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MEMORANDUM

TO: Omar Malik and Christopher Fine
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: April 6, 2022
SUBJECT: Proposed initiative 2021-2022 #134, concerning Minimum Wage for Workers in Alcohol-related Businesses.

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 Constitution appear to be to:

1. Effective January 1, 2023, require a chain retailer that sells alcohol beverages and any person providing third-party alcohol delivery services to pay a minimum wage to its employees of no less than \$20 per hour, exclusive of any

- employee benefits, overtime compensation, reimbursement for expenses incurred, and tips or gratuities given by customers;
2. Effective January 1, 2023, require independent contractors providing third-party alcohol delivery services to be paid a minimum wage of no less than \$24 dollars per hour, exclusive of any employee benefits, overtime compensation, reimbursement for expenses incurred, and tips or gratuities;
 3. Annually increase the required minimum wage rates for cost-of-living increases as measured by the consumer price index for Colorado; and
 4. Prohibit a chain retailer or other person that provides or gives consumers access to an alcohol delivery service using employees or independent contractors from retaining any portion of gratuities or tips given by customers to the employees or independent contractors.

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. As a change to the Colorado Constitution, the proposed initiative may only be amended by a subsequent amendment to the constitution. Is this your intention?
3. In subsection (2)(c) of the initiative, the proponents' intent appears to be to set the minimum wage for independent contractors who provide third-party alcohol delivery services at \$24 dollars per hour, yet this subsection refers to "benefits, overtime compensation, reimbursement for expenses incurred by the *employee*, and tips or gratuities given by customers for the *employee's* provision of services" (*emphasis added*). Would the proponents consider using the term "independent contractor" instead of "employee" in this subsection?
4. Subsection (3) of the initiative states that the minimum wage rates for employees and independent contracts of chain retailers and third-party delivery service providers "shall be increased annually... by the consumer price index used for Colorado."
 - a. While this is the language used in subsection (1) of this section, for clarity and consistency with the language used throughout the Colorado

Revised Statutes, would the proponents consider citing the more specific consumer price index for Denver-Aurora-Lakewood?

- b. The initiative states that the minimum wage is to be "increased annually" but does not specify in what year and on what date the annual increase is to take effect. Would proponents consider clarifying the date and year the annual increase is to take effect, e.g., "starting [month, date, year,] and each [month and date] thereafter."
5. Subsection (4) of the initiative, states that "such service employs..." Because a service does not employ the employee, would the proponents consider changing "service" to "chain retailer or person"?
6. Subsection (4) of the initiative uses the term "natural persons," which is not a defined term, but "person" is defined in subsection (5)(f). Would the proponents consider using the term "individual" instead of "natural person" to avoid confusion?
7. Standard drafting practice is to use the following terminology as the introductory language preceding one or more definitions: "As used in {insert reference to relevant section/subsection to which the defined terms apply}, unless the context otherwise requires:". Would proponents consider using this standard terminology in subsection (5) of the initiative?
8. With regard to the defined term "alcohol" in subsection (5)(a) of the initiative:
 - a. The definition refers to "beer, wine, and spirituous liquors." However, in the "Colorado Liquor Code," the terms used throughout, and defined in section 44-3-103, Colorado Revised Statutes, for use in the code, are "malt liquors," "vinous liquors," and "spirituous liquors." Additionally, the term "alcoholic beverages" is not used in the code; rather, the defined term is "alcohol beverages," which term is defined in section 44-3-103 (2), Colorado Revised Statutes, to mean "fermented malt beverage or malt, vinous, or spirituous liquors." Adding new and different terms could create confusion in the law. Would proponents consider using the terms defined in and used throughout the "Colorado Liquor Code" for consumption off the licensed premises."
 - a. Standard drafting practice is to limit definitions to provisions that actually define what a term means, and to place substantive requirements relating to the defined term in the substantive portions of the statute that impose specific requirements or limitations. The

definition of "alcohol" includes the method by which alcohol is sold and how it is transferred to consumers, which are substantive provisions that do not explain or define what alcohol is. Would proponents consider moving these substantive components to the portion of the initiative that imposes substantive requirements? Consider, for example, adding a new subsection that provides "This section applies to the sale and delivery of alcohol beverages at retail in sealed containers by persons licensed under this article 3 or article 4 of this title 44 for consumption off the licensed premises."

- b. If the term "alcohol" is limited to alcohol sold for off-premises consumption, does that mean that the initiative does not impose minimum wage requirements on a person that is licensed to sell alcohol beverages for on-premises consumption but is also authorized to sell and deliver alcohol, including by the drink, to customers for off-premises consumption? Would a third-party delivery service that delivers alcohol for a retailer licensed to sell alcohol beverages for on-premises consumption also be exempt from the initiative?
 - c. The phrase "sold in sealed containers for off-premises consumption, at retail to consumers" is confusing. Consider rephrasing as "sold at retail in sealed containers to consumers for consumption off the licensed premises where sold."
9. With regard to the definition of "alcohol delivery service" in subsection (5)(b) of the initiative:
- a. The location of the word "whether" before "delivery" creates confusion as to what the alternatives to the physical transfer of alcohol are. Is the intent that the alternatives are delivery to a person off the licensed premises or delivery to a physical location designated by a purchaser? Does that designated location need to be "off the licensed premises" as well? If the intent is that "delivery" or physical transfer of an alcohol beverage purchased by a customer is to a person who is located, or to a designated location that is, off the licensed premises, would proponents consider rewording the definition to make the intent clearer?
 - b. Can a "physical location designated by a purchaser" include another premises licensed under the "Colorado Liquor Code" or "Colorado Beer Code"? Under current law regarding delivery of alcohol beverages sold at retail, the delivery must be to a person "located at a place that is not

licensed pursuant to" the applicable provision of law. See, e.g., sections 44-3-409 (3)(a)(I), 44-3-410 (3)(a)(I), and 44-3-911 (3)(a), Colorado Revised Statutes. Is it the proponents' intent that "alcohol delivery service," as defined in the initiative, could include delivery to another licensed premises?

