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June 3, 2009

VIA FACSIMILE & FED EX

New York State Department of Labor
Attn: Jean Lindholm
Harriman State Office campus
Building 12, Room 185B
Albany, New York 12240

Re: Submission to the New York State Wage Board on Behalf of the New York State Restaurant Association, Greater New York City Chapters

Dear Ms. Lindholm:

This firm is labor counsel to the New York State Restaurant Association ("Association"), Greater New York City Chapters. We wish to thank the Wage Board and you for the opportunity to present the concerns of our members. Please accept this submission is in addition to my testimony of May 20, 2009 ("Hearing").

1. Introduction

The restaurant industry's importance to the economic well-being of New York State cannot be overstated. According to the New York State Restaurant Association ("NYSRA"), as recently as 2007, New York State was home to 37,354 eating and drinking establishments. See *Restaurant Industry At A Glance: New York State*, <http://www.nysra.org>. Additionally, the food-service sector employs more than 428,000 workers and posts sales of more than \$20 billion annually in New York State. Id. Moreover, every dollar spent in New York restaurants generates an additional \$0.98 in sales for New York's economy and each additional \$1 million spent in New York's drinking and eating establishments generates an additional 24.5 jobs in the State. In these trying economic times, the restaurant industry is more vital than ever to the health of New York's economy. The industry is largely made up of small business owners employing one of the most ethnically diverse workforces in the nation. Aside from being a significant tax revenue base for New York, the industry has long been a shining beacon throughout the world of New York's ingenuity and melting pot spirit.

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As myself and other members and representatives of the Association testified to at the Hearing, the restaurant industry stands at a crossroads today. New York State's restaurant industry is fighting for survival. Reeling from an unprecedented economic decline not seen since the Great Depression, the industry has struggled for the past several years from a sudden and full force attack by the plaintiffs' bar, not-for-profit-organizations and the New York State Department of Labor ("NYS DOL"). The restaurant industry does not dispute that, as with any industry, there are operators who have in fact violated wage and hour laws; some have done so egregiously and should be held accountable for such actions. However, the vast majority of restaurateurs are good people who seek to comply with the law, but find it incomprehensible and/or impracticable. The NYSRA Greater New York City Chapters, on behalf of its members, has in fact worked with the NYSDOL in educating its constituents, and believes that more education is a key component for future change.

Much of the confusion and resulting investigations and litigation that has affected the New York City restaurant community stems from antiquated wage and hour laws that have their origin in a Depression-era working environment. These laws and related regulations have not been amended to adjust to the industry's ever-changing demographics, practices, and technological advances, nor do they parallel federal or the laws of most other states with respect to the restaurant industry. As a result, the industry is forced to attempt to rely on a hodge-podge of often-conflicting opinion letters and memorandums strung together by the NYSDOL over the years for "guidance." Unfortunately, restaurant owners are left only more confused and exposed to costly lawsuits and extensive liability because of it.

The current onslaught of wage and hour class action lawsuits¹ and agency investigations are amongst the greatest threats to New York restaurant owners right now. The most significant issues encompassed by these suits and investigations are: (1) the participation of maitre 'ds in tip pools; (2) the scope of service employees who may permissibly participate in a restaurant's tip pool/share system (e.g., baristas, polishers, sushi chefs); (3) whether mandatory "service charges" must be turned over to non-supervisory service staff in a post-World Yacht environment and the potential retroactivity of penalties under such circumstances; (4) the

¹ These class action lawsuits have been fueled by a number of factors including: (1) inconsistencies in the application and interpretation of New York Labor Law § 196-d; (2) the inconsistent application and interpretation of the New York Minimum Wage Order for the Restaurant Industry; (3) a proliferation in class action litigation across the country as a result of the Class Action Fairness Act, 28 U.S.C. § 1453(c); (4) a marked increase in class action litigation in the service industry in general; and, (5) a more active New York State Department of Labor that has deemed the restaurant industry as one of its "targeted" industries.



