Buffalo Journal of Gender, Law & Social Policy

Volume 19 Article 5

9-1-2010

Real Work: Domestic Workers' Exclusion from the Protections of Labor Laws

Lisa Diaz-Ordaz

Real Work: Domestic Workers' Exclusion from the Protections of Labor Laws

LISA DIAZ-ORDAZ†

INTRODUCTION

> "What do we do about the cleaning lady that comes in? She enjoys herself. She gets together with the family and has a coke or a glass of milk."
>
> - Senator Peter Dominick, 1974[1]

Women, particularly women of color, have historically and continue to overwhelmingly represent those employed in the domestic sector, performing jobs such as housekeeping, child care, and care for the elderly and infirm.[2] Illustrating this fact, included among the top twenty-five most prevalent jobs for women in 2008 were maids and housekeeping cleaners, child care workers, home health aides and personal and homecare aides.[3] Domestic work, because it has been traditionally undertaken by the female head of the household—unpaid—is stereotypically categorized as a woman's job. While domestic tasks may be, at the very least, thankless when performed by the female head of the household, when the work is contracted out to a

---

† J.D., The State University of New York at Buffalo Law School, 2011.

1. STAFF OF S. COMM. ON LABOR AND PUBLIC WELFARE, 93D CONG., FAIR LABOR STANDARDS ACT AMENDMENTS OF 1974 *reprinted in* LEGIS. HISTORY OF THE LABOR STANDARDS ACT AMENDMENTS OF 1974, at 955 (Comm. Print 1976) (arguing against extending coverage of the FLSA to include domestic workers).

2. Mary Romero, Maid in the U.S.A. 69, 71-72 (1992); *see* Domestic Workers United & Datacenter, *Home Is Where the Work Is: Inside New York's Domestic Work Industry* 2 (2006), *available at* http://www.domesticworkersunited.org/media/files/266/homeiswheretheworkis.pdf [hereinafter *Home Is Where the Work Is*]. *See generally* Peggie R. Smith, *Regulating Paid Household Work,* 48 AM. U. L. REV. 851 (1999) [hereinafter Smith, *Regulating Work*].

3. Bureau of Labor Statistics, U.S. Dep't of Labor, Labor Force Statistics from the Current Population Survey, Employed Persons by Detailed Occupation and Sex (2009), *available at* http://www.bls.gov/cps/wlftable11.htm.

domestic service worker, it is stigmatized as being despised and low class.[4] Typically, this work is contracted out to a domestic service worker, because the female head of the household is too busy with her own job or simply prefers—and can afford—not to dirty her hands with these chores.[5] Thus, these tasks, when performed by domestic workers, are not only performed by women, but by *inferior* women: generally women of color who are less educated and lower on the socioeconomic ladder than their female employers.[6] Acting to perpetuate society's conception of these occupations and those who perform them as inferior, labor laws have traditionally excluded domestic workers from much of their protections. Domestic workers who work in private homes are completely excluded from the National Labor Relations Act and the Occupational Safety and Health Act.[7] In 1974, the Fair Labor Standards Act was amended to extend coverage to domestic workers;[8] however some workers, such as home health care workers and casual babysitters still lack the Act's protection.[9] Thus, although this work constitutes employment, just like any other job performed outside the home, through exempting domestic work from its protections, the labor laws continue to treat it as though it is lesser than other occupations.[10] This treatment acts to perpetuate the status of domestic workers as inferior, second-class citizens.

Interestingly, when this same work is performed outside the home, it is afforded the protections of the labor laws. Hotel maids and housekeepers and those who provide childcare at day care facilities, unlike those who work in private homes, are protected under the NLRA and the OSH

---

4. Judith Rollins, Between Women: Domestics and Their Employers 58-59 (Paula Rayman & Carmen Sirianni eds., 1985); ROMERO, *supra* note 2, at 66; Katharine Silbaugh, *Turning Labor into Love: Housework and the Law,* 91 NW. U. L. REV. 1, 72-74 (1996); *Home Is Where the Work Is, supra* note 2.

5. *See generally* Silbaugh, *supra* note 4; ROMERO, *supra* note 2, at 54-55.

6. Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. Rev. 45, 53 (2000) [hereinafter Smith, *Organizing the Unorganizable*].

7. *See infra* notes 43 and 52 and accompanying text.

8. *See infra* note 68 and accompanying text

9. *See infra* note 74 and accompanying text.

10. Silbaugh, *supra* note 4, at 72.

Act.[11] Furthermore, those workers who perform the same duties as home health aides and home care workers, but who provide them for a maid service agency or hospital are covered not only under the NLRA and the OSH Act, but are also afforded the wage and hour protections of the Fair Labor Standards Act.[12] Thus, it is clear that if the same *kind* of work is covered when performed outside the home, that the exemption is tied to the fact that the work is being performed in the home.[13] And when this work is performed in the home, it becomes, to quote the OSH Act exemption, "ordinary domestic household tasks" that are, apparently, not deserving of labor laws' protections,[14] largely due to their association with being women's work and thus not strenuous.[15]

But domestic work is *real* work, and it is rather strenuous. In fact, domestic workers suffer higher rates of injury than workers in most other occupations.[16] Maids and housekeepers are prone to injuries, such as cuts and bruises and burns from chemicals; they are also prone to back injuries and sprains as a result of moving and lifting furniture to clean and the frequent bending and stooping involved in cleaning.[17] Child care workers are also prone to injuries due to time spent bending, stooping and lifting children; they also suffer from larger than average instances of work related illness, due to exposure to sick

11. All are protected under the FLSA. *Id.* at 75-77.

12. *Id.* at 75-76; Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century,* 92 IOWA L. REV. 1835, 1838 (2007) [hereinafter Smith, *Aging and Caring*].

13. Silbaugh, *supra* note 4, at 76.

14. 29 C.F.R. § 1975.6 (2010).

15. Silbaugh, *supra* note 4, at 77.

16. *See, e.g.,*BUREAU OF LABOR STATISTICS, U.S.DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, HOME HEALTH AIDES AND PERSONAL AND HOME CARE AIDES 1-2 (2009) *available at* http://www.bls.gov/oco/ ocos326.htm [hereinafter BLS, HOME HEALTH AIDES, OOH]; BUREAU OF LABOR STATISTICS, U.S.DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, BUILDING CLEANING WORKERS 1 (2009) *available at* http://www.bls.gov/oco/ocos174.htm [hereinafter BLS, BUILDING CLEANING, OOH]; U.S.DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, CHILD CARE WORKERS 2 (2009) *available at* http://www.bls.gov/oco/ ocos170.htm [hereinafter BLS, CHILD CARE, OOH]; Smith, *Aging and Caring, supra* note 12, at 1884.

17. BLS, Building Cleaning, OOH, *supra* note 16.

children.[18] Personal and home care aides and home health aides are also very vulnerable to work related injuries, as their job requires them to move patients into and out of bed and help patients stand or walk.[19] Furthermore, since aides are responsible for performing some disagreeable tasks such as changing bed pans and soiled linens and dressing wounds, they are also prone to infections and communicable diseases.[20] The fact that society views this work as lesser than other types of work is also reflected in the wages that domestic workers make. On average, for domestic workers, the mean annual wage is in the $20,000-$21,000 range, and the mean hourly wages are in the $9-$10 range.[21] Furthermore, most of these workers do not receive health insurance or any other benefits, such as paid sick days or vacations, from their employers.[22] According to a survey of 547 domestic workers in New York City performed between 2003 and 2004, ninety percent of domestic workers did not receive health insurance.[23] Not surprisingly, due to the high risk of injury and illness and the lack of protections, and the low pay, there are high rates of turnover in domestic work.[24] The work ends up being performed by the most marginalized members of society, because with the awful

18. BLS, Child Care, OOH, *supra* note 16.

19. BLS, Home Health Aides, OOH, *supra* note 16.

20. *Id.*

21. While the Bureau of Labor Statistics' ("BLS") occupational employment statistics do not include private household workers, it does offer separate surveys of housekeepers, child care workers, and personal and home care aides and home health aides; it does not separate the first two categories into domestic or non-domestic. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL EMPLOYMENT AND WAGES, HOME HEALTH AIDES (2009) *available at* http://www.bls.gov/oes/current/oes311011.htm; BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL EMPLOYMENT AND WAGES, PERSONAL AND HOME CARE AIDES (2009) *available at* http://www.bls.gov/oes/current/oes399021.htm; BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL EMPLOYMENT AND WAGES, CHILD CARE WORKERS (2009) *available at* http://www.bls.gov/oes/ current/oes399011.htm; BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL EMPLOYMENT AND WAGES, MAIDS AND HOUSEKEEPING CLEANERS (2009) *available at* http://www.bls.gov/oes/current/oes 372012.htm.

22. Smith, *Organizing the Unorganizable, supra* note 6, at 53.

23. *Home Is Where the Work Is, supra* note 2 at, 2, 6.