- c. Given the structure of the definition, the phrase "in any manner including through a technological, telephonic, or any other means for ordering such alcohol" appears to modify the manner of "physical transfer" of alcohol. Presumably, alcohol cannot be physically transferred by electronic means. If the proponents' intent is to specify that "alcohol delivery service" includes delivery of alcohol that is *ordered or purchased* through technological, electronic, or other electronic means, would proponents consider rewording the definition to make this intent clear?

10. With regard to the defined term "chain retailer" in subsection (5)(c) of the initiative:

- a. The term "retailer" is not defined, and is used in limited instances, in the "Colorado Liquor Code" and is not used in the state constitution. If, by retailer, the proponents' intent is to reference a retailer that is licensed under the "Colorado Liquor Code" or "Colorado Beer Code" to sell alcohol beverages at retail, would the proponents consider defining retailer as "a person authorized under Colorado law to sell alcohol beverages at retail" or otherwise defining that term?
- b. How is gross revenue of a retailer calculated for purposes of this definition? Is it determined as total gross revenues that a retailer has derived from its sales since it started business? Or is it determined based on revenues over a specified period, like quarterly or annually? Would proponents consider clarifying how gross revenues are calculated?

11. With regard to the definition of "employee" in subsection (5)(d) of the initiative:

- a. The term is defined based on the existence of a "written or oral employment agreement." Given that Colorado is an "employment at will" state, this language suggests that there must be a contract of employment in order for a person to be an "employee." That is not the traditional way in which "employee" is defined in Colorado law and could be interpreted to exclude at-will employees who do not have a

contract of employment with an employer. Proponents may wish to consider defining the term "employee" in a manner more consistent with the definitions of the term in title 8 of the Colorado Revised Statutes.

For example, "employee" is defined for the purposes of section 8-2-126 (2)(d), Colorado Revised Statutes, as:

Every person who may be permitted, required, or directed by any employer in consideration of direct or indirect gain or profit, to engage in any employment and includes an applicant for employment" and in section 8-5-101 (4) for the purposes of article 5 of title 8, as a "person employed by an employer."

- b. The definition does not indicate who the employee is employed by. Is the intent that the employee is employed by the chain retailer licensed under the "Colorado Liquor Code" or "Colorado Beer Code" or by a third-party delivery service? Would proponents consider making clear by whom the employee is employed?

12. With regard to the definition of "independent contractor" in subsection (5)(e) of the initiative:

- a. Under Colorado labor and employment laws, including unemployment insurance laws, there are tests used to determine whether an individual is an "independent contractor" versus an "employee" for purposes of determining whether a person, for example, is obligated to provide workers' compensation coverage or pay unemployment insurance premiums. Often, the test relies on the existence of an "agreement" or contract between a person engaging the services of an independent contractor and the individual providing the services.

This definition in subsection (5)(e) requires the absence of an agreement, which could cause confusion by establishing a different standard for making the determination of whether an individual providing services is an independent contractor or an employee. Would proponents consider applying the same standards for making this determination, for purposes of this initiative, that apply in making this determination in other contexts of employment law? The current standards to prove that an individual is engaged in an independent trade, occupation, profession, or business and free from control and direction in the performance of a service are found in section 8-40-202 (2)(b), Colorado Revised Statutes.

- b. Similar to the definition of "employee" in the initiative, this definition does not specify for whom the independent contractor is providing services. Presumably, the intent of the initiative is that the independent contractor is engaged by a licensed chain retailer or by a third-party delivery service to provide delivery services. Would proponents consider clarifying for whom an independent contractor is providing delivery services?
13. With regard to the definition of "third party delivery service" in subsection (5)(g) of the initiative:
- a. The phrase "transfer of possession or control" seems to be missing the indication of what is being transferred. Presumably, the intent is "of alcohol." Would proponents consider specifying what is being transferred through the delivery service?
 - b. In current law regarding food delivery services, there are definitions of "third-party food delivery service" and "third-party delivery service platform" that may be helpful in crafting the definition of "third party alcohol delivery service." Proponents may wish to review those definitions in sections 8-4-124 and 30-11-129, Colorado Revised Statutes.

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. Because the proponents are, technically, amending all of section 15 of the Colorado Constitution, by adding a (1) before the current language and adding more subsections, the amending clause should be phrased as follows: "In the constitution of the state of Colorado, **amend** section 15 of article XVIII as follows:". Please make this correction.
2. When it modifies a noun, please hyphenate "third-party" throughout the initiative.

3. Although the text of the initiative should be in small capital letters, please use an uppercase letter to indicate capitalization for the first letter of the first word in subsections (2)(a) to (2)(c).
4. The subsection letters in subsections (2)(a) to (2)(c) and (5)(a) to (5)(g) should be lower case. For example:
 - (a) "ALCOHOL" MEANS ...
5. Because the word "alcohol" is defined for subsections (2) to (5) of the initiative, the phrase "as defined in this section" should be removed from subsection (2)(a).
6. Please review whether the word "service," in the phrase "delivery service," should be "services" in subsections (2)(b) and (2)(c).
7. Please review whether the word "purchaser" in subsection (5)(b) should be changed to "consumer," the word used previously in the initiative to refer to persons who purchase alcohol beverages or use alcohol delivery services.
8. Please review whether the words "the alcohol," or similar language, should be added at the end of subsection (5)(g), after the word "purchases."