

**RE-ENTRY TASK FORCE**  
FINAL RECOMMENDATION PRESENTED TO THE  
COLORADO COMMISSION ON CRIMINAL AND JUVENILE JUSTICE  
June 9, 2017

**FY17-RE #03. Revise statutory guidance on state licensure and employment.**

**Recommendation FY17-RE #03**

Promote community safety and economic growth by:

- Preventing consideration of arrests that did not result in a conviction, and convictions that have been pardoned, sealed, or expunged, in state licensure and employment decisions;
- Empowering the Department of Regulatory Agencies to delist certain conditional licenses;
- Collecting data;
- Encouraging the elimination of mandatory collateral consequences;
- Incentivizing opportunity expansion by state contractors; and
- Increasing transparency of agency policies.

**Discussion**

Colorado government regulates the employment of, or directly employs, a substantial portion of the State's population. The Department of Regulatory Agencies (DORA) alone administers over 50 regulatory programs governing professions, occupations, and businesses comprising over 710,000 individual licensees.<sup>1</sup> The State directly employs over 95,000 people,<sup>2</sup> and many more are employed by local governments.

A criminal record can adversely impact an individual's ability to obtain either a license necessary to work or direct employment with state or local governments.<sup>3</sup> This issue is of widespread concern, as it is estimated that nearly one in three Americans of working age have some form of criminal record.<sup>4</sup> In Colorado alone, over 190,000 people were arrested in 2015<sup>5</sup> and an estimated 1.5 million have criminal records.<sup>6</sup>

The inability of large numbers of people to obtain employment adversely affects the public's safety and welfare. On an individual level, gainful employment is a key factor that enables people to avoid future arrests and incarceration.<sup>7</sup> More broadly, the economy as a whole is negatively impacted by the

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<sup>1</sup> DORA (2016, Oct. 1), *2017-2018 Department Performance Plan*, (see p. 6 at [colorado.gov/dora/dora-executive-directors-office](http://colorado.gov/dora/dora-executive-directors-office)).

<sup>2</sup> Colo. Div. of Human Res. (2015), *FY 2014-15 Workforce Report*, (see p. 3 at [colorado.gov/dhr/fy2014-15workforcereport](http://colorado.gov/dhr/fy2014-15workforcereport)).

<sup>3</sup> Mark Evans, Colo. State Public Defender's Office, *The Consequences of Conviction: Sanctions Beyond the Sentence Under Colorado Law 14-15*, 51-94 (2014 ed.) (available at <http://www.coloradodefenders.us/consequences-of-conviction-2/consequences-of-conviction-2/>).

<sup>4</sup> J.C. McGinty (2015, Aug. 7), How Many Americans Have a Police Record?, *The Wall Street Journal* (at <https://www.wsj.com/articles/how-many-americans-have-a-police-record-probably-more-than-you-think-1438939802>).

<sup>5</sup> Colo. Bureau of Investigation, *Crime in Colorado 2015*, [http://crimeinco.cbi.state.co.us/cic2k15/state\\_totals/statewide\\_adult\\_arrests.php](http://crimeinco.cbi.state.co.us/cic2k15/state_totals/statewide_adult_arrests.php) (last visited Feb. 2, 2017).

<sup>6</sup> Bureau of Justice Statistics (2014, January), *Survey of State Criminal History Information Systems*, U.S. Dept. of Justice (see Table 1 on p. 14 at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>).

<sup>7</sup> Letter from United States Attorney General Eric Holder, Jr., to Colorado Attorney General John Suthers (April 18, 2011); see also J.H. Laub & R.J. Sampson (2001), Understanding desistance from crime, *Crime and Justice*, 28(1), 1-69 (doi: [10.1086/652208](https://doi.org/10.1086/652208)); National Research Council (2008), *Parole, Desistance from Crime, and Community Integration*, Committee on Community Supervision and Desistance from Crime (see pp. 23-24 at [cdpsdocs.state.co.us/ccij/Resources/Ref/NCR2007.pdf](http://cdpsdocs.state.co.us/ccij/Resources/Ref/NCR2007.pdf)); and J. Radice (2012), Administering justice: Removing statutory barriers to reentry, *University of Colorado Law Review*, 83(3), 715-779 (see p. 719 at [colorado.edu/law/sites/default/files/Vol.83.3.pdf](http://colorado.edu/law/sites/default/files/Vol.83.3.pdf)).

