, this is a lot of legwork.

In another scenario, the hiring party might claim that while a contract was in place, the terms of the agreement are not what the freelancer claims. This scenario presents a serious challenge because it is extremely difficult to gather evidence of the specific terms in the contract.

Perhaps the hiring party claims the work was not up to specification and payment has thus been rightfully withheld. In such a case, the freelancer will be forced to present her work and any evidence of discussion as to what standards the work should meet. The hiring party will likely point out as many flaws in the work as possible, and rely on the fact that no written agreement exists to define the standards. How can a freelancer claim they met specifications if none were established in writing? Even when a contract is put in writing, this type of disagreement is a major issue for creative freelancers.[97]

Perhaps the hiring party agrees that the work was performed properly but disagrees with the freelancer over the es-

95. *Id.*

96. *Id.*

97. Helprin v. Harcourt, Inc., 277 F. Supp. 2d 327, 329 (S.D.N.Y. 2003) ("At its heart, the instant case is more than a dispute between two parties over the interpretation of a contract. It is 'a dispute over creativity and the respective responsibilities of an author and his publisher.'" (quoting Double Day & Co. v. Curtis, 599 F. Supp. 779, 780 (S.D.N.Y. 1984))).

tablished price. The parties would likely present similar evidence as they would in a *quantum meruit* claim, and the same problems would follow.

Finally, a freelancer in Deborah's shoes might have expected to retain some ownership rights over the work she produced. If the hiring party claims that it agreed to assume all ownership of the work, it would be very difficult for a freelancer to prove otherwise. The freelancer might present previous contracts that show a pattern of ownership retention, but every freelance contract is negotiated differently, so this is rather weak evidence. While the price of the contract might have been relatively low, the right to ownership might be quite valuable. These types of disputes can arise over nearly all the terms in a freelance contract.

Nevertheless, Deborah expressed optimism over FIFA: "In mandating contracts, the Freelance Isn't Free [A]ct will protect the many freelancers making a living in the publishing industry—and the 30-day payment terms those contracts must have will have a real, tangible effect on this industry, where 120-day past due payments are par for the course."[98] Deborah is correct that written contracts will help freelancers get paid, but it does not necessarily follow that FIFA will ensure that all freelance contracts are in writing. Unfortunately, while the default terms set by FIFA will have an effect, FIFA does little to aid the freelancers who fail to secure a written contract. In each of the above scenarios, the freelancer can submit a complaint to the OLS and pursue a claim for $250 under the § 20-928 writing requirement. While she can also pursue double damages for unlawful payment practices under § 20-929, she is still required to engage in the above "he said, she said" battles. There is simply not enough evidence on either side to quickly adjudicate these cases. While FIFA provides for recovery of attorney's fees and court costs, there is no guarantee that the freelancer will win these uncertain claims.

III.
The New York State FPPA Burden-Shifting Solution

In 2011, the New York State legislature, with the support of Freelancers Union, proposed the Freelancer Payment Pro-

98. *This Freelancer Shared Her Nonpayment Story with the City of New York*, *supra* note 90.

tection Act in an effort to address the issue of freelancer nonpayment at the state level.[99] The bill garnered some attention, but was ultimately stalled in committee.[100] Perhaps due to Freelancers Union's influence on both proposals, FIFA bears a striking resemblance to FPPA. Both proposals require written contracts and establish administrative oversight, but there are a few key differences. For example, FPPA contained criminal sanctions for hiring parties who failed to pay freelancers.[101] First-time offenders would be charged with a misdemeanor carrying a fine of up to $20,000, and repeat offenders would be charged with a felony and the potential for six months imprisonment in addition to the fine.[102] FIFA originally contained a similar provision but it was dropped as the New York City Council solicited feedback on the bill.[103] It is foolhardy to speculate about the political motives at play in passing legislation, but FIFA's model appears to be a more careful and politically palatable approach.[104] Nevertheless, as Freelancers Union works to promote FIFA in additional jurisdictions, it is instructive to contemplate FPPA's strategy to incentivize hiring parties to sign written contracts. While criminal sanctions would likely have an impact, criminal prosecution for breach of contract is not the optimal choice for it is expensive and time-consuming. Well-designed regulation, on the other hand, can incentivize behavior without engaging with the state's heavy-handed criminal process. FPPA's burden-shifting solution is far more justifiable.

