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# Empire State Restaurant & Tavern Association

*Report From The Executive Director...Scott Wexler*

## January 2018

Tip Credit & Tipped Wage Under Attack - As you've read and heard in the news, Governor Cuomo has proposed holding statewide hearings to consider eliminating the tip credit. According to the Governor's original announcement last month, the hearings will determine whether the ability to pay employees less than the minimum wage is resulting in a hardship to these workers. While the announcement says it's an open question, our expectation is that these hearings will be used to justify eliminating the tip credit and requiring all servers to be paid the full minimum wage. Our fears were not relieved in any way by the recent announcement of the hearing schedule (more details below) in which the Governor uses more strident rhetoric including some of the language used by the advocates of eliminating the tip credit.

The only question is whether the Labor Commissioner will do this administratively or whether the Governor will seek to change the law which will require the engagement of the Assembly and Senate. During the recent battle over the \$15 minimum wage the State Labor Law was amended to stipulate that the cash wage for tipped food service workers is two-thirds of the minimum wage. But the provisions of the Labor Law that allows for the Labor Commissioner to enact such a change administratively were not removed from the law leading some to believe the tip credit can be eliminated without legislative action.

That's a question for the courts – if it comes to it – but for now we need to try to prevent ourselves from landing in that spot. The major groups representing the hospitality industry in New York State have formed a coalition to fight to protect the industry, its workers and businesses from the devastating effects of this proposal. The NYS Restaurant Association, the NYS Hospitality & Tourism Association, the NYS Bowling Proprietors Association, the NYC Hospitality Alliance and our Association are collaborating on our grassroots lobbying and communications activity. We're all on the same page in this battle. We'll be sharing a website so there's one spot for folks to go for information from the industry's perspective and so we can more easily coordinate our efforts. We'll provide the website address to you as soon as the page goes live.

One of the keys to our strategy is to focus as much as possible on the benefits to tipped workers of the current system and the possible problems they can experience if the tip credit is eliminated. The advocates of eliminating the tip credit highlight the segment of the tipped foodservice workers industry that make barely above the minimum wage. Tipped workers in full service restaurants, taverns and bars make considerably more than

the minimum wage – and we need them to tell the Labor Commissioner to leave the system alone. We also have to counter the image that owners are stealing tips from their workers and that working in the hospitality industry is a sexual harassment nightmare. The testimonials from owners, managers and servers are the best weapons we have.

The hearings will begin in March in Syracuse and conclude at the end of June in New York City. The hearing schedule is as follows:

**Monday, March 12, 2018 at 10 a.m.**

SUNY College of Environmental Science and Forestry  
The Gateway Center, Syracuse

**Wednesday, March 21, 2018 at 10 a.m.**

Common Council Chamber  
City Hall, Buffalo

**Friday, April 20, 2018 at 10 a.m.**

Roosevelt Little Theatre  
SUNY Farmingdale

**Wednesday, April 25, 2018 at 10 a.m.**

Dulles State Office Building  
317 Washington Street, Watertown

**Friday, May 18, 2018 at 10 a.m.**

Legislative Office Building, Albany

**Week of June 25**

New York City, Location TBD

Anyone wishing to testify at one of these hearings must pre-register with the Department of Labor. You can register:

- Online: [www.labor.ny.gov/subminimum](http://www.labor.ny.gov/subminimum)
- Email: [hearing@labor.ny.gov](mailto:hearing@labor.ny.gov)
- Phone: 518-457-5519
- Fax: 518-485-1126
- Mail: New York State Department of Labor  
ATTN: Subminimum Wage Hearing  
Building 12, Room 588  
Harriman State Office Campus  
Albany, NY 12240

Please sign-up to testify at these hearings and encourage your employees to sign-up to testify as well. The only way to prevent the elimination of the tip credit is to make it clear how damaging it will be and how unpopular it is. We'll keep you updated on developments as they occur. Watch our website, [www.esrta.org](http://www.esrta.org), for regular updates.

SLA Issues \$3.5 Million Penalty Against Wholesale Giant - The State Liquor Authority accepted a conditional no contest offer from Southern Glazer Wine & Spirits (SGWS) to settle charges that SGWS engaged in “pay-to-play” by providing illegal gifts and services to business to influence their purchasing decisions, for permitting incomplete, inaccurate, and inadequate recordkeeping practices, and for engaging in discriminatory sales. Some of these violations constitute serious and systemic violations of the 2006 Wholesale Consent Order and Decree.

