

Employment Issues Related to Personal Attendants

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Not Legal Advice!

Seriously. Employment law is complicated and this presentation is meant simply to help with spotting issues, not resolving problems. See an employment law attorney.

Employee or Independent Contractor?

- Most important question.
- Multi-factor test
 - Behavior control (who controls the means and manner of the work to be performed?)
 - Financial control (regular payments or different fee for each project completed? Single source employee?)
 - Written contract? (but this won't save your bacon).
 - Does worker have his or her own company?
- With household workers paid directly by the person receiving the services, it will almost always be determined that he or she is an employee.

Joint Employer

- Joint Employer: “any person...who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages hours, or working conditions of any person.” IWC Wage Orders; *Martinez v. Combs*, 49 Cal. 4th 35 (2010).
- What does this mean?
- Even if a personal attendant is hired or brought in through an agency, you can still be held liable as a “joint employer” for unpaid wages and penalties.
- The Labor Commissioner and California law will not leave an employee holding the bag for unpaid wages.

Joint Employer

- If you use an agency to obtain household help, make sure you use a reputable agency that will pay its employees.
- Make sure your contract with the agency includes indemnification language that the agency will defend and indemnify you for any claims related to the failure of the agency to pay its employees.

Exempt vs. Non-Exempt Employee

- Now that you've determined your household worker is an employee, the next question is whether he or she is exempt or non-exempt from overtime and meal/rest break requirements.
- All employees are non-exempt unless they fit the narrow exceptions for exempt employees.
- Household employees will almost never qualify as exempt under the standard exemptions.
- But are there any industry-specific exemptions that apply?

Domestic Worker Bill of Rights

- Personal attendants who are also “domestic work employees” are not exempt and are entitled to overtime (Labor Code secs. .1450-1454)
 - “Personal attendant” is any person who is employed by a private householder or by any third-party employer recognized in the health care industry to work in a private household to “supervise, feed, or dress a child, or a person who by reason of advanced age, physical disability, or mental deficiency needs supervision.”
 - Must spend at least 80% of total weekly work in the household on such tasks
 - In-home personal care employees qualify as personal attendants.
 - “Domestic work employee” is an individual who performs domestic work and includes live-in domestic work employees and personal attendants.
- Therefore, the vast majority of in-home personal care employees are non-exempt.

Domestic Work Employees Exclusions

- Workers in specified family relationships with the employer (parent, grandparent, spouse, sibling, child, or legally adopted child of the employer).
- Casual babysitters for a minor child and babysitters under 18 years of age.
- Workers who perform services through the In-Home Supportive Services program.
- Workers employed by certain licensed health facilities as specified in H&S code 1250.
- Workers employed pursuant to voucher programs connected with regional centers or the state department of Developmental Services.
- Workers who provide child care and are exempt from licensing requirements found in the Health and Safety Code.

General Requirements for Personal Attendant Employees

- Must keep track of hours worked
- Must pay overtime when applicable
- Must provide required meal and rest breaks
- Must provide accurate itemized wage statements documenting hours worked for the pay period.
- Must pay for federal and state withholdings
 - If responsible for the hiring as a fiduciary, it is recommended to hire a payroll service (ADP, Paychex, etc.) to handle this for you.
- Must have workers compensation insurance
 - Many homeowner's policies will cover this for household workers, but you must notify your insurance provider.
- Must provide Paid Sick Leave
 - CA: 24 hours per year; Los Angeles: 48 hours per year.
- Must verify authorization to work in the United States.

Authorization to Work in the United States

- All employers must timely fill out form I-9 and gather the required proof of authority to work in the United States
 - There is an exception for “casual employees performing irregular domestic service in a private home,” but this exception would likely not apply to a regular personal attendant.
- The Department of Homeland Security, specifically U.S. Immigration and Customs Enforcement, is charged with ensuring employers are compliant with this law. An ICE agent may, at any time, serve an employer with a subpoena, called a “Notice of Inspection” (“NOI”) that requires the employer to provide ICE with the I-9’s for every employee within three days of being served the subpoena.

Penalties and Fines for Failing to Comply with Worker Authorization Requirements

- Failing to properly complete, retain, or make the forms available for inspection carries a fine ranging from \$216 to \$2,156 per violation.
- Knowingly hiring or continuing to employ workers who are not authorized carries civil penalties ranging from \$589 to \$21,563 per violation.
- Engaging in unfair immigration-related employment practices carries a penalty of \$445 to \$17,816 per violation.
- Engaging in a pattern or practice of knowingly hiring or continuing to employ unauthorized workers carries criminal penalties as high as \$3,000 per unauthorized worker and/or six months of imprisonment.

