

# Hiring Domestic Help: A Trap for the Unwary

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There are risks when you employ domestic help. When a person brings someone into their home to perform domestic services, there could be an assumption that domestic help is immune from tax laws, wage/hour regulations, etc... Nothing could be further from the truth. In this article, we will discuss commonly used domestic help and corresponding pitfalls.

## **Tax Issues**

In hiring domestic help such as maids, personal attendants, or caregivers consideration must be given regarding proper classification. This applies to any prospective employer of the domestic workers, whether the employer is a family member or a trustee who will be paying for the services.

The first issue: is the domestic worker properly classified as an employee or independent contractor for income tax purposes. Where the domestic worker is hired through an agency, like a nursing service or a maid service, then the hiring party does not need to worry about classification issues, or

wage/hour issues. However, when the worker is hired directly by the family member or trustee, then classification and other issues become implicated.

The classification as an independent contractor or employee affects how federal income tax, Social Security, and Medicare taxes are paid. The classification also affects the workers eligibility for certain federal and state benefits.

If the worker is classified as an employee, then the employer must withhold income taxes, withhold and pay Social Security and Medicare taxes, and other California taxes, and pay state and federal unemployment taxes on the wages paid to the worker. In California, an employer is also required to provide workers compensation coverage.

The law considers many facts in deciding whether a worker is an independent contractor or an employee. The relevant factors are: behavioral control, financial control, and the relationship of the parties. Facts concerning behavioral control show whether the employer has a right to direct or control how the worker does the work. A worker is an employee of a business if the business has the right to direct and control the worker. It does not matter how much control the business actually exercises, just that it has the right to do so.

Facts concerning financial control determine whether there is a right

to direct or control the business part of the work. For the most part, domestic workers do not have significant investment in their work, nor have the opportunity to make a profit, indicating that they are employees.

The IRS has published several rulings in which it held that domestic workers such as caretakers were employees. Therefore, it would be very difficult to argue that certain domestic workers are an independent contractor. On the other hand, workers who perform child care services in the home may not be considered an employee where they have much more control over their work, and bring in their own tools or offer services to the general public. If unusual circumstances exist, a written contract would be necessary to document independent contractor status. Although not determinative, a written contract may show what the employer and the domestic workers intended concerning the responsibility regarding the withholding and payment of taxes.

If the in-home worker is an employee, the employer has a responsibility to withhold, remit, and pay certain taxes if the wages of the caregiver exceed a certain annual amount, currently \$1,900.00. The employer must withhold income tax and the caregiver's portion of Social Security and Medicare taxes.

Also, the employer is responsible for paying Social Security, Medicare, and unemployment taxes on the caregiver's wages. The employer is responsible for payment of the employee's portion of taxes if the employer neglects to properly withhold it from the employee's wages. If wages total \$1,000.00 or more to **all** household employees in any calendar quarter, Schedule H must be filed by the end of the month following the close of the quarter. If the employee earns \$1900.00 or more per year, the employer must give the caregiver a Form W-2, which is a wage and tax statement showing the amount of wages earned and taxes withheld from the employee's pay. An employer does not need to count the wages of household employees where the employee meets a specific exception, such as being the spouse of the employer, being a child under 21 of the employer, if the employee is under 18 years old unless their services are considered to be their principal occupation. (See IRS Publication 926 for Discussion of Taxes and Exceptions).

In California, a household employer must register with the Employment Development Department (EDD) when he/she employs one or more individuals to perform work and pays wages of \$750 or more in a calendar quarter. State Disability Insurance (SDI) must be withheld if the employee is paid at least \$750 per calendar quarter, and, in addition, Unemployment Insurance (UI) and Employment Training Tax (ETT) must be paid

where the wages paid to an employee are at least \$1,000 per calendar quarter.

If a domestic worker is an independent contractor and is paid \$600 or more in one calendar year, then the employer would be required to give the caregiver a form 1099-MISC, which is a miscellaneous income reporting of what has been paid to the caregiver. The worker would be responsible for paying their own income tax and self-employment tax.

### **Wage/Hour Issues**

Under the California Wage & Hour Orders, domestic employees have the same wage/hour rights as any other worker in this State with the exception of babysitters under the age of 18 and the employer's parent, spouse, or child, and "personal attendants." Under California law, a "personal attendant" is defined as someone who works in a private household to supervise, feed or dress a child or anyone that needs supervision because of their age and disability. Typically, nannies, caregivers and other types of workers fall under this classification. Personal attendant duties include activities related to personal care, such as bathing, showering, getting in or out of a bed or chair, and using a toilet. Personal care duties can include other duties that cannot be performed by the person needing care, including assistance in obtaining medical care, preparing meals, managing money, shopping for groceries or personal items, using a telephone

or performing housework. If a personal attendant spends at least 80% of their time engaged in these type of activities, then they are properly classified as "personal attendant."

While personal attendants have historically been excluded from many of California's wage and hours laws, California recently enacted new legislation (effective January 1, 2014), which provides that personal attendants are entitled to overtime premium pay for hours worked over nine (9) in a day, or 45 hours in a week. This new law provides several exclusions to the overtime pay requirement for personal attendants. Most notably, the bill does not provide overtime pay for casual babysitters. A casual babysitter is defined as a person who babysits on an irregular or intermittent basis, and whose vocation is not babysitting. If a babysitter does a significant amount of work other than supervising, feeding and dressing a child, the babysitter will be considered a domestic work employee and will be entitled to overtime pay.

It is also important to note that Domestic employers in California need to comply with existing federal law regulating domestic caregivers. Under the Federal Labor Standards Act (FLSA), employers with non-live-in domestic workers such as nannies, housecleaners, cooks, and other domestic workers who are not caregivers or companions remain responsible for complying with federal overtime rules. These rules require overtime pay of one and one-half times the nanny's

regular rate of pay for all hours worked over 40 in a workweek. Moreover, an employee who provides at-home companionship for adults who cannot care for themselves due to advanced age or physical or mental infirmity remains exempt from the FLSA's minimum wage and overtime requirements, however, the FLSA protections to these workers may be changing in 2015.

The above information serves to highlight just some of the many considerations when looking to employ the services of a domestic worker.

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