

Take Compliance Seriously When Hiring Domestic Employees in New York

The Bottom Line

- *The potential penalties and damages for failing to comply with the many legal requirements for hiring domestic staff serve as a reminder that, while employers may develop a great relationship with a domestic employee, things can always go sour later.*
- *When they do, the downside can be significant, easily reaching into the six figures for an employee who has been working for an employer for years.*
- *Employers of domestic employees must know and follow all of the applicable employment laws, and they would be well-served to work with payroll, accountant and legal professionals to minimize the risk of expensive legal claims.*

So you've hired a nanny for your new child. The nanny passed the background check, references are solid and interactions with your child are splendid. Your job here is done, right? You can just pay the nanny the agreed-upon amount weekly in cash, keep the situation fairly informal and feel confident that you have done your job as a responsible parent? Unfortunately, while you have secured excellent care for your child in the short-term, you may be opening yourself up to significant legal liability down the road if you're not careful.

Few people hiring a domestic employee — a nanny, housekeeper, driver, etc. — think of themselves as becoming an “employer.” These relationships often lack the formality of employment relationships familiar to most professionals, making it easy to overlook the myriad of legal ramifications stemming from hiring domestic employees. Nonetheless, whether you know it or not, hiring a domestic employee can present a host of compliance requirements that would be daunting to many companies' HR departments, not to mention your family. Therefore, it is important to seek professional assistance when navigating this legal minefield. Below are some of the main issues to be aware of when hiring a domestic employee in New York.

Minimum Wage and Overtime

The most common mistake made by employers of domestic employees is paying a fixed weekly salary. Even if employers pay a domestic employee generously, the employers are likely not in compliance with federal and state law if they fail to account for the actual number of hours worked and fail to pay overtime when required.

Federal and New York law require that domestic employees receive “time-and-a-half” (i.e., 1.5 times their regular rate of pay) for all work beyond 40 hours per workweek (or beyond 44 hours per workweek if the employee lives in the employer's home). Many employers try to “bake in” overtime pay by, for example, paying a domestic employee \$1,000 a week and stating that \$750 is for the employee's first 40 hours, whereas \$250 is for their overtime hours. This is not legally compliant; it is highly unlikely that any domestic employee works the exact same amount of hours each week. Moreover, this would likely be interpreted as a \$1,000 salary, with overtime owed on top of the \$1,000 for hours worked over 40 in a workweek.

If there is a “cardinal rule” for employing domestic employees, it is that employers must keep a record of all hours worked each day. The pay rate must be at least as high as the applicable minimum wage — currently \$12 an hour in New York City (if less than 11 employees); \$11 an hour in Nassau, Suffolk and Westchester counties and \$10.40 in the rest of New York State. Remember, employers must pay 1.5 times the regular hourly rate for hours worked over 40 (or 44 for “live-in” employees) in a workweek.

Employers must also remember, particularly in the case of drivers and residential employees, that “on call” time must be recorded and paid. This means that any time an employee is required to be *available* to work (not necessarily the time actually worked), and cannot leave a specific premises or use the time for personal purposes, is compensable. Whenever the employer is generally controlling the employee’s time, the employee must be paid. In addition, all breaks of 20 minutes or less are compensable time.

There are other potential traps for employers to avoid. Domestic employees **must** be paid on a **weekly** basis. Moreover, employers cannot take deductions from employees’ pay without written permission, and even then only under certain limited circumstances. Domestic employees may also be entitled to “spread of hours” pay. Minimum wage employees who stop work more than 10 hours after the beginning of their shift must be paid an extra hour’s wage at the basic minimum wage. However, if the employee is paid more than minimum wage, the employer receives a credit against the spread of hours premium, which eliminates this employer payment obligation for many domestic employees.

Wage Notice and Statements

New York’s Wage Theft Prevention Act imposes several requirements on employers of domestic employees. Upon hire, domestic employees must be provided a “wage notice” containing certain information regarding the employee’s pay, including:

- their regular rate of pay;
- their overtime rate;
- any allowances the employer takes; and
- the employer’s identification information.

