

Paid Sick-Leave Ordinance Challenge

by Devala A. Janardan, Associate Counsel

In early July, New York Mayor Michael Bloomberg, in a forum with other mayoral candidates, stated for the first time that he would support a city law that would require large employers to provide paid sick leave to employees who worked within city limits.[1] Currently, only three cities have passed local measures that require employers to provide paid sick-leave – San Francisco, the District of Columbia, and Milwaukee – so Mr. Bloomberg's comments have boosted the hopes of individuals and interest groups that favor of mandating paid sick-leave. These entities have needed a boost since Milwaukee had its paid sick-leave ordinance challenged and invalidated in court. In June 2009, the Circuit Court of Milwaukee County ruled that the ordinance was invalidly enacted and unconstitutional.[2] As more and more cities consider local laws that require private employers to provide paid sick leave to employees, it is noteworthy to see why the local Wisconsin court decided the way it did.

Milwaukee's paid sick-leave law was enacted in late 2008.[3] The ordinance requires employers with ten or more employees to provide paid sick-leave, up to a maximum of 72 hours per employee per year. Employers with fewer than ten employers are still required to provide paid sick leave, but to a lower maximum, 40 hours per employee per year. Paid sick leave can be used for the following general reasons: the employee's own illness or preventative care; to care for a family member who is ill or who needs preventative medical care; or an absence necessary due to domestic abuse, sexual assault or stalking. With regards to an "absence necessary due to domestic abuse, sexual assault or stalking," the ordinance allows an employee to use paid sick leave to seek medical attention, obtain the services of a victim services organization or psychological or other counseling, seek relocation, or for legal action.[4]

A local pro-business group, the Metropolitan Milwaukee Association of Commerce, Inc., (MMAC) challenged the ordinance on a number of grounds, alleging among other things, that the ordinance was an invalid exercise of police power, impaired existing employment contracts, and extraterritoriality. Challenges to the validity of the use of a city's police powers are reviewed under the rational basis test and, in Wisconsin, a plaintiff suing a locality "must demonstrat[e] beyond a reasonable doubt that the ordinance possesses no rational basis to any legitimate municipal objective."[5]

The court ruled that the ordinance failed to meet the rational basis standard. It first identified the objectives of the ordinance. The City had relied on numerous findings and objectives as listed in the "whereas" clauses in the ordinance. Some of these findings included: the fact that a large number of employers do not provide sick-leave; that the absence of paid sick leave poses serious problems for City employees and the community; serious problems, like employees coming into work sick, exposing others to sickness, or spreading sickness to certain goods that are entered into the stream of commerce; employees risking the loss of employment for staying home while sick; the difficulty of scheduling medical appointments; and the risk of family members being sent to a nursing home.[6] These supported the objectives of protecting the public welfare, health, safety and prosperity of the City in order to ensure a decent and healthy life for its citizens.

The court focused on the provision regarding using paid sick leave to deal with issues related to domestic abuse, sexual assault, and stalking, and specifically noted that "[a]t no point does the summary, findings, or objectives of the Ordinance include, discuss, or refer to provisions related to domestic abuse, sexual assault or stalking."[7] The court ruled that "[a]lthough the treatment of injuries related to domestic violence and sexual assault fall squarely within the objective" of protecting the welfare, health and safety of the public, "even the broadest interpretation of the [whereas clauses] would not rationally relate the objectives to the provisions permitting paid leave to *attend to relocation and pursue legal action*."[8] Based on this finding, the court granted summary judgment in favor of MMAC and issued a permanent injunction.

The court also addressed MMAC's challenge that the law impaired existing contracts. Under Wisconsin law, courts apply a three-part test in order to determine whether a new law unconstitutionally impairs existing contracts. First, is an obligation of a contract substantially impaired; second, does the legislation have a significant and legitimate public purpose; and lastly, is the impairment of the contract reasonable and necessary to serve that purpose.[9] The court noted that Wisconsin laws, such as the Living Wage Act, Family Medical Leave Act, and its Worker's Compensation Act, had all impacted collective bargaining in a much more intrusive way than the ordinance, which "only peripherally affects collective bargaining. … It operates prospectively, imposes gradual requirements upon employers, and allows employers to credit other types of paid time off as paid sick leave."[10] The court also held that the ordinance was not unconstitutional as extraterritorial. MMAC contended that because the ordinance regulated employers regardless of their location, it violated extraterritoriality limits on municipal legislation. The court disagreed, noting that the ordinance "explicitly only regulates those employees who

continued on page 31



Using the IMLA-MCC Listserve

by Lawton Langford

IMLA and Municipal Code Corporation (MCC) operate a List Service exclusively for municipal attorneys. There are currently 629 attorneys who participate on the IMLA-MCC Listserv, generating almost 30 messages each day covering topics as diverse as accident response fees, alcohol permit revocations, a Maryland patronage case, abandonment of a utility easement, and the myriad of issues that arise during the "normal" day of a local government attorney. This column will describe how to join, and get the maximum benefit from the tools that are available from the Listserv software.

Who qualifies? How to subscribe. To qualify as a member, a person must be an attorney with a significant portion of his or her practice comprised of representing local governments. Not all prospective subscribers are accepted: for instance, vendors are not qualified participants and there are no solicitous postings. To subscribe to the Listserv, go to MCC's website, www.municode.com, and click on the bullet titled "Listservs." Across the center of the next screen are a series of links. Click on the one titled "Attorney List Subscribe." You will be asked to type in your name and e-mail address, and to submit this information by clicking on the "Subscribe" button. You will then receive instructions from the Listserv to introduce yourself to the group. Once your introduction is circulated, your subscription will be activated.

