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Colorado Secretary of State

COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE 2019-2020 #247

MOTION FOR REHEARING

On behalf of Kelly Brough, registered elector of the State of Colorado, the undersigned counsel hereby submits this Motion for Rehearing for Initiative 2019-2020 #247 pursuant to Section 1-40-107, C.R.S., and as grounds therefore states as follows:

I. INITIATIVE #247 IMPERMISSIBLY CONTAINS MULTIPLE SEPARATE AND DISTINCT SUBJECTS IN VIOLATION OF THE SINGLE-SUBJECT REQUIREMENT.

While the measure purports to concern the establishment of a paid medical and family leave "insurance" program, it contains multiple separate subjects, in violation of section 1 (5.5) of article V of the Colorado Constitution and section 1-40-106.5, C.R.S. These multiple subjects allow the initiative's proponents to strategically combine separate proposals into a single measure to alleviate their potential concern that one of the subjects might fail if presented to voters alone. *See In Re Title, Ballot Title, Submission Clause for 2011-2012 #3*, 274 P.3d 562, 566 (Colo. 2012). In a presidential election year where tax policy, education funding, and spending on other essential government services (*e.g.*, transportation, healthcare, and housing) have been, and will continue to be, hot button topics, Initiative #247 impermissibly aims to appeal to separate and distinct voting blocs for passage.

The following separate components of the measure are distinct and without a necessary or proper connection. *See, e.g., In re Title, Ballot Title and Submission Clause for 2007-2008 #17*, 172 P.3d 871, 878 (Colo. 2007).

1. The measure creates a paid medical and family leave program

2. The measure purports to create a state enterprise to provide paid medical and family leave "insurance" funded by "premiums" paid by employers and employees.

3. The measure requires that employers (and employees) purchase paid medical and family leave insurance through the state (as opposed to

through private providers as is permitted for unemployment and workmen's compensation insurance).

4. The measure provides for mandatory notice requirements for employees taking paid medical and family leave.

5. The measure creates an obligation for employees who take paid medical and family leave in accordance with its terms to continue to pay for healthcare coverage provided by their employer or risk losing such healthcare coverage.

6. The measure creates a private right of action against employers for retaliation against persons taking paid medical and family leave.

7. The measure requires that the Director of the Paid Family Medical Leave Program and Division (the "Division") institute rules providing for fines of up to $500.00 per violation against employers who he or determines have violated the rules of the program.

8. The measure gives the Director the Division authority to set premiums for the program after December 31, 2024.

Therefore, the Title Board lacks jurisdiction to set title for Initiative #247 because it succumbs to the dangers of omnibus measures and impermissibly joins at least eight "incongruous subjects in the same measure," instead of having the passage of "each proposal depends on its own merits." *In Re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 646 (Colo. 2010).

Moreover, the measure is not saved by the proponents' characterization of the provisions as all falling under the umbrella topic or theme of "paid family and medical leave." The Colorado Supreme Court has held that that "water," "revenue changes," and "local regulation of oil and gas development" are three examples of "overarching themes" that did not qualify as single subjects when the proposed initiatives associated with those themes contained disconnected or incongruous provisions. *See In re Proposed Initiative "Public Rights in Waters II"*, 898 P.2d 1076,1080 (Colo. 1995) (holding that the theme of "water" did not satisfy the single subject rule when the measure contained two separate subjects – water conservation district elections and the public trust doctrine); *In re Proposed Initiative Amend TABOR 25*, 900 P.2d 121, 125 (Colo. 1995) (holding that the umbrella subject of "revenue changes" did not alter the fact that the measure contained two unrelated subjects – a tax credit and changes to the procedural requirements for ballot titles); *In re Title, Ballot Title and Submission Clause for 2013–2014 #90 and #93*, 2014 CO 63, ¶ 53 (holding that "the overarching theme of 'local regulation of oil and gas development' does not qualify as a single subject because the Proposed Initiatives contain disconnected and incongruous provisions that vest local governments with authority to regulate oil and gas development on the one hand and limit takings law on the other"). The theme of "paid family and medical leave" is at least as equally broad as these other umbrella topics, especially considering the measure contains provisions establishing a non-income-based corporate tax and funding for education and growth challenges.

