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No. A18-0771

STATE OF MINNESOTA
IN SUPREME COURT

Minnesota Chamber of Commerce, et al.,

Appellants,

vs.

City of Minneapolis,

Respondent.

BRIEF AND ADDENDUM OF *AMICUS CURIAE* STATE OF MINNESOTA BY ITS COMMISSIONER OF LABOR AND INDUSTRY

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The district court held in the negative. *The court of appeals affirmed*.

Most apposite authorities:
Minn. Stat. § 181.9413
Jennissen v. City of Bloomington, 913 N.W.2d 456 (Minn. 2018)
Mangold Midwest Co. v. Village of Richfield, 143 N.W.2d 813 (Minn. 1966)

II. Whether the City of Minneapolis' sick and safe time ordinance violates the extraterritoriality doctrine?

The district court held in the affirmative. *The court of appeals reversed*.

Most apposite authorities:
Minn. Stat. § 177.30
Minn. Stat. § 181.032

STATEMENT OF INTEREST

The State of Minnesota, by its Commissioner of Labor and Industry Nancy J. Leppink, has a compelling interest in ensuring that Minnesota's labor and employment statutes are correctly interpreted and applied.[1] The Minnesota Department of Labor and Industry ("DLI"), under the direction of the Commissioner, administers and enforces a variety of the State's labor and employment statutes. *See, e.g.*, Minn. Stat. §§ 177.26, 177.27, 181.9435 (2018).

This case concerns a challenge to a Minneapolis ordinance that regulates sick and safety leave. *See* Minneapolis, Minn., Code of Ordinances ("MCO") §§ 40.10-.310 (attached to Appellant's Addendum ("App. Add.")). Appellants sued the City of Minneapolis, requesting a declaration and injunctive relief prohibiting Minneapolis from enforcing its ordinance. Appellant argues that state law preempts the ordinance under two theories: conflict preemption and implied—or field—preemption. Appellant also argues that the ordinance operates beyond the city's borders, and thus has an impermissible extraterritorial effect.

Correctly interpreting state law that regulates leave benefits and allowing for regulations that protect workers are important to the Commissioner, DLI, and the citizens of the State. The Commissioner, therefore, offers her views to this Court and respectfully requests that the Court affirm the holding of the court of appeals.

[1] No portion of this brief was prepared by counsel for a party, and no monetary contribution was received. *See* Minn. R. Civ. App. P. 129.03.

ARGUMENT

Sick and safety leave laws provide important employment protections and benefits for employees who need time from work to care for their own health and safety and the health and safety of their families. These protections and benefits allow employees and employers to more effectively meet the demands of work and life. Minnesota's sick and safety leave law, Minn. Stat. § 181.9413 (2018), regulates sick and safety leave in a limited fashion. The state law does not occupy the field of sick and safety leave, nor does a municipal ordinance regulating sick and safety leave that provides more protections to workers conflict with state law. Regarding extraterritoriality, the Commissioner contends that the court of appeals reached the correct result, and notes that recordkeeping requirements are commonplace and serve a broader public purpose.

I. SICK AND SAFETY LEAVE IN MINNESOTA.

Existing Minnesota law regulates the sick and safety leave in a meaningful, albeit limited, way. A review of Minnesota's sick and safety leave statute is necessary before beginning the relevant preemption analysis.

Minnesota Statutes chapter 181 contains a variety of statutes regulating labor and employment. The chapter includes provisions on parenting leave and accommodations; leave related to bone marrow, organ, and blood donation; and leave related to civil air patrol service and for family members of members of the military.

Minnesota Statutes section 181.9413 addresses sick and safety leave. It provides that an employee may use personal sick leave benefits[2] for the illness or injury of the employee's qualifying family member for reasonable periods of time "on the same terms upon which the employee is able to use sick leave benefits for the employee's own illness or injury." Minn. Stat. § 181.9413(a).

Section 181.9413 also addresses safety leave, which means "leave for the purpose of providing or receiving assistance because of sexual assault, domestic abuse, or stalking." *Id*. § 181.9413(b). An employee may use personal sick leave to take safety leave. The safety leave may also be used for assisting qualifying family members. *Id*. The Legislature added the safety leave provisions in 2014, as part of the Women's Economic Security Act. 2014 Minn. Laws ch. 239, Art. 3, § 3 (amending Minn. Stat. § 181.9413).

