

2011

Defending Paid Sick Leave in New York City

Rebeccah Golubock Watson

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

Recommended Citation

Rebeccah G. Watson, *Defending Paid Sick Leave in New York City*, 19 J. L. & Pol'y (2011).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol19/iss2/10>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

DEFENDING PAID SICK LEAVE IN NEW YORK CITY

*Rebecca Golubock Watson**

INTRODUCTION

Maximino Santos, a chef at a New York City deli, developed colds easily.¹ But he often went to work sick for fear of losing his job.² In order to protect the food he was preparing from his coughs, he bought face masks with his own money.³ Many employees like Mr. Santos also do not take time off because they cannot afford it.⁴ For Mr. Santos, and many other employees, serious consequences follow: Mr. Santos developed pneumonia, and others are fired for missing work.⁵

No law required Mr. Santos' employer to allow him to take time off from work when he or a family member was sick. Like

* J.D., Brooklyn Law School 2012, B.A., Harvard University, 2004. I would like to thank Paul Sonn of the National Employment Law Project and Sherry Liewant of A Better Balance for their comments on drafts and their commitment to this work. I owe a debt of gratitude to Priti Trivedi, Bill Spierer, and the entire staff of the *Journal of Law and Policy* for their cheerful and tireless editorial assistance. Finally, deepest thanks to my family, especially to my mother, Carol Golubock, a fearless advocate for workers' rights, and my father, Arthur Watson, her partner in crime.

¹ *Transcript of the Minutes of the Comm. on Civil Serv. and Labor of N.Y.C. Council 22-24* (May 11, 2010) (testimony of Maximino Santos).

² *Id.*

³ *Id.*

⁴ JUDI CASEY & KAREN CORDAY, SLOAN WORK AND FAMILY RESEARCH NETWORK, PAID SICK LEAVE: AN INTERVIEW WITH SHERRY LEIWANT (May 2008), http://wfnetwork.bc.edu/The_Network_News/47/experts.htm.

⁵ *Transcript of the Minutes of the Comm. on Civil Serv. and Labor of N.Y.C. Council 22-24* (May 11, 2010) (testimony of Maximino Santos).

42% of all U.S. private sector employees,⁶ and nearly half of New Yorkers,⁷ Mr. Santos has no right to take sick leave. However, San Francisco,⁸ Washington, D.C.⁹ and Milwaukee¹⁰ have passed local laws that require all businesses within their jurisdiction to provide some paid sick days for their workers. Inspired by these measures, and concerned about the public health implications of an estimated 1.3 million workers in New York City lacking even a single day of paid sick time,¹¹ Council member Gale Brewer introduced the Paid Sick Time Act in August, 2009 with thirty-six co-sponsors in a fifty-one-member City Council.¹² Despite the bill's veto-proof majority, Speaker Christine Quinn decided not to bring it to a vote, citing concerns about the bill's effect on small businesses.¹³ Supporters of the bill have vowed to continue to push for its

⁶ INST. FOR WOMEN'S POLICY RESEARCH, FACT SHEET: 44 MILLION U.S. WORKERS LACKED PAID SICK DAYS IN 2010 (Jan. 2011), *available at* http://www.iwpr.org/publications/pubs/44-million-u.s.-workers-lacked-paid-sick-days-in-2010-77-percent-of-food-service-workers-lacked-access/at_download/file.

⁷ JEREMY REISS, ET AL., CMTY. SERV. SOC'Y OF N.Y. ET AL., SICK IN THE CITY: WHAT THE LACK OF PAID LEAVE MEANS FOR WORKING NEW YORKERS 4 (Oct. 2009), *available at* <http://www.cssny.org/userimages/downloads/Sick%20in%20the%20City%20report%20October%202009.pdf>.

⁸ Sick Leave Ordinance, S.F., CAL., ADMIN. CODE § 12W (2010) *available at* <http://library.municode.com/HTML/14131/level1/CH12WSILE.html>.

⁹ Accrued Sick and Safe Leave Act, D.C. CODE §§ 32-131.01–32-131.17 (2010).

¹⁰ Paid Sick Leave Ordinance, MILWAUKEE, WIS. CODE OF ORDINANCES § 112.

¹¹ REISS ET AL., *supra* note 7, at 4.

¹² The bill was re-introduced in March 2010 when the next session of the Council convened. Paid Sick Time Act, N.Y.C. Council Int. No. 0097-2010 (introduced Mar. 25, 2010), *available at* <http://legistar.council.nyc.gov/Legislation.aspx> (enter "Int 0097-2010" into "Search" box; select "All Years"; then select "Search Legislation.").

¹³ Patrick McGeehan, *Council Speaker Shelves a Sick-Leave Bill*, N.Y. TIMES, Oct. 15, 2010, at A26; Daniel Massey, *Quinn Opposes Mandatory Paid Sick Days*, CRAIN'S NEW YORK, Oct. 14, 2010, <http://www.crainsnewyork.com/article/20101014/SMALLBIZ/101019926#>; Council Speaker Christine Quinn, Prepared Remarks on Proposed Paid Sick Leave Legislation to the N.Y.C. Council (Oct. 14, 2010), *available at* <http://council.nyc.gov/html/pr/speeches.shtml>.

passage.¹⁴

The Paid Sick Time Act, along with its D.C., San Francisco, and Milwaukee counterparts, is illustrative of a broader phenomenon: localities crafting innovative legislation pursuant to their home rule power.¹⁵ Many cities and municipalities have relied on their home rule power—authority delegated to cities and municipalities to pass substantive laws affecting those within their borders¹⁶—when enacting a wide range of legislation, from alternative voting systems,¹⁷ campaign finance reform,¹⁸ minimum wage floors,¹⁹ and gay rights legislation.²⁰ This trend has prompted scholars to liken localities to “laboratories of democracy,” a phrase Justice Brandeis used to refer to the states.²¹ Often these local enactments seek to regulate businesses by imposing additional costs or new guidelines. The result is that businesses are likely to challenge local laws on federal and state law preemption

¹⁴ Celeste Katz, *Councilwoman Gale Brewer: NYC Paid Sick Leave Bill “Isn’t Dead” Yet*, DAILY POLITICS (Oct. 14, 2010, 12:45 PM), <http://www.nydailynews.com/blogs/dailypolitics/2010/10/councilwoman-gale-brewer-nyc-p.html>.

¹⁵ See Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 1–5 (2006); Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114–1123 (2007); Darin M. Dalmat, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 COLUM. J.L. & SOC. PROBS. 93, 93 (2005).

¹⁶ See Diller, *supra* note 15, at 1114.

¹⁷ See Briffault, *supra* note 15, at 7–9. For example, San Francisco recently adopted instant runoff voting, which allows voters to rank multiple candidates for the same position. *Id.* at 7–8.

¹⁸ *Id.* at 9–15.

¹⁹ See Dalmat, *supra* note 15. By 2002, over eighty cities and municipalities had enacted living wage ordinances. Margaret Levi, David J. Olson & Erich Steinman, *Living-Wage Campaigns and Laws*, 6 WORKINGUSA Dec. 2002, at 111, 119.

²⁰ See generally Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992) (analyzing local domestic partnership laws); Richard C. Schragger, *Cities As Constitutional Actors: The Case of Same-Sex Marriage*, 21 J. L. & POL. 147 (2005) (examining the role that local governments play in the same-sex marriage debate).

²¹ Briffault, *supra* note 15, at 4; Diller, *supra* note 15, at 1114.

grounds.²² As one scholar has commented, “[t]he examples are legion, but the story is familiar: when a city adopts a new policy that differs from state law and may harm some segment of the business community, a preemption challenge is almost certain to follow.”²³

In anticipation of such a challenge, this Note addresses whether the New York City Council has the authority to pass the Paid Sick Time Act, pursuant to the New York Municipal Home Rule Law, and whether state and federal laws governing employee benefits would preempt this local proposal. Part I of this Note establishes the need for paid sick leave by exploring the gaps left by current federal and state law addressing employment leave. Part II discusses the parameters of New York home rule doctrine, and lays out the principles of state law preemption of local law, arguing specifically that the Paid Sick Time Act does not conflict with the New York Minimum Wage Act. Part III analyzes federal preemption doctrine and asserts that neither the Family and Medical Leave Act (FMLA) nor the Employee Retirement Income Security Act (ERISA) preempts the Paid Sick Time Act.

