

STATE OF COLORADO

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MEMORANDUM

January 24, 2008

TO: Robin Wright, Cynthia Knox, and Sara Kuntzler

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #62, concerning just cause employee suspension and discharge

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 prohibit an employer from discharging or suspending an employee unless the employer has first established just cause for the discharge or suspension;
2. To define "just cause" to mean:

- a. Incompetence;
 - b. Substandard performance of assigned job duties;
 - c. Neglect of assigned job duties;
 - d. Repeated violations of the employer's written policies and procedures relating to job performance;
 - e. Gross insubordination that affects job performance;
 - f. Willful misconduct that affects job performance; or
 - g. Conviction of a crime involving moral turpitude.
3. To specify that any employee who is notified that he will be or has been discharged or suspended shall receive the employer's written documentation of the just cause used to justify such discharge or suspension;
 4. To allow an employee who believes he was discharged or suspended without just cause to, within thirty days after notification of the discharge or suspension, apply for mediation of a claim for wrongful discharge or suspension;
 5. To state that a hearing shall be held before a private mediator within one hundred twenty days after an employee files for mediation;
 6. To permit the employee and the employer to present evidence and make legal argument at the hearing;
 7. To allow a mediator who finds that an employee was discharged or suspended without just cause to award the employee all back wages or reinstatement in his former job or both;
 8. To require the mediator to assess the costs for his or her services to the losing party;
 9. To allow the mediator to award attorney fees to the prevailing party as to any claim made by the employee;
 10. To allow the general assembly to enact legislation to facilitate the purposes of the proposed amendment;
 11. To make the proposed amendment effective upon proclamation of the governor regarding the votes cast on the amendment.

Comments and Questions

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

Technical questions:

1. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by initiative:

"Be it Enacted by the People of the State of Colorado:"

Would the proponents consider adding such an enacting clause at the beginning of the proposed measure?

2. In Colorado, when a proposed measure adds new language to the Colorado Revised Statutes or the Colorado constitution, certain drafting conventions are used.

- a. To provide notice to the public of the proposed changes to the law and to identify where a new provision is to be placed, an initiative, similar to a bill or referendum, generally refers to the specific statutory or constitutional article, part, or section that is to be amended or added. Proposed measures to add new language use an "amending clause" indicating the specific section of the law where new language will be added. The amending clause would be placed following the enacting clause referred to in the above question 1. Would the proponents consider adding an amending clause to the proposed measure, indicating where the new language is to be placed? (See paragraph b. below for examples of amending clauses.)

- b. Each section of the statutes and the constitution begins with a section heading that includes the section number and a short description of the section contents. If the proponents decide to specify a constitutional or statutory section that is to be created, as discussed in the above paragraph a., would the proponents consider adding a section heading? For example:

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

8-2-124. Just cause for discharge or suspension - mediation. (1) NO EMPLOYEE MAY BE DISCHARGED OR SUSPENDED UNLESS THE EMPLOYER . . .

OR

SECTION 1. The constitution of the state of Colorado is amended BY THE ADDITION OF A NEW ARTICLE to read:

Section 1. Just cause for discharge or suspension - mediation. (1) NO EMPLOYEE MAY BE DISCHARGED OR SUSPENDED UNLESS THE EMPLOYER . . .

- c. Also, if it is the proponents' intent to add a new article or part to the constitution or the statutes, an initiative, similar to a bill or referendum, generally contains an article

or part heading that refers to the subject matter of the new article or part. The heading would be placed following the amending clause referred to in paragraph a. above. If the proponents intend to add a new part or article to the statutes or the constitution, would the proponents consider adding an article or part heading to the proposed measure? (A heading is not necessary if the proponents intend to add just a section.) For example:

ARTICLE XXX

Just Cause for Employee Discharge or Suspension

(or)

PART 5

JUST CAUSE FOR EMPLOYEE DISCHARGE OR SUSPENSION

3. To be consistent with standard drafting practices, would the proponents consider:
 - a. Changing the paragraph letters in subsection (2) and (4) of the proposed measure to be lower case, not small capped? For example, "(A)" should be "(a)", "(B)" should be "(b)", etc.
 - b. In subsection (2), capitalizing the first letter of the first word following each of the paragraph letters (a) to (g)? For example, "INCOMPETENCE" should be "INCOMPETENCE".
 - c. In paragraph (g) of subsection (2), changing the comma following the word "TURPITUDE" to a period?
 - d. Making the language of the proposed measure gender-neutral? For example, in subsection (3) and paragraph (a) of subsection (4), add "OR SHE" after the word "HE" and in paragraph (b) of subsection (4), add "OR HER" after the word "HIS".
4. In paragraph (a) of subsection (4) (in line 24), there seems to be a word missing. Would the proponents consider adding the word "THE" after the word "AT"?
5. In paragraph (d) of subsection (4), would the proponents consider changing "ATTORNEYS FEES" to "ATTORNEY FEES" for the correct term?

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. Subsection (3) states that the employee shall receive written documentation of the just cause for discharge or suspension. Do the proponents want to state directly that the employer shall

provide the written documentation to the employee?

3. Subsection (4) (a) refers to application for mediation. Do the proponents wish to specify how the mediator is selected?
4. Do the proponents wish to include a process to appeal the mediator's decision or is the mediator's decision a final action?
5. There appears to be no allowance for layoffs due to a lack of work or even the bankruptcy of the employer. Is this the proponents' intent? If so:
 - a. Where should the employee stand vis-à-vis other creditors of the employer?
 - b. If the employer is a corporation and has no available assets, would the employee be able to hold individualized officers of the corporate employer personally liable? Do the proponents wish to clarify whether this would be the case and, if so, what procedure should be followed to accomplish it?