DATE FILED: January 17, 2022 2:06 PM
FILING ID: 379E4ECD2EB27
CASE NUMBER: 2022CA91

Colorado Court of Appeals 2 E 14th Ave. Denver, CO 80203 Appeal; District Court, Denver County; Chief Judge Michael A. Martinez, Case No. 2021CV32203 **Appellee Chronos Builders, LLC** v. **Appellants Department of Labor and Employment, Division of Family and Medical Leave Insurance**	
Daniel E. Burrows Advance Colorado 1312 17th St. Unit 2029 Denver, CO 80202 (720) 588-2008 dan@advancecolorado.org Atty. Reg. #40284	Case Number:

NOTICE OF APPEAL

I. Case Background

Plaintiff–Appellee, Chronos Builders, LLC, sued Defendant–Appellant,

Department of Labor and Employment, for a violation of The Taxpayer's Bill of Rights, Colo. Const. art. X, § 20. According to Plaintiff, the recently enacted Paid Family and Medical Leave Insurance Act imposes an unconstitutional "added tax or surcharge" on income when it charges certain employers and employees to fund a state-run family and medical leave program.

Chronos Builders employs ten persons in Grand Junction and will be subject to the allegedly unconstitutional charge beginning January 1, 2023. The Department is set to administer the program through its new Division of Family and Medical Leave Insurance.

II. Order on Appeal

The Department moved to dismiss this suit under C.R.C.P. 12(b)(5). The district court granted the motion on December 13, 2021, with service on the parties the same day via the court's e-system. That order resolved all pending issues. The Court of Appeals has jurisdiction under Colo. Rev. Stat. § 13-4-102(1) (2021).

III. Post-Trial Motions

There have been no post-trial motions because there has been no trial. The Department never filed an answer, and the case was never "at issue" as defined by C.R.C.P. 16(b)(1).

IV. Extension of Time to File the Notice of Appeal

There were no requests to extend the deadline to file this notice of appeal.

V. Magistrate Order

This case was not decided by a magistrate.

VI. Issue on Appeal

Does the Family and Medical Leave Insurance Act's "premium," which is calculated as a raw percentage of an employee's wages and is not applied uniformly across employers and wage earners, violate The Taxpayer's Bill of Rights' requirement that "all taxable income . . . be taxed at one rate . . . with no added tax or surcharge," Colo Const. art X, § 20(8)(a)?

VII. Necessity of Transcript

No transcript is necessary.

VIII. Lawyer Information

Counsel for Plaintiff–Appellant is stated in the caption. Counsel for Defendant–Appellee are:

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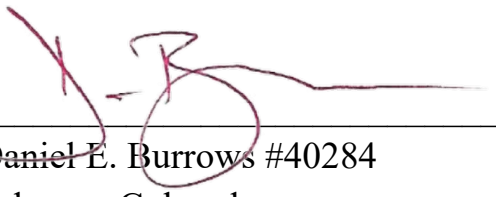
IX. Attachments

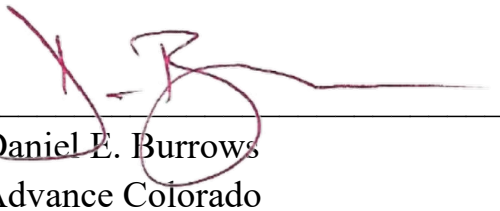
A copy of the order being appealed is attached to this notice.



Daniel E. Burrows #40284
Advance Colorado

CERTIFICATE OF SERVICE

I certify that the foregoing document (with its attendant appendix) was delivered to the Clerk of the Court on January 17, 2022, via electronic filing. Consistent with C.A.R. 30(e), service on Appellee will be accomplished by the Court's E-System. I also certify that a copy of this notice of appeal will be concurrently filed in the Denver District Court, consistent with C.A.R. 3(a).



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Advance Colorado

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, Colorado 80202	DATE FILED: December 17, 2021 2:46 PM CASE NUMBER: 2021CV32203 CASE NUMBER: 2022CA91
Plaintiff(s): CHRONOS BUILDERS, LLC **v.** **Defendant(s):** DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF FAMILY AND MEDICAL LEAVE INSURANCE	**▲ COURT USE ONLY ▲** Case No: 2021CV32203 Courtroom: 259

ORDER RE: DEFENDANT'S MOTION TO DISMISS PURSUANT TO 12(B)(5)

THIS MATTER comes before the Court on a Motion to Dismiss, filed by Defendant, the Department of Labor and Employment, Division of Family and Medical Leave Insurance ("Defendant"), against Plaintiff Chronos Builders, LLC ("Plaintiff"), for failure to state a claim upon which relief may be granted pursuant to C.R.C.P. 12(b)(5). The Court, having reviewed the Motion, the Complaint, Plaintiff's Response, Defendant's Reply, and all other pertinent pleadings and authority, and being otherwise fully advised on the premises, FINDS and ORDERS as follows:

I. BACKGROUND

Plaintiff is a custom home builder with its primary place of business in Grand Junction, Colorado. As of the date of the Complaint, Plaintiff employed 8 persons and was looking to hire a ninth. As recently as early 2021, Plaintiff had more than ten employees; however, the increased premium pursuant to Proposition 118 for companies with ten or more employees has made Plaintiff hesitant to cross that threshold again.