Section 181.9413 sets a floor for how an employer can limit the use of sick and safety leave benefits for a qualifying family member. An employer may limit the use of sick or safety leave for absences due to a family member's illness or injury "to no less than 160 hours in any 12-month period," although the paragraph does not apply to absences due to the illness or injury of a child as defined by section 181.940. *Id*. § 181.9413(c). The statute expressly states that it does not prevent an employer from

[2] "'[P]ersonal sick leave benefits' means time accrued and available to an employee to be used as a result of absence from work due to personal illness or injury, but does not include short-term or long-term disability or other salary continuation benefits." Minn. Stat. § 181.9413(d). Section 181.9413 states that the section "applies only to personal sick leave benefits payable to the employee from the employer's general assets." *Id*. § 181.9413(a).

providing greater sick leave benefits than those provided under section 181.9413. *Id*. § 181.9413(g). Section 181.943 reaffirms that an employer is not prohibited "from providing leave benefits in addition to those provided in sections 181.940 to 181.944," and that nothing in those statutes "otherwise affects an employee's rights with respect to any other employment benefit." *Id*. § 181.943(b) (2018).

The protections of section 181.9413 do not apply to all workers in Minnesota. Minnesota Statutes section 181.940 defines "employee" as follows:

> "Employee" means a person who performs services for hire for an employer from whom a leave is requested under sections 181.940 to 181.944 for:
>
> (1) at least 12 months preceding the request; and
>
> (2) for an average number of hours per week equal to one-half the full-time equivalent position in the employee's job classification as defined by the employer's personnel policies or practices or pursuant to the provisions of a collective bargaining agreement, during the 12-month period immediately preceding the leave.
>
> Employee includes all individuals employed at any site owned or operated by the employer but does not include an independent contractor.

Minn. Stat. § 181.940, subd. 2. "Employer" is a person or entity employing "21 or more employees at at least one site," although "employer" is defined more broadly for Minnesota's school leave statute, section 181.9412. *Id*. § 181.940, subd. 3.

Thus, Minnesota's sick and safety leave law does not require personal sick leave or paid personal sick leave. But if an employer provides personal sick leave, including paid personal sick leave, the employer must allow the leave to be used for safety time and for family members upon the same terms as the existing personal sick leave. The law,

therefore, protects Minnesota employees by adding minimum standards to employer-provided personal sick leave benefits.

DLI has enforcement authority. DLI can receive complaints regarding sections 181.172(a) or (d) and 181.939 to 181.9436, and investigate informally whether an employer violated those laws. Minn. Stat. § 181.9435, subd. 1. The statute directs DLI to "attempt to resolve employee complaints by informing employees and employers of the provisions of the law and directing employers to comply with the law." *Id*. DLI must report annually to the Legislature on such complaints.[3] Minn. Stat. § 181.9435, subd. 2. Minnesota Statutes section 177.27 allows the Commissioner to order an employer to comply with various laws, including sections 181.939 to 181.943. *Id*. § 177.27, subd. 4. In such cases, the Commissioner shall order an employer to cease and desist from engaging in a practice that violates the law and to take affirmative steps to come into compliance. *Id*., subd. 7. The Commissioner has the authority to order an employer to pay aggrieved parties compensatory damages and liquidated damages, in addition to back pay and gratuities. *Id*.

An individual also has a private cause of action under state law. Minnesota Statutes section 181.944 allows a person injured by a violation of sections 181.172(a) or

[3] The Women's Economic Security Act mandated reports are available electronically by visiting *https://www.leg.state.mn.us/lrl/mndocs/mandates_detail?orderid=8570* (last visited Aug. 26, 2019). The 2018 report is also posted on DLI's website and is included with DLI's Addendum for convenience. *See* Minn. Dep't of Labor & Industry, *Women's Economic Security Act Annual Report*, Oct. 2018, available at *https://www.dli.mn.gov/sites/default/files/pdf/WESA_annual_report_2018.pdf* (last visited Aug. 26, 2019) (DLI Add. 10-22).

