

Feasibility of Domestic Worker Collective Bargaining

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EXECUTIVE SUMMARY

This Report has been prepared in response to Section 10 of A. 1470B/ S. 2311-E, also known as the “Domestic Workers’ Bill of Rights”, requiring the Commissioner of Labor to report to the Governor, the Speaker of the Assembly, and the Temporary President of the Senate on the feasibility and practicality of allowing domestic workers to organize for the purposes of collective bargaining.

The report discusses the unique issues in the domestic work industry and their impact on the ability to bargain collectively. Possible frameworks for collective representation and bargaining for domestic workers under the New York State Employment Relations Act (SERA) are identified. Other alternatives for providing benefits to domestic workers are also suggested. This report has been prepared in consultation with representatives of domestic workers, individuals that employ domestic workers, agencies that place domestic workers with employers, and relevant state agencies such as the Public Employment Relations Board.

UNIQUE ISSUES WITH REGARD TO THE DOMESTIC WORK INDUSTRY

There are several issues unique to domestic workers that arise in the context of pursuing collective bargaining rights. Most are paid “off the books” and, therefore, accurate information regarding the size and demographics of the industry is difficult to obtain. They are highly decentralized, working in individual homes, usually without co-workers. Their isolation makes it difficult for them to raise issues with their employers. This decentralization also complicates the question of how to form an appropriate bargaining unit for domestic workers, as each worker labors for a different employer at a different worksite. The absence of a full understanding of the range of employers operating in a particular geographic location also impedes the formation of appropriate bargaining units.

Employers of domestic workers are, moreover, fundamentally different in many ways from other employers. They employ such workers not as part of their primary business and means of earning their living, but in addition to their regular jobs. Many have little time or ability, in addition to work and family responsibilities, to take on additional administrative burdens. Further, the ability of such employers to pay is limited by their own income, and they do not have the ability to pass on the cost of increased salaries or benefits to consumers, or to do so by restricting profits.

Because domestic workers labor in private homes with children and the elderly, they form unique emotional attachments with the families that employ them. While these relationships may make their employers less likely to arbitrarily terminate their employment, they also complicate the nature of the employment relationship, with many employers reporting they feel awkward discussing employment terms and many workers reporting their employment concerns are often treated too informally by their employers.

In addition, the fact that the workplace is in the employer’s home gives rise to serious challenges in imposing the standard range of labor protections that arise through collective bargaining. While many workers covered by collective bargaining agreements enjoy the right to

progressive discipline and the potential for reinstatement if victims of retaliatory terminations, both of these options would be difficult to obtain in workplaces that are private homes. Yet termination of live-in domestic workers without any advance notice places them at risk of homelessness, and the risks of retaliation for exercising rights associated with organizing are high among the more vulnerable sectors of this workforce.

FEASIBILITY OF A DOMESTIC WORKERS LABOR ORGANIZATION FORMED IN ACCORDANCE WITH THE STATE EMPLOYMENT RELATIONS ACT

The National Labor Relations Act and the State Employment Relations Act exclude domestic workers from their protections. This exclusion could be removed by deleting the language in Sec. 701(3)(a) of SERA which defines “employee” to not include domestic service. While the statutory amendment would be simple and straightforward, the implementation of collective bargaining for domestic workers, while feasible, would be much more complicated.

SERA is administered by the Public Employment Relations Board (PERB), which is responsible for determining questions of appropriate bargaining units for employees, resolving unfair labor practices, providing mediation services for the resolution of collective negotiation disputes, and administering panels of private arbitrators for the resolution of contract disputes. For the PERB framework to function in the domestic work context, employees are essentially dependent on their employers’ ability and willingness to join together into an association or other legal entity for the purposes of bargaining collectively. While SERA does not articulate statutory standards for such a multiple employer unit, associations created by employers in other industries for the purposes of collective bargaining have been certified by SERA in the past.

Without a multiple employer entity to negotiate with, domestic workers would be left to bargain in one-person units, an arrangement that may be less practicable for a number of reasons. Many collective bargaining relationships, however, have evolved from voluntary, single person bargaining relationships with individual employers to collective bargaining relationships between a labor organization and employer associations.

While domestic workers may face significant challenges in their attempts to achieve collective bargaining agreements, it is clear that providing the basic right to organize to domestic workers through SERA is feasible and a critical first step in the organizing process. Employee organization and the right to organize could be granted to domestic workers under SERA by amending the statute to take into consideration the unique characteristics of the domestic work industry. While it is unclear at this time which approach to collective organization for domestic workers will emerge as the most effective strategy in the future, including domestic workers within SERA’s coverage would create the opportunity for domestic workers and employers to begin the process of exploring these various approaches in an effort to ultimately achieve more harmonious labor relations.

OTHER POSSIBLE FRAMEWORKS FOR COLLECTIVE ORGANIZATIONS OR FOR ENSURING THE BENEFITS THAT ACCOMPANY ORGANIZATION FOR DOMESTIC WORKERS

This report also identifies several alternatives for providing basic rights and benefits to domestic workers through means other than inclusion in SERA. Such possible frameworks for collective organizations or for ensuring the benefits that accompany organization for domestic workers include hiring halls and/or cooperatives, legislation requiring written contracts of employment for domestic workers, and frameworks for the provision of health insurance to domestic workers.

In sum, there are feasible options for organizing domestic workers. At the same time, there are issues specific to the application of collective bargaining in the domestic worker context that require further exploration, and may need to be addressed in any legislation on this issue. We note that it is not unprecedented for SERA to be amended to provide a particular statutory framework to one industry. Finally, any application of SERA in this context could require significant additional State resources to support health insurance coverage or operations of PERB, which would have to be addressed. In addition, there are certain specific issues regarding its application in the domestic context that should be explored.

1. LEGISLATIVE CHARGE

On August 31, 2010, Governor David A. Paterson signed A. 1470B (Wright)/ S. 2311-E (Savino), a law extending labor protections to domestic workers. This law, also known as the "Domestic Workers' Bill of Rights," goes into effect on November 29, 2010.

Section 10 of the Domestic Workers' Bill of Rights law requires the Commissioner of Labor to report to the Governor, the Speaker of the Assembly, and the Temporary President of the Senate on the feasibility and practicality of allowing domestic workers to organize for the purposes of collective bargaining. The law provides that the report address:

- the feasibility of an employee organization formed in accordance with the State Labor Relations Act;
- how bargaining units for such organizations could be formed;
- whether there are any unique issues which arise in this context; and
- whether there are other possible frameworks for collective organization or for ensuring the benefits that accompany organization for domestic workers.

The statute also directs the Commissioner to consult with representatives of domestic workers, agencies that employ domestic workers, and relevant state agencies.

In addition, the Commissioner was charged with issuing a report with the assistance of an interagency working group on how best to provide easily accessible educational and informational material on employment benefits, tax and insurance laws for domestic employers and workers. The Legislature provided for participation of applicable state agencies including but not limited to the workers' compensation board, and the departments of insurance, health and economic development. Information about the Department's comprehensive outreach effort and educational and informational materials for employers of domestic workers and domestic workers themselves will be provided in a separate report.

The Legislature outlined the following legislative findings and intent when considering this law:

Many thousands of domestic workers are employed in New York State as housekeepers, nannies, and companions to the elderly. The labor of domestic workers is central to the ongoing prosperity that the state enjoys, and yet, despite the value of their work, domestic workers do not receive the same protection of many state laws as do workers in other industries. Domestic workers often labor under harsh conditions, work long hours for low wages without benefits or job security, are isolated in their workplaces, and are endangered by sexual harassment and assault, as well as verbal, emotional and psychological abuse. Moreover, many domestic workers in the state of New York are women of color who, because of race and sex discrimination, are particularly vulnerable to

*unfair labor practices. Additionally, domestic workers are not afforded by law the right to organize labor unions for the purpose of collective bargaining. The legislature finds that because domestic workers care for the most important elements of their employers' lives, their families and homes, it is in the interest of employees, employers, and the people of the state of New York to ensure that the rights of domestic workers are respected, protected, and enforced.*¹

In accordance with these legislative findings and intent and Section 10 of the “Domestic Workers’ Bill of Rights,” this report addresses the question of the feasibility and practicality of allowing domestic workers to organize for the purposes of collective bargaining. The report discusses the unique issues in the domestic work industry and their impact on the ability to bargain collectively. Possible frameworks for collective representation and bargaining for domestic workers under the New York State Employment Relations Act (SERA)² are identified. Other alternatives for providing benefits to domestic workers are also suggested. This report has been prepared in consultation with representatives of domestic workers, individuals that employ domestic workers, agencies that place domestic workers with employers, and relevant state agencies such as the Public Employment Relations Board (PERB).³

¹ S. 2311-E, § 1, 2010 Leg. (N.Y. 2010).

