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TESTIMONY OF

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EMPIRE STATE RESTAURANT & TAVERN ASSOCIATION

SUBMITTED TO THE

NEW YORK STATE LEGISLATIVE BUDGET HEARING

ON WORKFORCE DEVELOPMENT

FEBRUARY 3, 2016

ALBANY, NEW YORK

Chairwoman Young, Chairman Farrell, Chairwoman Titus, Chairman Martin, members of the Senate Committees on Finance and Labor, and members of the Assembly Ways & Means and Labor Committees, thank you for giving me this opportunity to submit testimony on behalf of the Association's members to the Legislative Budget Hearing on Workforce Development. The Association represents independent, small restaurants and tavern throughout the state – from Long Island to Niagara Falls – and they very much appreciate your willingness to have a thoughtful, substantive discussion about proposals to raise the minimum wage above the current rate of $9.00 per hour and to institute a paid family leave law.

The issue of raising the minimum wage has been top of mind to our folks for some time. I submitted testimony earlier this year to a hearing the Senate Committee on Labor held on the minimum wage. In that testimony I recounted that:

- our members have had to absorb a 24% increase in the minimum wage over the past three years
- the minimum wage for tipped workers in our industry was increased from $5.00 to $7.50 per hour on December 31st – a 50% increase covering about half the typical restaurant's workers
- our members' do not oppose further increases in the minimum wage – but there is strident opposition to plans for a $15 per hour minimum wage
- the hospitality industry and our workers have significant concerns about any plan to eliminate tips or the tip credit

I also told the Committee on Labor that we would await a specific proposal so we could see what is proposed – both the wage provisions and the mechanisms offered for business to offset the cost increases imposed by a higher minimum wage.

Well, the Governor has released his Executive Budget proposal and we now have specifics to comment on. While my comments to this hearing will focus on the Governor's proposals to raise the minimum wage and institute a paid family leave law, you should know that we find the "offsets" specifically proposed in the Executive Budget, if enacted, would barely make a dent in the exorbitant costs imposed on our members.

With that said, here's what the Governor's minimum wage proposal means to our members. Our non-tipped workers are affected like all other industries, but our tipped workers are treated differently than other workers – including tipped workers in other industries. It's been reported by some that the Governor's proposal leaves tipped workers alone, but that's not true. What is true is it leaves the existing law alone – and that's bad news.

Under the existing Labor Law, if any increase in the minimum wage increase is enacted by the Legislature a Wage Board would be required to be appointed within six months by Governor Cuomo's Labor Commissioner. And the Commissioner would unilaterally determine the cash wage for tipped food service workers – the only workers whose minimum wage rate would be set by Executive fiat rather than by the laws enacted by the State Legislature. It's entirely possible this would result in elimination of tipping or the tip credit causing significant economic harm to our members and massive disruption in our industry.

Not only would such a situation be economically distressful, it's also terribly unfair to the hospitality industry. Tipped employees in other industries covered by the Miscellaneous Industries Wage Order are treated differently than tipped food service workers. The Labor Law provides that they receive an increase in the cash wage at the same rate as the minimum wage increase enacted by the Legislature. So the employers of these workers had to manage a 24% increase in their tipped workers' wages as a result of the minimum wage increase the legislature enacted in 2013, while our members were handed a 50% increase by the Labor Commissioner. The Executive Budget provides that going forward the employers of these workers will continue to have their workers' wages determined by the State Legislature and our members will continue to have our tipped workers' wages set by a bureaucrat.

Over the past thirty years the cash wage for tipped workers has been set at roughly two-thirds (67%) of the minimum wage and when raised it typically was increased at the same rate as the minimum wage was increased – whether established by statute or by a Wage Order of the Commissioner of Labor. The public policy regarding the minimum wage for tipped food service workers recognized the total compensation received by tipped food service workers – cash wages plus tips – and set the cash wage at a rate that requires all workers to earn at least the minimum wage and most earn well above the minimum wage. This public policy carries over into tax and insurance law – our members have to pay employer taxes and fees based on workers' earnings including tips and their insurance premiums are based on payroll including tips.

This historical balance was upset with the implementation of the most recent minimum wage increase approved by the Legislature in 2013. Your changes to the law increased the minimum wage from $7.25 to $9.00 in three steps – a 24% increase in total. As I explained, the Labor Commissioner chose to raise the cash wage for tipped workers from $5.00 to $7.50 per – a 50% jump in one fell swoop. And since the other tipped workers minimum wages were only raised by 24%, workers covered by the Miscellaneous Industries Wage Order are actually required to receive a lower minimum wage than tipped food service workers.

