FILED
August 13, 2018
OFFICE OF APPELLATE COURTS

Case No. A18-0771

STATE OF MINNESOTA
IN THE COURT OF APPEALS

City of Minneapolis,

Appellant,

v.

Minnesota Chamber of Commerce, Minnesota Recruiting and Staffing Association, TwinWest Chamber of Commerce, Graco Inc., and Otogawa-Anschel General Contractors and Consultants LLC,

Respondents.

APPELLANT'S BRIEF AND ADDENDUM

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STATEMENT OF LEGAL ISSUE

Did the District Court err in granting permanent injunctive relief to Respondents based on its conclusion that the Minneapolis Sick and Safe Time Ordinance has an impermissible extraterritorial effect on employers resident outside the geographic boundaries of the City of Minneapolis?

Ruling Below: After discovery, the parties brought cross motions for summary judgment on Respondents' claim that the Minneapolis Sick and Safe Time Ordinance has an impermissible extraterritorial effect. (Addendum ("Add.___") at 79.) The District Court permanently enjoined the City from enforcing the Ordinance against any "employer resident outside the geographic boundaries of the City." (Add.101.) The City timely appealed this order and injunction.

Most Apposite Authority:

State v. Nelson, 68 N.W. 1066 (1896)
City of Plymouth v. Simonson, 404 N.W.2d 907 (Minn. App. 1987)

STATEMENT OF THE CASE

In 2016, Appellant City of Minneapolis ("City"), a home rule charter city, exercised its police powers to further public health and welfare by enacting the Minneapolis Sick and Safe Time Ordinance ("Ordinance"), which provides certain sick and safe time benefits for employees while working in the City. Respondents Minnesota Chamber of Commerce, Minnesota Recruiting and Staffing Association, TwinWest Chamber of Commerce, Graco Inc., and Otogawa-Anschel General Contractors and Consultants LLC ("Respondents")[1], commenced this lawsuit, arguing the Ordinance should be struck down because it conflicts with, and is impliedly preempted by state law, and because it has an impermissible extraterritorial effect. The Hennepin County District Court, the Honorable Mel I. Dickstein presiding, denied Respondents' motion for a temporary injunction striking down the entire Ordinance, but issued a temporary injunction narrowly enjoining the City from enforcing it against any "employer resident outside the geographic boundaries of the City."

Both parties appealed. This Court affirmed the District Court's denial of the temporary injunction on the grounds of conflict with and implied preemption by state law. *See Minnesota Chamber of Commerce v. City of Minneapolis*, No. A17-0131, 2017 WL 4105201 (Minn. App. Sept. 18, 2017), review denied (Nov. 28, 2017). This Court also affirmed the grant of the temporary injunction under an abuse of discretion standard on the issue of extraterritoriality. *Id.* On this latter issue, this Court stated that "the

[1] The National Federation of Independent Business was a Plaintiff at the temporary injunction stage of proceedings before the District Court, but was voluntarily dismissed with prejudice prior to cross motions for summary judgment. (Add.81 n.2.)

parallel is strong" between the facts in this case, and those in *State v. Nelson*, 68 N.W. 1066 (1896), in which the Supreme Court held that a city ordinance requiring inspection of "every animal producing milk for sale within the city," wherever located, did not have an impermissible extraterritorial effect. *Id.* at *6. (Add.74-75.) Nevertheless, this Court held that under the abuse of discretion standard of review, the Court could not conclude that Respondents had "not made 'a doubtful showing as to the likelihood of prevailing on the merits,'" even if the Court were to conclude that "serious obstacles" and "foreseeable barrier[s]" stood between Respondents and permanent injunctive relief. *Id.* at *7 (Add.77.)

Upon cross-motions for summary judgment, the District Court ruled that the Ordinance does not conflict with, and is not impliedly preempted by, state law. (Add.79, 83-97.) However, the District Court again ruled in Respondents' favor on the extraterritoriality issue, permanently enjoining the City from enforcing the Ordinance against any "employer resident outside the geographic boundaries of the City." (Add.79, 97-101.) The City filed a notice of appeal, challenging the District Court's injunction. Respondents cross-appealed, challenging the District Court's denial of their motion to strike down the entire Ordinance on the ground that it conflicts with and is impliedly preempted by state law.

STATEMENT OF FACTS

A. The City of Minneapolis Has a Long History of Regulating Public Health.

The City of Minneapolis has a long tradition of taking local action to preserve, protect and enhance public health. The City's first Board of Health was formed in 1867,

immediately following the City's incorporation that year. (Doc. Index # 47, ¶ 11.) As part of the special law incorporating the City, the Legislature gave the City the authority to protect "by ordinance, resolution or by-laws" the public health. (*See* Sp. Laws 1867, c. 19 (Doc. Index # 28, pp. 22-24.)

The City's original 1920 Charter included provisions allowing the City to make regulations "for the preservation of health and the suppression of disease" and to "prevent the introduction of contagious, infectious or other diseases in the city, and to make quarantine laws and enforce the same within the city." (Doc. Index # 29 (1920 Charter at Chapter IV, Section 5, Twenty-Ninth; and Chapter XIV, Section 2.)) The City has historically performed a number of public health functions including the operation of the Minneapolis General Hospital (the predecessor to Hennepin County Medical Center) and a separate sanatorium, inspecting the local milk supply, and ordering the temporary closure of school, theaters, and other public gatherings during the outbreak of serious contagious illnesses and otherwise exercising its authority to control infectious disease in the City. (Doc. Index # 47, ¶¶ 11-15, 17.)

In 1976, the Minnesota State Legislature passed the Community Health Services Act, which established the current Community Health Board system. (Doc. Index # 47, ¶ 19.) Following its enactment, the City was one of the first officially recognized Community Health Boards and has received community health services funding every year since. (*Id.*)

In the 1980s and 1990s, the City twice explored the possibility of consolidating the Minneapolis Health Department with the Hennepin County Health Department. (Doc.

Index # 47, ¶ 20.) After lengthy consideration, the City twice decided against consolidation. (*Id.*) The City was concerned that the health needs of City residents were different from the health needs of suburban residents. (*Id.*) The City therefore determined that it was important for the City to retain its historical local control over public health services and policies within the City. (*Id.*) The City's continuing local control is consistent with guidance from the Minnesota Department of Health regarding the optimal size of populations served by local health boards. (Doc. Index # 30, p. 4; Doc. Index # 47, ¶ 21.)

In accordance with the standards for Community Health Boards set forth in Minnesota Statutes, Sections 145A.02 and 145A.11, the City adopts and enforces ordinances and standards for essential public health services. (Doc. Index # 47, ¶ 7.) Consistent with the standards for Community Health Boards set forth in Minnesota Statutes, Section 145A.04, subdvision1a, the City takes action to address priorities in the areas of public health including "preventing the spread of communicable disease" and "implementing control measures during infectious disease outbreaks." (Doc. Index # 47, ¶ 8.)

