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WORKING TODAY

SARAH N. KELLY & CHRISTINE TRAMONTANO*

The average New York City freelancer is well educated and well paid. He¹ has earned a college or graduate degree.² He works in almost any industry imaginable as a writer, artist, financial advisor, or computer technician.³ He performs vital and diverse functions necessary to the strength of the economy and the progress of the business world.⁴ In New York, this “average freelancer” makes up approximately 30% of the workforce.⁵ Many industries such as the arts, media, advertising, finance, and especially technology are increasingly relying on freelance workers to perform necessary tasks and outsourcing work to them rather than hiring full-time employees.⁶ As such, because a freelance worker does not maintain a traditional employer-employee relationship, a freelancer does not enjoy the employer-based benefits that traditional workers enjoy. The average freelancer either does not have health insurance or pays \$500 a month or more for individual coverage.⁷ He also pays onerous New York City self-employment tax on top of employment tax.⁸ Because he essentially works for no one, he is not protected by the

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1. The pronoun “he” is used in this article in a gender neutral sense.

2. Press Release, Working Today, Health Insurance Affordability Survey (May 25, 2004), <http://www.workingtoday.org/press/05-25-04.php> (presenting findings that almost 90% of New York City’s freelancers have college or graduate degrees).

3. *Id.*

4. *Id.*

5. Press Release, Working Today, Survey Findings Presented to City Council (March 5, 2003), <http://www.workingtoday.org/about/03-05-03.php>.

6. David English, *Getting in: Media managers at top corporations and outsourcing agencies tell you how to land your next contract*, AV VIDEO MULTIMEDIA PRODUCER, Jan. 1, 2004, at 22, available at www.dvformat.com/2004/01_jan/features/gettingin.htm.

7. Press Release, Working Today, Educated, Working, Well Paid . . . And No Health Insurance: A Conundrum For Growing Freelance Workforce in New York City (May 25, 2004), <http://www.workingtoday.org/press/05-25-04.php> (reporting that 47% of freelance workers in New York City experience gaps in health insurance coverage and 84% find it difficult to afford health insurance).

8. Working Today, The Issues, <http://www.workingtoday.org/advocacy/issues.php> (last visited Oct. 16, 2005) (explaining that freelancer workers must pay self-employment tax in addition to individual income tax, whereas a worker who enjoys a

anti-discrimination laws under which traditional employees can seek redress for discrimination in the workplace.⁹ Nor is he covered by unemployment insurance.¹⁰

Freelancers became second-class workers during the 1940s, despite President Franklin D. Roosevelt's efforts in the 1930s to protect all workers through New Deal legislation.¹¹ In 1947, with a Republican majority in the House of Representatives and the Senate, Congress, over President Harry S. Truman's veto, passed the Taft-Hartley Act, which expressly excluded independent workers, as well as agricultural and domestic workers, from the definition of "employee."¹² Thus, independent workers were no longer afforded protection under the New Deal legislation.¹³ The Taft-Hartley definition of employee¹⁴ still stands today and, as a result, freelancers are not explicitly protected under the slew of legislation enacted by

traditional employer/employee relationship is only responsible for paying individual income tax, because the employer is responsible for paying employment taxes).

9. *Id.*

10. *Id.*

11. The National Labor Relations Act (NLRA), ch. 372, §2, 49 Stat. 450 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2000)) and the Fair Labor Standards Act (FLSA) of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (2000)) are collectively known as "The New Deal." The NLRA gave employees the right to unionize and the ability to bargain collectively for the right to negotiate the terms and conditions of their employment. *See* 29 U.S.C. § 157 (2000). The FLSA set the standards for minimum wage and maximum hours, and imposed penalties on employers that violated regulations under the Act. *See* 29 U.S.C. §§ 206, 207 (2000).

12. National Labor Relations Act, ch. 120, 61 Stat. 136, 138 (1947) (amending the National Labor Relations Act of 1935). For general discussion of the National Labor Relations Act, see Thomas M. Murray, *Independent Contractor or Employee? Misplaced Reliance on Actual Control Has Disenfranchised Artistic Workers Under The National Labor Relations Act*, 16 CARDOZO ARTS & ENT. L.J. 303, 310 (1998).

13. *See* Murray, *supra* note 12.

