

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

**TO:** Timothy Tyler and Wendy Howell

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**DATE:** February 28, 2020

**SUBJECT:** Proposed initiative measure 2019-2020 #283, concerning Paid Family and Medical Leave Insurance Program

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 directors of 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.

Earlier versions of this proposed initiative, proposed initiatives 2019-2020 #247 and 248, were the subject of memoranda dated January 31, 2020, which were discussed at a public meeting on February 4, 2020. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meetings, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

## **Purposes**

The major purposes of the proposed amendment to the Colorado Revised Statutes appear to be the same as for proposed initiative 2019-2020 #248, with the following changes:

1. To cap the maximum weekly benefit amount at \$1,100 for leave that begins before January 1, 2025, then 90% of the state average weekly wage for leave taken after that date;
2. To pay for benefits under the family and medical leave insurance program through premiums paid by employers and employees.
3. To set the premium amount from January 1, 2023, through December 31, 2024, at 0.9 percent of wages per employee and for the 2025 calendar year and each calendar year thereafter, to require the director to set the premium amount;
4. To allow employers to deduct up to 50 percent of the premium amount from employee's wages;
5. To require employers with fewer than 10 employees to pay only 50 percent of the premium amount;
6. To allow employers that are local governments to opt out of the family and medical leave insurance program;
7. To allow self-employed individuals and employees of local governments that have declined participation in the program to elect to participate in the program; and
8. To allow employers to offer family and medical leave benefits through a private plan instead of participating in the family and medical leave program.

## **Substantive Comments and Questions**

The substance of the proposed initiative raises the following comments and questions:

1. Section 8-13.3-403 (7) of the proposed initiative exempts from the definition of "employee" a "railroad worker" exempted under the federal "Railroad Unemployment Insurance Act." The term "railroad worker" is not defined in that act. Who do the proponents intend to exclude from the definition of employee?

2. In section 8-13.3-403 (16), the proponents refer to any right guaranteed "herein." As used in subsection (16), does "herein" mean "in this part 4"? If so, would the proponents consider changing the language to make the intent clearer? (See Technical Comment 2.)
3. Section 8-13.3-404 (2) of the proposed initiative specifies the circumstances under which family and medical leave insurance benefits are payable, and the right to paid family and medical leave is available, to a covered individual. As written, it is unclear whether the covered individual is required to take leave in order to receive the family and medical leave insurance benefits. Is it the proponent's intent to require an individual to take leave if the individual wants to receive benefits? Would the proponents consider modifying this section to clarify their intent?
4. Section 8-13.3-405 (3) of the proposed initiative includes the phrase "one day or eight hours." What do the proponents intend when using the term "one day"? In its current form, it is unclear whether "one day" means eight hours, twenty-four hours, or another unit of time, such as a work day. Would the proponents consider clarifying this phrase?
5. Section 8-13.3-407 of the proposed initiative refers to the family and medical leave insurance program. It is unclear to what program the proponents are referring as the program is not created until section 8-13.3-416. Would the proponents consider reordering the proposed initiative to assist with overall understandability of the initiative? Also, consider defining the term "program" in the definitions section as the family and medical leave insurance program created in section 8-13.3-416.
6. Section 8-13.3-407 (3)(a) of the proposed initiative establishes the premium amount as ninety one-hundredths of one percent of employee wages. Would the proponents consider rewording this to nine-tenths of one percent to aid in readability?
7. Section 8-13.3-407 (3)(b) of the proposed initiative requires the director to set the premium amount starting in the 2025 calendar year using the specified parameters. As written, this section is unclear. How do the proponents intend for the director to determine the premium amount?
8. Section 8-13.3-407 (4) discusses the premium amounts paid by individuals who elect coverage. This subsection requires the payment of an "employee share" or "employee portion" of the premium amount. Is this amount different from the premium amount? If so, how is this amount determined and by whom?

9. Section 8-13.3-407 (5) of the proposed initiative prohibits an employer from deducting more than 50 percent of the premium amount from an employee's wages. Who determines the amount an employer may deduct?
10. Section 8-13.3-408 (2)(d) authorizes the division to issue revenue bonds for the expenses of the division. What expenses do the proponents intend to allow the division to cover with revenue bonds? In what amount can revenue bonds be issued?
11. Section 8-13.3-409 (1) of the proposed initiative requires that "upon expiration of that leave" an employer restore an employee taking family and medical leave to the position the employee held before the leave. Is the employee entitled to this position regardless of whether they return to work? If not, would the proponents consider rewording this phrase to make the intent clear?
12. Section 8-13.3-409 (1) uses the term "fringe benefits." What does this term mean? What do the proponents intend by using this term?
13. Section 8-13.3-409 (4) of the proposed initiative prohibits retaliatory personnel action by a "temporary help company". This term is not defined in the proposed initiative. What does this term mean?
14. Section 8-13.3-409 (5) of the proposed initiative prohibits an employer's "absence control policy" to count family and medical leave as an absence. This term is not defined in the proposed initiative. What does this term mean?
15. Sections 8-13.3-409 (7) and 8-13.3-421 (6) require the director to establish a fine structure for certain violations and deposit collected fines in the family and medical leave insurance fund. Fines collected by agencies are usually deposited into the general fund so that an agency is not incentivized to collect fines. Would the proponents consider requiring the director to deposit collected fines into the general fund?
16. Section 8-13.3-410 (2) refers to "this chapter." Do the proponents mean "this part 4"? If so, would the proponents consider changing the language in this section?
17. Section 8-13.3-410 (3) requires the director to promulgate rules to determine the interaction of family and medical leave benefits, section 24-34-402.7, Colorado Revised Statutes, and workers' compensation benefits. What rulemaking do the proponents contemplate by this section? Would the proponents consider including parameters to this rulemaking authority?

