

Amendment 55 Allowable Reasons for Employee Discharge or Suspension

1 **Amendment 55 proposes amending the Colorado Constitution to:**

- 2 ♦ prohibit private-sector employers from firing or suspending full-time
- 3 employees except for specific reasons; and
- 4 ♦ allow an employee who believes he or she was improperly fired or
- 5 suspended to sue the employer.

6 **Summary and Analysis**

7 ***Current limits on firing employees.*** Under current law, private-sector
8 employees typically can be fired or suspended at any time and for any reason, an
9 arrangement commonly known as at-will employment. There are limits to at-will
10 employment. For example, an employee cannot be fired based on his or her race,
11 sex, religion, or age. In addition, an employee cannot be fired because of an
12 unwillingness to perform an illegal act.

13 ***Proposed limits on firing or suspending employees.*** Amendment 55 prohibits
14 private sector employers from firing or suspending full-time employees except for the
15 following reasons, which the measure defines as "just cause":

- 16 ♦ incompetence;
- 17 ♦ substandard performance or neglect of job duties;
- 18 ♦ repeated violations of an employer's written policies and procedures
- 19 relating to job performance;
- 20 ♦ gross insubordination or willful misconduct that affects job performance;
- 21 ♦ conviction of a crime involving moral turpitude;
- 22 ♦ employer bankruptcy; and
- 23 ♦ documented adverse economic circumstances that directly affect the
- 24 employer.

25 Amendment 55 requires that an employer provide an employee with written
26 documentation of the actions that led to the employee's firing or suspension.

27 ***Affected employers and employees.*** Amendment 55 applies to for-profit
28 employers that employ 20 people or more and nonprofit employers that employ
29 1,000 people or more. It affects employees who work full-time for at least
30 six consecutive months for such employers. Amendment 55 does not apply to
31 businesses where employees are covered by a collective bargaining agreement
32 requiring employers to show just cause for firing or suspending an employee. It also
33 does not apply to government entities.

1 **Legal remedies.** Amendment 55 allows an employee to file a lawsuit challenging
2 a firing or suspension. If the court determines that an employee was fired or
3 suspended without just cause, it may order the employee to be rehired and award
4 back wages and damages. This measure also allows the court to award attorneys
5 fees to the winning party.

6 **Arguments For**

7 1) Amendment 55 allows employees who do a good job to work without fear of
8 losing their employment with no notice and for no reason. The measure still allows
9 employees to be fired for incompetence or neglect of duties, or if the company faces
10 difficult economic circumstances, but companies cannot arbitrarily fire employees.

11 2) Providing job security for employees may help improve Colorado's business
12 climate. Employers will have a larger pool of applicants to choose from if job seekers
13 are attracted to the security offered by the just-cause requirements. Also, employees
14 who feel secure in their employment may be more likely to spend money, which could
15 improve the overall economy.

16 3) Amendment 55 puts in law business practices that are followed by good
17 employers. Many companies document issues that result in firing or suspending an
18 employee. This measure provides employees of private-sector companies with the
19 same protections available to most government employees and employees protected
20 by collective bargaining agreements.

21 **Arguments Against**

22 1) Amendment 55 imposes inflexible constitutional restrictions on businesses that
23 may hurt Colorado's economy. By preventing businesses from making basic
24 economic decisions, such as eliminating unnecessary employees, automating
25 operations, or reorganizing to improve efficiency, the measure places them at a
26 competitive disadvantage with businesses in other states. The measure increases
27 administrative and litigation costs, which may discourage new businesses from moving
28 to Colorado or may cause existing businesses to relocate to another state.

29 2) This measure may hurt the people it is intended to help by discouraging
30 employers from hiring full-time employees. To avoid the new requirements, employers
31 may be inclined to convert full-time employees to part-time employees or to hire
32 independent contractors instead of regular full-time employees. Such responses by
33 employers would adversely affect both the employed and those seeking work.

34 3) Amendment 55 is unnecessary because the decision to fire an employee is
35 rarely taken lightly. Most businesses recognize that firing an employee results in lost
36 productivity, and finding a replacement employee can be difficult, expensive, and
37 time-consuming. In addition, federal and state law already protect employees from

1 being fired for reasons unrelated to job performance, such as an employee's race,
2 sex, religion, or age.

3 **Estimate of Fiscal Impact**

4 Amendment 55 will increase the number of lawsuits filed by employees challenging
5 their firing or suspension. The actual increase in cases to be filed is unknown, but at
6 least 3,750 new lawsuits are expected each year. These additional lawsuits will
7 increase both revenue and spending in the state judicial branch. Revenue from fees
8 paid when lawsuits are filed is expected to total \$1.4 million per year. Spending is
9 expected to increase by \$2.7 million per year, including salary, operating, and capital
10 costs for about 30 new state employees. The new employees include district court
11 judges and associated support staff.

