



Statement of Haeyoung Yoon, Senior Policy Director, National Domestic Workers Alliance

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From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act

Introduction

Chairwoman Adams, Ranking Member Keller, Chairman Scott, Ranking Member Foxx, and Members of the Committee, thank you for holding this hearing, and for the opportunity to speak with you about the historical exclusion of domestic workers from one of our nation's core workplace laws, and protections and standards domestic workers need now as our nation recovers and rebuilds out of the twin crises of public health and economy.

My name is Haeyoung Yoon, and I am the Senior Policy Director at the National Domestic Workers Alliance (NDWA). Founded in 2007, the National Domestic Workers Alliance is the nation's leading voice for 2.2 million domestic workers who work as nannies, home care workers, and house cleaners in private homes.¹ NDWA works to raise and strengthen industry standards to ensure that domestic workers achieve economic security and opportunity, and have protections, respect, and dignity in the workplace. NDWA organizes domestic workers, cultivates the leadership of women and women of color, leads campaigns for policy change, engages in social innovation to deliver greater economic security and benefits to domestic workers and their families. NDWA reaches and engages over 250,000 domestic workers on a regular basis through our 70 affiliate organizations in 36 cities and 17 states, local chapters in Philadelphia, Washington, D.C., and New York City, and through digital platforms.

In my testimony, I will trace the historical exclusion of domestic workers from the Fair Labor Standards Act (FLSA) from its first enactment in 1938 to their progressive inclusion through the 1974 amendments to the FLSA and the 2013 Labor Department regulations and discuss the current exclusion. I will highlight the important roles domestic workers, other women, including women policy makers, and others played to ensure that domestic workers win inclusion in the FLSA. I will then draw the through line to today, explaining how the legacy of exclusions

¹ About the National Domestic Workers Alliance, <https://www.domesticworkers.org/about-us>

continue to subject domestic workers to substandard working conditions and abuse. Finally, I will provide an overview of state and federal laws that have been introduced and passed that would extend protections to domestic workers, including the Domestic Workers Bill of Rights Act, introduced by Congresswoman Pramila Jayapal.

Original Exclusion of Domestic Workers in the Fair Labor Standards Act of 1938

In the 1930s when the New Deal was being negotiated, Black workers and women in the South were highly concentrated in the domestic service sector. In 1930s and 1940s, approximately 79 percent of the South's domestic service sector consisted of Black workers.² While emancipation brought the legal abolition of slavery, it did not end southern plantation owners' motivations to retain the institution for their economic gains, cheap labor, and a racial hierarchy between whites and Blacks.³ As a result, the exploitation of Black labor to support the continued existence of a quasi-plantation society remained extremely important to the South for decades after the Civil War. Southern lawmakers at the state and national level worked to maintain this status quo by creating policies that would keep Black people economically dependent and politically disenfranchised, and prevent them from achieving upward mobility.⁴ For Black women in particular, this meant restricting their employment opportunities to service occupations, such as domestic work,⁵ where they would remain under the control of white households, and be paid extremely low wages, while working long hours to carry out grueling workloads.⁶

The Fair Labor Standards Act was a signature achievement of the New Deal, establishing the federal minimum wage and maximum work hours. Enacted in 1938, Congress aimed to "raise substandard wages and to give additional compensation for overtime work as to those employees within its ambit, thereby helping to protect this nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health."⁷ This landmark legislation that was intended to protect workers from "evils and dangers" resulting from low-wages excluded workers working in domestic service and other industries like agriculture, that were overrepresented by Black workers.

At first flesh, the statutory exclusion of domestic workers appears race-neutral, as its coverage and protection reached workers "engaged in commerce or in the production of goods for

² Sean Farhang and Ira Katznelson, The Southern Imposition: Congress and Labor in the New Deal and Fair Deal, *Studies in American Political Development*, p. 15 (2005).

³ Juan F. Perea, The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act, 72 *Ohio St. L.J.* 95, 100-104 (2011).

⁴ Perea, *supra* note 3 at 100-104.

