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Testimony of Professor Dorothy (Dede) Hill Albany Law School

To the New York State Wage Board

Regarding Changes to Regulations Governing Wage Rates and Tip Credits in the Hospitality Industry

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Good afternoon Chairman Grippen and members of the Wage Board. Thank you for giving me an opportunity to speak on this important issue. As an academic, my scholarship has focused on labor issues faced by low wage and immigrant workers, and as an attorney, I represented unions and employees in all manner of employment dispute.¹ Perhaps more important than my professional credentials are the years I spent before I decided to attend law school (barely) supporting myself waiting tables – at the Solid Gold Diner outside of Iowa City and at a wildly unpopular pizza place in San Francisco. I remember well the months when my tips were less than expected. Those months, I skimmed on groceries to make sure I had enough for the rent. For me, as a single young person with few financial obligations, this uncertainty was manageable. I shudder to think what that uncertainty would be like if I faced it now, with two kids to support and a mortgage to pay.

I recommend eliminating the tipped wage in New York for a number of reasons, principal among them so that the state’s nearly 230,000 tipped workers are not left to guess each week what their paycheck will hold. In addition, the data from the seven states without a tipped minimum wage strongly suggests that eliminating the tipped wage will not have a significant negative impact on New York industries that employ tipped workers – indeed, the National Restaurant Association is predicting greater job growth in the restaurant industry in the states without a tipped minimum wage than in New York.² Another reason, and the one I would like to focus upon, is that the current tipped wage system leaves New York’s tipped employees particularly vulnerable to wage theft for three interconnected reasons: (1) it is very difficult for well-meaning employers to properly implement; (2) it is very easy for unscrupulous employers to disregard; and (3) it is nearly impossible for employees and resource-strapped federal and state Departments of Labor, to consistently monitor and enforce.

The Tipped Wage Rules are Hard for Employers to Properly Implement

First, as has already been described by many previous speakers, employers’ obligation to “top up” the wages of tipped employees to the minimum wage is a complicated undertaking – particularly for small businesses. Most restaurants in New York – which employ the majority of the State’s tipped employees – are very

¹ See, e.g., Dorothy E. Hill, Guest Worker Programs are No Fix for Our Broken Immigration System: Evidence from the Northern Mariana Islands, 41 *New Mexico L. Rev.* 131 (2011).

² See also, National Restaurant Association, Facts at a Glance, available at <http://www.restaurant.org/News-Research/Research/Facts-at-a-Glance>.

small operations, without in-house accountants, or human resources professionals.³ The complexities of tracking tips and calculating the amounts owed each employee each week are likely part of the reason that ten percent of tipped employees surveyed by the White House National Economic Council in 2014 reported that their wages were not “topped up” by their employers.⁴ Moreover, the formula is so complex, many employees cannot even determine when they are owed wages.⁵

Wage Theft is All Too Common in the Restaurant Industry and Beyond

Second, tipped wage employees are particularly vulnerable to wage theft because of the complexities of the topping off rules, and because so many tipped employees work in the restaurant industry – an industry that has been identified as one in which wage violations are particularly widespread.⁶ During the period 2010 to 2012, the U.S. Department of Labor investigated nearly 9,000 full-service restaurants and found that 83.8 percent of the restaurants were in violation of wage and hour laws. Violations included 1,170 tip credit infractions that resulted in nearly \$5.5 million in back wages.⁷ In fact, it has been widely recognized in recent years that wage theft is an all-too-common problem across low-wage industries, one that is not limited to a few bad apple employers, and one that takes myriad forms, from deliberate policies requiring off-the-clock work, to periodic bounced checks and miscalculated hours.⁸

³ National Restaurant Association, New York Restaurant Industry, Facts at a Glance, available at <http://www.restaurant.org/Downloads/PDFs/State-Statistics/2014/new-york> (reporting that New York State is home to approximately 44,500 restaurants that employ 591,000 employees, or an average of 13 workers per restaurant). See also, National Restaurant Association, Facts at a Glance, available at <http://www.restaurant.org/News-Research/Research/Facts-at-a-Glance> (reporting that nine out of ten restaurants in the country employ less than 50 employees).

