

DYING TO WORK: OSHA'S EXCLUSION OF HEALTH AND SAFETY STANDARDS FOR DOMESTIC WORKERS

By Chelsy Castro*

Imagine being required to wash your bare hands in ammonia every day before starting work. Now imagine your employer requires you to sleep in an unheated basement or on a floor where sewage often overflows. Do you deserve better? Yes. Do you deserve the proper tools and protective gear to work safely? Yes. Are there federal standards to protect employees from hazardous work conditions? Yes, but not for all. Not for Angela Pena. Not for “Maria” from Colombia. Not for “Tania” from the Dominican Republic.¹ The Occupational Safety and Health Act of 1970 (OSHA) that protects other workers from having to wash their hands in ammonia does not protect Angela, Maria, and Tania.² They are also excluded from coverage under the National Labor Relations Act and the Fair Labor Standards Act.³ These women, along with countless others, are excluded because they are domestic workers. There are currently no federally supported standards and regulations to protect the health and safety of domestic workers.

Immigrant domestic workers leave their homes to work in ours. They care for our children, nurse our elderly, clean our homes and beautify our gardens. Domestic workers contribute to the economy by “enabling their employers to increase family income...[and], in turn, spend more on consumer goods.”⁴ They provide constant care for families in the United States, yet the United States Government does not provide protection for them.

This article explores the occupational safety and health conditions faced by domestic workers and the protections available to them. More specifically, this article identifies the reasons why domestic workers tolerate hazardous working conditions, examines OSHA's exclusion of domestic workers, and looks at case law considering a domestic worker's right to protection under OSHA. In addition, this article explores possible alternatives for protection available to domestic workers, and examines current and pending legislation directed at ensuring the rights of domestic workers. Finally, this article is a call to action for securing the right of domestic workers to “safe and healthful working conditions.”⁵

HAZARDOUS WORKING CONDITIONS

Domestic workers are a workforce consisting mostly of immigrant women of color.⁶ Angela, Maria, and Tania are just three of the estimated 31.1 million individuals in the United States who immigrated in pursuit of better lives for themselves and their families.⁷ A survey of New York City domestic workers conducted by Domestic Workers United and DataCenter, a nonprofit research firm, found that the domestic workers sur-

veyed came from forty-two different countries.⁸ Many of those surveyed had immigrated because they either could not support their families, or had no work opportunities in their home countries.⁹ Others had immigrated to escape war, political unrest or natural disaster.¹⁰

Many domestic workers endure unsafe, and physically and psychologically unhealthy work conditions—hazardous conditions from which the federal government protects non-domestic workers.¹¹ These conditions include exposure to toxic chemicals (such as ammonia, ammonium hydroxide and bleach) and risk of injury from heavy lifting, cleaning, or lack of proper equipment.¹² According to

an industry-wide survey performed by Domestic Workers United and DataCenter, 30% of live-in workers perform heavy lifting or other strenuous activities; 26% work with toxic supplies; 23% clean hard-to-reach places; and 10% provide care for children or elderly people with contagious diseases.¹³ Another survey, conducted by the San Francisco Department of Health and by DataCenter, indicated that 63% of domestic workers surveyed, almost all from Latin America, considered their jobs hazardous.¹⁴ The vast majority said that they did not receive protective gear such as gloves or facemasks¹⁵ and “[did] not receive training in job safety or workplace injury prevention.”¹⁶ Emilia was forced to scrub the carpet on her knees.¹⁷ Angela Pena, whose employer made her wash her hands in ammonia before starting work every day, recalled, “It burned my hands. The scent of the ammonia made me dizzy and I felt really sick the whole time I was working.”¹⁸

The survey by Domestic Workers United and DataCenter also revealed that 48% of all live-in domestic workers surveyed and 33% of all domestic workers surveyed had been abused by their employers in the past year.¹⁹ The abuse includes, but is not limited to, feelings of discomfort, verbal abuse (including name-calling and threats), sexual advances, and physical abuse including being punched, beaten, raped, or sexually assaulted by their employers.²⁰ Examples of this abuse include that of Judy, who

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was injured when her employer locked her in a basement.²¹ While Judy was hospitalized, her employer told her, “I should have left you for dead; no one here knows who you are anyway.”²² In another example, Vivian remembers how her employer “removed her sandal, and hit [her] and slapped [her] in the face.”²³

