# SICK OVER IT: EVALUATING THE IMPACT OF THE TWIN CITIES' SAFE AND SICK TIME STATUTES

Patrick Kennedy†



† Patrick Kennedy is a J.D. Candidate at Mitchell Hamline School of Law, expecting to graduate in May 2019. He would like to thank David Larson for his advice and input on this paper. He would like to add that he would not be here without the love and support of family, friends, mentors, and caffeine.

## I. INTRODUCTION

Minnesotans enjoy a relatively high quality of life compared to the rest of the United States.[1] Minnesotans have high standards of income, housing, jobs, health, education, and life satisfaction.[2] This, of course, comes at a cost. It is no secret that Minnesota is an expensive place to do business.[3] Employers in Minnesota must comply with wage and hour regulations set forth in a variety of federal and state statutes, including the Fair Labor Standards Act of 1938 (FLSA),[4] the Minnesota Fair Labor Standards Act (MFLSA),[5] and the Family Medical Leave Act (FMLA).[6] MFLSA guarantees covered employees a higher minimum wage than its federal counterpart.[7] Minnesota law is also less restrictive than federal law

1. *Regional Well-Being Index 2016, Minnesota*, ORG. FOR ECON. CO-OPERATION & DEV. (OECD), https://www.oecdregionalwellbeing.org/US27.html [https://perma.cc/2EKJ-3EGV] (last visited April 3, 2018).

2. *Id.*

3. *Minnesota Finishes No. 3 in America's Top States for Business*, CNBC (July 11, 2017, 11:28 AM), https://www.cnbc.com/2017/07/11/minnesota-finishes-no-3-in-americas-top-states-for-business.html [https://perma.cc/M9UG-SPEK] (finding Minnesota was ranked thirty-sixth in terms of cost of business but was elevated by other factors).

4. *See generally* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (2017); s*ee also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1984) ("[W]e perceive nothing in the overtime and minimum-wage requirements of the FLSA . . . that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.").

5. *See generally* Minnesota Fair Labor Standards Act, MINN. STAT. §§ 177.21–44 (2016).

6. *See generally* 29 U.S.C. §§ 2611–2619.

7. *Compare* MINN. STAT. § 177.24 ($9.50 per hour), *with* 29 U.S.C. § 206 ($7.25 per hour).

on when, how, and for how long employees may use sick leave time or unpaid leave for personal or familial health issues.[8]

Employers who wish to do business in the Twin Cities have even more regulations to follow. Over the last two years, the Minneapolis City Council has aggressively tried to boost employee benefits by passing two significant pieces of legislation. First, the Minneapolis City Council passed a Safe and Sick Time Law, which grants covered employees working in Minneapolis paid time off for health, personal, or family emergencies.[9] The St. Paul City Council soon followed suit, passing its own version in September of 2016.[10] Second, the Minneapolis City Council passed an incremental mandatory minimum wage increase taking effect in January 2018, resulting in a mandatory minimum wage of fifteen dollars per hour for all covered employees by 2024.[11] While no similar action has occurred in St. Paul, there is also a groundswell of support for an increase in the minimum wage in Minnesota's capital.[12] For the purposes of this article, only the Safe and Sick Time Ordinances will be discussed in detail.[13]

The Minneapolis Safe and Sick Time Ordinance and the St. Paul Earned Safe and Sick Time Ordinance present many regulatory hurdles for

8. *Compare* MINN. STAT. § 181.9413 ("reasonable periods of time"), *with* 29 U.S.C. § 2612 (twelve work weeks).

9. MINNEAPOLIS, MINN., CODE §§ 40.10–220 (2016).

10. ST. PAUL, MINN., CODE § 233 (2016).

11. MINNEAPOLIS CODE §§ 40.320–450.

12. *See* Frederick Melo, *The Minimum Wage Debate is Heating Up in St. Paul. Here's What to Look For*, PIONEER PRESS (Jan. 13, 2018), https://www.twincities.com/2018/ 01/13/a-conversation-with-employment-law-expert-lisa-schmid-on-st-pauls-minimum-wage-talks/ [https://perma.cc/JY6U-SC3H]; Josh Verges, *St. Paul School District Proposes $15 Minimum Wage by 2020*, PIONEER PRESS (Oct. 3, 2017), http://www.twincities.com/2017/10/03/st-paul-school-district-proposes-15-minim um-wage-by-2020/ [https://perma.cc/TL6K-DX4F]; Jessie Van Berkel, *Advocates Take Push for $15 Minimum Wage to St. Paul City Hall*, STAR TRIB. (Sept. 26, 2017), http://www.startribune.com/advocates-take-push-for-15-minimum-wage-to-st-paul-city-hall/448055793/ [https://perma.cc/7ZR7-SN6N].

13. For a further discussion on the impacts and implications of a $15/hour minimum wage, *compare* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016) (exploring the implications generally of government engaging in "social bargaining" in the wake of declining union membership), *and* Erin Conway & Caroline Fitcher, *Surviving the Tempest: Franchisees in the Brave New World of Joint Employers and $15 Now*, 35 FRANCHISE L.J. 509 (2016) (exploring the impact of higher wages on the franchise business model and the opportunities for the model to reform), *with* Stephen Plass, *Wage Compression as a Democratic Ideal*, 25 CORNELL J.L. & PUB. POL'Y 601 (2016) (exploring the necessity of wage flexibility in a globalized marketplace and the impacts of labor regulations on the employment market).

employers with employees who work in the Twin Cities.[14] This Note explores the history of the Twin Cities' ordinances from their roots to their implementation.[15] Next, it analyzes the structure and requirements of the ordinances and how employers deal with those requirements.[16] Then, this Note discusses reactions to these ordinances, from legislative action to legal challenges, and specifically analyzes whether the ordinances will survive judicial scrutiny.[17] Finally, this Note explores the policy aspects of the ordinances in the context of intent versus impact to determine what employers, employees, and practitioners can expect from these ordinances.[18]

## II. WAGE AND HOUR LAW IN THE TWIN CITIES

### *A. A Brief Recent History of Mandatory Paid Sick Leave in the United States*

The Twin Cities Safe and Sick Time Ordinances have their roots in a decade-old initiative in San Francisco.[19] San Francisco's Sick Leave Ordinance ("SLO") first went into effect on February 7, 2007,[20] and has served as a framework for similar ordinances across the United States.[21] In its most current form, the SLO ensures that for every thirty hours an employee works within the San Francisco area, that employee shall receive one hour of paid sick time.[22] The state of California has since enacted a similar mandatory paid sick leave law—the Healthy Workplaces, Healthy Families Act—which went into effect on July 1, 2015.[23] However, San Francisco's SLO provides more robust protections for employees, and was

14. Jessie Van Berkel, *Small Business Owners Brace for New Regulations in Minneapolis and St. Paul*, STAR TRIB. (Jan. 29, 2017), http://www.startribune.com/small-business-owners-brace-for-new-regulations-in-minneapolis-and-st-paul/412055693/ [https://perma.cc/4HA6-5L6Y] (discussing, in addition to effects of each of the laws, how the regulatory environment of Minneapolis and St. Paul may be off-putting to business).

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part IV.

18. *See infra* Part V.

19. *See* S.F., CAL. ADMIN. CODE ch. 12W (West 2017).

20. *Id.* § 12W.1.

21. *See generally* PHILA., PA., CODE ch. 9-4100 (2017); PORTLAND, OR., MUNICIPAL CODE tit. 9 (2017); SPOKANE, WASH., MUNICIPAL CODE ch. 9.01 (2017).

22. S.F., CAL. ADMIN. CODE § 12W.3(b).

23. Healthy Workplaces, Healthy Families Act, CAL. LAB. CODE § 245–249 (West 2017).

not superseded by the Healthy Workplaces, Healthy Families Act.[24] A notable feature absent from the San Francisco SLO is a "Safe Time" provision, which ensures that employees may use accrued sick time guaranteed by the ordinance to deal with a personal emergency, such as relocation from domestic violence, sexual assault, or stalking.[25] The Safe and Sick Time Ordinances passed by the Minneapolis and St. Paul City Councils feature this key provision.[26]

Following San Francisco's lead, states and municipalities across the country enacted legislation on mandatory sick leave throughout the last decade.[27] The first state to adopt mandatory paid sick leave was Connecticut, enacting a mandatory paid sick leave statute in 2012.[28] The Connecticut statute also contained a safe time provision,[29] but excluded workers in manufacturing and nonprofit organizations from coverage under the statute.[30] Seattle was the first major city to pass a Safe Time provision was Seattle, in addition to its sick leave ordinance, on September 1, 2012.[31]

24. *See* S.F., CAL. ADMIN. CODE ch. § 12.W. *But see* S.F., CAL., PROPOSITION E (2016), https://sfgov.legistar.com/View.ashx?M=F&ID=4270459&GUID=5885E583-FFEE-4C40-B57F-6E3A2166D97C [https://perma.cc/9HB6-E33W] (serving as a voter referendum amending San Francisco's SLO to match CAL. LAB. CODE § 245–249 in areas where the Healthy Workplaces, Healthy Families Act provides greater protections to workers).

25. *Compare* MINNEAPOLIS, MINN., CODE § 40.220(b)(3) (2017) (providing Minneapolis's safe time provision), *and* ST. PAUL, MINN., CODE § 233.04(b)(3) (2017) (providing St. Paul's safe time provision), *with* S.F., CAL. ADMIN. CODE § 12W.4 (2017) (providing San Francisco's sick leave provision).

26. MINNEAPOLIS CODE § 40.220(b)(3) (allowing for the use of accrued time "due to domestic abuse, sexual assault, or stalking of the employee or employee's family member"); ST. PAUL CODE § 233.04(b)(3).

27. *See* Healthy Workplaces, Healthy Families Act of 2014, CAL. LAB. CODE §§ 245–249 (2018) (effective Jan. 1, 2015); PORTLAND, OR., CODE ch. 9.01 (2018) (effective Jan. 1, 2014); PHILA., PA., CODE ch. 9-4100 (2018) (effective May 13, 2015); SPOKANE, WASH., MUNICIPAL CODE ch. 09.01 (2018) (effective Jan. 1, 2017).

28. CONN. GEN. STAT. §§ 31-57r–31-57w (2017).

29. *Id.* § 31-57t(a)(3) ("An employer shall permit a service worker to use the paid sick leave accrued . . . [w]here a service worker is a victim of family violence or sexual assault.").

30. *Id.* § 31-57r(4). ("'Employer' does not include: (A) Any business establishment classified in sector 31, 32 or 33 [Manufacturing] in the North American Industrial Classification System, or (B) any nationally chartered organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986 . . . that provides all of the following services: Recreation, child care and education . . .").

