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WINNING DIGNITY AND RESPECT:

A GUIDE TO THE DOMESTIC WORKERS' BILL OF RIGHTS

NATIONAL DOMESTIC WORKERS ALLIANCE

NELP
National Employment Law Project

Introduction

Domestic Workers' Bills of Rights seek to bring dignity and respect to a growing workforce that makes all other work possible in our economy. Every day, across the country, millions of domestic workers – largely women of color and immigrants – are entrusted with the very important and difficult work of caring for young children, elderly parents, people with disabilities, and homes. Despite their critical role in the economy, many domestic workers work in substandard conditions, logging in long hours in isolation, beyond the reach of personnel policies or wage and hour protections, and often without employment contracts.

Domestic Workers' Bills of Rights are state legislation that seeks to raise industry standards by ending exclusions of domestic workers from state minimum wage, overtime, and other workplace laws and by guaranteeing industry-specific labor rights. The National Domestic Workers Alliance (NDWA) and the National Employment Law Project (NELP) have prepared this guide as a resource to state advocates as they develop their Domestic Workers' Bill of Rights.

This guide sets out key policies state advocates can include in their Bill of Rights. These policies are divided into two broad categories: (1) inclusions into state labor and employment laws to the extent that domestic workers may be excluded from such protections in their state; and (2) establishing innovative domestic industry standards.

In designing their Bill of Rights, advocates will need to conduct a thorough assessment of their domestic worker community's needs and the legal, policy, and political landscape in their state and simply not replicate the New York Bill of Rights or another existing state's Bill of Rights, because every state has different exemptions and standards for domestic workers, as this guide discusses below. Domestic workers in New York finally won rights – significant as they are – after six years of campaigning that included negotiations and compromises on their initial demand. The New York Bill of Rights was their end and not a starting point.

Background

The lack of strong labor standards in the domestic work industry has been fueled by workers' exclusion from many federal[1] and state labor and employment laws, compounded by worker isolation and poor enforcement of the laws that do apply to domestic workers. The Fair Labor Standards Act (FLSA) sets a national floor for wages and other labor standards. Above this federal floor, states can provide greater protections through the state equivalent minimum wage and overtime laws. FLSA covers some, but not all, domestic workers under its minimum wage and overtime protections.[2] Other federal labor and employment laws explicitly or *de facto* exclude domestic workers, such as the Title VII of the Civil Rights Act of 1964, the National Labor Relations Act, and the Occupational and Health Safety Act. As far as state laws go, all domestic workers are excluded from minimum wage and overtime protections in about half of states across the country[3] and from nearly all state anti-discrimination and other civil rights laws and labor relations laws.

Therefore, the Domestic Workers' Bill of Rights holds the potential to fill significant gaps left by federal workplace laws and many state laws by ensuring protections under state laws while also offering the possibility for crafting new and innovative industry-specific solutions to ensure that workers are treated fairly and with dignity in the workplace.

The Pillars of the Domestic Workers' Bill of Rights

I. End the Exclusions of Domestic Workers in the State's Labor and Employment Laws

The Domestic Workers' Bill of Rights should aim to eliminate or narrow exemptions of domestic workers from the state's labor and employment laws, including minimum wage[4] and overtime laws,[5] workers' compensation,[6] unemployment insurance,[7] and anti-discrimination laws.[8] Even if advocates decide to limit the application of *new* rights created under the Bill of Rights to a subset of domestic workers (e.g., domestic workers working for private households) for political and other reasons, the Bill of Rights should aim to repeal exemptions of any group of domestic workers in the state laws, so that all domestic workers at least enjoy the existing protections (e.g., minimum wage, overtime) guaranteed to other workers in that state.

A. IDENTIFYING EXISTING EXCLUSIONS IN THE STATE LAW

Every state is different. A given state's minimum wage, overtime, or other workplace laws may exempt all domestic workers, or a subset of them (or contain no exemptions for domestic workers) Exemptions vary from state to state and not at all apparent at first glance. Exemptions are commonly written in one or more of following ways:

1. The **"Exemptions"** section of the law explicitly lists the broad category of "domestic workers," or a subset of domestic workers, such as "casual babysitters," "domestic workers who live in an employer's home," or "companions."[9] Listing these workers as "exempted" means they are excluded from the law's protections.