Live-in workers are more vulnerable to abuse than day domestic workers because living in their employers’ homes isolates them from the social networks that provide the means for getting help and escaping dangerous employment.²⁴ Sharing a

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living space often makes every aspect of a live-in worker’s life, including when and how they eat and sleep, subject to an employer’s influence. Many are “physically beaten, denied access to necessary medical care when injured; and forced to sleep in substandard or hazardous living quarters.”²⁵ Maria slept in the basement, “where sewage often overflowed.”²⁶ She recalls, “I had to find cardboard in order to walk around [the sewage] and get out of the basement to go and perform my daily housework.”²⁷ Lily explains: “I was never allowed to go out anywhere by myself for fifteen years.” Ruby was forced to work despite her doctor’s orders to stop working. “The doctor told them that I had to stop working for four days, but when I went home, they told me I had to cook, clean the house and take the children to the park.”²⁸ Tania recounts, “they made me sleep in the basement with no heat in the dead of winter. They denied me food during the time I was living-in [their home] and also forbade me [from bringing] food for myself from outside.”²⁹

Psychological abuse also contributes to the hazardous working conditions. Emilia’s employer forbade her from sitting down and from talking to people.³⁰ She was verbally abused on a regular basis.³¹ Her employer forced her to sleep in a “malodorous and moldy”³² basement. “She made me feel like garbage. I felt dehumanized.”³³ Tania recalled being yelled at to the point “where I was becoming sick with depression and nervousness....I could only think of hurling myself in front of passing cars because I was made to feel so bad I wanted to die.”³⁴

TRAPPED

Carolyn H. de Leon, a former domestic worker and a founder of Domestic Workers United, explains that “it’s really hard to galvanize domestic workers, because [they are]...dispersed in isolated homes and sometimes working 11, 12 hours a day.”³⁵ Their isolated work and position in society leaves them with little, if any, political access to protest for their own safety and health protections.

Many domestic workers endure hazardous working conditions because they do not have the financial resources to leave

their jobs, and often work for the same employer for a large part of their lives.³⁶ Requesting simple things such as gloves and facemasks or a safer method of cleaning could mean being fired or worse, beaten. For many, survival means, “We have to stay quiet.”³⁷ They fear losing their only means of providing for their families. Moreover, both the solitary nature of their work and language barriers often prevent domestic workers from developing social connections through which to seek help, making them more vulnerable to exploitation and abuse.³⁸ Lily explains: “When you are living and working in peoples homes, it’s hard because you have to do everything....And it’s just you alone....If I went out and met someone she [the employer] would not let me tell my name....I didn’t have any friends....I didn’t know where anything was, how to get around. I was always in the house.”³⁹

OCCUPATIONAL SAFETY AND HEALTH ACT

Congress passed OSHA in 1970 “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.”⁴⁰ Section 5(a) requires an employer to: (1) “furnish each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm;” and (2) “comply with occupational safety and health standards promulgated under [the Act].”⁴¹ The rights to safety and health standards enjoyed by most American workers today contrast greatly with the conditions faced by the American worker not long ago. Charles Dickens’ tales of the miserable working conditions of the English working class were also representative of those in the United States, as evidenced by disasters such as the Triangle Shirtwaist Factory Fire of 1911.⁴² Such disasters led to laws regulating worksite safety long before the passage of OSHA.

The enactment of OSHA was only one step in the already more than a century-old struggle for worker protections in the United States. Federal and state governments began to take a regulatory interest in workplace safety in the mid-1800s.⁴³ Massachusetts was a pioneer when it passed the nation’s first child labor law in 1836.⁴⁴ In 1840, the federal government took a role

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in worker safety and health regulation by restricting the hours worked by naval shipyard workers to a maximum of ten per day.⁴⁵ However, it was not until 1912 that the federal government passed the Esch Act, a groundbreaking piece of American health legislation that imposed a prohibitive tax on the domestic sale of white phosphorous matches in order to prevent a painful

necrosis of the jaw often contracted by workers in match factories.⁴⁶

In 1936, Congress passed a predecessor to OSHA, the Walsh-Healy Public Contracts Act.⁴⁷ The Walsh-Healy Act prohibited any government contracts under which working conditions were “unsanitary, or hazardous or dangerous to the health and safety” of employees.⁴⁸ This was the federal government’s first significant step towards a widely applied policy concerning worker safety. Congress continued to build upon the foundation established by the Walsh-Healy Act as the goals of the federal government evolved over time. Although federal law adapted to the demands of both the labor unions and the business sector, it still lacked a comprehensive federal health and safety law in the late 1960s.⁴⁹ OSHA filled this void in 1970.