² N.Y. LAB. LAW, §§ 700 – 718 (2010). Prior to 1991, SERA was known as the New York State Labor Relations Act. L.1991, c. 166, § 251. For the purposes of consistency, this report will refer to New York’s private sector collective bargaining law as SERA.

³ Effective July 22, 2010, PERB was granted jurisdiction over the private sector workforce covered by SERA. L. 2010, c. 45, Part O, §§ 1, 3 and 8.

2. BACKGROUND ON THE DOMESTIC WORK INDUSTRY

Domestic work includes, but is not limited to, cleaning, cooking, laundering, and/or caring for a child, the sick or the elderly in a private household. It may also involve work outside a home such as gardening, driving, and maintenance work. Precise information about the size of the industry is unavailable, because many domestic employment relationships are “off the books” and unreported to governmental entities.

Advocates have provided different estimates regarding the number of domestic workers statewide. One of the few resources which exists is a 2006 report by Domestic Workers United (DWU), a New York City based advocacy group. The report (“2006 DWU Report”) was part of an advocacy campaign to pass a prior version of the Domestic Workers’ Bill of Rights.⁴ That report estimated that the New York City metropolitan area alone contained approximately 200,000 domestic workers.⁵ This estimate used 2000 United States Census data and was based on an assumption that “likely employers” included New York City households with children under 18 years of age or elderly over 65 years of age and income of \$100,000 or greater. A more recent DWU survey cites an estimate of 200,000 domestic workers statewide.⁶ Yet another estimate has put the domestic workforce of New York City alone at 250,000 to 450,000.⁷

An alternate and perhaps more accurate method of estimating the size of the industry statewide would be to rely upon the Quarterly Census of Employment and Wages, which uses Unemployment Insurance reporting information as its primary input. According to this source, in March, 2010, reported employment in the Private Household industry (NAICS 8141) stood at 24,100.⁸ That industry typically employs individuals such as cooks, maids, butlers, and outside workers, such as gardeners, caretakers, and other maintenance workers. Extrapolating from this data to assess actual industry size would require an estimate regarding the percentage of employers in the industry who pay Unemployment Insurance (UI) taxes specifically. If one assumes that 20% of employers pay UI taxes, the total industry size would likely be in the 120,000 range; however, if one assumes that only 10% of employers do so, then total industry size would then likely be in the 240,000 range statewide. It is difficult to assess what percentage of employers pay unemployment taxes; data sources are scant, and those that exist may be skewed by factors such as sample selection bias, inaccurate self-reporting, or variations in the wording of tax-related questions.⁹ Based on widespread “off the books” employment in this

⁴ DOMESTIC WORKERS UNITED & DATACENTER, HOME IS WHERE THE WORK IS: INSIDE NEW YORK’S DOMESTIC WORK INDUSTRY 1 (2006), <http://www.domesticworkersunited.org/homeiswheretheworkis.pdf> [hereinafter DWU, HOME IS WHERE THE WORK IS].

⁵ *Id.* at 1.

⁶ DOMESTIC WORKERS UNITED, NATIONAL DOMESTIC WORKERS ALLIANCE, & THE COMMUNITY DEVELOPMENT PROJECT AT THE URBAN JUSTICE CENTER, DOMESTIC WORKERS AND COLLECTIVE BARGAINING: A PROPOSAL FOR IMMEDIATE INCLUSION OF DOMESTIC WORKERS IN THE NEW YORK STATE LABOR RELATIONS ACT 5 (2010) [hereinafter DWU, DOMESTIC WORKERS AND COLLECTIVE BARGAINING] (on file with the New York State Department of Labor).

⁷ Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 52 (2000).

⁸ New York State Department of Labor, Division of Research and Statistics, Quarterly Census of Employment and Wages program.

⁹ For example, one of the few sources of information regarding domestic employer pay practices is a pair of employer surveys, in 2008 and 2010, by the “Park Slope Parents” internet list serve. In the 2010 survey of 800

industry, a reasonable conservative estimate would be that the entire Private Household industry contains at least 120,000 employees statewide, most likely somewhere in the 120,000 to 240,000 range.

Similarly, there are few reliable sources regarding the demographics of the industry – employees or employers. One of the few resources which exist is the previously mentioned 2006 DWU Report. Although it was written as an advocacy piece and should be considered from that perspective, the report contains useful data about the industry, since it was based on surveys of over 500 domestic workers (including nannies, housecleaners, and elder care providers) conducted during 2003 and 2004.¹⁰ These survey results found that 99% of domestic workers surveyed were foreign-born, 95% were people of color, and 93% were women.¹¹ 32% had worked as domestic workers for more than 10 years, 27% had worked as domestic workers from 6-10 years, and 30% had worked as domestic workers from 2-5 years.¹²

The DWU 2010 study surveyed 505 domestic workers between August and October 2010, focusing primarily on benefits, employer-employee negotiations, and employment agreements. This survey found that the average hourly wage for the domestic workers surveyed was \$12.66 per hour and the average number of hours per week was 44 hours.¹³ 91% of workers surveyed were live-out workers, 65% had at least one child of their own, 48% identified as Caribbean, and 39% identified as Latina.¹⁴ 77% engaged in childcare, 50% engaged in cleaning, 44% engaged in cooking and laundry, and 8% engaged in elder care.¹⁵ 23% of the workers surveyed had worked at more than one household in the prior month.¹⁶

There is even less information available about the demographics of the employers of domestic workers. Most likely a majority or significant minority are dual income households with working mothers.

The Park Slope Parents “Nanny Survey” (“Park Slope Parents survey”) conducted in 2010 surveyed over 800 parents in lower Manhattan and the Brooklyn neighborhoods of Park Slope, Dumbo, Boerum Hill, Cobble Hill, Carroll Gardens, and Ditmas Park. The survey results found that 24% of the domestic workers employed by these parents, as far as the parents knew, had worked as domestic workers for 10 years or more, 49% had worked as domestic workers from 3-

parent/employers, 23% stated that they paid at least partially on the books, yet 86% stated they paid cash so there would be no record of payment (i.e. only 14% do have records of payment). See PARK SLOPE PARENTS, THE PARK SLOPE PARENTS NANNY COMPENSATION SURVEY V.2 2010, 48, 52 (2010), <http://oldpsp.parkslopeparents.com/docs/NannySurvey2010.FINAL.v2.pdf> [hereinafter PARK SLOPE PARENTS, 2010 SURVEY]. In the 2008 survey of 1100 parents, only 16% of parent/employers stated that they paid worker's compensation, disability, unemployment, social security tax. PARK SLOPE PARENTS, NANNY COMPENSATION SURVEY, JUNE 2008, 10 (2008), <http://www.parkslopeparents.com/images/Nanny%20Survey%20FINAL.pdf>. However, the Park Slope survey was limited to domestic workers providing childcare, and did not include housecleaners or elder care.

¹⁰ DWU, HOME IS WHERE THE WORK IS, *supra* note 4, at 1.

¹¹ *Id.* at 2.

¹² *Id.*

¹³ DWU, DOMESTIC WORKERS AND COLLECTIVE BARGAINING, *supra* note 6, at 5.

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ *Id.*

10 years, and 23% had worked as domestic workers for 0-3 years.¹⁷ It further found that 6% of domestic workers employed by these parents were 18-24 years of age, 57% were 25-44 years of age, and 25% were 45-54 years of age.¹⁸

While there are no statistics with exact percentages, many domestic workers are undocumented immigrants and this may be one reason many employers do not pay them on the books. 76% of respondents to the 2006 DWU Report were not United States citizens, although many of them may be authorized to work in the United States (“documented”) since there are many types of immigration status short of U.S. citizenship that allow for employment authorization.¹⁹ In the Park Slope Parents survey, 58% of respondents said they didn’t pay on the books because the nannies preferred it that way.²⁰ 34% of respondents to the Park Slope Parents survey stated they did not pay their domestic workers on the books because the worker was not a citizen or legal resident and therefore could not be paid on the books.²¹ Lack of immigration status may also make domestic workers more fearful or reluctant to assert their workplace rights, and therefore more vulnerable to labor law violations. Yet it should be noted that lack of immigration status is not a bar to membership in a collective bargaining unit or coverage under the collective bargaining law of New York State.²²

Domestic workers have indicated a desire for union representation for many reasons in addition to the need to improve wages, benefits, hours and working conditions. Many share an interest in improving the image of domestic work; in providing ways to help them perform their work better; in greater professionalism, dignity and respect; and in ensuring a pathway to citizenship.