31. SEATTLE, WASH., MUNICIPAL CODE § 14.16.030(A)(2) (2017) (providing Seattle's safe time provision).

In addition to attempts made by states and municipalities, federal efforts have also been made to pass sick and safe time ordinances. In early 2015, Rosa DeLauro, a Democratic representative from Connecticut, introduced the Healthy Families Act to the U.S. House of Representatives.[32] This bill would have allowed an employee to receive one hour of paid sick time per thirty hours worked, accruing up to fifty-six hours per year.[33] These hours would carry over from one year to the next, but employers would not be required to allow an employee to earn more than fifty-six hours at a given time.[34] The employee could use the paid sick time to deal with illness, family care, or the aftermath of domestic violence or stalking.[35] This bill stalled in committee and has not been taken up since.[36]

Despite these advances, the strides for mandatory sick leave have been met with opposition from business leaders and lawmakers, particularly in red states.[37] Twenty states have statutorily forbidden municipalities from enacting paid sick leave policies.[38] Of those twenty states, Oregon and Rhode Island, interestingly, have forbidden municipal adoption and enforcement of sick leave statutes, but still have enacted state-wide statutes providing for mandatory paid sick leave.[39] Notable among opposing states, Wisconsin has gone one step further, declaring any ordinance enacted by a city or municipality which is inconsistent—not merely in *conflict*—with state law to be void.[40] In doing so, the Wisconsin

32. Healthy Families Act, H.R. 932, 114th Cong. (1st Sess. 2015).

33. *Id.* § 5(a)(1) ("An employer shall provide each employee employed by the employer not less than 1 hour of earned paid sick time for every 30 hours worked . . . An employer shall not be required to permit an employee to earn . . . more than 56 hours of paid sick time in a year, unless the employer chooses to set a higher limit.").

34. *Id.* § 5(a)(5).

35. *Id.* § 5(b). This safe time provision was more expansive than most of the municipal statutes discussed, allowing an absence "for the purpose of caring for a child, a parent, a spouse, a domestic partner, or *any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.*" *Id.* § 5(b)(3) (emphasis added).

36. *H.R. 932 - Healthy Families Act*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/932/committees [https://perma.cc/HU9A-FKRF] (showing the latest action was on April 29, 2015).

37. *See* Cindy Brockhausen & Bill Kalten, *Rhode Island Becomes Eighth State to Enact Paid Sick Leave Law*, WILLIS TOWERS WATSON (Nov. 28, 2017), https://www.towerswatson.com/en/Insights/Newsletters/Americas/Insider/2017/11/rhode-island-becomes-eighth-state-to-enact-paid-sick-leave-law [https://perma.cc/DB K4-W587].

38. *Id.*

39. *Id.*

40. WIS. STAT. § 103.10 (1m)(e) (2018) ("Any city, village, town, or county

legislature expressly preempted and superseded any existing paid sick leave ordinances in the state.[41]

### *B. Legislative History of Safe and Sick Leave in the Twin Cities*

In the 2015 State of the City address, Mayor Betsy Hodges recommended a mandatory earned sick and safe time benefit for employees in Minneapolis.[42] In support of the enactment of a sick-leave ordinance, Mayor Hodges noted a variety of policy reasons based on safety, economics, and equity.[43] The Minneapolis City Council accepted the charge shortly after the State of the City address, introducing what would eventually become the Safe and Sick Time Ordinance on October

ordinance requiring an employer to provide an employee with leave from employment, paid or unpaid . . . that is in effect on May 20, 2011, is void.").

41. *See id.*; Metro. Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee, 798 N.W.2d 287, 311–13 (Wis. Ct. App. 2011) (holding that state law does not preempt the City of Milwaukee's sick leave ordinance). This case prompted the state legislature to enact the bill that declared municipal sick leave ordinances void if they were inconsistent with state law.

42. Mayor Betsey Hodges, 2015 State of the City: We Can't Do This Without You, Minneapolis (April 2, 2015) (transcript available at http://www.minneapolismn.gov/www/groups/public/@clerk/documents/webcontent/wcms1p-148259.pdf [https://perma.cc/J8MM-MHJH]). In Minneapolis, one of the key issues facing workers, "especially our low-income workers," is "Earned Sick and Safe Time . . . [r]ight now, employees who are not able to earn sick time means they have to choose between getting paid or getting well . . . Together we need to provide an alternative incentive structure so that sick people can get well and well people can stay well." *Id.* at 9.

43. *Id.* In terms of safety, Mayor Hodges explained the correlation between outbreaks of foodborne illnesses and a dearth of paid sick leave available in the restaurant industry. *Id.* With respect to equity, Mayor Hodges touched on huge disparities between different racial groups and access to paid sick leave within the private sector, with as much as forty-two percent of employees not having access to paid sick leave. *Id.* Finally, to build the economic case for mandatory safe and sick time, Mayor Hodges offered that workplaces in the United States lose roughly $180 billion in productivity due to workers coming to work sick. *Id.* Mayor Hodges also attempted to mitigate concerns about potential burdens to employers, noting that "research shows that paid sick and safe time has a positive effect on business profits and employer reputation, that jobs have grown in the sectors where it has been applied, and that there has been little effect on costs." *Id.* While the State of the City address did not go into great detail about the inclusion of a safe time provision, Mayor Hodges explicitly mentioned "sick and safe time" while building the case, rather than just "sick time." *Id.*

23, 2015.[44] The final version of the act was passed unanimously by the City Council on May 26, 2016, [45] and took effect on July 1, 2017.[46]

The St. Paul City Council took up the cause shortly before the Minneapolis City Council passed their version of the Safe and Sick Time Ordinance. On February 2, 2016, the St. Paul City Council passed a resolution to convene the Earned Sick and Safe Time Committee ("ESST Committee") with the intent of crafting an ordinance to take effect in 2017.[47] The ESST Committee met for the first time on March 8, 2016, and brought forth its recommendations on May 26, 2016,[48] the day the Minneapolis City Council passed their version of the Safe and Sick Time Ordinance. The St. Paul City Council passed its final version, the Earned Safe and Sick Time Ordinance, on September 7, 2016.[49] The St. Paul ordinance set an effective date of July 1, 2017 for large employers and January 1, 2018 for small employers.[50]

## III. THE STRUCTURE OF THE ORDINANCES

While understanding the history of the Safe and Sick Time Ordinances informs one's understanding of the evolution and policy considerations, for practitioners, judges, and students of the law, it is vital to understand what the law *does* to better counsel clients on how to effectively navigate the ordinances.

44. MINNEAPOLIS CITY COUNCIL AGENDA, Oct. 23, 2015, *Introducing Workplace regulations ordinance*, 15-01372 (Oct. 23, 2015).

45. OFFICIAL PROCEEDINGS, MINNEAPOLIS CITY COUNCIL, MAY 27, 2016, http://www.minneapolismn.gov/www/groups/public/@council/documents/proceedings/wcmsp-181031.pdf [https://perma.cc/B3EM-Z3FW].

46. MINNEAPOLIS, MINN., CODE § 40.90 (2017). The ordinance was enjoined and remains enjoined against employers based outside of Minneapolis pending the final resolution of Minnesota Chamber of Commerce v. City of Minneapolis.

47. CITY OF ST. PAUL, EARNED SICK AND SAFE TIME RESOLUTION, Feb. 3, 2016, https://www.stpaul.gov/sites/default/files/Media%20Root/Human%20Rights%20%26%20Equal%20Economic%20Opportunity/Earned%20Sick%20and%20Safe%20Time%20Resolution.pdf [https://perma.cc/G9MY-V87L].

48. CITY OF ST. PAUL EARNED SICK AND SAFE TIME TASK FORCE RECOMMENDATIONS 2016, https://www.stpaul.gov/sites/default/files/Media%20Root/Human%20Rights%20%26%20Equal%20Economic%20Opportunity/Final%20ESST%20Task%20Force%20Recommendations%20Report.pdf [https://perma.cc/FL67-BWUP].

49. *Earned Sick and Safe Time Background*, ST. PAUL, MINN., https://www.stpaul.gov/departments/human-rights-equal-economic-opportunity/contract-compliance-business-development-16 [https://perma.cc/NB62-6NNN] (last visited Mar. 26, 2018).

50. ST. PAUL, MINN., CODE § 233.21 (2017). "Large" employers have twenty-four or more employees, while "small" employers have twenty-three or fewer. *Id.*

### *A. Legislative Purpose and Ills Addressed by the Safe and Sick Time Statutes*

The Minneapolis Safe and Sick Time Ordinance and the St. Paul Earned Safe and Sick Time Ordinance substantively do the same thing: ensure paid time for employees to care for themselves or their immediate families during illness, or to deal with the effects of domestic violence, sexual assault, or stalking.[51] Both ordinances also nod to mitigating the economic inequalities that occur in the absence of guaranteed safe and sick time.[52]

### *B. Eligible Employees and Covered Employers*

Both the Minneapolis and St. Paul ordinances guarantee employees the right to sick and safe leave that is paid by their employers.[53] Both have an identical definition for "employer"—any person, organization, corporation, partnership, nonprofit, group, or other entity that employs one or more people, with the notable exceptions of the federal government,[54] state of Minnesota, or other county or city in Minnesota.[55]

It is critical to emphasize that the ordinances do not place a geographic restriction upon their definition of an employer.[56] The lack of a geographic restriction means that any employer that has any employee who conducts eighty hours of business within the geographical limits of Minneapolis or St. Paul must comply with the appropriate ordinance. This

51. *See id.* § 233.01 (statement of legislative purpose and intent); MINNEAPOLIS CODE § 40.30 (2017).

52. MINNEAPOLIS CODE § 40.30; ST. PAUL CODE § 233.01..

53. MINNEAPOLIS CODE § 40.40 ("*Sick and safe time* means leave, paid or unpaid, that may be used for the same purposes and under the same conditions as section 40.220 [Use of accrued safe and sick time]." (emphasis added)); ST. PAUL CODE § 233.02 ("*Earned sick and safe time* means leave, including paid time off and other paid-leave systems, paid at the same hourly rate as an employee earns from employment") (emphasis added)).

54. *See* McCulloch v. Maryland, 17 U.S. 316, 317 (1819) ("The states have no power, by taxation or otherwise, to . . . in any manner control the operations of the constitutional laws enacted by congress to carry into effect the powers vested in the national government.").

55. MINNEAPOLIS CODE § 40.40 ("*Employer* means a person or entity that employs one (1) or more employees. The term includes an individual, corporation, partnership, association, nonprofit organization, or group of persons."); ST. PAUL CODE § 233.02 ("*Employer* means a person who has one (1) or more employees. The term includes an individual, corporation, partnership, association, nonprofit organization, or a group of persons. An employer includes a person, firm, or corporation that hires temporary employees through an employment service.").