OSHA not only created safety and health standards, but also established a system by which to enforce them.⁵⁰ It created the Occupational Safety and Health Administration of the United States Department of Labor to articulate and implement workplace health and safety standards.⁵¹ Section 5(a)(2) of OSHA requires employers to comply with standards issued by the Secretary of Labor.⁵² These standards are based on research by the National Institute for Occupational Safety and Health.⁵³ OSHA also created a system to police employers and to ensure compliance with OSHA standards.⁵⁴ In addition, it established a judicial and penal system to manage conflicts over the maintenance of such standards.⁵⁵ Violations of OSHA are adjudicated by the Occupational Safety and Health Review Commission, and Federal Circuit Courts of Appeal review the Commission’s decisions.⁵⁶

THE DOMESTIC WORKER UNDER OSHA

OSHA’s employment standards and enforcement system protect non-domestic workers from the risks of exploitation and abuse faced by domestic workers.⁵⁷ If Angela Pena were protected by OSHA, Federal Regulation 1910.132(a) would require her employer to provide and require her to use protective equipment “wherever it is necessary by reason of...chemical hazards...encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.”⁵⁸ Angela would not have had to burn her skin and feel dizzy and sick from washing her hands in ammonia.⁵⁹ Instead of offering domestic workers equal protection against such abuse, OSHA denies domestic workers like Angela such protection because domestic workers are not considered under the law to be “employed in a business of [their] employer which affects commerce.”⁶⁰

While OSHA was monumental legislation, it simply does not go far enough. Section 3 of OSHA defines an employee covered by the Act as “an employee of an employer who is em-

ployed in a business of his employer which affects commerce.”⁶¹ Domestic workers are not included under OSHA’s definition of employee because they are employed to work for a private home, not a profit-generating business. As a result, domestic workers are denied OSHA’s health and safety standards, as well as access to the judicial and penal system established to enforce them.

CASE LAW

Cases brought by domestic workers against their employers for what would be OSHA violations for covered workers, are uncommon and seemingly fruitless. Courts nationwide have upheld the exclusion of domestic workers from the protection of OSHA and similar protections offered by individual states by applying the definitions of “employee” and “place of employment” in favor of employers.

In *Rosas v. Dishong*, Rosas, the Dishong family’s landscape maintenance provider of ten years, injured his back when he fell to the ground while attempting to cut a branch at their request.⁶² Among other claims, Rosas argued that the Dishongs did not comply with State of California Occupational Safety and Health Act statute and that this noncompliance contributed to his injuries.⁶³ Although, the court concluded that Rosas was the Dishongs’ employee, it refused Rosas relief because both California’s and

the federal government’s Occupational Safety and Health Act excluded domestic workers.⁶⁴ The court pointed to a California statute that defines a “‘place of employment’ to exclude any place where persons are employed in household domestic services,” and to the Federal OSHA legislation which defines an employer as “a person engaged in business affecting commerce who has employees.”⁶⁵ The court reasoned that both pieces of legislation intended to exclude domestic service work because “it is unlikely [that the] average homeowner [would] expect... OSHA requirements to apply when they hire someone to trim a tree for their personal benefit and not for a commercial purpose,” and that “homeowners are ill-equipped to understand or comply with the specialized requirements of OSHA.”⁶⁶

In a similar case, *Fernandez v. Lawson*, the Supreme Court of California overturned the California Court of Appeal’s decision to apply the California Occupational Safety and Health Act to a homeowner who hired Fernandez to trim a tree without complying with the applicable California Occupational Safety and Health Act standards.⁶⁷ Fernandez suffered a serious injury when he fell from a tree that he was trimming for Lawson, the homeowner.⁶⁸ The Court of Appeals applied the California Occupational Safety and Health Act because it did not consider tree trimming to be a “household domestic service.” The Court reasoned that tree trimming required a “degree of skill and expertise” which the average homeowner did not possess.⁶⁹ How-

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ever, the California Supreme Court disagreed and found that the Court of Appeal's test to determine whether or not a task was a "household domestic service" was too confusing.⁷⁰

Instead, the Supreme Court focused on the broad definition of a "household domestic service" and how it relates to a commercial or business activity. It found that the California Occupational Safety and Health Act "household domestic service" exclusion applied to tasks "in and outside a private residence" and to any duties performed "personal to the homeowner."⁷¹ Thus, Lawson was not liable under the California Occupational

Case law demonstrates the courts' concern that it is inconvenient and impractical to protect the safety and health of domestic workers in the same way that the federal government protects the safety and health of other workers.