The International Labor Organization (ILO) estimates that there are “tens of millions” of domestic workers worldwide. These mostly female workers share common issues: isolation, long hours, low pay, invisibility, lack of recognition, and lack of worker rights. Domestic workers have successfully organized formal unions in a few countries such as Peru, Indonesia, and South Africa. In Italy, a union in the commerce, tourism and service sector has negotiated a national collective bargaining agreement for privately employed domestic workers since 1974. Even where domestic workers do not have collective bargaining rights under the law, they are uniting, locally, regionally and globally and establishing networks to promote domestic workers’ rights. Support is building for the ILO to issue a convention to set global standards for “decent work for domestic workers.”²³

¹⁷ PARK SLOPE PARENTS, 2010 SURVEY, *supra* note 9, at 58.

¹⁸ *Id.* at 59.

¹⁹ DWU, HOME IS WHERE THE WORK IS, *supra* note 4, at 10.

²⁰ PARK SLOPE PARENTS, 2010 SURVEY, *supra* note 9, at 50. Lack of employment authorization is only one of many possible reasons that domestic workers may seek to be paid off the books – other reasons include maintaining eligibility for public entitlement programs and simply taking home higher wages.

²¹ *Id.*

²² SERA, N.Y. LAB. LAW §§ 700 - 718 (2010), governs collective bargaining for certain sectors of the New York workforce. Neither the statute itself, nor any of the cases interpreting its provisions, have distinguished coverage based on immigration status.

²³ ILO, REPORT IV(1): DECENT WORK FOR DOMESTIC WORKERS (June 2010),

http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_104700.pdf

3. LEGISLATIVE AND ADMINISTRATIVE FRAMEWORKS FOR COLLECTIVE BARGAINING

Domestic workers have long been excluded from federal and state laws that grant other workers the right to organize and bargain collectively. Yet, there have been numerous attempts by domestic workers in the United States to form unions as far back as the early twentieth century, but these organizations were difficult to sustain given the lack of resources and inability to join forces due to the unique characteristics of domestic work. A spurt of organized activity took place during the 1930's when domestic workers, who were primarily African American women, formed the Domestic Workers' Alliance in New York City with support from the National Negro Congress. Although short-lived, similar labor organizations were launched in other cities and they mobilized to try to win the same protections as other workers including a minimum wage, limits on hours of work, unemployment insurance, holiday and vacation pay, social security, and workers' compensation.

Over the last decade, organizations of domestic workers have mobilized with the support of community groups in many metropolitan areas across the country including New York City, Long Island, Los Angeles, San Francisco, and Montgomery County, Maryland. These organizations have taken on various forms with some functioning as employment agencies to link members with jobs without the need to pay an intermediary for job placement. Many of these domestic worker groups advocate for labor standards and worker protections and provide assistance to domestic workers on issues such as immigration, applying for public health and other assistance benefits, and skills training.

a. NATIONAL LABOR RELATIONS ACT, NEW YORK STATE EMPLOYMENT RELATIONS ACT AND THE TAYLOR LAW

The National Labor Relations Act (NLRA) is the primary law governing relations between unions, employees and employers in the private sector of the United States. Passed by Congress in 1935, it guarantees employees the right to organize and to join a union.²⁴ The National Labor Relations Board (NLRB) administers and enforces the NLRA. The NLRA specifically excludes domestic workers from coverage by excluding domestic work from its definition of the term "employee".²⁵

The New York State Employment Relations Act (SERA) largely mirrors the NLRA in its purpose, coverage and process. SERA declares that the state's public policy is "to encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self-organization and designation of representatives of their own choosing for the purposes of collective bargaining, or other mutual aid and protection."²⁶ SERA grants employees the right to "form, join, or assist labor organizations, to bargain collectively... and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."²⁷

²⁴ 29 U.S.C. § 157 (1994).

²⁵ *Id.* § 152(3).

²⁶ N.Y. LAB. LAW § 700 (2010).

²⁷ *Id.* § 703.

However, domestic workers are also excluded from the definition of “employee” under SERA, which established collective bargaining rights for private sector workers in New York State prior to the enactment of the NLRA. In its definition of the term “employees,” SERA excludes “any individual ...in the domestic service of and directly employed, controlled, and paid by any person in his home, any individual whose primary responsibility is the care of a minor child or children and/or someone who lives in the home of a person for the purpose of serving as a companion to a sick, convalescing or elderly person...”²⁸

In July 2010, PERB became the administrative agency responsible for administering and implementing SERA.²⁹ PERB also has statutory responsibilities for administering and implementing New York’s public sector collective bargaining law, the Public Employees’ Fair Employment Act (hereinafter, Taylor Law).³⁰ The Taylor Law grants public employees throughout the state the right to join unions and requires New York public employers to bargain collectively with employee organizations chosen by public sector employees. Under the Taylor Law, PERB is statutorily mandated to resolve representation disputes, to provide conciliation services to resolve public sector negotiation impasses, and to hear and determine improper practice charges filed under Civil Service Law §209-a.³¹

PERB is now responsible for determining questions of appropriate representation for private sector employees covered by SERA, for resolving unfair labor practices, for providing mediation services for the resolution of collective negotiation disputes, and for administering panels of private arbitrators for the resolution of contract disputes.³² At any stage during the negotiation process, upon the request of either party, upon the direction of the Governor, or on the Board’s own initiative, PERB can become involved in seeking to resolve a labor dispute.³³

Because most private sector employees and industries have fallen under the NLRA, and the jurisdiction of the NLRB, the scope of SERA’s jurisdiction has substantially diminished over time. Currently, the largest groups of employees covered by SERA are parochial school lay faculty, employees of small businesses that do not meet the interstate commerce thresholds established by the NLRB, and individual superintendents of residential apartment buildings.³⁴ In addition, PERB has the statutory responsibility for resolving representation disputes involving childcare providers under recently enacted legislation,³⁵ although such childcare providers are not covered under SERA.³⁶

²⁸ *Id.* § 701(3).

²⁹ *Id.* § 717.

³⁰ N.Y. CIV. SERV. LAW §§ 200 – 214 (2010).

³¹ Improper practices under the Taylor Law are similar, but distinct, from the unfair labor practices specified in N.Y. LAB. LAW § 704 (2010).

³² N.Y. LAB. LAW §§ 702, 702-a, 704, 705, 706, 708 and 709 (2010).

³³ *Id.* § 702-a.

³⁴ Telephone Interview with Jerome Lefkowitz, Chairperson, and William A. Herbert, Deputy Chair and Counsel, Public Employment Relations Board, (Oct. 18, 2010).

³⁵ Former New York Governor Eliot Spitzer issued an executive order in May 2007 granting independent childcare providers the right to union recognition, Exec. Order No. 12 (2007), which was continued by Governor David Paterson, Exec. Order 9 (2008) and subsequently enacted into law Oct. 5, 2010 when Gov. Paterson signed Senate Bill 7451/Assembly Bill 10764 (S. 7451, 2010 Leg. Sess. (N.Y. 2010)).

³⁶ Laws of 2010, Ch. 540

At the time of their enactment, the NLRA and SERA were designed to address the labor relations needs of predominant industries of their era, such as manufacturing and construction. The Taylor Law was modeled after these laws and adapted to issues arising in a government setting. The domestic worker industry does not readily fit into the traditional organizing framework established under these laws. However, several innovative efforts to organize workers in non-traditional industries by working within the framework of existing collective bargaining structures have succeeded over the last decade. Creative strategies have led to organizing across the country among home health care providers and, most recently, among in home childcare providers in New York State.