24. Smith, *Organizing the Unorganizable, supra* note 6 at 71, 74.

stigma, low pay, limited legal protections and the poor treatment, the work ends up being performed by those who truly have no other option.[25] If lawmakers recognized the domestic work is real work and that these workers are desperately in need of the protections of the labor laws, then perhaps the stigma on the work would change; these positions are held by the most marginalized individuals, and lawmakers' failure to act is perpetuating this stigma and thus the status of these workers, as second-class citizens.

I. THE RELATIONSHIP BETWEEN DOMESTICS AND THEIR EMPLOYERS

While the work may be largely the same whether it is performed inside a home or in a hospital or hotel, the employer-employee relationship between domestics and their employers is quite different from the usual employer-employee relationship.[26] Domestic workers perform work according to the subjective desires of their individual employers, usually the female head of the household.[27] Often, the relationship acts to reinforce the employer's position higher up in the social hierarchy, especially when the domestic worker is a maid or a housekeeper. Emphasizing this point, author Barbara Ehreneich, who went undercover as a maid for a cleaning service asked her co-workers "why so many of the [home]owners seem so hostile or contemptuous towards us."[28] Their responses were: "They think we're stupid"; "[t]hey think we have nothing better to do with our time"; "[w]e're nothing to these people . . . [w]e're just maids."[29] This illustrates the stigma on the occupation and the experiences these workers have

25. *See generally The Fair Home Health Care Act: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Education and Labor* , 110th Cong. 40-41 (2007) (statement of William A. Dombi, Vice President for Law on behalf of the National Association for Home Care & Hospice, Inc.) (hearinafter "*Fair Home Health Care Act Hearing*"); ROLLINS, *supra* note 4; Smith, *Aging and Caring, supra* note 12, at 1870-71.

26. *See* Smith, *Organizing the Unorganizable, supra* note 6, at 47.

27. *See* ROMERO, *supra* note 2, at 67.

28. Barbara Ehrenreich, Nickel and Dimed: On (Not) Getting By in America 99-100 (2001).

29. *Id.* at 100.

with their employers as a result. It did not matter that Ehrenreich, unlike her co-workers, was not a marginalized member of society or that she was highly educated and a renowned author; when she was cleaning the houses of the wealthy, because of the stigma that goes along with the position, she was subject to the exact same treatment. Employers do not care who these people are. Because of what they do, they are automatically stigmatized.

Reflecting on the stigma on their occupation, many domestics acknowledge that they are made to feel invisible by their employers and by society.[30] Recounting her notes of her own field work performed as a domestic, sociologist Judith Rollins wrote "On one occasion, while sitting in a kitchen having my lunch while a couple walked and talked around me, my sense of being invisible was so great...."[31] In another instance, Rollins' employers turned the heat down in the middle of the winter when they left the house as if there was no one there, leaving her to work in unbearably cold conditions.[32] Recounting her undercover experience as a maid for a cleaning agency, journalist, Barbara Ehrenreich explains a situation where she is in a client's home crouching on a countertop cleaning copper pots that are hanging from a rack on the ceiling when she drops one on the counter and it crashes into a glass bowl of marbles which scatter everywhere.[33] Interestingly, she noted that her punishment was seeing her co-worker's face "completely polarized with fear," because, she remarked, "[m]aids, as an occupational group, are not visible, and when we are seen, we are often sorry for it."[34] Discussing another incident where she was made to feel invisible, not just by her employer but by members of society, on account of her maid uniform and the stigma associated with the occupation, Ehrenreich recounted:

> At one place where we stopped for refreshments, an actual diner with a counter, I tried to order iced tea to take out, but the waitress just kept standing there chatting with a coworker, ignoring my "Excuse me's.". . . .True, I don't look so good by the

30. *Id.* at 99. ROLLINS, *supra* note 4 at 208-09.

31. Rollins, *supra* note 4 at 209.

32. *Id.* at 208.

33. Ehrenreich, *supra* note 28 at 98.

34. *Id.* at 98-99.

> end of the day and probably smell like eau de toilet and sweat, but it's the brilliant green-and-yellow uniform that gives me away, like prison clothes on a fugitive. Maybe, it occurs to me, I'm getting a tiny glimpse of what it would be like to be black.[35]

Being made to feel invisible is the ultimate social punishment. It is tacitly telling a person that they are inconsequential and inferior. Ehrenreich's comparison to blacks—people who had to fight for over one hundred years before they enjoyed equal protection of the law—and yet who are still a marginalized group, simply because of the color of their skin paints a lucid and gripping portrayal of the extent of discrimination that these workers suffer on account of their profession. That these are the experiences of highly educated individuals who went undercover in the profession, really emphasizes the stigma on the occupation: simply, and solely because a person performs domestic work in an individual's home, they are regarded as a lesser member of society.

Domestics also acknowledge situations wherein employers bestow upon them gifts of old clothing or old furniture and are told they are "part of the family."[36] Both Rollins and Romero note that this emphasizes the inferior role of the employee, as the employer is assuming a maternalistic role in offering these charitable "gifts" to their employees, which in actuality are "items that would have gone to the Salvation Army or the trash."[37] Rollins notes that "[t]he fact that material goods—wages and gifts—go in only one direction in the relationship is a clear statement that it is one of inequality."[38] When domestics are given these second hand "gifts," items that are no longer wanted or are no longer of good enough quality to be used by their employer, it reinforces the position of domestics as subservient to and of a lower socioeconomic class than their employers. These interactions act to reinforce the societal belief *and* the lawmakers' belief that this is not real work, because this is unlike any other work relationship—it is lesser than a work relationship—it is more akin to master-

35. *Id.* at 100.

36. Rollins, *supra* note 4 at 174, 176, 190, 191; ROMERO, *supra* note 2, at 109.

37. Romero, *supra* note 2, at 109.

38. Rollins, *supra* note 4 at 192.

servant than employer-employee.[39] As Romero notes, "It is almost inconceivable that the same woman would consider offering her old linen jacket to her secretary."[40] This practice is very common among those working in domestic service, but it is also unique to domestic work.[41] Why is it acceptable for this woman to give unwanted items to a domestic worker but not her secretary? Because of the nature of the work performed and the stigma that goes along with it, neither the law nor society recognizes this work as legitimate enough to be deserving of respect or protection of the laws.

II. OCCUPATIONAL SAFETY AND HEALTH ACT EXCLUSION

The Occupational Safety and Health Act ("Act") was created to provide workers with "safe and healthful" working environments.[42] However, the Act expressly excludes from coverage "[i]ndividuals who, in their own residences, privately employ persons for the purpose of performing for the benefit of such individuals what are commonly regarded as ordinary domestic household tasks, such as house cleaning, cooking, and caring for children."[43] This language downplays the significance and inherent dangers of domestic work. For instance, home health care workers perform tasks such as dressing wounds, administering vaccines, and changing soiled linens and bed pans.[44] These tasks put them in contact with blood and bodily fluids and put them at risk for exposure to infectious diseases.[45] Furthermore, as mentioned earlier, because of the strenuous nature of domestic work—lifting children, moving patients, moving furniture, bending and stooping—

39. *See* ROMERO, *supra* note 2, at110.

40. *Id.* at 109.

41. *See id.*

42. 29 C.F.R.§ 1975.3 (2010).

43. 29 C.F.R. § 1975.6 (2010).

44. Smith, *Aging and Caring, supra* note 12, at 1878; *See* BLS, HOME HEALTH AIDES, OOH, *supra* note 16, at 1.

45. *Id.*

these workers are at risk for injuries.[46] Although the Act's exclusion does not extend to those home health care workers employed by third-party agencies, the protections for these workers are very limited.[47] The Act has noted the difficulties of the employer controlling the work environment, which is an individual's private home, and has lessened the standard of care to such an extent that these employers may as well not be covered.[48] While an individual's expectation of privacy in her own home is a concern,[49] the Act should at least attempt a compromise to protect domestic workers' safety.[50] The Act's view that domestic work is "ordinary" and not strenuous or unsafe favors the privacy of the homeowner over the protection of workers and supports the societal view that domestic work is not real work and does not deserve labor law protections.[51]

III. NATIONAL LABOR RELATIONS ACT EXEMPTION

The National Labor Relations Act ("NLRA") defines employees covered under the Act so as to expressly exclude "any individual employed. . . . in the domestic service of any family or person at his home."[52] The purpose of the NLRA is to encourage employees to engage in collective bargaining "by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[53] As a result of the exclusion, domestic workers are neither guaranteed the right to organize nor to collectively bargain over the terms and conditions of their employment. Thus, as the express intent of the NLRA is to allow workers to collectively

46. Smith, *Aging and Caring, supra* note 12, at 1878, 1883. *See* BLS, HOME HEALTH AIDES, OOH, *supra* note 16 at 1; BLS, CHILD CARE WORKERS, OOH *supra* note 16; BLS BUILDING WORKERS, OOH, *supra* note 16 at 1.

47. *See* Smith, *Aging and Caring, supra* note 12, at 1874.

