



TECHNET
THE VOICE OF THE
INNOVATION ECONOMY

MEMORANDUM

TO: Honorable Mayor Jenny Durkan, City of Seattle

FROM: Samantha Kersul, TechNet

DATE: May 26, 2020

RE: Unconstitutionality of Proposed Seattle “Premium Pay” Ordinance

Mayor Durkan:

TechNet is the national network of over eighty technology companies that promotes the growth of the innovation economy through bipartisan advocacy at the federal and state level in all fifty states. TechNet’s diverse membership includes dynamic American businesses ranging from small startups to the most prominent global companies and represents more than three million employees in the fields of information technology, e-commerce, clean energy, gig and sharing economy, venture capital, and finance.

The Seattle City Council is considering a bill to require transportation and delivery-network companies to pay a \$5 premium on each delivery or ride in the City. We believe that parts of the bill, if enacted, would violate the United States Constitution. We also believe that the bill exceeds the City’s legislative authority. Because it would undermine the interests of the City and its residents to adopt an unauthorized and unconstitutional bill, we urge you to reject it.

The bill, Council Bill 119799, raises a laundry list of legal concerns—the most important of which is preemption. In 2018, Washington voters approved Initiative Measure 1634, the “Keeping Groceries Affordable Act.” The Act prohibits localities from imposing any tax, fee, or other assessment on groceries. It defines these assessments to include an “exaction of any kind” on grocery transportation. Bill 119799, however, imposes just such an exaction. It targets groceries by raising the cost of each delivery by \$5. It thus directly contradicts the voters’ will and violates state law.

Some individual parts of the bill likewise violate state and federal law. In particular, section 100.050C of the bill penalizes companies that avoid the bill's premium payments by reducing or eliminating their services:

No hiring entity shall, as a result of this ordinance going into effect, reduce or otherwise modify the areas of the City that are served by the hiring entity. It shall be a violation of this subsection 100.050.C if this ordinance going into effect is a motivating factor in a hiring entity's decision to reduce or otherwise modify the areas of the City that are served by the hiring entity, unless the hiring entity can prove that its decision to reduce or modify its services would have been taken in the absence of this ordinance.

This penalty is without precedent. We are aware of no constitutional authority for a city to compel a company to continue doing business within its borders. We know of no instance in which such an ordinance has been enforced.

The penalty also likely violates the U.S. Constitution,

- The bill violates the Takings Clause of the Fifth Amendment, extended to states under the Fourteenth Amendment. As the Supreme Court made clear in *Horne v. USDA*, 135 S. Ct. 2419, 2430 (2015), the Takings Clause protects personal property—including contract rights. The Court has also recognized that “regulatory” takings may be unlawful even where they do not directly appropriate property.

Here, by forcing a business to continue unprofitable operations, the City would be extracting payments from an unwilling person and thus taking private property without any—let alone just—compensation. And by threatening a business with sanctions for leaving the City, the bill effectively appropriates the business's entire operation for public use. Without just compensation, such an appropriation violates the Takings Clause.

- The proposed action also violates the Contracts Clause of Article I, section 10, by significantly impairing a business's contracts with independent workers and others. As the Supreme Court reaffirmed in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) and subsequent decisions, a state cannot “substantially impair” a contractual right without “sufficient justification.” To determine whether a state law violates the Contract Clause, the Court uses a two-part test. First, the Court asks whether the state law “substantially” impairs contractual obligations. Second, the Court asks whether the state has a legitimate public purpose and whether the law is a reasonable and appropriate means for accomplishing that purpose. The Court is more likely to find a law unconstitutional when the law imposes new, unforeseeable burdens.

Here, the bill imposes just those type of burdens. Companies have long enjoyed the right to scale their operations as they see fit—a right that includes the discretion to stop doing business in an unprofitable jurisdiction. Companies have entered hundreds, if not thousands, of contracts in the City allowing them to discontinue operations. The bill strips companies of those contractual rights in a single stroke. Such a measure would impair their contract rights in an unprecedented fashion and thus violate the Contracts Clause.

- For reasons closely related to the Takings Clause and the Contracts Clause, the proposed action potentially violates the Due Process Clause of the Fifth and Fourteenth Amendments by penalizing a business for exercising its previously unchallenged right to choose where to do business and where to stop doing business. *See Lambert v. California*, 355 U.S. 225 (1957) (“A law which punishes conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear. Its severity lies in the absence of an opportunity . . . to avoid the consequences of the law . . .”).

When registering to do business in Seattle, companies had no way to know they could be locked into doing business there. Nor had they any reason to expect they could be prevented from passing additional costs on to consumers; as written, the bill forces them to absorb the premium payments themselves. In short, they had no reason to expect that the City would impose such dramatic limits on their control over their business operations. Such unexpected limits raise serious Due Process concerns.

- Finally, to the extent the bill purports to give the City authority to enforce its penalties on a company after the company leaves the City, it violates RCW 35.21.740. That statute limits city powers to the limits of the city’s incorporated area. *See Washington State Attorney General Opinion*, AGO 1988 No. 15 (July 1, 1998) (“Municipal corporations generally are not authorized, in the absence of a legislative grant of authority, to operate beyond their own boundaries.”). By regulating businesses that choose to leave, the bill reaches beyond the City’s limits and exceeds the City’s authority.

For these reasons, we believe the bill violates federal and state law. If adopted, it would impose unnecessary costs on the regulated community, invite legal challenges, and distract from lawful, productive reform efforts. We urge you to reject it.

Please consider TechNet and our members a resource and feel free to reach out with any questions you may have. We look forward to partnering with you on this issue.

Best,

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