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# **Assessing Colorado's Economic Competitiveness Growth of Legal Expenses: 43 and Counting**

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## *About the Mike A. Leprino Fellowship*

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The Mike A. Leprino Free Enterprise Fellowship was established by Laura Leprino and Matthew Leprino in honor of the late Mike A. Leprino, who was a pillar in the Denver community. The son of Italian immigrants, he was a banker, developer and community servant. Some of the greatest treasures and neighborhoods in our state were built and funded by Mike. He gave back relentlessly to his state and country, something that he also instilled in each of his children. A great defender of free enterprise and the American dream, Mike is someone who from humble beginnings built an enviable legacy in Colorado. Thanks to Mike A. Leprino's legacy, we can all take a lesson in hard work, the entrepreneurial spirit, and the power of free enterprise. The Mike A. Leprino Fellowship will focus on issues reflected in the values and accomplishments of this former pillar of the community.

## ABOUT THE AUTHOR



**Lang Sias** is a former Colorado State legislator, attorney and Navy and Air National Guard fighter pilot. As a Colorado State Representative from 2015-2019, Lang represented House District 27 in Jefferson County. The ranking member on the business committee, Lang also served on the education, public health and health exchange oversight committees, and was a member of the legislative tax simplification task force and the JeffCo school safety task force. Over 85% of the bills Lang sponsored were bipartisan. He focused on solving problems in the areas of education, health care and small business, and on government transparency and accountability. He played major roles in passing legislation expanding public school choice, increasing healthcare transparency and reforming the public pension system to benefit retirees and taxpayers. Lang currently serves on the legislative subcommittee that oversees Colorado's state pension fund. He was the Republican candidate for Lieutenant Governor in 2018 and State Treasurer

## ABOUT COMMON SENSE INSTITUTE

**Common Sense Institute** is a non-partisan research organization dedicated to the protection and promotion of Colorado's economy. CSI is at the forefront of important discussions concerning the future of free enterprise and aims to have an impact on the issues that matter most to Coloradans. CSI's mission is to examine the fiscal impacts of policies, initiatives, and proposed laws so that Coloradans are educated and informed on issues impacting their lives. CSI employs rigorous research techniques and dynamic modeling to evaluate the potential impact of these measures on the economy and individual opportunity.

## TEAMS & FELLOWS STATEMENT

CSI is committed to independent, in-depth research that examines the impacts of policies, initiatives, and proposed laws so that Coloradans are educated and informed on issues impacting their lives. CSI's commitment to institutional independence is rooted in the individual independence of our researchers, economists, and fellows. At the core of CSI's mission is a belief in the power of the free enterprise system. Our work explores ideas that protect and promote jobs and the economy, and the CSI team and fellows take part in this pursuit with academic freedom. Our team's work is informed by data-driven research and evidence. The views and opinions of fellows do not reflect the institutional views of CSI. CSI operates independently of any political party and does not take positions.

## Introduction

This report is part of a series by CSI analyzing aspects of Colorado's economic competitiveness. It examines the recent proliferation of legislative measures which create or expand civil causes of action, how those measures can add and shift costs within the economy, and the resulting impact on the cost of living and doing business in our state. It also compares the evolving litigation landscape in Colorado with those in selected other states, providing insight into Colorado's future prospects for remaining economically competitive nationally.

A civil action is a noncriminal lawsuit that usually involves private parties but can also involve enforcement by the government, often via lawsuits brought by attorneys general or district attorneys. Typical civil causes of action include breaches of contract, torts (including assault, fraud, libel, product liability, malpractice, and nuisance), and violations of certain statutes and constitutional rights. The most common remedy in civil cases is monetary damages.

Civil actions play a vital and positive role in our free enterprise system when they efficiently compensate injured parties and punish bad behavior. By appropriately shifting costs from injured to responsible parties, civil actions help protect private property and facilitate commerce.

Civil actions can be abused, however. Much has been written about frivolous litigation, for example, which imposes high costs and does little to compensate legitimate victims or punish actual wrongdoers. Although this is an important issue, it is not the subject of this report.

Rather, this report focuses on the subtle but significant impact that state legislatures can have on how costs are allocated in the civil justice system. Specifically, the report examines how the Colorado legislature has created and expanded and modified civil causes of action in ways that shift costs.

This report does not take positions on any bills and certainly doesn't seek to imply that all the bills listed below are bad policy. Instead, it encourages policymakers to weigh carefully the benefits and costs of policy choices, especially in aggregate, as they percolate through the economy.

