How To Avoid Being Sued By Your Homecare Worker

San Gabriel Valley Fiduciary Round Table
May 10, 2017
The Big Questions:

• Are the individuals performing work in a home “employees” under California law?
  o If so, what are my legal obligations?
• May I simply treat the worker as an “Independent Contractor” and avoid these legal obligations?
Home Workers

• A nanny for young children
• A housekeeper
• Caregiver
• Others
Employment

• Generally, “employee” means any person employed by an employer.
• “Employer” means any person who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person. (E.g., 8 CCR §11090(2)(F).)
Independent Contractors

• Must be true independent business owners and behave that way
• “Right of Control” test
• “Economic Realities” test
• No safe harbor
• Different agencies and courts have their own view
• Burden on homeowner to prove the worker is NOT an employee
Staffing Agency

- Homeowner on the hook for the wage hour violations of the staffing agency
- Read the contracts carefully....who is the employer?
- What is a “Joint Employer?”
- Be sure there is an indemnity
“Domestic Work Employer”

• Any person, including corporate officers or executives, who directly or indirectly, or through an agent or any other person, including through the services of a third-party employer, temporary service, or staffing agency or similar entity, employs or exercises control over the wages, hours, or working conditions of a domestic work employee. (Labor Code section 1451(c)(1).)
Common Household Practices

- Paying workers in cash without providing an itemized wage statement
- Paying a set weekly or daily rate without applicable overtime pay
- Not keeping track of actual hours worked or other required employment recordkeeping
- Not providing legally required rest and meal breaks
- Not paying for all hours worked
Common Household Practices

• Having workers work 6+ days in a row without a day off
• Not using an employment application
• Not completing an I-9 Form
• Not having workers compensation insurance
• Not realizing that the full array of employment laws apply to these workers
  o Hiring (e.g., Ban the Box; background checks; credit checks)
  o Discrimination & Harassment

VIOLATION
Domestic Worker Bill Of Rights

• Since 2013; became permanent part of law in 2016 (Labor Code sections 1450-1454)
• Extends overtime pay rights to certain personal attendants working in the home who were not previously entitled to overtime pay under California law
• Personal attendants covered by this law are now entitled to overtime pay (1.5 x their regular rate):
  o > 9 hours /day
  o > 45 hours/ week
Who is a Domestic Worker?

• Provides services related to the care of people in the home, or maintains private households or their premises.

• Domestic workers include:
  o nannies,
  o childcare providers,
  o caregivers,
  o personal attendants,
  o housekeepers,
  o cooks, and
  o other household workers
How Much Must Domestic Workers Be Paid?

- Must pay minimum wage to all (except babysitters under 18 and employer’s parent, spouse or child)
- State minimum wage: $10/hour ($10.50/hour starting January 1, 2018)
- Los Angeles minimum wage: $10.50/hour ($12.00/hour starting July 1, 2018)
Are Domestic Workers Entitled to Overtime Pay?

• Yes
• All domestic workers are entitled to receive overtime pay.
• Determining when a domestic worker is entitled to overtime pay depends upon whether the individual qualifies as a “personal attendant.”
Definition of Personal Attendant

• Someone employed by a private household or any third party employer recognized in the health care industry to work in a private household

• Duties of a personal attendant include:
  o supervising,
  o feeding, and
  o dressing a child or person who needs assistance due to advanced age, physical disability, or mental deficiency.

• Not a personal attendant if spends > 20% of time performing work other than supervising, feeding and dressing the person to be cared for (housekeeping tasks)
  o Examples: cooking, cleaning, laundring, shopping, etc.
Overtime Pay to Personal Attendants

- 9+ hours/day
- 45+ hours/week
Excluded Employees:

- **Family members** (parent, grandparent, spouse, sibling, or child of the employer)
- Someone under the age of 18 employed as a babysitter to a minor
- Anyone who is a “casual babysitter” (meaning someone who babysits on an irregular or intermittent basis and is not a babysitter by vocation)
- Anyone who provides services to the developmentally disabled through a state or regional center voucher program
- Anyone who provides child care pursuant to certain child care acts (the Child Care and Development Services Act of the Education Code or the California Work Opportunity and Responsibility to Kids Act of the Welfare and Institutions Code)
Excluded Employers:

- Domestic worker registry or referral agencies that satisfy the requirements of Civil Code section 1812.5095 and Unemployment Insurance Code section 687.2 (specifically, such a referral agency must meet all the requirements of the Civil Code as solely a referral agency)
- Licensed health care facilities
- Clients overseeing or receiving services under the In-Home Supportive Services (IHSS) program
Overtime Pay for All Other Domestic Workers

• Not covered by the Domestic Worker Bill of Rights
  o However, regular overtime protections apply under Wage Order No. 15.

