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Becky Raizman,
Esq.

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California and the Federal Government Changing Together: Wage and Hour Protections for Domestic Workers

By **Becky Raizman**

"As California goes, so goes the nation," a familiar phrase in the Golden State proclaims, as in a number of areas changes in the California employment law landscape have predated or portended similar changes at the federal level or in other states. A recent example involves the home healthcare industry, which continues to grow in light of the country's aging baby-boomer population and as more Americans are opting to remain in their homes with long-term care services instead of utilizing nursing homes or other residential care facilities. Concurrently, a movement to extend wage and hour law protections to domestic workers in California and nationwide has emerged to bring these workers, the majority of whom are women and minorities, under state and federal labor law regulation.

Although California's Industrial Welfare Commission Wage Order No. 15-2001 ("Wage Order") regulates the wages, hours, and working conditions for household occupations, domestic workers have traditionally been excluded from most of the Wage Order's protections, such as overtime premiums and meal and rest breaks. However, effective January 1, 2014, the California Domestic Worker Bill of Rights ("AB 241") will regulate the hours of work of certain domestic employees and provide overtime compensation for any hours worked over 9 hours per day and 45 hours per week. The new provisions are encompassed in sections 1450 through 1454 of the California Labor Code, defining domestic work as "services related to

the care of persons in private households or maintenance of private households or their premises." Such occupations, now brought under the coverage of the Wage Order, include house cleaners; housekeepers and maids; childcare providers such as nannies; and caregivers of elderly, disabled, convalescing, and sick persons.

However, the new law applies only to domestic workers who are also personal attendants - that is, persons employed by a private household or by a third-party employer to work in a private household; to supervise, feed, or dress a child; or to supervise someone of advanced age, physical disability, or mental deficiency. The law applies so long as "no significant amount of work" other than personal attendant work is required, meaning the personal attendant is spending no more than 20% of his or her total weekly hours working on tasks other than those personal attendant-categorized tasks.

Employers should take note that the Domestic Workers Bill of Rights extends to private households or their agents, including third-party employers who control the wages, hours, or working conditions of domestic work employees. Residential facilities providing board or lodging for the elderly, for example, are not covered. Caregivers employed under In-Home Supportive Services ("IHSS"), a federal and state-administered program, are not covered. Casual babysitters, including babysitters under age 18, also are not contemplated for coverage, unless they do a "significant amount of work other than supervising, feeding, and dressing a child." Cal. Labor Code 1451(b)(2)(D).

Earlier attempts to enact a Domestic Worker Bill of Rights included a greater scope of protections under California's labor laws, including provisions for meal and rest breaks. The current law provides only for employees' rights regarding hours and overtime pay. There is no provision in the new legislation for double time for hours worked in excess of 12 hours per day or on seventh day premiums, unlike many of the Wage Orders regulating other industries. The law also has a "sunset clause," which provides the Legislature three years, until January 1, 2017, to extend or modify the provisions. The sunset clause takes into account the law's mandate for a committee of personal attendants, employers, and their representatives to study and report on the effects of the act. The law's proponents are expected to add some of the rejected provisions to the law over the coming years.

Along with the change in California law, the United States Department of Labor has also modified domestic work regulations under the Fair Labor Standards Act ("FLSA"), effective January 1, 2015. The agency's Final Rule, published in the Federal Register on October 1, 2013, and codified at 29 C.F.R. 552 *et seq.*, narrows the overtime exemption for "companionship services" through both the

definition of the term itself and to whom the exemption applies. First, "companionship services" now focus on "the provision of fellowship and protection for an elderly person with an illness, injury, or disability who requires assistance in caring for himself or herself," which means engaging individuals in social, physical, and mental activities and accompanying them outside of the home to monitor their safety and well-being. This revised definition does not contemplate nursing or medical care. However, the FLSA rule also provides a 20% allowance for "provision of care" other than companionship services.

Similar to the California law, the allowance applies so long as the provision of care does not exceed 20% of the total hours worked per person and per workweek. Second, companionship and live-in domestic service employees can only be individual, family, or household members. The rules specifically exclude employees of third-party employers, even when the employee is jointly employed by a third-party employer and the individual, family, or household using the services. Live-in domestic service workers employed by an individual, family, or household continue to be exempt from overtime pay, but those workers who are solely or jointly employed by a third-party employer must be paid overtime. These employers must also maintain an accurate record of live-in domestic service workers' hours. More information on the FLSA changes can be found at www.dol.gov/whd/homecare.

Employers subject to the new provisions under California's Domestic Worker Bill of Rights must consider how the regulations will impact their current childcare providers and care-giving arrangements for elderly and disabled individuals, particularly those who may require 24-hour care. Employers will also have to update their payroll practices and, if applicable for third-party employers, their employee handbooks. As for the FLSA companionship services regulation changes, employers will have to evaluate their status as an individual, family, household, or third-party employer and whether or not their status as well as the nature of the services provided to an elderly person are contemplated under the new definition of the overtime exemption for companionship services. Analysis of applicable definitions and exemptions can be extremely nuanced, and the assistance of labor and employment counsel can be of value to employers in navigating these new laws and ensuring compliance in policy and practice.

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