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October 28, 2008

Mr. Barry J. Zalben, Manager
Legislative Reference Bureau
Room B-11, City Hall

Re: Proposed Budget Amendment Mandating that City Employees Take Unpaid Leaves of Absence During 2009

Dear Mr. Zalben:

On October 16, 2008, you sent the following opinion request to this office:

> "On behalf of a Common Council member, the Legislative Reference Bureau is requesting that you opine on whether it is permissible, pursuant to an amendment to the 2009 proposed city budget, to mandate that city employees take a number of unpaid days during 2009. The opinion should further address whether such an amendment could be applicable to various classes of city employees, that is, those covered by collective bargaining agreements; management employees; and nonmanagement, nonrepresented employees."

We now respond to your inquiries.

Initially, we note that your inquiry regarding mandating City employees to take a certain number of unpaid days off work does not distinguish between City employees constituting the protective services, i.e., employed in the fire and police departments, and those employees in the general City workforce. Given the need for a timely response to your inquiry, the potential that in fact there may not be an interest in mandating that protective service personnel not work a certain number of days, and the complexities of the provisions of Wis. Stat. § 62.50 (with respect to the authority of the Common Council, the Mayor and the Fire and Police Commission regarding the regulation of the Fire and Police Departments), our response is limited to the various classes of City employees not holding sworn positions in the ranks of the Fire and Police departments.

Generally speaking, the rule of law in Wisconsin for municipal employees is set forth in *Vorwald v. School District of River Falls*, 167 Wis. 2d 549, 557, 482 N.W.2d 93, 96 (1992):

> "Under Wisconsin law, employment at will is the rule. Absent civil service regulations or laws, or a contract or collective bargaining agreement, a municipal employee is an employee at will and has no property interest in employment."

In our judgment, the City would be able to require that City employees take a limited number of unpaid days off work in 2009 due to financial pressures on the City. We have divided our analysis into two categories concerning addressing, respectively: (1) management employees and non-management/non-represented employees, and (2) employees represented by various labor organizations and covered by collective bargaining agreements.

With respect to those City employees not covered by a collective bargaining agreement, the Common Council may mandate a limited number of unpaid days off of work. One consequence, however, will result from such action taken regarding management employees who are exempt from the overtime payment requirements under the federal Fair Labor Standards Act ("FLSA"), 29 USC § 201, et seq. Pursuant to a regulation promulgated under the FLSA, 29 C.F.R. § 541.602, in order for employees to qualify as exempt from overtime pay requirements, City employees must be paid on a "salary basis." In such circumstances it is generally impermissible to make *any* reduction in the pay of an exempt employee in any work week in which the employee performs work, unless the reduction falls within certain enumerated exceptions identified in the regulations. If an otherwise-exempt employee were found not to be paid on a "salary basis," the employee would normally be deemed entitled to overtime pay for a period of three years prior to the filing of a complaint. However, a separate federal regulation, i.e. 29 C.F.R. § 541.710 (b), provides that:

> Deductions from the pay of an employee of a *public agency* for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced. (Emphasis added).

Under this exception, the City (and other public sector employers) can require exempt employees not to report to work for partial or full days and can reduce their pay accordingly as long as the action relates to a budgetary issue. Accordingly, we advise that any Common Council-enacted measure should clearly state that the number of days to be taken off (i.e., the furlough), was required because of City financial problems. The ramification of such Common Council action would cause these employees, who were otherwise exempt from the overtime requirements of the FLSA, to be deemed non-exempt, but only for work performed during the week of their furlough. In short, although it would seem highly unlikely, if these employees were to work more than 40 hours in the week in which the furlough was taken, they would be entitled to overtime pay for the hours worked in excess of 40 hours during that week. Apart from this situation, however, we do not consider there to be a limitation on the Common Council's mandating that unrepresented City employees take a limited number of unpaid days off of work during 2009.

With respect to employees covered by collective bargaining agreements, the rights of the City and the employees are determined by those agreements. Given that the City has collective bargaining agreements with 19 certified collective bargaining representatives, a comprehensive answer to your question would require examining the provisions of each of those labor agreements. Nonetheless, given that the City historically seeks to include standard language in certain articles of all labor agreements that might bear on this issue, we have reviewed the current labor agreement between the City and Milwaukee District Council 48, AFSCME (the largest union representing City employees) to respond to your question. Under the management rights article (Article 6) of that labor agreement, the following provisions are applicable:

> 6.1 The Union recognizes the right of the City to operate and manage its affairs in all respects in accordance with its responsibilities. Any power or authority which the City has not officially abridged, delegated or modified by this Agreement is retained by the City.
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> * * *
>
> 6.3 The City shall have the right to determine the reasonable schedules of work and to establish the methods and processes by which such work is performed.
>
> 6.4 The City has the right to schedule and assign regular and overtime work as required.
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> * * *
>
> 6.7 The City reserves the right to layoff for lack of work or funds, or the occurrence of conditions beyond the control of the City, or where the continuation of work would be wasteful and unproductive.

Additionally, the "Hours of Work" (Article 20) provision of that contract, specifying that the "normal" work day consists of eight hours and that the "normal" work week consists of five calendar days, provides:

> 20.4 Nothing in this Agreement shall be construed as a guarantee or limitation on the number of hours to be worked per day, per week, or for any other period of time except as may be specifically provided.

Given this language, in our opinion the pressing financial circumstances facing the City that might cause the Common Council to reduce the work week of City employees for a limited period of time would not constitute a violation of this provision of the contract. In that regard, when challenges have been brought to a governmental employer's decision to shorten the work week of its employees, arbitrators have generally determined that there has been no contract violation when the reduction has been for a limited period. For instance, in *Jackson County*, Case 148, No. 62559, MA-12338 (2005), the County notified all members of its highway department that there would be no work on one designated day in each of three weeks during April. The arbitrator determined that the budgetary shortfall prompting the County's action amounted to a single incident involving a three-day variation in the employees' regular work week and did not constitute a violation of the labor agreement. By contrast, when a county for budgetary reasons reduced the normal work week for its employees by one hour per week for 37 weeks, an arbitrator determined that this reduction for an extended period of time violated the contract, and required that the employees be paid for the one hour period for which they were denied work. *Fond du Lac County*, Case 176, No. 66362, MA-13502.

Although in our opinion the City has the authority to mandate that employees take a limited number of days off without pay in 2009, it is possible that such an action would be argued to constitute a lay off. The City's labor agreements contain provisions regarding the manner in which layoffs would occur, generally taking into account seniority. If the Common Council opts to mandate that employees take days off without pay, it would be prudent to include in any resolution providing for such time off language indicating that the action shall be undertaken consistent with applicable collective bargaining agreement provisions and Wisconsin labor law.

As a final word, it bears noting that employees who are ordered to take a day or more off without pay in a pay period would not be precluded from applying for and receiving unemployment compensation benefits for the time off (there is no waiting period for receipt of such benefits). Unemployment compensation benefits paid out to eligible City employees are assessed by the State to the City. Accordingly, this would have some impact upon the savings associated with a reduction in the days employees work.

Very truly yours,

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