Fiduciary Round Table
of the San Gabriel Valley

How to Avoid Being Sued by Your Homecare Worker

Presented by

Richard Rosenberg
BALLARD ROSENBERG
GOLPER & SAVITT, LLP

The Law Firm For Employers

May 10, 2017
Richard began his career as a workplace lawyer in 1977 after obtaining degrees from Cornell University’s School of Industrial & Labor Relations and the Santa Clara University law school. Richard has spent his entire career assisting management defend and risk manage workplace related legal matters and proposed personnel transactions.

His experience in the trenches enables Richard to provide management with a clear-eyed assessment and strategic options. Richard’s style is one which motivates his clients and adversaries to work cooperatively to find creative solutions to the toughest workplace challenges.

His reputation as a formidable opponent and labor law strategist who is both fair and trustworthy has resulted in peers naming him to the list of Southern California Super Lawyers every year since the inception of that honor and a listing in Best Lawyers in America since 2009.

Recognized as one of the state’s leading experts of workplace law, Richard has lectured extensively for bar associations, trade organizations and management groups throughout the United States and has delivered his proprietary workplace law compliance training and dispute prevention seminars to thousands of lawyers, human resources professionals, business executives and management personnel.

Richard has also published over 75 articles and legal commentaries in numerous trade publications and legal journals and is the creator and principal author of the firm’s widely read e-bulletin Compliance Matters.
Important Rules for Employing Household Employees

In recent years, California courts have seen a tremendous increase in employment litigation filed by individuals performing work in a person's home. Whether the individual is a nanny for young children, a housekeeper, or a caregiver, all of these individuals nevertheless are considered "employees" entitled to legal protections.

Most household employers utilize a very informal approach when employing these individuals and ignore the legal requirements. Practices that run afoul of the law include such things as paying employees in cash without providing an itemized statement, paying a daily or weekly rate without applicable overtime pay, not keeping track of actual hours worked or other required employment recordkeeping, not providing and tracking legally required rest and meal breaks, and not paying for all hours worked. Doing any of these things could land homeowners in a world of legal hurt that can be very expensive and time consuming to resolve.

Homeowners who employ domestic workers need to understand how the employment laws apply and what they must and must not do. The following FAQ summarizes some of the most important aspects of employing a domestic worker and a recent law signed by the Governor which extends overtime protections to these workers.

Q: What Does the New Law Say?
A: In September 2013, the Governor signed into law the Domestic Worker Bill of Rights, which extends overtime protections to certain domestic workers. That law contained a provision indicating that these overtime protections would expire on January 1, 2017. However, last month, the 2016 Domestic Workers Bill of Rights was enacted to make these protections a permanent part of the law.

Q: How Much Do I need to Pay a Domestic Worker?

A: All domestic workers are entitled to minimum wage. The only exceptions are babysitters under the age of 18 and the employer's parent, spouse or child. Currently, the state minimum wage is $10.00/hour. However, many cities have a higher minimum wage. In the City of Los Angeles, the minimum wage is $10.50.

Q: Do I have to Pay Overtime to a Domestic Worker?

A: Yes. All domestic workers are entitled to receive overtime pay. Determining when a domestic worker is entitled to overtime depends upon whether the individual qualifies as a "personal attendant".

Q: Who is a Personal Attendant?

A: A personal attendant is someone employed by a private householder or any third party employer recognized in the health care industry to work in a private household. Duties of a personal attendant include supervising, feeding, and dressing a child or person who needs assistance due to advanced age, physical disability, or mental deficiency. This definition includes nannies and caregivers. However, if someone hired as a personal attendant spends more than 20 percent of his or her time performing work other than supervising, feeding, and dressing the person to be cared for (such as on housekeeping tasks) then he or she is not considered a personal attendant.

Q: When Do I have to Pay Overtime to a Personal Attendant?

A: Personal Attendants must be paid 1.5 x the regular rate of pay for work over 9 hours in a day and 1.5 x the regular rate of pay for work over 45 hours in a work week.