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definition of a "uniform"; and (5) the applicability of the spread of hours, call-in pay and uniform maintenance allowance requirements to tipped employees. Faced with a six-year statute of limitations, the potential loss of the tip credit taken for all hours worked, the prospect of paying attorneys' fees for two sets of counsel and the disgorgement of tips, restaurant owners are faced with draconian penalties for even good faith errors in interpreting the law. The industry will not survive much longer without substantial change to the applicable state statutes and regulations, including the New York Minimum Wage Order for the Restaurant Industry ("Wage Order"), and the NYSDOL's policies and procedures in enforcing such laws.

New York's statutory and regulatory schemes must be clarified and simplified. Restaurant owners deserve to have a clear understanding of the standards to which they are being held, and a better opportunity to operate their respective businesses in good faith without the constant scrutiny of the plaintiffs' bar and NYSDOL. There is much room for change in New York's statutory wage and hour laws to better protect all of its citizens, including business owners and the individuals they employ, and avoid needless litigation and government investigations.

2. The Law

The definition of "gratuities" is codified under New York Labor Law § 196-d. The law states:

§ 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."

See N.Y. Labor Law, § 196-d (emphasis supplied.) (Treatise Section A-1).



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This provision has been the subject of much controversy and has led to a variety of conflicting "interpretations" from the NYSDOL, culminating in today's class action debacle with respect to tips and the service charge. The recent lawsuits and NYSDOL attention has turned an industry long steeped in tradition, past practice and protocol on its head. The following are the key areas of controversy arising from §196-d that threaten the viability of the industry:

1. What is a tip pool?
 - a. Whether a restaurant owner/operator can mandate employees pool their tips under § 196-d;
 - b. Who can participate in a tip pool?
 - c. While it is clear from the statute that an "employer or his agent" cannot participate in a pool, can a supervisor whose primary job function is to serve the customer participate in a tip pool (e.g., maitre 'ds or floor managers)?
2. What is the difference between a tip pool and a "tip share?"
 - a. Can a tip share exist simultaneously with a pool?
 - b. Are there limitations on the percentages that an employer can require be tipped out in a tip share?
3. Whether the World Yacht decision can be reconciled with past NYSDOL determinations upon which operators relied on and now threaten to destroy the catering industry.

I. Tip Pools

Generally speaking, in tip pools, all tips left by customers for service employees are intermingled, and then redistributed amongst the participants of the pool according to the participants own "formula" or "schedule."

Typically, the purpose of tip pooling is to promote excellent customer service from all employees. Tip pooling promotes cooperation and teamwork amongst employees. As most recently reaffirmed by a California Court of Appeal, "[a]n established tip pooling policy encourages employees to give the best possible service, which in turn enhances the employer's



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reputation and increases its business.” Lu v. Hawaiian Gardens Casino, Inc., 2009 Cal. App. LEXIS * 69 (Cal. Ct. App. Feb 11, 2009) (Treatise Section A-15) citing L eighton v. Old Heidelberg, Ltd., 219 Cal. App. 3d 1062, 1071 (Cal. Ct. App. 1990) (Treatise Section A-18). The Lu court continued:

“Tip pools preserve ‘the employer’s prerogative to run his own business,’ while also preventing ‘dissension 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. An employer must be able to exercise control over his business to ensure an equitable sharing of gratuities in order to promote peace and harmony among employees and provide good service to the public.”

Id.

Service staff in the fine-dining segment of the restaurant industry typically pools their tips. A fine-dining restaurant traditionally has a much larger service staff than other segments of the industry. Accordingly, a guest dining out in a three or four star restaurant will have more staff “touching” his or her table throughout a meal. In such a restaurant, one table may be served by no less than a host, maitre ‘d, captain, back waiter, sommelier, busser, runner, and a barista. Throughout the service, that table may also be served by several different individuals performing the same job function—resulting in upwards of a dozen different employees who may have interacted with one table. One busser may have cleared the appetizer course, while another may have assisted with entrees, and yet another cleared dessert before coffee and cordials were brought. In fact, two different maitre d’s may even have stopped by the table to check in, or to help open a bottle of wine, or fill an empty water glass.

