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## MEMORANDUM

TO: D'Arcy Straub and Gene Straub

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: July 16, 2015

SUBJECT: Proposed initiative measure 2015-2016 #26, concerning businesses providing a wedding-related service

Section 1-40-105 (1), Colorado Revised Statutes (hereafter C.R.S.), 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** appear to be:

1. To allow a business providing a wedding-related service to contract out the service to another business that is willing to accommodate lesbian, gay, bisexual, or transgender persons.

2. To require the state to maintain a state register of businesses that willingly provide wedding-related services to lesbian, gay, bisexual, or transgender persons.
3. To state that a business that provides wedding-related services that contracts out its services to another business is deemed to be in compliance with any other public accommodations law.

## **Substantive Comments and Questions**

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

1. Standard drafting practice defines terms used in a statute to aid in understanding the statutory requirements. As used in the proposed measure, does a wedding-related service include services provided by florists, bakeries, photographers, musicians, hair dressers, and caterers?
  - a. Does it include a wedding planner?
  - b. Does it include wedding-related services relating to travel, such as honeymoon accommodations or bookings by a travel agent?
  - c. Does it include a person who actually performs a civil ceremony or a person who actually solemnizes the wedding? Does it include or exclude a person who is a government official officiating at a wedding ceremony?
  - d. Does it include the actual performance of the wedding ceremony or does it apply only to ancillary services to or used in the wedding ceremony? Does it apply to ancillary services provided before or after the wedding ceremony?
  - e. Are there wedding-related services that would not be included?
  - f. Would the proponents consider adding a definition of "wedding-related service"?
2. Does a business providing a wedding-related service include a business that rents out facilities for wedding ceremonies and for wedding receptions? Does it include a restaurant? What about a courthouse or other venue at which a civil service may be performed?
3. Standard drafting practice uses terms or phrases for the same thing or entity consistently throughout the same section. The measure uses "business

providing a wedding-related service" and "wedding-related business". To be consistent with terminology, the last sentence should read: "A business providing a wedding-related service" instead of "A wedding-related business".

4. In two places in the proposed measure, the measure uses the phrase "lesbian, gay, bisexual and transgender persons". This implies that a person would be all four of those characteristics, which seems unlikely. Should the word "and" be changed to "or"? It is standard drafting practice to use the word "and" to connect two or more phrases, conditions, or events, all of which must occur, and to use the word "or" to connect two or more phrases, conditions, or events when only one or more, but not all, need occur. Is it the proponents' intent that this measure only applies to persons who meet all of those four characteristics? Another point of grammar is the use of the serial comma in a series. Standard drafting practice uses the serial comma immediately before the conjunction (either an "and" or an "or") in a series to avoid ambiguity. In this instance, a comma should be placed after the word "bisexual" in the first and second sentences.
5. Section 24-34-601, C.R.S., prohibits discriminatory practices in places of public accommodation, which is defined in section 24-34-601 (1), C.R.S. Section 24-34-601 (1), C.R.S., defines "place of public accommodation", in part, as "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public..." When construing this measure, a plain-meaning reading of the proposed measure would be that a business providing a wedding-related service is a business that is a "place of public accommodation" as defined in this statute. Do the proponents intend for a "business providing a wedding-related service" to be covered under the current definition of "place of public accommodation"?
6. Section 24-34-601, C.R.S., prohibits discrimination in places of public accommodation based on certain protected classes or characteristics, including sexual orientation. Section 24-34-301 (7), C.R.S., defines "sexual orientation" for purposes of parts 3 to 8 of article 34 of title 24, C.R.S., as "an individual's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another individual's perception thereof". Under section 24-34-601 (2), C.R.S., a business that is a place of public accommodation cannot deny any person participation, entry, or services based upon the person's sexual orientation. To paraphrase the statute, it is considered a discriminatory practice "to refuse, withhold from, or deny to an individual or a group", because of sexual orientation, "the full and equal enjoyment of the goods,

services, facilities, privileges, advantages, or accommodations of a place of public accommodation." The proposed measure specifically applies to the provision of services to persons that are lesbian, gay, bisexual, or transgender. A plain-meaning reading of the proposed measure is that it allows a business to decline to provide a wedding-related service to a person who is a lesbian, gay, bisexual, or transgender person if the business instead contracts with another business that is willing to provide services to lesbian, gay, bisexual, or transgender persons. Is it the intent of the proponents to specify that the practice of subcontracting out a wedding-related service to another business that is willing to perform those services for a person who is a lesbian, gay, bisexual, or transgender person is not a "discriminatory or unfair practice" for purposes of this statute? If so, the more direct way to accomplish this result would be to write: "It is not a discriminatory or unfair practice under this section for a business providing wedding-related services to contract the services out ...".

