

Domestic Worker Legal Advocates Training

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GOLDEN GATE UNIVERSITY

SCHOOL OF LAW

WOMEN'S EMPLOYMENT RIGHTS CLINIC

Kamusta!

Hello!

Hola!

Welcome



Goal:

Deepen our understanding of the law so that we fiercely defend the rights of domestic workers and residential care workers.

Roll call! Who's here
today?



Wage and Hour Violations in both the **Domestic** and **Residential Care** Industries

- Misclassification
- Long Hours, 24 Hour Shifts
- Overtime violations
- Sleep deductions
- Flat Rate
- Lack of Any or Accurate Record Keeping
- No paycheck stubs



**DOMESTIC
WORK**

Wage Order 15 + Labor Code §1450 et seq
(personal attendants)

FACILITY

Wage Order 5 - Public Housekeeping
Industry

FLSA

Provides greater coverage at times +
“Hours Worked” incorporated into WO 5

Pop Quiz





WHO'S GOT MY MONEY

Threshold Question:
Who is the employer?

Shady Employer Tricks to Avoid Payment



- Calling worker an Independent Contractor.
- Admitting the worker is an employee, but not their employee
 - Because they are just the agency (Joint Employer Liability)
 - Because the worker worked at another home (Single Enterprise Theory)
 - Because the home they worked for went bankrupt and shut down (Successor Liability)
 - Because the boss is just an individual and shouldn't be liable himself (Individual Liability)

Response to Worker Being Called an Independent Contractor

“**Employer** “is “any person ..., who directly or indirectly, or through an agent or any other person, employs or exercises **control** over the **wages, hours or working conditions** of any person.” –Wage Order, §2



or



or



“**Employ**” means “to **engage, suffer, or permit to work.**“ – Wage Order, §2

How can the Employer Overcome the Employee Presumption

A worker is presumed to be an employee unless the employer can prove otherwise.

THE ABC TEST

The Hiring Entity must prove all of the following in order to classify a worker as independent contractor:

A: Worker is **free from control**/direction of hiring entity in connection with performance of work; *and*

B: Worker performs work that is outside the hiring company's **usual course of business**; *and*

C: Worker is customarily engaged in an **independently established trade**, occupation, or business of the same nature as work performed for hiring company.

Are Personal Attendants Employees?

Yes if....

Does the person (including corporate officers or executives) or entity directly or indirectly control the **hours, wages, or working conditions?**

OR

Is there a common-law employment Relationship (*Borello* factors)?





or



or



Control over the
wages, hours or
working conditions

- Who hired the worker?
- Who set or negotiated the pay rate?
- Who set the worker's schedule?
- Can the worker decline or reject shifts/clients?
- Who sets the worker's tasks and how the work is performed?
- Who supervises or monitors the worker's performance?
- Who can discipline or fire the worker?

Common-Law Test - *Borello*

Most significant factor is whether the person to whom the services are rendered has control or the right to control both **the work done and the manner and means in which it is performed.**

S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations (1989) 48 Cal. 3d 341, 350-351

Right to discharge without cause (at-will) strong indicator of employment relationship.

Lack of supervision not indicative of independent contractor relationship. Inquiry is whether the hiring entity has the legal right to control the activities.

- *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal. 4th 522
- *Linton v. Desoto Cab Co., Inc.* (2017) 15 Cal. App. 5th 1208



Shady Employer Tricks to Avoid Payment



- Calling worker an Independent Contractor.
- Admitting the worker is an employee, but not their employee
 - Because they are just the agency (Joint Employer Liability)
 - Because the worker worked at another home (Single Enterprise Theory)
 - Because the home they worked for went bankrupt and shut down (Successor Liability)
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Joint Employer

IWC has three alternative definitions for employer. An employer is someone who

- a) exercises control over the wages, hours or working conditions of an employee, *or*
- b) suffers or permits an employee's work, *or*
- c) engages an employee, thereby creating a common law employment relationship.

The IWC statutory language is broader than the common law contractual employment relationship and reaches “situations in which multiple entities control different aspects of the employment relationship.”

– *Martinez v. Combs*, 49 Cal. 4th 35, 59 (2010)



Agencies are Employers unless they prove they are referral agencies....

An agency will not be considered the employer if the agency acts as a referral agency within the meaning of Civil Code §1812.5095, et seq. and complies with specific requirements under the code.

Those requirements include, among other things:

- a signed agency contract with the worker;
- the worker having the right to accept or reject work offered by the agency and to renegotiate the amount paid for services;
- the agency does not direct, control, or supervise the caregiver;
- the agency cannot terminate the caregiver-consumer relationship;
- and the agency discloses to the consumer — orally and in writing — that it is not the employer of the worker referred.

