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MEMORANDUM

April 11, 2008

TO: Ernest Duran and Irene Goodell

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #92, concerning employer responsibility for health insurance

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 add a new section to the state constitution;
2. To require every employer in the state of Colorado to provide, directly or indirectly, major medical health care coverage for its employees and their dependents;

3. To define "employer" to mean any individual, person, firm, partnership, association, corporation, limited liability company, company, or other entity that regularly employs 20 or more employees in the state of Colorado, including a receiver or other person acting on behalf of the employer and excluding the state or any political subdivision thereof;
4. To require the state of Colorado to establish a health insurance authority to administer the provision of such health care coverage;
5. To require employers that do not directly provide major medical health care coverage for employees and their dependents to pay premiums to the health insurance authority, which shall not provide such health care coverage itself but shall have the power to contract with health insurance plans, companies, and organizations to provide such health care coverage;
6. To preclude the general assembly from appropriating moneys from the general fund to pay costs of administering the insurance authority or costs of the required health care coverage, and to allow the general assembly to use other sources of revenue, if necessary, to pay for the costs of administering the insurance authority or providing the required health care coverage;
7. To state that an employer shall be deemed to provide health care coverage "directly" by offering a major health care coverage plan to its employees through a health insurance plan, company, or organization or by acting as a self-insurer;
8. To state that the major health care coverage plan offered or provided by the employer shall not require the employee to pay more than 20% of the premium cost of such coverage for the employee and shall not require the employee to pay more than 30% of the premium cost of coverage for dependents of the employee;
9. To state that an employer shall provide health care coverage "indirectly" by paying premiums to the insurance authority in such amounts as are determined by the insurance authority to fulfill the requirements of the constitutional section;
10. To require the general assembly to: Enact such laws as are necessary to implement the requirement for health care coverage; define terms that are not defined in the constitutional section, including the required components of major medical health care coverage; and provide for the administration of the insurance authority; and
11. To state the effective date of the new constitutional section shall be delayed until the general assembly has an opportunity to enact appropriate legislation to implement the requirements of the new constitutional section, but, in any event, the effective date shall not be delayed beyond November 1, 2009.

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 initiative adds new language to the state constitution, 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 16 heading, as those should remain in regular type as they already appear in the initiative. Also, note that if the proponents make such a change, the first letter of the first word of each sentence should be capitalized, the first letter of the first word at the beginning of each new subsection should be capitalized, and the first letter of the word "COLORADO" should be capitalized.

2. With regard to the use of terms in the proposed initiative:
 - a. The proposed initiative refers to both "major medical health care coverage" and "major health care coverage plan", although they appear to be the same thing. It is standard drafting practice to use terms consistently in a section of the state constitution. To alleviate confusion, would the proponents consider using a uniform term throughout the proposed initiative?

 - b. It is standard drafting practice to use the full name of a term the first time it is mentioned in a subsection, and then shortening the name of the term within the rest of the subsection. For example, the first time the health insurance authority is mentioned in a subsection, the term "health insurance authority" should be used and then, if the term is used in the rest of the subsection, it can simply be called the "authority". Similarly, the first time major medical health care coverage is mentioned in a subsection, the term "major medical health care coverage" should be used and then, if the term is used in the rest of the subsection, it can simply be called "health care coverage". Would the proponents consider changing the terms as indicated above throughout the proposed initiative?

In the alternative, the proponents can define a term for usage in the section. For example, in subsection (1), which is the first time the term "major medical health care coverage" is mentioned in the section, the proponents can define the term as follows: ". . . MAJOR MEDICAL HEALTH CARE COVERAGE, REFERRED TO IN THIS SECTION AS "HEALTH CARE COVERAGE", FOR ITS" The proponents would then use the term "HEALTH CARE COVERAGE" throughout the rest of the proposed initiative. Also, in subsection (2), which is the first time the term "health insurance authority" is mentioned in the section, the proponents can define the term as follows: ". . . A HEALTH INSURANCE AUTHORITY, REFERRED TO IN THIS SECTION AS THE "AUTHORITY", TO ADMINISTER. . . ." The proponents would then use the term

"AUTHORITY" throughout the rest of the initiative.

