

# STATE OF COLORADO

## Colorado General Assembly

Mike Mauer, Director  
Legislative Council Staff

**Colorado Legislative Council**  
029 State Capitol Building  
Denver, Colorado 80203-1784  
Telephone (303) 866-3521  
Facsimile (303) 866-3855  
TDD (303) 866-3472  
E-Mail: lcs.ga@state.co.us



Charles W. Pike, Director  
Office of Legislative Legal Services

**Office Of Legislative Legal Services**  
091 State Capitol Building  
Denver, Colorado 80203-1782  
Telephone (303) 866-2045  
Facsimile (303) 866-4157  
E-Mail: olls.ga@state.co.us

### MEMORANDUM

February 9, 2010

**TO:** Tom Tancredo and Ronald Pierce

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**SUBJECT:** Proposed initiative measure 2009-2010 #41, concerning a Measure to Require Employers to Electronically Verify the Work Authorization of New Employees

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 to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

## Purposes

The major purposes of the proposed amendment appear to be:

1. To create a new article 3.8 in title 8 of the Colorado Revised Statutes, entitled "All Employers Required to Utilize Federal E-verify Program";
2. To define the terms "agency", "e-verify program", "employee", "employer", "knowingly employ an unauthorized alien", "license", and "unauthorized alien", as used in the article;
3. To prohibit employers in Colorado from knowingly employing an unauthorized alien;
4. To require the attorney general or district attorney, upon receipt of a complaint, to investigate whether an employer has violated the prohibition against knowingly employing an unauthorized alien and, as part of the investigation, to verify the work authorization status of the alleged unauthorized alien with the federal government in accordance with 8 U.S.C. sec. 1373 (c);
5. To specify that a person who knowingly files a false and frivolous complaint is guilty of a class 3 misdemeanor;
6. To require, if the attorney general or district attorney determines that a complaint against an employer is not frivolous, that the attorney general or district attorney notify the United States bureau of immigration and customs enforcement and local law enforcement of the unauthorized alien, and, if the complaint was originally filed with the attorney general, that the attorney general notify the appropriate district attorney to bring an action against the employer;
7. To require actions against employers to be brought by the district attorney in the county where the unauthorized alien is employed;
8. To require the court in which the action is brought to expedite the action and set the hearing as soon as practicable;
9. To require the court to impose the following penalties against an employer upon a finding of a first violation of the prohibition against employing an unauthorized alien:
  - a. Order the employer to terminate the employment of all unauthorized aliens; and
  - b. Order appropriate agencies, upon receipt of the court order, to suspend the licenses held by the employer if the employer fails to file a signed, sworn affidavit, within 3 days after the order, stating that the employer has terminated all unauthorized aliens and will not knowingly employ an unauthorized alien;
10. With regard to the suspension of licenses for a first violation:

- a. To specify that the licenses remain suspended until the employer files the affidavit with the appropriate agencies; and
  - b. To specify that the employer's licenses that are necessary to operate its business at the location where the unauthorized alien performed work are subject to suspension, and, if there are no such licenses but the employer holds licenses that are necessary to operate its business generally, the employer's licenses that are held at the employer's primary place of business are subject to suspension;
11. To require the court to send a copy of the order to the attorney general, who is to maintain copies of all such orders and a database of employers who have a first violation, and make the orders available on the attorney general's web site;
12. To require the court to order appropriate agencies to permanently revoke all licenses necessary to operate at the location where the unauthorized alien performed work that are held by an employer found to have committed a second violation or, if no such licenses exist, to permanently revoke all licenses necessary to operate the employer's business in general that are held at the employer's primary place of business;
13. To require the court to consider only the federal government's determination pursuant to 8 U.S.C. sec. 1373 (c) of whether an employee is an unauthorized alien and to specify that the federal government's determination creates a rebuttable presumption of the employee's work eligibility status and that the court may take judicial notice of that determination;
14. To specify that, if an employer has verified the employment authorization of an employee through the e-verify program, proof of that act creates a rebuttable presumption that the employer did not knowingly employ an unauthorized alien;
15. To specify that the new article does not require an employer to take action that it believes in good faith would violate federal or state law;
16. To require all employers, after March 1, 2011, to verify the employment eligibility status of newly-hired employees through the e-verify program; and
17. To declare the provisions of the act severable and specify that if any provision of the act or the application of a provision to any person or circumstances is held invalid, the invalidity of the provision does not affect other provisions or applications of the act that can be given effect without the invalid provision or application.