Single Enterprise Theory

Two or more corporate entities can constitute a single enterprise if there is such **unity of interest** and **ownership** among the entities and their officers that it would be inequitable to treat them as separate entities.

Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal. App. 3d 1220, 1249

- ❖ Do the facilities have the same owner(s)?
- ❖ Do the facilities share an administrator?
- ❖ Same decision-maker for all facilities, including personnel matters?
- ❖ Shared control over employees across facilities?
- ❖ Same set of policies, employee handbook for all facilities?
- ❖ Transfer of employees from one location to another?



Successor Liability

Successorship liability is established by showing any of the following criteria:

- (1) substantially the same facilities or the same workforce to provide substantially the same services as judgment debtor;
- (2) has substantially the same owners or managers that control the workers as judgment debtor;
- (3) employs as a managing agent any person who directly controlled the wages, hours or working conditions of the workforce as judgment debtor; or
- (4) operates a business in the same industry and has an owner, partner, officer or director who is an immediate family member of the owner, partner, officer or director of the judgment debtor.

- Labor Code §200.3



Individual Liability

Labor Code §558.1: Imposes individual liability on owners, directors, officers, or managing agent of the employer

Labor Code §1451 - Imposes individual liability on corporate officers or executives [Personal Attendants in the Home]

Labor Code §238.5 - Imposes individual liability for unpaid wages in the long term care industry [includes Residential Care Facilities, Home Health Agency, Home Care Organization]

- Who hired the worker?
- Who set or negotiated the pay rate?
- Who set the worker's schedule?
- Who set the policies and procedures in the company?
- Who supervises or monitors the worker's performance?
- Who can discipline or fire the worker?
- What is the role of this person in the company?



WHO'S GOT MY MONEY

Conclusion:



Who are Domestic Workers?



Domestic workers are nannies, house cleaners, caregivers for seniors, attendants for people with disabilities, cooks, drivers, and gardeners. They are employees who work in private homes across CA.

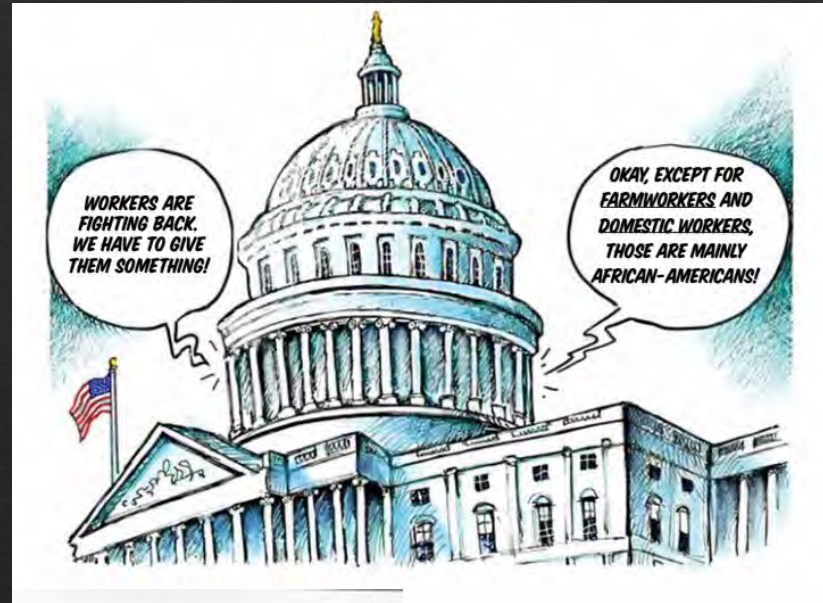
There are
approximately
325,000
employed **domestic**
workers in
California.



A 2015 report on **domestic worker** employers
estimated that 2 million households in the state hire
for domestic work services.

History of Exclusion: Domestic Work

- 1938 US Congress enacted the Fair Labor Standards Act which granted minimum wage and overtime protections to workers. Two key groups of workers were excluded: farmworkers and domestic workers.



- Rooted in legacy of slavery Domestic workers have been advocating to be written back into the fold of labor laws and to defend the value and dignity of their work.



