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New domestic worker law brings change — and more

By David C. Henderson

Whether wittingly or unwittingly, the state has created a "superclass" of childcare workers with more rights and protections than other groups of employees.

Last July, shortly after former Gov. Deval L. Patrick signed a bill purporting to create for Massachusetts a domestic workers' bill of rights, his press release announced that the new law would "extend basic work standards and labor protections to approximately 67,000 nannies, housekeepers, care givers, and other home workers," and that it would ensure that domestic workers "have the same basic workplace rights that we guarantee other workers in Massachusetts."

The press release may have misled. The most extensive of the new rights, those codified at G.L.c. 149, §§190-191, will not apply to most categories of people generally considered to be domestic workers.

On the other hand, some domestic workers will acquire rights extending beyond those generally held in the state by other employees.

Most of the new law went into effect on April 1. The changes are significant for a number of reasons. Two of them are that new rights, responsibilities and liabilities are being imposed within private homes, and significant means of enforcement are being directed at individuals, families and households that never before have been regulated as "employers."

Bill doesn't create uniform body of rights

Notwithstanding last July's press release, rights created by the legislation vary greatly according to the type of worker, and the most numerous and comprehensive of the rights will be held only by the relatively few who qualify as what may be called a Section 190 childcare worker.

The law's most important definitions are of "employer" and "domestic worker." And while the former definition is expansive, the latter is so curiously narrow that it may shock anyone who has reached a conclusion about the law's coverage based only on press coverage.

With certain exceptions, an "employer" for purposes of G.L.c. 149, §§190-191, is anyone who "suffers or permits" a domestic worker to work within a household. But in far less straightforward terms, a "domestic worker" is defined as:

"an individual or employee who is paid by an employer to perform work of a domestic nature within a household including, but not limited to: (i) housekeeping; (ii) housecleaning; (iii) home management; (iv) nanny services; (v) caretaking of individuals in the home, including sick, convalescing and elderly individuals; (vi) laundering; (vii) cooking; (viii) home companion services; and (ix) other household services for members of households or their guests in private homes; provided, however, that 'domestic worker' shall not include a personal care attendant or an individual whose vocation is not childcare or an individual whose services for the employer primarily consist of childcare on a casual, intermittent and irregular basis for 1 or more family or household members." Emphasis added.

The key definition thus baffles. It roars in like a lion and goes out like a lamb, with three broad exclusions that swallow up most of the nine worker categories that precede them.

An employee cannot be a "domestic worker" for purposes of §§190 and 191 if he or she is (a) a personal care attendant, (b) "an individual whose vocation is not childcare," or (c) "an individual whose services for the employer primarily consist of childcare on a casual, intermittent and irregular basis for 1 or more family or household members."

Conversely, the only employees who will satisfy that definition will be those with childcare vocations who are providing services not "primarily consist[ing] of childcare on a casual, intermittent and irregular basis for 1 or more family or household members."

That narrow definition of "domestic worker" thus flies in the face of broader

statements about the law from its supporters, its legislative proponents and the former governor.

And for some of the reasons explained below, it very likely will surprise many housekeepers, housecleaners, home managers, caretakers, cooks, home companions and others when they learn that they are not covered by the most numerous and salient of the protections.

Rights created for Section 190 childcare workers significant

Those who satisfy the above "domestic worker" definition (otherwise referred to herein as Section 190 childcare workers) will acquire employment rights greater than those held by others. Their employers likewise will acquire responsibilities and potential liabilities that other employers do not face.

Limitations on an employer's ability to terminate employment exemplify the new rights, responsibilities and liabilities. Effective April 1, the doctrine of "employment at will" will provide far less solace to any employer of a Section 190 childcare worker. Reasons include the following:

- Involuntary discharge will require at least 14 days' written notice or a week of severance pay.
- Termination of someone residing in the household will require 30 days' written notice to vacate the premises, and the employer "may then only evict the domestic worker through summary process under the uniform summary process rules."
- If the worker resides in the household and the employer terminates employment without cause, the employer must provide written notice and at least 30 days of lodging, either on-site or in comparable off-site conditions, or severance pay equivalent to average earnings for two weeks.

Even if cause for firing appears obvious, the employer may be wise to consult an attorney first. Consider, for example, the wide range of meanings attributable to the italicized terms in this portion of the new law:

"Neither notice nor a severance payment will be required in cases involving good faith allegations that are made in writing with reasonable basis and belief and without reckless disregard or willful ignorance of the truth that the domestic worker has abused, neglected or caused any other harmful conduct against the employer, members of the employer's family or individuals residing in the employer's home."

Employers of Section 190 childcare workers also will be under special rules relating to work, rest, wages and hours. The special rules include the following:

- A worker working 40 or more hours a week will be entitled to a period of rest of at least 24 consecutive hours in each calendar week and at least 48 consecutive hours during each calendar month, and "where possible, this time shall allow for religious worship."
- A worker will be able to agree to work on a day of rest only if the agreement is in writing and compensation is at an overtime rate.
- When a worker not residing on the employer's premises is on duty for less than 24 consecutive hours, pay will be required for all duty hours.
- When a worker is required to be on duty for a period of 24 consecutive hours or more, all meal periods, rest periods and sleeping periods will count as working time in the absence of a prior written agreement to the contrary.
- The employer and the worker will, with certain limitations, be able to agree to exclude a regularly scheduled sleeping period of not more than eight hours from working time for each 24-hour period.
- The employer will be required to keep a detailed record of wages and hours.
- The employer will be subject to special public and private enforcement of wage and hours laws, including provisions relating to injunctive relief, treble damages and awards of attorneys' fees.
- The worker will be able to request a written evaluation of his or her work performance after three months of employment and annually thereafter, and will be able to inspect and dispute his or her written evaluations under the Massachusetts Personnel Record Act.

An employer of a Section 190 childcare worker also will be under a specially tailored set of non-harassment laws that can be enforced by the Massachusetts Commission Against Discrimination and civil courts. Effective April 1, G.L.c. 149, §191(a) provides as follows:

"It shall be an unlawful discriminatory practice for an employer to: (i) engage in

unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature to a domestic worker if submission to the conduct is made either explicitly or implicitly a term or condition of the domestic worker's employment, if submission to or rejection of the conduct by a domestic worker is used as the basis for employment decisions affecting the domestic worker or if the conduct has the purpose or effect of unreasonably interfering with a domestic worker's work performance by creating an intimidating, hostile or offensive working environment; (ii) subject a domestic worker to unwelcome harassment based on sex, sexual orientation, gender identity, race, color, age, religion, national origin or disability if the harassment has the purpose or effect of unreasonably interfering with a domestic worker's work performance by creating an intimidating, hostile or offensive working environment; or (iii) refuse job protected leave for the birth or adoption of a child by the domestic worker or a spouse under [G.L.c. 149] section 105D."

Conclusion

There are many other parts of the domestic workers' bill of rights that are not mentioned above. The point, however, is that, whether wittingly or unwittingly, the state has created a "superclass" of childcare workers with more rights and protections than other groups of employees, and it has offered little explanation why the same rights and protections were not extended to other domestic workers, as seemingly were promised.

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