56. ST. PAUL CODE § 233.02; MINNEAPOLIS CODE § 40.40.

fact has resulted in the most successful challenge to one of the Twin Cities' ordinances to date.[57]

Unlike the definition of "employer," the ordinances' definitions of "employee" vary slightly between the two cities. Both ordinances define an employee as an individual who works for an employer at least eighty hours during a calendar year within the city's geographical area.[58] Neither statute covers independent contractors.[59] The most glaring difference is that the Minneapolis ordinance explicitly excludes individuals with "a most severe disability" from coverage under the Safe and Sick Time Ordinance.[60] St. Paul's Earned Safe and Sick Time Ordinance has no such exclusion.[61]

### *C. Reporting Requirements under the Ordinances*

Both ordinances subject employers to regulatory requirements, including a posting, reporting, and recordkeeping requirement.[62] The Minneapolis posting requirement—which is somewhat stricter than St. Paul—obliges employers to print and post notices in any language spoken by more than five percent of the total workforce in Minneapolis, as determined by the Minneapolis Department of Civil Rights.[63] Both ordinances require employers to post notices in whatever languages their city's administrative agency mandates.[64]

To satisfy the ordinances' requirements, employers in the Twin Cities must keep records for each employee showing hours worked and sick time

57. Minn. Chamber of Comm. v. City of Minneapolis, No. A17–0131, 2017 WL 4105201 (Minn. Ct. App. Sept. 18, 2017).

58. MINNEAPOLIS CODE § 40.40 (including part-time and temporary employees in the definition of "employee"); ST. PAUL CODE § 233.02.

59. MINNEAPOLIS CODE § 40.40; ST. PAUL CODE § 233.02.

60. MINNEAPOLIS CODE § 40.40 (excluding "[e]mployees classified as extended employment program workers as defined in Minnesota Rules part 3300.2005, subpart 18"); MINN. R. 3300.2005(18) (2017) (describing a worker under this section as "[a]n individual with a most severe disability . . . that results in serious limitations in three or more functional areas . . . that affect employment").

61. *See* ST. PAUL CODE § 233.02.

62. MINNEAPOLIS CODE §§ 40.250–70; ST. PAUL CODE §§ 233.07–09.

63. *Compare* MINNEAPOLIS CODE § 40.250(b) ("Every employer shall post this notice in English, and any language spoken by at least five (5) percent of the employees at the workplace or job site if published by the department."), *with* ST. PAUL CODE § 233.07(b) ("The poster shall be printed in English and any other languages that the department determines are needed to notify employees of their rights under this chapter.").

64. MINNEAPOLIS CODE § 40.250(b); ST. PAUL CODE § 233.07(b).

hours used.[65] Minneapolis imposes an additional requirement on employers to include each employee's sick time earned.[66] Both ordinances require employers to maintain these reports for three years.[67] Additionally, the ordinances allow the regulatory agency and the employee to review the records upon request and with appropriate notice.[68]

### *D. Compensation—Eligibility, Accrual, and Rate*

As noted, the ordinances cover all non-contract employees—including temporary and part-time employees—that work a total of eighty hours within the geographical area of the respective cities during a calendar year.[69] The ordinances are in agreement over the amount of safe and sick leave an employee may accrue, as well as when an employee is eligible to use their accrued safe and sick time.[70]

Employees begin accruing sick leave as soon as their term of employment begins or at the ordinance's effective date, whichever is later.[71] Both ordinances prescribe that employees should receive one hour of leave for every thirty hours worked with an annual limit of forty-eight hours.[72] Additionally, both ordinances provide that an employer must allow an employee to carry over up to eighty leave hours from year to year.[73] Employers may agree to allow employees to accrue and carry over "a higher amount" under the Minneapolis ordinance, or offer a more generous leave policy under the St. Paul ordinance.[74] Accruals are non-fractional, meaning that employees may receive leave in whole-hour increments only.[75] However, an employee may use leave time "in

65. MINNEAPOLIS CODE § 40.270(a); ST. PAUL CODE § 233.09.

66. MINNEAPOLIS CODE § 40.270(a).

67. *Id.* § 40.270(b); ST. PAUL CODE § 233.09(a).

68. MINNEAPOLIS CODE § 40.270(c)–(d); ST. PAUL CODE § 233.09(a).

69. MINNEAPOLIS CODE § 40.40; ST. PAUL CODE § 233.02.

70. MINNEAPOLIS CODE §§ 40.210–220; ST. PAUL CODE §§ 233.03–04.

71. MINNEAPOLIS CODE § 40.210(d); ST. PAUL CODE § 233.03(a). Currently, the only portion of the ordinances which has not taken effect is the application to employers not based in Minneapolis based on the injunction handed down in *Minnesota Chamber of Commerce v. City of Minneapolis*. No. A17–0131, 2017 WL 4105201 (Minn. Ct. App. Sept. 18, 2017).

72. MINNEAPOLIS CODE § 40.210(a); ST. PAUL CODE § 233.03(b).

73. MINNEAPOLIS CODE § 40.210(c); ST. PAUL CODE § 233.03(c).

74. MINNEAPOLIS CODE § 40.210(c); ST. PAUL CODE § 233.18(a) ("Nothing in this chapter shall be construed to discourage or prohibit an employer from the adoption or retention of an earned sick and safe time policy more generous than the one (1) required herein.").

75. MINNEAPOLIS CODE § 40.210(a); ST. PAUL CODE § 233.03(b).

increments consistent with current payroll practices," provided that those increments do not exceed four hours.[76]

The St. Paul ordinance mandates that employers compensate employees at their standard rate of hourly pay (or equivalent for salaried employees).[77] The St. Paul ordinance makes no consideration for employer size, but did give employers with twenty-three or fewer employees until January 1, 2018 to comply.[78] The Minneapolis ordinance, on the other hand, took sweeping effect on all employers, regardless of size, on July 1, 2017.[79] Despite this, the Minneapolis ordinance makes concessions for smaller employers—employers with five or fewer employees are not required to provide paid safe and sick time to their employees.[80] Both statutes explicitly state that an employer is only required to compensate employees for hours they would have worked or were scheduled to work.[81]

### *E. The "Teeth"—Enforcement Mechanisms*

Regulatory schemes, to be effective, must come with some sort of incentive or punishment—a "carrot" or a "stick"—to ensure compliance.[82] The city councils in Minneapolis and St. Paul clearly chose the stick.[83]

76. MINNEAPOLIS CODE § 40.220(f); ST. PAUL CODE § 233.04(c).

77. ST. PAUL CODE § 233.04(d) ("An employer must compensate an employee for used sick and safe time at the employee's standard hourly rate, for hourly employees, or an equivalent rate, for salaried employees. Employees are not entitled to compensation for lost tips or commissions and compensation is required only for hours that an employee is scheduled to have worked.").

78. ST. PAUL CODE § 233.21(a) (stating that the ordinance does not take effect until January 1, 2018 for employers with twenty-three or fewer employees).

79. MINNEAPOLIS CODE § 40.90(a).

80. *Id.* § 40.220(h).

81. *Id.* § 40.220(g); ST. PAUL CODE § 233.04(d).

82. Sidney A. Shapiro & Randy S. Rabinowitz, *Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA*, 49 ADMIN. L. REV. 713, 716 (1997) ("Regulated entities have strong short-term incentives to disobey agency regulations when enforcement is unlikely, but long-term incentives encourage managers to voluntarily obey these rules anyway. Agencies can undermine such voluntary compliance if they aggressively pursue and punish minor violations instead of relying on more cooperative approaches.").

83. *See generally* MINNEAPOLIS CODE § 40 (2018); ST. PAUL, MINN., CODE § 233 (2018). Although neither ordinance provides any cash incentives for employers to comply with the ordinance, there are oversight mechanisms which may result in fines for violations. The city councils in Minneapolis and St. Paul clearly chose the "stick" by imposing fines for violations.

A report of noncompliance with the ordinances may result in an investigation to determine if the employer is in violation.[84] If the employer is found to be in violation, the administrative department of the city may levy the greater of a fine of $250 or double the dollar value of the leave the employer failed to credit.[85] Additional violations by an employer against the same employee may result in additional fines of varying severity and form.[86] Additionally, an employer may be fined $1,000 per violation for failure to keep confidentiality or appropriate records under the St. Paul ordinance,[87] compared to $1,500 per confidentiality violation or $50 per day for recordkeeping violations in Minneapolis.[88]

Employers are also blocked from preventing the exercise of employee rights under the ordinances, such as reporting violations. The ordinances also bar employer retaliation for the exercise of those rights.[89] Retaliation can cost an employer a fine of up to $1,000 per violation in St. Paul and $1,500 per violation in Minneapolis.[90] Employers that repeatedly

84. MINNEAPOLIS CODE § 40.120 (2017); ST. PAUL CODE § 233.13 (2017) (detailing the respective reporting and investigatory processes).

85. MINNEAPOLIS CODE § 40.120(d); ST. PAUL CODE § 233.13(d).

86. MINNEAPOLIS CODE § 40.120(d) ("Reinstatement and back pay[;] The crediting to an employee of any accrued sick and safe time accrued but not credited plus payment to the employee of the dollar value of the accrued sick and safe time accrued but not credited multiplied by two (2), or two hundred fifty dollars ($250.00), whichever amount is greater[;] The payment of any accrued sick and safe time unlawfully withheld plus payment to the employee of the dollar amount of accrued sick and safe leave withheld multiplied by two (2), or two hundred fifty dollars ($250.00), whichever amount is greater[;] . . . Up to a one thousand five hundred dollar ($1,500.00) administrative penalty payable to the employee for each violation. . . . [;] An administrative fine payable to the city of up to fifty dollars ($50.00) for each day, or portion thereof, a violation . . . that has continued following written notice to the employer of such violation with a period of no less than five (5) business days to comply."); ST. PAUL CODE § 233.13(d) ("For a second violation by an employer against the same employee, in addition to the payment of any earned sick and safe time unlawfully withheld, the director shall assess liquidated damages in an additional amount and order the employer to pay to the employee the dollar value of the sick and safe time unlawfully withheld multiplied by two (2), or two hundred fifty dollars ($250.00), whichever amount is greater. In addition thereto, for any second violation by an employer, the director shall assess an administrative fine, payable to the city, up to one thousand dollars ($1,000.00).").

87. ST. PAUL CODE § 233.13(d)(6), 233.05–06.

88. MINNEAPOLIS CODE §§ 40.120(d)(4)–(5), 40.230, 40.240, 40.270.

89. "It shall be unlawful for an employer or any other person to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this chapter." MINNEAPOLIS CODE § 40.240; ST. PAUL CODE § 233.06.