48. *See id.*

49. *See id.* at 1843, 1855, 1888.

50. *See id.* at 1900.

51. *See generally id.* at 1855, 1900.

52. 29 U.S.C. § 152 (3) (2010).

53. 29 U.S.C. § 151 (2010).

bargain for *protection* and the terms and conditions of their employment, it is clear, once again, that the dangers inherent in household work are often overlooked, since, as discussed earlier, domestic workers suffer higher numbers of work related injuries than in many other occupations.[54]

Affording domestic workers the right to organize would give these workers the opportunity to bargain, without fear of retaliation, for employment benefits such as health insurance coverage, paid sick leave, vacations, holidays and better pay. Denying domestic workers these protections leaves them open to further exploitation and reinforces their position as far inferior to their employer, since the workers have virtually no leverage over their employers in the bargaining process.[55] Although domestic workers are not guaranteed the right to organize, that does not preclude them from organizing; however, the nature of domestic service makes it very difficult. Most domestic workers do not work with other domestic workers; they work in the home of their employers, so they have a one-on-one relationship with them.[56] Thus, the collectiveness necessary for collective bargaining is lost.[57] This not only makes it difficult to organize, but may create an intimidating situation for a domestic worker who wants to request benefits or a pay raise without the collective backing of any fellow workers to support her. However, organization is possible[58] and the right to organize and collectively bargain is crucial for domestic workers who are vulnerable to injury and exploitation.

Not only do domestic workers earn very low wages,[59] but most do not receive health insurance, or any other benefits,

---

54. *See supra* note 16 and accompanying text.

55. Adam J. Hiller & Leah E. Saxtein, *Falling through the Cracks: The Plight of Domestic Workers and Their Continued Search for Legislative Protection*, 27 HOFSTRA LAB. & EMP. L. J. 233, 240 (2009).

56. *Id.;* Smith, *Organizing the Unorganizable, supra* note 6, at 47.

57. Hiller & Saxtein, *supra* note 55, at 240; Smith, *Organizing the Unorganizable, supra* note 6 at 47.

58. Smith, *Organizing the Unorganizable, supra* note, 6 at 73-78 (explaining how the Service Employees Internation Union successfully organized 74,000 homecare workers in Los Angeles in 1999).

59. *See supra* note 21 and accompanying text.

such as, paid sick days or vacations.[60] As mentioned earlier, a survey of 547 domestic workers in New York City conducted between 2003 and 2004 revealed that ninety percent of domestic workers did not receive health insurance.[61] Illustrating her exploitation and the effects of receiving no benefits, one of the workers from the survey lamented:

> They never gave me a vacation or holidays off. Sometimes I was not feeling well but still had to work. The doctor told them I had to stop working for four days, but when I went home, they told me I had to cook, clean the house, take the children to the park. . .[62]

Thus, domestic workers rarely receive employment benefits, but they are among those who are most in need of the protections of health insurance and paid sick leave. As discussed earlier, domestic workers suffer higher rates of injury than workers in most other occupations.[63] Without health insurance, one injury could result in thousands of dollars in medical bills, and without paid sick leave, getting sick leads to lost income. Taking this into consideration, along with the fact that domestic workers' pay is already so low, it is obvious that domestic workers have no problem leaving their job for one that pays even slightly higher wages.[64]

Furthermore, the lack of bargaining power also leaves domestic workers vulnerable to wage and hour exploitation. Although maids, housekeepers, and non-casual babysitters are covered under the Fair Labor Standard Act's ("FLSA") wage and hour provisions, live-in domestic workers are not protected under the overtime provisions, and personal and home care aides and home health aides are not protected under either the minimum wage or maximum hour provisions of the FLSA.[65] Thus, where maids and housekeepers and non-casual babysitters are at least entitled to minimum wage and overtime pay, the other workers lacking FLSA protections *and* NLRA protections

60. Smith, *Organizing the Unorganizable, supra* note 6, at 53.

61. *Home Is Where the Work Is, supra* note 2, at 2, 6.

62. *Id.* at 17.

63. *See supra* note 16 and accompanying text.

64. Smith, *Organizing the Unorganizable, supra* note 6, at at 71.

65. *See infra* notes 74-81 and accompanying text.

are in an even worse bargaining position because they are not legally entitled to even the most minimum labor law protections. Many of these problems and risks could be eliminated if workers had the protections of the NLRA and the ability to bargain collectively for benefits and workplace protections. The lack of coverage under the NLRA serves to keep domestic workers in their position as inferior by denying them any leverage by which to reap employment benefits and protection from their employers and unsafe working environments, especially those who are not even afforded the wage and hour protections of the FLSA.

IV. FAIR LABOR STANDARDS ACT EXEMPTION

The FLSA was enacted by Congress in 1938.[66] Its stated purpose is to put in place standards for labor conditions in "industries engaged in commerce or in the production of goods for commerce" so as to maintain a "minimum standard of living necessary for health, efficiency and general well-being of workers."[67] The FLSA did not initially afford coverage to domestic workers, but it was amended in 1974 to extend coverage to domestic workers with some exceptions.[68] The reasons cited for bringing domestic workers under the protections of the FLSA were many; the Senate Committee on Labor and Public Welfare cited the following:

> [E]nhancing the status of domestic workers, since the status of household work is far down in the scale of acceptable employment. It is not only low-wage work, but it is highly irregular, has few if any non-wage benefits, and is largely unprotected by unions or by any Federal or State labor standards.[69]

The report also cited the exceedingly low average hourly wage of domestic workers at that time and the growing need for domestic workers, since many women at that time were beginning to go to work outside of the home; the committee

66. *See* 29 U.S.C. § 202 (a) (2010).

67. *Id.*

68. 29 U.S.C. § 202 (a) (5) (2010). *See* 29 U.S.C. § 213 (a) (15) (2010); 29 U.S.C. § 213 (b) (21) (2010).

69. Staff of S. Comm. on Labor and Public Welfare, 93d Cong., Report on Fair Labor Standards Amendments of 1974 18 (Comm. Print 1974) [hereinafter S. COMM. REPORT ON FAIR LABOR].

reasoned this need would likely be met if the workers were better paid.[70] It also cited the fact that most domestic workers are women, reasoning that:

> [N]ow that Congress has sent to the States the constitutional amendment guaranteeing equal rights to women, it would be hypocritical in the extreme to deny an appreciable segment of the female work force, earning low wages, an opportunity to share in the rewards of more meaningful employment under the protection of the Fair Labor Standards Act.[71]

Finally, the Committee cited poverty as a reason for the inclusion of domestic workers: "[T]here can be little doubt that the deplorably low wages received by domestics contribute substantially to the vicious poverty cycle."[72] The Committee qualified, "[s]ince domestic employment is one of the prime sources of jobs for poor and unskilled workers, it is clear that there is an important national interest at stake in [e]nsuring that the wages received for such work do not fall below a minimal standard of decency."[73] Thus, it is clear that Congress' intended purpose in extending the protections of the FLSA was to afford wage and hour protection to the most marginalized of workers, most of whom where women, who on top of not receiving employment benefits or the protection of unions, received very low wages.

However, the amendments did not provide comprehensive coverage to domestic workers. They expressly exclude from both minimum wage and maximum hour protections:

> [A]ny employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).[74]

---

70. *See id.* at 19.

71. *Id.* at 20.

72. *Id.* at 22.

73. *Id.*

74. 29 U.S.C. § 213 (a) (15) (2010).

The Secretary of Labor promulgated regulations to aid in clarifying to whom these exemptions apply.[75] Specifically, with regard to those who provide companionship services for the aged or infirmed, the Secretary provided:

> As used in section 13(a)(15) of the Act, the term companionship services shall mean those services which provide 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 household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: *provided, however*, that such work . . . does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services . . . which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.[76]

With regard to those "companionship service" providers who are employed by third-party agencies, the Secretary provided:

> Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15). Assigning such an employee to more than one household or family in the same workweek would not defeat the exemption for that workweek, provided that the services rendered during each assignment come within the definition of companionship services.[77]

Thus, personal and home care aides and home healthcare aides, even if employed by a third-party agency, are altogether excluded from coverage of the FLSA unless they can show either that more than 20 percent of their total weekly hours worked is spent performing housekeeping duties or that they are trained personnel, such as a registered or practical nurse.[78] With regard to the

75. *See* 29 C.F.R. § 552 (2010).

76. 29 C.F.R. § 552.6 (2010).

77. 29 C.F.R. § 552.109 (2010).