⁵ Jessica Pearce Rotondi, HISTORY, Underpaid, But Employed: How the Great Depression Affected Working Women, (March 11, 2019)

<https://www.history.com/news/working-women-great-depression>

⁶ Phyllis Palmer, National Archives, Black Domestic Workers During the Depression,

<https://www.archives.gov/publications/prologue/1997/summer/domestics-in-the-depression>

⁷ United States v. Rosenwasser, 323 U.S. 360, 361 (1945) (internal quotation marks omitted)

commerce.”⁸ Congress concluded that domestic work did not implicate commerce.⁹ However, a closer examination of committee debates and comments of policy makers tell a different story-- that the exclusion of domestic workers was indeed racially motivated to intentionally exclude Black workers from FLSA protection and led by efforts of Southern congressmen, who held majority control of the Senate during the 1930s.¹⁰ They understood well that the minimum wage and overtime provisions of the FLSA would primarily benefit rural and impoverished individuals.¹¹ In the South, that would mean helping large numbers of Black workers. And, in the eyes of Southern lawmakers, that could not happen because it would upset the status quo and threaten to give Black workers higher wages and more socioeconomic power.¹² These Southern congressmen refused to support the labor law provisions of the New Deal if they covered Black workers.

During the committee debate of the FLSA, Southern lawmakers expressed dismay at the outcomes of this legislation as meant to deprive the South of cheap, Black labor and provide equality with white workers.¹³ Representative Mark Wilcox of Florida commented that “We may rest assured, therefore, that ... [this bill] will prescribe the same wage for the Negro that it prescribes for the white man.... [T]hose of us who know the true situation know that it just will not work in the South. You cannot put the Negro and the white man on the same basis and get away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge. There just is not any sense in intensifying this racial problem in the South, and this bill cannot help but produce such a result.”¹⁴ Senator Ed Smith from South Carolina similarly lamented that “Any man on this floor who has sense enough to read the English language knows that the main object of this bill [the FLSA] is, by human legislation, to overcome the splendid gifts of God to the South.”¹⁵

President Roosevelt acquiesced to this racially-motivated pressure in order to get legislative priorities passed. President Roosevelt explained his strategy remarking, “First things come first, and I can’t alienate certain votes I need for measures that are more important at the moment by pushing any measures that would entail a fight.”¹⁶ Responding to disparities for Black workers under legislation to create fair wages and prices, Roosevelt said that “It is not the purpose of this

⁸ Pub. L. No. 75-718, § 2(a), 52 Stat. 1060, 1060 (1938)

⁹ See *Fair Labor Standards Act of 1937: Joint Hearings Before the S. Comm. on Educ. & Labor and H. Comm. on Labor on S. 2475 and H.R. 7200*, 75th Cong. 1067 (1937) (statement of Sen. Hugo L. Black, Chairman, S. Comm. on Education & Labor) (noting that exclusion of domestic service is “very intentional,” as “the bill does not attempt to regulate anything except interstate commerce.”)

¹⁰ Perea, *supra* note 3 at 104-126.

¹¹ Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 *Tex. L. Rev.* 1335, 1373-1375 (1987).

¹² Farhang and Katznelson, *supra* note 2 at 15.

¹³ Farhang and Katznelson, *supra* note 2 at 14.

¹⁴ Perea, *supra* note 3, at 115.

¹⁵ *Id.*

¹⁶ Perea, *supra* note 3, at 103,

Administration to impair Southern industry by refusing to recognize traditional differentials."¹⁷ Roosevelt tacitly embraced systemic racism by excluding domestic workers along with agricultural workers and tipped workers. When the opponents of the FLSA claimed that the federal law would require housewives to “pay your negro girl eleven dollars a week,” Roosevelt assured them “No law ever suggested intended a minimum wages and hours bill to apply to domestic help.”¹⁸ Notably, Roosevelt's own characterization of domestic work as “help” as opposed to real labor further exposes the devaluation of domestic labor.

Domestic Workers Make Gains Through the Power of Organizing

Domestic workers remained entirely excluded from the FLSA until the 1970s, when Congress found that domestic service employees in households affect commerce. Thanks to the organizing of Black domestic workers, more domestic workers were included in minimum wage and overtime protections in the 1970s. Organizing domestic workers was challenging because unlike in most other sectors, most domestic workers do not work in the same location, or even for the same employer. Domestic worker leaders like Dorothy Bolden rode the city bus lines to speak with other domestic workers on their commutes,¹⁹ while Carolyn Reed sought out domestic workers in the laundry rooms of apartment buildings.²⁰