The notice should be provided upon hire (or as soon as possible for employees already working), signed and dated by the employee and a copy should be retained by the employer. The notice must also be provided in the employee’s primary language, if not English, and if a form in such language is available from the New York Department of Labor.

Employers must also provide domestic employees with, and maintain their own record of, weekly “wage statements” (or as they are more commonly called, pay stubs) with information including:

- the dates of work covered by the payment;
- the employee’s regular and overtime pay rates;
- the number of regular and overtime hours worked; any
- allowances or deductions; and
- the employee’s gross and net pay.

Tracking and recording hours and calculating how much an employee should be paid can be difficult, if not impossible, for most employers of domestic employees. It is, therefore, highly recommended that employers

work with an established payroll service or accountant to process paychecks, issue compliant pay stubs and help with record-keeping.

Taxes and Insurance

Employing domestic employees in New York requires mandatory registration with the state's Department of Taxation and Finance, and employers must withhold and pay the required taxes for all domestic employees. Employers are also required to file payroll tax returns with the state and Internal Revenue Service (IRS).

In addition, employers of domestic employees who work at least 40 hours a week in New York must provide workers' compensation and disability insurance for their employees. The workers' compensation rider on a homeowners' insurance policy may not cover full-time domestic employees, and it may only cover part-time or "as needed" employees (think plumber, for example). Failing to obtain a workers' compensation policy could leave an employer in hot water, including significant fines for not having this mandatory insurance. And, as of January 1, 2018, New York State's new Paid Family Leave (PFL) law requires coverage for domestic employees, meaning that employers must comply with the PFL's time off requirements and obtain PFL insurance coverage, which is typically included as a rider to a short-term disability policy.

An employer can choose to (but is not required to) offer health insurance to a domestic employee, and it is advisable to work with a reputable insurance broker and seek counsel on the complex health insurance plan rules before offering any such insurance.

Paid Time Off

Domestic employees are entitled to at least two paid sick days and three additional paid "rest" days after working for an employer for a year. If an employer provides a domestic employee with vacation or other paid time off, they must put it in writing and should explain what happens to accrued, unused time at the end of employment.

In addition to paid time off, domestic employees must be allowed one 24-hour rest day every seven days.

This means that if an employer wants a domestic employee to work the seventh day of the week, the employee has discretion to decide whether or not to work, and cannot lawfully be fired for refusing. If the employee does choose to work the seventh day, the entire day must be paid at their overtime pay rate, regardless of how many hours the employee has worked that week.

NYC Applicant Salary History Ban

New York City employers may not (i) inquire about the salary history of a job applicant, or (ii) rely on the salary history of a job applicant in determining salary, benefits or other compensation for the applicant. In other words, employers may not ask a potential hire how much they are currently being paid or what they were paid at any prior job. Employers may, however, ask a prospective employee how much they want to be paid. Employers also may tell a candidate how much they intend to pay, either as an exact amount or a range.

Liability

As previously mentioned, employers of domestic employees must take the above requirements seriously if they want to avoid substantial financial liability for noncompliance. Employers can be forced to pay back up to six years' worth of wages/overtime for minimum wage violations and unpaid overtime, in addition to

liquidated damages that double this amount. Furthermore, in addition to the cost of paying their own attorney, employers could be forced to pay the employee's attorneys' fees. The state also imposes penalties for failing to properly issue wage notices and statements of up to \$5,000. It is a criminal misdemeanor to employ an uninsured employee, and penalties for not providing workers' compensation insurance can reach \$2,000 for every 10 days in which a violation goes uncured. Failing to make deductions for federal, state and local income taxes and social security contributions can lead to additional penalties. And a violation of the salary history ban may result in a damages assessment, a fine and/or additional affirmative relief such as mandated training and posting requirements.

Related People

Gregg Brochin

Partner

212 468 4950

gbrochin@dglaw.com