⁴ See “The Impact of Raising the Minimum Wage on Women and the Importance of Ensuring a Robust Tipped Minimum Wage,” The White House, March 2014, available at <http://www.whitehouse.gov/sites/default/files/docs/20140325minimumwageandwomenreportfinal.pdf>

⁵ Sylvia Allegretto and David Cooper, “Twenty-three Years and Still Waiting for Change: Why It’s Time to Give Tipped Workers the Regular Minimum Wage” (2014) 17-18, available at <http://www.epi.org/publication/waiting-for-change-tipped-minimum-wage/>

⁶ Id. at 18.

⁷ Id. (In total, the DOL recovered \$56.8 million in back wages for nearly 82,000 workers.)

⁸ Brady Meixell and Ross Eisenbrey, An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year, Economic Policy Institute (Sept. 2014), available at <http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/>.

Labor Enforcement Agencies Have Very Limited Resources

Third, neither the United States Department of Labor, nor the New York State Department of Labor, has sufficient resources to promptly and efficiently address the tens of thousands of individual wage complaints they receive each year, let alone to engage in close, affirmative monitoring of industries with complex wage structures – like those that employ tipped employees. For instance, the Wage and Hour Division of the United States Department of Labor currently employs 1,040 investigators to monitor a workforce of approximately 130 million covered workers.⁹ The New York State Department of Labor’s 98 investigators have had to handle an average of 7000 new wage theft cases each year during the period 2008 through 2013, along with a tremendous backlog of old cases.¹⁰

What the prevalence of wage theft and paucity of enforcement resources means is that enforcement of the wage and hour laws falls almost entirely upon workers themselves – to identify violations, and then to pursue relief with determination. When workers cannot even determine whether they have been paid the proper wage – as is often the case with tipped workers – there is essentially no chance they’ll recover wages wrongly denied.¹¹

Conclusion

No matter the reason that many tipped employees are not paid the minimum wage – be it by inadvertent mistakes by busy employers, or intentional practices undertaken to increase profit – the impact on the employees is the same: many

⁹ Steven Greenhouse, “Study Finds Violations of Wage Laws in New York and California,” N.Y. Times (Dec. 3, 2014), available at <http://www.nytimes.com/2014/12/04/business/study-finds-violations-of-wage-law-in-new-york-and-california.html> (reporting that the U.S. DOL currently employs 1,040 investigators); United States Department of Labor, Wage and Hour Division, Fact Sheet # 14: Coverage under the Fair Labor Standards Act (FLSA), available at <http://www.dol.gov/whd/regs/compliance/whdfs14.htm> (citing the number of workers covered by the FLSA in 2009 as 130 million). This number has likely grown since reported in 2009.

¹⁰ See “Wage Theft Investigations,” NY Office of the State Comptroller, Report 2013-S-38 (June 2014) at 6; <http://www.osc.state.ny.us/audits/allaudits/093014/13s38.pdf> (noting that each of the Department’s 98 investigators has an average caseload of 95 active wage theft investigations at any given time).

¹¹ Martha C. White, “Wage Theft Costing Low-Income Workers Billions,” Sept. 27, 2014, available at <http://www.nbcnews.com/business/economy/wage-theft-costing-low-income-workers-billions-n212406> (Quoting Gary Burtless, a labor economist at the Brookings Institute, explaining that to recover unpaid wages “requires determined and often prolonged efforts [by] workers or their representatives to bring violations to the attention of enforcement authorities.”)

must rely on food stamps, school lunches, Medicare, and other taxpayer-funded social services to make ends meet.¹² At the same time, careful employers, who make sure to follow the labor laws, are put at a competitive disadvantage by those that do not.

In sum, eliminating the tipped wage would be a simple and effective way to prevent wage theft of tipped employees by (1) making it easier for responsible employers to comply with the law, (2) making it harder for irresponsible employers to hide their wage and hour violations, (3) enabling tipped workers to more easily monitor their own paychecks, and recognize and report violations, and (4) simplifying wage investigations for resource-strapped agencies.

Eliminating the tipped minimum wage is the right thing to do for New York's struggling low-wage workers, and for its many conscientious small businesses.

¹² Clare O'Connor, "Report: Walmart Workers Cost Taxpayers \$6.2 Billion In Public Assistance," *Forbes* (4/15/2013), available at <http://www.forbes.com/sites/clareoconnor/2014/04/15/report-walmart-workers-cost-taxpayers-6-2-billion-in-public-assistance/>