## Key Findings

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- **Since 2019, the state legislature has passed at least 43 bills that create, expand, and/or modify civil causes of action.**
  - The vast majority of these bills shift costs to businesses which, over time, can reasonably be expected to pass these costs along to consumers.
  - Litigation-related legislation only adds to challenges cited in previous CSI's research finding that new policies enacted over the last several years have **increased annual taxes and fees by over \$2 billion<sup>i</sup> and that recent high inflation has cost the average Colorado household \$19,300 since 2020.**
  - **Small businesses, lacking the resources of their larger competitors, can be expected to be harmed most significantly.** Small businesses account for 99% of firms and employ 48% of Colorado workers.<sup>ii</sup>
  - According to a report by the US Chamber of Commerce, **Colorado had the 9th-highest tort cost per resident in 2020. Between 2016 and 2020, Colorado experienced the second-highest rate of population-adjusted tort cost growth among the eight states** studied in this report. Only California's costs grew faster.
  - Given the likelihood that the costs of new, expanded or modified civil causes of action are outpacing similar costs in competitor states, **the Colorado legislature should establish an interim committee to systematically review the aggregate cost and overlaps among recent reforms and how they compare to other states.**
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## The Cost of Living and Doing Business in Colorado

Colorado's increasingly high cost of living and doing business has been well documented in multiple studies and rankings. CSI's research has found that major new policies enacted over the last several years, just in the areas of Labor & Employment and the Environment, have increased annual taxes and fees by over \$2 billion<sup>iii</sup> and that recent high inflation has cost the average Colorado household \$19,300 since 2020. The average wage has increased by only 16%, 3 percentage points less than inflation, which means that Coloradans' real wages and purchasing power have declined.

These growing costs pose a threat to the state's continued economic growth, particularly if they increase at a faster rate than comparable costs in geographic and economic peer competitor states. An April CSI report noted that an 80% decline in net migration over the last two years, during a period in which migration continued to increase in peer competitor states, indicates that high costs may be dissuading people from moving to or remaining in Colorado. If these declines accelerate, or migration stabilizes at a reduced level, this could threaten the state's tax base and workforce.

The most meaningful way to compare the costs of living and doing business in Colorado and other states is to assess the aggregate impact of a wide range of economic policy choices. Though some policies, such as simple tax increases or cuts, are highly publicized and generally understood, other policies impact the economy in more subtle and indirect ways. Individually, these policies may have small or imperceptible economic impacts, but, collectively, they can form a substantial cost-driver.

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One such subtle cost-driver over which state lawmakers have some control is the cost of civil litigation, including both the cost of litigating and the cost of avoiding litigation. The legislature can shift costs and alter negotiating leverage through a range of actions, including by

- (i) Creating new private rights of action,
- (ii) Expanding permitted claims under existing private rights of action,
- (iii) Eliminating or bypassing administrative remedies for dispute resolution,
- (iv) Adding new civil enforcement authority by the attorney general,
- (v) Awarding attorney's fees only to prevailing plaintiffs,
- (vi) Expanding the Colorado Consumer Protection Act (CCPA) (which has civil enforcement provisions), or
- (vii) Prohibiting certain terms (for example, alternative dispute resolution provisions (e.g., arbitration) from being included in particular contracts between private parties.

When a legislature makes the types of changes listed above and the net impact falls significantly on the business community, it is reasonable to assume that these costs will impact margins and eventually be reflected in downward pressure on wages/hiring and upward pressure on prices borne by consumers. This outcome might be good or bad, depending on one's view of a particular issue, but the recovery of higher costs to businesses through increased prices to consumers should not be ignored.

Historically, Colorado had a reputation within the business community for moderate litigation costs, in part due to a series of reforms that made the state less attractive than many other states as a place to bring civil actions. Over the last 15 years, however, this reputation has deteriorated. Colorado ranked 8th in the country according to the 2010 U.S. Chamber of Commerce Lawsuit Climate Survey, for example, but fell to 35th by 2017. The state had only recovered some of that lost ground by 2019, when it ranked 21st.

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*Evidence suggests that small businesses are even more dramatically impacted by litigation costs than their larger counterparts.*

Although the Lawsuit Climate Survey captures costs originating apart from policy and its methodologies have changed somewhat over time, its results are nonetheless important to consider. This is because the results represent informed opinions upon which substantial businesses make important decisions.

Participants in the 2019 survey, for example, were senior attorneys and/or executives at companies with at least \$100 million in annual revenue, with knowledge of litigation matters and recent, first-hand litigation experience in the states they evaluated. Over 85% of these business leaders responding to the climate surveys “reported that a state’s litigation environment is likely to impact important business decisions.” If these leaders view Colorado as an increasingly expensive locale relative to viable alternatives, that can be expected to continue to weigh on Colorado’s economic growth.

A 2022 survey conducted by the Colorado Chamber of Commerce is consistent with the US Chamber’s Lawsuit Climate Survey.<sup>iv</sup> Although the Colorado Chamber survey does not address litigation specifically, it expresses deep concerns about the increasing costs of labor/employment and environmental regulations. Significantly, some of the most prominent new regulations in these areas contain robust civil enforcement provisions.

