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THE MILE HIGH CITY

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**TO:** Office of the Mayor  
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**FROM:** Douglas J. Friednash, City Attorney *DM*  
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**RE:** Analysis of Initiative I-300 of 2011 concerning paid sick and safe time

**DATE:** September 14, 2011

The Administration and City Council has asked us to analyze Initiative 300 (the "I-300" or "Initiative"), and to explain how implementation and enforcement of this initiated ordinance will work if adopted by the voters at the November 1, 2011, coordinated election. This memorandum contains a summary and our initial analysis of the proposed law.

### **Summary of I-300**

Initiative 300 mandates that employers in Denver provide "paid sick and safe time" to their full-time, part-time or temporary employees in certain specified amounts and administer the paid leave entitlement in accordance with various provisions of the proposed ordinance. "Paid sick and safe time" is defined as "leave that is compensated at the same hourly rate with the same benefits . . . as the employee earns from his or her employment . . ." <sup>1</sup> The Initiative is similar, but not identical, to municipal ordinances that have been adopted since 2007 in San Francisco, Milwaukee and Washington, D.C. The Initiative requires the Denver Agency for Human Rights and Community Relations (HR/CR) to administer the ordinance, and to do so in accordance with the procedures utilized by HR/CR in enforcing the city's longstanding anti-discrimination laws. <sup>2</sup>

**General rule.** The Initiative would generally require employers to grant one (1) hour of paid sick and safe time for every thirty (30) hours worked by an employee, up to a maximum leave bank of seventy-two (72) hours in a calendar year, which can be carried over from year-to-year. <sup>3</sup> Leave may be taken in as little as one hour increments. Employees begin to accrue sick and safe time immediately upon being employed, but are not entitled to take paid time off until they have been employed for at least three months. There is no provision for cash-out of the leave when the employee terminates or otherwise separates from his or her employment. These requirements would take effect sixty (60) days after its adoption (i.e. in January, 2012). <sup>4</sup>

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<sup>1</sup> Sec. 28-235 (h).

<sup>2</sup> Sec. 28-242.

<sup>3</sup> Sec. 28-236.

<sup>4</sup> Sec. 28-248.

***Special provisions for small businesses.*** The Initiative contains several provisions applicable to a small business, which is defined to mean any business “for which fewer than ten (10) persons work for compensation during a given week.”<sup>5</sup> First, the initiated ordinance will not go into effect for small businesses until six (6) months after the adoption of the ordinance (i.e. May 2012).<sup>6</sup> Second, employees of small businesses will accrue no more than forty (40) hours of paid sick and safe time.<sup>7</sup> Third, the Initiative excludes new small businesses until they have been in business for at least one (1) year.<sup>8</sup>

***Governmental exclusions.*** The Initiative does not apply to federal or state governmental employers or employees,<sup>9</sup> but would apply to the City and County of Denver itself and other local government employees that work in Denver.

***Collective bargaining contracts.*** I-300 contains exceptions for employers and employees under collective bargaining arrangements in two distinct ways; one provision for “building and construction industry” and a different provision for all other employers.<sup>10</sup> For employees in the construction trades who are subject to a collective bargaining agreement, the ordinance will not apply if the requirements of the ordinance are “expressly waived” in the contract. For all others, the requirements will not apply if there is an express waiver of rights under the ordinance and the collective bargaining agreement itself “provides for an equivalent benefit.” It is unclear how or whether the ordinance will apply to pre-existing collective bargaining contracts (including Denver’s own CBA’s).

