

Ordinance Mandating Employer Paid Time Off to Employees within Bernalillo County Summary of Issues

The information that follows has been prepared by attorneys specializing in Human Resources Law and explains some of the probable unintended consequences of passing such a poorly written ordinance. It is intended to raise your awareness of the situation/consequences as a REALTOR® and engaged member of this community.

Section 2:

- **The definition of Employee includes a requirement that the worker must have worked 56 hours for the employer in a “consecutive twelve-month period.”**

Issue: The definition of Employee is ambiguous. This makes compliance with the ordinance unnecessarily challenging for employers. It is unclear if an Employer must apply the *same* 12-month period to each worker for purposes of determining if the worker is an “employee” for purposes of the Ordinance, or if an employer may use a distinct 12-month period for each worker it employs. This ambiguity is likely to be the result of disputes between workers claiming benefits and employers.

Issue: The definitions of “Employer” and “New Local Business” are inconsistent. The Ordinance defines a “New Local Business” as having its principal office *and* place of business in Bernalillo County. Conversely, the Ordinance defines, in relevant part, an “Employer” as only having its principal office in Bernalillo County and having only a “physical presence” in the unincorporated areas of Bernalillo County.

Issue: The Ordinance does not require that an employer have its “place of business” in the unincorporated areas of Bernalillo county in order to fall subject to its requirements. As written, the Ordinance applies to any business that has its “principal office” (presumably the business incorporation address) in Bernalillo County and retains a “physical presence,” perhaps even a transitory presence, in the unincorporated areas of Bernalillo County.

Issue: It is unclear what interest, if any, this differing use of “physical presence” and “place of business” in these two definitions serves.

Issue: The term “physical presence” is not defined. This suggests that businesses may be required to comply with the Ordinance even if they maintain a transitory presence in the county (e.g. a food truck, delivery service, or employees driving through the unincorporated areas for business purposes).

Section 3:

- **Subsection (A)(1) provides that a Worker shall not accrue more than “56 hours” of earned paid time off in a year.**

Issue: The Ordinance does not justify why the paid time off benefit should be equal to 56 hours *exactly*.

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- **Subsection (A)(3) provides that earned paid time off shall begin to accrue “on the effective date of this Ordinance if an employee is already employed.”**

Issue: This requirement implies that Employers must, in practice, use different twelve-month periods when determining if a worker qualifies as an Employee under the ordinance and is thus entitled to benefits. This requirement, however, is not explicit and—as discussed above—the resultant ambiguity will likely be the cause of unnecessary disputes between workers seeking benefits and their Employers.

- **Subsection (A)(6) provides that an “Employee” may transfer up to 56 hours of accrued paid time off from one year to the next, and states that “an employee may only have a maximum of 56 hours of earned paid time off at any given time.”**

Issue: It is unclear if the Ordinance creates an individual property right in time off that is accrued but that cannot be used. Assume an Employee accrues 58 leave hours in a given year. Under this Ordinance, this Employee can carry over 56 hours of their accrued leave into the next year. In such circumstances, the Ordinance should specifically state that an Employer is not required to compensate Employees for accrued time that is not carried over from one year to the next. The Ordinance should further state that it does not create a private right of action for Employees to seek such damages.

Issue: The Ordinance does not provide a clear explanation of what “an employee may only have a maximum of 56 hours paid time off at any given time” means. This language seems to suggest that the Ordinance caps the number of leave hours an Employee may accrue to 56. However, later, at Subsection (A)(7), the ordinance contemplates a situation when an Employer has previously compensated, or cashed out, an Employee for leave accrued under the Ordinance. This clause again *suggests* that an Employee may demand compensation for leave time the Employee accrues but does not in fact use.

- **Subsection (B)(6) provides that an Employee may take time off for “any reason.”**

Issue: This should perhaps be the greatest area of concern for Employers. While the Ordinance provides that an Employer must provide notice of leave request procedures to Employees and can specify the manner in which those requests can be made, this Section clearly states that leave may be *taken*, not requested, for “any reason.” The ordinance further provides that an Employer may not discipline an Employee because they took leave time accrued under the Ordinance.

As written, then, the Ordinance takes away an Employer’s ability to discipline an Employee that has taken leave time in *any way*. This black and white standard will lead to unjust results for Employers. Consider for example, that a nurse gives advance notice that she wants to take time off on a given day but her attendance at work is needed to meet federal staffing requirements. Under this scenario, the Employer would be subject to penalties under this Ordinance if they took *any* adverse action (even a verbal warning) against the Employee-nurse. The Ordinance should replace this black and white standard with a reasonableness test that punishes bad actors but preserves the rights of Employers to run their business.

