Meet Nora. She loves her work, and she works for you. She will waitstaff, hostess, handle employee scheduling and fill in for the prep cook who calls in sick. In a pinch she’ll even work a couple of shifts at your second restaurant.

Nora does a good job. Her willingness to pitch in wherever needed makes your life easier, right?

Not necessarily. If restaurant records do not describe her jobs correctly, document her work hours accurately and calculate her wages fairly, this virtuoso employee could turn into a virtual nightmare for you, with costly consequences that might involve back pay and penalties.

Multi-task workers, tip pools, salaried jobs and teen employees all place restaurants at high risk for labor law violations. Compliance standards are precise, detailed and sometimes confusing—not a good match for busy restaurateurs.

Results from random audits by the U.S. Department of Labor’s Wage and Hour Division that concluded this spring, reveal that 24 restaurants and hotels in the Madison area owed more than $724,000 in back wages to 275 workers (see sidebar on page 12).

One three-location restaurant owed 86 employees a total of $402,391.

These auditors “are detail-oriented and get to the bottom of things,” says attorney Jennifer Mirus of the Madison firm Boardman & Clark, LLP, whose specialty is hospitality employment law.

“Unlike a discrimination or harassment case, there are not a lot of gray areas. Either you have the documentation or you don’t.”

Know their rights

Maybe Nora (a hypothetical employee) would rather work without overtime pay than have you give the extra hours to somebody else. Maybe you categorized her as a salaried employee, so you both know what her paycheck will be from one week to the next.

She may be agreeable, but employees can’t negotiate their rights away. Hourly employees are entitled to overtime pay after 40 hours of work, unless they meet the criteria to be considered exempt from overtime because they are truly an executive, administrative or professional worker as defined by law. Just saying that your employee is salaried doesn’t mean that he/she actually fits the criteria.

If Nora works 10 hours at your second restaurant, in addition to her full-time job with you, that’s 10 hours of overtime pay because you own both places. And if she spends most of her time waitressing, you had better not base that OT on $2.33 per hour, her wage as a tipped employee.

“The rules are all there, but the restaurant owner often doesn’t have the time to digest all information or doesn’t put it on his radar,” says attorney Barry Chaet, from Milwaukee firm Beck, Chaet, Bamberger & Polsky, whose specialties include hospitality law and labor/employment law. He says a DOL audit

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The Madison Audits

Wage and hour violations found during the recent sweep of Madison area hotels and restaurants included:

- Paying employees fixed salaries without regard to how many hours they worked, leading to overtime violations when they worked more than 40 hours in a week.
- Improperly calculating overtime for tipped employees.
- Paying overtime in cash, off the books, at “straight time” rates.
- Deducting [incorrectly] the cost of uniforms, breakages or shortages from workers’ pay.
- Reducing hourly wages below the federal minimum wage.
- Failing to keep accurate and thorough records of employees’ wages and hours worked.
- Failing to pay for all hours worked.
- Paying servers tips only.
- Requiring tipped employees to surrender tips to an illegal tip pool.
- Requiring minor-aged employees to work outside of the hours allowed by law.

Nationwide, at least $38 million for 46,902 workers in the restaurant industry was recovered during fiscal year 2015.

an auditor likely will find violations.

Think a random audit won’t happen to you? Mirus says the level of restaurant audits is higher than she’s seen in 20 years. In addition, the DOL’s Bridge to Justice program links workers with legal representation, sometimes resulting in employee-initiated lawsuits about wage and hour issues.

“If employers don’t fix things on their own, you have the potential for class-action claims, complicated by orders to pay attorney fees [for employees involved],” she says.

Willful vs. accidental mistakes

Chaet estimates 98 percent of all restaurants don’t have a human resources manager to monitor wages and hours. He believes infractions are more about misunderstanding the laws than willful violations, but don’t count on the DOL to let you off the hook by pleading ignorance.

For busy restaurateurs, “employee issues aren’t necessarily the first thing on your mind, but they are important,” says David King, the Minneapolis-based district director for the Wage and Hour Division (WHD). Nationally, the WHD has begun conducting an increased number of directed (random) investigations in addition to those based on complaints.

King says back wages may buy affected employees “a couple months of rent, child care, groceries—we’re not looking to get people fancy boats, but the necessities of life” through money legally owed to them.