2. The **"Definitions"** section of the law provides that "employee" does not include domestic workers and/or the definition of "employer" excludes employers of domestic workers, such as private households.[10]

3. The state law adopts the **FLSA exemptions** of domestic workers or defines "employee" to exclude any workers exempted from the FLSA.[11]

4. The state law's reach is limited to employers with **multiple employees** (generally between two and four for the minimum wage law and higher for the anti-discrimination law), resulting in the *de facto* exclusion of nearly all domestic workers employed solely by a private household.[12]

B. END THE EXCLUSION IN THE STATE MINIMUM WAGE AND OVERTIME LAWS

For explicit exemptions of domestic workers from the state minimum wage and overtime laws, the most direct approach is to repeal the entire exemption. If a complete repeal is not feasible for political or other reasons, the exemption can be narrowed to limit its impact. The remaining domestic worker exemption might be limited to casual workers, or to workers who are family members of the employer. For example, the New York Domestic Workers' Bill of Rights, passed in 2010, narrowed the exemption in the NY Minimum Wage Act for "part-time babysitters" to "part-time babysitters employed on a casual basis," thereby significantly limiting the group of workers excluded from the state's minimum wage law.[13]

Example of Narrowing an Exemption of Domestic Workers

Based on New York law at NY Labor Law § 651(5)

"Employee" includes any individual employed or permitted to work by an employer in any occupation, but shall not include any individual who is employed or permitted to work: (a) on a casual basis in service as a part time baby sitter in the home of the employer ~~[; or someone who lives in the home of an employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping~~][14]

In states where the minimum wage and overtime laws only apply to employers with multiple employees, domestic workers working for private households – nearly all nannies and housekeepers and many home care workers – are excluded from basic workplace protections. Because removing this type of exclusion altogether (e.g., by amending those minimum wage and overtime laws to apply to all employers no matter how many employees they have) will affect a broader segment of workers, such effort will no doubt fuel strong oppositions from small businesses, outside of the care industry. Another approach – more targeted and probably less prone to widespread opposition – would be to amend the state minimum wage law to explicitly provide that all domestic workers are entitled to the minimum wage and overtime protections notwithstanding the minimum wage and overtime laws' applicability to employers with multiple employees.[15] This ensures that those domestic workers who work for private households, where their employer is only employing one person, would be covered.

Proposals to repeal or narrow overtime exemptions have drawn sharper opposition than have efforts to close minimum wage exemptions. Both legislators and employers have argued that the extension of overtime requirements to domestic employers will drastically raise their costs because it is extremely hard to limit nannies' and other caregivers' work hours to 40 per week, and potentially even harder to limit daily work hours, a special concern in the states that provide workers daily overtime rights. (While most states' overtime provisions are calculated on a weekly basis – requiring time and a half pay after 40 hours worked in a week, currently Alaska, California, Colorado, Nevada, and Puerto Rico have daily overtime laws that require employers to pay workers at least one-and-a-half times their regular rate of pay for hours worked after 8, 9, or 12 hours worked in one day, regardless of the weekly hours worked.) Ensuring overtime protections is a crucial component to any effort to raise domestic work standards and must be a key component of the Bill of Rights – despite the challenges campaigns may face in achieving this change.

Model Legislation Providing Overtime Coverage for Domestic Workers

Based on New York law at New York Labor Law § 170

No person or corporation employing a domestic worker … shall require any domestic worker to work more than forty hours in a week … unless they receive compensation for overtime work at a rate which is at least one and onehalf times the worker's normal wage rate.

Based on the California Domestic Workers' Bill of Rights (AB 241)

A domestic work employee who is a personal attendant shall not be employed more than nine hours in any workday or more than 45 hours in any workweek unless the employee receives one and one-half times the employee's regular rate of pay for all hours worked over nine hours in any workday and for all hours worked more than 45 hours in the workweek.

C. ENSURE EQUAL OVERTIME PROTECTIONS FOR ALL DOMESTIC WORKERS

Some states exclude live-in domestic and other residential workers altogether from the overtime law, or require a higher work hour threshold than live-out workers before workers can be entitled to overtime pay. For example, in New York, all residential workers, including live-in domestic workers are entitled to overtime pay only after working 44 hours in a week, while non-residential workers are entitled to overtime pay after 40 hours of work each week.

Some Bill of Rights campaigns and states have erroneously replicated this feature of the New York law in their proposals, without realizing that this unique New York rule applies to all residential workers, not just live-in domestic workers, and predates the New York Bill of Rights campaign. We strongly urge state advocates and legislators not to adopt a separate and lower overtime standard for live-in domestic workers, which was never the goal of the New York Bill of Rights campaign.

This differential treatment is simply not fair to live-in workers who are even more vulnerable to excessive work hours and off-the-clock violations due to their isolated working conditions. Additionally, live-in domestic workers are excluded from federal overtime protections. Thus, it is very important to ensure that live-in workers are entitled to overtime at the state level and that these overtime protections are on par with those for live-out workers.

D. CLOSING EXEMPTIONS IN WORKERS' COMPENSATION LAW

In many states, domestic workers are either exempt from workers' compensation protections entirely, or are subject to special eligibility requirements – namely that they work a certain number of hours per week or per calendar quarter, or earn a certain threshold amount within a designated time before they are eligible for receive workers' compensation benefits for on-the-job injuries. These types of requirements are not typically imposed on other types of workers. Domestic work carries many safety hazards and long-term health consequences due to exposure to cleaning chemicals and strains from heavy lifting, among other working conditions. Because domestic employers seldom offer their employees health insurance, ensuring equal treatment under state workers' compensation laws is a key concern.

