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July 11, 2008

Alderman Ashanti Hamilton
1st Aldermanic District
200 East Wells Street, Room 205
Milwaukee, WI 53202

Re: Direct Legislation Petitions Relating to Proposed Paid Sick Leave Ordinance

Dear Alderman Hamilton:

By letter dated July 8, 2008, you requested a legal opinion as to whether the above-referenced proposed paid sick leave ordinance is an appropriate matter for direct legislation. It is our opinion that none of the limitations on direct legislation, explained more fully below, apply to the proposed ordinance. Accordingly, we conclude that the Common Council must either pass the proposed ordinance without alteration or place it on the ballot for the November election.

We so advise despite the fact that we have concerns about the validity of the proposed paid sick leave ordinance. As we indicated in the attached opinion dated August 6, 2007, it is not clear that the City of Milwaukee has the authority to impose a paid sick leave mandate on private sector employers employing individuals within the City of Milwaukee. In addition, we have other concerns about the text of this proposed ordinance which were not addressed in the August 6, 2007 opinion as in that opinion we were asked to review the San Francisco paid sick leave ordinance. However, given the conclusions stated in this opinion and the inability of the Common Council to alter the text of the proposed ordinance, this is not the appropriate time to discuss those concerns.

In our August 6, 2007 opinion we concluded that the City's power to enact a paid sick leave ordinance depends on whether the legislative record establishes a reasonable relationship between a paid sick leave requirement and the public health and general welfare and that the legislative record would determine the

permissible scope of any paid sick leave requirement. Due to the use of the direct legislation procedure, there has not been an opportunity to create a legislative record establishing that reasonable relationship. Nonetheless, as described more fully in this opinion, even "grave doubts" about the constitutionality or validity of proposed direct legislation, in the absence of "specific prior adjudications of unconstitutionality," will not justify the Common Council's refusal to either pass the proposed ordinance or place it on the ballot. *State ex rel. Althouse v. City of Madison*, 79 Wis. 2d 97, 255 N.W.2d 449 (1977).

The petitions, which were certified by the City Clerk on July 8, 2008, were presented under Wisconsin's direct legislation statute, Wis. Stat. § 9.20. Under Wis. Stat. § 9.20(4), the Common Council "shall, *without alteration*, either pass the ordinance or resolution within 30 days following the date of the clerk's final certificate, or submit it to the electors at the next spring or general election..." (emphasis added).

The Common Council's obligation to pass the ordinance, without alteration, or submit it to the electors is a mandatory, ministerial, and nondiscretionary duty enforceable in a mandamus action and subject only to four narrow limitations. *Althouse*, 79 Wis. 2d 97, 107. In *Mount Horeb Community Alert v. Village Board of Mt. Horeb*, 2003 WI 100, ¶ 17, 263 Wis. 2d 544, 665 N.W.2d 229, the Wisconsin Supreme Court restated the limitations on direct legislation as follows:

> Direct legislation initiated pursuant to Wis. Stat. § 9.20 is subject to four limitations that we have held are implicit in the statute. *See Althouse*, 79 Wis. 2d at 105, 255 N.W.2d 449. An ordinance initiated under Wis. Stat. § 9.20: 1) must be legislative as opposed to administrative or executive in nature; 2) cannot repeal an existing ordinance; 3) may not exceed the legislative powers conferred upon the governing municipal body; and 4) may not modify statutorily prescribed procedures or standards. *Heitman*, 226 Wis. 2d at 548-49, 595 N.W.2d 450 (citing *Althouse*, 79 Wis. 2d at 107-08, 255 N.W.2d 449).

The only limitation that arguably applies is the third limitation which provides that a proposed ordinance may not exceed the legislative powers conferred upon the governing municipal body. However, in applying the limitations on direct legislation in the *Althouse* decision, the Wisconsin Supreme Court considered the

following question, which is directly applicable to our analysis: "Whether the council has the discretion to refuse to enact or place on the ballot a proposed initiated ordinance on the ground that it appears to the council to be arguably invalid or unconstitutional." *Althouse*, 79 Wis. 2d at 109.

In *Althouse*, the Madison city clerk certified petitions seeking the enactment of a fair rent ordinance. Based on advice from the city attorney that the fair rent ordinance was likely in violation of state statutes and unconstitutional, the common council took no action on the proposed ordinance, neither passing it nor placing it on the ballot. Grounding its decision in separation of powers principles, the Wisconsin Supreme Court held that:

> [W]here there has been no specific prior adjudication of unconstitutionality, the electorate under the direct legislation statutes, may compel placement on the ballot regardless of grave doubts in respect to constitutionality and statutory validity. Only after the measure has passed and a controversy arises may a court of this state pass upon the question of constitutionality.

