Written Testimony of Melissa A. Fleischut on behalf of the New York State Restaurant Association.

Members of the Wage Board: I am Melissa Fleischut, Director of Government Affairs for the New York State Restaurant Association (NYSRA). I appreciate the opportunity to address the Wage Board about the current Minimum Wage Order for the Restaurant Industry and offer the Association's thoughts and suggestions.

The Association is a non-profit trade association dedicated to protecting, promoting, representing and educating its members so that they can better serve the public. NYSRA represents more than 8,000 restaurants, catering facilities, foodservice operations, and suppliers from Massena to Montauk and everywhere in between.

New York's Minimum Wage Order for the Restaurant Industry covers an industry with more than 476,000 employees, a sizeable portion of New York State's economy and workforce.

NYSRA has several observations and recommendations to improve the current wage order. Our goal is to make the Minimum Wage Order for the Restaurant Industry more employer-friendly, reflective of the current conditions and "real-world" realities of the restaurant industry, simplified and uniform. The result will be a wage order that the restaurateur can understand, that clearly defines what constitutes compliance, and is free of redundant and unnecessary specifications.

1. **Section 137-1.3 Overtime hourly rate**
NYSRA believes that the definition of regular hourly rate should be clearly defined to help restaurateurs understand how to calculate overtime for food service workers and other restaurant employees.

2. **Section 137-1.4 Tip allowance for service employees.**
NYSRA does not see the need to combine the tip allowance for service employees with the tip allowance for food service workers.

3. **Section 137-1.5 Tip allowance for food service worker.**
NYSRA is aware through its members that tipped employees are earning far in excess of the minimum wage and should not receive continued increases in the cash wage under this section. So as long as tips and the cash wage at least equal the statutory minimum wage, as required in section 137-1.2, then compliance is met.

To support this recommendation, I ask you to consider the Federal Law. Under the Fair Labor Standards Act (FLSA) employers must be able to show that the employee receives at least the minimum wage when direct wages and the tip credit allowance are combined. The current federal cash wage is $2.13 an hour and the federal minimum wage will soon rise to $7.25 making the federal tip allowance $5.12 an hour, far in excess of New York's tip allowance of $2.55 an hour, which is based on a $7.15 an hour minimum wage. Let me reiterate, the federal law recognizes the substantial amount of tips received by waitstaff employees and therefore kept its cash wage at $2.13 an hour even though the federal minimum wage increased to $7.25 an hour. In fact the federal cash wage has not increased since 1989.

Of all the states, New York State has the 11th highest cash wage in the country including those states that do not have a tip allowance. Twenty states allow a cash wage of $2.13 an hour, just like the federal law. New York State has the third highest cash wage for tipped employees in the country of the states that have a tip allowance. (Please see attachment A as supporting documentation.)

It is recognized in the restaurant and hotel industries that foodservice workers whom render a personal service to the customer/client, receive sufficient tips on a daily basis, in the vast majority of cases which far exceeds state minimum wage requirements. In some cases, wait staff personnel receive anywhere from $12 to $17 per hour in tips from customers/clients on a daily basis. Documentation furnished to the Internal Revenue Service for tax purposes by tipped employees to the restaurant employer can substantiate these facts.

There is also a relationship between menu prices and tip earnings. In the past two years, food-service management, because of increases in energy costs, rent, taxes, insurance, equipment and food-products themselves, have had to increase their menu prices. Simply put, it would follow, since patrons tip on the basis of the amount of the check; tipped employees' income has increased as well. So, without an increase in the minimum wage, tipped employees' earnings have continued to rise and, in fact, usually rise every time management must raise prices.

Increases in the cash wage for tipped employees also limit management's ability to give increases to the non-tipped employees in the kitchen. These employees are the real minimum wage employees earning, in most cases, far less than the tipped employees.

And finally, to further support this modern approach and prove that employees are receiving more than adequate tips, we recommend that the Wage Board examine the records of the N.Y.S.D.O.L. - Division of Labor Standards for the past 10 years and look at the total number of minimum wage inspections for restaurants completed where not making sufficient tips was the basis of the underpayments. We think you will find there are few, if any minimum wage under payments.

4. Section 137-1.7 Additional rate for spread of hours.

The spread of hours should be eliminated. The employee is already being paid the minimum wage required for every hour worked and overtime if applicable. Part of the reason employees choose to work in the restaurant industry is the flexibility in the hours allowing for work hours outside the traditional 9 to 5 work environment. Since the minimum wage and labor laws were passed, women have entered the workforce and family issues have become more important – we have worked hard to add flexible workweek and other models to the schedule. Employers should not be penalized for allowing an employee to work two shifts in one day and go home to their families in between.

5. Section 137-1.9 Allowances for meals and lodging.

NYSRA recommends that there should not be any differentiation in meal allowances or lodging allowances for food service workers and for all other workers. The value for a meal and lodging should be the same, since it is the same meal and the same room being provided to these employees. In fact, this distinction is not recognized in the uniform allowance, but one rate is allowed for all uniforms regardless of whether it is worn by a foodservice worker or a service employee.