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reduction of employment rates for people with a criminal record.<sup>8</sup> Numerous studies have shown that the employment related consequences of a criminal record disparately impact communities of color.<sup>9</sup> It is thus necessary to ensure that Colorado's record-based restrictions on employment and licensing are both fair to individuals and productive to the safety and welfare of society.

When an individual with a criminal record applies for a state job, section 24-5-101, C.R.S. 2016, governs the effect of that record on his or her employment prospects. When an individual with a record applies for a state issued license to engage in most regulated professions, the licensing agency is governed by the same.<sup>10</sup>

The statute purports to "expand employment opportunities for persons who, notwithstanding that fact of conviction of an offense, have been rehabilitated and are ready to accept the responsibilities of a law-abiding and productive member of society."<sup>11</sup> It provides little guidance, however, for the most frequent circumstances in which state agencies must consider a criminal record.

First, the only clear statutory guidance on how a criminal record should be considered does not apply to licensure decisions.<sup>12</sup> It applies only to actual employment by the State. The statutory provisions applicable to licensure decisions indicate that a prior conviction should be considered, but do not indicate how.<sup>13</sup>

Second, the guidance provided for state employment decisions mandates that the same criteria for evaluating convictions which have been pardoned, expunged, or sealed applies to those that have not.<sup>14</sup> This defeats the express goal of a pardon,<sup>15</sup> and the implicit goals underlying the statutory scheme for expunging, sealing, or dismissing conviction records.<sup>16</sup> It also makes no mention of orders of collateral

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<sup>8</sup> A. Christman & M.N. Rodriguez (2016, August). *Fact Sheet: Research Supports Fair-Chance Policies*. The Nat'l Emp't Law Project (at [nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf](http://nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf)); J. Roberts (2011), Why misdemeanors matter: Defining effective advocacy in the lower criminal courts, *U.C. Davis Law Review*, 45(2), 277-372 (see pp. 300-301 at [lawreview.law.ucdavis.edu/issues/45/2/Articles/45-2\\_Jenny\\_Roberts.pdf](http://lawreview.law.ucdavis.edu/issues/45/2/Articles/45-2_Jenny_Roberts.pdf)); J. Schmitt & K. Warner (2010), *Ex-Offenders and the Labor Market*, Center for Econ. & Policy Research (at [cepr.net/documents/publications/ex-offenders-2010-11.pdf](http://cepr.net/documents/publications/ex-offenders-2010-11.pdf)).

<sup>9</sup> E. A. Carson (2015, September), *Prisoners in 2014*, Bureau of Justice Statistics, U.S. Dept. of Justice (reporting on p. 15 that as of December 31, 2014, black men are imprisoned in state and federal facilities at a rate of 2,724 per 100,000, Hispanic men are imprisoned at a rate of 1,091 per 100,000, and white men are imprisoned at a rate of 465 per 100,000; similar disparities exist for women) (at [bjs.gov/content/pub/pdf/p14.pdf](http://bjs.gov/content/pub/pdf/p14.pdf)); and U. S. Equal Opportunity Commission (2012, April 25), *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (see "I. Summary" at [eoc.gov/laws/guidance/arrest\\_conviction.cfm](http://eoc.gov/laws/guidance/arrest_conviction.cfm)).

<sup>10</sup> "[I]f a licensing entity in title 10 or 12, C.R.S., determines that an applicant for licensure has a criminal record, the licensing entity is governed by section 24-5-101 for purposes of granting or denying licensure or placing any conditions on licensure." § 24-34-102(8.7), C.R.S. 2016.

<sup>11</sup> § 24-5-101(2), C.R.S. 2016.

