Falling Through the Cracks: The Plight of Domestic Workers and Their Continued Search for Legislative Protection

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FALLING THROUGH THE CRACKS: THE PLIGHT OF DOMESTIC WORKERS AND THEIR CONTINUED SEARCH FOR LEGISLATIVE PROTECTION

I. INTRODUCTION

According to the United States Constitution, Congress has the power “to regulate Commerce with foreign Nations, and among the several States...” and to make “all Laws which shall be necessary and proper for carrying into Execution [its enumerated powers]...” Under the auspices of such broad powers, Congress has been able to enact legislation affecting the rights of workers in this country. But not all workers in the United States are created equal; there exists a severe problem for a large segment of people working within American homes, known collectively as domestic workers. In 1998, according to the United States Bureau of Labor Statistics, approximately 847,000 individuals reported private household workers (i.e., cooks, butlers, child-care providers) and an additional 549,000 live-in and live-out domestic workers resided in the United States. The most current estimates by the United States Census Bureau report that nationally, there are 1.5 million domestic workers in the United States, which does not include workers in the country illegally and those who fail to report collected income on their taxes, making a definitive figure nearly impossible to calculate.

In spite of the size of such a workforce, domestic workers do not reap the benefits of employee protection statutes: the Fair Labor Standards Act (“FLSA”) fails to provide live-in domestic workers overtime.

2. Id. cl. 18.
pay,⁵ the National Labor Relations Act ("NLRA") explicitly limits its definition of "employee" from including domestic workers,⁶ the Occupational Safety and Health Act ("OSHA") fails to protect individuals employing persons engaging in ordinary domestic household tasks,⁷ and Title VII of the Civil Rights Act of 1964 ("Title VII") fails to afford domestic workers the right to claim violations of sex, race or national origin discrimination.⁸ Federal legislation in its current form is substantially lacking. Legislative bodies in the United States need to recognize that many domestic workers who immigrate to the United States legally, in hopes of realizing financial opportunity, "fall through the cracks of the U.S. government"⁹ and ultimately experience, abuse, exploitation, and deprivation.¹⁰ Fortunately, there may be hope; recent strides in particular state and local legislatures may provide a benchmark for domestic workers being afforded benefits comparable to other protected workers within the United States.¹¹ While such progress is encouraging, it is the federal government who must ultimately act to secure the rights domestic workers deserve.¹²

II. CURRENT FEDERAL PROTECTIONS

A. The Fair Labor Standards Act ("FLSA")

In 1938, Congress enacted the FLSA with the purpose of establishing protections for workers in order to prevent "detrimental . . . maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."¹³ In doing so, Congress hoped to avert the inherent inequality in bargaining power between employers and employees and establish certain minimum standards for wages and hours.

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7. See 29 C.F.R. § 1975.6 (2008); see also Chang, supra note 6, at 337.
8. See 42 U.S.C. § 2000e-(b) (2006); see also Chang & Kim, supra note 6, at 337.
10. S.B. S2311A.
11. See, e.g., Montgomery County Bill Council 2-08 (Md. 2008) (demonstrating the efforts of a legislative body effecting positive changes for domestic workers by recognizing rights); see also S.B. S2311A.
worked.  

Congress justified such action through its Commerce Clause power, articulating the desire to obviate the negative effects of substandard working conditions on interstate commerce. In practice, the FLSA sets the minimum wage requirements for workers and the maximum number of work hours per week. However, not all workers are considered equal; not only is the definition of “employee” in the FLSA under-inclusive, but the Act sets forth classifications limiting those eligible for its protections. Though the first version of the FLSA passed in 1938 and was followed by a number of subsequent amendments, it was not until 1974, more than 35 years following its inception, that the definition of “employee” came to include domestic service workers. Specifically, the Amendments of 1974 provided for a minimum wage for domestic service employees and also an overtime restriction for live-in domestic workers.

While it is true that inclusion into the FLSA’s definition of “employee” was certainly a victory for domestic workers, problems arise from Congress’ negligence in defining “domestic service.” Perhaps the reasoning behind Congress’ failure to provide a workable definition can be gleaned from the words of Senator Peter Dominick (R-Colo.) during a U.S. Senate Committee Hearing on the Fair Labor Standards Amendments of 1974:

[H]ow are we going to compute it? [I] do not have the faintest idea what we will do or how anyone will ever figure this out. What do we do with the cleaning lady who comes in? She enjoys herself. She gets

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15. See McComb v. Farmers Reservoir & Irrigation Co., 167 F.2d 911, 913 (10th Cir. 1998) (discussing the purpose of the FLSA as “[E]radicat[ing] from interstate commerce the evils attendant upon low wages and long hours of service.”).
together with the family and has a Coke and a glass of milk.\textsuperscript{22}

Unfortunately, it appears that while Congress was cognizant of the fact that determining the wages and hours of domestic workers was problematic, it failed to address the issue by not including a clear definition in the FLSA.\textsuperscript{23}

As a result of Congress' failure to define "domestic service" within the FLSA, the responsibility falls on the courts to determine whether coverage extends to a particular employee.\textsuperscript{24} According to one particular court, a "domestic service employee" is one who undertakes "[n]on-commercial labor in private family homes, and whose work, but for the availability of outside paid help and the economic means of the homeowner to compensate the same, would be done by tradition and necessity in every household in the United States by members of that family unit."\textsuperscript{25} Currently, most courts agree with this definition and consider such home-related work done within the private home as "domestic service" under the FLSA.\textsuperscript{26} Yet, the fact remains that many of the workers falling under this definition are denied protection.

In what is seemingly a direct contradiction to Congress' purpose under the FLSA—to maintain the general welfare of workers and prevent a "detrimental . . . maintenance of a minimum standard of living . . ."—the Act explicitly exempts certain workers from its protections.\textsuperscript{27} Such workers include those 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

\begin{footnotesize}
\begin{enumerate}
\item[24.] \textit{See} Buckman, \textit{supra} note 17, at 175.
\item[25.] Marshall v. Cordero, 508 F. Supp. 324, 325 (D.P.R. 1981) (discussing how "the term 'domestic service employee' is not defined in the Act [(FLSA)""); \textit{see also} Jenkins v. INS, 108 F.3d 195, 201 (9th Cir. 1997) (supporting the definition of "domestic service employee" as articulated in \textit{Marshall}).
\item[26.] \textit{See} Buckman, \textit{supra} note 17, at 175.
\item[28.] \textit{Id.} § 213(a)-(b). According to \textit{Adams v. Dep't of Juvenile Justice of the City of New York}, such exemptions are meant to protect household employers of domestic workers: "The logic of these exemptions is primarily based on the predicaments of household employers, not the generic types of work performed by domestic service employees." 1996 WL 82404, at *4 (S.D.N.Y. 1996).
\end{enumerate}
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Falling Through the Cracks

The Supreme Court recently addressed this issue of "companionship" in *Long Island Care at Home, Ltd. v. Coke* and held that the Department of Labor’s regulation under the FLSA that exempts domestic workers employed by third parties who provide "companionship services" from minimum wage and maximum hour protections is valid and binding. Specifically, the Department of Labor regulation ("third-party regulation") states that the exemption for those providing "companionship" includes those "employed by an employer or agency other than the family or household using their services . . . ." 

In *Long Island Care*, the Court recognized the literal conflict between the Department of Labor’s regulatory definition of "domestic service employment" and its third-party regulation. On one hand, for the purposes of exclusion from FLSA coverage, the Department’s definition of "domestic service employment" includes those employees rendering household services in the home "of the person by whom he or she is employed" and not those employed by third parties. The third-party regulation, on the other hand, states that exemption for "companionship workers" extends to those "who are employed by the employer or an agency other than the family or household using their services . . . ."