14. The NLRA as amended provides:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, *but shall not include* any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Congress designed to protect employees' rights.¹⁵ Freelance workers who must obtain individual health insurance are not afforded the same federal protections against discrimination by health insurance providers that are available to individuals who receive health insurance through their employers' group-rate plans. Specifically, the protection against denial of insurance coverage due to pre-existing conditions does not apply to workers in nontraditional working relationships.¹⁶

A freelance worker living in New York City with no dependents must earn over \$120,000 per year in order to afford the cost of an individual plan premium.¹⁷ Yet less than 4% of freelance workers fall within this income bracket.¹⁸ The result is that many freelancers

29 U.S.C. § 152 (3) (2000) (effective July 5, 1935) (amended June 23, 1947) (emphasis added). The 1947 amendment added independent contractors to the list of individuals that were not included in the definition of employee. *Id.*

15. Title XXIX of the U.S. Code provides health, safety, and benefits to employees, but defines "employee" to exclude freelancers. *See* 29 U.S.C. §§ 1-3058 (2000).

16. *See* Group Health Plan Requirements Relating to Portability Access and Renewability, 29 U.S.C. § 1182 (1996). The Group Health Plan Requirements Relating to Portability Access and Renewability prohibits health insurance providers from discriminating against individual participants who are offered health insurance benefits through their employers' group rate health plan. *Id.* As such, an insurer cannot refuse coverage based on an individual's health status, medical condition, or disability. *See id.* In contrast, individual health insurance coverage does not provide such broad protections. For example, § 1182 along with the Individual Market Rules Relating to Portability Access and Renewability, 42 U.S.C. § 300gg-41, prohibit health insurance providers from denying coverage to individuals with preexisting conditions, but only if: 1) the individual had prior coverage for an aggregate of 18 months before applying for coverage; and 2) the prior coverage was through a group plan, governmental plan, or church plan. Hence, if an individual was either uninsured or had prior insurance with an individual plan, health insurance providers can refuse coverage.

17. The average monthly premium for an individual health plan is \$521 per month. *See* Working Today, *supra* note 7. Studies show that freelancers in New York City can afford to pay approximately 5% of their gross income on health insurance. Assuming a \$521 monthly premium, a freelancer's health insurance plan would total \$6,252 per year. A freelancer's annual income would need to equal at least \$125,040 in order for an individual health plan to be "affordable" according to the 5% affordability ratio. A majority of freelancers surveyed by Working Today, however, feel that because of the high cost of living in New York City, they would have trouble allocating even 5% of their income to health insurance. *See* Working Today, *supra* note 5. *See also* SARA R. COLLINS, ET AL., THE AFFORDABILITY CRISIS IN U.S. HEALTH CARE: FINDINGS FROM THE COMMONWEALTH FUND BIENNIAL HEALTH INSURANCE SURVEY (Mar. 2004), *available at* http://www.cmwf.org/usr_doc/collins_biennial2003_723.pdf.

18. *See* Sara Horowitz & Stephanie Buchanan, Working Today, The High Price of Creativity 2004, 2, *available at* <http://www.workingtoday.org/advocacy/artsreport2004>.

go without coverage and without medical care or rely on visits to the emergency room, instead of seeking regular preventive care.¹⁹ Low-cost and state-sponsored health plans are generally not available to the typical freelance worker due to strict eligibility requirements. For example, the New York State Medicaid program bills itself as a program for “New Yorkers who can’t afford to pay for medical care,” but it has extremely narrow criteria for determining who can “afford to pay.”²⁰ For a single individual to qualify, he must not earn more than \$8,004 per year.²¹ This salary requirement alone would preclude qualification for the majority of freelance workers, considering that 74% of freelance workers in New York City earn \$25,000 or more per year.²² Healthy NY offers another low-cost form of health insurance.²³ An individual can qualify for Healthy NY if he earns no more than \$23,800 per year.²⁴ Al-

pdf (last visited Oct. 16, 2005) [hereinafter Horowitz & Buchanan, *The High Price of Creativity*]. According to surveys conducted by Working Today, 41% of New York’s freelancers earn between \$25,000 and \$50,000 per year. See Sara Horowitz & Stephanie Buchanan, Working Today, *Health Insurance Affordability Report 2004, Educated, Employed and Uninsured: How Independent Workers Fall Out of the Social Safety Net* [hereinafter Horowitz & Buchanan, *Educated, Employed and Uninsured*], 4, (2004), available at <http://workingtoday.org/advocacy/affordabilityreport2004.pdf>. Based on the 5% affordability ratio, a person earning \$25,000 per year could only afford monthly premiums of \$104, and a person earning \$50,000 per year could only afford monthly premiums of \$208. Thus, most freelancers fall well short of the \$521 or more needed to for an individual health insurance plan.

19. Horowitz & Buchanan, *Educated, Employed and Uninsured*, *supra* note 18.

20. See New York State Department of Health, *Information for a Healthy New York*, <http://www.health.state.ny.us/nysdoh/medicaid/mainmedicaid.htm> (last revised Sept. 12, 2005).

