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On June 12, 2009, a Milwaukee judge invalidated Milwaukee's Paid Sick Leave Ordinance, which had been enacted as a ballot initiative on November 4, 2008, and issued a permanent injunction prohibiting the City of Milwaukee from enforcing the Ordinance. The judge found that the Ordinance was improperly enacted under Wisconsin statutory law governing "direct legislation" such as ballot initiatives, and further found that the Ordinance was an improper exercise of the City's police powers, in that it was overbroad and its provisions were not reasonably related to the stated goals of the Ordinance.

## Judge Invalidates Milwaukee Paid Sick Leave Ordinance

By Noah G. Lipschultz

On Friday June 12, 2009, a Milwaukee circuit court judge invalidated the City of Milwaukee's Paid Sick Leave Ordinance, which had been enacted by voter ballot initiative on November 4, 2008. The Ordinance would have required employers operating in Milwaukee's geographical boundaries to provide up to 72 hours of paid "sick leave" per year (accruing in hourly increments every 30 hours worked) to each of their employees, to be used for a variety of circumstances far exceeding the scope of most state and federal family leave laws. In particular, the Ordinance provided that such leave could be used for an employee's own, or a family member's, mental or physical illness, injury or medical condition, or for preventative care, medical diagnosis or treatment, and also if they themselves or a family member are victims of stalking, domestic abuse or sexual assault. "Family member" had been defined broadly not just to include immediate and extended family members, but also "any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship." For more information about the Ordinance, please see Littler's November 2008 ASAP, *Milwaukee Becomes Third City to Mandate Paid Sick Leave for Employees*.

The Metropolitan Milwaukee Association of Commerce (MMAC) filed suit to enjoin enforcement of the ordinance and a declaration that the ordinance was invalidly enacted and unconstitutional. An employee rights advocacy group, 9to5 National Association of Working Women, intervened in the lawsuit in an effort to defend the Ordinance. On February 6, 2009, the court enjoined the City of Milwaukee from enforcing the ordinance, pending its review and determination of the MMAC's legal challenge. The MMAC advanced a number of legal theories to challenge the ordinance, including: (1) the ordinance was improperly enacted; (2) it was preempted by state law (Wisconsin's Living Wage Act, Workers' Compensation Act, and Family Medical Leave Act), and federal law (the National Labor Relations Act, and the Labor Management Relations Act), and (3) the ordinance was an unconstitutional exercise of police powers, an invalid impairment of existing contracts, unconstitutionally vague and extraterritorial.

## Court Finds Ordinance Improperly Enacted and Overbroad in its Reach

The court found merit to the challenge based on the procedural defects in the enactment of the Ordinance, which failed to comply with Wisconsin statutory law governing “direct legislation” such as referendums. Specifically, the referendum ballot question (“Shall the City of Milwaukee adopt ... an ordinance requiring employers within the city to provide paid sick leave to employees”) failed to contain a “concise statement of its nature,” as required by Wisconsin statutes, because it failed to “reasonably, intelligently, and fairly” comprise or refer to the essential elements of the Ordinance. As one example, the court noted that the term “paid sick leave” as used on the ballot failed the “concise statement” test because the ordinance encompassed numerous reasons for paid leave far beyond the common understanding of “sick leave,” including leave for stalking, domestic abuse and sexual assault. As a result, the court found that the “true intent” of the voter could not be elicited from the referendum vote.

The court rejected MMAC’s arguments that the Ordinance conflicted with Wisconsin’s other laws, such as Wisconsin’s FMLA and Living Wage Act, finding instead that the ordinance “complemented” those statutes. As to the Wisconsin FMLA, the court noted that the sick leave ordinance was consistent with that statute’s allowance of the substitution of paid leave for other types of leave and for the allowance of more generous leave policies than those contained in the Wisconsin FMLA.

The court rejected federal labor law preemption, finding that the ordinance did not relate to activities covered by the NLRA, and it did not affect the balance of power in labor/management relations.

As to the challenge to the constitutional exercise of police powers, the court found that the provisions relating to domestic abuse and sexual assault were not reasonably related to the overall objectives of the ordinance. In particular, the court found that provisions allowing “sick leave” to be used for relocation or taking legal action relating to sexual assault and domestic abuse were not rationally related to the ordinance’s overall objectives, which were geared toward more traditional notions of sickness.

The court rejected MMAC’s arguments that the Ordinance impermissibly interfered with existing contracts (mainly, collective bargaining agreements), finding that the Ordinance did not nullify the terms of any contracts, but only peripherally affected collective bargaining agreements.

The court refused the City of Milwaukee’s request to sever the portions of the Ordinance the court found unconstitutional and enforce the remaining provisions, finding that such an act would cause the court to “balance policy decisions better left to the electorate.”

## Further Legal Proceedings and Efforts in Support of Paid Sick Leave Are Likely

The judge’s ruling does not spell the end of mandated paid sick leave. It is likely that 9to5 will appeal the judge’s ruling, and the organization, along with many other employee rights advocacy groups, will continue to pursue federal, mandated sick leave legislation, including the “Healthy Families Act,” which would guarantee seven paid sick days per year to employees of employers with 15 or more employees. In addition, the electors of the City of Milwaukee may use the judge’s ruling as a guidepost and re-introduce the sick leave ballot initiative in a manner which addresses the court’s legal concerns.

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