Changes to the Law

- 1976 Household Occupations Wage Order: workers that clean homes and care for property are granted overtime and meal and rest breaks, but the workers that primarily care for people (children, seniors & people with disabilities) are left out. The reason the state gives is that people doing caregiving work do it only for “supplemental income” or as “a source of rewarding activity,” like a hobby.
- 2013 & 2016: Passage of the Domestic Worker Bill of Rights
- Jan. 2015 Paid Sick Leave
- Jan. 2016 Home Care Services Consumer Protection Act & the Creation of the Home Care Services Bureau within



California Bill of Rights

- ❑ In 2013, the California Domestic Workers Coalition won a historic victory with the passage of AB 241 (Ammiano), which extended overtime protections to personal attendants (such as nannies and homecare attendants), on the condition that the law would sunset after three years.
- ❑ In 2016, we came back to the capitol to win legislation, SB1015 (Leyva), making the provisions of AB 241 permanent under state law. SB1015 was signed into law by Governor Brown in Sep 2016.
- ❑ In 2019, after two years of coalition campaigning, Gov. Newsom signed the budget establishing a new Education and Outreach Program within the DLSE to make domestic worker rights real.
- ❑ In 2021, CDWC won the passage of the San Francisco Paid Sick Leave Ordinance, which mandated the creation and use of a Portable Benefits System in order to ensure all domestic workers could access their paid sick leave.



Domestic Worker Profile

- 86% of domestic workers are women and 77% are Latinx, African American, Asian American, and mixed or other races.
- The majority of California domestic workers are born outside of the United States, and more than 8 out of 10 house cleaners are immigrants.
- Many are the primary breadwinners for their families here in the US and/or in their home countries.
- In a 2013 statewide survey 25% of domestic workers reported being paid below the minimum wage. 35% of workers reported that in the past 12 months they were forced to pay their rent or mortgage late and nearly a quarter reported lacking resources to purchase food.



Median Hourly wage in 2018



The need for strategic enforcement

An example from the Office of Labor Standards Enforcement in San Francisco

Estimated Minimum Wage Violation Rates by Industry per 10,000 Workers



Domestic Worker Minimum Wage Violations Reported

ONLY 1 COMPLAINT



Domestic Workers

Wage Order 15 & Labor Code 1450 et seq.



Domestic Workers - at a Glance

Wage Order 15 & Labor Code 1450 et seq.

1. Personal Attendants

2. Companions

4. Live-in Personal Attendants

5. Live-in Non-Personal Attendants

5. Casual Babysitters

Personal Attendant - WO 15, §2(J); Lab. Code §1451(d)

Any worker, including a babysitter, who is:

- Employed by a private householder OR
- By any third party employer recognized in the health care industry to work in a private household, AND
- Spends a significant amount of time supervising, feeding, or dressing a child, seniors or people with disabilities
- Significant amount of time means 80% or more on supervising, feeding or dressing

Personal Attendant – Duties

Caregiving Duties (Supervise, Feed, Dress)	Non-Caregiving Duties (Other Work)
Feeding client	Housecleaning
Bathing client	Cooking
Toileting	Laundry
Transferring	Making beds
Direct Supervision of client (monitoring clients, help with activities of daily living)	Other duties related to maintain household (e.g. gardening, pet care)
Time Spent: 80% or more of total worktime in workweek	Time Spent: 20% or less of total work time in workweek
Employee works 40 hours in week and spend 32 hours or more on caregiving tasks = Employee is personal attendant.	Employees works 40 hours in a week and spends more than 8 hours on non-caregiving duties = Employees is NOT a personal attendant.

SAMPLE – CAREGIVER TIMESHEET

Should fill out weekly with exact hours

Employee Name: _____

Week of	Time In	Time Out	Meal Period Time out	Meal Period Time In	Total Daily Hours
Sunday					
Monday					
Tuesday					
Wednesday					
Thursday					
Friday					
Saturday					
Total Hours					

Housekeeping Task	Weekly Total Amount of Time
Laundry	
Cooking	
Cleaning	
Gardening	
Other Housekeeping tasks	

I certify that the above record is true and correct.

Date

Employee Signature

*****To Be Completed By the Employer*****

Rate: \$	Total Hours Worked	Pay Owed
Regular		
Overtime (1.5x)		
Double Time (2x) (depends on applicable law)		
TOTAL PAY		
	Accrued this week	Used this week
Paid Time Off (<i>vacation, holidays</i>)		
Paid Sick Time		
Balance		

