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Milwaukee Becomes Third Major City to Pass Paid Sick Leave Legislation

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On November 4, 2008, Milwaukee, Wisconsin became the third major city in the country (following Washington, D.C. and San Francisco) to pass legislation mandating paid sick leave for employees. Passed as a binding referendum, the Ordinance is far-reaching, as it requires private employers to provide their employees within the City of Milwaukee up to nine (9) eight-hour days of paid sick leave per year. Additionally, the Ordinance affords paid leave for time off for matters not traditionally considered to be "sick leave" and allows an employee time off to care for family and other household members.

While the Ordinance became law on November 12, 2008, administrative rules which address practical implementation and enforcement are still being drafted by the City. The Ordinance contains significant ambiguity in defining the family members it covers, the parameters of leave use, and what substantiation, if

any, an employer may require to support need for leave. While the City expects implementation to take place in early February 2009, the Ordinance will likely face legal challenge with a resulting stay. The broad scope of the paid sick leave mandate has caused the Metropolitan Milwaukee Association of Commerce (MMAC) to provide notice to the City of its opposition to the law. Basis for legal opposition is that the Ordinance exceeds the legislative authority of the City because it: (1) improperly attempts to regulate employers located outside the geographic boundaries of the City that employ individuals within the City; (2) is considered to be an attempt to set a living or minimum wage within the meaning of Wis. Stat. Chap. 104; and (3) conflicts with and violates the spirit and policy of the Wisconsin Family and Medical Leave Act ("WFMLA"). Despite likely postponement and lack of definitional clarity in execution and enforcement, it may be prudent for employers having employees within the City of Milwaukee to consider how existing paid time-off programs might most advantageously be modified to coordinate with the Ordinance, should it become effective in 2009. However, given the expected challenges to the Ordinance and likely delay in its implementation, changing existing attendance and leave policies in anticipation of the Ordinance may be premature.

As it stands, the Ordinance provides that all private sector employees employed within the City of Milwaukee shall accrue a minimum of one (1) hour paid sick leave for every thirty (30) hours worked by the employee, up to a maximum of seventy-two (72) hours (the equivalent of nine (9) eight-hour days) within a calendar year. Employees of a "small business," which is defined by the Ordinance as a private entity employing fewer than ten (10) persons during a given week, shall accrue up to forty (40) hours of paid sick leave in a calendar year. In circumstances where the number of persons working for a small business fluctuates above and below ten (10) or more persons per week, business size is determined for a current calendar year based on the average number of persons who worked for the employer per week during the preceding calendar year. Leave provided under the Ordinance begins to accrue from an employee's first day of employment but may not be used until the ninetieth (90th) calendar day following the start of employment. Employers must carry over unused paid sick leave to the following calendar year; however, an employee's use is limited to the annual maximum of forty (40) hours for employees of small businesses and seventy-two (72) hours by employees of all other businesses. Employees include full-time, part-time and temporary workers, and "any person who is employed within the geographic boundaries of the city." Under the Ordinance, an employer is not required to pay out accrued, but unused, sick pay upon an employee's separation from employment. Finally, the accrued sick leave of any employee terminated and then rehired by the same employer within one (1) year of termination, will be fully reinstated.

Under the Ordinance, an employer is not required to provide additional sick leave if the employer already provides paid leave that meets the broad parameters of leave under the Ordinance. However, it is unlikely that an employer's currently existing PTO, sick leave, or other paid leave policies will do so. In order to coordinate existing paid leave programs with the new Ordinance, an

employer may have to revise current paid leave programs. This presents difficulty for those national and regional employers who have attempted to have uniformly administered paid leave policies. It is therefore estimated that the costs associated with the implementation of this Ordinance will be significant and might be extremely detrimental. The costs incidentally may have dramatic effect on the survival of smaller businesses within Milwaukee.

The most problematic issues of coordinating current employer paid leave policies are anticipated to be in the areas regarding permitted use of the paid sick leave and identifying the family members for whose care sick leave is being taken. In its entirety, the Ordinance is far more permissive toward employee absence than the Wisconsin or Federal Family and Medical Leave Act (FMLA). For example, under the Ordinance a family member is also defined as a grandparent, grandchild, sibling or spouse of a sibling, domestic partner, or *any other individual related by blood or affinity whose association with the employee is the equivalent of a family relationship*. Taken to its extreme, a close friend may be deemed a family member under the plain language of the Ordinance. Sick leave may also be used within very broad and ambiguous parameters. It includes time off for "preventive" medical care. The Ordinance further allows employees to use paid sick leave for absence related to injuries resulting from or handling issues regarding domestic abuse, sexual assault or stalking including obtaining "other counseling", and/or "taking legal action," which includes "preparing for" a civil or criminal legal proceeding.

Also troubling is that, while the Ordinance broadens an employee's ability to take time off, conversely it seems to restrict an employer's ability to have definition or accountability surrounding those absences. For example, an employer is prohibited from requiring "disclosure of information relating to domestic abuse, sexual assault or stalking, or the details of an employee's medical condition as a condition of providing paid sick leave" under the Ordinance. An employer is further restricted from imposing "unreasonable barriers to use the paid sick leave" or requiring "unreasonable documentation of illness when an employee takes sick leave." What is "unreasonable" in these contexts is undefined. While it would be presumed that the current documentation policy and procedure an employer has in place with regard to administration of its FMLA and paid leave policies would be considered reasonable, an employer is significantly restricted from obtaining any necessary information regarding leave unrelated to medical-based absence. It is hoped that the administrative rules currently under formulation by the City will address these definitional problems.

Additional administrative requirements of the Ordinance relate to notice, posting, and recordkeeping. Employers are required to give notice to employees that sets out their entitlement to paid sick leave and its terms; the notice must also state that retaliation against employees who request or use paid sick leave is prohibited. Notice may be given by providing written notice or displaying a poster, either of which must be in English, Hmong, and Spanish. Finally, employers are required to retain records documenting hours worked by employees and paid sick taken leave taken by employees for a period of five (5) years, which far exceeds federal and state

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law record retention requirements.

Because of potential delays in implementation, lack of definitional clarity and unclear enforcement of the Ordinance, employers doing business within the City of Milwaukee should understand the parameters of the Ordinance and, with the assistance of legal counsel, should develop a flexible coordination strategy that anticipates some necessary policy modification to balance against the financial and management impact of the Ordinance. However, unless and until the Ordinance is implemented, employers should continue to enforce their existing attendance and leave policies.

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