

# Domestic Workers Bill of Rights

## *Its Effect on the Household Help Industry*

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### Groundbreaking legislation

On Nov. 29, 2010, New York State became the first state in the nation to extend workers' rights and protections to people working in the household help industry. Household help or domestic workers are people working in other people's homes to care for the: home/property; child/ren; or, sick, convalescing or elderly person/s. The New York State Domestic Workers Bill of Rights mandated that domestic workers be:

- paid time and a half over their basic hourly rate when they work more than 40 hours per week. (Live-in household help are entitled to overtime pay when they work more than 44 hours per week.);
- provided one day (24 hours) off for every seven days worked, or overtime pay if the workers agree to work on their day of rest;
- paid at least three rest days each year after working for one year for the same employer; and,
- protected under the New York State Human Rights Law for domestic workers who experience harassment due to sex, race, religion, nation origin, or retaliation for complaining of such harassment.

New York's law also mandates:

- an eight hour work day and a minimum wage of at least \$8.75 per hour (with a credit toward the minimum wage if the employer provides meals and/or lodging to the employee);
- domestic workers to be paid weekly;
- employers provide written notice about sick leave, vacation, personal leave, holidays and work hours;
- employers keep detailed payroll and time records of the hours the employee worked, wages paid and any deductions made from wages;
- employers pay taxes for unemployment insurance if the household employee is paid \$500 or more in cash wages; and,
- employers obtain workers compensation insurance (to cover work-related injury or sickness) for an employee working at least 40 hours per week, as well as disability benefits (for when an employee cannot work

### Why Hire Household Help?

It is not easy to define household employers or employees, because the terms are used in so many different ways. According to the U.S. Internal Revenue Service, a household employer is any person who employs nannies, eldercare providers, housekeepers, maids, gardeners and others who work in and around his or her private residence. For instance, a nanny is a household employee stationed within the employer's home to care for the employer's child/children.

Popular household positions in the United States include: after-school nanny; nanny; baby nurse; doula; mother's helper; household manager; cook; housekeeper; maid; driver; maintenance worker; eldercare provider; gardener; and, personal assistant.

More and more U.S. households hire employees to help the heads of households achieve a manageable life/work balance. In mid-2012, CNBC reported that an estimated 1.5 million people worked in "private household service" in America in 2008—which, according to the U.S. Census Bureau, doubled from the previous decade. At present, home care providers—one of the fastest growing professional areas in the United States—alone account for more than 1.7 million household workers now caring for seniors and people with disabilities, according to the National Domestic Workers Alliance.

because he or she is injured or sick [including pregnancy] from an event occurring outside of their work).

Three other states followed New York's lead and now have similar Domestic Workers Bill of Rights laws, including:

- Hawaii, signed into law April 30, 2013, effective July 2013;
- California, signed into law on Sept. 25, 2013, effective Jan. 1, 2014; and,
- Massachusetts, signed into law on July 2, 2014, effective April 1, 2015.

Other states, including Illinois, Ohio, Oregon and Texas, are at work on legislative initiatives offering domestic workers comparable protections.

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According to David S. Rich, an employment lawyer based in New York City and practicing throughout the states of New York and New Jersey, the New York Domestic Workers Bill of Rights (DWBOR) made a number of significant changes to state law. "The Domestic Workers Bill of Rights affords protection to household help

that other workers in New York State have, such as disability benefits coverage. Further, in a few respects, the DWBOR gives to domestic workers rights that not all employees in New York State enjoy, such as paid vacation." (The DWBOR mandates three vacation days after one year of employment with the same employer.)

"History shows that employers...often don't go beyond their mandated obligations," said Rich. "The New York State Department of Labor is going after the household employer who doesn't consider himself or herself to be subject to employment laws. Many people who retain domestic workers do not consider themselves to be employers."

Households which retain domestic workers must recognize that they (the households) are employers, said Rich, and must gain familiarity with applicable laws so that they can be fully compliant. The University of California at Los Angeles' Institute for Research on Labor and Employment echoed Rich's assessment, stating, "Individuals hiring domestic workers often do not think of themselves as employers. Thus, they may not think about their own responsibility to provide the people working in their home with a living wage and benefits. A domestic workers bill of rights can help set standards for employers to follow."

