

Amendment 57 Additional Remedies for Injured Employees

1 **Amendment 57 proposes amending the Colorado statutes to:**

- 2 ♦ require every private employer in Colorado with ten or more employees
3 to provide a safe and healthy workplace; and
- 4 ♦ allow an injured employee to seek damages in court, beyond workers'
5 compensation benefits, if the employee believes that the employer
6 failed to provide a safe and healthy workplace.

7 **Summary and Analysis**

8 Currently, federal and state safety standards exist to ensure safe working
9 conditions for employees. Companies may be fined if they do not meet these
10 standards. Employees who are injured at work receive benefits through workers'
11 compensation.

12 ***What remedies are available to injured employees under workers'***
13 ***compensation?*** Workers' compensation is the exclusive remedy for employees to
14 receive benefits from employers for on-the-job injuries. State law requires all
15 employers with one or more full- or part-time employees to provide workers'
16 compensation benefits for on-the-job injuries and work-related diseases. Benefits are
17 provided regardless of whether the injury was caused by the employer, the employee,
18 the equipment, or a third party. Employees are entitled to specific benefits, which are
19 outlined in state law, without going to court. When a workplace injury occurs, an
20 injured employee receives the following benefits, depending on the circumstances:

- 21 ♦ reasonable and necessary medical care, at no cost to the employee;
- 22 ♦ tax-free payment for lost wages up to two-thirds of the injured
23 employee's salary;
- 24 ♦ payment for permanent disability and disfigurement;
- 25 ♦ vocational rehabilitation;
- 26 ♦ funeral expenses; and
- 27 ♦ death benefits for surviving dependents.

28 An employee may appeal the determination of benefits through a state system,
29 but cannot sue an employer for damages. An employee may sue a third party whose
30 negligence may have caused or contributed to a workplace injury to recover damages
31 in excess of workers' compensation benefits. In 2005, over 120,000 workplace
32 injuries were reported, and of those, approximately 85,000 resulted in claims for
33 medical care and 16,600 resulted in claims for lost wages.

34 ***What additional remedies are offered to injured employees under***
35 ***Amendment 57?*** In addition to any remedies received under workers' compensation,
36 Amendment 57 allows an injured employee to sue an employer if he or she believes

1 that the employer failed to provide a safe and healthy workplace. Amendment 57
2 applies to employees working at private companies with ten or more employees. An
3 employee cannot receive damages that he or she already received under workers'
4 compensation. Under Amendment 57, examples of damages that an employee may
5 sue for include:

- 6 ♦ past and future monetary losses;
- 7 ♦ pain and suffering;
- 8 ♦ emotional distress;
- 9 ♦ inconvenience;
- 10 ♦ mental anguish;
- 11 ♦ loss of enjoyment of life; and
- 12 ♦ other non-monetary losses.

13 **Arguments For**

14 1) The workers' compensation system does not always meet the needs of injured
15 employees. While an injured employee receives medical care at no cost, the choice of
16 doctor and treatment options are limited. Further, an injured employee who is unable
17 to work may receive wage payments that are far below the employee's previous
18 take-home earnings. By allowing the courts to review individual cases,
19 Amendment 57 establishes another avenue for employees to seek compensation for
20 injuries, such as pain and suffering, beyond the benefits provided by workers'
21 compensation.

22 2) Amendment 57 encourages an increased focus on workplace safety, and both
23 employers and employees benefit from safe and healthy workplaces. Safe
24 workplaces allow employees to be efficient and productive, saving employers money.
25 Maintaining a safe workplace reduces employees' concerns about their day-to-day
26 safety and the likelihood of injury. Amendment 57 provides a mechanism to
27 financially penalize employers who endanger the safety of their employees.

28 **Arguments Against**

29 1) Amendment 57 is unnecessary. The current workers' compensation system
30 effectively balances the needs of employees and employers. It ensures prompt
31 delivery of benefits to injured employees without the delay, expense, and risk involved
32 with a lawsuit and controls costs for employers. Amendment 57 disrupts this balance
33 by requiring employers to continue to pay for workers' compensation benefits and
34 making them subject to lawsuits from injured employees seeking additional benefits.
35 Moreover, employers are already motivated to provide safe and healthy workplaces to
36 comply with safety regulations, lower costs for worker replacement and insurance
37 premiums, and increase employee productivity.

38 2) The negative effect of Amendment 57 on the state's economy outweighs any
39 potential benefits to some injured employees. It exposes employers to increased

1 liability and legal costs. These costs are expected to be passed on to consumers and
 2 employees through higher prices for goods and services, lower wages, and reduced
 3 employee benefits. Amendment 57 may increase unemployment by discouraging
 4 businesses from locating or expanding in Colorado.