E. ENDING THE EXCLUSIONS IN THE STATE ANTI-DISCRIMINATION LAWS

Nearly all state employment discrimination laws exclude domestic workers either explicitly or on a *de facto* basis because they apply only to employers with multiple employees. Just a couple of states provide protection from sexual harassment. Similar to exemptions from the state minimum wage and overtime laws, advocates can end this exclusion in one of two ways: 1) repeal the multiple employee requirement for employer coverage under the law; or 2) notwithstanding the multiple employee requirement, extend the anti-discrimination protection to domestic workers. In addition to ending exclusions in anti-discrimination laws, advocates in some states have also included new provisions to protect domestic workers from workplace harassment. For example, the New York Bill of Rights established domestic worker protections against sexual harassment and harassment based on gender, race, religion, or national origin.[16]

Given the intimate nature of caregiving work, it may be important to allow that sex discrimination could be a bona fide occupational qualification (BFOQ) and thus an allowable consideration in hiring.[17] Advocates interested in amending the state employment discrimination laws as part of their Bill of Rights should consult employment discrimination law experts in their states to ensure that proposed changes address the concerns and needs of both workers and employers.

II. Establish Innovative Industry-Specific Labor Standards

The second goal of the Domestic Worker' Bill of Rights is to establish industry-specific labor standards that domestic workers need, both in order to work safely and with dignity and in order to continue to provide professional quality care to their employers. In addition to their exclusion from many federal and state workplace laws, domestic workers typically work without any policies regarding leave time and other basic workplace standards. While some domestic employers may have clear polices and provide certain benefits, the industry as a whole lacks standards, and employers can change or rescind benefits with little or no consequence. The intimate nature of the work and the often highly personal relationships between a worker and an employer further contribute to certain types of workplace abuses, such as inadequate sleeping facilities, lack of kitchen access to cook food, and insufficient time off to eat, sleep, and rest. Domestic employers who fail to see themselves as employers and

their homes as workplaces often do not recognize the need to set – and adhere to – formal standards. And, laboring alone, domestic workers may feel ill-equipped to negotiate with employers or confront them when they diverge from their promises.

Advocates should develop their Bill of Rights based on the needs and concerns of their state's worker community. As a starting point, we provide the following key policies for your consideration:

1. **Annual Paid Leave Time**
2. **One Day of Rest in Calendar Week**
3. **Provision of Food and Housing**
4. **Sleep Time and Compensation for Interrupted Sleep Time**
5. **Paid Meal and Rest Breaks**
6. **Notice of Termination and Severance Pay**
7. **Written Notice and Wage Statements**
8. **Recordkeeping by Employers**

To ensure that new rights created through the Bill of Rights actually improve workers' working conditions, the Bill of Rights should provide meaningful penalties for violations, in order to ensure employer compliance. The Bill of Rights should also provide workers with the right to enforce their rights both administratively (e.g., by filing complaints with the state Department of Labor) and through a private right of action (e.g., by bringing individual lawsuits in court).

A. COVERAGE FOR NEW BILL OF RIGHTS LABOR STANDARDS

Advocates will need to determine to which group of workers the Bill of Rights labor standards should apply. Typically, a Bill of Rights adds a new definition of "domestic worker" to the state's labor laws and provide that these new standards apply to "domestic workers" as defined in the Bill of Rights. Most of the Bills of Rights that have added a definition of "domestic worker" for purposes of new standards define this group as including nannies, babysitters, housekeepers and other workers employed to cook, clean and care for children and the elderly in private homes, employed by private households.[18] Advocates may also consider including home care workers who are employed by third parties (e.g., home care agencies), or "companions" (as they are called in many states' laws and in the FLSA), who work in private

homes as caregivers for the elderly, sick and people with disabilities. Because home care workers employed through public programs and/or by agencies are unionized (or are involved in union organizing drives) in some states, advocates should consult with the relevant union(s) when deciding which group of domestic workers should be covered under their Bill of Rights – to understand fully what the consequences of coverage will be and what political issues the campaign may raise. Even if advocates choose to limit the new industry-specific rights to a subset of domestic workers, as discussed in Part I, we strongly recommend that the Bill of Rights eliminates exemptions for any group of domestic workers currently excluded from your state's minimum wage and overtime laws.

B. PAID LEAVE TIME

The Bill of Rights should include a provision requiring employers to provide their employees with paid leave time. Advocates should decide whether to aim for a separate provision requiring paid sick leave, or whether to focus their efforts on winning a greater number of paid leave days intended to include both sick days and other time off. This decision may depend on whether your state or any cities in your state already guarantee paid sick leave time, whether such existing protections cover domestic workers, or whether there is an active paid sick day campaign underway in your state that has the potential to provide sick leave protection to domestic workers.