The real question for the Court was which of these regulations is binding.

In deciding that the third-party regulation is binding, the Court acknowledged the authority of administrative agencies, like the Depart-

30. 551 U.S. 158 (2007). Specifically, the Department of Labor regulation (which the Court refers to as the "third-party regulation") declares that the provision of the Fair Labor Standards Act that exempts "any employee 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 [of Labor])," also includes those "companionship" employees whose employer is someone other than the person receiving the benefit of their services. *Id.* at 162 (quoting 29 U.S.C. § 213(a)(15) (2006)).
31. *Id.*
32. 29 C.F.R. § 552.109(a) (2008). This regulation has been the source of much controversy over the past several years as evidenced by the fact that the Department of Labor considered modifying the regulation on at least 3 different occasions over the past 15 years in order to make it a more narrow exemption and include workers paid by third parties within FLSA coverage. *Long Island Care*, 551 U.S. at 163.
34. 29 C.F.R. § 552.3.
35. *Id.* § 552.109(a) (emphasis added). The Court in *Long Island Care* states that the "two regulations are inconsistent, for the one limits the definition of 'domestic service employee' for purposes of the 29 U.S.C. § 213(a)(15) exemption to workers employed by the household, but the other [third-party regulation] includes in the subclass of exempt companionship workers persons who are not employed by the household." *Long Island Care*, 551 U.S. at 168-69.
ment of Labor, to create regulations in order to carry out congressional legislation.\textsuperscript{37} Consequently, the Court deferred to the Department of Labor regulations to fill in the gaps in the FLSA regarding the scope of statutory terms like "domestic service employment" since "the subject matter of the regulation in question concerns a matter in respect to which the agency is expert, and . . . [the] details of which . . . Congress entrusted the agency to work out."\textsuperscript{38}

In response to the argument that the amendments to the FLSA were meant to extend rather than restrict coverage, the Court again referred to the gaps in the statutory language concerning "domestic service employment" and "companionship services" and how such gaps require interpretations by the Department of Labor.\textsuperscript{39} While completely aware of the complexity in defining such statutory terms, the Court effectively takes a hands-off approach.\textsuperscript{40} Rather than attempting to shed light on some of the questions over whether, if at all, companionship workers should be covered under the FLSA, the Court balks; it infers Congress' intent from the statute and leaves the decisions to the Department of Labor, with the understanding that "satisfactory answers to such questions may well turn upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency, such as the Department of Labor, possesses."\textsuperscript{41}

Collectively, it is clear that domestic workers are not equal to other workers protected under the FLSA and lack the benefits of minimum wage and maximum hour protections. Unless agencies act completely unreasonably or arbitrarily, the courts will continue to defer to their in-

\textsuperscript{37} Id. at 167-68.

\textsuperscript{38} Id. at 165. The Supreme Court affords a high level of deference to administrative agencies. The first question the Court will ask when dealing with the statutory interpretations by administrative agencies is whether Congress has explicitly addressed the issue in question. If Congress has not (meaning that the statute is ambiguous or silent on the issue), the Court must then determine whether the agency's interpretation is reasonable. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984). In supporting its decision to give deference to the Department of Labor and its suggestion that the third-party regulation governs, the Court explains that: (1) deciding contrary to the Department of Labor (i.e., that the General Regulation is controlling rather than the third-party regulation on the issue FLSA exemption) would create "serious problems" in terms the scope of the FLSA; (2) generally a specific regulation that speaks directly to an issue governs over a general regulation (i.e., the third-party regulation speaks directly to the type of workers included under the "companionship workers" exemption whereas the General Regulation speaks to the "kind of work" that must be performed to qualify as "domestic service employment"; (3) the Department of Labor may change its interpretations of such regulations over time as long as there would be no "unfair surprise" and (4) the fact that the Department of Labor set forth the interpretations of the regulations in a legal brief is irrelevant. Long Island Care, 551 U.S. 169-71.

\textsuperscript{39} Id. at 165.

\textsuperscript{40} See id.

\textsuperscript{41} Id. at 167-68.
terpretations.\textsuperscript{42} As evidenced by the holding in \textit{Long Island Care}, such deferential treatment does not bode well for the rights of domestic workers.\textsuperscript{43}

\textbf{B. The National Labor Relations Act ("NLRA")}

Not only does federal legislation afford certain types of employees minimum wage and maximum hour protection, it also provides \textit{certain}, but not all, employees the right to organize and bargain as a single unit so as to equalize the inequity inherent in negotiations between employers and employees.\textsuperscript{44} Through a series of amendments as recent as 1974,\textsuperscript{45} the NLRA provides this empowering collective voice and addresses, more generally, "protecting the exercise by workers of full freedom of association [and] self-organization . . . for the purpose of negotiating the terms and conditions of their employments or other mutual aid or protection."\textsuperscript{46} While beneficial at first glance, issues for domestic workers arise based on the NLRA's definition of "employee."

In defining the term "employee," the NLRA \textit{explicitly} limits its applicability, as the definition does "not include any individual employed . . . in the domestic service of any family or person at home . . . "\textsuperscript{47} In effect, this restriction equates to differential treatment, since under this definition domestic workers do not have the right to organize and collectively bargain for increased wages or benefits.\textsuperscript{48} Such exclusion from labor protection, liberally speaking, can also be interpreted as a "legacy..."
of the Jim Crow era," resulting in inherent risks of abuses that will perpetually remain until Congressional legislation "breaks from 'caste line' discourse." Because the NLRA does not include domestic workers, it effectively denies such workers the ability to maintain any type of leverage with employers; not being able to legally strike, picket, or use any of the other means recognized under the NLRA significantly handicaps domestic workers in the face of potential abusive employers.

As to the reasoning behind the exclusion of domestic workers from the NLRA, it appears that "administrative difficulties" are in part to blame. The Act was promulgated with an eye toward trade workers—workers who work for a mutual employer at a common worksite—and on the notion that "collective rather than individual action is necessary for workers to have an effective voice at the workplace." The nature of domestic work, however, is generally devoid of collectivism as most workers work in one-on-one employment settings.

Unlike workers under the "conventional organizing model" engrained with a sense of cooperativeness amongst each other and a combative nature towards their employer (the "us against them" mentality), domestic workers display a different set of characteristics. First, as previously alluded to, the individualized one-on-one nature of domestic service work transforms the dynamics of the working atmosphere. Scholars argue that individualized/intimate working relationships between many domestic workers and their clients or employers shift the focus to the quality of services they provide rather than general work-related issues. As a result, wages, benefits, and working conditions—factors that dominate the consciousness of those within the conventional work-

50. Id.
52. Peggie R. Smith, Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation, 79 N.C. L. REV. 45, 62-63 (2000). According to a Senate Report, the Committee on Education and Labor, whose purpose was to "promote equality of bargaining power between employers and employees, [and] to diminish the causes of labor disputes . . .," decided against including "persons in domestic service of any family or person in his home, or any individual employed by his parent or spouse" in the NLRA. The Senate Report fails to elaborate, citing "administrative reasons" as its justification for limiting the scope of the NLRA. S. COMM. ON EDUCATION AND LABOR, S. Rep. No. 74-573 at 1, 7 (1935).
53. Smith, supra note 52, at 63.
54. Id.
55. See id. at 69.
56. Id.
force and, consequently, their respective unions—are less apparent.\textsuperscript{57} Rather than an "us against them" collective mentality, a sense of "personalism pervades" the domestic working relationship "with workers often becoming privy to the most intimate details of their employers’ affairs."\textsuperscript{58} The personalization of the domestic working relationship stands in stark contrast with the general workforce relationship and, more broadly, the traditional worker organization model.\textsuperscript{59}