DOUG FRIEDNASH'S COMMENTS ON LAST DRAFT OF AMENDMENT 55

My main concern is that the fiscal analysis greatly underestimates the number of lawsuits that will be filed as a result of this litigation. The number of lawsuits will be much higher. How did you calculate this number? By way of example only, in 2007, 87,000 claims of discrimination were filed. I don't have the Colorado numbers, but each of the individuals filing such a claim, would also have a legal claim under this measure. Similarly, it is likely that all individuals who seek unemployment compensation, wage claims, or other employment claims would also seek a claim under this measure. Simply put, there will be a litigation explosion. Attorneys will handle these matters on a contingency basis. The number of lawsuits has been grossly underestimated and more attention should be placed on estimating the number of cases likely to result. The act is an invitation for litigation.

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Last Draft as mailed to Interested Parties

Initiative #76 Allowable Reasons for Employee Discharge or Suspension

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12 from firing an employee because of his or her unwillingness to perform an illegal act.

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30 six consecutive months for such employers. Amendment ? does not apply to
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32 bargaining agreement requiring employers to show just cause for firing or suspension.

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1 being fired for reasons unrelated to job performance, such as an employee's race,
2 sex, religion, or age.

3 **Estimate of Fiscal Impact**

4 Amendment ? is expected to result in roughly 3,750 new lawsuits per year by
5 employees who challenge their firing or suspension. These additional lawsuits will
6 increase both revenue and spending in the state judicial branch. Revenue from fees
7 paid when lawsuits are filed is expected to total \$1.4 million per year. Spending is
8 expected to increase by \$2.7 million per year, including salary, operating, and capital
9 costs for about 30 new state employees. The new employees include district court
10 judges and associated support staff.

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Amendment 55
Allowable Reasons for Employee Discharge or Suspension

1 **Ballot Title:** An amendment to the Colorado constitution concerning cause for
2 employee discharge or suspension, and, in connection therewith, requiring an employer
3 to establish and document just cause for the discharge or suspension of a full-time
4 employee; defining "just cause" to mean specified types of employee misconduct and
5 substandard job performance, the filing of bankruptcy by the employer, or documented
6 economic circumstances that directly and adversely affect the employer; exempting from
7 the just cause requirement business entities that employ fewer than twenty employees,
8 nonprofit organizations that employ fewer than one thousand employees, governmental
9 entities, and employees who are covered by a collective bargaining agreement that
10 requires just cause for discharge or suspension; allowing an employee who believes he
11 or she was discharged or suspended without just cause to file a civil action in state
12 district court; allowing a court that finds an employee's discharge or suspension to be
13 in violation of this amendment to award reinstatement in the employee's former job,
14 back wages, damages, or any combination thereof; and allowing the court to award
15 attorneys fees to the prevailing party.

16 **Text of Proposal:**

17 *Be it enacted by the People of the State of Colorado:*

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

20 **Section 13. Just cause for employee discharge or suspension.** (1) AN EMPLOYEE MAY
21 BE DISCHARGED OR SUSPENDED ONLY IF HIS OR HER EMPLOYER HAS FIRST ESTABLISHED
22 JUST CAUSE FOR THE DISCHARGE OR SUSPENSION.

23 (2) FOR PURPOSES OF THIS SECTION:

24 (a) "JUST CAUSE" MEANS:

- 25 (I) INCOMPETENCE;
- 26 (II) SUBSTANDARD PERFORMANCE OF ASSIGNED JOB DUTIES;
- 27 (III) NEGLECT OF ASSIGNED JOB DUTIES;
- 28 (IV) REPEATED VIOLATIONS OF THE EMPLOYER'S WRITTEN POLICIES AND
- 29 PROCEDURES RELATING TO JOB PERFORMANCE;
- 30 (V) GROSS INSUBORDINATION THAT AFFECTS JOB PERFORMANCE;
- 31 (VI) WILLFUL MISCONDUCT THAT AFFECTS JOB PERFORMANCE;

1 (VII) CONVICTION OF A CRIME INVOLVING MORAL TURPITUDE;
2 (VIII) FILING OF BANKRUPTCY BY THE EMPLOYER; OR
3 (IX) DISCHARGE OR SUSPENSION DUE TO SPECIFIC ECONOMIC CIRCUMSTANCES
4 THAT DIRECTLY AND ADVERSELY AFFECT THE EMPLOYER AND ARE
5 DOCUMENTED BY THE EMPLOYER, PURSUANT TO SUBSECTION (3) OF THIS
6 SECTION.