Domestic worker activists worked hand-in hand with, and stood at the intersection of several contemporaneous movements. For the civil rights, labor and women's rights movements, domestic workers became “the quintessential candidate for advocacy as the lowest-paid woman, the poorest-paid African American worker, and the bottom tier of wage labor.”²¹ Organizing around the FLSA became part of the national women's movement. Women's testimony helped underscore the actual labor involved in housework, and shift the perception around cooking, cleaning, and childcare as “demanding, socially essential activities.”²² Similarly, civil rights groups and labor organizations helped equate “cleaning work outside the home with such work inside the home” and supported the inclusion of domestic workers in the FLSA to further racial and wage justice.²³

Notably, in Atlanta, Bolden started the National Domestic Workers Union (NDWU), which helped improve labor conditions for workers. NDWU helped workers with job placement and negotiation skills.²⁴ Inspired by the civil rights movement, Bolden's group also required that all

¹⁷ *Id.*

¹⁸ Suzanne B. Mettler, *Federalism, Gender, & the Fair Labor Standards Act of 1938*, *Polity*, Vol. 26, No. 4, p. 647 (1994).

¹⁹ Daniel E. Slotnik, *The New York Times*, *Overlooked No More: Dorothy Bolden, Who Started a Movement for Domestic Workers*, (Feb. 20, 2019) <https://www.nytimes.com/2019/02/20/obituaries/dorothy-bolden-overlooked.html>

²⁰ Premilla Nadasen, *The Care Deficit*, *Dissent Magazine* (2016) <https://www.dissentmagazine.org/article/care-deficit-hta-domestic-worker-organizing-history>

²¹ Phyllis Palmer, *Outside the Law: Agricultural and Domestic Workers Under the Fair Labor Standards Act*, 7 *J. Policy Hist.* 416, 427 (1995).

²² *Id.* at 418, 427-78,

²³ *Id.* at 478.

²⁴ Elizabeth Beck, *The National Domestic Workers Union and the War on Poverty*, *The J. Soc'y & Soc. Welfare* 195, 203-205, (2001) <https://scholarworks.wmich.edu/jssw/vol28/iss4/11>

members register to vote and mobilized workers to boycott racist businesses and to support Black strikers.²⁵ NDWU eventually represented more than 30,000 domestic workers in ten cities, and became the longest surviving domestic workers union.²⁶ Bolden also brought national recognition to the domestic worker movement, becoming an advisor to Presidents Richard Nixon, Gerald Ford, and Jimmy Carter.²⁷

Around the same time, Geraldine Miller organized the Household Technicians of America (HTA). It was the first national organization of domestic workers. They chose the name “household technician” to demand that they no longer be dismissed, but be recognized as workers that have skill and training.²⁸ Among other tactics, the HTA pressured Congress to include domestic workers in the federal minimum wage, as well as pressuring employers to comply with Social Security laws.²⁹ Other groups included the Domestic Workers of America formed by Geraldine Roberts in Cleveland and the Household Workers Organization formed by Mary McClendon in Detroit.³⁰ These domestic worker activists were critical in mobilizing their members to testify before Congress and create a national presence.

Representative Shirley Chisholm, the first Black female member of Congress, was instrumental in advancing the cause of domestic worker advocates. Congresswoman Chisholm connected the through line between FLSA exclusions and the resulting economic insecurity on domestic workers saying: “Of these poor female heads of household who work, over half worked as maids in 1970 and had incomes under the poverty line.”³¹ Congresswoman Chisholm also challenged the narrow definition of interstate commerce, through which domestic workers were excluded from the FLSA coverage. Chisholm correctly pointed out that “Every household product used by a domestic from Handy-Andy to a Hoover is a product which has moved in interstate commerce.”³² Finally, she acted as a political counterweight to Southern Congressmen that did not want to expand FLSA protections, even successfully recruiting Alabama Governor George Wallace, as an unlikely ally, to intervene with reluctant members of Congress.³³

²⁵ *Id.* at 201-203.