78. *See* 29 C.F.R. § 552.6 (2010).

exemption of casual babysitters, the Secretary of Labor provided:

> As used in section 13(a)(15) of the Act, the term casual basis, when applied to babysitting services, shall mean employment which is irregular or intermittent, and which is not performed by an individual whose vocation is babysitting. Casual babysitting services may include the performance of some household work not related to caring for the children: Provided, however, That such work is incidental, i.e., does not exceed 20 percent of the total hours worked on the particular babysitting assignment.[79]

It is interesting to note that the Secretary excludes from the exemption those babysitters whose vocation is babysitting, but it does not exclude from the exemption those personal and home care aides and home health aides whose vocation is home health care. The precariousness of the home health care exclusion is discussed in further detail below. Live-in domestic workers are also excluded from the overtime protections of the FLSA, but not the minimum wage protections.[80] The reasoning for this revolves around the personal agreements between the domestic worker and their employer about working hours so it is difficult to ascertain how many hours a domestic worker has actually worked when they reside on the premises.[81] Sadly, live-in domestic workers are subject to some of the most flagrant wage and hour abuses and are in need of increased protection under the labor laws.

A. *Live-In Domestic Exemption From the FLSA*

Live-in domestic workers, though covered by the minimum wage provisions are exempt from the overtime protections of the FLSA.[82] Abuses suffered by live-in domestic workers are so many and so flagrant, such as sexual, physical abuse and involuntary servitude, that the subject deserves a deeper and more extensive examination than it will get here. The scope of this discussion is limited to wage and hour exploitation. Live-in domestic workers, while not very common today, are generally either

79. 29 C.F.R. § 552.5 (2010).

80. 29 U.S.C. § 213 (b) (21) (2010).

81. 29 C.F.R. § 552.102 (2010).

82. 29 U.S.C. § 213 (b) (21).

undocumented workers or women from foreign nations who are in the United States on special temporary visas to work as live-in domestic workers.[83] These women come to the United States to escape poverty and to send money back home to their families.[84] Not only are these workers foreign, but also many of them are women of color.[85] Thus, it is important to note both their extraordinarily marginalized position and the incredible power that employers are capable of wielding over these women. Undocumented workers are in the country illegally and risk deportation if they are discovered. Workers on employment –based visas lose their immigration status if they lose their job or choose to voluntarily leave their job.[86] Both documented and undocumented workers depend on their jobs to survive and to send money home to their families.[87] Thus, these employees have zero bargaining power when it comes to the terms and conditions of their employment.

In the worst case scenarios the abuses these workers face are so flagrant that they become victims of involuntary servitude.[88] More commonly, however, live-in domestics are exploited by being required to work very long hours for meager pay. A survey of domestic workers in New York City from 2003-2004 reported that twenty-one percent of live-in workers made below minimum wage;[89] the report also pointed to a survey of live-in Latina domestic workers in Los Angeles where it was reported that 79 percent of workers earned below minimum wage.[90] Moreover, the survey of the New York City workers showed that 63 percent of live-in workers worked overtime, and 67 percent of all domestic workers did not receive overtime pay for

83. *Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States,* HUM. RTS. WATCH, June 1, 2001, at 1 *available at* http://www.hrw.org/en/reports/2001/06/01/hidden-home [hereinafter *Hidden in the Home*]; *Home Is Where the Work Is, supra* note 2, at 10; Smith, *Regulating Work, supra* note 2, at 919 n.415.

84. *Hidden in the Home, supra* note 83.

85. *Home Is Where the Work Is, supra* note 2, at 10.

86. *Hidden in the Home, supra* note 83.

87. *Id.*; *Home Is Where the Work Is, supra* note 2, at 10.

88. *Hidden in the Home, supra* note 83, at 1.

89. *Home Is Where the Work Is, supra* note 2, at 15 (emphasis added).

90. *Id.* at 16.

their work.[91] Much of this can be attributed to the fact that domestic workers, unlike other low-wage workers who are paid hourly, are generally paid a flat rate.[92] This ends up resulting in very low wages, because for live-ins, it is difficult to separate work and free time, since they live where they work. Thus, many are on call all the time, so it is nearly impossible to calculate all the hours worked.[93] In illustrating this point, one worker recounted:

> Mr. 'Connor' told me my job started at 6:30 am until he came home around 7:30 in the evening. But from the first week that never happened because he would come in later than 7:30 and I would have to wait until he got there until I was able to go to bed. . . .I worked all day and into the night. Most nights I would get three to four hours of sleep. I was never given holidays because Mr. & Mrs. 'Connor' said I was not an American so the holidays were not for me.[94]

Thus, it is clear that, for live-in domestics, there is no clear line between working and not working, and employers take advantage of the fact that the worker is on the premises and readily accessible. As a result, although the flat weekly rate may seem like a considerable sum to the worker, many hours end up unaccounted for, and unpaid.[95] This underscores the reality that the relationship between domestic workers and their employers tends to lean in the direction of master-servant. These flagrant abuses would not be permitted in other occupations—to use Romero's earlier comparison to a secretary[96]—an employer would not expect his or her secretary to be on call twenty-four hours a day seven days a week or to work many unpaid hours at the whim of her employer. But, when the work is being performed in the home, employers do not look at the domestic worker as performing real work. They do not think of themselves as employers. Further, these employers are in a unique position to exploit these workers due to the

---

91. *Id.* at 17.

92. *See id.*; Hiller & Saxtein, *supra* note 55, at 257.

93. *See Home Is Where the Work Is, supra* note 2, at 27; ROLLINS, *supra* note 4, at 70- 71.

94. *Home Is Where the Work Is, supra* note 2, at 23.

95. *See id.* at 17, 27.

96. *See supra* note 41 and accompanying text.

power they wield over these employees—the employers are economically and socially superior, and they hold the employees' livelihoods in their hands. This position of power is strengthened by the fact that the law offers little protection or little means by which to enforce the wage and hour provisions and by the fact that workers are not in a good position to report these abuses, since many risk deportation or losing their visas if they do report these abuses.[97]

Perhaps taking note of the fact that so much of what goes on within the confines of the house of an employer of domestics is unknown due to the one-on-one nature of the employment relationship, the U.S. Department of Labor's Wage and Hour Division stated that as part of its Spring 2010 agenda, it planned to update the FLSA recordkeeping requirements for live-in domestic workers to require information regarding hours worked and wage computation for live-in domestics.[98] The goal of this was transparency: to make an employer more cognizant of the employment relationship and to make the employee aware of her rights.[99] However, a search of the Federal Register revealed no notices of proposed rulemakings on this topic for 2010.[100] Thus, it appears that not much is being done in the way to protect live-in domestic workers from this exploitation. Live-in domestic workers, many of whom are not even citizens of this country,[101] are by far the most marginalized of domestic workers. The class and power disparity between the workers and their employers in this sector of domestic work is huge. Further, although these workers are protected by the minimum wage laws, this means

97. *See Hidden in the Home, supra* note 83, at 13.

98. *See* U.S. DEP'T. OF LABOR, WAGE AND HOUR DIV., RECORDKEEPING REGULATIONS, SPRING REGULATORY AGENDA 2010, *available at* http://www.dol.gov/regulations/factsheets/whd-fs-flsa-recordkeeping.htm.

99. *See id.*

100. Search results for proposed rulemaking, THE FEDERAL REGISTER, http://www.gpoaccess.gov/fr/ (search for "domestic worker," " FLSA," and "live-in" in the 2010 search box; no results turned up for any notice of proposed rulemaking on this topic; however there was a notice for proposed rulemaking to extend information collecting for those who employ workers to perform industrial work at their home, such as manufacturing clothing) (this topic was also discussed in the Spring Regulatory Agenda).

101. *See supra* note 84 and accompanying text.

nothing when they are paid a flat rate and hours go unreported, since the line between working and not working is so blurred. The Department of Labor was right to take note of the fact that there needs to be better reporting requirements in this occupation. However, by doing nothing and thus condoning these abuses, the government is perpetuating the inhumane treatment and deplorably low status of these workers.

B. Companionship Exemption From the FLSA

1. *Who Are Home Health Care Workers?* The companionship exemption exempts from both the wage and hour protections of the FLSA those workers who care for the aged or infirm.[102] It is estimated that there are presently 1,738,800 individuals employed as home health care workers in the United States.[103] The average hourly wage for these workers is $10.39, and the average annual wage is only $21,620.[104] To give an idea of how low the average annual wage is- the poverty threshold for a family of four in 2010 was $22,050.[105] Thus, these workers, if they have families, are living just below the poverty line and would be eligible for essentially all forms of public assistance. Even if they are only supporting themselves, the poverty threshold for a single person in 2010 was $10,830, which would put a single home health worker at about 100 percent of the poverty threshold; thus, these workers would still be

---

102. *See* 29 U.S.C. § 213(a) (15) (2004).

103. *See* BLS, HOME HEALTH AIDES, OOH, *supra* note 16. Personal and home care aides and home health aides essentially perform the same work with a minor distinction: home health aides are typically employed by certified home health or hospice agencies that receive government funding. As such, they must be in compliance with certain regulations in order to continue receiving funding; this usually means that they report to a medical professional, such as a nurse or doctor and keep records on treatment and the patient's status. Due to their similarities in duties and pay, I will not further distinguish them throughout this paper and will refer to them collectively as "home health care workers" or "aides."