Certain categories of personal attendants are excluded from overtime protections, including personal attendants who provide domestic services through the In Home Support Service (IHSS) program; personal attendants who provide domestic services through Department of Developmental Services pursuant to the Lanterman Developmental Disability Services Act (DDS); casual babysitters; babysitters under age of 18; and close family members such as parent, grandparent, spouse, sibling, child.
Q: When Do I have to Pay Overtime to Domestic Workers Who Don't Qualify As Personal Attendants?

A: It depends upon whether the domestic worker lives in or outside the house:

**Live-out** domestic workers who are not personal attendants are entitled to:

- 1.5 x regular rate of pay for work over 8 hours in a day or 40 hours in a week
- 1.5 x regular rate of pay for the first 8 hours on the 7th consecutive day
- 2.0 x regular rate of pay for work over 12 hours in a day
- 2.0 x regular rate of pay for work of over 8 hours on the 7th consecutive day

**Live-in** domestic workers who are not personal attendants are entitled to:

- 3 hours off in a 24 hour workday (it can be non-consecutive);
- 12 consecutive hours off in any 24 hour workday;
- 24 consecutive hours off for every 5 days of work.

- 1.5 x regular rate of pay for work over 9 hours in a day;
- 1.5 x regular rate of pay for the first 9 hours of work on the 6th and 7th consecutive day;
- 2.0 x regular rate of pay for more than 9 hours on the 6th or 7th consecutive day.

Q: Are Domestic Workers Entitled to Meal Breaks?

A: Yes. All domestic workers, except personal attendants, are entitled to meal periods. Employees who work shifts in excess of five (5) hours, are required to take a thirty (30) minute duty-free unpaid meal period. The meal period must start before completion of the fifth hour of work. However, if the work day does not exceed six (6) hours, the employee may elect to waive the meal period provided the employee has signed a meal period waiver.

Employees who work shifts in excess of ten (10) hours, are required to take a second thirty (30) minute duty-free unpaid meal period. The second meal period must be taken before completion of the 10th hour of work. If the work day does not exceed twelve (12) hours, the employee may elect to waive the second meal period if the employee has taken the first meal period and the employee has signed a meal period waiver.

Additionally, employers are required to maintain written time records showing the start and stop time of each meal period.

Q: Are Domestic Workers Entitled to Rest Breaks?
A: Yes. All domestic workers, except personal attendants, are entitled to rest periods. A ten (10) minute rest period is permitted during each four (4) hour period worked or major fraction thereof. This means that if an employee works between 3½ and 6 hours, the employee is entitled to one 10-minute rest break. If an employee works more than 6 hours, the employee is entitled to a second paid 10-minute rest break. If the employee works more than 10 hours, the employee is entitled to a third 10-minute rest break.

Q: What if I provide Meals and Lodging to a Domestic Worker?

A: An employer who provides meals and/or lodging to an employee may credit part of the cost of those meals and/or lodging against the minimum wages earned by the employee. However, there are certain limits to the amounts that may be credited, and in order to take advantage of the credit, there must be an agreement in writing with the employee that satisfies certain legal requirements.

Q: Do I need to Maintain Time Records?

A: Yes. The homeowner must keep contemporaneous written records showing the actual clock hours worked by a domestic worker, which means actual start and stop times, as well as start and stop times of each meal period.

Q: Can I pay the Domestic Worker in Cash or Check?

A: Yes, but regardless of the method of payment, the employee must be provided with a detachable part of the check or a separate writing showing certain information, and the employer must make the proper deductions.

Specifically, the employer is required to provide the following information on the itemized statement:

1. Gross wages earned
2. Total hours worked (not required for salaried exempt employees)
3. The number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece rate basis
4. All deductions (all deductions made on written orders of the employee may be aggregated and shown as one item)
5. Net wages earned
6. The inclusive dates of the period for which the employee is paid
7. The name of the employee and the last four digits of his or her social security number or an employee identification number other than a social security number
8. The name and address of the legal entity that is the employer
9. All applicable hourly rates in effect during the pay period, and the corresponding number of
hours worked at each hourly rate by the employee.

Many household employers engage a service to provide for the accounting and recordkeeping of household employees which is required. There are many services that do all this for you which are advertised on the Internet.

If you have any questions about this article, please contact any member of the Firm. We can be reached at (818) 508-3700, or online at www.brgslaw.com.