Althouse, 79 Wis. 2d at 117-118. Because there was no specific prior adjudication of the constitutionality or statutory validity of the fair rent ordinance, the Wisconsin Supreme Court held that the lower court erred when it declined to compel the common council to place the proposed ordinance on the ballot.

The Common Council's options with regard to the proposed paid sick leave ordinance appear to be governed squarely by the *Althouse* decision. No Wisconsin court, or any other jurisdiction, has specifically ruled on the constitutionality or statutory validity of an ordinance imposing a paid sick leave requirement on private sector employers. San Francisco, through direct legislation, and the District of Columbia, through council action, enacted paid sick leave ordinances, in 2007 and 2008 respectively. Neither ordinance has been struck down.

In our August 6, 2007 opinion, we concluded, in pertinent part:

> Given the favorable standard of review accorded to municipal use of the statutorily-delegated police power, we cannot say that a paid sick leave requirement is clearly beyond the bounds of the City's

> police power. We believe that a paid sick leave ordinance can be defended in good faith as a lawful use of the City's police power only if the legislative record supports the ordinance's assertion that a paid sick leave requirement is reasonably related to the City's legitimate objective of promoting the public health or welfare.

Based on our August 6, 2007 opinion, our review of the proposed paid sick leave ordinance, and our review of Wis. Stat. § 9.20 and the applicable court decisions, we conclude that the Common Council must either pass the ordinance, without alteration, or place it on the ballot for the November general election. If you have any comments or concerns or require any additional information, please do not hesitate to contact the undersigned.

Very truly yours,

GRANT F. LANGLEY
City Attorney

STUART S. MUKAMAL
Assistant City Attorney

THOMAS D. MILLER
Assistant City Attorney

c: Ronald D. Leonhardt, City Clerk

TDM:tdm
Enclosure
1033-2008-2136:134903

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August 6, 2007

Alderman Tony Zielinski
14th Aldermanic District
City Hall, Room 205

Re: Mandatory Paid Sick Leave Ordinance

Dear Alderman Zielinski:

By letter dated April 4, 2007 you indicated that you wish to introduce an ordinance requiring businesses in the City of Milwaukee to provide paid sick leave to their employees similar to an ordinance recently enacted in the City and County of San Francisco ("San Francisco ordinance"). The administrative agency responsible for monitoring and enforcing the San Francisco ordinance issued final rules for its implementation on May 31, 2007 and the ordinance became fully effective on June 1, 2007.

You requested that we review the San Francisco ordinance and provide an opinion as to the legality and enforceability of this type of ordinance. We understand your request to be whether the City of Milwaukee has the authority to require private sector employers employing individuals within the City of Milwaukee to provide paid sick leave.

We cannot definitively say that the City has such authority. There are no court decisions directly on point as San Francisco is the first municipality in the nation to adopt such an ordinance. Testimony at public hearings held before municipal governments in San Francisco and Washington, D.C., as well as the Massachusetts

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legislature and the United States Congress, has cited a relationship between paid sick leave and public health and welfare. The City's power to enact a paid sick leave ordinance under its delegated police powers depends on whether the legislative record, including hearing testimony and studies, demonstrates a reasonable relationship between the proposed requirement and the public health and general welfare. These hearings should be held and the record established before any proposed ordinance is drafted as the record will dictate the permissible scope of such a regulation on private sector employers in the City of Milwaukee.

We anticipate that a paid sick leave ordinance would be challenged in court. It is our opinion that the City's authority to enact a paid sick leave ordinance can be defended in good faith only if supported by legislative findings demonstrating a rational link between a paid sick leave requirement and the public health or welfare. However, we cannot predict with any degree of certainty that a Wisconsin court would uphold such authority.

You have given no indication that you intend to propose a paid sick leave mandate that is as broad as the San Francisco ordinance. It is important to note that the San Francisco ordinance requires that private sector employers provide significantly greater sick leave benefits than those currently provided by the City of Milwaukee to City employees under Milwaukee City Ordinance § 350-37 and through collective bargaining agreements that the City has entered into with various unions. Again, no such City of Milwaukee proposed ordinance is before us but this discrepancy may pose equal protection problems and would likely undermine any public health or welfare rationale for a City requirement as broad as the San Francisco ordinance. We further caution that there are other enforcement aspects of the San Francisco ordinance that would clearly not be legal and enforceable under Wisconsin law, which we address in Part II of this opinion.

