INTEROFFICE COMMUNICATION
COUNTY OF MILWAUKEE

DATE: June 24, 2013

TO: Chris Abele, County Executive
Teig Whaley-Smith, Economic Development Director

FROM: Kimberly R. Walker, Corporation Counsel KRW
Mark A. Grady, Deputy Corporation Counsel MAG

SUBJECT: Legal Opinion: Preemption of County Living Wage and Related Requirements

On June 18, 2013, Mr. Whaley-Smith requested our opinion concerning the legality of the County including living wage and sick allowance benefit provisions in development agreements for County lands. The opinion request was made following consideration by the Committee on Transportation, Public Works and Transit of an amendment to the agreement in File No. 13-439 that had been proposed, but rejected by the Committee. Subsequently, on June 20th, the County Board adopted an amendment with the same relevant terms. Unfortunately, in the limited time available, we were unable to conduct our research and finalize our opinion in order to provide this input to the County Board prior to its action. The resolution containing those provisions is now pending your review. In our opinion, case law and guidance from the Attorney General indicate that the County may not impose such provisions.

County Home Rule Authority

Section 59.03, Stats., contains the home rule provision:

> **(1) Administrative home rule.** Every county may exercise any organizational or administrative power, subject only to the constitution and to any enactment of the legislature which is of statewide concern and which uniformly affects every county.

As noted, the exercise of home rule authority is subject to legislative enactments of statewide concern which uniformly affect every county.

Living Wage Statutes

Section 104.001, Stats., provides:

(1) The legislature finds that the provision of a living wage that is uniform throughout the state is a matter of statewide concern and that the enactment of a living wage ordinance by a city, village, town, or county would be logically inconsistent with, would defeat the purpose of, and would go against the spirit of this chapter. Therefore, this chapter shall be construed as an enactment of statewide concern for the purpose of providing a living wage that is uniform throughout the state.

(2) A city, village, town, or county may not enact and administer an ordinance establishing a living wage. Any city, village, town, or county living wage ordinance that is in effect on June 16, 2005, is void.

(3) This section does not affect any of the following:

(a) The requirement that employees employed on a public works project contracted for by a city, village, town, or county be paid at the prevailing wage rate, as defined in s. 66.0903(1)(g), as required under s. 66.0903.

(b) An ordinance that requires an employee of a county, city, village, or town, an employee who performs work under a contract for the provision of services to a county, city, village, or town, or an employee who performs work that is funded by financial assistance from a county, city, village, or town, to be paid at a minimum wage rate specified in the ordinance.

"Living wage" is defined in §104.01(5) as the compensation for labor paid. The State Department of Workforce Development is authorized to establish the living, or minimum wage under §104.04 and no employer may pay less than the living wage. §104.02.

Thus, the State has determined that (1) the establishment of a living or minimum wage is a matter of statewide concern; (2) the State will establish the amount of wages that constitute a living wage and (3) no county may enact an ordinance establishing a living wage that defeats the desired uniformity of such a wage across the State (with exceptions not applicable here).

Clearly, this statute sets forth an "enactment of the legislature which is of statewide concern and which uniformly affects every county" and is the precise type of limitation on the county's home rule authority set forth in §59.03.

The only remaining question is whether the County Board's action falls into the type of action prohibited by the limitation, given that it is not an "ordinance" as set forth in §104.001. At first blush, it might appear that the resolution adopted by the County Board does not constitute an "ordinance" that is prohibited by the terms of §104.001(2) and therefore the resolution is not prohibited by the statute.

However, case law and opinions of the Attorney General have interpreted the limitation on county home rule authority in §59.03 more broadly; the limitation includes resolutions and other forms of exercise of County legal authority.

In *Jackson County v. Dept. of Natural Resources,* 293 Wis. 2d 497 (2006), the county had taken a tax deed to property containing a landfill. Subsequently, the County Board acted to adopt a *resolution* attempting to cancel the tax deed and forcibly return the property to the prior owner. The Wisconsin Supreme Court explained:

> When exercising home rule power, a county must be cognizant of the limitation imposed if the matter has been addressed in a statute that uniformly affects every county as such legislation shows the matter is of statewide concern. Wisconsin courts have previously recognized that while some subjects are exclusively a statewide concern, others may be entirely a local concern and some subjects are not exclusively within the purview of either the state or of a county. For those subjects where both the state and a county may act, the county's actions must "complement rather than conflict with the state legislation."
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> Four factors assist us in determining how a county's action is to be analyzed:
> (1) whether the legislature has expressly withdrawn the power of municipalities to act;
> (2) whether the ordinance logically conflicts with the state legislation;
> (3) whether the ordinance defeats the purpose of the state legislation; or
> (4) whether the ordinance goes against the spirit of the state legislation.
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> If any one of the four factors set out in [case law] is met by a county's ***action***, that ***action*** is without legal effect. We conclude that the second factor, whether the County ***resolution*** logically conflicts with a state statute, must be evaluated because Wis. Stat. § 75.22 specifically addresses cancellation of tax deeds.

Jackson Cnty. v. State, Dep't of Natural Res., 2006 WI 96 at ¶¶19-20 (emphasis added).

The Supreme Court ultimately held that the County's *resolution* attempting to cancel the tax deed was preempted by the provisions of §75.22. The fact that it was a County resolution and not an ordinance being addressed, and that the quoted four factor test referenced ordinances, did not prevent the Court from applying the limitation on county home rule authority to the resolution.