In this service model, it is almost impossible to individually split tips. This is why the pooled tip system is not only necessary, but the only fair, or even possible system. At the end of a shift, tips are pooled and split according to some formula – sometimes evenly, sometimes proportionally. Contrary to what the NYSDOL or a plaintiff’s attorney may think, the check is not always left by a “waiter,” or picked up by the waiter. As a result, a waiter is not the direct recipient of the tip on all occasions. Often, a guest may ask the barista who brought the coffee for the check. And, at the end of the meal it is the busser who picks up the check when he/she clears and resets the table. Accordingly, it is inaccurate for the many server/litigants currently suing New York City’s fine-dining community to claim that it is they alone who are the intended recipients of gratuities. It certainly takes a village.



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II. New York State Law Does Not Clearly Articulate Who Can Participate In A Tip Pool

A. The New York "Standard" For Tip Pools

The NYSDOL has created an administrative standard that subjects tip pools to intense scrutiny. Under the NYSDOL standard, a tip pool must be: (a) completely voluntary; (b) created by the employees themselves with, or without the knowledge of management; (c) managed by the employees themselves; and, (d) not made part of the terms of hire or conditions of continuing employment. *See New York State Division of Labor Standards Manual of Investigations* (undated), at 169 (emphasis supplied) (Treatise Section A-3).

According to the NYSDOL, the employer cannot exercise control of, or interfere with, the tip pooling arrangement or the collection, or distribution of pooled tips. Moreover, the NYSDOL has stated that employees who do not wish to pool their tips cannot be required to participate in a pooling arrangement, and must be permitted to collect tips directly from the individual customers they serve. *Id.* at 170-171. Additionally, an employer cannot demand that employees surrender their tips for "handling, counting, or distribution in any tip sharing or tip pooling arrangement, even where the employer does not retain any part of the tips." *Id.* at 169. These standards are impractical, impossible to enforce, do not benefit the employees and are no longer consistent with current times.

First, under the NYSDOL's "completely voluntary" standard, in order for it to actually work, a restaurant owner would be required to make its staff vote at the beginning of each service whether or not they want to pool tips for that shift as the service teams typically changes almost daily. With today's computerized payroll systems, this would be an accounting and payroll nightmare, as systems would have to be re-calibrated daily. Second, it is highly unlikely that staff would agree each day on the pool's "point" breakdown and chaos would result pitting server against server. Under the NYSDOL's interpretation, if any one employee wishes to opt-out of the pool, that employee must be permitted to do so. It would be nearly impossible to carve out a dining room section for that employee to work in outside of a pool. It is more than likely that the other service team members would refuse to assist any employee who had already refused to share his/her tips with the team. Such a scenario would only result in poor employee relations and disastrous customer service.

Mandatory tip pooling benefits the customers, the staff and the restaurant owner equally. The NYSDOL's "interpretations" of § 196-d have created an impractical situation, enabling a cottage industry of class action lawsuits to be filed claiming that employers did not "voluntarily"



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agree to tip pools. However, in the majority of cases, it becomes a "chicken or the egg" situation. It is often impossible to trace the origin of the pool, and no employee has ever objected to its use. Moreover, no court has ever addressed how to measure the damages of a "mandatory" pool.

B. § 196-d Does Not Sufficiently Clarify Who May Participate in Tip Pools

While § 196-d makes clear that "owners" and their "agents" cannot take any part of an employee's tips or gratuities, precisely who is an "agent" in the context of a dining room has been the subject of much litigation and NYSDOL flip-flopping. It is precisely this confusion that has resulted in the plethora of wage and hour class actions against New York City's most well known and highly praised restaurants.