I. THE CITY OF MILWAUKEE'S AUTHORITY TO REQUIRE EMPLOYERS TO PROVIDE PAID SICK LEAVE

A. Substantive Requirements of the San Francisco Ordinance

The San Francisco ordinance requires that employers provide paid sick leave to employees for their own medical leave or "for the purpose of providing care or

assistance to other persons [listed below]...with an illness, injury, medical condition, need for medical diagnosis or treatment or other medical reason."

Paid sick leave may be taken to care for the following persons other than the employee: child; parent; legal guardian or ward; sibling; grandparent; grandchild; spouse; registered domestic partner under any state or local law; or "designated person." An employee may select a "designated person" for whom the employee may use sick leave to care for if the employee has no spouse or registered domestic partner. The employee may change this designation annually.

The San Francisco ordinance defines "employee" to include any person "employed within the geographic boundaries of the City and County of San Francisco" and includes part-time and temporary employees as well as welfare-to-work participants. The San Francisco ordinance defines "employer" to include any "person" who directly or indirectly employs or exercises control over the wages, hours, or working conditions of an employee and includes a person using the services of a temporary worker agency.

Paid sick leave begins to accrue 90 days after hiring with the employee earning one hour of paid sick leave for every 30 hours worked. The ordinance caps accrued paid sick leave for employees of "small businesses" at 40 hours. "Small business" is defined as an employer of less than 10 people during any given week. The ordinance caps paid sick leave at 72 hours for all other employees.

Paid sick leave carries over from year to year but it is limited to the applicable maximum hours. The employer is not required to make a payout of unused accrued paid sick leave upon separation from employment. An employer's current paid leave policy is sufficient if it makes paid sick leave available for the same purposes as the ordinance and provides the same amount of paid leave. The ordinance prohibits retaliation for use of paid sick leave.

An employer may require "reasonable notification" of an absence for which paid sick leave is or will be used. The ordinance does not define "reasonable notification" but the administrative rules address notice. An employer may only take "reasonable measures" to verify or document that an employee's use of paid sick leave is lawful. Again, the ordinance leaves it to the administrative agency to prescribe "reasonable measures" of verification. The requirements of the San

Francisco ordinance may be expressly waived by a collective bargaining agreement.

B. The City's Legal Authority to Enact a Paid Sick Leave Ordinance

The City's authority to enact a paid sick leave ordinance is not clear. We cannot definitively say that the City lacks such authority but cannot predict with any degree of certainty that a court would find that the City possesses such authority. We believe that a paid sick leave ordinance can be defended in good faith as a lawful use of the City's police power only if the legislative record shows that a paid sick leave requirement is reasonably related to the promotion of the public health or welfare.

1. Constitutional Home Rule

It appears that the City does not have power to enact such an ordinance under Wisconsin's home rule amendment, Article XI, Section 3 of the Wisconsin Constitution. The home rule amendment grants cities and villages broad power to determine their local affairs and government. Wisconsin courts classify legislative enactments into three categories for purposes of determining whether they fall under the home rule amendment: (1) those that are exclusively of statewide concern; (2) those that are entirely of local character; and (3) those that do not fit exclusively into either category. *State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 526, 253 N.W.2d 505 (1977). Courts must then determine whether legislation possessing aspects of both statewide concern and of local affairs is "primarily or paramountly" a matter of local affairs or statewide concern. *Id.* (ordinance concerning effort to ensure compliance with the City's building and zoning code was primarily a matter of local affairs).

The City's authority to enact a paid sick leave ordinance most likely does not derive from its constitutional home rule powers. Paid sick leave, like family and medical leave which is currently provided by state statute, appears to be primarily a matter of statewide concern. Many of the employers that would be subject to the ordinance employ workers residing in other parts of the state and nation. Further, private sector employees throughout the state may be affected by the same workplace and health issues that a proposed ordinance would aim to address.

