

WHAT TO DO WHEN A LAW YOU DIDN'T KNOW ABOUT CONSIDERS YOUR HOME A BUSINESS!

By: Judge B. Ruth Kraft
RKraft@Kirschenbaumesq.com



On August 31, 2010, then New York Governor David Paterson signed into law the Domestic Workers' Bill of Rights, which was enacted by the legislature to provide protection for household workers by establishing rules for overtime and time off, including paid time off. The statute also protects domestic workers against unwelcome sexual advances, hostile work environment, and harassment based on gender, race, religion or national origin. The law has been in effect since November 29, 2010. Although it has not been publicized, its ramifications are serious and may be financially onerous. Do you remember US Attorney General nominee Zoe Baird, in the Clinton administration, whose confirmation was derailed by the disclosure that she had household help who worked "off the books"? If you are a business owner or professional with children living in New York City and its suburbs, the likelihood is high that you have domestic workers and almost as high that you are paying them off the books.

First, who qualifies as a domestic employee? The law defines this to include housekeepers, nannies, companions to the sick or elderly, or any person employed in a home or residence for any other domestic purpose. "Casual workers", meaning your adolescent Saturday night babysitter, and your relatives (whether through blood, marriage or adoption) are excluded. Also excluded are individuals whose services are retained through and are paid by an employment agency.

What protections does the law provide to domestic workers?

- Hourly pay at no less than the minimum wage (currently \$7.25 per hour)
- Overtime at the rate of "time and a half" after 40 hours of work in a calendar week for "live-out" workers or after 44 hours of work for "live-in help"
- One day (meaning a full 24 hours) of rest per week or, if you agree to work on that 7th day, payment at the overtime rate
- At least three days off after one year of work for the same employer
- Mandatory weekly pay (which is not required under NY law for other worker classifications)
- Employer may not deduct money from pay without the worker's written permission except for deductions authorized by law, including income tax withholding, social security, Medicare, health insurance

- Prohibition against deductions from wages for breakages or other reasons
- Mandatory written notification of all deductions, regardless of the method of payment
- Employer's obligation to keep detailed payroll and time records for SIX YEARS of:
 1. The hours you work
 2. Your wages
 3. Deductions from wages

Additionally, the law extended the NYS Disability Benefits Law to cover domestic workers; all employers are required to provide disability benefits for off the job injuries or illness for those working more than 40 hours per week. . Employers must purchase workers' compensation coverage for their domestic workers employed 40 or more hours per week, make quarterly unemployment insurance payments for workers who earn more than \$500 in a calendar quarter, and notify workers, in writing, of the date of termination of employment and the date of cancellation of benefits not more than five working days after the date of separation.

Employers must obtain an employer identification number from the Social Security Administration and remit social security and Medicare taxes for all employees who earn more than \$1,400 per year.

KNOW YOUR RIGHTS

Can an employer take wage deductions for providing live-in help with room and board? Yes, but only a token amount: \$2.50 per meal and \$3.10 per day for lodging.

If the domestic worker travels with the family, must she be paid? Yes, and the employer must pay the travel expenses.

Must live-in help be paid for hours when he or she is sleeping? The domestic worker must be paid for the full period of time on duty, including sleep and meal periods, unless there is an agreement to exclude sleeping time!! In order to do so, the employer must provide adequate sleeping facilities and the exclusion is limited to eight hours per day.

What if the domestic worker is an undocumented alien? This will not absolve the employer of the obligation to comply with the law. Indeed, although individuals who lack authorization to work in the United States (non-"green card holders") are ineligible to collect unemployment, you are still obligated to remit employment

taxes to the government. Just as employers in a business setting are required to have all workers complete form I-9 and must verify eligibility, the same rules apply to domestic workers.

Employers must post a Domestic Workers' Rights Notice in a conspicuous place in their home. If the employee is not a native speaker of English, the notice should be posted both in English and in the native tongue. The form is available in a variety of languages on the NYS Department of Labor website.

If a household pays its domestic workers well in excess of the minimum wage or allows them free time during the day, will it catch a break? No. Being generous in terms of pay, time off with pay, etc. will not constitute mitigation of your responsibilities under the law. In terms of free time, if this is not documented in writing, then if your worker files a complaint, it will be your word against hers—with the law which places the burden upon you to maintain business records. Also, know that if the domestic is paid at the minimum wage rate and works 10 consecutive hours, the NYS wage/hour law requires that she receive an additional hour's pay! All these complications make it virtually impossible for an employer to comply with the statute.

**BEWARE OF THE
TRAPS**

THE LAW CONTAINS MAJOR TRAPS FOR THE UNAWARE!!!! If you do not track the hours worked, then the governing assumption will be that the employee worked 24 hours a day which would trigger time-and-a-half for 18 of those hours. A former worker can make a claim at any time during the six years following separation from employment. **DO THE MATH!!!** If you have paid domestic help at a weekly rate of pay, the Department of Labor is free to assume that, to calculate an hourly rate, that wage should be divided by 44. This means that, if you pay a live-in domestic \$600 for a 5 day week, the hourly rate of pay, would be \$13.64 per hour, way over the minimum wage. But, if the worker brings a complaint, you could conceivably owe her \$20.46 for at least 10 more hours per day (assuming that you can successfully invoke the sleeping exclusion). That is an extra \$204.60 per day or \$1023 per week!! Over the course of a year, you could be charged with the obligation to make additional payments to your worker which would bring her annual income to \$84,306. And, yes, this is the point where you may ask yourself why you went to graduate school and why a domestic worker could possibly be entitled to pay higher than that of various professionals.

In addition, the law imposes a penalty of \$50 per week for each week in which the employer did not maintain payroll records. Failure to carry workers' compensation insurance carries a maximum penalty of \$1000 per 10 day period and there are penalties, thankfully lower, for the failure to maintain disability benefits insurance or make mandatory payments of unemployment tax and other tax withholdings.

Very few violations of the law have been reported to the Department of Labor. Some household workers have sought the intervention of pro bono legal services organizations to obtain settlements. However, once a matter is brought to the Department, the consequences can be extremely costly and easily reach six figures.

It is abundantly clear that a household which employs an undocumented worker or pays a domestic worker off the books is taking an enormous risk.

About the Author:

JUDGE RUTH B. KRAFT is *of counsel* to the firm and specializes in labor and employment law. She counsels clients on all aspects of compliance with federal and state regulations including wage and hour issues, employee classification, and tax contribution as well as the practicalities of addressing matters brought before administrative agencies including the Unemployment Insurance Appeal Board and Industrial Appeal Board. She is skilled in evaluation and design of best practices in employment law, training management, and evaluating effectiveness and in the use of alternative dispute resolution in the workplace.

To contact Judge Kraft, call her at (516) 747-6700 x. 326 or email her at RKraft@Kirschenbaumesq.com.

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