15.0609.02000

FISCAL NOTE Requested by Legislative Council 01/20/2015

Bill/Resolution No.: HB 1438

1 A. State fiscal effect: Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.

	2013-2015 Biennium		2015-2017 Biennium		2017-2019 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1 B. County, city, school district and township fiscal effect: Identify the fiscal effect on the appropriate political subdivision.

	2013-2015 Biennium	2015-2017 Biennium	2017-2019 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **Bill and fiscal impact summary:** Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).

HB 1438 increases the minimum wage for tipped employees.

B. Fiscal impact sections: Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.

HB 1438 increases the state minimum wage for tipped employees by about \$.39 cents per hour in the first biennium (from \$4.86 per hour to \$5.25) and raises it in \$1.00 per hour biennial increments thereafter. This will likely increase individual income tax collections due to the potential growth in income on the part of tipped employees. The amount of this income growth -- and the associated increase in income tax collections -- cannot be estimated.

- 3. State fiscal effect detail: For information shown under state fiscal effect in 1A, please:
 - A. **Revenues:** Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.
 - B. Expenditures: Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.
 - C. **Appropriations:** Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.

Name: Kathryn L. Strombeck Agency: Office of Tax Commissioner Telephone: 328-3402 Date Prepared: 01/26/2015

2015 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1438

2015 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee

Peace Garden Room, State Capitol

HB 1438 1/28/2015 Job Number 22693

□ Subcommittee □ Conference Committee

Committee Clerk Signature Re Mae Kush

Explanation or reason for introduction of bill/resolution:

Minimum wage for tipped employees.

Minutes:

Attachments #1-4

Chairman Keiser: Opens the hearing on HB 1438.

Representative Boschee~District 44-Fargo, Sponsor: (Attachment 1).

(3:34)

Representative Laning: You mentioned an employer has to show the pay he provides and tips equals minimum wage. Do you know of any claims where the employer had to prove it?

Representative Boschee: The Department of Labor may be able to answer that.

Representative Amerman: A tipped minimum wage is \$4.86. The restaurant owner has to pay the \$4.86?

Representative Boschee: That is how I understand it. Tips will make up the rest.

Representative Becker: You indicated that raising the wage for tipped employees would increase restaurant sales. Is it because servers are not going to be subminimum wage that the patrons of the restaurant will be tipping less or not at all so now they are a regular wage person? They can now apply those dollars to making more purchases in the restaurants. Is that the reason?

Representative Boschee: Look at page 4 & 5 of the report (Attachment 1, page 8 & 9). As the Restaurant Opportunities Center identifies the increase in purchasing power, the restaurant industry is buying more.

Representative Becker: Various restaurants jobs are entry level jobs. That's how many of us got a start in life. It's not a problem that there is a high percentage of people at a lower standard of living because they are just getting started. I'm not so sure that the tipped employees will be in favor of this bill. They make good money with tips. If the new understanding is going to be that servers are now on par with other non-tipped employees there is going to be much less that compels the patron to tip the employee. Also, the manager may say all the tips will be shared by everyone. So even though the wage will be increased, the take-home pay will be less. Do you see a problem in my analysis?

Representative Boschee: I don't disagree that those in the service industry make good livings. My concern is for a family where it's the only income. The point of tipping is the quality of service.

Representative Louser: Your testimony says there are more than 10,000 tipped workers in North Dakota. Do we know how many of the 10,000 are under 21?

Representative Boschee: I'll email that information to you.

Representative Ruby: The two levels we have now-- the \$4.86 and the \$7.25 are the federal minimum wage level. Correct?

Representative Boschee: Yes. The standard minimum wage in the country is \$7.25. We are over double of the federal tipped minimum wage level for North Dakota. The federal tipped minimum wage is \$2.13. If you go to the Restaurant Opportunities Center's website you will see wages from other states. We are in the minority of states above that. That shows our restaurant industry is taking care of our employees.

Vice Chairman Sukut: If we are going to mandate a wage that a restaurant owner is going to pay, what is that going to do for the cost of the meal?

Representative Boschee: Yes, we as the consumers will likely see an increase in the price of the product. That's why we went with the incremental over a four-year period until we reach the floor of the state minimum wage.

Representative Beadle: When I worked in a restaurant and they calculated at the end of the day what was received for tips, cash tips were not recorded as part of their salary. They just used 8% of the sales to assume what the server received as tips. Have we seen more accurate data with the use of credit cards? Is there any data showing a correlation between increases in prevalence of that as well as any adjustments in annual take-home pay of tipped employees? When we look at states that have increased the higher tipped minimum wage above \$5, is there a correlation due to faster recovery during post-recession?

Representative Boschee: Your last question, I will dig into it deeper. To your previous point about an analysis using credit cards, we can see if that exists. Tips are usually in cash and then allow the employee to decide how to report it. When people are making \$7.25, it is reported on a W-2 Form.

Representative Frantsvog: You said there are some 10,000 employees in North Dakota that are working in the food service industry.

Representative Boschee: Yes, that is according to the Bureau of Labor Statistics from May of 2013.

Representative Frantsvog: Does that tell how many are making over minimum wage?

Representative Boschee: The median income of tipped workers in North Dakota is \$8.50. It's actually above the minimum wage. But when we look at the mean that is a statistical number so there are people who make less and there are some that make more.

Representative Frantsvog: How many make less?

Representative Boschee: The report I was looking at from the Bureau of Labor Statistics gave just the mean and the average.

Representative Ruby: Is there any data that shows what percentage of increase overall it will give to the employers. What percentage of increase are we putting on the business owners?

Representative Boschee: I will have to look for that.

Representative Ruby: Obviously it is going to be higher. So it's going to be passed on to a higher cost in food. It's going to be expensive to go out to eat. Do you agree?

Representative Boschee: Costs are going to increase. We have to make decisions personally. In economic theory the goal is that everyone is lifting up at the same time. The idea is setting a new floor were everyone is at that \$7.25.

Representative Ruby: It's going to reflect in people's decisions which will lead to fewer people going out to eat. Then the business owner may not need to hire as many people.

Representative Boschee: I won't disagree. Businesses will have to make decisions.