Another crucial characteristic cutting against the ability of domestic workers to organize under the traditional organizing model relates to defining bargaining units.\textsuperscript{60} Under the model promulgated by the NLRA, the National Labor Relations Board ("NLRB") has the obligation to define specific bargaining groups within a particular workplace for the purposes of voting and eventually electing a particular union as its exclusive collective bargaining representative.\textsuperscript{61} This model works most efficiently with a group of employees at a single worksite under one employer because of the ease of identifying bargaining units.\textsuperscript{62} Such conditions are not pervasive within the domestic workers industry as workers are generally "employed at smaller and more geographically decentralized worksites."\textsuperscript{63} This characteristic, coupled with the one-on-one nature of the working relationships within the domestic workplace, makes the process of identifying proper collective bargaining units nearly impossible and, thus, the feasibility of traditional unions just as impractical.\textsuperscript{64}

When considering the characteristics of the domestic service workforce in light of the collective philosophy surrounding the NLRA, it is clear why domestic service workers do not fit within the NLRA's organizing model.\textsuperscript{65} It still begs the question, however, whether domestic

\textsuperscript{57} See id. at 68-69.

\textsuperscript{58} Id. at 69.

\textsuperscript{59} See id. ("[H]ousehold employers are the final customers of the services provided, which adds a layer of complication rarely seen in most workplace relations.").

\textsuperscript{60} Id. at 70-71 (noting that bargaining units are easily identifiable when workers are hired by a single employer at a common jobsite).

\textsuperscript{61} See 29 U.S.C. § 151 (2006); see Cox, supra note 45, at 105.

\textsuperscript{62} Smith, supra note 52, at 70-71.

\textsuperscript{63} Id. at 71 (quoting Howard Wial, The Emerging Organizational Structure of Unionism in Low-Wage Services, 45 RUTGERS L. REV. 671, 678 (1993)).

\textsuperscript{64} See Smith, supra note 52, at 70-71. There are other traits of the domestic service workforce that also conflict with the traditional organizing model promulgated under the NLRA. These traits include the lack of familiarity of domestic workers to unions based on a general lack of exposure and high-rate of turnover of domestic service workers, which means a general lack of long-term obligations to a single employer. Id.

\textsuperscript{65} See id. at 71 ("Many low-wage service workers, however, pose a challenge to this strategy because they frequently lack long-term attachments with particular employers.").
workers can be organized and, if so, what are the implications of such organizing. The reality is that domestic workers can be organized, but it takes a degree of creativity.\textsuperscript{66}

Despite working largely in one-on-one environments that lack the basic characteristics of a traditional working environment, domestic workers have made strides in organizing efforts.\textsuperscript{67} Because of the unique, individualized nature of their work environment, domestic workers have been forced to be more imaginative in terms of organizing efforts.\textsuperscript{68} One byproduct of such efforts has been the rise of workers’ centers.\textsuperscript{69} Generally speaking, workers’ centers are “organization[s] doing innovative organizing in a low-wage community.”\textsuperscript{70} These establishments are “grassroots” based, with a focus on leadership and decision-making by the workers as opposed to an established union.\textsuperscript{71} These centers, which emerge largely within particular ethnic communities, focus on a wide array of issues in trying to secure workers’ rights and address injustices.\textsuperscript{72} While having a particular sensitivity to their individual communities, workers’ centers have also “emerged as part of a broader law and organizing movement that creatively uses lawsuits and legal strategies as organizing tools.”\textsuperscript{73}

Ultimately, even with the success in organizing domestic workers through grassroots organizations in hopes of securing rights and addressing injustices, such efforts are largely a byproduct of the exclusion of


\textsuperscript{67} See id.

\textsuperscript{68} See id. at 422. “Domestic worker organizing is the most distinct from the traditional [NLRA] model due to both legal necessity and industry structure.” Id. at 416.

\textsuperscript{69} Id. at 425.

\textsuperscript{70} Id. at 403-04.

\textsuperscript{71} Id.

\textsuperscript{72} Id.

\textsuperscript{73} Id. In addition to workers’ centers, there are also examples of domestic workers organizing through union-based activities. The most drastic example is the efforts of Service Employees International Union (“SEIU”). Smith, supra note 52, at 73. In 1999, SEIU succeeded in organizing “74,000 home-care workers in Los Angeles . . . [marking] the largest union victory in the United States since 1937.” Id. In other instances, both local workers’ centers and more traditional unions join to create a collaborative effort to facilitate changes for domestic workers’ rights. David L. Gregory, Labor Organizing by Executive Order: Governor Spitzer and the Unionization of Home-Based Child Day-Care Providers, 35 FORDHAM URB. L.J. 277, 277 (2008). In New York, for example, the efforts of the Association of Community Organization for Reform Now (“ACORN”) at the community level, combined with the work of unions, such as the United Federation of Teachers (“UFT”) and the New York State United Teachers (“NYSUT”), were instrumental in the issuing of Executive Order No. 12 by Governor Eliot Spitzer. Id. at 291, 298. This Order created the opportunity for the “unionization of 60,000 persons paid directly or indirectly, in whole or in part by state funds, to provide home-based day-care for the children of working parents.” Id. at 277.
domestic workers from the NLRA. Such exclusion effectively deprives such workers of the rights and federal protections, particularly in terms of collective bargaining, afforded to many other workers in this country.74

C. Occupational Safety and Health Act ("OSH Act")

Congress also provides protections for workers in the actual workplace through the OSH Act.75 In this Act, Congress implemented its commerce power "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ."76 Such words are nothing more than empty promises when considered from the domestic worker’s perspective. Shortly after the passage of the OSH Act, the Department of Labor came to the conclusion that "every working man and woman" does not apply to domestic workers.77

In determining coverage under the OSH Act, deciding whether a particular person is an "employer" is critical.78 Though they seem to be broadly defined, the OSH Act regulations limit the definition of "employer" in the context of employing domestics79 and effectively excludes a person who privately employs another within the home to perform domestic services, like cleaning and/or caring for children80:

As a matter of policy, individuals 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, cook-
ing, and caring for children, shall not be subject to the requirements of the Act with respect to such employment. 81

As a result, any domestic worker who is exposed to dangerous conditions in the home when handling cleaning chemicals, kitchen appliances, and working in poorly ventilated areas 82 is not protected nor assured the “safe and healthful working conditions” 83 purported to be guaranteed by the OSH Act.

There has been, however, considerable debate over extending the OSH Act’s regulations into the private home, but due to a concern for employees who work at home (rather than at the employer’s place of business) and not domestic workers. 84 Regardless, the debate ultimately concerns domestic workers for many of the same protections are at stake. Several years ago, the Occupational Safety and Health Administration (“OSHA”) articulated in a letter that the OSH Act “applies to work performed by an employee in the employee’s home,” which means that the employer would be “responsible for complying with the agency’s health and safety standards in home offices . . . [and] for preventing or correcting hazards to which the employee may be exposed in the course of her work.” 85 Additionally, the employer, in certain situations, could be required to perform “on-site inspections of the employee’s work-at-home environment.” 86 Clearly, the argument could be extended to domestic workers since it seemed the main obstacle preventing extension in the past—the private home—had been overcome, leaving domestic workers just as deserving of protection as work-at-home employees.

