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March 31, 2022

The Honorable Kathy Hochul  
Governor of the State of New York  
Executive Chamber  
New York State Capitol Building  
Albany, NY 12224

Re: A766/S2762 by Assemblymember Rosenthal: Securing Wages Enforced Against Theft Act (“SWEAT”) – **DISAPPROVAL RECOMMENDED**

Dear Governor Hochul,

We write on behalf of the Hotel Association of New York City, Inc. (“HANYC”) for the purpose of outlining HANYC’s position with respect to A766/S2762 by Assemblymember Rosenthal. Established in 1878, HANYC is one of the oldest professional trade associations in the nation. Today, HANYC is an internationally recognized leader in New York City’s \$5 billion tourism industry, with nearly 300 hotel members and 80,000 rooms. We serve as the voice of the hotel industry, supporting our members with the highest standard of services and best available resources.

### **Elements of the SWEAT Legislation**

1. Employees Can Secure A Lien for the Value of an Alleged “Wage Claim”, Even if the Claim Has Not Been Proven in a Court of Law or by a Governmental Agency

SWEAT provides an employee the ability to secure a lien against his or her current or former employer’s interest in property for the value of the employee’s wage claim, including liquidated damages.<sup>1</sup> “Wage claim” is defined as a “claim that an employee has suffered a violation” of the following labor laws:

- New York Labor Law regarding hours of work for domestic workers (NYLL §170),
- New York Labor Law regarding wage deductions (NYLL §193),

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<sup>1</sup> “Employer” and “employee” are defined the same as those terms are defined under the New York Labor Law.

- New York Labor Law regarding gratuities, *i.e.*, unlawfully retained gratuities (NYLL §196-d),
- New York Labor Law regarding the minimum wage orders, including claims of unpaid wages, commissions and benefits, and spread of hours pay (NYLL §652),
- New York labor law regarding the minimum wages for farm workers (NYLL §673),
- Federal Law regarding minimum wage,
- Federal Law regarding overtime pay, or
- A claim for wages due to an employee pursuant to an employment contract.

Unlike the few other states that have passed similar legislation, where a lien is permitted against business owners for wage violations only *after* a wage theft allegation has been proven as a result of a lawsuit or a governmental agency investigation, SWEAT permits an employee to secure a lien based on mere allegations alone.<sup>2</sup> The legislative rationale underlying this aspect of SWEAT is the belief that by the time an employee files a lawsuit and is awarded a judgment, exploitative employers have already dissipated their assets or dissolved their businesses to avoid paying wages they owe to their employees.

2. The Time to File A Wage Claim Lien is Three Years and the Lien May Automatically Extinguish After One Year if an Employee Fails to Commence a Wage Action or to Foreclose on the Lien

Unlike mechanics liens, which must be filed during the progress of the work performed or within four to eight months after the work is completed (with some exceptions), SWEAT provides an employee with three years from the end of employment to file a lien against an employer.

An employee must properly serve a notice of lien either five days prior to filing the lien or within thirty days after filing the lien upon the employer. Failure to file proof of such service with the applicable county clerk within 35 days after the lien is filed will terminate the notice as a lien. An employee's lien on real property or on personal property cannot extend longer than one year after the notice of lien has been filed, unless an extension to such lien is filed with the county clerk. In the request for an extension, the employee must include the names of the lienor and the owner of the real property against whose interest such lien is claimed, a brief description of the property affected by such lien, the amount of such lien, and the date of the filing the notice of lien. A lien cannot be extended for longer than an additional one-year period. If during this time, the employee fails to commence an action to obtain judgment on the wage claim, or to foreclose the lien, the lien will automatically extinguish unless redocketed by order of the court. If, however, the employee commences an action to obtain judgment on a wage claim, or a foreclosure action within these time periods, the lien will extend through the pendency of the action and for 120 days following the entry of final judgment. An action to obtain judgment on a wage claim includes:

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<sup>2</sup> Wisconsin is the only other state that has passed similar legislation permitting a lien against an employer prior to any wage theft allegations being proven.

- An action brought in any court of competent jurisdiction,
- The submission of a complaint to the NYS Department of Labor (“SDOL”),
- The submission of a claim to arbitration pursuant to an arbitration agreement, and
- Investigations of wage claims by the SDOL or the State Attorney General regardless of whether the investigation was initiated by a complaint.

Once the employer provides notice of its intent to vacate the lien, the employee must either commence an action to enforce the lien or commence an action to obtain judgment on the wage claim upon which the lien was based.

