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# Milwaukee's Paid Sick Leave Ordinance: How to Navigate the New Law

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# GENESIS OF THE ORDINANCE

- Wisconsin's Direct Legislation Statute
- 9 to 5 National Association of Working Women obtained 40,000 signatures
- November 4<sup>th</sup> vote – 68% approval
- Ordinance published November 12, 2008
- Implementation date February 10, 2009
- Employees do not begin to accrue paid sick leave until February 10, 2009



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# ACCORDING TO THE CITY OF MILWAUKEE

- The City is currently working on legal, operational and administrative considerations to enforce the sick leave ordinance.
- Administrative rules are being drafted.
- The infrastructure to handle questions and process complaints is being developed by the Department of Employee Relations.



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# INTERPRETATION AND ENFORCEMENT ISSUES

- Lack of legislative process
- Vague terms
  - “affinity”
  - “employed”
- No agency exists to administer ordinance
- Enforcement issues



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# PAID SICK LEAVE INITIATIVES IN OTHER PARTS OF THE UNITED STATES

- San Francisco
- Washington, D.C.
- Ohio



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# SOLUTIONS

1. Complete Automation
2. Independent Contractors
  - Not a viable option for most employers
3. Relocate
4. Compliance



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# PREAMBLE THE ORDINANCE

Employees without paid sick leave:

- are more likely to come to work when they are sick;
- may cause the employee's condition to worsen or may delay the employee's recovery;
- may expose other employees to infectious diseases;
- will jeopardize the health of the public;
- are more likely to come to work despite the medical problems facing their children or other family members;
- may send their child, even though sick, to school or a childcare center, thereby exposing other children to germs and disease;



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- may keep an older child home from school to care for a younger, ill sibling;
- who must stay home when they, their children, or other family members are ill or injured lose earnings and may risk a loss of employment;
- find it much more difficult to schedule medical appointments for themselves and their children and other family members;
- find it much more difficult to care for family members on a short-term basis. As a result, it sometimes becomes necessary for family members to be placed in nursing homes.

It is essential that all persons working in our community be able to earn paid sick days that are adequate to ensure a decent and healthy life for them and their families.



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# WHO IS COVERED

- “Employer” as defined in Wis. Stat. §104.01(3)(a)

The term “employer” shall mean and include 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 wages of another.

- Excludes

1. the United States government
2. State of Wisconsin
3. any county or local government



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# WHO IS COVERED

- “Employee” is any person who is *employed* within the geographic boundaries of the City by an employer, including part-time and temporary employees.



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# ACCRUAL OF PAID LEAVE

- *All employees* have the right to paid sick leave.
- *All employers* shall provide a minimum of one hour of paid sick leave for every 30 hours worked by an employee. Employers will not be required to provide more than 72 hours of sick leave for an employee in a calendar year.
- Employees of *small businesses* will not *accrue* more than 40 hours of paid sick leave in a calendar year, unless the employer selects a higher limit.
- Paid sick leave shall be *carried over* to the following calendar year; however, an *employee's use of sick leave* in each calendar year shall not exceed 40 hours for employees of small businesses and 72 hours for employees of all other businesses.



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# SMALL BUSINESS

- “Small business” means any private individual, firm, partnership, institution, corporation, or association for which *fewer than 10 persons* work for compensation during a given week.
- In determining the number of persons performing work for compensation during a given week, *all persons performing work for compensation* on a full-time, part-time, or temporary basis shall be counted, including persons made available to work through the services of a temporary services or staffing agency or similar entity.



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# ACCRUAL OF PAID LEAVE SALARIED EMPLOYEES

- Salaried exempt employees will be assumed to work 40 hours in each work week for purposes of paid sick leave accrual unless their regular work week is less than 40 hours, in which case, paid sick leave accrues based upon that regular work week.



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# ACCRUAL OF PAID LEAVE

- Paid sick leave shall begin to accrue at the commencement of employment.
- Paid sick leave shall accrue in hour unit increments.
- Employees shall be entitled to use accrued paid sick leave beginning on the 90<sup>th</sup> calendar day following commencement of their employment. After the 90<sup>th</sup> calendar day of employment, employees may use sick leave as it is accrued.



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# ACCRUAL OF PAID LEAVE

- No requirement to pay out accrued paid sick leave upon termination.
- When there is a separation from employment and the employee is *rehired within one year* of separation by the same employer, previously accrued paid sick leave that had not been used shall be reinstated. Further, the employee shall be entitled to use accrued paid sick leave at the commencement of employment following a separation from employment of one year or less.



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# USE OF PAID LEAVE

Paid sick leave shall be provided to an employee by an employer for:

- (1) An employee's mental or physical illness, injury or health condition or need for medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition or need for preventive medical care.
- (2) Care of a "family member" with a mental or physical illness, injury or health condition who needs medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition or who need preventive medical care.