(d) and 181.939 to 181.943 to bring a civil action to recover damages and receive injunctive and equitable relief. Minn. Stat. § 181.944 (2018). In addition, the recently enacted law to combat wage theft gives the Attorney General enforcement authority over chapter 181. 2019 1st Special Sess. Minn. Laws ch. 7, Art. 3, § 13 (adding Minn. Stat. § 181.1721).

Consistent with its duties to administer chapter 181, DLI issues guidance to employers and employees. This guidance includes a poster explaining sick and safety leave. *See* Minn. Stat. § 181.9436 (2018); Minn. Dep't of Labor & Industry, *Sick and safe leave*, available at *https://www.dli.mn.gov/sites/default/files/pdf/sick_leave.pdf* (last visited Aug. 26, 2019) (DLI Add. 3).[4] DLI has provided information on the Women's Economic Security Act, including Minnesota sick and safety leave. *See* Minn. Dep't of Labor & Industry, *Women's Economic Security Act FAQs*, available at *https://www.dli.mn.gov/business/employment-practices/womens-economic-security-act-faqs* (last visited Aug. 26, 2019) (DLI Add. 4-9).

II. STATE LAW NEITHER PREEMPTS NOR CONFLICTS WITH MINNEAPOLIS' SICK AND SAFETY LEAVE ORDINANCE.

It is the Commissioner's position that state law does not occupy the field of sick and safety leave, and that state law leaves ample room for supplemental municipal regulation that protects workers. Minneapolis' sick and safety leave ordinance does not conflict with state law but instead complements state laws meant to protect Minnesota workers.

[4] *See also* App. Add. 84.

A. State Law Does Not Occupy The Field.

Field preemption occurs when state law occupies the field of a particular subject matter and leaves no room for supplemental municipal legislation. *Jennissen v. City of Bloomington*, 913 N.W.2d 456, 459-60 (Minn. 2018). A reviewing court asks four questions in deciding if the Minnesota Legislature has so comprehensively addressed the subject matter of a regulation such that state law occupies the field:

> (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?

Mangold Midwest Co. v. Village of Richfield, 143 N.W.2d 813, 820 (Minn. 1966).

The court of appeals determined that the subject matter regulated is private employer-provided sick and safety leave. *Minn. Chamber of Commerce v. City of Minneapolis*, 928 N.W.2d 757, 764 (Minn. Ct. App. 2019). The Commissioner notes that this determination is reasonable because the ordinance regulates sick and safety leave, and the sick and safety leave statute likewise regulates sick and safety leave.

The second and third questions require careful consideration of state law. *See Jennissen*, 913 N.W.2d at 460-62. Minnesota's existing sick and safety leave law is not so comprehensive to suggest that the Legislature intended for state law to occupy the field. Indeed, the state law has limitations in both requirements and scope. Section 181.9413 imposes requirements on covered employers who provide covered employees personal sick leave benefits. The imposed requirements are minimum standards for sick

and safety leave; the law does not prohibit an employer from providing greater leave benefits than what is required. Minn. Stat. §§ 181.9413(g), 181.943(b).

The scope of the sick and safety leave statute is narrower than the waste collection statute considered in *Jennissen*, 913 N.W.2d 456. The *Jennissen* Court noted that although the state law provided detailed procedures, the law did not require municipalities to organize collection and then provided minimum steps for municipalities to follow. *Id*. at 461-62. The sick and safety leave statute does not regulate when personal sick leave benefits must be provided, but instead provides minimum requirements if covered employers provide covered employees personal sick leave benefits. By regulating sick and safety leave in a limited fashion, the Legislature has not indicated that sick and safety leave is a matter solely of state concern. In fact, state legislative attempts to more comprehensively regulate sick and safety leave have been unsuccessful. *See, e.g.*, H.F. 11, 91st Leg. (Minn. 2019); Draft of H.F. 2208, 3d Engross., 91st Leg. (Minn. 2019).

