

Emancipating Law & Liberating Lives:
Making CA State Legislation to Protect Domestic Workers More Muscular and Accessible
By Robert Castro *

“Law is only as good as one’s ability to enforce it,” one of my law professors once told me and I have come to realize how true this is particularly when it comes to protecting highly vulnerable populations like the working poor particularly immigrant women. On November 29, 2010 Governor David Patterson signed into law a Bill of Rights to protect two hundred and fifty thousand domestic workers (aka “domestics”) employed in New York State.¹ Typically, domestics are immigrant women that are employed as low-wage maids, nannies, and caretakers for the disabled and elderly. The New York law was created to address egregious workplace violations that domestics routinely encounter (e.g. race discrimination, sexual harassment, unpaid work etc.).

New York’s 2010 provisions included:

1. A new expanded definition of “domestic worker” which includes employment situations where workers live-in or live-out of the house and whose duties include companionship, house-keeping, and child-rearing services.²
2. The law set a maximum number of work hours and designates over-time pay for work that had formerly been done “off the clock.”³
3. A new section was added to provide at least one day off and additional days off after one year of employment – that had not been a guaranteed right before the new law.⁴
4. A new section which protects domestic workers against sexual harassment and employment discrimination based on “gender, race, religion, or national origin.”⁵

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¹ http://www.democracynow.org/2010/9/2/after_years_of_organizing_domestic_workers <accessed 7/27/13>; Amanda Fretto, *New York’s Domestic Workers Bill of Rights: Progress Toward Guaranteeing Domestic Workers Protection From Employment Abuse*, 12, 691, 692 *Geo.J. Gender & L.* (2011).

² 2010 N.Y Sess. Laws ch. 481 (A. 1470-B) § 2 (McKinney) (adding a new subdivision 16 to section 2 of the Labor Law to include the definition of “domestic workers”); see McKinney’s Consolidated Laws N.Y. LAB. LAW § 2 (16).

³ 2010 N.Y. Sess. Laws ch. 481 (A. 1470-B) §5 (McKinney)(removing the domestic worker exemption to the standard eight hour work day); see McKinney’s Consolidated :Laws N.Y. LAB. LAW § 160; 2010 N.Y. Sess. Laws ch. 481 (A. 1470-B) §6 (McKinney) (adding a new section to the labor law); see McKinney’s Consolidated Laws N.Y. LAB. LAW §170.

⁴ See DOMESTIC WORKERS UNITED, NATIONAL DOMESTIC WORKERS ALLIANCE & THE URBAN JUSTICE CENTER, *DOMESTIC WORKERS AND COLLECTIVE BARGAINING: A PROPOSAL FOR THE IMMEDIATE INCLUSION OF DOMESTIC WORKERS IN THE NEW YORK STATE LABOR RELATIONS ACT*. Available at: <http://www.domesticworkers.org/finish/3/4/0> <accessed 11/26/2011>.

However, for all of its improvements, New York's Bill of Rights had significant shortcomings. For example, it lacked paid sick leave, paid personal leave, advance termination notice, and severance pay.⁶ Most importantly, the New York Bill of Rights lacked an enforcement mechanism to ensure employer compliance.⁷ This is particularly important given the hardships that domestics customarily experience. A 2010 article in SLATE magazine made one such situation visible for its readers:

"Maria was hired to care for a 13 year old boy who was handicapped and wore diapers. Her boss paid her \$2 an hour and told her to sleep in a basement where sewage overflowed.⁸ Maria cobbled together a cardboard walkway so she could pass between her bed and the door without trampling through feces. Her boss fired her without telling her why and made Marina leave the house the next day. As a Colombian immigrant with no family in the States, she had nowhere to go."⁹

Domestics are also subject to verbal insults, beatings, pokes, and shoves at the hands of employers that boldly act without fear of retribution or retaliation from domestics.¹⁰ Oddly and in disturbing fashion – an employer's authority over their domestics can become so ubiquitous, that it can even influence how a domestic's own child and the employer's children relate to adults in the household. Professor Mary Romero's ethnographic work is instructive here, she writes about a particular latina domestic working in the Los Angeles area:

"While Olivia [domestic's daughter] referred to the employer's formally, by their last names, the employer's children called Olivia's mother Carmen [domestic employee] by her first name."¹¹

This subtle yet powerful observation delineates stark cultural dichotomies that produce asymmetrical relations of power between employer vs. employee, white vs. non-white, affluent vs. poor, and dominant vs. subordinate roles in the household.

⁵ 2010 N.Y. Sess. Laws ch. 481 (A. 1470-B) § 3 (McKinney); see McKinney's Consolidated Laws N.Y. EXEC. Law § 292 (5)-(6).