90. MINNEAPOLIS CODE § 40.120(d)(4); ST. PAUL CODE § 233.13(d)(5).

or egregiously violate provisions of the ordinances or refuse to comply with a final determination of a violation may even face legal action.[91]

### *F. Rights of Employers*

Taken in totality, it is hard to deny that the Safe and Sick Time Ordinances are conceived, drafted, and implemented for the benefit of workers, not employers.[92] Nevertheless, the City Councils gave employers some rights. For example, an employer is not required to compensate terminated employees for unused accrued sick leave.[93] An employer may also request a copy of a doctor's note or other documentation for sick time where the absence totals more than three consecutive days.[94] Additionally, the ordinances only provide a floor that the employer must meet, and do not preclude employers from giving more generous paid sick leave benefits.[95]

For employers facing administrative penalties, the ordinances afford the right to appeal a determination of violation to the administrative agency, and then the ability to further appeal to the Minnesota Court of Appeals.[96] However, the ordinances have strict requirements—an appeal must be filed in writing with the administrative agency within twenty-one days of the violation determination.[97] Failure to file an appeal within twenty-one days "shall constitute admission to the violation, and the

91. "Where prompt compliance is not forthcoming with a final determination of violation, the department may refer the action to the city attorney to consider initiating a civil action in a court of competent jurisdiction against an employer. . . ." MINNEAPOLIS CODE § 40.140 (2017); *see also* ST. PAUL CODE § 233.15.

92. *See* MINNEAPOLIS CODE § 40.20–30 (findings and purpose); ST. PAUL CODE § 233.01 (statement of legislative purpose and intent).

93. MINNEAPOLIS CODE § 40.280 ("Nothing in this chapter may be construed as requiring financial or other reimbursement to an employee from an employer upon the employee's termination, resignation, retirement, or other separation from employment for accrued sick and safe time that has not been used."); ST. PAUL CODE § 233.03(e) ("An employer is not required to provide financial or other reimbursement to an employee upon the employee's termination, resignation, retirement, or other separation from employment for earned sick and safe time that the employee has not used.").

94. "It is not a violation of this ordinance for an employer to require reasonable documentation that the sick and safe time is covered by . . . this section for absences of more than three (3) consecutive days." MINNEAPOLIS CODE § 40.220(d); ST. PAUL CODE § 233.04(f).

95. MINNEAPOLIS CODE § 40.310; ST. PAUL CODE § 233.18.

96. MINNEAPOLIS CODE § 40.130; ST. PAUL CODE § 233.14.

97. MINNEAPOLIS CODE § 40.130; ST. PAUL CODE § 233.14. It is important to note that an employer *or* complainant may appeal by following the process within these provisions of the ordinances.

violation shall be deemed final . . . ."[98] The administrative agency passes the appeal to a hearing officer, who may entertain oral arguments and act as a fact finder, and review the department's determination for clear error.[99] While it may not seem like much compared to the protections for workers,[100] the right of appeal will prove a critical battleground for future enforcement and administration of the safe and sick time ordinances.

## IV. REACTION AND CHALLENGES

### *A. State Action Limiting Municipal Sick Leave Laws*

In response to the ordinances, Representative Pat Garofalo, a Republican representing Farmington, Minnesota,[101] introduced a bill that would bar municipal and city governments from enacting laws mandating paid sick leave or minimum wage.[102] This bill, called the Uniform Labor Standards Bill, was passed by the Minnesota Legislature on a party line vote on March 2, 2017.[103] Governor Mark Dayton of the Democratic Farm Labor Party (DFL) vetoed the bill on May 30, 2017.[104] In a letter to the President of the Senate explaining his reasons for vetoing the bill, the governor stated:

> The role of the state government is to set minimum standards for workplace protections, wages, and benefits, not maximums. Should local officials, who were elected by their constituents in their communities, approve higher wage and benefit levels to meet the needs of their residents, they ought to retain the right to do so.[105]

98. MINNEAPOLIS CODE § 40.130(a); ST. PAUL CODE § 233.14(a).

99. MINNEAPOLIS CODE § 40.130; ST. PAUL CODE § 233.14.

100. *See generally* MINNEAPOLIS CODE § 40; ST. PAUL CODE § 233.

101. *Representative Pat Garofalo (R) District: 58B*, MINNESOTA HOUSE OF REPRESENTATIVES, http://www.house.leg.state.mn.us/members/members.asp?id=1 2262 [https://perma.cc/R7SW-VALV] (last visited Mar. 26, 2018).

102. Uniform Labor Standards Act, H.F. 600, 90th Leg. (Minn. 2017).

103. *Roll Call: MN HF*, LEGISCAN, https://legiscan.com/MN/rollcall/HF600/id/629242 [https://perma.cc/HV9Q-335B] (last visited Mar. 26, 2018).

104. Letter from Mark Dayton, Governor, Minn., to Sen. Michelle Fischbach, Pres. of the Senate (May 30, 2017), http://mn.gov/gov-stat/pdf/2017_ 05_30_Chapter_02.pdf [https://perma.cc/8YXX-F39A].

105. *Id.* In the early days of wage and hour law, labor was viewed, and treated, as a contract between the employer and employee. Lochner v. New York, 198 U.S. 45, 64 (1905) ("[T]he freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution."). The thinking was simple: an employee could

## *B. Legal Challenges*

### *1. Chamber of Commerce of Minnesota v. City of Minneapolis*

The proposed Uniform Labor Standards Bill was backed by the Minnesota Chamber of Commerce, a powerful group representing business interests across Minnesota.[106] While supporting the bill, the Minnesota Chamber of Commerce was simultaneously embroiled in a legal battle with the City of Minneapolis, challenging the authority of the City Council to enact and enforce the Safe and Sick Time Ordinance against private companies, both within and outside of city limits.[107]

In a challenge to the Minneapolis Safe and Sick Time Ordinance, the Minnesota Chamber of Commerce requested an injunction on three grounds: the city lacked the authority to enact the ordinance, the ordinance

negotiate for higher wages, better hours, and more safety if the employee felt it was warranted. *Id.* at 53 ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution . . . The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right."). In these negotiations, the power of the individual was severely limited against the structure of the business. Unions, initially mistrusted by the court and public at large, gave workers significantly more negotiating power through collective bargaining and retaliatory methods, such as strikes. *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 481 (1921) ("The change in the law by which strikes once illegal and even criminal are now recognized as lawful was effected in America largely without the intervention of legislation. . . . [A]lthough the strike of the workmen in plaintiff's factory injured its business . . . the obvious self-interest of the strikers constituted a justification."). *But see* Norris La-Guardia Act, 29 U.S.C.A. §§ 101–110, 113–15 (2017), *and* U.S. v. Hutcheson, 312 U.S. 219, 236–37 (1941) (holding that a boycott of Anheuser-Busch products urged by a worker's union violated the Norris-LaGuardia and Clayton Antitrust Acts). However, United States union membership is about half of what it was in 1983, hovering around eleven percent of all workers as of 2015. MEGAN DUNN & JAMES WALKER, BUREAU LAB. STAT., UNION MEMBERSHIP IN THE UNITED STATES 2 (Sept. 2016) https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf [https://perma.cc/U695-X2XJ]. By enacting more stringent employment and labor laws, municipal governments have practiced a form of "social bargaining," supplanting a role traditionally ascribed to unions. *See* Andrias, *supra* note 13 at 94–99.

106. Rachel E. Stassen-Berger, *Mark Dayton Vetoes Bill Curtailing Cities' Paid-Time Off, Minimum Wage Rules*, PIONEER PRESS, (May 30, 2017), http://www.twincities.com/2017/05/30/mark-dayton-vetoes-bill-curtailing-cities-paid-time-off-minimum-wage-rules/ [https://perma.cc/2WRP-JCTQ].

107. Minn. Chamber of Commerce v. City of Minneapolis, No. A17–0131, 2017 WL 4105201 (Minn. Ct. App. Sept. 18, 2017).

conflicted with or is preempted by state law, and the ordinance impermissibly "extend[ed] the city's power beyond its boundaries."[108]

The district court noted that the Chamber of Commerce was unlikely to prevail on the merits of the first two arguments.[109] However, the district court found in favor of the Chamber of Commerce with respect to extraterritoriality and issued an injunction of the ordinance "against any employer resident outside the geographic boundaries of the City of Minneapolis until after the hearing on the merits of the case, or further order of the Court."[110] Though the district court temporarily barred enforcement of the ordinance against employers outside of Minneapolis, the district court declined to bar the enforcement of the ordinance against employers in Minneapolis.[111] Both the Chamber of Commerce and Minneapolis appealed.[112] The next two sections discuss similar caselaw in Wisconsin, which the Minnesota Court of Appeals relied on, and the outcome of the Minneapolis case.[113]

*a. Similar Case Law in Wisconsin*

In the absence of binding primary authority on the subject, the Court of Appeals used authority from other jurisdictions to provide non-binding insight on how to evaluate the legal question before it.[114] Fortunately, the court had to look no further than Minnesota's favorite eastern neighbor, Wisconsin, as the Wisconsin courts had previously ruled on a municipal sick leave statute.[115]

In *Metropolitan Milwaukee Association of Commerce, Inc. v. City of Milwaukee*, the Wisconsin Court of Appeals examined challenges to a 2008 statute (enacted by Milwaukee voters) which gave employees who work in the city guaranteed paid sick leave.[116] The Metropolitan Milwaukee Association of Commerce (MMAC) challenged the statute's legality on six different grounds, including: (1) failure of the ballot

108. *Id.* at *1.
109. *Id.* at *6.
110. *Id.* at *1.
111. *Id.*
112. *Id.* at *2.
113. *Id.* at *1.
114. AMY E. SLOAN, RESEARCHING THE LAW: FINDING WHAT YOU NEED WHEN YOU NEED IT 14 (Vicki Been et al. eds., 2014).
115. Metro. Milwaukee Ass'n of Commerce v. City of Milwaukee, 798 N.W.2d 287 (Wis. Ct. App. 2011).
116. *Id.* (deciding the validity of MILWAUKEE, WIS., CODE OF ORDINANCES § 112–5.1.c–4–5 (2008)).

measure to meet statutory requirements,[117] (2) violation of substantive due process by having no rational relationship to the city's police powers, (3) preemption by state statute, (4) preemption by federal statute, (5) constitutional prohibitions against impairment of contracts, and (6) extraterritoriality.[118] The district court ordered a permanent injunction on the implementation of the statute and granted summary judgement for MMAC.[119] The Wisconsin Court of Appeals reversed the district court's decision and issued an order protecting the law that the two-year period (where the ordinance may only be modified or repealed by electors) would not include the period where the injunction was in place.[120]

The Minnesota Chamber of Commerce's challenges were not nearly as numerous.[121] Therefore, this article will not explore MMAC's challenges to the ballot initiative on statutory grounds, impairment of contracts, or federal preemption. Instead, the analysis in this section will focus on the substantive due process, state preemption, and extraterritoriality challenges brought by MMAC, which mirror the challenges raised by the Minnesota Chamber of Commerce.

