

## In This Issue:

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New York just enacted the first law in the nation designed specifically to provide domestic workers with certain employment guarantees. Beginning on November 29, 2010, nannies, housekeepers and caregivers in New York shall be entitled to overtime pay, either one day of rest per week or overtime pay when they work on their day of rest, three days of paid time off after one year of employment, disability benefits, and the right to work in an environment free of harassment based on sex, race, religion and/or national origin.

## New York Enacts Bill of Rights for Domestic Workers

By Stephen A. Fuchs

### Introduction

On August 31, 2010, just in time for Labor Day, New York Governor David Paterson signed into law the "Domestic Workers Bill of Rights" ("Bill of Rights"). The Bill of Rights, which takes effect on November 29, 2010, amends the New York State Human Rights Law (NYSHRL), New York Labor Law and New York Workers' Compensation Law. It amends the NYSHRL to protect domestic workers from harassment based on sex, race, religion and national origin. It amends New York Labor Law to entitle domestic workers to receive overtime pay, one day of rest per week or overtime pay when they work on their day of rest, and three days of paid time off after one year of employment. It also extends eligibility for disability benefits under the state workers' compensation law to domestic workers who work fewer than 40 hours per week.

### Definition of Domestic Worker

The Bill of Rights applies to any "person employed in a home or residence for the purpose of caring for a child, serving as a companion for a sick, convalescing or elderly person, housekeeping, or for any other domestic service purpose," except those that:

- work on a casual basis;
- provide companionship services (*i.e.*, care for the elderly or infirm who cannot care for themselves) and are employed by someone other than the family or household receiving such services; and/or
- are a relative through blood, marriage or adoption of the employer or of the person for whom the worker is providing services under a program funded by a federal, state or local government.

## Protection Against Harassment

The Bill of Rights amends New York's fair employment statute, the NYSHRL, to specifically extend some of its provisions to domestic workers, even if they are the employer's only employee. When the Bill of Rights takes effect, employers of domestic workers will be prohibited from:

- (a) engaging in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to a domestic worker when their submission to such conduct is either: (i) a term or condition of employment; (ii) used as the basis for employment decisions; or (iii) such conduct has the purpose or effect of unreasonably interfering with the individual's work performance by creating an intimidating, hostile or offensive working environment; or
- (b) subjecting a domestic worker to unwelcome harassment based on gender, race, religion or national origin, where such harassment has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment.<sup>1</sup>

This means that a family that employs only one nanny or housekeeper, for example, will be subject to being sued if they unlawfully harass that employee based on sex, race, religion or national origin. The Bill of Rights thus opens the door for harassment suits by nannies, caregivers and other domestic workers based not only on the conduct of the employer (e.g., a specific family member) but also on alleged conduct by the children, elderly or infirm persons for whom they provide care, without regard to their maturity or mental stability.

## Overtime Pay

The Bill of Rights also extends New York's overtime pay requirements to domestic workers. It amends New York Labor Law to require payment of overtime pay at the rate of one and one-half times the worker's regular hourly wage for all hours worked over 40 in a week (or over 44 hours for domestic workers who reside in their employer's home).<sup>2</sup>

Although federal law already guarantees overtime pay to certain domestic workers for all hours worked over 40 each week, it exempts a broader array of workers than New York's Bill of Rights.

Moreover, federal law exempts from its overtime pay requirements those domestic workers who reside at their place of employment, whereas the Bill of Rights does not.

As New York law permits claims for unpaid overtime and other wages to be brought up to six years after they were earned, employers who fail to provide their domestic workers with the requisite overtime pay may be sued several years after the end of the employment relationship. In addition to the unpaid overtime or other wages, such employers could be held liable for the domestic worker's attorneys' fees, costs, interest, and a penalty equal to 25% of the unpaid wages, not to mention potential civil fines and criminal penalties.

## Paid and Other Time Off

The Bill of Rights also entitles domestic workers to one full day (24 consecutive hours) of rest each calendar week. Domestic workers who choose to work on their day of rest must be paid overtime for all hours worked that day, whether or not they work the requisite, aggregate hours that week. The Bill of Rights further provides that the day of rest "should, whenever possible, coincide with the traditional day reserved by the domestic worker for religious worship."<sup>3</sup>

Additionally, the Bill of Rights entitles domestic workers to three paid days off after one full year of service.<sup>4</sup> This marks the first time that New York has required any private sector employer to provide any employee with paid time off.

## Disability Benefits

The Bill of Rights further amends New York's Workers' Compensation Law to extend its provisions on disability benefits to domestic workers who work less than 40 hours each week.<sup>5</sup> If the employer does not provide disability benefits insurance, such benefits are generally provided by the state. This means that employers of domestic workers will soon have to examine their homeowner's and other potentially applicable insurance policies to determine whether or not their domestic workers will receive the requisite coverage and provide the workers with the forms needed to apply for such benefits, from the insurer or the state.

## Implications for Employers of Domestic Workers

The Domestic Workers Bill of Rights creates several potential landmines for their employers, particularly families. Some basic precautions will help such employers avoid liability. For instance:

- Employers of domestic workers should consult with employment counsel sufficiently in advance of November 29, 2010 to determine the extent to which they are covered by the Bill of Rights and ensure compliance with its requirements. One way to do so is through written employment agreements with the domestic worker that confirm the workers' entitlement to all the applicable provisions of the Bill of Rights, as well as any other material terms of employment.
- Employers of domestic workers should take steps to learn about, and ensure they comply with, other provisions of potentially applicable New York law, paying their domestic employees with the requisite frequency, obtaining signed acknowledgments from them at the outset of their employment, acknowledging receipt of notice of their pay day, regular pay rate and overtime pay rate, and creating and maintaining accurate payroll and work records. The latter include recording the employee's hours worked daily and weekly, the employee's gross wages, the amount deducted from those wages, and the net amount paid. These records must be maintained for a minimum of six years.
- Employers should treat seriously all complaints of harassment by domestic workers, whether the alleged harasser is a minor, mentally infirm, or head of the household. It is critical that such complaints be investigated immediately and that effective remedial action be taken promptly in the event they are found to have merit. These investigations and remedial actions should be documented and counsel should be consulted to ensure they are handled adequately.
- Employers with workforces that include both domestic and other workers should have their policies, practices, and employee handbooks reviewed by employment counsel and/or qualified human resources professionals to ensure they comply with the Bill of Rights.
- Employers of domestic workers should contact their insurance carriers regarding workers' compensation and disability insurance coverage to ensure they are providing those workers with the requisite insurance coverage.

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<sup>1</sup> Bill No. A01470B, S-2311-E, establishing N.Y. EXEC. LAW § 296-b.

<sup>2</sup> *Id.*, establishing N.Y. LAB. LAW § 170.

<sup>3</sup> Bill No. A01470B, S-2311-E, § 7, amending N.Y. LAB. LAW § 161.

<sup>4</sup> *Id.*

<sup>5</sup> Bill No. A01470B, S-2311-E, § 9, amending N.Y. WORK. COMP. LAW §§ 201(5),(6)(A). Employers are required to provide workers' compensation benefits insurance coverage to domestic workers who work 40 or more hours per week. N.Y. WORK. COMP. LAW § 2(4), 3(Group 12). The Bill of Rights does not expand coverage for workers' compensation benefits to employees who work less than 40 hours per week.