This past year, several Bill of Rights campaigns used as their starting point proposed leave time provisions requiring three paid days off (and no separate sick leave provision), modeled on the New York Bill of Rights. It is important to note that the three paid leave days domestic workers ultimately won in New York State was a result of a six-year campaign and was not the campaign's initial demand. When it was first introduced, the New York Bill of Rights provided for close to 30 days total of paid leave time, including designated holidays, vacation, sick leave and personal days (and more vacation time for workers with longer tenures).[19] Given that, like in New York, the Bill of Rights language will likely be amended and may be weakened as it goes through the state legislative process, and that three paid leave days per year falls far short of what workers need and deserve, we encourage advocates to start with higher number of paid days off. A paid leave time provision requiring seven paid days off, for example, would be a fair demand and would leave some room for negotiation.

C. A DAY OF REST IN EACH CALENDAR WEEK

Domestic workers frequently work long hours, often working seven days a week. One way to address the problem of overwork is to mandate a day of rest each calendar week with pay of at least 1.5 times the regularly hourly rate if the worker voluntarily agrees to work on that day. While a number of states have a day of rest provision, many of these laws are limited to certain industries and few carry meaningful penalties or provide workers with a private right of action to enforce this requirement in court. Some require only that employers provide 24 consecutive hours of rest per week rather than one full day off. The distinction is crucial: 24 consecutive hours off can legally span two days, such as noon on Saturday to noon on Sunday, which most workers will find inconvenient.

Thus, if advocates decide to include a day of rest in their Bill of Rights, we recommend that it provides for a calendar day of rest rather than 24 consecutive hours off each week. Additionally, the day of rest provision is strongest if the employer is required to obtain the worker's written consent to work on this day of rest.

D. PROVISION OF FOOD AND HOUSING

Clear and strong standards on the provision of food and housing and related costs are crucial for domestic workers. These standards are particularly important for live-in domestic workers who often have little control, if any, over the food they eat or where they sleep. These standards should (a) guarantee that workers have a safe and decent housing accommodation and prior written notice about food and housing costs, and should (b) limit the amount employers may charge workers for food and housing and require the worker's written consent before such costs are deducted from their pay.

Because some states already regulate the amount employers can deduct for food and lodging for all workers, including domestic workers, advocates should review the current law in their states to make sure that their Bill of Rights builds upon – and does not conflict with or weaken – existing standards.[20]

Massachusetts' Bill of Rights is a good model for such a provision:

MEALS: A domestic worker shall pay for food or beverages only if it is voluntarily and freely chosen and actually consumed. Payments shall not be unreasonable or exceed the actual cost to the employer for the food or beverages and shall not be accepted by the employer unless (1) the employer has given the domestic worker prior written notice setting forth the actual costs of the food or beverages to be charged to the domestic worker and that acceptance of the food or beverages is done voluntarily and freely; and (2) the domestic worker has provided voluntary and uncoerced written acceptance of the food or beverages and charges. If a domestic worker cannot easily bring or prepare meals on premises, the employer shall not accept any payments for food or beverages.[21]

HOUSING: A domestic worker shall pay for lodging only if it is voluntarily and freely accepted, desired and actually used by the domestic worker; if the employer has given prior written notice that describes the lodging and the amount to be charged for the lodging and that informs the domestic worker that acceptance of the lodging is voluntary and freely chosen or rejected; and if the domestic worker has provided voluntary and uncoerced written acceptance of the lodging and charges. Payments for lodging shall not be allowed if the employer requires that a domestic worker resides on the employer's premises or a particular location or if the payments result in earnings less than the basic minimum wage plus applicable overtime pay. Payments for lodging shall not be unreasonable and shall not exceed the lesser of: 1) the reasonable market rent of the lodging; 2) the actual cost incurred by the employer for lodging the domestic worker. Whether or not a domestic worker makes any payments for lodging, the lodging shall meet the standards for safe and sanitary housing established by law.[22]

E. SLEEP TIME AND COMPENSATION FOR INTERRUPTED SLEEP TIME

Live-in domestic workers are uniquely vulnerable to being on call constantly and working long hours. According to a landmark survey of over 2000 domestic workers, *Home Economics: The Invisible and Unregulated World of Domestic Work*, 49 percent of workers reported that their employer expected them to be available at any time, and 25 percent of live-in workers indicated that, in the previous week, their work schedule prevented them from getting at least five hours of uninterrupted sleep.[23]

The Bill of Rights should establish standards for *uninterrupted* sleep time and compensation if the workers' sleep is interrupted to perform work. Note that federal law currently provides that workers who are on duty for 24 hours or more can enter into an agreement with their employer to exclude up to eight hours of sleep time from pay, provided that the worker has adequate sleeping facilities and can usually enjoy an uninterrupted night's sleep.[24] If there is no express or implied agreement to the contrary, the employer must compensate the worker for the entire eight hours of sleeping time.[25] The federal law further requires that if a worker's sleep is *interrupted* to the extent that she cannot get a minimum of five hours of sleep the employer must pay her for the entire night.[26] Since the federal law does not require uninterrupted sleep, and does not require that the agreement to exclude sleep time from compensation be in writing, advocates should consider establishing higher standards at the state level that build upon the federal requirements, as some state campaigns have done.

