

Staying Out of Hot Water





Common employment related **mistakes** that can get restaurants in **trouble**

by Mary Lou Santovec

Employees and smartphones can serve up a toxic brew. Your employees now have the latest information about workplace rules and regulations at their fingertips. And they're not afraid to confront you about inconsistent practices.

Know the law advises Barry Chaet, a partner at Beck, Chaet, Bamberger & Polsky, S.C. in Milwaukee. Chaet has spent the last 35 years as the WRA's de facto labor counsel. "The restaurant industry is the most exposed industry to employment-related claims and issues," according to Chaet. "The industry is rewarding, but is not without risk," added Debbie Taber, human resources and office administrator at the Wisconsin Restaurant Association (WRA) and member of the Ask WRA Team.

Don't wait to find yourself on the "wrong side" of the law with these hot button topics. The Ask WRA team and its legal consultant share some of the top employee related issues that can get restaurants in trouble.

Keep in mind, the information presented in this article is for educational use only and is not intended as legal advice or opinion. For specific questions, call the Ask WRA Team or contact your legal advisor.

Wages, hours and FSLA

It's no secret that wage and human resources audits are on the rise. "Plaintiff lawyers are preying on employees who have complaints about their employers," said Chaet. Instead of complaints prompting audits, the Department of Labor (DOL) now targets specific types of restaurants in addition to conducting random checks.

Ethnic restaurants such as Mexican or Chinese seem to be the hardest hit. "It's been my experience in all of my investigations that the Department of Labor will 'pick on' ethnic, small mom and pop restaurants, not the ones with franchise support," he said. DOL doesn't intentionally set out to discriminate.

There's a reason why the general minimum

wage is called "minimum," said Taber. Even if your staff earns tips, you still must pay employees at least a specific amount—\$2.33 for tipped employees and \$7.25 for those who aren't entitled to receive tips such as "back of the house" employees, exempt employees and managers/owners.

When your employee doesn't receive enough in tips and base wages to bring them to the full minimum wage, you must increase their base wages to make the minimum. "If a server has to work a slow Monday night shift and that's all they work that week, the employer has to make up the difference if the general minimum wage is not met," said Taber. "If more hours are worked, tips are averaged over the total hours worked that week."

continued on page 12



Calculate overtime correctly

Operators must pay overtime when an employee has worked in excess of 40 hours in a week, but are often tripped up when calculating it. “Employees get additional half time on the extra hours at the \$7.25 rate, not at \$2.33,” said Carrie Douglas, Member Engagement Manager for the WRA and member of WRA’s Ask WRA Team. “If you don’t follow the technical requirement, you can be on the hook for a six-figure liability,” Chaet says, “even if the oversight was a mistake.”

If your employee worked overtime one week and fewer hours the next, you can’t average those hours to avoid paying overtime.

Employees who are 16- or 17-years-old and who work more than 10 hours in a day must be paid overtime—even if they didn’t work 40 hours in a week. Employees under 16 are not allowed to work that many hours in the first place.

Owners of multiple locations—beware. For example, a server working banquets at two of your operations during the same week, say 30 hours at Restaurant A and 15 hours at Restaurant B, would be owed five hours of overtime. Sometimes operators “don’t even know that the employee has accepted a job at a sister restaurant,” said Taber. “Restaurateurs have to be careful when that happens.”

A change in the requirement for “executive status” or exempt employees took effect January 1, 2020. Exempt employees are defined as supervising two or more full-time or full-time equivalent employees or being the sole person in a department. They’re exempt from overtime if they make at least \$684 per week or \$35,568 a year. If you’re caught failing to pay the exempt employee this guaranteed weekly salary, you risk losing the employee’s exempt status, said Chaet, and “the employee would be entitled to receive overtime for all work performed over 40 hours in the week.”

Worse, “overtime would not be calculated at \$7.25 an hour but would be based on the ‘regular hourly wage rate’ for this employee, calculated using the employee’s weekly guaranteed salary divided into the employee’s normally scheduled work week. Depending upon how long the exemption is lost, the amount due and what you owe this employee, it could cost you ‘a big number,’” said Chaet.