(23:24)

Caitlin McDonald~North Dakota Women's Network representing the North Dakota Economic Security & Prosperity Alliance: (Attachment 2).

(25:42)

Representative Kasper: How many people use these types of jobs as their full time job?

Caitlin McDonald: I don't have that information.

Tom Ricker~President of the North Dakota AFL-CIO: The federal minimum tipped wage is \$2.13/hour. That has not been raised since 1991. The administrative rule 46-02-07.03 came into effect in 2009. Anyone that was a tipped server from 1991 to 2009 saw no increase. Then in 2009 in North Dakota it went from \$2.13 to \$4.86 for tipped workers. I don't remember in 2009 any businesses doubling their prices. There may have been some increases but I don't remember prices doubling. My first job was in 1983 at Pizza Hut. I made \$3.35. From 1983 to 2009 if you were a minimum wage tipped worker, your salary went from \$2.13 to \$4.86 which is only \$1.50 more than a minimum wage worker made in 1983. I researched average prices. In 2009 the average rent for a house was \$780. Today that is over \$1104. The price of milk in 2009 was \$2.65. Today it is about \$3.65. The price of eggs in 2009 was \$1.29. Today it is over \$2.12. Everything else is going up. But the tipped-wage workers' salaries haven't increased since 2009.

I urge passage of this bill.

Representative Beadle: Has there been any adjustments or increase of bringing people out of the poverty level since we doubled the minimum wage in 2009?

Tom Ricker: I can't give you an informed answer from that.

Representative Ruby: Are you making a statement that if someone worked at one place for five years, they didn't get a raise?

Tom Ricker: No, my intent was that there was no requirement for any raises under federal law.

Representative Ruby: The starting wage would stay the same?

Tom Ricker: They would have gotten a raise because of their years of service.

Representative Kasper: From Representative Boschee's statistics, 18% of the tipped workers and 21% of the tipped restaurant workers are living in poverty. Do you know how the statistics were gathered? Did the survey measure their total household income or just the income that the tipped worker made at his or her job?

Tom Ricker: I don't know where the research came from.

(31:25)

Kevin Murch, Citizen of West Fargo, ND: I support this bill as a consumer. If I receive good service, I'm going to give a decent tip. Coming from a border city and spending time in Minnesota where the tipped wage is higher than Fargo, I have seen no significant increases in the prices between Fargo and Moorhead.

Opposition:

Rudie Martinson~Executive Director of the North Dakota Hospitality Association: (Attachment 3).

(39:28)

Representative Ruby: Are you aware of any data that would be helpful to us about the number of people in poverty that flow out of the industry?

Rudie Martinson: From the National Restaurant Association, nationally the majority of minimum wage restaurant workers are 46% teenagers and 70% are under the age of 25.

Representative Kasper: According to Representative Boschee's handout, of those living in poverty, is this statistic showing the restaurant income as their only income.

Rudie Martinson: I haven't seen the report of Representative Boschee.

Representative Amerman: Explain to me why I should pay wages because tips are wages. I want to tip for friendly good service. These are wages. They help the owner get up to the minimum wage. The owner gets to write off his wages as expenses. I am helping pay those wages and I don't get to write off anything. Explain why I should be paying wages to this one industry.

Rudie Martinson: Tipping is not in every country. I don't know how it became the norm here. I don't know what the background would be.

Representative Laning: Are you aware of any claims that have been filed where the employer had to justify the wage he paid in addition to the tips did equal federal minimum wage?

Rudie Martinson: That is justified every year when the employer files his annual tax return.

Representative M Nelson: The money paid to an employee is just one thing on a pay check. What number does a restaurant pay those things on? Do they pay it just on the subminimum wage or is it the minimum wage or is it on the total income?

Rudie Martinson: I don't know the answer to that. Employees are required to declare 100% of their tips. I would guess when the business owner files the tax return, it would be on the reported income of the people working for them.

Representative Boschee: Can you talk about the loophole for cash wages? How many employers require 100% reported wages?

Rudie Martinson: In previous years when it was more common for people to pay restaurants tabs in cash, it was a moving target. So 8% of sales were used as an agreement between the industry and the IRS. As time has gone on, credit cards are more common by about 75% of restaurant transactions.

Chairman Keiser: I do pay my bill by credit card and I tip in cash.

Representative Hanson: If the industry passes on that cost, you have to pay that employee \$4.86/hour even if they did nothing. Correct?

Rudie Martinson: I can pay that \$4.86/hour if the tips bring their wage above \$7.25/hour. If they earn zero tips or nobody walks into my restaurant so that they make no tips, I have to make up the difference so they clear at least \$7.25/hour.

Representative Hanson: With a lot of restaurants paying over that to retain a workforce, this would go right past them?

Rudie Martinson: They don't think so or else they wouldn't have asked me to speak to you.

Representative Hanson: Have you spoken to your colleagues in Minnesota to see what their experiences are in a state without tip credit?

Rudie Martinson: There is a counterpart association called Hospitality Minnesota. I haven't talked to them about this issue. I do have some multiunit operators in our association who own restaurants in Minnesota. Food and labor are the two top cost line items in a restaurant. They are hurting over the wage situation in Minnesota.

Representative Louser: I didn't know the requirement to bring them up to minimum wage existed. If somebody is paid minimum wage, are they considered in poverty?

Rudie Martinson: I am not sure. It would depend on their household income.

Chairman Keiser: Most fast food places don't get tips. Is it up to the owner to move to a tip basis for compensation?

Rudie Martinson: The administrative rule that Representative Boschee cited has provisions in it for when you need to notify your employees that they will be operating under tip credit.

Chairman Keiser: So any restaurant employer can opt into a tip basis?

Rudie Martinson: Yes.

Neutral:

Troy Seibel~Commissioner of Labor for the North Dakota Department of Labor: (Attachment 4).

In answer to the question on how an employer gets into the tipped credit system--it requires that the employees are a tipped employee. We define a tipped employee to be any employee in an occupation which the employee customarily and regularly receives more than \$30/month in tips.