5 Estimate of Fiscal Impact

6 **State revenue and spending.** Amendment 57 is expected to lead to new court
 7 filings by employees injured at work. Because the measure establishes a new right of
 8 action, there is no experience available to estimate the number of filings that will
 9 result. Table 1 shows both annual state revenue and spending increases if 1 percent,
 10 10 percent, or 25 percent of workers' compensation claims for lost wages result in new
 11 court cases. Revenue increases result from court filing fees, and spending increases
 12 pay for additional court staff. As people become aware of their ability to sue under
 13 this measure, the potential for significant revenue and spending increases is real.
 14

15 Table 1. Annual State Revenue and Spending Increases			
16 under Amendment 57*			
	17 1% of Claims	18 10% of Claims	19 25% of Claims
	Result in a	Result in a	Result in a
	Court Case	Court Case	Court Case
20 Cases Filed	166	1,660	4,150
21 New Revenue - Fees	\$61,000	\$608,000	\$1,520,000
22 New Spending	\$139,000	\$1,433,000	\$3,583,000
23 New Employees	2	18	44

24 * Table 1 shows only government spending and does not include costs to private companies.

**Amendment 57
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5 compensation benefits, if the employee believes that the employer
6 failed to provide a safe and healthy workplace.

7 **Summary and Analysis**

8 Currently, federal and state safety standards exist to ensure safe working
9 conditions for employees. Companies may be fined if they do not meet these
10 standards. Employees who are injured at work receive benefits through workers'
11 compensation. THE COLORADO WORKERS' COMPENSATION SYSTEM IS A NO-FAULT
12 SYSTEM, MEANING THE INJURED WORKER IS ENTITLED TO BENEFITS WHETHER OR NOT THERE
13 IS EMPLOYER FAULT OR WHETHER THE INJURY WAS THE RESULT OF NEGLIGENCE ON THE
14 PART OF THE EMPLOYEE.

15 ***What remedies are available to injured employees under workers'***
16 ***compensation?*** Workers' compensation is the exclusive remedy for employees to
17 receive benefits from employers for on-the-job injuries. State law requires all
18 employers with one or more full- or part-time employees to provide workers'
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20 provided regardless of whether the injury was caused by the employer, the employee,
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16 **Arguments For**

17 1) The workers' compensation system does not always meet the needs of injured
18 employees. While an injured employee receives medical care at no cost, the choice of
19 doctor and treatment options are limited. Further, an injured employee who is unable
20 to work may receive wage payments that are far below the employee's previous
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22 57 establishes another avenue for employees to seek compensation for injuries, such
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25 employers and employees benefit from safe and healthy workplaces. Safe
26 workplaces allow employees to be efficient and productive, saving employers money.
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28 safety and the likelihood of injury. Amendment 57 provides a mechanism to
29 financially penalize employers who endanger the safety of their employees.

30 **Arguments Against**

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36 making them subject to lawsuits from injured employees seeking additional benefits.
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38 comply with safety regulations, lower costs for worker replacement and insurance
39 premiums, and increase employee productivity.

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2 potential benefits to some injured employees. It exposes employers to increased
3 liability and legal costs. These costs are expected to be passed on to consumers and
4 employees through higher prices for goods and services, lower wages, and reduced
5 employee benefits. Amendment 57 may increase unemployment by discouraging
6 businesses from locating or expanding in Colorado. THE NATIONAL COUNCIL ON
7 COMPENSATION INSURANCE (NCCI) MANAGES THE NATION'S LARGEST DATABASE OF
8 WORKERS' COMPENSATION INSURANCE INFORMATION. THE NCCI ESTIMATES THAT THE SAFE
9 WORKPLACE BALLOT INITIATIVE COULD CAUSE WORKERS' COMPENSATION SYSTEM AND
10 TORT-RELATED COSTS TO DOUBLE (INCREASE BY \$1.2 BILLION) IF ENACTED IN ITS CURRENT
11 FORM. THE MAGNITUDE OF THE INCREASE WILL ULTIMATELY DEPEND ON HOW COURTS
12 INTERPRET THE LANGUAGE IN THIS INITIATIVE.