²⁶ Georgia State University Library, Dorothy Bolden gave voice to Atlanta’s “Help” (Sep. 7, 2011)

<https://blog.library.gsu.edu/2011/09/07/dorothy-bolden-gives-voice-to-atlanta%E2%80%99s-%E2%80%9Chelp%E2%80%9D/>

²⁷ Rosalind Bentley, The Atlanta-Journal Constitution, Dorothy Bolden: Helped black domestic workers harness political power (Feb. 21, 2019) <https://www.ajc.com/lifestyles/dorothy-bolden-helped-black-domestic-workers-harness-political-power/peRGlyDV2cjjP7uSHgIUuN/>

²⁸ Loretta Ross, Voices of Feminism Oral History Project Sophia Smith Collection, Smith College, Geraldine Miller, p. 30 (Oct. 14, 2004) <https://www.smith.edu/libraries/libs/ssc/vof/transcripts/Miller.pdf>

²⁹ *Id.* at 53

³⁰ Premilla Nadasen, Institute for Policy Studies, PAY, PROFESSIONALISM & RESPECT: Black Domestic Workers Continue the Call for Standards in the Care Industry. Report, p. 13 (2018) <http://www.jstor.org/stable/resrep27076.15>

³¹ Palmer, *supra* note 21, at 430.

³² *Id.*

³³ House of Representatives, Office of Art & Archives, Office of the Clerk, Guts, Stamina, Audacity: Shirley Chisholm’s House Career (2019) <https://history.house.gov/Blog/2019/January/1-3-Chisholm/>

Inclusion of Some But Not All Domestic Workers in the FLSA 1974 Amendments

In 1974, Congress amended the Fair Labor Standards Act to bring within its minimum wage and overtime protections workers “employed in domestic service in one or more household.”³⁴ Lawmakers estimated that 1.28 million domestic workers gained FLSA coverage, benefitting about 73 percent of whom earned less than the minimum wage.³⁵

In extending coverage, Congress rejected its past rationale for excluding domestic workers, by finding that “the employment of persons in domestic service in households affects commerce.”³⁶ The legislative history of the 1974 amendments pointed out that “employees in domestic service employment handle goods such as soaps, mops, detergents, and vacuum cleaners that have moved in or were produced for interstate commerce and also that they free members of the household to themselves to engage in activities in interstate commerce.”³⁷ The Senate Committee on Labor and Public Welfare noted “that coverage of domestic employees is a vital step in the direction of ensuring that all workers affecting interstate commerce are protected by the Fair Labor Standards Act.”³⁸

At the same time, through the 1974 amendments, Congress created two exemptions from the long overdue full coverage. Domestic service workers who provide companionship services to older adults and people with disabilities³⁹ were exempted from the minimum wage and overtime protections, and domestic workers who reside in the households in which they provide services (i.e. “live-in domestic workers”) were excluded from overtime protection.⁴⁰ The legislative history further clarified that the intent of the 1974 amendments was to expand the FLSA coverage to all employees whose vocation was domestic service, and narrowly exempt from coverage casual babysitters and individuals who provided companionship services.⁴¹ During the debate of the 1974 amendments, Senator Harrison Williams, Chairman of the Senate Subcommittee on Labor and the Senate, “described individuals who provided companionship services as ‘elder sitters’ whose primary responsibility was ‘to be there and to watch’ over an elderly person or person with an illness, injury, or disability in the same manner that a babysitter watches over children, ‘not to do household work.’”⁴²

After Congress extended the FLSA to workers in domestic service with the intent to cover all employees whose vocation was domestic service, the Labor Department interpreted the law’s

³⁴ Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 7, 88 Stat. 55, 62 (1974).

³⁵ H.R. REP. 93-913, at 33 (1974).

³⁶ Pub. L. No. 93-259, § 7, 88 Stat. 55, 62.

³⁷ 29 CFR § 552.99 (1974).

³⁸ S. Rep. 93-690, pp. 21-22 (1974).

³⁹ FLSA defines individuals who receive companionship services as “individuals who (because of age or infirmity) are unable to care for themselves.” *See* Fair Labor Standards Act, Pub. L. No. 75-718, 52 Stat. 1060 (1938). In this testimony, I refer to such individuals as older adults or aging adults and people with disabilities.

⁴⁰ Pub. L. No. 93-259, § 7, 88 Stat. 55, 62.; 29 U.S.C. 13(a)(15), 13(b)(21).

⁴¹ 29 CFR Part 552 at 60457.

⁴² 29 CFR Part 552 at 60457.

narrow “companionship” exemption expansively to deny coverage to caregivers who provide home-based services, even though they would have enjoyed full FLSA rights had they performed the same work in nursing home or similar congregate settings.