Under FPPA, hiring parties would bear the burden of keeping all written contracts on file for no less than six years.[105] If a hiring party is unable to provide the written contract during a dispute, FPPA creates a presumption in favor of

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99. S. 4129, 235th Leg., 2011 Reg. Sess. (N.Y. 2011) [hereinafter FPPA].

100. *See Senate Bill S4129B*, NEW YORK STATE SENATE, https://www.nysenate.gov/legislation/bills/2011/s4129/amendment/b (last visited Apr. 17, 2018).

101. FPPA § 196-C.

102. *Id.*

103. *See New York City Council Introduction No. 1017*, N.Y.C. CITY COUNCIL (Dec. 7, 2015), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2530972&GUID=61F8754B-80AF-493E-895E-D6D17209776E.

104. FPPA's definitions section had the potential to create confusion around independent contractor status; the proposal also lacked a retaliation provision, data collection requirements, and navigation mandates. *See* FPPA.

105. FPPA § 196-C.

the freelancer: "The failure of a [hiring party] to produce such written work terms . . . shall give rise to a presumption that the terms that the [freelancer] has presented are the agreed terms."[106] FPPA's framework relied on the oversight of the commissioner of the Department of Labor, but this burden-shifting concept can be applied to disputes in court under FIFA-like legislation. In fact, FIFA already deploys a burden-shifting framework when a hiring party fails to respond to a freelancer's complaint through the OLS.[107] This presumption is not as strong as the FPPA presumption, as it only applies when a hiring party fails to respond to a complaint at all, and it only presumes that the freelancer's claims of unfair payment practices are true. It does not seem to contemplate a situation where the terms of an oral contract are in dispute. Empowering freelancers with the FPPA presumption in court would greatly decrease the number of hiring parties insisting on oral contracts. It would go a long way in forcing hiring parties to be proactive about getting contracts in writing, without involving the clunky machinery of government agency oversight. This would effectively plug the hole in FIFA, and would provide relief for freelancers who fail to secure a written contract.

Imagine again that a freelancer like Deborah is pursuing payment, but this time the freelancer benefits from the FPPA presumption. When the hiring party disputes the quality of the work, the price of the contract, or ownership rights, the hiring party bears the burden to prove such claims. The hiring party can then present emails, previous agreements, job descriptions, internal documents, and other evidence of their claims. This makes it far easier for a freelancer to argue her case because she is no longer forced to compile scraps of evidence to attain payment. At the same time, freelancers will be restrained from making extravagant claims and demanding devastating fees because the hiring party could easily rebut such claims. If a freelancer claims a fee far in excess of what is reasonable, the hiring party can produce past contracts and market data. While variation in freelancer pay complicates this argument, it is far easier to restrict outlandish claims than to identify more exact instances of shortchanging based on available evidence.

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106. *Id.*
107. N.Y.C. Admin. Code § 20-931.

Overall, fairness dictates shifting the burden to the hiring party. The hiring party is often in a position of superior bargaining power, but that alone is not enough to justify legislative action. Instead, a burden-shifting framework is justified by the fact that it is the hiring party who refused to sign a written contract. It is no secret that freelancers want and benefit from written contracts—hence FIFA. When a hiring party insists on an oral contract, it places the freelancer at a disadvantage. The FPPA presumption is designed to discourage this behavior with a penalty.

A. *Presumptions as Solutions to Injustice*

Why should hiring parties bear the burden of proof rather than freelancers? Such a burden-shifting framework is justified because the hiring party is responsible for the nonavailability of evidence. FIFA requires hiring parties to establish written contracts with freelancers upon request. In creating such a requirement, the legislature is placing a duty upon hiring parties for which they may be punished should they fail to fulfill such duty. Under FIFA, a hiring party who fails to establish a written contract is not compliant. The legislature deems this wrong to be punishable by a $250 fine.

