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MEMORANDUM

To: Dennis Dougherty and True Apodaca

From: Legislative Council Staff and Office of Legislative Legal Services

Date: March 14, 2025

Subject: Proposed initiative measure 2025-2026 #43, concerning requiring an employer to have just cause for the discharge or suspension of an employee

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado Constitution. We hereby submit our comments and questions to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments and questions intended to aid designated representatives, and the proponents they represent, in determining the language of their proposal and to avail the public of the contents of the proposal. Our first objective is to be sure we understand your intended purposes of the proposal. We hope that the comments and questions in this memorandum provide a basis for discussion and understanding of the proposal. Discussion between designated representatives or their legal representatives and employees of the Colorado Legislative Council and the Office of Legislative Legal Services is encouraged during review and comment meetings, but comments or discussion from anyone else is not permitted.

Purposes

Purposes for Proposed Initiative 2025-2026 #43

The major purposes of the proposed amendments to the Colorado Revised Statutes appear to be:

1. To require an employer to establish just cause for the discharge or suspension of an employee before discharging or suspending the employee;
2. To require an employer to provide to an employee who is discharged or suspended a written notification of the discharge or suspension within seven days after the discharge or suspension occurs;
3. To allow an employee who believes that they were discharged or suspended without just cause to file a civil action within 180 days after the discharge or suspension; and
4. To allow a court that finds that an employee's discharge or suspension was wrongful to provide certain relief, including reinstatement or rehiring of the employee and the ordering of back pay or front pay.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado Constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. As part of the definition of "just cause," subsection (2)(a)(III) of the proposed initiative references "repeated violations." Would two violations constitute repeated violations? Would it matter how long it has been between violations to count as "repeated"?
3. As part of the definition of "just cause," subsection (2)(a)(VI) of the proposed initiative references a "crime of moral turpitude."
    a. What crimes would constitute crimes of moral turpitude? Do you intend that this would include financial crimes, such as embezzlement and theft?

   b. What qualifies as a conviction? Would a plea of guilty qualify? Would a plea of *nolo contendere*, or "no contest," qualify?

4. The definition of "suspension" in subsection (2)(c) of the proposed initiative refers to an "involuntary, unpaid period of employment exceeding one day." This is a broad definition that would seem to encompass circumstances in which an employer directs an employee not to work for reasons of the employee's own safety or security, such as inclement weather or a natural disaster, or for other reasons that might be outside of the employer's control. Is it your intention to have the definition of "suspension" include these types of circumstances?

5. The text of the proposed initiative is ambiguous regarding exactly which individuals may qualify as "employees" and thereby enjoy protection under the proposed initiative. Specifically, the proponents' proposed definition of "employee" reads, in pertinent part, as follows:

   (d) "EMPLOYEE" MEANS ANY NATURAL PERSON WHO HAS WORKED FOR AT LEAST SIX CONSECUTIVE MONTHS FOR A PRIVATE SECTOR EMPLOYER.

   This definition is unclear regarding whether a person who "has worked for at least six consecutive months for a private sector employer" but who is *no longer* so employed qualifies as an "employee." Do the proponents intend to include former employees as well as current employees?

   Additionally, this definition applies no minimum of "work" to be performed, so the definition appears to potentially include as an "employee" not only an individual who performed part-time work but also an individual who performed any *de minimus*, intermittent work during any period of six months. Is this the proponents' intent?

6. In subsection (4)(a)(I) of the proposed initiative, it does not seem necessary to include the sentence "If the court orders back pay, the employer shall pay the back pay to the employee." (To whom else would an employer pay back pay that is ordered by a court?)

7. Subsection (4) of the proposed initiative provides recourse for an employee who, after receiving written notification from an employer regarding the reasons for discharge or suspension, believes that they were wrongfully discharged or suspended. What, if any, recourse does the employee have if the employer does not provide the written notification? Do you intend an employee to be authorized to file a civil action under such circumstances?

8. Subsection (4)(c) of the proposed initiative reads as follows:

   (c) THE COURT MAY AWARD REASONABLE ATTORNEY FEES AND COSTS TO THE PREVAILING PLAINTIFF. IF THE COURT FINDS THAT ***AN ACTION OR DEFENSE*** BROUGHT PURSUANT TO THIS SUBSECTION 4 WAS FRIVOLOUS, GROUNDLESS, OR VEXATIOUS AS PROVIDED IN ARTICLE 17 OF TITLE 13, C.R.S., THE COURT MAY AWARD COSTS AND ATTORNEY FEES ***TO THE DEFENDANT*** IN THE ACTION. AN AWARD OF ATTORNEYS FEES AND COSTS PURSUANT TO THIS SECTION SHALL BE CONSIDERED BY THE COURT IN THE SAME MANNER AS RELIEF IS AUTHORIZED PURSUANT TO SECTION 405 OF ARTICLE 34 OF TITLE 24, C.R.S. **[Emphasis added.]**

   The first clause of the second sentence contemplates that a court may find that "an action or defense" was frivolous, groundless, or vexatious. However, the second clause of the sentence appears to contemplate that only a defendant, and not a plaintiff, may receive an award of attorney fees and costs as a result of such a finding. Is this the proponents' intent?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public hearing only if the designated representatives so request. You will have the opportunity to ask questions about these comments at the review and comment hearing. Please consider revising the proposed initiative as follows:

1. The proponents' drafted amending clause for their proposed addition of a new section 8-13.7-101, C.R.S., is correctly phrased for the addition of a statutory section:

