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August 7, 2015

Honorable Bridget Gainer
Commissioner – 10th District
Cook County Board of Commissioners
118 North Clark Street, Room 567
Chicago, Illinois 60602

CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

In Re: 15-210: Countywide Paid Leave Mandate

Dear Commissioner Gainer:

We received your request for advice with regard to the County's home rule authority to institute a countywide paid leave ordinance. Based on our discussion with your Chief of Staff and the committee's discussions on July 29, 2015, it is our understanding that the County is considering the implications of enacting a County ordinance requiring employers to provide paid sick time to all employees countywide.

ISSUE PRESENTED

Whether Cook County has the authority to enact a paid leave mandate for employers in both unincorporated and incorporated areas of the Cook County.

CONCLUSION

The Illinois Supreme Court identified similar laws within the scope of State labor regulations, and concluded that the State has a far more vital interest in regulating labor conditions than did local entities. Consistent with that analysis, we conclude that the enactment of an ordinance requiring employers to provide paid leave to their employees likely does not fall within a home rule unit's government and affairs, and therefore, the County lacks the home rule authority to enact such an ordinance. Furthermore, the Supreme Court's analysis would apply equally to an ordinance passed by the City of Chicago, and would present a similar challenge to the application of such an ordinance within its jurisdiction.

DISCUSSION

Any analysis regarding the validity of home rule power must begin with the legal question of whether the problem pertains to local government and affairs, as required by section 6(a) of the 1970 Illinois Constitution. As a home rule unit of local government, the County may exercise any power and perform any function pertaining to its government and affairs, including, but not limited to, the power to regulate for the protection of the public welfare and to tax. 1970 Ill. Const., art. VII, § 6(a). Notwithstanding the forgoing, if the home rule entity's action does not pertain to its "government and affairs" it is invalid.

County's Home Rule Authority within the Scope of Labor Regulations

The Illinois Supreme Court's ruling in *Bernardi v. City of Highland Park,* 121 Ill. 2d. 1 (1988) directly calls into question the County's home rule authority to enact the proposed ordinance. As a general rule, the authority of home rule units under section 6(a) is limited in those fields traditionally subject to comprehensive State regulation. *Bernardi,* 121 Ill. 2d at 14 citing *Kalodimos v. Village of Morton Grove*, 103 Ill. 2d 483, 501 (1984). In *Bernardi*, the court considered whether a home rule municipality must conform to the requirements of the Illinois Prevailing Wage Act. *Bernardi,* 121 Ill. 2d at 5. The court opined that "[e]stablishing minimum requirements to . . . improve working conditions has traditionally been a matter of State concern, outside the power of local officials to contradict, and it remains so today." *Id.* at 14.

Identifying a long list of wage-related statutes as within the scope of State labor regulations, the court opined that a departure from the prevailing wage is beyond the authority of a home rule unit because the State has a far more vital interest in regulating labor conditions than did local entities. *Id.* at 15-16. The court concluded that allowing home rule units to govern local labor conditions would destroy the General Assembly's "carefully crafted and balanced economic policies." *Id.* at 16.

There is no existing Illinois law creating an obligation on employers to provide paid sick leave. We note that that two bills, House Bill 4420 and Senate Bill 2789, creating the Earned Sick Time Act [30 ILCS 805/8.38 (new)] were introduced in late 2014, which if enacted would have provided for minimum requirements with regard to a mandatory accrual of sick time. However, these bills died at the end of the legislative session and no further action has been taken by the legislature. As such, the clearest guidance with regard to this issue rests with our Supreme Court. Consistent with the Illinois Supreme Court's findings in *Bernardi*, an ordinance that mandates employers provide mandatory paid leave to its employees, would likely not be considered to pertain to the County's "government and affairs".

Among the statutes that the *Bernardi* court identified as within the scope of state labor regulations was the One Day Rest in Seven Act [820 ILCS 140/1, *et seq.*]. This Act was meant to promote the public health and comfort of employees. With some exceptions, the Act requires employers to provide at least twenty-four consecutive hours of rest in every calendar week in addition to the regular period of rest allowed at the close of each working day. 820 ILCS 140/2. We find that an ordinance requiring employers within Cook County to provide paid leave to employees is to be substantially similar to those laws identified by the *Bernardi* court as labor

conditions within the scope of State labor regulations. Therefore, we must conclude that the County does not possess the home rule authority to enact the Ordinance.

An Alternative Interpretation of Bernardi

While we believe our interpretation of *Bernardi* to be dispositive with regard to ordinances within the scope of labor and employment such as a paid leave mandate, we note that the passage of a similar ordinance by the City of Chicago that will raise the minimum wage for Chicago workers to $13 per hour ("Minimum Wage Ordinance") suggests a different interpretation of *Bernardi*. It is clear from our discussions with the City that prior to the enactment of the Minimum Wage Ordinance, the City considered the Supreme Court's ruling in *Bernardi*. Still, in the preamble to its Minimum Wage Ordinance, the City of Chicago cites its home rule authority pursuant to section 6(a) of the 1970 Illinois Constitution. Therefore, we must conclude that the City has interpreted *Bernardi* in such a way to preserve its home rule power to enact ordinances within the scope of labor regulation.