### 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 meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. The amending clause for the measure indicates that a new "section" is being added to title 8 of the Colorado Revised Statutes. However, the next line of the measure refers to a new "Article 3.8". The amending clause should match and indicate the actual type of provision being added, whether it's a "section" or "article".
2. Do the proponents intend to create a new "section" or a new "article"? A "section" of the Colorado Revised Statutes is a subset of an article, and an article is a subset of a title of the Colorado Revised Statutes. If creating a new "section", then the proponents need to identify the specific "article" in title 8 of the Colorado Revised Statutes in which the section is to be placed. If the proponents intend to create a new "article", then the amending clause should indicate that a new "article" is being added to title 8, Colorado Revised Statutes.
3. It is standard drafting practice to insert a left tab at the beginning of the first line of each new section, subsection, paragraph, or subparagraph, including amending clauses and section headings. It is also standard practice to bold the section number.
4. Each section of the Colorado Revised Statutes is identified by a section number that identifies the specific title, article, and section number, with each number offset by hyphens. For example, if the proposed new section 101 is being added to a new article 3.8 in title 8, Colorado Revised Statutes, the specific statutory section would be identified as "8-3.8-101." and would appear in bold-faced type. Additionally, the headnote or title of each section appears in lowercase letters and bold-faced type.
5. If a section of the Colorado Revised Statutes contains multiple parts, those parts are organized into numbered subsections. Subparts of a subsection are labeled as lettered paragraphs. Subparts of paragraphs are called "subparagraphs" and are identified with capitalized Roman numerals, and subparts of subparagraphs are identified with capitalized, lettered sub-subparagraphs. All of the identifiers are offset by parentheses. Following this standard format, the provisions in the measure identified as capitalized, lettered subsections should be labeled as numbered subsections. For example, current subsection "A." should appear as "(1)", "B." should be "(2)", "C." should be "(3)", and so forth. Following this format, the numbered paragraphs in proposed section 102 should be lowercase, lettered paragraphs. For example, "1." should be "(a)", "2." should be "(b)", and so forth. This format should be used throughout the proposed measure.
6. Each subpart of a provision of statute is identified with a letter or numeral as indicated in comment number 5, above. Accordingly, the items listed under current section 101, subsection F., in the definition of "License" should have identifying numerals or letters preceding them. Since the definition of "License" includes 2 main parts, with subparts under

each part, the standard structure for that provision would be as follows:

(6) (a) "LICENSE" MEANS ANY AGENCY PERMIT, CERTIFICATE, APPROVAL . . . INCLUDING BUT NOT LIMITED TO:

(I) ARTICLES OF INCORPORATION;

(II) A CERTIFICATE OF PARTNERSHIP, A PARTNERSHIP REGISTRATION, OR ARTICLES OF ORGANIZATION;

(III) ANY TRANSACTION PRIVILEGE TAX LICENSE.

(b) "LICENSE" DOES NOT INCLUDE:

(I) A GRANT OF AUTHORITY ISSUED TO A FOREIGN CORPORATION;

(II) ANY PROFESSIONAL LICENSE.