The seemingly positive step in extending regulations into private homes was fleeting as the Secretary of Labor quickly announced that the letter was to be “withdrawn,” 87 citing the potential for unforeseen conse-

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81. 29 C.F.R. § 1975.6 (2008); see Silbaugh, supra note 79, at 78.
82. See Silbaugh, supra note 79, at 77.
85. Id. at 1304. This letter was a response to a letter sent by CSC Credit Services in August 1997 during a litigation, which inquired as to OSHA’s regulations, particularly with regard to employees who work at home. The response to this letter, by Richard E. Fairfax, the Director of Compliance Programs at OSHA, was not received until November of 1999 and did not contain the signatures of either the Administrator or the Secretary of the Department of Labor. Id.
86. Id.
87. Id. at 1305. OSHA posted the letter on its website shortly after responding to CSC Credit Services, which subsequently lead to “a political firestorm” with numerous media outlets discussing the effects of extending the OSH Act’s coverage into the home for work-at-home employees. Id. The question of whether the advisory letter would be considered binding and whether courts would have given the letter any deference is a difficult one. See id. at 1306.
quences and mass confusion. The Washington Post, who credited an anonymous Labor Department official, wrote that the failure to withdraw the letter by the Secretary of Labor would have been devastating as the letter may "have been used by the courts to hold employers liable for injuries that occur in home offices." According to policymakers, the reason why employers should not be held responsible for violations of the OSH Act occurring in the home of its work-at-home employees is that employers lack control over the home workplace. Even if regulation changed so as to require employers to inspect homes, another set of issues regarding invasion of privacy would undoubtedly arise.

To date, no regulatory extensions have been made and domestic workers still do not enjoy the benefits of the safely regulations and workplace protections stipulated under the OSH Act. Considering the hazards that many domestic workers experience on a daily basis in their workplace, such exclusion from the benefit of safety regulation is particularly troubling.

D. Title VII of the Civil Rights Act of 1964 ("Title VII")

While one of the most pressing issues for domestic workers centers upon the deprivation of protection for minimum wages and maximum hours, protection against discrimination is also an issue. Under Title VII, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." According to the Supreme Court, Title VII also pro-

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88. See id at 1305. The Secretary of Labor later stated that the letter was meant purely as a means of guiding CSC and not as a "sweeping decision for all U.S. industry." Id. at 1306.

89. Id. at 1305. The concern over the letter being used by courts to bind employers is minimal because it is not "[a] legislative rule issued in compliance with the notice-and-comment and Federal Register publication requirements of section 553 of the APA." Id. at 1306 (citation omitted). An agency, such as OSHA, must act according to the authority delegated by Congress and adhere to required procedures of the APA to create a rule with the force of law. Here, OSHA's actions were equivalent to the issuance of an "interpretative rule," which is excluded from notice-and-comment procedures under section 553 of the APA and, "as a legal matter, is not binding on the public." Id. at 1307.

90. See Smith, supra note 19, at 1876.

91. See id.


tects workers against sexual harassment. A worker may establish a violation of Title VII by demonstrating that “discrimination based on sex created a hostile or abusive work environment.” For those domestic workers who experience verbal abuse, physical abuse, sexual assaults and harassment, such a demonstration could be established quite easily.

The issue confronting domestic workers yet again stems from statutory coverage. After considering this section of Title VII in isolation, it would be fair to assume that such protections apply to domestic workers. The truth, however, is that the protections against discrimination and sexual harassment do not apply to domestic workers, as they are in effect excluded based on the statute’s definition of “employer.” The term “employer” is defined as any person who employs fifteen or more employees. Considering that domestic workers are generally the only employee in the workplace, their employer would not satisfy the definition under the statute, removing such workers for Title VII protections against discrimination and harassment.

E. Federal Legislation: A Troubling Theme

Consideration of the pertinent federal legislation reveals a common, yet troubling theme: the exclusion of domestic workers from the protections and benefits afforded by the FLSA, NLRA, the OSH Act, and Title VII. It is certainly relevant to address the rationale for excluding these workers; however, it is more important at this stage to recognize the ramifications stemming from the lack of protections and move toward crafting potential solutions. While the exclusion from federal legislation is troubling in and of itself, such exclusions are particularly troubling when considered in light of the abusive working conditions experienced by domestic workers.

94. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986). According to the Court, the language of Title VII should not be considered narrowly because Congress intended Title VII to address a broad spectrum of discriminatory treatment of men and women. Id.
95. Id. at 66.
98. See Chang, supra note 6, at 337.
100. See Chang, supra note 6, at 337 & n.86.
While the lack of federal protection and governmental oversight of domestic workers is troublesome in and of itself, it is particularly problematic in light of the evidence of physical, mental, and verbal abuse plaguing domestic workers. Although federal law makes it a felony and punishes "whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held..." there are still instances of involuntary servitude today. As recent as 2008, a jury in the Eastern District of New York convicted two defendants for harboring illegal aliens who they forced to perform domestic labor while being beat, starved and tortured. Similarly, in Massachusetts, a jury convicted two defendants of involuntary servitude after a live-in domestic worker received beatings and was spat on for leaving the television monitor on. Here, the employers also withheld medical treatment after the domestic worker injured her ribs while cleaning, and withheld dental treatment for an abscessed tooth. Additionally, the employers denied her adequate food, which resulted in malnourishment, massive hair loss, and cessation of menstrual cycles. The employers appealed the jury’s verdict and the First Circuit affirmed the lower court’s decision, noting that physical restraint is not necessary to prove involuntary servitude; threats of physical violence for escape attempts are sufficient.

Surprisingly, the treatment described above would seem rather trivial to those domestic workers who are “overtly impeded through locks,
bars and chains or less conspicuously (but no less effectively) restricted by confiscation of their passports and travel documents . . . .”

Often times, domestic workers are the victims of labor trafficking and are misled about the conditions of their employment when brought over to the United States. In 2004 alone, the United States government spent $19.4 million to combat the labor trafficking problem. Labor trafficking can lead to not only severe underpayment for services rendered, but also psychological, physical and/or sexual abuse. In these types of cases, workers are isolated and threatened by their employers; they are told not to leave the premises or speak to anyone or else they will face deportation, arrest, or retaliation against their families.

An example of such treatment can be found in Alzanki, where the family promised a woman from Sri Lanka a job as a live-in domestic worker at a monthly salary of $250. This amount was later reduced to $120 upon departure from her home country. When the domestic worker arrived at the household her passport was immediately confiscated and she was told never to leave the apartment, that she could not use the telephone or mail, and that she could not speak to anyone or look out of the apartment windows. The family also told her that “the American police, as well as the neighbors, would shoot undocumented aliens who ventured out alone.” The Supreme Court has recognized that this type of behavior—“compulsion of . . . service by the constant fear of imprisonment under the criminal laws’ violated ‘rights intended to be secured by the Thirteenth Amendment’”—is not tolerable.

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111. Id. at 1.


113. See Hidden in the Home, supra note 3, at 1.

114. See, e.g., Alzanki, 54 F.3d at 999.

115. Id.

116. Id.

117. Id.

118. Id.

119. United States v. Kozminski, 487 U.S. 931, 943 (1988) (citing United States v. Reynolds, 235 U.S. 133, 146, 150 (1914)); U.S. CONST. amend. XIII, § 1, provides that: “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

120. See, e.g., Clyatt v. United States, 197 U.S. 207, 215 (1905); Pollack v. Williams, 322 U.S. 4, 9 (1944); Bailey v. Alabama, 219 U.S. 215, 242 (1911) (holding that compulsion of services through the use or threatened use of physical or legal coercion constitutes conditions involved in
In addition to being exploited both physically and emotionally, live-in domestic workers are taken advantage of by employers economically as they are consistently paid significantly lower than the minimum wage and endure long work hours. In considering why domestic workers accept such conditions, it is important to recognize that some come to the United States seeking work in order to send money back to their families. Unfortunately, they "become some of the world's most disadvantaged workers held captive by some of the world's most powerful employers, who exploit, abuse, degrade, mock, and humiliate them." Thus, establishing an avenue for employees to bring forth claims from underpayment to physical abuse will not only manifest feelings of security, but it will hopefully re-instil a sense of faith in the American system and help ensure prosecution of those who take advantage of the less protected.

