

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: January 31, 2020

SUBJECT: Proposed initiative measure 2019-2020 #247, concerning the Creation of a Paid Family Leave 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 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 to the Colorado Revised Statutes appears to be:

1. To create a paid family and medical leave insurance program for employees in the state of Colorado to provide partial wage replacement and job protection for employees who have personal or family caregiving needs that require an extended absence from work;

2. To offer employees the option to take paid family and medical leave because the employee: Through birth, adoption, or placement through foster care, is caring for a new child during the first year after the birth, adoption, or placement of that child; is caring for a family member with a serious health condition; has a serious health condition; has a qualifying exigency leave; or has a need for safe leave related to domestic violence, stalking, or sexual assault or abuse.
3. To allow paid family and medical leave for up to 16 weeks in an application year, with an additional four weeks for an employee with a serious health condition related to pregnancy complications or childbirth complications;
4. To require an employee to provide at least 30 days' notice to the employee's employer before the date the leave is to begin when the need for leave is foreseeable;
5. To require an employee to provide notice to the employee's employer as soon as practicable when the need for leave is not foreseeable or if providing 30 days' notice is not possible;
6. To provide the weekly benefit amount for an employee who takes paid family and medical leave at an amount equal to: 90% of an employee's average weekly wage for the portion of the employee's average weekly wage that is equal to or less than 50% of the state average weekly wage, plus 50% of the employee's average weekly wage for the portion of the employee's average weekly wage that is more than 50% of the state average weekly wage;
7. To cap the maximum weekly benefit amount at \$1000 for leave that begins before January 1, 2025, then 100% of the state average weekly wage for leave taken after that date;
8. To pay for the program through premiums paid by employers and employees. From January 1, 2023, through December 31, 2024, the premium amount is 1.04 % of wages per employee. For the 2025 calendar year, and each calendar year thereafter, the director of the division is required to set the premium based on a percent of employee wages and at the rate necessary to obtain a total amount of premium contributions equal to 135% of the benefits paid during the immediately preceding calendar year, plus an amount equal to 100% of the cost of administration of the payment of those benefits during the immediately preceding calendar year, less the amount of net assets remaining in the fund as of December 31 of the immediately preceding calendar year.

Substantive Comments and Questions

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

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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. As a statutory change, the proposed initiative may be amended by subsequent legislation enacted by the General Assembly. Is this your intention?
3. Section 8-13.3-403 (3) of the proposed initiative defines "covered individual" as a person who, among other criteria, "submits an application." The initiative does not refer to submitting an application in any other location in the initiative. What do the proponents mean by "submits an application"? An application to whom and for what?
4. Section 8-13.3-403 (12) of the proposed initiative defines "health care provider" as a person who is "licensed ... to provide medical or emergency services". The subsection then lists certain providers. Not all health care providers are licensed; some are registered or certified. Should those providers also be included?
5. Section 8-13.3-409 (7) of the proposed initiative allows an aggrieved individual to bring a civil action. However, this relief is available only "to the extent allowable under Colorado law and as deemed appropriate by the court." To what other Colorado laws are the proponents referring? Is it the proponents intent that the relief is available only if another law already provides the relief or is it the proponents intent that this section provides the relief? Additionally, how does a court deem a civil action appropriate? Would the proponents consider establishing standards to aid a court in making this determination?
6. Sections 8-13.3-409 (8) and 8-13.3-410 (1)(a) of the proposed initiative use the term "and/or". The use of "and/or" in these subsections makes it difficult to determine the intent of the proposed initiative language. For example, section 8-13.3-409 (8) requires the director to "establish a process for the determination, assessment, and/or appeal of fines under this subsection." Does the director have to establish a process for all three of these categories or is it optional? Would the proponents consider using either "and" or "or" instead in these subsections instead of "and/or"?
7. Section 8-13.3-413 of the proposed initiative requires the director to exercise discretion to waive payments when the recovery is "against equity and good conscience." Are there standards in the proposed initiative to assist the director in determining when recovery would be "against equity and good conscience"?

Would the proponents consider providing parameters in this section of the proposed initiative to assist directors in making this determination?

8. Under section 1-40-105.5, C.R.S., 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.

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. The proponents 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. Because the proposed initiative creates a new part 4, considering using the following standard amending clause: "**SECTION 1.** In Colorado Revised Statutes, **add** part 4 to article 13.3 of title 8 as follows:". By using this single amending clause, you will no longer need to use a separate amending clause to create each new statutory section.
2. Because the definitions should be in alphabetical order, the definitions in subsection (13) and (14) and (19) and (20) should be reordered.
3. It is standard drafting practice, when making a reference to a provision in another statute, to use the following format -- "... under section 8-13.3-403 (3)" to refer to subsection (3) of section 8-13.3-403.

When making a reference to multiple subsections in a specific section, the reference should use the following format: "... under section 8-13.3-404 (2)(a), (2)(b), (2)(d), or (2)(e)."

Finally, when referencing the section you are currently in, the section number does not need to be referenced. For all other article and section divisions, the number or letter of what you are referencing should be specified for every level of the reference. For example: This subsection (2)(d) or this part 4.

4. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), C.R.S., and means "that a person has a duty." The related word, "must," which is defined in section 2-4-401 (6.5), C.R.S., means "that a person or thing is required to meet a condition for a consequence to apply." Furthermore, the definition states that "'must' does not mean that a person has a duty."
5. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate, including the first word of new subsections, paragraphs, Roman numeral subparagraphs (I), (II), etc.

Names of state and federal governmental agencies, like the department of labor and employment and names of entities created in the initiative, like the enterprise need not be initial capitalized. However, names of federal acts should be quoted and initial capitalized, for instance: "Family Medical Leave Act of 1993."