The Paid Family and Medical Leave Insurance Act (the "Act"), C.R.S. § 8-13.3-501, *et seq.*, was added by voter approval of Proposition 118, and became effective on December 31, 2020. The Act was enacted to provide access to paid family and medical leave insurance for Colorado workers by creating an affordable insurance program. *Id.* § 8-13.3-502. To implement the program, the Act created a statewide paid family medical leave insurance enterprise: The Division of Family and Medical Leave Insurance (i.e., Defendant in this matter). *Id.* §§ 8-13.3-502, -508.

Defendant is authorized under the Act to collect payroll premiums from employers and employees in order to finance the "pay[ment of] family and medical

leave insurance benefits and associated administrative and program costs." *Id.* § 8-13.3-502(4)(b); *see also id.* § 8-13.3-507. The Act clarifies that "[t]he premiums collected under this [Act] are used exclusively for the payment of Family and medical leave insurance benefits and the administration of the program. Premiums established under this section are fees and not taxes." *Id.* § 8-13.3-507(7). The premium amount is based on a percentage of employee wages at a rate set by Defendant, established "to defray the costs of providing the program's leave benefits to workers." *Id.* § 8-13.3-502(4)(a); *id.* § 8-13.3-507(3)(b). The Act does not uniformly apply the premium to all employers and employees. For example, an employer with ten or more employees is required to remit 100% of the premium and may deduct up to 50% of the premium required for an employee from that employee's wages, while an employer with fewer than ten employees is only required to remit 50% of the required premium and may deduct up to 50% of the premium required for an employee from that employee's wages. *Id.* § 8-13.3-507(5).

Beginning on January 1, 2023, Plaintiff will be required to pay the premium to Defendant for each of its employees. Plaintiff brought this action seeking to enjoin Defendant from collecting such premiums and requesting that the Court enter a declaratory judgment providing that the Act's funding mechanism is not severable from the statutory scheme at large and therefore that the Act is unenforceable as a whole.

Plaintiff's Complaint is based on its contention that the premium under the Act constitutes an "additional charge on certain income." Specifically, Plaintiff asserts that, because the premium is not uniformly applied under the Act to all wages or wage earners in the state, the premium violates Section (8)(a) of the Taxpayer's Bill of Rights (TABOR). Section (8)(a) states that "[a]ny income tax law change . . . shall also require all taxable net income to be taxed at one rate . . . with no added tax or surcharge." Defendant seeks dismissal of Plaintiff's Complaint and contends, as Section (8)(a) does not apply to the premium because the Act's premium is not an income tax law change and also because the premium constitutes a fee and not a tax. Plaintiff concedes that the premium is a fee, therefore I limit my analysis to whether the premium is subject to Section (8)(a).

II. LEGAL STANDARD

A motion to dismiss for failure to state a claim tests the sufficiency of the claim for relief. *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992). A motion to dismiss under C.R.C.P. 12(b)(5) is disfavored and should be granted only when a complaint fails to state a plausible claim for relief. *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016); *Rector v. City & Cty. of Denver*, 122 P.3d 1010, 1013 (Colo. App.

2005). A court must find facts solely on the allegations in the complaint, with all factual allegations being accepted as true, and drawing all reasonable inferences therefrom in favor of the non-moving party. *Rector*, 122 P.3d at 1013. However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Warne*, 373 P.3d at 591.

III. DISCUSSION

Plaintiff claims that the Act's premium is subject to the requirements of Section (8)(a) of TABOR. As relevant here, the last sentence of Section (8)(a) states that "[a]ny income tax law change after July 1, 1992 shall also require all taxable net income to be taxed at one rate, excluding refund tax credits or voter-approved tax credits, *with no added tax or surcharge*." Colo. Const. Art. X, § 20(8)(a) (emphasis added). Relying wholly on the "no added surcharge" language of this sentence, Plaintiff asserts that the premium is unconstitutional as an added surcharge because it is not applied uniformly at one rate. Defendant maintains that the Complaint cannot state a plausible claim for relief under Section (8)(a) given that the Act's authorization and creation of the premium does not constitute an "income tax law change" and is therefore not subject to the requirements of Section (8)(a).