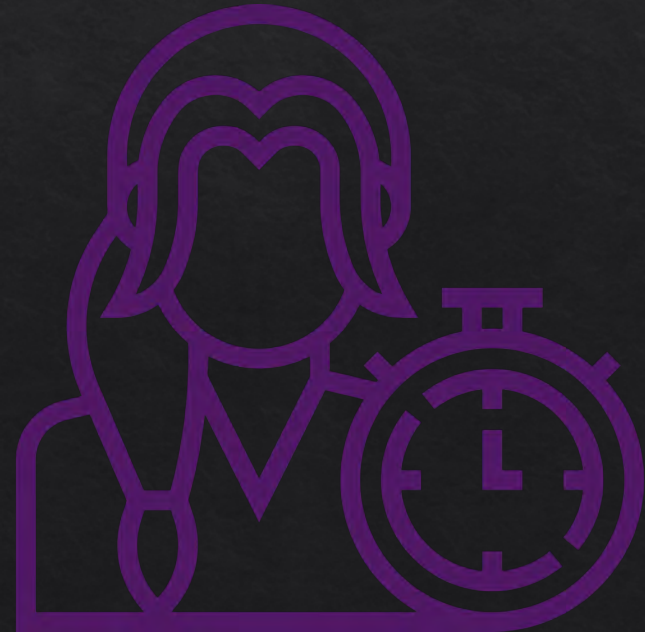
**Personal
Attendant
Duties**

Personal Attendant OT - DWBR

Effective January 1, 2014, personal attendants are entitled to overtime

- **1.5 x regular rate of pay for work over 9 hours in a day**
- **1.5 x regular rate of pay for work over 45 hours in a week**

AB 241 is codified at Labor Codes §1450-1454.



Personal Attendant OT Exemptions

1. Provide services through In Home Support Service (IHSS)
2. Provide services where payment comes from a regional center or through the Department of Developmental Services (DDS)
3. Provides care to a family that receives funding from the Child Care and Development Services Act or California Work Opportunity and Responsibility to Kids Act
4. Casual babysitters and babysitters under the age of 18
5. Employer's parent, grandparent, spouse, sibling or child



Personal Attendant General OT Rules

- Under state law, personal attendants are entitled to overtime at 1.5 x the regular rate after 9 hours a day and after 45 hours in a week.
- Under federal law, if they are not exempt under FLSA, a personal attendant is also entitled to overtime after 40 hours a week.
- **Most personal attendants, thus, are entitled to overtime at 1.5 times the regular rate after 9 hours a day and after 40 hours in a workweek.**

Exceptions apply. See Flowchart and [CDWC Overtime Tool](#).



Personal Attendant Coverage - WO 15

- Personal Attendants under WO 15 are entitled to MW and covered by the food and lodging credits only.
- Personal attendants were originally excluded from overtime protection but the Domestic Worker Bill of Rights, AB 241, extended overtime protection to personal attendants, effective 2014
- Personal Attendants are excluded from all other provisions of WO 15 including meal & rest breaks



Companion OT Rules

- A direct hire companion is entitled to state minimum wage and overtime laws.
- Under state law, there is no corresponding category for “companion.”
- Most likely a companion will be considered a personal attendant under state law and if not exempt, entitled to 1.5 times the regular rate after 9 hours in a day and after 45 hours in a week.



Live In Employees

- A domestic worker who is a direct hire live-in employee and not a personal attendant is entitled to overtime at 1.5 times the regular rate after 9 hours in a day and on the sixth and seventh consecutive day, 1.5 times the regular rate for the first 9 hours and double time after 9 hours.
- A domestic worker who is a direct hire live-in employee and a personal attendant is entitled to overtime at 1.5 times the regular rate after 9 hours in a day and after 45 hours in a week.

*Exceptions apply.



FLSA Exemptions - Direct Hires Only

Companions: Exempt from federal OT and MW

Provides fellowship and protection to older adults, people with disabilities such as playing games, conversation, accompanying on walks, errands

Directly hired by family or person receiving services

Cannot spend more than 20% of the total work time on activities or instrumental activities of daily living such as dressing/ grooming, light housework, transferring, meal preparations

Live-In Employees: Exempt from federal OT

A domestic worker who resides in the home where they are employed and is directly hired by the family or person receiving services



Casual Babysitters: Federal & DWBR

Casual babysitter defined as employment that is irregular or intermittent, and which is not performed by an individual whose vocation is babysitting. 29 C.F.R. §552.5; Lab. Code §1451(b)(2)(D)

Exempt from federal minimum wage and overtime and exempt from personal attendant overtime rules.

- A casual babysitter who is NOT a personal attendant and not a live-in is entitled to overtime at 1.5 times the regular rate after 8 hours a day and after 40 hours a week, double time after 12 hours a day and after 8 hours on the 7th consecutive day in a week.

Babysitters under the age of 18 of a minor child are exempt from state minimum wage and overtime. - Wage Order 15, §1(B).