Safety and Health Act because he hired Fernandez to perform a service related to his private residence, a place not related to commercial or business activities. The Supreme Court cited the public policy and practicality concerns of *Rosas* and added its concern that if OSHA applied to homeowners, then homeowners could also be liable for "COBRA health coverage benefits, sexual harassment claims, collective bargaining agreement enforcement" and other obligations that "they would be ill-equipped to comply with."⁷²

The judiciary's concern for practicality is also observed in *Stenvick v. Constant*, where the Court of Appeals of Minnesota similarly concluded that a homeowner was not an employer liable under the Minnesota Occupational Safety and Health Act for a scaffolder's death because the Minnesota legislature did not intend homeowners to be considered employers under the Minnesota Occupational Safety and Health Act.⁷³ The Court expressed concern that to do so would hinder homeowners' willingness to hire other workers.⁷⁴

The case law demonstrates the courts' concern that it is inconvenient and impractical to protect the safety and health of domestic workers in the same way that the federal government protects the safety and health of other workers. The legal system denies domestic workers protections guaranteed to what it considers "employees." In effect, the courts treat domestic workers as independent contractors, although, in reality, most are not.

DOMESTIC WORKERS LACK THE PROTECTIONS OF BOTH EMPLOYEES AND INDEPENDENT CONTRACTORS

Domestic workers are denied the status and protections of employees under OSHA, but also lack the protections enjoyed by independent contractors. Independent contractors are also excluded from OSHA protections,⁷⁵ however, independent contractors, have control over how tasks are performed and what tools are used and as such, have the power to control their own safety in a work environment. Domestic workers are unique

because while the courts treat them like independent contractors for purposes of health and safety standards, domestic workers do not have the control implied by the relationship between independent contractors and employers.

While there is no uniform test to determine whether or not someone is an independent contractor, the Internal Revenue Service's "twenty (20) factor test" is often referenced and three general tests are applied: the "right to control" test, the organization test and the "economic realities test."⁷⁶ These three tests are used in both state and federal courts, but the "right to control" test is the most often applied to domestic workers.⁷⁷

The "right to control test," defines an independent contractor "as one who carries on an independent business and contracts to do a piece of work according to his own methods, subject only to the employer's control as to results."⁷⁸ Courts, regardless of jurisdiction, have repeatedly defined an independent contractor as one who has the right to determine the details and methods by which to accomplish the desired result.⁷⁹ Thus, a domestic worker who does not control the means and methods by which he or she cleans the house, cooks, trims a tree, or cares for children or the elderly does not fit the courts' definition of an independent contractor.

The testimonials of domestic workers demonstrate that they often do not have control over how a home is cleaned, how a child is cared for, or what tools are to be used to do so. The homeowner often dictates exactly how the domestic worker is to perform her or his assigned tasks. Such working conditions deny domestic workers control over their own safety. Angela Pena did not want to wash her hands in ammonia in preparation for her tasks, but her employer required it. If Angela was protected by OSHA, her employer would be prohibited from requiring her to so injure herself. If she were treated as an independent contractor, she would not be subject to her employer's hazardous requirement. Because she is neither protected nor has the freedoms of an independent contractor, Angela either has to wash her hands in ammonia, or lose her job. As domestic workers, Angela, Maria, and Tania are all in limbo. They, like countless other domestic workers, are denied the protections of both employees and independent contractors and, defenseless, work under dangerous conditions.

DOMESTIC WORKER COOPERATIVES: AN ALTERNATIVE SOURCE OF PROTECTION

In response to the independent contractor-employer problem some domestic workers have come up with creative solutions. These innovative few have established domestic worker cooperatives. A domestic worker cooperative is a business run and owned by the individuals who provide the domestic services. The cooperative as a business entity enters into contracts with clients in the market for domestic services. The cooperative then assigns its own employees to fulfill the contracts. Thus, each domestic worker is an employee of the cooperative, not of the homeowner client.