   SECTION 1. In Colorado Revised Statutes, **add** 8-13.7-101 as follows:

   However, there is no existing article 13.7 in title 8 of the Colorado Revised Statutes at this time. So, the correct phrasing for the amending clause in this case is:

   SECTION 1. In Colorado Revised Statutes, **add** article 13.7 of title 8 as follows:

   Accordingly, the proponents should also provide a proposed heading for the new article 13.7, such as the following, before proceeding into the text of the new section 8-13.7-101, C.R.S.:

   ARTICLE 13.7

   Just Cause for Discharge or Suspension of Employees Required

2. The headnote of each statutory section is drafted to indicate to readers, as briefly as possible, the content of the section. The proponents' proposed headnote does not adequately indicate the entire content of their proposed new section 8-13.7-101, C.R.S. The proponents may consider using a more descriptive headnote such as the following:

   8-13.7-101. Just cause for employee discharge or suspension required – notice of discharge or suspension required – civil actions – available relief – definitions.

3. The proponents have placed the key substantive provision of their proposed initiative (i.e., the requirement that an employer have just cause in order to discharge or suspend an employee) as subsection (1) of their proposed new section 8-13.7-101, C.R.S., and they have placed the definitions under subsection (2). We recommend that the proponents locate their definitions under subsection (1) of their proposed new statutory section, in accordance with standard drafting practice.

4. The proponents should list the defined terms that appear within the definitions subsection in alphabetical order.

5. In the introductory clause of the proponents' proposed definitions subsection, the word "the" should be inserted after "unless."

6. In the proposed definition of "just cause," the proponents have included the words "Discharge or suspension due to" in subsection (2)(a)(VII) of the proposed initiative. However, these words just as easily apply to subsections (2)(a)(I) to (2)(a)(VI) of the proposed initiative. For this reason, the proponents may consider removing this language.

7. For clarity, and to conform to standard drafting practice, the proponents should consider restating their definition of "Suspension" as follows:

   (c) "SUSPENSION" MEANS AN INVOLUNTARY, UNPAID PERIOD OF EMPLOYMENT EXCEEDING ONE DAY. "SUSPENSION" DOES NOT INCLUDE:

   (I) A REGULARLY SCHEDULED DAY OFF THAT OCCURS DURING A WORKWEEK; OR

   (II) A VOLUNTARY LEAVE OF ABSENCE.

8. The proposed definition of "employee" uses both "natural person" and "individual" to refer to an employee. The proponents should use one of these terms consistently.

9. It is not necessary to include language regarding the University of Colorado Hospital Authority and the Denver Health and Hospital Authority in both the

definitions of "employer" and "governmental entity." For example, the proponent may consider removing such language from the definition of "governmental entity" and then restating the definition of "employer" to read as follows:

> (e) (I) "EMPLOYER" MEANS ANY BUSINESS ENTITY THAT EMPLOYS AT LEAST EIGHT EMPLOYEES IN COLORADO.
>
> (II) "EMPLOYER" INCLUDES THE UNIVERSITY OF COLORADO HOSPITAL AUTHORITY CREATED IN SECTION 23-21-503 AND THE DENVER HEALTH AND HOSPITAL AUTHORITY CREATED IN SECTION 25-29-103.
>
> (III) EXCEPT AS DESCRIBED IN SUBSECTION (1)(e)(II) OF THIS SECTION, "EMPLOYER" DOES NOT INCLUDE A GOVERNMENTAL ENTITY.

10. Subsection (2)(e) of the proposed initiative should end with a period.

11. In the definition of "governmental entity," a colon appears after the words "Colorado Constitution." This should be a semicolon. Also, if the proponents retain the language concerning the University of Colorado Hospital Authority and the Denver Health and Hospital Authority in subsection (2)(f) of the proposed initiative, the words "Government entity" at the beginning of the second sentence should appear in quotes, as they do in the first sentence, and the word "Government" should be changed to "Governmental" to match the defined term in the first sentence.

12. In the subsection (3) of the proposed initiative, the proponents may consider:

    a. Adding the word "to" after "shall provide";

    b. Substituting "is" for "has been";

    c. Striking the word "with";

    d. Substituting "suspension, which notification" for "suspension that";

    e. Substituting "constitutes" for "there is"; and

    f. Substituting "seven days after" for "seven days of."

13. In the introductory portion to subsection (4) of the proposed initiative, the proponents may consider substituting "An" for "Any."

14. In the introductory portion to subsection (4)(a) of the proposed initiative, the proponents may consider substituting "such relief as" for "affirmative relief that."

15. In subsection (4)(c) of the proposed initiative, the proponents may consider substituting "the prevailing plaintiff" for "a prevailing plaintiff of a claim under this section."
16. Subsection (4)(c) of the proposed initiative references "article 17 of title 13, C.R.S." However, only part 1 of article 17 of title 13, C.R.S., concerns frivolous, groundless, or vexatious actions. To comply with standard drafting practice, the proponents should change this reference to read "part 1 of article 17 of title 13."
17. In the third sentence of subsection (4)(c) of the proposed initiative, the proponents may consider changing "attorneys fees" to "attorney fees".
18. In subsection (4)(c) of the proposed initiative, in order to comply with standard drafting practice, the proponents should restate the reference to "Section 405 of article 34 of title 24, C.R.S." to read "section 24-34-405."
19. In the effective date clause in section two of the proposed initiative, the proponents should substitute "This act" for "The article."