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# USE OF PAID LEAVE

- (3) Absence necessary due to domestic abuse, sexual assault or stalking, provided the leave is to:
- (A) Seek medical attention for the employee or employee's child, spouse, parent, grandparent or extended family member to recover from physical or psychological injury or disability caused by domestic or sexual violence; or
  - (B) Obtain services from a victim services organization; or
  - (C) Obtain psychological or other counseling; or
  - (D) Seek relocation due to the domestic or sexual violence or stalking; or
  - (E) Take legal action, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from the domestic or sexual violence.



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# DEFINITION OF FAMILY MEMBER

“Family member” is defined as:

- (1) a child;
- (2) a parent;
- (3) a person to whom the employee is legally married;
- (4) a grandparent defined as the parent of a parent or spouse of a grandparent;
- (5) a grandchild defined as the child of a child;
- (6) a biological, foster, or adopted sibling or spouse of a biological, foster or adopted sibling;
- (7) a domestic partner; and
- (8) any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.



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# COMPLIANCE STRATEGIES

- Equivalent or more generous leave policies.
  - Any employer with a paid leave policy, such as a paid time off policy, who makes available an amount of paid leave sufficient to *meet the accrual requirements* of this Chapter that may be *used for the same purposes* and *under the same conditions* as paid sick leave under this Chapter is not required to provide additional paid sick leave.
  - Nothing in this Chapter shall be construed to prevent employers from adopting or retaining leave policies that are more generous than the policies required under this Chapter.



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# COMPLIANCE STRATEGIES

- NOT ONE SIZE FITS ALL SOLUTION
  - Sick/Vacation Policies
  - PTO/CTO Policies
  - Notice of leave
  - Drafting of policies



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# UNION CONTRACTS

“Nothing in this Chapter shall be construed as diminishing the obligation of an employer to comply with any contract, collective bargaining agreement, employment benefit plan or other agreement providing more generous leave to an employee.”



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# UNIONIZED EMPLOYERS

- Preemption by Section 301 of Labor Management Relations Act
- Union Contract
  - What paid leave is provided?
  - Reopener / contravention of law provisions
  - Interpretation / compliance with law provisions
  - Breach of contract issue
    - Union grievance and arbitration
- Duty to bargain
- Strategy to deal with union



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# EMPLOYER PROHIBITIONS

- An employer may not require, as a condition of an employee's taking paid sick leave, that the employee search for or find *a replacement worker* to cover the hours during which the employee is on paid sick leave.
- An employer may not impose *unreasonable barriers* to use of paid sick leave or require *unreasonable documentation* of illness when an employee takes sick leave.
- An employer may not penalize an employee for use of sick leave by reducing any benefits of employment otherwise due the employee.



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# ANTI-RETALIATION PROVISIONS

- An employer or any other person shall not interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this chapter.
- An employer shall not take retaliatory personnel action or discriminate against an employee because the employee has exercised rights protected under this chapter. Such rights include but are not limited to the right to use paid sick leave; the right to file a complaint or inform any person about any employer's alleged violation; and the right to inform any person of his or her potential rights.
- No employer may treat sick leave as an absence that may lead to or result in discipline, discharge, demotion, suspension or any other adverse action, or treat the use of paid sick leave as a negative factor in hiring, evaluation or promotion.



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# NOTICE TO EMPLOYEES

- Employers *shall* give notice that employees are entitled to paid sick leave, the amount of paid sick leave, and the terms of its use and that retaliation against employees who request or use paid sick leave is prohibited.
- Employers *may* comply by supplying each of their employees with a notice in English, Hmong and Spanish that contains the information required above.
- Employers *may* comply by displaying a poster in a conspicuous and accessible place in each establishment where such employees are employed which contains in English, Hmong and Spanish all information required above.



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# RECORDKEEPING

- Employers shall retain records documenting hours worked by employees and paid sick leave taken by employees, for a period of 5 years.



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# ENFORCEMENT

- The Equal Rights Commission established under Chapter 109 has all authority granted to it to enforce the ordinance.
- The Equal Rights Commission shall exercise all authority . . . with respect to violations of the ordinance including but not limited to the power to receive complaints, remedy violations, adopt rules, issue subpoenas and order redress following a hearing.



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# PENALTIES

Following a hearing, the Commission may:

- Order a respondent to redress any injury occasioned by violation.
- Order a respondent to cease and desist from violation.
- Undertake any action necessary to effectuate the purpose of the ordinance or to bring an employer into compliance.



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# THE ISLAND OF MILWAUKEE

- Effect on businesses
- Effect on residents



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# COURT CHALLENGE

- Status
  - City denied claim on November 25, 2008
  - MMAC litigation
- Legal Issues – Ordinance:
  - Exceeds legislative authority of the City
  - Regulates employers beyond its borders
  - Preempted by Wisconsin's Living Wage Statute
  - Preempted by FMLA
  - Preempted by NLRA
  - Void for vagueness



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# QUESTIONS



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