21. *Id.* Medicaid has expanded income levels for children and pregnant women. Families with children one to nineteen years of age can qualify for Medicaid if earning an income of up to 133% of the Federal Poverty Level. Pregnant women and infants one year old or younger can qualify for Medicaid if earning an income of up to 200% of the Federal Poverty Level. In order for a family of four to qualify, the family must not earn more than an annual net salary of \$11,904 and cannot have more than \$5,950 in resources.

22. See Horowitz & Buchanan, *The High Price of Creativity*, *supra* note 18.

23. Healthy NY was introduced by Governor Pataki in 2000, under the New York Healthy Care Reform Act of 2000. See 2000 N.Y. Sess. Laws page no. 1832 (McKinney) (codified as amended N.Y. Ins. Law § 4326 (2005)).

24. New York State Healthy NY – For Small Businesses & Working Individuals, *Eligibility Criteria for Individuals*, <http://www.ins.state.ny.us/website2/hny/english/hny-eci.htm> (last visited July 13, 2005).

though this salary requirement is less restrictive than Medicaid, Healthy NY imposes additional eligibility requirements.²⁵

In 1995, Sara Horowitz, seeing the increasing vulnerability of the freelance worker, formed Working Today, a non-profit organization dedicated to representing the needs of the growing independent workforce.²⁶ Working Today is a national nonprofit organization that was formed to represent the needs and concerns of independent workers, such as freelancers, consultants, temps, and other contingent workers.²⁷ Through advocacy, information, and service, Working Today's mission is to update the nation's social safety net, developing systems so that people in nontraditional employment arrangements can access affordable benefits.²⁸

Working Today has a two-pronged approach to achieving its mission. First, the group launched the Freelancers Union in September 2001.²⁹ The Freelancers Union, originally called the Portable Benefits Network, offers New York City residents and independent workers in a limited number of industries access to benefits. Second, Working Today educates policymakers and the public about the needs of independent workers. The group advocates for changes in policy by lobbying and working with politicians to make changes to city, state, and national laws.³⁰

On September 4, 2001, Working Today launched its Portable Benefits Network and 24,000 people visited their website during the first week.³¹ But Working Today, like the rest of New York, was hit hard by the effects of September 11. It took until January 2002 for people to resume signing up. By October of that year, almost 1,000

25. Healthy NY requires that applicants lack insurance for the twelve months preceding the filing of an application. The program also requires that the applicant is currently employed or has been employed within the past twelve months.

26. See Working Today, Sara Horowitz Biography, <http://www.workingtoday.org/about/sarahorowitzbio.php> (last visited Aug. 30, 2005).

27. See Working Today, About Us, <http://www.workingtoday.org/about/index.php> (last visited Aug. 30, 2005).

28. See Working Today, *supra* note 26.

29. See Working Today, *supra* note 27.

30. *Id.*

31. Stephanie Strom, *Health Insurance for Freelancers; A New Group Focuses on an Overlooked Group of Workers*, N.Y. TIMES, Oct. 2, 2002, at B1.

people had enrolled in health insurance plans through Working Today.³²

The idea behind Working Today's Portable Benefits Network is deceptively simple. By bringing together independent workers from around the city, Working Today is able to offer its Freelancers Union members access to benefits at reasonable rates. In 2001, it launched the program by offering benefits to a limited number of qualified individuals. To be eligible, individuals must work in one of six qualified industries: nonprofit, financial services, technology, media and advertising, arts and entertainment, child care, or alternative and traditional health care.³³ According to Horowitz, Working Today decided to start with these particular industries because she knew that the freelancers who worked in them could afford to pay, thus allowing the organization to develop a "track record" and gain credibility in the freelance community and the insurance industry.³⁴ The list of eligible industries continues to grow, and in July 2004, Working Today added child caregivers to their list of qualified industries.³⁵

In addition to working in a qualified field, applicants must have worked at least twenty hours per week for the eight weeks prior to joining the plan, or earned \$10,000 during the six months prior to joining.³⁶ They must also live or work in the New York City area.³⁷ The Freelancers Union offers three health insurance plans to its members.³⁸ The plans vary in price, depending on whether the plan covers an individual or a family and whether the plan covers in-network health providers only or covers out of network

32. *Id.*

33. See Working Today, Eligibility Requirements — Premium Membership, <http://www.workingtoday.org/about/premiumeligibilityrequirements.php> (last visited Aug. 30, 2005).

