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Just When You Thought it was Safe . . . Nannygate II: The Sequel

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Nannygate II: Wage and Hour Laws and Domestic Workers

by Martin J. Katz and Christopher M. Leh

The "Nannygate" scandal that erupted in the wake of Zoe Baird's failed attorney general nomination and Judge Stephen Breyer's aborted Supreme Court nomination has subsided. Most employers of domestic workers now realize they must comply with certain tax and immigration requirements. However, what they may not realize is that they might be violating the law concerning the most fundamental aspect of the employment relationship: how much they pay their domestic employees.

Most people understand that nondomestic employees are subject to minimum wage, overtime and recordkeeping requirements of the federal Fair Labor Standards Act ("FLSA").(fn1) What is not so obvious is that the FLSA also applies---with some twists---to domestic employees. Further, the consequences of deviating from these laws can be severe.(fn2) Unfortunately, those employers who try to do right by complying with tax and immigration reporting requirements may be unwittingly reporting their own wage violations to enforcement authorities. Consequently, it is essential to understand how wage and hour laws apply to domestic employees and to follow a few tips to ensure compliance with federal law.

Wages and Hours

Domestic workers, like most other employees, must be paid at least minimum wage. Currently, the

federal minimum wage is $4.25 per hour.(fn3) Although states may prescribe a higher minimum wage, Colorado does not do so. The applicability of additional wage and hour requirements depends on whether the domestic employee lives in the employer's home.

Live-Out Domestic Employees

A domestic worker who does not live in the employer's home must be paid overtime wages if the worker works more than forty hours per week.(fn4) For each hour per week over forty that the employee works, the employee must be compensated at 1.5 times his or her "regular rate."(fn5) The regular rate is an hourly rate that is calculated by dividing compensation by the weekly hours worked.(fn6)

Thus, where a live-out domestic employee is concerned, the employer must pay the employee an amount at least equal to the minimum wage, as well as overtime, just as with any other employee subject to the FLSA.

Live-In Domestic Employees

The FLSA specifically exempts live-in domestic employees from federal overtime requirements.(fn7) Again, although states may impose overtime requirements on employers of live-in domestic workers,(fn8) Colorado has not done so.

Live-in domestic employees are subject to minimum wage requirements. However, in the live-in context, the minimum wage calculation becomes more complicated. As discussed above, the actual hourly wage paid, which must equal or exceed the minimum wage, is the value of the employee's compensation divided by the hours worked. The problem is that in the context of a live-in worker, it may be difficult to calculate the hours worked and the value of compensation.

Hours Worked. Although a live-in employee lives at the workplace, the employee is not considered to be working all of the time that he or she is on the premises.(fn9) However, to determine how much time the employee spends working may be difficult. Regulations usually applicable to such situations mandate that an employer pay wages to an employee working "on call" if the on-call requirements are so restrictive that they interfere with an employee's personal pursuits.(fn10) Under this test, there is often significant uncertainty about whether an employee must be compensated for time spent on call even where the employee lives out. This uncertainty only increases in the case of a live-in employee.

Fortunately, federal regulations recognize the difficulty of applying traditional on-call rules to live-in employees and provide a mechanism for avoiding it. The employer and employee can enter into an agreement to determine how much time the employee will be considered to have worked.(fn11)

As long as the agreement reasonably reflects the actual

number of hours worked by the employee, the agreed-on number of hours can be used for wage calculations, and precise records need not be kept.(fn12) The regulations require that
[t]he employer shall keep a copy of the agreement and indicate that the employee's work time generally coincides with the agreement. If it is found by the parties that there is a significant deviation from the initial agreement, a separate record should be kept for that period or a new agreement should be reached that reflects the actual facts.(fn13)
Thus, to ensure compliance with the FLSA, the employer should consider entering into a written agreement with the live-in domestic employee, specifying the compensation arrangement based on a reasonable approximation of the number of hours the employee works. The employer should further re-evaluate the approximation to ensure the agreement does not significantly deviate from the hours worked.