The 1975 Department of Labor regulations defined companionship as “fellowship, care, and protection,” which included “household work . . . such as meal preparation, bed making, washing of clothes, and other similar services” and could include general household work not exceeding ‘20 percent of the total weekly hours worked.’⁴³ In addition, the 1975 regulations permitted third party employers, or employers of home care workers other than the individuals receiving care or their families or households, to claim both the companionship services and live-in domestic service employee exemptions.⁴⁴

The Labor Department’s broad interpretation of a narrow companionship exemption denied home care workers, like Evelyn Coke, a right to minimum wage and overtime pay. Coke took care of elderly people - bathing, dressing and cooking for them.⁴⁵ In return for, at times, working 24-hour shifts, she earned only around \$7 an hour and never earned overtime pay.⁴⁶ Coke challenged her exclusion from the FLSA in the Supreme Court, but the Court unanimously ruled against her in 2007, holding that the “companionship” exemption was still in force and only Congress or the Department of Labor could change the rules.⁴⁷

The 2013 Labor Department Home Care Rule Covers Two Million Home Care Workers

The Obama administration responded four years later by issuing a regulation in 2013 to extend FLSA’s minimum wage and overtime protections to two million home care workers. The Labor Department points out in its Final Rule that, since the 1974 amendments, the home care industry that employs most of the workers that are excluded by the companionship service exemption has undergone dramatic expansion and transformation.⁴⁸ These workers now belong to one of the fastest growing occupations in our economy,⁴⁹ as the caregiving demand has skyrocketed with aging of Baby boomers and more individuals prefer to receive long-term supports and services in home and community settings. This workforce that provides critical services to people with disabilities and older Americans with activities of their daily living, such as bathing and dressing, and often provide medical care, such as managing their medications or performing tracheostomy care, are not the elder sitters that Congress envisioned when it enacted the companionship services exemption in 1974. Rather, they are professional caregivers.

⁴³ 29 CFR § 552.2 at 273.

⁴⁴ 29 CFR § 552.2 at 276.

⁴⁵ Douglas Martin, Evelyn Coke, Home Care Aide Who Fought Pay Rule, Is Dead at 74, *The New York Times* (Aug. 9, 2009) <https://www.nytimes.com/2009/08/10/nyregion/10coke.html>

⁴⁶ Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007). See also Sandra S. Butler, Home Care Work: The Companionship That Was Exempted, *The Gerontologist*, Vol. 52, Issue 3, pp. 433–436 (2012)

⁴⁷ *Id.*

⁴⁸ 29 CFR Part 552 at 60458.

⁴⁹ Paraprofessional Healthcare Institute U.S. Home Care Workers Key Facts (2019) <https://phinational.org/wp-content/uploads/2019/08/US-Home-Care-Workers-2019-PHI.pdf>.

The 2013 Final Rule defines the companionship services narrowly to limit to workers who are providing the sorts of limited, nonprofessional services Congress envisioned when creating the exemption in 1974.⁵⁰ Moreover, to ensure that the domestic service employees Congress intended to protect under the FLSA, the Final Rule precludes third party employers (e.g., home care agencies) from claiming the exemption for companionship services or live-in domestic service employees.⁵¹

Domestic Workers Today: The Impact and Legacy of FLSA Exclusions

Demographics, Wages and Working Conditions

As it was when the FLSA was first enacted in 1938, the domestic workforce remains a gendered sector today, carrying the legacy of slavery and exclusion. Domestic work is, by necessity, intensely personal in nature and is largely seen as women’s work. As such, it also carries the long legacy of the devaluation of women’s labor in the households. Domestic workers are over 90 percent women, well over half are women of color, and more than a third are immigrants.⁵² While women still dominate the workforce, changes in immigration policies and globalization have given rise to more immigrant women taking up domestic work. As of 2019, domestic workers are more likely than other workers to have been born outside the United States; one in five domestic workers is a foreign-born noncitizen, while about one in seven is a U.S. citizen who was born in a different country.⁵³ While noncitizens are overrepresented in all domestic worker occupations, they are particularly concentrated in the house cleaner workforce, making up half of house cleaners.⁵⁴

Steeped in a historically racist and gender-laced perception that domestic labor is merely “help” and not real work, domestic workers continue to be underpaid and undervalued. While many domestic workers are primary breadwinners for their households⁵⁵, they are paid low wages, have few employer-provided benefits, like health insurance or paid time-off, and cannot access paid family and medical leave or paid sick days. The typical domestic worker is paid \$12 an hour, 39.8 percent less than a typical nondomestic worker who is paid \$19.97 an hour.⁵⁶ The average annual income of a domestic worker is less than \$16,000 per year.⁵⁷

⁵⁰ 29 CFR Part 552 at 60454-55.

