

# New York's Domestic Workers' Bill of Rights Takes Effect

## November 18, 2010

On November 29, 2010, New York's Domestic Workers' Bill of Rights law becomes effective. Signed into law on August 31, 2010, by Governor David Patterson, this legislation affords substantive labor protections to certain categories of domestic workers, making New York the first state in the nation to do so. This landmark legislation amends the New York Labor Law, New York State Human Rights Law, and the New York Workers' Compensation Law extending certain rights, benefits, and protections to domestic workers, guaranteeing those who come within its coverage overtime pay at time and one-half their regular hourly rate for hours worked in excess of forty (40) in a week, or forty-four (44) hours in the case of live-in domestic workers; one day of rest every seven (7) days or overtime pay in lieu of the day off if the employee works seven (7) days that week; and three (3) paid days off annually after one (1) year of service. It also extends statutory disability benefits under the New York Workers' Compensation Law to domestic workers to the same degree as other workers. Finally, the new law amends the New York Human Rights Law removing the domestic workers exemption and providing such workers a right to sue for sexual harassment, as well as harassment on the basis of race, religion, gender and/or national origin.

## Who Is a Domestic Worker?

As coverage is limited to certain categories of "domestic workers," the definitional section is most important. Under section 2(16) of the New York Labor Law, a domestic worker is defined as "a person employed in a home or residence for the purpose of: caring for a child, serving as a companion to a sick, convalescing or elderly person, housekeeping, or for any other domestic service purpose." A domestic worker does *not* include "any individual (a) working on a "casual basis," (b) who is engaged in companionship services as defined in section 213(a)(15) of the FLSA, and who is employed by an employer or agency *other than* the family or household using the individual's services; or (c) who is a relative through blood, marriage or adoption of (i) the employer or (ii) the person for whom the worker is delivering services under a program funded or administered by federal, state or local government.

To qualify for the “companionship services” exemption as defined in the FLSA and its regulations, the worker must provide fellowship, care, and protection for a person who, because of advanced age, cannot care for his or her own needs. Such services may include household work, “*provided, however, that such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked.*” 29 C.F.R. § 552.6 and 29 U.S.C. § 213(a)(15); *see also, Settlement Home Care, Inc. v. Industrial Bd. of Appeals of Dept. of Labor*, 542 N.Y.S.2d 346, 348 (N.Y. Sup. Ct. 1989) (holding that sleep-in home attendants who performed a variety of specific personal care and housekeeping services – including bathing, grooming, feeding and dressing the clients, shopping, housekeeping, and doing laundry – for their elderly clientele were *not* within the companionship exemption of the New York Labor Law because, “although [the] attendants [did] provide some measure of companionship to the clients,” the attendants primary duties included housekeeping; therefore, any companionship was merely incidental to the attendant’s presence in the clients’ homes).

Simply put, New York’s Domestic Workers Bill of Rights law extends protections to housekeepers, full-time babysitters, and those caring for a child, the elderly, or the sick if employed in a home or residence directly by the family or household, in contrast to those employed by a third party or agency.

### **Summary of Specific Provisions:**

(1) Eight-Hour Workday. Labor Law § 160(3) is amended to provide an eight (8) hour workday for all covered domestic workers.

(2) Overtime for Domestic Workers. A new section 170 is added to the Labor Law which provides that employers cannot require domestic workers to work more than forty (40) hours a week, or forty-four (44) hours a week for domestic workers who reside in the home of their employer, unless the worker is paid overtime at a rate of one and a half times the worker’s regular hourly rate. Domestic workers who did not reside in the household of their employer were already guaranteed overtime benefits pursuant to federal and/or state law. However, this amendment now extends these benefits to “live-in” domestic workers in New York State, as well.

(3) A Day of Rest and Paid Time Off. Section 161(1) of the Labor Law is now amended to require employers to give domestic workers one (1) day off each calendar week. The day off can be voluntarily waived by the worker; however, the worker must then be paid for working his/her day of rest at an overtime rate if s/he works all seven days that week. In addition, domestic workers will also accrue three (3) paid days off a year after working one (1) year with an employer.