Sincerely,
Richard S. Rosenberg
Katherine A. Hren
Ballard Rosenberg Golper & Savitt, LLP
The Administration's War on Independent Contractors

Business owners need to know that the Obama Administration has declared war on the independent contractor relationship. The goal: reclassify most workers as "employees" (who will be taxed and covered under the myriad of federal and state labor laws).

Earlier this summer, the U.S. Department of Labor issued an official "Administrator's Interpretation" on the topic. The DOL boldly declared that most workers will be employees, not independent contractors. This admonition couldn't be any clearer. Any company using independent contractors is now on official notice that the federal government considers most companies that engage independent contractors to be labor law scofflaws. This is intended to be fair warning that the federal wage-hour agency intends to bring an end to the practice.

Companies that mistakenly misclassify employees as independent contractors face a world of hurt if they are sued. Compliance audits by any one of the myriad federal and state labor law regulators are expensive and time consuming to resolve. And, class action lawsuits over worker misclassification are hugely popular these days.

Recently, the California Labor Commissioner ruled in favor of a driver of Uber Technologies, Inc. and ordered the company to reimburse her for costs incurred while driving. The Commissioner concluded that Uber is an "employer" of the driver and that the driver did not qualify as independent contractors.

Also, a federal judge in San Francisco certified a class of Uber drivers in a class action suit claiming that Uber misclassified them as independent contractors and unlawfully withheld tips. Both rulings are huge setbacks for the "the sharing economy," as they set the stage for similar class actions and wage claims against other companies whose business model is centered on a flexible workforce it designates as independent contractors.

From a risk management perspective, the only way to be sure you get it right is to start with the basic proposition that every worker is an employee unless you are sure that the independent contractor relationship will pass muster, if tested. And, don't get lulled into complacency because you have a contract stating that the worker is a contractor. While it's good evidence of what the parties intend, the contract isn't worth the paper it's written on unless the actual relationship comports with the law.

When doing your analysis, you should keep one very unsettling reality in mind. There is no such thing as a safe harbor. Case law makes clear that one agency's finding on the matter is not binding on another. To make matters worse, different agencies and courts weigh different factors and then ascribe to them different levels of importance. For example, defeating the
claim of a contractor who files for unemployment insurance doesn't insulate the company from a case brought by that same person before the EEOC for discrimination or a claim for an industrial injury before the Workers Compensation Appeals Board. Keep in mind that if the situation is a close call, you are sticking your chin out big time and risking costly litigation, fines, back wages, taxes and the like.

At its core, these DOL guidelines, as well as other agency and court rulings, are designed to evaluate whether the contractor is truly an independent business enterprise. Using the "economic realities" test, the DOL's guidelines focus on a set of six factors to evaluate whether the worker is "economically dependent" on the employer (in which case the worker is an employee) or truly an independent business with all of the trappings of business ownership.

Some agencies and courts use at what's referred to as the "right to control" test, examining whether the company retains the right to tell the putative contractor what to do, how to do it, when to do it and where to do it. Layered on to that test is an assessment of where the work is done, whose equipment and materials are used and whether the contractor has a financial stake in the venture. Control over the methods and means of how the work is done indicates employment, as does the use of equipment owned by the company. And, if the contractor has no risk of financial loss if the project doesn't go well, this also leans in favor of employment.

By issuing these guidelines, the Obama Administration is throwing down the gauntlet when it comes to worker misclassification. Business owners should heed this warning and evaluate all independent contractor relationships before legal complications arise.
Independent Contractor vs. Employee

State and federal courts, as well as the various government agencies, consider several factors in determining whether a worker may qualify for independent contractor status. No single factor is determinative. Accordingly, all factors must be considered, and a final determination must be based upon a realistic appraisal of the situation as a whole. The burden will always be on the company to establish the non-existence of the employment relationship.

The principal inquiry used by courts and government agencies is the so-called "right of control" test, which examines the extent to which the hiring entity retains (or exercises) the right to control the method and manner in which the work is to be performed (as opposed to merely requesting that the service provider produce a particular result). Based upon court decisions and administrative agency interpretations, some of the most important matters in evaluating the degree of control retained by the hiring entity are the following:

1. Instructions. A worker who is required to comply with the hiring entity’s instructions about when, where, and how he or she is to work ordinarily is an employee. This “control” factor is present if the person or persons from whom the services are performed have the right to require compliance with instructions, even if that right is rarely exercised.