Although organizing domestic workers does not fit conventional approaches to union organizing, it is possible for domestic workers to form unions and bargain collectively by creating a legal structure as part of SERA. At this time, the most practicable approach for organizing domestic workers through SERA is unclear, and even domestic worker advocates and their employers have suggested that additional research is needed to develop a labor relations system for the domestic work industry through SERA. This report identifies several possible options for collective negotiations for domestic workers as well as alternatives for providing basic rights and benefits to domestic workers through other means.

b. SERA'S PURPOSE AND PROCEDURES

When considering possible forms of labor organization for domestic workers, it is important to take into account the process and procedures administered by PERB under SERA. When a labor organization seeks to represent a group of employees for purposes of collective bargaining with their employer for the first time, the process under SERA is as follows:

1. A group of employees may form a labor organization and seek voluntary recognition from an employer. When voluntary recognition occurs, the employer and a labor organization enter into an agreement in which the employer recognizes the labor organization as the exclusive representative for employees of an agreed upon bargaining unit, and the parties agree to commence negotiations. PERB's responsibilities under SERA become applicable when a dispute arises between the parties over continued representation by the labor organization, an impasse arises during contract negotiations, a representation petition is filed by another labor organization or the employer, or an unfair labor practice charge is filed against the employer.
2. A labor organization may file a representation petition with PERB seeking to be certified as the exclusive representative for a group of employees after an employer refuses a voluntary recognition request. A certification petition proposes a unit of employees for the purposes of collective bargaining. Following the filing of a representation petition, PERB conducts an investigation aimed at determining, among other things, the appropriate composition of the bargaining unit. Should the employer and labor organization agree upon the composition of the unit, PERB will generally accept the terms of a stipulated unit.³⁷ If the unit composition cannot be resolved, PERB will

³⁷ PUBLIC EMPLOYMENT RELATIONS BOARD, FREQUENTLY ASKED QUESTIONS, <http://www.perb.state.ny.us/faq.asp> [hereinafter PERB, FAQ].

conduct a hearing to gather facts for determining whether the employees should be in an employer unit, multiple employer unit, craft unit, plant unit, or any other unit determined by PERB.³⁸ Bargaining units composed of one employee have been certified under SERA.³⁹ For example, there are many one-person units in New York City composed of a single superintendent in a residential apartment building.⁴⁰

3. Once the composition of the bargaining unit has been determined, the bargaining representative must be determined and a labor organization may be certified as the exclusive bargaining agent for the purposes of collective bargaining under SERA through: a showing of majority support through a “card check” procedure or an election. SERA provides that the preferred means for determining the representative of a bargaining unit is through an administrative examination of a showing of interest by a majority of employees submitted by the labor organization demonstrating (“card check”) in the form of dues deduction authorization cards or petitions and other evidence.⁴¹ If the labor organization has not submitted a sufficient showing for a “card check,” PERB can direct the holding of an election, and a labor organization will be certified if a majority of the votes cast are in favor of representation by the labor organization.⁴²
4. Once PERB determines that a majority of the employees seek representation by that labor organization, PERB issues a written certification to all persons concerned naming the labor organization designated or selected as the exclusive negotiations representative of the employees in the unit.⁴³ Along with a certification, PERB issues a bargaining order directing the employer to negotiate with the certified labor organization. SERA’s administrative scheme continues after the bargaining process has begun. If it is alleged that an employer has committed an unfair labor practice (such as refusing to bargain in good faith), the labor organization may file a charge with PERB. The charge is then processed, and PERB may issue an unfair labor practice complaint against the employer. Following issuance of a complaint, PERB will hold a hearing and following that hearing issue a decision and order.⁴⁴

PERB’s role can continue, even after the parties have reached a collective bargaining agreement, as the administrator of panels of independent arbitrators. Collective bargaining agreements will frequently include a grievance arbitration clause for the resolution of contract interpretation and disciplinary disputes.

These administrative procedures are well-established and provide an understanding of the current statutory framework available to employees that seek to form unions. The question is whether it is feasible to extend similar coverage to domestic workers, given the unique issues in that industry. Moreover, we also must recognize that expansion of PERB’s jurisdiction over

³⁸ N.Y. LAB. LAW § 705(2) (2010).

³⁹ Telephone Interview with Bruce Newman, former Supervising Mediator of the New York State Employment Relations Board (SERB), (Oct. 26, 2010).

⁴⁰ Lefkowitz and Herbert, *supra* note 34.

⁴¹ N.Y. LAB. LAW § 705(1) (2010). *See also* PERB, FAQ, *supra* note 37.

⁴² Lefkowitz and Herbert, *supra* note 34.

⁴³ N.Y. LAB. LAW § 705(3) (2010).

⁴⁴ PERB, FAQ, *supra* note 37.

collective bargaining issues in the domestic worker industry will require additional staff and resources for PERB.

4. UNIQUE ISSUES WITH REGARD TO THE DOMESTIC WORK INDUSTRY

There are several issues unique to domestic workers that arise in the context of pursuing collective bargaining rights. As mentioned earlier, a large percentage of the workforce is paid “off the books,” making it difficult to get an accurate picture of the industry, the levels of compliance with labor laws, and existing wage and benefit levels.⁴⁵ The absence of a full understanding of the range of employers operating in a particular location also impedes the formation of appropriate bargaining units.

Domestic workers are highly decentralized, all working at different worksites for different employers. Most work alone and have no co-workers with whom to “share notes” or negotiate collectively for better conditions with an employer. Domestic workers are often unaware of their rights or afraid to raise any issues with their employers, and employers frequently are not aware of their obligations.

Most domestic employers only have one domestic employee. However, some domestic workers are employed by multiple families part time each week – and some may work only a partial day for a given employer every two or four weeks. This complicates the question of what an appropriate bargaining unit for domestic workers would be. Larger units, which would presumably have better bargaining power, would be very difficult to establish due to the challenges of identifying all the domestic workers in a given geographical unit. Even smaller units, whose composition would be easier to determine, face the challenge of not having a singular employer with whom to bargain.

Additional challenges include the fact that many individuals who employ domestic workers are ambivalent about their role as the employer, feel uncomfortable treating domestic workers as employees, and feel awkward discussing terms and conditions of employment. They often do not think of their home as a workplace. Complicating this is the fact that domestic employers, unlike many service sector employers, are the ultimate consumers of their employees’ services – thus making discussion of the employee’s services an even more delicate issue.

In addition, domestic workers, because they work in their employers’ homes, are privy to personal and intimate information about the employers. There are also likely to be greater emotional attachments arising within domestic labor relations than may be typical in an industrial or service context. In addition, many domestic worker relationships have a presumptive end point: in the case of childcare, often that end point is when children enter elementary school; and in the case of elder care, often the relationship ends when an elderly person goes into a nursing home or dies.

Given the relationships that form between domestic workers and those for whom they care (children or the elderly), domestic workers may be more irreplaceable to their employers than workers in industrial or service contexts. They are in a sense less fungible to a typical domestic employer than a restaurant or factory worker would likely be to his or her employer.

⁴⁵ See footnote 49, *infra*, for one example – three different surveys listed three different average or median wages for New York City domestic workers that ranged from \$10 per hour to \$16.61 per hour.

Employers of domestic workers are, moreover, fundamentally different in many ways from other employers. They employ such workers not as part of their primary business, but in addition to their regular jobs (and, indeed, as the means for maintaining those jobs). Many such employers are families in which the sole parent, or both parents, work, and they hire have little time or ability, in addition to work and family responsibilities, to take on additional administrative burdens. Further, the ability of such employers to pay their workers is limited by their own income, which in many instances is itself just sufficient to provide for family needs, or unable to provide for those needs without incurring debt. They cannot pass on the cost of increased salaries or benefits to consumers, nor can they meet such costs by restricting profits, as might a business enterprise.

Finally, the fact that the workplace is in the employer's home gives rise to serious challenges in imposing the standard range of labor protections that arise through collective bargaining. For example, many employers of domestic workers may be uncomfortable with the idea of requiring progressive discipline for poor performance rather than employment at will, since the safety and security of family members may be put in danger by the employee's continued presence in the home.⁴⁶ Yet termination of live-in domestic workers without any advance notice places them at risk of homelessness. In a similar vein, while reinstatement is frequently a remedy for retaliatory termination in other industries, it may raise problematic privacy concerns in the domestic work context. It is difficult to imagine PERB or a court ordering an employer to reinstate an employee into an employer's private home.

For the past decade, some New York City domestic workers have organized themselves through Domestic Workers United. Their employers, on the other hand, have not yet formally come together as an employer group. For the PERB framework to function in the domestic work context, employees are essentially dependent on their employers' ability and willingness to join together into an association or other legal entity for the purposes of collectively bargaining. SERA does not articulate any statutory standards for a multiple employer unit, although associations created by employers in other industries for the purposes of collective bargaining have been certified by SERA in the past. Without a multiple employer entity to negotiate with, domestic workers would be left to bargain in one-person units, an arrangement that may be less practicable for a number of reasons detailed below in the section titled "Collective Bargaining Units of One Person." Nonetheless, as previously cited, SERB has certified multiple-employer units in other industries. Moreover, many collective bargaining relationships have evolved from voluntary, single person bargaining relationships with individual employers to collective bargaining relationships between a labor organization and employer associations.

⁴⁶ An owner of a nanny placement agency echoed the concern of parent/employers regarding this provision in the initial version of the Domestic Workers Bill of Rights and stressed that many of her clients would resist any requirement of progressive discipline. Telephone Interview with Susan Tokayer, Founder and Owner, Family Helpers, Inc., Dobbs Ferry, N.Y. (Oct. 22, 2010).

