

2009 New York State Issues



Following the November elections, the majority of the Senate flipped to Democratic, with a 32-29 margin. Republican incumbent Senator Padavan remains in a close race with Jim Gennaro that has gone into the court system, so that seat remains undecided.

The leadership of the new Senate is as follows: The new Majority Leader is Senator Malcolm Smith (D, Queens), his Deputy Majority Leader is Senator Jeff Klein (D, Bronx), and the Vice President Pro Tempore is Senator David Valesky (D, Syracuse). The new chair of the Senate Tourism Committee is Senator Jose Serrano, Jr. (D, Bronx). The new chair of the Senate Labor Committee is Senator George Onorato (D, Queens).

The Assembly Democrats maintained their wide majority in the November elections, now holding a 109-41 majority. They have reelected Assemblyman Sheldon Silver (D, Manhattan) as Speaker of the Assembly. Steven Englebright remains the Assembly Tourism Committee Chair, and Susan John is the Assembly Labor Committee Chair.

This leaves New York State, for the first time in 40 years, with Democrats in power in the Governor's office, the Senate, and the Assembly.

Budget

In the tough economy, the Governor has proposed large cuts in all parts of the State Budget. The Executive Budget cut School Aid by \$698 million and proposes cutting health care spending by \$6 billion over two years.

I Love NY / Matching Grants Funds

Governor Paterson released his proposed Executive Budget for 2009-2010 on December 16, as well as releasing Deficit Reduction bills that would make amendments to the 2008-2009 State Budget for the current fiscal year.

The Deficit Reduction plan amends last year's budget appropriations for the current fiscal year. The Governor cut the 2008-2009 appropriations to \$11,015,000 for the "I Love NY" and \$4,171,000 for the Tourism Matching Grants. Last year, \$16,015,000 was appropriated for "I Love NY" and \$5,171,000 for the Tourism Matching Grants. Therefore, the Governor's proposed cuts represent a \$5 million cut of the "I Love NY" appropriation, and a \$1 million cut of the Tourism Matching Grant appropriation. At this time, legislative leaders plan to act on the Deficit Reduction bills in February.

For 2009-2010, the Governor's Executive budget allocated \$11,015,000 for the "I Love NY" program and allocated \$4,171,000 for the Tourism Matching Grant program thereby maintaining the reductions proposed in the Deficit Reduction bills. While Paterson originally set a March 1st deadline for enactment of the new budget, he has recently acknowledged that will be difficult to achieve.

NYSH&TA was recently notified that Tourism Promotion Agencies have not received any funds from the Tourism Matching Grant Program for the 2008-2009 fiscal year. NYSH&TA has contacted the Assembly Tourism Committee Chair, Assemblyman Steven Englebright (D, Suffolk County), to find out why the funding has not been provided and when the programs and vouchers will be funded.

Paid Family Leave

Over the last two years, five comprehensive paid family leave plans were proposed and introduced, two proposed by the former Governor. These plans would provide paid leave for an employee to bond with a child or care for a family member. The paid family leave proposals include: application to every employee in New York after four weeks on the job regardless of the size of employer, paid leave for up to 14 weeks, leave for educational meetings, additional notice requirements to employees, and paid leave that can be taken in increments of less than a day. The proposals also include payment of up to \$440 per week, no allowance for a charge to the employees for this increased benefit, and lax proof requirements by the employee. These requirements, while they would not require the position to be held open for the employee, would add to the requirements already in place under the Family and Medical Leave Act (FMLA) which does mandate positions to be held open in companies with more than 50 employees. Fortunately, none of the five proposals passed in either house in the last Session.

Not only is this legislation predicted to increase job costs, but it will also encourage absence from the workplace. The need to fill-in for missing employees will more than likely cause mandatory overtime for other employees. Additionally, many New York State employers already provide paid family leave and incur substantial expenses in doing so but they are not bound by the terms of the proposed legislation.