Value of Compensation. The second part of the wage computation involves the value of compensation. Live-in domestic workers often receive room, board or other nonmonetary benefits in addition to their monetary wages. Many such non-monetary benefits may be counted as compensation for purposes of determining compliance with federal wage laws.(fn14) However, the value that should be assigned to such nonmonetary benefits is often unclear.

To satisfy the FLSA minimum wage requirements, employers may count the "reasonable cost" of providing certain nonmonetary benefits as wages.(fn15) Regulations define reasonable cost as "the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5 $1/2 percent) for interest on the depreciated amount of capital invested by the employer."(fn16) This amount should be calculated using "good accounting practices."(fn17)

However, if the "total so computed is more than the fair rental value (of the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost."(fn18) Moreover, reasonable cost may not exceed actual cost.(fn19) Thus, an employer cannot make a profit by providing nonmonetary benefits to an employee. Finally, employers who count board, lodging or other facilities to employees as wages must keep records substantiating the costs of providing these benefits.(fn20)

Therefore, to ensure compliance with compensation regulations, an employer should consider contacting an accountant to assist in determining the value of non-monetary benefits provided as wages. Further, the employer should document the costs of all benefits provided.

"Employers who comply with tax and immigration reporting requirements may be unwittingly reporting their own wage violations to enforcement authorities." Recordkeeping

The FLSA requires employers of domestic workers to keep records.(fn21) Although the law prescribes no particular form for them,(fn22) the employer should keep records of:
1) name, home address, date of birth (if under nineteen), sex and occupation;(fn23) 2) time of day and time of week on which the workweek begins, regular hourly rate of pay and basis of pay;(fn24) 3) hours worked each workday and workweek;(fn25) 4) total daily or weekly straight-time (nonovertime) earnings, total overtime, total additions or deductions from wages paid and total wages paid each pay period;(fn26) 5) date of payment and pay period covered by payment;(fn27) and 6) costs of providing board, lodging or other nonmonetary benefits, if part of wages.(fn28) In most cases, an employer must keep these FLSA records safe and accessible at the place of employment for at least three years.(fn29) Some records, such as time and earning cards, need be kept for only two years.(fn30)
For employers of live-in domestic workers, the FLSA may relieve some recordkeeping obligations. A reasonable agreement between the worker and the employer that accurately reflects the hours worked obviates the requirement of recording the worker's hours.(fn31) Of course, this does not relieve the employer from the other recordkeeping requirements listed above.

The FLSA prohibits violations of its recordkeeping requirements. Failure to comply with the FLSA's recordkeeping requirements subjects an employer to the same sanctions to which violators of other FLSA violations are subject.(fn32) In addition, the Department of Labor may subpoena the records of a domestic worker's employer regardless of whether a case is pending.(fn33)

Therefore, to ensure compliance with recordkeeping requirements, the employer should maintain the records specified by the FLSA and its regulations and keep them in an accessible place, preferably at home, for at least three years. If the domestic worker lives in, the employer should consider entering into an agreement with him or her concerning the hours worked, to cut down on recordkeeping.

Conclusion

Avoiding Nannygate II is not difficult for employers of domestic workers. The key to doing so is to address the requirements of the wage and hour laws, as well as those of the more obvious and well-publicized immigration and tax laws.
NOTES

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Footnotes:

1. 29 U.S.C. Â§ 201 *et seq.* (1988 and Supps. I-IV, 1989-93).

2. A variety of sanctions may be imposed for FLSA violations. The employee or the U.S. Department of Labor may bring a civil action against the employer to collect up to double the amount of unpaid wages, as well as attorney fees and costs, or to enjoin further FLSA violations. 29 U.S.C. Â§Â§ 216(b) and (c), 217. The Department of Labor may impose a civil penalty of $1,000 per violation on the employer. 29 U.S.C. Â§ 216(e). Finally, criminal fines of up to $10,000 may be imposed on willful offenders, and repeat offenders may be imprisoned for up to six months. 29 U.S.C. Â§ 216(a).

3. 29 U.S.C. Â§ 206(a).

4. 29 U.S.C. Â§ 207(a).