The job positions most at issue in these lawsuits and NYSDOL investigations are those of the maitre 'd (sometimes referred to as a floor manager or service director).² To the plaintiffs' bar and the NYSDOL, these positions have become a target, because the position typically exhibits some supervisory responsibilities insofar as maitre d's direct the flow of the dining room and often assign service staff stations. However, merely having some supervisory responsibilities does not make these employees ineligible to take part in the tip pool. The NYSDOL's own Manual of Investigation and Southern District case law recognizes that supervisory employees can participate in tip pools. In a section entitled "Supervisory Employees Sharing in Tips," the NYSDOL states the following:

Investigator should interview the supervisory employees concerning their duties and obtain any written job descriptions which may exist, with the aim of determining whether the supervisory employees perform such a level of personal service to patrons as to warrant their inclusion in the category of service employees. For example, a maitre d' in one establishment may great and seat guests, circulate in the dining room, and dispatch wait and bus staff in response to observed needs; in another establishment, where the maitre d' coordinates the operational functions of several departments, the level of personal service provided directly to guests would be minimal. *In*

² The job title often varies from restaurant to restaurant. The term "maitre 'd" is a historic term and derives from the French term "maitre 'd hotel" or "master of the hotel." Today, many restaurants have strayed from the maitre 'd title and use instead the titles "service director" or "floor manager," so as to connote more respect with guests and to send the message that each guest is special and is being attended to by a "manager." The job responsibilities themselves have not changed, the position is only about ensuring appropriate guest service.



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the first instance, the supervisory employee will be treated as a service employee eligible to share in tips; in the second, he/she will not.

See Id. at 177 (emphasis supplied).

Unfortunately, NYSDOL investigators have not always followed these parameters in recent investigations. Of late, investigators have routinely stated to New York restaurant owners that the position of the NYSDOL is that, unless the maitre d's main responsibility is to "touch the table throughout the night like a server," they cannot get tips. This position defies law, logic and existing NYSDOL standards.

The few courts in New York's Second Circuit that have addressed the issue of supervisory employees in the tip pool have also acknowledged that it can be an accepted practice. In determining whether a restaurant's general manager was an "employer or his agent" and could subsequently participate in the wait staff's tip pool, the Court found that the appropriate analysis was to look at factors such as whether the employee has the "full authority" to suspend or terminate employees; whether he supervised the wait staff and made hiring decisions; whether he had responsibility for the restaurant's budget, payroll and food costs; and whether he was paid a fixed salary. See Ayers v. 127 Restaurant Corp., 12 F.Supp.2d 305 (S.D.N.Y. 1998) (Treatise Section A-8).

Without further clarification as to supervisors' participation in the tip pool, restaurateurs are left in a no-win situation. A definitive and consistent standard is needed.

C. Clarifying § 196-d Will Benefit All Parties

While there are a number of solutions to the tip pool problem, consistent application of the NYSDOL's own policies and procedures and amending § 196-d would be the most beneficial and practical. Accordingly, below please find proposed revisions with respect to the tip pool and participant section (proposed amendments are italicized and underlined):

§ 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



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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 and among service employees, including but not limited to: waiters, bussers, hosts, runners, captains, sommeliers, bartenders, barbacks, maitre 'ds, and other similar employees who significantly participate in direct service to the guest. Nothing in this provision shall be construed as prohibiting employers from requiring the pooling of tips so long as such pooling does not result in any employee's total compensation being less than the minimum wage.

III. New York's Legislature Never Prohibited Mandatory Tip Pools

A. The Legislative History of § 196-d

The legislative history of Labor Law § 196-d is silent with respect to "mandatory" tip pools. (See Treatise Section A-2). As the 1968 legislative history of § 196-d reveals, the original concern was over the rampant abuse of cabana boys and pool hall employees who were apparently not receiving any wages. Much attention was also paid to the hotel industry – not to the restaurant industry. Much has changed since 1968 – from the workforce itself to the very nature of the way gratuities are paid and tracked. It is time to re-examine the very core of the statute.