A. Scope of Section (8)(a) of TABOR

Defendant argues that Section (8)(a) is strictly limited in its scope to income tax law changes. Plaintiff argues that the clause that begins the sentence—"any income tax law change"—in nonrestrictive and does not apply to the entire sentence. Specifically, Plaintiff argues that the prohibition against added surcharges is independent of the restrictions over income tax law changes. The last sentence of Section (8)(a), Plaintiff argues, should be interpreted to mean that "all income must be treated the same." Resp. at 5.

The first question the Court must consider then is the breadth of Section 8(a), specifically whether the requirements and restrictions in Section (8)(a) are applicable to statutory provisions other than income tax laws. This is therefore an issue of constitutional interpretation.

> [T]he court's duty in interpreting a constitutional amendment is to give effect to the electorate's intent in enacting the amendment. Courts must give words their ordinary and popular meaning in order to ascertain what the voters believed the amendment to mean when they adopted it. Courts should not engage in a narrow or technical construction of the initiated amendment if doing so would contravene the intent of the electorate. Thus, when the language of an amendment is clear and unambiguous, the amendment must be enforced as written. Language

> in an amendment is ambiguous if it is "reasonably susceptible to more than one interpretation."

Davidson v. Sandstrom, 83 P.3d 648, 654 (Colo. 2004) (internal quotations omitted) (quoting *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo.1996)). Further, when the court finds the text of TABOR supports multiple interpretations equally, the court may employ the interpretive guideline in TABOR that states "[i]ts preferred interpretation shall reasonably restrain most the growth of government." Colo. Const. art. X, § 20(1). Moreover, interpretations that would hinder basic government functions or cripple the government's ability to provide services shall be avoided. *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008).

Here, the Court finds that, in giving effect to each word's ordinary meaning, and employing basic grammatic principles, Section (8)(a) applies only to "income tax law changes" and therefore prohibits added surcharges only within the context of income tax laws. The Court finds that construing the words and clause at the beginning of a sentence to provide context for the rest of the sentence is a general and not hyper-technical reading as Plaintiff argues. 'Any income tax law change' is a restrictive clause, introducing information necessary to the meaning of the last sentence in Section (8)(a). Plaintiff's interpretation of the last sentence of Section (8)(a) effectively strikes out the opening clause, but in order to enforce Section (8)(a) as written, the Court must give effect to the restrictive opening clause. Similarly, the word 'tax' is essential within the clause 'any income tax law change,' and cannot be removed. Thus, finding that there is only one reasonable interpretation of the scope of the last sentence of Section 8(a), I need not consider which party's interpretation would most restrain the growth of government.

Therefore, Section (8)(a)'s prohibition against added surcharges is restricted to the specific context of incomes tax law changes.

B. Is the premium subject to Section (8)(a) of TABOR?

Having established the scope of the relevant portion of Section (8)(a), the Court turns to consider whether the Act's premium is subject to Section (8)(a), and, if it is, whether the premium is unconstitutional as an invalid surcharge. In making this assessment, I note that the premium provision is subject to the presumption of constitutionality. *Mesa Cty. Bd. of Cty. Com'rs v. State*, 203 P.3d 519. "The beyond-a-reasonable-doubt showing necessary to overcome that presumption 'acknowledges that declaring a statute unconstitutional is one of the gravest duties impressed upon the courts.'" *Id.* (quoting *City of Greenwood Vill. v. Petitioners for the Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000)). Courts afford the legislature deference in its law-making functions, so I review the premium under the assumption that the

"legislative body intends the statutes it adopts to be compatible with constitutional standards." *Meyer v. Lamm*, 846 P.2d 862, 876 (Colo.1993).

As discussed above, Section (8)(a) is explicitly limited to income tax law changes. Here, I find that, while the premium is measured in reference to an employee's wages or income, this relation to income does not subject the Act to Section (8)(a)'s requirements. Thus, even if I were to assume, arguendo, that the Act's premium is a surcharge, the premium still would not be subject to Section (8)(a) because the Act was enacted as a family and medical leave law, not an income tax law. Therefore, because the Act's premium is not subject to Section (8)(a), it cannot be unconstitutional under Section (8)(a).

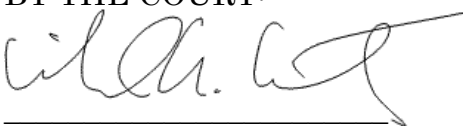
IV. CONCLUSION

Accordingly, I find that Section (8)(a) is inapplicable in this matter and, therefore, that the Complaint does not state a claim upon which relief may be granted. Further, in concluding that Section (8)(a) of TABOR does not apply to the premium, I need not address whether the Act's funding mechanism is severable from the statutory scheme at large.

WHEREFORE, for the reasons set forth above, Defendant's Motion to Dismiss pursuant to C.R.C.P 12(b)(5) is now **GRANTED**. Accordingly, this matter is hereby **DISMISSED** with prejudice.

SO ORDERED this 13th day of December, 2021.

BY THE COURT:



MICHAEL A. MARTINEZ
District Court Chief Judge