5. FEASIBILITY OF A LABOR ORGANIZATION FORMED IN ACCORDANCE WITH SERA

a. VOLUNTARY RECOGNITION

If SERA were amended to cover domestic workers, it would be feasible for a collective group of employers to enter into a written agreement voluntarily recognizing a group of domestic workers as the exclusive collective bargaining representative for an agreed-upon bargaining unit.⁴⁷ Union certification could take place following a card check or an election conducted by PERB. Voluntary recognition could also take place without even going through the steps of card check or an election, if the employers and employees all agreed upon the bargaining unit and representative.

Upon signing the agreement to accept the unit and recognize the representative, the employers would be legally bound by SERA to bargain in good faith. At that point, the right to invoke the more formal administrative procedures of SERA would attach. If the employers failed to bargain in good faith, reached impasse, or committed an unfair labor practice, the labor organization could seek redress through PERB. Similarly, once a contract was in place that designated PERB as the administrator of a panel of arbitrators, the administration and enforcement of the contract could occur through PERB's voluntary grievance arbitration procedures.

As a logistical matter, the above structure would likely function in practice only if the employer group selected a representative to bargain on their behalf and negotiated a master agreement with the labor organization that would be applicable to all domestic workers employed by those employers. Such a "multiple employer unit" is permitted by the NLRA and SERA⁴⁸ and has been implemented in several industries including the construction trades, building services, and performing arts industries. While the experiences with multiple employers in those industries provide insight, it would be far more practicable for SERA to be amended to include an administrative process for the certification of a multiple domestic worker employers, and the certification of the labor organization to avoid the fallout during negotiations when one family or another seeks to withdraw from the process.

In contrast, a bargaining situation with individual employers simultaneously negotiating individual contracts with one employee representative could present challenges. Still, some bargaining relationships have started out with individual workers bargaining with their employer through SERA. For instance, initially, individual building superintendents sought certification for single-person units through SERA in order to collectively bargain with their employers. Over the years, building superintendents joined together under the umbrella of SEIU Local 32BJ,

⁴⁷ If employers can agree to recognize a bargaining unit and representative outside of SERA's administrative procedures, and can negotiate a contract and abide by the contract voluntarily, then one might ask, why would SERA coverage be necessary in order for domestic workers to organize? In fact, SERA coverage would be necessary at several stages in the process. SERA coverage would require the employer, having voluntarily recognized the unit and agent, to negotiate in good faith. SERA coverage creates administrative procedures for handling negotiations that have reached an impasse. SERA coverage also would create protection for domestic workers from unfair labor practices, as well as administrative procedures for vindicating those rights. Finally, as a result of collective bargaining under SERA, disputes arising under that collective bargaining agreement can be resolved by arbitrators. If there were voluntary recognition but no SERA coverage, the above issues would have to be resolved through litigation in court instead of through administrative procedures.

⁴⁸ N.Y. LAB. LAW § 705(2) (2010).

which, in turn, negotiated a master contract on their behalf with a group of building owners. Using this success in the building services industry as a model, a group of employers who are willing to come together and voluntarily recognize the employees' chosen bargaining unit and representative would present a feasible method of effectuating an employee organization under SERA for domestic workers.

It is reasonable to query whether any employers would ever be willing to commit themselves to voluntary recognition. Although many employers may be reluctant to do so, it is not unrealistic to assume that there is at least a certain sector of domestic employers who would be willing to voluntarily recognize a union. Reasons to voluntarily recognize a union include concern for the well being of the worker, an interest in a higher standard of care provided by unionized services, or simply a desire for a more streamlined employment relationship with a contract and its terms already in place.

While it is unknown exactly what percentage of employers fall into this category, there are at least some employers who already provide salaries and benefits beyond those required by law to domestic workers. For example, in New York City the "Employers for Justice Network", a project of Jews for Racial and Economic Justice (JFREJ), is a network whose members are present and former, full-time and part-time employers of nannies, housekeepers and elderly caregivers who, through the Network, have made concrete improvements in their employment practices. In addition, there are employers outside such formal networks who voluntarily provide conditions far above the legally-mandated wage floor of \$7.25 per hour; for example, virtually all employers surveyed for the Park Slope Parents survey paid domestic workers well above the minimum wage,⁴⁹ and also provided paid vacation time or sick leave.⁵⁰ Finally, there are employers who sign written employment contracts with their domestic employees even though they are not required to do so by any collective bargaining laws. Estimates as to the number of such written contracts vary - 33% of the employers who responded to the Park Slope Parents survey reported having a written agreement in place between themselves and their nanny listing duties, compensation, time off and other expectations,⁵¹ yet only 8% of workers surveyed in the DWU report stated they had a written contract.⁵² In sum, given that a number of employers are already providing employment terms well above the legal floor, it is not unrealistic to assume that some of them would voluntarily recognize an employee organization.⁵³

Another reason employers may voluntarily hire unionized domestic workers or recognize an employee organization would be if the labor organization can offer a cost-effective system for

⁴⁹ See PARK SLOPE PARENTS, 2010 SURVEY, *supra* note 9, at 23, showing an average wage of \$13.38 per hour for full time live-out nannies caring for one child. See also International Nanny Association, 2010 INA Salary and Benefits Survey Recap (2010), http://www.nanny.org/pdf/2010_INA_Salary_Surveybookletfinal.pdf, showing an average wage of \$16.61 per hour for full time live-out nannies in New York City. But see DWU, HOME IS WHERE THE WORK IS, *supra* note 4, at 16 (stating the median hourly wage for domestic workers surveyed in New York City in 2003 – 2004 was \$10 per hour), and DWU, DOMESTIC WORKERS AND COLLECTIVE BARGAINING, *supra* note 6, at 5 (stating the average hourly wage for domestic workers surveyed in 2010 was \$12.66 per hour).

⁵⁰ PARK SLOPE PARENTS, 2010 SURVEY, *supra* note 9, at 30.

⁵¹ *Id.* at 39.

⁵² DWU, HOME IS WHERE THE WORK IS, *supra* note 4, at 33.

⁵³ It should be noted, as well, that these practices are not necessarily wholly altruistic – some employers may also engage in them because their own lives will run more smoothly when the people working in their homes are satisfied with their employment arrangement.

connecting employers to domestic workers who provide a higher standard of care. One potential model for such practice would be to develop a version of the traditional union hiring hall for this industry.⁵⁴ These higher standards could be determined jointly by the employee organization and the employers. Such a hiring hall could constitute an alternative framework for collective representation, as the Legislature instructed this Report to identify.

Currently, there is no certification or official training for working as a domestic worker, even when caring for children. A labor organization (or other nongovernmental or governmental entity) could create training programs for the different types of domestic work such as childcare, elder care, and housecleaning, but require that, in order to hire those who have been trained, employers must voluntarily recognize the bargaining unit and representative – i.e. a modified version of a hiring hall. A training program could include courses on cardiopulmonary resuscitation (CPR), basic child development, nutrition, first aid, and childproofing and household safety. More advanced courses could address such topics as caring for children with food and other allergies; caring for children with special needs such as autism, attention deficit hyperactivity disorder (ADHD), or sensory processing disorder; or (for bilingual caregivers) teaching children a second language. A reasonably-sized subset of employers could potentially be motivated to voluntarily recognize a unit and representative if it meant that they could be assured of securing more skilled and trained employees.

Domestic worker advocacy organizations are developing the components of such a model in different parts of the country and could draw on these experiences in forming a hiring hall in New York. Domestic Workers United has already engaged in a successful pilot Nanny Training Course for its members in conjunction with the Cornell University School of Industrial and Labor Relations and the American Heart Association. This Course is a certificate program that includes sessions on child psychology, basic pediatrics, occupation health and safety, adult and infant CPR, as well as rights education and negotiation training.⁵⁵ Members of the UNITY Housecleaners Cooperative of the Workplace Project in Hempstead, New York complete a four-week training program on housecleaning skills (including appropriate use of cleaning products and health and safety while cleaning) and running a cooperative.⁵⁶ Within the National Domestic Workers Alliance, there are already several experiences regarding such training programs and hiring halls.⁵⁷

A third reason employers may voluntarily hire unionized domestic workers or recognize an employee organization is simply a desire for a more streamlined employment relationship with a

⁵⁴ “In organized labor, a hiring hall is an organization, usually under the auspices of a labor union, which has the responsibility of furnishing new recruits for employers who have a collective bargaining agreement with the union... The presence of a hiring hall places the responsibility on the union to ensure that its members are suitably qualified and responsible individuals before assigning them to an employer... Many employers, particularly those who require skilled trades people, prefer to voluntarily use the services of a reputable hiring hall rather than attempt to find qualified, responsible recruits on their own. Hiring halls are generally most prevalent in skilled trades and where employers need to find qualified recruits on short notice.” WIKIPEDIA, http://en.wikipedia.org/wiki/Hiring_hall.