104. *Id.*

105. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVS., The HHS Poverty Guidelines for the Remainder of 2010, *available at* aspe.hhs.gov/poverty/10poverty/shtml.

eligible, in many states, for some forms of public assistance such as food stamps and Medicaid.[106]

Not surprisingly, many home health care workers rely – or have relied on some form of public assistance,[107] as over half of them are low-income, and 23 percent are living in poverty.[108] Of home health care workers employed nationally, 88.7 percent are women,[109] and in 2009, home health aides (grouped with nursing and psychiatric aides) ranked fifth among the top twenty most prevalent occupations for women in the United States, and personal and home aides ranked twentieth.[110] The typical home health care worker is a single mother,[111] and the average age of these workers is 46 years old.[112] Almost half of these workers are non-white;[113] Latina and Hispanic workers are heavily represented,[114] and one fifth of these workers speak

---

106. *See id.* *NEW YORK MEDICAID AND S-CHIP ELIGIBILITY*, N.Y. HEALTH RESOURCES AND SERVICES ADMININSTRATION, (http://www.hrsa.gov/reimbursement/states/new-york-eligibility.htm) (for Medicaid, income cannot exceed 100% of the Federal Poverty Threshold); *Eligibility and Issuance Requirements,* CAL. DEPT OF SOC. SERV., (http://www.dss.cahwnet.gov/foodstamps/PG841.htm#inc) (for food stamps, income cannot exceed 130% of federal poverty threshold)

107. Kristin Smith & Reagan Baughman, *Caring for America's aging population: a profile of the direct-care workforce,* MONTHLY LAB. REV., Sept. 2007, at 20, 23.

108. *See* Rhona J.V. Montgomery et al., *A Profile of Home Care Workers from the 2000 Census: How It Changes What We Know,* 45 GERONTOLOGIST 593, 598 (2005).

109. *Labor Force Statistics from the Current Population Survey, Employed Persons by Detailed Occupation and Sex*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, (2008), available at http://www.bls.gov/cps/ wlftable11.htm.

110. *Quick Stats on Women Workers* U.S. DEP'T OF LABOR, WOMEN'S BUREAU, (2009) http://www.dol.gov/wb/ stats/main.htm.

111. Steven L. Dawson & Rick Surpin, *Direct Care Health Workers: The Unnecessary Crisis in Long Term Care* at 12 (2001), www.directclearinghouse.org/download/Aspen.pdf; Smith, *Aging and Caring, supra* note 12, at 1848.

112. Montgomery et. al., *supra,* note 108, at 595; Smith, *Aging and Caring, supra* note 12, at 1848.

113. *Id.*

114. Montgomery et. al., *supra,* note 108, at 595; Smith, *Aging and Caring, supra* note 12, at 1848.

a language other than English at home.[115] Further, more non-U.S. citizens are employed as home care aides in comparison with nursing home aides and hospital aides.[116] With regard to safety on the job, in comparison to other occupations, home health care workers suffer larger than average incidents of job related injuries.[117] On average, 61 percent of home health care workers work full time,[118] and they receive no protection from wage and hour exploitation under the Fair Labor Standards Act.[119] Furthermore, in comparison to other female workers, workers in this industry are less likely to have health insurance coverage;[120] only 23 percent of home health care workers obtain health insurance through their employers.[121]

Home health care work is one of the fastest growing occupations[122] as a result of the aging baby boomer population.[123] However, the demand for these workers will largely remain high due to the fact that this occupation is known for its high rate of turnover.[124] In a yearlong study of those who were employed in the home health care profession, more left the profession than remained in it by the end of the year.[125] This can be attributed to the fact that the workers are paid low wages and receive little if any benefits and the work is both physically and emotionally taxing.[126] Furthermore, like other domestic workers who lack employment benefits, any injury on the job could result in thousands of dollars in hospital bills, and a sick day

115. Smith, *Aging and Caring, supra* note 12, at 1848.

116. *Id.*

117. *Id.* at 1884-85; BLS, Home Health Aides, OOH, *supra* note 16, at 2.

118. Smith & Baughman, *supra* note 107, at 22.

119. Fair Labor Standards Act, 29 U.S.C. 213 (a) (15) (2004).

120. Smith & Baughman, *supra* note 107, at 22.

121. *Id.* at 23.

122. BLS, Home Health Aides, OOH, *supra* note 16 (explaining that employment in home health care work is expected to grow 50 percent from 2008 to 2018).

123. Smith, *Aging and Caring, supra* note 12, at 1837; Dawson & Surpin, *supra* note 111, at 13.

124. Smith & Baughman, *supra* note 107, at 24.

125. *Id.*

126. Dawson & Surpin, *supra* note 111, at 10.

taken with no paid sick leave results in lost income. Thus, workers likely have no qualms about leaving their jobs for better paying jobs if they become available or leaving the industry altogether, if they become injured from their work.[127] Not only does this affect workers, but it affects their clients too. Because the job is so unattractive, and because there is a high turnover rate, the demand for home health care workers exceeds the supply.[128] As a result, clients may not be receiving the care they need, and the care that they are receiving may be of lower quality due to the *type* of workers who are filling these positions: because the position of a home health worker is so undesirable, the applicant pool is filled with individuals who have a difficult time finding employment elsewhere, such as individuals who have little education, a history of drug and alcohol abuse, or poor work histories.[129] In fact, in Wisconsin, thirty percent of home health worker applicants were found to have felony-level backgrounds.[130] It is impossible for clients to expect adequate care when the people providing their care are barely surviving on their meager wages.

2. *Nature of the Work.* Home health care workers generally work in the homes of elderly, infirm, or mentally disabled individuals.[131] They require basic paramedical skills, such as knowing how to respond to an emergency and how to monitor and record vital signs;[132] most must undergo some sort of training and/or certification.[133] Their duties range from the technical, such as administering medication, checking vital signs, helping with prescribed exercises, changing dressings, and assisting with medical equipment such as ventilators, to the mundane, such as completing light housekeeping chores like laundry, changing bed linens, shopping for groceries and planning and preparing

127. Smith, *Aging and Caring, supra* note 12, at 1850.

128. Dawson & Surpin, *supra* note 111, at 10 ("National trade associations representing long-term care providers have put labor vacancies among their top concerns."); Montgomery et al, *supra,* note 108, at 593.

129. Dawson & Surpin, *supra* note 111, at 10.

130. *Fair Home Health Care Act Hearing, supra* note 25, at 41.

131. *See* BLS, HOME HEALTH AIDES, OOH, *supra* note 16 at 1.

132. *Id.* at 1-2.

133. *Id.* at 2.

meals.[134] Most aides also assist clients with getting out of bed, bathing, dressing and grooming.[135] Aides may be assigned to only one client for a substantial part of the day or may work with multiple clients for a few hours each day.[136] In order to accommodate patients' needs, many aides work nights and weekends and are generally responsible for their own transportation to and from patients' houses.[137] Not only is the nature of this work physically demanding, as home health care workers are generally required to move patients into and out of bed and help patients stand or walk,[138] but it is also emotionally demanding, as aides often care for patients who may be disoriented, uncooperative, angry or abusive.[139] Aides are also responsible for performing tasks which expose them to bodily fluids such as changing bed pans and soiled linens, dressing wounds, and administering vaccines; thus they must protect against infections and communicable diseases.[140]

3. *The Courts' Treatment of the Home Health Care Exemption.* Most cases seeking to determine whether a home health aide is covered under the FLSA arise where the plaintiffs claim they fall under the trained personnel exception to the exemption, which is a construction of the Department of Labor regulations.[141] That exemption states in relevant part, "[t]he term 'companionship services' does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse."[142] However, the majority of courts have narrowly interpreted

134. *Id.* at 1-2.

135. *Id.* at 1.

136. *Id.*

137. *Id.* at 2.

138. *Id.* at 1; Smith, *Aging and Caring, supra* note 12, at 1871.

139. BLS, Home Health Aides, OOH, *supra* note 16.

140. *Id.* at 1-2.

141. *See, e.g.,* Cox v. Acme Health Servs., Inc., 55 F.3d. 1304 (7th Cir. 1995); McCune v. Oregon Senior Servs. Div., 894 F.2d 1107 (9th Cir. 1990); Nellis v. G.R. Herberger Revocable Trust, 360 F. Supp. 2d 1033 (D. Ariz. 2005); Armani v. Maxim Healthcare Svc. Inc., 53 F. Supp. 2d 1120 (D. Colo. 1999); Sandt v. Holden, 698 F. Supp. 64 (M.D. Pa. 1988).