The so-called "rule" prohibiting employer-mandated tip pools only came into being after the passage of § 196-d, and is based on the NYSDOL's interpretation of the law.³ In a September 5, 1972 "Inter-Office Memorandum" the Department of Labor for the very first time stated that it "intend[ed] to hold employer-imposed tip pooling arrangements as being in violation of Section 196-d." (Treatise Section A-19). Although the NYSDOL noted that this was a "customary and accepted" practice, it failed to note that employees prefer and benefit from this practice as much, if not more, than employers. For 37 years, the NYSDOL has relied upon this memo for its position that mandatory pooling is impermissible – neither the legislature nor the courts have yet to weigh in.

³ See the NYSDOL opinion letters contained in Section A-19 of the accompanying Treatise confirming that employers cannot mandate tip pools.



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B. Federal Law and Many Other States Permit Employer-Mandated Tip Pools

New York State's prohibition on employer-mandated tip pools makes it an outlier with respect to the rest of the country. Under federal law, employers can mandate tip pools in their restaurants. See 29 CFR 531.54. (Treatise Section F). Moreover, employer-mandated tip pools are permissible in most states, including in employee-friendly California.

In fact, California courts have recognized the value of tip pools. See e.g. Leighton, 219 Cal. App. 3d at 1062 (finding that tip pooling in restaurants is not prohibited by California Labor Code section 351). In a recent decision, a California Court of Appeals recognized the value of tip pooling, stating that "where employees together provide good service, the patron will be inclined to leave larger tip." Lu, 2009 Cal. App. LEXIS at * 69. The Court also found 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 quarrelling, 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. (Emphasis supplied.)

Another recent California decision also summarized the value of tip pools as follows:

"*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 that 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."



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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). (Emphasis supplied.) (Treatise Section A-17).

Finally, a third decision by a California Court of Appeals has acknowledged what restaurant employees and owners have always known: great guest service is not always visible to the guest. In Etheridge v. Reins Int'l California, 172 Ca. App. 4th 908, (Cal. Ct. App. 2009) the Court affirmed a lower court ruling holding that participants in a tip pool need not be restricted to staff who provided "direct" table service to customers. (Treatise Section A-16). The Court recognized that employees in the "chain of service," including dishwashers, may be able to participate in tip pools.

The Court found:

"If the plates on which the food is served are not clean, the food received is not hot, or is not as ordered, the patron may be inclined to leave a smaller tip even when the services of the servers and bussers were satisfactory. Likewise, when the meal is delicious, the presentation on the plates beautiful, and special food requests have been satisfied, the patron may be inclined to leave a generous tip, even when the servers and bussers might not have delivered exceptional service. In short, a patron tips on all of the service received, *not simply the service received by employees the patron can see.*"

Id. (Emphasis supplied.)

Whether any New York restaurateur can afford the gamble and litigate one of these cases remains to be seen. Unlike any other state, New York has a six year statute of limitations on wage and hour claims. However, the California tipping cases provide a strong blueprint for the New York legislatures and courts to turn to for reform. It is time for reform before any of these lawsuits further cripple the industry. Given the enormous success the industry had for most of the last six years, returning any portion of the tip pool plus damages and attorneys fees is virtual financial ruin for most restaurateurs.

IV. Tip Sharing

Separate from "tip pooling" is the concept of "tip sharing." Unfortunately, the concepts are often confused. The NYSDOL has distinguished these terms as follows:



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“Tip-pooling occurs when tips are pooled and redistributed among the tipped employees. Tip-sharing occurs when an employee who provides service to a customer shares a portion of his tip with an employee who also provides customer service but who receives no tip, i.e. when waiters share tips with busboys. Tip-sharing *may* be mandated by an employer. Tip-pooling *may not* be mandated, but may only take place on a completely voluntary basis.”

See NYSDOL Opinion Letter, November 8, 2006. (Treatise Section A-19).

The NYSDOL has also made clear that it is solely the employer’s decision as to what percentage of the tips waiters will be required to tip out to the other service employees: “[t]he employer may compel waiters to share tips with busboys and similar employees whether or not the waiters have their own tip sharing agreement, and set the amount to be shared.” See NYSDOL Opinion Letter, September 27, 2005. (Treatise Section A-19). Accordingly, while employees decide to pool their tips—it is the employer’s sole decision whether to mandate tip sharing and to determine what percentage is allotted to the various employees.