13 **Estimate of Fiscal Impact**

14 **ESTIMATE OF FISCAL IMPACT ON THE STATE OF COLORADO**

15 ~~State revenue and spending.~~ Amendment 57 is expected to lead to new court
16 filings by employees injured at work. Because the measure establishes a new right of
17 action, there is no experience available to estimate the number of filings that will
18 result. Table 1 shows both annual state revenue and spending increases if 1 percent,
19 10 percent, or 25 percent of workers' compensation claims for lost wages result in new
20 court cases. Revenue increases result from court filing fees, and spending increases
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22 this measure, the potential for significant revenue and spending increases is real.
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24 **Table 1. Annual State Revenue and Spending Increases**
25 **under Amendment 57***

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33 * Table 1 shows only government spending and does not include costs to private companies.

JOHN BERRY'S COMMENTS ON LAST DRAFT OF AMENDMENT 57

John Berry

On behalf of DOE I have no further comments on this draft.

DOUGLAS FRIEDNASH'S COMMENTS ON LAST DRAFT OF AMENDMENT 57

Thank you for the opportunity to respond to the Third Draft.

1. Throughout this process, we have written to urge you to explain the exclusivity provisions of the Workers Compensation Act. The proposed language fails to put this in the proper context for the voters. This is particularly important in light of the "arguments for" section, which puts a disingenuous spin on how: (1) the workers compensation act doesn't always meet the needs of injured employees; (2) limits choice of doctor and treatment options; don't receive appropriate wage payments; and, (4) allows the court to review individual cases. Again, the point is that that is the point of workers compensation act; that it is a quid pro quo and changes from a no-fault system, and in doing so, renders the WCA meaningless.

2. The analysis fails to apprise the voters in the summary and analysis section that the terms "safe" "healthy" and "workplace" (and the phrase "safe and healthy workplace") are undefined. This will certainly lead to unintended consequences as courts grapple with the scope of these definitions.

3. There can be no doubt that this measure will lead to a massive influx of litigation. Injured employees will continue to obtain legal representation on a contingent fee basis with no additional cost to them. The impact should not simply be measured in terms of new revenue in court filing (which will be above the 25% of claims), but rather also in terms of what that means for employers and employees. Employers will be exposed to additional legal fees, which will clearly increase their cost of insurance premiums. It is axiomatic that this cost WILL be transferred to an increase in the prices of goods and services, reduced benefits, reduced hours, and the elimination of jobs to offset these costs. I would be shocked if there were only 4,150 cases (the 25% estimate). Injured workers could also bring cases that are not currently seen in the Workers Compensation area, as they may have different damages (e.g., pain and suffering, mental anguish, and other monetary losses), not covered by workers compensation, where claims may not have been otherwise brought. Hence, the language that it "may" increase unemployment or that the increased costs "are likely" to be passed on isn't strong enough. These things will happen.

4. Finally, I have seen the NCCI analysis of June 20, 2008. Upon information and belief this information was submitted to you. However, I see no indication from the draft analysis that these issues were taken into consideration. Among other things, the actuarial analysis

is telling. "Due to the uncertainty in the interpretation, NCCI expects an increase in workers compensation costs, substantial damages from tort suits, as well as significant loss adjustment expenses...the vast majority of workers compensation cases might be argued to have resulted from an unsafe or unhealthy workplace". "The NCCI estimates that at least a 100% cost increase (doubling of cost) can be expected if this initiative were to pass". The language of the analysis, arguments, and fiscal impact minimize this clear impact.

Should you have any questions, please do not hesitate to contact me.

Douglas J. Friednash
Fairfield and Woods, P.C.



Property Casualty Insurers
Association of America

Shaping the Future of American Insurance

August 15, 2008

Ms Christie Lee
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Re: Proposed Ballot Initiative #93 – “Additional Remedies for Injured Employees” (3rd Draft)

Dear Ms Lee:

PCI is composed of more than 1,000 member companies, representing the broadest cross-section of insurers of any national trade association. Member companies write 49 percent of the U.S. automobile insurance market, 39 percent of the homeowners market, 32.1 percent of the commercial property and liability market, and 37.6 percent of the private workers' compensation market. Many of our members provide commercial lines insurance to Colorado employers including general liability and workers' compensation insurance. The mission of PCI is to foster a competitive insurance marketplace for the benefit of consumers and insurers and to provide a responsible and effective voice on public policy questions affecting insurance products and service.

PCI appreciates the opportunity to provide input on the 3rd draft of Initiative #93 - Additional Remedies for Injured Employees. Also, we are including copies of our comments on previous drafts as well for your further consideration.

We would like all of our comments included in the packet, which will be distributed in late August. We understand the constraints regarding the ballot structure and wording requirements. However, we believe all of our comments should be considered in totality so that Legislative Council and all interested parties will understand the significant impacts to Colorado if this initiative passes from a public policy perspective.

