

Additional Action Items Pursuant To the New York Domestic Workers' Bill of Rights For Home Care Managers

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by Susan Gross Sholinsky and Peter J. Strauss

As discussed in our firm's recent [Act Now Advisory](#), on August 31, 2010, New York Governor David A. Paterson signed into law A.1470B, the nation's first "Bill of Rights" for domestic workers. Among other things, the Domestic Workers' Bill of Rights, which takes effect on November 29, 2010:

- ❖ adds Section 296-b to the New York State Human Rights Law, which specifically protects domestic workers from unwelcome harassment in a household;
- ❖ amends New York's Labor Law and Minimum Wage Act by: (i) requiring minimum wage and overtime payments for domestic workers, (ii) legislating a "legal day's work," (iii) requiring one day of rest per week (or overtime pay if the worker works on his or her day of rest), and (iv) mandating three days of paid time off after one year of employment; and
- ❖ amends New York's Workers' Compensation Law by extending eligibility for disability benefits to domestic workers who work fewer than 40 hours per week.

Under the new law, a "domestic worker" is defined as a person employed in a home or residence for the purpose of: (a) caring for a child; (b) serving as a companion to a sick, convalescing, or elderly person; (c) housekeeping; or (d) for any other domestic service purpose. Excluded from coverage are those who: (a) work on a "casual basis"; (b) provide "companionship services" and who are employed by third-party agencies; or (c) are related by blood, marriage, or adoption of the employer or of the person for whom the worker is delivering services under a program funded or administered by federal, state, or local government.

While this law does not require changes or obligations on the part of a Professional Geriatric Care Manager ("GCM"), who may assist a client, usually an older, impaired person, in locating and hiring a home care aide or companion by screening candidates and making recommendation, but is not the employer, the law does pose risks worthy of consideration.

For example, in a typical scenario, the GCM's client is an elderly or incapacitated person. The client, or a family member or guardian acting as the client's representative, requests assistance in connection with selecting a qualified home care aide to assist the client with the activities of daily living. The GCM's role may be limited to screening and

matching potential qualified home care aides with the client's particular needs or this task may be one of the GCM's ongoing broader duties. Once a "match" is made, the home care aide enters into an employment relationship with the client directly; the GCM is usually not the "employer."

Could the GCM, however, bear potential liability for any "Bill of Rights" violations committed by the client-employer? Could the home care aide allege "joint employer" liability, claiming that the GCM retained elements of control or supervision over him or her? Further, what duties, if any, arise if the home care aide notifies the GCM that his or her rights are being violated by the client-employer?

Aside from the straightforward overtime and disability benefits requirements under the Bill of Rights, the new law also prohibits unlawful harassment of a home care aide. Specifically, such workers are protected from "unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature" and other harassment based on gender, race, religion, or national origin. What if the elderly or infirm individual suffers from dementia or Alzheimer's, and harasses the home care aide by making inappropriate sexual or racial comments, or exhibits behavior that could be misconstrued? Could such comments or behavior rise to the level of a violation of the law? Because the law has recently been enacted, there is no guidance in the form of case law or jurisprudence.

Because of such risks, however, which could lead to claims being alleged against the GCM, we recommend the following action items -- specifically tailored for the GCM's practice:

- ❖ Provide written notice to the home care aide and the client-employer and the client's representatives of the home care aide's rights under the Bill of Rights.
- ❖ Such notice should include an acknowledgment, which must be signed by both the client-employer or his or her representative and the home care aide, that the client-employer is the home care aide's employer, and not the GCM.
- ❖ Obtain written acknowledgment from the home care aide and client-employer or his or her representative that any perceived or actual violation of the Bill of Rights must be addressed solely by and through the client-employer, and that the GCM is held harmless from any and all claims or liability under the Bill of Rights.

In addition to the above, the Bill of Rights may in fact offer the GCM a business opportunity to offer a new service to her or his clients. If a client-employer receives a complaint of harassment from a home care aide, the client-employer may be required to investigate. It will likely be difficult for the client-employer to be objective in connection with such an investigation (i.e., a complaint that the client-employer's father harassed the home care aide). As such, the GCM may wish to offer to be retained as a third-party neutral investigator and arbiter of complaints of harassment. In this regard, both the domestic worker and the client-employer will have security knowing that harassment complaints will be investigated and resolved in an impartial manner. In connection with such services, however, we would recommend that the GCM receive written

acknowledgment from the complainant (the home care aide), the alleged harasser (if possible) or the client-employer's representative that the GCM is being retained as an investigator and arbiter, and is not an employer of the home care aide.

Similar issues may arise when the client obtains a home care aide through a placement agency or registry. In such a case, the placement agency or registry usually does not perform any ongoing supervisory functions and has little or no involvement in the case. The risk may be that the home care aide may allege that there is some responsibility on the part of the agency to ascertain if the client's home might constitute an environment where violations of the law could occur.

For more information on the New York Domestic Workers' Bill of Rights and the unique compliance issues affecting home care managers, please contact:

[Susan Gross Sholinsky](#)

New York
212/351-4789

sgross@ebqlaw.com

[Peter J. Strauss](#)

New York
212/351-4746

pstrauss@ebqlaw.com

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