<sup>12</sup> § 24-5-101(3), -101(4), C.R.S. 2016.

<sup>13</sup> § 24-5-101(1), -101(2), C.R.S. 2016.

<sup>14</sup> § 24-5-101(3)(d), -101(4), C.R.S. 2016.

<sup>15</sup> "A pardon issued by the governor shall waive all collateral consequences associated with each conviction for which the person received a pardon unless the pardon limits the scope of the pardon regarding collateral consequences." § 16-17-103, C.R.S. 2016.

<sup>16</sup> State and local government agencies are generally forbidden from asking applicants to disclose information in records that were sealed due to non-prosecution, dismissal, or acquittal. § 24-72-702(1)(a), -702(1)(f), C.R.S. 2016. State and local government agencies are also generally forbidden from asking applicants to disclose information in sealed records relating to

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relief, which can be issued by courts to relieve eligible individuals of state imposed collateral consequences.<sup>17</sup>

Third, the scant existing guidance for licensure decisions applies only when a state or local agency is required to make a finding that the applicant “is a person of good moral character as a condition to the issuance thereof ...”<sup>18</sup> Most of the statutes governing state licensure decisions do not require an evaluation of whether a person is of “good moral character.” They simply allow adverse licensure action to be taken on the basis of a prior offense.

Finally, the guidance for both employment and licensure applies only to discretionary agency decisions. It does not apply if there is a specific statutory prohibition that prevents an individual from obtaining employment or licensure.<sup>19</sup>

Information obtained from DORA indicates that its various regulatory programs do not have a widespread practice of denying licensure based on a past criminal history. Those programs will, however, regularly issue licenses on a conditional or probationary status based on such a history. This results in a record of the individual’s criminal history being publicly accessible through DORA’s website. DORA does not have the power to ever remove public access to that information.

**This recommendation includes one non-statutory element:**

**1. Increase transparency of agency policies.**

State employment and licensing decisions are made by hundreds of people who serve on various regulatory boards. To achieve consistent, fair, and productive results, they should have guidance on how to evaluate the impact of applicants’ criminal history.

CCJJ recommends that DORA develop a written policy on how state agencies should implement section 24-5-101 and section 24-32-102(8.7). The policy should provide clear guidance on how an applicant’s criminal record may impact state employment and licensure decisions, and should be available to the public on DORA’s website.

**This recommendation includes five statutory elements:**

- 1. Amend section 24-5-101.**
- 2. Empower DORA to delist certain conditional licenses.**
- 3. Collect data.**
- 4. Encourage the elimination of unnecessary mandatory collateral consequences.**
- 5. Incentivize opportunity expansion by state contractors.**

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certain controlled substance, petty offense, and municipal offense convictions. § 24-72-703(4)(d)(I), C.R.S. 2016. With the exception of certain controlled substance and human trafficking related offenses, the sealing of a record reflects that a judge has already determined that the harm to the individual’s privacy outweighs the public’s interest in the availability of the record. §§ 24-72-702(1)(b)(II)(B), -704(1)(c), -705, -706, -708(3), C.R.S. 2016.

<sup>17</sup> See §§ 18-1.3-107, 18-1.3-213, 18-1.3-303, C.R.S. 2016. The State of New York has long issued certificates similar to Colorado’s orders of collateral relief. There, however, public agencies and private employers are required to give consideration to such certificates. N.Y. Correct. Law § 753(2). Other states have similar mechanisms. See Conn. Gen. Stat. § 54-130e(b); 730 Ill. Comp. Stat. Ann. 5/5-5.5-15; N.C. Gen. Stat. § 15A-173.2; Ohio. Rev. Code Ann. § 2953.25.

<sup>18</sup> § 24-5-101(2), C.R.S. 2016.

<sup>19</sup> §§ 24-5-101(3)(a), 24-34-102(8.7), C.R.S. 2016.

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**Proposed Statutory Language**

These proposed changes address and rectify the issues delineated above. They make clear that the same standards govern an agency's evaluation of an applicant's criminal record, whether that application is for state employment or state licensure. They also give meaning to Colorado's existing statutory provisions for record sealing, expungement, pardons, and orders of collateral relief.