142. 29 C.F.R. § 552.6 (1995).

the regulation to mean that if the plaintiff is neither a licensed nor registered nurse that the exception to the exemption does not apply, and the plaintiff is not entitled to wage and hour protection.[143] Further, giving the regulation the narrowest interpretation, one court held that even if the plaintiff is a licensed or registered nurse, mere licensure is not enough, and the court must still examine whether the duties performed by the plaintiff are functions that may *only* be performed by a licensed or registered nurse.[144] If the duties performed by a licensed or registered nurse are merely what the court has interpreted to be companionship duties, then the exemptions to the exclusion still do not apply.[145] Furthermore, if the worker is *not* a licensed or registered nurse, but performs duties that only a licensed or registered nurse would perform, the exemptions do not apply, because the court does not want to reward them for performing duties they are not supposed to perform.[146] The courts' narrow construction of the Secretary's interpretation of the trained personnel exclusion to the exemption is frustrating in light of the fact that the purpose of the 1974 amendments was to *extend* the protections of the FLSA.[147] When the plaintiffs in *McCune v. Oregon Senior Services* took their argument a step further and urged the court to ignore the Secretary's interpretation of the FLSA and the creation of this trained personnel exemption altogether, the court, citing *Chevron* held that it *had* to defer to the agency's interpretation of the statute,[148] because it could not find that the agency's interpretation of the statute in defining companionship services was "unreasonable in light of the [Secretary's] congressional mandate."[149] Thus, when it comes to challenging the application of the trained

143. *See Cox*, 55 F.3d. at 1311; *McCune*, 894 F.2d at 1113; *Armani*, 53 F. Supp. 2d 1120 at 1126-27; *Sandt*, 698 F. Supp. 64 at 68. *But see Nellis,* 360 F. Supp. 2d at 1046;

144. *Nellis*, 360 F. Supp. 2d at 1039.

145. *Id.* at 1044.

146. *McCune*, 894 F.2d at 1111.

147. *See* S. COMM. REPORT ON FAIR LABOR, *supra* notes 69-73 and accompanying text.

148. *McCune*, 894 F.2d at 1110.

149. *Id.* For a further discussion of the *Chevron* test *see infra* notes 168-173 and accompanying text.

personnel exception to the exemption, it has proven to be unsuccessful for workers who are skilled and perform tasks far beyond mere companionship but who are lacking the title of licensed or registered nurse.

In his dissent in *McCune,* Judge Pregerson made a public policy argument for the inclusion of certified nursing assistants and other similarly trained home health care workers within the trained personnel exception to the exemption and for the inclusion of all home health care workers under the protections of the FLS .[150] Judge Pregerson began by providing a legislative history of the 1974 amendments to the FLSA that provided coverage for domestic workers;[151] citing the legislative history, he stated that it was Congress's intention to provide "these workers with the opportunity to maintain a 'minimum standard of living necessary for health, efficiency and general well-being.'"[152] He continued:

> To allay concerns that "unlimited" minimum wage protection for domestic workers would wreak economic havoc, sponsors of the measure agreed to exempt from minimum wage coverage babysitters and companions. By the terms "babysitter" and "companion," the sponsors meant persons who did not provide medical care or perform substantial household work.[153]

He went on to point out how Congress was specific to differentiate babysitters and companions as those who were "*not* 'regular bread-winners or responsible for their families' support."[154] Thus, Judge Pregerson stated that the work performed by the plaintiffs in the case at hand: providing full-time, live-in daily services for their clients including housekeeping, medical care and tending to the clients' hygiene was *not* what Congress intended to be encompassed within the meaning of "babysitting" or "companionship."[155] With regard to the plaintiffs' argument that they fell within the trained personnel exception to the exemption, Judge

150. *McCune*, 894 F.2d at 112-13.

151. *Id.* at 112.

152. *Id.* (citing H.R.Rep. No. 913, 93d Cong., 2d Sess. 33, *reprinted in* Legislative History, *supra* at 2111) (internal quotations omitted).

153. *Id.*

154. *Id.* (citing to legislative history).

155. *Id.*

Pregerson noted that the district court acknowledged that the plaintiffs, many of them certified nursing assistants, had undergone an "ambitious" curriculum of sixty hours of medical training; however the majority ignored this in favor of using the regulation's *examples* of trained personnel, licensed and registered nurses, as the *definition* of trained personnel. [156] Judge Pregerson opined that "[e]xemptions to the FLSA are to be *narrowly* construed in order to give full effect to the Act's purpose."[157] In light of this, he stated "*exceptions* to the exemptions should be *broadly* construed; such a construction, consistent with Congressional intent, broadens, not narrows, the number of workers eligible for protection under the FLSA." He continued, "[t]he argument that CNAs are not trained for the purposes of minimum wage coverage smacks of elitism."[158]

Judge Pregerson's dissent illuminates the fact that the court's strict interpretation of the FLSA is unjust in light of the fact that many home health aides, particularly those who work for agencies that receive reimbursement from Medicare or Medicaid, are skilled and have undergone relatively extensive training and certification programs, in contrast to other domestic workers who *are* covered under the FLSA, such as housekeepers and nannies.[159] Judge Pregerson, as he should, gives great weight to home health aides' skill and training in emphasizing his opinion that these workers are not merely companions who could be likened to a casual babysitter. The courts' interpretation of these regulations is overly narrow, especially in light of the fact that the courts considered the workers' training and strenuous duties, and still rejected them from coverage under the FLSA. This again, emphasizes the stigma of domestic work and its inferior position to other types of more preferred work that is performed outside of the home. As Pregerson noted, the narrow interpretation is a very elitist interpretation of the act;[160] he made it seem that it was common sense that these workers should be afforded

156. *Id.* at 1113.

157. *Id.* (citing *A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).*

158. *Id.*

159. BLS, Home Health Aides, OOH, *supra* note 16.

160. *McCune*, 894 F.2d at 1113.

coverage and that not providing them with coverage was offensive to both him and the workers.

4. *Home Health Care Workers Employed by Third Parties.* Another perplexing interpretation of the Act is that the Secretary of Labor expressly excludes those home health care workers who are employed by a third-party agency, but not childcare workers who are employed by a third-party agency, differentiating on the basis that those babysitters are "engaged in this occupation as a vocation."[161] Contrary to other types of domestic workers, many home health care workers are employed by these third-party agencies;[162] thus although their work is performed in the homes of patients, they are employed by and paid by an agency. This regulation was often challenged by workers on the grounds that it was in conflict with another interpretive regulation promulgated by the Secretary that defines domestic work as "services of a household nature performed by an employee in or about a private home (permanent or temporary) *of the person by whom he or she is employed.*"[163] Thus, the workers argued that because they were employed by an agency and not by a person in the house where they performed their work, they were not, by definition, domestic workers, and as a result were entitled to the wage and hour protections of the FLSA.[164] However, the Supreme Court finally ruled on this regulation in 2007 in *Long Island Care at Home, Ltd. v. Coke* and determined that the Secretary's regulations were binding.[165] While the Court acknowledged that the two regulations conflicted, it cited four reasons for deciding that the regulation excluding companionship workers employed by third parties took precedence over the regulation defining domestic work, because, in short, it was more specific and it created less problems, i.e. this holding would not extend coverage to more workers, to whom, according to

161. 29 C.F.R. 552.109 (a), (b).

162. Smith, *Aging and Caring, supra* note 12, at 1862-63.

163. 29 C.F.R. § 552.3 (emphasis added). *See* Buckner v. Fla. Habilitation Network, Inc., 489 F.3d 1151 (11th Cir. 2007); *see also* Johnston v. Volunteers of Am., Inc., 213 F.3d 559 (10th Cir. 2000); Zachary v. ResCare Okla. Inc., 471 F. Supp. 2d 1183 (N.D. Okla. 2006).

164. *See Buckner*, 489 F.3d 1151; *see also Johnston*, 213 F.3d 559; *Zachary*, 471 F. Supp. 2d 1183.

165. Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007).

the Court, Congress did not intend to afford coverage.[166] Subsequently, the Court afforded the regulation which expressly excluded companionship workers employed by third parties *Chevron* deference and held that the agency's interpretation was controlling, because the agency's interpretation was reasonable under the statute and it was merely filling a gap in the statute left open by Congress.[167] The decision of the Court was mechanical and based purely on statutory interpretation, the rule making process and the level of deference to be afforded to the Secretary's regulation.

When a plaintiff challenges an agency's interpretation of a statute, courts apply the *Chevron* test. First, of course, it must be determined that Congress has given the agency the power to interpret the statute through either rule making or adjudication.[168] Then, the court must look at the statute to determine whether it is ambiguous or whether Congress has left a gap to be filled by the agency.[169] If it is not ambiguous or if Congress speaks directly to the issue, then the plain language of the statute is controlling, and the agency's interpretation is not entitled to deference.[170] However, if the court deems the statute ambiguous or silent on the issue in question, then the agency's interpretation of the statute, which usually takes the form of a rule or regulation, is controlling, and the court will defer to this interpretation unless it is found to be either "arbitrary and capricious or manifestly contrary to the statute."[171] Of course, it should be noted that in applying *Chevron* to an agency interpretation of a statute that is determined to be ambiguous, a challenger to the agency's interpretation has not succeeded since 1990.[172] Thus, plaintiffs attempting to challenge the Secretary's creation of this rule will be out of luck, as Congress gave the Secretary power to further interpret the FLSA and its exclusions and the Secretary's

166. *Id.* at 169-71.