I. NO PROTECTION FOR SICK WORKERS

A. *The Need for Paid Sick Leave*

No federal law guarantees even a minimum number of paid sick days for U.S. workers to use for ordinary illness for themselves or their children.²⁴ Advocates for paid sick leave argue that workers should have a fundamental right to take time off to take their children to the doctor or care for short-term, commonplace illnesses.²⁵ It is essential that this leave be protected by law, they say, to ensure that employees will not be fired or penalized for taking time off to see the doctor or care for their sick

²² Diller, *supra* note 15, at 1114.

²³ *Id.* at 1115.

²⁴ A BETTER BALANCE, FACT SHEET: MINIMUM PAID SICK LEAVE – THE TIME IS NOW 1 (August 2007), available at http://www.abetterbalance.org/web/images/stories/Documents/sickdays/factsheet/Factsheet_SickLeave.pdf.

²⁵ 153 CONG. REC. S3347 (2007) (statement of Sen. Kerry).

children.²⁶ Furthermore, advocates argue that paid sick leave is necessary from a public health standpoint because employees like Mr. Santos need time off to recuperate from illnesses that, if not treated preventatively or early on, would only recur and prevent the employee from working or affect others in the workplace.²⁷ Moreover, sick leave is not only necessary for the health of the individual employee, but for her “co-workers, customers, classmates, and in turn, their families.”²⁸

Statistics reflect the dire situation many workers face when it comes to paid sick leave. Only about half of private employees are provided sick leave by their employer, and such leave is usually in the form of accrued time off that employees use for their own non-work-related illness.²⁹ Paid sick leave is out of reach for over one-third of women in workplaces of fifteen employees or more.³⁰ Access to paid leave divides along class lines as well. Not surprisingly, paid sick days are often not available to low-wage workers.³¹ Of the top quartile of American workers in terms of wages, 81% have paid leave, when only a third of the lowest quartile of workers do.³² This deep discrepancy may be one of the reasons why there is now a growing urgency for paid leave. Many Americans may take their paid leave for granted, and therefore fail to appreciate the toll an unpaid day of work could take on a

²⁶ JUDI CASEY & KAREN CORDAY, SLOAN WORK AND FAMILY RESEARCH NETWORK, PAID SICK LEAVE: AN INTERVIEW WITH SHERRY LEIWANT (May 2008), http://wfnetwork.bc.edu/The_Network_News/47/experts.htm.

²⁷ John Petro, *Sweating the Swine Flu? Urge the Council to Pass This Bill*, NY DAILY NEWS, Sept. 4, 2009, http://www.nydailynews.com/opinions/2009/09/04/2009-09-04_sweating_the_swine_flu_urge_the_council_to_pass_this_bill.html.

²⁸ REIS ET AL., *supra* note 7, at 16.

²⁹ Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 7 (2005).

³⁰ *Id.* at 6.

³¹ STAFF OF THE JOINT ECON. COMM., 111TH CONG., EXPANDING ACCESS TO PAID SICK LEAVE: THE IMPACT OF THE HEALTHY FAMILIES ACT ON AMERICA'S WORKERS 5 (Mar. 2010), *available at* <http://jec.senate.gov/public/index.cfm?p=Reports1> (choose March 2010, Report on Benefits of Paid Sick Leave).

³² *Id.*

moderate or low-wage worker. In 2000, three out of four workers who reported that they needed leave did not take it because they could not afford to lose wages.³³ New studies support advocates' contention that paid sick leave promotes public health. A new report by the Restaurant Opportunities Center found that nearly 90 percent of all restaurant workers in New York City report having no paid sick days, and that over 63 percent report having cooked or served food while sick.³⁴

Little progress has been made, both federally and at the state level, to address the need for paid sick days. Six states—Hawaii,³⁵ Maine,³⁶ Minnesota,³⁷ Oregon,³⁸ Washington,³⁹ and Wisconsin⁴⁰—allow workers who already have paid sick days for personal illness to use them to care for certain family members as well. At the federal level, Representative Rosa DeLauro and Senator Ted Kennedy introduced the Healthy Families Act⁴¹ in 2009, which would require employers to provide seven paid sick days to employees who work more than thirty hours a week.⁴² The bill died in committee in the 111th Session of Congress, and has not yet been introduced in the 112th Session.⁴³

³³ Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 45 (2007).

³⁴ RESTAURANT OPPORTUNITIES CENTER, *SERVING WHILE SICK: HIGH RISKS & LOWS BENEFITS FOR THE NATION'S RESTAURANT WORKFORCE, AND THEIR IMPACT ON THE CONSUMER* ii (Sept. 30, 2010), *available at* <http://www.rocunited.org/news/20100927-serving-while-sick-report-reveals-need-paid-sick-days-health-insurance-restaurant-indu>.

³⁵ HAW. REV. STAT. §§ 398-1-398-29 (2010).

³⁶ ME. REV. STAT. tit. 26, § 636 (2010).

³⁷ MINN. STAT. § 181.9413 (2010).

³⁸ OR. REV. STAT. §§ 659A.150-186 (2010).

³⁹ WASH. REV. CODE § 49.12.270 (2010).

⁴⁰ WIS. STAT. § 103.10 (2010).

⁴¹ Healthy Families Act, H.R. 2460, 111th Cong. (2009); S. 1152, 111th Cong. (2009).

⁴² S.1152 § 5(a)(1). The bill allows employees to take fifty-six hours of leave, which amounts to seven eight-hour workdays. *Id.*

⁴³ Search Bill Summary & Status, THOMAS, <http://thomas.loc.gov/home/LegislativeData.php> (select "111th Congress," type "Healthy Families Act" into the search form, click "search" and then choose "Healthy Families Act" from

B. Family Leave: A Different Animal

The only law that comes close to addressing workers' need for sick leave is the FMLA.⁴⁴ But the FMLA only covers serious illnesses or childbirth, is available only to full-time workers, and, perhaps most importantly, is unpaid.⁴⁵ Even those Americans who are eligible for the FMLA are not protected by law for taking time off for short-term illnesses. In addition, they are not paid for time taken.

The FMLA requires employers with fifty or more employees to grant up to twelve weeks of job-protected unpaid leave to employees in the event of the birth or adoption of a child or a serious health condition affecting the employee or the employee's child, spouse, or parent.⁴⁶ To be eligible for the leave, employees must have been employed for at least twelve months by the employer, with at least 1,250 hours of service for that employer over the past twelve months.⁴⁷

The FMLA has problems of its own. While beneficial to some, it fails to adequately cover broad categories of workers; the benefits extend to only half of the U.S. workforce.⁴⁸ The FMLA disproportionately benefits middle- and upper-income workers who can afford to take unpaid leave.⁴⁹ More than half of all low-wage workers are excluded from the FMLA, as they are employed by small businesses. In addition, low-wage workers are less likely to satisfy the FMLA's yearlong employment and hour requirements, as more than half of them are part-time and spend less than a year on the job.⁵⁰ Finally, part-time workers are often denied benefits under the FMLA because they have yet to work the requisite 1,250 hours.⁵¹ This in turn disproportionately hurts low-

the list of options).

⁴⁴ Family and Medical Leave Act, 29 U.S.C.A. §§ 2601–2619 (West 2010).

⁴⁵ §§ 2611–2612.

⁴⁶ *Id.*

⁴⁷ § 2611(2)(A).

⁴⁸ Lester, *supra* note 29, at 2.

⁴⁹ O'Leary, *supra* note 33, at 39.

⁵⁰ *Id.* at 44.