The DOL’s announcement recapping the Madison audits makes it clear that they consider the restaurant industry to be high-risk and have expressed concerns in the past, hinting at oppression of industry employees. Karen Chaikin, regional administrator for the Wage and Hour Division in Chicago, contended:

“We are committed to using every tool at our disposal to ensure that these workers are paid every penny they have rightfully earned, and that employers in this industry who play by the rules do not find themselves at a disadvantage to those who do not.”

That includes DOL workshops to explain the Fair Labor Standards Act, and a DOL helpline for employers.

According to the DOL, hospitality jobs often are filled by students, temporary workers or foreign workers who are unfamiliar with their rights, Chaikin observed. “Language barriers, fear of retaliation and fears about immigration status leave them vulnerable to exploitation.”

What to expect

A human resources rep for audited Madison restaurants described the audit process as “very long and detailed,” requiring at least 100 hours, so “be prepared to set other priorities aside so you can focus on completing a thorough audit.”

One of the most challenging components of complying with the process was not being able to get written responses to technical or procedural questions. This is because the DOL is only allowed to provide wage and hour law regulations passed by legislation.

After the audit, “we continue to spend time collecting required follow-up paperwork,” but she “welcomed the DOL’s professional evaluation of our processes and procedures.”

Attorneys say a DOL auditor will ask for two years of payroll records, occasionally more. That includes records of time worked and the name, address, phone number and Social Security number for every employee.

“There is no need to provide information the minute they require it, but be as cooperative as possible,” Chaet advises. Employees, past and present, will be contacted. They might be interviewed over the phone, or they might be asked to fill out a questionnaire.

The auditor will look to see what is paid to whom, and which employees are salaried vs. hourly. “They make it appear like this is a simple process, but that’s not necessarily true,” says Chaet, who thinks the biggest mistake is to contact a lawyer AFTER the audit process has begun.

“They normally send a letter and
Perfection at Pedro’s

It is very unusual for a restaurateur to come through a wage and hour audit without violations, but the U.S. Department of Labor says two—Ginza of Tokyo and Pedro’s Mexican Restaurante—did just that during random audits in the Madison area.

Jim Martine, owner of Pedro’s, celebrates 35 years of business this year. He has 35 full-time employees and 25 part-timers. “Know the laws and follow up with managers and supervisors, to make sure they are following the proper procedures,” advises Martine, who has no human resources department.

He uses time-keeping applications on his POS system and farms out payroll work (“they are a great resource for information and will have the proper documentation for the auditors”).

This year’s audit was not Martine’s first, and he says he previously represented himself successfully, but in 2016 he involved Milwaukee attorney Barry Chaet “because of the attitude of the investigators.”

Chaet gets credit for educating the restaurateur and his management team about wage and hour issues years ago. “It started with his help writing our employee manual and detailing our procedures when orienting new staff,” Martine says. “We believe the key is to start out right. That makes follow-up easier.”

Martine got acquainted with Chaet’s expertise through Wisconsin Restaurant Association seminars and says additional easy-to-access resources from the WRA help him stay on top of wage-hour rule nuances and changes.

“Remember, the DOL audits all industries, so when they come in they will pretend they understand tipping rules and procedures and how people are paid, but many times you will know more than the auditors,” Martine believes. “It matters how you package (information) for them.”

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give you at least a week's notice, but sometimes just show up on your doorstep," he says. “Bully tactics" may discourage the restaurant owner from getting an attorney involved, but he says it is your right to have a lawyer present.

Why consider this? “I try to get the lay of the land, evaluate and make recommendations about how to best make your case," Chaet says. “I would remind employees about how they are paid and would make sure they know to be honest and tell the whole story.”

Whole story? A salaried sous chef, for example, might tell an investigator that his job involves cooking but omit other pertinent details, like being in charge of inventory or supervising the dishwashers.

“Once statements are made to an auditor, I'm playing catch-up and trying to put the genie back in the bottle," Chaet says. The HR rep in the Madison audit says her auditor was “pleasant and just like any other relationship in life, the more honest and polite you are, the easier the process goes.” Audit results prompted policy changes, “most with regards to paying/employing multi-location employees” and “keeping consistent pay rates between restaurants for like jobs.”

**The most common mistakes**

King, from the DOL, says restaurants have unique labor issues, such as tipped employees, whose tips and base wages must at least equal minimum wage ($7.25).

If overtime is due, it is calculated at 1.5 times the minimum wage, NOT the reduced wage for tipped employees ($2.33), regardless of how much the employee makes in tips during overtime.

“Tips and tip pooling are huge issues,” Chaet says. Servers, bussers and sometimes hosts are eligible to share in a tip pool, but these tips should not be shared with kitchen staff or management.