II. THE TITLE BOARD MUST SET A TABOR TITLE FOR THE MEASURE BECAUSE THE MEASURE IMPOSES A NEW PAYROLL TAX.

Article X, Section 20 of the Colorado Constitution (hereinafter the "Taxpayer Bill of Rights" or "TABOR") requires that except in situations of grave fiscal shortfall or other emergency the title for any ballot measure which will impose "any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain" in the State or any political subdivision thereof must begin with the language "SHALL TAXES BE INCREASED . . . ." Colo. Const. Art. X, §20(3)(c) and (4)(a). Here, the proponents of the measure have argued and the Title Board has agreed that a TABOR-compliant ballot title is unnecessary because the proposed Division will function as a state "enterprise" exempt from TABOR. Colo. Const. Art. X, §20(2)(b). But the Division cannot qualify as an enterprise under Colorado law.

An enterprise is defined in TABOR as a "government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined." Colo. Const. Art. X, §20(2)(d). To be sure, the measure provides that the Division will have bonding power and notes that Division risks loss of enterprise status if it receives more than ten percent of its total revenues in grants from all Colorado state and local governments combined. *See* Initiative #247, Section 8. But the Title Board must also determine whether the Division as proposed is a "government-owned business." It is not, because the Division, as proposed, is not a "business" within the ordinary meaning and understanding of this term.

"The term "business" is generally understood to mean an activity which is conducted in the pursuit of benefit, gain or livelihood." *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 868 (Colo. 1995) (citing *Lindner Packing & Provision Co. v. Industrial Comm'n*, 60 P.2d 924, 926 (Colo. 1936). The Colorado Supreme Court has held that the ability of an entity to levy taxes is inconsistent with the characteristics of a business and disqualifies such an entity as an enterprise under TABOR. *Id.* at 869. The measure vests the Division with the ability to levy a mandatory payroll tax—styled as "payroll premiums"—to be remitted beginning January 1, 2023 "in the form and manner determined by the Division." *See* Initiative #247, Section 7. After December 31, 2024, the Director of the Division is empowered to set the rate of this payroll tax at an amount sufficient to cover 135% of the benefits paid during the preceding calendar year plus 100% of the "cost of administration of the payment of those benefits during the immediately preceding calendar year" less money left over. *Id.* In truth, these taxes will cover more than the payment of benefits and the administration of those payments; they will pay for the general "administration of the program" which includes developing and enforcing rules governing employer and employee conduct. *Id.* Sections 7, 9 and 13.

The Internal Revenue Service (the "I.R.S.") has determined that mandatory payroll deductions levied by the State of California to finance its Family Temporary Disability Insurance program are payroll taxes which may be deducted from federal taxable income under Section 164 of the Internal Revenue Code. *See* Memorandum, Office of Chief Counsel Number 200630017 (July 28, 2006) (a copy is attached hereto). The I.R.S. based its determination that payroll deductions for such state-mandated "insurance" are taxes because they are mandatory and "imposed and collected for the purpose of raising revenue to be used for a governmental function that serves public purposes, namely, to allow individuals to take time off from work to care for a seriously ill child, parent, or domestic partner; or to bond with a new child." *Id.* The I.R.S. characterization of California's program matches almost perfectly the measure's proposed program for Colorado.

Not only are the "premiums" imposed by the measure mandatory, they are only avoidable through self-employment, unemployment or employment outside Colorado. It is this inability to choose to avoid these "premiums"—to refuse to pay for the "service" being "sold" by the proposed "enterprise"—that distinguishes these proposed exactions from other fees which the Colorado Supreme Court has held are TABOR-exempt when they bear a "reasonable relationship" to the services provided and/or a "comprehensive regulatory regime" associated with the services provided. *See Colorado Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506 (Colo. 2018) (holding that $0.20 fee imposed on paper grocery bags by municipality constitutes a TABOR-exempt fee because it bears a reasonable relationship to the service of recycling such bags and regulations associated with that service). Because the proposed Division can—and indeed, as proposed must—levy a payroll tax, the Division is not a business within the ordinary meaning of that term, and cannot therefore qualify as an enterprise under *Nicholl*.

Even if the Title Board were to determine that the proposed payroll premiums do not vest the Division with taxing authority under *Nicholl*, other characteristics of the Division render it not a business and therefore not a TABOR-exempt enterprise. The Division as contemplated will have significant enforcement, regulatory and rate-setting powers. There will be no free market for its product. Under the measure, employers and employees will have no choice—except for sole proprietorships—but to purchase paid family medical leave insurance through the Division or another party. They will be required to purchase this "product" at whatever rate the Director determines is necessary. Even monopolies cannot ordinarily compel an entire state's working population to become their customers. The Division is not a business in the ordinary understand of that term in Colorado and federal law. Because it is not a business, it is not a "government-owned business" and cannot qualify as a TABOR-exempt enterprise. Hence, to the extent the Title Board finds that it has jurisdiction to set a title, it should set a title in compliance with TABOR.