5. *Id.*

6. The regular rate is defined at 29 U.S.C. Â§ 207(e) and 29 C.F.R. Â§ 778.108. Compensation, for purposes of calculating the regular rate, includes most forms of remuneration. Many types of bonuses, for example, must be included in the regular rate calculation. 29 C.F.R. Â§ 778.208 (1993). However, gifts and reimbursements of expenses generally need not be included. 29 U.S.C. Â§ 207(e).

7. 29 U.S.C. Â§ 213(b)(21).

8. *See, e.g., Lagrimas v. Gossel,* No. HAR 92-2262 (D.Md. Jan. 25, 1993) (Maryland can and does impose overtime requirements for employers of live-in domestic workers, notwithstanding exemption of such workers from federal wage laws).

9. 29 C.F.R. Â§ 785.23.

10. *Armitage v. City of Emporia,* 982 F.2d 430, 433 (10th Cir. 1992) (*citation omitted*); 29 C.F.R. Â§ 553.221(d). Whether the requirements are so restrictive that they interfere with an employee's personal pursuits depends on a number of factors, including any restrictions the employer imposes on the kinds of activities in which the employee may engage (such as how far the employee may travel from the workplace, the expected response time to a call to duty, or restrictions on consumption of alcohol). *See Gilligan v. City of Emporia,* 986 F.2d 410 (10th Cir. 1993); *Armitage,* 982 F.2d 430; *Renfro v. City of Emporia,* 948 F.2d 1529 (10th Cir. 1991).

11. 29 C.F.R. Â§Â§ 785.23, 552.102.

12. *Id.*

13. 29 C.F.R. Â§ 552.102(b).

14. 29 U.S.C. Â§ 203(m).

15. Benefits provided for the employer's benefit, such as tools or uniforms required for the job and the cost of construction for the employer, cannot be counted toward wages. 29 C.F.R. Â§ 531.3(d).

16. 29 C.F.R. Â§ 531.3(c).

17. *Id.*

18. *Id.* Some states specify the maximum value of nonmonetary benefits that can be counted as wages under their wage laws.

19. 29 C.F.R. Â§ 531.3(a).

20. 29 C.F.R. Â§ 516.27. *See infra,* note 28 and accompanying text.

21. 29 U.S.C. Â§ 211(c); 29 C.F.R. Â§ 516. Employers also must post in the workplace a notice from the U.S. Department of Labor explaining the FLSA. 29 C.F.R. Â§ 516.4.

22. 29 C.F.R. Â§ 516.1(a).

23. 29 C.F.R. Â§ 516.2(a)(1) to (4).

24. 29 C.F.R. Â§ 516.2(a)(5) to (6).

25. 29 C.F.R. Â§ 516.2(a)(7). Where the domestic worker works a fixed schedule, the employer may fulfill this requirement by maintaining records showing the schedule of daily and weekly hours normally worked. Where the domestic worker adheres to the schedule, the employer should indicate by check mark or statement that such hours were worked. In weeks when the domestic worker worked more or fewer hours, the employer should indicate the exact number of hours worked. *Id.*

26. 29 C.F.R. Â§ 516.2(a)(9) to (11).

27. 29 C.F.R. Â§ 515.2(a)(12).

28. 29 C.F.R. Â§ 516.27. *See supra,* note 20 and accompanying text.

29. 29 C.F.R. Â§Â§ 516.5, 516.7(a).

30. 29 U.S.C. Â§ 516.6.

31. *Supra,* notes 11 to 13 and accompanying text.

32. *See* 29 U.S.C. Â§Â§ 216(c) and 217; *supra,* note 2.

33. *See* 29 U.S.C. Â§ 209.

Column Ed.: John M. Husband of Holland & Hart, Denver---(303) 295-8228 *This review is prepared by the Labor Law Section of the Colorado Bar Association to present current issues and topics of interest to members of the bar as both legal practitioners and employers. This month's column was written by Martin J. Katz and Christopher M. Leh, Denver, of Davis, Graham & Stubbs, (303) 892-9400.*

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