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MEMORANDUM

April 11, 2008

TO: Ernest Duran and Bradley Johnston

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #93, concerning safe workplaces

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 declare it is the policy of this state that every employee should work in a safe and healthy work environment;
2. To require every employer in this state to provide a safe and healthy workplace for its

employees;

3. To state that failure of an employer to comply with its obligations to provide a safe workplace is actionable by an injured employee in district court in addition to any rights the employee may have under the workers' compensation system; and
4. To entitle an injured employee to a jury trial on all issues and to compensatory and punitive damages, including damages for past and future pecuniary losses, pain and suffering, emotional distress, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical questions:

1. In Colorado, when a proposed measure adds new language to the Colorado Revised Statutes, new language is generally shown in small capital letters [THIS IS AN EXAMPLE OF NEW LANGUAGE IN SMALL CAPITAL LETTERS]. Would the proponents consider indicating the proposed new language with small capital letters? Note that this would **not** include changing the language of the enacting clause, the amending clause, or the section 8-2-124 heading, as those should remain in regular type as they already appear in the proposed initiative. Also, note that if the proponents make such a change, the first letter of the first word of each sentence should be capitalized and the first letter of the first word at the beginning of each new subsection should be capitalized.
2. On lines 11 and 12, would the proponents consider changing the amending clause as follows, to conform to standard drafting format:

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

3. On line 22, the proposed initiative refers to the "workers' compensation system". It is standard drafting practice to refer to the name of an act and where it is located in the Colorado Revised Statutes. Would the proponents consider deleting "workers' compensation system" and adding ""Workers' Compensation Act of Colorado", articles 40 to 47 of this title."?
4. For correct spelling, on line 25, would the proponents change "non-pecuniary" to "nonpecuniary"?

5. On lines 27 and 28, it is standard drafting format to not include "C.R.S." in a citation if the section being referred to is within the same title as where the citation occurs. Also, it is standard drafting format to use the word "section" instead of the section symbol "§". For proper citation format, would the proponents consider changing "C.R.S. § 8-4-101" to "section 8-4-101"?

Substantive 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. The proponents have located the proposed initiative as a new section in part 1 of article 2 of title 8 in the Colorado Revised Statutes. Have the proponents considered situating the measure in part 2 ("Employer's Liability"), or under the "Labor Conditions" portion (i.e., articles 11 through 14) of title 8? Or, perhaps the initiative should recreate and reenact section 8-1-109 or 8-1-110, C.R.S., which were titled "**Employer to furnish safe place to work.**" and "**Unsafe places - investigation - report - order.**", respectively.
3. Subsection (1) of the proposed initiative states that "[i]t is the policy of this state that every employee should work in a safe and healthy environment". The terms "safe" and "healthy" are broad and may cause some confusion. What is meant by "safe"? What is meant by "healthy"? Have the proponents considered defining or illustrating those terms, in order to give employers and employees better direction as to their duties and rights under this law?
4. What is the intended scope of the term "workplace"? Do the proponents mean the immediate area in which work is performed? Or do the proponents intend the initiative to extend to a larger area? For example, section 25-14-203, C.R.S., defines "place of employment" as "any indoor area or portion thereof under the control of an employer in which employees of the employer perform services for, or on behalf of, the employer". Section 8-40-201, C.R.S., defines the same term as "every place whether indoors, outdoors, or underground and the premises, workplaces, works, and plants appertaining thereto or used in connection therewith where either temporarily or permanently any industry, trade, or business is carried on; or where any process or operation directly or indirectly relating to any industry, trade, or business is carried on; or where any person is directly or indirectly employed by another for direct or indirect gain or profit". Would the proponents consider clarifying what is meant by the term "workplace"?
5. The proposed initiative states that the new law would be "in addition to any rights the employee may have under the worker's compensation system".
 - a. Do the proponents mean articles 40 through 55 of title 8, C.R.S.? If so, would the proponents consider specifically citing this portion of the Colorado Revised Statutes?
 - b. Workers' compensation is founded on the theory that employees covered by the

workers' compensation system will receive a certain measure of recompense for injuries sustained arising out of employment, but, in return, relinquish their ability to seek redress in court. In other words, the scheduled payment under workers' compensation is intended to be the exclusive remedy available to an injured employee. The proposed initiative seems to turn this theory on its head by allowing dual recovery for injured employees (via both workers' compensation and civil actions). Is this the proponent's intended result? If so, have the proponents considered what other laws and regulations may be impacted by the initiative?

6. The proposed initiative states that the injured employee "shall be entitled to a jury trial on all issues..." Because juries are the triers of questions of fact, and judges the arbiters of questions of law, would the proponents consider clarifying that the jury would try "all issues of fact"? Should the measure specify that, though an injured employee is entitled to a jury trial, the employee still must make a demand and pay a fee for such pursuant to Rule 38 of the Colorado Rules of Civil Procedure?
7. Have the proponents considered that, under current federal regulations contained in the Occupational Safety and Health Act of 1970 (29 U.S.C. sec. 651 et seq.), employers already have general and specific duties to provide safe and healthful workplaces to their employees? If so, how is the proposed initiative intended to complement or supplement the federal law in this area?