First, MMAC asserted that the sick leave legislation was not a valid exercise of the city's police powers. This assertion was framed as a substantive due process challenge.[122] The appropriate standard for a substantive due process challenge is for the court to determine whether or not the statute has a rational relationship to any legitimate municipal objective.[123] The appellate court held the statute does not violate substantive due process because (1) the stated purpose of the legislation, "[t]o safeguard the public welfare, health, safety and prosperity of Milwaukee,"[124] is a legitimate municipal interest; and (2) the challenged

117. *Id.*; *see* WIS. STAT. § 9.20(6) (2015) ("The ordinance or resolution need not be printed in its entirety on the ballot, but a concise statement of its nature shall be printed together with a question permitting the elector to indicate approval or disapproval of its adoption.").

118. *Metro. Milwaukee Ass'n of Commerce*, 798 N.W.2d at 294.

119. *Id.* at 295.

120. *Id.* at 317 (citing WIS. STAT. § 9.20(8) (2016)). "City ordinances or resolutions adopted under this section shall not be subject to the veto power of the mayor and city or village ordinances or resolutions adopted under this section shall not be repealed or amended within 2 years of adoption except by a vote of the electors. . . ." *Id.*

121. *Compare* Minn. Chamber of Commerce v. City of Minneapolis, No. A17–0131, 2017 WL 4105201, at *1 (Minn. Ct. App. Sept. 18, 2017), *with Metro. Milwaukee Ass'n of Commerce*, 798 N.W.2d at 296.

122. *Metro. Milwaukee Ass'n of Commerce,* 798 N.W.2d at 304–10.

123. *Id.* at 304.

124. MILWAUKEE, WIS., CODE § 112 (2010).

provisions of the ordinance, including the relocation (safe time) and minimum accrual rates, have a rational relationship to that legitimate municipal objective.[125]

Next, MMAC's claim of state preemption rested on an interpretation of three Wisconsin statutes: the Minimum Wage Law,[126] the Wisconsin Family Medical Leave Act,[127] and the Worker's Compensation Act.[128] The Wisconsin Court of Appeals held that because the Milwaukee ordinance only legislated sick time as a benefit, it did not impermissibly increase the hourly wage rate and its enforcement did not conflict with the Minimum Wage Law.[129] With respect to the Wisconsin Family Medical Leave Act, the court held that the state law allowed for other types of leave in addition to the twelve weeks unpaid leave provided for in the state statute.[130] The court also noted that portions of the state statute allow for the enactment of "'[l]ocal orders,' including ordinances, as long as these orders are not 'unreasonable and in conflict with the order of the [DWD [Department of Workforce Development]],'" and therefore the ordinance was not preempted.[131] On the Worker's Compensation Act, the court rejected MMAC's argument that the statute provided the sole remedy against an employer for work-related injuries and illness and the Milwaukee ordinance was preempted because it required overlapping

125. *Metro. Milwaukee Ass'n of Commerce*, 798 N.W.2d at 309–10.

126. WIS. STAT. § 104 (2017).

127. *Id.* § 103.10 (2017). Portions of this statute were preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1132(a), 1144(a) (2017). *See* Sherfel v. Gassman, 899 F.Supp.2d 676, 701 (S.D. Ohio 2012) ("The court concludes that insofar as the WFMLA substitution provision is invoked to require the payment of STD benefits provided by Nationwide pursuant to the Plan, it is pre-empted both under § 1144(a) and under conflict pre-emption principles due to its operation within the scope of § 1132(a), ERISA's civil enforcement provisions.").

128. WIS. STAT. § 102.03(2) (2017).

129. *Metro. Milwaukee Ass'n of Commerce*, 798 N.W.2d at 311.

130. *Id.* at 508; *see also* WIS. STAT § 103.10(2)(a) (2017) ("Nothing in this section prohibits an employer from providing employees with rights to family leave or medical leave which are more generous to the employee than the rights provided under this section.").

131. *Metro. Milwaukee Ass'n of Commerce*, 798 N.W.2d at 312; *see also* WIS. STAT. § 103.001(10) (2017) (defining a local order as "any ordinance, order, rule or determination of any common council, board of alderpersons, board of trustees or the village board, of any village or city, a regulation or order of the local board of health, . . . or an order or direction of any official of a municipality, upon any matter over which the department has jurisdiction"), § 103.005(7)(b) ("If . . . it shall be found that the local order appealed from is unreasonable and in conflict with the order of the [DWD], the [DWD] may modify its order and shall substitute for the local order appealed from such order as shall be reasonable and legal in the premises, and thereafter the local order shall . . . be void and of no effect.").

benefits. Instead, the court held that "[t]he worker's compensation statutes expressly allow and provide for such potentially overlapping benefits."[132] The court firmly held the statute was not preempted on state law grounds.

Finally, MMAC challenged the territorial reach of the Milwaukee ordinance.[133] MMAC's main argument rested on the fact that the term "employer," as defined, did not have any geographic limitation and imposed requirements on any employer with any employee who met the definition in the ordinance.[134] The court acknowledged the truth in this assertion, but noted the definition of an employee is limited to "any person who is employed within the geographic boundaries of the city by an employer."[135] The court reasoned that when read together (the employer and employee definitions and the stated purpose), the city had properly limited the reach of the ordinance to employees within its municipal boundaries.[136] Because the ordinance only applied to those employers with employees working within the geographical limitations of the city, Milwaukee's ordinance did not run afoul of the extraterritoriality doctrine by attempting to regulate commerce outside of its jurisdiction.[137]

### *b. The Minnesota Appellate Court's Finding in Minnesota Chamber of Commerce*

In the Minnesota case, the district court noted that the likelihood of irreparable harm was great enough to the Chamber of Commerce to warrant an injunction against the provision binding employers located outside the City of Minneapolis.[138] On appeal, the Minnesota Court of Appeals held that the district court has wide discretion in ruling on motions

132. *Metro. Milwaukee Ass'n of Commerce*, 798 N.W.2d at 312; *see also* WIS. STAT. § 102.30(2) ("An employer may provide . . . sick, accident or death benefits in addition to the compensation provided under this chapter."), § 102.30(3) ("Unless an employee elects to receive sick leave benefits in lieu of compensation under this chapter, if sick leave benefits are paid during the period that temporary disability benefits are payable, the employer shall restore sick leave benefits to the employee in an amount equal in value to the amount payable under this chapter.").

133. *Metro. Milwaukee Ass'n of Commerce*, 798 N.W.2d at 317.

134. *Id.* ("MMAC reads the ordinance to require employers located outside the City with individual employees who work both within and outside the City to pay those employees their full wages for days on which they were out sick but not scheduled to work in the City.").

135. MILWAUKEE, WIS., CODE §§ 112–1.3 (2010).

136. *Metro. Milwaukee Ass'n of Commerce*, 798 N.W.2d at 317.

137. *Id.*

138. Minn. Chamber of Commerce v. City of Minneapolis, No. A17–0131, 2017 WL 4105201, at *4 (Minn. Ct. App. Sept. 18, 2017).

for temporary injunctions, which can only be reversed for a clear abuse of discretion.[139]

Next, the City of Minneapolis argued that because the ordinance had yet to be enforced against any employer, the city could adopt rules barring the enforcement of the ordinance against non-resident employers.[140] Therefore, the city argued, the extraterritoriality issue was not justiciable.[141] The Court of Appeals rejected this argument, reasoning that the same argument was rejected by the Minnesota Supreme Court in *McCaughtry v. City of Red Wing*[142] as a purely legal question that did not need a factual record to be answered.[143]

Although the Court of Appeals handed the city a loss with respect to enforcement against non-resident employers, it dealt the Chamber of Commerce a far bigger blow by holding that the district court did not abuse its discretion in declining to enjoin the remainder of the ordinance.[144] The Court of Appeals gave insight as to how the courts are likely to treat the Chamber's contention that the Ordinance is preempted by state law in the future. [145] Based on this analysis, and the exploration of the factors Minnesota uses to determine whether a law has been preempted by state action,[146] the Chamber of Commerce faces unfavorable odds in future claims.

139. *Id.* at *2 (citing Carl Bolander & Sons Co. v. City of Minneapolis, 502 N.W.2d 203, 209 (Minn. 1993)).

140. *Id.* at *5.

141. *Id.*

142. 808 N.W.2d 331, 333–40 (Minn. 2011) (declining to delay resolution because a facial challenge presents "a purely legal question that does not require the development of a factual record").

143. Harris v. Mexican Specialty Foods, 564 F.3d 1301, 1308 (11th Cir. 2009); *Minn. Chamber of Commerce*, 2017 WL 4105201, at *2–4.; *see also*

144. *Minn. Chamber of Commerce*, 2017 WL 4105201, at *2–4.

145. *Id.* at *4 ("The district court found that the chamber established irreparable harm and that the balance of harms favors the chamber, but the likelihood of success and public-policy considerations favor the city.").

146. *See* Mangold Midwest Co. v. Village of Richfield, 274 Minn. 347, 358, 143 N.W.2d 813, 821 (1966) ("In looking at the [preemption] cases we should keep in mind four questions: (1) What is the 'subject matter' which is to be regulated? (2) Has the subject matter been so fully covered by state law as to have become solely a matter of state concern? (3) Has the legislature in partially regulating the subject matter indicated that it is a matter solely of state concern? (4) Is the subject matter itself of such a nature that local regulation would have unreasonably adverse effects upon the general populace of the state?").

*c. What's Missing from the Decisions: Resolution*

In the original civil suit, the Chamber of Commerce challenged the enforcement of the ordinance on three grounds: (1) the city's lack of authority to enact the statute, (2) the statute's preemption by state law, and (3) the impermissible extraterritorial overreach.[147] The Court of Appeals evaluated each argument, but none were decided with finality.[148] Considering both parties' desire to appeal the district court's decision, the parties stipulated to an order staying further district court proceedings.[149] On September 18, 2017, the Court of Appeals released its decision reviewing the district court's discretion in enjoining the geographic provision and refusal to enjoin the Safe and Sick Time Ordinance. [150]

*d. The Merits of Legal Challenges*

Until the appeals process is exhausted, the City of Minneapolis's Safe and Sick Time Ordinance exists in limbo, having the force of law with the proverbial Sword of Damocles hanging above.[151] Because it could take years for the issue to be fully adjudicated on the merits, the following arguments are worth analyzing at this stage.

*1. Does the City of Minneapolis Have the Authority to Enact the Ordinance?*

The Minnesota Chamber of Commerce first argued that the City of Minneapolis lacks the authority to enact the Safe and Sick Time Ordinance.[152] Yet, this contention was not addressed directly at the appellate level.[153] Minneapolis, as a home rule charter city,[154] has plenary

147. *Minn. Chamber of Commerce*, 2017 WL 4105201, at *1.

148. *See id.* at *7.

149. The opinion was not considered a decision on the merits being that it did not address the chief issues of the case with finality. *Id.* at *2.

