

# *Enforcement Strategies for Empowerment: Models for the California Domestic Worker Bill of Rights*

*An Informational Policy Report*



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Domestic workers and their employers, labor advocates and the general public, have a stake in ensuring a robust labor standards regime to enhance the quality of care and maintain everyday life across the generations. This policy report begins with the assumption that better care requires decent working conditions: only when nannies, elder care, and other household workers obtain fair compensation, a decent working environment, and recognition as workers with skill and knowledge, who have opportunities for training and career advancement, can they provide the kind of services that will enable households and individuals to retain employment while sustaining homes and the lives of those needing assistance or care.

Following New York and Hawaii, the California legislature passed a Domestic Worker Bill of Rights (DWBOR) in 2013. This new law builds upon prior state wage and hour orders for household workers, but does not include In-Home Supportive Services Workers, who fall under Welfare Statute. California's Wage Order 15 that regulates wages, hours, and working conditions for household occupations, last updated in January 2006, also excludes personal attendants, and, like the federal Fair Labor Standards Act (FLSA), teenage babysitters and those tending family members. California's DWBOR covers overtime pay for many other domestic workers still excluded under other state overtime provisions: nannies and personal care attendants who work more than a nine-hour day, providing that such care makes up 80% or more of their duties for workweeks of more than 45 hours. Violation of this standard is a misdemeanor, reportable to the California Division of Labor Standards Enforcement. The bill also mandates an advisory committee to study the impact of the law on personal care attendants and their employers.<sup>1</sup>

Subsequently, in July 2014, Massachusetts enacted the most comprehensive regime of rights and enforcement, enhancing its inclusion of private household workers under its wage and hour, worker compensation, and collective bargaining laws from the 1970s—a product of the efforts of Melena Case and the other African American activists of The Women's Service Club of Boston.<sup>2</sup> A new generation of workers, many of them from immigrant backgrounds and dominated still by women of color, now have renewed such rights and extended them. DWBORs are pending in Connecticut and Illinois. The California law alone has a sunset provision of January 2017, prior to which the legislature may reconsider the terms and extent of its provisions.

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Caption/credit: Governor Jerry Brown signs the California Domestic Workers Bill of Rights (AB 241) into law on September 26, 2013. Photo courtesy of the California Domestic Workers Coalition.

Part one summarizes the provisions in enacted bills of rights with a focus on enforcement mechanisms. Part two updates the legal status of the revisions of the Obama administration that would extend FLSA protections to home care workers employed by third parties and redefine “elder companion” and “care” so to end the exclusion of these workers from overtime. Part three presents laws and policies from other nations, which suggest the range of arrangements that different political economies establish to define labor markets for household work. It also summarizes the ILO convention. Part four assesses models of enforcement: civil litigation; state agency (Department of Labor, Attorney General, and/or Human Rights); state employment bureau/public authority; worker center/NGO; and worker ambassador/grass roots monitoring. Some of these approaches overlap; all of them contain elements that together can enhance the rights of workers and employers of household labor.

An update of this report will appear as a brief following a convening of stakeholders from the National Domestic Worker Alliance, including employers and workers, and experts from other states to propose recommendations that will address the costs and benefits of enforcement; what kinds of enforcement and education mechanisms make sense for California; and which kinds of enforcement procedures are more likely to empower workers in the process.

#### Part I: Domestic Workers Bills of Rights

The increasing number of DWBORs represents a form of policy diffusion, in which different models for policy move from state to state, in this case through deliberate campaigns organized

by workers and their allies. The four states with such laws use civil litigation and administrative claims, relying upon a department of labor for enforcement processes. All place the burden on individual domestic workers to file and initiate enforcement processes. New York, Massachusetts and California have passed Wage Theft Prevention Acts (WTPA) to clarify labor law, provide filing processes or access to litigation for enforcement, and to issue fines against employers found in violation of the laws that can be used by domestic workers. Hawaii has a law with stricter record keeping and paystub information as an alternative to WTPA. Additionally, employment trends and budgetary decisions at state levels have led to shift in enforcement of labor laws and venues from collective bargaining and litigation strategies to mandatory arbitration clauses in contracts and privatized processes of restitution.<sup>3</sup> Litigation overall has favored employees and yielded higher financial awards, even when settled, when compared to arbitration and at times, labor administrative rulings.

