

## **Legal Requirements for Employing a Domestic Worker**

By Maureen E. Carr, Esq.

Many American households employ domestic workers such as housekeepers, nannies, and gardeners. This article addresses the legal requirements governing such relationships, including compensation, tax, and recordkeeping obligations.

### **Compensation Requirements**

The Fair Labor Standards Act (“FLSA”) is a federal law that imposes minimum wage, overtime pay, equal pay, recordkeeping, and child labor standards. Domestic workers such as nannies, housekeepers, companions, babysitters, cooks, waiters, maids, nurses, janitors, caretakers, handymen, gardeners, home health aides, personal care aides, and family chauffeurs are generally covered by the minimum wage and overtime requirements of the FLSA, with limited exceptions. Therefore, *most* domestic workers must be paid at least the minimum wage (the current federal minimum wage is \$7.25, but states may set higher minimum wages) and be paid one-and-a-half times their regular rate of pay for all hours worked over 40 in a work week.

The FLSA exempts certain *limited* categories of domestic workers: (1) “casual babysitters” and “companions” for the elderly and infirm are exempt from the minimum wage *and* overtime requirements, and (2) “live-in” domestic workers are exempt from the overtime requirements. The first exemption is available to (a) a casual babysitter who provides irregular or intermittent babysitting (typically less than 20 hours per week) and whose vocation is not babysitting, and (b) a worker who provides companionship services (in the form of “fellowship” or “protection” services, as opposed to medically-related or primarily household services) to an elderly person or a person with an illness, injury or disability who requires assistance caring for himself. The second exemption applies to live-in domestic workers who reside at the employer’s premises either (a) permanently (seven days per week), or (b) for an extended period of time (five days per week, 120 hours or more). Live-in domestic workers must be paid at least the minimum wage for all hours worked, but not overtime.

A domestic worker must generally be paid for all hours when the worker is “on duty,” even for periods of inactivity when the employee is required to be available (i.e. a nanny who must watch over a sleeping child). However, a domestic worker who has been completely relieved from duty and is able to use the time for his own purposes need not be paid for that time.

### **Tax Obligations**

An employer who pays a domestic employee \$1,000 or more in a *quarter* must pay federal unemployment tax and *may* owe state unemployment tax. An employer who pays a domestic employee \$1,900 or more in a *calendar year* must withhold and pay social security and Medicare taxes. Domestic employers are not required to withhold federal or state income tax from wages paid to domestic workers, but may do so at the workers’ request.

## Recordkeeping Requirements

The FLSA requires employers of domestic workers to maintain records for each worker who is entitled to minimum wage and/or overtime (all workers other than casual babysitters and companions) for at least *three* years. Such records should include records of hours worked (i.e. timesheets), payroll records, and any written agreement between the employer and employee.

For tax and social security purposes, a domestic employer should maintain records of the following for each worker: cash and noncash wages paid, social security and Medicare wages, social security and Medicare withholdings, and federal and state tax withholdings. Employment tax records should be maintained for at least *four* years after the due date of the return reporting the taxes or the date the taxes were paid, whichever is later.

In addition, domestic employers should obtain federal and state employer identification numbers, verify each worker's eligibility to work in the United States, and report new hires to the state employment office.

It is advisable to consult with an attorney, an accountant, and/or a domestic employment consultant to ensure compliance with federal and state employment and tax laws.

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