NYSH&TA submitted memos, charts, and fact sheets to legislators during numerous meetings throughout the last Session in an effort to combat this burdensome legislation. The Business Council of NYS, Inc. also mounted an opposition campaign of its own.

NYSH&TA will continue to work with the Business Council, the State Legislature, and the Department of Labor to prevent the imposition of additional costs on businesses in New York while remaining employee-friendly. We have expressed our willingness to work toward a proposal that is advantageous to both the industry and its workforce.

Service Charge and Gratuity

In 2008, the NYS Department of Labor indicated that it would be looking to address the issue of service charges and gratuities via the regulations currently in place. The Department expressed an interest in changing this regulation.

NYSH&TA members and others have explained steps they take in order to ensure consumer knowledge and expressed their concerns with any change to the current service charge or gratuity regulation. NYSH&TA, along with others, sent a letter to the Department of Labor expressing a willingness to work with the Department to ensure that an explanation is given on the bill and/or menu identifying who receives the service charge. NYSH&TA has also asked for clarity of the current policy of the Department in an effort to remain in compliance with all labor regulations. NYSH&TA and Wilson Elser met with the counsel and program staff in the Governor's Office to convey our concerns. In response to the letters written to the Department of Labor, Patricia M. Smith, Commissioner of Labor wrote a letter that confirmed the rule in the World Yacht case: that if an employer causes a reasonable patron to believe that a service charge is a gratuity to be received by service employees, then it is a "charge

Service Charge and Gratuity (continued)

purported to be a gratuity for an employee” under the Labor Law and must be distributed to such employees. Further, the letter explained that this is not a modification in the policy, so new regulation are not contemplated at this time and that “such enforcement policy will be applied to all current and future matters”, not retroactive.

In the past, the Assembly and Senate introduced legislation in various forms that would require all service charges or other similar forms of service appreciation payments to go directly to service employees and not to their employers. These bills, introduced at the request of unions, fortunately did not pass in either house. However, with a new majority in the Senate, it is important to express the concerns of the tourism industry, specifically the negative economic impacts such a proposal would have if enacted. Therefore, we will again meet with Assembly Labor Chair Susan John (D, Rochester) as well as with new Senate Labor Chair George Onorato (D, Queens) to inform them of these concerns.

Minimum Wage Increase

On July 24, 2009, the Federal minimum wage will increase to \$7.25. New York’s current minimum wage is \$7.15, so the Federal minimum wage increase will supersede the New York State minimum wage. The Federal minimum wage law does not speak to the minimum wage for food service employees, so New York’s minimum wage for food service employees will remain at \$4.60 when the Federal increase to the minimum wage takes place in July.

The Speaker of the Assembly, Sheldon Silver, sponsored a bill in the last Session that would increase the minimum wage. This bill would have increased the current minimum wage to \$7.75 per hour, effective January 1, 2009. The minimum wage would then increase in 2010 to \$8.00 per hour and in 2011 to \$8.10 per hour. After this period, the bill increased the minimum wage by the rate of inflation in subsequent years. No bill was introduced in the Senate that would increase the minimum wage, but with the Senate’s new Democratic majority, a bill introduction that would increase the minimum wage is probable. The Assembly bill did not pass during the 2008 Session, however it is likely to be re-introduced and considered in 2009 or 2010.

Note: Dan Murphy has been appointed to the new Department of Labor Wage Board where the above Minimum Wage and Service Charge Issues will be discussed.

Trans Fat Ban

In his State of the State Speech, Governor Paterson set as one of his priorities the passage of a ban on trans fats in all restaurants in the State. The Governor included the ban on trans fats as part of his plan to combat child obesity in which First Lady Michelle Paterson will participate.