PCI truly appreciates Legislative Council's efforts on providing an efficient and effective process for submitting comments and concerns regarding Initiative #93. Please consider PCI as a resource if you need any further information.

Our comments are listed on the following pages.

Summary and Analysis

- *Page 1, Lines 8-11: Currently, federal and state safety standards exist to ensure safe working conditions for employees. Companies may be fined if they do not meet these standards. Further, employees who are injured at work receive benefits through workers' compensation.*

PCI believes a further explanation of the Colorado workers' compensation system should be included. We suggest adding the following statement to this section:

“The Colorado workers' compensation system is a no-fault system, meaning the injured worker is entitled to benefits whether or not there is employer fault or whether the injury was the result of negligence on the part of the employee.”

- *Page 1, Lines 14-16: State law requires all employers with one or more full- or part-time employees to provide workers' compensation benefits for on-the-job injuries or work-related diseases, regardless of who or what caused the injury.*

PCI respectfully requests an additional phrase be included for emphasis to ensure that the public is aware that workers' compensation coverage pays for work-related injuries regardless of fault. We request lines 14-16 to be revised as follows:

“State law requires all employers with one or more full- or part-time employees to provide workers' compensation benefits for on-the-job injuries or work-related diseases, regardless of who or what caused the injury including negligence on the part of the employee.”

- *Page 1, Lines 20-26: In these lines, potential workers' compensation benefits are listed. PCI requests that Legislative Council consider adding “Permanent Total Disability Benefits” to the list so that the public understands that the current workers' compensation system provides benefits to those injured employees who become permanently and totally disabled for the rest of their lives.*
- *Page 1, Lines 27-28: An employee may appeal the determination of benefits through a state system, but cannot seek damages in court.*

This statement is correct, however, Legislative Council may want to consider adding a statement that would inform the public that the current workers' compensation system allows workers to bring a civil lawsuit against a third party, such as a manufacturer of faulty equipment that causes an injury.

Arguments Against

- *Argument #1: PCI believes this argument needs to be expanded to reflect how this ballot initiative will destroy the exclusive remedy provision of the Colorado Workers'*

Compensation Act. Exclusive remedy lies at the heart of the workers' compensation system. Initiative #93 eliminates the exclusive remedy provisions of the Colorado Workers' Compensation Act, which will create adverse impacts to the economic climate of the state.

- *Argument #2:* PCI respectfully requests that Legislative Council include a summary of the cost analysis provided by the National Council on Compensation Insurance (NCCI), which is attached. The NCCI is based in Boca Raton, Florida and manages the nation's largest database of workers' compensation insurance information. NCCI analyzes industry trends, prepares workers' compensation insurance rate recommendations, determines the cost of proposed legislation, and provides a variety of services and tools to maintain a healthy workers' compensation system.

We suggest the following wording for consideration:

The National Council on Compensation Insurance (NCCI) manages the nation's largest database of workers' compensation insurance information. The NCCI estimates that the Safe Workplace Ballot Initiative could cause workers' compensation system and tort-related costs to double (increase by \$1.2 billion) if enacted in its current form. The magnitude of the increase will ultimately depend on how courts interpret the language in this initiative.

We believe emphasis should be included that these costs will impact the employer community and will create significant adverse impacts to the Colorado economy. These costs are in addition to the costs outlined in the section titled "Estimate of Fiscal Impact." It is our understanding that the costs cited in this section relate specifically to additional state costs. As an aside, we ask that Legislative Council revise the title of the previously cited section to "Estimate of Fiscal Impact on the State of Colorado." By referencing the potential costs to employers in Argument #2 and revising the fiscal impact title to reference state costs, the public will have a more informed perspective on the actual cost implications of this initiative.

Additional Comments

As stated in previous correspondence with Legislative Council, PCI understands the challenges in preparing the final wording on Initiative #93. The purpose of Initiative #93 as currently drafted is to permit injured employees to receive workers' compensation benefits and then to sue for unlimited damages in the tort system against the employer resulting from the same injuries. If this initiative passes, the exclusive remedy provision of the workers' compensation act will be eliminated, dramatically altering the current well-balanced system. Our most serious concern is by eliminating the exclusive remedy provision, a workers' compensation system may not be sustainable in the long-term.

RITA NOWAK'S COMMENTS ON LAST DRAFT OF AMENDMENT 57

If you have any questions regarding our comments or need any additional information, please do not hesitate to contact PCI.

Rita Nowak
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DANIEL O'NEIL'S COMMENTS ON LAST DRAFT OF AMENDMENT 57

Here are my comments:

On the first page in the list of benefits, please add the benefit of permanent disability benefits. This is a major component of what the injured worker is entitled to. On the first page, please add some language reflecting the injured worker is able to bring a third party tort action if there is a negligent third party.