⁵¹ *Id.*

wage women, since women comprise two thirds of the part-time workforce.⁵² Many family leave advocates anticipated this result, predicting that the FMLA would be “a shadow benefit” for many workers as long as the leave was unpaid.⁵³

But even if the FMLA were strengthened to include part-time employees, or those who have been with the employer for less than a year, the problem remains that it is limited to long-term leave for childbirth or serious illness, excluding the many common, short-term sicknesses that plague American workers and their families and it does not require paid leave.

C. New York City's Paid Sick Time Act

The Paid Sick Time Act would allow employees to take paid sick leave for themselves and to care for family members.⁵⁴ It is designed to provide paid sick leave for workers without overly burdening employers. The Paid Sick Time Act would require employers to allow employees to accrue sick time based on hours worked.⁵⁵ For every thirty hours worked, the employee would gain one hour of paid sick leave.⁵⁶ Although the employee would begin accruing sick leave once her employment begins, she could not use her accrued time until she has worked for ninety days.⁵⁷ The bill would impose a cap on the amount of paid sick leave allowed: for

⁵² *Id.*

⁵³ Emily A. Hayes, *Bridging The Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act Of 1993*, 42 WM. & MARY L. REV. 1507, 1523 (2001). It is also worthwhile to note that the FMLA's unpaid leave makes the United States the least generous industrialized nation when it comes to family leave. Lester, *supra* note 29, at 3. In addition, the U.S. is the only country among twenty-two countries ranked highly in terms of economic and human development that does not guarantee that workers receive paid sick days or paid sick leave. JODY HEYMAN ET. AL, CTR. FOR ECON. & POLICY RESEARCH, CONTAGION NATION: A COMPARISON OF PAID SICK DAY POLICIES IN 22 COUNTRIES 1 (May 2009), available at <http://www.cepr.net/documents/publications/paid-sick-days-2009-05.pdf>.

⁵⁴ Paid Sick Time Act, N.Y.C. Council Int. No. 0097-2010 (2010).

⁵⁵ *Id.* § 2(c).

⁵⁶ *Id.* § 2(c)(2).

⁵⁷ *Id.* § 2(c)(7).

businesses with fewer than twenty employees, workers would be allowed forty hours of paid sick leave; for larger businesses, workers could take off up to seventy-two hours.⁵⁸ An employee could use the leave for her own mental or physical illness, diagnosis, or preventative care, and she could take leave to care for the illness of a spouse, child, parent, grandparent, or domestic partner.⁵⁹ The Paid Sick Time Act would also allow employees to take paid leave in the event of a business or school emergency.⁶⁰ An employer found in violation of the law would be liable for a minimum civil penalty of one thousand dollars for each violation.⁶¹

The Paid Sick Time Act seeks to protect workers from losing their jobs when forced to take off work to care for their own short-term illnesses, or to care for a sick family member. It also seeks to promote public health by enabling service workers like Maximino Santos to take time off to stave off a serious illness, and to prevent spreading his illness to others.

II. HOME RULE AND STATE LAW PREEMPTION

A. *The Power of Home Rule: Protecting Well-Being*

Pursuant to the Constitution of the State of New York (“New York Constitution”) and the New York Municipal Home Rule Law, local governments possess broad powers to enact laws relating to the welfare of citizens within their municipality.⁶² The New York Constitution provides that “every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law.”⁶³ The scope of this legislative power includes laws relating to government, protection, order, conduct, and the safety, health and

⁵⁸ *Id.* § 2(c)(8).

⁵⁹ *Id.* § 2(d)(1)(i-ii). The bill defines “family member” broadly to include parents-in-law, domestic partners, and the parents of a domestic partner. *Id.* § 2(b)(7).

⁶⁰ *Id.* § 2(d)(iii).

⁶¹ *Id.* § 2(1)(1).

⁶² *See* N.Y. CONST. art. IX, § 2(c); N.Y. MUN. HOME RULE § 10(1)(a)(12).

⁶³ N.Y. CONST. art. IX, § 2(c)(i-ii).

well-being of New Yorkers.⁶⁴ New York City's police powers are further established in the New York City Charter, which provides, in pertinent part, that the City Council "shall have power to adopt local laws which it deems appropriate, which are not inconsistent with the provisions of this charter or with the constitution or laws of the United States or this state."⁶⁵ These laws must be, *inter alia*, "for the preservation of the public health, comfort, peace and prosperity of the city and its inhabitants."⁶⁶ However, the New York Constitution mandates that such laws must not conflict with the Constitution's own terms, or any state law related to "property, affairs, or government,"⁶⁷ and the Municipal Home Rule Law proscribes cities from adopting local laws inconsistent with the state constitution or any general state law.⁶⁸

New York City has enacted a broad range of legislation aimed at safeguarding the health, safety, and welfare of its residents. For example, New York City has recently required food establishments to post the calorie counts for their food⁶⁹ and provided that building owners, when first taking over a new building, must offer temporary employment to the predecessor employer's service employees.⁷⁰ New York courts have interpreted home rule power broadly to authorize many of these local enactments.⁷¹ However, the City has also lost its share of home rule battles. In 1962, a state preemption challenge invalidated the City Council's minimum wage ordinance,⁷² and in 2005, the Appellate Division found that

⁶⁴ *Id.* § 2(c)(10); N.Y. MUN. HOME RULE § 10(1)(a)(12).

⁶⁵ N.Y.C. CHARTER § 28(a).

⁶⁶ *Id.*

⁶⁷ N.Y. CONST. art. IX, § 2(c).

⁶⁸ N.Y. MUN. HOME RULE § 10(1)(ii).

⁶⁹ 24 R.C.N.Y. § 81.50 (2009).

⁷⁰ N.Y.C. ADMIN. CODE § 22-505 (2009).

⁷¹ *See, e.g.,* Metro. Funeral Dirs. Ass'n, Inc. v. City of New York, 702 N.Y.S.2d 526 (Sup. Ct. 1999) (funeral industry disclosure law); Slattery v. City of New York, 697 N.Y.S.2d 603 (N.Y. App. Div. 1999) (domestic partner law); City of Buffalo v. Nat'l Fuel Corp., 766 N.Y.S.2d 828 (Buffalo City Ct. 2003) (historic preservation law); Pete Drown, Inc. v. Town Bd. of Town of Ellenburg, 591 N.Y.S.2d 584 (N.Y. App. Div. 1992) (commercial incinerator prohibition).

⁷² Wholesale Laundry Bd. of Trade v. City of New York, 234 N.Y.S.2d 862 (N.Y. App. Div. 1962), *aff'd*, 189 N.E.2d 623 (N.Y. 1963).

Paid Sick Leave in New York

983

state law preempted the City Council's legislation requiring that City contracts only be awarded to businesses providing spousal benefits for same-sex partners.⁷³

B. Occupying the Field: New York State Preemption Doctrine

A measure enacted by a New York city or municipality is generally preempted by state law when it expressly conflicts with the state law, or where the State has established an intent to "preempt an entire field"⁷⁴ or to create "uniformity" in that field.⁷⁵ Field preemption is evidenced in legislative history, or from a statute's "comprehensive and detailed regulatory scheme in a particular area."⁷⁶ When a state court determines that a state provision occupies the field, it will generally invalidate a local measure that proscribes a practice which the state law "considers acceptable," even if the state law does not "expressly speak[]" to it, or it limits rights granted in state law.⁷⁷

In one of the seminal New York home rule cases concerning employment benefits, *Wholesale Laundry v. City of New York*, the New York Appellate Division invalidated a city law setting wage thresholds because the measure regulated a field fully occupied by a state scheme, and in doing so prohibited what the state law allowed.⁷⁸ The New York City Minimum Wage Act, enacted by the City Council in 1962, required all employers in New York City

⁷³ Council of N.Y.C. v. Bloomberg, 791 N.Y.S.2d 107 (N.Y. App. Div. 2005) ("[T]he City Council cannot achieve even laudable goals by making illegal what is specifically allowed by state law.") (quoting N.Y.C. Health & Hosp. Corp. v. Council of N.Y.C., 752 N.Y.S.2d 665, 665 (N.Y. App. Div. 2003)), *aff'd*, 846 N.E.2d 433 (N.Y. 2006).