⁵¹ *Id.* at 60454.

⁵² Julia Wolfe, Jori Kandra, Lora Engdahl, and Heidi Shierholz, Economic Policy Institute, Domestic workers chartbook (May 14, 2020) <https://www.epi.org/publication/domestic-workers-chartbook-a-comprehensive-look-at-the-demographics-wages-benefits-and-poverty-rates-of-the-professionals-who-care-for-our-family-members-and-clean-our-homes/>

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Since March 13, 2020, NDWA has been conducting weekly surveys of domestic workers through our online news services. Our surveys in March and early April showed that 77 percent of over 15,000 surveyed workers are primary breadwinners of their households. See National Domestic Workers Alliance, Coronavirus’ Economic Impact on Domestic Workers (2020) https://domesticworkers.org/sites/default/files/Coronavirus_Report_4_8_20.pdf

⁵⁶ Wolfe, *supra* note 50.

⁵⁷ *Id.*

Today, despite the fact that care work is one of the fastest growing occupations in our economy, wages are not keeping up with the demand for these jobs. Domestic workers are much more likely than other workers to be living in poverty, regardless of occupation.⁵⁸ In addition, workplace violations are pervasive and systemic across domestic occupations, compounded by the stark power imbalance between workers and employers and the fear of termination or other retaliation.⁵⁹ They often perform work that is physically punishing, involving heavy lifting, long hours, and exposure to potentially harmful cleaning products.⁶⁰ Workers are highly exposed to the entire spectrum of labor exploitation, including sexual assault, physical and verbal abuse and trafficking.⁶¹ We have even seen modern day slavery type cases.⁶² Domestic workers' ongoing exclusion from other federal employment laws leave many without protection from anti-discrimination, anti-harassment, and safety and health laws.⁶³

The story of Zofia, a home care worker from Illinois, illustrates the continuing issue of wage theft. Zofia worked 84 hours per week and earned just \$500 weekly while caring for a patient with Parkinson's and dementia. After learning her rights and how to calculate her proper wages from an NDWA affiliate, Zofia found she was owed thousands of dollars for 11 months of work. With support from our affiliate, she led meetings and direct negotiations with the employer, and recovered \$11,000 in owed wages.

Stories from our NDWA affiliates demonstrate also how domestic workers are subject to harassment and abuse. Deborah is from New York state, and got her first job as a nanny when she was 16 years old. She cared for a 3-year-old boy while his parents were at work. She was so excited because it meant helping her family financially. One day, the dad arrived home and immediately went to take a shower. He called for her to help him with something. When she arrived at the bathroom door with the child, he exposed himself to Deborah. She felt scared and paralyzed by shock. She took the child to another room, but the father followed them. He began to touch and sexually assault Deborah right in front of his child. It was one of the most terrifying experiences of her life. Deborah was able to get away when a neighbor knocked on the door. She ran out of the house but out of fear and embarrassment, she kept silent for almost two decades.

⁵⁸ *Id.*

⁵⁹ Annette Bernhardt, Ruth Milkman, and Mik Theodore, National Employment Law Center, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (2009) <https://www.nelp.org/publication/broken-laws-unprotected-workers-violations-of-employment-and-labor-laws-in-americas-cities/>

⁶⁰ Linda Burnham and Nik Theodore, Home Economics: The Invisible and Unregulated World of Domestic Work, National Domestic Workers Alliance, pp. 28-32 (2012) <https://domesticworkers.org/sites/default/files/HomeEconomicsReport.pdf>

⁶¹ John Cavanagh and Ai-jen Poo, Institute for Policy Studies and National Domestic Workers Alliance, The Human Trafficking Of Domestic Workers In The United States (2017): https://ips-dc.org/wp-content/uploads/2017/03/Beyond-Survival-2017-Report_FINAL_PROOF-1-1.pdf.

⁶² American Civil Liberties Union, Modern Enslavement of Migrant Domestic Workers by Foreign Diplomats in the United States, <https://www.aclu.org/other/domestic-workers>

⁶³ Rocio Avila and Lillian Agbeyegbe, National Domestic Workers Alliance and Polaris Project, Human Trafficking at Home, pp. 16-17 (2019): https://polarisproject.org/wp-content/uploads/2019/09/Human_Trafficking_at_Home_Labor_Trafficking_of_Domestic_Workers.pdf.

