

The Cost of Compliance— How Much Does it Cost to Have Domestic Help (when done properly)?

January 2018



Elena Paraskevas-Thadani

In a recent episode of the Big Bang Theory¹, quirky comic-store owner Stewart was evicted from his apartment, and asked his friends Howard and Bernadette if he could stay with them. As they were expecting their first child, he sold them on the benefits of having an extra pair of hands around during this critical time in a family's life, when a couple can feel overwhelmed. Under the arrangement, Howard and Bernadette provided room and board so that Stewart wasn't homeless, and in return, Stewart served as an attentive "butler-like" presence, anticipating their every need with alacrity. It was a win-win all around.

As a New York employment attorney who has often seen these win-win situations result in someone losing, I wondered what it would look like if the friendship soured and Stewart sued for wages for all the work he performed round-the-clock. If this were to be characterized as an employment relationship after-the-fact, and they were in New York, Howard and Bernadette would be on the hook for wages going back six years, not to mention, liquidated damages, interest (9%) and penalties. This is definitely not what they bargained for when they agreed to let Stewart in as a favor.

Having represented many households with domestic staff, I have often encountered situations where a family was more generous than the law required, but ended up losing a legal dispute because they failed to comply with the technical requirements of the law. In the hopes that information can help prevent these unnecessary and unfortunate losses, I thought it would be helpful to summarize the legal requirements and costs of compliance for domestic employees.



Let's start with childcare, which is a need many households have. Often times, a nanny is the only domestic employee of a family. In this context, the question I have often been asked is:

How Much Does Legally Employing a Nanny in New York Cost?

Despite the practices in many households to pay their nanny a set salary, a nanny is required under New York law to be paid hourly². As the law requires an employer not to pay less than the minimum wage, below is a hypothetical scenario of what it would look like to properly pay a nanny in New York City³.

Scenario One

Let's assume for the time being that we have a family who employs a nanny who lives-out and commutes to work. Their nanny works 11 hours/day and 5 days/week, which totals 55 hours/week. Of the 55 hours/week, the first 40 hours would be straight time and the remaining 15 hours would be overtime. Using the New York City Minimum Wage for Small Employers⁴, the calculation would look like this:

40 hours x \$12.00 = \$480.00 for straight time

15 hours x [\$12.00 x 1.5] = \$270.00 for overtime

Total for straight time and overtime: \$750.00

There is also a little-known regulation called "spread of hours" in New York that would apply to a nanny making minimum wage—the spread of hours regulation requires that an employer pay "spread pay" equivalent to 1 hour of minimum wage if the beginning of the employee's work day and the end of the work day spans more than 10 hours.

This makes the total minimum lawful pay for the week:

40 hours x \$12.00 = \$480.00 for straight time

15 hours x [\$12.00 x 1.5] = \$270.00 for overtime

Spread Bonus [5 days x \$12] = \$60.00

Total wages: \$810.00

Scenario Two

Let's now assume that we have a New York City family who employs a live-in nanny. The live-in nanny works 11 hours/day, 6 days/week, which totals 66 hours/week. For the first 44 hours of the 66 hours/week, the above minimum wage rate of pay applies⁶. For the remaining 22 hours, the above overtime hourly rate of pay applies. Also, for each of the 6 days/week that the nanny's shift goes over 10 hours, the above spread of the hour pay applies.

This makes the total minimum lawful pay for the week:

44 hours x \$12.00 = \$528.00 for straight time

22 hours x [\$12.00 x 1.50] = \$396.00 for overtime

6 days x \$12.00 = \$72.00 for spread bonus

Total wages: \$996.00

Providing housing and meals does not eliminate the obligation to pay minimum wage, and despite the Howard and Bernadette win-win example above, it is not legal to provide housing and free meals in lieu of wages.

However, an employer providing meals and/or a room for their live-in nanny, may receive a credit toward the minimum wage owed. The employer may be able to claim a housing or meal allowance against the hourly wage as follows:

\$4.15/meal⁷ x 2 meals/day⁸ x 5 days/week = \$41.50 for meals

\$5.05/day⁹ x 5 days/week = \$25.25 for housing

Total wages: \$996.00 - \$41.50 - \$25.25 = \$929.25

It is very important that the hourly and overtime rates are discussed and memorialized in writing in advance at the time of hire. In addition, the precise hours of work must be recorded daily and weekly. It is virtually impossible to pay a nanny a "salary" if the nanny works more than 40 hours/week and not owe the nanny overtime. If a nanny works more than 40 hours and is paid a salary, for the reasons explained below, the employer will always owe overtime.