⁷⁴ ILC Data Device Corp. v. Cnty. of Suffolk, 588 N.Y.S.2d 845, 849 (N.Y. App. Div. 1992), *appeal dismissed*, 613 N.E.2d 965 (N.Y. 1993); *see also* N.Y. State Club Ass'n v. City of New York, 505 N.E.2d 915, 917 (N.Y. 1987) ("[T]he City may not exercise its police power when the Legislature has restricted such an exercise by preempting the area of regulation.").

⁷⁵ *In re City of New York*, 863 N.Y.S.2d 564, 567 (N.Y. Sup. Ct. 2008).

⁷⁶ *Id.* at 566.

⁷⁷ *ILC Data Device Corp.*, 588 N.Y.S.2d at 850.

⁷⁸ *Wholesale Laundry Bd. of Trade v. City of New York*, 234 N.Y.S.2d 862 (N.Y. App. Div. 1962).

to pay a minimum wage of \$1.25, and not less than \$1.50 beginning one year from the date the law became effective.⁷⁹ At the time, the State's Minimum Wage Act set a minimum wage of \$1 per hour during a two-year time period, and then then provided for specific increases in subsequent two-year periods.⁸⁰ During each such period, the State Minimum Wage Act allowed for an increase in the wage only if another wage was established under the State Minimum Wage Act.⁸¹ Specifically, the Commissioner of the Department of Labor could investigate the need for higher wages in various occupations, and could then appoint a wage board to make recommendations as to whether a higher wage should be fixed by the Commissioner.⁸²

The local law's opponents had two main arguments: (1) New York State's Home Rule Law prevented the City from enacting such a measure, and (2) the local law was invalid because it was "inconsistent with State-wide legislation on the same subject."⁸³ The *Wholesale* court found that it did not need to address the home rule issue because the local law was inconsistent with the State's Labor Law.⁸⁴ Although the City argued that its law "extends but does not run counter to the State statute," the court found that the local law made impermissible what would be allowed under the state law.⁸⁵ Moreover, the court held that the state's minimum wage statute meant to occupy the entire field because it had an "elaborate machinery" in place for shaping wage thresholds.⁸⁶

New York courts have also vitiated a local law on preemption grounds when it imposed "prerequisite 'additional restrictions' on rights under State law, so as to inhibit the operation of the State's general laws."⁸⁷ In *Council of the City of New York v. Bloomberg*,

⁷⁹ *Id.* at 863.

⁸⁰ *Id.* at 864.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 863–64.

⁸⁴ *Id.* at 864.

⁸⁵ *See id.*

⁸⁶ *Id.* at 865.

⁸⁷ *Council of N.Y.C. v. Bloomberg*, 791 N.Y.S.2d 107, 109 (N.Y. App. Div. 2005)(quoting *Consol. Edison v. Town of Red Hook*, 456 N.E.2d 487, 491

the New York Appellate Division held that New York City's Equal Benefits Law, which prevented the City from contracting with vendors that did not provide spousal benefits to domestic partners, conflicted with General Municipal Law 103(1) and ERISA.⁸⁸ General Municipal Law 103(1) requires that the State obtain the best services at a competitive price.⁸⁹ Because the Equal Benefits Law "expressly excludes a class of potential bidders for a reason unrelated to the quality or price of the goods or services they offer," the court held that the state statute invalidated the local law.⁹⁰

Despite the *Wholesale* ruling, New York courts have been cautious to find field preemption when the state and local measures regulate a similar subject but with different approaches, and the state law does not evince the intent to occupy the field. In *People v. Cook*, the court considered a challenge to a New York City law that taxed cigarettes in proportion to the amount of tar and nicotine they contained.⁹¹ The defendant in *Cook* argued that the law was invalid because state law permitted businesses to sell cigarettes without a tax differential. The *Cook* court disagreed, finding that despite the state's existing general regulation of cigarettes, it had not "spoken through its own laws in relation to price differentials based on tar and nicotine content. The fact that the State also taxes cigarettes has no significant relation to the price-differential aspect of the city's enactment, and therefore cannot be said to create an inconsistency."⁹²

The court in *Cook* also did not accept defendant's contention that the City was preempted from regulating cigarettes on the basis of nicotine content because the State's regulation tacitly permitted such conduct. The court found that this interpretation of preemption doctrine was too loose, stating "[i]f this were the rule, the power of local governments to regulate would be illusory. Any

(N.Y. 1983)) *aff'd*, 846 N.E.2d 433 (N.Y. 2006).

⁸⁸ *Id.* at 109–10. See Part III, *infra*, for a longer discussion of ERISA preemption.

⁸⁹ *Bloomberg*, 791 N.Y.S.2d at 109.

⁹⁰ *Id.*

⁹¹ *People v. Cook*, 312 N.E.2d 452, 454 (N.Y. 1974).

⁹² *Id.* at 457.

time that the State law is silent on a subject, the likelihood is that a local law regulating that subject will prohibit something permitted elsewhere in the State.”⁹³ The court drew a distinction between the circumstances before it, in which the state law was silent on a subject, and other circumstances in which the state has “acted upon a subject, and in so acting has evidenced a desire that its regulations should pre-empt the possibility of varying local regulations,” as in *Wholesale Laundry*.⁹⁴ Under the latter circumstances, the State law preempts the local law. Thus, *Cook* illustrated a fairly cautious approach towards field preemption under circumstances where there is significant overlap between the two areas of regulation, yet the state has not acted to preempt the entire field.

The *Cook* court also established important precedent regarding New York City’s home rule authority to protect health, finding that the City is granted the authority to promote health by the New York Constitution, the Municipal Home Rule Law, and the New York City Charter.⁹⁵ If the City’s law is properly related to the power to promote health, the court held, there are only two exceptions to its legitimacy: (1) if the local law is inconsistent with constitutional law, or (2) if the Legislature prohibits it.⁹⁶ The *Cook* court relies on a test set forth in *Good Humor Corp. v. City of New York*, where the New York Court of Appeals vitiated an anti-peddler ordinance “because it was not passed for the purpose of advancing health or general welfare but rather, in the words of the city council, ‘to prevent unfair competition by itinerant peddlers with storekeepers who pay rent and various taxes.’”⁹⁷ The *Good Humor* test requires that the local law have a “substantial relation to a legitimate, authorized purpose” granted to the City.⁹⁸ The *Cook* court found that the City’s new tax structure for cigarettes had a “substantial relation” to health.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 455.

⁹⁶ *Id.*

⁹⁷ *Id.* at 456–57 (quoting *Good Humor Corp. v. City of New York*, 49 N.E.2d 153, 155 (N.Y. 1943)).

⁹⁸ *Id.* at 457.

Other Court of Appeals decisions adopt *Cook*'s narrow approach to field preemption. In *Myerson v. Lentini Bros. Moving and Storage Co.*, the court considered a city law protecting consumers from deceptive practices by moving companies despite a state transportation law that regulated moving company rates.⁹⁹ The court found that the state law, which required companies to obtain a permit and file and publish their rates, fulfilled a different purpose than the local law, which proscribed unethical business practices.¹⁰⁰ The state law was designed to “foster sound economic conditions in the industry” and to promote “reasonable charges...without unjust discriminations,” which was distinct from the local measure’s effort to curtail specific behavior.¹⁰¹ Furthermore, the court held, the state statute did not establish the intention to occupy the entire field of moving company regulation.¹⁰²

The Court of Appeals applied a similar approach to preemption in reviewing a more recent challenge to a city law regulating rental car agencies in New York City.¹⁰³ The local provision prohibited rental agencies from determining whether to rent to a customer, or to adjust rental rates, based on the customer’s residence. In *Hertz Corp. v. City of New York*, the court considered several state statutes, one of which established a comprehensive scheme regulating all motor vehicles in the state, including those owned by rental companies. Another provision specifically regulated the rental car industry, prohibiting discrimination based on age, race, gender, and credit card ownership, among other statuses.¹⁰⁴ Yet none of the provisions, the court held, addressed the specific issue of whether rental companies could deny service or alter rates based on an individual’s residence, and thus the state law did not preempt.¹⁰⁵ Moreover, the state measures were not “so broad in

⁹⁹ *Myerson v. Lentini Bros. Moving & Storage Co.*, 306 N.E.2d 804 (N.Y. 1973).