"The DWBOR modified state law to provide domestic workers with the protections other employees in New York State have," Rich noted. "Household employers are not exempt from labor laws merely because they employ only a single worker in the home...Household employers cannot stick their heads in the sand and pretend not to know what happens around them. The NYSDOL won't accept that defense."

Rich stated that it is for New York State's Legislature, not him, to say what, if anything, more needs to be done to protect household employers and employees. On a related note, Rich cited the U.S. District Court for the Southern District of New York's 2012 decision, *Gurung vs. Malhotra*, 851 F. Supp. 2d 583 (S.D.N.Y. 2012), as a hot topic affecting the household help industry.

The *Gurung* decision made international headlines. The *Gurung* court awarded, to a 22-year-old domestic worker, damages of \$1,458,335 against the maid's former employers — an Indian diplomat and her husband. The diplomat and her husband, Neena and Jogesh Malhotra (“the Malhotras”), had brought the plaintiff, Shanti Gurung, from her native India to New York City and: forced Gurung work for them as a maid 16 hours per day, seven days per week, for three years; and, refused to pay Gurung any wages, let alone any overtime pay. The Malhotras had induced Gurung to work without pay by confiscating her passport and visa, limiting her ability to leave their apartment, and repetitiously warning her that if she traveled on her own without their authorization, she would be arrested, beaten, raped, and returned to India as “cargo.”

The Southern District of New York's award to Gurung (and against the Malhotras) of nearly \$1.5 million included more than \$600,000, under the federal Fair Labor Standards Act and New York law, representing unpaid wages, unpaid overtime pay, liquidated damages and attorneys' fees; punitive damages of \$300,000; and \$500,000 for emotional distress under several federal statutes banning human trafficking and forced servitude. Rich stated that, within the Southern District of New York, any employer who coerces workers, by threat of serious harm, to work overtime hours without being paid time-and-a-half may be liable, under federal law, for substantial damages for emotional distress.

“You cannot assume because you moved your domestic worker with you from another country to the United States that you are exempt from federal, state and local laws governing employment,” Rich observed. “Any such assumption is foolhardy.”

## Pay

Successful household employers use detailed work agreements and employee handbooks specifying job description, hours, pay and overtime, etc., to help make a positive and productive workplace. Yet, employers—from household employers to large corporations—regularly fail to pay overtime or require employees to work considerably more than the hours they are paid for. Termed “wage theft”, this practice amounts to an estimated \$105 billion per year in stolen wages, according to the national report *Home Economics: The Invisible & Unregulated World of a Domestic Worker*, self-described as the first national survey of domestic workers in the United States to provide an empirically based and representative picture of domestic employment in 21<sup>st</sup> Century America. This report, issued by the National Domestic Workers Alliance, the Center for Urban Economic Development at the University of Illinois at Chicago and DataCenter, surveyed 2,086 domestic workers in 14 American cities between June 2011 and February 2012. The cities—Atlanta, Boston, Chicago, Denver, Houston, Los Angeles, Miami, New York, San Antonio, San Diego, San Francisco, San Jose, Seattle and Washington, D.C.—represent every region of the country, and, collectively, they total 243,370 nannies, caregivers and housecleaners. According to the report, widespread wage theft is because “hourly wages for workers have stagnated for decades, and actually have declined since the economic downturn that began in 2008.”

## Who are Household Employers?

There are four basic types of U.S. household employers. The:

1. wealthy;
2. comfortable dual-income family with parents who both want to maintain and grow their careers;
3. dual-income family just getting by with parents who both need to work—even when one parent would prefer to stay home to care for the child/children; and,
4. single parent dependent on one income.

Source: *How to Hire A Nanny: A Household HR™ Handbook*

According to the report, the median hourly wage for the domestic workers surveyed is \$10/hour; nearly a quarter (23 percent) of survey respondents are paid less than their state's minimum wage and a little more than half (56 percent) worked more than 40 hours per week for their primary employer. In addition, the report found that many domestic workers are paid a flat rate that does not fluctuate based on the actual numbers of hours worked.

## Wages and work conditions

The report lists widespread substandard working conditions in the domestic work industry: low wage rates and often hazardous work conditions persist—and domestic workers, largely isolated in the workplace, seldom have a way to report, let alone improve, substandard conditions.