Are You Really in the Clear if You Pay More Than the Minimum Wage?

“My nanny makes a salary of \$1,000 per week. As I pay way more than the minimum wage, and my nanny doesn’t pay any taxes, I won’t have any issues or liability,” my clients often say.

Not true.

Here are the main requirements for families employing domestic employees in general—these come with costs for compliance and costs for non-compliance:

Requirement	Cost of Compliance	Cost of Non-Compliance
<u>Day of Rest</u> ¹⁰ : An employer must provide 1 day (24 hours) of rest per calendar week. If their nanny agrees to work on that day, they must pay overtime (time-and-a-half) even if the employee did not work over 40 hours that week.	\$0 – 1.5 of the employee’s wage, or cost of replacement coverage.	A civil penalty in an amount not to exceed: \$1,000 – first violation \$2,000 – second violation \$3,000 – third or subsequent violation. ¹¹
<u>Paid Time Off</u> ¹² : The employer must give their nanny at least 3 paid days off after 1 year of work for that employer. (If the employer already provides the nanny with sick leave and vacation leave, the employer’s obligation under the law is met once they have given the nanny 3 days of paid leave, regardless of the type of leave it is.) For each day of paid rest the nanny must be paid at their regular rate of pay for the average number of hours the nanny works on a normal workday. If the nanny has any unused days when they leave the employer they must be paid for them. If the nanny does not use their time during the year in which it is earned, the employer must give them an extra day of pay for each day of rest the nanny did not receive.	Cost of employing a nanny at their current salary for 3 days plus cost of replacement coverage.	A civil penalty in an amount not to exceed: \$1,000 – first violation, \$2,000 – second violation \$3,000 – third or subsequent violation. ¹³
<u>Wage Notice</u> ¹⁴ : Upon hire, New York requires that employers provide their nanny with a wage notice indicating their hourly wage, their overtime wage, and any allowances taken against their wage (such as lodging, meal credits, etc.).	\$0.	If any employee is not provided with a wage notice within 10 business days of his or her first day of employment, he or she may recover in a civil action with resulting damages of \$50 for each work day that the violations occurred or continue to occur, but not exceeding a total of \$5,000, together with costs and reasonable attorney’s fees. ¹⁵

Requirement

Paystub¹⁶

Workers' Compensation Insurance¹⁸: Nannies employed 40 or more hours per week by the same employer are required to be covered by a New York State workers' compensation insurance policy.

Unemployment Insurance²⁰: Employers of domestic workers are liable as of the first day of the calendar quarter in which they pay cash remuneration of \$500 or more to persons employed in domestic service in the employer's home(s).

[Also, under the Federal Unemployment Tax Act (FUTA), employers of domestic workers are liable for any calendar year in which the pay cash remuneration of \$1,000 or more in any quarter during that year or the precedent calendar year.

Cost of Compliance

\$0 if made by hand – if using a payroll service, it is included in the third-party payroll service costs (which could be \$50/month or greater).

According to a recent quote by the New York State Insurance Fund, the cost for a Workers Comp policy for a full-time live-in nanny in New York City is \$728.35 per year, and for a full-time live-out nanny is \$2,029.04.

An employer's New York State Unemployment Insurance contribution rate is divided in two parts—the normal and the subsidiary contribution²¹. The amount of money in the U.I. Trust Fund determines the employer's normal contribution rate while the balance in the General Account determines the subsidiary contribution rate. Both of these contributions are experience rated, meaning they are dependent upon how many former employees have filed for, and received, unemployment insurance benefits.²²

[The FUTA tax is 6.0% of the employee's FUTA wages²³. However, the employer may be able to take a credit against the FUTA tax²⁴.]