## **Analysis**

### ***Denver has no existing system to implement this measure.***

The proposed ordinance is unprecedented at the local government level in Colorado. No municipality in the state, including Denver, has ever adopted any ordinance regulating wages and benefits for private sector employers not in a direct contractual relationship with the municipality. In 1996, Denver voters defeated an Initiative that would have adopted a higher minimum wage for all private sector employees within the city. Shortly thereafter, the Colorado General Assembly adopted preemptive state legislation specifically forbidding municipalities from having their own minimum wage laws.<sup>11</sup>

No department or agency in Denver’s administrative structure has ever been charged with overseeing the compensation policies of all employers in Denver. Accordingly, there is nothing akin to a “department of labor and employment” in Denver’s organizational chart. HR/CR, the agency tasked with enforcing the initiative, is one of the city’s smaller agencies, consisting of approximately ten (10) employees. HR/CR has no specific experience enforcing wage and

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<sup>5</sup> Sec. 28-235 ((k)).

<sup>6</sup> Sec. 28-248.

<sup>7</sup> Sec. 28-236 (c).

<sup>8</sup> Sec. 28-236 (e).

<sup>9</sup> Sec. 28-235 (e).

<sup>10</sup> Sec. 28-244 (d).

<sup>11</sup> Secs. 8-3-102, 8-6-101, 8-12-102, C.R.S.

benefit laws, and thus the adoption of the Initiative would impose significant new mandates on the agency.<sup>12</sup>

In this regard, it is instructive to contrast the situation in two other cities that have adopted similar initiatives. San Francisco has a dedicated “Office of Labor Standards Enforcement” nested within that city’s General Services. In addition to enforcing the San Francisco paid sick leave law,<sup>13</sup> the OLSE also enforces that city’s prevailing wage and living wage laws applicable to certain municipal contractors, a municipal minimum wage ordinance, as well as another ordinance requiring employers to pay a certain amount of medical insurance costs for each employee. Likewise, the Washington, D.C. paid sick leave ordinance<sup>14</sup> is administered by that city’s “Department of Employment Services” which enforces a myriad of laws applicable to employers in the District of Columbia.

Under the Initiative, HR/CR would be the regulatory agency responsible for developing all rules associated with the new ordinance.<sup>15</sup> This includes the power to take complaints, conduct investigations, hold hearings, provide a conciliation process, issue orders and impose fines.<sup>16</sup> HR/CR would be responsible for ensuring businesses are following the ordinance and keeping proper records. The Initiative requires that employers track hours worked, sick time accrued and taken for a minimum of five years and allow HR/CR access to such records.<sup>17</sup> Additional resources will be required for both the complaint and compliance functions associated with this mandate.

***I-300 has an expansive definition of the term “employer”***

I-300 will govern, not just businesses that are based in Denver, but also any business “employing persons anywhere in Colorado” according to the definition of the term “employer” in the ordinance.<sup>18</sup> Thus, the ordinance can be construed to apply to businesses that are based in other Colorado jurisdictions or even out of state. By way of comparison, the San Francisco ordinance contains a similarly broad definition of “employer” and has been construed to apply to out-of-town businesses.<sup>19</sup> The specific trigger for applying the ordinance will be whether or not an employee of an out-of-town business spends at least forty (40) hours in any year working in Denver.<sup>20</sup> Thus, for example, a delivery business based in Grand Junction could be subject to the ordinance if one of its employees spends at least one week out of the year making deliveries within Denver.

The apparent applicability of the ordinance to out-of-town businesses under some circumstances will impose obvious enforcement and administration challenges for HR/CR.

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<sup>12</sup> The existing scope of HR/CR functions and activities is set forth in Chapter 28 of the Denver Revised Municipal Code.

<sup>13</sup> Chapter 12W, San Francisco Administrative Code.

<sup>14</sup> Washington, D.C.; Accrued Sick and Safe Leave Act of 2008.

<sup>15</sup> Sec. 28-241.

<sup>16</sup> Sec. 28-242.

<sup>17</sup> Sec. 28-240.

<sup>18</sup> Sec. 28-235 (e).

<sup>19</sup> Sec. 12W.2, San Francisco Administrative Code.

<sup>20</sup> Sec. 28-236 (a).