III. THE TITLE AS DRAFTED IS MISLEADING

The Title also is impermissibly misleading because it states that the premiums will be "employer paid," but then notes that only 75% of the premium is required to be employer paid. *In re Title, Ballot Title, & Submission Clause for 2007–2008 # 62,* 184 P.3d 52, 58 (Colo. 2008) (explaining that the clear title requirement requires that the title "fairly reflect the proposed initiative so that petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the Board"); *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45,* 234 P.3d 642, 648 (Colo. 2010) (explaining that a title set by the Title Board will be overturned if it is "insufficient, unfair, or misleading"). Therefore, the Title should be amended to accurately describe the premium as at least 75% employer paid.

CONCLUSION

Accordingly, the Objector respectfully requests that this Motion for Rehearing be granted and a rehearing set pursuant to C.R.S. § 1-40-107(1).

Respectfully submitted this 26th day of February, 2020.

/s/ Christopher O. Murray
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Office of Chief Counsel
Internal Revenue Service
Memorandum

Number: 200630017

Release Date: 7/28/2006
CC:ITA:B04:SAlskow
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date: June 01, 2005

to: John Chinnapongse
Associate Area Counsel (SBSE)
Sacramento

from: Robert M. Brown
Associate Chief Counsel
(Income Tax and Accounting)

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subject: California Paid Family Leave

You have requested our views regarding the tax consequences of Family Temporary Disability Insurance (FTDI) payments made under California's Paid Family Leave Program. Specifically, you have asked (1) whether the amounts withheld from employees' paychecks for FTDI are deductible under § 164 of the Internal Revenue Code, and (2) whether amounts paid to an individual under the program are includible in gross income under § 85 if (a) an individual does not itemize deductions on a federal income tax return, or (b) an individual itemizes deductions on a federal income tax return.

FACTS

Effective January 1, 2004, the State of California amended its State Unemployment Insurance Code to include FTDI as a component of its disability insurance program. FTDI payments are made to eligible individuals who are unable to work because they are caring for a seriously ill or injured family member, or bonding with a minor child within one year of the birth or placement of the child in connection with foster care or adoption. Thirteen million Californians will be covered by this program.

FTDI payments will be paid from the State disability fund, and will be funded entirely by employee contributions. The payroll deductions are mandatory.

Eligible individuals can receive up to 6 weeks of FTDI payments in a 12-month period. An individual is not eligible to receive an FTDI payment for the same days the individual receives or is entitled to receive unemployment compensation, disability insurance, or other cash benefits from the State, any other state, or the Federal government.

ISSUE 1

Are the amounts withheld from employees' paychecks under this program deductible under § 164?

HOLDING

Such amounts are deductible by the employee under § 164(a)(3) for the taxable year in which paid or accrued, but only if the employee's deductions are itemized in computing taxable income under § 63.

ANALYSIS

Section 164(a)(3) provides, in part, that state income taxes shall be allowed as a deduction for the taxable year in which they are paid or accrued.

Principles developed under federal law, not state interpretations or designations, determine whether a payment falls within the meaning of terms 'taxes' and 'income taxes' as used in federal statutes. *See* Rev. Rul. 79-180, 1979-1 C.B. 95; Rev. Rul. 76-215, 1976-1 C.B. 194; Rev. Rul. 71-49, 1971-1 C.B. 103; and Rev. Rul. 61-152, 1961-2 C.B. 42.

The word 'taxes' has been defined as an enforced contribution, exacted pursuant to legislative authority in the exercise of the taxing power, and imposed and collected for the purpose of raising revenue to be used for public or governmental purposes and not as a payment for some privilege granted or service rendered. *See* Rev. Rul. 77-29, 1977-1 C.B. 44; Rev. Rul. 71-49; Rev. Rul. 61-152; and Rev. Rul. 58-141, 1958-1 C.B. 101. Further, it is the position of the Service that a tax must be paid to a government levying the tax, to certain public corporations created by that government for a public purpose, or to their agents. *See* Rev. Rul. 74-525, 1974-2 C.B. 411, Rev. Rul. 74-58, 1974-1 C.B. 180; and Rev. Rul. 71-49.

In Rev. Rul. 81-191, 1981-2 C.B. 49, employees were required to contribute to the Rhode Island temporary disability insurance benefit fund pursuant to the Rhode Island Temporary Disability Insurance Act (Act). The employer was required to withhold the amount of such contributions from the employees' wages at the time the wages were paid. If the employer failed to withhold the contributions of any employee within the time provided by the Act, the employer became solely liable for such contributions under the Act.

