

3-2-2011

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Recommended Citation

Seville, Marci and Shah, Hina, "Complex Employment Issues in Elder Care" (2011). *Publications*. Paper 186.
<http://digitalcommons.law.ggu.edu/pubs/186>

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Complex Employment Issues in Elder Care

Marci Seville and Hina Shah

2011-03-02 04:01:16 PM

While lawyers often associate estate planning with aging parents, there are, in fact, a host of employment law issues related to elder care that can leave one's head spinning. This article addresses obligations that arise under California law when you or your family members hire caregivers. When hiring a caregiver — either at home or when additional individual care is needed in a facility such as assisted living — you must comply with a complex patchwork of laws and regulations governing wages and working conditions. Usually, California's Industrial Welfare Commission Wage Order 15-2001 applies when hiring a caregiver to work in the home and IWC Wage Order 5-2001 applies when an individual caregiver is needed to work in a facility. The [IWC Wage Orders](#) are regulations governing the working conditions of California employees in specific industries and occupations.

WHO IS THE EMPLOYER?

Initially, you must decide whether to hire the caregiver directly or through an agency. The IWC Wage Orders define "employer" as "any person as defined in §18 of the labor code, 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." "Employ" means "to engage, suffer, or permit to work." This language is purposefully broad and goes beyond common-law employment relationships. In most situations, if you hire the caregiver directly, you will be considered the employer since you will be giving direction and setting the working conditions of the caregiver. Do not assume that the caregiver can be treated as an independent contractor because under California law, workers are presumed to be employees. (See e.g., Cal. Labor Code §§3357, 2750.5)

If you hire a caregiver through a home health agency, rather than hiring the person directly, exercise due diligence in finding out whether the worker is, in fact, the agency's employee. An agency will not be considered the employer if the agency acts as a referral agency within the meaning of Civil Code §1812.500, *et seq.* and complies with specific requirements of Civil Code §1812.5095. 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.

When hiring through an agency, ask the necessary questions. Does the agency withhold payroll taxes, pay into the State Disability and Unemployment Insurance systems and carry workers' compensation insurance? Ask to see the contract between the agency and the caregiver, and carefully read any contract you sign with the agency. Have you received a disclosure that the agency is not the employer? Ensure that you are getting the benefit of that agency relationship. Be aware that the IWC definition of "employer" can reach situations where there are multiple employers (e.g., one entity hires and pays the worker and another entity supervises the work), and you could therefore be considered a joint employer with the agency in some circumstances. (*Martinez v. Combs*, 10 C.D.O.S. 6119)

UNRAVELING THE OVERTIME RULES

To determine the wage and hour requirements for caregivers, first determine which wage order applies. Under all of the wage orders, the employer (whether you or the agency) has discretion to set the hourly rate, provided relevant state or local minimum wage requirements are met. However, the overtime rules differ depending on the applicable wage order and the type of work provided by the caregiver.

PRIVATE RESIDENCE

If you are hiring a caregiver for a private residence (either yours or your elders), Wage Order 15-2001 usually applies. The next inquiry is whether or not the caregiver qualifies as a "personal attendant" under that wage order. Personal attendants must be paid at least minimum wage but are exempt from overtime pay and most other provisions of Wage Order 15-2001. A personal attendant under Wage Order 15-2001 can either be employed directly by the householder or by "a third party employer recognized in the health care industry to work in a private household," such as a home health agency.

To qualify as a personal attendant, the employee must not spend more than 20 percent of total hours worked on duties other than supervising, feeding, or dressing the elder. If the caregiver spends more than 20 percent of her time on general housekeeping duties, she is most likely not a personal attendant and is entitled to overtime, meal and rest breaks, and other protections of Wage Order 15-2001. The determination that a worker is a personal attendant is a fact-intensive inquiry.

Even if the caregiver is a personal attendant excluded from overtime rules, the worker must be paid for all hours that she is under your control, whether or not she is at all times performing work duties. This means that the worker must be paid at her regular hourly rate for all hours she is required to remain at the residence. A live-in personal attendant, who must be "on call" 24 hours a day, must be paid for all 24 hours.

If the worker is not a personal attendant, overtime rules vary depending on whether the caregiver is a "live-in" or not. A "live-in" caregiver, who is not a personal attendant, is entitled to 12 consecutive hours off duty within every 24-hour period, and to three (nonconsecutive) hours off duty during her 12-hour work shift. In other words, she has a nine-hour workday. For any hours beyond nine, she receives 1 1/2 times her hourly rate. If she works on the sixth or seventh day in the workweek, she is entitled to 1 1/2 times her hourly rate for the first nine hours and double time after nine hours.

A "non live-in" caregiver, who is not a personal attendant, is entitled to the same overtime pay as most other workers, which is the overtime specified in Cal. Labor Code §510: 1 1/2 times the hourly rate after eight hours per day or 40 hours per week and double time after 12 hours. On the seventh day in a workweek, the worker earns time and a half the hourly rate for the first eight hours and double time after eight hours.

In case the rules are not yet complicated enough, you need to be aware that only third-party agency employers recognized in the health care industry that send personal attendants to your home come under Wage Order 15-2001. So, if you hire someone through an agency to do 50 percent general housekeeping and 50 percent caregiving duties, the person likely will not be a personal attendant and the employment relationship will be governed by IWC Wage Order 4-2001.

FACILITIES

Wage Order 5-2001 governs a caregiver hired to help an elder in assisted living or another type of facility outside the home. The need for an individual caregiver in a facility might arise when an elder in assisted living has a decline in health that requires extra care beyond the level available at the facility. Most likely, this caregiver would be hired through a home health care agency.

Under Wage Order 5-2001, "personal attendant" is defined more narrowly than in Wage Order 15-2001: The worker must be hired by a nonprofit to supervise, feed or dress the elder. If the employing agency is a nonprofit entity and the caregiver meets the definition of a personal attendant, special overtime rules will apply. If the employing agency is a for-profit entity, the caregiver cannot be a personal attendant within the meaning of Wage Order 5-2001 and she will be entitled to the Labor Code §510 overtime pay. However, be aware that there are different definitions of "hours worked" under Wage Order 5-2001 when the employee is "required to reside on the premises" or works in the "health care industry," as defined by the wage order. Also, carefully review the other requirements of the wage order, such as meal and rest period provisions, to ensure that you are in compliance.

OTHER EMPLOYER OBLIGATIONS

You are deemed a household employer in California if you have paid \$750 in wages in a calendar quarter, an amount that you will reach quickly when employing a caregiver. That wage payment triggers various reporting and tax withholding obligations, and payment of \$1,000 or more will trigger contributions for unemployment insurance benefits (see, e.g., EDD Household Employee Information Sheet DE 231L; [IRS Publication 926](#)). You also have obligations to complete an I-9 Employment Eligibility Verification.

If the caregiver works 52 hours or more and earns \$100 during the 90 calendar days immediately preceding an injury or the date of last employment, she will be entitled to workers' compensation (Cal. Labor Code §3352(h)). In this situation, you will need to either obtain workers' compensation insurance or have a homeowners or renters insurance policy. Under Cal. Insurance Code §11590, comprehensive personal liability insurance must provide for workers compensation coverage for residential employees. Finally, if you are in San Francisco, your employee will accrue paid sick leave and you need to ensure that you comply with requirements of the Health Care Security Ordinance.

CONCLUSION

Elder care responsibilities can be emotionally wrenching and difficult to fit into the busy lives of practicing lawyers. Knowing your obligations as an employer in advance is a helpful step in managing the stress of elder care responsibilities.

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