#### A. New York

New York's enforcement options come through two processes: civil lawsuits or filing claims through the Department of Labor through their administrative and mediator services or filing a civil litigation claim. The DWBOR mandates a notice of rights requirements by the employer, records of employment, information in English and Spanish, and compliance with minimum wage and overtime laws, and minimum written contracts standards and examples. Violation of these provisions can result in civil fines and penalties. New York State also has legislation requiring written contracts and documentation for all workers with the passage of Wage Theft Prevention Law (WTPA). The New York Department of Labor also has noted that WTPA covers domestic workers that can be used for enforcement beginning April 9, 2011.<sup>4</sup> Current legislation requires domestic workers individually to initiate enforcement processes.<sup>5</sup>

#### B. Hawaii

Enforcement of the DWBOR relies on Immigrant Resource Centers (IRC) to assist domestic workers with understanding and obtaining rights. Under the legislative initiative Act 305 of the 1985 Hawaii State Legislature, Hawaii contracts to specific non-profits which work with immigrants to help advocate and assist with worker compensation claims and fulfill the legal obligations of the Office of Community Services (OCS), which "provides human service programs for Hawaii's economically disadvantaged, immigrants, and refugees."<sup>6</sup> OCS also fosters compliance with Federal Agencies and Federal Grants.<sup>7</sup> OCS was created to consolidate various state and federal agencies tasked with anti-poverty services, civil rights, immigration needs and labor laws specifically including legal assistance and advocacy programs. A centralized administrative unit, OCS outsources the multifarious responsibilities to non-profits, private organizations and community programs. These non-profit centers provide direct services and ensure all state obligations are fulfilled.<sup>8</sup> Enforcement for DWBOR is expected to be through IRC. Funding for DWBOR programs is exclusively provided by the Hawaiian Legislature's allocations in the annual budget for OCS.<sup>9</sup> Individuals may also use civil lawsuits or seek administrative enforcement through filing complaints with the state Department of Labor. In lieu of a wage theft prevention law, the DWBOR requires employers to provide record keeping and written contracts, as well as maintain a specific paystub, which allows individuals to sue for civil penalties. The burden of enforcement is on individual workers who can seek assistance by contacting an IRC as a step towards filing with the appropriate state agency.<sup>10</sup>



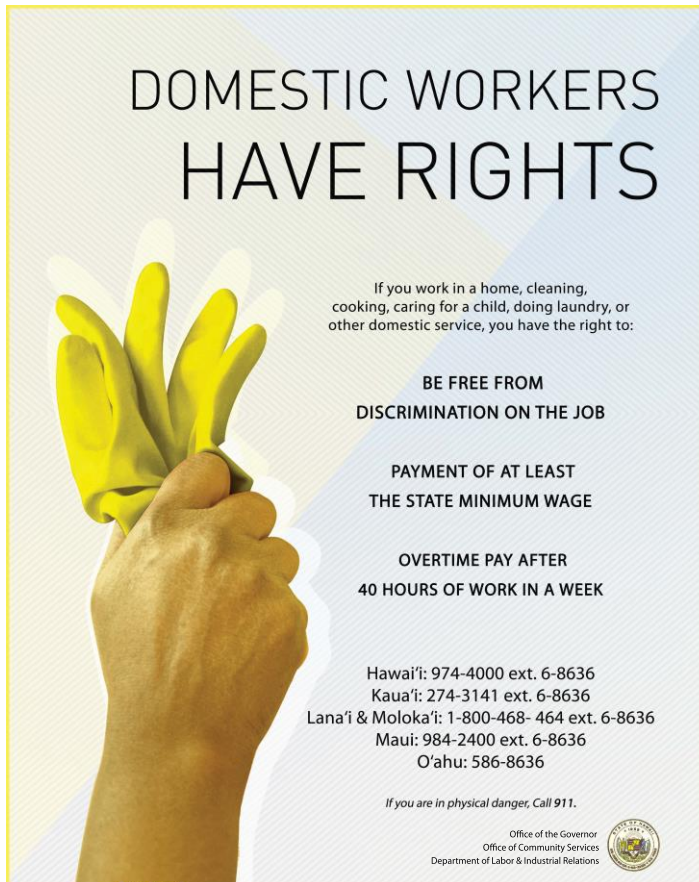


Image: Domestic Workers Have Rights, PDF Poster: Hawaii Department of Labor and Industrial Relations. Downloaded May 8, 2015.