NYSRA further recommends that the wage board consider eliminating specific rates in the Wage Order for these allowances, and permit the employer to charge the actual cost of the meals and lodging, or the fair value of same. Fair Value means not more than the actual cost to the employer of the food or lodging supplied by an employer and does not include a profit to the employer. To support this recommendation, the Wage Board should look at the Fair Labor Standards Act and the New Jersey Wage & Hour Law.

6. Section 137-2.1 (e) Employer records.
NYSRA recommends adding the language "or another location mutually acceptable to all parties" at the end of the paragraph. This change would allow the Department of Labor to review the employer's records at any location not just the place of employment so long as all parties agree. Some examples would be the Corporate or Main Office, the Accountants Office, the NYSDOL's District office, etc.

7. Section 137-2.3 Posting
NYSRA recommends adding "or a reasonable facsimile" to the end of the paragraph. This change would allow employers to post a notice other than the Department of Labor's so long as it included all of the necessary information.

8. Section 137-3.2 Employee
NYSRA recommends that a dollar threshold be created for professional employees, as it is for executive and administrative, and establish work experience criteria for this classification to exist for various types of Chefs working in the back of the house. Clearly there are a number of professionals working throughout the industry whose weekly salary is so high that the minimum wage order should not be applicable.

9. Section 137-3.3 Service employee and nonservice employee.
NYSRA would like to see the definition of a service employee clarified to include clear examples of those who meet the definition of a service employee. NYSRA believes that clarification will lead to greater compliance.

10. Section 137-3.4 Food service worker.
NYSRA suggests this language be expanded to include employees who regularly receive tips directly or indirectly from such guests, patrons or customers, (e.g. tip sharing and tip pooling arrangements).

11. Section 137-3.5 Regular rate
NYSRA recommends providing clear examples in the definition. There is a great deal of confusion in the industry as to what is meant by regular rate of pay when computing overtime. It should be clearly defined as the minimum wage rate ($7.15 an hour) for tipped employees.

12. Section 137-3.8 Meals
NYSRA recommends that the definition of a meal should be changed to read "(a) A meal shall provide adequate portions of a variety of wholesome, nutritious foods." The rest of the language should be eliminated since it is out of date with current dietary recommendations.

13. Section 137-3.13 Required Uniforms

The definition of a uniform should be clarified so that employers have a better understanding of what constitutes a uniform. If "street clothes" are currently used as what does not constitute a uniform, then that needs to be clearly spelled out. Since the federal government allows a wash and wear exemption from maintenance, NYSRA thinks this makes sense in New York State to also grant this exemption for employers and employees.

14. Service Charge

The *Samiento* (World Yacht) case was based on a unique set of facts wherein the employer retained monies a reasonable customer would find to be a gratuity. The case did not change longstanding DOL policy and guidance. Prior to World Yacht, restaurants, catering facilities, hotels, clubs and other hospitality providers followed the Labor Law and DOL requirements and neither the general public nor the employees were injured. When service charges are used properly, banquet employees are usually paid well in excess of the minimum wage, the state receives taxes and the customer is not lead astray. However, the industry does need clarification as to DOL's position on what is commonly known as a "service charge" and is commonly used for banquets as per DOL's 1995 memo (attachment B). On May 9, 2008 and August 6, 2008, The New York State Restaurant Association wrote to the Department of Labor's Counsel's Office asking for clarification and review of NYSRA proposed guidelines for the restaurant industry (attachments C & D). In response we received a letter from the Commissioner (attachment E) on December 1, 2008, stating "that an Opinion issued by the Department dated March 26, 1999, effectively superceded the 1995 memo…". The March 26, 1999 Opinion (attachment F) states,

> "If the employer's agents lead the patron who purchases a banquet or other special function to believe that the contract price includes a fixed percentage as a gratuity, then the percentage of the contract price must be paid in its entirety to the waiters, busboys, and 'similar employees' who work that function, even if the contract makes no reference to such a gratuity. The charge in question is a gratuity within the meaning of the statute and Department's guidelines because of the employer's verbal representations, regardless of the actual contract language."

This Opinion letter is referring to a specific case of circumstances and is not the basis of an industry wide policy shift by the New York State Department of Labor. If this were the case, DOL employees would have to be notified, the Field Manual for investigators would have to be changed and the industry would have to be notified. NYSRA believes that not one of these three things were done as a result of the March 26, 1999 opinion letter and provides you with more opinion letters dated August 11, 1999; March 24, 2000; March 27, 2000 and March 12, 2001, all referencing the 1995 memo as proof that the policy was not changed. The December 1, 2008 letter goes on to say,

> "Please be further advised that since there has been no modification of the Department's enforcement policies since the 1999 Opinion letter affirmed by *Samiento*, and since no modification if such policies is contemplated, your request that any 'modification' be applied prospectively has no basis in fact or law. Such enforcement policy will be applied to all current and future matters, as it has been in the past."