Here is a model from both California and Massachusetts:

When a domestic worker is required to be on duty for a period of 24 consecutive hours or more, the employer and the domestic worker may agree in writing prior to performance of the work to exclude a regularly scheduled sleeping period of not more than 8 hours from working time for each 24-hour period, provided that the employer provides adequate sleeping quarters and the domestic worker can enjoy 8 hours of uninterrupted sleep. If the sleeping period is interrupted by a call to duty, the entire period must be counted as working time. If no prior written agreement is made, all meal periods, rest periods and sleeping periods shall constitute working time."[27]

F. PAID MEAL AND REST BREAKS

There is no federal requirement that employers provide meal or rest breaks, only that workers must be paid if they work through meal periods[28] and that 5 to 20 minutes of rest periods are considered part of compensated work hours.[29] Some states require employers to provide meal and/or rest breaks to their employees, but few require that meal breaks be compensated,[30] and meal and rest break requirements may not cover domestic workers.[31] Paid meal and rest breaks are vital to the health of domestic workers, who often work long hours without any breaks. *Home Economics* reported that 50 percent of live-in workers and 33 percent of live-out workers worked long hours without breaks.[32] In designing the paid meal and rest breaks provision, advocates should review the current law in their state to make sure that their Bill of Rights builds upon – and does not conflict with or weaken – existing standards. Advocates should also consult their domestic worker community on whether the right to use their employer's kitchen facilities to cook their own food should be included in their Bill of Rights.

G. ADVANCE NOTICE OF TERMINATION AND SEVERANCE PAY

The rights to advance notice of termination and severance pay are important rights to win because low pay and lack of job security are systemic to the domestic work industry. Such rights are particularly vital for live-in workers who risk being homeless as soon as they lose their job. We can look to the federal Worker Adjustment and Retraining Notification Act (the WARN Act) which requires certain employers to provide notice 60 days in advance of plant closings and mass layoffs, as a model for the notice of termination.

If advocates plan to include the notice of termination and severance pay in their Bill of Rights, we encourage you to consider the following:

ADVANCE NOTICE OF TERMINATION OR DISMISSAL PAY OR BOTH: As a starting point in the campaign, advocates may want to require employers to provide both notice of termination and severance pay. If this is not feasible, consult domestic workers and coalition partners in your state to identify the campaign's priority – the notice of termination or severance pay. Another option is to require employers to provide the notice of termination, or if no notice is given, provide that workers are entitled to severance pay.

The original Bill of Rights in New York required employers to give workers written notice of their termination 21 days in advance of termination, and one week of severance pay for each year worked.[33] This provision was ultimately removed from the final bill that was enacted into the law.

The Massachusetts Bill of Rights offers another model:

Upon termination of employment, an employer shall provide at least 14 days written notice or severance pay in an amount equivalent to the average earnings during a week of employment."[34]

FOR LIVE-IN WORKERS, THE MA BILL OF RIGHTS FURTHER PROVIDES:

"... at least 30 days written notice for the domestic worker to vacate the premises, and may then only evict the domestic worker through summary process under the uniform summary process rules." [35]

CONSULT WITH YOUR COALITION PARTNERS, INCLUDING EMPLOYERS: Requiring severance pay may be financially difficult for certain segments of domestic employers, especially low-income elderly and people with disabilities. In designing the notice of termination and/or severance pay provision, be sure to consult the employer community to see what would be feasible for moderate- to low-income families that employ domestic workers.

BILL LANGUAGE: In drafting the severance pay provision, advocates should review the treatment of severance pay by federal and state laws, including tax laws and Unemployment Insurance (UI) laws to ensure that all workers will receive severance pay, regardless of immigration status[36] and not become ineligible for certain benefits, such as unemployment insurance as a result of receiving the severance pay.[37]

H. WRITTEN NOTICE AND WAGE STATEMENTS

Although a good number of states require employers to provide their employees with written notice about wages and benefits at the time of hire and a wage statement at each pay period reflecting hours worked and wages paid, many do not require sufficient specification

to enable workers, including domestic workers, to hold employers to the promises they made and seek timely action if employers break their commitments. And New York is the only state that requires employers to provide written notice at the time of hire in the employee's primary language.[38]

Advocates should consider requiring employers to provide domestic workers with (a) written notice or an agreement at the time of hire and annually thereafter and (b) a wage statement at each pay period. This transparency can help workers consider a job offer carefully and gives them more certainty about their wage rate and benefits before they commit their time to an employer. Similarly, receiving a wage statement with each pay can help workers to seek timely action to address any violations about their hours and wages. Advocates can also consider requiring domestic employers to provide written notice any time there are changes to the terms and conditions of the worker's employment, and to provide this information in the worker's primary language. If advocates are interested in including the primary language requirement, be sure to engage your state labor enforcement agency to garner its support since the agency is best situated to create templates of dual-language notices.[39]

Massachusetts is one model advocates can consider: [40]

