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November 20, 2008

To the Honorable Common Council
Of the City of Milwaukee
Room 205 – City Hall

Re: Resolution relating to the claim of Metropolitan Milwaukee
Association of Commerce (MMAC)
C.I. File No. 08-L-338

Dear Council Members:


We return the enclosed document that has been filed with the City Clerk with the following recommendation.

Claimant, MMAC, by its attorneys Scott C. Beightol and Joseph Louis Olson, of Michael Best & Friedrich LLP, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, WI 53202-4108, alleges that Chapter 112, MCO, relating to paid sick leave, adopted by the electors on November 4, 2008, exceeds the legislative authority of the City. It claims irreparable injury to its members and seeks repeal or non-enforcement of the ordinance.

The City is prohibited by law from repealing or amending the ordinance for two years, and might be ordered to enforce the ordinance by a court in a *mandamus* proceeding. These facts alone bar the City from granting this claim. In addition, whether the ordinance is a lawful exercise of the City's police powers depends upon whether there is a nexus between the benefit provided and the public health. To date, no record has been made establishing such a nexus. Accordingly, we recommend the claim be denied and request that this be scheduled for immediate adoption at the November 25, 2008 Common Council meeting. We have informed the attorneys for the claimant that this item may be acted on at that meeting, and they have no objection.

Very truly yours,


GRANT F. LANGLEY
City Attorney


LINDA ULISS BURKE
Deputy City Attorney

LUB:bl

Enclosure

c: Atty. Scott C. Beightol
Atty. Joseph Louis Olson

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OFFICE OF THE CITY ATTORNEY

MICHAEL BEST

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CITY OF MILWAUKEE

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November 5, 2008

BY HAND DELIVERY

Mr. Ronald D. Leonhardt
Clerk of the City of Milwaukee
City Hall, Room 205
200 East Wells Street
Milwaukee, WI 53202

Mayor Tom Barrett
City of Milwaukee
City Hall, Room 205
200 East Wells Street
Milwaukee, WI 53202

Re: Notice of Claim

Dear Messrs. Leonhardt, Barrett and Langley:

The Claimant, Metropolitan Milwaukee Association of Commerce ("MMAC"), hereby presents its Notice of Claim to the City of Milwaukee (the "City") pursuant to Wis. Stat. § 893.80:

Metropolitan Milwaukee Association of Commerce, Inc. ("MMAC"), is a non-profit, non-stock Wisconsin corporation with its principal place of business located at 756 North Milwaukee Street, Suite 400, Milwaukee, Wisconsin, 53202. MMAC includes 2,000 member businesses with more than 300,000 employees in Milwaukee, Ozaukee and Washington counties. A substantial percentage of those employees work in the City of Milwaukee. MMAC serves as an advocate for metropolitan businesses to encourage business development, capital investment and job creation. MMAC also exists to protect its member employers and the Milwaukee-area business community against legislative and administrative actions that violate their rights under state and federal law through informational meetings, community and public relations, political action and advocacy, and litigation if necessary. This assistance and protection is directly germane to the purpose of MMAC.

On July 30, 2008, the Common Council of the City voted 12-2 to submit to the electors of the City a proposed ordinance requiring all employers to "provide paid sick leave benefits" to their employees who work within the geographic boundaries of the City (the "Ordinance"). A copy of the Ordinance is attached as exhibit A. The Ordinance was submitted to the City Clerk pursuant to the direct legislation provisions of Wis. Stat. § 9.20.

Grant F. Langley, Esq.
City Attorney for Milwaukee
Office of the City Attorney
Frank P. Zeidler Municipal Building
841 North Broadway, 7th Floor
Milwaukee, WI 53202-3653

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On November 4, 2008, the electors of the City voted to enact the Ordinance. Pursuant to Wis. Stat. § 9.20(7), the Ordinance will become effective within 10 days of the election. Pursuant to Part 3 of the Ordinance, MMAC's members will have to comply with the Ordinance "no later than 90 days" after the Ordinance becomes effective. Ordinance Part 3.

The Ordinance requires employers to provide "a minimum of one hour of paid sick leave for every 30 hours worked by an employee." Ordinance § 112-3.2. The Ordinance requires employers to pay up to 72 hours of sick leave per year to its employees who work within the geographic boundaries of the City. Id. The Ordinance limits the annual sick pay for small business to 40 hours of sick leave per year. Ordinance § 112-3.3. The Ordinance defines "small business" as "any private individual, firm, partnership, institution, corporation, or association for which fewer than 10 people work for compensation during a given week." Ordinance § 112-1.9.

The Ordinance defines "employer," with the exclusion of the United States government and the state of Wisconsin, as "every person, firm or corporation, agent, manager representative, contractor, subcontractor or principal, or other person having control or direction of any person employed at any labor or responsible directly or indirectly for the wage of another." Ordinance § 112-1.4 (incorporating Wis. Stat. § 104.01(3)(a)). And, the Ordinance defines "employee" as "any person who is employed within the geographic boundaries of the city by an employer, and includes a part-time or temporary employee." Ordinance § 112-1.3. Accordingly, The Ordinance applies to employers located outside the geographical limits of the City who employ employees within the geographical limits of the City. Ordinance § 112.1.3 & .4.

