BY HAND DELIVERY AND ONLINE

Amanda Fritz
City Commissioner
City of Portland
Office of the City Attorney
1221 SW Fourth Ave, Room 430
Portland, OR 97204

Re: Comments on the Portland Sick Leave Ordinance Administrative Rules

Dear Commissioner Fritz:

I am a construction attorney with the law firm of Schwabe, Williamson & Wyatt, with nearly 20 years of experience representing general contractors, specialty contractors, developers, design professionals, project managers, and other members of the construction industry in several states in the Pacific Northwest. I also serve as the counsel to the board of directors of the Associated General Contractors Oregon-Columbia Chapter ("AGC").

Please accept this letter as a formal response to your request for comments on the Portland Sick Leave Administrative Rules. These comments represent the primary interests of the members of AGC.

1. **AGC Members Will be Impacted by the Portland Sick Leave Ordinance**

Since 1922, AGC has served as the voice of the commercial construction industry. With nearly 1,000 member companies, AGC is the only trade association representing the full range of commercial construction from industrial to building, from heavy highway to multi-family residential. AGC members and their employees are working all over the State of Oregon, with many of their projects and employees located within the City of Portland. As a whole, AGC members are extremely concerned about how to administer the Portland Sick Leave Ordinance, given the existence of binding, previously formed collective bargaining agreements related to construction labor unions, as well as their unique transient workforce. The below describes in further detail AGC’s concerns and suggestions.

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2. **The Portland Sick Leave Ordinance Appears to Illegally Interfere with Currently Binding and Enforceable Agreements**

**A. What the Ordinance Provides**

As you are aware, the Portland Sick Leave Ordinance (the “Ordinance”) provides no exemptions or opportunity for waiver of any of the Ordinance’s requirements for already existing and binding accepted project proposals or collective bargaining agreements related to construction labor unions. In the construction industry, work is often completed by utilizing the tools of collective bargaining agreements and project bids. Collective bargaining agreements are enforceable agreements between employers and employees that bind the parties to various agreed upon and negotiated working conditions. Likewise, the construction industry most often relies upon a system of collecting bids for construction projects, which are then evaluated, and any accepted bid becomes an enforceable and binding agreement to complete the particular project within the proposed constraints. Both collective bargaining agreements related to construction labor unions and accepted bids for work are binding on the parties and cannot be altered. In addition, both provide for work that can extend through January 1, 2014, when the Ordinance will take effect.

**B. Why the Ordinance Appears to be an Illegal Interference**

The Ordinance requires already formed contracts to be materially altered, which is prohibited by the Constitution. The United States Constitution provides that “[n]o State shall [...] pass any [...] ex post facto law, or law impairing the obligation of contracts.” U.S. Const., Art. I, § 10. Article I, § 21 of Oregon’s Constitution contains a similar provision. Thus, attempts to dictate that previously formed and binding collective bargaining agreements and accepted bids be retroactively changed and impaired is prohibited.

These prohibitions on the impairment of contracts complement the underlying necessity in any construction bidding and collective bargaining context for both sides to be armed with the knowledge of what the financial factors are and for those factors to be fixed. It is financially impossible for businesses to properly compete with one another for construction jobs if ordinances, such as the Portland Sick Leave Ordinance, can be enacted to retroactively change one of the financial factors taken into account in reaching a binding bid or collective bargaining agreement related to construction labor unions. At the public hearing, you mentioned that this Ordinance is much like an increase in minimum wage. However, minimum wage increases do not actually affect the price paid to construction employees on projects that were previously bid or where a collective bargaining agreement is in place. Instead, those binding agreements are grandfathered in and only new agreements and bids, where the parties are able to assess the new financial factors at hand, will the increased wage be taken into account. Without certainty
in knowing how much money a business will actually need to expend in order to complete a project, businesses in the City of Portland will suffer and look to other geographic areas to perform.

C. Who Bears the Risk of the Additional Costs Imposed By the Ordinance?

The construction industry estimates that the Ordinance will add approximately two percent (2%) to the cost of each project. The cost repeats at each sub-tier contracting level. If contractors are required to begin adhering to the Ordinance in the middle of a job – one that was budgeted and bid prior to the passage and implementation of the Ordinance – will each contractor have to “eat” these new, unanticipated costs? Alternatively, will project owners be required to increase their budgets mid-stream to account for the new costs – and issue contract amendments to change the contract price? Will the rules address this issue at all?