7 (b) "EMPLOYEE" MEANS ANY NATURAL PERSON WHO:

8 (I) HAS WORKED AS A FULL-TIME EMPLOYEE FOR AT LEAST SIX CONSECUTIVE MONTHS
9 FOR A PRIVATE SECTOR EMPLOYER; AND

10 (II) IS NOT COVERED BY A BONA FIDE COLLECTIVE BARGAINING AGREEMENT WHICH
11 CONTAINS A PROVISION THAT REQUIRES JUST CAUSE FOR DISCHARGE AND SUSPENSION
12 FROM EMPLOYMENT.

13 (c) "EMPLOYER" MEANS ANY BUSINESS ENTITY THAT EMPLOYS AT LEAST TWENTY
14 FULL-TIME EMPLOYEES IN COLORADO. "EMPLOYER" EXCLUDES:

15 (I) ANY GOVERNMENTAL ENTITY; OR

16 (II) ANY NONPROFIT UNINCORPORATED ASSOCIATION OR ANY NONPROFIT
17 CORPORATION, INCLUDING ANY CHARITABLE ORGANIZATION OR FOUNDATION EXEMPT
18 FROM FEDERAL TAXATION UNDER SECTION 501(C) OF THE "INTERNAL REVENUE CODE OF
19 1986", AS AMENDED, THAT EMPLOYEES LESS THAN ONE THOUSAND EMPLOYEES.

20 (d) "GOVERNMENTAL ENTITY" MEANS ANY AGENCY OR DEPARTMENT OF FEDERAL,
21 STATE, OR LOCAL GOVERNMENT, INCLUDING BUT NOT LIMITED TO ANY BOARD,
22 COMMISSION, BUREAU, COMMITTEE, COUNCIL, AUTHORITY, INSTITUTION OF HIGHER
23 EDUCATION, POLITICAL SUBDIVISION, OR OTHER UNIT OF THE EXECUTIVE, LEGISLATIVE,
24 OR JUDICIAL BRANCHES OF THE STATE; ANY CITY, COUNTY, CITY AND COUNTY, TOWN,
25 OR OTHER UNIT OF THE EXECUTIVE, LEGISLATIVE, OR JUDICIAL BRANCHES THEREOF; ANY
26 SPECIAL DISTRICT, SCHOOL DISTRICT, LOCAL IMPROVEMENT DISTRICT, OR SPECIAL
27 TAXING DISTRICT AT THE STATE OR LOCAL LEVELS OF GOVERNMENT; ANY "ENTERPRISE"
28 AS DEFINED IN SECTION 20 OF ARTICLE X OF THE COLORADO CONSTITUTION; OR ANY
29 OTHER KIND OF MUNICIPAL, PUBLIC, OR QUASI-PUBLIC CORPORATION.

30 (3) AN EMPLOYER SHALL PROVIDE AN EMPLOYEE WHO HAS BEEN DISCHARGED OR
31 SUSPENDED WITH THE EMPLOYER'S WRITTEN DOCUMENTATION OF THE JUST CAUSE USED
32 TO JUSTIFY SUCH DISCHARGE OR SUSPENSION.

33 (4) (a) ANY EMPLOYEE WHO BELIEVES HE OR SHE WAS DISCHARGED OR SUSPENDED
34 WITHOUT JUST CAUSE MAY, WITHIN ONE HUNDRED EIGHTY DAYS AFTER NOTIFICATION

1 OF THE DISCHARGE OR SUSPENSION, FILE A CIVIL ACTION IN STATE DISTRICT COURT. IF
2 THE DISCHARGE OR SUSPENSION IS HELD TO HAVE BEEN WRONGFUL UNDER THE
3 PROVISIONS OF THIS SECTION, THE COURT SHALL, AT ITS DISCRETION, AWARD THE
4 EMPLOYEE REINSTATEMENT IN HIS OR HER FORMER JOB, BACK WAGES, DAMAGES, OR ANY
5 COMBINATION THEREOF.

6 (b) IN ADDITION TO ANY AWARD MADE PURSUANT TO THIS SUBSECTION (4), THE
7 COURT MAY ALSO AWARD ATTORNEY FEES TO THE PREVAILING PARTY.

8 (c) THE DECISION OF THE DISTRICT COURT MAY BE APPEALED TO THE COLORADO
9 COURT OF APPEALS AND THE COLORADO SUPREME COURT AS PERMITTED UNDER THE
10 COLORADO RULES OF CIVIL PROCEDURE.

11 (5) THE GENERAL ASSEMBLY MAY ENACT LEGISLATION TO FACILITATE THE PURPOSES OF
12 THIS SECTION.

13 (6) THIS SECTION SHALL BECOME EFFECTIVE UPON PROCLAMATION OF THE GOVERNOR
14 REGARDING THE VOTES CAST ON THIS AMENDMENT.