150. *Id.*

151. *Damocles*, LIVIUS.ORG, http://www.livius.org/sources/content/cicero/Tusc ulan-deputations/damocles/? [https://perma.cc/PLP4-2WUE] (last modified Jan. 19, 2017) (providing translation of Cicero's Tusculan Disputations 5.61). The tyrant Dionysus agreed to let a sycophant, Damocles, live his life of luxury for a single day. *Id.* After gathering food, furs, gold, and servants, Dionysus had a sword hung from the ceiling above the man's head by a single horse hair. *Id.* Damocles could not enjoy the luxuries surrounding him and begged to be released, stating that he no longer wished to be fortunate. *Id.*

152. *Minn. Chamber of Commerce*, 2017 WL 4105201, at *1.

153. *See id.*

154. The following definition of a "home rule charter city" may be helpful:

Home rule cities derive their powers from a home rule charter, which also

authority granted by its charter to exercise "any power that a municipal corporation can lawfully exercise at common law."[155] This provision of authority gives Minneapolis the power to enact legislation to provide for the common welfare of its citizens, so long as such legislation is not in conflict with state or federal law.[156] Consequently, there is little to no chance that the Minnesota Supreme Court would overturn the Minneapolis Safe and Sick Time Ordinance on the basis that the city lacks the authority to enact the ordinance.

### *2. Is the Ordinance Preempted by Minnesota Law?*

The Chamber of Commerce's next claim, and the first argument the Court of Appeals addressed directly, was that existing state labor law preempts the Safe and Sick Time Ordinance.[157] The Court of Appeals did not explicitly rule on the merits of this particular argument in a binding fashion; however, it affirmed the district court's ruling that "the chamber is unlikely to succeed on its claims that the ordinance conflicts with, or in the alternative is impliedly preempted by, state law."[158] The Minnesota Supreme Court is not likely to overturn the Safe and Sick Time Ordinances on a contention of preemption. While the Minnesota Supreme Court has shown a willingness to invalidate city ordinances on grounds of conflict preemption,[159] it is unclear whether the court would undo a municipal

> defines the specific powers of elected officials and appointed staff. The charter is, in effect, a local constitution. Charter adoption, amendment and abandonment procedures are found in state statutes. The charter may provide for any form of municipal government, as long as it is consistent with state laws that apply uniformly to all cities in Minnesota.

*Types of Cities in Minnesota*, League of Minnesota Cities, https://www.lmc.org/page/1/types-of-cities.jsp [https://perma.cc/6V4V-G6YB] (last visited Mar. 27, 2018).

155. MINNEAPOLIS, MINN., CHARTER § 1.4(a) (2017); *see also* ST. PAUL, MINN., CHARTER § 1.03 (2017) ("It is the intention of this Charter that every power which the people of the city might lawfully confer upon themselves, as a municipal corporation, by specific enumeration in this Charter shall be deemed to have been so conferred by the provisions of this section.").

156. MINNEAPOLIS, MINN., CHARTER § 1.04; *accord* Mangold Midwest Co. v. Village of Richfield, 143 N.W.2d 813, 821 (1966) ("It would therefore seem that, generally stated, the rule would be that once the municipality is granted a charter with a general welfare clause . . . that clause will be construed liberally to allow effective self-protection by the municipality.").

157. Minn. Chamber of Commerce v. City of Minneapolis, No. A17–0131, 2017 WL 4105201, at *2–3 (Minn. Ct. App. Sept. 18, 2017).

158. *Id.* at *3.

159. *See* Bicking v. City of Minneapolis, 891 N.W.2d 304, 315 (Minn. 2017) (holding that a proposed ballot initiative requiring police officers to purchase professional liability

ordinance based on implied preemption, whether "conflict" or "field" preemption.[160]

To determine if an ordinance is preempted by state law, the court evaluates four factors, as determined by *Mangold Midwest Co. v. Village of Richfield*: (1) the subject matter to be regulated; (2) whether the subject matter has been so fully covered by state law as to have become solely a matter of state concern; (3) whether the legislature, in partially regulating the subject matter, indicated that it is a matter solely of state concern; and (4) whether the subject matter itself is of such a nature that local regulation would have unreasonably adverse effects upon the general populace of the state.[161] The district court held that the subject matter to be regulated (the first factor) is "private-employer provided sick and safe leave."[162] The Chamber of Commerce challenged this finding, arguing the court should classify the disputed subject matter as "employer-provided leave,"[163] a much broader area of employment law for which there was likely more statutory regulation.[164] The court defused this objection by recognizing that applying the second and third *Mangold* factors ultimately leads to the same result, regardless of which offered definition is operative.[165]

Regarding the second and third *Mangold* factors, the district court held that it could not infer that the subject of "private-employer provided sick and safe leave" (or, for that matter, employer-provided leave) was "solely of state concern." The court stated:

> [T]he chamber had not shown that the subject matter . . . is regulated by state law to an extent or in a manner that indicates it is a matter solely of state concern. Given the sparsity and narrowness of statutory provisions on the subject matter, the district court reasonably concluded that the legislature has not indicated an intent to occupy the field.[166]

insurance directly conflicted with MINN. STAT. § 466.02).

160. *See* State v. Kuhlman, 729 N.W.2d 577, 580 (Minn. 2007) ("[N]o conflict exists where the ordinance, though different, is merely additional and complementary to or in aid and furtherance of the statute." (internal quotations omitted) (citing City of St. Paul v. Olson, 220 N.W.2d 484, 485 (1974))) ; *see also* Mangold Midwest Co. v. Village of Richfield, 143 N.W.2d 813, 820–21 (1966).

161. 143 N.W.2d 813, 819–20.

162. *Minn. Chamber of Commerce*, 2017 WL 4105201, at *3.

163. *Id.*

164. *See* MINN. STAT. § 181.9413 (2016) (listing the title "Sick Leave Benefits; Care of Relatives").

165. *Minn. Chamber of Commerce*, 2017 WL 4105201, at *3.

166. *Id.* at *4.

On the fourth *Mangold* factor,[167] the district court once again sided against the Chamber of Commerce.[168] The Chamber of Commerce argued that differing, and possibly conflicting, paid sick leave ordinances in Minnesota cities would make administration and compliance difficult for companies.[169] The district court was not persuaded, observing that the Minnesota Supreme Court has held that a "checkerboard of conflicting regulations" does not infer there is an unreasonably adverse effect upon the general populace.[170]

Thus, the appellate court held that the findings were "reasonable," affirming the district court's findings.[171] If and when this case is eventually decided on the merits, the second and third *Mangold* factors would likely favor the City of Minneapolis, due to a lack of dispositive case law about implied preemption, especially on wage and hour laws within city limits.[172] Because there has been little regulation on the state-level, findings in the future will remain consistent.

The Minnesota Legislature, in response to this case, narrowly passed a bill intending to preempt both mandatory paid sick leave ordinances and mandatory minimum wage laws.[173] However, because the bill was vetoed by Governor Dayton,[174] it is unclear if the court that eventually decides this matter will find the Uniform Labor Law bill to be dispositive of a legislative attempt to preempt municipal action. In the alternative, the deciding court might interpret Dayton's veto as a clear demonstration that private-employer-paid sick and safe leave (or employer-provided leave) is not a matter of state concern, and therefore hold it is an area for municipalities to regulate.[175]

167. *Mangold Midwest*, 143 N.W.2d at 819–20 (whether the subject matter itself is of such a nature that local regulation would have unreasonably adverse effects upon the general populace of the state).

168. *Id.*

169. *Id.*

170. *Id. See, e.g.,* G.E.M. of St. Louis, Inc. v. City of Bloomington, 144 N.W.2d 552, 554 (1966) (holding that an ordinance prohibiting certain business activities on Sunday, if properly adopted, was within the corporate power of the city of Bloomington).

171. *Id.*

172. *See* Bicking v. City of Minneapolis, 891 N.W.2d 304, 304 (Minn. 2017); State v. Kuhlman, 729 N.W.2d 577, 580 (Minn. 2007) (stating a city may not enact traffic legislation which conflicts with state laws except where expressly authorized);.

173. *See* H.F. 600, 90th Leg., Reg. Sess. (Minn. 2018).

174. *See* Letter from Governor Dayton, *supra* note 104.

175. *See* Mangold Midwest Co. v. Village of Richfield, 274 Minn. 347, 358, 143 N.W.2d 813, 820 (1966).

### *3. Can the City Enforce the Ordinance Against Nonresident Employers?*

The final argument of the Chamber of Commerce was that Minneapolis's Safe and Sick Time Ordinance impermissibly extends the authority of the City Council by imposing regulations on employers outside of its boundaries.[176] The district court held the Chamber of Commerce was likely to suffer irreparable harm if this portion of the ordinance was allowed to take effect, and granted a temporary injunction barring Minneapolis from enacting this portion of the ordinance against any extraterritorial employers.[177] This injunction remains in effect until the case is decided on the merits, or until the injunction is invalidated by the Minnesota Supreme Court.[178]

In *Bicking v. City of Minneapolis*, the Minnesota Supreme Court held that a statute or ordinance did not need to cause a factual harm for the Court to resolve a challenge to its validity, reiterating that:

> [A] justiciable controversy exists when a claim presents "definite and concrete assertions of right that emanate from a legal source," "a genuine conflict in tangible interests between parties with adverse interests," and a controversy capable of "resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion."[179]

Here, the ordinance requiring that all employers provide paid safe and sick time to employees who work eighty hours or more within Minneapolis never took effect on employers outside of the Twin Cities.[180] Nevertheless, based on *Bicking*, the court may rule on the merits of challenges to the portion of the statute establishing Safe and Sick Time over the objections of the City of Minneapolis.[181]

Next, the Chamber of Commerce argued that the enforcement of the ordinance against non-resident employers regulated extraterritorial commerce.[182] To determine whether Minneapolis's Safe and Sick Time

176. *See Minn. Chamber of Commerce*, 2017 WL 4105201, at *3.

177. *Id.*

178. *Id.*

179. 891 N.W.2d 304, 308 (Minn. 2017).

180. *See Minn. Chamber of Commerce*, 2017 WL 4105201, at *3 (explaining there is no effect due to temporary injunction).

181. *See Bicking*, 891 N.W.2d at 308.

182. The power to regulate commerce among the several states is granted to the federal government by the Commerce Clause of the Constitution. *See* U.S. CONST. art. I, § 8, cl. 3. While the Commerce Clause represents an affirmative grant of power to Congress, it also implicitly prohibits states from enacting statutes that discriminate against or unduly burden interstate commerce, a prohibition known as the "Dormant" Commerce Clause.