Also, on the last page, there is an estimate of fiscal impact. NCCI did an analysis of the ballot initiative. This estimate should be part of the fiscal impact since it is a true cost of the initiative.

Daniel F. O'Neil
General Counsel
Pinnacol Assurance



**ANALYSIS OF COLORADO SAFE WORKPLACE BALLOT INITIATIVE
As Submitted on June 20, 2008**

NCCI estimates that the Safe Workplace Ballot Initiative in Colorado could cause workers compensation (WC) system and tort-related costs to double (increase by \$1.2 billion) if enacted in its current form. The magnitude of the increase will ultimately depend on how courts interpret the language in this initiative.

Under this proposal, injured workers would have the opportunity to file for statutory WC benefits and also proceed with a tort action. In addition to the substantial damages that may be awarded under the tort system as compared to the no-fault WC system, employees/carriers would incur significant legal costs to defend claims.

Background and Summary of Safe Workplace Ballot Initiative

Currently in Colorado, as specified in the Revised Statutes (C.R.S), workers compensation (WC) benefits are the exclusive remedy for injured employees (except in cases of intentional injury). Per C.R.S 8-40-102 *Legislative Declaration*, "It is the intent of the general assembly that the Workers' Compensation Act of Colorado be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation, recognizing that the workers' compensation system in Colorado is based on a mutual renunciation of common law rights and defenses by employers and employees alike."

The Safe Workplace Ballot Initiative proposes to add language to the Colorado statutes that would give injured employees the right to sue their employers for failure to provide a safe and healthy work environment, in addition to any rights the employee may already have under the Workers Compensation Act of Colorado. Under the Initiative, injured employees would have the right to receive benefits under the Workers Compensation Act, and also to seek recovery for compensatory and exemplary damages, including damages for past and future pecuniary losses, pain and suffering, emotional distress, mental anguish, loss of enjoyment of life and other non-pecuniary losses, provided that the employee shall not be entitled to a double recovery for losses covered under the Workers' Compensation Act.

The proposed language would only apply to employers that regularly employ ten or more employees in the state of Colorado.

Actuarial Analysis

Safe Workplace

Under this ballot initiative, an injured employee would be able to file a lawsuit against their employer while at the same time collecting workers compensation benefits, when the employee alleges that the employer failed to provide a safe and healthy workplace. The phrase "safe and healthy workplace" is not defined and appears to provide a very low threshold for an employee to sue their employer for damages, which adds tremendous uncertainty to the monetary impact of this proposal. How this particular language is interpreted will be crucial and up to Colorado courts/juries to decide in determining the ultimate cost impact. Due to uncertainty in the interpretation, NCCI expects an increase in workers compensation costs, substantial damages from tort suits, as well as significant loss adjustment expenses (LAE). If enacted, and dependent on how the threshold might be interpreted, the vast majority of workers compensation cases might be argued to have resulted from an unsafe or unhealthy workplace.



ANALYSIS OF COLORADO SAFE WORKPLACE BALLOT INITIATIVE As Submitted on June 20, 2008

Currently in Colorado several measures currently exist which motivate an employer to maintain a safe workplace. Experience Rating is an individual risk rating program which adjusts individual employers' prospective premium based on their historical WC claim experience; an employer with better claims experience than its peers would receive a premium credit. In addition, the United States Department of Labor Occupational Safety and Health Administration (OSHA) sets and enforces standards for workplace safety. Yet another program which is unique to Colorado that motivates workplace safety is the Certified Risk Management Program, which provides a 5% manual premium credit for qualifying employers.

Unlimited Damages

Currently, indemnity benefits in Colorado have statutory limits on weekly and aggregate benefits. In addition, indemnity permanent partial benefits follow a schedule, which dictates the number of weeks of benefits that are to be paid for injuries to various parts of the body. Medical benefits available to injured workers are generally considered unlimited; however, payments to providers are subject to a maximum fee schedule amount which varies by medical procedure, utilization review of medical procedures, and other cost containment protocols.

Under the Safe Workplace Ballot Initiative, the amounts an employee may receive for the various types of damages such as 'pain and suffering' and/or 'inconvenience' are not specified, and there are no individual or aggregate limits specified. Data is not readily available, and precedence does not exist which would indicate likely damages in WC tort cases thus it would be up to the courts/juries to decide. Under this ballot initiative, costs for employers and insurers would appear to have no structure and limitation and thus are highly uncertain. In addition, awards for damages may be inconsistent for the same types of injuries or work environments.

