

**STATE SENATOR KATHY BERNIER**  
TWENTY-THIRD SENATE DISTRICT



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**From: Senator Kathy Bernier**  
**To: The Senate Committee on Labor and Regulatory Reform**  
**Re: Testimony on Senate Bill 758**  
**Relating to: counting of tips for tipped employees and granting rule-making authority.**  
**Date: February 12, 2020**

Thank you Chairman Nass and committee members for allowing me to testify on Senate Bill 758 today. I am grateful for the opportunity to work with Rep. Schraa and the Wisconsin Restaurant Association on this important piece of legislation.

Restaurants have become the target of frivolous lawsuits due to an outdated provision in the administrative code.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

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

This loophole must be corrected before more small businesses face the disruption and expense of these attacks. Which is why I ask you to please support the passage of Senate Bill 641. Thank you again for allowing me to provide testimony today.



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### **Written Testimony**

**TO: Senate Committee on Labor and Regulatory Reform**

**FR: Susan Quam, Executive Vice President**

### **Support of SB 758**

Thank you Chair Nass and members of the committee for the opportunity to speak to you today in support of SB 578.

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

We consider this an issue that cannot wait to be addressed through the administrative rule update process and we believe SB 758 needs to pass this session to prevent thousands of small businesses from frivolous lawsuits.

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

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

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

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

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

We strongly encourage you to pass SB 758. One restaurant has already spent \$10,000 defending themselves in one of these lawsuits. What is worse, they are being sued for what is lawful employment practice. A legislative fix is needed this session!

#### **Background information:**

#### **The statute giving authority to DWD is**

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

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

#### **The administrative rule in question is**

#### **DWD 272.01(b).**

#### **(b) *Burden of proof.***

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

#### DWD 272.03(2)(b)2


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

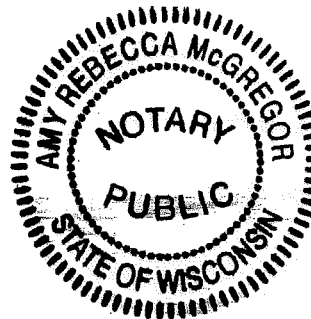


6. Claims for violations of the tip declaration recordkeeping requirements of DWD § 272.03(2) can only be pursued by the DWD, and the DWD would not pursue a claim alleging a violation of DWD § 272.03(2) based on the above-described system.

  
Jim Chiolino

Subscribed and sworn to before me  
this 7<sup>th</sup> day of November, 2019.

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



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Tony Evers, Governor  
Caleb Frostman, Secretary

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Testimony on Senate Bill 758  
Senate Committee on Labor and Regulatory Reform  
February 12, 2020

Thank you, Chair Nass and members of the Committee, for this opportunity to speak for informational purposes on SB 758.

This bill would require the Department of Workforce Development to promulgate rules that would allow an employer to require tipped employees to use an electronic signature or other electronic means that uniquely identifies that employee when acknowledging the counting of tips toward fulfillment of minimum wage obligations.

The current rule on this topic provides:

DWD 272.03(2)(b).

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

Since the inception of electronic point-of-sale (POS) systems, the Department's Equal Rights Division has interpreted the rule in a consistent fashion as it relates to those systems. An employer that uses a POS system to collect employee tip information, and requires that its tipped employees enter their tips into that system at the end of each shift, and provides them with paychecks with their paystubs attached that reflect the proper taxes taken out for all the wages (including hourly wages and tips), meets the requirements of DWD 272.03(2).

This bill would simply codify that interpretation.