Cost of Non-Compliance

If any employee is not provided a wage statement, he or she shall recover in a civil action damages of \$250 for each work day that the violations occurred or continue to occur, but not to exceed a total of \$5,000, together with costs and reasonable attorney's fees.¹⁷

An employer is liable for a penalty of \$2,000 per 10-day period of noncompliance, plus the actual award (including both compensation and medical costs), plus any other penalties the Workers' Compensation Board assesses for non-compliance. In cases involving severely injured employees, the medical costs alone could be in the hundreds of thousands of dollars per injury.¹⁹

Each calendar quarter, the law requires liable employers to report their payroll and pay unemployment insurance contributions by filing the *Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return*. If the return is not received by the due date, the penalty is the *greater* of: \$1,000 or \$50 times the number of employees shown on the last quarterly return filed (estimated if no reports previously filed). The maximum penalty for any calendar quarter is \$10,000. There are also penalties for late filing of the return.²⁵

Requirement

Disability Benefits²⁶: Nannies employed 40 or more hours per week by the same employer are required to be covered by a New York State disability benefits insurance policy if they work 30 or more days in a calendar year for that employer. [In addition, as of January 1, 2018 an employer is obligated to provide Paid Family Leave as part of its disability insurance coverage. This is meant to be an employee-funded benefit and is not addressed here.]

When an employee cannot work because they are injured or sick (defined to include pregnancy) as a result of something that does not occur in the course of their work²⁷, the employer must have an insurance policy that pays the worker up to \$170 per week for up to 26 weeks, if the worker cannot return to work during that period and is not receiving other compensation from the employer.²⁸

Paying hourly and overtime by tracking hours worked

Cost of Compliance

The employer may comply by purchasing a policy of insurance or by applying to the Chair for approval as a self-insurer with permission to deposit securities or file a surety bond. Insurance may be purchased from any insurance company authorized to write Disability Benefits insurance in this state, including the State Insurance Fund. According to the premium quotes by the NYSIF, the annual premium for Disability Benefits Insurance is calculated based on an employee’s estimated annual wages. Wages are limited to the first \$17,680 each employee earns during a policy period. (If an employee is expected to earn less than \$17,680 during the policy period, then the lower amount should be provided.) The minimum annual premium charge is \$60.

A covered employer is authorized to collect from each employee, through payroll deduction, a contribution of 1/2 of 1% of wages paid, but not in excess of 60 cents per week. However, an employer may waive all employee contributions, or by employee agreement and acceptable to the Chair, arrange for employee contributions in excess of the statutory rate if the amount is reasonably related to the value of the benefits provided. Every covered employer bears the cost of providing benefits in excess of the contributions collected from employees.²⁹

Wages and overtime owed.

Cost of Non-Compliance

Failure to carry Disability Benefits Insurance is a misdemeanor punishable by a fine of not less than \$100 nor more than \$500 or imprisonment for not more than one year, or both, with increased monetary penalties³⁰ for second and third or subsequent violations.

Where an employee of a non-insured employer is disabled due to an off-the-job injury or illness, the non-insured employer will be responsible for payment of the amount of benefits to which the employee is entitled or for payment of 1% of his/her payroll for the period of non-compliance, whichever is greater.³¹

Where an employer fails to carry Disability Benefits Insurance, the Chair will impose a penalty no tin excess of 1/1 of 1% of the employer’s weekly payroll for the period of non-compliance and a further amount not in excess of \$500.³²

See below.

This one deserves its own explanation.

Potential Liability for Wages

This merits its own section and constitutes the majority of disputes I have handled involving domestic employees.

Many families pay their nanny more than is required by the law. Assuming the family pays their live-out nanny \$1,000/week, meaning that the nanny makes more than minimum wage (see above), then this family will still owe overtime wages. Let's assume the live-out nanny was paid \$1,000/week for 60 hours/week. The potential wage liability would be calculated as follows:

$\$1,000 / 60 \text{ hours} = \text{a regular rate of } \16.67 per hour

As the law would consider this nanny only paid straight time for the first 40 hours out of her 60 hours of work, the family would then owe $\$16.67 \times 0.5 = \8.34 for each of the remaining 20 overtime hours, or $\$8.34 \times 20 = \166.80 overtime pay per week.

Let's now assume this was a long-term nanny who worked the same schedule over the course of the six-year statute of limitation period, and that the nanny worked 50 weeks/year for six years and her salary did not change, then this family would owe:

$\$166.80 \text{ overtime per week} \times 50 \text{ weeks per year} \times 6 \text{ years} = \$50,040 \text{ for unpaid overtime and } \$50,040 \text{ liquidated damages}$

Total owed: \$100,080 plus attorney's fees, plus interest.

