

STATE OF COLORADO

Colorado General Assembly

Kirk Mlinek, 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

March 5, 2008

TO: Robin Wright and Cynthia Knox

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #76, concerning just cause employee discharge or suspension

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.

An earlier version of this initiative was the subject of a memorandum dated January 24, 2008. Proposal 2007-2008 #62 was discussed at a hearing on January 29, 2008. The comments and questions raised in this memorandum will be limited so as not to duplicate comments and questions that were addressed at the earlier hearing unless it is necessary to fully address the issues in the revised measure. However, the comments and questions that have not been addressed by changes in the proposal continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendment appear to be:

1. To add a new section to article XVIII of the state constitution;
2. To allow an employee to be discharged or suspended only if an employer has first established just cause for the discharge or suspension;
3. 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;
 - g. Conviction of a crime involving moral turpitude;
 - h. Filing of bankruptcy by the employer; or
 - i. Specific economic circumstances that directly and adversely affect the employer and are documented in writing by the employer.
4. To define "employee" to mean any natural person who has worked as a full-time employee for at least 6 consecutive months for an employer and is not covered by a bona fide collective bargaining agreement that contains a provision that requires just cause for discharge or suspension from employment;
5. To define "employer" to mean any business entity that employs at least 20 full-time employees in this state, excluding any governmental entity, charitable organization, or foundation exempt from federal taxation under section 501 (c) (3) of the internal revenue code, or designated nonprofit;
6. To define "governmental entity" to mean any agency or department of federal, state, or local government, including but not limited to any board, commission, bureau, committee, council, authority, institution of higher education, political subdivision, or other unit of the executive, legislative, or judicial branches of the state; any city, county, city and county, town, or other unit of the executive, legislative, or judicial branches thereof; any special district, school district, local improvement district, or special taxing district at the state or local levels of government; or any other kind of municipal, public, or quasi-public corporation;
7. To specify that an employer shall provide an employee who has been discharged or suspended with the employer's written documentation of the just cause used to justify such discharge or suspension;

8. To allow an employee who believes he or she was discharged or suspended without just cause to, within 180 days after notification of the discharge or suspension, file a civil action in state district court;
9. To specify that if the discharge or suspension is held to have been wrongful under the proposed new section, the court shall, in its discretion, award the employee reinstatement in his or her former job, back wages, damages, or any combination thereof, and allows the court to award attorney fees to the prevailing party in addition to any other award;
10. To allow the decision of the district court to be appealed to the state court of appeals and the state supreme court as permitted under the Colorado rules of civil procedure;
11. To allow the general assembly to enact legislation to facilitate the purposes of the proposed amendment;
12. 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:"

On page 1, line 1 of the proposed measure, would the proponents consider removing the italics in the enacting clause and capitalizing the first letter of the word "enacted"?

2. With regard to the amending clause on page 1, lines 3 and 4, it is standard drafting practice to bold the phrase "SECTION 1.", refer to the "constitution of the state of Colorado" instead of the "Colorado Constitution", and to not refer to the new section number in the amending clause (in this case, "13"). Would the proponents make such changes to the proposed measure, as shown below?

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

3. With regard to the constitutional section heading on page 1, line 6, it is standard drafting

practice to bold the heading, to not put it in small caps, and to have the first line of the first subsection of the section immediately follow the heading, instead of on a separate line. Would the proponents make such changes to the proposed measure, as shown below?

Section 13. Just cause for discharge or suspension. (1) AN
EMPLOYEE MAY BE DISCHARGED OR SUSPENDED ONLY IF HIS OR HER
EMPLOYER HAS FIRST ESTABLISHED . . .

(2) FOR PURPOSES OF THIS SECTION:

(a) "JUST CAUSE" MEANS

4. With regard to subsection (2) of the proposed measure, to harmonize this subsection with other definitions sections in the Colorado constitution:
 - a. It is standard drafting format to place defined terms in alphabetical order. Would the proponents modify subsection (2) to follow this standard drafting practice?
 - b. It is standard drafting format to capitalize the first letter of the first word following a subsection number, paragraph letter, or subparagraph roman numeral. Would the proponents modify the subparagraphs in paragraphs (a) and (b) so that the first word following the subparagraph number is capitalized? For example, "INCOMPETENCE" should be "INCOMPETENCE" and "SUBSTANDARD" should be "SUBSTANDARD".
5. On page 1, line 32, would the proponents change "WHICH" to "THAT" for proper use of the word?
6. On page 1, line 33, regarding "AND/OR", it is standard drafting practice to not use the phrase "AND/OR". Since the disjunctive "OR" includes the conjunctive "AND", would the proponents change "AND/OR" to "OR"?
7. On page 1, lines 38 and 39, with regard to the reference to the internal revenue code:
 - a. The "(c)" in "501 (c) (3)" should be lower case, i.e., "(c)", not "(C)";
 - b. It is standard drafting practice to include a citation to a federal act so that a reader may know where to look up the federal cite;
 - c. It is standard drafting practice to place the name of a federal act in quotation marks;
 - d. It is redundant to include the phrase "or any successor provision", as the phrase "as amended" encompasses any successor provisions.

Would the proponents make such changes to the proposed measure, as shown below?

. . . FEDERAL TAXATION UNDER 26 U.S.C. SEC. 501 (c) (3) OF THE
FEDERAL "INTERNAL REVENUE CODE OF 1986", AS AMENDED, OR
DESIGNATED NONPROFIT.

8. To correct misspellings, it is suggested the proponents:
 - a. On page 1, line 36, change "TWEFTY" to "TWENTY";

- b. On page 1, line 40, change "NON-PROFIT" to "NONPROFIT".
 - c. On page 2, line 17, change "ATTORNEYS" to "ATTORNEY".
9. To be consistent with standard drafting practices, would the proponents consider making the language of the proposed measure gender-neutral? For example, on page 2, line 13, add "OR HER" after the word "HIS".
10. On page 2, line 16, would the proponents add "(4)" after "THIS SUBSECTION" for proper citation format?

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 definition of "employee" is limited to a "full-time employee" who has worked for "at least six consecutive months for a private[-]sector employer".
 - a. What constitutes "full-time" employment? Could an employee who actually works less than 40 hours per week, for example a nurse who works three 12-hour shifts, be considered a full-time employee?
 - b. Many persons work part-time, but on a long-term basis, and depend on the income from this employment to meet their daily needs. Is there a reason for excluding these persons from the definition of an "employee"?
 - c. Could an employer transfer employees from one subsidiary to another every six months and thus avoid the mandates of this measure?
3. The definition of "employer" excludes a "designated non-profit". What is a "designated" nonprofit, and how does it differ (if at all) from other nonprofits?
4. For purposes of the exclusion for a "governmental entity", would a state-run enterprise, as defined in article X, section 20(2)(d) of the Colorado constitution (a/k/a "the TABOR Amendment") also be excluded? Do you wish to so specify?
5. May an employer require an to employee waive the protections of this section, either as a condition of employment or in exchange for a specified increase in pay or other benefits? If not, do you wish to so specify?