IV. STATE LEGISLATIVE SOLUTIONS

A. Montgomery County Bill

Even though it may seem that domestic workers' rights are utterly neglected, there have been legislative efforts made on the local and state level. One solution to protecting domestic workers' rights has been to require a contract between the employer and the worker specifically stating the terms and conditions for employment. Montgomery County in Maryland recently passed an act, approved unanimously by the County Council, which did just this, requiring an employer to sign a written con-

121. See Hidden in the Home, supra note 3, at 1 (Human Rights Watch is an independent, nongovernmental organization that is dedicated to protecting the human rights of people around the world. Their articles address different governmental practices, criminal abuses against domestic workers, exclusions from labor laws, and child and domestic workers). See, e.g., Gonzalez Paredes v. Vila, 479 F. Supp. 2d 187, 190 (D.D.C. 2007). This case was brought by a domestic worker who alleged violations against her employer under the Fair Labor Standards Act, the District of Columbia Minimum Wage Revision Act, and the District of Columbia Minimum Wage Payment and Collection Act. Id. Her employer had failed to provide her with a copy of the contract allegedly signed that contained written terms stipulating to an hourly rate of $6.72 an hour for the first forty hours, overtime pay for any duties above that and holiday and vacation time. Id. Despite the terms of the contract, the domestic worker had been forced to work approximately 77 hours per week and was only paid $500 per month. Id.

122. See Hidden in the Home, supra note 3, at 1.

123. Id.

tract with the domestic employee. The Bill was passed on July 15, 2008, in part with the support of a study performed in 2006 by the joint efforts of the Council's Committee on Health and Human Services and by the George Washington University Master of Public Policy candidates, which surveyed approximately 300 domestic workers in the county. The domestic workers were surveyed at parks, metro stations, churches, and community outreach centers. The results of the study demonstrated that domestic workers make low wages, do not receive overtime or health insurance, and are generally isolated from other workers. In a free response question, most domestic workers commented on lack of healthcare, inadequate wages, and time-off. These conditions received attention from policymakers, evidenced by the Bill being introduced and eventually passed. The goal of the Bill is to "ensure that domestic workers in the County understand and receive the legal protections they are entitled to."

Specifically, the Bill requires a contract to be put forward in writing that articulates the terms and conditions of employment. The employer "must present a proposed written employment contract to a domestic worker and offer to negotiate the terms and conditions of employment." There also must be a model disclosure statement and em-

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125. Montgomery County Bill Council 2-08.
127. Id. at 49 (domestic workers who participated in the survey were comprised as follows: 28% worked as nannies, 44% worked as housekeepers, and the rest of the sample was neither nannies nor housekeepers, but assumed to be elderly caretakers). See also Memorandum from Robert H. Drummer, Legislative Attorney, County Council Montgomery County, Md. (Jan. 29, 2008) (subject of memorandum was the "Introduction: Bill 2-08, Consumer Protection – Domestic Workers-Employment Contracts").
128. Transcript of Montgomery Co. Council, supra note 126, at 36; see also Drummer, supra note 127, at 10 (providing a summary of the survey findings indicates that $6.29 was the hourly wage reported by live-in domestic workers and on average they worked 58 hours a week. Seventy-five percent of live-in domestic workers also reported not receiving overtime compensation).
129. Drummer, supra note 127, at 10.
130. Id. at 7; see also Montgomery County Council 2-08.
131. Montgomery County Council 2-08, § 11-4B(c).
132. Id. at § 11-4B(c). The Montgomery County bill provides that:

Each written employment contract must specify the following terms and conditions of employment: (1) days and hours of work; (2) wages; (3) paid time off; (4) unpaid time off; (5) frequency of payment of wages; (6) deductions from wages; (7) eligibility for and calculation of overtime wages; (8) duties; (9) right of the employer, if any, to require the domestic worker to perform duties that are not specified in the contract; (10) living accommodations provided by the employer, if any, including deductions for rent; (11) meals provided by the employer, if any, including deductions for meals; (12) time allowed for breaks and meals during work hours; (13) required notice, if any, before the employer or domestic worker terminates the contract; (14) severance wages, if any, if the employer terminates the contract before the end of the contract period; (15) contract period; (16) reimbursement for work-related expenses; and (17) notice of employment
employment contract available that an employer may use to comply with this section, which must be published in a variety of languages. In hopes of facilitating the new legislation, the Montgomery County’s Office of Consumer Protection launched a website that provides a model contract, disclosure statement, resource links and information about the new law. An employer who violates the terms or conditions of the contract may be subject to a complaint filed with the Office of Consumer Protection by the domestic worker. The Bill requires that the Office of Consumer Protection investigate complaints and generally enforce the law. Complaints concerning living accommodations must be referred to the Department of Housing and Community Affairs for investigation and enforcement while complaints alleging discrimination must be referred to the Office of Human Rights.

The protections that this Bill provides are essential for the workers themselves and the families for which they work. A councilmember at the session stressed the importance of domestic workers’ daily role in the lives of others: “[w]hat could be more important than caring for our children or making sure that we live in safe and clean and happy environments in our homes, or caring for our parents and our grandparents? And yet all too often these workers are not treated as professionals.” In its entirety, the Montgomery Bill ensures that workers performing these important domestic functions are treated as professionals and have the right to contract, while also providing avenues of relief for any violations of the contract by the employer.

rights under State law.

Id.

133. Id. at § 11-4B(f) (“The model contract and the model disclosure statement must be published in English, French and Spanish.”).


135. See Montgomery County Council 2-08 § 11-4B(g)(h)(g). The bill further states than an employer must not retaliate against a worker who “files a complaint or testifies, assists, or participates in any manner in an investigation, proceeding, or hearing to enforce this [bill].” Id. at (f)(g)(f)(2).


137. Montgomery County Council 2-08 § 11-6(d)-(e).


139. See Montgomery County Council 2-08; Drummer, supra note 127, at 7.
B. New York Assembly Bill

Similar to efforts made by Montgomery County, New York State currently has a bill being reviewed by the Senate Committee on Labor entitled, "An Act to Amend the Labor Law, the Executive Law, and the Workers’ Compensation Law, in Relation to the Labor Standards and Human Rights of Domestic Workers," which would in effect provide for a "Domestic Workers’ Bill of Rights."\footnote{140. S.B. S2311A, Reg. Sess. (N.Y. 2009), available at http://open.nysenate.gov/openleg/api/html/bill/S2311A (justifying the act by explaining that “[d]omestic workers are among the most oppressed workers in the United States. They are often abused, mistreated and work under harsh conditions. They are regularly forced by employers to work six days a week, and receive little or no pay for their services. They are also sexually, physically assaulted and abused.”).} The legislature found that because domestic workers care for their employers’ lives, their families, and their homes, it is important to ensure that their rights are protected, respected, and enforced.\footnote{141. Id. § 1.} The new law would add an article requiring the employer to give the domestic worker health coverage\footnote{142. Id. art. 696 (The employer can either provide the domestic worker with health benefits, or the employer may supplement the hourly wage rate “by an amount no less than the lowest available cost of health benefits described in section the insurance laws.”).} and provide the domestic worker with an annual cost of living adjustment pursuant to the Consumer Price Index for the New York Area.\footnote{143. Id. art. 696a.} In addition, the new law would provide for a day of rest, paid time off, termination and severance packages.\footnote{144. Id. art. 696b.} To enforce this additional coverage, New York State proposes implementing penalties consistent with the current labor law provisions and by providing civil remedies to domestic workers to bring forth individually, or through the commissioner or the attorney general.\footnote{145. See id. art. 697.}