In answer to the question about claims--we closed about 730 wage and hour investigations last year. I have not received any claim from a tipped employee that they haven't received the minimum wage as a result of the tipped credit. The reason is that the restaurant industry knows that it needs to make up that gap. The pooling of tips is the bigger area of complaints.

Vice Chairman Sukut: If an employee receives \$30 in tips per month?

Troy Seibel: Yes that's correct.

Vice Chairman Sukut: Then the employer could move into that status as a tipped employer.

Troy Seibel: That correct. The employer must provide advanced notice and maintain records which establish that the tipped employee is receiving at least \$7.25/hour when you combine the credit with the \$4.86.

Vice Chairman Sukut: If he is paying the employee \$4.86/hour and \$30 worth of tips in the month, he has to make up the difference to get it up to \$7.25.

Troy Seibel: Yes.

Representative Laning: When an employer decides to use the tipped wage, he still has the freedom to go from \$4.86 up to the minimum wage in addition to the tips. They are not locked in at the very low minimum wage, are they?

Troy Seibel: Yes that's correct. In certain parts of the state we are seeing the effective minimum wage for tipped employees in excess of \$7.25.

Representative Amerman: I'm not the employer but my tips are paying wages. So what am I?

Troy Seibel: The tip credit was enacted to recognize that these individuals are receiving funds from the patrons of that employer. So the employer is given a credit for that portion of those wages.

Representative Ruby: In general for a consumer of any goods or service we are paying the wage.

Troy Seibel: That is probably correct.

Representative M Nelson: When the employer is paying in the items on the pay stub, what number is he paying those on?

Troy Seibel: I don't know the answer to that.

Chairman Keiser: Closed the hearing.

Representative Ruby: Moved Do Not Pass.

Representative Sukut: Seconded the motion.

Representative Becker: I will support the motion. I don't see them as a disadvantaged group of people. Tips exceed what is reported. Even without tips an employee only receiving the minimum wage is making about \$15,000 per year which is higher than the poverty level.

Representative Boschee: I will be resisting this motion. Yes, a lot of people do make a good wage, but \$15,000 a year is not a livable income in this state. It's creating a floor for all employees. Some employees out in the rural areas don't receive that much in tips. That is why they are working 2 to 3 jobs. The purpose of this bill is to create a standard floor for all employees.

Representative Kasper: Addressing the comment about the people living at minimum wage and not being able to survive. Most people who work in the service industry are working part-time and are younger, still in high school or college. We have an industry that I don't think wants to change. I don't think changing what we do now is going to solve any problems and may create more.

Chairman Keiser: I wished that the general public understood tipping better. There are a lot of educational things that the industry should do to inform the customer.

A Roll Call vote was taken: Yes <u>11</u>, No <u>4</u>, Absent <u>0</u>.

Do Not Pass carries.

Representative Sukut will carry the bill.

				Date: Lan Roll Call Vote	28,	2015	
				IG COMMITTEE	9		
Lleves Industry			ION NC	VOTES 1438	Com	mittee	
House Industry	, Business & Labor					millee	
		Confer	ence C	ommittee			
Amendment LC# or	Description:						
Recommendation: Adopt Amendment Do Pass							
Motion Made By Rep Ruby Seconded By Rep Sukut							
Chairman Keiser	entatives	Yes ×	No	Representatives Representative Lefor	Yes 🗴	No	
Vice Chairman S		×		Representative Louser	X		
Representative E	Beadle	×		Representative Ruby	X		
Representative Becker		×		Represenative Amerman		×	
Representative Devlin		¥		Representative Boschee		X	
Representative Frantsvog		×		Representative Hanson		X	
Representative Kasper Representative Laning		X		Representative M Nelson	-	Y	
Representative L	aning	¥					
					-		
					-	· · · ·	
Total (Yes) _	11		No	р_Ц			
Absent	D						
Floor Assignment	Ref	Sc	uKu	rt			

If the vote is on an amendment, briefly indicate intent:

.

REPORT OF STANDING COMMITTEE

HB 1438: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends DO NOT PASS (11 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). HB 1438 was placed on the Eleventh order on the calendar.

2015 TESTIMONY

HB 1438

٠

Testimony for HB 1438 - House Industry, Business and Labor Committee January 28, 2015 Rep. Joshua A. Boschee, District 44

Good morning Chairman Keiser and members of the committee. For the record, my name is Josh Boschee and I have privilege of representing District 44 in north Fargo.

HB 1438 is a bill that would create a new section to Chapter 34-06 of the Century Code to increase the tipped wage in North Dakota to mirror the standard state minimum wage, incrementally, over the next four years. Currently, the tipped minimum wage in North Dakota is \$4.86 and the minimum wage for non-tipped employees is \$7.25, which was enacted on July 24, 2009. The tipped minimum wage is allowed under Administrative Rule 46-02-07-03.1, which states:

"A tip credit of thirty-three percent of the minimum wage may be allowed for tipped employees. The employer may consider tips as part of wages, but such a tip credit must not exceed thirty-three percent of the minimum wage. The employer who elects to use the tip credit provision must inform the employee in advance and must maintain written records showing that the employee receives at least the minimum wage when direct wages and the tip credit allowance are combined."

In effect, the passage of HB 1438 will remove the tip credit provision in Administrative Rule.

According to the Restaurant Opportunities Center's analysis, based on their analysis from the US Dept of Labor's Bureau of Labor Statistics

- More than 10,000 tipped workers in North Dakota
 - o 63% work in the restaurant industry.
- Five of the ten lowest paying occupations in North Dakota are in the restaurant industry and two are in tipped occupations.
- Median wage for ND tipped workers including tips is \$8.50 an hour
- Tipped workers live in poverty at 3x the rate of the North Dakota workforce with 18% of tipped workers and 21% of tipped restaurant workers living in poverty.

goal of this legislation is to eliminate the difference between the minimum wage and the subminimum wage in order to only have one wage floor in our state. Removing the tipped minimum wage in the state, will likely increase restaurant sales, according to the Restaurant Opportunities Center's state by state analysis of states with no tipped minimum wage and those that have are at the federal, tipped minimum wage of \$2.13. I refer you to pages 5 and 6 of the report titled *Recipe for Success: Abolish the Subminimum Wage to Strengthen the Restaurant Industry.*

By eliminating the tipped minimum wage, it is my hope that we stop asking patrons to subsidize tipped employee's wages through the tip line and guarantee them a standard minimum wage spread out over the product we are purchasing. Additionally, as we know in most industries, as wages increase, so does individual purchasing power and tax revenue, while decreasing the number of North Dakotans dependent on government assistance.

