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PERSPECTIVE

Post-pandemic domestic workers present unique challenges

By Arash Homampour

With the resumption of post-pandemic life, California families are bringing workers back into their homes. These families can still risk possible COVID exposure for themselves and their loved ones. But if they don't properly classify and pay their household workers, they could be facing a whole other set of risks for violating laws designed to protect these invaluable workers.

Whether it's a part-time gardener or a live-in au pair, it is a big mistake to become complacent about classification and compensation, but it's an easy thing to do — especially if the workers are family members or if homeowners are unaware (even if blissfully unaware) of their obligations as employers. The consequences of doing things the wrong way, even through ignorance, can be extremely costly.

Domestic workers — especially those who care for one's children or loved ones — should be protected, treated fairly and afforded all legal rights to which they're entitled.

Before engaging domestic help, families should understand the legal implications of misclassification, underpayment of wages, or failure to obtain requisite insurance. They must know whether their live-in workers can be charged for housing and food, added to their insurance policies, provided workers compensation coverage, or denied meal and rest breaks.

Worker Classification

The State Division of Labor Standards Enforcement presumes that workers are employees under Labor Code Section 3357, but the actual determination depends on several factors, including whether the person to whom service is rendered has control or the right to control the worker, what work is being done, and how it is performed.

Unless household workers are employed by an outside agency or have substantial control over how they do their jobs, they are employees. Even a worker who is part of the extended family, such as a niece or a cousin, is considered an employee for all relevant purposes.

The law now imposes significant penalties on employers, including families, who erroneously

classify their staff as independent contractors. These penalties are on top other penalties that domestic workers could also seek if they are misclassified as independent contractors.

Categories of Domestic Workers

California Wage Order No. 15 governs "household occupations," and defines that term to include "all services related to the care of persons or maintenance of a private household or its premises by an employee of a private householder."

Domestic workers can be "personal attendants" or "other domestic workers," and improperly categorizing them could subject the employer to substantial penalties.

A domestic employee who spends more than 20% of the time making beds, housecleaning, cooking, laundry, or other duties related to the maintenance of a private household is considered an "other domestic worker."

The Wage Order states that "personal attendant" means any person employed by a private householder or by any third party employer recognized in the healthcare industry to work in a private household, to supervise, feed, or dress a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision. The status of 'personal attendant' shall apply when no significant amount of work other than the foregoing is required." Only those who spend significant time supervising, feeding, and dressing a child or person who needs supervision can be considered a personal attendant.

Rate of Pay

The Fair Labor Standards Act requires workers to be paid at least the federal minimum wage for all hours worked and overtime pay at time and-a-half the regular rate of pay for all hours worked over 40 in a workweek, unless subject to an exemption. Live-in domestic workers may be exempt from the FLSA's overtime pay requirement. California employers, including domestic employers, must generally pay hourly non-exempt employees daily overtime at time-and-a-half, and possibly double time, depending on how many hours they work in a day or week.

California's Domestic Worker Bill of Rights, Labor Code Sections 1450- 1454, extends overtime pay to certain personal attendants who were not entitled to overtime under Wage Order No. 15. Personal attendants covered by the law are now

entitled to overtime pay at one-and-a-half times their regular rate of pay for any hours worked in excess of nine hours in a day or 45 hours in a week. Wage Order 15 governs overtime pay for all "other domestic workers."

Homeowners can charge live-in employees for room and board to a certain extent, but only if the arrangement is documented in a voluntary written agreement between the family and the employee before work is performed.

Tax Considerations

Individuals considered "household employers" by the IRS must comply with all tax regulations about employees, including FICA taxes, which are paid by the employer and, through payroll deduction, the employee. Spouses, parents, and minors are exempt, but some exceptions apply to parents and special rules apply to paying one's own children.

Just like any other employer, household employers must obtain federal employer identification numbers (EIN) from the IRS, have their employees complete a Form W-4, and verify eligibility to work in the United States. They must also register with the state as an employer.

Insurance Coverage

If employees work in the home, the homeowner has a legal obligation to insure the residence as if it were a business. California homeowners who use employee labor, including from family members, must purchase workers' compensation insurance under Labor Code Section 3700, and failure to do so can be expensive. The DLSE will issue a stop order and penalty assessment prohibiting further use of employee labor until insurance is purchased.

Meal and Rest Breaks

For workers who qualify as personal attendants, meal periods and rest breaks are not legally required. Other domestic workers, regardless of where they live, are entitled to the same meal periods and rest breaks as any other California employee.

All domestic workers, except personal attendants have the right to one 10-minute rest break for shifts from three-and-a-half to six hours in length; two 10-minute rest breaks for shifts of more than six hours and up to 10 hours; and three 10-minute rest breaks for shifts of more than 10 hours and up to 14 hours. Rest periods

are counted as hours worked and must be paid, and employers must pay an additional hour at the employee's regular rate of pay for each work day in which there was a rest break violation.

These workers also have the right to one 30-minute unpaid meal break for work periods more than five hours and a second 30-minute meal period if the work exceeds 10 hours in a day. If the employee agrees in writing to take an on-duty meal period when the work prevents him from taking time off, that meal period must be paid. Employees who work six or less hours in a day can waive their meal periods, and those who work 12 hours can waive their second meal period. Employers who violate meal break rules must pay an additional hour for each day of violation.

Sick Leave

California's Paid Sick Leave law applies to all employers including domestic employers, and some California cities' ordinances require employers to provide more paid sick time than state law requires.

Unless a homeowner has 25 or more workers, he or she is exempt from California Senate Bill 95, which requires California employees to provide up to 80 hours of supplemental paid sick leave

for COVID-related issues. The employer can, however, get a federal tax credit for offering workers paid COVID sick leave.

Workplace Safety

In September 2020, Gov. Newsom vetoed Senate Bill 1257, which would have deleted the household domestic services exception to Labor Code Section 6303, requiring employers to comply with California Division of Occupational Safety and Health Act standards for working conditions.

While bill proponents had argued that OSHA protections should protect the state's domestic workforce, Newsom — objected to the extension of OSHA's employer obligations to private homeowners and renters. He also objected to the concept of Cal/OSHA investigating private residences.

Given the governor's openness to considering an alternative model for protecting domestic workers, household employers should prepare themselves for a future in which they will have to implement workplace safety measures. Until then, doing the right thing — and the ongoing presence of the COVID virus — should sufficiently motivate domestic employers to keep households clean and workers safe. ■



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