The Minneapolis Health Department enforces both state food regulations and the City's food ordinances relating to health and safety such as Minneapolis Code of Ordinances Chapter 203, which requires grocery stores to continuously offer for sale certain minimum quantities of fresh grocery items. (Doc. Index # 47, ¶ 9.) The Department also conducts foodborne disease outbreak investigations in collaboration with Hennepin County. (*Id.*)

B. Connection Between Public Health and Paid Sick Leave

The City Health Department made a presentation at a City Council Study Session on October 6, 2015. (Doc. Index # 47, ¶ 26.) This presentation set forth the research demonstrating the relationship between public health and paid sick leave. Specifically, the spread of disease in a population increases exponentially over time. (*See* visual illustration at Doc. Index # 47, pp. 19-28 of PDF (marked Ex. B at pp. 9-18.)) Only 29% of people in service jobs, including food preparation and serving, health care support, and personal care services, have access to paid sick leave. (Doc. Index # 47, p. 32 of PDF (marked Ex. B, p. 22.)) People in service jobs are among the most likely to be in contact with the public, making it even more important to public health that they stay home when they are sick. (*Id.*) During the H1N1 flu pandemic, among people who work in the City, an estimated 133,388 people did not have paid sick leave, including approximately 15,167 health care practitioners and technical workers, and approximately 15,551 full-time food preparation and service workers. (Doc. Index # 47, pp. 20-24 of PDF (marked Ex. B at. at pp. 10-14.)) The Workplace Regulations Partnership Group's (WPG) final report, *see infra* Part.C, contained similar findings, specifically that, among all employees in the City, more than 52,000 (about 17%) are working in "healthcare & social assistance" fields. (Doc. Index # 32, p. 5.) Employment in positions with larger public health exposure and greater risk of spreading infection includes approximately 35% of City employment in three fields: healthcare (17%); education (11%); and food service & accommodation (6%). (*Id.*)

The conclusions reached by the Minneapolis Health Department are consistent with state and national research related to public health. Workers' inability to take leave from work while contagious risks public health and can be linked to hundreds of disease outbreaks in Minnesota over the last decade. (Doc. Index # 33, p. 9.) Between 2004 and 2013, at least 208 outbreaks of foodborne illness in Minnesota were linked to employees working while sick, which resulted in 2,996 documented illnesses. (*Id.*, pp. 7, 18.) An additional 19 outbreaks were documented where a food worker cared for an ill family member. (*Id.*, p. 19.) And 579 outbreaks were associated with person-to-person transmission in public settings from 2004 to 2011. (*Id.* at 7.) The Trust for America's Health, using a CDC model, estimates that 39,000 Minnesotans would die in a serious flu pandemic. (*Id.*, p. 20.)

Nationally, an estimated 7,000,000 people contracted the H1N1 flu virus in 2009 because employees came to work while infected. (Doc. Index # 34, at 1.) The illnesses led to 1,500 additional deaths. (Doc. Index # 35, p. 1.)

Working while sick raises the chance of having a heart attack. (Doc. Index # 36, pp. 2-4.) Paid sick leave may also enhance productivity and reduce turnover. (Doc. Index # 37, p. 2.) Among U.S. workers, one study observed that lost productive time for a personal or family health reason cost U.S. employers at least $226 billion in 2002. (Doc. Index # 38, p. 7.) When workers have paid sick days, they can recover at home or seek medical attention in a timely manner. Also, paid sick leave can be used for preventive care, possibly preventing health problems from becoming more troublesome, harmful, and expensive. (Doc. Index # 39, p. 4.)

C. The Workplace Regulations Partnership Group Provided Recommendations to the City Council Regarding Regulation of Earned Sick and Safe Time.

In 2015, the City Council established the WPG to study earned sick time and paid time off policies and make recommendations. (Doc. Index # 31, p. 3.) The WPG also was tasked to engage the community through focus groups and listening sessions, and consult subject-matter experts in the course of its study. (*Id.*) The WPG had 15 voting and 4 non-voting members representing employees and employers from a cross-section of industry sectors. (*Id.*, p. 4.) The WPG hosted fourteen listening sessions where about 550 individuals spoke. (Doc. Index # 32, p. 5.) The sessions sought input from many groups including construction and manufacturing, retail, franchise restaurants, independent and small employers, health care, downtown employers, professional services firms, service workers, union employees, nonprofit and social sector organizations, and individuals from the Latino, Hmong, African-American, Native American and East African/Somali Communities. (*Id.*) The WPG met eleven times to craft the recommendations. (*Id.*, p. 3.)

The WPG eventually presented detailed recommendations to enact a sick and safe time ordinance to the City Council in March 2016. (*Id.*, pp. 1, 8-13.) The WPG recommended that the City adopt an ordinance that covered all employees that work in the City limits for at least 80 hours in a year, regardless of employer location. (*Id.*, p. 8.) The WPG provided a rationale for this recommendation:

> Recognizing that residents, employees, visitors, and others all share the public health risks in the City, the WPG affirmed that their intention was to address health concerns for all those in Minneapolis. This tradeoff allows the policy to *include* the 75,000 Minneapolis residents who work within the City of Minneapolis, as well as the 225,000 employees in the City who are

> *not* City residents, and will not directly impact the 297,000 working age Minneapolis residents who currently work outside the City of Minneapolis. While the WPG acknowledges the implementation challenge of identifying employees working *within* the City of Minneapolis for at least 80 hours annually, that approach was deemed preferable to creating a disincentive by focusing on employers *located* in Minneapolis. The WPG heard extensively from employees working in hospitality, food service, housekeeping, security, and other positions with low rates of access to paid sick time that while their employers may be physically located elsewhere, their work is (and will likely remain within) the City of Minneapolis.

(*Id.*, p. 8 (emphasis in original.)) Virtually all of the WPG members who were employers or business associations voted "yes" on the recommendations to enact a sick time ordinance including Jim Rowader, Vice President, General Counsel Employee and Labor Relations, Target Corporation; Susie Brown, Minnesota Council of Nonprofits; Faisal A. Mohamud Deri, Optum Health, Inc.; Dayna Frank, First Avenue; Molly Glasgow, Twin Cities Metro iBA; and Danny Schwartzman, Common Roots Cafe & Catering. There was one abstention and only one vote of "no." (Doc. Index # 32, p. 14; Doc. Index # 42, p. 1.)

D. Prior to Enacting the Ordinance, the City Received Public Testimony Regarding the Need for Such an Ordinance.

Based on the recommendations of the WPG, City staff drafted a proposed sick and safe time ordinance. (Add.1-14.) On May 18, 2016, the Minneapolis Committee of the Whole held a public hearing on the proposed ordinance. (Doc. Index # 109, p. 1.) Seventy-four witnesses testified, many describing in vivid detail how a lack of sick time has impacted their lives and the community. (*Id.*, pp. 1-2.)

- Employees testified that lack of paid sick time had a serious impact on their families. One witness testified that she and her children were evicted when she had to take unpaid time off to care for her sick child, and that they had to move

into a shelter. (*Id.*, pp. 80-81.) A janitor testified that when he took unpaid time off due to a back injury, he could not afford to send money to his sick children living abroad who suffer from a chronic heart condition and kidney failure. (*Id.*, pp. 64-65.)

- Several nurses testified that health care employees need sick time to care for themselves or their loved ones, so that they do not need to work while ill, risking the infection of patients. (*Id.*, pp. 10-11; 12-13.)

- A school nurse testified that working parents send their kids to school after vomiting, because if the parent has to stay home, they will not be paid. (*Id.*, pp. 61-62; *see also* 14, 110-11, 136, 138-39, 140 (witnesses noting that sick children sent to school infect others and that parents have to choose between sending a sick child to school and a loss of income to support their family.))