¹⁰⁰ *Id.* at 807.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Hertz Corp. v. City of New York*, 607 N.E.2d 784 (N.Y. 1992).

¹⁰⁴ *Id.* at 786.

¹⁰⁵ *Id.*

scope or so detailed” to preempt all local rental company regulation.¹⁰⁶

The *Wholesale*, *Bloomberg*, *Cook*, *Myerson*, and *Hertz* cases offer some (at times contradictory) principles that New York courts follow when determining whether state or federal laws preempt local laws. First, *Wholesale* stands for the proposition that a local law cannot prohibit what a state or federal statute explicitly permits when the state evinces the intention to preempt the entire field. Under *Bloomberg*, a local law cannot impose additional “prerequisites” on a state law that limit its scope. However, under *Cook*, a local law *can* proscribe something that a state law permits, provided that the State is silent, and therefore tacitly permissive, on that subject. The conflict arises when the State has “acted” on an issue and, in so doing, indicated that it seeks to occupy the field. In addition, *Cook* grants broad authority to cities to promote health pursuant to their home rule power. A court will most likely find field preemption if a state law establishes a comprehensive regulatory scheme over a specific area, as with the state minimum wage regime in *Wholesale*. But, under *Cook*, *Myerson*, and *Hertz*, a court will uphold the local law—even if it regulates in an area that is quite similar to that treated by the state statute—as long as the aspects of the regulation are different, and the state law does not establish an intent to preempt the field.

C. The Paid Sick Time Act and State Law Preemption

The Paid Sick Time Act represents an effort by the City Council to assert its home rule authority for the health and welfare of its citizens. At the threshold, it must be determined whether the Council has this authority. If it does, the second issue is whether the State Minimum Wage Law would preempt the bill if it were to become law.

A New York court would first ask whether New York’s Home Rule Law empowers the City to enact such legislation. Under *Cook*, a court would likely find that the City was acting pursuant to its police powers to promote health, and that the legislation has a

¹⁰⁶ *Id.*

Paid Sick Leave in New York

989

“substantial relation to a legitimate, authorized purpose.”¹⁰⁷ The legislative intent section of the Paid Sick Time Act asserts that the primary thrust of the Act is to “ensure a healthier and more productive work force in New York City” and to promote public health.¹⁰⁸ Thus, it seems clear that the City seeks to enact the Paid Sick Time Act “for the preservation of the public health, comfort, peace and prosperity of the city and its inhabitants.”¹⁰⁹

After establishing that the Paid Sick Time Act falls within the bounds of proper local legislation under New York’s home rule doctrine, the court would then ask whether the bill is preempted by state law. The court would first look for any evidence of a direct conflict between the Minimum Wage Act, or other state law, and the proposed legislation. An argument could be made that, under the Minimum Wage Act, the word “wages” includes other employee benefits, such as sick leave. The Minimum Wage Act does not explicitly define wages, but it does establish that they “include allowances . . . for gratuities and, when furnished by the employer to employees, for meals, lodging, apparel, and other such items, services and facilities.”¹¹⁰ The question, then, is whether a court could find that sick leave benefits could be included under “other items, services and facilities.” That is unlikely. There is no case law, nor is there employer practice, to suggest that courts in New York permit employers to view wages as anything other than compensation. The New York Minimum Wage Act does not prescribe floors for the amount of sick leave, or other benefits, as it does for wages, and employers are not permitted to compensate benefits with wages under the Minimum Wage Act.

There is one exception to this last rule. Pursuant to the New York State Labor Law, public contractors are required to pay “prevailing wages,” as set by the New York Department of Labor, and can credit benefits, or “supplements,” towards these wages.¹¹¹

¹⁰⁷ *People v. Cook*, 312 N.E.2d 452, 457 (N.Y. 1974).

¹⁰⁸ Paid Sick Time Act, N.Y.C. Council Int. No. 0097-2010 (2010).

¹⁰⁹ N.Y.C. CHARTER § 28(a).

¹¹⁰ N.Y. LAB. Law § 651(7) (McKinney 2010).

¹¹¹ LAB. § 220(3)(a) (requiring that workers in the construction industry receive a wage determined by the prevailing wage rate of that locality); *Id.* 220(3)(b) (requiring that supplements paid to the employee are determined by

“Supplements” are defined as “all remuneration for employment” which does not constitute wages.¹¹² This remuneration includes “health, welfare, [and] non-occupational disability,” among others.¹¹³ These prevailing wage provisions offer the only instance in New York where employers may supplant wages with benefits. If the New York State legislature had wanted to provide such an option to other employers, it could have done so explicitly in the State Minimum Wage Law, as it did under the prevailing wage provisions of the New York State Labor Law. Because the Legislature has expressly permitted employers to substitute benefits for wages in some instances, it is even less likely that a court would find that the Legislature meant to imply this exchange existed in the State Minimum Wage Law. This makes an express finding of preemption even less plausible.

If a New York court were to consider how a court of another state has dealt with an express preemption challenge to local paid sick legislation under state minimum wage law, it might look to a recent Wisconsin state court decision on the Milwaukee Paid Sick Leave Ordinance.¹¹⁴ Although three cities have passed paid sick leave legislation,¹¹⁵ only Milwaukee’s bill has been challenged in court. The Milwaukee Ordinance was passed by ballot initiative and then struck down by the trial court because of the wording of the ballot question.¹¹⁶ The Wisconsin Supreme Court remanded after a split decision, and the case is currently pending in the Court of Appeals. The Ordinance is similar to the Paid Sick Time Act. It requires all Milwaukee employers to grant employees paid sick leave that accrues by the number of hours worked.¹¹⁷ Employees may take the leave for their own health, or in order to care for a

the prevailing rate).

¹¹² *Id.* § 220(5)(b).

¹¹³ *Id.*

¹¹⁴ Paid Sick Leave Ordinance, MILWAUKEE, WIS. CODE OF ORDINANCES § 112 (2010).

¹¹⁵ *See supra* notes 8-10.

¹¹⁶ *Metro. Milwaukee Ass’n of Commerce v. City of Milwaukee*, No. 08CV018220, 2009 WL 2578536 (Wis. Cir. June 12, 2009), *vacated*, 787 N.W.2d 847 (Wis. 2010), *divided decision*, 789 N.W.2d 734 (Wis. 2010).

¹¹⁷ MILWAUKEE, WIS. CODE OF ORDINANCES § 112-3(2).

Paid Sick Leave in New York

991

family member.¹¹⁸ The court considered state statutes governing wages and employment benefits, including the Wisconsin FMLA and the Wisconsin Living Wage Act, and found that none preempted the Paid Sick Leave Ordinance.¹¹⁹

The Wisconsin Living Wage Act establishes minimum wage standards, defining “wage” as “any compensation for labor measured by time, piece or otherwise.”¹²⁰ As in New York, a state agency sets the wage floors pursuant to state law,¹²¹ but “it does not prescribe a minimum for benefits, such as sick leave.”¹²² The court found that sick leave and wages were “fundamentally different.”¹²³ Unlike for a wage,

an employer need not compensate its employee with paid sick leave if the employee does not qualify for its use. [C]ompensation under the L[iving] W[age] A[ct] is limited to a minimum wage amount and tips Therefore, other employment benefits, including the payment of sick leave, could not qualify as “compensation” under the state law.¹²⁴

Thus, the court found that the Living Wage Act did not preempt the Ordinance because it involved compensation for labor, and the Ordinance instead governed “a benefit that the employee must be eligible to receive.”¹²⁵ Although the Wisconsin court applied its own state labor law in its decision, the guiding principal behind the analysis would probably be the same in a New York state court.