The Costs of the Tort Alternative to Workers' Compensation (2001), published in the *Workers' Compensation Policy Review*, and written by Jeff Biddle and Edward M. Welch, describes the impact of moving from workers compensation to a tort system. While the study focused on how Oregon system costs would be impacted by a change in compensability standards for WC claims, this study is relevant in Colorado since the Oregon study involves employees who would be able to bring tort action against their employers. The authors estimated a range for the percentage of cases where a suit might be filed and the percentage difference between civil (tort) awards and WC awards. In this study, the estimated cost impact of moving to a tort system for those who might sue in tort is between 7.5%-160%. Since the Colorado initiative would potentially affect all claims except those associated with small employers, NCCI estimates that at least a 100% cost increase (a doubling of cost) can be expected if this initiative were to pass.

Legislative Intent

This ballot initiative appears to erode the legislative intent of the current Colorado workers compensation laws as provided in C.R.S. 8-40-102. As mentioned above, the workers compensation system is intended "...to be administered without litigation..." The mere allegation of an unsafe work environment would require the employer/carrier to defend any subsequent lawsuit, even if the case was of little merit, potentially triggering the duty to defend and increasing frictional costs. Currently, in Colorado attorneys fees are limited to 20% on contested benefits on WC cases; under a tort system, parameters for attorney fees are not specified although fees up to 25%-40% of the award might be expected.

In addition, the legislative intent indicates that benefits are to be provided "at a reasonable cost to employers". The current workers compensation system in Colorado has a relatively clear structure



**ANALYSIS OF COLORADO SAFE WORKPLACE BALLOT INITIATIVE
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for predictable and consistent delivery of both indemnity and medical benefits. By leaving the interpretation of this initiative up to a jury, the potential cost of damages and loss adjustment expenses to employers under this ballot initiative is significantly increased.

The legislative intent of workers compensation also describes how the system is intended to be run: "...recognizing that the workers' compensation system in Colorado is based on a mutual renunciation of common law rights and defenses by employers and employees alike". The very nature of the ballot initiative would serve to supplant the exclusive remedy provision in the current workers compensation laws and allow employees to file tort actions.

Settlement Leverage

If this initiative were to pass, the frequency of WC claims may increase as an insurer/employer may be more likely to accept a borderline WC claim in an attempt to avoid a potential lawsuit (to show good faith, or if the employer were able to settle the WC claim and get the employee to waive their right to sue). However, a claimant may have relatively little to lose in seeking a large award for damages from a jury, so that they may still sue their employer whether their WC claim was accepted or not.

It is anticipated that employers/carriers may try to avoid the uncertainty of a jury decision by making higher settlement offers to some claimants that indicate their desire to sue, and employees may be willing to waive the right to sue in order to receive an immediate lump sum payment that is larger than the statutory WC benefit. As a result, higher costs may also be experienced under the no-fault side (WC) if this initiative is enacted in terms of a greater claim acceptance rate, higher WC settlements, and greater loss adjustment expenses in defending these cases.

Small Employers

Small employers (those with less than ten employees) would be immune from the cost impacts described in the language in this initiative, since the proposed changes would apply only to employers that regularly employ ten or more employees. Medium and large employers would still be impacted, however, and those who employ more than ten employees are expected to comprise the bulk of the payroll in Colorado. Employers with slightly greater than ten employees may have an incentive to reduce the number of employees in order to avoid lawsuits. Based on data from the United States Census Bureau, approximately 10% of payroll in Colorado is comprised of employers with less than ten employees, so the overall impact of this proposal is tempered to some degree and protects the smallest employers from lawsuits. However, employees of smaller employers may attempt to apply the right to sue, arguing equal protection.

Summary

NCCI estimates that the Safe Workplace Ballot Initiative which would introduce tort liability as an additional course of action, if enacted in its current form, could cause workers compensation and related system costs in Colorado to double due to increased litigation and unlimited damages. Such higher costs will impact the entire employer community (including governmental entities) and thereby the economy of the state of Colorado. **The ultimate specific magnitude of the increase, however, remains unclear and will depend on the behavior of employees, employers, lawyers, and insurers, as well as the courts' interpretation of the language.** If enacted, Colorado's system would be unique compared to other states, by allowing an unlimited right of tort action in addition to retaining workers compensation system of no-fault benefits.



National
Council on
Compensation
Insurance, Inc.

