NEW YORK STATE SENATOR

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From the Desk of Senator Jack M. Martins

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When the Rules Change

Something unfair is going on. It's not only unfair but at the risk of sounding cliché, it's strikes me as distinctly un-American. It's been written about here and there, but has mostly gone unnoticed by the media and the few outlets that have covered it, in my opinion, have missed the point.

For anyone who has ever used catering facilities, whether local halls, caterers at hotels or even at synagogues and civic organizations, you'll recall that your bill normally includes a "service charge" – a percentage of the overall bill. That charge has become the center of much discussion.

The old rule regarding those charges – as reflected in public record on at least ten separate occasions by the New York State Department of Labor and consistent with State and Federal Tax Laws – repeatedly held that "a service charge is not a gratuity which must be distributed to employees, but is part of the employer's gross receipts." Under the old rule the caterer paid sales tax as well as income tax on the service charge as part of its gross receipts.

The new rule, going forward, is that the service charge will now be considered a gratuity which has to be distributed amongst catering workers who then pay whatever tax may be due on it as income. Under the new rule, the customer knows exactly what the service charge is intended to be; the caterer has clear direction; and the catering workers know what to expect.

This sounds fine thus far and while the new rule is clear cut, unfortunately the application of it has been anything but. Our society is built on laws and we all understand that laws can change just as this one has. The difference here is that they're trying to enforce this rule change retroactively, essentially requiring caterers to have been in compliance with the new rule before it was even changed! To make an analogy, it'd be the equivalent of lowering a speed limit from 55 to 45 and then ticketing all those who had exceeded the new limit before it had been changed.

Retroactive application of the new rule puts the entire catering industry on the hook for hundreds of millions of dollars of "service charges" despite the fact that they did nothing more than follow the law precisely as it existed at the time. In reality, it also threatens to put many caterers out of business, risking the jobs of the tens of thousands of workers they employ. Both are unacceptable results. Both are patently unfair.

That's why I've proposed a bill (S.6299) that would settle the matter once and for all. It calls for the new rule to be confirmed as the industry standard, service charges henceforth being considered gratuities, unless represented otherwise, in writing. Most importantly, it protects consumers by insuring that they know exactly what the charges they are paying, actually represent.

This doesn't mean a caterer can't be sued individually if there's evidence of malfeasance. It simply insures that those that are innocent are not presumed guilty and unfairly prosecuted.

The law is there to protect as well as punish. It's our responsibility to make sure it is applied equitably to everyone.

The media has erroneously sensationalized this as a David versus corporate Goliath, pitting caterers against their employees. But in reality this affects hundreds of small family businesses as well as civic and religious organizations, which are being unfairly portrayed as "big guys." What this all boils down to is providing clear direction for the industry, its workers and its customers.

Not surprisingly, the bill has enjoyed wide bipartisan support. It passed the Senate last week and I hope that it will meet equal success on the floor of the Assembly where it is co-sponsored by local Assembly members Schimel, Lavine, Montesano, and Weisenberg.