Rev. Rul. 81-191 holds that the contributions withheld from the wages of an employee are state 'income taxes' that are deductible by the employee under § 164(a)(3), provided that the employee itemizes deductions in computing taxable income. Rev. Rul. 81-191 reasons that the employee contributions to the fund are 'taxes' because they are exacted pursuant to legislative authority in the exercise of the taxing power of the state, and they are imposed and collected by the state for the purpose of raising revenue to be used for governmental functions that serve public purposes. The ruling further reasons that the employee contributions to the fund are 'income taxes' because they are measured by wages paid during the calendar year. For similar results and rationale, see Rev. Rul. 81-192, 1981-2 C.B. 50 (New York); Rev. Rul. 81-193, 1981-2 C.B. 52 (New Jersey); and Rev. Rul. 81-194, 1981-2 C.B. 54 (California).

In California, the contributions under its FTDI program are taxes. The law requires employers to withhold a portion of each employee's wages at the time the wages are paid. These withheld and contributed amounts are exacted pursuant to legislative authority in the exercise of the taxing power of the State of California, and are imposed and collected for the purpose of raising revenue to be used for a governmental function that serves public purposes, namely, to allow individuals to take time off from work to care for a seriously ill child, parent, or domestic partner; or to bond with a new child.

Moreover, the amounts withheld from the employees' wages are 'income taxes' because they are measured by wages paid during the calendar year. *See* Rev. Rul. 81-191, and *Trujillo v. Commissioner*, 68 T.C. 670 (1977).

Consequently, amounts withheld from the wages of an employee for contribution under this program are state income taxes and, therefore, shall be deductible by the employee under § 164(a)(3) for the taxable year in which paid or accrued. However, such amounts are deductible by an employee only if the employee's deductions are itemized in computing taxable income under § 63.

If you have any questions about Issue 1, please contact Erika Reigle at (202) 622-4950.

ISSUE 2

Are FTDI payments includible in gross income under § 85 if:

(a) an individual does not itemize deductions on a federal income tax return; or

(b) an individual itemizes deductions on a federal income tax return.

HOLDING

Individuals who do not itemize deductions include only the amount in excess of their contributions in income. Individuals who itemize deductions include the full amount of the FTDI payment in income, but take an income tax deduction equal to the amount of their contributions.

ANALYSIS

Section 85 provides that gross income includes unemployment compensation. Under § 85(b), unemployment compensation is defined as any amount received pursuant to a state or Federal government program which is in the nature of unemployment compensation. Section 85 does not define "in the nature of unemployment compensation." However, the House Report provides that "unemployment compensation programs are those designed to provide cash benefits on a regular basis to normally employed workers during limited periods of unemployment." H.R. Rep. 95-1445 at 48. Prior to enactment of § 85, the Service taxed unemployment compensation benefits received under private plans but exempted those received under a governmental plan as a social welfare benefit. In explaining the reason for the change, the Committee on Ways and Means stated, "unemployment compensation paid under a government program should be includible in gross income because such benefits are, in substance, a substitute for taxable wages." H.R. Rep. 95-1445 at 47.

The FTDI payments provide a substitute for taxable wages and are in the nature of unemployment compensation. This conclusion is not changed by the determination of how an individual prepares his or her individual income tax return. However, based on § 1.85-1(b)(1)(iii) of the Employment Tax Regulations, the amount an individual reports as gross income is affected by whether or not the individual itemizes deductions.

Section 1.85-1(b)(1)(iii) provides:

If a governmental unemployment compensation program is funded by an employee contribution which is not deductible by the employee, an amount paid to such employee under the program is not to be considered unemployment compensation until an amount equal to the total nondeductible contributions paid by the employee to such program has been paid to such employee.

Thus, in essence, if an individual does not take an income tax deduction equal to his or her contributions to the governmental plan, only amounts in excess of the individual's basis in the fund are includible in gross income. Conversely, if an individual does deduct his or her contribution to the governmental plan, the entire amount of the payment is includible in gross income.

This provides equal tax treatment to each category of filer. Those individuals who do not itemize deductions include only the amount in excess of their contributions in income. Those individuals who do itemize deductions include the full amount of the

FTDI payment in income, but take an income tax deduction equal to the amount of their contributions. Thus, the net result is that each individual is taxed on only the amount of the FTDI payment that is in excess of his or her contribution.

If you have any questions about this issue, please contact at .

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We hope this information is helpful. For any other questions, please contact at .