In a more recent case, the Wisconsin Supreme Court addressed a Town's denial of a permit for a livestock facility pursuant to an ordinance adopting various requirements. The denial of the permit was challenged as a prohibited exercise of the Town's home rule authority contrary to a statute of statewide concern. Addressing the denial of the permit and referencing the four factor test set forth above, the Court stated:

Prior cases have applied this test when there have been challenges to political subdivisions' ordinances. The test is also properly applied where, as here, the action of the political subdivision has the force and effect of law.

Adams v. State Livestock Facilities Siting Review Bd., 2012 WI 85, n. 18, 342 Wis. 2d 444, 464, 820 N.W.2d 404, 414 (emphasis added). Thus, the Supreme Court has explained that the limitation on county home rule authority applies to *any* exercise of legal authority by a county or municipality that is contrary to uniform legislation of statewide effect.

Similarly, the Attorney General has applied these principles to opine that an ***appointment*** by a County Board contrary to a statute governing appointments was preempted ("I therefore conclude that a county cannot exercise its home rule authority in such a way as to appoint one regular member and one alternate member who reside in the same town to a county board of adjustment."), *OAG 2-07 (June 8, 2007)*, and that a ***resolution*** reassigning the power to make certain appointments from the county administrator to the county board was preempted ("In my opinion, a county board in a county with a county administrator or a county executive cannot reassign the power of appointment that is statutorily granted to a county executive or a county administrator in cases where the statutes provide that appointments to a particular board or commission are to be made by the county board, by the chairperson of the county board, or by the county administrator or county executive."), *OAG 1-10 (Jan. 28, 2010)*.

Likewise, Milwaukee County lost a case when the Court of Appeals held that the County's home rule authority was preempted by an equal pay statute and a civil service rule. Home rule did not authorize the County to enforce a ***pay freeze*** to pay two captains at a lower level of pay than other captains in the same classification and stage of advancement. *Roberson v. Milwaukee County.*, 2011 WI App 50, 332 Wis. 2d 787, 802, 798 N.W.2d 256, 264, *review denied,* 2011 WI 100, 337 Wis. 2d 51, 806 N.W.2d 639.

Given the policy underlying the uniformity sought by the statute, these decisions and opinions are logical. It is inconsistent with the legislative policy that mandates minimum wage uniformity across the state to allow municipalities to exercise their authority in any manner that defeats that uniformity. The fact that a resolution may affect only a limited number of employers, or even only one employer, creates a lack of uniformity among employers and defeats the legislative policy in the same manner as an ordinance does; the resolution just does so on a smaller scale. State differently, whether the lack of uniformity is among hundreds of employers through an ordinance or is among only two or three employers through a resolution, uniformity no longer exists and the legislative policy would be defeated.

Opinion

In summary, case law and Attorney General opinions appear to demonstrate that any exercise of county legal authority, not just through an ordinance, is governed by the limitation on home rule authority in §59.03 that exists for uniform legislation of statewide effect. The living wage statute expressly states that it is designed to be of statewide effect to create uniformity and thus it prohibits a county from imposing living wage requirements different from those established by the State, no matter how imposed. Thus, in our opinion, it is likely that a court would declare that the county cannot legally adopt the living wage requirements contained in the amended resolution in File No. 13-439.

Sick Allowance Benefits

Section 103.10(1m)(a), Stats., contains a provision similar to the statute on living wages:

> (a) The legislature finds that the 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 from employment, paid or unpaid, for any of the reasons specified in par. (c) would be logically inconsistent with, would defeat the purpose of, and would go against the spirit of this section. Therefore, this 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.
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> (c) Subject to par. (d), a city, village, town, or county may not enact and administer an ordinance requiring an employer to provide an employee with leave from employment, paid or unpaid, for any of the following reasons:
> 1. Because the employee has a health condition, is in need of medical diagnosis, care, or treatment of a health condition, or is in need of preventive medical care.
> 2. To care for a family member who has a health condition, who is in need of medical diagnosis, care, or treatment of a health condition, or who is in need of preventive medical care.
> 3. Because the employee's absence from work is necessary in order for the employee to do any of the following:
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> a. Seek medical attention or obtain psychological or other counseling for the employee or a family member to recover from any health condition caused by domestic abuse, sexual abuse, or stalking.
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> b. Obtain services for the employee or a family member from an organization that provides services to victims of domestic abuse, sexual abuse, or stalking.
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> c. Relocate the residence of the employee or of a family member due to domestic abuse, sexual abuse, or stalking.
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> d. Initiate, prepare for, or testify, assist, or otherwise participate in any civil or criminal action or proceeding relating to domestic abuse, sexual abuse, or stalking.

4. To deal with any other family, medical, or health issues of the employee or of a family member.

(d) This subsection does not affect an ordinance affecting leave from employment of an employee of a city, village, town, or county.

(e) Any city, village, town, or county ordinance requiring an employer to provide an employee with leave from employment, paid or unpaid, for any of the reasons specified in par. (c) that is in effect on May 20, 2011, is void.

Opinion

For the same reasons set forth above with respect to the living wage statute, it appears that Milwaukee County cannot use its authority to impose sick allowance benefits on employers that are different from those set forth in the statutory Family Medical Leave Act. This prohibition applies to any county action that attempts to enforce such provisions, including the resolution at issue. Thus, in our opinion, it is likely that a court would declare that the county cannot legally adopt the sick allowance requirements contained in the amended resolution in File No. 13-439.

We suggest that you share this opinion with the Board of Supervisors.

If you have further questions, please let us know.