The changes would also give DORA the ability to issue a conditional license due to an applicant's criminal history, but later grant the full benefits of licensure by delisting the conditional licensure after a period of time has elapsed. Additionally, they would create an incentive for employers who contract with the State to provide a fair chance to individuals with a record. Together, these changes aim to ensure that record-based restrictions on state employment and licensing are both fair to individuals and productive to the safety and welfare of Colorado society.

**1. Amend section 24-5-101 as follows. (Entire section is included for reference.)**

(1)(a) Except as otherwise provided in paragraph (b) of this subsection (1), the fact that a person has been convicted of a felony or other offense involving moral turpitude shall not, in and of itself, prevent the person from applying for and obtaining public employment or from applying for and receiving a license, certification, permit, or registration required by the laws of this state to follow any business, occupation, or profession.

(b) This subsection (1) shall not apply to:

(I) The offices and convictions described in section 4 of article XII of the state constitution;

(II) The certification and revocation of certification of peace officers as provided in section 24-31-305;

(III) The employment of personnel in positions involving direct contact with vulnerable persons as specified in section 27-90-111, C.R.S.;

(IV) The licensure or authorization of educators prohibited pursuant to section 22-60.5-107(2), (2.5), or (2.6), C.R.S.;

(V) The employment of persons in public or private correctional facilities pursuant to the provisions of sections 17-1-109.5 and 17-1-202(1)(a)(I) and (1.5), C.R.S., and the employment of persons in public or private juvenile facilities pursuant to the provisions of sections 19-2-403.3 and 19-2-410(4), C.R.S.;

(VI) The employment of persons by the public employees' retirement association created pursuant to section 24-51-201 who, upon the commencement of that employment, will have access to association investment information, association assets, or financial, demographic, or other information relating to association members or beneficiaries; and

(VII) The employment of persons by the department of public safety and the department of corrections.

(2)(A) Whenever any state or local agency is required to make a finding that an applicant for a license, certification, permit, or registration is a person of good moral character as a condition to the issuance thereof, **OR EVALUATE THE IMPACT OF AN**

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**APPLICANT'S CRIMINAL RECORD**, the fact that such applicant has, at some time prior thereto, been convicted of a felony or other offense involving moral turpitude, and pertinent circumstances connected with such conviction, shall be given consideration in determining whether, in fact, the applicant is **QUALIFIED**. ~~a person of good moral character at the time of the application.~~ The intent of this section is to expand employment opportunities for persons who, notwithstanding that fact of conviction of an offense, have been rehabilitated and are ready to accept the responsibilities of a law-abiding and productive member of society.

**(B) IF THE AGENCY DETERMINES THAT THE APPLICANT HAS BEEN ARRESTED OR CHARGED BUT NOT CONVICTED OF A CRIMINAL OFFENSE AND THE CRIMINAL CASE IS NOT ACTIVELY PENDING, THAT THE APPLICANT HAS BEEN CONVICTED BUT PARDONED, THAT THE APPLICANT HAS BEEN CONVICTED BUT RECORDS OF THE CONVICTION HAVE BEEN SEALED OR EXPUNGED, OR THAT A COURT HAS ISSUED AN ORDER OF COLLATERAL RELIEF SPECIFIC TO THE CREDENTIAL SOUGHT, THE AGENCY SHALL NOT USE THAT INFORMATION AS A BASIS FOR DENIAL OR FOR TAKING ANY ADVERSE ACTION AGAINST THE APPLICANT.**

**(C) IF THE AGENCY DETERMINES THAT THE APPLICANT HAS HAD ANY OTHER CRIMINAL CONVICTION, IT SHALL BE GOVERNED BY SUBSECTION (4) OF THIS SECTION.**

(3)(a) Unless statute prohibits the employment of a person with a specific criminal conviction for a particular position, an agency shall not advertise the position with a statement that a person with a criminal record may not apply for the position or place on the application a statement that a person with a criminal record may not apply for the position.