⁶ Fretto, *supra note* 1, 697-698.

⁷ *Id.*, 698.

⁸ Meaghan Winter, A bill of rights for domestic workers in New York, April 30, 2010. Available at: http://www.slate.com/articles/double_x/doublex/2010/04/a_nannies_bill_of_rights.html <accessed 7/28/2013>.

⁹ *Id.*

¹⁰ Reyna Ramolete Hayashi, *Empowering Domestic Workers Through Law and Organizing Initiatives*, 9, 494-495 Seattle J. Soc. Just. (2010); Tony Robinson et al., On the Job with Domestic Workers: Workplace Abuse and Worker Exploitation in Colorado's Invisible Workforce, El Centro Humanitario Report 27 (2010) Available at http://www.centrohumanitario.org/Domestic%20Worker%20El%20Centro_Published.pdf <accessed 11/26/2011>.

¹¹ Mary Romero, The Maid's Daughter: Living Inside and Outside the American Dream, 53 (2011).

Employers also exercise power by routinely making sexual advances or acting in a sexually suggestive manner towards domestics who are put into the position of having to choose between losing a modest but regular salary, and surrendering their bodies to their employer's libidinous appetites.¹² It is easy to imagine how uneducated, illiterate, and non-English speaking classes of poor women would be reluctant to confront their employers let alone seek the aid of the police in these situations.¹³ Clearly, these kinds of situations need to be addressed through the force of law but law needs to be made accessible to domestics in tangible ways.

Hawaii recently passed domestic workers legislation and a similar bill is winding its way through the CA legislature for the third time.¹⁴ Last year, a domestic worker bill of rights was approved by the CA legislature but was vetoed by Governor Brown.¹⁵ This year's rendition, AB 241, is sponsored by Assemblyman Tom Ammiano (D-San Francisco). AB 241 is intended to protect individuals employed as domestic workers in private households. It includes provisions to ensure meal and rest breaks, overtime pay, equal access to workers compensation and eligibility for up to three days paid rest after one year of employment.¹⁶

I. Enforcement of AB 241 in California

Should AB 241 pass, the responsibility for its enforcement will likely lie with the Bureau of Field Enforcement (BFE) in California's Division of Labor Standards Enforcement (DLSE) – an organ of the Department of Industrial Relations. The BFE's key enforcement mandate is to ensure that employees are not required or permitted to work under unlawful conditions.¹⁷ The BFE has recently undergone a remarkable reincarnation under the direction of California Labor Commissioner, Julie Su.¹⁸

¹² See Lauren D. Applebaum, *Why a Domestic Workers Bill of Rights?* No. 6, 4, Research & Policy Brief. UCLA Institute for Research on Labor and Employment (December 2010).

¹³ *Id.*, 691.

¹⁴ http://www.mercurynews.com/breaking-news/ci_23578930/hawaii-gov-sign-domestic-workers-bill <accessed 7/28/13>.

¹⁵ AB_889_Veto_Message found at http://gov.ca.gov/docs/AB_889_Veto_Message.pdf.

¹⁶ AB-241 Domestic Work Employees: Labor Standards (2013-2014) located at: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB241 <accessed 7/28/2013>.

¹⁷ 2011 Annual Report on the Effectiveness of the Bureau of Field Enforcement. CA Dept. of Industrial Relations. Located at: http://www.dir.ca.gov/dlse/BOFE_LegReport2011.pdf <accessed 7/31/13>.

¹⁸ "Her Job: Stopping Wage Theft: For California Labor Commissioner Julie Su, success is ensuring that workers get 'a just day's pay for a hard day's work.' Her office has identified \$185 million in unpaid wages and other compensation." LA Times May 22, 2013 located at: <http://www.latimes.com/business/la-fi-labor-commissioner-20130522,0,2507825,print.story> <accessed 7/28/2013>.

The BFE has recalibrated its efforts around California's eclectic and oftentimes gritty underground business economy (e.g. carwash, restaurant, construction, garment, and agriculture) that typically employs large immigrant workforces.¹⁹ Commissioner Su has expanded the staffing levels of her field enforcement team from 84 (2011) to 91 (2012) as well as made dramatic inroads in updating and streamlining BFE's overarching approach to enforcement.²⁰ New enforcement strategies include enhancing BFE's ability to respond to retaliation complaints and developing an inter-agency labor enforcement task force (LETF) to provide a comprehensive framework for state-wide labor enforcement.²¹ Enforcement protocols utilize data-driven and complaint-driven targeting methods to identify non-compliant employers.²² Once identified, Su's investigative staff profile suspicious businesses on-line and then uses physical surveillance to gather additional actionable evidence that would support STOP ORDERS or INSPECTION WARRANTS.²³ The changes spearheaded by Commissioner Su have garnered impressive results. From 2010 to 2012, the BFE has shown a 419% increase in the number of total wages assessed.²⁴ In 2012, the BFE assessed \$2.6 million in civil penalties against the car wash industry, \$7.4 million against the restaurant industry, \$5.7 million against the construction trade, and \$2.28 million against garment industries.²⁵