Not to mention other penalties associated with failure to issue a W2 and to comply with federal payroll laws.

Many clients pay their nannies more than the minimum wage to begin with. If there is a set salary their nanny demands, there are ways to make it comply with technical requirements and limit exposure. The best time to put these in place is at the time of hire.

That being said, there are ways to fix things mid-stream. It is mostly a matter of paperwork. An employment attorney, human resources, or a payroll professional can help you get things in order. The chart above may help as a starting point for the various paperwork requirements.

Conclusion

Many domestic employers pay more than is required by the law—but failure to comply with the above requirements will lead to additional liability (meaning the need to pay out money), for which a family did not budget. I do not know of any families setting aside extra for a labor dispute with their nanny.

I have heard noncompliant employers assert that it is the nannies who drive the “cash salaries” practices. While this may be the case, none of these reasons would be a defense should the nanny decide later to claim damages for noncompliance. At the very least, employers should provide the wage notices, pay stubs, hourly pay and overtime for hours worked, and should record their nanny's hours daily and weekly.

While I am sympathetic to the argument that some families cannot afford to comply with the law (the Department of Labor is not similarly sympathetic)—the more important question is, can they afford not to?

Elena Paraskevas-Thadani is an employment attorney practicing more than 20 years in New York and focuses on resolving workplace issues and on employment compliance. She is the President and Founder of EPT Legal LLC, with offices in Westchester and New York City. Her email is ept@eptlegal.com

¹ See *Big Bang Theory*, Season 10, Episode 10.

² N.Y. Lab. Law § 170

³ Minimum wage costs vary outside the parameters of New York City as different regulations apply to Nassau, Suffolk, and Westchester counties, and to the remainder of New York State. See 12 NYCRR §142-21

⁴ 12 NYCRR §142-2.1(a)(1)(ii)

⁵ This regulation does not apply to employees making more than minimum wage. See NYSDOL Counsel Opinion Letter RO-07-0106 (October 15, 2007).

⁶ 12 NYCRR §142-2.2

⁷ 12 NYCRR §142-2.5(a)(i)(a)(2)

⁸ For a meal to qualify for the meal credit, it must provide adequate portions of a variety of wholesome, nutritious foods, and shall include at least one of the following groups: (a) fruits or vegetables; (b) cereals, bread or potatoes; (c) eggs, meat, fish or poultry; (d) milk, tea or coffee; except that for breakfast, group (c) may be omitted if both cereal and bread are offered in group (b). See 12 NYCRR §142-2.19

⁹ 12 NYCRR §142-2.5(a)(ii)(a)(2)

¹⁰ N.Y. Lab. Law § 161(1)

¹¹ N.Y. Lab. Law § 218(1)

¹² N.Y. Lab. Law § 161(1)

¹³ N.Y. Lab. Law § 218(1)

¹⁴ N.Y. Lab. Law § 195(1)

¹⁵ N.Y. Lab. Law § 198(1), (1-b)

¹⁶ N.Y. Lab. Law § 195(3)

¹⁷ N.Y. Lab. Law § 198(1), (1-d)

¹⁸ N.Y. Workers' Comp. Law § 308

¹⁹ N.Y. Workers' Comp. Law § 26

²⁰ N.Y. Lab. Law § 500

²¹ See N.Y. Lab. Law § 577

²² N.Y. Lab. Law § 581(1)

²³ 26 U.S.C. § 3301(2) (2017).

²⁴ 26 U.S.C. § 3302(a)(1) (2017).

²⁵ N.Y. Tax Law § 685(v)(1)(B)

²⁶ N.Y. Workers' Comp. Law § 202(2)

²⁷ N.Y. Workers' Comp. Law § 201(9)

²⁸ N.Y. Workers' Comp. Law § 206

²⁹ N.Y. Workers' Comp. Law § 209(3)-(5)

³⁰ N.Y. Workers' Comp. Law § 220(1)

³¹ N.Y. Workers' Comp. Law § 213(1)

³² N.Y. Workers' Comp. Law § 220(2)