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Additional Unintended Consequence

- NCCI anticipates that the passage of this bill could affect economic expansion of the state of Colorado in addition to the workers compensation system. This ballot initiative could have an impact on Colorado's economic development potential, as businesses outside of Colorado would be less inclined to consider expanding or relocating to the state in order to avoid the potential future risk of unpredictably high costs. In addition, employers may choose to relocate from Colorado to avoid the potential costs associated with this initiative.

Last Draft as Mailed to Interested Parties

Initiative #93 Additional Remedies for Injured Employees

1 **Amendment ? proposes amending the Colorado statutes to:**

- 2 ◆ require every private employer in Colorado with ten or more employees
3 to provide a safe and healthy workplace; and
- 4 ◆ allow an injured employee to seek damages in court, beyond workers'
5 compensation benefits, if the employee believes that the employer
6 failed to provide a safe and healthy workplace.

7 **Summary and Analysis**

8 Currently, federal and state safety standards exist to ensure safe working
9 conditions for employees. Companies may be fined if they do not meet these
10 standards. Employees who are injured at work receive benefits through workers'
11 compensation.

12 ***What remedies are available to injured employees under workers'***
13 ***compensation?*** Workers' compensation is the exclusive remedy for on-the-job
14 injuries. State law requires all employers with one or more full- or part-time
15 employees to provide workers' compensation benefits for on-the-job injuries or
16 work-related diseases, regardless of who or what caused the injury. Employees are
17 entitled to specific benefits, which are outlined in state law, without going to court.
18 When a workplace injury occurs, an injured employee receives the following benefits,
19 depending on the circumstances:

- 20 ◆ reasonable and necessary medical care, at no cost to the employee;
- 21 ◆ tax-free payment for lost wages up to two-thirds of the injured
22 employee's salary;
- 23 ◆ payment for disfigurement;
- 24 ◆ vocational rehabilitation;
- 25 ◆ funeral expenses; and
- 26 ◆ death benefits for surviving dependents.

27 An employee may appeal the determination of benefits through a state system,
28 but cannot seek damages in court. In 2005, over 120,000 workplace injuries were
29 reported, and of those, approximately 85,000 resulted in claims for medical care and
30 16,600 resulted in claims for lost wages.

31 ***What additional remedies are offered to injured employees under***
32 ***Amendment (?)?*** In addition to any remedies received under workers'
33 compensation, Amendment ? allows an injured employee to sue in court if he or she
34 believes that the employer failed to provide a safe and healthy workplace.
35 Amendment ? applies to employees working at private companies with ten or more
36 employees. An employee cannot receive damages that he or she already received

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1 under workers' compensation. Under Amendment ?, examples of damages that an
2 employee may sue for include:

- 3 ◆ past and future monetary losses;
- 4 ◆ pain and suffering;
- 5 ◆ emotional distress;
- 6 ◆ inconvenience;
- 7 ◆ mental anguish;
- 8 ◆ loss of enjoyment of life; and
- 9 ◆ other non-monetary losses.

10 **Arguments For**

11 1) The workers' compensation system does not always meet the needs of injured
12 employees. While an injured employee receives medical care at no cost, the choice of
13 doctor and treatment options are limited. Further, an injured employee who is unable
14 to work may receive wage payments that are far below the employee's previous
15 take-home earnings. By allowing the courts to review individual cases, Amendment ?
16 establishes another avenue for employees to seek compensation for injuries, such as
17 pain and suffering, beyond the benefits provided by workers' compensation.

18 2) Amendment ? encourages an increased focus on workplace safety, and both
19 employers and employees benefit from safe and healthy workplaces. Safe
20 workplaces allow employees to be efficient and productive, saving employers money.
21 Maintaining a safe workplace reduces employees' concerns about their day-to-day
22 safety and the likelihood of injury. Amendment ? provides a mechanism to financially
23 penalize employers who endanger the safety of their employees.

24 **Arguments Against**

25 1) Amendment ? is unnecessary. The current workers' compensation system
26 effectively balances the needs of employees and employers. It ensures prompt
27 delivery of benefits to injured employees without the delay, expense, and risk involved
28 with a lawsuit and controls costs for employers. Allowing injured employees to sue for
29 additional benefits disrupts this balance. Moreover, employers are already motivated
30 to provide safe and healthy workplaces to comply with safety regulations, lower costs
31 for worker replacement and insurance premiums, and increase employee productivity.

32 2) The negative effect of Amendment ? on the state's economy outweighs any
33 potential benefits to some injured employees. It exposes employers to increased
34 liability and legal costs. These increased costs are likely to be passed on to
35 consumers and employees through increased prices for goods and services, lower
36 wages, and reduced employee benefits. Amendment ? may increase unemployment
37 by discouraging businesses from locating or expanding in Colorado. It could also
38 result in significant litigation, adding to the current backlog of court cases.