We presume that the City relied on an alternative interpretation of *Bernardi* that is premised on the idea that the State's vital interest in labor regulations does not foreclose a home rule unit from enacting similar ordinances in all cases. This argument relies heavily on a belief that *Bernardi* court expressly held that the State's interest is to set minimum standards with regards to labor regulations. *See, Bernardi,* 121 Ill. 2d at 5 at 14 (discussing "[e]stablishing ***minimum requirements*** to . . . improve working conditions has traditionally been a matter of State concern, outside the power of local officials to contradict, and it remains so today." (Emphasis Added)). Proponents of this interpretation cite to a myriad of cases where Illinois courts have routinely upheld local laws that provide greater protection than state laws. *See, Crawford v. City of Chicago,* 304 Ill. App. 3d 818, 828 (1st Dist. 1999) (City of Chicago's policy of extending benefits to same sex domestic partners upheld) *see also*, *Village of Bolingbrook v. Citizens Utils. Co.,* 158 Ill. 2d 133, 134-143 (1994) (environmental ordinances that regulate sewage discharge more restrictively than state law); *Kalodimos,* 103 Ill. 2d 483 (gun safety ordinance that regulated hand guns more restrictively than state law).

Adopting this rationale, it could be argued that the City's Minimum Wage Ordinance, and likewise, similar labor regulation such as a paid leave mandate, would not interfere with the protection of the state's interests as long as such an ordinance provides more protections to workers than state law requires. While the argument can certainly be made, in light of the Supreme Court's clear holding that labor regulations are not a matter pertaining to the local government and affairs, and the fact that none of the local laws cited by *Crawford, Village of Bolingbrook,* or *Kalodimos* pertain to the regulation of labor and employment, we conclude that our interpretation is the more prudent course of action. Nevertheless, because the City's Minimum Wage Law has yet to be challenged, we cannot say conclusively as to which interpretation our courts would adopt.

State Action on Paid Leave Mandates

We note that whether or not the County chooses to move forward on a paid leave mandate at this time, the state could always choose to enact its own legislation expressly authorizing the County to pass such a law. Likewise, nothing would prevent the Illinois legislature from enacting a state statute expressly preventing or retroactively nullifying such an action by the County. In fact, several states have enacted preemption laws prohibiting cities, counties, and other state municipalities from passing mandatory paid sick leave laws. At least eleven states – Alabama, Arizona, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi, North Carolina, Tennessee, and Wisconsin have responded in this manner. The preemption laws, such as the one passed in Wisconsin in 2011, nullified the Milwaukee ordinance and prohibited future local ordinances requiring businesses to provide paid sick leave to employees citing a need for statewide uniformity. WIS. STAT. ANN. § 103.10 (1m) (a) (finding the provision of family and medical leave that is uniform throughout the state is a matter of statewide concern).

Application of Countywide Paid Leave Mandate

Finally, we acknowledge that your question also raises an issue regarding the application of such an ordinance in incorporated and unincorporated areas of the County. Section 6(c) of Article VII states that "[i]f a home rule county ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail within its jurisdiction." The Report of the Committee on Local Government of the 1970 constitutional convention recognized the problem of legislating in the same field by both a municipality and a home-rule county not as a question or preemption of authority but as a matter of resolving conflicts in ordinances. (7 Proceedings 1591, 1646-1650.) In defining the problem to be resolved by section 6(c) the committee proposal states. " * * * there may be differences or actual conflicts and inconsistencies between municipal legislation and county legislation. Some provision must be made to resolve these potential disagreements and conflicts." (p. 1647).

When examining this issue, the Illinois Attorney General stated that "[i]t is my opinion that to the extent that a home-rule county ordinance and a municipal ordinance actually conflict, the municipal ordinance will be given effect within the municipality's corporate boundaries. 1996 Ill. AG LEXIS 36 (Ill. AG 1996). In this opinion, the Attorney General relied on *Evanston v. County of Cook,* 53 Ill. 2d 312, 317 (1972) where the Court noted that in zoning, regulatory and licensing ordinances, "there are clear opportunities for contradictions and conflicts between the ordinances of the municipalities and ordinances of the county." As such, it appears that, as a general rule, a county may not regulate within a home-rule municipality if that municipality has conflicting ordinances of its own. Likewise, if the City of Chicago, a home rule unit enacted a regulatory ordinance such as a conflicting mandatory paid leave ordinance, that ordinance would be controlling within the City of Chicago. However, just as a mandatory paid leave ordinance would likely be challenged under *Bernardi* as a matter of local concern within a home rule unit's authority to enact, the City of Chicago could face the same challenge to any ordinance it enacts with regard to mandatory paid leave. We note that even under the City's analysis of *Bernardi,* the enactment of a paid leave ordinance is limited to home rule units. Therefore, if the County

enacted a paid leave ordinance, such ordinance would also be effective within the incorporated areas of non-home rule municipalities.

We hope the above discussion has been helpful to you. If this Office can be of further assistance to you in this matter, please contact us.

Sincerely,

ANITA ALVAREZ
STATE'S ATTORNEY OF COOK COUNTY

Daniel F. Gallagher
Deputy State's Attorney
Chief, Civil Actions Bureau