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# Empire State Restaurant & Tavern Association

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TESTIMONY OF

SCOTT WEXLER

EXECUTIVE DIRECTOR

EMPIRE STATE RESTAURANT & TAVERN ASSOCIATION

SUBMITTED TO THE

NEW YORK STATE LEGISLATIVE BUDGET HEARING

ON ECONOMIC DEVELOPMENT

FEBRUARY 2, 2016

ALBANY, NEW YORK

Chairwoman Young, Chairman Farrell, Chairman Boyle, Chairman Schimminger, members of the Senate Committees on Finance and Commerce, Economic Development and Small Business and members of the Assembly Ways & Means and Economic Development, Job Creation, Commerce and Industry Committees, thank you for giving me this opportunity to submit testimony on behalf of the Association's members to the Legislative Budget Hearing on Economic Development. The Association represents independent, small restaurants and tavern throughout the state – from Long Island to Niagara Falls – and they very much appreciate your willingness to listen to our concerns and priorities in your areas of focus.

The most important issue for our members in this year's Executive Budget is the Governor's proposal to raise the minimum wage. For our members the Governor's proposal is a double-edged sword – not only are they impacted by the exorbitant 67% proposed increase in the minimum wage – but under the existing Labor Law enactment of the Governor's minimum wage proposal will also lead to the appointment of another Wage Board by Governor Cuomo's Labor Commissioner. And the Commissioner would unilaterally determine the cash wage for tipped food service workers – the only workers whose minimum wage rate would be set by Executive fiat rather than by the laws enacted by the State Legislature. It's entirely possible this would result in elimination of tipping or the tip credit causing significant economic harm to our members and massive disruption in our industry.

I'm submitting testimony to the Legislative Budget Hearing on Workforce Development that addresses the minimum wage issue in detail – I've attached a copy for your information. But the Governor also committed to offering proposals to help offset the costs another minimum wage increase would impose on our members' business and I'm here to let you know that we find the "offsets" specifically proposed in the Executive Budget, if enacted, would barely make a dent in the exorbitant costs imposed on our members.

However, there are some promises of initiatives-to-come from the Governor in his State of the State Message. In particular, the SLA Chairman's Working Group on ABC Law Reform has been tasked with making recommendations for modernizing and reforming the law. This group is expected to complete its work and issue a report with recommendations for changes to the law at its next meeting on March 2<sup>nd</sup>. This Working Group did not emerge out of thin air and the history is worth recounting in order to understand the magnitude of its work product and importance of enacting its recommendations into law.

As you well know, the Alcoholic Beverage Control law was written following the repeal of Prohibition more than 80 years ago when the principal objective was to keep organized crime out of the liquor business. The vast majority of the provisions of the law are antiquated making it ill-equipped to address the continual evolution of the industry over the many decades. This is not news. When I started in this position more than 30 years ago State Senator Roy Goodman had already issued a report explaining the ways the Alcoholic Beverage Control law was antiquated and calling for the recodification of the law to bring it up-to-date. That was in 1981.

Think about it. The purpose of the Alcoholic Beverage Control law as written in 1934 was "to promote temperance and public convenience" which is often at cross purposes with our current emphasis on economic development and job creation. Society has undergone dramatic changes

over the years, but as our industry has tried to respond to our customers' demands we often have to shoehorn our practices into the laws, rules and regulations that are embedded in an era long since passed. But no matter how obvious the need to review and update the ABC law was it has not been an easy road to hoe.

I began working on legislation tasking the state's Law Review Commission with the responsibility to review and propose recommended changes to the ABC law in 1986. The original bill as I recall was sponsored by Senator Goodman and Assemblywoman Betty Connelly. But it wasn't until Governor Spitzer signed the bill sponsored by Senator Alesi and Assemblyman Schimminger into law as Chapter 391 of the Laws of 2007 was the process finally put in place for the Law Review Commission to study and make recommendations for revising the ABC law.

The Commission began their work in the Fall of 2007. They met with a wide cross-section of industry stakeholders one-on-one to understand their perspective, concerns and interests. The Commission held a number of roundtable discussions to examine topics of interest. The Commission was deliberative, taking about two years to complete their work, but their final report offered promise for improvements the law. I was in this room addressing Chairman Schimminger's Committee on Economic Development in January of 2010 expressing our enthusiasm for the Law Review Commission's proposals and the hope that many of the recommendations would be enacted into law. That was six years ago.

While a few of the recommendations of the Law Review Commission were enacted into law in bits and pieces in the years since, the main thrust of the recommendations lay dormant. It's unclear where the process fell down but legislation advancing the Commission's recommendations never materialized. Two years ago then State Liquor Authority Chairman Dennis Rosen sought to advance his vision of a revised ABC law in the waning days of the legislative session that was prepared without stakeholder input and it was widely rebuked.