Hypo 1

- The worker works in a private home and is a personal attendant – meaning they spent 80% or more of their time providing direct care.
- The worker is not a close family member.
- The person receiving the care or their family member directly hired the worker.
- The Employer is not receiving funding from In Home Support Services or through a regional center/Dept. of Social Services to pay the worker.
- The worker lives in the home where the care is provided.

What is the applicable overtime?

Use this CDWC Overtime tool to find the answer: [CDWC Overtime Tool](#).



Answer to Hypo 1

The worker is entitled to overtime after 9 hours in a day or over 45 hours in a week.

Worker is exempt from federal FLSA because they are a direct hire live-in employee



Hypo 2

- The person receiving care or their family member directly hired the worker.
- The worker is a personal attendant – they spent 80% or more of their time providing direct care.
- The Employer is not receiving funds from In Home Support Services or through a regional center/Dept. of Social Services to pay the worker.
- The worker is not a close family member.
- The worker DOES NOT live in the home.

What is the applicable overtime?

Use this CDWC Overtime tool to find the answer: [CDWC Overtime Tool](#).



Answer to Hypo 2

The Worker is entitled to overtime after **9 hours in a day and after 40 hours in a week.**

Because the worker is not a live-in domestic worker, they are no longer excluded from the federal overtime protection and the employer must comply with both daily overtime under the DWBR and the weekly overtime under FLSA.

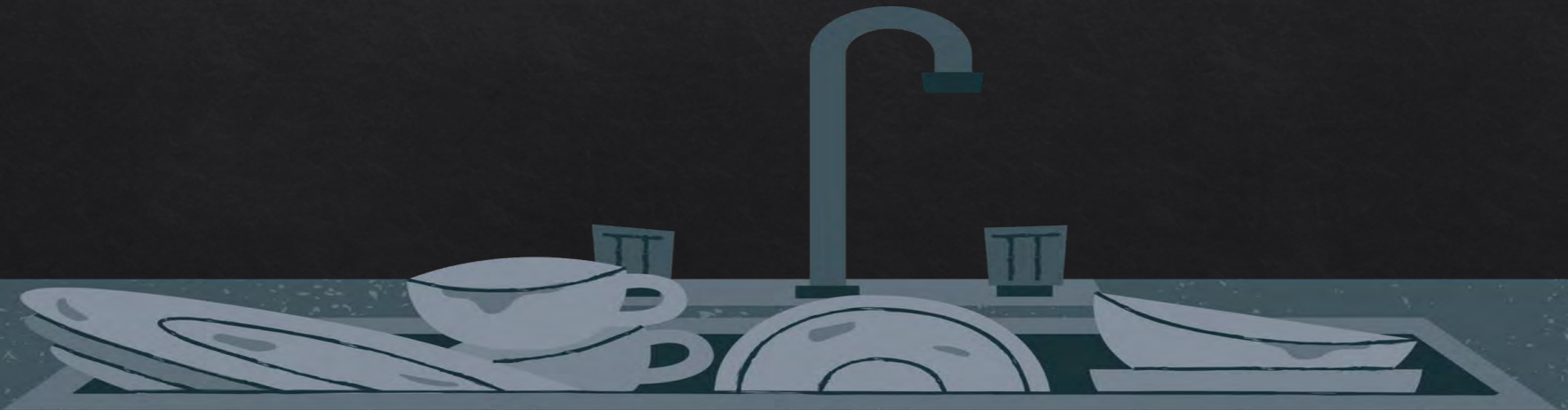


Hypo 3

- The worker is a caregiver but spends more than 20% of their work time on housekeeping tasks such as cleaning, laundry, cooking.
- The worker is not a live-in worker.
- The worker is hired by a care agency and placed in a private home.
- The worker is not a close family member of the person receiving care.

What is the applicable overtime?

Use this CDWC Overtime tool to find the answer: [CDWC Overtime Tool](#).