### C. California

California has enforcement models that allow for civil litigation, administrative processes through the Department of Labor included in SB 241 legislation, with the sub-agency of the California Labor Commission, and with the Department of Industrial Relations (DIL) as the state agency tasked for enforcement with wage claims and provision of information in district offices.<sup>11</sup> Individual domestic workers must initiate civil litigation or report to the Department of Labor to file a claim. SB 241 does not offer collective bargaining solution and, as a sunset law, has limited enforcement options given the timeframe. The California Labor Commission can also enforce wage claims through Wage Order 15 and the WTPA.<sup>12</sup> The recent California Supreme Court ruling, *Mendiola v. CPS Security Solutions, Inc*, affirmed this interpretation to include domestic workers, especially in relation to overtime. Additionally, the WTPA can be used to assert enforcement of rights. It states that all employers must comply with this legislation that went into effect in 2012 without any caveats.<sup>13</sup> Thus California labor law has legal obligations and tasks for state agencies, employers, and employees. Yet the burden of initiation lies with domestic workers.



Domestic Workers and AFL-CIO hold a press conference celebrating lobbying and success of AB 241 at the California Legislature in Sacramento, CA October 12, 2013. Image used with permission: National Domestic Workers Alliance.

Table 1: Characteristics of Bills of Rights

	New York <sup>14</sup>	Hawaii <sup>15</sup>	California <sup>16</sup>	Massachusetts <sup>17</sup>
Bill # / Year	A1470B/S2311E 2010 <sup>18</sup>	SB535 SD1 HD2 CD1 2012 <sup>1920</sup>	SB 241 2014 Sunset Law- 2017 <sup>21</sup>	S. 882 <sup>22</sup> April 1, 2015 <sup>23</sup>
Governor	Gov. Patterson (D)	Gov. Abercrombie (D)	Gov. Brown (D)	Gov. Patrick (D)
Name of Bill	Domestic Worker Bill of Rights	Domestic Worker Bill of Rights	Domestic Worker Bill of Rights	Domestic Worker Bill of Rights
Key prior legislation impacted	NY Labor Laws Amended: Workers Compensation, Unemployment Insurance §§2, 160, 161 & 651, add §170, Lab L; add §296-b, amd §292, Exec L; amd §201,	Act 70, Revises- Act 248 2013 Wage & Hourly 387, 388, Child Labor Laws- Chapter 390, <sup>24</sup> Cert of Age for Minors <sup>25</sup>	Wage Order 15 <sup>2627</sup> California Labor Code sections <a href="#">1450–1453</a> and <a href="#">1454</a> <sup>2829</sup>	G.L. c. 151, § 1A Massachusetts Wage & Overtime Act <sup>30</sup>
Employer Responsibilities	Written Information on pay, overtime, policies. Records, notice of rights (6 years)	Written contract, pay statement, Records (6 years) <sup>32</sup>	Written Contract, notice of Rights, <sup>33</sup> Records (3 years) <sup>34</sup>	Written Contract, <sup>35</sup> Evaluation, Record Keeping (2 years) <sup>3637</sup>

	Unemployment Insurance <sup>31</sup>			
Employer Defined As	Private Household: <sup>38</sup> Domestic Workers Bill of Rights Corporations <sup>39</sup> covered by: Workers' Compensation Law (WCL §2 and 3) and Unemployment Insurance (WCL §3 Groups 1-14-a)	Private Households, even if only 1: exempts some HI agencies	Private Households: IHHS/ Govt. Agencies Exempt <sup>40</sup>	Private Households (unless care attendant) and Companies: excludes ch. 140 <sup>41</sup>
Enforcement Agencies for State	NYS Department of Labor <sup>42</sup> NYS Workers Compensation Board <sup>43</sup>	Department of Labor & Industrial Relations, Hawaii Civil Rights Commission <sup>44</sup> , Community Services <sup>45</sup> & Wage Standard Division	CA Department of Industrial Relations, Department of Labor Standard Enforcement, Labor Commission, Field Offices <sup>46</sup> , Industrial Welfare Commission (IWC) <sup>47</sup>	Attorney General <sup>48</sup> , Civil & Labor MA Commission Against Discrimination, <sup>49</sup> EOLWD <sup>50</sup>
Civil Litigation	Yes- 4 Years statutes of limitations <sup>51</sup>	Yes: 180 days statute of limitations, HI Civil Rights Commission <sup>52</sup> , 300 days if cross-filed with EEOC <sup>53</sup>	Yes- 3 Years Statutes of Limitations CA Division of LSE <sup>54</sup>	Yes- 3 year statutes of limitations AGO Civil <sup>55</sup> Private Civil Litigation <sup>56</sup>
Administrative Order	Yes- NY DOL 3 years	Wage & Labor Division <sup>57</sup>	CA DLSE – 3 Years	AGO Fair Labor <sup>58</sup>
Wage Theft Prevention Act (WTPA) Enacted	Yes- WTPA, extends Labor Law Section 215 2011, Labor Law Section 195 <sup>59</sup>	NO: SB 332 enforces record keeping (SB535 HD2- Amends Act 248) (SB332 HD2- Amends Act 70) <sup>60</sup>	Yes- WTPA, AB 469, Labor Code 2810.5 2012 <sup>61</sup>	Yes, Ch. 144 Restoring the Minimum Wage and Providing Unemployment Reforms <sup>62</sup>
Notice of Rights	Yes – Multilingual <sup>63</sup>	NO: Only available in English	Employer required to post	-Yes: Employer -AG post on website, multilingual
Unionization Options	With changes to SERB, Yes, Can follow superintendent Model, SEIU BJ42, Unionize as single person is legally permissible <sup>64</sup>	No: HB 413 <sup>65</sup> failed to pass: proposed additional rights for domestic workers and directs DURL to conduct feasibility study on collective organizing (Companion proposal to SB535, 2013)	No	Yes: MA Labor and Workforce Development (Private Employees) <sup>66</sup>