7. Definition sections in the Colorado Revised Statutes indicate that the definitions of the specified terms apply as those terms are used in a particular portion of the Colorado Revised Statutes. Since the definitions in section 101 of the proposed measure appear to apply to the new article 3.8, the following introductory language should appear after the heading to the section and prior to the first defined term: "AS USED IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:".
8. Under standard drafting procedures, a series of three or more items is set off by commas, including a comma between the second-to-last item and the conjunction. In particular, the proponents should add commas in the following locations:
  - a. In section 101, subsection A., between "BOARD" and "OR" and between "CITY" and "OR";
  - b. In section 101, subsection D., in the third and fifth lines, between "STATE" and "AND";
  - c. In section 101, subsection F., between "CHARTER" and "OR" and between "REGISTRATION" and "OR", and the semicolon after "REGISTRATION" should be changed to a comma;
9. In section 101, subsection B., the word "AMENDED" appears to be misspelled as "AMMENDED". Also, a comma should be inserted between "ADMINISTRATION" and "OR" in the last line.
10. When citing provisions of the United States Code, the standard citation format used in the Colorado Revised Statutes is to specify the title number of the U.S. Code, followed by the recognized abbreviation for the code, "U.S.C.", then an abbreviation for section, "sec.", followed by the section number. For example, the reference to "8 UNITED STATES CODE SECTION 1324a" in section 101, subsection E., should appear as "8 U.S.C. SEC. 1324a". This format for citing to sections of the U.S. Code should be used throughout the proposal.
11. When headings to Colorado Revised Statutes sections contain multiple phrases or words that describe different concepts contained in the section, the standard format used in the Colorado Revised Statutes to separate those concepts is to insert a hyphen. The two concepts in the heading to section 102 are separated by a semicolon, which should be changed to a hyphen

(-), with spaces before and after the hyphen.

12. In section 102, subsection B., the first word "ON" should be changed to "UPON" to more accurately reflect the intent that once a complaint is received, the section requires an investigation. Also in subsection B., the phrase "ALLEGEDLY KNOWINGLY" is unclear. The sentence might read more clearly if modified to state "UPON RECEIPT OF A COMPLAINT ALLEGING THAT AN EMPLOYER KNOWINGLY EMPLOYS AN UNAUTHORIZED ALIEN . . .".
13. When referring to a subsection within a section of the Colorado Revised Statutes, (known as an "internal reference") the standard drafting format is to indicate "SUBSECTION (1) OF THIS SECTION". When referring to a paragraph of the subsection, the format is "PARAGRAPH (a) OF THIS SUBSECTION (1)". When referring to a paragraph contained in a different subsection, the format is "PARAGRAPH (a) OF SUBSECTION (1) OF THIS SECTION". The internal references in the measure should be modified to follow this standard format used in the Colorado Revised Statutes.
14. In section 102, subsection E., do the proponents intend the word "assigning" to mean "setting" or "scheduling"? If so, the proponents may consider changing that word accordingly to more clearly indicate the meaning of the provision.
15. In section 102., subsection G., it appears that the attorney general is required to perform a series of 3 tasks, i.e., maintain copies of court orders, maintain a database of violators, and make court orders available to the public. Based on technical comment number 8, above, this series of three should be offset by commas. Accordingly, in the second line, the "AND" should be deleted and a comma should be inserted after "1", and in the fourth line, a comma should be added between "A" and "AND" and the word "SHALL" should be inserted before "MAKE".
16. In section 102, subsection H., it appears that the first word "ON" should be "IN".