Unsurprisingly, in New York, organizations whose sole purpose is protecting the rights of domestic workers have been vigorously encouraging the new legislation.\footnote{146. Domestic Workers United ("DWU") is one such group. Founded in 2000, DWU organizes for fair labor standards and supports the movement to end exploitation and oppression of domestic workers.\footnote{147. Domestic Workers United, http://www.domesticworkersunited.org/index.php (last visited Jan. 23, 2010).} In promoting the enactment of the Domestic Work-
er’s Bill of Rights, DWU argues that domestic workers are the “invisible backbone of New York City’s economy.” A leading organizer within the DWU said that “[o]ur fight for a bill of rights challenges centuries of slavery in the U.S.”

To carry out its mission in practice, DWU brings domestic workers together by counseling and supporting them. The organization’s primary form of reaching out to domestic workers is directly through the community, by word of mouth and venturing out to libraries, playgrounds, and anywhere else domestic workers frequent. Through such efforts, the organization hopes to “expose the innumerable indignities and violations that take place in the domestic work industry.” In terms of actual organization, DWU brings domestic workers together to perform protests to raise awareness of the brutal realities occurring behind closed doors. DWU also goes beyond public outreach by contacting employers directly if requested by a domestic worker.

In trying to protect domestic workers from being taken advantage of at the bargaining table, DWU created a guide to aid employers in determining fair and reasonable working conditions for domestic workers. The guidelines address hours and wages, vacations, personal days and sick days, notice of termination and severance, health benefits, and immigration status. DWU also created an employer-friendly chart, containing a description of the job position, average weekly wage, and hourly wage, with the average wage depending on the job position. For example, a nanny for one child is paid less than a nanny for two children and housekeeping, or someone caring for an elderly individual. Lastly, DWU makes available a list of all employment agencies licensed by the New York City Department of Consumer Affairs that place nannies, housekeepers, and elderly caregivers in the tri-state area as well as surveys conducted by individuals who have used the agencies

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148. Id.
149. Id.
151. Id. at 67.
152. Id.
153. Id. at 69.
154. Id.
156. Id.
157. Id.
158. Id.
that help DWU recommend certain agencies to other domestic workers.\textsuperscript{159} However, without legislation to protect these workers, even with the efforts of organizations like DWU, there is the potential for “one more day that a worker is abused, denigrated and exploited and one more day that her family, her children suffer beside her.”\textsuperscript{160} 

Although the New York Assembly Bill did not pass, it is instructive to consider the transcript of the minutes from a public hearing on the bill, which provides a unique and informative account of the issues needing to be weighed by the legislature considering domestic workers’ rights. For example, a member and full time organizer of DWU, and the daughter of a domestic worker, testified about her mother’s horrific experience and what her organization is doing to address such abuses.\textsuperscript{161} Her mother has been a domestic worker for almost twenty years, working in households all over New York and Connecticut.\textsuperscript{162} According to the testimony, the DWU member often went to work with her mother after school and saw the disrespectful treatment that her mother endured.\textsuperscript{163} Employers mimicked her mother’s speaking, refused to give her a raise or compensation for overtime work, and refused to pay medical bills after one of their children tripped her while she was on the stairs, causing her to fall and seriously injure her knees and break her front teeth.\textsuperscript{164} 

Unfortunately, domestic workers’ bleak work experiences are not a recent phenomenon and neither is the fact that they are not protected under the law like other workers. At the hearing, Professor Premilla Nadasen, a historian, noted several historical reasons why domestic workers have not been assured the same rights as other workers.\textsuperscript{165} First, the workers are primarily “poor women of color who lack political clout, which is why they have been marginalized and excluded from provisions of labor law.”\textsuperscript{166} Second, the reason for their exclusion from labor laws has a racial underpinning arising out of the New Deal era, when southern congressmen would only support the New Deal package if black agricultural and domestic workers were not included.\textsuperscript{167} Third, since domestic

\begin{footnotesize}
\begin{enumerate}
\item \textit{Domestic Working Circumstances and Conditions}, supra note 150, at 65.
\item \textit{Id.} at 61–69.
\item \textit{Id.} at 61.
\item \textit{Id.} at 61–62.
\item \textit{Id.} at 62–64.
\item \textit{Id.} at 6–18.
\item \textit{Id.} at 8.
\item \textit{Id.} at 9 ("Southern congressmen were simply unwilling to cede racial control of their re-
\end{enumerate}
\end{footnotesize}
work occurs within the private realm of the home, it has not been deemed "real work."\textsuperscript{168} Lastly, unlike other workers, domestic workers work alone and thus are particularly vulnerable.\textsuperscript{169} Realistically, there is little opportunity for domestic workers to organize and voice their concerns. Employers wield a great deal of power over their employees in these situations and "[t]his can, and has, lead to extreme abuses."\textsuperscript{170}

Professor Nadasen explains, however, that even in the midst of this colossal financial crisis, \textit{this} is the moment to enact a bill that will guarantee domestic workers their rights.\textsuperscript{171} This economic crisis is due, in part, to a widening income gap over the past decade.\textsuperscript{172} This gap leaves domestic workers the "most vulnerable and least protected."\textsuperscript{173} Although the New York Domestic Worker's Bill of Rights would be the first one passed on the state level, it would, according to Professor Nadasen, help our economy because "our economic system function[s] best when the working people of this nation . . . have their rights protected and a minimum standard of living [is] guaranteed."\textsuperscript{174} The economic crisis also affords this country the opportunity to make "dramatic legislative change[s]," much like the type of legislative change that occurred during the Great Depression.\textsuperscript{175} As Professor Nadasen put it, "the American people have spoken with the election of Barack Obama about the kinds of changes they want to see happening."\textsuperscript{176}

Moreover, it is not just the domestic workers that will benefit from new legislation and who want change, but evidence suggests that employers of domestics do as well. The policy co-director of the National Employment Law Project ("NELP"), who also testified at the public hearing,\textsuperscript{177} stated that "public policy has a unique obligation to step in
and help to establish a framework of core standards for the industry.\textsuperscript{178} NELP recently conducted research and found that "greater regulation of the industry will benefit both [sic] workers and employers."\textsuperscript{179} During the research project, employers repeatedly expressed frustration over not having any guidelines to help them with the terms of employment for their domestic workers.\textsuperscript{180}