7. The measure implies that if a business providing wedding-related services contracts with a business on the register the contracting business would be in compliance with public accommodations laws. Is it the proponents' intent that the exception to discriminatory practice is contingent on the business contracting with a business that is on the register?
  - a. What if there are no businesses that sign up to be on the register? Does that mean that the business providing a wedding-related service cannot meet the requirements of this statute because it has not "contracted out its service"?
  - b. What if the business contracts with a provider that is not on the state register? Does that mean that the business providing a wedding-related service cannot meet the requirements of this statute because it has not "contracted out its service"?
  - c. What happens if, in a particular area of the state, there are no businesses willing to provide services to lesbian, gay, bisexual, or transgender persons? Does that mean that the business providing a wedding-related service cannot meet the requirements of this statute because it has not "contracted out its service"?
  - d. What happens if the business cannot find any subcontractor to provide a wedding-related service? Does that mean that the business providing a wedding-related service cannot meet the requirements of this statute because it has not "contracted out its service"?

- e. In all four scenarios discussed in this comment #7, if the business does not actually form a contract with a subcontractor, will the business have to provide the requested service in order to avoid violating this section?
8. Is the effect of the proposed measure to create a business practice of contracting out services to another business, which practice is only used selectively, when the customer appears to be or acknowledges that he or she is a lesbian, gay, bisexual, or transgender person? This appears to be inconsistent with the way other protected classes and characteristics, such as disability or race, are protected from discriminatory practices under section 24-34-601, C.R.S.? What is the rationale for allowing a business to treat one protected class differently?
9. What does contracting out a service to another business mean?
- a. Does it affect the charges for the service provided? Will a customer who is lesbian, gay, bisexual, or transgender and whose wedding-related service is contracted out end up paying more for the services because of the subcontract?
  - b. Is there an obligation on the contracting business to notify the customer who is lesbian, gay, bisexual, or transgender that a wedding-related service will be contracted out to another business?
  - c. Do the customers who are lesbian, gay, bisexual, or transgender have the opportunity to say to the business that they do not want any service to be contracted out?
  - d. If a service is contracted out under this system, what are the guarantees to the customer who is lesbian, gay, bisexual, or transgender regarding the level of service or quality of service provided by the subcontractor? What if there is a problem with the subcontractor's work? Who is liable for a problem? For example, if a same-sex couple goes to a caterer for its wedding reception because the caterer is known for creative work with gluten-free food, but the caterer contracts with a grocery store that uses wheat products and one of the people getting married has an allergic reaction, what is the recourse for that same-sex couple?
10. The last sentence reads: "A wedding-related business that contracts out its service is deemed to be in compliance with any other public accommodation law."

- a. Do the proponents mean that the business would be considered in compliance with section 24-34-601, C.R.S., and with part 6 of article 34 of title 24, C.R.S.? If so, consider writing "in compliance with this section and with this part 6."
  - b. The use of the words "any other" implies that the business would be considered to be in compliance with some other law on public accommodations. If the proponents' intent is to affect some other public accommodations law not contained in part 6 of article 34 of title 24, C.R.S., the proposed measure should more explicitly state to what laws this refers.
  - c. If the proponents use the suggestion in question #6 to more directly state that the practice of subcontracting a service out is not a discriminatory or unfair practice and rework the last sentence to incorporate this suggestion, then the issues about compliance addressed in this question would probably be resolved.
11. Under section 24-34-306, C.R.S., a person who believes that he or she has been discriminated against pursuant to the public accommodations law in section 24-34-602, C.R.S., can file a charge of discrimination with the Colorado Civil Rights Division in the Department of Regulatory Agencies. The Civil Rights Division has authority to investigate the matter. Section 24-34-306, C.R.S., and part 6 of article 34 of title 24, C.R.S., provide for different methods of enforcement and administrative remedies if there is a probable cause determination of discrimination, and after the administrative remedies are exhausted, the person may be able to file a lawsuit in court against the business and seek an assessment of fines. When the measure says that a business providing a wedding-related service that contracts out the service to another business willing to serve lesbian, gay, bisexual, and transgender persons is deemed to be in compliance with any other public accommodation law, is it the intent of the proponents that the act of contracting out the service would mean that the business is not engaging in a discriminatory act and could not be found in violation of section 24-34-601, C.R.S.? Is it the intent of the proponents that a complaint of discrimination on the basis of sexual orientation could not be filed against the business providing the wedding-related services? What do the proponents believe is the effect upon the public accommodations law in sections 24-34-602 and 24-34-603, C.R.S., of contracting out the service to another willing business?

