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Domestic Workers: What are Their Rights?

By Jennifer Eber

There are at least two million domestic workers in the United States. Domestic workers are generally those who work within the employer's household. Due to the increased demand for home care for persons of all ages, from the young to the old, the number of domestic workers is predicted to increase in the coming years.

Domestic workers have been organizing and focusing on building the rights and protections in the employment laws related to this growing sector of workers. The National Domestic Workers Alliance, a network of activist groups across the country, was formed in 2007 and is seeking to pass laws at both the state and federal level to afford domestic workers the protections already afforded to many other employment sectors.

The federal and New Hampshire laws addressing the rights and protections of domestic workers are difficult to navigate and offer differing definitions of a "domestic worker." In addition, a recent New York Times article ("Out of the Shadows" by Lauren Hilgers, February 21, 2019) stated that only around 5 percent of domestic workers in the United States are "paid on the books." Additional layers of complexity are that many domestic workers are unfamiliar with their rights and English may not be their native language.

With regard to federal law, one of the most important protections to workers is the Fair Labor Standards Act (FLSA), passed in 1938, that provides minimum wage and overtime protections. It was not until 1974 that Congress extended the FLSA to cover "domestic service" workers who were generally defined to be employees performing household services in a private home. The FLSA provides these domestic service workers with the protections of both overtime pay and minimum wage. "Domestic service employment" means services of a "household nature" performed in or about a private home. 29 CFR 552.3. It includes an illustrative list of "companions, babysitters, cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, personal care aides, and chauffeurs of automobiles for family use." *Id.*

Thus, the FLSA provides a broad definition of workers with wage protection. The FLSA, however, excludes from coverage of minimum wage protections those employees providing casual babysitting services and domestic service workers employed to provide "companionship services" to elderly, ill, injured, or disabled persons. 29 CFR 552.4, 552.5 and 552.6. In addition, live-in domestic service workers may be exempt from overtime pay requirements if they reside in the employer's premises "permanently" or for "extended periods of time."

On January 1, 2015, new FLSA regulations went into effect that allow many direct care workers, such as nursing assistants, home health aides, personal care aides, and other caregivers to receive minimum wage and overtime protections. More information can be found on www.dol.gov/whd/homecare.

Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating against workers on the basis of protected classes, including race and gender, often does not apply to domestic workers. While there is no direct exclusion for domestic workers under Title VII, most domestic workers are employed by private employers with less than 15 workers. Title VII protections apply only to employers with 15 or more employees. It is estimated that more than 12 million United States workers, or about 10 percent of the workforce, worked for employers with fewer than 10 employees in 2017 and a vast majority of these workers are housekeepers, nannies, home health care aides, and other domestic service workers.

In New Hampshire, under RSA 279, employees engaged in household labor and domestic labor are exempt from the minimum wage law requirements. RSA 279:21, I. Under N.H. Department of Labor regulations, domestic labor is defined either as

(1) work performed in a private residence of the employer where employees are not employed by an employer or agency other than the family using services, “which includes but is not limited to, caregivers or companions for babies, children or persons who are not physically or mentally infirm or the aged, as well as housekeeping, gardening, and handy person work; or

(2) live in companionship services, which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity cannot care for his or her own needs” regardless of the employer/agency’s relation to the person using the services subject to the following limitations: (a) the services include household work (not to exceed 20 percent of total weekly hours worked), and (b) the services do not involve care that is normally performed by specially trained personnel, such as licensed nurses. NH Lab. 802.04. Household labor is not defined in the regulations.

Under RSA 354-A, the state law which prohibits discrimination in the workplace, an employee is defined not to include “any individual in the domestic service of any person.” RSA 354-A:2, VI. Domestic service is not defined under RSA 354-A or the regulations. There appears to be no case law from the New Hampshire Supreme Court to date on who meets the definition of “domestic service” and thus would be excluded from discrimination protection. In addition, RSA 354-A does not cover employers with fewer than six persons in their employ. Many domestic service workers may not have an employer who meets this minimum worker requirement. Domestic workers still have common law actions, including wrongful termination suits, if they can meet the common law requirements.

Under the workers’ compensation law, RSA 281-A:6 states that workers’ compensation coverage for “domestic workers” is provided by a comprehensive personal liability, tenant’s or homeowner’s policy in the absence of a workers’ compensation policy. A domestic employee or worker is defined generally as those persons performing domestic services in a private residence where the employer is an individual, family, local college club or local chapter of a college fraternity or sorority. RSA 281-A:2, V-a.

“Domestic labor” or “domestic services” means the performance of such duties as housekeeping, childcare, and serving as a companion or caregiver for “children and others who are not physically or mentally infirm.” RSA 281-A:2, V-b.

There have been unsuccessful attempts to pass legislation in New Hampshire to require all homeowner’s policies to cover all types of work by domestic workers. The New Hampshire Insurance Department in 2016 approved a new NCCI (National Council on Compensation Insurance) class code for use in certain classes of in-home physical assistance care thereby reducing the cost to disabled people who need to hire a caregiver and purchase workers’ compensation coverage. Thus, domestic workers should be afforded workers’ compensation coverage either through a tenant or homeowners’ policy or through separate coverage purchased by their employer.

The number of employment issues arising from domestic service employment will likely increase in the coming years. Lawyers should be aware of the rights and protections that both federal and state law afford these workers in order to counsel them and the families that employ them.

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