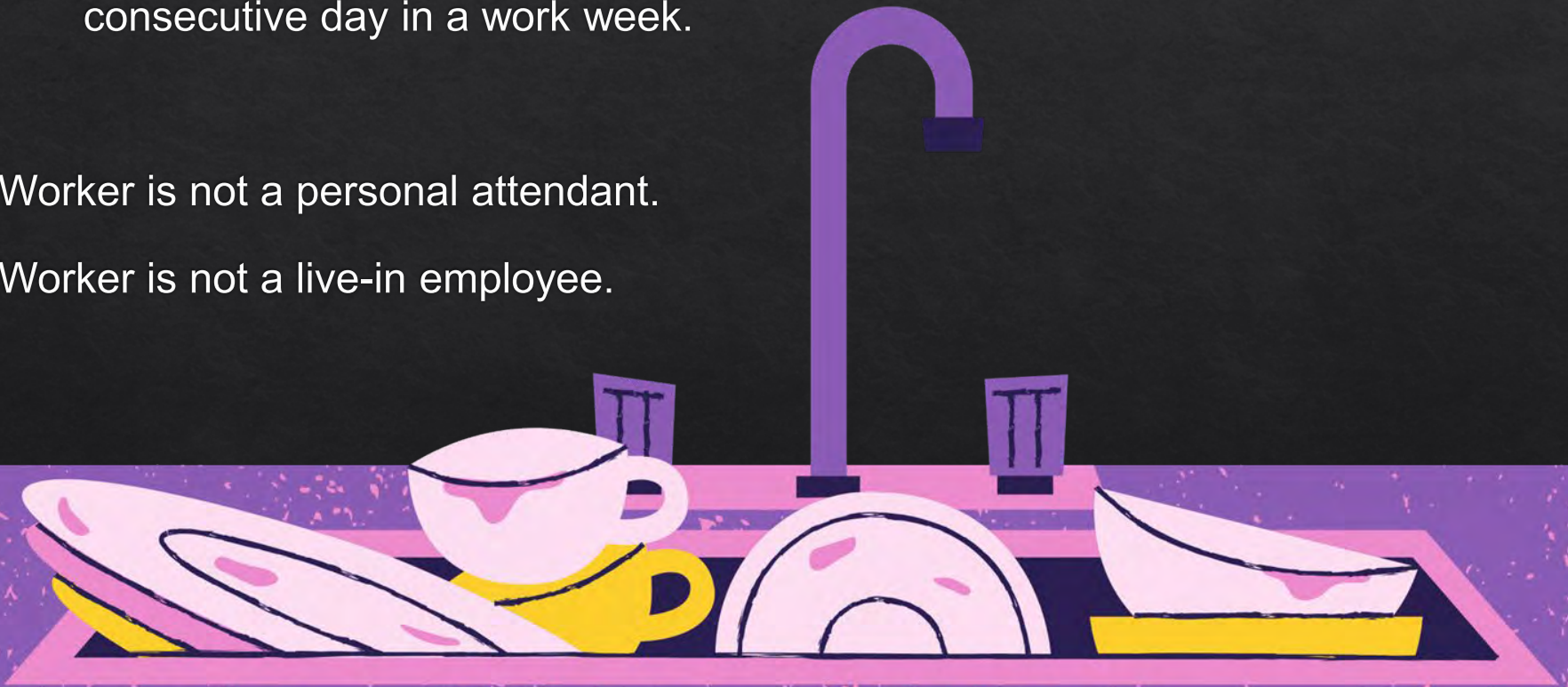


Answer to Hypo 3

- Overtime after 8 hours in a day, or more than 40 hours in a week.
- On the 7th consecutive workweek, overtime for the first 8 hours worked.
- Double time after 12 hours in a day and more than 8 hours on the seventh consecutive day in a work week.

Worker is not a personal attendant.

Worker is not a live-in employee.



Hours Worked - Sleep

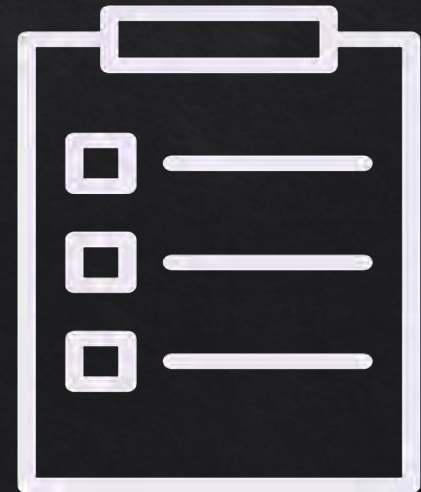
- Section 2 (H): Time during which an employee is subject to control of an employer and includes all time the employee is suffered or permitted to work, whether or not required to do so.
- Absent express language, sleep time cannot be excluded from hours worked for 24-hour shift workers. *Mendiola v. CPS Security Solutions (2015) 60 Cal.4th 833*
- No express sleep exclusion under WO 15
- WO 15 legislative history shows that IWC considered adding sleep exclusion but ultimately did not.