Nina, a homecare worker from Florida, worked as a live-in caregiver to a male employer. On her very first night on the job, he asked her to get into bed with him. Over the course of the next several months, he groped her repeatedly. Nina explains that she felt she could not tell the agency she worked for because she knew they would take her off the job, and she needed the income. Nina described feeling isolated and alone and did not know where to turn for help. She left as soon as she could find another job, and it wasn't until months later that she learned her employer had been harassing other women who worked for him as well. Nina says it took her years to get over the shame and embarrassment she felt.

Live-in Domestic Workers and the Current Exclusion from FLSA Overtime Protection

Currently, live-in domestic workers who are hired directly by their household employer remain excluded from the FLSA overtime pay protection. In 2013, the Labor Department concluded that “[b]ecause the live-in domestic service employee exemption is statutorily created, the Department cannot eliminate the exemption... Only Congress could eliminate the overtime exemption for such workers.”⁶⁴

Live-in domestic workers often have no separation between work and their personal life. Their work day does not have an official “end”, as they may be responsible for taking care of the family of the house from morning until evening - and may even need to work in the middle of the night.⁶⁵

Stories of our NDWA members illustrate how live-in domestic workers are treated without the FLSA protection. Carmen has worked as a domestic worker for almost 10 years and lives in Massachusetts. When she worked as a live-in nanny, Carmen worked 12 hours and sometimes up to 20 hours a day. She got paid a total of \$350 a week and never compensated for her overtime hours. Her employer relied on the FLSA overtime exclusion to not pay for all the hours she worked.

Leonora lives in a border state and has been a domestic worker for the past 18 years. For three years she was working as a live-in nanny and house cleaner for a family with three children ages. Leonora worked Mondays to Fridays from 6:30am-7pm and received a total of \$220 each week in violation of both the minimum wage and overtime protection under the FLSA.

Domestic Workers During the COVID-19 Pandemic

The pandemic brought a magnifying glass to how the exclusion from labor protections is tied to and exacerbates domestic workers' economic insecurity. Many domestic workers experienced sudden job losses, without access to unemployment insurances or other COVID relief. For

⁶⁴ 29 CFR Part 552 at 60473-74.

⁶⁵ Burnham and Theodore, *supra* note 60, at 19

instance, NDWA conducted a survey of 800 Black domestic workers in May and June 2020 in Massachusetts, Miami-Dade County, and New York and found that 70 percent of the Black immigrant domestic workers surveyed had either lost their jobs or received reduced hours and pay.⁶⁶ Black undocumented workers were nearly twice as likely to be terminated than documented workers.⁶⁷ NDWA also surveyed more than 20,000, largely Spanish-speaking domestic workers, from March to September 2020, and found that, by late March, 90 percent of workers lost jobs due to COVID-19.⁶⁸

While many experienced sudden unemployment, many other domestic workers continued to go to work, risking their lives and that of their own families to care for children, an aging adult or people with disabilities.⁶⁹ Thus, this pandemic has also been *a crisis of impossible choices* for domestic workers. Without a safety net, domestic workers have no choice but to go to work or risk eviction and the threat of not feeding their families. For months, many workers went without personal protective equipment (PPE) or child care for their own children and did not receive an increase in pay.

Federal and State Efforts to Establish Standards for Domestic Workers

The domestic worker movement has grown since domestic workers were originally excluded from the Fair Labor Standards Act and other New Deal legislation. The National Domestic Workers Alliance was founded in 2007 and over the last decade, our organizing and advocacy have been critical to the passage of the Domestic Workers Bill of Rights Act in ten states and two major cities including Oregon⁷⁰, California⁷¹, Connecticut⁷², Illinois⁷³, New York⁷⁴, Massachusetts⁷⁵, Hawaii⁷⁶, Nevada,⁷⁷ New Mexico⁷⁸ and Virginia.⁷⁹ The Domestic Workers Bill of Rights Acts have consisted of ending historical exclusion in state minimum wage and

⁶⁶ The Institute for Policy Studies' Black Worker Initiative, National Domestic Workers Alliance's We Dream in Black program, and National Domestic Workers Alliance Labs, Notes from the Storm: Black Immigrant Domestic Workers in the Time of COVID-19 (2020): <https://domesticworkers.org/sites/default/files/IPS-WDiB-survey-brief.pdf>