Thank you Chairman Keiser and committee members. I stand for any questions.

Century Code - <u>http://www.legis.nd.gov/cencode/t34c06.pdf?20150127200527</u> Administrative Rules - <u>http://www.legis.nd.gov/information/acdata/pdf/46-02-07.pdf?20150127202127</u> <u>http://rocunited.org/wp-content/uploads/2014/03/ROCUnited_Recipe-for-Success.pdf</u>

34-06-22. State minimum wage rate.

- 1. Except as otherwise provided under this chapter and rules adopted by the commissioner, every employer shall pay to each of the employer's employees:
 - a. Effective July 24, 2007, a wage of at least five dollars and eighty-five cents per hour;
 - b. Effective July 24, 2008, a wage of at least six dollars and fifty-five cents per hour; and
 - c. Effective July 24, 2009, a wage of at least seven dollars and twenty-five cents per hour.
- 2. This section does not limit the authority of the commissioner to adopt rules establishing a state minimum wage rate that differs from the rates established under subsection 1.

Pgz

No employment contract or policy may provide for forfeiture of earned paid time off upon separation. An employment contract or policy may require an employee to take vacation by a certain date or lose the vacation (use it or lose it), provided that the employee is given a reasonable opportunity to take the vacation. The employer must demonstrate that the employee had notice of such contract or policy provision.

- 13. The reasonable value not exceeding the employer's actual cost of board, lodging, and other facilities customarily furnished by the employer for the employee's benefit may be treated as part of the wages, up to a maximum of eighteen dollars per day, if agreed to by a written agreement and if the employee's acceptance of facilities is in fact voluntary.
- 14. The common law test provided in subdivisions a and b of subsection 5 of section 27-02-14-01 will be used to determine whether or not an individual may be considered an employee or an independent contractor.
- 15. Earned bonus: An earned bonus is an amount paid in addition to a salary, wage, or commission. An earned bonus is compensable when an employee performs the requirements set forth in a contract or an agreement between the parties.

Earned commission: A commission is a fee or percentage given for compensation to an individual for completion of a sale, service, or transaction. Upon separation from employment, the past practices, policies, and entire employment relationship will be used to determine if the commission is earned and compensable.

16. The department will use the past practices, policies, and entire employment relationship in wage claim determinations.

History: Effective May 1, 1994; amended effective October 1, 1996; September 1, 1997; March 1, 1998; July 24, 2007; October 1, 2012. General Authority: NDCC 28-32-02(1), 34-06-04 Law Implemented: NDCC 34-06-03, 34-06-09, 34-06-11, 34-06-12, 34-06-15

46-02-07-03. Additional standards that apply to service and nonprofit industries.

1. A tip credit of thirty-three percent of the minimum wage may be allowed for tipped employees. The employer may consider tips as part of wages, but such a tip credit must not exceed thirty-three percent of the minimum wage. The employer who elects to use the tip credit provision must inform the employee in advance and must maintain written records showing that the employee receives at least the minimum wage when direct wages and the tip credit allowance are combined.

Jet.

- 2. Tip pooling is allowed only among the tipped employees. A vote of tipped employees to allow tip pooling must be taken, and fifty percent plus one of all tipped employees must approve it. The employer must maintain a written record of each vote on tip pooling, including names of employees voting and the vote totals. A vote on whether to pool tips is required if requested by fifty-one percent or more of the tipped employees. The tipped employees shall provide documentation verifying the request. Time spent in meetings called by the employees exclusively for tip issues is not work time.
- 3. Tipped employees employed in the nonprofit gaming industry means all employees who are employed as gaming attendants by a gaming organization licensed under North Dakota Century Code section 53-06.1-03.
 - a. Gaming sites that regularly have four or fewer tipped employees on duty can require tip pooling among all tipped employees at the site.
 - b. A gaming organization licensed under North Dakota Century Code section 53-06.1-03 may require tip pooling by blackjack (twenty-one) dealers at an authorized site as provided in North Dakota Century Code section 53-06.1-10. This tip pooling requirement only pertains to any employee, pit boss, or supervisor when actually dealing blackjack (twenty-one).
 - C. Pit bosses or supervisors at gaming sites are not tipped employees and cannot be part of the tip pool when performing functions of those positions other than dealing blackjack (twenty-one).

History: Effective May 1, 1994; amended effective October 1, 1996; September 1, 1997; March 1, 1998. **General Authority:** NDCC 28-32-02(1), 34-06-04 **Law Implemented:** NDCC 34-06-03, 34-06-09, 34-06-11, 34-06-12

46-02-07-04. Additional standards that apply to government entities.

1. Any two individuals employed by the state or any political subdivision in any occupation may agree to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime. If one employee works for another, each employee will be credited as if that employee had worked that employee's normal schedule. In order to qualify an agreement between individuals employed by the agency the agreement must be approved by the agency. The agency approval must be prior to the work being done. Each employee must be free to refuse to participate. The employee's decision to participate is valid only if freely made without coercion from the employer. A public agency that employs individuals who substitute

RECIPE FOR SUCCESS: Abolish the Subminimum Wage to Strengthen the Restaurant Industry



ww.rocunited.org

Restaurant Opportunities Centers United 350 7/th Avenue, Ste 1504. New York, NY 110001 21/2,243,6900 fo@rocunited.org



U.S. WORKFORCE

Introduction/Summary

The true federal minimum wage in the United States is \$2.13 per hour.