Ordinance violates the extraterritoriality doctrine, the court needed to decide if the regulation controls conduct outside the boundaries of the city's jurisdiction.[183] The first step the court took was to analyze cases where a city's regulatory authority was challenged on the grounds of extraterritoriality.[184]

The district and appellate courts first analyzed *State v. Nelson*, which arose out of a challenge to a Minneapolis regulation "requiring inspection of 'every animal producing milk for sale within the city,' wherever located."[185] This ordinance was upheld by the Minnesota Supreme Court, even though the requirement that all animals producing milk sold in the city, "wherever located," would include animals located outside of the city.[186] The court reasoned this ordinance did not violate the extraterritoriality doctrine because the "ordinance has no extraterritorial operation, and there has been no attempt to give it any such effect. The only subject on which [the ordinance] operates is the sale of milk within the city."[187]

The second of such cases was *Duluth v. Orr*, in which the Minnesota Supreme Court invalidated a Duluth ordinance prohibiting the storage of explosives within one mile of city limits.[188] The court held that Duluth had the authority to regulate or prohibit the storage of explosives within the

> "As a complement to the explicit grant of power to Congress, the Supreme Court has held that '[t]he negative or dormant implication of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace.'"

Minn. *ex rel.* Swanson v. Integrity Advance, LLC, 870 N.W.2d 90, 93 (Minn. 2015) (citing Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997)). The main aim of enforcement of the Dormant Commerce Clause is to prevent economic protectionism, whereby one state impermissibly burdens out-of-state actors engaged in commerce. See *Swanson*, 870 N.W.2d at 94. A closely-related principle of the Dormant Commerce Clause is the "extraterritoriality doctrine," which asserts that states may not enact laws that have a wholly "extraterritorial effect"—that is, laws that control "commercial activity occurring wholly outside the boundary of the State." *Id.* Similarly, within states themselves, a city's regulatory authority is limited by its borders and its own internal concerns. *Id.*; Healy v. Beer Inst., 491 U.S. 324, 337 (1989). "A city has no authority to 'legislate as to matters outside the municipality in the guise of municipal concern.'" *Minn. Chamber of Commerce*, 2017 WL 4105201, at *6 (citing Almquist v. City of Biwabik, 28 N.W.2d 744, 746 (1947)).

183. *Swanson*, 870 N.W.2d at 94.

184. *Id.* at *6.

185. *Id.* (citing State v. Nelson, 68 N.W. 1066, 1067 (1896)).

186. *Nelson*, 68 N.W. at 1068.

187. *Id.*

188. City of Duluth v. Orr, 132 N.W. 265, 265 (1911); *Minn. Chamber of Commerce*, 2017 WL 4105201, at *6–7.

city limits, but not beyond its borders.[189] Because the Duluth ordinance applied to areas outside the city limits, the ordinance was invalidated.[190]

The third case, which the court did not find as instructive, was *Plymouth v. Simonson*.[191] There, the appellate court upheld a city ordinance prohibiting the delivery of harassing materials within the city.[192] Here, the appellate court noted that "[b]ecause in *Simonson*, all relevant activity occurred within the city borders, this case is less instructive."[193]

Because the appellate court found *Nelson* the most instructive, it may indicate results of future cases.[194] The court in *Nelson* stated:

> It is a matter of common knowledge that much of the milk sold in a city is produced in dairies situated outside the city limits. Any police regulations that did not provide means for insuring the wholesomeness of milk thus brought into the city for sale and consumption would furnish very inadequate protection to the lives and health of the citizens.[195]

Similar to *Nelson*, the extraterritorial regulatory hurdle imposed by the Safe and Sick Time Ordinance is only triggered if a commercial actor engages in commercial activity within the city limits.[196] The Minneapolis Safe and Sick Time Ordinance imposes requirements upon employers outside of city limits, but only if their employee works a certain amount of time within the geographic limits of the city.[197]

While employees working within Minneapolis will never be perfectly analogous to milk sold within city limits, the principle is analogous. The legislature's intent here is to provide protections to those who live and work within the city limits by imposing regulations on those who seek to engage in commercial activity therein, regardless of where those commercial actors call home.[198] Though the appellate court did not find clear error in the district court's ruling sufficient to overturn the injunction,

189. *Orr,* 132 N.W. at 265.

190. *Id.*

191. 404 N.W.2d 907 (Minn. Ct. App. 1987).

192. *Id.* at 908–09.

193. *Minn. Chamber of Commerce*, 2017 WL 4105201, at *7.

194. *Id.* at *6.

195. State v. Nelson, 68 N.W. 1066, 1068 (1896).

196. MINNEAPOLIS CODE § 40.40 (2016) ("*Employee* means any individual employed by an employer . . . who perform[s] work *within the geographic boundaries of the city* for at least eighty (80) hours in a year for that employer." (emphasis added)).

197. *Id.*

198. *See* MINNEAPOLIS CODE § 40.30(e) ("To safeguard the public welfare, health, safety and prosperity of the people of and visitors to the city.").

the district court seemed to indicate that the city may yet prevail on extraterritoriality.[199] The district court and appellate court held that the ordinance could take effect, but enjoined enforcement of the ordinance on employers located outside of Minneapolis City Limits.[200]

*e. Looming State Legislative Action*

In response to Milwaukee's Sick Leave Ordinance and the decision in *Metropolitan Milwaukee Associaton of Commerce v. City of Milwaukee*, the Wisconsin legislature enacted Act 16 on May 5, 2011, just over two months after the decision.[201] Act 16 contained an amendment aimed at curtailing city ordinances which provided workers with more sick benefits protections than those provided by state law under the Wisconsin Family/Medical Leave Law.[202] Act 16 slammed the door on sick leave ordinances in Wisconsin with the stated purpose of creating uniform labor enforcement across the state.[203]

As mentioned above, the Minnesota Legislature passed the Uniform Labor Bill, which, if implemented, would preempt both the St. Paul and Minneapolis Sick and Safe Time Ordinances, as well as any future mandatory municipal paid sick leave and minimum wage ordinances enacted by different cities.[204] However, Governor Dayton's veto of the bill has stopped it, at least for the time being.[205] The next gubernatorial election in Minnesota is in 2018, and Governor Dayton has announced that he will not seek re-election.[206] A strong Republican showing in the 2018

199. *Minn. Chamber of Commerce*, 2017 WL 4105201, at *7 ("The district court likewise found that the likelihood of success on the merits (with respect to extraterritoriality) favored the chamber.").

200. *Id.*

201. 2011 Wis. Act 16, 100th Leg. (enacted 2011).

202. *Id.*; *see also* WIS. STAT. § 103.10(1m) (2016) ("[T]his section shall be construed as an enactment of statewide concern for the purpose of providing family and medical leave that is uniform throughout the state.").

203. 2011 Wis. Act 16, 100th Leg.; *see also* WIS. STAT. § 103.10 (1m) ("[T]he provision of family and medical leave that is uniform throughout the state is a matter of statewide concern and that the enactment of an ordinance by a city, village, town, or county that requires employers to provide employees with leave . . . would go against the spirit of this section.").

204. H.F. 600, 90th Leg. § 2(2)(b) (Minn. 2017) ("A local government must not adopt, enforce, or administer an ordinance, local resolution, or local policy requiring an employer to provide either paid or unpaid leave time.").

205. Letter from Governor Dayton, *supra* note 104.

206. *The Race for Governor: Who's In, Who's Out*, MPR NEWS (last updated Mar. 12, 2018), https://www.mprnews.org/story/2017/03/27/who-is-in-who-is-out-Mineso ta-governors-race-2018 [https://perma.cc/H5PG-66S6].

election could lead to a second passage of the Uniform Labor Law bill,[207] which would completely preempt any paid sick leave mandate within the state if signed into law. Only time will tell whether the political landscape will shift to allow for the enactment of a Uniform Labor Law in Minnesota, or if the bill will remain mired in the political process. Until then, practitioners, students, and judges should continue to watch for developments in the appeals process of the lawsuit against the City of Minneapolis.[208]

## V. POLICY: IMPACT VS. INTENT

Laws do not exist in a vacuum; fundamentally, they respond to a social ill for which the public needs or demands a solution:[209]

> The purpose of the laws is to regulate or shape the behavior of the members of the society, both by prescribing what is permitted or forbidden, and by enabling them, through the establishment of institutions and processes in the law, to carry out functions more effectively. A general test of the effectiveness of a law (a particular provision of a legal system) is therefore to see how far it realizes its objectives, *i.e.* fulfills its purposes.[210]

Therefore, laws should also be judged by their unintended consequences. When left unchecked, they may compound the very social ills for which the law was intended to correct, or may create new problems which, again, must be dealt with through legislative action.[211]

Since their inception, paid sick leave laws have caused considerable hand-wringing among business leaders and their legislative allies.[212] Such opponents argue that mandatory paid sick leave laws impose burdens upon businesses and make jumping through regulatory hurdles difficult, especially when dealing with a "checkerboard" of conflicting laws and

207. H.F. 600, 90th Leg. § 2(2)(b) (Minn. 2017).

208. Minn. Chamber of Commerce v. City of Minneapolis, No. A17–0131, 2017 WL 4105201 (Minn. Ct. App. Sept. 18, 2017).

209. Anthony Allott, *The Effectiveness of Laws*, 15 VAL. U. L. REV. 229, 230 (1981) ("The remedy for every social ill, the mechanism for achieving every social goal, is—it seems—to make a law.").

210. *Id.* at 233.

211. Mark Hermann, *3 Examples Of Unintended Consequences In The Law*, ABOVE THE LAW (Feb. 1, 2016, 10:02 AM), https://abovethelaw.com/2016/02/3-examples-of-unintended-consequences-in-the-law/?rf=1[https://perma.cc/RT9D-RN7W] ("It's an unintended consequence: By generously protecting workers' rights, a country's laws may in fact reduce the number of available jobs.").

212. Brockhausen & Kalten, *supra* note 37.

requirements in different places.[213] Opponents also suggest that such laws create a multitude of economic drawbacks and provide minimal benefit.[214] Some of those drawbacks include: decreased work hours, higher prices, increased unemployment, and reduced benefits in other areas.[215]

Proponents argue that mandatory sick leave laws increase public safety, job security, and economic equality.[216] When paid sick leave is unavailable, employees must "choose between getting paid or getting well."[217] Proponents also assert that paid sick leave correlates with increased job growth and employer reputation, and has little effect on costs.[218]

Because the implementation of the Minneapolis and St. Paul Safe and Sick Time Ordinances was fairly recent, observers are unsure of their long-term impact on the economy, employees, and general welfare of the Twin Cities. As stated previously, however, the Twin Cities is not exactly experimenting with a wholly new policy.

### *A. The Seattle Study*

Following the enactment of a Paid Sick and Safe Time Ordinance, the City of Seattle commissioned a study and survey conducted by the University of Washington to examine the impact of the ordinance on the city's economics, employers, and employees.[219] While Seattle's ordinance and the Twin Cities' ordinances vary in structural application,[220] the laws

213. Minn. Chamber of Commerce v. City of Minneapolis, No. A17–0131, 2017 WL 4105201, at *4 (Minn. Ct. App. Sept. 18, 2017).