As "a business affecting commerce who has employees," a

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domestic worker cooperative is subject to OSHA,⁸⁰ and is charged with ensuring the domestic workers' safety.⁸¹ La Mesa Cooperative in New Mexico is an example of a successful domestic worker cooperative. Formed and run by domestic workers, it provides both full and part-time work and charges customers \$12.50 per hour to clean homes, offices, and yards.⁸² Cooperatives like La Mesa follow a for-profit business model, but others have incorporated as non-profit tax-exempt organizations under the Internal Revenue Code section 501(c)(3), making them eligible to receive grants for training.⁸³ By contracting directly with the homeowners, La Mesa Cooperative and others like it provide protection for domestic workers by taking responsibility for working conditions.

If Angela Pena was a member of a domestic worker cooperative, she would not be permitted to wash her bare hands in ammonia prior to starting work everyday because Federal Regulation 1910.132(a) would compel her employer, the cooperative, to provide and require her to use protective equipment "wherever it is necessary by reason of... chemical hazards... encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact."⁸⁴ These domestic worker cooperatives serve as buffers, providing safety and health precautions otherwise denied to domestic workers.

Unfortunately, most domestic workers do not belong to cooperatives. They instead work invisibly in limbo, out of reach of the protections typical of employees and of independent contractors. They, like Angela, Maria, Tania, Judy, Emilia, and Lily, are too often under-paid, over-worked, and abused.

A CALL FOR CHANGE

As the case law demonstrates, protection of domestic workers under OSHA may be too impractical to make a reality. Applying OSHA to employment in a private home creates unique challenges and conflicts. For example, OSHA grants the Secretary of Labor permission to "enter without delay and at reasonable times any factory, plant, establishment, construction site or other area workplace, or environment where work is performed by an employee of an employer."⁸⁵ If applied to the employment of a domestic worker, such a regulation would threaten the right to privacy expected in a private home. However, it is not necessary for domestic workers to be excluded entirely from the type of protection guaranteed to employees under OSHA just because it would be difficult to apply. Domestic workers are no less deserving of safe and healthy work environments than non-domestic workers.

The federal government expressed its "purpose and policy" to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."⁸⁶ If the federal government will not offer domestic workers protection under OSHA, then it should at least establish comparable mechanisms to fulfill its "purpose and policy to provide for the general welfare... of every working man and woman."⁸⁷ Protections guaranteed by OSHA can

be adapted to fit the special conditions faced by domestic workers. For example, regulations could require an employer of a domestic worker to provide documentation to the state or federal government demonstrating proof of purchase of protective gear as well as an agreement to its use by the domestic worker. Regulations could also require employers to provide their domestic workers information on their rights to a safe and healthy work environment; information on the health and safety standards required for the relevant tasks; and information on the proper use of equipment and products to be used in domestic work. Additionally, the Occupational Safety and Health Administration could provide information, education, and training to domestic workers and their employers, as it plans to do for adult and teenage immigrant workers in fields, such as health care, manufacturing, and hospitality.⁸⁸

OSHA permits any state to "assume the responsibility for development and enforcement... of occupational health and safety issue[s] with respect to which a Federal Standard has been promulgated."⁸⁹ Thus, if a state wishes, it may establish its own Occupational Safety and Health Act and take responsibility for its own enforcement. The Occupational Safety and Health Administration must approve of the state plans and is responsible for monitoring them. State occupational safety and health standards must be at least as effective as the comparable federal standards.⁹⁰ While many states adopt standards identical to the federal ones, they are permitted to promulgate standards covering hazards not addressed by federal standards.⁹¹ Twenty-six states and jurisdictions have enacted their own plans.⁹² However, only seven differ in any way from the federal OSHA standards⁹³ and none of them recognize domestic workers as beneficiaries of the rights they guarantee.⁹⁴ Domestic workers are excluded in many different ways - "business or commerce" restrictions, "private residence" restrictions, and the "domestic services" exclusions are a few.⁹⁵

In the absence of federal legislation some local governments have taken other steps to offer domestic workers some protection. In 2003, Domestic Workers United, an organization of Caribbean, Latina, and African nannies, housekeepers, and elderly caregivers in New York City, succeeded in getting a law passed requiring "domestic worker placement agencies to provide employers with a 'code of conduct' explaining labor laws."⁹⁶ Additionally, the law requires such agencies to outline job responsibilities, social security requirements, and wages before worker placement.⁹⁷ Agencies in violation of the law face fines up to \$1,000.⁹⁸ Without the law, "agencies work in the employers' favor... They ask [domestic workers]...to do things

[they]... don't want to. [Domestic workers]...have to accept any conditions...or not get anything."⁹⁹ Critics of the legislation point out that only a small portion of domestic workers are placed by agencies, leaving the remainder of the domestic worker population to face the status quo.¹⁰⁰ However, the law is a step in the right direction; it protects domestic workers who are employed through agencies and may encourage others to seek improvements in their own work conditions.