3. In the amending clause on page 1, line 5, the word "State" should not be initial capped. Would the proponents consider changing "State" to "state"?
4. On page 1, lines 7 and 8, the proposed initiative states "Every employer . . . that employs twenty or more employees . . ." However, the definition of "employer" in subsection (5) of the initiative already references that "employer" means twenty or more employees. Since the reference to "twenty or more employees" is already in the definition of "employer", would the proponents consider deleting the reference in subsection (1) to eliminate this redundancy?
5. On page 1, line 16, would the proponents consider changing "monies" to "moneys" for correct spelling?
6. It is standard drafting practice to place a comma before the last item in a series of three or more, but not for a series of two. On page 1, line 26, would the proponents consider deleting the comma after the word "employee", since it is a series of two?
7. On page 1, line 29, and page 2, line 9, there are references to "subsection (2) of this section", when referring to where the insurance authority was established. However, the insurance authority is referred to in other places of the proposed initiative, but there are no references to subsection (2) in those other places. Also, it seems unnecessary to refer to subsection (2) since the authority is established in the same section as the references to it appear. Would the proponents consider deleting the references to subsection (2)?
8. With regard to subsection (5) on page 2, lines 1 to 4, the standard drafting language used to introduce the definition subsection of a provision is "AS USED IN THIS SECTION, "EMPLOYER" MEANS . . ." Would the proponents consider adding such language to the beginning of subsection (5) to follow this standard drafting practice?

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. On page 1, line 8, the proposed initiative specifies that employers that employ "twenty or more employees" are subject to the requirement to provide major medical health care coverage. Do the proponents intend this number to include full-time, part-time, and seasonal employees? For example, if an employer consists of ten full-time employees and ten part-time employees, would the employer be subject to the provisions of the initiative? Is there a certain period for which an employer would have to employ twenty employees in order to be subject to the initiative's requirements? Would the proponents consider clarifying this issue? Do the proponents intend the general assembly to clarify this issue in implementing legislation?

3. Would the proponents consider clarifying what is meant by "major medical health care coverage"? Do the proponents mean "major" to refer to cost (that is, more complicated or frequent health care procedures)? Or, do the proponents refer to routine or basic health care services (such as emergency care)? If the latter, what types of services, procedures, and treatments would fall within the scope of coverage? What would fall outside?
4. On page 1, line 14, the proposed initiative refers to "health insurance plans, companies, and organizations" that will provide the major medical health care coverage under the "indirect" scheme. The term used in the Colorado Revised Statutes to refer to such entities is "carriers". Would the proponents consider replacing or supplementing the existing language of the initiative with this word?
5. With regard to the health insurance authority created in subsection (3) of the proposed initiative:
 - a. If the general assembly is prohibited from making appropriations from the general fund to pay for the costs of establishing and administering the health insurance authority, how will the authority be funded?
 - b. Should the health insurance authority be located within an existing agency or department? Who will promulgate rules for the authority? Will the authority be headed by a commissioner? A board or commission? Do the proponents intend that the general assembly address these issues with implementing legislation?
 - c. How should the health insurance authority select the health care carriers who will provide health care coverage in the proponent's "indirect" scheme? Do employers have any say in the selection? Do employees?
6. With regard to subsection (4) of the proposed initiative:
 - a. Will an employer who opts to provide "direct" health care coverage to its employees be required to meet some minimum threshold of coverage? Will these employers be overseen by the insurance authority created by the proposed initiative?
 - b. Will employers who choose to "indirectly" provide health care coverage to their employees pay the entire premium contemplated by the proposed initiative? A portion? Would the proponents consider clarifying the employer's responsibility under the indirect scheme?
 - c. Will employers who come under the purview of the proposed initiative be prohibited from lowering wages of employees in order to pay for the costs of direct or indirect health care coverage?
7. On page 2, lines 1 to 4, the definition of "employer" raises the following questions:
 - a. Do proponents intend that nonprofit entities be included?

- b. What is meant by "*regularly* employs" (emphasis added)? If an employer employs nineteen employees for eleven months of every calendar year, and for one month of the year, employs twenty employees, would the employer be subject to the requirements?
- 8. The federal "Employee Retirement Income Security Act of 1974", commonly known as ERISA, regulates employer-sponsored benefit plans. Have the proponents considered how the proposed initiative will be affected (or possibly preempted) by ERISA?