18. Section 8-13.3-411 of the proposed initiative requires the division to provide notice that includes protection against retaliation and interference. The proposed initiative defines the term "retaliatory personnel action." Does "retaliation" mean "retaliatory personnel action." If so, would the proponents consider using the defined term. If not, would the proponents consider using a different term to avoid confusion?
19. The last sentence of section 8-13.3-411 refers to "this subsection." Section 8-13.3-411 is a section, not a subsection. Would the proponents consider making this change?
20. Section 8-13.3-415 (1) of the proposed initiative allows an employer to be reimbursed by the fund. How do the proponents intend for this to work? Would the proponents consider adding language allowing the director to develop a process for this reimbursement?
21. Section 8-13.3-416 of the proposed initiative allows the family and medical leave insurance program to collect "contributions." The term "contribution" is not used elsewhere and is not defined in the proposed initiative. Are the proponents referring to "premiums." If so, would the proponents consider using "premiums" instead for clarity?
22. The headnote of section 8-13.3-418 includes "Family and medical leave insurance account fund." The fund created in that section is called the family and medical leave insurance fund. Would the proponents consider removing "account" from the headnote?
23. Section 24-1-136 (11)(a)(I), Colorado Revised Statutes, requires that reports to the general assembly expire after three years. Is it the proponents' intent that the reports in section 8-13.3-419 expire after three years? If not, consider adding "Notwithstanding section 24-1-136 (11)(a)(I)," at the beginning of the sentence.
24. The proposed initiative includes a severability clause in section 8-13.3-423. Are the proponents aware that section 2-4-204, Colorado Revised Statutes, already provides for severability of new laws? Would the proponents consider removing this redundant language?
25. Section 8-13.3-424 (2) of the proposed initiative includes rulemaking authority within the section specifying the effective date. This language would be better suited in another location. Would the proponents consider clarifying who has this rulemaking authority and moving it to a different section of the proposed initiative?

26. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the Legislative Council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.

- a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
- b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
- c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the Legislative Council staff at [BallotImpactEstimates.ga@state.co.us](mailto:BallotImpactEstimates.ga@state.co.us).

## Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. The Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

**X-X-XXXX. Headnote.** (1) Subsection (*introductory portion*):

(a) Paragraph:

(I) Subparagraph:

(A) Sub-subparagraph

(B) Sub-subparagraph

(II) Subparagraph

(b) Paragraph

(2) Subsection

(3) Subsection

Except in the definitions section, all introductory portions should be numbered. Sections 8-13.3-402 and 8-13.3-404 do not have subsection numbers preceding the introductory portions. These sections should be renumbered as indicated in the example above.

2. Guidelines for statutory citations:

- a. When you are referencing the section you are currently in, the section number does not need to be referenced. For example:

**1-1-105.5. District elections.** (1) (b) Except when a contestor to elector qualifications has been timely initiated as described in *this section*, this section validates ... [*emphasis added*]

- b. The number or letter of what you're referencing needs to be specified for every other level of reference, even when you're referring to a provision within the same:

Title: "this title 1"

Article: "this article 1"

Part: "this part 1"

Subsection: "this subsection (2)"

Paragraph: "this subsection (2)(a)"

Subparagraph: "this subsection (2)(a)(I)"

Sub-subparagraph: "this subsection (2)(a)(I)(B)"

3. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty."
4. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
  - a. The first letter of the first word of each sentence;
  - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and

- c. The first letter of proper names.

In section 8-13.3-403 (3)(a)(II) of the proposed initiative, "elects" should be capitalized and "section" should not be capitalized. In section 8-13.3-412 (2), "director" should not be capitalized. In section 8-13.3-421 (3), "division" should not be capitalized. "Internal revenue service" should not be capitalized.

5. It is standard drafting practice to avoid the use of the phrases "provided that" and "provided, however, that" because these phrases can be unclear and ambiguous and have opposing meanings. Preferred terms are "except that" for an exception to the stated rule or "if" or "so long as" for an additional condition. In sections 18-13.3-405 (1) and 18-13.3-409 (2), please consider changing "provided, however, that" to one of the suggested phrases.
6. Section 2-4-102, Colorado Revised Statutes, provides that the singular form of a word includes the plural and the plural includes the singular. The proponents use the phrase "job or jobs" in several locations in section 8-13.3-406 (2) of the proposed initiative. Would the proponents consider rephrasing this subsection to include only the singular version of the word "job"?
7. It is standard drafting practice to spell out numbers and symbols such as "and," "percent," and "dollars." If you choose to use digits and symbols, please consider using them consistently. In section 18-13.3-406 (1), "percent," "%," and "\$" are used.
8. When listing more than one statutory citation, the sections should be listed in numerical order. Section 8-13.3-412 (1) of the proposed initiative lists statutory citations out of numerical order.
9. It is unnecessary to refer to a definition in a section for which the term is already defined. In section 8-13.3-403, several terms are defined for purposes of the entirety of part 4. Therefore, in section 8-13.3-421, it is unnecessary to refer to the definition section in subsections (1)(c), (1)(d), and (1)(e).
10. The following word is misspelled: "leaves" should be spelled "leave" in section 8-13.3-406 (1)(b).