Non-profits: 503 (c) 4 that can obtain state funding for DWBOR	Considered <sup>67</sup>	Yes: Immigrant Resource Centers, including private & faith based <sup>68</sup>	No	No
Workers Centers/ Coops, Community	Considered: <sup>69</sup>	No	No	No
Additional Options Considered By the State	Considers using tax deductions, health insurance policies (IFU) or via NY Health Insurance <sup>70</sup>	Immigrant Resource Center, grants to non-profits	Tax & Wage theft	Tax Regulation, Wage Theft Prevention Act <sup>71</sup> Trafficking Act

### C. Massachusetts

Massachusetts has the most robust rights and enforcement options of all four states, and goes beyond the ILO recommended language. Its provisions include rights that are similar to those found in collective bargaining agreements that protect workers against exploitation, abuse, and numerous forms of discrimination (race, gender, sexuality, disability, age). It forbids employers from confiscating passports and other state documents. It protects live-in workers from employer overcharging for room and board and deductions for unwanted services. It also requires a 30-day notice, or 30 days of alternative housing or two weeks of severance pay for live-in workers let go without cause. Employers must provide a written contract in the preferred language of the worker. Legal rights cover those working sixteen hours a week, though not necessarily with the same employer.

Domestic workers have the same rights and enforcement options as all other workers in the state; the new law enhances enforcement options with civil litigation that had been available to them since the 1970s through G.L. c. 151, § 1A (the Massachusetts Overtime Act) passed to enforce wage and overtime laws. Litigation has proven successful for enforcement and the new law will clarify access to litigation. The new law clarifies domestic workers rights and insists on access to enforcement venues available to all other workers.<sup>72</sup> The Attorney General is explicitly tasked with the responsibility for enforcement, with options such as: either civil litigation or administrative claims, and access to the Massachusetts Commission Against Discrimination (MACD) for harassment and discrimination rights, thus enabling workers to have enforcement options to which all other workers in the state are entitled. MACD is tasked with preventing civil rights violations and providing relief and remedy for all residents with enforcement options of civil litigation, arbitration, mediation, joint investigations with the EEOC, or administrative injunctions. Massachusetts also has passed a WTPA to enhance wage and overtime rights that includes domestic workers and personal attendants. The burden is on the employer to provide documentation and pay schedules. The Attorney General's Office provides explicit requirements for the employer to adhere to as a preventative strategy, with enforcement options including civil penalties.<sup>73</sup>





Domestic Care Worker providing crucial care work in the resident's home. Image credit: National Domestic Workers Alliance, Flickr. Used with permission.

## Part II. "Companionship Rule"

In 1974, Congress amended the FLSA to encompass household workers, omitting casual babysitters and elder companions, but not family breadwinners who labored as care workers in homes. In implementing this legislation, the Department of Labor introduced a companionship extension that applied to all domestic workers, whether hired by individuals or "third-party" enterprises. These companions were defined as those who spent no more than 20% of their time at housekeeping while assisting elderly individuals and people with disabilities with the fundamental activities of daily living, including toiletry, eating, and ambulation. So household workers who washed floors and windows were doing real work, but if they cleaned or helped feed a person that was something altogether different, care rather than labor. But if they performed those tasks and countless others in an institution, they remained covered under the FLSA, but not if they did the same labor in a home.