All this has occurred as Su's team has expanded the number of cases accepted for investigation while simultaneously shortening the number of days it takes for BFE to complete investigations in such labor intensive areas like retaliation complaints.²⁶ As commendable as these success rates are, they reflect success in dealing with conventional "brick-n-mortar" businesses (e.g. warehouses etc.) and traditional

¹⁹ A Report on the State of the Division of Labor Standards Enforcement. Julie Su, Labor Commissioner, Dept. of Industrial Relations (May 2013) 22-28; LA Times, *supra note 18*.

²⁰ Report, *id*, 13-14; LA Times, *id*.

²¹ Report, *id*, 13, 33-36.

²² Labor Enforcement Task Force (LETF) Annual Report. CA Dept. of Industrial Relations (2012) 1-2.

²³ *Id*; Report, *supra note 17*.

²⁴ REPORT, *supra note 19*, 15.

²⁵ *Id* at 21-26.

²⁶ *Id* at 33-34.

albeit fluid work environments such as agricultural industries. Moreover, even successful enforcement methods may not result in positive outcomes for victimized employee classes.²⁷

Practically speaking – the work environments in which domestics typically toil do not easily lend themselves to the enforcement strategies currently being used by government outfits like BFE. As previously mentioned domestics customarily work in private households and tend to be hired through oral contracts. These informal agreements are highly fungible: precise terms, mutual understandings and specific meanings can change dramatically over time and circumstance – particularly when the contracting parties speak different languages or only have partial command of one another’s native tongues. Additionally, a domestic’s work schedule is oftentimes irregular and doesn’t fit into conventional work shift models – muddling the ability of investigators to assess hours worked vs. wages owed. For instance, domestics can simultaneously or consecutively work for one or several households, work full or part-time, work regularly or perhaps only on an intermittent basis.

Further, domestics are sometimes without proper legal papers (e.g. undocumented) which makes them acutely vulnerable to employer threats and intimidation about being deported.²⁸ The threat of police involvement can be paralyzing to many in the immigrant community – even those domestics that have authentic legal residency or are U.S. citizens might be reluctant to involve government authorities like the police.²⁹ The potential willingness of domestics to report offending employers is further complicated by the fact that domestics can be highly ambulatory populations that unexpectedly move from place to place – making them less reliable as complaining parties or witnesses.

Logistically, the sheer number and geographic distribution of private households in California that could employ domestics could quickly overwhelm BFE’s modest investigative team. Complicating matters, there are also 4th Amendment concerns to the surveillance strategies currently being used by Su’s team or the conventional stop orders or inspection warrants that Su’s team utilizes to overcome employer reluctance.³⁰ How would these apply legally within the realm of private households?

²⁷ “Many low-wage workers who won judgments were never paid: Thousands of the mainly immigrant workers in California never collected claims for back pay and labor law penalties from their employers, a study says.” LA Times June 27, 2013 located at: <http://articles.latimes.com/2013/jun/27/business/la-fi-wage-theft-report-20130627> <accessed 7/28/2013>. Report “Hollow Victories: The Crisis in Collecting Unpaid Wages for California’s Workers” located at: <http://labor.ucla.edu/publications/pdf/HollowVictories.pdf> <accessed 7/31/13>.

²⁸ Report, “Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement,” i, 5-13, Located at: http://www.policylink.org/atf/cf/%7B97c6d565-bb43-406d-a6d5-eca3bbf35af0%7D/INSECURE_COMMUNITIES_REPORT_FINAL_V2.PDF <accessed 7/31/13>.

²⁹ *Id.* 16.

³⁰ Adam J. Hiller and Leah E. Saxtein, *Falling Through the Cracks: The Plight of Domestic Workers and Their Continued Search for Legislative Protection*, 258-259, 27 Hofstra Lab. & Emp. L.J. 233 (Fall 2009).

II. Education as a First but Vital Step

For ameliorative legislation to succeed, it needs to be “muscular” in that it should have a strong operational “bite.” Thus, the operational enforcement for any state bill of rights created to protect domestics should ensure the following:

1. The scope of protection needs to be expansive and it should capture all classes of domestics that are at risk for exploitation. Moreover, there also needs to be substantial sanctions for employers that retaliate (e.g. threats, intimidation, etc.) against domestic employees for filing workplace complaints against them.
2. The legislation needs to designate a lead agency responsible for investigating complaints, adjudicating these complaints administratively, and proactively initiating investigations into workplace violations.
3. The investigating agency needs to aggressively form partnerships with other civilian law enforcement agencies to deal with pendant issues like immigration, criminal matters etc.