- Witnesses testified that when employees are able to use sick time, they can care for themselves without financial hardship, and urged that such benefits should not be only available to professionals. (*Id.*, pp. 16-17.) Several testified that with sick time, they would have been able to take time to care for themselves for ailments from a respiratory virus to leukemia and kidney failure. (*Id.*, pp. 46-47, 48-49.) One restaurant worker testified that she was forced to inject herself with migraine medication in the employee break room while she worked. (*Id. at* pp. 98-100.) Several witnesses testified about the risks of contamination inherent in working sick in the restaurant industry. (*Id.*, 48-49, 51-54.)

- Several witnesses testified that they lost their jobs for taking sick time. (*Id.*, pp. 60-61 (employee lost job for going home sick; took two months to find new job); *id.*, pp. 117-18 (boss told employee to go to the hospital after being hurt at work, and when he returned, he no longer had a job.))

- Several business owners testified that they support the ordinance and that providing paid sick time to their employees was not a significant burden. (*Id.*, pp. 57-60, 91-93.)[2]

[2] The record demonstrates that many business owners fully support the Ordinance. *See* Doc. Index # 49,¶¶ 5-10 (owner of Common Roots Café and Common Roots Catering fully supports Ordinance; cost of Ordinance will be approximately 0.5% to 1% of payroll; benefits to his business will outweigh cost); Doc. Index # 50, ¶¶ 4-8 (owner of Butter Bakery Café fully supports Ordinance, implemented paid sick time for all employees in

E. The City Enacted the Ordinance to Address Public Health Concerns.

In May 2016, the City Council enacted the Ordinance, and made several findings of the public health policies underlying it, including the following:

- Forty-one per cent (41%) of employed Minneapolis residents lack access to earned sick time. The employees least likely to have paid sick leave or the financial ability to forego wages are in occupations most likely to have contact with the public, especially food services, long term care and health care. Minneapolis workers who work in public-contact occupations, such as service occupations, are less likely to have paid sick time than workers in other occupations.

- When workers have no paid sick leave or an inadequate amount available to them, they are more likely to come to work when they or their family members are sick. Absent the proper care needed for treatment or recovery, the ill worker's or ill family member's health problems may intensify or be prolonged. Employees in the city working in low wage jobs are least likely to have paid sick leave.

- Access to paid leave is not available equally across populations of different incomes or race/ethnicity. The city continues to increase diversity and both residents and people who work in the city. People of color are more likely than white people in Minneapolis to be in low-paying, less secure jobs with few benefits.

2015; it added about 1% to Butter's payroll costs, and not been administratively burdensome to his business; it has reduced staff turnover and is the reason Butter is a growing business); Doc. Index # 51, ¶¶ 5-8 (owner of landscaping business Field Outdoor Spaces fully supports Ordinance; implemented a paid time off program in 2016; costs are relatively low and not burdensome, benefits are substantial by boosting employee morale and loyalty, and Rathe does not expect the changes necessary to comply with the Ordinance to be difficult or burdensome.); Doc. Index # 52, ¶¶ 5-8 (owner of Wolfpack Promotionals fully supports the Ordinance, estimates the cost will be the same as buying a cup of coffee a day; and that the Ordinance helps small businesses by leveling the playing field by requiring all businesses to offer similar benefits); Doc. Index # 53, ¶¶ 4-8 (owner of Birchwood Café fully supports Ordinance, believes that cost of complying with Ordinance will not be unduly burdensome; while there is a cost, her customers will accept any necessary modestly higher prices as part of valuing their food, the farmers that grow it, the chefs that prepare it, and the servers that serve it; believes that her employees will be happier and there will be less turnover and unplanned absences).

- Employees who come to work when they are sick are likely to expose other employees, customers, and members of the public to infectious diseases, such as the flu. Workers with no paid sick leave, or an inadequate amount to take time off to care for a sick child, are likely to send sick children to school or a child care center, thereby potentially spreading contagious illnesses. The lack of access to paid sick leave has public health implications and has contributed to contagious disease outbreaks in Minnesota.

- Paid sick and safe days will promote the safety, health and welfare of the people of the city by reducing the chances that worker's illnesses will intensify or be prolonged, by reducing the exposure of co-workers and members of the public to infectious diseases, and by reducing the exposure of children at schools and day cares to infectious diseases; resulting in a healthier and more productive workforce, better health for older family members and children, enhanced public health and improved family economic security.

See M.C.O § 40.20 (Add.1-3.) The City Council also included a "purpose" of the Ordinance, stating that "[i]n enacting and implementing this chapter, the city is exercising its police power to preserve and protect safety, health, and general welfare." M.C.O. § 40.30 (Add.3.) The Council set forth the following purposes of the Ordinance:

(a) To ensure that workers employed in the city can address their own health needs and the health needs of their families by requiring employers to provide a minimum level of paid sick days including time for family care.

(b) To reduce public and private health care costs in the city by enabling workers to seek early and routine medical care for themselves and their family members.

(c) To protect workers employed in the city from losing their jobs while they use sick days to care for themselves or their families.

(d) To assist victims of domestic abuse and their family members by providing them with job-protected paid time away from work to allow them to receive treatment and to take the necessary steps to ensure their protection.

(e) To safeguard the public welfare, health, safety and prosperity of the people of and visitors to the city.

(f) To accomplish the purposes described in subsections (a)—(e) in a manner that is feasible for employers and that does not require employers to provide any additional paid time to their employees if they already provide the same amount of paid time off that

can be used for the same purposes and under the same conditions as required in this chapter

M.C.O. § 40.30 (Add.3.)

F. Ordinance Provisions

The Ordinance became effective July 1, 2017. M.C.O. § 40.90 (a) (Add.5). The basic provisions of the Ordinance include:

•The ordinance covers employees who work at least 80 hours per year in the City of Minneapolis for an employer with six or more employees which does not already provide comparable or more generous benefits to their employees.[3] M.C.O. § 40.220 (g).

[3] At least 30 U.S. municipalities have enacted paid sick leave ordinances. Many have a similar minimum threshold of 80 hours per year as required in the Ordinance, while some set a lower threshold.

Employees in Saint Paul, Minnesota, are entitled to paid sick time if they perform at least 80 hours of work in the city in a year, with some exemptions. See Saint Paul, Minn. legis. code § 233.02.

Employees in New York City, New York, are entitled to paid sick time if they perform more than 80 hours of work in the city in a year, with some exemptions. See N.Y.C., N.Y., admin. code § 20-912 (f).

Most employees in Philadelphia, Pennsylvania, are entitled to paid sick time if they perform at least 40 hours of work in the city in a year, with some exemptions. See Phila., PA., code § 9-4103 (3).

Employees in Los Angeles, California, are entitled to paid sick time if they work in the city at least two hours in one or more weeks of the year, for the same employer for 30 days or more within a year, and are entitled to minimum wage under California law. See L.A., Cal., mun. code §§ 187.01 (c), 187.04 (a).

Employees in Berkeley, Emeryville, Oakland, and San Diego, California, are entitled to paid sick time if they perform at least two hours of work in the city in one or more calendar weeks of the year, if they are entitled to minimum wage under California law. See Berkeley, Cal., code § 13.100.030 C; Emeryville, Cal., code § 5-37.01 (c); Oakland, Cal., code § 5.92.010; San Diego, Cal., code § 39.0104.

Employers with fewer than six employees must provide the same minimum amount sick and safe time; but it may be unpaid. M.C.O. § 40.220 (h) (Add.11.) The ordinance exempts federal, state and county employers. M.C.O. § 40.40 (Add.4.)