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- **Subsection (C) (Record Keeping) creates a legal obligation upon all Employers to create and store records and provides that a failure to do so is a violation of the ordinance.**

Issue: It is unclear why a penalty is necessary to force compliance with this ordinance. Ultimately, an Employer that does not have good records will not be able to effectively defend themselves in an enforcement action. The Ordinance provides no support for the notion that a “penalty” will increase Employer compliance with the record keeping requirement. Removing this penalty provision will not prevent Employees from successfully asserting claims under the Ordinance. Subsection (C)(4) gives a finder of fact the discretion to determine an Employee’s entitlement to accrued time off when the Employer’s records are not available or insufficient.

Section 4:

- **Subsection (A)(2) provides that the County may “review records regarding all employees at the employer’s work site in order to protect the identity of any employee identified in the complaint and to determine whether a pattern of violations has occurred.”**

Issue: This provision seems aimed at protecting the confidentiality of Employees seeking administrative enforcement of the Ordinance. This provision, however, unduly violates the privacy rights of all employees.

Issue: This provision contemplates that the County may initiate its *own* administrative investigation into a pattern and practice of violations. The Ordinance, however, does not articulate what evidence the County must have to initiate a “pattern and practice” investigation, what procedures it must follow, or if such an investigation must first be authorized by a neutral magistrate. Absent these protections, the Ordinance as written raises Constitutional search and seizure concerns for all Employers.

- **Section (A)(4) provides that the county *may* “attempt” to reach an administrative resolution prior to bringing an enforcement action in Court.**

Issue: The Ordinance prefers litigation over informal dispute resolution. The Ordinance should require that the County and individual plaintiffs first exhaust administrative remedies as a jurisdictional pre-requisite that must be met before proceeding to Court. The Ordinance also needs to spell out the procedures for administrative enforcement. The Ordinance should also provide for an ultimate right of administrative appeal to the Bernalillo County Commission to best ensure the due process right of Employers.

- **Section (A)(6) provides that the County may suspend a business’ license for up to 30 days for failure to permit an inspection of records.**

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Issue: Apart from this section, the Ordinance does not state what *administrative* penalties the County may impose upon Employers. Basic constitutional principles require that a statute advise the public of the penalties for non-compliance.

Issue: The right of the County to suspend a business' license further illustrates the need for a clear administrative procedure that provides robust due process protections for an Employer who is subject to a County administrative enforcement action.

- **Subsection (B)(1) provides that a covered employee or “his representative” may bring a civil action in a court of competent jurisdiction for an alleged violation of the Ordinance.**

Issue: The Ordinance suggests that an Employee may be represented by a non-attorney in a civil proceeding before a court of competent jurisdiction. The Ordinance should be amended to conform with the general rule that only a licensed attorney may *represent* another person in Court.

- **Subsection (B)(2)-(3) provides civil damages available to an Employee, fee and cost shifting for a prevailing Employee, and special damages in retaliation cases.**

Issue: The Ordinance makes fee and cost shifting available to a prevailing employee only. As a matter of fundamental fairness, fee-shifting and cost sharing should also be available to prevailing Employers; especially those Employers involved in civil enforcement proceedings brought by the Government (County).

Issue: The Ordinance ultimately leaves Employer liable to any and all claims for damages or equitable relief, so long as the relief is reasonable. The Ordinance is ambiguous, however, in that it also suggests that civil damages are limited to liquidated damages equal to two-times of the earned paid time off accrued. This ambiguity invites unnecessary litigation and claims made against Employer. The Ordinance should limit the civil damages available in Court to the value of an Employee's liquidated damages.

Issue: Employers and Employees should not be responsible for costs or attorney fees associated with County administrative enforcement actions initiated pursuant to Section 4(A).

- **Subsection (C) provides for additional penalties for violations of the Ordinance.**

Issue: The Ordinance is unclear if the penalty provisions of Subsection (C)(1) apply to Employers that have only been subject to administrative enforcement pursuant to Section 4(A).

Issue: The Ordinance does not define “prevailing” party. The lack of clarity here will invite disputes between Employee and Employers over fee and cost shifting claims.

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Issue: The Ordinance’s penalty stacking provision (See Subsection (C)(2)) is very punitive. This again raises Constitutional due process concerns for any Employer subject to the Ordinance’s penalty provision.

Section 6-7:

- **These two sections state that the Ordinance does not replace or prohibit Employers from offering more “generous” earned sick or vacation time.**

Issue: The Ordinance does not clearly state what constitutes the “minimum” standard against which private and public employer plans will be judged. This ambiguity will result in unnecessary disputes between Employees, Employers, and County enforcement officials.

Issue: The Ordinance similarly does not identify what makes an Employer’s plan more “generous” than the Ordinance. This ambiguity will again result in unnecessary disputes between Employees, Employers, and County enforcement officials.

Section 8:

- **This section exempts New Businesses from complying with the Ordinance during their first twelve-months of business.**

Issue: This exemption recognizes that compliance with this Ordinance will present unique challenges to different types of businesses. As written, the Ordinance applies to any Employer with two or more employees with no regard for how compliance with this Ordinance will impact the unique operations of small businesses. To better ensure compliance without imposing undue burdens on Employers, the Ordinance should consider linking the amount of leave time a Worker accrues and uses with the size of the business.