California wrote domestic workers into the state minimum wage in 1976, when the Industrial Commission—whose determinations by then extended to men as well as women—issued Wage Order 15 for "Employees in Household Occupations." This order provided a floor on wages; it also regulated the hours and breaks of both live-in and live-out employees, forbid deductions for breakage or uniforms, and mandated record keeping. Like the amended FLSA, Wage Order 15 encompassed those domestics who primarily did housework, but classified personal attendants and others who cared for people as ineligible for its protections. IHSS existed as a separate part of the state code, though some provisions like minimum wage applied to these care workers paid through MediCal.

The Clinton administration proposed revision of the companionship rule during the 1990s, but the presidency of George W. Bush stopped this process in early 2001. The Obama Wage and Hour Division took up the issue again in December 2011, issuing final rules some twenty-one months later that were to go into effect on January 1, 2015. California enacted SB 855 in June 2014 that committed the state to implementing overtime even if the federal change was delayed, appropriating \$172.2 million in the current budget year and \$354.4 million ongoing that could not be used for other purposes. Then DC District Court Judge Richard A. Leon, a George W. Bush appointee, struck down the revised rule just as it was to begin in *Home Care Association of America v. Weil*, ignoring precedent and the Supreme Court's own reasoning

which had upheld the rule making power of the DOL. But in response, California's Department of Social Services halted payment of IHSS overtime, even though there is nothing to keep a state from being more generous in its payments than the FLSA. The Department of Labor has appealed Leon's decision and a hearing took place on May 7.<sup>74</sup>

### Part III. Global Perspectives

#### A. Policies regulating paid domestic work in Europe

Since the 1990's, several European countries have introduced policies that make it easier for households to purchase domestic services. Domestic employment is seen as a source of job creation especially for the long-term unemployed, (female) migrants and the low skilled. Another aim of the policies is to reduce the extent of undeclared work in the informal sector/underground economy. The nature of paid household work varies between countries, and this also affects the regulation of the sector. Countries differ most in definitions of paid household work and the employment relationship.<sup>75</sup> Here we present selected examples.

Four ways of regulating paid household work dominate in Europe:

- Reducing the price (tax incentives for households)
- Simplification of procedures through vouchers
- New regulation on employment
- Fostering the emergence of a supply side (migration policies)

While there are several cases of regulation of paid domestic work in Europe, most of them are designed to serve the customer (the household or individual purchasing services) and only a few can be considered to directly contribute to the enforcement of domestic workers' legal rights. Tax incentives for households may reduce undeclared work and in that way bring more domestic workers into the scope of formal employment. However, the system does not cover enforcement of law related to domestic workers' wages, working hours, or other conditions.<sup>76</sup>

The most effective public policy from workers' perspective could be the voucher system, although it also has its limitations since it usually only regulates wage and social protection. In 1994, France was one of the first countries to introduce a voucher for household services. Nowadays the *cheque emploi service universel* (CESU) is widely used: in 2011, 3.4 million households (13 per cent of households in France) purchased household services. It is estimated that during 1996 and 2005 the share of undeclared work dropped from 50 per cent to 30 per cent. In Belgium vouchers can only be used for registered agencies offering paid domestic services. The system is based on an arrangement between the issuing company (that issues the vouchers), the users, the employers, the workers and the Federal State that is the main financing party of the measure. The vouchers can be used for purchasing domestic services but the system excludes direct care work. Households can purchase up to 500 vouchers per year for a price of 8.50 euros (after 400 vouchers the price is 9.50 euros) with 30 per cent tax deductions reducing the price to 5.95 euros. In Italy, the voucher system *Buoni lavoro*, was established in 2003. The aim of the vouchers was to reduce undeclared work, particularly to regulate occasional work. While it started as a program targeted to personal services, the scope of the vouchers now includes many other sectors with high share of undeclared work, such as agricultural sector.<sup>77</sup> While in France and Belgium the state has consistently designed policies to create a formal sector of domestic services, in Italy the voucher system was set up to regulate

the already widespread unregulated sector. Another difference is that in the Italian case, the limit of vouchers is set to employees' income, not consumers' use of services.<sup>78</sup>

Table 2. Models of Regulation

<i>Model of regulation</i>	<i>Programs</i>	<i>Examples</i>
Reducing the price for consumers	Tax credit/ tax reduction schemes Reduction of VAT rate Exemptions from social contributions	France, Finland, Sweden, Denmark The Netherlands Spain, France
Simplification of procedures	Voucher system	France, Belgium, Italy
New regulation on employment, recruitment of workforce	Varies by nation	Germany, the Netherlands, Belgium
Fostering supply	Migration policies	France, Italy, Belgium, Spain

Source: Adapted from Nicholas Farvaque, *Developing Personal and Household Services in the EU: A Focus on Housework Activities*. (Luxembourg: Publications Office of the European Union, 2013), 46-7.