Opponents of paid sick time legislation might counter that, under *Wholesale*, the local law cannot bar what state law permits—in this case, the right of employers to grant sick leave as they see

¹¹⁸ *Id.* § 112–5(1)(b).

¹¹⁹ *Metro. Milwaukee Ass’n of Commerce*, 2009 WL 2578536 at *15.

¹²⁰ WIS. STAT. § 104.01(8) (West 2010).

¹²¹ *See* N.Y. LAB. LAW § 652-659 (McKinney 2010) (setting forth the authority of the Labor Commissioner to establish a wage board and to raise the minimum wage in specific industries according to the wage board’s recommendations).

¹²² *Metro. Milwaukee Ass’n of Commerce*, 2009 WL 2578536 at *16.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

fit. In his testimony against the proposed paid sick time legislation, Jack Friedman, the Executive Director of the Queens Chamber of Commerce and a representative of the Five Boro Chamber Alliance, stated that the Alliance opposed “government deprivation of our ability to determine the appropriate benefit package for our employees.”¹²⁶ Although this appears to be framed as a policy argument, it could also be tied in to a legal argument supporting preemption. Perhaps opponents of the Paid Sick Time Act would argue that state law permits employers to regulate employee benefits within the confines of state and federal law, and therefore cities cannot interfere with the permissive stance established by the Legislature. This argument could also rely on *Bloomberg*, contending that the local law imposes “prerequisite “additional restrictions” on those state law rights, to the effect of “inhibiting the operation of the State’s general laws.”¹²⁷

However, it is not likely that this line of reasoning would succeed under *Cook*. The court in *Cook* found that the success of a preemption claim does not hinge on the state law’s silence on a subject. Instead, under *Cook*, the court must look to whether the state has sought to occupy the field on the subject.

This might lead to the court to ask whether the state had indicated that it wished to establish a uniform system of benefits provision, and thus occupy the field. The *Wholesale* court found that the State Minimum Wage Act evinced an intention to occupy the field of setting wages thresholds, and therefore the City Council’s attempt to raise wage levels for New York City was invalid.¹²⁸ In *Wholesale*, this field was limited to minimum wage thresholds. For the state law to preempt the Paid Sick Time Act, however, an argument would have to be made that the Act intended to preempt the entire field of employee benefits.

The New York Legislature’s purpose in enacting the State

¹²⁶ *Transcript of the Minutes of the Comm. on Civil Serv. and Labor of N.Y.C. Council* 66 (May 11, 2010) (testimony of Jack Friedman).

¹²⁷ *Council of N.Y.C. v. Bloomberg*, 791 N.Y.S.2d 107, 109 (N.Y. App. Div. 2005) (quoting *Consol. Edison Co. of N.Y. v. Town of Red Hook*, 456 N.E.2d 487, 491 (1983)).

¹²⁸ *Wholesale Laundry Bd. of Trade v. City of New York*, 234 N.Y.S.2d 862, 865 (N.Y. App. Div. 1962).

Minimum Wage Act was not nearly so broad: the Legislature intended to preserve the health of New Yorkers through the establishment and maintenance of certain wage floors. In its Statement of Public Policy, the Legislature expressed a concern for individuals employed in the State at wages insufficient to provide adequate maintenance for themselves and their families.¹²⁹ This employment, the Legislature found, “impairs the health, efficiency, and well-being of the persons so employed.”¹³⁰ As the Legislature concluded: “[I]t is the declared policy of the state of New York that such conditions be eliminated as rapidly as practicable To this end minimum wage standards shall be established and maintained.”¹³¹

The *Wholesale* court found that the state meant to occupy the field of minimum wage standards because it had established an “elaborate machinery” that would dictate the rise of the minimum wage.¹³² Identifying this elaborate machinery, the court pointed to provisions that created a wage board and empowered the Labor Commissioner to instigate a wage board process should she see a need for wages to increase in a particular industry. This machinery does not apply to the Paid Sick Time Act, as there is no indication that the wage board process was meant to address issues of employee benefits. Furthermore, no evidence of a “comprehensive and detailed regulatory scheme” exists in state law that is particular to the area of employee benefits.¹³³ Thus, a state preemption challenge to the Paid Sick Time Act is more akin to *Cook*, *Myerson*, or *Hertz* than *Wholesale* or *Cook*. In the former, the Court of Appeals generally held that the fact that the local and state measures at issue share some common ground is not dispositive. Unless the State has expressed a desire to occupy the field, the two laws can co-exist as long as they do not regulate the same aspect of the same subject.

Even if the Legislature did not intend to preempt the field of

¹²⁹ LAB. § 650.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Wholesale Laundry*, 234 N.Y.S.2d at 865.

¹³³ *N.Y. State Club Ass’n v. City of New York*, 505 N.E.2d 915, 917 (N.Y. 1987).

employee benefits, paid sick leave opponents might argue that the paid sick leave legislation would jeopardize the Legislature's desire for "uniformity in a given field."¹³⁴ Opponents may also argue that implementing a generous sick leave policy in New York City could hurt local businesses and confer an unfair advantage upon businesses outside the City, thereby incentivizing businesses to leave the City altogether. Although these are strong policy arguments for the opponents of the bill, these arguments are not grounded in the legal question of preemption. The State Legislature has not created a uniform statute to structure and regulate all employee benefit programs, and therefore it has not shown the requisite intent to create uniformity in this area.

III. FEDERAL PREEMPTION

Federal preemption cases test the boundaries of state sovereignty and therefore frequently come before the circuits and the Supreme Court. The Supremacy Clause of Article VI of the United States Constitution governs the federal preemption doctrine.¹³⁵ Under Article VI, federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."¹³⁶ State law conflicting with federal statute is "without effect."¹³⁷

State law is preempted when, *inter alia*, it seeks to regulate a field solely occupied by the federal government.¹³⁸ Congress may evince an intent for federal law to occupy the field by constructing a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where Congressional law "touches a field in which federal interest is so dominant that the federal system will

¹³⁴ *In re City of New York*, 863 N.Y.S.2d 564, 567 (N.Y. Sup. Ct. 2008).

¹³⁵ *Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 238 (3d Cir. 2009), *cert. granted*, 130 S. Ct. 1734 (U.S. Mar. 8, 2010) (No. 09-152).

¹³⁶ U.S. CONST. art. VI, cl. 2.

¹³⁷ *Williamson v. Mazda Motor of Am.*, 84 Cal. Rptr. 3d 545, 548 (Cal. Ct. App. 2008), *cert. granted in part*, 130 S. Ct. 3348 (U.S. May 24, 2010) (No. 08-1314).

¹³⁸ *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990).

be assumed to preclude enforcement of state laws on the same subject.”¹³⁹ Federal law also preempts when the state provision is in direct conflict with federal law.¹⁴⁰ This occurs when a party cannot comply with both state and federal law,¹⁴¹ or where the state law precludes the fulfillment of Congress’s goals.¹⁴²

A. Federal Laws and NYC Paid Sick Leave

A possibility remains that various federal laws preempt the Paid Sick Time Act, including the FMLA and ERISA. The FMLA contains an express provision allowing employees to take advantage of benefits more generous than the FMLA:

Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.¹⁴³

In dicta, the Supreme Court interpreted this clause to mean that Congress required a minimum of twelve weeks of unpaid leave and allows states the option to develop more generous leave plans.¹⁴⁴ The Southern District of New York has found that this provision establishes that

the Act will not curtail rights established by any state or local law. This [clause] is further proof that Congress did not wish for federal law—and therefore federal courts—to control the field in this area of litigation. Rather, Congress intended that the FMLA serve as a complement to state

¹³⁹ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

¹⁴⁰ *English*, 496 U.S. at 79.

¹⁴¹ *Id.*

¹⁴² *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁴³ Family and Medical Leave Act, 29 U.S.C.A. § 2651(b) (West 2010).

¹⁴⁴ *See Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 740 n.12 (2003).