214. *Employment Policy Group Urges California Legislators to Consider Unintended Consequences of Mandated Leave*, EMP. POL'Y INST. (Apr. 2011), https://www.epionline.org/release/o317/ [https://perma.cc/4ENU-K47J] [hereinafter "*Unintended Consequences*"].

215. *See The Labor Market Impacts of Paid Sick Leave*, EMP. POL'Y INST., (Aug. 2016) https://www.epionline.org/studies/the-labor-market-impacts-of-paid-sick-leave/ [https://perma.cc/K33P-XFJP] (analyzing the impact of the Connecticut Paid Sick Leave Statute).

216. Mayor Betsey Hodges, 2015 State of the City: We Can't Do This Without You, Minneapolis (Apr. 2, 2015) (transcript available at http://www.minneapolismn.gov/www/groups/public/@clerk/documents/webcontent/wcms1p-148259.pdf [https://perma.cc/J8MM-MHJH]).

217. *Id.*

218. *Id.*

219. JENNIFER ROMICH ET AL., IMPLEMENTATION AND EARLY OUTCOMES OF THE CITY OF SEATTLE PAID SICK AND SAFE TIME ORDINANCE, 2 (Apr. 23, 2014) https://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/PSSTOUWReportwAppendices.pdf [https://perma.cc/X9TY-B2EN].

220. *Compare* SEATTLE, WASH., CODE § 14.16.020 (2017) (separating employers into

serve a similar function and purpose.[221] The findings of this study may inform the public's understanding and expectations for the outcome of the Twin Cities' ordinances.

At the time of the follow-up survey in 2013, 83% of all surveyed employers in Seattle reported that they knew of the ordinance, up 14% from an initial survey in 2012.[222] The study also showed that roughly 96% of employers offered paid time off to full-time employees, while 62% offered paid time to part-time employees and 26% offered paid time to seasonal or temporary employees.[223] Across all industries, the percentage of employers offering paid sick leave (or qualifying paid time off) increased 9% from 2012 to 2013.[224] Notably, the percentage of employers in the service industries (accommodation and food services) offering paid sick leave to employees increased a whopping 64% (from 14% to 78%).[225] These jobs tend to be the lowest paid in terms of hourly wages.[226]

However, the Seattle survey also found that only 45% of the largest employers (250 or more full-time equivalents) reported providing employees with enough sick leave to meet the statutory requirements.[227] The compliance statistics were much higher with smaller employers.[228] Among those employers who were not in compliance with the requirements of the ordinance, only 6% were aware of their non-compliance, 24% did not know about the ordinance, and 10% mistakenly

tiers based on number of employees), *with* ST. PAUL CODE § 233.21 (2017) (defining different effective dates for employers based on numbers of employees, but with no other operative provisions being different), *and* MINNEAPOLIS CODE § 40.220(h) (2017) (allowing employers with five or less employees to provide unpaid time instead of paid time, with all other operative portions of the law remaining in effect).

221. *Compare* SEATTLE, WASH., CODE § 14.16, *with* MINNEAPOLIS CODE § 40.20, *and* ST. PAUL CODE § 233.01.

222. ROMICH, *supra* note 219, at 15.

223. *Id.* at 18.

224. *Id.* at 19.

225. *Id.*

226. Leisure and hospitality employees averaged $15.59 per hour as of December 2017. *Economic News Release: Table B-3. Average Hourly and Weekly Earnings of All Employees on Private Nonfarm Payrolls by Industry Sector, Seasonally Adjusted*, U.S. DEPT. OF LABOR BUREAU OF LAB. STAT. (last modified Mar. 9, 2018), https://www.bls.gov/news.release/empsit.t19.htm [https://perma.cc/KBH9-XXJ3]. The next lowest group, retail employees, averaged $18.34 per hour, a difference of $2.75 per hour, or $57,620 per year for a fulltime employee. *Id.*

227. ROMICH, *supra* note 219, at 20–21.

228. *Id.* at 21 (finding 83% of employers between 5 and 49 full-time employees, and 73% of employers between 50 and 250 full-time employees, met statutory requirements).

believed that the ordinance did not apply to their organization.[229] The majority (59%) were unsure if their organization was in compliance.[230] This shows that the information distribution methods, the regulatory teeth of the ordinance,[231] or both were inadequate and ineffective.

Of the employers surveyed, 73% reported at least one employee utilizing the new paid sick leave; yet only 8% reported having to reprimand an employee for abuse of leave.[232] The biggest difficulty for employers in remaining compliant seemed to be understanding the ordinance and keeping proper administrative records.[233] Some employers also had to raise prices, decrease employee pay or vacation time, relocate employees, or, in rare instances, shut down operations in Seattle.[234] Still, "nine out of ten employers believed that their customer service, employee morale, and number of sick employees on the job were about the same as before the Ordinance."[235] Of employers surveyed, 70% reported being very or somewhat supportive of the ordinance.[236]

Another major concern among business leaders and opponents of mandatory safe and sick time is the potential for negative effects on job, business, and wage growth.[237] However, the Seattle study showed that job growth did not significantly vary from comparable cities in the region, indicating that the ordinance had no discernable effect on jobs.[238] Similarly, the study showed that after the ordinance took effect, the number of employers in Seattle actually *increased* at a faster rate than in comparable cities.[239] Wage growth, the study noted, was not as robust in Seattle after the ordinance took effect, but the authors of the study emphasized that the difference was not statistically significant and may be due to other factors.[240] These findings show that the implementation of a mandatory sick leave ordinance seems to have negligible impact on the

229. *Id.* at 23.

230. *Id.*

231. SEATTLE, WASH., CODE §§ 14.16.060–14.16.110 (2018) (granting the Office of Labor Standards enforcement power).

232. ROMICH, *supra* note 219, at 24.

233. *Id.* at 26.

234. *Id.* at 27.

235. *Id.*

236. *Id.* at 29.

237. *See Unintended Consequences*, *supra* note 214 ("Despite the claims of advocates, mandates like this could have unintended consequences for Californians including reduced hours, cuts in benefits, and fewer job opportunities.").

238. ROMICH, *supra* note 219, at 35.

239. *Id.* at 34.

240. *Id.* at 36.

economic growth of the city. Based on the findings of the study, the Seattle ordinance seems to accomplish its aims of protecting wage workers with minimal unintended economic consequences.

### *B. Other studies*

Results in a similar 2009 initial impact study examining San Francisco's paid sick leave ordinance were far more drastic.[241] The number of firms offering paid sick leave to employers increased from 73% to 91%, with smaller firms showing a 20% increase, compared to 9% in firms with over 100 employees.[242] Roughly one-third of surveyed employers reported reducing staff, raising prices, reducing benefits, reducing wages, or taking some other measures to accommodate the ordinance requirements.[243] However, the policy was implemented in 2007 and the study was performed in 2009,[244] roughly coinciding with a stark economic downturn known as the Great Recession.[245] The study also consisted only of survey responses by employers in San Francisco and the surrounding area, and did not examine broader economic conditions, such as average wages or job growth over the same period.[246]

As previously mentioned, Connecticut became the first state to implement a statewide sick leave ordinance in 2012.[247] A study conducted to examine the Connecticut statewide version of paid sick leave returned a result more closely resembling the results in Seattle than those in San Francisco.[248] The Connecticut study directly examined the assertions of opponents regarding administrative burden and economic impact, finding that "the Connecticut law has had a modest impact on businesses in the state."[249] Overall, it seems that affected employers at a both city and state

241. *See* Carrie H. Colla, et al., *Early Effects of the San Francisco Paid Sick Leave Policy*, AM. J. OF PUB. HEALTH (Dec. 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4232165/pdf/AJPH.2013.301575.pdf [https://perma.cc/GDB8-JQFC].

242. *See id.*

243. *See id.*

244. *See id.*

245. *See generally* INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK (2009) https://www.imf.org/external/pubs/ft/weo/2009/01/pdf/text.pdf [https://per ma.cc/XH4S-4BWY] (detailing the overall economic trends and impacts of the worldwide recession).

246. Colla, et al., *supra* note 241.

247. *See id.* at 2; *see also* CONN. GEN. STAT. §§ 31-57r–31-57w (2015).

248. *See* Eileen Appelbaum, et al., *Good for Business? Connecticut's Paid Sick Leave Law*, CTR. FOR ECON. POL'Y RES. (Mar. 2014), http://cepr.net/documents/good-for-buisness-2014-02-21.pdf [https://perma.cc/7STN-GC94].

249. *Id.* at 18. It is important to emphasize that the Connecticut Statute included "carve-out" exclusions for specific industries, such as 501(c)(3) nonprofits and

level support these ordinances more than they oppose them once the ordinances take effect.

## VI. CONCLUSION

Since their first inception, employers and employment groups have resisted Safe and Sick Time Ordinances.[250] Fortunately, the concerns about the overall negative economic impacts of these laws seem to have been overstated.[251] Despite the minimal economic impact to the community at large, these laws increase worker protections where compliance is high.[252]

The Twin Cities' Safe and Sick Time Ordinances are a bold, but not wholly uncharted, step for worker protections that are likely to survive legal challenges.[253] Despite adding to the regulatory requirements already placed upon employers by other laws,[254] affected employers generally tend to support these ordinances after they're put into place,[255] pointing to the likelihood of their long-term survival. However, there is still some resistance from the Minnesota legislature and business interest groups, and the already-formed Uniform Labor Bill may render safe and sick time ordinances invalid across the state.[256] Until the Uniform Labor Bill is signed into law, practitioners, judges, students, and employers should get comfortable with the requirements of these ordinances.

manufacturing jobs. CONN. GEN. STAT. § 31-57r (4) (2015).

250. *See* WIS. STAT. § 103.10(1m)(e) (2016); Minn. Chamber of Commerce v. City of Minneapolis, No. A17–0131, 2017 WL 4105201 (Minn. Ct. App. Sept. 18, 2017); Metro. Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee, 798 N.W.2d 287, 311–13 (Wis. Ct. App. 2011).

251. *See* ROMICH, *supra* note 219; Appelbaum, et al., *supra* note 248. *But see* Colla, et al., *supra* note 241.

252. *See* Appelbaum, et al., *supra* note 248; ROMICH, *supra* note 219.

253. *See Minn. Chamber of Commerce*, 2017 WL 4105201.

254. *See* ST. PAUL, MINN., CODE § 233 (2017); MINNEAPOLIS, MINN., CODE § 40 (2017).

255. ROMICH, *supra* note 219, at 5; Appelbaum, et al., *supra* note 248, at 2.

256. H.F. 600 § 2(2)(b), 90th Leg. (Minn. 2017).