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1 Estimate of Fiscal Impact

2 Amendment ? is expected to lead to new court filings by employees injured at
3 work. Because the measure establishes a new right of action, there is no experience
4 available to estimate the number of filings that will result. Table 1 shows both annual
5 state revenue and spending increases if 1 percent, 10 percent, or 25 percent of
6 workers' compensation claims for lost wages result in new court cases. Revenue
7 increases result from court filing fees, and spending increases pay for additional court
8 staff. As people become aware of their right of action under this measure, the
9 potential for significant revenue and spending increases is real.

10

11 **Table 1. Annual State Revenue and Spending Increases**

12 **Under Amendment ?***

	1% of Claims Result in a Court Case	10% of Claims Result in a Court Case	25% of Claims Result in a Court Case
Cases Filed	166	1,660	4,150
New Revenue - Fees	\$61,000	\$608,000	\$1,520,000
New Spending	\$139,000	\$1,433,000	\$3,583,000
New Employees	2	18	44

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20 * Table 1 shows only government spending and does not include costs to private companies.

AMENDMENT 57
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Amendment 57
Additional Remedies for Injured Employees

1 **Ballot Title:** An amendment to the Colorado Revised Statutes concerning a safe
2 workplace for employees, and, in connection therewith, requiring employers to provide
3 safe and healthy workplaces for their employees; restricting such requirement to
4 employers regularly employing ten or more employees in the state; and enabling
5 employees who are injured because of an employer's violation of this requirement to file
6 suit in district court, with the right to a jury trial, to recover compensatory and
7 exemplary damages, actual past or future pecuniary losses, and noneconomic losses
8 including pain and suffering, emotional distress, inconvenience, mental anguish, and
9 loss of enjoyment of life, but prohibiting injured employees from recovering any
10 damages for which the employee already received compensation pursuant to the
11 "Workers' Compensation Act of Colorado".

12 **Text of Proposal:**

13 *Be it Enacted by the People of the State of Colorado:*

14 Part 1 of article 2 of title 8, Colorado Revised Statutes, is amended BY THE
15 ADDITION OF A NEW SECTION to read:

16 **8-2-124. Safe workplace.** (1) IT IS THE POLICY OF THIS STATE THAT EVERY EMPLOYEE
17 SHOULD WORK IN A SAFE AND HEALTHY WORK ENVIRONMENT.

18 (2) EVERY EMPLOYER IN THIS STATE SHALL PROVIDE A SAFE AND HEALTHY WORKPLACE
19 FOR ITS EMPLOYEES.

20 (3) FAILURE OF AN EMPLOYER TO COMPLY WITH ITS OBLIGATIONS UNDER THIS SECTION
21 SHALL BE ACTIONABLE BY AN INJURED EMPLOYEE IN DISTRICT COURT IN ADDITION TO
22 ANY RIGHTS THE EMPLOYEE MAY HAVE UNDER THE WORKERS' COMPENSATION ACT OF
23 COLORADO, ARTICLES 40 TO 47 OF THIS TITLE. THE INJURED EMPLOYEE SHALL HAVE A
24 RIGHT TO A JURY TRIAL ON ALL ISSUES OF FACT, IF DEMANDED IN ACCORDANCE WITH THE
25 COLORADO RULES OF CIVIL PROCEDURE. THE COURT OR JURY MAY AWARD THE INJURED
26 EMPLOYEE COMPENSATORY AND EXEMPLARY DAMAGES, INCLUDING DAMAGES FOR PAST
27 AND FUTURE PECUNIARY LOSSES, PAIN AND SUFFERING, EMOTIONAL DISTRESS,
28 INCONVENIENCE, MENTAL ANGUISH, LOSS OF ENJOYMENT OF LIFE, AND OTHER
29 NONPECUNIARY LOSSES, PROVIDED THAT THE EMPLOYEE SHALL NOT BE ENTITLED TO A
30 DOUBLE RECOVERY FOR THE SAME LOSSES FOR WHICH THE EMPLOYEE HAS ALREADY
31 BEEN COMPENSATED UNDER THE WORKERS' COMPENSATION ACT.

32 (4) "EMPLOYER" AND "EMPLOYEE" SHALL HAVE THE MEANINGS SET FORTH IN
33 SECTION 8-4-101, EXCEPT THAT THIS SECTION SHALL APPLY ONLY TO EMPLOYERS THAT
34 REGULARLY EMPLOY TEN OR MORE EMPLOYEES IN THE STATE OF COLORADO.