Governor Cuomo has made the state alcohol beverage producers a priority in his economic development efforts. These products are among the most successful members of the Taste NY program and our members are proud to serve and use many Made in New York products. And the Governor has extended this to support for the State Liquor Authority – and our members have been the beneficiaries of improved service, reduced licensing processing and agency personnel who actually seem interested in providing assistance to business owners and the public.

The Governor has held three "Summits" to focus attention on the state's alcohol beverage industry and at the Third Summit this Fall the Governor announced the creation of the aforementioned SLA Chairman's Working Group. And with that announcement the Governor embraced the longstanding call for ABC reform, empowering the State Liquor Authority to resurrect the work of the Law Review Commission, engage stakeholders in a robust discussion and develop recommendations for changes to the ABC law.

SLA Chairman Bradley selected a group of industry representatives and a representative of a New York City Community Board to serve on this Working Group. SLA senior staff led the panel through a discussion of possible topics to consider and the Group agreed to discuss an extensive list of ideas for possible changes to the law. After three meetings at which the members of the

Working Group discussed the pros and cons of each issue they reached consensus on about twenty recommendations for changes to the ABC law (the final list will be approved on March 2<sup>nd</sup>). The recommendations most important to our members are:

**Reorganization of the Existing Law** - this was one of the primary recommendations of the Law Review Commission. The current law is haphazardly organized making it more difficult to understand and all but impossible for a small business owner to navigate. The Working Group report will recommend reorganizing the law in the manner drafted by the State Liquor Authority.

**Flexibility in Application of 200 Foot Law** - amongst the most dated provisions of the law is the outright prohibition on granting an on-premises liquor license within 200 feet of a school or place of worship. This has become a barrier to economic development in many communities. The Working Group report will recommend providing the State Liquor Authority the ability to grant such a license subject to the advice and input of local communities.

**Sunday Morning On-Premise Sales** - the inability to sell alcoholic beverages on Sunday morning is one of the most antiquated parts of the law, one of the only remaining "Blue laws" on the books that restricts New Yorkers' social and economic activities in the name of religion. The Working Group report will recommend completely eliminating the prohibition on Sunday morning sales in restaurants and taverns making the allowable hours of sale the same on all seven days of the week.

**Pricing** - a number of the members of the Working Group wanted to address the laws governing the buying and selling of wine and liquor to retailers. Our members are flummoxed by a system where they pay more for a bottle of liquor at wholesale than it's available for sale at retail through their local liquor store. Other stakeholders, including our wholesalers, have their own ideas for modifying the current system. While this has been one of the most challenging set of the issues the Working Group took on, it's so important that the report will recommend continuing this discussion in the hope of finding common ground.

Several of these recommendations already exist in legislative proposals. For example, Senator O'Mara and Assemblyman Morelle are sponsoring a bill to permit Sunday morning sales. It doesn't go as far as the Working Group would like. Rather than eliminating the Sunday morning prohibition statewide for all licensed premises, this bill authorizes the State Liquor Authority to permit Sunday morning sales at individual premises and it provides local municipalities with the same advisory role they have in the licensing process.

Assemblyman Skartados recently introduced legislation that would give the State Liquor Authority the discretion to issue a liquor license to a premise within 200 feet of a school or place of worship. His district includes numerous typical upstate cities, with mixed-use downtowns in which places of worship are intermingled with local businesses. But no new restaurants or taverns can open in these downtown areas due to the complete prohibition in the law. The only work around is to get an exemption passed by the Assembly and Senate and signed into law by the Governor – an overwhelming hurdle for most business owners and leaving empty storefronts in many communities.

The pricing issue has been addressed by a number of legislative proposals. Senator Gallivan has introduced two bills to help address the cost of goods for retailers. One allows individual retailers to join together to take advantage of quantity discounts available from wholesalers and another allows liquor stores to sell to restaurants and bars. Both proposals have the effect of lowering the costs for business owners and helping small business owners compete with their large, corporate competitors. Our members have no problem competing in the marketplace as long as the playing field is level, but the current system doesn't meet that test.

These proposed changes in the law stand on their own as reasonable, sensible modifications that reflect modern times and practices. But they bring an urgency to their consideration and advancement in light of your consideration of higher wage mandates. And that's why the history is so important. Senator Goodman called out for reform in 1981. Assemblyman Schimminger was successful getting the review process started in 2007. The Law Review Commission issued its recommendations in 2009. And now, seven years later, an Industry Working Group is poised to present you with a report of recommendations adopted by consensus for modernizing and reforming these laws. The circle is complete so to speak. Thirty-five years after Roy Goodman began the process his successors and former colleagues can finish the job.

I thank you for all the work you, your staffs – including the Central staff in both houses – have invested in this over the years. I'm looking forward to a robust discussion of these ideas in the weeks ahead and I'm hopeful that the last vestiges of Prohibition have are about to see their final days. Thank you for your consideration.



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FEBRUARY 3, 2016

ALBANY, NEW YORK

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