Previous experience shows that there are certain requirements for a voucher system to work:

- The system has to be user-friendly for both employers and employees
- The voucher has to be equivalent to the market price
- Structure of the system (i.e., does it offer incentives to households as employers or consumers of services) can have a crucial impact on future developments in the sector with either maintaining direct employment relationships or increasing number of companies providing services.

#### B. Enforcement of law by civil society actors

According to the article 14 of ILO Convention No.189, states should develop mechanisms to ensure compliance with the national laws and regulations regarding paid domestic work. Public authorities have taken up these kinds of measures—especially in the Latin American countries, such as Peru, Argentina and Uruguay,<sup>79</sup> where domestic workers can contact a special unit in the agency in cases of violation. Uruguay created such a unit in 2007 to monitor the implementation of domestic workers' legal rights. At the labor inspectorate, domestic workers can file complaints regarding their working conditions. Contrary to other countries, in Uruguay the labor inspector has a right to enter private households if needed.<sup>80</sup>

In most countries, enforcement of law depends on civil society actors, such as domestic workers' associations, migrant associations and trade unions. In these cases, legal counseling is often provided in collaboration with migrant associations that have established centers for migrant workers. National trade unions in Germany (DGB), Italy (CISL), and Spain (CCOO) run centers for migrant workers with services, such as legal aid and language and vocational training.<sup>81</sup> The services are available for both documented and undocumented migrants and they do not require union membership from their participants. In Uruguay, the employers' organization LIGA engages with the domestic workers' trade union and the government in collective bargaining.<sup>82</sup>

In UK, the migrant domestic workers association KALAAYAN provides legal advice for migrant domestic workers and helps in many other work-related issues, such as retrieving passports held by domestic workers' employers. In Peru, domestic workers can contact domestic workers' associations, such as AGTR-La Casa de Panchita, for legal counseling. The association also helps to file a complaint if needed. In addition, the association runs an employment agency that collaborates with employers in order to enforce the law on domestic work that was introduced in 2003.<sup>83</sup> In Jordan and Lebanon legal aid is provided by several organizations. However, domestic workers often lack information about these services; thus campaigns informing domestic workers about their rights and services remain crucial.<sup>84</sup>

Table 3 presents actions in different countries to enforce national laws and regulations.

Table 3. Enforcement of law by type of action

<i>Action</i>	<i>Description</i>	<i>Examples</i>
Legal counseling	Provision of legal services, such as counseling and assistance in filing complaints in cases of violation of law	Public authority: Uruguay, Peru, Argentina Trade union: Uruguay Migrant center: Germany, Spain, Italy
Labor inspection	Work place inspection in private households	Uruguay
Collective bargaining	Workers and employers are included in negotiations regarding regulation on paid domestic work	Uruguay
Decent working conditions ensured in recruitment processes	Employment agency recruits domestic workers with fair contracts includes employers in the process	Peru
Information on national laws and regulations regarding paid domestic work	Campaigns, personal legal assistance, helpline, targeted to domestic workers and/or their employers	Uruguay

Source: Merita Jokela

### C. ILO Convention 189 “Decent Work for Domestic Workers”

Table 4. Summary of the ILO Convention No. 189

<i>Provision</i>	<i>Description</i>	<i>Article</i>
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Fundamental principles and rights at work	Freedom of association and right to collective bargaining; Elimination of forced labor; Abolition of child labor; Elimination of discrimination in respect of employment and occupation	3 3 3, 4 3, 11
Protection from abuse, harassment and violence		5
Fair terms of employment - decent working and living conditions		6
Information on terms and conditions of employment		7
Working time	Equal treatment between domestic workers and workers in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and annual paid leave	10
Remuneration	Minimum wage where it exists; non-discrimination based on sex; payment at least once a month; payments in kind	11 12
Occupational safety and health		13
Social security		14
Protection for particular groups of domestic workers	Live-in domestic workers Child domestic workers Migrant domestic workers	6, 9 4 8
Oversight of private employment agencies		15
Compliance and enforcement	Access to courts and other dispute settlement procedures; mechanism of enforcement	16, 17

Source: International Labor Organization, *Decent Work for Domestic Workers*. Convention 189 & Recommendation 201 at a glance (Geneva; ILO, 2011).

ILO Convention No.189, approved in 2011, sets international standards for the working conditions of domestic workers. Recommendation No.201 provides fuller guidelines for national legislation.