Employers also personally expressed their concern at the hearing through testimony regarding domestic workers' rights and benefits.\textsuperscript{181} One employer spoke highly of her domestic worker who has worked for her for over twenty-five years and also worked for other groups of friends as well.\textsuperscript{182} She notes that one of the major problems with domestic worker employment is defining the relationship; to her, she is not only an employee but a friend, and "when the relationship [line] gets blurred, and after 25 years it can, it can prevent a working balance that gives employees the rights they deserve."\textsuperscript{183} This employer admits that only recently has she begun to think about "percentage of salary, percentage based on consumer price index, and have it be a discussion with her [employee].\textsuperscript{184} The employer in this case took for granted the importance and value of having clear employment terms and conditions expressed in an employment agreement.\textsuperscript{185} Unfortunately, domestic "workers are typically at a disadvantage when establishing the terms of their employment arrangement. Given their precarious economic position, domestics frequently find themselves accepting terms unilaterally imposed by employers. Communication skills can further complicate the negotiation process for immigrant domestics."\textsuperscript{186} Ultimately, in testifying in support of new legislation, the employer expressed that "[s]tandardized regulations will lessen the burden on employers . . . to

\begin{footnotes}
\item[178] \textit{Id.} at 24 ("Policies such as the New York Domestic Worker Bill of Rights are designed to do just that by setting a baseline floor for working conditions including paid sick days, vacation days, breaks, annual raises, and health insurance.").
\item[179] \textit{Id.}
\item[180] \textit{Id.} at 25.
\item[181] \textit{Id.} at 74-80.
\item[182] \textit{Id.} at 74.
\item[183] \textit{Id.} at 74-75.
\item[184] \textit{Id.} at 76.
\item[185] See \textit{id.} at 76-77. She went on to ask, "[w]hat happens about vacation pay or sick leave? What about the raises I spoke about earlier? We as employers have only practices of friends, neighbors, and co-workers to use, and then only if we are smart enough to ask questions and seek advice." \textit{Id} at 76.
\item[186] Smith, \textit{supra} note 52, at 90.
\end{footnotes}
figure out what is appropriate and what is fair."\textsuperscript{187} Clear and coherent standards in this industry are especially important now with the recession.\textsuperscript{188} As people search for less expensive help, domestic workers are, as a result, at a higher risk for abuse and workplace violations based on "deteriorating working conditions such as extra workload, loss of hours, loss of sick days, and more."\textsuperscript{189} It is telling that a recent online discussion among Park Slope domestic worker employers focused on how domestic workers compensation might be limited because of financial problems.\textsuperscript{190} Currently, NELP is in the middle of fielding a survey in New York, Chicago, and Los Angeles of about 5,000 workers, with domestic workers being one of the key groups.\textsuperscript{191} A major concern for domestic workers, particularly in the last few months, has been the reduction in hours of work, which translates into a decrease in earnings.\textsuperscript{192} Another concern involves increases in domestic worker responsibilities following an employer’s firing of a second caregiver without a corresponding increase in the remaining worker’s pay.\textsuperscript{193} Because of flat pay rates, the primary method of payment implemented by employers, domestic workers are not receiving their overtime associated with accomplishing the additional responsibilities.\textsuperscript{194}

The Domestic Workers Bill of Rights would be extremely helpful considering the lack of guidance for employers, and employees not being able to negotiate the terms of their employment properly. While NELP pushed for the Bill to be passed, it added that a movement on the federal level would be paramount.\textsuperscript{195} Even though the Bill ultimately was not passed, the testimonials and evidence presented at the hearing by organizations, historians, and even employers demonstrates an eager effort to protect this exposed class of workers; but from a policy standpoint, there is a concern that even with legislation, enforcement will be an issue.

\begin{enumerate}
\item \textsuperscript{187} Domestic Working Circumstances and Conditions, supra note 150, at 77.
\item \textsuperscript{188} Id. at 25.
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Id. at 25-26 (This is a "stark example of the consequences of lack of industry regulation, a group of novices making up standards on the spot, some well-intentioned, others not, without any legal background or information on what makes for a living wage in New York City.").
\item \textsuperscript{191} Id. at 28.
\item \textsuperscript{192} Id.
\item \textsuperscript{193} Id.
\item \textsuperscript{194} Id.
\item \textsuperscript{195} See id. at 24.
\end{enumerate}
V. PROBLEMS WITH ENFORCEMENT

Although there have been activist organizations and legislative proposals, a major hurdle remains: enforcement. Even where law relating to domestic workers exists, under-enforcement and enforcement is a problem. Social security tax requirements require domestic workers to be included in the formulation, yet in 1992, the Congressional Record indicates that only 25% of households complied with the requirements. A survey in Los Angeles of affluent individuals who hired domestic workers found that an overwhelming majority did not pay Social Security taxes, Medicare taxes, or withhold income taxes as the law requires. This failure to comply with tax law may be the result of domestic workers' desires to avoid deductions from already insufficient pay or the employer's desire to avoid paperwork. Violations, however, tend to be much worse than tax evasion; minimum wage requirements are almost never adhered to. For obvious reasons undocumented workers do not have an incentive to report underpayment. Even if the worker does want to seek a remedy for underpayment, she has not paid the appropriate taxes on what she has earned and so redress is usually not sought.

Another potential problem with enforcement relates to the Fourth Amendment. During the public hearing for the New York Assembly Bill, Chairwoman Susan V. John, a member of the Assembly, introduced a challenge to this proposed legislation based on the Fourth Amendment's protection against unreasonable searches and seizures and stressed that this may cause a dilemma when it comes to enforcement. The Supreme Court has said that the Fourth Amendment draws "a firm line at the entrance to the house" and "[t]hat line . . . must not be only..."
firm but also bright.” The Supreme Court has recognized the importance of privacy within the home and although the homes in these cases are also places of work, there may be some resistance to allowing an agency to do routine checks.

Problems may also arise with enforcement because of the immigration status of domestic workers. It is often the case that employers exploit the fact that the domestic worker does not have legal status in the United States, which “discourag[es] the reporting of violations.” The United States only exacerbates this vulnerability by allowing employers to inquire into the domestic worker’s immigration status and by failing to establish a vehicle through which domestic workers can lodge a complaint. Domestic workers failure to file complaints is often a result of a “lack of knowledge of the U.S. legal system, exacerbated by social and cultural isolation; fear that employers would report them to the INS and that they would subsequently be removed from the United States; and fear of retaliation . . . in their countries of origin.”

One possible solution to the problem of reluctance to file complaints is protection on the federal level, which may give domestic workers a sense of security and hope that the United States government is defending their rights. The executive director of the Central Labor Council of the City of New York submits that “[l]abor law should not rest on the legal status of a worker.” In fact, over the years, the United States has “facilitated over 15 million workers coming into this country without full status.” Not only did the government allow this to happen, but they facilitated it, and “employers needed it.” The United States clearly welcomes and needs domestic workers’ services, yet adequate protections are not provided on any level of government.

Even though there have been state and local efforts to protect domestic workers, there is no guarantee that state legislatures will ever ac-

209. *See infra* pp. 270-74.
211. *Id.*
212. *Id.*
213. *See supra* Part II. A-D.
complish their proposed goals. For example, while New York's efforts to be the trendsetter are encouraging, there is plenty of evidence to suggest that domestic workers' rights will continue to be unaddressed. Up until recently, the state legislature had become a place of turmoil with senators changing party lines, stalemates, lockouts, shouting matches, and even the governor threatening the use of state troopers to reestablish control. Even with the eventual end to the stalemate, it is doubtful that any type of domestic workers' bill will be passed as the chaos has "bottled up important legislation." 

With the uncertainty of state legislation ever passing, federal legislation is critical. If domestic workers are protected on the federal level, there would be uniformity with respect to their rights and a better understanding of the scope of their protection. Furthermore, if such federal legislation establishes an agency with the express purpose of enforcement, perhaps many of the issues currently relating to enforcement will be minimized. In a country that so desperately demands domestic workers' services, adequate protections are not only necessary but just. With federal action and the creation of an administrative agency, domestic workers may finally receive adequate protection.