“[A]n employer is free to dictate what percentage of tips a waiter must share with a busboy or similar employee, and may also dictate the distribution of such monies among those employees. There is nothing in the statute which would appear to require that all employees of the same job category receive the same amount of such monies.”

See NYSDOL Opinion Letter, July 24, 1996. (Treatise Section A-19).

Unfortunately, nothing is simple when it comes to tipping and the Department of Labor. Of late, there seems to be confusion among investigators as to whether there are limitations as to the percent a server can be required to tip “share.” In a less structured dining room where a server may only need to tip out a busser and a runner the tip share may only amount to 15-20% of the total tip amount. However, in a fine dining restaurant where the service team involves a host, maitre d, captain, back waiter, sommelier, busser, runner, bartender and a barista, 50-60% of the total tips may be “shared.” The NYSDOL and plaintiffs’ bar has been known to take a rather simplistic view of service and assume that the majority of the tips were left to the server and should not be “cut” into so many other portions. This view ignores all of the other essential service team members. The service model is so bifurcated that contrary to the NYSDOL’s belief, there is often no “waiter” – but rather captains and back waiter and many other team members. So long as the minimum wage is met, and employees know in advance what the tip



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share percentages are, it should continue to be at the discretion of management to determine the distribution. Clarification and consistency with respect to the tip share is also needed.

V. **The World Yacht Decision and Service Charges**

In Samiento v. World Yacht, Inc., 10 N.Y. 3d 70 (Feb. 14, 2008), the New York Court found that, pursuant to New York Labor Law § 196-d, mandatory service charges may now be considered gratuities which must be paid in its entirety to the service staff if a "reasonable patron" would understand that the service charge "purported to be a gratuity" under Section 196-d, regardless of the employer's compensation system or the employees' expectations under it. (Treatise Section C-1). This decision is fueling a new wave of litigation in the restaurant and catering industries that threatens to topple both if the industries are forced to retroactively refund upwards of 20% of their gross receipts over the past six years to employees who have typically been paid far in excess of minimum wage for catering events.

Prior to World Yacht, the law in New York with respect to service charges had mirrored the Fair Labor Standards Act ("FLSA"); specifically, that service charges are were not considered "gratuities". On June 1, 1995, a watershed Memorandum was issued by the then Director of Labor Standards, Richard J. Polsinello. It said in key part:

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.***

(Emphasis supplied.) (Treatise Section C-3).

This Memorandum was routinely cited over the next 13 years by the NYSDOL for the proposition that so long as restaurants, hotels and catering facilities paid at least the minimum wage, taxed the service charge and did not refer to the charge as a gratuity, none of it had to be paid to the employees. See e.g. Hai Ming Lu v. Jing Fong Restaurant Inc., 503 F.Supp.2d 706 (S.D.N.Y. 2007) (Treatise Section A-6). This Memorandum was the definitive and consistently cited position of the NYSDOL on service charges. In fact, on October 26, 2007 an attorney from the NYDOL faxed the undersigned a copy of this Memorandum to distribute to members of the Association who would be attending a November 1 training the NYDOL and Association was



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jointly conducting for members. Members have thus longed relied on that Memorandum. (Treatise Section J-1).

Now, a cavalcade of lawsuits have flooded New York State and federal courts since World Yacht, all clamoring to recover the service charge on behalf of service staff who never expected to receive such charges in the first place. Many of New York's largest catering facilities and restaurants have been named in these suits – employers that had all followed the exact parameters set forth in the 1995 Polsinello Memorandum and had never received any complaints from its staff that they were entitled to the service charge fees. Not only do these suits threaten the very existence of these businesses, but New York State stands to lose significant tax revenue when these service charges that were previously taxed are subsequently reclassified as gratuities and are no longer taxable.