The Court’s language, “thus leaving States free to provide their employees with more family-leave time,” suggests that the Court may have only been referring to state employees. *Id.* But even if this were true, the case still stands for the general proposition that states may supplement the FMLA without being preempted. *Id.*

law.¹⁴⁵

Along these lines, a Maryland District court found that “no part of the [FMLA] evinces an attempt by Congress to ‘occupy the field.’”¹⁴⁶

The Wisconsin circuit court heard state law preemption arguments involving the Milwaukee Paid Sick Leave Ordinance and the Wisconsin FMLA (WFMLA).¹⁴⁷ The WFMLA, like the Federal FMLA, allows an employee to take unpaid leave for serious health conditions and in order to care of family members.¹⁴⁸ Opponents of the Milwaukee Paid Sick Leave Ordinance argued that the WFMLA preempted the Ordinance for two reasons: (1) the leave allowed by the state law overlapped with the uses of paid sick leave, and (2) the WFMLA affirmatively does not require an employer to pay the employee for this leave.¹⁴⁹ The court however, found that the WFMLA, like the Federal FMLA, has an express provision providing that employees may substitute paid or unpaid leave for the family or medical leave governed by the Act, and that this provision “provides a carve-out for a paid sick leave system provided voluntarily or otherwise from an employer.”¹⁵⁰

Even if a New York court were to hold that the FMLA’s explicit provision allowing more generous leave does not bar a preemption argument, it would most likely still find that the Paid Sick Time Act does not conflict with the FMLA. The court would

¹⁴⁵ *Bellido-Sullivan v. Am. Int’l Grp.*, 123 F. Supp. 2d 161, 166 (S.D.N.Y. 2000).

¹⁴⁶ *Findlay v. Phe, Inc.*, No. 1:99CV00054, 1999 U.S. Dist. LEXIS 9761 at *8 (M.D.N.C. Apr. 16, 1999) (quoting Family and Medical Leave Act, 29 U.S.C. § 2651).

¹⁴⁷ *Metro. Milwaukee Ass’n of Commerce v. City of Milwaukee*, No. 08CV018220, 2009 WL 2578536, at *16 (Wis. Cir. June 12, 2009). Because New York has no FMLA provisions in state law, and the WFMLA is substantially similar to the federal FMLA for the purposes of this Note, the WFMLA analysis is included in the federal preemption section.

¹⁴⁸ *See* WIS. STAT. § 103.10 (West 2002).

¹⁴⁹ *See Id.* § 103.10(5)(a), which states, “[t]his section does not entitle an employee to receive wages or salary while taking family leave or medical leave.”

¹⁵⁰ *Metro. Milwaukee Ass’n of Commerce*, 2009 WL 2578536 at *17.

Paid Sick Leave in New York

997

first look to whether the FMLA contains an explicit preemption clause, which it does not. Then, the court would consider whether the statute contains an implied preemption, or an intention to occupy the field.¹⁵¹ The court would likely find that Congress's purposes for creating the FMLA, as expressed in the Findings and the Purposes sections of the Act, do not encompass the kind of short-term, paid sick leave that the NYC Council was seeking to require, and that Congress had not intended for the FMLA to occupy the field of employee benefits.

Congress's general purpose for the FMLA was to allow employees to care for newborns and for family members with serious health problems.¹⁵² Under the Purposes section of the Act, employees are entitled to take "reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition."¹⁵³ "Reasonable leave for medical reasons" raises the possibility that the leave could be for a short duration, and therefore more akin to sick leave than child rearing or care-giving for a family member with a long-term illness. The regulations define "reasonable leave" somewhat narrowly.¹⁵⁴ Employees cannot take the FMLA leave for parental or family care except in cases of birth, foster care and adoption, or a family member's serious illness.

In order for an employee's own sick leave to qualify under the FMLA, it must be for a "serious health condition," which is defined as an illness or condition that involves inpatient care in a medical care facility or "continuing treatment"¹⁵⁵ by a health care

¹⁵¹ See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

¹⁵² Family and Medical Leave Act, 29 U.S.C.A. § 2601(b) (West 2010).

¹⁵³ *Id.*

¹⁵⁴ Qualifying leave is defined in the regulations as follows:

(1) For birth of a son or daughter, and to care for the newborn child, (2) For placement with the employee of a son or daughter for adoption or foster care, (3) To care for the employee's spouse, son, daughter, or parent with a serious health condition, (4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job.

29 C.F.R. §§ 825.112, 825.113, 825.120–123 (2011).

¹⁵⁵ For more on what constitutes "continuing treatment," see 29 C.F.R. §

provider.¹⁵⁶ The FMLA also allows employees to take intermittent or reduced leave because of the serious health condition of the employee or of a child, spouse, or parent.¹⁵⁷ These specifications are strong evidence that the short-term sick leave available under the Paid Sick Time Act is not covered by the FMLA. They also show that the FMLA did not intend, implicitly or expressly, to preempt local or state law concerning short-term sick leave, nor did it intend to “occupy the field” of sick leave generally.

Although the FMLA and the Paid Sick Time Act are similar in that they both allow employees to take leave to care for themselves or for family members, the FMLA leave is unpaid and applies only to serious health conditions. The Paid Sick Time Act, on the other hand, provides for paid leave and has a much broader definition of what kinds of illnesses qualify for such leave. Under the Paid Sick Time Act, an employer must permit an employee to use paid leave for: (1) the care, diagnosis, or preventive care for the employee’s physical or mental “illness, injury, or health condition;”¹⁵⁸ (2) to care for a family member with a mental or physical illness or condition; or/and (3) if the employee’s place of business, or his or her child’s school, closes because of a public health emergency.¹⁵⁹ Thus, under the Paid Sick Time Act, an employee can claim the need to take time off for the prevention or diagnosis of, or treatment for, a wide array of conditions. After three consecutive days of leave, an employer can require reasonable documentation that the leave is for a qualifying illness, in the form of a signed

825.115 (2011).

¹⁵⁶ Family and Medical Leave Act, 29 U.S.C.A § 2611(11)(A)–(B) (West 2010). Under the FMLA regulations, “the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave” unless “complications arise.” 29 C.F.R. § 825.113(d) (2011). “Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.” *Id.*

¹⁵⁷ 29 C.F.R. § 825.203 (2011).

¹⁵⁸ Paid Sick Time Act, N.Y.C. Council Int. No. 0097-2010 (2010) § 2(d)(1)(i).

¹⁵⁹ *Id.* § 2(d)(1)(ii)–(iii).

Paid Sick Leave in New York

999

letter from a licensed health care provider.¹⁶⁰

It would be reasonable for a court to find that there is some overlap between the kinds of leave covered in the FMLA and the Paid Sick Time Act. For example, Mr. Santos would be able to receive paid sick leave and the FMLA leave when he finally received his pneumonia diagnosis from the doctor, because pneumonia rises to the level of a “serious illness” that qualifies for the FMLA.

It could be argued that this overlap invalidates the local law because it confounds or interferes with the purposes of the federal law. That was the argument raised by the plaintiff in the Wisconsin case, *Metropolitan Milwaukee Association of Commerce*. There, the Metropolitan Milwaukee Association of Commerce (MMAC) argued that the Milwaukee Paid Sick Leave Ordinance covered illnesses that qualify for leave under the WFMLA, and thus the local law conflicted with the WFMLA.¹⁶¹ The court agreed that there were certain similarities between the WFMLA and the Paid Sick Leave Ordinance, and that the two laws did in fact overlap.¹⁶² Specifically, the Milwaukee Paid Sick Leave Ordinance provides paid leave for various illnesses that are also covered by the WFMLA. But the court ultimately found that these overlapping provisions do not vitiate the Paid Sick Leave Ordinance,¹⁶³ and instead stated that “the addition of *paid* leave provides a complement [to] rather than a conflict” with the state law.¹⁶⁴ In fact, the court suggests, an employee could elect to substitute unpaid time off for paid time.¹⁶⁵ Therefore, the court found that the Wisconsin legislature “has not expressly withdrawn the power of the City to act, does not logically conflict with the [WFMLA], does not defeat the purpose of the [WFMLA], and does not violate the spirit of the [WFMLA].”¹⁶⁶

¹⁶⁰ *Id.* § 2(d)(3).