• Amount of overtime depends on whether the domestic work lives in or outside the house:
  o **Live out** domestic workers who are not personal attendants are entitled to:
    • 1.5 x the regular rate of pay for hours worked over 8 in a day or 40 regular hours in a workweek
    • 1.5 x the regular rate of pay for the first 8 hours on the 7th consecutive day of the workweek
    • 2 x the regular rate of pay for work over 12 hours in a day
    • 2 x the regular rate of pay for work over 8 hours on the 7th consecutive day of the workweek.
  o **Live-in** domestic workers who are not personal attendants are entitled to:
    • 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 x regular rate of pay for more than 9 hours on the 6th or 7th consecutive day

• 3 hours off in a 24 hour workday (can be nonconsecutive)
• 12 consecutive hours off in any 24 hour workday
• 24 consecutive hours off for every 5 days of work
<table>
<thead>
<tr>
<th>IF YOU ARE:</th>
<th>THEN YOU ARE ENTITLED TO:</th>
<th>SOURCE OF LAW</th>
</tr>
</thead>
<tbody>
<tr>
<td>A personal attendant employed in a private household</td>
<td><strong>Overtime</strong> (1.5 x regular rate of pay)</td>
<td>n/a</td>
</tr>
<tr>
<td>&gt; 9 hours/day or</td>
<td>Double time (2 x regular rate of pay)</td>
<td>Domestic Worker Bill of Rights (Labor Code sections 1450–1454)</td>
</tr>
<tr>
<td>&gt; 45 hours/week</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other type of domestic worker (not a personal attendant)</td>
<td></td>
<td></td>
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<tr>
<td><strong>Not live-in</strong></td>
<td>&gt; 8 hours/day or</td>
<td>&gt; 12 hours/day or</td>
</tr>
<tr>
<td></td>
<td>&gt; 40 hours/week</td>
<td>&gt; 8 hours on the 7th consecutive day of work</td>
</tr>
<tr>
<td>Live-in</td>
<td>&gt; 9 hours/day or</td>
<td>&gt; 9 hours on the 6th or 7th day of the week</td>
</tr>
<tr>
<td>Up to 9 hours worked on the 6th or 7th day of the week</td>
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Meal Breaks

• All domestic workers, except personal attendants, are entitled to meal periods.

• Shift $> 5$ hours $\rightarrow$ 30 min duty-free unpaid meal period; must start before completion of 5th hour of work
  - Shift $< 6$ hours $\rightarrow$ employee can waive meal period if signed meal period waiver

• Shift $> 10$ hours $\rightarrow$ 2nd duty-free unpaid meal period (to start before completion of 10th hour of work)
  - Shift between 10 and 12 hours $\rightarrow$ employee can waive meal period if taken 1st meal period and signed meal period waiver

• Employers are required to maintain written time records showing start and stop times of each meal period.
Rest Breaks

- All domestic workers, except personal attendants, are entitled to rest periods.
- 10 min rest period during each 4 hour period worked (or major fraction thereof)
- Shift is between 3.5 and 6 hours → 1 paid break
- Shift > 6 hours → 2 breaks
- Shift > 10 hours → 3 breaks
Meal and Lodging Credits

- Use the value of meals/lodging toward minimum wage obligations
- Only if the employer and the employee enter into a voluntary written agreement before the work is performed
- Employee is not required to live on premises
<table>
<thead>
<tr>
<th>LODGING</th>
<th>July 1, 2014</th>
<th>Effective Jan. 1, 2016</th>
</tr>
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<tbody>
<tr>
<td>Room occupied alone</td>
<td>$42.33 per week</td>
<td>$47.03 per week</td>
</tr>
<tr>
<td>Room shared</td>
<td>$34.94 per week</td>
<td>$38.82 per week</td>
</tr>
<tr>
<td>Apartment – two thirds (2/3) of ordinary rental value, and no more than:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Apartment for single employee:</td>
<td>$508.38 per month</td>
<td>$564.81 per month</td>
</tr>
<tr>
<td>Apartment for couple employed by same employer:</td>
<td>$752.02 per month</td>
<td>$835.49 per month</td>
</tr>
<tr>
<td>MEALS (must be bona fide meals consistent with employee’s work shift)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Breakfast</td>
<td>$3.26</td>
<td>$3.62</td>
</tr>
<tr>
<td>Lunch</td>
<td>$4.47</td>
<td>$4.97</td>
</tr>
<tr>
<td>Dinner</td>
<td>$6.01</td>
<td>$6.68</td>
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Recordkeeping

- Required by law
- Actual clock hours worked
  - Start and stop times for each meal period must be recorded
Paying Cash

• OK, but MUST provide a detachable part of the check or a separate writing showing information listed below and employer MUST make proper tax withholdings
• Itemized statement requirements:
  1. Gross wages earned
  2. Total hours worked
  3. If paid on piece-rate basis, the number of piece-rate units earned and any applicable piece rate
  4. All deductions
  5. Net wages earned
  6. Inclusive dates of period for which employee is paid
  7. Name of the employee and last 4 of SSN or employee id number
  8. Name and address of legal entity that is employer
  9. All applicable hourly rates and corresponding number of hours worked at each hourly rate