

A Guide to Understanding the Minimum Wage and Overtime Requirements for Domestic Employers in New York State

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People who work in household settings are commonly known as domestic workers. Examples of domestic workers include nannies, babysitters, and home care aides and their job responsibilities can differ. Some live in the household where they are employed, while others do not. Some are employed and paid directly by the household employers while others are employed and paid through home care and domestic cleaning agencies who assign their employees to the job orders the company receives. These variables can be extremely important in understanding the federal and state laws that apply.

The foundation of federal wage and hour law is the Fair Labor Standards Act of 1938. Currently, many states have enacted additional laws which supplement or expand certain provisions of the federal laws. It is important to understand how these employment laws interface. Namely, when a state enacts labor laws, it can provide both additional and corollary benefits to employees above and beyond the protections required by federal employment laws. In situations where employers are covered by both federal and state wage-hour laws, they must comply with the law that affords their employees the highest level of benefits. Below is a review and explanation of federal law as it relates to employment of domestic workers.

Section 13(a)(15) of the Fair Labor Standards Act (FLSA) exempts the following people from the statute's minimum wage and maximum hours requirements:

*any employee employed on a **casual basis** in domestic service employment to provide babysitting services or any employee employed in **domestic service employment** to provide **companionship services** for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and de-limited by regulations of the Secretary [of Labor]).¹*

The United States Department of Labor (DOL) regulations further state:

*the term **casual basis** when applied to babysitting services, shall mean employment which is irregular or intermittent, which is not performed by an individual whose vocation is babysitting. Casual babysitting services may include the performance of some household work not relating to children: provided however that such work is incidental, i.e., does not exceed 20 percent of the total hours worked on the particular babysitting assignment.² Furthermore, employment is not on a casual basis, whether performed for one or more family or household employers, if such employment for all such employers exceeds 20 hours per week in the aggregate.*

The United States Department of Labor (DOL) regulations further state:

*the term **domestic service employment** refers to 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 employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.³*

The DOL further defines the term "companionship services" for the aged or infirm to mean:

those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: Provided, however, that such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked by the companion.⁴

The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions [under FLSA §13(a)(15)], they may still qualify for an exemption to overtime as domestic service employees if they are employed in a private household to provide live-in domestic services.

The DOL has interpreted FLSA §13(a)(15) to extend to companionship workers **including** those "who are employed by an employer or agency other than the family or household using their services".⁵ In 2007, the Supreme Court upheld this interpretation in *Long Island Care at Home, Ltd. v. Coke*. The DOL also publishes a fact sheet specific to companionship exemptions within a domestic worker home care setting.⁶ This document is no longer applicable within New York State due to the recent amendment to New York's Labor Law as discussed below.

The DOL has extensive regulations dealing with domestic service employment, including provisions defining and limiting the terms "babysitting services" and "companionship services".⁷ Additionally, there is a second FLSA exemption, relating to overtime only, for **live-in** domestic services employees (see FLSA §13(b)(21) and DOL regulations there under⁸). The term **live-in** means that the domestic worker sleeps and resides in the employer's residence.

With this fundamental understanding of federal labor law, let's talk through the labor laws specific to New York State. The new Domestic Worker Bill of Rights Legislation⁹ signed into law by Governor Paterson on September 2, 2010 creates a fundamental shift in the private employment of domestic workers by household employers within New York State. In addition to supplementing federal laws, the legislation establishes rules and responsibilities that employers are required to follow to ensure that domestic workers are treated in a fair and equitable manner in all aspects of their employment. Prior to passage of this legislation in New York State, there were very few rules that covered the employment of domestic workers. The absence of statutory guidance has led, in part, to many publicized cases of physical, mental and/or sexual abuse over the years.

Here is a summary of some of the provisions of the new law:

- Amends of the definition of "domestic worker"
- Requires covered household employers to:
 - Pay overtime after 40 hours of work in a week, (or 44 hours for in-home [live-in] workers)
 - Provide one (1) day of rest every seven (7) days, unless waived by the employee
 - Provide three (3) days of paid rest (vacation) after one year of employment
 - Provide disability benefits to domestic workers (placing them on parity with other workers)

In order to minimize the fiscal implications of these new laws on New York State (through its Medicaid program), this new legislation redefined the term "domestic worker" as:

*A person employed in the home or residence for the purpose of caring for a child, serving as an companion for a sick, convalescing or elderly person, housekeeping, or any 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 15 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*¹⁰

This means that household employers may be held to a different set of rules than home care agencies. The playing field is no longer equal. As a result, home care agencies may still qualify under the federal exemptions for the home care live-in exemption, which does not require the payment of minimum wage, while household employers cannot.