During the last Session, there were five bills in the Legislature that banned trans fat in restaurants (A.1192-A Ortiz, A.8328 Ortiz / S.4347 Rath, A.9031-B Ortiz / S.8660 Hannon, S.3831 Hannon, and S.7733 Hannon). These bills varied in enforcement mechanisms authorizing the Department of Health to enforce the rule and setting a fine of \$50 not to exceed \$500 total. The trans fat ban is a measure with a good potential of passage due to the fact that it is now the Governor’s priority and it is not a measure that imposes a cost on the state. Some bills introduced last year combined a trans fat ban with menu posting requirements.

A New York City Department of Health regulation requiring chain restaurants to post caloric content on their menus has been enforced since May 12, 2008. Early last October, the New York City Health Department issued a press release regarding the menu posting, urging consumers to check the calories of the food they intake from fast food restaurants. New York City mounted an advertising campaign promoting the observation of this requirement by consumers. The New York City Health Department has also issued a guide to compliance with the regulation.

The regulation covers restaurants that are in a group of at least 15 in the country, offer mostly the same menu and operate under common ownership. The restaurants are required to post on menus the caloric content of each item or post the caloric content on the individual item’s pricing tag. NYSH&TA will monitor any such legislation that would place a similar requirement on all restaurants in the State.

Lay-off Notice Details

The new requirement currently impacts employers of 50 or more full-time employees.

Who is Affected

- Employers of 50 or more full time employees (excludes part time employees)
 - Part time employees are
 - employees hired for an average of fewer than 20 hours per week
 - employees who have been employed for fewer than 6 of the previous 12 months preceding the date which the notice is required
- Employers of 50 or more employees who work an aggregate of 2000 hours per week

New Requirement

- 90 days notice required if employer executes a lay off of
 - 33% of the workforce which is also at least 25 full time employees, or
 - At least 250 full time employees

Lay-off Notice Details (continued)

The notice must go to

- Affected employees and their representatives
- The New York State Department of Labor
- The local workforce investment boards

The notice must

- Be in writing
- Be specific
- Provide information based on the best information available to the employer at the time the notice is served
- Contain
 - The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information
 - A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect
 - Additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known
 - (To employee representatives and State only) The expected date of the first separation, and the anticipated schedule for making separations
 - (To employee representatives and State only) The job titles of positions to be affected and the names of the workers currently holding affected jobs
 - (To employees only) The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated
 - (To employees and State only) An indication whether or not bumping rights exist
 - (To State only) The name of each union representing affected employees, and the name and address of the chief elected officer of each union

Violation Liability – if the employer violates this requirement he is liable to each employee entitled to notice for

- Back pay at the average regular rate of compensation received by that employee during the last three years of employment, or the employee's final rate of compensation, whichever is higher (for 60 days or ½ the employee's total employment duration, whichever is smaller)
- The value of the cost of any benefits to which the employee would have been entitled had the employment not been lost, including any medical expenses incurred by the employee that would have been covered under an employee benefit plan, less any wages, unconditional payments, payments for benefits or any other liability paid by the employer for violation of this law

The civil penalty for lack of notice to New York State Department of Labor is \$500 for each day of the employer's violation. The civil penalty does not apply if the employer pays all liabilities to the employees within three weeks.



Amusement Tax

The Revenue Budget Bill imposes an expansion of the tax on amusement charges such as charges to use rides, devices, and facilities, other than lawfully operated video lottery terminals. This provision also expands the definition of “place of amusement” to include places where a performance is given, theaters, fairs, race tracks, exhibitions, circuses, golf courses, gymnasiums, bowling alleys, swimming pools and other places where people engage in sports or athletic activities, campgrounds and parks, and any other place that has equipment, apparatus, exhibit, display, or other facilities for amusement such as devices, rides and games at an amusement park, whether or not contained in an enclosure defining the space and whether or not coin-operated, and such as sports, weight training, or other equipment or apparatus at a club or other place.

This provision repeals certain exemptions whereby only 25% of the general admission charges were subject to sales tax in amusement parks.