At the beginning of employment, including but not limited to: the rate of pay including overtime and additional compensation for added duties or multilingual skills; working hours including meal breaks and other time off; and where applicable, the provisions for days of rest, earned sick days, vacation days, personal days, holidays, transportation, health insurance, severance, yearly raises, and whether or not earned, sick days, vacation days, personal days, holidays, severance, transportation costs and health insurance are paid or reimbursed; any fees or other costs including costs for meals and lodging; the responsibilities associated with the job; the process for raising and addressing grievances and additional compensation if new duties are added; the right to collect workers compensation if injured; the required notice of employment termination by either party; and any other rights or benefits afforded to the domestic worker.[41]

I. RECORDKEEPING BY EMPLOYERS

Although the FLSA[42] and most state laws already require employers to maintain records of their employees' pay and work hours, advocates can consider proposing more stringent recordkeeping requirements. At a minimum, the Bill of Rights should expand record-keeping requirements to require domestic employers to create and maintain records on any additional rights extended to domestic workers by the Bill of Rights, such as the number of days off or sick leave. In designing the recordkeeping provision, advocates should research the current state law to ensure that the new provision builds upon the current law and consult legal advocates in assessing the current standards and determining whether they are sufficient.

J. OUTREACH AND ENFORCEMENT

DOLs and state Attorneys Generals can be powerful allies in efforts to enforce the rights of domestic workers. Even in times of tight budgets, public agencies have resources and are charged with ensuring that workers get paid properly. They can help create lasting change in employer behavior and in an industry if the right approaches are pursued. In addition, they can use the media to publicize enforcement actions and communicate to employers that they will face consequences if they break wage and hour laws.

As part of the Bill of Rights, advocates may consider including a provision requiring a state DOL to undertake measures to educate domestic workers and employers about the Bill of Rights. For example, the New York Bill of Rights required the New York State Department of Labor (NYSDOL) to work with other state public agencies to develop a plan for outreach and education on domestic workers' labor protections. As a result of this mandate, NYSDOL issued a report laying out it outreach and education plan.[43] Winning passage of such a provision may not be easy, or even possible in some states. It is important to first assess the likelihood of a positive response; garnering the state agency's support for the Bill of Rights should be part of the campaign strategy. The agency's support for the campaign will go a long way because advocates will need to continue to collaborate and partner with the agency to ensure that they prioritize domestic worker cases and pursue affirmative and smart enforcement of their Bill of Rights.

K. COLLECTIVE BARGAINING AND OTHER FEASIBILITY STUDY

The New York Bill of Rights included a unique provision requiring the NYSDOL to study and report on the feasibility and practicality of allowing domestic workers to organize and collectively bargain. The Bill of Rights mandated that NYSDOL had to consult representatives of domestic workers and employers of domestic workers.

Building upon the New York precedent, the Massachusetts Coalition for Domestic Workers included in their Bill of Rights a mandate that requires its labor agency to consult with domestic workers and their representatives, state agencies, and the Massachusetts AFL-CIO and SEIU chapters in issuing a report developing a framework for domestic workers to collective bargain. Additionally, the Massachusetts Bill of Rights further requires the agency to issue a report developing a state-supported mediation program to address disputes between domestic workers and their employers; occupational safeguards and standards for domestic workers; and providing a domestic worker health care and retirement fund."[44]

Advocates can consider including a provision of requiring a study of collective bargaining or other studies in their Bill of Rights because such a mandate could provide domestic workers and domestic worker organizations an opportunity to explore and examine different models to collectively bargain or experiment with different models that can build worker power and lift up labor standards in the domestic industry.

III. Conclusion

Domestic workers themselves defined their priorities, shaped legislation in partnership with advocates, and led the hallmark Bill of Rights campaigns in New York and California, galvanizing a wave of domestic worker organizing across the country. By providing domestic worker advocates with guidance on identifying which policies to include in their state's Domestic Workers' Bill of Rights, we are excited to work with state advocates to win the labor protections and recognition that this vital workforce deserves.

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ADDITIONAL RESOURCES:

National Domestic Workers Alliance, Employment Protections for Domestic Workers: An Overview of Federal Law, available at http://www.domesticworkers.org/sites/default/files/Domestic_Worker_Employment_Protections_Federal.pdf

New York State Department of Labor, Feasibility of Domestic Worker Collective Bargaining (Nov. 2010), available at http://www.labor.ny.gov/legal/laws/pdf/domestic-workers/domestic-workers-feasibility-study.pdf

Domestic Workers and Collective Bargaining: A Proposal for Immediate Inclusion of Domestic Workers in the New York State Labor Relations Act, a report by Domestic Workers United, National Domestic Workers Alliance, and the Community Development Project at the Urban Justice Center (October 2010), available at http://www.researchfororganizing.org/uploads/pdfs/Domestic_Workers_and_Collective_Bargaining.pdf

Hina Shah & Marci Seville, Domestic Worker Organizing: Building a Contemporary Movement for Dignity and Power, Golden Gate University School of Law (2012), available at http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1481&context=pubs

For information on the impact of the federal companionship rules on states, see NELP's webpage at http://www.nelp.org/page/content/state_chart_companionship/

Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft, National Employment Law Project (January 2011), available at http://www.nelp.org/page/-/Justice/2011/WinningWageJustice2011.pdf?nocdn=1

1 For more information on domestic workers coverage under federal labor and employment laws, see National Domestic Workers Alliance, Employment Protections for Domestic Workers: An Overview of Federal Law, available at, http://www.domesticworkers.org/sites/default/files/Domestic_Worker_Employment_Protections_Federal.pdf.