The legislation states that every domestic worker must be paid at least the minimum wage for the first 40 hours of work per week (or 44 hours for a live-in) and then at a rate of time and a half of their base pay thereafter. In addition, every person employed as a domestic worker shall be allowed at least twenty-four (24) consecutive hours of rest in each calendar week. However, the worker may voluntarily agree to work on his or her day of rest as long as the worker is compensated at the time and a half of the base rate for those hours he or she worked on the day of rest. After completion of one year of work with the same employer, a domestic worker shall be entitled to at least three (3) days of rest in each regular year at the regular rate of compensation.

Prior to the passage of the Domestic Worker Bill of Rights, household employers were not required to have disability insurance coverage in place for part-time domestic workers. This exclusion has now been eliminated and all domestic workers must now be covered by disability insurance.

The federal minimum wage, as well as the New York State minimum wage, is \$7.25 per hour. Should New York State increase its minimum wage, employers would be required to increase the hourly rate of pay for domestic workers accordingly.

To better understand the cost of compliance with these new wage and hour laws, the following illustrations represent the cost of gross pay for domestic workers using minimum wage as the basis:

| LIVE-IN ILLUSTRATIONS | | | | LIVE-OUT ILLUSTRATIONS | | | |
|--|------|------------------|---------------------------------------|--|------|------------------|-------------------------------------|
| Time and a Half starts for Live-in's after 44 hours | | | | Time and a Half starts after 40 hours | | | |
| New York State Minimum Wage Rate | | \$ 7.25 | | New York State Minimum Wage Rate | | \$ 7.25 | |
| New York State Minimum Time and a Half Rate | | \$ 10.875 | | New York State Minimum Time and a Half Rate | | \$ 10.875 | |
| Illustration 1: Live in Working 2 days per week | | | | | | | |
| Hours | Days | Total | | Hours | Days | Total | |
| 24 | 2 | 48 | Regular \$ 319.00 | 12 | 2 | 24 | Regular \$ 174.00 |
| | | | Time and a Half \$ 43.00 | | | | Time and a Half \$ 0.00 |
| | | | Total Weekly Wages \$ 362.00 | | | | Total Weekly Wages \$ 174.00 |
| Converted Live-in Daily Rate | | \$ 181.00 | | Hourly Translation: \$ 7.25 per hour | | | |
| Illustration 2: Live in Working 3 days per week | | | | | | | |
| Hours | Days | Total | | Hours | Days | Total | |
| 24 | 3 | 72 | Regular \$ 319.00 | 12 | 3 | 36 | Regular \$ 261.00 |
| | | | Time and a Half \$ 304.00 | | | | Time and a Half \$ 0.00 |
| | | | Total Weekly Wages \$ 623.00 | | | | Total Weekly Wages \$ 261.00 |
| Converted Live-in Daily Rate | | \$ 207.00 | | Hourly Translation: \$ 7.25 per hour | | | |
| Illustration 3: Live in Working 4 days per week | | | | | | | |
| Hours | Days | Total | | Hours | Days | Total | |
| 24 | 4 | 96 | Regular \$ 319.00 | 12 | 4 | 48 | Regular \$ 290.00 |
| | | | Time and a Half \$ 565.50 | | | | Time and a Half \$ 87.00 |
| | | | Total Weekly Wages \$ 884.50 | | | | Total Weekly Wages \$ 377.00 |
| Converted Live-in Daily Rate | | \$ 221.13 | | Hourly Translation: \$ 7.85 per hour | | | |
| Illustration 4: Live in Working 5 days per week | | | | | | | |
| Hours | Days | Total | | Hours | Days | Total | |
| 24 | 5 | 120 | Regular \$ 319.00 | 12 | 5 | 60 | Regular \$ 290.00 |
| | | | Time and a Half \$ 826.50 | | | | Time and a Half \$ 217.50 |
| | | | Total Weekly Wages \$ 1,145.50 | | | | Total Weekly Wages \$ 507.50 |
| Converted Live-in Daily Rate | | \$ 229.10 | | Hourly Translation: \$ 8.46 per hour | | | |
| Illustration 5: Live in Working 6 days per week | | | | | | | |
| Hours | Days | Total | | Hours | Days | Total | |
| 24 | 6 | 144 | Regular \$ 319.00 | 12 | 6 | 72 | Regular \$ 290.00 |
| | | | Time and a Half \$ 1,087.50 | | | | Time and a Half \$ 348.00 |
| | | | Total Weekly Wages \$ 1,406.50 | | | | Total Weekly Wages \$ 638.00 |
| Converted Live-in Daily Rate | | \$ 234.42 | | Hourly Translation: \$ 8.86 per hour | | | |
| Illustration 6: Live in Working 7 days per week | | | | | | | |
| Hours | Days | Total | | Hours | Days | Total | |
| 24 | 7 | 168 | Regular \$ 319.00 | 12 | 7 | 84 | Regular \$ 290.00 |
| | | | Time and a Half \$ 1,348.50 | | | | Time and a Half \$ 478.50 |
| | | | Total Weekly Wages \$ 1,667.50 | | | | Total Weekly Wages \$ 768.50 |
| Converted Live-in Daily Rate | | \$ 238.21 | | Hourly Translation: \$ 9.15 per hour | | | |