Moreover, section 181.9413 is a remedial law and should be interpreted in favor of those meant to benefit from the law—Minnesota employees. *Cf. Hansen v. Robert Half Intern., Inc.*, 813 N.W.2d 906, 916 (Minn. 2012) ("The [Minnesota Parenting Leave Act] is a remedial law. Generally, 'statutes which are remedial in nature are entitled to a liberal construction, in favor of the remedy provided by law, or in favor of those entitled to the benefits of the statute.'") (internal footnote omitted) (quoting *Blankholm v. Fearing*, 22 N.W.2d 853, 855 (Minn. 1946)); *see also* Minn. Stat. § 645.17(5) (2018). The sick and safety leave statute, which provides protections to employees receiving

personal sick leave benefits, should not be construed to preempt remedial local regulation that also protects workers' rights.

Finally, sick and safety leave regulation is not of such a nature that a local ordinance would have unreasonably adverse effects upon Minnesota's general populace. Sick and safety leave helps workers by allowing them to take time away from work to care for themselves and their families. Paid leave helps promote workers' financial security. Even if an employee has not accrued many hours of leave, some available paid leave can still benefit workers by providing flexibility when a worker is met with the need to care for themselves and their families. Thus, such regulation has a benefit to those who work or those who wish to work in Minneapolis, or in a city that provides such protection. If Minneapolis or another Minnesota city has determined that mandated sick and safety leave, including paid leave, is necessary to protect workers and persons within the city, then that determination is consistent with state law meant to protect workers and workers' ability to balance the demands of work and life.

Answering the four *Mangold* field preemption questions shows that the Minnesota Legislature has not so comprehensively addressed sick and safety leave such that state law occupies the field.

B. The City Sick And Safe Time Ordinance Does Not Conflict With State Law.

Conflict preemption applies if an ordinance and statute are irreconcilable with each other, if the ordinance permits what the statute forbids, or if an ordinance forbids what the statute expressly permits. *Mangold*, 143 N.W.2d at 816-17. But generally "no

conflict exists where the ordinance, though different, is merely additional and complementary to or in aid and furtherance of the statute." *Id*. at 817.

1. The Ordinance Is Not Irreconcilable With Section 181.9413.

The *Mangold* Court addressed the second conflict preemption principle, and stated that the state statute and ordinance were not irreconcilable. The Court reasoned, "[t]his provision of the ordinance does not permit, authorize, or encourage violation of the statute." 143 N.W.2d at 819. In *Bicking v. City of Minneapolis*, the Court considered a proposed charter amendment and determined in part that the Court could not "reconcile" provisions of the proposed amendment with the City's obligations under state law. *See* 891 N.W.2d 304, 315 (Minn. 2017). If this Court considers federal-to-state conflict preemption analysis to assist in this analysis, then that analysis involves considering if a party cannot simultaneously comply with both laws and if the state law is an obstacle to achieving the federal law's purpose. *Housing & Redev. Authority of Duluth v. Lee*, 852 N.W.2d 683, 687-88 (Minn. 2014); *Sanchez v. Dahlke Trailer Sales, Inc.*, 897 N.W.2d 267, 276 (Minn. 2017). These considerations are in line with the conflict discussion in *Mangold* and *Bicking*.

Minneapolis' sick and safe time ordinance is not irreconcilable with state law. An employer can comply with both the ordinance and section 181.9413 at the same time. Section 181.9413 requires a covered employer who provides sick leave to covered employees to allow employees to use that sick leave for the illnesses and injuries of qualifying family members, and to allow employees to use that sick leave for safety leave for the employee or to assist a qualifying family member. The ordinance requires an

employer to provide sick and safety leave to an employee so the employee can care for herself or for a qualifying family member, and that the leave be paid if an employer has more than five employees. MCO § 40.220(b). The sick and safe leave ordinance does not permit, authorize, or encourage a violation of section 181.9413. As such, the ordinance is not irreconcilable with state statute.

2. The Ordinance Does Not Prohibit What Section 181.9413 Expressly Permits.

The sick and safe leave ordinance does not forbid what a state statute expressly permits. Indeed, a statute's silence does not amount to *expressly* permitting anything.