⁵⁵ E-mail from Priscilla Gonzalez, Director, Domestic Workers United, to Terri Gerstein, Deputy Commissioner of Labor for Wage Protection and Immigrant Services, New York State Department of Labor, (Oct.27, 2010 11:53 PM EST) (on file with the New York State Department of Labor).

⁵⁶ See Workplace Project website, <http://www.workplaceprojectny.org/programs-and-campaigns/women/>.

⁵⁷ See <http://www.nationaldomesticworkeralliance.org/> for more examples of training and educational programs being implemented by NDWA member organizations.

standard contract. By working with a unionized domestic worker, employers would not have to worry about determining the contents or validity of an employment contract themselves since the employee organization would already have a master contract the employer could utilize. Employers interviewed for the DWU report noted they were unclear regarding the responsibilities involved in employing another person and found it “awkward” to discuss employment terms such as rates of pay.⁵⁸ They also stated that they had difficulty knowing what the expectations of employees were with regard to employment terms and frequently turned to informal surveys of neighbors and friends to set pay rates and other terms – but pointed out that this resulted in an arbitrary pay scale.⁵⁹ Since the domestic employment relationship is often more emotionally involved than most traditional industrial relations, many domestic employers may be motivated to participate in a master contract with clear terms as a way to ensure that their employees are content and do not feel exploited.⁶⁰ Adoption of a standard contract would provide clear and consistent rights and responsibilities for all parties and lower worker turnover.

Employers would benefit by coming together to form an association because they could take advantage of economies of scale and their collective purchasing power. A single employer acting on his or her own may have difficulty procuring health care insurance or navigating workers’ compensation or disability paperwork or understanding their obligations under the law. An employer association can offer an array of services to its employer members and use the combined strength and resources of many employers to negotiate lower health care and workers’ compensation costs. An employer association would be a viable option for employers if it is perceived as lowering costs and enhancing the pool of qualified workers available.

Finally, as a matter of factual background, Domestic Workers’ United, the primary advocacy group for domestic workers in New York State, and the Employers for Justice Network, described above, have reported to the Department of Labor that at this time, there are in fact organized groups of employers and employees who are willing to commence pilot projects if SERA were amended to include domestic workers as employees. SERA coverage would provide important protections for those domestic workers able to bring their employers to the bargaining table – especially protections against retaliation and failure to bargain in good faith. Since SERA has never covered domestic workers, such pilot projects, if undertaken, would help to clarify how the collective bargaining units would best be organized in practice.

There are limits to what can be achieved through voluntary recognition, especially if collective bargaining rights are not granted statutorily. It is possible that the immediate effect of granting collective bargaining rights would be limited to communities or neighborhoods whose residents are simultaneously (a) relatively affluent and able to afford to pay and grant benefits to domestic employees at a level likely to arise out of collective bargaining; and (b) would be supportive of such arrangements.

It would be a fair question to ask whether the achievement of collective bargaining agreements (CBAs) through voluntary recognition would have broader impact beyond these

⁵⁸ DWU, HOME IS WHERE THE WORK IS, *supra* note 4, at 32.

⁵⁹ *Id.* at 33.

⁶⁰ An owner of a nanny placement agency echoed the importance of written employment agreements in the domestic context, noting that employers frequently don’t see themselves as employers and may not otherwise work out the details of the arrangement before entering into it. Tokayer, *supra* note 46.

limited environments. Moreover, most domestic employers likely would not agree to voluntary recognition of the unit and agent, and it may be impossible under SERA to compel the unwilling employer to collectively bargain, except in one-person units. While there is no legal impediment to voluntary recognition of a one-person bargaining unit for domestic employees, there are potentially significant administrative burdens as described below in the section titled “Collective Bargaining Units of One Person.”

However, even if SERA coverage were only effectuated through voluntary recognition in highly specialized locations at first, those initial pilot projects could assist in determining future structures for collective bargaining units, and could also demonstrate how a collective bargaining agreement for domestic workers would work in practice. A successful model could potentially convince a broader range of employers to consider voluntary recognition, while a less successful model would probably not be emulated.

b. WHEN THERE IS NO VOLUNTARY RECOGNITION

As described above, where there is no voluntary recognition, PERB must determine the appropriate bargaining unit, usually through a hearing; and subsequently, PERB must also determine the collective bargaining agent, through an election or through a card check. Then, SERA’s procedures require the employer to negotiate in good faith. In most scenarios, it would be difficult to effectuate these procedures for domestic workers and employers in the absence of voluntary recognition.

Determining the appropriate bargaining unit could be a considerable and costly process. As noted, PERB has the authority to certify a multiple employer unit.⁶¹ However, PERB has stated it is highly improbable that, absent voluntary recognition, the agency would have sufficient staff and resources to conduct the necessary investigation and analysis for determining the scope of a multiple employer unit for domestic workers.⁶² Certainly if an employer had multiple domestic workers, determining the appropriate unit could be relatively clear-cut: the employer's household staff would be the appropriate unit. Obviously, however, such fully-staffed households are rare. A more likely scenario might involve a group of domestic workers employed in a particular village, neighborhood or apartment building who seek to be represented collectively by a labor organization. The significant disparity in income and wealth among employers within such possible units, however, could make collective negotiation problematic. As a practical matter, if PERB determined an appropriate multiple employer unit with or without new legislated criteria, it would be logistically and administratively difficult for PERB to enforce the bargaining requirements unless the multiple employers acted and negotiated collectively.

c. COLLECTIVE BARGAINING UNITS OF ONE PERSON

Under SERA, PERB has clear legal authority to certify a bargaining unit of one employee.⁶³ In fact, SERB, PERB’s predecessor in administering SERA, routinely certified one-person units.⁶⁴ However, the number of such units is relatively small in comparison to the vast number

⁶¹ N.Y. LAB. LAW § 705(2) (2010).

⁶² Lefkowitz and Herbert, *supra* note 34.

⁶³ *Union Turnpike, Inc.* 2 S.L.R.B. 866, 873 (1939).

⁶⁴ Newman, *supra* note 39.

of potential one-person units that could be petitioned for if the Legislature merely lifted the statutory exemption for domestic workers.

The conduct of a card check or election would be relatively simple for a one-person domestic worker unit, although historically it was a common practice under SERA to hold a formal administrative hearing during which the employee would have to appear and testify under oath about whether she or he wanted to be represented.

One-person units in this industry would most likely play out in the following manner. If there were a domestic workers union, a worker who wished to be a member would request recognition from her employer as a one-person unit and request that the domestic workers union be her collective bargaining agent. The employer would either voluntarily recognize the unit of one and the union as the collective bargaining agent; or, if not, then PERB would determine the appropriate bargaining unit (one person); hold an election (a somewhat nonsensical concept given the unit of one) or certify the union based on card check.

After the labor organization is certified to represent the one-person unit, then the employer would have a duty to negotiate with the union in good faith. Presumably a domestic workers union would develop a boilerplate collective bargaining agreement with blanks to be completed in the course of the negotiation. Once the agreement was signed, the administrative procedures of SERA in enforcing the CBA would come into play.

This model is well established in the building services industry, where there were many units of one (for example, one superintendent in an apartment building), and the union, which had a boilerplate contract, would negotiate a CBA specific to that unit of one. There are no legal impediments to one-person units. However, it is impossible to predict at this point the number of workers that would seek recognition as one-person units. The numbers could be quite modest, given the isolation of domestic workers and the possibility that few might be willing to exercise their rights. However, if the volume were considerable, this could lead to a significant administrative burden for PERB. The time devoted to a massive number of one-person units under SERA could adversely impact PERB's ability to continue to satisfy its statutory obligations to public employers and employees under the Taylor Law.

Moreover, a number of unique issues and challenges that have not been fully explored could arise in negotiations in the domestic worker context and could present problems in implementation. These include:

1. Employers who reject union demands on the basis of ability to pay must reveal information to demonstrate the business' financial condition. It is unclear how such a requirement could be squared in the domestic worker context with the protection of sensitive personal financial information, or other disclosures that could implicate serious privacy concerns such as health-related expenditures.
2. There is well-developed case law as to when periods of financial distress can allow for termination of collective bargaining agreements. But there is no case law as to how the impact of changed individual circumstances such as a health emergency, the layoff of a source of family income, the need to place a child in a special school, or other personal events would impact collectively bargained arrangements.