Workers who receive tips have had their wage frozen at \$2.13 an hour since 1991. For 23 years, workers who receive tips have not received a raise; with such low wages, these workers must depend on tips for the majority of their income.¹ Although employers are required by federal law to ensure that tips bring tipped workers up to the overall minimum wage of \$7.25 an hour, the U.S. Department of Labor reports that there is pervasive non-compliance with this regulation.² As a result, tipped workers can earn as little as \$2.13 an hour including tips; these workers depend on food stamps and live in poverty at twice the rate of the general population. Tipped restaurant workers, the vast majority of tipped workers are restaurant workers, including servers, bartenders, and dining room attendants, a substantial number are in occupations such as healthcare support, personal care, and transportation.⁴

Women make up two-thirds of all tipped workers.⁵ The tipped minimum wage puts women in the compromising position of having to please clients and employers since their livelihood depends on their tips. Not surprisingly then, 7% of American women work in restaurants, but 37% of all sexual harassment claims to the EEOC come from the restaurant industry.⁶ Among the six million tipped workers in the United States, the median age is 31, a third are parents, and nearly half of all tipped worker mothers are single mothers.⁷ Latinos, Blacks, and Asians are overrepresented among tipped workers.⁸ Tipped workers thus epitomize the Rising American Electorate.

All tipped workers do not earn \$2.13 an hour. There are seven states, employing over 1 million tipped workers that have decided that no worker should have to rely on tips for any portion of their income. In those states, tipped workers earn the full minimum wage, and the poverty rate among tipped workers has been reduced by a third.⁹ An additional 23 states have increased the tipped minimum wage.¹⁰ The average tipped minimum wage among states and territories that have raised their tipped minimum wage since 1991, is set at 70 percent of the current federal minimum wage, and reaches as high as 130% of the federal minimum wage among states that have eliminated it.¹¹

This report finds that across the country, restaurant sales and restaurant employment per capita increase as the tipped minimum wage increases because workers stay at their jobs longer, increase productivity, focus on customer service, and spend their own income to support the industry. It's time to abolish the tipped minimum wage.

What is the tipped minimum wage?

There is no official list of tipped occupations. Instead, under federal law, any worker can be classified as a tipped worker if they receive at least \$30 per month in tips.¹² To capture the universe of tipped workers this report includes currently employed civilian workers who regularly receive tips in food preparation and serving, healthcare support, personal care and service, and transportation and material moving occupations.

Prior to 1966, tipped workers received the same minimum wage as other workers. It was not until 1966 that employers were allowed to pay tipped workers a subminimum wage that was set at 50% of the full minimum wage.¹³ From 1966 on, customers were handed the task of paying for a substantial portion of employee wages. The exact amount ranged up to 60% but never dipped below 50%.¹⁴ 1991 was the last year that the subminimum wage saw an increase to \$2.13. Twenty three years ago, in 1996, the National Restaurant Association, under the leadership of Herman Cain, negotiated with Congress to permit an increase to the full minimum wage as long as the tipped minimum wage were frozen at \$2.13.15 It has remained frozen at \$2.13 ever since. As a result, the United States is the only industrialized tion where tipped workers must depend on tips for a majority of their income.¹⁶ Although upping restaurant workers and other professions is customary in dozens of countries, it is generally treated as a method of rewarding good service. In no country is tipping required. Only in the United States do tips provide the bulk of an employee's income, and yet tipping practices are largely inelastic; individuals tend to tip the same regardless of service. However, servers can receive larger tips if they touch their customers, call customers by name, smile, crouch next to the table, and engage in other similar behaviors.17

Employers are required by law to ensure that any tips that an employee receives make up the difference between \$2.13 and the tipped minimum wage. However, this rarely happens. From 2010-2012, the Wage and Hour Division of the Department of Labor conducted nearly 9,000 investigations in the full service sector of the restaurant industry, and found an 84% non-compliance rate. The Wage and Hour Division recovered \$56.8 million in back wages for nearly 82,000 workers and assessed \$2.5 million in civil money penalties.¹⁸ This past month, February 2014, a restaurant chain in PA and NJ, Chickie's & Pete's, was forced to pay \$8.5 million for misappropriating tips and failing to pay the minimum wage.¹⁹ Our current system of allowing a subminimum wage for tipped workers encourages this abuse.







ROCUNITED.ORG/STATEOFTIPPEDWORKERS



MARTIAL & PARENTAL STATUS STATUS Married 32% Parents 31% Dads 22% Moms 36% Single Moms 17%

FIGURE 1

The percentage of workers living in poverty falls as the minimum wage increases.



Who Are Tipped Workers?

There are six million tipped workers working in occupations as varied as massage therapists, barbers, nail salon attendants, airport passenger attendants, and bartender assistants. Although the restaurant industry employs the vast majority of tipped workers, nearly forty percent of all tipped workers are not in the restaurant industry.²⁰

Tipped workers are young, but they are not teenagers seeking temporary employment. Half of all tipped workers are over 30 years old, 32% are married, and 31% are parents.²¹ People of color are overrepresented among tipped workers. Nearly 20% are Latino, over 10% are African American, and a full 10% are Asian.²² Nearly one fifth of all tipped workers are single mothers. Together, tipped workers embody the Rising American Electorate — historically ignored groups who have played a decisive role in deciding the last few elections.

However, the overwhelming majority of tipped workers are women. Two thirds of tipped workers are women, and nearly 40% of them are mothers.²³ Especially because they are dependent on customers' tips for their income, in order to feed themselves and their children, women are forced to tolerate significant abuse from customers, co-workers, and management. Nearly 40% of all EEOC charges by women regarding sexual harassment come from the restaurant industry, and the EEOC has targeted the restaurant industry as the single largest source of sexual harassment claims, even though less than 7% of employed women work in the restaurant industry.²⁴ Over 10% of the more than 4,300 restaurant workers ROC has surveyed report sexual harassment in their restaurant. An examination of EEOC verdicts paints a picture of pervasive and inappropriate verbal and sexual harassment and assault, with unenforced or absent sexual harassment policies and training.²⁵ The current tipped

wage system, where women are forced to toil at a subminimum wage and depend on tips in order earn their living, is a system ripe for systematic abuse.