This issue is also about fairness. Service staff at catering events are well compensated. These are not minimum wage employees who are being denied tips. Unlike regular restaurant service staff who work for tips by continually “upselling” guests, catering or private events service staff know what they are being paid going into an event. They are being paid a set wage and are not selling food or beverages—the selling was already done ahead of time in the contract. At the event, service staff are simply being used to serve the food with a smile. Tips are rarely if ever given because guests are at an event hosted by the contracting party who is paying for the event. The dynamic – and the servers' expectations – are very different than in a restaurant setting.

Moreover, under the current state of the law, the business owners' good faith reliance on the Polsinello Memorandum does not provide them with any kind of reprieve. This is because, unlike the FLSA, New York's Labor Law does not contain a statutory good faith defense to liability. See e.g. 29 U.S.C. § 259 (the employer is not liable for conduct “in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of [the Wage and Hour Division].”) Accordingly, the service charge is an area ripe for legislative reform in New York.

VI. Uniforms, Spread of Hours & Call-In Pay

The Wage Order current requires restaurant owners to provide “minimum wage employees” with a uniform maintenance allowance of up to \$8.90 per week (depending on the number of hours worked), an extra hour of pay for employees who work a spread of ten hours or more in a day, and call-in pay corresponding to a minimum number of hours. These provisions are particularly onerous to the restaurant industry for a number of reasons. First, they are



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difficult to understand; second, they are poorly communicated by the NYSDOL to the industry; third, they are little known to the industry; and, fourth, their definitions are antiquated and do not reflect the demographics or workplaces of today.

Even a cursory review of the language of the Wage Order reveals that the call-in pay and spread of hours provisions in particular, are near impossible for even the most sophisticated attorney to understand, let alone a small business owner. The language of the Wage Order needs to be simplified so that business owner and employee alike can understand the provisions. In addition, the NYSDOL needs to do a better job of communicating its rules and provisions to the entities which are bound by them.

Significantly, as noted above, these provisions do not reflect the restaurant industry of today in terms of business practices or the demographics of the workplace. The spread of hours rule actually hurts employees. Many employees request to work "doubles." They want the flexibility to take time off during the day to go to school, take care of dependents, go on auditions or work a shorter work week by working longer days. By requiring a spread of hours payment, the NYSDOL is actually providing a disincentive for employers to permit employees to work "doubles." This seems counterintuitive and against the spirit of the regulation itself.

In addition, the uniform rules are also impractical and hard to follow. Essentially, an employer is required to pay its employees upwards of \$8.90 a week to wash a t-shirt if it contains an establishment's logo on it. This is unreasonable. No matter what an employee wears to work at any job, clothing must be washed. To require a restaurant owner to pay their employees \$8.90 per week to do nothing more than throw a t-shirt in with their regular wash is nonsensical. Federal law has a "wash and wear" exception that should be adapted by New York. Moreover, very often restaurants provide service employees with articles of clothing such as a jacket or vest that do not need to be regularly cleaned on a weekly basis. For these reasons, a weekly cleaning allowance is unduly burdensome on restaurant owners.

Finally, the Wage Order was created to protect the welfare of minimum wage employees. The vast majority of restaurant service workers are not minimum wage employees. An average New York City server can take home between \$250 in tips a night, and a runner/busser can take home between \$125-\$185 in tips a night. In fact, it is not uncommon for some New York City servers at certain restaurants and clubs to make well into the six-figures annually—all the while a restaurant's profit margin may still hover at 5%. A more practical solution would be to apply a "means test" to the relevant provisions of the Wage Order. The Wage Order should be about promoting employment in the industry, not hindering it.



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VII. Conclusion

Clearly, current Labor laws and regulations in New York are inconsistent with the needs and desires of both employers and employees. Administrative interpretation of these laws and regulations have varied from case to case. If the restaurant industry is to survive this economic downturn, it needs guidelines that are clear, reflect the times and promote all members of the industry. Restaurant owners need reform and they need to understand the rules.

We thank the Wage Board for their time and consideration.

Very truly yours,

FOX ROTHSCHILD LLP

Carolyn D. Richmond, Esq.

Attachments

cc: New York State Restaurant Association, Greater New York City Chapters



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