D. An Example of How the Public Will Be Adversely Impacted

The Sellwood Bridge Project is a significant and high-profile publicly owned construction project. As you are no doubt aware, this project faced – and faces – numerous financial challenges that nearly prevented its construction. The Bridge is inside the City of Portland, and therefore the project is subject to the new Ordinance. According to Multnomah County’s dedicated Sellwood Bridge Website, the total budget for the bridge is $307.5 million. The midway point for construction is 2014. Thus, roughly speaking, the remainder of the project, after implementation of the Ordinance, will cost about $154 million. Two percent of that amount is $3,080,000, which is what the Ordinance would add to the cost of the project, using AGC’s estimate. Either the County or the project’s contractor will be forced to absorb that cost – one that neither entity likely budgeted for or is in a position to absorb given the already difficult financial challenges.

Sellwood Bridge is but one example of the impact the Ordinance will have if projects that are already under contract are not exempted. The City of Portland has any number of construction projects active at any given time. Does the City intend to issue contract addenda so that contractors are paid for the additional costs imposed by this Ordinance? If not, it will force these costs onto its contractors who, again, likely did not anticipate or budget for these additional costs. In essence, the City will be adding a new contract obligation after the fact. The same problem exists with every private construction project that is under contract at the time this Ordinance takes effect. Contractors, above almost all else, need a predictable and consistent set of rules within which to operate. There are multiple reasons for this, but the two that are most relevant here are to ensure that all contractors who are competing for a given project have the same set of external forces they must deal with, and to ensure that all of those external

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forces are accounted for in a project’s budget. When the rules change in the midst of a project, contractors are disadvantaged with respect to their competitors, who do not have to suffer the same consequences of accounting for the new rules, and they are disadvantaged with respect to their own cost/revenue balance.

Imposing the Ordinance on projects that are already under contract upsets the predictability that contractors and project owners need to successfully complete projects. Inevitably, if the City refuses to grandfather construction projects that have already been out for bid or proposal, or that are already under contract, there will be litigation, because project owners, who did not budget and may not have funding for the additional costs resulting from the Ordinance, will likely deny contractor requests for contract addenda. Contractors will then almost certainly submit claims, and the courts will ultimately have to decide which party is in the better position to bear these new costs.

In other contexts in Oregon, when state agencies modify statutes or rules that affect how parties to construction contracts budget and price work, those modifications are implemented so that they only apply to new contracts. In this way, project owners and contractors are afforded the opportunity to factor in the risks and costs of such changes in their project budgets, bids and proposals. This is the most reasonable approach because no party in the contracting chain is unfairly penalized by having to absorb a risk and cost that it could not have identified when it originally priced the project.

E. How Other Sick Leave Ordinances Handled this Issue Differently

The above explanation and example provide the likely reason why San Francisco, Seattle, Connecticut, and Washington, D.C. all chose to allow parties to expressly waive their respective sick leave law’s requirements. In San Francisco, all or any portion of San Francisco’s sick leave ordinance requirements “shall not apply to any employees covered by a bona fide collective bargaining agreement to the extent that such requirements are expressly waived in the collective bargaining agreement in clear and unambiguous terms.” California Labor Code § 18. The City of Seattle copied San Francisco’s waiver option. See Seattle Admin. R. 70-500 (stating same).

Connecticut and Washington, D.C. approached the issue in slightly different ways, but still, unlike the City of Portland, provided for a waiver of the sick leave requirements for already formed and enforceable agreements. In Connecticut, collective bargaining agreements in effect prior to the date of the ordinance’s enactment, including agreements that provided for less paid sick leave than required by the ordinance, must remain in effect until the collective bargaining agreement is expired or renegotiated, whichever date is earlier. Connecticut Gen. Stat. 31-57u. In Washington D.C., leave in excess of three paid days may be waived by a bona fide collective bargaining agreement.
D.C. Municipal Regs. 7-32. Therefore, San Francisco, Seattle, Connecticut, and Washington, D.C. all provided some method by which grandfather previously formed collective bargaining agreements or to allow an agreement to waive part or all of the sick leave ordinance requirements. The City of Portland stands alone in its decision to retroactively impair the obligations of binding project bid and collective bargaining agreements related to construction labor unions.

F. Conclusion

We suggest that the City of Portland follow San Francisco, Seattle, Connecticut, and Washington D.C.’s lead by providing an express grandfather clause and waiver opportunity. The Administrative Rules should state that,

The Ordinance shall only apply to employees:

(a) not covered by a bona fide collective bargaining agreement related to construction labor unions; and
(b) performing work at a work site or project where the invitation to bid or request for proposals is published after January 1, 2014.