(4) Minimum Wage. Although most domestic workers are generally covered under the federal minimum wage law, the new legislation now extends minimum wage protection to any domestic worker who “lives in” the home of an employer, a category of workers previously exempted from New York’s Minimum Wage Law, by amending Labor Law § 651(5).

(5) Unlawful Discriminatory Practices. Under this new legislation, sections 292(5)-(6) of the Executive Law are amended to include domestic workers and their employers under the coverage of the New York State Human Rights Law. Thus, the definition of “employer” under the NYSHRL has been amended so that coverage attaches where the employer employs at least one domestic worker. Consequently, domestic workers may sue their employers for unlawful discriminatory practices taken against them, including unwelcomed sexual advances or requests for sexual favors where (i) submission is explicitly or implicitly made a term or condition of an individual’s employment; (ii) the conduct creates an intimidating, hostile or offensive working environment; or (iii) an employer makes an employment decision affecting an individual based on the individual’s submission to or rejection of such conduct. Further, employers are prohibited from subjecting a domestic worker to unwelcomed harassment based on gender, race, religion, and national origin.

(6) Disability Benefits. The Workers' Compensation Law has been amended to cover full-time and part-time domestic workers for purposes of disability benefits insurance.

(7) Union Organizing. Presently, the New York Labor Law bars domestic workers from organizing into labor unions. The new legislation provides that the Commissioner of Labor will report to the governor and state legislature on the feasibility of allowing domestic workers to organize for bargaining purposes.

### **What It Means for Employers**

New York employers – particularly families and households who employ domestic workers, as well as third-party agency employers – should be aware of these new amendments extending protections to domestic workers to ensure that they are providing covered domestic workers with the appropriate benefits and working conditions required under the Domestic Workers’ Bill of Rights. All relevant employer practices and policies must be updated to reflect these changes in the law. Although explicit civil remedies were excluded from the final version of this law, employers must be cognizant of the potential liabilities that can be imposed for violations of the New York State Human Rights Law, Workers' Compensation Law, and the New York Labor Law, which have all been amended to provide protection and guarantees to domestic workers. In particular, as the Labor Law has a six (6) year limitations period, the failure to keep payroll records and pay appropriate overtime could subject employers to substantial back wage payments including 25 percent liquidated damages under New York law, as well as potential criminal law penalties.

It is important for employers to remember that individuals providing “companionship services” who are employed by third parties (i.e., someone other than the family or household using their services) are excluded from the definition of a domestic worker under the Domestic Workers' Bill of Rights. Accordingly, the protections available to “domestic workers” (i.e., minimum wage requirements, overtime, an eight-hour workday, paid vacation and protections against sexual harassment) under the new law do not apply to such categories of workers, resulting in minimal impact to agencies in the business of providing such services. However, since the FLSA covers workers engaged in domestic service, there might be circumstances where there is federal law coverage.

Households and families who employ domestic workers and who are unfamiliar with New York's employment, payroll practice, and wage payment laws should make efforts to learn about them. Consideration should be given to providing domestic workers written notice of their pay date, regular rate of pay, overtime right of pay, and benefit entitlements. Similarly, employers have posting requirements regarding various labor and employment laws and "new hire" notice obligations under the New York Labor Law. Further, keeping accurate time records of hours worked and paid for a six (6) year period is of paramount importance. In addition, the new law makes it incumbent upon families and households to contact their insurance carriers regarding workers' compensation and disability benefits. Finally, all forms of harassment should be investigated immediately and prompt remedial action taken if the claims have any merit.

If you have questions about this client alert or seek assistance in preparing a handbook of basic personnel and employment policies for your covered domestic workers, please do not hesitate to contact your Proskauer relationship attorney or any of the members of Proskauer's Employment Law Counseling & Training Practice Group.

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*Special thanks to Law Clerk, Latoya Moore, who assisted in preparing this alert.*

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