Meal and Rest Breaks

- All domestic workers except for personal attendants have the right to:
 - A 30 minute unpaid meal break for work periods more than 5 hours; a second meal period of 30 minutes for shifts more than 10 hours in a day. You can give up your 1st meal period if you work a total of 6 hours per day or less.
 - 10 minute paid rest breaks: you should receive 10 minute rest periods for shifts from 3.5 to 6 hours, 20 minute total rest periods for shifts of 6 to 10 hours, and 30 minute total rest periods for shifts of 10 to 14 hours.
 - Employers must pay 1 additional hour of pay at the employee's 'regular rate of pay' for each work day that there is a rest or meal break violation.

Record-Keeping

- WO 15 requires all domestic employers, except those who employ personal attendants, to keep time records and furnish a itemized wage statement.
- Labor Code 226(d) exempts direct hire domestic service employers from the record keeping requirement under §226.



Domestic Workers – Cheat Sheet

Wage Order 15 & Labor Code 1450 et seq.

1. Personal Attendants	<ul style="list-style-type: none">• No more that 20% spent on non-caregiving activities• O/T after 9 hrs/day (state) and 40 hrs/week (fed)
2. Companions	<ul style="list-style-type: none">• No more than 20% on care activities<ul style="list-style-type: none">• Not covered under FLSA• O/T after 9 hrs/day and 45 hrs/week (state) if personal attendants
4. Live-in Personal Attendants	<ul style="list-style-type: none">• Direct hires not covered under FLSA• O/T after 9 hrs/day and 45 hrs/week (state)
5. Live-in Non-Personal Attendants	<ul style="list-style-type: none">• Direct hires not covered under FLSA• O/T after 9 hrs/day and first 9 hrs on 6th or 7th consecutive day
5. Casual Babysitters	<ul style="list-style-type: none">• Personal Attendant - no O/T, gets minimum wage• Non-Personal Attendant – O/T after 8 hrs/day and 40 hrs/week



Residential Care Facility Workers

IWC Wage Order 5

Residential Care Industry



RCFE WORKER PROFILE

- 81% of RCFE workers are women.
- 80% are POC (Latinx, African American, Asian American, and mixed.)
- 46% are born outside of the United States.
- The average age is 42 years old.
- Many are the primary breadwinners for their families here in the US and/or in their home countries.
- 81% of RCFE workers earn low-wages despite working full-time, throughout the year.



Wage Order 5 – “Public Housekeeping”

- Caregivers in Facilities, e.g. Hospitals, rest homes, homes for the aged.
- Residential Care Facilities -- Residential Care Facilities for the Elderly, Adult Residential Care Facilities
- Housecleaners employed by cleaning agencies.



Hours Worked



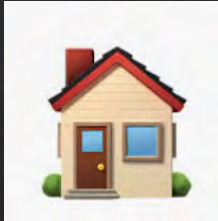
WO 5 has 3 distinct definitions for hours worked.

For employees working in residential care facilities, FLSA (federal) definition of hours worked apply.... aka “suffered or permitted to work.”

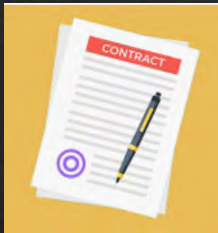
BUT....

Requirements to Determine Hours Worked for Live-In Workers

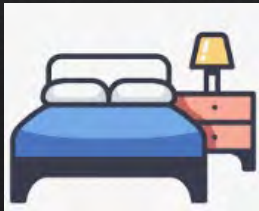
29 C.F.R. §785.23



1. Lives on the Premises
At least 5 days - 120 hours.



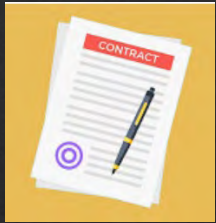
2. Reasonable Agreement
 - A written or oral agreement, express or implied
 - Entered into in advance.
 - Must be realistic, take specific work site factors into consideration, and pay for all hours worked, including nightly interruptions.



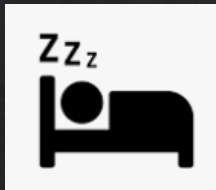
3. Private place for sleep.

Then, does not have to be considered working all of the time on the premises.

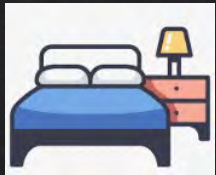
Sleep Time Deduction for Live-In Emp. if:



1. Both parties agree in advance (written/oral, express/ implied)



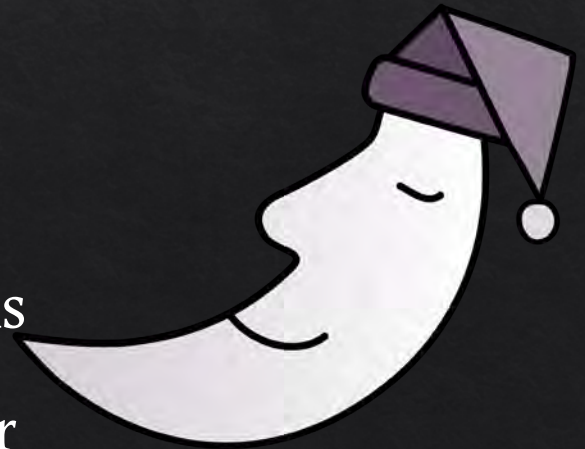
2. The worker generally gets at least 5 hours of total sleep.