•Initially, new employers (other than chain establishments) have one year to provide paid sick time. M.C.O. § 40.90 (c) (Add.5.) During the first year, they are required to provide unpaid sick time. *Id.*

•Covered employees are to accrue sick and safe time at one hour per 30 hours worked, and be compensated while using sick and safe time at normal rates of pay and benefits. M.C.O. § 40.210 (a) (Add.9.)

•Employees may use sick and safe time for their own health and certain family members' illness, injury or health conditions; or appointments for diagnosis, care, treatment or preventive care. M.C.O. § 40.220 (b) (Add.10.) Victims of domestic abuse, sexual assault and stalking may use sick and safe time to receive medical treatment and other necessary services. *Id.*

•The Minneapolis Department of Civil Rights (MDCR) is responsible for implementing, administering and enforcing the Ordinance, including the investigation of possible violations. (Doc. Index # 48, ¶¶ 2, 5; M.C.O. §§ 40.100, 40.110, 40.120) (Add.6-7.)

G. Ordinance Amendments

1. <u>"Safe Harbor" provision</u>

The Ordinance was amended in September 2016 to provide a "safe harbor" provision thereby easing the burden on employers. The amendment allows employers to satisfy the Ordinance requirements through adoption of a paid time off policy so long as the policy provides for at least the same accrual levels as § 40.210 of the Ordinance and may be used by the employee for the same purposes and under the same conditions as sick and safe time under § 40.220. (Add.19.) This allows employers to convert paid

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Employees in San Francisco and Santa Monica, California, are entitled to paid sick time if they work in the city. See S.F., Cal., admin. code § 12W.2 (c); Santa Monica, Cal., code § 4.62.025.

vacation benefits to paid time off programs and still be in compliance with the Ordinance, without providing additional sick and safe time.[4] M.C.O. § 40.310 (b) (Add.19). The amendment also deleted a provision previously in M.C.O. § 40.270(d) that had required an employer with employees who occasionally perform work in the City to track hours worked in the City by each employee performing work in the City, further reducing any burden on employers. (Add.19.)

2. Right to accrue and use sick time applies only to hours worked in the City.

In March 2018, after this Court's ruling on the temporary injunction order, the Ordinance was further amended to make clear that it only touches hours worked within Minneapolis' geographic boundaries. Specifically, the amendments included express provisions in the body of the Ordinance to make clear: (1) sick and safe time is only earned (accrued) under the Ordinance for time worked by an employee within the geographic boundaries of the City; and (2) that employers are only required to allow employees to *use* accrued sick and safe time (take accrued time) for hours the employee is scheduled to work within the geographic boundaries of the City. M.C.O. §§ 40.210 (a); 40.220(k) (Add.23, 25.) While the two clarifications had already been included in the published Rules and a Frequently Asked Questions document for the Ordinance issued by the MDCR, this made it express that the impact of the Ordinance is only on hours worked *within* the geographic boundaries of the City. (Doc. Index # 111, 112).

[4] As noted below, Respondent Graco took advantage of this provision and came into compliance with the Ordinance simply by converting its paid vacation benefit into a paid time off program without adding any additional paid time off to its employees.

H. Businesses Already Comply with a Variety of Regulations that Differ by Municipality.

Many businesses in Minneapolis routinely deal with a variety of municipal regulations that may vary city-to-city, such as varying trade license requirements, fuel regulations, and local ordinances placing additional restrictions on the sale of tobacco. (Doc. Index # 106, ¶¶ 3-7.) Some are even mobile businesses and perform services in multiple municipalities such as taxicabs, tree service contractors, and plumbers. (*Id.*, ¶ 3.) Each of these businesses must comply with the local regulations that are in place in the particular jurisdiction in which they operate. (*Id.*) The local regulations with which these businesses must regularly and customarily comply can vary greatly from municipal jurisdiction to jurisdiction. (*Id.*, ¶ 4.)

I. Respondents File Lawsuit and Ask District Court to Strike Down the Ordinance Before It Goes into Effect.

Respondents commenced this lawsuit and moved for a temporary injunction in October 2016, seeking to block enforcement of the Ordinance on the grounds that the ordinance conflicted with state law, was impliedly preempted by state law, and had an impermissible extraterritorial impact. (Doc. Index # 1.) On January 19, 2017, the Hennepin County District Court, the Honorable Mel I. Dickstein presiding, issued an order granting in part and denying in part Respondents' motion for a temporary injunction. (Add.32.) The District Court denied Respondents' motion on the basis that the Ordinance conflicts with or is impliedly preempted by state law. (Add.40-50.) However, the Court temporarily enjoined the City from enforcing the Ordinance against any employer "resident outside the geographic boundaries of the City of Minneapolis" until

after the hearing on the merits of this case, or further order of the Court. (Add.33, 51-57, 60.)

Respondents appealed the denial of the temporary injunction to this Court, and the City filed a notice of related appeal, challenging the temporary injunction with respect to nonresident employers. (Doc. Index # 67, 68.) On September 18, 2017, this Court affirmed the District Court's ruling under an abuse of discretion standard of review. *Minnesota Chamber of Commerce v. City of Minneapolis*, No. A17-0131, 2017 WL 4105201 (Minn. App. Sept. 18, 2017), *review denied* (Nov. 28, 2017). On the issue of extraterritoriality, this Court stated that "the parallel is strong" between the facts in this case, and those in *State v. Nelson*, 68 N.W. 1066 (1896), in which the Supreme Court held that a city ordinance requiring inspection of "every animal producing milk for sale within the city," wherever located, did not have an impermissible extraterritorial effect. *Id.* at *6 (Add.74-75.) Nevertheless, this Court held that under the abuse of discretion standard of review, the Court could not conclude that Respondents had "not made 'a doubtful showing as to the likelihood of prevailing on the merits,'" even if the Court were to conclude that "serious obstacles" and "foreseeable barrier[s]" stood between the chamber and permanent injunctive relief. *Id.* at *7. (Add.77.)

In the interlocutory appeal, the City also argued that the District Court's temporary injunction relating to any "employer resident outside the geographic boundaries of Minneapolis" should be reversed because it is unclear what employers are affected. *Id.* at *7, n.1. (Add.77.) This Court noted that "[e]very order granting an injunction ... shall be specific in terms; shall describe in reasonable detail ... the act or acts sought to be restrained" under Minn. R. Civ. P. 65.04, and concluded that "the order is sufficiently

specific in view of the temporary nature of the injunction and the limited enforcement permitted by the ordinance in its first year." *Id.* (Add.77.)

J. The Ordinance Has Had Minimal Impact on Respondents.

This lawsuit was premised on the notion that Respondents would suffer significant harm should the Ordinance go into effect. The Ordinance did go into effect and discovery in this case revealed that such claimed harms were overstated.[5]

1. Minnesota Chamber of Commerce

The Minnesota Chamber of Commerce is located in St. Paul, MN. (Doc. Index # 116, p. 15.) St. Paul has enacted an ordinance called the Earned Sick and Safe Time Ordinance. (*Id.*, p. 41.) The Chamber provides a paid-time-off benefit that employees can use for vacation or sick time. (*Id*., p. 23-24.) The Chamber's designated corporate representative was not aware how much paid time off their employees receive. (*Id.*, p. 22-24.)

2. Minnesota Recruiting and Staffing Association

The Minnesota Recruiting and Staffing Association has no employees. (Doc. Index # 117, p. 22.)