Both NYSRA and the NYSDOL agree that based on the facts of the case, the *Samiento* decision is not inconsistent with the current service charge policy; however, we disagree as to what the current policy is. NYSRA believes that the 1995 memo issued by Richard Polsinello is still the current policy, while the Commissioner and the NYSDOL believe that the 1999 opinion letter set the

current policy. Therefore, we request the Wage Board define a service charge and include specific criteria and language to clarify when it is not purported to be a tip or a gratuity. We also request that these criteria and language be applied moving forward from the date of acceptance by the Commissioner and not applied retrospectively.

15. Tip Pooling and Tip Sharing

Tip pooling and tip sharing is not printed anywhere in the labor law or in the Wage Order. NYSRA would like to see this language included in the Wage Order or some other appropriate area to allow greater understanding of the law and therefore increase compliance. NYSRA would like the New York State Department of Labor to follow the vast majority of other states and permit mandatory tip pooling because it benefits the employee. We would like to see the Wage Order affirmatively state that tip pooling is a positive workplace practice. The positive virtues of tip pooling could not have been better stated by California courts.

In a recent decision, the Court recognized the value of tip pooling, stating that "where employees together provide good service, the patron will be inclined to leave a larger tip." *Lu v. Hawaiian Gardens Casino Inc.,* 2009 Cal. App. LEXIS 69 (Cal. Ct. App. 2009). The Court also stated that a tip pool:

> [p]romotes good service among *all of the employees* who come in contact with the patron, which enhances the [establishment's] reputation and increases its business. This arrangement allows the employer to exercise control over its business and ensure the equitable sharing of gratuities among the employees who provide service..., while preventing "dissention among employees." And "friction and quarreling, loss of good employees who cannot work in such an environment and a disruption in the kind of service the public has a right to expect." *Id.*

Another recent California decision also summarized the value of tip pools.

> "Tip pools exist to minimize friction between employees and to enable the employer to manage the potential confusion about gratuities in a way that is fair to the employees... It is in the nature of a tip pool that it is based on the general experience of each particular establishment, that it is only broadly predictive of the reasons for and the patterns of tipping in that particular restaurant and that, in the final analysis, this is the best anyone can do. It is simply not possible to devise a system that works with mathematical precision and solomonic justice in each one of the millions of transactions that take place every day." *Budrow v. Dave & Buster's of California, Inc.,* 2009 Cal. App. Lexis 272 (Cal. Ct. App. 2009) (holding that California law does not limit tip pools solely to employees providing direct table service).

In addition, so many tips are credit card tips and employee self interest often leads to conflict and sometimes mistrust, there is a need for management to be involved in the distribution of tips in a tip pooling arrangement. We see no reason that tip pooling, like tip sharing should not be a condition of employment. Administrating separate arrangements for each employee could be an administrative nightmare. NYSRA would like to see the New York State Department of Labor follow the majority of other states and permit mandatory tip pooling because it benefits the employee. Tip pooling encourages a team atmosphere and better service amongst all employees.

16. Should provisions that currently apply only to "applicable minimum wage rate" (spread of hours, call-in pay, uniform maintenance) be changed to apply regardless of wage rate? If not, should the phase-out process be better explained?
The provisions of the "Minimum Wage Order for the Restaurant Industry" should apply only to those employees who are earning the minimum wage. All of these provisions listed were developed to protect the worker from falling below the minimum wage and should not apply to employees earning in excess of the minimum wage.

While I have covered many of the industry's concerns as they relate to Commissioner Smith's charge, I am sure that you will hear additional concerns from restaurant employers today and at the other Wage Board hearings.

