

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

**To:** Raef William VonBrutt and Deborah VonBrutt

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

**Date:** February 28, 2025

**Subject:** Proposed initiative measure 2025-2026 #37, concerning ending forced arbitration in state antitrust cases.

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 and questions 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 and questions intended to aid designated representatives, and the proponents they represent, in determining the language of their proposal and to avail the public of the contents of the proposal. Our first objective is to be sure we understand your intended purposes of the proposal. We hope that the comments and questions in this memorandum provide a basis for discussion and understanding of the proposal. Discussion between designated representatives or their legal representatives and employees of the Colorado Legislative Council and the Office of Legislative Legal Services is encouraged during review and comment meetings, but comments or discussion from anyone else is not permitted.

## **Purposes**

### **Purposes for Proposed Initiative 2025-2026 #37**

The major purposes of the proposed amendments to the Colorado Revised Statutes appear to be:

1. To define "predispute arbitration agreement" and "predispute joint-action waiver" as used in the proposed initiative;
2. To specify that at the election of a person alleging conduct that violates article 4 of title 6, C.R.S., or the named representative of a class in a collective action alleging a such a violation, no predispute arbitration agreement or predispute joint action waiver is valid or enforceable with respect to a case that is filed under state law and related to a violation of article 4 of title 6, C.R.S.;
3. To require that an issue as to whether the provisions of the proposed initiative apply with respect to a dispute is determined under state law; and
4. To require the applicability of the proposed initiative to an agreement to arbitrate and the validity and enforceability of an agreement to which the provisions of the proposed initiative apply to be determined by a court and not by an arbitrator.

## Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and 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. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado". To comply with this constitutional requirement, this phrase must be added to the beginning of the proposed initiative.
3. Article V, section 1 (4)(a) of the Colorado constitution requires that when the majority of voters approve an initiative, the initiative is effective on and after the date of the official declaration of the vote and proclamation of the governor.

Because the proposed initiative does not contain an effective date, this would be the default effective date. Does this default effective date satisfy your intent? If not, the designated representatives should include the desired effective date that is not earlier than the default effective date to comply with this constitutional requirement.

4. The following comments and questions relate to the provisions concerning the definition section in proposed section 6-4-124 (1) C.R.S., in proposed initiative 2025-2026 #37:
  - a. Is a “predispute arbitration agreement” a legally binding agreement entered into by two parties to a contract stating that both parties agree to handle any dispute that arises under the contract through arbitration rather than by filing a lawsuit?
  - b. Is a “predispute joint-action waiver” a legally binding agreement entered into by two parties to a contract stating that both parties agree that they will not participate in a joint action, class action, or other collective action in connection with the contract?
  - c. Are either of these terms used elsewhere in the Colorado Revised Statutes or in article 4 of title 6, C.R.S.?

5. The following comments and questions relate to the provisions concerning an election to make a predispute arbitration agreement or a predispute joint-action waiver invalid in proposed section 6-4-124 (2)(a), C.R.S., of the proposed initiative:
- a. The proposed initiative states that “at the election of the person alleging conduct constituting a violation of this article 4, or the named representative of a class or in a collective action alleging such conduct...” a predispute arbitration agreement or a predispute joint-action waiver may be invalid or unenforceable. Is it your intent that there are three situations when a person may elect to have a predispute arbitration agreement or a predispute joint-action waiver made invalid or unenforceable as follows: 1) when a person alleges a violation of the statute; 2) when a person is a named representative of a class that alleges a violation of the statute; and 3) when a person is a named representative in a collective action that alleges a violation of the statute? If so, please consider clarifying this in your measure. If not, what are the circumstances under which a person may elect to have such an agreement be invalid or unenforceable?
  - b. What does “at the election” of a person mean? How would a person elect to make a predispute arbitration agreement or a predispute joint-action waiver invalid or unenforceable? Does a court or arbitrator need to be involved? If so, what process does a person have to follow to involve a court or arbitrator? If not, how would the election to invalidate the agreement be legally binding?
  - c. Does the measure allow a person who is not a party to a predispute arbitration agreement or a predispute joint-action waiver to elect that the agreement or waiver is invalid or unenforceable after it has been signed by both parties? Does the person electing to make the agreement or waiver invalid or unenforceable have to be a party to the agreement?
  - d. If the person making the election does not have to be a party to the predispute arbitration agreement or a predispute joint-action waiver, does either party to such an agreement have any say in whether the agreement is invalid or unenforceable?
  - e. Subsection (2)(a) seems to imply that a predispute arbitration agreement or a predispute joint-action waiver is automatically invalid or unenforceable at the election of a person alleging conduct that constitutes a violation of

article 4 of title 6. However, subsection (2)(b) indicates that the enforceability of such an agreement to which the proposed initiative applies will be determined by a court. Are these two provisions in conflict? If not, why not? If so, which provision reflects your intent?

- f. Subsection (2)(a) states that “no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under state law and relates to a violation of this article 4.” However, it seems that the provisions of (2)(b) allow a court to make this determination. Which provision reflects your intent?
  - g. What is an example of a case that would be filed under state law and relates to a violation of article 4 of title 6, C.R.S.? What is a situation that might cause a person to elect to find such an agreement invalid?
6. The following comments and questions relate to the provisions concerning an issue as to whether the proposed initiative applies in connection with a dispute in proposed section 6-4-124 (2)(b), C.R.S., of the proposed initiative:
- a. Subsection (2)(b) specifies that an issue as to whether the provisions of the proposed initiative apply to a dispute is determined "under state law". To which state laws are you referring? Are there any current laws that address whether an existing predispute arbitration agreement or a predispute joint-action waiver can be challenged by a third party?
  - b. What factors would a court use to determine whether an agreement should be held invalid?
  - c. Does the proposed initiative require a court to determine both the applicability of the proposed initiative to 1) an agreement to arbitrate; and 2) the validity and enforceability of an agreement to arbitrate? If not, what is a court required to determine? What, if anything, would make the requirements of the proposed initiative inapplicable to an agreement to arbitrate?
  - d. Does subsection (2)(b) require that a court preside over a determination of whether the provisions of the proposed initiative apply even if the parties to the contract have already agreed that disputes will be addressed in arbitration?

- e. Does the ability for a person or a court to determine that an agreement between two parties is invalid implicate any contractual law or raise any contractual issues?

## Technical Comments

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

1. Before the amending clause, number each section, part, etc. that is being amended or added with a section number (e.g., SECTION 1., SECTION 2.). For example:

**SECTION 1.** In Colorado Revised Statutes, **add** section 6-4-124 as follows:

2. Each section in the Colorado Revised Statutes has a headnote. Headnotes briefly describe the content of the section. The headnote that you included in the proposed initiative does not need to include a section symbol.
3. It is standard drafting practice to use small capital letters [and not ALL CAPS] or lowercase letters to show the language being added to the Colorado Revised Statutes.
4. It is standard drafting practice to have the headnote in bold type but not to have the language being added to the Colorado Revised States in bold.
5. The following is the standard drafting language used for creating a definition is "As used in this section, unless the context otherwise requires:". This should be added after (1) in the proposed initiative.
6. It is standard drafting practice to avoid using archaic terms. In subsection (2)(b), instead of using "irrespective of", consider using "regardless of" or "whether or not".
7. Sometimes "joint-action" is hyphenated in the proposed initiative and sometimes it is not. However, "joint-action" should be hyphenated throughout the proposed initiative.