[5] In the Complaint, the Minnesota Chamber and the Recruiting and Staffing Association claimed the Ordinance would harm their members. The City sought discovery on the harm to these members, but these Respondents objected and the District Court agreed that they did not have to provide any discovery related to their membership. The City was thus limited to providing evidence only on the named Respondents and their employees.

3. TwinWest Chamber of Commerce

Employees of the TwinWest Chamber of Commerce did not receive any additional benefits due to the Minneapolis Sick and Safe Time Ordinance, because they already received enough PTO to satisfy the Ordinance. (Doc. Index # 118, pp. 47-50.)

4. Graco Inc.

To comply with the Ordinance, Graco converted its vacation time benefit into a paid time off benefit that could be used for sick and safe time under the Ordinance. (Doc. Index # 119, pp. 29, 30, 58. The amount of time off that employees receive was unchanged when the vacation benefit was converted into paid time off. (*Id.*, pp. 22, 32-33.)

Whether a Minnesota Graco employee is working inside or outside Minneapolis does not impact how much paid time off the employee receives. (*Id.*, p. 35.) Graco has not invested in any tracking software to track employees' work locations. (*Id.*, p. 48-49.) Even if the Ordinance is struck down, Graco intends to maintain its current practice of providing paid time off that can be used for vacation or sick and safe time, and has no plans to go back to its prior practice. (Doc. Index # 120; Doc. Index # 119, pp. 115-116.)

Kellie McLauglin, a Graco human resource manager, stated in a sworn affidavit filed in support of Respondents' Temporary Injunction Motion in this case that because some Graco employees from other countries perform at least 80 hours of work in Minneapolis each year, this created an "issue" for Graco in preparing to comply with the Ordinance. (Doc. Index. # 11, ¶ 8.) McLaughlin pointed to an example of "several of our key managers from China" who come to Minneapolis several times a year. (*Id.*) However,

in her deposition, McLaughlin admitted that the managers from China referenced in her affidavit are not employees of Graco, Inc., the Respondent in this case, and McLaughlin was not aware of what benefits they receive. (Doc. Index # 121, p. 41.)

5. Otogawa-Anschel General Contractors and Consultants LLC

Otogawa-Anschel has one employee who accrues paid time off because of the Ordinance, a part-time intern. (Doc. Index # 122, pp. 24-25.) The firm has not paid out any sick time to that intern. (*Id.*, pp. 31-32.) The firm tracks the intern's work location as a result of the Ordinance, and the intern only accrues paid time off when working in Minneapolis. (*Id.*, pp. 32-34.) The firm now permits employees to bank sick time from year to year. (*Id.*, pp. 50-51.)

K. Employers Have Claimed the Injunction Excuses Them from Providing Ordinance Benefits to Employees Working Full-Time in the City of Minneapolis.

The District Court's injunction has blocked employees that work exclusively in Minneapolis from earning the sick and safe time that Ordinance provides. For example, the Service Employees International (SEIU) Local 26 represents approximately 2,000 janitors who work in the City of Minneapolis, employed by fourteen cleaning companies. (Doc. Index # 105, ¶¶ 2-5.) Prior to the Ordinance's enactment, these janitors lacked the level of sick leave benefits that would be provided by the Ordinance (*Id.*, ¶¶ 7-8.) Subsequent to the issuance of the District Court's temporary injunction, these employers claimed that the injunction relieves them of any obligation to provide Ordinance benefits to the vast majority of these janitors, even though many of the janitors work exclusively within the City of Minneapolis for their employers. (*Id.*, ¶¶ 10-13.)

The janitors represented by Local 26 clean approximately 90% of the subcontracted commercial office as well as mixed office/warehouse spaces in the City of Minneapolis. (*Id.*, ¶ 6.) Buildings cleaned by these janitors include the Hennepin County Government Center, Target Corporate Offices, Wells Fargo Center, IDS Center, Thrivent Financial, U.S. Bank Plaza and U.S. Bank Corp. (*Id.*)

Thirteen of the fourteen janitorial services contractors who are party to the SEIU agreement have neither a headquarters nor do they maintain a branch office within the geographic boundaries of the City of Minneapolis. (*Id.*, ¶ 10.) As such, these thirteen companies claimed they are not a "resident" of the City and claimed that they are exempt from complying with the Ordinance pursuant to the terms of the injunction entered in this case. (*Id.*, ¶ 10.) These thirteen companies employ approximately 1,700 janitors who work within the geographic limits of the City, but because of their employers' interpretation of the injunction, did not receive benefits in the amount to which they would otherwise be entitled under the Ordinance. (*Id.*,¶ 11.) Approximately 1,500 of these janitors' positions hold "regular" positions with these companies, meaning their regular job is cleaning a specific assigned building or buildings all within the City limits. (*Id.*, ¶ 12.) The assigned work location of "regular" employees is fixed and does not change absent a permanent reduction in force by the employer. (*Id.*, ¶ 12.) Of these 1,500 "regular" positions, approximately 1,000 (two-thirds) are full-time positions. (*Id*.) The balance, approximately 500 positions, are part-time. (*Id*.) Whether full- time or part-time, all of these 1,500 janitors perform cleaning work for their employer exclusively within the geographic boundaries of the City of Minneapolis. (*Id.*, ¶ 13.) Under the injunction,

the employers of these janitors took the position that none of these 1,500 janitors are entitled receive sick leave benefits in the amount mandated by the Ordinance, even though in all relevant respects they are identically situated to the janitors working for the one company that acknowledges it must comply with the Ordinance. (*Id.*, ¶ 13.)

During the pendency of this appeal, a labor arbitrator ruled that these janitors should be permitted to earn sick and safe time pursuant to the Ordinance. The arbitrator's decision has not yet been published, but SEIU Local 26, which was a party to that arbitration, will be filing an amicus brief to this Court. The need to arbitrate such an issue illustrates the likelihood that, under the District Court's injunction, many employers may be denying their employees the right to earn sick and safe time despite their significant connections to Minneapolis.

L. The Parties Cross-Move for Summary Judgment and the District Court Permanently Enjoins City from Enforcing Ordinance Against Any "Employer Resident Outside the Boundaries of the City."

On May 8, 2018, the District Court ruled on the parties' cross motions for summary judgment, concluding that the Ordinance does not conflict with, and is not impliedly preempted by, state law. (Add.79, 83-97.) However, the District Court again ruled in Respondents' favor on the extraterritoriality issue, permanently enjoining the City from enforcing the Ordinance against any "employer resident outside the geographic boundaries of the City." (Add.79, 97-101.)

The District Court's permanent injunction used the same undefined term – "employer *resident* outside the geographic boundaries" – that it used in its temporary injunction, despite this Court's instruction that any injunction should be specific and

detailed in the acts restrained. *Minnesota Chamber of Commerce*, 2017 WL 4105201 at *7, n.1 (Add.77.) Again, this Court had concluded that the temporary injunction was sufficiently specific in light of its temporary nature and the limited enforcement of the ordinance in the first year. (*Id.*)

The scope of the injunction is unclear. The phrase "employer resident" is not derived from a known legal standard. It is not known whether an "employer resident" outside of Minneapolis should be determined based upon the employer's place of incorporation, the location of its corporate headquarters, its principal place of business or, as used in analyzing personal jurisdiction, the nature and extent of the employer's contacts with the City. Whether the Ordinance may be enforced against a particular employer will vary depending upon which of the factors are used. For example, a manufacturing company with its corporate headquarters in Minnetonka but with a majority of its employees working at its plant in Minneapolis may be subject to the Ordinance under a "principal place of business" or "sufficient contacts" analysis but not subject to the Ordinance if its residence is determined based upon the location of its corporate headquarters. The ambiguous wording of the injunction leaves the City in the position of having to forego enforcement of the Ordinance against many employers whose employees work principally, if not exclusively, within City limits.

