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"Mandatory Sick Leave Proposals Are Ill-Advised"

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Nelson Cary, a partner in the firm's Columbus office, authored a column regarding the burden mandatory sick leave places on employers. The column was originally posted on *Law360*.

Mandatory Sick Leave Proposals Are Ill-Advised

Many assert that the U.S. economy is sick. Those who are particularly pessimistic even go so far as to suggest that an economic recession is near.

It is certainly true that unemployment in many states is on the rise and home foreclosures make headlines nearly every day. Stimulus efforts like tax rebates may have a short-term positive effect, but keeping the U.S. economy on the right track is a substantial challenge that must remain focused on the long term.

In the face of some troubling economic news across the country, an effort is blooming that, if successful, could send the nation even further behind, creating a long term, structural disadvantage for our economy. In Congress, twelve states, and at least one city, proposals are under consideration that, if enacted, would impose yet another burden on employers struggling to stay competitive and create jobs.

These proposals, which have taken the form of proposed ballot initiatives and legislative efforts, mandate that some form of paid sick leave be provided by all employers. The numbers vary – from businesses with seven employees to those with 25 or more – but the general concept is the same – a law that would require every employer with more than a certain number of employees to provide a predetermined number of days each year of paid sick leave.

Currently, San Francisco is the only city to require businesses to provide mandatory sick leave. Washington D.C.'s Mayor recently signed a similar measure, which now awaits any resulting Congressional consideration of the legislation.

Congress also is considering the Healthy Families Act, introduced in March 2007. It would require every employer in the U.S. with more than 15 employees to provide seven days a year of paid leave.

In Ohio, a group with a laudable name – Ohioans for Healthy Families – is promoting a comparable proposal with attempts both to secure passage via a legislative campaign or a ballot initiative. But despite the name, the Ohio Healthy Families Act, or HFA, would be anything but healthy for Ohio's economy. And more importantly, the proposal provides a crystal ball into what many states or cities could face down the road.

The Ohio group has gathered enough petition signatures to present the HFA legislation to the General Assembly. Ohio law requires groups that want to place a proposal on the ballot for a direct, popular vote to first give the General Assembly an opportunity to act on their proposal.

While the HFA sounds harmless enough, no mistake should be made: this proposal is a bad idea that will hinder Ohio's ability to attract and retain jobs.

To understand the scope of the proposed HFA requirements, it is useful to compare its requirements to those of the federal Family and Medical Leave Act (FMLA). The Ohio HFA proposal would require businesses with as few as 25 employees to provide seven days of paid sick leave a year to each employee. The FMLA, on the other hand, applies to employers with 50 or more employees and only requires unpaid leave.

The "sick" leave included in this proposal could be used for a large number of purposes, including visits to the doctor when an employee or family member is not sick. Only if the employee uses more than three consecutive days could the employer require the employee to bring in a doctor's note substantiating the absence.

By contrast, the FMLA requires that an employee use leave only for a "serious health condition," the need for which the employee must document. It also gives the employer a right to seek a second, and sometimes even a third, opinion regarding the employee's need for the leave.

To date, the Ohio General Assembly has not acted. Ohioans for Healthy Families has vowed to obtain additional signatures to place the proposal before voters in November.

There are four primary reasons the Ohio proposal – and ones modeled after it that are under consideration in other jurisdictions – should be rejected.

First, the proposal interferes with the right of employees and employers to allocate employment benefits as they choose. The reality is that some employees might prefer to have a higher wage, tuition reimbursement, year-end bonuses, or any number of other employment benefits. Employers unable to raise prices because of competitive pressures might be forced to cut these or other benefits to pay for mandatory sick days.

Second, the proposal hurts businesses that already provide sick leave. In Ohio, for example, 58% of private sector employers already provide paid sick leave. If sick leave is an important benefit, then employers that offer it must have a competitive advantage in attracting and retaining employees, which they could lose

under the proposal.

Indeed, the law could impose new costs on these same employers. Employers would not have to provide sick leave if they already provide leave that is “at least equivalent.” The proposed legislation does not define what “equivalent” means.

Thus, an employer who provides paid time off might be forced to incur additional expense in adding even more days off for employees if a court decides that that paid time off is not “equivalent” to the required sick leave.

And, an employer may not reduce other types of leave “in order to comply” with the provisions in the proposal. In addition, employers would bear the cost of administering the leave and lost efficiencies.

Third, the HFA could actually hurt employees. For example, the law would limit the employer’s right to consider sick leave usage as a “negative factor” in any employment action. This ambiguous term could require employers, when considering pay raises or promotions for employees, to treat the employee who has missed work the same as the employee who attends work everyday.

There are other ambiguities in the law that will invite litigation, further harming Ohio’s image as a good place for creating jobs.

Finally, the proposed legislation hurts Ohio’s ability to compete. If Ohio enacted the proposal, it would be the only state in the nation with such a requirement. If a new business thought about locating here, or a small business in Ohio considered whether to stay here, the law would impose yet another obstacle to attracting or retaining those jobs.

Given Ohio’s difficult economic environment already, the last thing the General Assembly or voters should do is support legislation that puts Ohio in a more precarious economic position.

The same holds true for cities and states across the nation. No municipal or state economy should bear the negative effects of a proposal like this one. Elected officials at all levels of government should be working toward – not against – meaningful laws that promote job creation, economic development and competitiveness.

After all, businesses are not just competing state to state anymore, but must be positioned to be successful in the global marketplace, retaining jobs in the U.S. and paving the way for economic prosperity for everyone.