2. Training. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services to be performed in a particular method or manner.

3. Integration. Integration of the worker’s services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. The greater the degree of integration, the less able the hiring entity is able to legitimately claim contractor status.

4. Services Rendered Personally. If the service must be rendered personally, this is a factor that leans towards employment. Presumably, this suggests “control” since the person or persons for whom the services are performed are interested in the methods used to accomplish the work, as well as the results.

5. Hiring, Supervising, and Paying Assistants. If the person or persons for whom the services are performed hire, supervise, and pay assistants of the purported contractor, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide
materials and labor and under which the worker is responsible only for the attainment of a result, this factor point toward an independent contractor status.

6. **Continuing Relationship.** A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring, although irregular, intervals.

7. **Set Hours of Work.** The establishment of set hours of work by the persons for whom the services are performed is a factor indicating control.

8. **Full-Time Required.** If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working, and impliedly restricts the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses and sets his or her own hours of work.

9. **Doing Work on Employer's Premises.** If the work is performed on the premises of the hiring entity, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the hiring entity such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the services involved and the extent to which an employer generally would require or permit other true employees to perform such services on the employer's premises. Control over the place of work is indicated when the hiring entity have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places.

10. **Order or Sequence Set.** If a worker must perform the services in the order or sequence set by the hiring entity, that factor shows control (i.e., that the worker is not free to follow the worker's own pattern of work, but must follow the established routines and schedules of the hiring entity). Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.

11. **Oral or Written Reports.** A requirement that the worker submit regular or written reports to the hiring entity indicates a degree of control.

12. **Payment by Hour, Week, Month.** Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally leans towards the worker being an independent contractor.

13. **Payment of Business and/or Traveling Expenses.** If the hiring entity ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An
employer, to be able to control expenses, generally retains the right to regulate and direct the worker’s business activities.

14. **Furnishing Of Tools And Materials.** The fact that the hiring entity furnishes significant tools, materials, and other equipment needed by the worker to do the work tends to show the existence of an employer-employee relationship.

15. **Significant Investment.** If the worker invests in facilities that are used by that worker in performing the services for the hiring entity and those tools/equipment are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends points to the worker being an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the hiring entity and, accordingly, the existence of an employer-employee relationship. Special scrutiny is required with respect to certain types of facilities, such as home offices.

16. **Realization of Profit or Loss.** A worker who can realize a profit or suffer a loss as a result of the worker’s services (in addition to the profit or loss ordinarily realized by employees) is more likely to be an independent contractor, but the worker who cannot is generally an employee. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.

17. **Working for More Than One Firm at a Time.** If a worker performs more than *de minimus* services for a multiple of unrelated persons or firms at the same time, that factor generally is indicative of an independent contractor. However, a worker who performs services for more than one person may simply be an employee of each, especially where such persons are part of the same service arrangement.

18. **Making Service Available to General Public.** The fact that a worker makes his or her services available to the general public on a regular and consistent basis is indicative of an independent contractor relationship.

19. **Right to Discharge.** The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right to discharge is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer’s instructions. An independent contractor, on the other hand, cannot be fired as long as the independent contractor produces a result that meets the contract specifications.

20. **Right to Terminate.** If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes and without incurring liability, that factor indicates an employer-employee relationship.
Aside from the “right to control” factors discussed above, many California court decisions confirm that inquiry into the following “secondary indicia” is needed to fully vet the true nature of the relationship:

- whether the one performing services is engaged in a distinct occupation or business;
- the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- the skill required in the particular occupation;
- whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
- the length of time for which the services are to be performed;
- whether or not the work is a part of the regular business of the principal; and
- whether or not the parties believe they are creating the relationship of employer-employee.

There is a general presumption that individuals performing work for a company are employees, not independent contractors. The penalties for misclassifying an employee as an independent contractor can include back taxes, fines, compensation, and other lost benefit costs. Also, an employee who is misclassified as an independent contractor may bring a civil lawsuit to recover other damages and even attorney’s fees and costs of suit in some cases.