2. Legislative Home Rule and Police Power

Though the constitutional home rule authority of cities extends to local affairs only, a city ordinance may be authorized by Wis. Stat. § 62.11(5) even if the ordinance regulates matters of statewide concern. *Anchor Sav. & Loan Assoc. v. Equal Opportunities Comm'n*, 120 Wis. 2d 391, 395, 355 N.W.2d 234 (1984). "Indeed, sec. 62.11(5), Stats., would be a nullity if it were construed to confer on municipalities only that authority which related to 'local affairs' since that power is already constitutionally guaranteed by the home-rule amendment." *Id.* at 396 (*quoting Wis. Envtl. Decade, Inc. v. DNR*, 85 Wis. 2d 518, 533, 271 N.W.2d 69 (1978) (holding that the state could confer on the City of Madison the power under § 62.11(5) to prohibit chemical treatment of aquatic nuisances in area lakes but that such authority was preempted by state statute)). Section 62.11(5) provides in pertinent part:

> POWERS. Except as elsewhere in the statutes specifically provided, the council shall have...power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by...regulation...and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

It is well-established that the police power of the state, exercised by municipalities pursuant to Wis. Stat. § 62.11(5), extends not only to public safety, health, and morals but also to "promotion of the public welfare, convenience, and general prosperity..." *Highway 100 Auto Wreckers, Inc. v. City of West Allis*, 6 Wis. 2d 637, 643, 96 N.W.2d 85 (1959) (citations omitted)[1]. The broad and flexible nature of the police power has been described as follows: "the police power has a dynamic or progressive capacity to be applied to new subjects or to be exercised by new or revised measures as economic or social changes require." 6A McQuillin, *The Law of Municipal Corporations*, § 24:8, at 32 (3d Ed. 2007).

[1] Pursuant to Wis. Stat. § 62.03(2), the City has adopted Wis. Stat. § 62.11(5) such that it applies to the City. (Ord. File No. 50790 – 2/6/33)

Accordingly, a reviewing court will grant a large measure of deference to a municipality's determination that an ordinance is a necessary and reasonable use of the police power:

> Courts will not interfere with the exercise of police power by a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases to interfere with the exercise of this power reposed by law in municipal corporations...Municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of ordinances under their police power, and every intendment is to be made in favor of the lawfulness and reasonableness of such ordinance. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance in the light of this knowledge creates a *prima facie* presumption that it is reasonable.

Highway 100 Auto Wreckers, 6 Wis. 2d at 646 (citations omitted).

The challenging party bears the "frequently insurmountable task of demonstrating beyond a reasonable doubt that the ordinance possesses no rational basis to any legitimate municipal objective." *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 209, 313 N.W. 2d 805 (1982) (citations omitted). However, the Wisconsin Supreme Court has cautioned that the rational-basis standard of review is "not a toothless one." *Id.*

In *Grand Bazaar*, the court held that an ordinance limiting liquor licenses to establishments that receive at least 50% of their income from alcohol sales was arbitrary and irrational because there was no reasonable link between the restriction and the purported purposes of limiting the number of new liquor licenses and ensuring compliance with the liquor ordinances. *See also Clark Oil & Refining Corp. v. City of Tomah*, 30 Wis. 2d 547, 141 N.W.2d 299 (1966) (finding there was no rational basis for an ordinance prohibiting delivery of gas to

retail stations in trucks holding 1500 gallons of gas or more because of the far greater fire hazard posed by the greater frequency of smaller trucks that would be required to travel the roads).

Under these general police power principles, the City must establish a legislative record that demonstrates that a paid sick leave ordinance is reasonably related to the City's power to promote the public health and general welfare of its residents. We cannot predict with any degree of certainty whether a Wisconsin court would uphold a paid sick leave requirement as a reasonable use of the City's police power granted by Wis. Stat. § 62.11(5). No court has ruled on the question of a municipality's power to enact such an ordinance, or more specifically, whether this particular regulation of the employer-employee relationship by a municipality can be considered a reasonable exercise of the police power.

Given the favorable standard of review accorded to municipal use of the statutorily-delegated police power, we cannot say that a paid sick leave requirement is clearly beyond the bounds of the City's police power. We believe that a paid sick leave ordinance can be defended in good faith as a lawful use of the City's police power only if the legislative record supports the ordinance's assertion that a paid sick leave requirement is reasonably related to the City's legitimate objective of promoting the public health or welfare.

If you introduce such legislation, it is imperative that the appropriate Common Council committee conduct a legislative fact finding hearing so that the need for and purpose of the proposed ordinance can be fully established and documented. If the legislative findings support such an ordinance, the findings of fact should be incorporated into the body of the ordinance. We emphasize that the legislative findings will determine the permissible scope of any ordinance requiring that private sector employers provide paid sick leave to their employees.