3. Traditional union remedies would have different implications in this context. What is the impact of strikes and picketing when the workplace is at someone's private residence? How could the due process concerns of employees that are typically addressed through a grievance and arbitration procedure for disciplinary actions be balanced with the need for employers to be comfortable with the individual who is working in their private home?

PERB reports that labor cases involving a single employee are often complicated and difficult to resolve due to the employee's relative lack of knowledge and understanding of the labor law and its processes.⁶⁵ Such complications and difficulties would be magnified when the employer in the labor dispute is a couple, a single parent, or an elderly person, who may be equally unfamiliar with workplace-related laws and procedures. There is a reasonable possibility that representation petitions, unfair labor practice charges and negotiation impasses between a household and a domestic worker might become bogged down administratively due to the parties' lack of knowledge and experience regarding the law and procedures, combined with the emotions that can emanate from a householder-domestic worker employment relationship. In addition, even if a CBA is signed, PERB's continued role subsequent to the signing could be considerable.

In addition to the burden on PERB, one-person units would be costly for a labor organization to manage as well – each contract could have its own variations and there would be no accumulation of relevant knowledge among representatives both for the employers and the employees. When there is a master contract for an industry, those who negotiate its terms and handle grievances that arise under it become familiar with the patterns of how such grievances are handled and, out of a desire to preserve relationships with other parties, would have little incentive to bring *de minimis* issues to PERB. Additionally, one of the benefits for employers of participating in a master contract is that the terms of the contract have already been worked out and are not arbitrary – in a one-person unit each employer would be “reinventing the wheel.” Furthermore, individual workers would have difficulty establishing the leverage needed to fairly represent their interests in a bargaining situation with individual employers.

Based upon these problems associated with a single-employee domestic worker unit model under SERA, multiple employer units under SERA appear to be more practical for this industry. Multiple employer units permit the negotiation of master agreements containing terms and conditions of employment for domestic workers of those employers. Nonetheless, one-person units are permissible under SERA, although they present certain unique issues that would need to be addressed in the domestic context, and could potentially be administratively burdensome, depending upon the eventual volume.

⁶⁵ Telephone Interview with William A. Herbert, Deputy Chair and Counsel, Public Employment Relations Board, (Oct. 20, 2010).

6. OTHER POSSIBLE FRAMEWORKS FOR COLLECTIVE ORGANIZATIONS OR FOR ENSURING THE BENEFITS THAT ACCOMPANY ORGANIZATION FOR DOMESTIC WORKERS

There are a number of other possible frameworks for collective organizations or for ensuring the benefits that accompany organization for domestic workers. The following are several possibilities.

a. HEALTH INSURANCE

Since health insurance is one of the most important benefits that organized workers receive, any programs or incentives that would facilitate the provision of health insurance to domestic workers should be considered. To reduce costs, health insurance pooling for domestic employers would be necessary in order to enable them to obtain insurance at lower group rates.

Currently, domestic workers in New York may be insured through the Freelancers' Union, a Brooklyn-based national non-profit association providing portable benefits such as health, dental, and disability insurance as well as retirement plans to independent workers.⁶⁶ Eligible freelance or independent workers are able to access flexible and lower-cost health insurance plans through its Freelancers Insurance Company, Inc. ("FIC"). While domestic work is an eligible industry for FIC coverage, domestic workers would have to purchase the insurance themselves or with money provided by the employer. This option is financially out of reach to most domestic workers – the least expensive plan quoted for a resident of the Crown Heights section of Brooklyn was \$196 per month for an individual member/\$354 per month for a member and her children, and this plan has a \$10,000 deductible that applies to all primary care and specialist visits.⁶⁷

Another option for health insurance for New York residents is "Healthy New York", a means-tested program administered by the State of New York.⁶⁸ While this may be a viable option for some domestic workers, others will earn too much to be eligible for coverage. For example, a domestic worker living in a one person household cannot earn a gross monthly income over \$2,257 and remain eligible for coverage under "Healthy New York".⁶⁹ So for example, taking the statistical averages from the most recent DWU study, a live-in domestic worker making \$12.66 per hour, working an average of 44 hours per week, four weeks per month, would have a gross monthly income of $\$12.66 \times 44 \times 4 = \$2,228.16$. As these are the average wages and hours, and they result in a gross monthly income very close to the eligibility cap for a single person household, it is safe to assume that a significant percentage of domestic workers will earn above that amount and thus be ineligible for coverage under this program.

To assure that domestic workers have health care coverage, the State could allow a labor organization representing domestic workers to create a voluntary employee benefit association that could purchase health insurance coverage for its members through Family Health Plus. A similar plan is underway between the state of New York and childcare providers represented by

⁶⁶ Freelancers' Union website, <http://www.freelancersunion.org/index.html>.

⁶⁷ <http://www.freelancersunion.org/insurance/explore/11216/health2010/>.

⁶⁸ Healthy New York website, <http://www.healthny.com>.

⁶⁹ See Individual Eligibility Screener, Healthy New York website, http://www.ins.state.ny.us/website2/hny/eli_tool/Ind.htm. The cap for a two person household is \$3,036 per month; the cap for a three person household is \$3,815 per month.

CSEA and UFT, which is phasing in coverage for the uninsured and then extending coverage to those providers who do not otherwise qualify for Family Health Plus. The State is supplementing the cost of expanding this coverage for childcare providers and the unions are conducting the outreach to the workers to sign them up. The cost of extending such coverage to all domestic workers is unknown, although many likely already qualify for public health programs like Family Health Plus and Medicaid. However, this approach may be the most cost-effective way of extending coverage to domestic workers, enabling their employers to pay for all or some of the cost.

Finally, it should be noted that the national health care reform legislation passed earlier this year may potentially expand domestic workers' access to health insurance coverage, but an analysis of such potential impact is beyond the scope of the current report.

In addition, tax credits could be used to incentivize employers of domestic workers to provide health insurance. Employers in other industries generally write off employee health insurance as a business expense. Allowing domestic employers to do so would create parity in this regard, since domestic employers who provide health insurance are currently paying for it with after-tax dollars.

Each of the above options would impose a cost on the State. As a result, the State's ability to implement these proposals will depend upon the State's fiscal situation, and what resources are available to meet the expenses of such programs.

b. HIRING HALLS AND/OR COOPERATIVES

In hiring halls, standards are set by workers and maintained by workers refusing to work for less. This model would provide guidance and relative ease for parents wishing to meet community standards that are currently passed on through word of mouth and unofficial vehicles. If the hiring hall were combined with a training and certification process for domestic workers, it would provide employers with a more reliable and skilled pool of potential employees.

A traditional hiring hall, in the union labor context, is an organization which furnishes new recruits for employers who already have a collective bargaining agreement (CBA) with the labor union coordinating the hiring hall. As the employers have already signed the CBA with the union, all employment resulting from the hiring hall is governed by the standards set out in the CBA. Given that there are no collective bargaining agreements currently in place in the domestic work sector, this traditional version of the hiring hall does not exist. But three of the affiliates of the National Domestic Worker Alliance run their own versions of hiring halls – the Caring Hands Workers' Association of Mujeres Unidas y Activas of San Francisco, CA;⁷⁰ the Women's Collective of the San Francisco Day Laborer Organizing Program at La Raza Centro Legal;⁷¹ and the Day Labor Center of Graton, California.⁷² All three have slightly different models – Caring Hands matches MUA members with employer requests and helps workers negotiate wages but does not have a set wage rate for members, whereas both the Women's Collective and the Graton

⁷⁰ <http://www.caringhandsbayarea.org/>

⁷¹ http://techforpeople.net/~lrcl/article.php/about_womens_collective.

⁷² <http://www.gratondaylabor.org/index.php>

Day Labor Center have minimum wage rates for all jobs connected through the hiring hall.⁷³ In these contexts, the hiring halls also help workers overcome language barriers that might otherwise prevent them from communicating with potential employers and obtaining employment.

In addition, there are several domestic worker cooperatives in the country.⁷⁴ In New York, the UNITY Housecleaners cooperative of the Workplace Project in Long Island functions as a domestic worker cooperative.⁷⁵ The Workplace Project reports that the cooperative, a limited liability corporation, was formed in part to allow its members to take greater control of their working lives by cutting out middlemen who were contracting with homeowners for housecleaning services.⁷⁶ The cooperative sets rates for housecleaning and assigns jobs according to a point-based system where members accumulate points by being active in the organization.⁷⁷ Members must complete a training series on how to run the cooperative as well as on standards for the work performed and health and safety on the job.⁷⁸ While most employment obtained through this cooperative is of a short-term nature and therefore does not serve as a vehicle for achieving benefits such as advance notice of termination or paid sick days, vacation days or personal days, the members report that they have been able to increase their earnings and improve their working conditions through organizing the cooperative. A cooperative, like a hiring hall, would be another method by which trained domestic workers could provide a more highly skilled pool of potential employees – and by virtue of this appeal to potential employers, could be a vehicle for workers to set standards higher than what is statutorily required for employers.