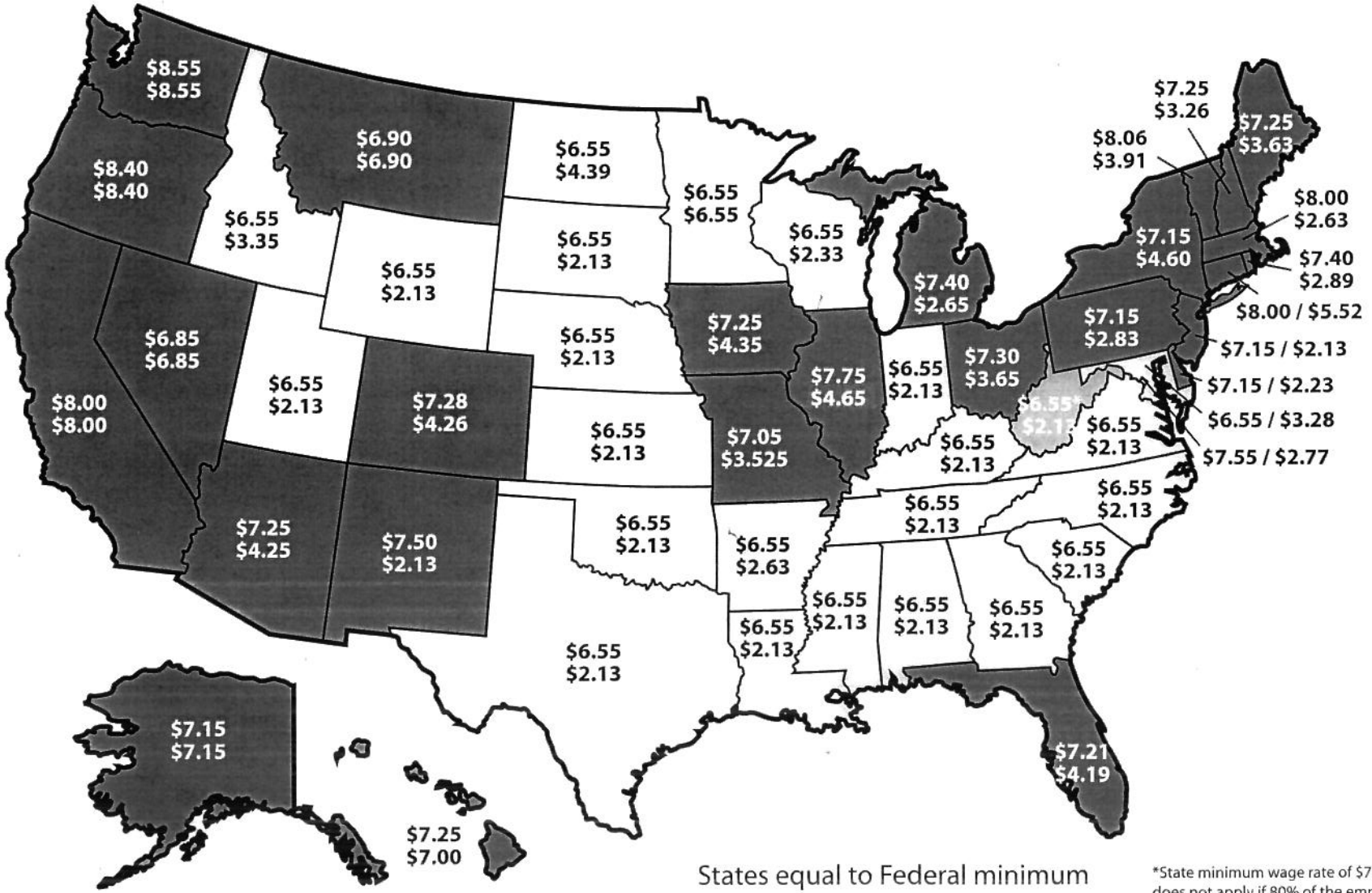
I would like to thank the Wage Board for this opportunity to testify and make suggestions. We hope that these hearings will result in a more modern approach to the wage order, one that truly reflects the restaurant industry in 2009, and the years to come.

Thank you.

A

Mininum Wage Rates

As of 1/1/09



States equal to Federal minimum wage rate

State minimum wage rates above the Federal rate

See footnote

*State minimum wage rate of $7.25 does not apply if 80% of the employer's employees are subject to the FLSA. If that is the case, employers are allowed to pay the current federal minimum wage of $6.55.

NATIONAL RESTAURANT ASSOCIATION®

www.restaurant.org

The information stated herein is not intended to be legal advice nor should the reader base any decision on this map without first checking with legal counsel as to its applicability and accuracy. The National Restaurant Association provides this information from its independent research sources.

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NEW YORK STATE DEPARTMENT OF LABOR

INTER-OFFICE MEMORANDUM

Date: June 1, 1995

To: ALL SUPERVISORS Office: STATEWIDE

From: Richard J. Polsinello RJP Office: Director, Division of Labor Standards

Subject: Regulatory Reform - Banquets, Section 196-d

Section 196-d provides that an employer may not accept, demand or retain any part of a gratuity, or charge purported to be a gratuity for an employee. There is an exception for "practices in connection with banquets... where a fixed percentage of a patron's bill is added for gratuities which are distributed to employees." It has been our past policy, when enforcing Section 196-d for banquets or other special functions, to require that, unless a service charge is clearly identified in writing as not being a gratuity, a fixed percentage service charge to the patron must be distributed in its entirety to those employees who perform or render a personal service to the customer.

Effective immediately, service charges will not be considered gratuities. Service charges will be considered part of the gross receipts of the employer, and may be incorporated as part of the employer's wage obligation to employees. A service charge is not required to be distributed to employees.

All pending complaints and cases involving banquets are to be reviewed as a result of this policy change. If you have any questions, you should consult with your respective Chief.

Please notify your staff accordingly.

cc: Dep. Comr. Peterson
Assistant Director
Chief Investigators
J. Bermudez
M. Burkard

LS-95-OP-4

Memo distributed 6/1/95 MC

B

C

McNamee, Lochner, Titus & Williams, P.C.