⁶⁷ *Id.*

⁶⁸ National Domestic Workers Alliance Labs, 6 Months in Crisis: The Impact COVID-19 on Domestic Workers (2020),

⁶⁹ See Madeline R. Sterling, Emily Tseng, and Anthony Poon, Experiences of Home Health Care Workers in New York City During the Coronavirus Disease 2019 Pandemic, *JAMA Intern. Med.* (2020), See also Luke Winkie, Vox, What domestic work looks and feels like right now (Jan 15, 2021) <https://www.vox.com/the-goods/2021/1/15/22225692/national-domestic-workers-alliance-us-covid-19-rights>

⁷⁰ OR (SB-552A, 2015):

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB552/Enrolled>

⁷¹ CA (AB 241, 2013 and SB 1021, 2016): http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_1001-1050/sb_1015_bill_20160211_introduced.html

⁷² CT (SB 446, 2015): <https://www.cga.ct.gov/2015/ACT/pa/pdf/2015PA-00249-R00SB-00446-PA.pdf>

⁷³ IL (HB 1288, 2016): <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=099-0758>

⁷⁴ NY (Bill No. A01470B, S-2311-E, 2010): <https://www.labor.ny.gov/legal/domestic-workers-bill-of-rights.shtm>

⁷⁵ MASS (S. 882, 2014): <http://www.mass.gov/ago/docs/workplace/domestic-workers/dw-notice-of-rights.pdf>

⁷⁶ HI (SB535 HD2, 2013): <http://www.capitol.hawaii.gov/session2013/bills/GM1351>

⁷⁷ NV (SB 232, 2017): <https://www.leg.state.nv.us/App/NELIS/REL/79th2017/Bill/5125/Text>

⁷⁸ NM (SB 85, 2019): <https://www.nmlegis.gov/Sessions/19%20Regular/bills/senate/SB0085.pdf>

⁷⁹ VA (SB 1310, 2021): <https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0513>

overtime laws, which flowed from the FLSA exclusions and establishing new and innovative standards. In states like Virginia and New Mexico, domestic workers now finally enjoy the rights to state minimum wage law protections, and more domestic workers in Hawaii are covered under its state minimum wage law. In New York⁸⁰, Illinois⁸¹, California⁸² and Oregon,⁸³ domestic workers are entitled to overtime pay for the first time or are entitled to it at the same rate as other workers do. Other protections these local and state laws extend include protections against discrimination and harassment, paid time off, meal and rest breaks, a right to notice of termination, and enhanced retaliation protection. While local and state laws are critical to protecting domestic workers' rights, much more is needed to establish a national baseline standard to ensure that all of our nation's 2.2 million domestic workers are protected and enjoy the same rights and protections.

In 2019, Congresswoman Pramila Jayapal introduced the National Domestic Workers Bill of Rights Act,⁸⁴ and we are working with Congresswoman Jayapal and Senator Kirsten Gillibrand to reintroduce it in this Congress. The National Domestic Workers Bill of Rights strikes the remaining FLSA exclusion for live-in domestic workers and establishes other baseline standards such as earned sick days, privacy protections, meal and rest breaks, safety and health measures, and fair scheduling provisions⁸⁵ to protect domestic workers from substandard working conditions.

Conclusion

Domestic workers epitomize essential work by enabling millions of other workers to participate in the workforce, knowing their homes and families are in good hands. As more people live longer, we're going to need more care than ever before. And, as occupations like home care are set to be the fastest growing over the next decade, this workforce is going to be a huge part of how we care for our families in the 21st century.

This Congress has a profound moment of opportunity to rebuild and reset our economy to be more inclusive and equitable. In the context of jobs and recovery, we could - and we must - invest in caregiving the way we invest in infrastructure. That includes making sure that our care workforce, which includes domestic workers, are able to earn living wages and take care of their own families. In turn, these jobs-enabling jobs, will allow women and everyone else to have the ability to return and remain in the workforce.

⁸⁰ Bill No. A01470B, *supra* note 74.

⁸¹ HB 1288, *supra* at note 73.

⁸² AB 241, *supra* at note 71.

⁸³ SB-552A, *supra* at note 70.

⁸⁴ Domestic Workers Bill of Rights, H.R. 3670/S. 2112 (2019) <https://www.congress.gov/bill/116th-congress/house-bill/3760/text>

⁸⁵ *Id.*