

## 5 Common Mistakes Employers Of Calif. Domestic Workers Make

*Law360, New York (July 26, 2016, 11:55 AM ET) --*

Beginning in January 2014, the Domestic Workers Bill of Rights (DWBR) established new rights for household employees who previously did not share the same protections that other workers possessed in California, including rights to overtime, meal and rest periods and the right to a documented pay stub.

Despite the fact that it has been over two years since the new law was enacted, many household employers are still unaware of their employment obligations and the risks associated with the same. As a result, there are a growing number of claims and lawsuits alleging substantial amounts of unpaid wages and owed penalties.

The most typical types of situations that give rise to claims of violations of the DWBR and related wage and hour violations tend to be brought against wealthy and high-volume users of domestic employees.

Most of these cases fall under four types of situations: (1) Full-time nannies or personal attendants who take care of young children or the elderly; (2) employees who are required to sleep over in the employer's home; (3) employees whose duties include transporting a child or elderly person to a school or other location and then picking up the child or elderly person later in the day and resulting down time between drop off and pick up; and/or (4) employers who pay their employees a flat salary regardless of the number of hours they work. In each of these situations, certain risks arise that relate to a household employer's failure to comply with legal requirements that can only be understood in the context of the various legal requirements when employing household employees.



Scott Liner



Tiffany Caterina

### Common Mistake #1: Misclassification

One of the most common mistakes made by household employers with their household employees is when they misclassify their employee as a personal attendant. A personal attendant is someone employed by a private householder or any third-party employer recognized in the health care industry to work in a private household. Cal. Labor Code § 1451(d).

Duties of a personal attendant include supervising, feeding and dressing a child or person who needs assistance due to advanced age, physical disability or mental deficiency. To have personal attendant status, the employee may not spend more than 20 percent of his or her weekly work time engaged in other duties, such as housecleaning, cooking, laundry or other duties related to the maintenance of a

private household. Id.

If the employees spend less than 80 percent of their time performing the duties defined for them to qualify as a personal attendant, then they are not entitled to the enhanced status of a personal attendant and the employer is obligated to provide meal and rest periods, as well as meet the overtime obligations that covers other domestic employees as discussed below. This typically occurs when the employee has other duties unrelated to the care of the child or elderly family member, such as cleaning the house, shopping for the family, cooking for the family, or any other similar duties.

To avoid the risk of misclassifying an employee as a personal attendant an employer should either ensure that there is another employee who performs the other household duties or simply treat the employee as a normal domestic employee and not try to classify them as a personal attendant.

### **Common Mistake #2: Overtime Payments**

A second common mistake made by household employers is when they fail to pay their household employees overtime. This occurs under two typical situations: Either they don't comply with the specific overtime laws that cover domestic workers, and/or they pay the employee a flat salary regardless of the number of hours they work.

Non-live-in domestic workers who are not personal attendants are entitled to overtime (1.5 times the regular rate of pay) for any hours worked over eight hours per day or 40 regular hours in a workweek; overtime for the first eight hours worked on the seventh consecutive day of the workweek; double time (two times the regular rate of pay) for any hours worked over 12 hours in a day; and double time for any hours worked over eight hours on the seventh consecutive day of the workweek. IWC Wage Order 15-2001, section 3(C).

Conversely, live-in domestic workers who are not personal attendants are entitled to overtime for any hours worked over nine hours per day and for the first nine hours worked on the sixth and seventh consecutive day of the workweek. Live-in employees are entitled to double time (two times the regular rate of pay) for any hours worked over nine hours on the sixth and seventh consecutive day of the workweek. IWC Wage Order 15-2001, section 3(B). On the other hand, personal attendants are entitled to overtime (1.5 times regular rate of pay) for any hours worked over nine hours per day or over 45 hours per week, unless they are excluded employees or the employer is excluded under the Domestic Worker Bill of Rights. Cal. Labor Code §§ 1450-1454.

Based upon the above overtime requirements, household employers must be careful to understand the status of their employee and pay the appropriate overtime compensation. However, a common mistake occurs when employers simply pay their household employees a flat weekly salary regardless of the number of hours actually worked. When this occurs, if the employee works any overtime hours, they are entitled to overtime compensation. See Cal. Labor Code § 515(d)(2) which holds that when an employee who is entitled to overtime is paid a fixed salary, the salary compensates only the employee's regular, nonovertime hours, regardless of any agreement to the contrary.

Another related common mistake by employers is when employees have down time after dropping off a child or elderly person and are not expected to pick that employee up for several hours. Employers typically assume under these circumstances that the employee is off duty and not entitled to compensation until they pick up the family member later in the day. However, if the employee is performing any duties for the employer during that time or is "on call" for any reason, and must

immediately respond should the need arise, then such down time is in fact compensable.

Similar “on call” concerns arise when employers require employees to sleep over and those employees have any obligations to be “on call” or are restricted from their ability to conduct themselves as if on personal time. See *Mendiola v. CPS Security Solutions Inc.*, 60 Cal. 4th 833, 849 (2015), reh’g denied (March 18, 2015). In *Mendiola*, the California Supreme Court affirmed the court of appeals’ conclusion that security guards were “on call” because they were required to be on the worksite even when they were not on active patrol, which constituted hours worked within the meaning of Wage Order 4 and was subject to the wage order’s minimum wage and overtime provisions. *Id.*

If the employee is deemed to be “on call” and is covered by the *Mendiola* decision, then the employee is entitled to compensation for all “on call” time, even if that time includes sleeping. *Id.* To avoid this risk, employers should set forth specific policies associated with sleep-over employees that confirms they are not on call, have no duties after their shift ends, and have the freedom to come and go as they please.