12. This measure allows a business to treat customers who are lesbian, gay, bisexual, or transgender differently than it treats customers who are heterosexual persons. When a distinction providing for different treatment is made in a law, courts construing that law will usually ask whether there is a rational basis for the way the class of persons is treated. What is the policy basis for distinguishing between lesbian, gay, bisexual, or transgender persons and heterosexual persons?
13. How does a business providing wedding-related services know that a person is a lesbian, gay, bisexual, or transgender person? Won't the business in some cases be invading that person's privacy in order to exercise this business practice of subcontracting out a wedding-related service? What happens if the business makes an assumption about someone's sexual orientation that is wrong?
14. Have the proponents considered that the creation of the register of businesses willing to accommodate lesbian, gay, bisexual, or transgender persons might result in attracting positive or negative attention to a business that is or is not on the register? Might the use of the registry lead to conflicts, protests, or even boycotts?
15. The measure says that the "state shall maintain a register of businesses". How does a business get placed upon the register? Is the state required to create the register? Or are the businesses supposed to create it and then the state maintains the register? If the proponents intend for the state to create the register, standard drafting practice would be to specifically state the requirement to create a register, if that is the intent, and to assign that function to a particular department of state government rather than using a broad term such as "state". Would the proponents consider specifying a particular department of state government that should be responsible for creating and maintaining this register of businesses? Or do the proponents intend that the General Assembly should enact enabling legislation, if this measure passes, to specify what state department is charged with creating and maintaining the register?
16. Section 24-34-601 (2), C.R.S., also states that it is a discriminatory practice for a person "directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that

an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable" because of sexual orientation. Can a business providing a wedding-related service post or publicize that it will only subcontract out wedding-related services to persons on the state register who are willing to accommodate lesbian, gay, bisexual, or transgender persons? Or is that conduct still a discriminatory and unfair practice as defined in section 24-34-601, C.R.S.?

17. Have the proponents considered any fiscal or other impacts on the state that may result from the enactment of the proposed initiative? Insofar as enactment of the proposed initiative were to lead to a strain on governmental resources, have the proponents considered incorporating a tax, fee, or some other mechanism, such as general fund appropriations made by the General Assembly, that would allow some of the costs of the proposed initiative to be recovered?
18. When implementing legislation, sometimes the state agency that will be implementing the legislation needs some time to prepare for the new law. In this instance, if a state agency is creating the register or registry of businesses that are willing to provide wedding-related services to lesbian, gay, bisexual, or transgender persons, the agency might need some time to implement this measure and figure out how businesses are placed on the register. In cases where some time is needed to start a new program, standard drafting practice provides a future effective date after the passage of the legislation. The proponents should consider adding a future effective date to the proposed initiative.
19. As a statutory change, the proposed initiative may be amended by subsequent legislation enacted by the General Assembly. Is this your intention?
20. 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?

## **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. Each statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, if you intend to add subsection (4) to section 24-34-601, C.R.S., you would include the following amending clause: "In Colorado Revised Statutes, 24-34-601, **add** (4) as follows".
2. The headnote to section 24-34-601, C.R.S., should be shown in **bold** as follows:  
**Discrimination in places of public accommodation - definition.**
3. Current drafting practice uses "people first" language. See section 2-2-802, C.R.S., for more information. Thus, the language in the first and second sentences would be written as "persons who are lesbian, gay, bisexual, or transgender".
4. It would be clearer if the last sentence of the measure read: "contracts out a service" rather than "contracts out its service".