The Administrative Rules should also state, as San Francisco and Seattle have provided, that all or any portion of the Ordinance’s sick leave requirements “shall not apply to any employees covered by a bona fide collective bargaining agreement to the extent that such requirements are expressly waived in the collective bargaining agreement in clear and unambiguous terms.” With the above revisions, the Ordinance will most likely not result in conflicts with the Oregon and U.S. Constitutions, and will provide predictability for businesses while still protecting workers in the City of Portland.

3. The Ordinance is Highly Complex to Administer and the City of Portland Should Provide a Grace Period for Employers to Become Compliant

A. Why the Ordinance is Particularly Burdensome to the Construction Industry

As you are aware, the Ordinance creates several administrative challenges for employers with employees working in the City of Portland. Many of these challenges are exacerbated by the unique workforce that makes up the construction industry. For example, the construction industry requires a transient workforce—a worker may spend fifteen minutes at one site in Beaverton before driving to Portland for a one hour job and then to Bull Run for a four hour job. Each minute, hour, day, month, or year, the work needed at a particular job site changes and the need for workers with particular skill sets likewise changes.
The short time frames that employees are performing work at different sites makes calculating accrual rates and general recordkeeping burdensome. In addition, determining whether or not an employee is within the “City” of Portland as he or she moves from project to project throughout the State of Oregon is particularly challenging. The Administrative Rules currently define the “City” to mean “the City of Portland, Oregon or the area within the territorial City limits of the City of Portland, Oregon, and such territory outside this City over which the City has jurisdiction or control by virtue of ownership or any Constitutional or Charter provisions, or law. A basic search for maps or information on what precise geographic areas this definition includes leads to no answer. Employers will certainly need to have a very clear map, with precise street names and markers, in order to comply with the Ordinance. Even then, calculating accrual rates and whether sick time may be used for employees who are frequently travelling in and out of these geographic areas will be very difficult. We suggest defining the City of Portland as any project permitted by the City of Portland.

B. An Example of How the Ordinance Poses a Significant and Complex Administrative Burden

The Bull Run watershed is located 26-miles from downtown Portland in the Sandy River basin on the Mt. Hood National Forest. While 96% of the lands are under federal ownership, 4% are owned by the City of Portland. See City of Portland, Portland Water Bureau, Bull Run Watershed, available at http://www.portlandoregon.gov/water/29784. Construction is currently and frequently taking place at the Bull Run watershed. This means that employers will need to know whether employees are performing work within the 4% of land owned by the City of Portland or not. This is just one example of the challenges facing the members of AGC as they struggle to create methods for complying with the Ordinance.

C. How Other Sick Leave Ordinances Handled this Issue Differently

Unlike the City of Portland’s thus-far expressed plans, Seattle and San Francisco both provided for a “grace period” for employers to achieve compliance. In Seattle, from the date of enactment in September 2012 through February 2013 (approximately four months or 120 days), the Seattle Office of Civil Rights (the division enforcing the Seattle ordinance) has expressly focused solely on compliance; not punishment. See Enclosures. Even after February 2013, employers have been given 30 days to resolve any complaint after receiving an advisory letter from the Seattle Office of Civil Rights and an opportunity to receive technical assistance to resolve the complaint. If a complaint is resolved within 30 days, the file is closed. As of February 2013, the Seattle Office of Civil Rights has yet to file a charge. Likewise, in San Francisco, the San Francisco Board of Supervisor and the Mayor approved a proposal to delay the date employers were
required to provide sick time by 120 days in order to allow employers additional time to set up accrual and recordkeeping systems. See Enclosures.

D. Conclusion

Portland’s Ordinance requires employers to take significant steps to ensure compliance. We suggest that Portland follow Seattle and San Francisco’s lead in providing an initial four-month (or 120-day) minimum grace period and subsequent 30-day grace period for employers to determine, implement, and correct the best tools for compliance. Further, we recommend exempting current construction projects and those workers who are subject to a collectively bargained construction labor agreement.

AGC is committed to assisting its members to comply with Portland’s Ordinance. With the above suggestions, the Ordinance will achieve the City’s goals of promoting a sustainable, healthy, and productive workforce in a constitutionally permissible manner, while ensuring businesses operating here can continue to be economically sustainable, meet the demand for construction projects and bids, and provide thousands of jobs to Oregonians. If you have any questions or concerns, please do not hesitate to contact us.

Very truly yours,

Jeremy T. Vermilyea, Esq.
Leora Coleman-Fire, Esq.

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Enclosures
Thank you for your comment.