¹⁶¹ *Metro. Milwaukee Ass’n of Commerce v. City of Milwaukee*, No. 08CV018220, 2009 WL 2578536, *17 (Wis. Cir. June 12, 2009).

¹⁶² *Id.*

¹⁶³ *Id.* at *18.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

Although the Wisconsin court applied Wisconsin state preemption doctrine in its analysis of the WFMLA preemption, a New York court applying federal preemption doctrine would most likely reach a similar finding. Under the case law on federal preemption discussed *supra*, this kind of overlap between federal and local law does not suffice to constitute federal preemption. In order for the FMLA to preempt the Paid Sick Time Act, it would have to be “impossible for a private party to comply with both state and federal requirements,”¹⁶⁷ or the local law must present an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁶⁸ Requiring employers to provide paid leave that buttresses the FMLA simply would not present an obstacle so great such as to frustrate Congress’s objectives, nor would it make it “impossible” for a private employer to manage both kinds of leave.

B. ERISA Preemption

ERISA regulates employee benefit plans maintained by private employers. The statute deals exclusively with a “plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both,” to provide any of the types of welfare or pension benefits described in the statute for employee participants or their beneficiaries.¹⁶⁹ A court’s main concern regarding ERISA preemption would likely be whether the Paid Sick Time Act constitutes a “welfare plan.”¹⁷⁰

In its ERISA regulations, the U.S. Department of Labor (USDOL) sheds light on the parameters of a welfare plan by listing

¹⁶⁷ *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

¹⁶⁸ *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁶⁹ Employee Retirement Income Security Act, 29 U.S.C.A. §§ 1002(1), 1002(2)(A) (West 2010).

¹⁷⁰ 29 U.S.C.A. §1002(1). A “welfare plan” is defined as plan, fund, or program “established or maintained by an employer or by an employee organization . . . for the purpose of providing for its participants or their beneficiaries through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment.” *Id.*

Paid Sick Leave in New York

1001

programs that do not fall into the specifications. Included in those plans is the

[p]ayment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment).¹⁷¹

Courts might consider whether an "absence for medical reasons" would constitute the kind of paid leave permitted under the Paid Sick Time Act.

The USDOL addressed just this question in a 1994 Advisory Letter.¹⁷² An employer, Parisian Inc., had a paid sick leave plan for employees who worked thirty-five or more hours per week and had worked for six months for the employer. The benefits, which were paid by the employer's general assets, would accrue based on the employee's years of service. USDOL ruled that, although the employer's sick leave policy provides "benefits in the event of sickness," as identified in section 3(1)(A) of ERISA, it is a "payroll practice," as described in § 2510.3-1(b), and therefore

does not constitute an employee welfare benefit plan within the meaning of section 3(1). It is the Department's position that an employer's practice of paying no more than an employee's normal compensation during periods of absence due to illness, out of the general assets of the employer, falls within the exception to coverage carved out in the regulation.¹⁷³

A Wisconsin district court has held that employees can substitute benefits provided by the employer for the FMLA benefits. In *Aurora Medical Group v. Department of Workforce Development*, the court held that an employee was permitted to substitute paid sick time provided by her employer for unpaid sick

¹⁷¹ 29 C.F.R. § 2510.3-1(b)(2) (2011).

¹⁷² ERISA Section 3(1), Advisory Op. 94-40A (Dep't of Labor Dec. 7, 1994), available at <http://www.dol.gov/ebsa/programs/ori/advisory94/94-40a.htm>.

¹⁷³ *Id.*

time allowed under the FMLA.¹⁷⁴ The court found that the FMLA preempted ERISA. “[T]o the extent to which ERISA is amended by the FMLA, ERISA must yield to any provisions of the WFMLA providing greater family leave rights than those provided by the FMLA.”¹⁷⁵

To support this finding, the court relied on the U.S. Senate’s 1993 floor debate over the FMLA. During the debate, Senator Dodd, one of the legislation’s main sponsors, was asked whether ERISA would prohibit employees from using accrued paid leave, regardless of its source, in lieu of any leave provided under ERISA.¹⁷⁶ Senator Dodd’s response was that the FMLA was “intended to supersede ERISA and any Federal Law.” Congress’s intent, he maintained, was to ensure that ERISA and other federal law did not “undercut[.]” family and medical leave laws at the state level.¹⁷⁷ States that allowed employees to replace unpaid family leave with accrued paid leave would continue to be permitted to do so, “so long as those State law provisions are at least as generous as those of this Federal legislation.”¹⁷⁸

A New York court ruling on ERISA preemption and the Paid Sick Leave Act would also most likely consider *Bloomberg*, which found that the City’s equal employment benefits law was preempted by ERISA.¹⁷⁹ The court held that the Equal Benefits Law at issue “mandate[s] employee benefit structures or their administration,” and therefore conflicted with ERISA.¹⁸⁰ Despite the fact that this requirement is conditionally based on whether the vendor chooses to contract with the City, the court nonetheless held that the Law “connect[s] with a core concern of ERISA, impermissibly interferes with its goal of uniform plan

¹⁷⁴ *Aurora Med. Grp. v. Dep’t of Workforce Dev.*, 602 N.W.2d 111 (Wis. Ct. App. 1999), *aff’d*, 612 N.W.2d 646 (Wis. 2000).

¹⁷⁵ *Id.* at 114.

¹⁷⁶ *Id.* at 114–15.

¹⁷⁷ *Id.* at 115.

¹⁷⁸ *Id.*

¹⁷⁹ *Council of N.Y.C. v. Bloomberg*, 791 N.Y.S.2d 107 (N.Y. App. Div. 2005).

¹⁸⁰ *Id.* at 110 (quoting *N.Y.S. Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995)).

Paid Sick Leave in New York

1003

administration, and is thus preempted.”¹⁸¹ The local law invalidated by the *Bloomberg* court is distinguishable from the Paid Sick Time Act, however. With respect to the Equal Benefits Law, New York City governed all “employee benefits,” which ranged from health insurance and pension and retirement benefits, to sick leave, life insurance, bereavement policies, and tuition reimbursement.¹⁸² These benefits align much more closely with an ERISA welfare plan, and do not fall into any exceptions laid out in the statute.

CONCLUSION

Low-earners, part-time workers, and women are hit hardest by their own or their family’s sickness. Paradoxically, they are also the groups that are least likely to have paid sick days. Advocates for paid sick leave legislation have made compelling arguments about the need for all workers to have a minimal number of days they can take off when they or a family member is ill. In addition, advocates point out the public health hazards triggered when restaurant workers prepare food while sick, or when children go to school sick because their parents cannot afford to take time off to care for them. For these and other reasons, some states and localities have created new floors on minimum worker benefits. These new laws rely on the authority of local and state governments to act for the welfare of the state or municipality. But this authority is called into question, particularly by businesses and chambers of commerce. Defending the authority of legislative bodies to pass health and welfare legislation on the state and local level involves a multi-pronged approach. States, municipalities, and advocates must work to defend local laws against claims of preemption by federal law and interference with state and federal regulatory schemes, and local laws must be justified under home rule provisions.

The Paid Sick Time Act is a fitting exercise of local home rule authority and does not conflict with state and federal laws. The

¹⁸¹ *Bloomberg*, 791 N.Y.S.2d at 110.

¹⁸² N.Y.C. ADMIN. CODE § 6-126(b)(7) (West 2009).

1004

JOURNAL OF LAW AND POLICY

State Minimum Wage Act establishes a comprehensive scheme for wage regulation, but does not regulate employee benefits. The FMLA has an explicit preemption provision, allowing states and localities to craft family leave provisions that go beyond the scope of the statute. Finally, ERISA regulates employment welfare plans, but a USDOL Advisory Letter suggests that paid sick leave falls into one of the statute's enumerated exceptions.