If the employer recovers a favorable judgment on the merits of the wage claim, or it is determined that the employee was not entitled to an attachment, then the employee will be liable to the employer for all costs and damages, including reasonable attorney’s fees, which may have been sustained due to the employee seeking the attachment.

### 3. Unlike Mechanics Liens, Employees Can Secure a Lien Against an Employer’s Personal Property as Well as Business Property

An employee may secure a lien against an employer’s interest in personal property as well as an employer’s business property, except that the lien cannot extend to deposit accounts or goods, as that term is defined under the Uniform Commercial Code (“UCC”).<sup>3</sup> Additionally, SWEAT empowers the SDOL and the New York Attorney General’s offices to secure liens on behalf of employees against employers who are the subject of their investigations, court actions or administrative agency actions.

As a result of SWEAT (and unlike a mechanics liens), employees can go after the personal property of managers and individual owners or shareholders of businesses for the value of their alleged wage theft claim. An employee must be able to sufficiently describe the personal property within the meaning of §9-108 of the UCC and SWEAT imposes penalties on employees who willfully exaggerate their wage theft claims in order to assert larger liens. Such penalties involve voiding the lien and precluding any recovery thereon, in addition to barring the employee from filing a subsequent lien on the same wage claims. But given the broad pleading standards in our courts, this hardly ameliorates the concern that an employee can throw in the kitchen sink of wage theft claims against a middle-class manager’s personal assets. An employee’s lien on personal property may immediately be enforced against the property through

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<sup>3</sup> “Goods” means all things that are movable when a security interest attaches. The term includes (i) [fixtures](#), (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (v) [manufactured homes](#). The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include [accounts](#), [chattel paper](#), [commercial tort claims](#), [deposit accounts](#), [documents](#), [general intangibles](#), [instruments](#), [investment property](#), [letter-of-credit rights](#), letters of credit, money, or oil, gas, or other minerals before extraction. UCC §9-102 (emphasis added).

a foreclosure or upon judgment obtained by the employee.

4. Exposure to Personal Liability for Shareholders of Private Corporations and Members of an LLC are Enhanced Beyond the Proposed Lien Law

Currently in New York, the top ten largest shareholders of a private corporation and the ten members with the largest interest in a limited liability company (“LLC”) may be personally liable for unpaid wages. This is so only after an employee puts such shareholder or member on notice of such liability within a certain period of time and only after the employee obtains a judgment against the company and is unable to execute on that judgment. SWEAT removes these threshold requirements by removing such provisions from New York’s Business Corporation Law and Limited Liability Company Law. As a result, SWEAT expands a shareholder’s or member’s exposure to personal liability not just in the context of the lien law, but in all instances where an employee seeks to hold shareholders and members personally liable for wage and hour claims.

Additionally, SWEAT codifies the personal exposure to liability of shareholders by including liquidated damages, penalties, interests and attorneys’ fees and costs, in addition to unpaid wages.<sup>4</sup> This is in stark contrast to the mechanic’s lien law, where such liens cannot be for a sum greater than the value or agreed upon price of labor and materials that remain unpaid.

SWEAT also provides an employee the ability to demand the inspection of business records within five days of written notice to the private corporation or LLC employer. The disclosure obligations are limited to names, addresses, and the value of the shareholder's interest in the corporation, or the value of the member’s interest in the LLC. Therefore, the employee cannot obtain the financial records of the corporation or LLC.

**Reasons for Opposition to the SWEAT Legislation**

- There is no Due Process for employers and their managers.
- Securing liens against middle-class managers and small businesses could have devastating financial impact, including long-lasting effect on personal credit scores and/or the ability to obtain financing.
- There is the possibility that employees could use the lien process against managers for ulterior motives and some managers make less than the employees they supervise.
- There is the possibility that unionized employers could face arbitrations brought by the union and liens by the employee for the same claim. This may also mean that employers will bring Federal court litigation to force their employees to arbitrate claims covered by a collective bargaining agreement.
- Employers will be dissuaded from doing business in New York.
- Private corporations (both foreign and domestic) may have a smaller investor pool to pull from.

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<sup>4</sup> Personal liability of LLC members for liquidated damages, attorneys’ fees and penalties and interest is already codified in Section 609 of the Limited Liability Company Law.

- Further dissuades shareholders and members from doing business in New York by removing the requirement in all wage and hour actions (and not just for purposes of securing a lien) that an employee must attempt to collect on a judgment against the company first, prior to any individual shareholder or member liability.

Accordingly, for the foregoing reasons, we urge disapproval of this legislation.

Sincerely,

Vijay Dandapani  
President & CEO

cc: Elizabeth Fine, Counsel to the Governor