ATTORNEYS AT LAW

DAVID J. WUKITSCH
Direct Dial
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May 9, 2008

Maria Colavito, Esq.
Counsel
New York State Department of Labor
Room 508, Building 12
The State Campus
Albany, New York 12240

Re: **New York State Restaurant Association Guidelines for Administrative Fee to Avoid Service Charge Violations**

Dear Ms. Colavito:

I am a counsel for the New York State Restaurant Association ("NYSRA"). NYSRA represents many restaurants, catering and banquet facilities. In view of the Court of Appeals decision in the Samiento case (10 N.Y.3d 70), we are proposing guidelines for the NYSRA membership in this area of the law.

The proposed Guidelines indicate that the Administrative Fee is not a tip or gratuity and will not be distributed to the wait staff or food service workers. Proper notification of this fact will be made before work commences for an event/party or special function to the customer/client(s) and to the wait staff involved. We would appreciate your review, comments and approval of these guidelines to ensure that there is no violation of Labor Law §196-d, or any other Labor Law provisions and/or regulations.

If you have any questions, do not hesitate to contact me. Thank you for your attention to this matter.

Very truly yours,

David J. Wukitsch

David J. Wukitsch

DJW/jj
enclosure
cc: Rick Sampson

DRAFT

Guidelines for adding what was formerly known as a "service charge"

- Do not use the phrase "service charge" or the word "service", because it leaves the impression with the customer that it is going to be given to the service staff.
- Possible alternatives include management fee, administrative fee, set-up fee, catering fee or banquet fee.
- Make it clear on the invoice or contract that this charge is not a tip or a gratuity.
- You may want to make it a policy to include a line on the bill or invoice for a gratuity to be added by the customer, to further distinguish this charge from a gratuity.
- You may want to show a breakdown on the contract or invoice of how this charge is being used and/or distributed so there is no confusion.
- A notice should also be posted or distributed to waitstaff notifying them that this fee is not a tip or gratuity.

D

McNamee, Lochner, Titus & Williams, P.C.

ATTORNEYS AT LAW

RECEIVED AUG 0 7 2008

DAVID J. WUKITSCH
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August 6, 2008

Maria Colavito, Esq.
Counsel
New York State Department of Labor
Room 508, Building 12
The State Campus
Albany, New York 12240

Re: New York State Restaurant Association Guidelines for Administrative Fee to Avoid Service Charge Violations

Dear Ms. Colavito:

I am a counsel for the New York State Restaurant Association ("NYSRA").

On or about May 9, 2008, I mailed you the enclosed letter requesting the Department of Labor's review and input on proposed NYSRA service charge guidelines. I have not received a response from you. Enclosed is a copy of my letter with slightly revised guidelines that the NYSRA respectfully submits for your review, comments and approval.

Thank you for your anticipated cooperation.

Very truly yours,

David J. Wukitsch

David J. Wukitsch

DJW/jjf
enclosures
cc: Rick Sampson, NYSRA President
M. Patricia Smith, Commissioner

E

New York State Department of Labor
David A. Paterson, *Governor*
M. Patricia Smith, *Commissioner*

December 1, 2008

Mr. Joseph E. Spinnato, Esq.
President
Hotel Association of New York City, Inc.
320 Park Avenue
New York, New York 10022-6838

Mr. Rick J. Sampson
President and CEO
New York State Restaurant Association
409 New Karner Road
Albany, New York 12205

Mr. Daniel C. Murphy
President
New York State Hospitality and Tourism Association
80 Wolf Road
Albany, New York 12205

Re: Request for Opinion
Labor Law §196-d
Tips/Service Charges
RO-08-0107
RO-08-0111
RO-08-0129

Dear Sirs:

This letter is written in response to correspondence received from each of you in which you ask for an opinion as to whether the decision by the New York State Court of Appeals in *Samiento v. World Yacht, Inc.*, 10 NY3d 70 (2008), will cause this Department to modify its policy regarding enforcement of Labor Law §196-d in regard to the collection and distribution of banquet and event service charges. In particular, you ask whether the *Samiento* decision will have any effect upon the position expressed in a memorandum from Richard Polsinello, then Director of the Division of Labor Standards, dated June 1, 1995 (hereinafter referred to as "the 1995 memo") and whether the Department will be promulgating regulations to implement the Court of Appeal's decision in that case.

By way of background, it should be noted that an Opinion issued by the Department dated March 26, 1999, effectively superceded the 1995 memo when it

stated that, "[i]f the employer's agents lead the patron who purchases a banquet or other special function to believe that the contract price includes a fixed percentage as a gratuity, then that percentage of the contract price must be paid in its entirety to the waiter, busboys and 'similar employees' who work at that function, even if the contract makes no reference to such a gratuity." Any misconception as to the meaning and import of this Opinion was erased, moreover, when it was quoted and relied upon by the Court of Appeals in the *Samiento* decision which correctly and clearly sets forth the proper interpretation of Labor Law §196-d.