Approximately 10% of workers in the restaurant industry do earn a living wage, primarily bartenders and servers in fine dining establishments.²⁶ Unfortunately, these positions are largely denied to women and people of color.²⁷ Over 20% of tipped restaurant workers live in poverty, three times the rate of the rest of the US workforce.²⁸ Sixteen percent of tipped workers depend on food stamps to put food on their table, twice the rate of the US workforce.²⁹ And 40% of tipped workers who are parents depend on free hot lunches to feed their children.³⁰ Average wages for tipped workers are dramatically impacted by the few good jobs in fine dining, but this does not represent most tipped workers. A significant portion of tipped workers live in poverty and depend on public assistance to feed themselves and their children. In a terrible irony, the women who feed us cannot afford to feed themselves or their families.

The number of workers living in poverty significantly declines as the minimum wage increases (*SEE FIG.1*).³¹ In the seven states that have eliminated the tipped minimum wage, the poverty rate among tipped workers is lower by one third, 14% compared to 20% in \$2.13 states.³² This reduction in poverty is more significant for workers of color. Eliminating the tipped minimum wage in these seven states means lower poverty rates among white workers — 16% of white workers in states with subminimum wages of \$2.13 for tipped workers live in poverty, while only 13% of white workers in states with no subminimum wages live in poverty. Among workers of color, a full 25% of workers of color in states with \$2.13 subminimum wages live in poverty, while only 14% of workers of color in states with no subminimum live in poverty.³³ Thus, eliminating the tipped minimum wage has effectively eliminated the racial poverty gap among tipped workers. In states with a tipped minimum wage of \$2.13, the poverty rates for workers of color is nearly double that of the seven states without a tipped minimum wage, with one in four living in poverty.

WHITE P	PEOPLE OF COLOR	ALL
~	~	~
POVERTY	RATES IN \$2.13	3 STATES
16%	25%	20%
16%	25%	20%

POVERTY RATES IN STATES WITH NO TIP CREDIT 13% 14% 14%

Can Business Afford to Raise the Tipped Wage?

The restaurant industry can afford to give its employees a raise. There are currently seven states that do not allow a subminimum wage, including Alaska, Montana, Nevada, Minnesota, California, Oregon, and Washington. Those states account for over one million tipped work-

ers, and experience above average employment growth.³⁴ The restaurant industry projects employment growth over the next decade of 10.5% in the seven states without a tipped minimum wage, compared to 9.1% in states with a subminimum wage.³⁵ Tipped workers in California, with the largest restaurant industry in the country, earn the same \$8 per hour that all other workers receive. Tipped workers in Alaska and Nevada earn \$7.25 and \$8.25, and those states enjoy a projected 14% and 15% industry growth, respectively.³⁶

Of course, it is difficult to compare states directly. A close examination of state-by-state per capita actual sales in the restaurant industry over the last three years shows that per capita sales increase as the tipped minimum wage increases, and this effect is statistically significant every year *EE FIG.2*, p < .001). FIGURE 2 Restaurant sales per capita increase as the tipped minimum wage increases.



FIGURE 3

Tipped restaurant employment grows in importance as the tipped minimum wage rises.



One potential explanation for greater sales per capita is an increase in menu prices tied to greater labor costs. If that were true, one would expect to see employment among restaurant workers, and in particular tipped workers, stagnate or decline.37 An examination of actual trends in restaurant employment since the end of the Great Recession in 2009, finds absolute growth in restaurant employment, including among tipped restaurant workers, across all states. To compare across states, average growth in restaurant industry employment as a percentage of total state employment is positive in all categories of states, and slightly higher in \$2.13 states. However, average growth among tipped workers as a percentage of both restaurant employment and as a percentage of total state employment tends to be higher in states that pay tipped workers above \$5 per hour, and is higher still in states that offer the full tipped minimum wage. In states with no tipped minimum wage, tipped workers have grown in importance as a percentage of the total economy (SEE FIG.3). Although a confound might be responsible for this relationship, a higher minimum wage is associated with higher restaurant sales per capita and increasing employment. As states increase the tipped minimum wage restaurant sales increase, as does the importance of tipped workers as a driver in the state economy.

Restaurant Sales and Employment Growth Increase as the Tipped Minimum Wage Increases

	2011 Real sales per capita ³⁸	2012 Real sales per capita	2013 Real sales per capita	2009-2012 Restaurant Tipped Worker Job Growth ³⁹	2009-2012 Restaurant Job Growth as % of Total Employment	2009-2012 Tipped Job Growth as % of Total Restaurant Employment	2009-2012 Tipped Restaurant Job Growth as % of Total Employment
National Average	1.45	1.49	1.53	2%	0.08%	-0.37%	0.01%
\$2.13 States	1.34	1.38	1.42	2%	0.09%	-0.37%	0.01%
Min. Wage > \$5	1.69	1.73	1.78	3%	0.07%	0.11%	0.04%
Full Min. Wage	1.60	1.64	1.68	4%	0.05%	0.49%	0.05%

A higher tipped minimum wage might affect sales and employment by increasing productivity, allowing workers to focus on customer service instead of maximizing tips, and creating a local stimulus by putting desperately needed funds directly in workers' pockets. Reduced turnover is also likely a key factor. A survey of over 1000 restaurant employers found that higher wages cut turnover in half, reducing hiring and training costs, and allowing for a more knowledgeable and productive workforce.⁴⁰ Increasing the minimum wage for tipped workers reduces opportunity costs that are an incentive for turnover, especially for restaurant workers that must care for their families, allowing knowledge to increase at the point of service and sales and leading to a more robust restaurant industry.

CONCLUSION Abolish the Tipped Minimum Wage

Our current subminimum wage system encourages abuse and sexual harassment, and is based on the antiquated notion that tipped workers are either teenagers looking for extra cash in the summer, or that tipped workers all earn substantial incomes in tips. Tipped workers are neither wealthy nor teenagers. They are parents and spouses, many struggling to feed themselves and their children. Most significantly, they are overwhelmingly women who live in poverty, working in an industry that requires them to please customers in order to put food on their table.

The fact that states with a higher tipped minimum wage have higher restaurant sales per capita indicates that the industry could actually benefit from paying its workers a real wage, rather than forcing them to live off tips. For 23 years the tipped minimum wage has stood at \$2.13.