- Low pay: 60 percent of workers surveyed reported spending more than half their income on rent or mortgage payments; 20 percent stated that during the previous month there were times when there was no food in their homes because they could not afford to buy any; 23 percent are paid below their state's minimum wage; 70 percent are paid less than \$13 an hour; 67 percent of live-in workers are paid below their state's minimum at a median hourly wage of \$6.15/hour.
- Domestic workers rarely receive employment benefits: less than 2 percent receive retirement or pension benefits from their primary employer; less than 9 percent work for employers who pay into Social Security; 65 percent do not have health insurance, and only 4 percent receive employer-provided insurance.
- Substandard work conditions: 35 percent reported that they worked long hours without breaks in the prior 12 months; 25 percent of live-in workers reported that the week prior to the survey they had responsibilities that prevented them from getting at least five hours of uninterrupted sleep at night; 30 percent of workers who have a written contract or other agreement report that their employers disregarded at least one of the provisions in the prior 12 months. Among workers fired from a domestic work job, 23 percent said they are fired for complaining about working conditions and 18 percent said they are fired for protesting violations of their contract or agreement.
- Hazardous workplace, during the past 12 months: 38 percent suffered from work-related wrist, shoulder, elbow or hip pain; 31 percent suffered from other soreness and pain; 29 percent of housecleaners suffered from skin irritation and 20 percent had trouble breathing; 36 percent of nannies contracted an illness while at work; and, 29 percent of caregivers suffered a back injury.

According to the report, employers can be a significant part of the solution by educating themselves about workers' rights and holding themselves responsible to fair labor standards. "Employers should be prepared

## Excluded from Worker Protections

- The National Labor Relations Act explicitly bars domestic workers from forming unions or bargaining collectively.
- Live-in domestic workers, reported to often be subject to unreasonable and uncompensated demands on their time, are excluded from the Fair Labor Standards Act's overtime provisions.
- Domestic workers routinely work with toxic products, yet are excluded from Occupational Safety and Health Act protections.
- Federal anti-discrimination law, including the Civil Rights Act, Americans with Disabilities Act and Age Discrimination in Employment Act, generally cover employers with multiple employees, excluding the vast majority of domestic workers—as do many federal, state and local employment law and regulations.

Source: *Home Economics: The Invisible & Unregulated World of a Domestic Worker*

to provide domestic workers with a contractual agreement, fair wages including overtime pay and regular pay raises, access to affordable medical care, secure retirement income, paid leave, and a safe and healthy work environment,” stated the report. “Practicing respectful communications and keeping accurate records of hours worked can go a long way toward improving the quality of the employment relationship.” Domestic work, though conducted in private homes, contributes substantially to the public good, stated the report. Household labor is a lynchpin connecting the economics of the home and the workplace.

## Considerations Affecting Domestic Workers and their Employers

- New York State led the nation with its landmark Domestic Workers Bill of Rights law focusing on payroll standards and worker protection. Hawaii, California and Massachusetts followed with similar laws, and many other states are considering comparable laws. Additionally, it raised awareness about the household help industry and compliance (or the need for compliance) with tax and labor law and regulations.
- President Obama’s Affordable Care Act exempts employers with less than 50 full-time employees from providing health insurance to their employees. Yet, despite this exclusion, the Affordable Care Act does affect household employers and their employees. Under the Affordable Care Act, all Americans are required to have health insurance or pay a fine. Most household employees will have likely signed up through an exchange to individually purchase their own health insurance—and likely qualified for a subsidy based on their income level. To obtain the subsidy, the household worker must present documented wages, thereby forcing the household employer to maintain precise records, as well as forcing employer and employees to follow legitimate payroll and tax practice. (No paying “under the table” or “off the books”.)
- On Jan. 1, 2015, third party caregivers, such as home care agencies, will no longer be able to classify home care workers as “companions” as a way to avoid paying minimum wage and overtime. This applies only to third parties; the companion care exemption remains for families that directly employ home caregivers. Home care is already one of the fastest growing professions in

America; driven by significant cost savings, direct hired home care will increase.

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“Most people who hire domestic workers are honest citizens who want to do right by their employees but simply do not have the time or expertise in labor and tax law to fully understand their obligations,” said New York State Sen. Liz Krueger, who cosponsored the

state’s DWBOR legislation and whose office produced the *Guide to Employing a Nanny and Other Full-Time Domestic Workers*, first published in May 2011. (The guide may be accessed via Krueger’s web site at <http://www.lizkrueger.com/wp-content/uploads/Sen-Kruegers-Nanny-Guide.pdf>.)

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