***I-300 also similarly contains an expansive definition of “employee”***

To repeat, an employee of either an in-town or an out-of-town business who works within the geographic boundaries of Denver a mere one (1) week in any calendar year in Denver could have a right to claim that he or she is entitled to paid sick and safe time under the initiated ordinance. This follows even if the employee works part-time or is a temporary employee.<sup>21</sup>

The Initiative expressly applies to both “exempt” and “non-exempt employees” as defined by the federal Fair Labor Standards Act.<sup>22</sup> In other words, paid sick and safe time must be provided both to hourly wage-earners as well as professional, supervisory and administrative employees.

***Applicability of I-300 to employers with pre-existing paid sick leave policies***

Various provisions of I-300 indicate that the law is not intended to supersede or discourage employers’ leave policies that are already equivalent or exceed the requirements set forth in the initiated ordinance.<sup>23</sup> Nevertheless, the fact that an employer has a more generous pre-existing paid sick leave policy does not necessarily mean the employer will be exempt from the applicability of the law. Even if an employer provides for the accrual of paid sick leave in an amount equal to or exceeding the requirements of the ordinance, the employer may still be subject to complaints and enforcement actions as well as the compliance requirements of the ordinance. For example, the ordinance prohibits employers from requiring certain types of documentation and proof when an employee claims sick or safe time-off, and generally prohibits employers from imposing “unreasonable barriers” when an employee wants to take leave.<sup>24</sup> These requirements will apply to employers with preexisting paid sick leave policies, not just those who are required to begin providing paid sick and safe time off as a result of the adoption of the ordinance. Thus, I-300 will necessitate that all employers re-evaluate their policies for compliance with the ordinance.

***Applicability of I-300 to the City and County of Denver itself***

The Initiative will apply to the City itself and will require the City to make various changes to its own sick leave policies. Although the City has for many years offered paid sick leave to its employees and has allowed sick leave to accumulate in amounts far in excess of the requirements of I-300,<sup>25</sup> the city’s policies differ in several significant respects from I-300. For example:

- The CCD does not currently provide paid sick leave to part-time employees who work less than twenty (20) hours per week.

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<sup>21</sup> Sec. 28-235 (d).

<sup>22</sup> Sec. 28-236 (d).

<sup>23</sup> Secs. 28-236 (i); 28-244; 28-245.

<sup>24</sup> Sec. 28-238.

<sup>25</sup> Chapter 18, Art. V, D.R.M.C.; CSA Rule 10.

- The ordinances and CSA rules do not currently incorporate the idea of paid “safe time” in addition to traditional notions of paid “sick time” as contemplated in I-100.
- Current CCD policies preserve considerable management discretion to monitor the justifications for sick leave in order to prevent “leave abuse.” These policies would have to be reevaluated for compliance with I-300

In sum, a variety of city laws, rules and policies, as well as future collective bargaining contracts, would need to be reevaluated and reconciled to conform to the requirements of I-300.

*Limitations on the authority of employers to control usage of paid sick and safe time off*

I-300 contains various restrictions on the ability of employers to monitor and document the usage of paid sick and safe time off by their employees. For example:

- In general, the ordinance would prohibit employers from erecting “unreasonable barriers” to their employees’ usage of paid sick and safe time off.<sup>26</sup> Since the ordinance does not define what an “unreasonable barrier” might be, further clarification on this point would be an ideal subject for rule-making or additional clarifying legislation if I-100 is adopted by the voters.
- An employer may not require disclosure of “details” of an employee’s medical condition as a condition of providing paid sick and safe time off.<sup>27</sup>
- While ambiguously worded in the Initiative, an employer is prohibited from requiring documentation of any kind of an employee’s illness until after “three consecutive days of absence”.<sup>28</sup>
- Employers cannot require an employee to find a “replacement worker” as a condition of granting paid sick or safe time off.<sup>29</sup>

The ability to monitor for any potential “leave abuse” may pose a significant practical concern for employers who will be subject to the law. Traditionally, personnel managers have used a carrot and stick approach to ensuring paid sick leave benefits are not abused. For example, some employers (like the City and County of Denver) allow for a substantial accrual of paid sick leave which is later subject to conversion or cash-out if left unused. A system like Denver’s provides a natural disincentive against unjustified sick leave requests. In contrast, I-300 would require the accrual of paid sick and safe leave up to a relatively modest cap—72 hours maximum—with no requirement for a cash-out of unused leave.<sup>30</sup> Thus, when an employee reaches the cap, the opportunity to accrue any additional paid time-off will exist only

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<sup>26</sup> Sec. 28-237 (d).