It is time to abolish the subminimum wage for tipped workers.



- 2 Allegretto, S. 2013. Waiting for Change: Is it Time to Increase the \$2.13 Subminimum Wage? Working Paper No. 155-13. Institute for Research on Labor and Employment, U-C Berkeley.
- 3 American Community Survey (ACS), 2012. Calculations by the Restaurant Opportunities Centers United (ROC-United) of civilian employed population based on Ruggles et al., Integrated Public Use Microdata Series: Version 5.0 [Machine-readable database]. Minneapolis: Minnesota Population Center, 2010.
- 4 Ibid.
- 5 Ibid
- 6 Restaurant Opportunities Centers United, 2012. Tipped Over The Edge: Gender Inequity in the Restaurant Industry
- 7 ACS, 2012. Calculations by ROC-United.
- 8 Ibid.

9 Ibid.

- 10 Wage and Hour Division, Department of Labor (DOL). 2014. Minimum Wages for Tipped Employees.
- 11 Ibid

12 DOL. 2011. The Fair Labor Standards Act of 1938.

- 13 Ibid
- 14 Allegretto, S., and K. Filion, 2011. Waiting for Change: The \$2.13 Federal Subminimum Wage. Economic Policy Institute & Center on Wage and Employment Dynamics Briefing Paper #297
- 15 Liddle, A. (1996, June 24) "Associations urge Senate to retain wage provisions." Nation's Restauraut News.
- 16 Jynn, M. (2006, January 1), "Topping in Restaurants and Around the Globe: An Interdisciplinary Review." Cornell University, School of Hotel Administration Collection. Ihid
 - Megretto, S. 2013. Waiting for Change.

- 19 Evans, J. (March 1, 2014), "A record-setting wage and hour settlement," Zanesville Times Recorder.
- 20 ACS, 2012. Calculations by ROC-United.
- 21 Ibid
- 22 Ibid.
- 23 Ibid
- 24 ROC-United, 2012. Tipped Over The Edge,
- 25 Ibid.
 - 26 Bureau of Labor Statistics, U.S. Department of Labor, Occupational Employment Statistics, 2012.
 - 27 Bendick, M. R. Fanni, and S. Javaraman, 2009. "Race-Ethnic Employment Discrimination in Upscale Restaurants: Evidence from Paired Comparison Testing." The Social Science Journal, Vol. 39, Issue 10: 895-911.
- 28 ACS, 2012. Calculations by ROC-United.
- 29 Ibid.
- 30 Current Population Survey (CPS), 2013. Calculations by ROC-United based on King et al., Integrated Public Use Microdata Series, Current Population Survey: Version 3.0 [Machine-readable database]. Minneapolis, MN: Minnesota Population Center, 2010. 31 ACS, 2012. Calculations by ROC-United.
- 32 lbid. 33 Ibid
- 34 National Restaurant Association. 2014, 2014 Restaurant Industry Forecast. 35 Ibid.
- 36 Ibid.
 - 37 Aaronson, D. & E. French. 2006. Output Prices and the Minimum Wage. Employment Policies Institute.
 - 38 National Restaurant Association, 2012-2014. 2012-2014 Restaurant IndustryForecast. 39 ACS, 2009-2012, Calculations by ROC-United
 - 40 Batt, R., J.E. Lee, and T. Lakhani. 2014. A National Study of Human Resource Practices. Turnover, and Customer Service in the Restaurant Industry. Restaurant Opportunities Centers United.

Abolish the Subminimum Wage to Strengthen the Restaurant Industry



Restaurant Opportunities Centers United 350 7th Avenue, Ste 1504 New York, NY 10001 212.243.6900 fo@rocunited.org ww.rocunited.org

Testimony on Behalf of The North Dakota Economic Security & Prosperity Alliance (NDESPA) House Bill 1438 – House Industry, Business and Labor Committee January 28, 2015

Chairman Keiser and members of the House IB&L Committee, my name is Caitlin McDonald) from the North Dakota Women's Network. I am representing the North Dakota Economic Security & Prosperity Alliance. NDESPA is a coalition of citizens and organizations working to build assets for North Dakotans of low and moderate income through public policy change. I am here in support of House Bill 1438 that would provide an increase to the minimum wage of tipped employees.

Close to 20 million people work in the food system in the United States, the largest private sector employer in the country. According to Bureau of Labor Statistics data, over six million workers in the food system earn the federal minimum wage. Due to low wages, food workers use food stamps at 1.5 times the rate of the rest of the U.S. workforce. Food workers also face food insecurity, or having enough healthy food to eat every day, as defined by the USDA, at 1.2 times the rate of all other workers, according to the Food Chain Workers Alliance.

As many of you know, The **Fair Minimum Wage Act** is already working its way through Congress. The federal legislation represents an historic shift from minimum wage increase legislation of the last two decades, since the federal minimum wage for workers who receive tips, like servers, bussers, and bartenders, has been frozen at \$2.13 for more than 20 years.

North Dakota, and your committee, has an opportunity to begin making these corrections here and now. By passing HB 1438, you would be assisting with access to a basic necessity of life for the thousands of food workers, and their families, in the state. For the working people who prepare our food, serve our food and clean our dishes, HB 1438 could provide these workers the means to support themselves and their families, rather than relying on SNAP benefits.

The North Dakota Economic Security & Prosperity Alliance urges the committee to pass HB 1438 as an investment in North Dakotans with low-income. Attached to this testimony is a list of NDESPA partners who stand in support of this legislation. I would be happy to take questions from the Committee.



North Dakota North Dakota Economic Security and Prosperity Alliance

North Dakota Economic Security & Prosperity Alliance (NDESPA) 2015

AARP-ND

North Dakota Women's Network **CAWS North Dakota** North Dakota Disabilities Advocacy Consortium North Dakota Community Action Partnership North Dakota Head Start Association North Dakota Human Rights Coalition North Dakota United **Charles Hall Youth Services** Family Voices of North Dakota American Association of University Women in North Dakota **Charles Hall Youth Services** North Dakota Chapter of the National Association of Social Workers Childcare AWARE Mental Health America of North Dakota Prevent Child Abuse of North Dakota North Dakota County Social Service Directors Association

NDESPA works to build and sustain a system of economic security for all North Dakotans through poverty awareness and education, grassroots and community capacity building, research and data development, and promotion of policies and practices to eliminate disparities and obstacles for achieving economic security.