167. *See id.*

168. *See* Gonzales v. Oregon, 546 U.S. 243, 255-56 (2006).

169. *See* Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-43 (1984).

170. *Id.*

171. *Id.* at 843-44.

172. *See* Dep't of Treasury v. Fed. Labor Relations Auth., 494 U.S. 922, 928 (1990).

interpretation must therefore be controlling.[173] Thus, courts are unwilling to disturb the status quo and home health care workers continue to be marginalized. Since it has been a no win situation for home health care workers in the courts, it is clear that they cannot call upon the courts to alter their excluded status under the FLSA; they must go to the legislature or the agency.

5. *Congressional Intent and Attempted Amendments to the FLSA Include Home Health Care Workers.* Even though it has been the trend of the courts give the Secretary's interpretation deference and the courts often refuse to look to congressional intent when interpreting statutes, in order to gain a better understanding of this exemption, it is important to ask what Congress' intent truly was when it provided for the companionship exemption. The intent of the 1974 amendments to the FLSA that extended coverage to domestic workers, as discussed earlier, was to afford protections to a broader group of workers and to enhance the position of marginalized female workers.[174] In light of this fact, did Congress truly intend for home health care workers to be excluded from coverage? Probably not. The Senate Committee on Labor and Public Welfare expressly stated, "[i]t is the intent of the Committee to include within the coverage of the Act all employees whose vocation is domestic service."[175] In discussing the companionship exemption, the Committee states, "[b]ut it is not intended that trained personnel such as nurses, whether registered or practical, should be excluded. People who will be employed in the excluded categories are not regular bread-winners or responsible for their families' support."[176] Thus, while the language of the trained personnel exception to the exemption comes directly from the Committee report, it is important to note that the sentence is immediately qualified by a sentence explaining that the exclusions are only meant to cover *casual* workers. This is incredibly important, as it reinforces that it was *not* Congress' intent to exclude home health care workers as their jobs presently exist today.

---

173. *See* 29 U.S.C. § 213 (a)(15) (2004).

174. *See* S. COMM. REPORT ON FAIR LABOR, *supra* note 69 at 18-20, 22.

175. *Id.* at 20.

176. *Id.*

The exclusion is clearly based on this notion of casual work. In contrast to the idea of casual workers espoused by the committee, the statistics of home health care workers illustrate that most home health care workers are *not* casual laborers, as 61 percent work full time.[177] Furthermore, in contrast to the notion of a companion, most home health care workers are skilled and generally trained and/or certified.[178] Their work is demanding and predisposes them to illness and injury.[179] Furthermore, in comparison to the work performed by other domestic employees, home health care workers' tasks are arguably just as strenuous and labor intensive, if not more so, as the those performed by covered domestic workers. Thus, this *cannot* be the type of work that Congress sought to exclude form the protections of the FLSA. On the contrary, it seems clear that this is exactly the type of work to which Congress meant to extend the FLSA's protections.

In fact, in 2001, in an attempt to amend its own rules, which interpret this exemption, the Department of Labor admitted that it was *not* the intent of Congress to exclude from its protections the work of home health care workers as it exists today:

> Due to significant changes in the home care industry over the last 25 years, workers who today provide in-home care to individuals needing assistance with activities of daily living *are performing types of duties and working in situations that were not envisioned when the companionship services regulations were promulgated.* The number of workers providing these services has also greatly increased, and most of these workers are being excluded from the FLSA under the companionship services exemption. The Department has reevaluated the regulations and determined that—as currently written—they exempt types of employees far beyond those whom Congress intended to exempt when it enacted section 13(a)(15).[180]

---

177. Smith & Baughman, *supra* note 107, at 23.

178. BLS, Home Health Aides, OOH, *supra* note 16.

179. *Id.*

180. Application of the Fair Labor Standards Act to Domestic Service, 66 Fed. Reg. 5481 5482 (Jan. 19, 2001) (to be codified at 29 C.F.R. pt 552) (emphasis added).

While the Department of Labor never followed through with this proposed revision,[181] it acknowledged that home health care as it exists today is not the same as when the FLSA amendments were passed, and as a result, the Secretary's interpretations are *not* in line with the congressional intent of the statute.[182]

Not only has there been proposed rulemaking to include home health care workers within the protections of the FLSA, but there has also been proposed legislation to amend the FLSA itself. In 2007, following the Supreme Court's decision in *Coke*, members of the House and Senate proposed the Fair Home Health Care Act, the purpose of which was to clarify the exemption of home health care workers from the Act.[183] The new provisions would exempt only those babysitters or companions whose employment:

> (A) is irregular or intermittent, and is not performed by an individual whose vocation is the provision of babysitting or companionship services or an individual employed by an employer or agency other than the family or household using such services; and
>
> (B) does not exceed 20 hours per week in the aggregate, whether performed for one or more family or household employers.[184]

The bill was referred to, and heard before the House Committee on Education and Labor, and a companion bill was introduced in the Senate; however, it was never submitted for voting and has not yet been reintroduced.[185]

The supporters of this bill gave reasons that, by now, seem to be common sense: these workers are in need of the protection of the FLSA, because their wages are so low and their jobs are so dangerous—and there is really no good reason *not* to afford these workers the protection of the FLSA when maids and housekeepers are covered and where people who perform the same duties in nursing homes and

---

181. Smith, *Aging and Caring, supra* note 12, at 1870.

182. *See id.* at 1867.

183. Fair Home Health Care Act, H.R. 3582, 110th Cong. (2007).

184. *Id.*

185. Govtrack.us, H.R. 3582: Fair Home Health Care Act, http://www.govtrack.us/congress/bill.xpd?bill=h110-3582.

hospitals are covered.[186] Opponents to the bill argued that the exclusion of home health care workers was a "deliberate choice by Congress"[187] as Congress meant to strike a balance:

> [B]etween the protection of companionship service workers and the needs of the elderly and infirm patients to obtain this care in these services. That balance recognizes that increasing the cost of companion care services by way of minimum wage and overtime requirements, it is likely to result in a hardship to many who need these services but for whom they would become too costly.[188]

It is clear that home care is a cost that may be difficult to afford, especially if the need for the service arises unexpectedly or if the person in need of the service is low income herself.[189] Homecare is a unique domestic service, because unlike maids, housekeepers and in-home child care providers who are generally employed by the wealthy or middle class, home care is a service used by those of all classes.[190] But, regardless of the expenses of the cost of home health care to clients, the argument that home health care workers should foot the bill through low wages and the denial of the protection of the FLSA is completely illogical.[191] Surely there are other ways the government can subsidize the cost of providing home health care to those in need. Furthermore, as discussed earlier, clients actually suffer as a result of paying home health care workers low wages.[192] If home health care workers were paid better wages and afforded the protections of the FLSA, the quality of the care would *improve*, because the work would appeal to a more diverse group of people rather than just the most marginalized members of society and those who cannot get jobs elsewhere due to criminal backgrounds or poor employment history.[193] Essentially, clients will continue to

186. *The Fair Home Health Care Act Hearing, supra* note 25, at 8, 23-24, 26, 33.

187. *Id.* at 5.

188. *Id.*

189. *See* Smith, *Aging and Caring, supra* note 12, at 1842.

190. *See id.* at 1840.

191. *See id.* at 1842.

192. *See supra* notes 128-130 and accompanying text.

193. *Id.*; Smith, *Aging and Caring, supra* note 12, at 1842-43.

get what they pay for until Congress affords these workers the protections that they need.

The failure of Congress and the Department of Labor to amend the laws and regulations in the face of evidence that is so clearly on the side of home health care workers emphasizes the pervasiveness of the stigma of performing domestic work and the belief that work performed in the home is not real work. Opponents to the amendments are looking out for the interests of the clients of home health care workers rather than the workers, because these types of workers, to them, are second-class citizens. Because they are paid such low wages, it is a self-fulfilling prophecy that the most marginalized of workers are going to take these jobs—reinforcing the societal belief that domestic workers are second-class citizens. This will not be remedied until home health care workers are paid sustainable wages and are afforded the protections of the labor laws; it will not only benefit the workers but the clients as well.

V. PROTECTION AT THE STATE LEVEL

While some states have included home health care workers in their wage and hour protections,[194] the only state thus far to fully acknowledge the plight of domestic workers and to afford them a bill of rights has been New York State. On August 31, 2010, New York State passed the Domestic Workers Bill of Rights, codified in the New York State Labor Law. These changes went into effect on November 29, 2010. It should be noted that prior to the enactment of these laws, domestic workers in New York, except casual babysitters and live-in companions to the elderly and infirm, were already protected under the minimum wage and maximum hour laws,[195] and those who were placed in their jobs through employment agencies enjoyed other protections such as notice: the agencies are required to give the worker a written copy of the rights afforded to them under New York State law and to provide them with a written description of the work to be performed and the terms and conditions of their employment prior to

194. *Fair Home Health Care Act Hearing, supra* note 25, at 36-37.