In a contract dispute, a written contract is some of the best evidence available. When a hiring party, in contravention of FIFA, denies a freelancer a written contract, they are also denying the court that evidence at trial. As a result, they should be subject to a presumption against their argument in court. Had the hiring party honored the freelancer's request for a written contract, the court would have far better evidence to assist in reaching a decision, and adjudication of the dispute would be far more efficient. Hiring parties are harming freelancers by insisting on oral contracts, and they are also disrupting the efficient administration of justice.

In other contexts, courts have created presumptions in favor of plaintiffs and against defendants who are responsible for the dearth of evidence.[108] The following four cases are from a variety of contexts, but they each support the notion that a presumption in favor of a plaintiff is a reasonable and

108. *See* Stephen A. Spitz, *From* Res Ipsa Loquitur *to Diethylstilbestrol: The Unidentifiable Tortfeasor in California*, 65 IND. L.J. 591 (1990).

just solution when the defendant is responsible for the unavailability of evidence.

1. *Valcin v. Public Health Trust of Dade County*

Valcin v. Public Health Trust of Dade County was a Florida case that established an evidentiary principle known as the *Valcin* presumption.[109] *Valcin* was a medical malpractice case where the hospital was unable to produce the patient's records as evidence.[110] Florida law requires hospitals to keep and maintain patient records, and the hospital was not compliant. The patient's file was key evidence in the case and its absence reduced the plaintiff's ability to prosecute the case and hence the chance of recovery.[111] The court found "where evidence peculiarly within the knowledge of the adversary is, as here, not made available to the party who has the burden of proof, other rules must be fashioned."[112] This notion, combined with the fact that the hospital did not comply with the statute, led the court to establish a presumption, rebuttable by a preponderance of the evidence, of negligence.[113] The court noted that this would ensure that the issue of negligence would go to the jury and incentivize hospitals to comply with the statutory recordkeeping requirements.[114]

2. *Haft v. Lone Palm Hotel*

In the California case of *Haft v. Lone Palm Hotel*, the plaintiff was the surviving family of a father and young son who drowned in the hotel's pool.[115] While required by statute, the hotel failed to provide a lifeguard on duty or a warning sign.[116] There were no witnesses to the death of the father and son, and therefore little evidence to support the family's negligence claim. Rather than allow the family to go uncompen-

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109. Daniel Morman, *The Wild and Wooly World of Inference and Presumptions—When Silence is Deafening*, 79 FLA. BAR J. 38, 39–40 (2005); Valcin v. Pub. Health Tr. of Dade Cty., 473 So. 2d 1297 (Fla. Dist. Ct. App. 1984), *approved in part, quashed in part*, 507 So. 2d 596 (Fla. 1987).

110. Morman, *supra* note 109, at 39.

111. *See id.*

112. *Id.* (quoting *Valcin*, 473 So. 2d at 1305).

113. *Id.*

114. *Id.* at 39–40.

115. Haft v. Lone Palm Hotel, 3 Cal. 3d 756 (Cal. 1970).

116. *Id.* at 763.

sated because, through no fault of their own, they lacked evidence of negligence, the court created a presumption of negligence.[117] The court reasoned that the defendant was at fault for the lack of evidence because had a lifeguard been on duty as the statute required, there would have been a witness to the deaths.[118] This justified placing the burden of proof on the defendant. Many cases have since followed the *Haft* rationale.[119]

3. *Sindell v. Abbott Laboratories*

Another famous California case that made use of burden shifting to deal with difficulty in the production of evidence was *Sindell v. Abbott Laboratories*.[120] The case was a class action by individuals injured as a result of a pharmaceutical given to their mothers during pregnancy. The defendants were just a handful out of many manufacturers of the drug in question, but there was no evidence to prove which drug manufacturer had supplied the drug to each individual plaintiff. As a result, the plaintiffs were unable to show causation. The court was troubled by the notion that these plaintiffs would be left uncompensated due to no fault of their own.[121] To overcome this problem, the court created a presumption in favor of the plaintiffs and placed a burden on the defendants to prove they were not the manufacturer at fault. The court relied on the well-known *Summers v. Tice* in justifying its decision:

> [A]s between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury. Here, as in *Summers*, plaintiff is not at fault in failing to provide evidence of causation, and although the absence of such evidence is not attributable to the defendants either, their conduct in marketing a drug the effects of which are delayed for many years played

117. Spitz, *supra* note 108, at 604.

118. Haft, 3 Cal. 3d at 771 ("[A]n attentive guard does serve the subsidiary function of witnessing those accidents that do occur.").

