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AB 50 Testimony on Tipped Wage

Thank you Chairman Swearingen and fellow members of the State Affairs Committee, for the opportunity to provide testimony on Assembly Bill 50, 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 last session when I learned from the Wisconsin Restaurant Association that restaurants are facing frivolous lawsuits due to an outdated requirement in the Administrative Code.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 50 simply closes this imaginary loophole so that restaurants may continue to use current technology to record tips and claim the tip credit. This identical bill was passed unanimously out of this committee last session, but was not voted upon in the final Senate floor date. Restaurants are in a more difficult position than ever due to the economic realities of the COVID pandemic. They need to have the tipped wage issue resolved as quickly as possible.



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Testimony

March 10, 2021

TO: Assembly Committee on State Affairs
Representative Rob Swearingen, Chair

FR: Susan Quam, Executive Vice President

RE: Testimony in support of AB 50

Thank you Mr. Chairman and members of the committee for hearing our testimony today. Just 12 months ago, I presented very similar testimony on this bill's predecessor last session, which ultimately passed the Assembly on a voice vote. With the pandemic interrupting the last session, I am here again to ask for your support of this important measure for the restaurant industry.

The Wisconsin Restaurant Association represents over 7,000 restaurant locations statewide. Our organization represents all segments of the restaurant and hospitality industry; our membership includes food establishments of all types and sizes, such as seasonal drive-ins, supper clubs, diners, locally owned franchisees, fine-dining and hotels/resorts. Over 75 percent of our membership are independent restaurants and the majority of our members have alcohol licenses. Regardless of ownership type, all restaurants are the cornerstones of their neighborhoods and communities. Restaurants not only provide great food, drink and hospitality, they support schools, teams, charities and churches with fundraising and donations. They provide meeting places to celebrate, mourn and organize, or to provide a safe, tasty meal for a busy family. Prior to the pandemic, the restaurant industry employed nine percent of Wisconsin's workforce.

This bill addresses a problem we first learned about in December of 2019. 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 slow administrative rule update process and we believe AB 50 needs to pass early this session to protect thousands of small businesses from frivolous lawsuits. We know of three active cases being litigated and recruitment for a class action lawsuit is in progress.

Throughout my testimony, I am going to use the example of a lawsuit that one of our members is defending itself in. At their request, we are keeping the restaurant name confidential.

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 being lawful practice, is out of sync.

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.

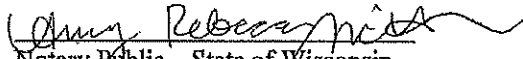
1. When the employer elects to take tip credit **the employer must have a tip declaration signed by the tipped employee each pay period** and show on the payroll records that any required social security or taxes have been withheld each pay period to show that when adding the tips received to the wages 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.

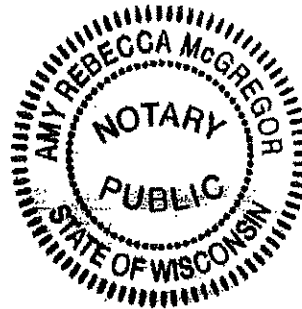
2. The department may refuse to take action to collect minimum wage deficiencies for a tipped employee who has refused or failed to file an accurate signed tip declaration for the employer each pay period

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: 12-14-2021



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STATE SENATOR KATHY BERNIER
TWENTY-THIRD SENATE DISTRICT



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From: Senator Kathy Bernier
To: The Assembly Committee on State Affairs
Re: Testimony on Assembly Bill 50
Relating to: counting of tips for tipped employees and granting rule-making authority.
Date: March 10, 2021

Thank you Chairman Swearingen and committee members for allowing me to provide testimony on Assembly Bill 50 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 (DWD) 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. Swift passage of Assembly Bill 50 would provide for clarity and security for small businesses and those who earn a living with a tipped wage. Thank you again for allowing me to provide testimony today.