<sup>27</sup> Sec. 28-243.

<sup>28</sup> Sec. 28-237 (d). This provision contains some inherent ambiguities about how and when the 3-day rule will be interpreted and applied. The City and County of Denver already has a similar 3-day rule on documentation of sick leave which is somewhat more definitive on how this requirement is already applicable to career service employees, CSA Rule 10-44 (d).

<sup>29</sup> Sec. 28-237 (b).

<sup>30</sup> Sec. 28-236 (j).

when and if the employee draws down the accrued hours. The more paid sick and safe leave an employee claims, the more paid time-off he or she will accrue over time. Conversely, an employee who never claims any paid safe and sick leave time off will never accrue more than 72 hours because only a maximum of 72 hours can roll over from year to year.

***The Initiative conflicts with existing state statute regarding “safe time”***

The concept of “safe time” as included in I-300 is meant to encompass situations where an employee is a victim of domestic violence, sexual assault, stalking, etc., and needs time off to seek legal assistance, restraining orders, medical care or counseling, securing the victim’s home from further violence, and so forth.

Colorado already has a state statute addressing the concept of “safe time,” a law that is already applicable to employers statewide.<sup>31</sup> The statute which was originally adopted in 2002 differs from I-300 in several key ways. For example:

- The statute allows employers to grant “safe time” leave on either a paid or an unpaid basis at the employer’s discretion.
- Under the statute, an employer is obligated to grant a maximum of three (3) days leave per annum.
- The statute only applies to employers of fifty (50) or more employees.

The statute does not expressly declare the subject of “safe time” to be a matter of statewide concern nor does it expressly preempt local governments from adopting different or additional requirements for “safe time.” However, the existence of this statute may imply a policy that “safe time” is intended to be regulated uniformly throughout Colorado and that all employers should be subject to the same set of mandates in this regard.

***Questions regarding enforcement, penalties and sanctions***

HR/CR has traditionally enforced Denver’s anti-discrimination ordinance<sup>32</sup> solely on a complaint basis. The agency does not actively seek cases involving possible discrimination but waits for complaints to be filed and then conducts an investigation, mediation and hearings. This approach is quite similar to the way other EEO agencies operate.

Even though the proponents of I-300 have indicated that they would expect the new law to be enforced in exactly the same way on a complaint-only basis, there are some definite differences between the two types of laws. Unlike an anti-discrimination ordinance which primarily requires employers to refrain from doing something (i.e. discriminating), a wage or benefit law affirmatively requires employers to do certain things (i.e. accrue, document, and then

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<sup>31</sup> Sec. 24-34-402.7, C.R.S. The existence of the state statute is acknowledged at Sec. 28-239 of I-300, and the Initiative indicates that “safe time” rights under the statute will be in addition to the paid “safe time” rights granted under the ordinance; i.e. after an employee exhausts his or her rights to paid time off under the ordinance, the employee may still be able to claim additional time off under the statute.

<sup>32</sup> Chapter 28, Art. IV, D.R.M.C.

pay-out a prescribed benefit). The proposed ordinance expressly empowers HR/CR to conduct investigations with or without a complaint being filed. How aggressively the city chooses to enforce the law is entirely a policy call and a question of how much resources the city wishes to devote to the effort. Certainly, a proactive enforcement strategy would require a much greater commitment of money and personnel, as opposed to simply enforcing the law on a complaint basis.