2 The FLSA excludes from its minimum wage and overtime provisions babysitters employed on a "casual basis" and workers who provide "companionship services" 29 U.S.C. §213(a)(15) (2013). The US Department of Labor defines the terms "babysitting" and "casual basis" and "companionship" in its regulations. See 29 CFR § 552.1 *et seq.* The DOL recently revised its regulations defining companionship services, narrowing the scope of the exemption. The new rules, which will go into effect on January 1, 2015, limit the types of services considered exempt and will disallow the exemption for third party employers, such as home care agencies. The exemption will apply only to workers who are employed solely by a private household and who primarily provide fellowship and protection and a limited amount of assistance with daily activities. For more information, see DOL's webpage on the regulations at http://www.dol.gov/whd/homecare/, and NELP's webpage at http://www.nelp.org/page/content/state_chart_companionship/. The FLSA also excludes live-in domestic workers from overtime protections. 29 U.S.C. §213(b)(21) (2013); 29 CFR § 552.102.

3 Of these states, Alabama, Louisiana, Mississippi, South Carolina, and Tennessee have no state minimum wage law or overtime pay requirements for any workers. Alaska, Arkansas, Delaware, Georgia, Idaho, Kansas, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, Virginia, and West Virginia have a state minimum wage but exclude all domestic workers from coverage.

4 See, e.g., OHIO. REV. CODE ANN. § 4111.14(B), (D) (West 2013).

5 See, e.g., 820 ILL. COMP. STAT. 3(d)(1), 3(d)(3)(2013).

6 See, e.g., ORE. REV. STAT. § 656.027(1)(2013).

7 See, e.g., CAL. UNEMP. INS. CODE ANN. §629 (West 2013) (exempting "domestic service in a private home" if performed for or a person who paid less than one thousand dollars "to individuals employed in the domestic service in any calendar quarter in the calendar year or the preceding calendar year").

8 See, e.g., OHIO REV. CODE ANN. §§ 4112.01(A)(2),(3) (2013).

9 See, e.g., ORE. REV. STAT. §§ 653.020(2), (13), (14) (2013). (exempting "those employed in or about a family home in domestic service on a casual basis or to provide companionship services for individuals who are aged or infirm, as well as those providing child care services in the home of the individual or the child"); OHIO. REV. CODE ANN. § 4111.14(B), (D) (exempting employees who are exempted from FLSA, and those employed in or about the employer's property/residence on a casual basis).

10 See, e.g., OHIO. REV. CODE ANN. § 4111.14(B), (D) (West 2013) (excluding employees exempted from FLSA, and those employed in or about the employer's property/residence on a casual basis).

11 FLSA covers most domestic service employees but has a minimum wage and overtime exemption for casual babysitters and companionship workers, and an overtime exemption for live-in domestic workers. See note 2, supra.

12 See, e.g., 820 ILL. COMP. STAT. 3(d)(1)(2013) (exempting employees of employers with fewer than 4 employees).

13 N.Y. LAB. LAW § 651(5) (2013).

14 Italics signifies added text. Strikethrough signifies deleted text.

15 The New York Domestic Workers Bill of Rights took this approach in ending the exclusion of domestic workers from the state's human rights law to provide workers protection from workplace harassment and from retaliation by their employers for complaining of such harassment. See NY EXEC LAW § 296-b.

16 NY EXEC LAW § 296-b (2013).

17 Under Section 703(e)(1) of Title VII, an employer may discriminate on the basis of religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. 42 U.S.C. § 2000e-2(e)(1). The Supreme Court has said that the BFOQ defense in Title VII is written narrowly. *Int'l Union v. Johnson Controls,* 499 U.S. 187, (1991) (citing Dothard v. Rawlinson, 433 U.S. 321, 332-337, (1977). Moreover, the Supreme Court has pointed out that BFOQ cannot be general subjective standards and must be objective, verifiable requirements that concern job-related skills and aptitudes. *Int'l Union,* 499 U.S. at 202. Health care positions that involve providing hygiene or other intimate care to naked or exposed patients have permitted sex discrimination for patients' privacy interests. See e.g., *Jennings v. N.Y. State Office of Mental Health*, 786 F. Supp. 376 (S.D.N.Y. 1992)(permits sex discrimination for Security Hospital Treatment Assistants employed at inpatient psychiatric hospital, where these assistants' responsibilities included feeding, clothing and cleaning patients).

