



The Legality and Enforceability of Pittsburgh's Sick Leave Ordinance

In justifying its authority to mandate that employers in the City of Pittsburgh offer paid sick leave to employees (unless the employees are one of the exempted classes) the Council ordinance claims the ability to take such an action is based on Article IX, Section 2 of the state Constitution; the Home Rule and Optional Plan Government Law, 53 Pa CS Section 2961; The Second Class City Law, 53 PS 23103 and 23145; the Disease Prevention and Control Law 35 PS 521.16(a)(c) and the Home Rule Charter of the City of Pittsburgh.

The state Constitution states that a municipality can exercise any power or function that is not denied to it by the Constitution, the municipality's home rule charter, or the General Assembly. The Home Rule Law sections essentially echo that very important language. The section of the Second Class City Law states that a city of the second class may "...make regulations to secure the general health of the inhabitants and to remove and prevent nuisances". The Disease Prevention and Control act speaks to "regulations relating to disease prevention and control" and the City's Home Rule Charter expresses the powers of the City as a home rule municipality.

However, the sick leave ordinance faces legal obstacles in the form of the same state law governing Home Rule municipalities, prior case rulings and a judgment by the Pennsylvania Supreme Court in 2009 regarding a 2004 City ordinance. In that case the City had attempted by legislation to place "...certain requirements on City of Pittsburgh awarded contractors relative to janitorial, security, and building maintenance; providing for job security protections, enforcement, due process, penalties for non-compliance, and remedies". The requirements were focused on the retention of personnel under a previous contractor by the new contractor for a 180 day transition period. The ordinance would have applied to structures of more than 100,000 square feet and for contractors employing five or more people.

When the ordinance ended up in court, it was struck down by the Allegheny County Court of Common Pleas, Commonwealth Court upheld the decision, and ultimately so did the state Supreme Court. In its decision, the Supreme Court noted "...we hold that the City of Pittsburgh exceeded its power and violated the Home Rule Charter and Optional Plans Law, 53 Pa CS [section] 2962". That crucially important section states:

A municipality which adopts a home rule charter shall not determine duties, responsibilities or requirements placed upon businesses, occupations and employers, including the duty to withhold, remit or report taxes or penalties levied or imposed upon them or upon persons in their employment, except as expressly provided by statutes which are applicable in every part of this Commonwealth or which are applicable to all municipalities or to a class or classes of municipalities. This subsection shall not be construed as a limitation in fixing rates of taxation on permissible subjects of taxation.

Given the clear statutory language, the majority opinion in the Supreme Court decision stated that the pertinent law "...prohibits home rule municipalities, like Pittsburgh, from regulating businesses by determining their 'duties, responsibilities, or requirements'. Pittsburgh's ordinance nonetheless purports to prohibit a new contractor from firing or releasing any employees from a prior contractor during a 180-day transition period. This is plainly a 'requirement' placed upon the new contractor".

Requiring by statute that employers in the City provide paid sick leave seems to be a duty, responsibility, and requirement in violation of this language in the Home Rule Law. Obfuscation by claiming the City is doing this for purposes of protecting public health will be unlikely to convince the courts. After all, the County's health department already has plenty of jurisdiction deal with public health issues—even in the City. Assuming the bill becomes law, the business community or an affected business owner should file a motion seeking an injunction against implementation on the grounds that any costs they incur before the law is disallowed by the court will be unrecoverable.

But assuming that the ordinance stands because there is no legal challenge or one goes forward and the courts find that the City's ordinance is legal, how does the sick leave ordinance get enforced?

The bill as written places the implementation and management of the ordinance requirements on the Controller's office or "a department or entity designated by the Office of the Mayor" (hereafter referred to as the agency).

The agency in charge will have the power to design a system to take complaints, investigate violations, and try to resolve them as long as the complaint (brought by an employee, employer, or collective bargaining unit) is brought within six months. The responsible agency can use mediation. It can impose penalties and fines, but the only specified penalty or fine for violating the ordinance is for an employer "...in an amount not to exceed \$100 for each separate offense" which can only be levied after the agency has issued a warning.

The agency can mandate restitution of wages or benefits for sick leave time and can reinstate the employee (presumably if wrongfully terminated or demoted). Employers are required to keep two years of hours worked and sick leave used and must allow the agency access to the records to monitor compliance.

The bill does not mention budgetary impacts, but one has to wonder what they will be like, both for the City and for the businesses subject to the mandate. Where will the money come from for the City to manage the law's provisions? Will an emergency appropriation be necessary? Such an undertaking will almost certainly require personnel diversion or additional hires to prepare the documents that must be sent to all businesses describing the ordinance and the responsibilities of the employers, the procedures to be followed, the penalties for non-compliance, and the procedures to appeal, etc.

In other cities, companies have incurred substantial costs in having to acquire new payroll software, not to mention the time of the owners or managers to track absenteeism, the reasons for it, hours of sick leave earned, etc. According to latest Census figures there are roughly 25,000 businesses in Pittsburgh with employment of 150,000. These businesses will have to provide information as to whether or not they currently offer sick leave pay. Presumably, a great many of the 25,000 firms have no employees and are one person operations. Nonetheless, there are

undoubtedly thousands with only a handful of employees and they are unlikely to offer the benefit.

Here is the problem the ordinance faces. A business owner can make a calculation as to whether the likely annual cost of paying fines after hassling with the implementing agency will be less than putting the mandated sick pay system in place. If that is the case they may simply refuse to offer sick pay. The City's collecting a \$100 fine per offense will be of little help for the employee.

What if a large percentage of firms ignore the ordinance? Where does the City go from there? Is the City prepared to withdraw their licenses or permits? Withdrawing business licenses or permits will be of little help to employees who lose their jobs.

Here's the question the City should be answering. If it is so concerned about people being able to take time off work to care for a sick family member or because they are sick and not lose pay during their absence, why does the City not establish a fund to provide funds for these folks? Maybe it could divert some money from generous benefits it provides its own employees.

This reveals the true nature of what is happening. The City cannot get beyond its anti-free market, anti-business mindset. The City just cannot get its arms around the idea that the profit motive is key to business startups and growth that redound to the City in the form of business taxes, payrolls, higher real estate values and all that comes with real prosperity. Or it can continue to place its hopes on the non-profits such as universities and hospitals and of course governments to provide jobs and economic vitality.

Why should it be the business owner's responsibility to incur the cost? They can if they choose, but government mandating is a far different matter.

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