Labor Law §196-d states, in relevant part:

> Gratuities. No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. ... Nothing in this subdivision shall be construed as affecting ... practices in connection with banquets and other special functions where a fixed percentage of the patron's bill is added for gratuities which are distributed to employees ...

The first sentence of this statute clearly states, in summary, that an employee may keep all gratuities received by him/her and that no employer may, in any way, take possession of any such gratuity or charge purported to be a gratuity. The final sentence of the statute exempts from this prohibition the common practice of employers collecting gratuities by adding fixed "service charges" to the price of banquets and other special functions for distribution to employees. It was this final sentence upon which the employers in *Samiento* relied in asserting that banquet service charges were not contemplated within the meaning of "charges purported to be a gratuity" as set forth in Labor Law §196-d. Contrary to this assertion, the *Samiento* court examined the legislative history of this final sentence and held that its intent was:

> ... to ensure the industry could continue its common practice of applying a fixed percentage, or lump sum payment, to a banquet patron's bill as a gratuity which then was distributed to all personnel engaged in the function, wait staff, bartenders, busboys and all other similar employees. It was feared that without this language the practice of pooling for later distribution of tips to all involved employees would be prohibited because upon receiving payment, a person could

> believe they were entitled to retain the entire amount and not share with the rest of the personnel who worked the banquet, (10 NY3d at 80). (Citation omitted).

In light of this legislative intent, the Court held that the employers' contention that banquet "service charges" did not fall within the meaning of the term "any charge purported to be a gratuity" was incorrect.

In *Samiento*, the Court also considered the practice of employers who, among other things, "told inquiring customers that the 20% service charge is remitted to defendants' waitstaff as the gratuity, but then failed to distribute any amount of the service charge to their waitstaff," and "presented banquet patrons with bills which segregated and excluded the banquet service charge from other banquet charges, thereby treating the banquet service charge like a gratuity for sales tax purposes, and presumably for income tax purposes as well," and "represent[ed] to the customer that the gratuity was included in the ticket price but then only remitt[ed] to its employees a gratuity of between 4% to 7%," (10 NY3d at 75-76).

Under the "reasonable patron" standard of review used by the Court (10 NY3d at 79), such practices lead patrons to understand that the gratuity was already included in the cost of their meal and consequently, required the distribution of such gratuity to employees. In arriving at such decision, the Court cited with approval the 1999 opinion issued by this Department which is referenced above. (*Id.* at 79-80)

Therefore, as described and affirmed by *Samiento*, it is clear that if an employer causes a reasonable patron to believe that a service charge is a gratuity to be received by a service employee(s), then it is "a charge purported to be a gratuity for an employee" under Labor Law §196-d and must be distributed to such employee(s). This decision affirms the position taken by the Department in the March 26, 1999 Opinion and clearly lays to rest any doubt with regard to the validity of the 1995 memo.

Please be further advised that since there has been no modification of the Department's enforcement policies since the 1999 Opinion letter affirmed by the *Samiento* Court, and since no modification of such policies is contemplated, your request that any "modification" be applied prospectively has no basis in fact or law. Such enforcement policy will be applied to all current and future matters, as it has been in the past.

Finally, the Commissioner will be appointing a Wage Board pursuant to Labor Law §653, which will be charged with examining minimum wage issues relating to food

service workers and which may, among other things, be asked to make a recommendation with regard to the promulgation of regulations codifying the holdings in *Samiento*. We will await such recommendation before making a final decision with regard to the matter.

Sincerely,

M. Patricia Smith

cc: Carmine Ruberto

F

STATE OF NEW YORK
DEPARTMENT OF LABOR
345 Hudson Street, Room 8001
New York, New York 10014-0673

COUNSEL'S OFFICE
(212) 352-6561

March 26, 1999

Edith Lutnick, Esq.
Lutnick & Swomley
One World Trade Center, 105th Floor
New York, New York 10048-0578

Re: Request for Opinion
Labor Law Section 196-d
Banquet Gratuities

Dear Ms. Lutnick:

Your March 25, 1999 letter refers to my May 20, 1998 letter to Bruce E. Menken, Esq. on the above subject. In that letter, I wrote that, in the context of a banquet or other "special function" as those terms are used in Section 196-d of the Labor Law, pursuant to the statute and the Department's June 1, 1995 guidelines, a charge specifically denominated as a "gratuity" had to be paid to those employees who performed or rendered a personal service to the customer, such as waiters, busboys, and "similar employees" as that term was used in the statute. I wrote, further, that this would be the case whether the patron's bill was for a fixed amount per person, "gratuities included," or for a fixed amount per person with an additional percentage added for "gratuities." In the situation described in your letter, the employer's sales representatives and/or conference planners represent to patrons that a 19.75% gratuity is included in a fixed price for a banquet or other special function, but the actual banquet contract is silent as to any such gratuity.