One of the cases *Mangold* cites, *Power v. Nordstrom*, 184 N.W. 967 (Minn. 1921), illustrates this conflict preemption principle. A city enacted an ordinance concerning licensing businesses that exhibit motion pictures, among other activities, and provided that motion picture exhibitions could not occur on Sundays. *See id*. at 968. The Court considered whether the ordinance conflicted with state law. *Id*. at 969. The opinion indicates that a state statute prohibited certain activities on Sunday, but did not address or prohibit indoor exhibitions of motion pictures. *Id*. The Court noted that by failing to prohibit such exhibitions, the Legislature had impliedly allowed them on Sundays. *Id*. Nevertheless, the Court explained:

> There can be no conflict between a statute and an ordinance where there is no statute covering the subject-matter of the ordinance. Such is the case here. The statute is silent upon the subject of the exhibition of motion pictures on Sundays. It does not prohibit their exhibition. Neither does it expressly permit it as it does the playing of baseball on Sunday between certain hours. By refraining from legislating on the subject and by authorizing villages not only to regulate the business, but to refuse to grant licenses and so prevent such exhibitions, the Legislature has treated the

> whole matter as one properly within the domain of the police power of villages.

Id. The *Mangold* Court cited *Nordstrom*, explaining that "part of the holding of that case was that an ordinance requiring the closing of movie theatres on Sunday was not inconsistent with the state Sunday closing statute since the latter, while not specifically forbidding threatres [sic] to open, did not expressly permit them to either." *Mangold*, 143 N.W.2d at 816-17. Consistent with this principle, a statute's silence does not amount to express permission.

Similar to how the statute in *Nordstrom* did not expressly permit theaters to open on Sunday, although section 181.9413 does not require personal sick leave benefits, the statute does not contain language that explicitly confers a right to a Minnesota employer not to provide leave. Instead, the statute expressly gives employees the ability to use personal sick leave benefits for specific purposes. And the statute "does not prevent" an employer from providing more generous leave than is required. Minn. Stat. § 181.9413(g). As the *Nordstrom* and *Mangold* decisions explained, impliedly or effectively allowing something through silence is different than express permission. The word "expressly" should not be ignored in analyzing this conflict preemption factor. Giving meaning to the phrase "expressly" in deciding what a statute expressly permits does not equate conflict preemption with express preemption.

One case that illustrates where a statute expressly permitted activity is *Lewis ex rel. Quinn v. Ford Motor Co.*, 282 N.W.2d 874 (Minn. 1979). In *Lewis*, the Court considered whether a defense available under the Minnesota Human Rights Act was

available in a proceeding involving a city's antidiscrimination ordinance. *Id.* at 876-77. According to the opinion, the Act expressly provided for the serious threat defense based on a serious threat to the health or safety of a person with a disability or others, whereas the ordinance allowed for a defense that a disability posed a serious threat to the safety of others only. *Id*. at 876. The Court determined the statute should control, reasoning that the Act "clearly and expressly" granted an employer an affirmative defense. *Id*. at 877.

The Minneapolis ordinance adds requirements that state law does not, but these additional requirements do not amount to a conflict. Again, turning to *Mangold* assists this analysis. The *Mangold* Court cited *State v. Clarke Plumbing & Heating, Inc.*, 56 N.W.2d 667 (Minn. 1952), explaining that the Court had determined an ordinance was valid "despite the existence of a similar statute that did not have as broad a coverage as the ordinance, saying that the city could well have determined that greater restriction was necessary in a community of its size." *Id*. at 817. Section 181.9413 addresses sick and safety leave, but it does not have as broad a coverage as Minneapolis' ordinance, nor is it as protective or generous towards workers. A sick and safety leave ordinance that provides greater protection to workers and that creates requirements that neither violate nor are incompatible with state law, does not conflict with state law.

III. RECORDKEEPING REQUIREMENTS SERVE IMPORTANT PUBLIC POLICY.

The Commissioner will not repeat arguments on extraterritoriality, but agrees that the court of appeals reached the correct result. If this Court considers alleged recordkeeping burdens, the Commissioner notes that recordkeeping requirements are

common, beneficial, and important to protect workers and employers. Labor and employment laws and regulations regularly contain recordkeeping requirements.