195. N.Y. COMP. CODES R. & REGS. tit. 12, § 142(2.14) (2009); N.Y. LAB. LAW § 170 (McKinney 2011).

placement.[196] The stated purpose for further increasing the protections afforded to domestic workers was:

> Many thousands of domestic workers are employed in New York state as housekeepers, nannies, and companions to the elderly. The labor of domestic workers is central to the ongoing prosperity that the state enjoys, and yet, despite the value of their work, domestic workers do not receive the same protect ion of many state laws as do workers in other industries. Domestic workers often labor under harsh conditions, work long hours for low wages without benefits or job security, are isolated in their workplaces, and are endangered by sexual harassment and assault, as well as verbal, emotional and psychological abuse. Moreover, many domestic workers in the state of New York are women of color who, because of race and sex discrimination, are particularly vulnerable to unfair labor practices. Additionally, domestic workers are not afforded by law the right to organize labor unions for the purpose of collective bargaining.
>
> The legislature finds that because domestic workers care for the most important elements of their employers' lives, their families and homes, it is in the interest of employees, employers, and the people of the state of New York to ensure that the rights of domestic workers are respected, protected, and enforced.[197]

Thus, New York has recognized and addressed that domestic workers are truly the most marginalized of workers and are in need of the protections of the labor laws. The most important amendment is that New York has expanded the definition of domestic worker to mean:

> [A] person employed in a home or residence for the purpose of caring for a child, serving as a companion for a sick, convalescing or elderly person, housekeeping, or for any other domestic service purpose. "Domestic worker" does not include any individual (a) working on a casual basis, (b) who is engaged in providing companionship services, as defined in paragraph fifteen of subdivision (a) of section 213 of the fair labor standards act of 1938, and who is employed by an employer or agency other than the family or household using his or her services, or (c) who is a relative through blood, marriage or adoption of: (1) the employer; or (2) the person for whom the worker is delivering services under

196. N.Y. LAB. LAW §§ 691, 692.

197. 2010 N.Y. Sess. Laws 481 § 1 (McKinney 2010).

> a program funded or administered by federal, state or local government.[198]

Thus, New York has expanded the definition of domestic workers to include the protection of those workers who provide companionship services to the elderly on a non-casual basis and has clarified that, contrary to *Long Island Care at Home, Ltd. v. Coke,* companionship service providers who work for an agency are *not* domestic workers.

With regard to hour protections, the domestic workers are no longer exempted from the protections of an eight-hour work day.[199] It has also amended overtime protections for live-in domestics; although overtime pay is not required for live-ins until after forty-four hours of work, they are now entitled to one and one-half times their regular pay, whereas prior to the amendments they were only entitled to one and one-half times the minimum wage.[200] Additionally, the amendments provide for 24 hours of consecutive rest each week, overtime pay if the worker decides to work on that day, and after one year of work with the same employer, the domestic worker is entitled to three paid days off per year.[201] The Labor Law provides for the enforcement of these provisions through the labor commissioner.[202]

Finally, recognizing that domestic workers are prone to the most flagrant of abuses in the homes of their employers such as sexual harassment and physical abuse and acknowledging that these workers are not protected under Title VII of the Civil Rights Act of 1964 due to the requirement that an employer must employ a minimum of fifteen employees, New York enacted a new human rights law to protect domestic workers against harassment:

> It shall be an unlawful discriminatory practice for an employer to:
>
> (a) Engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to a domestic worker when: (i) submission to such conduct is made

198. N.Y. LAB. LAW § 2(16) (McKinney 2011).

199. *See* N.Y. LAB. LAW § 160(3) (McKinney 2011).

200. LAB. § 170.

201. N.Y. LAB. LAW § 161(1) (McKinney 2011).

202. N.Y. LAB. LAW §693 (McKinney 2010).

> either explicitly or implicitly a term or condition of an individual's employment; (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment.
>
> (b) Subject a domestic worker to unwelcome harassment based on gender, race, religion or national origin, where such harassment has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment.[203]

In order to effectuate this, New York amended the definition of employer to provide for an exception to the minimum number of employees requirement for those who employ domestic workers and amended the definition of employee to include domestic workers.[204] Title VII like protection against sexual harassment and harassment based on other protected categories is especially noteworthy and necessary given that the one-on-one nature of the employment relationship that most domestic workers have with their employers puts these employees in a particularly vulnerable position when it comes to harassment. It is also important to note that there is nothing in these laws which reserves their protections for a United States citizens only; undocumented workers are protected by the New York State labor laws.[205] Thus, New York has set an example for other states and the federal government in affording domestic workers the protections they deserve.

There are, however, a few protections missing such as the right to paid sick leave and most notably, the right to collectively bargain;[206] interestingly, the legislative history acknowledges the lack of this right and counts it as one of the reasons for amending the laws to afford domestic

---

203. N.Y. EXEC. LAW § 296-b (McKinney 2010).

204. N.Y. EXEC. LAW § 292 (5)-(6) (McKinney 2011).

205. NY State Dep't of Labor, Fact Sheet: Labor Rights and Protections for Domestic Workers in New York (2010) *available at http://www.labor.ny.gov/sites/legal/laws/pdf_word_docs/P712-revised-12-8-10.pdf*

206. *See* N.Y. LAB. LAW § 701 (McKinney 2010).

workers coverage.[207] Perhaps this was a compromise in ensuring that the bill passed. However, as discussed previously, just because domestic workers are not guaranteed this right does not mean that they cannot exercise this right—it just means that they will not be protected if they do. According to the legislative history, it is clear that New York is aware of the marginalized position and mistreatment of these workers, and its intent in creating these laws was to bolster the position of these workers in society and afford them the protections they deserve. Since these laws were passed so recently, it is impossible to report on the positive effects of this act, but is clear that domestic workers are now, under New York law, on relatively equal footing with other employees protected by the New York State labor laws. While it does not remove the dangers of employment for workers like home health aides, it ensures that at the very least, they are compensated for their overtime work and are afforded ample time to rest. For the occupation, hopefully these new protections will help to remove the stigma on domestic workers and will make domestic employment more acceptable as legitimate work to society. And for the workers, hopefully these new protections will afford them better treatment and help them to earn a more substantial living. If anything, the rights to overtime pay, a day of rest, paid time off and protection from harassment give these workers more leverage in bargaining with their employer. Since these workers have been singled out by the law, hopefully employers and society will begin to recognize, as the state has, that this is legitimate work and that domestic workers are deserving of the same respect and treatment as other employees.

CONCLUSION

Based on the fact that there have been attempts at the federal level and success at the state level in implementing laws to afford comprehensive protection to domestic workers, it is clear that lawmakers are aware of the precariousness of the labor laws as they apply to domestic workers. As they presently exist, labor laws extend coverage to the most marginalized of workers who perform

207. 2010 N.Y. Sess. Laws 481 § 1.

the most menial tasks: fast food workers who flip burgers, janitors who scrub toilets in office buildings, health aides who change diapers in nursing homes. Somehow, domestic workers are even more inferior than these workers, because the work they perform, cooking, cleaning, caring for children, caring for the elderly and infirm, work that is generally reserved for the female head of the household to perform—unpaid— is hardly considered work at all; thus, they are denied the full and fair protections of the labor laws. Their employers: owners of the homes that they clean, parents of the children whom they tend, children of the parents for whom they care, unsurprisingly, do not view these workers as their employees. Because of the lax nature of employing a person in one's home, which is a result of the failure of the laws to more closely regulate domestic employment, domestic workers are treated as lesser than employees. They are treated like second-class citizens, like servants. Predictably, this work is performed by the most marginalized of people: women of color, immigrants – documented and undocumented, women on public assistance, uneducated women, women with criminal backgrounds, women with histories of substance abuse, women, who for various reasons, have trouble finding better work elsewhere.[208] Thus, their marginalized status is cyclical and perpetual: society and lawmakers view this work as being lower than the most menial of jobs; because of this stigma, these jobs are performed by people who have no other option. This perpetuates the view that these workers are second-class citizens, because most of the time, these workers were already independently marginalized in some way before taking the job. Thus, if the workers continue to perform these jobs, there is no way out. The laws refuse to recognize their need for protection, and there is no such thing as advancement in domestic work. In doing nothing to amend these laws to protect the workers, lawmakers perpetuate this cycle. Lawmakers need to recognize the plight of domestic workers and place them on equal footing with the burger flipping fast food workers, the toilet scrubbing janitors, and the diaper changing nursing home aides. Not only will it benefit the workers, but it will benefit the children and the aged parents who are cared for by these workers; so if lawmakers will not change the law

208. *See supra* notes 25, 82-85, 128-130 and accompanying text.

for the workers, then they should change it to benefit themselves. This is back breaking, dirty, dangerous, *real* work that deserves and *needs* to be protected by the labor laws.