If the employer's agents lead the patron who purchases a banquet or other special function to believe that the contract price includes a fixed percentage as a gratuity, then that percentage of the contract price must be paid in its entirety to the waiters, busboys and "similar employees" who work at that function, even if the contract makes no reference to such a gratuity. The charge in question is a "gratuity" within the meaning of the statute and the Department's guidelines because of the employer's verbal representations, regardless of the actual contract language.

I trust that the foregoing is responsive to your inquiry. If you have any further questions, you may contact me at (212) 352-6655.

Very truly yours,

Robert Ambaras
Senior Attorney

Writer's Direct Dial (212) 352-6655

STATE OF NEW YORK
DEPARTMENT OF LABOR
345 Hudson Street, Room 8001
New York, New York 10014-0673

COUNSEL'S OFFICE
(212) 352-6561

bc: J Mrozak
H Aloisi
M Fruchter
T Glubiak
E Davidow
C Ruberto

August 11, 1999

Leon Greenberg, Esq.
5 Beekman Street -- Suite 212
New York, New York 10038

Re: Request for Opinion
Labor Law Section 196-d
Banquet Service Charges

Dear Mr. Greenberg:

Your August 1, 1999 letter requests an opinion on several issues involving the policy followed by the Department's Division of Labor Standards in the enforcement of Section 196-d of the Labor Law. That statute provides that: "No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee.[...]" However, it further provides that: "Nothing in this subdivision shall be construed [...] as affecting practices in connection with banquets and other special functions where a fixed percentage of the patron's bill is added for gratuities which are distributed to employees [...]." Prior to June 1, 1995, the Division's policy was to require that, unless a fixed percentage service charge to the patron was clearly identified in writing as not being a gratuity, such a charge be distributed in its entirety to those employees who performed or rendered a personal service to the customer. On June 1, 1995, the Division issued a memorandum, a copy of which is annexed to your letter, stating that, effective immediately, service charges would not be considered gratuities, but, rather, part of the gross receipts of the employer, could be incorporated as part of the employer's wage obligation to employees, and were not required to be distributed to employees.

In response to your first question, the Division still follows the memorandum in question. In response to your second question, the memorandum applies only to "banquets and other special functions" as that term is used in the statute. In response to your third question, the Division considers any charge added to a patron's bill, whether characterized as a gratuity or otherwise (other than as a service charge), which leads the patron to believe that it is intended to take the place of a gratuity, as a "charge purported to be a gratuity" within the meaning of the statute. In response to your fourth question, with respect to charges other than service charges imposed in connection with a banquet or other special function, the Division requires that such

charges be distributed in their entirety to service employees unless the employer has explicitly notified the customer in writing that it will be retaining all or part of the charge.

I trust that the foregoing is responsive to your inquiry. If you have any further questions, you may contact me at (212) 352-6655.

Very truly yours,

Robert Ambaras
Senior Attorney

Writer's Direct Dial (212) 352-6655

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March 24, 2000

Robert L. Murphy, Esq.
Stokes & Murphy, P.C.
3131 Camino del Rio North
San Diego, California 92108

Re: Request for Opinion
Labor Law Section 196-d
Mandatory Service Charges

Dear Mr. Murphy:

Your January 6, 1999 letter to Commissioner James J. McGowan asks whether the Department of Labor would consider certain charges imposed by your client, a private club, upon its members, to be gratuities within the meaning of Section 196-d of the Labor Law, or service charges not regulated by that statute.

The club imposes an automatic and mandatory charge on all its members' food and beverage purchases, at the rate of 15 percent for a la carte service and 20 percent for banquet service. The "chits" which members sign before being served refer to this charge variously as "service charge" and "gratuity." The members' monthly statements refer to the charge as "service charges." The club reports the charges as "service charges" to the Department of Taxation and Finance and pays sales taxes on them. Before May 1993, the club distributed a portion of the charges to its service employees. At that time, these employees voted to receive a higher base wage rate without any share of the charges, and, since then, the club has paid them accordingly. You ask whether the amounts collected as automatic charges belong to the club or the service employees, and whether the members' belief that these charges are distributed to the service employees would affect the Department's answer to your first question.

Section 196-d of the Labor Law provides as follows:

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§196-d. Gratuities

> No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. This provision shall not apply to the checking of hats, coats or other apparel. Nothing in this subdivision shall be construed as affecting the allowances from the minimum wage for gratuities in the amount determined in accordance with the provisions of article nineteen of this chapter nor as affecting practices in connection with banquets and other special functions where a fixed percentage of the patron's bill is added for gratuities which are distributed to employees, nor to the sharing of tips by a waiter with a busboy or similar employee.