The City filed a notice of appeal, challenging the District Court's injunction of that portion of the Ordinance. Respondents cross-appealed, challenging the District Court's denial of their motion to strike down the entire Ordinance on the ground that it conflicts with and is impliedly preempted by state law.

M. Respondents Unsuccessfully Challenge City's Municipal Minimum Wage Ordinance on Same Grounds.

The Minneapolis Minimum Wage Ordinance was also recently challenged by Respondents Minnesota Chamber of Commerce, Minnesota Recruiting and Staffing Association, TwinWest Chamber of Commerce, and Graco Inc.[6] (Doc. Index # 113.) The Minimum Wage Ordinance raised the minimum wage for employees working in Minneapolis higher than the minimum wage required by state statute. (*Id.*, p. 2.) The Minimum Wage Ordinance requires employers to pay the Minneapolis Minimum Wage for hours worked in the City by employees who work at least two hours per week within the City limits. Employers can satisfy the Minimum Wage Ordinance by tracking their employees' location, making reasonable estimates of the employees' locations, or paying their employees at least enough to satisfy the Minneapolis Ordinance for all hours. (Doc. Index # 114.) Graco pursued the same arguments in that case as asserted in this lawsuit – conflict, implied preemption and extraterritoriality. The District Court ruled in the City's favor on all counts. With regard to extraterritoriality, the Court ruled that there was no impermissible extraterritorial reach because the City was only regulating wages for hours of work performed in the City of Minneapolis. (Doc. Index # 113, pp. 5-17, 17-32, 33-34.) Graco appealed and that case is currently pending in this Court as Appellate Case No. A18-0593. Briefing is now complete in that appeal, and Graco is not challenging the

[6] In the minimum wage suit, the Minnesota Chamber and all other association plaintiffs dismissed their claims with prejudice following the district court's denial of Plaintiffs' motion for a temporary injunction, leaving Graco as the sole plaintiff in that action.

district court's ruling that the Minimum Wage Ordinance has no impermissible extraterritorial reach, but has limited its appeal to its preemption claims.

ARGUMENT

I. Standard of Review

On appeal from summary judgment, this Court reviews the record to determine: (1) whether there is any genuine issue of material fact and (2) whether the district court erred in its application of the law. *McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 544-545 (Minn. 2008) (citing *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 847 (Minn. 1995)). A genuine issue of material fact exists "when the nonmoving party presents evidence that is 'sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.'" *Id*. at 545 (quoting *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997)). If the material facts are not disputed, the Court reviews the application of law *de novo*. *Id.*

As a home rule charter city, Minneapolis has the same regulatory authority within its boundaries as the state, unless state law has limited or otherwise withheld that power. *See* Minn. Const., art. XII, sec. 4 and Minn. Stat. § 410.07; *see also Dean v. City of Winona*, 843 N.W.2d 249, 256 (Minn. App. 2014), *appeal dismissed*, 868 N.W.2d 1 (Minn. 2015) ("In matters of municipal concern, home rule cities have all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld.") (quotation marks omitted). In addition, the City has broad powers

as a Community Health Board to take action to address issues of public health in the City. *See* Minn. Stat. § 145A.04, subd. 1a; Doc. Index # 47, ¶ 8.

Ordinances enacted pursuant to such broad municipal powers enjoy a presumption of validity absent express legislative limits. *Benson Hotel Corp. v. City of Minneapolis*, 187 N.W.2d 610, 612 (Minn. 1971) (street use ordinance changing two-way traffic to one-way traffic enjoyed presumption of validity). The Minnesota Supreme Court has long held that when the "public interest may be reasonably served by [adoption of an ordinance], the ordinance before us may be sustained." *City of St. Paul v. Clark*, 259 N.W. 824, 824-25 (Minn. 1935). The burden to show that an ordinance does not come within the police power of the city is on the party attacking the ordinance. *Id*.

II. The Ordinance Does Not Have an Impermissible Extraterritorial Effect.

As this Court suggested in its opinion on the temporary injunction order in this case, the District Court's ruling on the issue of extraterritoriality is in error under the applicable *de novo* standard of review for a permanent injunction and must be reversed. Indeed, since this case was in front of this Court on the prior appeal, the City's case has only been made stronger. Subsequent to this Court's opinion, the City amended the Ordinance so that it now expressly provides that sick and safe time is *only* earned for hours worked *in* the City of Minneapolis and that employers are only required to allow employees to *use* accrued sick and safe time for hours they are scheduled to work *in* the City. As such, this regulation is well within the City's territorial authority. Moreover, the evidence obtained by the City in discovery demonstrates that Respondents' claims of excessive burden were overstated. The Ordinance does not have an impermissible

extraterritorial reach and this Court should reverse the District Court's grant of a permanent injunction and uphold the Ordinance in its entirety.

A. The District Court's Conclusion that the Ordinance's 80-Hour Threshold Was Improper and that the Ordinance Is Not "Narrowly Crafted" Was Based on an Unpled Substantive Due Process Claim, Which Fails Both Procedurally and on the Merits.

In concluding that the Ordinance had an impermissible extraterritorial effect, the District Court relied heavily on its determination that the 80-hour threshold is improper and that the Ordinance is not "narrowly crafted." (Add.99.) The language used by the District Court in its analysis is that of substantive due process. Respondents have brought no substantive due process challenge to the Ordinance, and any such challenge fails both procedurally and on the merits.

1. Legal standard

Substantive due process protects individuals from "certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). "Strict scrutiny is the appropriate standard of review when fundamental rights are at issue." *SooHoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007). To survive strict scrutiny, a law must: (1) advance a compelling state interest and (2) be narrowly tailored to further that interest. *Id.* at 821. If a fundamental right is not at stake, "judicial scrutiny is not exacting and substantive due process requires only that the statute not be arbitrary or capricious; the statute must provide a reasonable means to a permissible objective." *Dean*, 843 N.W.2d at 260. The rational basis standard requires

that: (1) the act serve to promote a public purpose, (2) the act not be an unreasonable, arbitrary or capricious interference with a private interest, and (3) the means chosen bear a rational relation to the public purpose sought to be served. *Id.*

2. The District Court improperly subjected the Ordinance to strict scrutiny, and the Ordinance easily survives a rational basis analysis.

By focusing on the City's choice of an 80-hour threshold and arguing that the Ordinance must be "narrowly crafted," the District Court implicitly concluded that the Ordinance is subject to a strict scrutiny analysis. Respondents brought no substantive due process challenge to the Ordinance, and, even if such a challenge had been brought, strict scrutiny is inapplicable.

The rational basis test applies here because the Respondents' claim does not involve a fundamental right or liberty. Fundamental rights are those "deeply rooted in the Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Flowers v. City of Minneapolis*, 478 F.3d 869, 873 (8th Cir. 2007). There are no fundamental rights or liberty interests associated with the Respondents' interest in the freedom to contract with their employees regarding employment benefits. As the Minnesota Supreme Court stated in *Essling v. Markman*, 335 N.W.2d 237, 239 (Minn. 1983): "Neither this court nor the United States Supreme Court has recognized freedom of choice or contract as fundamental rights sufficient to invoke strict judicial scrutiny."