The Initiative cross-references the same system of penalties and sanctions as the city's existing anti-discrimination ordinances.<sup>33</sup> For example, it would be possible under the ordinance for HR/CR to impose fines and file civil suits against violators of the ordinance. In the recent history of enforcement of Denver's existing anti-discrimination laws, the city has never invoked these sanctions. Instead, all complaints are handled through mediation and settlement. Whether the same would be true in regard to the enforcement of the paid sick and safe time ordinance remains to be seen. Also identical to the existing anti-discrimination laws, the Initiative would create a private cause of action, i.e. an employee who believes an employer has violated the ordinance could personally take the employer to court seeking "damages or equitable relief" regardless of whether the city did so.<sup>34</sup>

### ***Potential pre-emption challenges***

When Milwaukee voters approved a paid sick leave ordinance similar to I-300, the enactment was immediately challenged in state court, primarily based upon claims that the ordinance was preempted by state and federal labor laws. Ultimately, applying state law, the Wisconsin Court of Appeals upheld the initiated city law.<sup>35</sup> However, shortly thereafter the Wisconsin legislature passed a new state law preempting municipalities in that state from adopting local paid sick leave requirements.<sup>36</sup> Thus, the Milwaukee ordinance has never been enforced.

The authors of I-300 may have anticipated a possible preemption challenge when they included the following provision in the initiative: "Nothing in this Article shall be interpreted or applied so as to create any power or duty in conflict with Federal or state law."

If I-300 is adopted by the voters and challenged in court, the judge will analyze whether or not the ordinance is expressly or impliedly preempted by any existing state laws. Even if the initiated ordinance is deemed to be in conflict with any existing state laws, there is a possibility that the ordinance might survive a preemption challenge if the city can convince the court that the ordinance regulates a matter of "local and municipal concern" versus a matter of "statewide concern" or "mixed state and local concern." In weighing whether or not a particular subject is primarily a matter of state or local concern, the Colorado courts tend to consider the following factors:

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<sup>33</sup> Sec. 28-242.

<sup>34</sup> Sec. 28-242 (b).

<sup>35</sup> *Metropolitan Milwaukee Association of Commerce, Inc. v. City of Milwaukee*, 798 N.W.2d 287 (Wis. App. 2011).

<sup>36</sup> Wisconsin Senate Bill 23 of 2011.

- The need for statewide uniformity of regulation.
- Extraterritorial impact, i.e. the impact of the municipal regulation on persons living outside the municipality.
- Historical considerations, i.e. whether a particular matter is traditionally governed by state or local government.
- The necessity of cooperation among government units.
- Whether the Colorado constitution itself commits the matter to either state or local regulation.<sup>37</sup>

***Opportunities for future clarifications or amendments to the initiative***

Under the Denver Charter, an initiated ordinance that is approved by the voters cannot be amended in any way whatsoever for a period of six months after the ordinance is adopted. Thereafter, the ordinance may be amended by council after a public hearing and with a super-majority, two-thirds vote.<sup>38</sup> Even prior to six months from the adoption of the measure, it may be possible for the City Council to adopt supplementary legislation clarifying the law, so long as the legislation does not conflict with the provisions of the initiative.

The Initiative expressly empowers HR/CR to adopt rules as necessary to coordinate the “implementation and enforcement” of the ordinance.<sup>39</sup> An extensive public process for agency rule-making in Denver is more fully set forth elsewhere in the City Code.<sup>40</sup> If the Initiative is adopted by the voters, it will be important for HR/CR to begin immediately to consider rules that will clarify how the agency intends to interpret and enforce the law.

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<sup>37</sup> *City and County of Denver v. State*, 788 P.2d 764 (Colo. 1990).

<sup>38</sup> Denver Charter, Sec. 8.3.3 (E).

<sup>39</sup> Sec. 28-241.

<sup>40</sup> Sec. 2-91, et seq., D.R.M.C.