34. Joan Oleck, *Under the Radar*, FORD FOUNDATION REPORT (Summer 2003), http://www.fordfound.org/publications/ff_report/view_ff_report_detail.cfm?report_index=419.

35. See Press Release, Working Today, Caring for the Caregivers: Nannies in New York Finally Get Access to Affordable Health Insurance (July 26, 2004), <http://www.workingtoday.org/press/pressreleases.php>.

36. Working Today, *supra* note 33.

37. *Id.*

38. Working Today, Health Insurance — Choice of Three Plans, <http://www.workingtoday.org/productsservices/healthdental.php> (last visited November 17, 2005).

health care providers as well.³⁹ For an individual, premiums start at as little as \$185.78 per month.⁴⁰ For freelancers who do not meet the minimum requirements, Working Today often steers individuals toward government programs for which they may qualify, such as Medicaid and Healthy NY.⁴¹

In addition to health insurance, the Freelancers Union offers disability and life insurance, and free checking through Citibank.⁴² It also runs financial seminars that help independent workers learn how to plan for retirement and long-term financial health.⁴³

By creating and maintaining partnerships with professional associations, membership and community based organizations, unions, and companies, Working Today has provided access to affordable benefits to over 4,000 independent workers.⁴⁴ Organizations affiliated with eligible industries can offer its members the same health, life, and disability insurance and financial services benefits available to members of the Freelancers Union.⁴⁵

39. *Id.*

40. The first plan, HIP Select EPO #1, offers in-network coverage only, including prescription drug coverage and preventive dental and optical care. Co-payments are required for office visits and in-patient care is subject to a deductible of up to \$3,000. The premium starts at \$185.78 per month for an individual and \$567.73 per month for a family of three. *Id.*

The second plan, HIP Select EPO #2, offers in-network coverage only, including prescription drug coverage and preventive dental and optical care. Co-payments are required for office visits and in-patient care is subject to a deductible of up to \$2,000. The premium starts at \$212.65 per month for an individual and \$649.93 per month for a family of three. *Id.*

The third plan, HIP Prime POS, includes in-network and out-of-network coverage with prescription drug benefits and preventive dental and optical care. The HIP Prime POS plan includes co-payments for in-network care with no deductible, and coinsurance out-of-network subject to a \$2,500 deductible. The premium starts at individuals \$287.58 per month and a family \$879.12 per month. *Id.*

Working Today guarantees these rates through August 31, 2006. *Id.*

41. *See supra* text accompanying notes 20-25.

42. Working Today, Financial Services, <http://www.workingtoday.org/product-services/citibankservices.pdf> (last visited June 5, 2005).

43. Working Today, Working Today Events, <http://www.workingtoday.org/events/index.php> (last visited Dec. 22, 2004).

44. *See* Sara Horowitz, PowerPoint Presentation for Yale School of Management, (Mar. 13, 2003), http://www.ventures.yale.edu/docs/Horowitz_Presentation.pdf. *See also* Working Today, *supra* note 26.

45. Working Today, Partner with Us, <http://workingtoday.org/partners/partnerwithus.php#Eligibility> (last visited July 12, 2005). *See also* Working Today, *supra* note 33.

One of the strengths of Working Today has been the ability of its staff to work with policymakers and other employment unions — such as the Graphic Artists Guild, American Society of Journalists and Authors, and National Writers Union — to pressure politicians and others in authority to change the laws that govern independent workers.⁴⁶ Before an organization can secure health insurance for its members at the group rate level, the organization must be classified as an “association” by the New York State Insurance Department.⁴⁷ In 2000, Horowitz convinced then New York State Insurance Commissioner Neil D. Levin that freelance workers and temporary employees were no different than the employees of any corporation.⁴⁸ As a result, the Commission classified Working Today as an association.⁴⁹ By virtue of its new classification, Working Today was in the unique position of being able to administer insurance to those affected by the attacks of September 11, in cooperation with the September 11 Fund.⁵⁰ Without the publicity and attention Working Today received for its September 11 relief efforts, its insurance program might never have gotten off the ground.

In May 2002, Working Today launched a letter-writing campaign as a way to draw attention to the overlooked and under-represented community of freelance workers.⁵¹ Through its lobbying efforts, Working Today has formed valuable relationships

In order to qualify for benefits, members of partnership organizations are subject to the same eligibility requirements imposed on members of the Freelancers Union. *Id.*

46. Working Today, Partners, <http://www.workingtoday.org/partners> (last visited July 12, 2005).

47. See N.Y. INS. LAW §§ 4235(c)(1), 3231(a), 4317(a) (2005). See also Memorandum from the Office of General Counsel of the State of New York Insurance Department, *Re: Association Groups, Health Insurance* (June 3, 2005), available at <http://www.ins.state.ny.us/rg050605.htm>.

