



MICHAEL SCHRAA

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SB 50 Testimony on Tipped Wage

Thank you, Chairman Nass and members of the Committee on Labor and Regulatory Reform, for the opportunity to provide testimony on Senate Bill 50, which deals with recording tips for tipped employees.

All restaurant owners take advantage of the tip credit. My tipped employees used to total their tips and sign their timecards verifying the amount. We recently purchased a point of sale (POS) system and now our wait staff verifies that they have at least made minimum wage by signing electronically in that system. This is standard practice, in accordance with Department of Workforce Development (DWD) guidelines.

You can imagine my surprise last session when I learned from the Wisconsin Restaurant Association that restaurants are facing frivolous lawsuits due to an outdated requirement in the Administrative Code. Lawyers representing former tipped employees are suing for the difference between the tipped wage and the minimum wage. They allege that DWD does not have the authority to issue guidance that POS systems are sufficient to record tips, so unless there is a physical signature on paper every pay period, they claim that restaurants are on the hook for all those back wages.

There is no question that these employees were fairly compensated for their work. There is also no question that DWD has the authority to issue guidance on this antiquated rule. Unfortunately, restaurants must spend tens of thousands of dollars to simply defend practices that are sanctioned by DWD.

SB 50 simply closes this imaginary loophole so that restaurants may continue to use current technology to record tips and claim the tip credit. The identical bill was passed unanimously out of this committee last session, but was not voted upon in the final Senate floor date. Restaurants are in a more difficult position than ever due to the economic realities of the COVID pandemic. They need to have the tipped wage issue resolved as quickly as possible.

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 50
Relating to: counting of tips for tipped employees and granting rule-making authority.
Date: February 8, 2021

Thank you Chairman Nass and committee members for allowing me to provide testimony on Senate Bill 50 today. I am grateful for the opportunity to work with Rep. Schraa and the Wisconsin Restaurant Association on this important piece of legislation.

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

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

This loophole must be corrected before more small businesses face the disruption and expense of these attacks. Swift passage of Senate Bill 50 would provide for clarity and security for small businesses and those who earn a living with a tipped wage. Thank you again for allowing me to provide testimony today.

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Tony Evers, Governor
Amy Pechacek, Secretary-designee

Testimony on 2021 Senate Bill 50
Senate Committee on Labor and Regulatory Reform
Monday, February 8, 2021 at 1:30 PM
Wisconsin State Capitol, Room 201 Southeast

Dear Chair Nass and Committee Members:

Thank you for the opportunity to provide testimony for informational purposes on 2021 Senate Bill 50.

SB 50 requires the Department of Workforce Development (DWD) 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 administrative rule controlling this topic, DWD 272.03(2)(b), provides the following:

(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, DWD's Equal Rights Division has consistently interpreted and applied the existing rule. ERD has found that an employer that uses a POS system to collect employee tip information, requires 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).

SB 50 would codify that interpretation.

Sincerely,

Danielle Williams
Assistant Deputy Secretary
Department of Workforce Development

Matthew White
Bureau of Investigations Director
DWD Equal Rights Division



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Testimony

February 8, 2021

TO: Senate Committee on Labor and Regulatory Reform
Senator Stephen Nass, Chair

FR: Susan Quam, Executive Vice President

RE: Testimony in support of SB 50

Thank you Mr. Chairman and members of the committee for hearing our testimony today. Just 10 months ago, I presented very similar testimony on this bill's predecessor and then its Assembly bill companion that passed the Assembly on a voice vote. With the pandemic interrupting the last session, I am here again to ask for your support of this important measure for the restaurant industry.

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

This bill addresses a problem we first learned about in December of 2019. Restaurants located in the southeast part of Wisconsin have been targeted in lawsuits relating to how tipped employees declare (report) their tips. The crux of the lawsuits relate to the Department of Workforce Development's administrative rule, which dictates how those tips are documented by the employer.

We consider this an issue that cannot wait to be addressed through the slow administrative rule update process and we believe SB 50 needs to pass early 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 defending itself in. At their request, we are keeping the restaurant name confidential.

Here is the crux of the problem. Employment lawyers are taking advantage of an out of date administrative rule to bring nuisance lawsuits against employers who use the tip credit (aka tipped wage). Current Wisconsin Administrative rule regarding employee tip declarations and what the Department of Workforce Development considers 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 acknowledged 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 software that generate employee paychecks, which show the appropriate taxes have been withheld. The use of POS systems to collect and confirm payroll information also satisfies federal reporting/declaration requirement laws, so DWD's interpretation conforms to 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.

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 IRS or federal Department of Labor does an employer audit, the first place they begin looking for information is via the POS system, because POS information cannot be changed. The DWD and the state Department of Revenue do the same.

I am sure you all know the toll the COVID-19 pandemic has taken on the entire hospitality and tourism industry. The vast majority of restaurants have seen steep declines in their sales, steep increases in prices for supplies and services and in some places, severe restrictions on their ability to be open and safely serve customers. It seems like every time we turn on the news or read publications, public health officials across the country are scapegoating restaurants and other public facing businesses as places to avoid, or even worse, close in order to protect the public. And worst of all, our industry has been forced to lay off a large number of our employees, who in turn are suffering economically and having a hard time paying their own bills.

We strongly encourage you to pass SB 50. Restaurants are spending \$10,000 - \$20,000 defending themselves in these these lawsuits. Most have held out from settling, knowing that if they settle, more lawsuits will come. What is worse, these restaurants are being sued for what is lawful employment practice.

Background information:

The statute giving authority to DWD is

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

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

The administrative rule in question is DWD 272.01(b).

(b) Burden of proof.

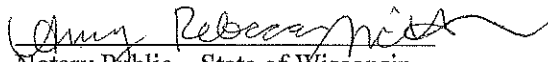
1. When the employer elects to take tip credit **the employer must have a tip declaration signed by the tipped employee each pay period** and show on the payroll records that any required social security or taxes have been withheld each pay period to show that when adding the tips received to the wages paid by the employer, no less than the minimum rate was received by the employee. When the employer's time and payroll records do not contain these requirements, no tip credit shall be allowed. DWD 272.03(2)(b)2.

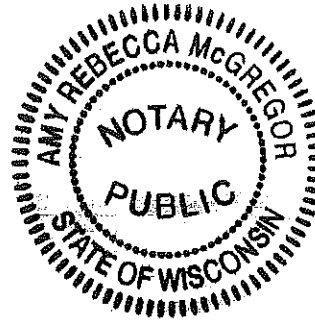
2. The department may refuse to take action to collect minimum wage deficiencies for a tipped employee who has refused or failed to file an accurate signed tip declaration for the employer each pay period

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


Jim Chiolino

Subscribed and sworn to before me
this 7th day of November, 2019.


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



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