A legislative record sufficient to demonstrate a reasonable link between the public health and general welfare and a mandate that employers provide paid sick leave to employees for time off for their own sickness or that of their children or other family members would address, at a minimum, the following issues:

- The number of City of Milwaukee residents, employed by Milwaukee employers, who lack paid sick leave.

- The number of City of Milwaukee residents, employed by Milwaukee employers, who have care responsibilities for children, elderly, and disabled adult family members.
- The degree to which paid sick leave is a factor in employees' decisions to take time off work to address their own health care needs or that of their children or other family members.
- The impact of a lack of paid sick leave on City residents' ability to address their own health care needs or that of their children or other family members.
- The degree to which parental involvement in a child's health care affects the health of such child.
- The impact of a lack of paid sick leave on the health of the children of those workers and other children (others enrolled in day care, e.g.).
- The impact of a lack of paid sick leave on the health of co-workers.
- The impact of a paid sick leave requirement on the rate of contagious illnesses and disease within the City of Milwaukee.
- The impact of paid sick leave requirement on the rate of avoidable hospitalizations and other overall health care costs.
- The relationship between a lack of paid sick leave and increased demands for City health services.
- The degree to which a lack of paid sick leave increases economic insecurity among City residents and any corresponding increase in demand for taxpayer-funded City services.

A sufficient legislative record is essential for a good faith defense of the City's assertion of authority to enact a paid sick leave ordinance under the legislative home rule and police powers statute.

Assuming that this regulation does not exceed the bounds of the City's police powers, it is our opinion that the state has not preempted the ability of the City to enact an ordinance requiring that private sector employers provide paid sick leave. "Where a municipality acts within the legislative grant of power but not within the constitutional initiative, the state has the authority to withdraw the power of the municipality to act." *Anchor Sav.*, 120 Wis. 2d at 397. The test for whether the state has withdrawn the power of the municipality to act, or preempted the matter, is: (1) whether the legislature has expressly withdrawn the power of municipalities

to act; (2) whether the ordinance logically conflicts with the state legislation; (3) whether the ordinance defeats the purpose of the state legislation; or (4) whether the ordinance goes against the spirit of the state legislation. *Id.*

The state has not enacted any legislation requiring employer-provided paid sick leave. In contrast to the recent amendment to the Wisconsin minimum wage statute prohibiting municipalities from enacting living wage ordinances, Wis. Stat. § 104.001, there is no such express statutory provision withdrawing the power of municipalities to act with regard to paid sick leave.

Further, we do not believe that a paid sick leave ordinance would conflict with or defeat the spirit or purpose of the Wisconsin Family and Medical Leave Act ("FMLA"). Paid sick leave and unpaid family and medical leave are separate, distinct benefits. A paid sick leave ordinance may overlap with the Wisconsin FMLA in that an employee's medical condition or need for family leave may qualify the employee for both benefits. However, it seems likely that an ordinance and the statute can effectively coexist as the Wisconsin FMLA allows employees to substitute employer-provided paid sick leave for unpaid FMLA leave. Wis. Stat. § 103.10(5)(b).

3. ERISA Preemption

Any legal analysis of a state or local employee benefit mandate must address federal Employee Retirement Income Security Act ("ERISA") preemption. It appears that the San Francisco ordinance would not be preempted by ERISA because the ordinance requires that paid sick leave be paid from an employer's general assets and not from a benefit plan governed by ERISA.

ERISA regulates "employee welfare benefit plans," which include plans that provide "benefits in the event of sickness." 29 U.S.C. § 1002(1). ERISA preempts state and local laws relating to "any employee benefit plan." 29 U.S.C. § 1144(a).

The Department of Labor (DOL) issued rules identifying certain practices that do not constitute "employee welfare benefit plans." Specifically, the DOL's rules state that the following practices, among others, constitute "payroll practices"

rather than "employee welfare benefit plans," and are therefore not governed by ERISA:

> (2) Payment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment); and
>
> (3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example = [payments while on vacation, holiday, active military duty, jury duty, training, and sabbatical].