In summary, the wage and hour laws are quite complicated. In order to minimize risk, all household employers should not employ anyone without a signed and binding employment agreement. This document can eliminate ambiguity and aid in the defense of legal claims by documenting the terms and conditions of the household employee's employment. Among other things, this document should clearly spell out that the position is "employment-at-will" and may be terminated at any time. Any additional worker benefits such as sick and vacation pay should also be indicated.

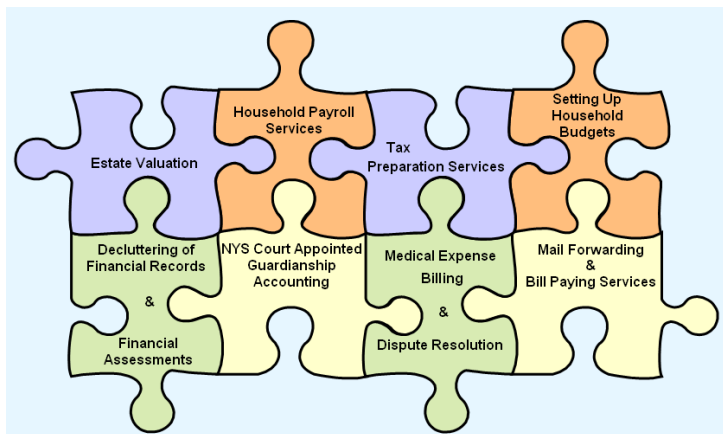
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About Redlig Financial Services LLC:

Redlig Financial Services LLC is a family run business that caters to the needs of busy families, small businesses, expatriates and the elderly throughout the New York area. We provide a wide range of personal assistance to clients, who want help with their financial affairs, or those of a loved one. These services include household payroll, tax preparation, daily money management and bill paying, medical expense billing and dispute resolution, and all other aspects associated with paperwork and family finances.

Our payroll system is unique and one of a kind. Unlike others, this is specifically designed for households and automates all aspects of the payroll process. With consistent and frequent communication, we convert everything to electronic instructions, from direct deposit and direct withdrawal of funds as well as monthly and quarterly tax payments and forms. This translates into value added services and minimal paperwork and time on your behalf.

Serving our client's personalized needs is all part of our role as Trusted Financial Advisor. While our services are broad and diverse, it is purposely designed to meet the needs of complicated and changing family financial issues. Our business model is built around picking the right services at the right time seamlessly.



For more information about Redlig Financial Services LLC, please feel free to contact me directly via email at egilder@redlig.com.

Disclaimer: This article is not designed to provide legal advice concerning any specific situation. Household employers are urged to consult their labor and employment law counsel regarding specific situations and issues.

[1] See FLSA §13(a)(15), 29 USC §213(a)(15) (emphasis added), available at http://www.law.cornell.edu/uscode/html/uscode29/usc_sec_29_00000213----000-.html.

[2] See 29 CFR §552.3 (emphasis added), available at http://www.dol.gov/dol/allcfr/Title_29/Part_552/29CFR552.3.htm

[3] See 29 CFR §552.3 (emphasis added), available at http://www.dol.gov/dol/allcfr/Title_29/Part_552/29CFR552.3.htm

[4] See 29 CFR §552.6 (formatting added), available at http://www.dol.gov/dol/allcfr/Title_29/Part_552/29CFR552.6.htm.

[5] See 29 CFR §552.109(a), available at http://www.dol.gov/dol/allcfr/Title_29/Part_552/29CFR552.109.htm.

[6] See <http://www.dol.gov/whd/regs/compliance/whdfs25.pdf>

[7] See 29 CFR §552 at http://www.dol.gov/dol/allcfr/Title_29/Part_552/toc.htm

[8] See FLSA §13(b)(21), 29 USC §213(b)(21) ("any employee who is employed in domestic service in a household and who resides in such household"), available at http://www.law.cornell.edu/uscode/html/uscode29/usc_sec_29_00000213----000-.html ; see also 29 CFR 552.102, available at http://www.dol.gov/dol/allcfr/Title_29/Part_552/29CFR552.102.htm

[9] See Bill Number S2311E is available at <http://open.nysenate.gov/legislation/bill/S2311E>.

[10] See N.Y. Lab. Law § 2 (2010) (amendment adding subdivision 16 of § 2 of Article I).