3. Adequate sleeping facilities with private quarter in a home-like environment

Then:

- Can deduct up to 8 hours
- Employees paid for all interruptions
- If the employee didn't get at least 5 net hours of sleep, no deduction for that night.



Other Deductions for Live In Employee

- 30-minute meal period - even if worker has to remain on-site
- Any time that the employee is completely free from duty and can leave the premises (whether or not they do).

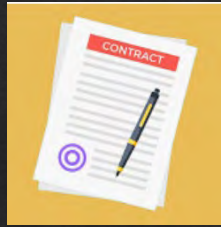


Requirements to Determine Hours Worked for 24 Hour Shift Workers

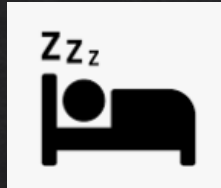
29 C.F.R. §785.22



1. Works at least 24-hour shifts



2. Reasonable Agreement



3. **Adequate sleeping facilities are provided (does not need to be a private room).**

Then, does not have to be considered working all of the time on the premises and can deduct up to 8 hours sleep time under the same rules.

Hypo 4: What are the hours worked?

Employee works in residential care facility

Works three days a week, 24 hour shifts. Starts work at 6 a.m.

The residents go to a day program for 3 hours in the day from 9 a.m. to 12 p.m.

Employee believes she needs to stay on site during this time, while her employer states that she is free to leave. She has no car. Other employees who work alongside Employee state that they regularly leave the premises during this time. For two of the hours, she naps and reads. The other hour she is cleaning and preparing the residents' lunch.

The residents come back at noon and stay on the premises. Employee is working or providing general supervision.

After residents go to bed at 7 pm, Employee goes to the staff room, watches tv and/or reads a book, cannot leave the premises and must attend to any needs the residents have.

At night, there are sometimes interruptions. Employee gets up approximately once or twice a week for about an hour to help residents at night and gets paid for those interruptions.

Analysis of Hypo 4

24-Hour shift worker - 29 C.F.R. §785.22

6 a.m. to 9 a.m. – 3 hours compensable

11 a.m. to 7 p.m. – 8 hours (9 a.m. to 11 a.m not compensable as the evidence shows that she was free to leave the premises.)

7 p.m. to 9 p.m. – 2 hours (not free to leave premises and on-call)

9 p.m. to 6 a.m.: 1 hour (Only up to 8 hours can be deducted)

14 HOURS WORKED

Assuming:

- Gets at least 5 hours sleep + Paid for Interruptions
- Adequate Facilities for sleep
- Reasonable Agreement

Hypo 5: Hours Worked

- Same hypo, but live-in employee – what changes?

Analysis of Hypo 5

Must provide adequate sleeping facilities in a home-like environment.



Regular overtime rules applies except:

Personal
Attendants in
Non-profit
Facility

AND

Resident
Managers for
Homes of the
Aged with less
than 8 beds



Exempt from
Daily
Overtime

Entitled to
weekly
overtime (over
40 hours or on
7th day)

UNLESS

Regularly
works
more
than 40
hours or
6 days

Meal and Rest Breaks

- On-duty meal periods ok when “necessary to meet regulatory or approved program standards” and one of the following two conditions is met:
 - (a) Employees eat with the residents during the residents’ meals and are provided with the same meal at no charge; or
 - (b) The employee is in sole charge of the residents and is provided with a meal at no charge on the day shift.
- Employees may be required to remain on the premises and maintain general supervision of residents during rest periods, without penalty if the employee is in sole charge of the residents.



WO15 v. WO5 for Caregivers

At a Glance

WO 15 for Personal Attendants

- Overtime after 9 hours in a day and 40 hours in a week
- Sleep time cannot be excluded if the caregiver must remain on the job site.
- Personal attendants are not covered by meal and rest break laws.

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- Regular overtime rules, with some exceptions.
- 24 hour shift/live-in caregivers can deduct up to 8 hours of sleep under certain circumstances
- Caregivers are entitled to meal and rest break laws with some exceptions

Closing

MCLE Evaluation