(b) With the exception of the department of corrections and the department of public safety, the agency shall not perform a background check until the agency determines that an applicant is a finalist or makes a conditional offer of employment to the applicant.

(c) If, after determining that an applicant is a finalist or after making a conditional offer of employment to an applicant, the agency determines that the applicant has been arrested or charged but not convicted of a criminal offense and the criminal case is not actively pending, **THAT THE APPLICANT HAS BEEN CONVICTED BUT PARDONED, THAT THE APPLICANT HAS BEEN CONVICTED BUT RECORDS OF THE CONVICTION HAVE BEEN SEALED OR EXPUNGED, OR THAT A COURT HAS ISSUED AN ORDER OF COLLATERAL RELIEF SPECIFIC TO THE EMPLOYMENT SOUGHT**, the agency shall not use that information as a basis for not making an offer of employment or for withdrawing the conditional offer of employment.

(d) If, after determining that an applicant is a finalist or making a conditional offer of employment to an applicant, the agency determines that the applicant has had **ANY OTHER CRIMINAL CONVICTION, IT SHALL BE GOVERNED BY SUBSECTION (4) OF THIS SECTION**. ~~a criminal conviction expunged or sealed from his or her record, received a pardon, or that charges were dismissed pursuant to successfully completing a deferred judgment or sentence, the agency shall not use that information as a basis for not making an offer of employment or for withdrawing the conditional offer of employment~~

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~~unless, after reviewing the factors in subsection (4) of this section, the agency determines that the applicant should be disqualified for the position.~~

~~(e) Nothing in this section prevents an agency from considering criminal history information that the applicant voluntarily provides.~~

(4) Except as provided in subsection (6) of this section, if ~~after determining that an applicant is a finalist or making a conditional offer of employment to an applicant,~~ the agency determines that the applicant has been convicted of a crime **OTHER THAN AS DESCRIBED IN PARAGRAPHS (2)(B) OR (3)(C) OF THIS SECTION**, the agency shall consider the following factors when determining whether the conviction disqualifies the applicant: ~~for the position:~~

- (a) The nature of the conviction;
- (b) Whether there is a direct relationship between the conviction and the position's duties and responsibilities and the bearing, if any, the conviction may have on the applicant's fitness or ability to perform one or more such duties and responsibilities, including whether the conviction was for unlawful sexual behavior as listed in section 16-22-102(9), C.R.S., and whether the duties of employment would place a co-worker or the public in a vulnerable position;
- (c) Any information produced by the applicant or produced on his or her behalf regarding his or her rehabilitation and good conduct; and
- (d) The time that has elapsed since the conviction.

(5) Notwithstanding any other provision of law to the contrary, the provisions of this section apply to the office of the governor.

(6) If, at any stage in the hiring process, the department of corrections or the department of public safety determines that the applicant has been convicted of a crime, the department must consider the factors listed in paragraphs (a) to (d) of subsection (4) of this section when determining whether the conviction disqualifies the applicant for the position.

## 2. Empower DORA to delist certain conditional licenses.

When an individual with a criminal history applies for licensure to practice a profession, regulatory agencies may sometimes have concerns about the impact of that history on the individual's ability to do so. Once those concerns have been proven unfounded, however, the individual should be permitted a full opportunity to succeed in his or her chosen profession. CCJJ thus recommends adding a new subsection (5) to the following section 24-34-107, C.R.S. 2016:<sup>20</sup>

(5) When any division, board, or agency of the department of regulatory agencies determines that an individual applying for a license has been convicted of a crime prior

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<sup>20</sup> Section 24-34-107, C.R.S. 2016 is titled "Applications for licenses – authority to suspend licenses – rules." It prescribes lawful presence as a condition of licensure, and gives DORA the power to deny or revoke a license on the basis of unpaid child support.