Here’s a common scenario. You’ve hired some awesome workers willing to fill shifts. They even agree to work overtime at their normal hourly rate. You cannot allow employees to waive overtime. “Agreements between employers and employees regarding wage and hour laws are void,” said Chaet. Employees also cannot clock in under

someone else’s name so the operator can avoid paying overtime even if all involved agree to this arrangement.

Not only are employers required to pay overtime, they must pay for all time worked. “Don’t let employees who come to work early perform any work,” says Chaet. “There is no working people off the clock.” Employees “punch in” when they start work, and should perform all their work before they “punch out.” If they hang around once punching out, it must be clear that they remain as “customers.”

Tips and tip pooling

Some confusion exists regarding tips and tip pooling. “Tips are the ownership of the employee unless there’s a legal mandatory tip pool,” said Douglas.

Tip pools are becoming common because front of the house staff share many of the same duties. Busspersons often serve meals; waitstaff roll silverware or prepare salads. Under tip pooling, tipped employees will put 15 to 20 percent—or what the DOL considers “reasonable and customary”—of their tips into an account that’s held for the benefit of the participating employees. Managers hold the money and share it with those who qualify—bartenders, busspersons and hosts. “As tempting as it is to share with everyone in the restaurant,” said Douglas, “the DOL has set rules over who that tip can go to.”

If you pay your tipped employees the full general minimum wage of \$7.25 or more, you can have a tip pool that includes back of the house employees. “A recent DOL regulation now permits the sharing of tips with back of the house employees if all employees who share in the tip pool are making at least \$7.25 an hour,” said Chaet. Owners, managers and supervisors still can’t participate.

New DOL regulations also permit tipped employees to perform “side work” without losing the tip credit “provided the employee is performing the side work immediately before and/or after servicing customers or contemporaneously with serving customers,” he added. The O*Net website onetonline.org contains a list of approved tasks.

Don't even think about paying an employee in cash. "Do not, under any circumstances, pay anyone cash unless you're going to deduct the necessary payroll taxes," said Chaet. Taber added: "All wages are subject to state and federal withholding and FICA taxes."

Minors as employees

Federal and state regulations protect employees who are under 18 years of age. There are specific requirements under wage and hour laws about when minors can work. Employees under 16 could once work longer hours but now Wisconsin law says they can only work until 7 p.m. during the school year, defined as Labor Day to June 1.

There are also Occupation Safety and Health (OSHA) requirements that protect teens from injury. Restaurants are full of equipment, chemicals and heating appliances. Minors cannot generally use electrical equipment such as meat slicers and mixers.



Other traps:

- If an employee's 15-year-old son needs to ride home when mom's shift ends at 10:30 p.m. and is willing to work until then, his mom may approve, but the law doesn't.
- Employees under age 18 who work more than six hours must get a 30-consecutive-minutes meal break. No state or federal laws require adults to get breaks but they are recommended.

Restaurateurs who hire minors have to make a "concerted" effort to supervise the workforce.

"If you're hiring minors, you're also hiring their parents," said Chaet. If something goes wrong, "the kids won't file the complaint; the parents will."

Sexual harassment

Sexual harassment can present major problems for restaurants, especially those employing minors. Sometimes employees forget they are there to work, not to socialize. "It's not necessarily a 40-year-old and a 15-year-old," warned Chaet. "It could also be a 15-year-old sophomore and an 18-year-old senior." He cautioned operators to watch the behavior of newly twentyish or younger managers and teens. Sexual harassment policies and procedures are a must.

