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Nanny 9-1-1: Avoiding the pitfalls of hiring a nanny

Nannies can seem part of the family but they are still employees under the jurisdiction of employment standards legislation

By Carol Chan

In many Canadian households, a nanny is an essential and beloved member of the family. However, unlike other family members, a nanny is also an employee whose employment relationship is governed by law. Unfortunately, failing to remember and act on this important distinction can expose a family to potential liability. Let's consider three common missteps and how to avoid them.

A nanny is an independent contractor. She's not an employee.

A common misconception is that if a nanny agrees to be described as an "independent contractor," certain employment standards and tax laws do not apply to the employment relationship. This would include the requirement to remit taxes and make source deductions on her behalf, and to ensure she receives at least the minimum standards mandated by the governing employment standards legislation — such as the Employment Standards Act, 2000 (ESA) in Ontario — including, for example, minimum wage, maximum daily and weekly hours of work and overtime (more about this later).

However, regardless how a family and a nanny describe the arrangement, the courts, Ministry of Labour, and Canada Revenue Agency will look past that description to the real details of the relationship and, in the majority of cases, will find the nanny to be an employee. This is because in order to be an independent contractor, the following factors must be present (more or less):

• The nanny would have control over the work she performs, including where, when and how that work is performed.

• The nanny would own the tools used to perform the job.

• The nanny would have assumed some financial risk and have the opportunity to profit from the relationship, usually through investment in equipment, advertising or other activities.

• The nanny would provide services to other clients and will not be economically dependent on the contract.

As an employee, the nanny may file a complaint with the Employment Standards Branch of the Ministry of Labour seeking entitlements she ought to have received under the ESA, including, for example, overtime pay. She may also file a wrongful dismissal claim in the event her employment is terminated in a way she believes is unlawful. Finally, if the Canada Revenue Agency determines a nanny is an employee, but the employer has not been deducting and remitting appropriate taxes on her behalf, this could result in an order to make those payments together with penalties and interest.

Do employment standards apply to my nanny?

As an employee, a nanny is entitled to the minimum standards provided under the ESA, including in respect of minimum wage, hours of work, daily and weekly rest periods, breaks, overtime pay, vacation pay, public holidays and notice of termination. These minimum standards apply regardless whether the nanny lives in or out of the home, and works full- or part-time.

Failing to meet the ESA's minimum standards can have serious financial — and reputational — consequences for a family. One recent example is the case *Leys v. Likhanga,* in which a nanny successfully filed an ESA complaint against her employers seeking unpaid wages. The nanny was awarded $7,707.13 by the Employment Standards Officer and the case was appealed to the Ontario Labour Relations Board.

The board conducted a thorough examination of the private details of the employers' household, and relationship with the nanny, right down to the number of times the employers went to the gym each week. It concluded the nanny was owed $13,092.29 based on a number of *ESA* violations including:

• The nanny was paid below minimum wage. The employment agreement stated she would work 40 hours per week and would be paid $400 per week.

• The employers deducted cell phone bills from the nanny's wages without a written agreement.

• The employers averaged the nanny's hours of work without a written averaging agreement. She worked an estimated 56.5 hours per week. The employers claimed they were was not liable for overtime because the nanny only worked 15 hours when the family

was skiing, on vacation or at its cottage, six or seven weeks per year. In response, the nanny alleged the employers gave her lengthy task lists during those weeks that could not possibly be completed in just 15 hours. The board held the employers could not average hours of work without the nanny's written agreement.

• The nanny cared for the family's dog and cat on weekends, but was not paid for this time. The board was highly critical of the employers' claim the nanny volunteered for this work: "Simply put, it is unacceptable in these circumstances to characterize pet care as something that constitutes voluntary rather than actual work… the (nanny) and persons similarly situated are particularly vulnerable given their reliance upon Canadian work permits. Any suggestion of voluntary work should be met with the highest degree of scrutiny by the board."

The board reduced the order to pay to $10,000, which is the maximum order permitted by the ESA.

If I fire her, she's only entitled to two weeks' notice, right?

Not necessarily. First, remember that any entitlement to notice of termination must at least meet the minimum standard set by the ESA. That standard depends on how long your nanny has worked with your family. If, in the particular circumstances of your nanny, she is entitled to greater than two weeks' notice, then providing two weeks' notice will be a breach of the law.

Second, if you do not have a written employment agreement with your nanny limiting her notice entitlement to the ESA minimum, she may be entitled to common law reasonable notice, which can expose your family to considerably greater liability.

This issue recently arose in the case *Pascua v. Khul-Schachter*, which serves as an important reminder of the importance of a well-drafted and executed employment agreement. In this case, the employer claimed she had just cause to terminate her nanny's employment because she failed to properly supervise the two children in her care. If the alleged neglect of the children constituted "cause," the nanny would not have been entitled to any notice of termination. The case went to court where the judge disagreed with the employer, finding the nanny to have been wrongfully dismissed and awarding her four months' common law notice.

The facts surrounding the alleged neglect of the children are not relevant for the purposes of our analysis. What is relevant is that the employer and nanny had an employment agreement that purported to limit the nanny's notice entitlement upon termination to the legislative minimum — in this case, two weeks. Why, then, did the judge disregard this clause in the employment agreement and award notice based on the common law? The clause in the agreement read as follows:

"The employer must give written notice before terminating the contract of the employee. This notice shall be given at least two weeks in advance. The parties agree to abide by provincial / labour / employment standards regarding written notice of termination of employment."

The judge held that this language did not displace the obligation to provide common law reasonable notice because the language was ambiguous and did not clearly state it was limiting termination notice to the legislative minimum. The judge therefore struck down the clause and in so doing the parties reverted back to the common law under which the nanny was awarded four months' notice —eight times more than what she would have received under the *ESA*.

Tips for employers

While it may be tempting to skip an employment agreement with your nanny or to ignore employment standards or other legal requirements that may seem confusing or complicate life, a household employer does so at its peril. As illustrated in the cases discussed above, taking the time to prepare a well-drafted employment agreement and to understand the obligations as an employer is critical. A nanny may be considered a close and valuable member of the family, but she is also an employee.

For more information see:

• *Leys v. Likhanga*, 2012 CarswellOnt 6703 (Ont. Lab. Rel. Bd.).
• *Pascua v. Khul-Schachter*, 2013 CarswellOnt 10860 (Ont. S.C.J.).

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