VI. FEDERAL SOLUTION: THE CREATION OF AN ADMINISTRATIVE AGENCY

While efforts on the local and state levels are encouraging, they are not far-reaching enough to significantly impact the larger domestic worker population. To bring relief to such a widespread population, the federal government must take action. In hopes of addressing the issues
resulting from the systematic exclusion of domestic workers from federal legislation and abusive working conditions, it is instructive to consider the NLRB and the mechanisms by which employees seek redress from unfair labor practices as a model.\textsuperscript{219} The NLRA acts as a legislative foundation for the NLRB, allowing the agency to effectively carry out its purpose as intended by Congress.\textsuperscript{220}

As mentioned previously, the NLRA, along with a series of amendments, exists to protect "by law . . . the right of employees to organize and bargain collectively . . ."\textsuperscript{221} against the potential interference, restraint or coercion by employers.\textsuperscript{222} In order to ensure enforceability of the Act, Congress established the NLRB.\textsuperscript{223} At the administrative head of the NLRB is the General Counsel,\textsuperscript{224} whose authority consists of investigating unfair labor practice complaints, determining the veracity of such complaints, and directing prosecution.\textsuperscript{225} Providing assistance to the General Counsel is a large staff of directors, attorneys, field examiners, and field attorneys divided between the Washington D.C. office and more than fifty other offices (regional, sub-regional, and resident).\textsuperscript{226}

The protection of the NLRB begins with the filing of a formal unfair labor practice\textsuperscript{227} charge in the office of the region where the alleged violation occurred.\textsuperscript{228} After the filing of a formal charge, accompanied by supporting evidence, with the Regional Director, the individual facing the charge is asked to reply, while a Field Examiner Attorney undergoes an investigation of the facts and circumstances surrounding the complaint (for example, if the complaint is made against an employer, the Field agent will generally conduct interviews of the employer as well as other employees).\textsuperscript{229} If such investigation yields unsubstantial evi-

\begin{itemize}
\item \textsuperscript{219} See generally Cox, supra note 45, at 98-99 (discussing the mechanisms through which workers submit complaints for unfair labor practices and the adjudication process).
\item \textsuperscript{220} See id. at 98.
\item \textsuperscript{221} 29 U.S.C. § 151 (2006); see generally Cox, supra note 45, at 85-86 (discussing the specific rights afforded employees under the NLRA and its amendments).
\item \textsuperscript{222} Cox, supra note 45, at 85-86
\item \textsuperscript{223} Id. at 98.
\item \textsuperscript{224} Id. The office of the General Counsel was created by Congress in the Taft-Hartley amendments of 1947. Prior to the amendments, the administrative and adjudicatory responsibilities of the Board fell on the "five Members of the Board, appointed by the President . . . ." Id.
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Id.
\item \textsuperscript{227} See Id. It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 which included the right to "self-organization . . . assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of bargaining or other mutual aid or protection." See 29 U.S.C. § 152 (2006); Id. § 157.
\item \textsuperscript{228} Cox, supra note 45, at 98.
\item \textsuperscript{229} Id. at 98-99.
\end{itemize}
dence, the case is generally dismissed, otherwise further investigation may occur, including informal meetings at local NLRB offices between the employee and employer discussing the alleged unfair labor practices in an effort to reach some type of amicable settlement. In reality, the vast majority of unfair labor practice cases have been settled by this informal type of face-to-face negotiation. The key here, and one that is particularly noteworthy in suggesting an NLRB-like mechanism to serve domestic workers, is “the informality of these investigations, conferences, and settlements” and the goal of conducting the entire process “with all possible informality and an eye to amicable adjustments.”

After considering the workings of the NLRB, it is clear that domestic workers would benefit greatly from a similar type of administrative structure and an agency that would entertain and investigate complaints with hopes of facilitating agreeable negotiations. Like the NLRB scheme, the domestic workers’ agency would address formal charges submitted by domestic workers, followed by an investigation of the circumstances, interviews of pertinent parties, and even an inspection of the working environment, if deemed necessary.

With such an agency in place, domestic workers could present issues regarding their workplace environment and terms of employment, with the ultimate goal being a reasonable settlement between the parties, much like workers who submit claims under the NLRA. Based on the personal interaction that often exists between an employer and a domestic worker, a settlement that is produced amicably is critical to maintaining the viability of the employer-worker relationship. Not only would such a forum provide domestic workers a place to voice their grievances, but it would also act as a means of deterrence. With an NLRB-like agency in place, enforcement issues would be less ominous and, consequently, employers would arguably be less inclined to act with complete disregard for the rights of their domestic workers.

Essential to the proposal for an NLRB-like agency is the enactment of separate federal legislation governing the rights of domestic work-

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230. Id. at 99.
231. Id. In published figures of the NLRB from the 2004 fiscal year, “of the 29,954 unfair labor practice charges that were ‘closed,’ 29% were withdrawn before a complaint issued, 30.8% were dismissed before a complaint, and 35.8% were settled or adjusted – only 2.3% proceeded as contested cases to be closed by a Final Board order.” Id.
232. Id.
233. See supra text accompanying notes 221-25.
234. See supra text accompanying notes 213-18.
235. See supra text accompanying notes 57-59.
236. See supra Part V.
237. See supra text accompanying notes 213-18.
238. See supra Part IV.A.
239. See supra Part IV.B.
240. Cox, supra note 45, at 76.
242. See supra text accompanying notes 202-205.
243. See supra text accompanying notes 181-87.
amples of Congress acting both swiftly and decisively. With the state of our current economy and this recent change in federal administrative mentality, there is nothing to say that a significant transformation in workers' rights is not on the horizon. The naysayers should look no further than the recent signing of the Lilly Ledbetter Fair Pay Act by President Obama, which provides equal pay for equal work, as an early indication of the types of changes in legislation to come in the future.

VII. CONCLUSION

Domestic workers provide vital services within households throughout the United States. Unfortunately, the laws of this country are inadequate as they exclude domestic workers from many of the protections held by workers in traditional employment relationships. Consequently, the United States must address the problems surrounding the lack of protection for these employees who are too often abused and exploited. As has been suggested, the current state of the economy coupled with a fresh perspective from the Obama administration offers an exceptional opportunity for the government to properly address the protections domestic workers deserve. While some progress has been made on the local and states levels, it is not enough. Thus, action by the federal government to create an agency emulating the NLRB is necessary to effectively address the issues plaguing domestic workers. Much like the NLRB, this administrative agency would provide domestic workers with a means of submitting claims and settling complaints with employers efficiently and as amicably as possible.

In what appears to be a ground-breaking era for this country—one of "change"—the time for domestic workers to reap the benefits of rights enjoyed by many other workers in this country is now. There is no reason why those who take care of some of the most quintessential

245. See Chad Pergram, Congress Passes $787B Stimulus Bill, Sends it to Obama for Signature, FOXNEWS.COM, Feb. 14, 2009, http://www.foxnews.com/politics/2009/02/13/congress-readies-final-vote-b-stimulus/. Following the House of Representatives passing of the bill in a single day, “[t]he bill passed the Senate late Friday night with a vote of 60-38 after Democratic leadership held the vote open for several hours to allow one member, Democratic Sen. Sherrod Brown, to return to Washington to cast the deciding vote. He had flown back from Ohio, where his mother died earlier in the week.” Id.

246. See Domestic Working Circumstances and Conditions, supra note 150, at 4-5.


248. See supra text accompanying notes 138, 141.

249. See supra Part II.

250. See supra Part III.

251. See supra text accompanying notes 244-47.

252. See supra text accompanying notes 230-32.
parts of the American home should continue to be denied and exploited. The bitter reality is that the window for "change" is not perpetual; without action by the federal government, this vulnerable class of workers will most certainly continue to be abused, exploited, and excluded.

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