Keep tabs on your restaurant's culture. Employers have to remind all staff not to cross a line between professional and nonprofessional behavior.

continued on page 14

920-849-7717 | Chilton, WI
VISIT US ONLINE
VernsCheese.com

We are
WISCONSIN

PROUDLY CHEESE WISCONSIN

DELIVERING WISCONSIN'S FINEST

- Over 500 Wisconsin Cheeses • Fresh Dairy: Butter, Eggs, Glass Bottled Milk
- Sausages & Specialty Meat Products • Specialty Foods, Snacks & Candles
- Pickles, Olives & Bar Condiments • Craft Sodas & Beverages

Midwest Foodservice Expo Booth #233

Alcohol issues

In Wisconsin, you must be 21 to consume alcohol but you need to be only 18 to serve it. You can have younger employees bus tables with alcoholic beverages on them or stock the bar. But they are not allowed to mix drinks or add garnishes.

Allowing customers to bring in their favorite bottle of wine to enjoy with their meal can put your operation at risk. Wisconsin law prohibits this practice. While the concept sounds enticing, don't allow it even if competitors are doing so. "Any alcohol that a restaurant serves has to have a paper trail to a Wisconsin wholesaler," said Douglas.

Other traps

- One of the easiest things you can do is to have the posters displayed prominently as required by law. WRA sends members laminated versions of these posters. Members can also access these posters online in the Members

Only section of the WRA website at wirerestaurant.org.

- You must keep financial, personnel, daily sales and other records. The required timeframe varies depending upon the document. It's important to know what you need to keep and for how long. For guidance on what to keep, contact the Ask WRA Team at 608-270-9950 or askwra@wirerestaurant.org. There's also reference materials on this topic in Members Only on the WRA website at wirerestaurant.org.
- There are questions about whether to pass credit card processing fees on to consumers as a convenience or a service fee. What you call the fee determines what you can do. Check with the Ask WRA Team for more information.
- Employees who quit often demand their final paycheck on their last day. By law, final paychecks may be paid out on an employee's last day but are not required

to be paid until the next regular pay day.

Vigilance is rewarded

While knowing all the laws and regulations can seem daunting, it just takes some vigilance. Know that even operators with a dedicated human resources manager can run afoul of the law.

"The best offense is good employee relations," said Chaet. "Develop a collaborative relationship with your employees. Have a good employment handbook and use it." WRA's Model Employee Handbook is a template/guide that can help you create your own employee handbook. It is available only to current WRA restaurant members. Also, it's important to realize that you're not in this alone. WRA provides many resources for restaurant operators to help navigate the landscape of laws and regulations including Members Only on the WRA website and the Ask WRA Team hotline. **WR**

What To Do if You Get Audited

Attorney Barry Chaet, shares these hints in the event that you get audited by the Department of Labor:

1. Should you get a letter from any government agency, you need to seek legal advice immediately. Anything you or your supervisors say or do will be held against you.
2. The government investigators may appear friendly, but they are not your friends. Their scorecards depend on how good they are at ferreting out violations. They will keep looking until they find something.
3. Always be polite, even when an investigator is rude, abusive or uncooperative. The investigator is there to do a job. If you are polite to them, they will be more likely to give you the benefit of the doubt when it can be given. They do have some discretion.
4. Although it may not seem so, you will be given time to seek legal counsel and/or prepare for the on-site investigation.
5. Never give anything to an investigator unless you and your legal counsel have thoroughly reviewed the document first.
6. Wage and hour investigations are kept confidential while they are underway and therefore, employees should be advised of an investigation only on a need-to-know basis. For example, you may need an affidavit from an employee to show that his or her position is an exempt position. Also, the wage and hour investigator usually will interview certain employees. You should meet and discuss the investigation with those employees before they are interviewed. Under no circumstances should any management or supervisors be interviewed by investigators without the presence of legal counsel.
7. Keep in constant communication with the investigator throughout the audit. By doing so, you will gain more insight into what the investigator is looking at and you will be in a better position to respond.
8. When you get the initial determination by the investigator, do not panic. You have the opportunity to negotiate and to reduce the amount of the monetary assessment and/or penalty.
9. Be aware that if the matter can't be resolved at the local level, it can be resolved at a higher level.
10. Call the Wisconsin Restaurant Association. They can provide valuable advice throughout the audit. In addition, they can monitor both the number and type of state and federal investigations occurring throughout the state.