Much of this is already happening in BFE’s policing of California’s conventional employment landscape. In the case of domestics working in the relative isolation of private dwellings, California’s enforcement agenda should be directed first towards education: making domestics aware of their employment rights and making these rights accessible to them. Employers should also be educated about their responsibilities relative to a domestic’s employment rights.

However, educating domestics regarding their workplace rights needs to be creative as well as strategic. Educational campaigns need to be designed to reach into the daily lives of live-out domestics, live-in domestics, and employers with information that is concise yet accessible (e.g. verbal as well as written, written for laypersons, in native language etc.). All parties need to be informed about employee rights, employer obligations, and the authority of the investigating agency by postings/announcements placed and publicized in areas and spaces where relevant parties move and dwell.

A.Live-Out Domestics: Live-out domestics are those domestic workers that do not reside at their employer’s private residence. Typically, they take public transportation to work, but might ride-share or travel in a personal vehicle. Ideally, postings can be placed in the interior/exterior of buses, taxis, and community shuttles. TV, radio and internet ads would also be powerful informational forums. In the Los Angeles region – radio stations such as *KLove*, which plays romantic Mexican/Hispanic music, would be a good choice for advertising public service announcements particularly for domestics that cannot read.³¹ In television – popular dramas called “*Novelas*” might also have a far-ranging ability to tap into large populations of working domestics. On the internet, bulletin boards like *Craigslist* might include warning information under its services-for-hire links. Additionally, local schools might be able to play a role by sending information home with children. Thus, if a domestic has a child living with them, they can convey bill of rights information handed out at school to their parents.

³¹ <http://iloveklove.univision.com>

Because a domestic's duties oftentimes include doing laundry, public laundry mats might also be a prime location to post announcements or occasionally have representatives hand out information to patrons. A domestic's life is grounded in child-rearing and care-taking, so public parks, public restrooms, doctor's offices, and grocery stores also represent important informational venues. Churches, bible study groups, and *novenario/novena* gatherings are also important points of distribution.³² Places like restaurants, bakeries (e.g. *panaderías*), convenience stores, and gas stations in ethnic neighborhoods also represent prime spots to post announcements. Sometimes, domestics are married to or partnered with, other persons engaged in forms of work-for-hire like landscaping or gardening; so announcements placed at equipment rental/repair businesses, home improvement stores like Home Depot or Lowes, or mega-stores like Super Wal-Mart Centers might be fruitful for dispersing bill of rights information. All types of public interest information are available in these spaces and places, so it would not likely pose a problem to post announcements particularly if the information – like a state bill of rights for domestics -- is sanctioned by state government.

B.Live-in Domestics: Live-in domestics are domestic workers that reside at their employer's private residence. At times, live-in domestic stay at several different residences during a week because they work for several families at the same time. In other instances, live-in domestics stay in the home of only one family. Most of these arrangements are voluntary, but sometimes – particularly with domestics that have been victimized by human trafficking syndicates – domestics are forced to work involuntarily. In any event, it's best to approach outreach activities for these kinds of work situations with due caution. For information to reach domestics working in a live-in situation, the information must be channeled in such a way so that it pierces the insulated realm of private residences. It must be creatively structured so as to not alert or alarm wary or suspicious employers. It may also be possible for announcements to be placed inconspicuously on products which domestics routinely use in their care-taking duties such as milk cartons, coffee packages, diaper boxes, and baby wipes containers. Because almost all domestics do family laundry – detergent bottles, softener jugs, and soap labels are ideal places to print discrete information regarding workplace rights. Door-jam flyers and knob hangers placed during daytime hours when employers are typically at work can also be effective tools to spread critical rights information.

C.Employers: Education campaigns aimed at employers should be oriented towards conveying rights information whenever the employer undertakes a routine but necessary transaction with state government. Take for example, the state department of motor vehicles. Information can be attached to annual car registration materials, or license fee applications, informing parties of rights that domestics have in the workplace and the pendant obligations which employers are also required to follow. Likewise, information can be made part of property and income tax forms. In a related fashion – informative emails can be sent based on local tax scrolls to encourage employer compliance with standing laws to protect domestics.

³² In the Hispanic/Latino culture *novenario/novenas* are nine-day prayer gatherings which take place after someone has died.

Perhaps by making legislation like AB 241 more aggressive and accessible to domestics working in private residences – elected officials, authorities, advocates, and domestics themselves can make such legislation more muscular and meaningful.