119. Haft has been particularly influential in collision cases to impose liability on defendants responsible for later collisions that obfuscate the damage from earlier collisions. *See* Spitz, *supra* note 108, at 604.

120. Sindell v. Abbott Labs., 26 Cal. 3d 588 (Cal. 1980).

121. *Id.* at 600–01. ("Certainly there can be no implication that plaintiff is at fault in failing to [identify the manufacturer]—the event occurred while plaintiff was *in utero*, a generation ago.").

> a significant role in creating the unavailability of proof.[122]

4. *Coffman v. Keene Corp.*

It is clear that courts have been willing to create presumptions and shift burdens when fairness and policy dictate such action. The heeding presumption in failure-to-warn cases, first articulated in *Coffman v. Keene Corp*, further exemplifies this.[123] Just as in any other tort action, a plaintiff in a failure to warn case must show the defendant's action to be a proximate cause of her injury. Unfortunately, failure-to-warn cases pose a problem when no warning is provided at all: we do not know if the plaintiff would have read and followed the warning, making causation very difficult to prove. Again, as above, the dispute suffers from a lack of evidence. Other than speculative claims by the plaintiff regarding her willingness to heed warning labels, there is no evidence because no warning was provided. The heeding presumption allows for the possibility of recovery.[124] The presumption is commonly justified on policy and fairness grounds.[125] As a matter of policy, a presumption that plaintiffs read all warning labels creates an incentive for manufacturers to provide warning labels. As a matter of fairness, the heeding presumption makes it possible for the plaintiff to recover when causation may be impossible to prove due to no fault of her own. Some believe it is better to allow an injured plaintiff to recover under the presumption than to prevent any compensation due to a lack of evidence.

B. *Following the Example of Early Freelancer Protections*

The experience of American fishermen shows a willingness to extend presumptions in favor of freelance workers and create penalties for noncompliant hiring parties. In many ways, the plight of the fisherman parallels the plight of all freelance workers. Indeed, one of the most common types of fishermen, the lay share fisherman, is freelance worker. Like other

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122. *Id.* at 610–11.

123. Coffman v. Keene Corp., 628 A.2d 710, 718 (N.J. 1993).

124. *See id.*

125. Karin L. Bohmholdt, *The Heeding Presumption and its Application: Distinguishing No Warning from Inadequate Warning*, 37 LOY. L.A. L. REV. 461, 469–70 (2003).

freelancers, fishermen face a great risk of broken promises. Once at sea, the fisherman has little choice but to continue the work. A written contract requirement provides far more security for the fisherman. It is not entirely surprising that admiralty law would provide such protections to its freelancers. It is a maxim of admiralty law that "Congressional action in admiralty cases is largely remedial in nature, devised to provide further protection for the rights and needs of seamen, who have been traditionally viewed as wards of the Court."[126]

> According to 46 U.S.C. § 10601,
>
> (a) Before proceeding on a voyage, the master or individual in charge of a fishing vessel, fish processing vessel, or fish tender vessel shall make a fishing agreement in writing with each seaman enployed [sic] on board if the vessel is—
>
> (1) at least 20 gross tons . . .; and
>
> (2) on a voyage from a port in the United States
>
> (b) The agreement shall also be signed by the owner of the vessel.
>
> (c) The agreement shall—
>
> (1) state the period of effectiveness of the agreement;
>
> (2) include the terms of any wage, share, or other compensation arrangement peculiar to the fishery in which the vessel will be engaged during the period of the agreement; and
>
> (3) include other agreed terms.[127]

The protections provided under this section stem back to 1792.[128] In one of Congress's first acts it provided payment protection for cod fishermen.[129] Since then, the protections have been expanded and recodified in § 10601.