Retaining Worker Authorization Records

- An employer must retain Form I-9 records for as long as the individual works for the employer.
- Once the individual's employment terminates, the employer must retain the records for three years from the date of hire or one year from the date of termination, whichever is longer.
- According to ICE, workplace immigration busts have increased 10-fold over the past five years.

Special Overtime Rules for Non-Exempt Personal Attendants

- Must pay 1.5x the regularly hourly rate for all hours worked beyond nine in a day, or 45 in a week.
 - Up from the standard, eight in a day, or 40 in a week.
- No double-time owed.

Consequences of Wage and Hour Violations

- Why should I care?
- **SNOWBALL EFFECT**
- Minor violations, done consistently and over a long period of time add up
- Statutory penalties stack upon one another
- Prejudgment interest

Consequences of Wage and Hour Violations

- Pay unpaid wages
 - Usually a surprising amount of overtime will be claimed, and the burden is on the employer to disprove the claims because the employer has the obligation to keep accurate records.
 - Three-year statute of limitations that extends to four with B&P 17200 claim
- Pay a one-hour penalty for each day an employee does not receive a meal or rest period (LC 226.7)
- Pay up to \$4,000 penalty for failure to provide accurate itemized wage statements (LC 226)
- Pay up to 30 days' of daily wages for failure to pay all wages owed up on termination (LC 203)
- EDD Penalties
- IRS Penalties

Consequences of Wage and Hour Violations

- ATTORNEYS' FEES

- This is a one-way street. An employee who recovers unpaid wages is entitled to his or her reasonable attorneys' fees and costs. An employer who is successful defending against a wage claim does not get to recover attorneys' fees.
- Attorneys' fees is the tail wagging the dog.

- Personal liability

- An employer who does not pay wages is personally liable for those wages and penalties

- Fiduciary situations

- If one is a fiduciary who is responsible for obtaining home care for someone, take extra precautions to do everything by the book.
- Arguably, hiring a home care worker without complying with the law could open a fiduciary up to a negligence or breach of fiduciary duty claim.
- Probate courts may require proof that disbursements have been made to cover taxes and workers compensation insurance.

Betty White: A Teaching Moment

- In 2016, a woman who says she worked for Betty White for more than two decades sued the comedian for a handful of labor-code violations and unfair business practices.
- Anita Maynard says she worked for the 94-year-old actress for more than 22 years. She claims she worked in excess of 14 hours a day, six days a week and was not paid overtime. She also says she didn't get uninterrupted meal breaks, wasn't given timely accurate wage statements and wasn't paid all of her wages and vacation pay owed upon her employment ending.

Betty White: Liability Analysis

- *Assumes \$20/hr.
- Unpaid overtime [(\$30/hr. x 5 hrs./day) x 6 days/wk. x 52 wks./yr. x 4 years] = \$187,200
- Meal/rest break penalty [\$20 x 6 days/wk. x 52 weeks/yr. x 4 yrs.] = \$24,960
- Failure to pay all wages owed on termination [\$310/day x 30 days] = \$9,300
- Failure to provide itemized wage statements = \$4,000
- Without proper records or a way to disprove the amount claimed, an employer is in an indefensible position

Betty White: Liability Analysis

- Attorneys' Fees = \$200,000? (at least)
- IRS/EDD Penalties?
 - IRS: Employers may also be assessed a penalty of \$5,000 per misclassified worker plus 1.5% of the employee's federal income tax liability plus 20% of the amount that should have been withheld for the employee's social security taxes.
 - EDD: Various state penalties, one of which is imprisonment for up to one year.
- Prejudgment interest compounded at 7% per year

Betty White: Liability Analysis

- Total liability: \$425,460 plus tax penalties plus interest
 - \$225,460 in wages and statutory penalties + \$200,000 in attorneys' fees
- From a single employee making only \$20 per hour.

Takeaway Points

- Being an employer in California is *hard*
- Legal compliance is *hard*
- The consequences for violating the law are *severe*
- If you are in a fiduciary relationship, you should take extra care to make sure you comply with the law
- As more attention is being brought to wage and hour claims, probate courts are becoming much more active in making sure fiduciaries comply with their obligations as employers