Caption: Founding Congress, International Domestic Worker Network/Federation, Montevideo, Uruguay, 26-28 October 2013. Front from left: Ip Fish, Regional Coordinator Asia, IDWF; Ida Le Blanc, General Secretary, National Union of Domestic Employees, Trinidad and Tobago; Elizabeth Tang, General Secretary, IDWF. Photo: Eileen Boris

#### Part IV. Models for Enforcement

##### A. Civil Litigation

Given the intimate nature of the labor, it is often difficult for workers to bring suits against their employers under civil procedure. Those who do bring suit generally wait until they are no longer working for the offending employer. Most complaints end up being settled out of court. While some high profile cases under the U.S. Trafficking in Person Law have involved household workers, Martina Vandenberg, the founder of the Human Trafficking Pro Bono Legal Center, has found suits under wage theft provisions of the Wage and Hour law more likely to gain plaintiffs back pay and damages.<sup>85</sup> Even with legal representation, worker centers, immigrant/migrant NGOs, or domestic worker associations supporting individual actions, this model for enforcement has two major pitfalls: first, it exposes the litigant to the legal system and to employers and thus is best deployed after abuse and leaving a position (and forfeiting a referral

from past employer, a “lost” to be weighed against damages from employers who break the law) and second, the legal system is slow and does not guarantee monetary relief.

As explained in our state-wide analysis, the DWBORs have provisions for workers to file complaints with state agencies. Because the Massachusetts law clarifies wage and compensation standards to ensure rights, its particularly provides legal basis to counter employer counter claims in courts.

## B. State Agency

DWBORs lodge enforcement with state agencies. New York, Hawaii, and California place enforcement with the division(s) of the Department of Labor that oversees wage and hour and other workplace violations.

The Office of the Attorney General in Massachusetts pursues violations; it has the power to seek injunctive or declaratory relief in Superior Court through suits initiated by workers or through its own investigations. It has the power to issue a civil citation to an offending employer, which requires restitution and cessation of such behavior. It enforces wage and hour rights, including payment for all working time and observance of days of rest, as well as specified working conditions.<sup>86</sup>

New York and Massachusetts further invest enforcement under anti-discrimination agencies. New York has provided protection under its New York State Human Rights Law, which allows domestic workers who suffer sexual or racial harassment to pursue redress through a special cause of action. It forbids employers from basing employment decisions on worker refusal for sexual favors or other forms of harassment. Workers can file a complaint against retaliation through the New York Division of Human Rights. Once employed, workers can file complaints of sexual harassment (this includes personal attendants) and discrimination claims through the Massachusetts Commission Against Discrimination (MCAD). Additionally, the MCAD enforces right to privacy, ability to bring private lawsuit for workplace injury occasioned by another employee, and the right to maternity leave. While technically there is a right to collectively bargain in Massachusetts that should cover domestic workers, currently there is no mechanism for this to take place through a tripartite or other form of negotiation involving representatives of workers and employers.



Caption: Campaign poster from California Domestic Workers Coalition, September 2013. Credit: California Domestic Workers Coalition

### C. Employment Bureau/Public Authority

From the mid-19<sup>th</sup> century, placement agencies developed to connect domestic workers with employers. These employment bureaus included those established by philanthropic and religious organizations, such as the Young Women's Christian Association in Boston and New York, which also held training classes in domestic service. Settlement houses, which often functioned like today's worker centers, set up such registries. Chicago's famous Hull House ran one with the Chicago Women's Club in the 1890s. These non-profit oriented bureaus nonetheless often served the interest of women employers even more than workers, which is why Hull House soon ended its experiment. However, even if most employment agencies a century ago were businesses, workers used them as spaces to gather and exchange information about employers, going rates, and job expectations. There they publically negotiated with employers over wages and tasks, with more experienced workers educating newcomers on workplace norms.<sup>87</sup> Beginning in the 1920s, chapters of the National Urban League ran placement services in cities like New York and St. Louis. During the Great Depression, workers who made use of their services reported deterioration of conditions, lowering of compensation,

and scarcity of jobs. In New York, the Urban League won publically funded visiting home health placements as well as training programs. In St. Louis, demands of domestic workers pushed the League's Women's Division to not only investigate the conditions of household work but to increased the wage, travel reimbursement, and other standards that employers using its placement service had to offer.<sup>88</sup>

