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Assembly Bill 840 / Senate Bill 758

Thank you Chairman Nass and members of the Committee for the opportunity to provide testimony on AB 840/SB 758, which deals with recording tips for tipped employees.

All restaurant owners take advantage of the tip credit. My tipped employees used to total their tips and sign their timecards verifying the amount. We recently purchased a new point of sale (POS) system and now our waitresses will be able to verify that they have at least made minimum wage by signing electronically in that system. This is standard practice, in accordance with Department of Workforce Development guidelines.

You can imagine my surprise when I learned from the Wisconsin Restaurant Association that restaurants are facing frivolous lawsuits due to an outdated requirement in the Administrative Code. Lawyers representing former tipped employees are suing for the difference between the tipped wage and the minimum wage. They allege that DWD does not have the authority to issue guidance that POS systems are sufficient to record tips, so unless there is a physical signature on paper every pay period, they claim that restaurants are on the hook for all those back wages.

There is no question that these employees were fairly compensated for their work. There is also no question that DWD has the authority to issue guidance on this antiquated rule. Unfortunately, restaurants must spend tens of thousands of dollars to simply defend practices that are sanctioned by DWD.

AB 840/SB 758 simply closes this imaginary loophole so that restaurants may continue to use current technology to record tips and claim the tipped wage credit.

In closing, as a restaurant owner, I never expected that the authority of the DWD would be called into question, but I appreciate the opportunity to correct this situation.

Thank you so much for your attention to this urgent matter.

STATE SENATOR KATHY BERNIER
TWENTY-THIRD SENATE DISTRICT



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From: Senator Kathy Bernier
To: The Senate Committee on Labor and Regulatory Reform
Re: Testimony on Assembly Bill 840
Relating to: counting of tips for tipped employees and granting rule-making authority.
Date: March 17, 2020

Thank you Chairman Nass and committee members for allowing me to provide testimony on Assembly Bill 840 today. I am grateful for the opportunity to work with Rep. Schraa and the Wisconsin Restaurant Association on this important piece of legislation.

Restaurants have become the target of frivolous lawsuits due to an outdated provision in the administrative code. Under the minimum wage law, employers may count tips toward the wages of tipped employees, as long as there is a signed tip declaration for each pay period. With electronic point of sale (POS) systems, this is often automated. The Department of Workforce Development has issued guidance that this is acceptable, despite the fact that the actual administrative code specifies a written signature.

Recently, certain restaurants have faced lawsuits demanding the difference between the tipped wage and minimum wage because no paper was actually signed. Their claim is the DWD does not have the authority to issue guidance on the rule, and only an actual signature is valid.

This loophole must be corrected before more small businesses face the disruption and expense of these attacks. Which is why I ask you to please support the passage of Assembly Bill 840. Thank you again for allowing me to provide testimony today.



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Written Testimony

TO: Senate Committee on Labor and Regulatory Reform

FR: Susan Quam, Executive Vice President

Support of AB 840

Thank you Chair Nass and members of the committee for the opportunity to speak to you today in support of AB 840.

As we testified last month on SB 758, this bill addresses a problem we first learned about in late December. Restaurants located in the southeast part of Wisconsin are being targeted in lawsuits relating to how tipped employees declare (report) their tips. The crux of the lawsuits relate to the Department of Workforce Development's administrative rule, which dictates how those tips are documented by the employer.

We consider this an issue that cannot wait to be addressed through the administrative rule update process and we believe AB 840 needs to pass this session to prevent thousands of small businesses from frivolous lawsuits.

Throughout my testimony I am going to use the example of a lawsuit that one of our members is currently defending itself in. At their request, we are keeping the restaurant name confidential. It has also been reported to us that if this suit is successful either as a settlement or via a hearing, more suits are teed up and ready to be filed.

Here is the crux of the problem. Employment lawyers are taking advantage of an out of date administrative rule to bring nuisance lawsuits against employers who use the tip credit (aka tipped wage). Current Wisconsin Administrative rule regarding employee tip declarations and what the Department of Workforce Development considers to be lawful practice, is out of sync. The rule I am referring to is included at the end of the written testimony you have before you.

The rule is antiquated and requires a written notice signed by the employee each pay period. The Department acknowledges the rule is out of date and it issued an interpretation that allows for the use of electronic point of sale (POS) systems to collect tip information from employees. A vast majority of restaurants use POS systems for employees to clock in and out of shifts, in addition to entering their tip information. These systems sync with payroll systems that generate employee paychecks which show the appropriate taxes are being withheld. The use of POS systems to collect and confirm payroll information also satisfies federal reporting/declaration requirement laws, so DWD's interpretation conforms with federal law. Attached to this written testimony is an affidavit from the before mentioned lawsuit that

outlines the Department's interpretation of the use of electronic tip declaration. The restaurant industry has been using POS systems for over 20 years and the Department has considered this practice lawful for over a decade.

There are individuals who have advocated against this bill, stating that it takes away employee protections. This is not true. This bill puts into statute what is already considered lawful practice at the state and federal level. We would argue that electronic tip reporting protects an employee from fraud, since altering credit card transactions in order to defraud an employee is very hard to do with modern systems. In fact, when the federal IRS or Department of Labor does an employer audit, the first place they begin looking for fraud is via the POS system. The same with DWD and the state Department of Revenue.

We strongly encourage you to pass AB 840. One restaurant has already spent \$10,000 defending themselves in one of these lawsuits. What is worse, they are being sued for what is lawful employment practice. A legislative fix is needed this session!

Background information:

The statute giving authority to DWD is

104.045 Tips, meals, lodging, and hours worked. The department shall promulgate rules governing all of the following:

(1) The counting of tips or similar gratuities toward fulfillment of the employer's obligation under this chapter.

The administrative rule in question is

DWD 272.01(b).

(b) Burden of proof.

1. When the employer elects to take tip credit **the employer must have a tip declaration signed by the tipped employee each pay period** and show on the payroll records that any required social security or taxes have been withheld each pay period to show that when adding the tips received to the wages paid by the employer, no less than the minimum rate was received by the employee. When the employer's time and payroll records do not contain these requirements, no tip credit shall be allowed.

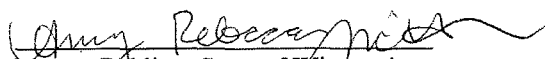
DWD 272.03(2)(b)2

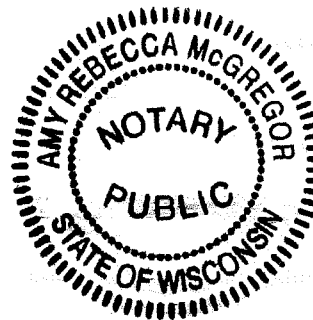
2. The department may refuse to take action to collect minimum wage deficiencies for a tipped employee who has refused or failed to file an accurate signed tip declaration for the employer each pay period

6. Claims for violations of the tip declaration recordkeeping requirements of DWD § 272.03(2) can only be pursued by the DWD, and the DWD would not pursue a claim alleging a violation of DWD § 272.03(2) based on the above-described system.


Jim Chiolino

Subscribed and sworn to before me
this 7th day of November, 2019.


Notary Public – State of Wisconsin.
My Commission expires: 12-19-2021



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