### **Common Mistake # 3: Meal and Rest Periods**

Another common mistake by household employers occurs when they fail to provide meal and rest periods to their household employees. Significantly, the law does not require meal or rest periods for personal attendants. However, all other domestic workers are entitled to such breaks.

With regard to meal breaks, all non-personal attendant domestic workers have the right to a 30-minute unpaid meal break for a work period of five to 10 hours. IWC Wage Order 15-2001, section 11(A). The worker can waive the meal period if he or she works six hours or less in the day. *Id.* The worker gets a second meal period of 30 minutes if the work period is more than 10 hours in a day. IWC Wage Order 15-2001, section 11(B). If an employee’s total work time is no more than 12 hours per day, a second meal break may be waived, as long as the first meal period was not waived. *Id.*

An employee must be relieved of all duties during the meal break, unless the nature of the work prevents such relief, in which case the meal period must be paid. IWC Wage Order 15-2001, section 11(C). The employer must pay one additional hour of pay at the employee’s regular rate of pay for each work day, where there is a meal break violation. IWC Wage Order 15-2001, section 11(D).

With regard to rest periods, all domestic workers except personal attendants have the right to a 10-minute rest period for shifts between three and a half to six hours in length; a 20-minute total rest period for shifts between six to 10 hours; and a 30-minute total rest period for shifts of more than 10 hours and up to 14 hours. IWC Wage Order 15-2001, section 12(A). Authorized rest periods are considered as work hours and must be paid. The employer must pay one additional hour of pay at the employee’s regular rate of pay for each work day where there is a rest break violation. IWC Wage Order 15-2001, section 12(B).

It is critical that household employers comply with the meal and rest period obligations and confirm these rights and how they are to be followed by their employees in writing.

### **Common Mistake #4: Itemized Wage Statements**

Another common mistake by household employers is their failure to keep and furnish itemized wage statements. Many employers either don’t maintain work hour records and simply cut a check to the employee without taking out applicable withholdings and/or fail to provide any required pay stub

documentation. In that regard, employers must keep time records of when the employee begins and ends each work period, including meals, for all domestic employees who are not personal attendants. IWC Wage Order 15-2001, section 7(A)(3).

The employer must also keep a record of total daily and weekly hours worked and total wages paid each payroll period. IWC Wage Order 15-2001, section 7(A)(4)-(5). Moreover, at the time of each payment, the employer must furnish each employee, either a detachable part of a check, a draft, or a voucher showing payment of the employee's wages, or separately, an itemized written statement showing: (1) all deductions; (2) the inclusive dates of the period the employee is paid; (3) the name of the employee or the employee's Social Security number; and (4) the name of the employer, provided all deductions may be aggregated and shown as one item, made on written orders of the employee. Cal. Labor Code § 226; IWC Wage Order 15-2001, section 7(B). The employer must keep these records for at least three years. IWC Wage Order 15-2001, section 7(C).

To protect themselves from wage and hour claims, household employers must require their employees to submit their hours worked every week on a time record form and that document must also confirm that they received their meal and rest periods. Separately, employers must issue a pay stub document reflecting all required information as set forth under Labor Code section 226. When employers fail to comply with these requirements, they are subject to applicable penalties, and are at a substantial disadvantage should they face a claim that a household employee was not paid all wages owed.

#### **Common Mistake #5: Workers' Compensation Insurance**

In California, workers' compensation is compulsory. There is no exemption for employers with a small number of employees. The requirements for obtaining workers' compensation insurance for domestic workers includes any employer who has an employee who was employed 52 or more hours, or earned \$100 or more, during 90 calendar days immediately preceding a date of injury or last employment exposing such worker to the hazards of an occupational disease. Cal. Labor Code § 3352.

Should a household employer fall under these conditions, they must have workers' compensation insurance. A failure to comply will result in a stop order from the California Division of Labor Standards Enforcement (DLSE) prohibiting the use of employee labor until coverage is obtained, and failure to comply is a misdemeanor punishable by imprisonment in the county jail for up to 60 days, a fine of up to \$10,000, or both. Cal. Labor Code §§ 3700.5, 3710.1-3710.2.

The DLSE will also assess a penalty the greater of (1) twice the amount the employer would have paid in workers' compensation premiums during the period the employer was uninsured or (2) \$1,500 per employee, employed during the period the employer was uninsured. Cal. Labor Code §3722(b). Additionally, after a worker files a workers' compensation claim and a final determination is made, the employer may be assessed a penalty of \$2,000 per employee if the worker's claim was noncompensable or \$10,000 per employee if the worker's case was compensable. Cal. Labor Code §3722(d).

In conclusion, household employers must comply with their obligations under the DWBR and related Labor Code requirements. By failing to do so, they face substantial exposure to wage and hour litigation. It is critical for a household employer to consult with an experienced employment law attorney to ensure they comply with their wage and hours obligations.

—By Scott K. Liner and Tiffany R. Caterina, Liner LLP

*Scott Liner is a partner at Liner LLP practicing exclusively in the area of labor and employment law. Tiffany Caterina an associate in Liner LLP's litigation group with a practice focused on the entertainment industry.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

---

All Content © 2003-2016, Portfolio Media, Inc.