## Substantive Comments and Questions

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

1. Section 1 (5.5) of article V of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. In the definition of "AGENCY" in section 101, subsection A., the term appears to apply to an agency or a county, city, or town. Would an agency of a "city and county", like Denver or Broomfield, be included? If so, the proponents may want to add the term "city and county" to the list of local governments in the definition of "agency".
3. Also with regard to the definition of "AGENCY", do the proponents intend the term "agency" to mean "a county, city, or town" or does the term mean "any agency, department, board, or commission" *of* a county, city, or town? If the proponents intend the latter, that intent may be clearer if the word "OF" is added between "OR" and "A COUNTY" in the second line.
4. Section 102, subsection B., suggests that a complaint may be filed but does not specify who may file a complaint. Do the proponents intend that any person could file a complaint? Do the proponents think that should be specified in the measure? Also, the measure does not specify with whom a complaint is to be filed but implies that maybe a person could file a complaint with the attorney general or with a district attorney. Is that the intent? If so, the proponents may wish to clearly state the procedure for filing a complaint, at least by specifying who may file and with whom a complaint is to be filed. Also, if a complaint may be filed with a district attorney, can the complainant file the complaint with *ANY* district attorney or does the complaint need to be filed with a particular district attorney depending on the location of the alleged violation? Again, the proponents may wish to specify these details in the measure.
5. In section 102, subsection B., the measure indicates that a person who knowingly files a false and frivolous complaint is "GUILTY OF A CLASS 3 MISDEMEANOR." Is it the proponents' intent that the person would be subject to punishment in accordance with section 18-1.3-501, Colorado Revised Statutes, which is the criminal statute that defines the classes of misdemeanors and their corresponding penalties? Pursuant to section 18-1.3-501, Colorado Revised Statutes, a class 3 misdemeanor is subject to a minimum penalty of a \$50 fine and a maximum penalty of 6 months in prison, \$750 fine, or both. Is this the penalty the proponents intend for filing a false and frivolous complaint? Do the proponents intend to specify a different penalty? General drafting procedure is to make a reference to the misdemeanor statute if the intent is to impose the penalties specified in that statute. Accordingly, the proponents may want to add the phrase "AND SHALL BE PUNISHED AS PROVIDED IN SECTION 18-1.3-501, C.R.S." after the word "MISDEMEANOR".
6. In section 102, subsection F., under paragraph 1., an employer who commits a first violation is to be ordered to terminate all unauthorized aliens. However, for a second violation, paragraph 2. does not require the court to order the employer to terminate all unauthorized

aliens. Is it the intent that for a second violation, the employer would again be ordered to terminate unauthorized aliens? If so, would the proponents consider specifying that the court is to order termination of unauthorized aliens when an employer commits a second violation, too?

7. In section 102, subsection F, paragraph 2., if an employer has a license "permanently" revoked, is there a mechanism for the employer to get the license reinstated or do the proponents intend that the employer would never be allowed to get that license, either by reinstatement or applying for a new license? Can the employer appeal the revocation of a license? Would an appeal be through the agency that actually revokes the license, or would the appeal be to the Colorado court of appeals and through the court system?
8. With regard to the revocation of licenses under paragraphs 1. and 2. of subsection F of section 102, who determines which licenses are to be suspended? Under 1.(b) and 2., the court is to order the suspension of "all licenses that are held by the employer and that are necessary to operate the employer's business at the employer's business location where the unauthorized alien performed work." Who is to determine which licenses this applies to? Who determines if there are no such licenses? Who determines which licenses are "held by the employer at the employer's primary place of business"?
9. In section 103, since the phrase "AFTER MARCH 1, 2011," is used, it appears that starting March 2, 2011, employers will have to verify the employment eligibility of new employees through the e-verify program. Do the proponents intend the requirement to use e-verify to apply on March 1, 2011, or on March 2, 2011? If the proponents intend the requirement to apply starting on March 1, 2011, the proponents may want to change the phrase to "ON AND AFTER MARCH 1, 2011,".
10. Also with regard to section 103, would an employer be subject to any penalties for failing to use the e-verify program to verify employment eligibility of new employees? If so, what would those penalties be? Would the proponents consider specifying the penalties for noncompliance with section 103?
11. The measure does not contain an effective date clause or any language indicating the intent as to when the measure would take effect. Absent an effective date clause, the measure will take effect upon proclamation of the governor, assuming it is approved by the voters. Do the proponents want the measure to take effect on a specific date or on whatever date the governor issues the proclamation?