48. Strom, *supra* note 31.

49. *Id.*

50. The September 11 Fund, established as a result of a joint venture between the New York Community Trust and the United Way of New York City, was intended to provide one year’s worth of health insurance to 15,000 people who were affected by the attacks. See Stephanie Strom, *\$200 Million More in Sept. 11 Aid is Allocated*, N.Y. TIMES, July 12, 2002, at B4. See also Strom, *supra* note 31. The purpose of the fund was to insure people who worked below Canal Street and in parts of Chinatown and who had lost jobs or suffered other economic effects as a result of the attacks. *Id.*

51. See Working Today, Latest Campaigns, <http://www.workingtoday.org/advocacy/campaigns.php> (last visited Feb. 14, 2006).

with New York City and State legislative figures. The organization has raised awareness among governmental bodies about the lack of affordable health insurance. It has lobbied the New York City Council, the New York City Mayor's Office, and the New York State Insurance Department seeking legislative solutions to the problem. After conducting an online survey in January 2003, Working Today presented its findings at an educational briefing to New York City Council members Christine Quinn and Bill DeBlasio, who served as chairs of the Health Committee.⁵² Working Today members, eager to have their voices heard, filled the briefing room.⁵³ Working Today members testified about the difficulty in finding affordable health care.⁵⁴ Quinn, in particular, expressed her surprise at the salary needed to afford individual health insurance.⁵⁵ After the testimony, both DeBlasio and Quinn affirmed their commitment to ensuring affordable health insurance for New Yorkers and welcomed a continuing relationship between City Council and Working Today.⁵⁶

At New York City's 2004 Neighborhood Development Achievement Awards reception, New York City Mayor Michael Bloomberg and Robert Walsh, Commissioner of the Department of Small Business Services, recognized Sara Horowitz for her success in community leadership.⁵⁷ The website of the Mayor's Office of Health Insurance Access now refers individuals that don't qualify for government-based plans to Working Today. Working Today is the only non-governmental, non-group based health insurance option listed on the Mayor's website.⁵⁸

Perhaps most notable is Working Today's collaboration with Governor Pataki's administration and the New York State Insurance Department's Health Care Reform Act of 2000. Working Today was

52. See Working Today, *supra* note 5.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Press Release, Working Today, Working Today Founder Sara Horowitz Receives "Community Leadership Award" from City of New York (July 23, 2004), <http://www.workingtoday.org/press/07-23-04.php>.

58. See Mayor's Office of Health Insurance Access, How to Buy Health Insurance for Individuals and Sole Proprietors, <http://www.nyc.gov/html/hia/html/indivoptions.html> (last visited Jan. 8, 2005).

instrumental in ensuring that eligibility rules for coverage through insurance plans created under the Act, such as Healthy NY, would not exclude freelance workers from coverage.⁵⁹ Working Today is a member of the Insurance Department's Health Insurance Alliance, which engages in initiatives working toward a goal of affordable health insurance options for all New Yorkers.⁶⁰

Affordable health insurance is a growing problem for many Americans today, but the freelance sector of the workforce is hit harder than others. Workers that remain employed with one company enjoy the benefit of employer-subsidized health insurance and their employers are able to provide this benefit because insurance companies offer reduced group rates to the employers. Freelance workers, on the other hand, have no such luxury and must pay full price for their health insurance premiums. Thus, many freelance workers choose to go without coverage rather than pay costly insurance premiums. Working Today was formed to address the growing needs of freelance workers, an often overlooked sector of the workforce. By lobbying insurance companies to allow Working Today to offer group rates to its members, the organization now provides more affordable insurance premiums to approximately 4,000 freelancers.⁶¹ Working Today has had considerable success working in collaboration with policymakers. Within the next year, Working Today seeks to build upon that success by encouraging a high level of membership participation through an online forum; or "online marketplace." This marketplace will facilitate communication between members, potential employers, and partner organizations and will in turn improve the ability of Working Today to act as a cohesive political force.⁶²

59. See Working Today, *supra* note 51.

60. New York State Insurance Department, Testimony by Gregory V. Serio, Superintendent of Insurance, before the New York City Council Committees in Economic Development and Health Concerning the Availability of Affordable Health Care for Small Businesses and Sole Proprietors in NYC (Dec. 10, 2003), <http://www.ins.state.ny.us/spch1210.htm>.

61. Horowitz, *supra* note 44.

62. Working Today, Working Today Communications (Dec. 2004) (on file with authors).