18 See, e.g., NY LABOR LAW § 2(16) (2013)("Domestic worker" shall mean a person employed in a home or residence for the purpose of caring for a child, serving as a companion for a sick, convalescing or elderly person, housekeeping, or for any other domestic service purpose. "Domestic worker" does not include any individual (a) working on a casual basis, (b) who is engaged in providing companionship services, as defined in paragraph fifteen of subdivision (a) of section 213 of the fair labor standards act of 1938, and who is employed by an employer or agency other than the family or household using his or her services, or (c) who is a relative through blood, marriage or adoption of: (1) the employer; or (2) the person for whom the worker is delivering services under a program funded or administered by federal, state or local government."); S.B. 535 §3, 2013 Leg., 27th Sess. (Haw. 2013)("Domestic service" means services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes, but is not limited to, services performed by employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, and chauffeurs of automobiles for family use. The term also includes babysitters whose employment is not on a casual basis.").

19 The New York Domestic Workers' Bill of Rights, A.1470 (2010), contained multiple categories of paid leave. A. 1470 required employers in the New York Metropolitan area to give employees paid time off for (1) New Year's Day, Martin Luther King Jr. Day, President's Day, Memorial Day, Independence Day, Thanksgiving, Labor Day, Christmas Day, and one other holiday (or overtime if these days are worked), (2) 2 weeks per year vacation time for 6 months to 3 years worked, 3 weeks per year for 3 to 5 years worked, 4 weeks per year for 5 to 10 years worked, and 5 weeks per year for years worked over 10, (3), 5 sick days per year; and (4) 5 personal days per year. A.1470 §2, 2010 Leg. Sess. (N.Y. 2010).

20 For example, current California law requires domestic employers to provide workers an area for sleeping separate from the child and/or patient, with a separate deb. See Industrial Welfare Comm., order No. 15-2001 (Jan. 2006).

21 H.B. 1750, 2013 Leg. (Mass. 2013).

22. *Id.*

23 Linda Burnham & Nik Theodore, Home Economics: The Invisible and Unregulated World of Domestic Work, pp.26-28, (2012), available at http://www.domesticworkers.org/homeeconomics/

24 29 C.F.R. § 785.22.

25 *Id.*

26 *Id.*

27 *Id.*

28 *See* 29 C.F.R. § 785.19

29 *See* 29 C.F.R. § 785.18

30 The USDOL has a chart of minimum length of meal period required under state law, available at http://www.dol.gov/whd/state/meal.htm For a discussion on paid meal and rest breaks as a policy option, see National Employment Law Project, Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft, pp. 101-103, (Jan. 2011), available at http://www.nelp.org/page/-/Justice/2011/WinningWageJustice2011.pdf?nocdn=1

31 For example, California law currently exempts "personal attendants" from its meal and rest break provisions; *See* California Wage Order 15-2001 §§ 11,12.

32 Burnham *et al.*, Home Economics: The Invisible and Unregulated World of Domestic Work, p. 33, available at http://www.domesticworkers.org/homeeconomics/

33 A.1470 §2.

34 H.B.1740 (i), available at https://malegislature.gov/Bills/BillHtml/126587?generalCourtId=11.

35 *Id.*

36 Government agencies, applicable laws and courts have different interpretations on whether severance pay is wages for past employment or wages for work that would have been performed

but for termination. The provision of severance pay may affect undocumented workers differently in light of current case law. NELP has researched this issue and has a memo we can circulate.

37 Some state UI laws distinguish between "severance pay" and "pay in lieu of notice," and "pay in lieu of notice" would disqualify a worker from receiving UI benefits. As such, in drafting the severance pay language, review the state UI laws and avoid using the term, "pay in lieu of notice," if your state makes such distinction.

38 *See* NY LABOR LAW § 195 (2013).

39 The Wage Theft Prevention Act, enacted on April 9, 2011 in New York, required the New York State Department of Labor (NYSDOL) to prepare the templates for pay notices, including dual-language notices. The NYSDOL created the pay notice in Spanish, Chinese, Haitian Creole, Korean, Polish, and Russian. *See* sample notices at http://www.labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm

40 For other sample language, see National Employment Law Project, Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft, 106-110 (January 2011), available at http://www.nelp.org/page/-/Justice/2011/WinningWageJustice2011.pdf?nocdn=1

41 H.B. 1750, 2013 Leg. (Mass. 2013).

42 The US DOL recently strengthened the recordkeeping requirements for employers of live-in domestic workers. As of January 1, 2015, domestic employers will be required to track and record work hours of their employees, including live-in domestic workers. See US DOL "Fact Sheet #79C: Recordkeeping Requirements for Individuals, Families, or Households Who Employ Domestic Service Workers Under the Fair Labor Standards Act (FLSA)," available at, http://www.dol.gov/whd/regs/compliance/whdfs79c.pdf.

43 NYS Department of Labor, Report on Outreach Efforts for Domestic Worker Legislation (Dec. 30, 2010), available at http://www.labor.ny.gov/legal/laws/pdf/domestic-workers/report-to-governor-outreach.pdf

43 H.B. 1750, 2013 Leg. (Mass. 2013).