29 C.F.R. § 2510.3-1(b)(2) and (3).

Courts have applied these DOL rules to exclude sick leave and vacation pay from ERISA coverage. The United States Supreme Court summarized the purpose of ERISA in a case in which it held that an employer's payment of end-of-employment vacation pay from its general assets was an exempted "payroll practice" and therefore not governed by ERISA:

> In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employee benefits from accumulated funds....Because ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside the employee's control, they present none of the risks that ERISA is intended to address. If there is

> a danger of defeated expectations, it is no different from the danger of defeated expectations of wages for services performed – a danger Congress chose not to regulate in ERISA.

Massachusetts v. Morash, 490 U.S. 107, 115 (1989). See also *Shea v. Wells Fargo Armored Serv. Corp.*, 810 F.2d 372, 376 (2nd Cir. 1987) (holding "that from the payment of traditional sick leave and vacation wages out of an employer's general operating assets, there do not arise the evils Congress intended to address [through ERISA]"); *Abella v. W.A. Foote Mem'l Hosp.*, 740 F.2d 4 (6th Cir. 1984) (accumulated sick pay plan was not covered by ERISA where retiree introduced no evidence indicating that the benefits were not paid out of the hospital's general assets).

In *Alaska Airlines, Inc. v. Oregon Bureau of Labor*, the court held that an employer's payment of sick leave constituted an exempted "payroll practice" not regulated by ERISA. 122 F.3d 812 (9th Cir. 1997). In *Alaska Airlines*, the employer paid its employees for sick leave directly by drawing from its general assets. The employer then sought reimbursement from a trust fund it had created to administer the sick leave benefit and other benefits. Relying on *Morash*, the court noted that the employees relied on the financial health of the airline, and not that of the trust, for the regular sick leave payments. *Id.* at 814.

Similarly, it is our opinion that ERISA does not preempt the City's authority to enact a paid sick leave ordinance similar to the San Francisco ordinance. The ordinance adopts the definition of "paid sick leave" found in § 233(b)(4) of the California Labor Code, which provides as follows:

> "Sick leave" does not include any benefit provided under an employee welfare benefit plan subject to the federal Employee Retirement Income Security Act of 1974 (Public Law 93-406, as amended) and does not include any insurance benefit, workers' compensation benefit, unemployment compensation disability benefit, or benefit not payable from the employer's general assets.

Because the mandated paid sick leave appears to be a "payroll practice" exempted from ERISA coverage, we believe that it would not be preempted by ERISA.

4. NLRA Preemption

It also appears that the San Francisco ordinance would not be preempted by the National Labor Relations Act ("NLRA"). The United States Supreme Court has held:

> The mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of preemption, for there is nothing in the NLRA...which expressly forecloses all state regulatory power with respect to those issues that may be the subject of collective bargaining.

Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 21 (1987) (citation omitted). Moreover, the ordinance contains a provision exempting employees covered by a collective bargaining agreement if the sick leave requirements are waived in the collective bargaining agreement in clear and unambiguous terms.

II. ENFORCEMENT ISSUES

We also point out that several provisions of the San Francisco ordinance would clearly not be legal and enforceable under Wisconsin law. For instance, the San Francisco ordinance is monitored and enforced by the Office of Labor Standards Enforcement ("OLSE"), which is an administrative agency of both the City and County of San Francisco. Under the San Francisco ordinance, OLSE may investigate possible violations, and, after an administrative hearing, may order relief, including, but not limited to, reinstatement, backpay, payment of sick leave unlawfully withheld, payment of an administrative penalty to each person whose rights under the ordinance were violated, and interest on all amounts due. The City of Milwaukee has no authority to require payment of an administrative penalty to the complaining employee.

In addition, if the employer does not promptly comply with an OLSE order, OLSE or the City Attorney may initiate a civil action. The ordinance also authorizes the

following parties to file a civil action in a court of competent jurisdiction: any person aggrieved by a violation of the ordinance, any entity whose member is aggrieved by a violation of the ordinance, or any other person or entity acting on behalf of the public as provided for under state law. However, the City is not empowered to create a cause of action in circuit court. *See*, 6 McQuillin, *The Law of Municipal Corporations*, § 22.01 at 388 (3rd Ed. 1998) ("The well-established general rule is that a municipal corporation cannot create by ordinance a right of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves.").

If you have any comments or concerns or require any additional information, please do not hesitate to contact the undersigned.

Very truly yours,

GRANT F. LANGLEY
City Attorney

KATHRYN M. ZALEWSKI
Assistant City Attorney

THOMAS D. MILLER
Assistant City Attorney

TDM:tdm
c: Ronald D. Leonhardt, City Clerk
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