Minnesota recently strengthened its recordkeeping requirements. Pursuant to the new wage theft law, at the start of employment, an employer[5] must provide a written notice to an employee that includes the employee's "rate or rates of pay and basis thereof" and "paid vacation, sick time, or other paid time-off accruals and terms of use." 2019 1st Special Sess. Minn. Laws ch. 7, Art. 3, § 11 (amending Minn. Stat. § 181.032). DLI has provided a sample template notice on its website. *See* Minn. Dep't of Labor & Industry, *Employee notice*, available at *https://www.dli.mn.gov/sites/default/files/pdf /employee_notice_form.pdf* (last visited Aug. 26, 2019) (DLI Add. 1-2). An employer is also required to provide a written notification to employees prior to the effective date of any changes to the terms identified in the initial notice, including the accruals and terms of use of sick leave. 2019 1st Special Sess. Minn. Laws ch. 7, Art. 3, § 11. An employer must provide employees with earning statements, which must identify an employee's rate or rates of pay, and the total number of hours the employee worked (unless exempt from chapter 177). Minn. Stat. § 181.032; 2019 1st Special Sess. Minn. Laws ch. 7, Art. 3, § 11.

In addition, employers subject to Minnesota Statutes sections 177.21 to 177.44 must keep records of each employee's rate of pay and the hours worked each day and

[5] For the purposes of section 181.032, an employer is "any person having one or more employees in Minnesota and includes the state and any political subdivision of the state." Minn. Stat. § 181.171 (2018).

workweek. Minn. Stat. § 177.30 (2018); *see also* Minn. R. 5200.0100 (2017). Under the wage theft law, those employers also must keep a list of personnel policies provided to employees and the written notice given to employees at the start of employment. 2019 1st Special Sess. Minn. Laws ch. 7, Art. 3, § 5 (amending Minn. Stat. § 177.30).

A variety of other state statutes and regulations administered and enforced by DLI contain recordkeeping or posting requirements. *See, e.g.*, Minn. Stat. §§ 181.88 (recordkeeping for migrant workers), 182.658 (Commissioner to issue rules about OSHA posting), 182.663 (employer to keep records as Commissioner prescribes in rules for OSHA enforcement) (2018); Minn. R. 5210.0420 (OSHA posting), 5205.0100, subp. 1a (adopting federal rules on injury and illness reporting and recording) (2017).

These laws demonstrate that many employers already must maintain records and provide information about employees' rights. Ensuring that employers create and maintain accurate employment records is an important priority of the State, for good reason. Such records are necessary to protect the interests of workers. Recordkeeping is important so an employee knows the terms of her employment and what her employer's policies are. It is also reasonable that an employee know an employer's leave policies and what leave is available. A failure to keep accurate records can also harm a workers' ability to obtain relief from an employer who has violated the law. *See Milner v. Farmers Ins. Exchange*, 748 N.W.2d 608, 619 (Minn. 2008) ("The failure of an employer to maintain records is an obstacle for employees like the plaintiffs here trying to pursue claims for unpaid overtime compensation. When employers do not maintain the required

records, it becomes difficult for employees to meet their burden of proof with respect to compensatory damages.").

In addition, it is in the interest of employers to maintain accurate and detailed records. Such records can allow an employer to protect its interests by, for example, making clear the employee's terms and conditions of employment in the event of a dispute. It is thus a good business practice that benefits both employer and employee, made easier with today's technology.

Accordingly, although the court of appeals correctly decided the extraterritoriality issue, to the extent the Court considers any arguments about alleged burdens, recordkeeping is often required, serves a public good, and benefits employer and employee alike.

CONCLUSION

For the reasons discussed above, the Court should affirm the decision of the court of appeals.

Dated: September 3, 2019

Respectfully submitted,

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STATE OF MINNESOTA BY ITS
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CERTIFICATE OF COMPLIANCE
WITH MINN. R. CIV. APP. P. 132.01, SUBD. 3

The undersigned certifies that the Brief submitted herein contains 4,287 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2010, the word processing system used to prepare this Brief.

/s/ Rachel Bell-Munger
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