Experience suggests that the impact of excessive wage increases – like the recent 50% jump in tipped food service workers hourly wage – is felt by employees. According to a report by Cornell researchers on the impact of a minimum wage increase on the restaurant industry, a 10% increase in the tipped minimum wage resulted in only a 0.5% rise in restaurant workers' earnings. Their explanation – increased worker productivity – and cited it as a benefit of the minimum wage increase. What really happened? Restaurants reduced workers' hours whether through the use of technology or just doing more with less. Either way a 10% hourly wage increase that results in only a 0.5% increase in earnings is a policy that has failed to achieve its objective. Yet, despite this obvious fact the Commissioner of Labor repeated this mistake with the recent Hospitality Wage Order and the Commissioner will likely make the same mistake again – if given the chance. And our employees will take it on the chin, again.

The rationale for allowing tipped workers in any industry to be paid below the minimum wage is that when combined with tips received from customers these employees earn in excess of the minimum wage. Tipped food service workers usually earn well in excess of the minimum wage. Nationally, food service workers earn $15 - $25 per hour with tips well above the minimum wage in every state in the country.

Tipped food service workers in our members' businesses are not low wage workers. The rules allowing them to be paid about two-thirds the minimum wage provides opportunities for workers to earn well above the minimum. Working in the hospitality industry provides opportunities for all types of workers – those seeking careers, those needing some money to help pay for school, those for whom flexible work hours is critical – and quality hospitality professionals can make a substantial living. Undermining this system not only risks the many small businesses that operate in the hospitality industry, but it puts our well paid workers' earnings on the front line.

Rather than permit the Labor Commissioner to continue this march towards eliminating tipping and the tip credit, we urge the Legislature to re-assert its longstanding policy of recognizing the total compensation of tipped food service workers and to set the cash wage of these workers at the historical benchmark of two-thirds the minimum wage. We do not suggest you roll back the recent increase in the cash wage, rather as you address future increases in the minimum wage we call on you to fix the cash wage to this rate going forward. In the near term, this will provide time for businesses and workers to adjust to the recent increase in the tipped minimum wage (about one year under the Governor's wage increase timetable). And in the long term this will provide our members with a predictable schedule of wage increases we can plan for and will give our employees the ability to continue to receive livable earnings.

The fact that some businesses break the law and don't compensate their employees correctly – whether by stealing tips, not "topping off" workers' wages when their wages plus tips don't equal the minimum wage, or as a result of some other scheme – should not justify eliminating the tipped minimum wage. These bad actors need to suffer the consequences. The good actors don't deserve to be punished for others' bad acts. On the other hand, the tipped minimum wage should not be used to trap workers in low wage jobs. There are clearly some workers who are not enjoying the same benefits as our members' workers. We support exploring accommodations for low wage tipped workers so they earn more than mere pennies above the minimum.

As for the mechanisms offered for business to offset the cost increases imposed by a higher minimum wage, I said at the outset that the Governor's specific proposals fail to achieve the desired objective of providing an offset to the projected cost increase a higher minimum wage would impose on our members' businesses. But there are some promises of initiatives-to-come from the Governor in his State of the State Message. In particular, the SLA Chairman's Working Group on ABC Law Reform has been tasked with making recommendations for modernizing and reforming the law. This group is expected to complete its work and issue a report with recommendations for changes to the law at its next meeting on March 2nd.

I submitted testimony to the Economic Development budget hearing yesterday in which I identified existing legislative proposals that would accomplish several of the recommendations I expect to be included in the Working Group's report. These proposed changes in the law stand on their own as reasonable, sensible modifications that reflect modern times and practices. But they bring an urgency to their consideration and advancement in light of your consideration of higher wage mandates. There's no offset for increasing the minimum wage to $15 or eliminating the tipped minimum wage, but an incremental increase in the minimum wage toward a more reasonable target could be offset with enactment of economic development initiatives that create the opportunity for our members and their workers to generate higher earnings.

Similarly, our members do not outright oppose the Governor's proposal to institute a paid family leave system in New York. Frankly, as small family oriented businesses this issue is close to their hearts. We did not oppose the paid family leave proposal in the Senate's one house budget resolution last year and the Governor's proposal is similar in a number of ways. The concerns that have been raised by our members are about the brief waiting period (4 weeks) and the inclusion of even the smallest employers in all of the provisions.

Since almost all of the costs of this benefit are borne by workers our concerns are not about the cost. And while there will be some costs imposed on employers, including the burden of administering the system, our members can live with that. But the requirement upon small business owners to hold a position open for an employee on leave is not as feasible as for larger businesses. No other state (of the few that mandate paid family leave) require this. In California a worker has to be employed for one year in order to be eligible for paid leave and in New Jersey businesses with less than 50 employees are not covered (just like under federal law).

We look forward to working with the Legislature and the Executive as this process continues over the next few weeks on these important Workforce Development issues. Thank you for your consideration.