An ordinance, such as the present Ordinance, enacted by direct legislation cannot exceed the legislative powers conferred upon the City. In the absence of legislatively granted authority, municipalities are authorized to enact ordinances concerning only local matters:

Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.

Wis. Const. Art. XI, §3(1).

The Common Council of a city also has the following limited statutory powers:

(5) POWERS. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and 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 license, regulation, suppression, borrowing of money, tax, levy, appropriation,

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fine, imprisonment, confiscation, 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.

Wis. Stat. § 62.11(5).

The Ordinance exceeds the legislative authority of the City. Indeed, in 2005, the State of Wisconsin amended Wis. Stat. ch. 104, Minimum Wage Law, governing the minimum wage in the State of Wisconsin via the enactment of 2005 Wisconsin Act 12. Section 104.001(1) states:

(1) The legislature finds that the provision of a living wage that is uniform throughout the state is a matter of statewide concern and the enactment of a living wage ordinance by a city, village, town or county would be logically inconsistent with, would defeat the purpose of, and would go against the spirit of this chapter. Therefore, this chapter shall be construed as an enactment of statewide concern for the purpose of providing a living wage that is uniform throughout the state.

(2) A City, village, town, or county may not enact and administer an ordinance establishing a living wage. ...

Wis. Stat. § 104.001(1)&(2).

"Living Wage" is defined by the State as "compensation for labor paid, whether by time, piecework, or otherwise ...". Wis. Stat. § 104.01(5). Section 104.01(8) defines Wage as: "any compensation for labor measured by time, piece or otherwise." Wis. Stat. § 104.01(8). And section 109.01(4) defines Wage as:

remuneration payable to an employee for personal services, including salaries, commissions, holiday pay and vacation pay, overtime pay, severance pay or dismissal pay, supplemental unemployment benefit plan payments when required under a collective bargaining agreement, bonuses and any other similar advantages agreed upon between the employer and any other similar advantage agreed upon between the employer and the employee or provided by the employer to the employees as an established policy.

Wis. Stat. § 109.01(4).

The paid sick leave mandated by the Ordinance is "compensation for labor" within the meaning of Wis. Stat. § 104.01(5) & (8). Likewise, the paid sick leave mandated by the Ordinance is "remuneration payable to an employee for personal services" within the meaning of Wis. Stat. § 109.01(4). Accordingly, the Ordinance is an attempt to set a living or minimum wage within the meaning of Wis. Stat. Ch. 104 and is expressly prohibited.

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Similarly, the State of Wisconsin has enacted Wis. Stat. § 103.10 (the "Wisconsin Family and Medical Leave Act" or "WFMLA"), which is a comprehensive statutory and regulatory scheme that provides for and regulates the provision of family and medical leave to employees. The Ordinance conflicts with, and violates the spirit and policy of, the WFMLA. Accordingly, the Ordinance exceeds the legislative authority of the City.

Moreover, the Ordinance exceeds the legislative authority of the City because it improperly attempts to regulate employers located outside the geographic boundaries of the City.

MMAC's members include employers who employ people within the geographic limits of the City that currently provide less than one hour of paid sick leave for every hour an employee works. MMAC's members also include employers who employ less than 10 workers per week, whose employees work within the geographic limits of the City and that currently provide less than one hour of paid sick leave for every hour an employee works.

MMAC's members include employers that provide less than 72 hours of paid sick leave per year and who employ workers within the geographic boundaries of the City. MMAC's members also include employers who employ less than 10 workers per week, that provide less than 40 hours of paid sick leave per year and who employ workers within the geographic boundaries of the City.

MMAC's members also include employers who are located outside the geographic boundaries of the City but whose employees work within the geographic boundaries of the City.

MMAC's members are directly and adversely affected by the Ordinance because MMAC's members will be required to provide the minimum paid sick leave required by the Ordinance to their employees as soon as the Ordinance goes into effect, and thereafter, are subject to enforcement action by the City for noncompliance. If the Ordinance is not repealed before compliance is required, MMAC's members will suffer financial injury. This injury will be irreparable because the City will not be liable to MMAC's members for these amounts and MMAC's members will not be entitled to recoup these amounts from their employees who have benefited from the Ordinance. Such an irreparable injury will force MMAC's members to seriously consider moving jobs outside of the geographic boundaries of the City. Accordingly, MMAC demands that the City repeal the Ordinance or develop, and, engage in, a systematic written policy of non-enforcement of the Ordinance.

Pursuant to Wis. Stat. § 9.20(8) the City lacks the authority to repeal or amend the Ordinance for two years after the adoption of the Ordinance. Accordingly, MMAC asserts that it is not required to comply with Wis. Stat. § 893.80 or, if compliance is required that the City, as a matter of law, has constructively denied this claim immediately upon receipt.

MICHAEL BEST

& FRIEDRICH LLP

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Dated at Milwaukee, Wisconsin, this 5th day of November, 2008.

MICHAEL BEST & FRIEDRICH LLP



Scott C. Beightol
Joseph Louis Olson

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