In 2007, New York city revisited the plight of the domestic worker by amending its labor law to establish a Domestic Workers' Bill of Rights. The Domestic Workers' Bill of Rights guarantees domestic workers the right to paid holidays, vacation, and sick days.¹⁰¹ A similar bill of rights has recently gained media attention in Montgomery County, Maryland. The Montgomery County bill of rights proposed the establishment of a living wage of \$10.50 per hour and mandated paid holidays, vacation, and sick leave, as well as family and medical leave.¹⁰² It also forbade discrimination and retaliation against workers and granted domestic workers the right to complain for the violation of such rights to the Montgomery County Commission on Human Rights.¹⁰³ However, Montgomery County council-members are unsure whether a local government, such as Montgomery County, has the jurisdiction to enact such labor laws.¹⁰⁴ The Maryland legislature has yet to adopt the "Domestic Worker Bill of Rights."

These legislative initiatives are a step in the right direction,

but still fail to address the safety and health concerns covered by OSHA. Though the issues of wages and hours worked are important issues faced by the domestic worker population, the legislation in New York and Maryland does not protect Angela Pena from having to wash her bare hands in ammonia everyday before work; it does not protect Emilia from having to scrub the carpet on her knees; and it does not prevent Maria, Judy and Tania's employers from requiring them to sleep in moldy, heatless, sewage-infested basements.

Domestic workers in the United States are hard-working members of our society. If the Government will not protect the health and safety of domestic work-

ers like Angela, Maria and Tania at work with OSHA, then another mechanism is required. The goal should be to not only to address the current health and safety problems that domestic workers face in the workplace, but also to establish the proper mechanisms to prevent such problems from reoccurring.

The government must pass laws protecting the health and safety of domestic workers. The laws should offer protections similar to those enjoyed by non-domestic workers under OSHA. The laws must be enforced and both domestic workers and their employers must be educated about the rights and consequences created by these laws. Laws like those passed in New York city are only the beginning. Domestic workers do not have to be the invisible workforce. They care for the American home. It is time for America to care for them.

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ENDNOTES

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¹ Names have been altered throughout the article.

² See Occupational Safety and Health Act [hereinafter OSHA] of 1970, 29 U.S.C. § 652 (2004).

³ See generally National Labor Relations Act, 29 U.S.C. §§ 151-169 (1947); Fair Labor Standards Act of 1938; 29 U.S.C. §§ 201-219 (2007).

⁴ See 29 U.S.C. §§ 151-169; 29 U.S.C. §§201-209.

⁵ See 29 U.S.C. §652.

⁶ See Domestic Workers United and DataCenter, *Home is Where the Work is: Inside New York's Domestic Work Industry* (Jul. 14, 2006), <http://www.datacenter.org/reports/homeiswheretheworkis.pdf> (last visited Mar. 7, 2008).

⁷ See United States Census Bureau, 2000. See also American Friends Service News Archive <http://www.afsc.org/immigrants-rights/news/default.htm> (last visited Mar. 7, 2008).

⁸ See Domestic Workers United and Datacenter, *supra* note 6.

⁹ See *id.*

¹⁰ See *id.*

¹¹ See generally 29 U.S.C. §652.

¹² *Id.*

¹³ See *id.*

¹⁴ Megan Tady, *Unprotected by Laws, Domestic Workers Face Exploitation*, NewStandard, Mar. 14, 2007, <http://newstandardnews.net/content/index.cfm/items/4487> (last visited Mar. 7, 2008).

¹⁵ Mujeres Unidas y Activas, Day Labor Program Women's Collective of La Raza Centro Legal & Datacenter, *Behind Closed Doors: Working Conditions of California Household Workers* (Mar. 2007) <http://www.datacenter.org/reports/behindcloseddoors.pdf> (last visited Mar. 7, 2008); Tady, *supra* note 14.

¹⁶ *Id.*

¹⁷ Domestic Workers United and Datacenter, *supra* note 6.