In contrast, for-profit employment agencies preyed upon the jobless. They required job seekers to pay "excessive" fees and hand over a portion of their salary. There were no protections in terms of work conditions or harassment and other forms of abuse, including absconding with payments after sending workers to "phony" placements. These agencies would come under usury laws and other state regulation by the 1950s that required licensing, prohibited fee sharing between agents and employers, capped worker fees, and banned sending scabs to labor disputes. ILO Conventions—No.34 Fee-Charging Employment Agencies (1933), No.96 Revision of Fee-Charging (1949), and No.181 Private Employment Agencies (1997)—set rules to place these entities under labor standards and non-discrimination strictures.<sup>89</sup> Additionally, governments established their own employment bureaus, often connected to unemployment divisions. In 1933, the U.S. Employment Service reorganized to include regional branches. However, the existence of state agencies did not guarantee fair treatment. During WWII, when African American women sought better paying jobs in defense industries, many offices of the USES directed them back to domestic service. The ILO sought to upend such state practices with its postwar convention, No.88 Employment Services (1948).<sup>90</sup>

But this historical context does not mean that the employment agency cannot serve the interests of workers, especially if under worker control or government officials accountable to workers. The hiring hall in old craft industries is one model of an employment bureau in which employers go to workers, who have set the terms for the job.<sup>91</sup> The public authority consisting of state, worker, and employer representatives is another form that such an agency could take, as seen with home care in California, Washington, and Oregon. Indeed, Oregon passed legislation to extend its Home Care Commission Registry and Referral System to private pay consumers so more people could have access to hiring trained, background checked workers, a system that could be adapted for other forms of household labor and used to educate employers on standards as well as workers on techniques.<sup>92</sup> Fine and Gordon propose reviving the tripartism once considered for the Fair Labor Standard Act, but tailoring such joint worker, state, and employer operations to low-waged and scattered industries like domestic work to overcome obstacles in the current regime of underfunded departments of labor dependent on complaints and employer self-regulation.<sup>93</sup> The National Domestic Worker Alliance has developed CareTango as a "'fair care' employment agency."<sup>94</sup>

#### **D. Worker Center/NGO**

Domestic worker associations, which some classify as worker centers and others classify as immigrant rights and grassroots social justice organizations, spearheaded the DWBORs. But they also engage in grassroots enforcement of decent standards. They serve as places where workers, especially immigrant workers, feel that they can go for help. They have worked with legal clinics to file claims. But they have also engaged in public shaming of employers, taking to the streets to demand redress. Those in California engaged in a "Know Your Rights" organizing campaign and are targeting neighborhoods to reach workers. Some, like Mujeres Unida y Activas, have organized training and placement services that include education on worker rights.

Many of these groups have expanded the small group model to create larger networks of worker groups or committees, such as Matahari (Boston), Fe y Justicia (Houston) and the Atlanta chapter of the National Domestic Workers' Alliance.<sup>95</sup> These committees decide on a variety of actions to improve conditions as well as provide support to members.

### **E. Ambassador/Grassroots Monitoring**

Closely related to the Worker Center/NGO model of enforcement, and essential to a re-envisioned employment agency/public authority mechanism, are attempts by workers and their organizations to monitor labor standards. Education of workers and employers represents a crucial initial step, as we have noted. Domestic Worker United (DWU) initiated a worker-to-worker education program in 2012 that redesigned the union "shop steward" for the scattered household labor workforce. Some home health care locals previously had adapted the shopfloor steward system by relying on telephone center persons and union hall call centers. For Northern Californian home care workers, for example, the neighborhood where they labored was coterminous usually with the one where they lived, especially among those paid to tend to family members.<sup>96</sup> But DWU focused its organizing from the start on the neighborhoods where women worked and congregated in parks and waited for buses to return home. So it made sense to locate its "ambassador program" in these same areas where the private world of domestic work went public. Because the New York State Department of Labor lacked the capacity from too few inspectors for too many workplaces to enforce the DWBOR, the workers sought to inform other workers of their rights. They distributed pamphlets and talked with women; some women developed a monthly support group. Though there were limits in the actual practice of the program, such as the ability to reach only limited sectors within a stratified carework and domestic work industry, outreach based on social networks and small affinity groups promises an effective platform to build a larger mobilization of linked groups.<sup>97</sup>

### **Conclusion**

A vigorous movement over the last decade has produced various DWBORs as an effort to incorporate workers uncovered by labor standards into such regimes. But enforcement remains vexed because it depends on low-waged workers themselves initiating complaints without guarantees of speedy redress and with the risk of retaliation and unemployment. Enforcement mechanisms reflect structures of antagonism for an industry that involves trust and personal contact between nannies, attendants, and others and those they work for.

This report has compiled information as a basis for discussion among stakeholders that will take place as a convening on June 3, 2015 at the UCLA Labor Center. By bringing together those with knowledge of the industry and the on-the-ground conditions, this convening hopes to develop recommendations for enforcement for worker empowerment.

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