The case law under § 10601 recognizes that "[m]andating written contracts prior to embarkation merely fosters pre-voyage bargaining between the fisherman and the captain regarding what share of the proceeds a seaman is worth, and protects

126. Doyle v. Huntress, Inc., 301 F. Supp. 2d 135, 144 (D.R.I. 2004).
127. 46 U.S.C. § 10601 (2002).
128. Harper v. U.S. Seafoods LP, 278 F.3d 971, 974 (9th Cir. 2002).
129. Act of 1792, ch. 6, § 4, 1 Stat. 229, 231 (1792).

the fisherman from arbitrary discrimination."[130] The same can be said for freelancers in nearly every industry.

When a captain fails to secure a written contract with his fisherman, 46 U.S.C. § 11107 provides further protection. Under § 11107, unlawful engagements are deemed void:

> An engagement of a seaman contrary to a law of the United States is void. A seaman so engaged may leave the service of the vessel at any time and is entitled to recover the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of the engagement, whichever is higher.[131]

This "statutory default wage" encourages hiring parties to enter written contracts because it redraws the economic incentives for the hiring party.[132] While freelancers are a diverse group, and it is likely impossible to establish a statutory default wage for all freelancers, there is something to be learned from this solution to the problem. Section 11107 is seen by the courts as both a "penalty" against hiring parties who fail to enter into a written contract and "statutory default to market wage."[133] Stiffed fishermen (and freelancers generally) are entitled to payment for the work they performed. Unfortunately, providing a freelancer with merely what she deserved for the work done ignores the costs of litigation and improperly incentivizes hiring parties. A penalty is far more likely to influence the decision making of a hiring party, and § 11107 properly incorporates such a penalty. As discussed above, the penalties (e.g., $250 fine) imposed by FIFA are inadequate. Fortunately, FPPA's presumption in favor of the freelancer is a fair way to properly align incentives.

Conclusion

As the freelance economy continues to grow throughout the United States, so too will political support for freelancer protections. New York City is a hotbed for freelance work, and it is not surprising that Freelancers Union was able to garner enough support in the city council for action. Freelancers

130. Doyle, 301 F. Supp. 2d at 144.
131. 46 U.S.C. § 11107 (1983).
132. Doyle, 301 F. Supp. 2d at 148.
133. *Id.*

Union has already begun mobilizing in other cities and it is likely that more jurisdictions will adopt FIFA-like legislation.[134] Overall, this is fantastic news for freelancers. Americans are beginning to recognize freelancers as an economic powerhouse, and freelancers are finding their voice in legislatures and the media. FIFA's protections against nonpayment, data collection, and oversight policies are going to have a real impact on the lives of New Yorkers and the New York City economy. Other jurisdictions would benefit from adopting similar protections for their freelancers. However, as has been argued, other jurisdictions must recognize and patch the hole left in FIFA.

FIFA mandates written contracts and provides protections such as double damages for freelancers recovering under written contracts. Unfortunately, FIFA does not adequately consider freelancers who still fail to attain written contracts. The law relies too heavily on government enforcement, and fails to recognize the incentives at play. A freelancer with an oral contract under FIFA is left with nearly the same protections as if no law was passed. Fortunately, there are ways to fill this gap. As proposed, FPPA's presumption in favor of the freelancer provides much needed relief to the freelancers who fall between FIFA's cracks. It ensures that freelancers who do not have a written contract are still able to recover fair compensation for the work they have done without engaging in messy and expensive "he said, she said" legal battles. As illustrated in Part III, such burden-shifting frameworks have been justified and used to great effect in other contexts.

It is the providence of each jurisdiction to experiment with new laws and regulations for the betterment of its citizens. New York City has put itself out as the first to protect freelancers from nonpayment in the modern economy. Much will be revealed as other jurisdictions craft their own laws and adapt to the ever-changing economic landscape. With some modification, the FIFA framework shows promise.

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134. Horowitz, *supra* note 24; FREELANCERS UNION, https://www.freelancersunion.org/advocacy/freelance-isnt-free/ (last visited Apr. 16, 2016).