The Ordinance clearly satisfies the rational basis test. With regard to the first factor of the test, there can be no dispute that the Ordinance serves the public purposes,

set out in the body of the Ordinance, of safeguarding the public welfare, health, safety and prosperity of the City, ensuring a more stable workforce and providing the 41% of workers in the City, who are disproportionately people of color and lack access to earned sick time, with the ability to take time off to care for themselves and their children when ill, to recover from domestic abuse or sexual assault and to seek preventive health care. (M.C.O. §§ 40.20, 40.30 (Add.1-3); Doc. Index # 33, p. 7, 9, 18-19.) *See also supra* Statement of Facts Parts B – E.

With regard to the second factor of the rational basis test, the Ordinance is not an unreasonable, arbitrary or capricious interference with Respondents' interests. As described above, discovery has shown that the harms Respondents feared when seeking a temporary injunction from this court have largely not come to pass. As is detailed in footnote 3, *supra*, numerous other municipalities have enacted sick and safe time ordinances with 80-hour or lower thresholds, so the Ordinance at issue is hardly an outlier or otherwise unknown to the business community.

Regarding the final factor of the rational basis test, there can be no dispute that the Ordinance bears a rational relation to the public purpose sought. As discussed above, the record is replete with research and testimony that lack of access to paid sick leave causes people to go to work while sick and that access to paid sick leave has public health benefits. The importance of providing these benefits to employees whose employers are not based in the City is evidenced by the example of the 1,500 janitors cleaning downtown offices who work exclusively within the City limits, but whose employers claimed their employees were not subject to the Ordinance due to the District Court's

injunction. (Doc. Index # 105.) These janitors clean the district courthouse in which this case was decided, plus the Target Corporate Offices, Wells Fargo Center, IDS Center, Thrivent Financial, U.S. Bank Plaza and U.S. Bank Corp. (*Id.*) While a labor arbitrator has since ruled that these janitors should be permitted to earn sick and safe time pursuant to the Ordinance, the District Court's injunction is so unclear that many employers may be denying their employees the right to earn sick and safe time despite their significant connections to Minneapolis. Clearly, there is a strong connection between public health and employees such as these janitors receiving benefits under the Ordinance. Respondents' challenge to the City's choice of an 80-hour threshold and any unpled substantive due process claim fail as a matter of law.

B. The Recent Ordinance Amendment Removes Any Doubt as to the Legality of the Ordinance's Reach.

The recent amendment to the Ordinance confirms its reach is limited to the City's boundaries. The amendment clarified two points: (1) employers are only required to permit employees to accrue sick and safe time for time worked by an employee within the geographic boundaries of the City; and, similarly, (2) that employers are only required to allow an employee to use accrued sick and safe time for hours the employee is scheduled to work within the geographic boundaries of the City. M.C.O. §§ 40.210 (a) (Add.23); 40.220(k) (Add.25); *see also* Add.22. The City's Municipal Minimum Wage Ordinance contains a similar limitation in the body of the ordinance - that it applies only to hours worked within the City. *See* M.C.O. § 40.370. The absence of such a limitation in the Sick and Safe Time Ordinance was a key factor in this Court's decision to uphold

the temporary injunction partially enjoining enforcement of the Ordinance. *See Minnesota Chamber of Commerce*, No. A17-0131, 2017 WL 4105201, at *5 ("The district court here concluded that . . . the city's stated plans for enforcement do not alter the plain language of the ordinance. We agree."). The amendment removes this concern and makes the Ordinance analogous to the Minimum Wage Ordinance, which has been found to have no impermissible extraterritorial effect. *See Graco v. City of Minneapolis*, 27-cv-17-17198 (Hennepin Cty. Dist. Ct., Mar. 22, 2018) (Burke, S., J.) (Doc. Index # 113). Graco, a Plaintiff in both this case and the challenge to the Minimum Wage Ordinance, is not challenging the extraterritorial effects in its appeal of the district court order upholding the Ordinance. *See* Graco's briefs in Appellate Case No. A18-0593.

C. Minnesota Precedent Establishes that a City May Regulate Conduct Within Its Borders Even Though Some Actions Required by an Ordinance Will Occur Outside of City Limits.

The recent amendment makes express that the City seeks only to regulate conduct within its borders even though some actions necessary for compliance may occur beyond city limits. For over a century, Minnesota has allowed cities to reach beyond their borders to regulate conduct occurring *within* their city limits.

1. *The seminal case on extraterritoriality,* State v. Nelson, *supports the legality of the Ordinance.*

The courts first addressed the permissible scope of a municipality's extraterritorial authority in 1896 when the City of Minneapolis enacted an ordinance requiring anyone selling milk within the city to allow inspection of the dairy and dairy herd producing the milk. *See State v. Nelson*, 68 N.W. 1066, 1067 (Minn. 1896). Nelson appealed his

conviction for violating the ordinance and asserted that the ordinance, in so far as it requires inspection of dairies and dairy herds outside of the city, exceeded the city's extraterritorial authority. *Id*.

The Minnesota Supreme Court disagreed. The Court noted that the inspection requirement applied only to those dairies or dairy herds outside the city limits whose milk is proposed to be sold in the city and that the "provisions of the ordinance in that regard go only so far as it is reasonably necessary to prevent the milk of diseased cows [from] being sold in the city." *Id.* at 1068. The Court further stated that "[t]he inspection is wholly voluntary on the part of the owner of the dairy or dairy herd" with the only consequence of refusing to allow the inspection being that "he or the one to whom he furnishes milk cannot obtain a license to sell milk within the city." *Id*. The Court concluded that the ordinance "has no extraterritorial operation" because the "only subject upon which it operates is the sale of milk within the city." *Id*.

Nelson has obvious similarities to this action and this Court agreed that "the parallel is strong" between the two ordinances. *Minnesota Chamber of Commerce*, No. A17-0131, 2017 WL 4105201, at *6. Both the Ordinance here and the ordinance in *Nelson* stem from concerns about public health. Both can affect those located outside of the City, but only to the extent they purposefully direct business into the City. The Ordinance here is less burdensome than that in *Nelson* in that the ordinance in *Nelson* had *no* threshold requirement, such as the 80-hour threshold here, but applied to any milk sold in the City, regardless of how small an amount. *Nelson*, 68 N.W. at 1067-68. In addition, the ordinance in *Nelson* required physical tagging and removal of diseased animals from

herds located outside of the City as well as criminal penalties. *Id.* By contrast, the only extraterritorial impact of the Ordinance is with respect to employers who may maintain time records outside the City.[7] This is a far less intrusive impact than the inspections, testing, tagging and removal of animals required of any producer whose herd may produce milk to be sold in the City, regardless of whether that producer is actually the seller or merely a supplier to a third party seller.

Despite these strong similarities, the District Court concluded that the Ordinance is distinguishable from *Nelson* because it provides a benefit to employees who spend little time in Minneapolis and who therefore accrue sick and safe time at a slower rate. The District Court argued that the Ordinance was therefore not "narrowly drafted to protect against the harm" of employees working while sick, because some employees might not have sufficient safe and sick time accrued to miss work when sick. This argument misreads *Nelson*. The Court in *Nelson* did not examine whether the ordinance was "narrowly drafted" or whether it would prevent *all* contaminated milk from being sold. In fact the Court rejected Nelson's challenge to the Ordinance even though there was evidence that the test administered to the cows was "uncertain in its results, and deleterious to the health of the animals." 68 N.W. 1068. The Court looked only to whether the Ordinance had a "reasonable tendency to prevent the sale of unwholesome milk within the city." Similarly, here, a court's inquiry is not whether the Ordinance will prevent all employees from attending work while sick, but whether the Ordinance has a

[7] Moreover, in these days of cloud data storage, the question of where data is stored can be a metaphysical inquiry given that data can be stored on servers literally across the globe.