¹⁸ Tady, *supra* note 14.

¹⁹ See Domestic Workers United and Datacenter, *supra* note 6.

²⁰ See *id.*

²¹ See *id.*

²² See *id.*

²³ See *id.*

²⁴ A live-in domestic worker resides in the home of his or her employer, whereas a day worker does not.

²⁵ Domestic Workers United and Datacenter, *supra* note 6.

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.*

³¹ See Domestic Workers United and Datacenter, *supra* note 6.

³² See *id.*

³³ See *id.*

³⁴ See *id.*

³⁵ Chisun Lee, *Nanny Bill Gains Political Ground*, THE VILLAGE VOICE, May 6, 2003. <http://www.villagevoice.com/news/0319,lee,43864,5.html> (last visited Mar. 7, 2008).

³⁶ See *id.*

³⁷ See *id.*

ENDNOTES CONTINUED

- ³⁸ See *id.*
- ³⁹ See *id.*
- ⁴⁰ See 29 U.S.C. §652.
- ⁴¹ *Id.* § 654.
- ⁴² See Occupational Safety and Health Law, American Bar Association 18 (Stephen Bokat & Horace Thompson eds., 1998). For a more in depth look at the fire, refer to David von Drehle, TRIANGLE: THE FIRE THAT CHANGED AMERICA (Grove/Atlantic Inc. 2004).
- ⁴³ See American Bar Association, *supra* note 42, at 18.
- ⁴⁴ See *id.*
- ⁴⁵ *Id.*
- ⁴⁶ *Id.* at 21.
- ⁴⁷ *Id.* at 22-26.
- ⁴⁸ *Id.* at 23.
- ⁴⁹ American Bar Association, *supra* note 42, at 32.
- ⁵⁰ See 29 U.S.C. §652.
- ⁵¹ See *id.*
- ⁵² See *id.* § 654(a) (2).
- ⁵³ See Hood Et Al, WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS 161 (WEST PUB. CO. 1990).
- ⁵⁴ See Occupational Safety and Health Act, 29 U.S.C. § 657 (2004).
- ⁵⁵ See *id.* §§ 659, 660.
- ⁵⁶ See Hood Et al., *supra* note 53, at 161, 162.
- ⁵⁷ See 29 U.S.C. §652.
- ⁵⁸ 29 C.F.R. 1910.132(a) (2006).
- ⁵⁹ Tady, *supra* note 14.
- ⁶⁰ 29 U.S.C. §652.
- ⁶¹ *Id.*
- ⁶² Rosas v. Dishong, 67 Cal. App. 4th 815, 817 (App. Ct. 1998).
- ⁶³ Rosas, 67 Cal. App. 4th at 818.
- ⁶⁴ *Id.* at 819.
- ⁶⁵ *Id.* at 824.
- ⁶⁶ *Id.* at 826.
- ⁶⁷ Fernandez v. Lawson, 71 P.3d 779 (Cal. 2003).
- ⁶⁸ See Fernandez 31 Cal. 4th at 34.
- ⁶⁹ See Fernandez v. Lawson, 119 Cal. Rptr.2d 767, 775 (App. Ct. 2002).
- ⁷⁰ See Fernandez v. Lawson, 71 P.3d 779, 425 (Cal. 2003).
- ⁷¹ Fernandez, 71 P.3d at 37.
- ⁷² *Id.* at 42.
- ⁷³ See Stenvick v. Constant, 502 N.W. 2d 416 (Minn. App. 1993).
- ⁷⁴ See Stenvick 502 N.W. 2d at 420.
- ⁷⁵ See generally 29 U.S.C. §652.
- ⁷⁶ See Rick A. Pacynski, *Legal Challenges in Using Independent Contractors*, MICH. BAR J., 72 Mich. B.J. 671, 673 (1993) (citing Kenny and Hulen, *Determining Employee or Independent Contractor Status*, 20 TAX ADVISOR 661, 662 (1989)). The "right to control" test examines whether the employer controls the time and manner in which the work is done. The organization test examines whether the worker is integrated into an organization through criteria such as graded pay and a disciplinary code. The "economic realities" test examines if the worker receives direct economic benefit from his labor, if that benefit is based on a level of skills or productivity and if the worker has a capital investment in the venture.
- ⁷⁷ See Enoch v. Williams & Co., 370 U.S. 1 (1962). The "right to control" test is more commonly applied to domestic workers because the organization test and/or the "economic realities" test often clearly indicate that the domestic worker is not treated as an independent contractor. The subject matter in the "right to control test" is less concrete than that of the other tests.
- ⁷⁸ Steen v. Potts, 61 N.W.2d 825, 826 (S.D. 1953); See generally 19 RICHARD A. LORD, WILLISTON ON CONTRACTS § 54:3 (4th ed.) 2007.