Using the Listserv. To make maximum use of the Listserv, including researching archives, managing your profile to suspend messages while on vacation, or changing the mode in which messages are received (digest or index format), you must have a password. To create a password, either read the instructions found within the Listserv FAQs, or send an e-mail to password@municode.com.

Searching the archives. Past Listserv messages are stored at municode.com for your perusal. Messages dating back to 2006 are currently available, though the archives will be purged periodically to free up space. This archive has proven invaluable to many Listserv members. Although it enables you to search using keywords (similar to Westlaw or Lexis), the real value is finding discussions on topics, written by peers who may be wrestling with the same issue. By searching the archives, an "expert" who would be willing to discuss his or her solution to your immediate problem may be found. To search the archives, go to www.municode.com and click on the eighth bullet, titled "Listservs." Click on the "Attorney List Archives" link in the middle of the screen and log-in, using the e-mail address you used to subscribe and your password. Click "Search Archives" at the bottom of the choices, under the title "options." Enter your search word in a dialogue box and click "search" at the bottom right.

Searches can be by author, date range, or key word. A "hit list" of messages meeting your search criteria will be returned, along with the subject line from the original message. Clicking on the "Item #" to the left of the hit list will open the original message.

Sharing files. Another useful tool for Listserv members is the FTP site. FTP stands for "File Transfer Protocol" and is a way to share documents. For security reasons, the Listserv does not allow attachments to messages, which means an alternative method for sharing documents is needed. FTP'ing documents is easy, though to view any file on the FTP server, the software in which the document was created must be available to the viewer: a Word document on the FTP server would require the person downloading the document to have Word on their computer. To access the FTP server, go to: ftp://ftp.municode.com/attorneylistserv. To open a document posted on the FTP site, double-click it—this will automatically launch the software necessary to display the document (assuming your computer has that software loaded).

There is a username and password requirement, and all members of the Listserv are entitled to them. However, because this magazine has wider circulation than just Listserv members, the username and password are not published here. If you are a Listserv member and want the username and password, send an e-mail to ListFTP@municode.com.

Managing messages. Because the Listserv generates approximately 30 messages each day, it is easy to become overwhelmed. Members address this in a couple of ways. One way is to create a separate folder for Listserv messages in your e-mail software, and then establish a "rule" that automatically sends Listserv messages to that folder. This keeps the Listserv messages out of your Inbox and allows them to accumulate until it's convenient to review them. An alternative is to use the "digest" or "index" mode of delivery. These are settings on a participant's profile that bundle or index messages. In the digest mode, one e-mail is sent containing 25 messages. To review the messages, open the digest message. The index mode sends a summary of the subject lines of messages. To review the original messages, click on one of the indexed subject lines.

Water Cooler List. The MuniAtty Listserv is intended to provide a forum for the substantive discussion of issues relevant to practicing local government attorneys. An alternative forum called the Water Cooler List exists for the more whimsical or collegial banter that attorneys enjoy. This is moderated by IMLA's past President, William J. Kearns. To join, send an e-mail to Mu-

nicAttyWaterCooler@yahoogroups.com that identifies you and the local government that you represent. You will get a response from YahooGroups that you are not a member, asking if you want to join. Respond to the message as directed and YahooGroups will notify Bill Kearns so that your membership can be approved. The approval process is simply to keep the discussions among our municipal attorney colleagues.

ML

Inside Canada

cont. from page 28

The court held both sides were entitled to their respective injunctions. The plaintiffs were entitled to an injunction to restrain trespassing and interference with construction: "the defendants have no right to take the law into their own hands." As property owners, the plaintiffs were entitled to assert the ordinary rights of property owners, including the right to prevent people from impeding or obstructing lawful activities on the property. The defendants' right to seek an injunction rested on their obtaining standing as public interest litigants. The court granted them this status, and, after a review of the *Endangered Species Act*, held there was a serious question to be tried as to whether a stop work order should be issued. "If the injunction is not granted, the work is commenced, and habitat is destroyed, the harm will be irreparable." An injunction for a 30-day period was granted, sufficient to give the Minister of Natural Resources time to decide whether to act and issue a stop work order under the legislation. ML

Ordinances

cont. from page 29

are working within the geographical boundaries of the City" and had no bearing on what benefits employers offered when their employees operated outside the City limits.[11]

The City plans to appeal, and it remains to be seen whether or not efforts to require employers to provide paid sick leave will remain at the local level or transition to Congress. In May, Representative Rosa DeLauro (D-CT) introduced the Healthy Families Act, H.R. 2460, which would require employers of 15 or more employees to provide at least one hour of paid sick time for every 30 hours worked. As of August 2009, the bill sits with the Committee on Education and Labor.

Notes

1. David Chen, *At Working Families Party Forum Bloomberg Declines to Toe Liberal Line*, N.Y. Times, July 3, 2009, at A25.
2. Metro. Milwaukee Ass'n of Commerce v. City of Milwaukee, No. 08CV018220 (Milwaukee Cty. Cir. Ct. June 12, 2009).
3. Milwaukee, WI., Code of Ordinances § 112 (2008).
4. *Id.* at § 112-5.
5. State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee, 313 N.W.2d 805 (Wis. 1982).
6. *Metro. Milwaukee Ass'n* at 26-27.
7. *Id.* at 28.
8. *Id.* (emphasis added).
9. Dairyland Greyhound Park, Inc. v. Doyle, 719 N.W.2d 408 (2006).
10. *Metro. Milwaukee Ass'n* at 32.
11. *Id.* at 33. ML