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to the application being submitted it may, subject to the provisions of section 24-5-101, C.R.S., issue a conditional license to that individual. If the individual remains free of any criminal conviction or licensing sanction either until the individual applies for a renewal of licensure or for two years, whichever is sooner, the individual can request that the conditional designation or any related adverse action be removed. The division, board, or agency shall grant the request unless it determines that, under the provisions of section 24-5-101, C.R.S., the conditional designation remains necessary. If the division, board, or agency removes the conditional designation, it shall make the original conditional designation confidential, and shall remove from the individual's professional history any reference to crimes committed before the application for licensure was submitted.

### 3. Collect data.

DORA's regulatory agencies are required to collect and report data on "the number of licenses or certifications that the agency denied, revoked, or suspended based on a disqualification and the basis for the disqualification."<sup>21</sup> Information from DORA has revealed that agencies are not separating that data based on whether an application for licensure was denied on the basis of a past criminal history, or whether existing licensure was penalized due to criminal behavior by a licensed person. Agencies are also not collecting data on the number of conditional licenses issued on the basis of a criminal history. This data is critical for evaluating whether the intent of the legislature is being realized. CCJJ thus recommends amending the statute governing DORA's sunset review process, as further explained in statutory element #4.

### 4. Encourage the elimination of unnecessary mandatory collateral consequences.

DORA's regulatory agencies are subject to sunset review on a ten-year cycle.<sup>22</sup> During the sunset review process, one factor in determining whether the current degree of regulation should continue is: "Whether the agency through its licensing or certification process imposes any disqualifications on applicants based on past criminal history and, if so, whether the disqualifications serve public safety or commercial or consumer protection interests."<sup>23</sup>

CCJJ recognizes that criminal history based restrictions on state licensing are sometimes necessary, but believes they should be imposed on a case-by-case basis. Mandatory licensure sanctions, which apply automatically regardless of an individual's circumstances, are rarely if ever appropriate. CCJJ thus recommends amending subsection 24-34-104(6)(b)(IX) as follows:

(IX) Whether the agency through its licensing or certification process imposes any **SANCTIONS OR** disqualifications on applicants based on past criminal history and, if so, whether the **SANCTIONS OR** disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis prepared

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<sup>21</sup> § 24-34-104(6)(b)(IX), C.R.S. 2016.

<sup>22</sup> § 24-34-104(10) to -104(27), C.R.S. 2016.

<sup>23</sup> § 24-34-104(6)(b)(IX), C.R.S. 2016.

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pursuant to paragraph (a) of subsection (5) of this section must include data on the number of licenses or certifications that the agency denied **BASED ON THE APPLICANT'S CRIMINAL HISTORY, THE NUMBER OF CONDITIONAL LICENSES OR CERTIFICATIONS ISSUED ON THE BASIS OF THE APPLICANT'S CRIMINAL HISTORY, AND THE NUMBER OF LICENSES OR CERTIFICATIONS** revoked or suspended based on **AN INDIVIDUAL'S CRIMINAL CONDUCT.** ~~a disqualification and the basis for the disqualification.~~ **FOR EACH SET OF DATA, THE ANALYSIS MUST INCLUDE THE CRIMINAL OFFENSES THAT LED TO THE SANCTION OR DISQUALIFICATION. THE ANALYSIS MUST ADDRESS WHETHER ANY MANDATORY COLLATERAL SANCTIONS IMPOSED CAN BE CONVERTED TO DISCRETIONARY DISQUALIFICATIONS, AS DEFINED IN SECTION 18-1.3-107, C.R.S.**

**5. Incentivize opportunity expansion by state contractors.**

Colorado's statutory guidance concerning criminal histories applies only to state licensure and employment decisions. Although that guidance does not apply to private industry, private employers should be incentivized to use similar practices. CCJJ recommends establishing an incentive modeled after Colorado's currently-existing purchasing preference for environmentally preferable products.<sup>24</sup> This incentive would not require private employers to take any action. It would simply establish a state purchasing preference for products and services sold by employers whose hiring and retention policies are substantively equivalent to the State's policies for licensure and employment of people with a criminal history, as described in subsections (3) and (4) of section 24-5-101.

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<sup>24</sup> § 24-103-207.5, C.R.S. 2016.