"reasonable tendency" to prevent such a harm. In light of the ample record evidence of positive health impacts of paid sick and safe time, the Ordinance easily passes the test set by *Nelson.*

2. Along with Nelson*, additional case law on extraterritoriality supports the validity of the Ordinance.*

This Court, in its prior opinion in this case, distinguished the central precedent cited by Respondents below, the case of *Duluth v. Orr*, 132 N.W. 265 (Minn. 1911). In *Duluth v. Orr*, the City of Duluth passed an ordinance prohibiting the storage of explosives within a one mile radius outside of the City's borders, without a permit issued by the City of Duluth. *Id.* at 265. In the case, the Minnesota Supreme Court concluded that, while Duluth had the authority to require permits for the storage of explosives within its city limits, it could not extend this requirement to activity taking place beyond the City's limits. *Id.* This Court, in its prior decision in this case, distinguished *Orr* by stating that, with the Ordinance, "employers are only subject to the ordinance if their employees work within the city limits at least 80 hours per year." *Minnesota Chamber of Commerce*, No. A17-0131, 2017 WL 4105201, at *7.

The third precedent on extraterritoriality is the 1987 decision of this Court in the case of *City of Plymouth v. Simonson*, 404 N.W.2d 907, 908 (Minn. App. 1987). In this case, this Court upheld a Plymouth criminal ordinance that made it unlawful to for any person to 'mail, transmit, deliver, or provide for the delivery of letters, cards, or other articles to persons within the City of Plymouth with the intent to "annoy, harass, cause feelings of imposition, intimidation, oppression, or cause fear for personal safety." *Id.* at 907. The defendant was convicted of this offense after he was found to have mailed at

least two letters to a woman in Plymouth that carried a Minneapolis postmark and were deposited in the mail in Minneapolis. *Id.* at 908. Simonson appealed his conviction and asserted that the ordinance could not reach conduct, such as the mailing of letters, occurring beyond the city limits. *Id.* This Court rejected this argument and upheld the ordinance concluding that it "has no extraterritorial effect" and found that the ordinance "merely restricts the delivery of harassing mail to people in Plymouth." *Id.* As this Court noted, "the purpose of the ordinance would be frustrated" if Plymouth could not restrict the flow of damaging mail into the city. *Id.*

Nelson, *Orr*, and *Simonson* establish a clear rule: a municipality may impose requirements on individuals beyond the municipal boundary in order to regulate conduct occurring within the municipality.[8] Consistent with this standard, Minneapolis enacted an ordinance that requires employers, whether based in Minneapolis or not, who choose to have their employees work in the City of Minneapolis for at least 80 hours per year to provide sick and safe leave to such employees. Any employer can avoid the requirements

[8] This legal principle is further bolstered by case law permitting the state to reach far beyond its borders to apply its statutes. For example, in *Follese v. Eastern Airlines,* 271 N.W.2d 824, 829-32 (Minn. 1978), the Court applied the Minnesota Workers' Compensation Act to not only an out of state employer, but to cover an employee who was neither injured while working in nor a resident of the State of Minnesota at the time of the injuries. The employee only became a resident of Minnesota after she terminated her employment. The Court nevertheless concluded, utilizing a "business localization" test, that the Minnesota statute was applicable to provide a remedy for this claimant. Similarly, the Eighth Circuit, applying Minnesota law, upheld the application of Minnesota drug testing law to a Wisconsin employer that hired an employee for a job in West Virginia, but took his pre-employment drug test in Minnesota. *Olson v. Push, Inc.*, 640 F. App'x 567, 571 (8th Cir. 2016). The court found no issue in applying the requirements of the Minnesota drug testing law, despite the fact that both the employer and the job were located in other states.

of the Ordinance by choosing to forego work in the City of Minneapolis just as a dairy could avoid the inspection requirement by choosing not to allow its milk be sold in Minneapolis and an individual could avoid liability under the anti-harassment ordinance by refraining from directing harassing materials to the city's residents.

The Ordinance at issue here is quite unlike the ordinance in *Orr*. The Ordinance seeks to promote the health and welfare of its residents by requiring all employers, whether based in Minneapolis or not, to provide sick and safe leave for employees working in Minneapolis. The Ordinance does not seek to impose requirements on employers except as to employees working in the City. Indeed, to be analogous to *Orr*, the Ordinance would need to require employers to provide paid sick leave to employees working within a mile radius outside the City of Minneapolis to protect the health of those within the City's limits. As noted by this Court, that is not the case here.

The controlling precedent established in *Nelson*, *Orr*, and *Simonson* establishes a plain test: if the conduct that is being regulated is within a municipality's borders, the fact that some related acts may occur outside those borders – the location of and testing of dairy cows outside of Minneapolis in *Nelson* or the creation and mailing of a harassing letter outside of the City of Plymouth in *Simonson* – does not result in impermissible extraterritoriality. Here, as in *Nelson* and *Simonson*, despite the fact that the employer may have its office outside of Minneapolis, it is the employment of individuals working within the City that is the relevant factor. The subject matter of the Ordinance is the health of workers while they are scheduled to work in the City, just as the Minnesota Supreme Court found that the subject matter in Nelson was on ensuring that milk sold in

the City was healthful. The fact that the employer may choose to store its employment records outside the City is irrelevant – the same as the fact that the actual location of the dairy cows to be inspected and tested by Minneapolis inspectors in *Nelson* was not deemed to overcome the fact that the City's regulation was focused on the sale of milk in the City. Here, the focus of the Ordinance is on work performed within the City and only on hours of work performed within the City.

To argue a business has no physical presence in the City even as its employees perform work in the City is far too narrow a lens. This is no different than the City imposing any regulation on businesses, such as the requirement for a rental license for landlords. The real estate owner as well as the apartment management company may and often are located outside the City limits, but they are still required to comply with all City requirements to rent apartments within the City. Other businesses are mobile in nature and perform services in multiple municipal jurisdictions, such as food trucks and taxicabs, and each of these businesses must comply with the local regulations that are in place in each jurisdiction. (*See* Doc. Index # 106 ¶ 3.)

CONCLUSION

For all the foregoing reasons, the City respectfully requests that the District Court's judgment enjoining the City from enforcing the Ordinance against employers resident outside the geographic boundaries of the City of Minneapolis, be reversed and set aside, and that judgment be entered in the City's favor in all respects in this matter.

Respectfully submitted,

Dated: August 13, 2018

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Case No. A18-0771

STATE OF MINNESOTA
IN THE COURT OF APPEALS

City of Minneapolis,

Appellant,

v.

Minnesota Chamber of Commerce, Minnesota Recruiting and Staffing Association, TwinWest Chamber of Commerce, Graco Inc., and Otogawa-Anschel General Contractors and Consultants LLC,

Respondents.

CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 131.01, subd. 4. The length of this brief is 10,972 words. This brief was prepared using Microsoft Word 2016.

Dated: August 13, 2018

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