

Need Help? Legal Issues When Hiring Caregivers

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With Baby Boomers starting to turn 65 in 2011,¹ twenty percent of the U.S. population is likely to be at least 65 by the year 2030. As their health starts to decline, many will need long-term assistance performing the activities of daily living (*e.g.*, meal preparation, laundry, bathing, hygiene). If they do not qualify for Medicare or Medicaid, which is probable, these older Americans must obtain services at their own expense or rely on their families for help.

There are many legal issues to consider when hiring caregivers. Individuals who hire caregivers without understanding the legal ramifications may be shocked to find themselves liable for unpaid wages, taxes, unemployment contributions and, if the caregiver is injured, medical and other expenses. Some of these pitfalls may

be avoided by hiring a caregiver through an agency. A few of these issues are discussed below.

Who's the Boss?

The nature of the relationship between the parties dictates whether a worker is an employee or independent contractor. To qualify as an independent contractor, the worker must typically operate an independently established business that performs the same type of service for multiple clients during the year. The most critical factor indicative of an employment relationship is the right to direct and control the work. Although an agency would qualify as an independent contractor, an individual worker who provides the care most likely would not.

Do Wage and Hour Laws Apply?

Caregivers who work in the private homes of their clients are considered "domestic workers." Domestic workers who do not qualify as independent contractors must be paid in accordance with applicable wage and hour law.

Federal law exempts from minimum wage and overtime requirements domestic employees who provide "companionship services," defined as "fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs." Such services may include general household work related to the care of the aged or infirm person, so long as

the work does not exceed 20 percent of the caregiver's total weekly hours.² The term does not include care for which specialized training is required (*e.g.*, skilled nursing care). The companionship exemption applies whether or not the employee is hired by an individual or a third-party agency. Oregon has a similar exemption from minimum wage and overtime requirements for companionship services,³ but Washington does not.

Federal, Oregon and Washington law all exempt from overtime domestic workers who reside in the private home of the employer.⁴ The live-in exemption can extend to nurses and other trained professionals not covered by the "companionship" exemption. Caregivers who do not qualify for the live-in exemption must be paid minimum wage for all hours worked, plus applicable overtime.

The employer and caregiver may agree on the amount of sleeping time, meal time, and other periods of free time that will not be counted as "hours worked." Employers may also deduct from compensation the reasonable cost or fair value of food, lodging, and other facilities customarily provided to the employee.

Workers' Compensation

Oregon and Washington law exempt most employers of domestic workers from providing workers' compensation insurance,⁵ which covers medical expenses and lost

wages resulting from on-the-job injuries. While providing coverage is not mandatory, it may be prudent, particularly if the duties of the job are physically demanding. In the absence of workers' compensation coverage, an employee injured on the job can sue the employer for negligence.

Record keeping and Tax Issues

Employers are generally required to maintain employment records that include the precise number of hours the employee worked each day. A written agreement documenting the agreed upon time a live-in caregiver is on- and off-duty may be used in lieu of maintaining records of the hours worked. If the caregiver does not qualify under the live-in exemption, the employer must maintain accurate records of all hours worked.

Employers must withhold and pay applicable Social Security, unem-

ployment, and payroll taxes.⁶ To facilitate payment of these taxes and, in some cases, workers' compensation premiums, employers must obtain federal and state employer identification numbers and file quarterly tax and payroll reports.

Hire Direct or Through an Agency

Complying with all the responsibilities of an employer can be daunting. Consequently, many people turn to agencies to supply the caregivers to work in their homes. In addition to record keeping, reporting, and tax compliance, agencies may also provide background checks on workers, regular supervision, and substitute workers in the case of an absence or poor performance. For those willing to hire directly, it is a good idea to have an attorney and accountant on board from the outset to help with compliance issues.

Stacey Mark chairs both the Labor and Employment Group and the Sustainable Practice Advisory Group. She focuses her employment practice on developing strategies that enable employers to meet their legal obligations in ways that promote their overall business objectives. She can be reached at 503-226-8612 or sem@aterwynne.com.

¹Federal Interagency Forum on Aging-Related Statistics; http://www.aoa.gov/agingstatsdotnet/Main_Site/Data/2008_Documents/Population.aspx.

²29 U.S.C. §213(a)(15).

³ORS 653.020(14); OAR 839-020-004(11).

⁴29 USC §213(21); 29 CFR 552.102; OAR 839-020-0125(3)(n); RCW 49.46.010(5)(j).

⁵ORS 656.027(1); RCW 51.12.020(1)

⁶For withholding requirements, see Household Employer's Tax Guide for Wages Paid in 2009, <http://www.irs.gov/pub/irs-pdf/p926.pdf>.



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