ND's Restaurant, Lodging & Beverage Association



3

ND Restaurant, Lodging & Beverage Association

P.O. Box 428 • Bismarck, ND 58502 • Phone: 701-223-3313 • Fax: 701-223-0215 E-mail: NDhospitalityassn@gmail.com • www.ndhospitality.com

Testimony of Rudie Martinson Executive Director, ND Hospitality Association In opposition to HB 1438 Before the House Industry, Business, and Labor Committee Canuary 28, 2015

Good morning Mr. Chairman and members of the House Industry, Business, and Labor Committee. My name is Rudie Martinson, and I am the Executive Director of the ND Hospitality Association. We are the trade association for North Dakota's restaurant, lodging, and retail beverage industries.

I rise today in opposition to HB 1438. We oppose the bill because it's unnecessary for tipped employees, it needlessly drives up the costs for operators, and infringes on a system that's currently working well.

First, I think it's important to address the following question: **how much does a tipped employee really make?**

To quantify this for you, I reached out to a board member of ours who operates several casual dining restaurants around the state of North Dakota. This category includes restaurants like Applebee's, Ground Round, TGI Fridays, or Chili's, and serves as a good benchmark to try and affix an industry average.

Within that category, we can comfortably work with an average of 2.1 guests per table and an average check of \$35. On that check, the server is tipped an average of 17.5%, which amounts to \$6.13. If that server works with just that one table, they've made \$6.13 plus the \$4.86 hourly minimum, for a total of just shy of \$11 per hour. A reasonably busy restaurant can expect their servers to handle 5-7 tables per hour during a lunch or dinner service. On the low end of that spectrum, with an average tip per table of \$6.13, that server has made \$30.65 in tips, in addition to the \$4.86 minimum wage, for a total of \$35.51 for that hour of work.

That's one North Dakota example. I've also attached to my testimony a chart from the National Restaurant Association that reflects national averages for tipped restaurant employee take home pay. I've also attached a "help wanted" post that appeared on a local restaurant's public Facebook page yesterday. It reflects what that operator expects their tipped employees to be able to make working in that particular business.

Secondly, passing this bill would add an unnecessary cost to an industry already struggling with rising costs.

Within the restaurant industry, operating costs are continually rising. For most restaurants, food and labor are the two major cost line items, but certainly not the only things becoming more expensive. Increases in utilities, food, beverage, repairs, paper, chemicals, etc. present ongoing challenges to an industry in which profit margins are not high to begin with. Passage of HB 1438 reflects a direct cost increase to operators of potentially tens of thousands of dollars per location per year.

We do our best to absorb these costs without passing them along to the consumer, but this is not always possible. An arbitrary and unnecessary increase in labor costs must result in one of two options – lower profit margins for operators, or higher costs for consumers. In an environment like we're currently experiencing in North Dakota, restaurants are already forced to raise menu prices more regularly than we'd like – sometimes as often as twice per year.

The likely practical effect of the passage of this bill will be fewer servers working more tables per shift. We're concerned that this will lead to a lower quality customer experience, a lower quality employee experience, and produce little benefit for operators or employees.

Finally, Mr. Chairman and members of the committee, it's important to understand that our industry provides a work environment that is attractive to many simply because of its unique nature. Scheduling is flexible, the work is social in nature and centered on hospitality, and pay is based on a true meritocracy. Under the current system, success can be measured at the end of every shift. These qualities are features, not bugs. HB 1438 tinkers with a system that isn't broken, and we ask that you give this bill a "do not pass" recommendation.

Thank you.

The Truth on Tipped Employees



1. Based upon federal cash wage for tipped employees.

2. If timployee does not earn an average of at least \$7.25 an hour in base wage

an hour.

Cluck

>

Į.

Top Comments +



Jack Dalrymple Governor

Troy T. Seibel Commissioner



State Capitol 600 E. Boulevard Ave. - Dept. 406 Bismarck, ND 58505-0340

> www.nd.gov/labor www.nd.gov/humanrights

Testimony on HB 1438 Prepared for the House Industry, Business and Labor Committee

January 28, 2015

Good morning Chairman Keiser and members of the Industry, Business and Labor Committee, my name is Troy Seibel, and I am the Commissioner of Labor. I appear before you today neutral on HB 1438. I am here to provide information regarding current minimum wage laws and rules for tipped employees and how HB 1438 changes these laws and rules.

Current Minimum Wage Law and the Tip Credit

North Dakota's current minimum wage is \$7.25, as provided in N.D.C.C. § 34-06-22. The Department of Labor and Human Rights, by administrative rule, allows an employer a tip credit for tipped employees. This rule is found at N.D.A.C. § 46-02-07-03 and allows an employer to pay a tipped employee 67% of the state's current minimum wage. Tipped employees include any service employee in an occupation in which the employee customarily receives more than \$30 per month in tips. The rule requires an employer that uses the tip credit to inform employees in advance and maintain records showing the employee receives at least the current minimum wage when paid wages and the tip credit are combined. The Department's tip credit rule allows an employer that meets the requirements to currently pay a tipped employee a minimum of \$4.85 per hour.

<u>HB 1438</u>

Telephone: (701) 328-2660

HB 1438 adds a new section to N.D.C.C. ch. 34-06, which creates a new minimum wage for tipped employees. The bill requires employers to pay tipped employees \$5.25 on August 1, 2015 and increases this minimum wage by \$1 per hour every second year until the minimum wage for tipped employees equals the state's standard minimum wage, as set forth in N.D.C.C. § 34-06-22. HB 1438 would abrogate the Department's administrative rule allowing for a tip credit. Eventually, employers would be required to pay tipped employees the state's standard minimum wage. It would raise the minimum wage for tipped employees from \$4.85 to \$5.25 on August 1, 2015.

Thank you and I'd be happy to answer any questions you may have.