Southern has agreed to pay \$3.5 million in civil penalties, the largest fine ever imposed by the SLA, as well as one of the largest fines imposed by any state liquor administrator. In addition to the \$3.5 million civil penalty, the SLA and SGWS have agreed to a groundbreaking new Corporate Compliance Agreement. The program will be one of the first of its kind within the alcoholic beverage control industry, creating additional obligations and responsibilities on SWGS to report suspicious activity directly to the SLA for investigation and possible prosecution. By working together to identify suspicious activity early, SGWS and SLA are creating a new scalable and replicable compliance model for the industry. The Corporate Compliance Agreement includes a Code of Business Conduct and Ethics, a Corporate Compliance Program and Policy, and provides for a Corporate Compliance Officer, as jointly appointed by the SLA and SGWS, to monitor and address suspicious activity both to SLA and SGWS.

We’ll Be Calling You - One of our most valuable membership benefits is our workers’ compensation insurance safety group. Almost half of our members belong to the group and are receiving the benefits of an advance discount and an annual dividend. In these difficult times we want to make sure every member is aware of its value proposition so our workers’ compensation group manager, the Risk Management Planning Group (RMPG) a York Risk Services Group Company, will be reaching out to members not currently participating in the group to offer you the opportunity to learn how much you can save in workers’ compensation costs by joining our group. They’ll also be reaching out to non-member establishments across the state to try to help expand our membership but we’re starting with outreach to our current members to give you priority access to the enrollment process. To paraphrase a TV commercial for a well-known auto insurance company “take 15 minutes and see how much you can save.”

New York Cracks Down on Service Animal Fraud - A new law makes it unlawful for any person to knowingly affix to any dog any false or improper tag identifying the dog as a guide, service, therapy or hearing dog. While this law is helpful in dealing with fraudsters, it does not broaden the scope of permissible questions businesses and their employees may ask of patrons. Employees may ask only a limited number of questions to assess whether they are required to allow an alleged service animal to enter the premises. You may ask if the service animal is required because of a disability, but you can’t inquire about the disability. You can also ask about the work or task that the service animal has been trained to perform. You should not ask for medical documentation, require a special identification card or training documentation for the service animal or ask that the service animal perform the work or task.

SLA Chooses Not to Remove Split Case Charge Regulation - This past Fall we reported to you that the State Liquor Authority was considering amending several of their rules and regulations, including the regulation that limits the amount a wholesaler can charge you for “splitting a case” of liquor. The current regulation limits the charge to \$1.92 per case (pro-rated per bottle) although current practice sees charges as high as almost \$30 per case. The wholesalers can do this because allegedly, under a previous administration, the Liquor Authority permitted the wholesalers to charge whatever they want as long as they publicly posted their charges (which they do). The Authority proposed to remove this provision from the regulations since it hadn’t been enforced in several years and because it would be easier to regulate this through the use of advisories or bulletins rather than by regulation which has a highly regimented process for making future changes. We protested – and we won!

In written comments submitted to the State Liquor Authority and in oral comments provided at their public hearing on the proposed changes, the Association urged the SLA not to delete these provisions. We recognized that they were in need of being updated, but that it should be done based on data demonstrating the basis for any proposed rate. And we also used the opportunity to call the Authority’s attention to the fees wholesalers charge for delivery – which appear to be out of compliance with the existing SLA regulations that govern such charges. In addition to our own testimony, comments supporting our position were submitted to the SLA by Assemblymember Dan Quart, the Assembly Co-Chairman of the Legislative Administrative Regulatory Review Commission.

And we were successful on both counts. The final regulations were just released and the Liquor Authority removed the proposed changes to the split case charge. While the SLA is not going to enforce the outdated limits, Chairman Bradley has indicated he will be following up on our suggestion to bring all stakeholders together to look at the appropriate data and then the Authority can propose new limits that make sense. They’re also committed to examining the delivery charge issue. The Chairman has heard complaints about delivery charges from many individual licensees so our concerns resonated with him when we presented them.

We’re still examining the possibility of suing wholesalers for charging more for split cases and delivery than the SLA regulation permits. It looks to be a very expensive pursuit and as important as it is, with the tipped wage issue ahead of us, we need to establish our priorities. We’ll continue to pursue legislative relief by seeking passage of S4343 – A7898, our proposal to allow on-premises licensees to purchase wine and spirits from liquor stores. Our progress will be dependent in large part on your willingness to join in our grassroots lobbying activity. Stay tuned for future updates and requests.