Whether a charge is "purported to be a gratuity for an employee" depends on how the charge is characterized and the reasonable belief of the customer as to its distribution. In this case, the charge is characterized as either a "gratuity" or a "service charge," without further explanation. Under the circumstances, a customer would reasonably believe that the charge is distributed to the employees who serve him or her. Accordingly, the 15 percent charge imposed on a la carte transactions is a "gratuity" within the meaning of the statute and must be distributed to the employees for whose service the charge is imposed.

On June 1, 1995, the Department issued the enclosed guidelines on the treatment of charges imposed in connection with banquets and other special functions, pursuant to which a charge denominated a "service charge" will not be considered a "charge purported to be a gratuity" and will be considered part of the employer's gross receipts. In this case, the club refers to the 20 percent charge imposed on banquet transactions interchangeably as a "service charge" and a "gratuity." It would be incongruous, however, for the Department to treat the same charge differently depending on which form happens to be used in a particular transaction. Accordingly, assuming that the charge is uniformly denominated a "service charge," it is not a gratuity which must be distributed to employees, but is part of the employer's gross receipts.

I apologize for the delay in responding to your inquiry, and trust that the foregoing is responsive thereto. If you have any further questions, you may contact me at (212) 352-6655.

Very truly yours,

Robert Ambaras

Robert Ambaras
Senior Attorney

Enclosures

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March 12, 2001

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Re: Request for Opinion
Labor Law Section 196-d
Distribution of Service Charge

Dear Mr. Adler:

Your February 16, 2001 letter asks under what circumstances your client, a resort hotel, may distribute portions of a service charge imposed on guests to employees other than those presumed to be "service employees" according to 12 NYCRR § 138-4.5(b).

Section 196-d of the Labor Law provides as follows:

Sec. 196-d. Gratuities. No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. This provision shall not apply to the checking of hats, coats or other apparel. Nothing in this subdivision shall be construed as affecting the allowances from the minimum wage for gratuities in the amount determined in accordance with the provisions of article nineteen of this chapter nor as affecting practices in connection with banquets and other special functions where a fixed percentage of the patron`s bill is added for gratuities which are distributed to employees, nor to the sharing of tips by a waiter with a busboy or similar employee.

A service charge imposed on guests of a resort hotel is a "charge purported to be a gratuity for an employee" within the meaning of the statute and must, accordingly, be distributed to those who provide a direct personal service to guests and who the guests would reasonably expect to receive such the proceeds of such a charge, *i.e.*, those presumed to be "service employees" according to 12 NYCRR § 138-4.5(b). An employer may distribute portions of such a charge to other employees provided that it notifies the guests on their bills of the precise categories of employees who will receive such distributions. However, if the service charge is imposed in connection with a banquet or other special function, it is exempted from the application of the statute and need not be distributed to employees, pursuant to the enclosed June 1, 1995 memorandum from Richard J. Polsinello, Director of the Department's Division of Labor Standards.

Telephone (212) 352-6655 **usbrca@labor.state.ny.us** **Fax (212) 352-6565**

I trust that the foregoing is responsive to your inquiry. If you have any further questions, you may contact me at (212) 352-6655.

Very truly yours,

Robert Ambaras

Robert Ambaras
Associate Attorney

Enclosures

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March 27, 2000

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Re: Request for Opinion
Labor Law Section 196-d
Service Charge on Room Service Bills

Dear Mr. Badoux:

Your November 29, 1998 letter asks whether a mandatory service charge of between 16 and 18 percent automatically assessed on all bills for hotel room service charges would be considered a gratuity within the meaning of Section 196-d of the Labor Law. You suggest that such a charge is more akin to a banquet service charge and should not be considered a gratuity. According to your letter, all moneys collected from the service charge would be pooled and distributed among all room service employees, regardless of which shift they worked, while any gratuities left by customers over and above the mandatory service charge would belong to the employees for whom they were left.

Section 196-d of the Labor Law provides as follows:

> **§ 196-d. Gratuities**
>
> No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. This provision shall not apply to the checking of hats, coats or other apparel. Nothing in this subdivision shall be construed as affecting the allowances from the minimum wage for gratuities in the amount determined in accordance with the provisions of article nineteen of this chapter nor as affecting practices in connection with banquets and other special functions where a fixed

percentage of the patron's bill is added for gratuities which are distributed to employees, nor to the sharing of tips by a waiter with a busboy or similar employee.

As you are aware, the Department of Labor has issued the enclosed June 1, 1995 guidelines regarding the treatment of banquet service charges under the statute. However, these guidelines are based upon the statutory exception for "banquets and other special functions." Hotel room service does not fall within this exception. Therefore, unless customers are advised specifically in writing that the mandatory service charge is pooled among all room service employees, it must be distributed in its entirety to the employees for whom it is left. If, however, customers are so advised, moneys collected from the service charge may be distributed among room service employees as proposed in your letter.

I apologize for the delay in responding to your inquiry, and trust that the foregoing is responsive thereto. If you have any further questions, you may contact me at (212) 352-6655.

Very truly yours,

Robert Ambaras

Robert Ambaras
Senior Attorney

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Enclosure