The consequences of illegal tip pooling “can be horrendous—in the six figures, even for the small restaurant operator,” Chaet says. “It's probably bigger than any other liability” because of the need to make amends over a two-year period.

And although “it’s the nature of restaurant work to have one employee do more than one thing,” Mirus says if that person works more than 40 hours, the overtime rate should be based on a blended average of hourly rates assigned to the range of work performed.

Labeling cooks and lower-level management employees as salaried employees is another typical mistake. To be exempt from hourly wages, an employee must manage a department and supervise the equivalent of two or more full-time employees during at least 51 percent of work time, Chaet says.

Mirus says an administrative worker can be salaried if he heads internal/business operations and “has independent judgment on matters of significance," such as budgeting, auditing, purchasing, advertising and/or marketing.

The new minimum pay threshold for employees to be considered exempt from overtime pay increases from $23,660 to $47,476 per year on Dec. 1 this year. (Look for the article on page 24 for more background on the new federal OT rule.)

Employing minors also carries complications. Any minor with a work shift of at least six hours, for example, must get a 30-minute, duty-free meal period (but it does not have to be paid work time).

Easy to forget, cautions Chaet, is that federal law prohibits 14- and 15-year-olds from working after 7:00 p.m. [during the school year and after 9:00 p.m. during the summer] “In a small town, the parents may not care if it's later,” he says, especially during summer, but that is not a good excuse. Neither does it matter that “most restaurant owners I know treat these kids like they are their own.”

Mirus says it's easy to forget that 14- and 15-year-olds should be treated differently than 16-year-olds. Beyond the equipment restrictions that apply to all teens under the age of 18, there are more rules and restrictions involving equipment and job duties for these younger teens.

**Proactive vs. reactive**

“Of all the associations that I represent, the WRA is the best at making its members aware of wage and hour issues and laws,” Chaet says. Disregarding these materials isn’t wise, he adds.

“The big challenge is getting restaurant owners to read and pay attention to this information,” King says.

Dr. David Weil, Wage and Hour administrator with DOL, commented on WRAs efforts to educate members, “We are pleased to see the association is working with the department and continuing to deliver crucial information to their members,” he said.

“It is critical to get this information out so that employers can comply prospectively, and help us to ensure a fair day’s pay for a fair day's work.”

Proactive restaurateurs will use a
lawyer or human resources compliance specialist to put a system in place that prevents infractions. “It’s a minimal expense to offset what could be a substantial liability,” Chaet says.

Such a “process check,” Mirus says, will compare your business practice with what is legal. The time and expense for such an assessment “depends on the organization’s organization,” but most can be completed in about 10 hours.

“Know the rules, self-identify the issues, correct them and be clear with your employees about why you do what you do,” Mirus says. “It’s your duty to know the rules.”

“Be sure to document all standard operating procedures and stay abreast of payroll laws and regulations,” advises the HR professional whose restaurants were audited. “I would also advise having continuing conversations with management about the realities of being audited; it can be easy to have the mind set of ‘it will never happen to us,’ but be assured it can.” WR

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**Tools to Use**

The Wisconsin Restaurant Association’s magazine, newsletter and website routinely address labor law questions, identify hot-button issues and explain upcoming rule changes.

Call the WRA Hotline – 800-589-3211 – for quick and confidential answers to your restaurant operation questions, including wage and hour topics. You may also want to check your email in-box or visit the WRA website www.wirestaurant.org to read a recent email alert series on DOL audits.

A comprehensive reference guide is the Handbook for Excellent Restaurant Operations (HERO manual), which new WRA members automatically receive upon joining, and annual updates are free. The most current chapters of the HERO laws and regulations are available online. The HERO chapters on breakage & errors, minimum wage, overtime, teen labor, tips & taxes, state vs. federal law and uniforms are particularly important when it comes to avoiding DOL FLSA violations. Another helpful chapter, wage & hour audits, has Barry Chaet’s “10 Commandments for Responding to Wage and Hour Audits.”

Besides restaurant audits, the U.S. Department of Labor conducts outreach for employers, employees and others. The aim is to raise awareness about federal wage and hour laws and protections, legal rights and responsibilities.

DOL provides a toll-free helpline – 866-487-9243 – to answer questions about federal labor laws. Don’t be afraid that your question will spark an audit, says David King, district director for the Wage and Hour Division. “We’re busy enough,” King says. “We don’t have to go after people trying to get help” to do the right thing.

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