- ⁷⁹ See N.L.R.B. v. A.S. Abell Co., 327 F.2d 1, 4 (4th Cir. 1964) (citing National Labor Relations Board v. Steinberg, 182 F.2d 850, 857 (5th Cir. 1950)); Blankenship v. Overholt, 786 S.W.2d 814, 816 (Ark. 1990); Markova v. United States of Am., 201 F.3d 110 (2d Cir. 2000).
- ⁸⁰ 29 U.S.C. §652.
- ⁸¹ For a more in depth look at the pros and cons of domestic worker cooperatives, See Scott Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-income Workers*, 26 N.Y.U. REV. L. & SOC. CHANGE 181 (1999).
- ⁸² See Ken Patterson, *Business Cooperatives Help Immigrants Climb Economic Ladder*, The American News Service, Sep. 2, 1999, <http://www.berkshirepublishing.com/ans/HTMLView.asp?parItem=S031000121A> (last visited Mar. 7, 2008).
- ⁸³ *Id.*
- ⁸⁴ 29 C.F.R. 1910.132(a) (2006).
- ⁸⁵ 29 U.S.C. §652.
- ⁸⁶ *Id.* § 651.
- ⁸⁷ *Id.*
- ⁸⁸ The Occupational Safety and Health Administration plans to present training and education programs for adult and teenage immigrant workers in an effort to ensure that "every employee has a safe and healthful workplace." See Ted Fitzgerald, *Job Safety Effort Underway for Immigrant Workers in Rhode Island*, OSHA News Release, Nov. 13, 2006, http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=12999 (last visited Mar. 7, 2008).
- ⁸⁹ 29 U.S.C. §652.
- ⁹⁰ See *id.*; Federal Occupational Safety and Health Administration Frequently Asked Questions about State Occupational Safety and Health Plans, <http://www.osha.gov/dcs/osp/faq.html#oshaprogram> (last visited Mar. 7, 2008).
- ⁹¹ Alaska, Arizona, California, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virgin Islands, Washington, and Wyoming have state plans. See Federal Occupational Safety and Health Administration Frequently Asked Questions about State Occupational Safety and Health Plans, <http://www.osha.gov/dcs/osp/faq.html#oshaprogram> (last visited Mar. 7, 2008).
- ⁹² Federal Occupational Safety and Health Administration Frequently Asked Questions about State Occupational Safety and Health Plans, <http://www.osha.gov/dcs/osp/faq.html#oshaprogram> (last visited Mar. 7, 2008).
- ⁹³ *Id.*
- ⁹⁴ *Id.*
- ⁹⁵ The "business or commerce" restriction, observable in the Utah, Iowa and Connecticut state OSHAs, prohibits application of OSHA to work done in the home if the homeowner does not operate a business out of his home. The "private residence" restriction, observable in the Alaska Hawaii, North Carolina, Oregon, Puerto Rico and the Virgin Islands, excludes work done in any residence. The "domestic services" restriction, observable in California, New Mexico and Arizona, excludes domestic labor. The categories are vague and incorporate a spectrum of interpretation and application.
- ⁹⁶ See Tady, *supra* note 14.
- ⁹⁷ See *id.*
- ⁹⁸ See *id.*
- ⁹⁹ See Lee, *supra* note 35.
- ¹⁰⁰ See 4nanny.com, Nannies in the News, May 15, 2003, http://www.4nanny.com/newsletters/june_03.htm (last visited Mar. 7, 2008).
- ¹⁰¹ See Albor Ruiz, *Our Domestic Workers Deserve Bill of Rights*, DAILY NEWS, May 31, 2007, http://www.nydailynews.com/boroughs/2007/05/31/2007-05-31_our_domestic_workers_deserve_bill_of_rig-3.html (last visited Mar. 7, 2008).
- ¹⁰² See Tim Craig, *Montgomery Domestic Workers Plead for Help*, WASH. POST, Feb. 8, 2005, at B02.
- ¹⁰³ See *id.*
- ¹⁰⁴ See *id.*

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