Both a hiring hall and a cooperative could play a role that is similar to that currently played by employment agencies in a particular segment of the industry. There are “nanny” employment agencies which screen potential employees, refer them to families, and some even provide as part of their service a boilerplate contract (and help the parties negotiate the terms to be completed in that contract).⁷⁹ Such agencies charge a fee for their services, paid by the employer, and this fee puts them out of the budget range of the lower-income sector of domestic employers. A domestic worker cooperative could serve some of these same functions (screening, training, assistance with contract negotiation and drafting) for a broader range of employers and workers. With the advent of the internet, there has been a proliferation of lowest-cost online services that screen and refer in-home childcare providers to paying clients (the employers). The amount of screening and vetting such online services undertake is in many cases much less rigorous than that of the

⁷³ E-mail from Ai-Jen Poo, Executive Director, National Domestic Workers Alliance, to Jessie Hahn, Legal Intern, New York State Department of Labor, (Oct. 17, 2010, 11:21 PM EST) (on file with the New York State Department of Labor).

⁷⁴ Other such cooperatives include the Beyond Care cooperative in Sunset Park, Brooklyn (<http://www.beyondcare.coop/>) and Green Cleaning for Life, LLC, a women’s cooperative housed out of El Centro Humanitario in Denver, Colorado (<http://www.centrohumanitario.org/womensprogram.php>). For a list of member organizations of the National Domestic Workers Alliance, see <http://www.nationaldomesticworkeralliance.org/members>.

⁷⁵ See Workplace Project website, <http://www.workplaceprojectny.org/programs-and-campaigns/women/>.

⁷⁶ Telephone Interview with Lilliam Juarez, Coordinator and Co-Founder, UNITY Housecleaners Cooperative, (Oct. 26, 2010).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See International Nanny Association, <http://www.nanny.org/index.php>.

employment agencies. Yet by most accounts, the most common method used by domestic workers to find work is still word of mouth referrals by friends and acquaintances.⁸⁰

The more traditional employment agencies tend to maintain very high standards of professionalism, only taking on applicants who already have two to three years of childcare experience and can prove their authorization for employment.⁸¹ Employers often seek their services because they want a childcare provider who has been extensively vetted by an independent agency and is known to that agency. One agency interviewed for this report stated of all the applicants they receive, they only place 3% with employers, and it is not uncommon for such placements to last up to eight years.⁸² While these agencies are not the employers of record for the childcare providers, and therefore cannot be parties to a CBA, they could play a role in promoting the idea that the employers with whom they work should voluntarily accept unionized in-home childcare providers or voluntarily offer in their individual employment contracts the benefits sought through collective bargaining.

c. LEGAL REQUIREMENT OF A WRITTEN CONTRACT OF EMPLOYMENT

In Montgomery County, Maryland, a Domestic Workers' Law requires certain employers of domestic workers located in the County to offer a written contract that specifies the terms and conditions of employment.⁸³ The law also prohibits retaliation against a domestic worker who requests a written contract, attempts to enforce the terms of a contract, or files a complaint or participates in an investigation of a complaint. This approach, while it would not guarantee any specific labor standards, could potentially clarify the parties' expectations at the outset and lead to more harmonious labor relations. It would also give employees whose contracts are violated a private right of action to enforce the terms of the contract, ending their dependence on government agencies to enforce domestic work standards. Employers also might be less likely to unilaterally change parameters that have been agreed upon in writing at the commencement of employment. Another possibility would be to take this concept a step further, and create a boilerplate form that would be recommended for all domestic employment situations. Domestic Workers' United has developed a draft model contract that is still under review. Such an option, however, would need to address the significant differences in means between different domestic employers.

d. LEGISLATION

Another approach would be to pass legislation specifically for domestic workers mandating that employers provide some of the benefits that workers usually obtain through collective bargaining, such as paid vacation, sick leave, notice of termination, and severance pay requirements. For employers who would refuse to voluntarily recognize their employee's proposed collective bargaining unit and agent, a statutory approach may be the most fruitful. Any

⁸⁰ 54% of workers surveyed by DWU in its first report stated a referral by friends was the method they used to find domestic employment. DWU, HOME IS WHERE THE WORK IS, *supra* note 4, at 33.

⁸¹ Tokayer, *supra* note 46.

⁸² *Id.*

⁸³ Montgomery County, Md., Code ch. 11, § 11-4B, available at <http://www.montgomerycountymd.gov/content/ocp/domestic/pdfs/Law.pdf>.

such approach, however, would need to address the limitation on available resources of many domestic employers, and ensure that it does not place the ability to hire an employee to care for a child or elderly relative beyond the reach of individuals of modest means. Further, since such mandatory terms do not apply to other industries, concerns might be raised in regard to the expansion of such terms to other employees, and the potential impact in such other contexts.

e. CONTINUED OUTREACH TO WORKERS AND EMPLOYERS AND STRONG ENFORCEMENT OF EXISTING STANDARDS

Although it will not help domestic workers gain the benefits available through collective bargaining, continued outreach and strong enforcement of existing laws remains important for effectuating those rights that do exist. For example, in the event of discharge, domestic workers already have the right to unemployment insurance; however, noncompliance with this requirement may in some cases be depriving domestic workers of the legal protection that they already have by statute.⁸⁴ Similarly, workers' compensation insurance is by no means a substitute for health insurance; yet it plays an important part in addressing health problems that arise from work. Increasing workers' compensation compliance by domestic employers will provide needed protection in appropriate circumstances.

Given the high percentage of employers who at this time are likely paying "off the books" – and not paying taxes, complying with workers compensation requirements, etc., it may also be worthwhile to consider a limited-time amnesty for those employers who failed to comply in the past but now wish to come into compliance. Although this would entail the state voluntarily ceding certain taxes which were unquestionably owed, those are taxes that are unlikely ever to be paid and bringing people into formal relationships with employees "on the books" would bring more funds into the state's coffers going forward.

⁸⁴ It should be noted that otherwise qualified employees may still receive unemployment insurance benefits even if the employer has failed to pay unemployment taxes. However, many domestic workers who are authorized to work in the United States (i.e. are not undocumented) but who have been paid "off the books" are unaware of this and would be unlikely to apply even though they would be covered.

CONCLUSION

While domestic workers may face significant challenges in their attempts to achieve collective bargaining agreements, it is clear that providing the basic right to organize to domestic workers through SERA is a critical first step in the organizing process. SERA provides a feasible framework for domestic workers and their employers to form associations and to bargain collectively.

Employee organization cannot be effectuated without granting the right to organize to domestic workers under SERA. Section 701(3)(a) of the Labor Law could be amended by deleting the exclusion of domestic workers from the definition of employee covered by SERA. Furthermore, consideration should be given to including a specific procedure for certifying a multi-employer association as the representative for a group of employers for the purposes of collective bargaining. SERA could be amended to provide statutory criteria for a legal entity to represent groups of employers of domestic workers and the right for the filing of a joint representation, thus providing a legal structure for collective negotiations that would work and would eliminate the inherent uncertainty of voluntary recognition.

In sum, there are feasible options for organizing domestic workers. At the same time, there are issues specific to the application of collective bargaining in the domestic worker context that require further exploration, and may need to be addressed in any legislation on this issue. These include:

- The process for establishing multiple employer units, given the significant variety of circumstances in which domestic employees work;
- The creation of administrative processes that would lessen the burden that collective bargaining arrangements for single-employer units would impose on employers, employees and unions;
- Whether single employer units would be included in such arrangements, and if so, how issues unique to the family context (such as financial privacy and personal emergencies) should be addressed.

We note that it is not unprecedented for SERA to be amended to provide a particular statutory framework to one industry. *See, e.g.*, Labor Law § 704-a (unfair labor practices for performing arts; Labor Law § 716 (grievance and dispute resolution procedures for non-profit hospitals and residential care centers).

Finally, any application of SERA in this context could require significant additional State resources to support health insurance coverage or operations of PERB, which would have to be addressed. In addition, there are certain specific issues regarding its application in the domestic context that should be explored.

At this time, although it is unclear which approach to organizing will emerge as the most effective strategy, including domestic workers within SERA's coverage provides the opportunity for domestic workers and employers to begin the process of exploring these various approaches in an effort to ultimately achieve more harmonious labor relations. Both domestic workers and their employers must determine their best form of organization.