Ominously for small businesses, the Lawsuit Climate Survey is based on feedback from senior legal counsel at large companies. Evidence suggests that small businesses are even more dramatically impacted by litigation costs than their larger counterparts. Small businesses generally do not have in-house legal departments, and often cannot afford to insure against all of their potential liability. It has been estimated that small businesses, on average, directly insure only about a quarter of their potential litigation costs<sup>v</sup>. Because small businesses account for 99% of firms and employ 48% of Colorado workers, cost increases that impact the small business community will certainly ripple through the economy.<sup>vi</sup>

Finally, a cost study published by the U.S. Chamber of Commerce in 2022 found that Colorado’s tort cost growth between 2016 and 2020 was 45% faster than the U.S. average. At the end of that period, Colorado’s estimated tort cost per household ranked 9th-highest in the country and its total tort cost as a percentage of state GDP ranked 17th-highest nationally.

The litigation cost portion of the U.S. Chamber report has been the subject of vigorous debate; critics claim that it overstates tort costs and the Chamber claims that it understates them. CSI does not view the report cost figures for any one state as dispositive, or as exclusively a result of state legislation, but considers the state-to-state comparisons and trends over time informative. The findings of the study indicate a similar trend and impact as found by state and national surveys and is consistent with the sheer volume of recent Colorado legislation creating, expanding, or otherwise modifying civil causes of action.



## Colorado Legislation

Over the last four years, the legislature has passed at least 43 measures creating, expanding, and/or otherwise modifying civil causes of action. Many business leaders cite that these have driven up costs which are ultimately passed on to consumers.

The following is a brief summary of 47 bills introduced in the legislature since 2019. Of these, 43 passed and were enacted into law, three failed to pass and one passed but was vetoed by the governor. To create this list, CSI used a list of 74 bills compiled by Colorado legislative staff.

Colorado Legislation Creating, Expanding and/or Modifying Civil Causes of Action					
2019	2020	2021	2023	2023 HB	2023 SB
HB19-1289	HB20-1290	HB21-1188	HB22-1071	HB23-1004	SB23-017
HB19-1309	HB20-1414	HB21-1193	HB22-1137	HB23-1030	SB23-046
SB19-085	SB20-205	HB21-1282	HB22-1272	HB23-1032	SB23-077
SB19-107		SB21-057	HB22-1284	HB23-1076	SB23-093
		SB21-087	HB22-1287	HB23-1095	SB23-105
		SB21-169	SB22-097	HB23-1099	SB23-168
		SB21-173	HB22-161	HB23-1120	SB23-172
				HB23-1162	SB23-184
				HB23-1171	SB23-252
				HB23-1190	
				HB23-1192	
				HB23-1196	
				HB23-1201	
				HB23-1215	
				HB23-1254	
				HB23-1302	

## Key Takeaways from Recent Legislation

- Though it is extremely difficult to quantify the dollar-impacts of these measures, it is not difficult to discern how, particularly in the aggregate, the measures shift costs and risk onto Colorado businesses. Whether or not each is good policy is a matter of opinion.
- Labor & employment law was significantly impacted by several pieces of legislation. This includes measures that expand opportunities for litigation by lowering legal standards for liability (SB23-172), increasing recoverable amounts (SB22-161), adding categories of recovery (HB21-1188), and directing the Director of the Division of Labor and Statistics to develop a system of enforcement, while preserving private parties' right to bring a civil action (SB19-085). It is likely that these measures will increase compliance costs for employers, which in turn will exert upward pressure on consumer prices.
- Landlord-tenant law has also been impacted by several pieces of enacted legislation, including SB23-184, HB23-1120, HB23-1099, SB21-173, and HB23-1095. For example, HB23-1095 prohibits landlords from including several types of provisions in rental contracts, and SB23-184 prohibits landlords from requiring prospective tenants to have gross income of greater than 200% of annual rent. As with the labor & employment measures, regardless of whether these changes are desirable public policy, it is likely that they will drive up costs for landlords and exert upward pressure on rental rates for consumers.
- Healthcare transparency was a subject of several bills, including SB23-252, HB23-1201, and HB22-1284. Notably, most of these bills were highly bipartisan, whereas legislation in the areas of labor and employment and landlord-tenant law was not.
- Some bills were significantly weakened between introduction and passage. For example:
  - As introduced, HB23-1032 added emotional distress damages and attorney fees for prevailing parties and eliminated the requirement to exhaust administrative remedies before suing in state ADA lawsuits.
  - HB19-1289, as introduced, included significant additional changes to existing Colorado law, including prohibitions of certain terms in consumer contracts and abolishment of the requirement that standing to bring an action under the CCPA requires proof that a deceptive trade practice has a "significant public impact."
  - HB23-1294, as introduced, included a new provision for private civil actions in addition to Air Quality Control Commission (AQCC) enforcement.
  - Although these provisions were deleted from the final versions of the respective bills, experience shows that measures that fail in one year often return for consideration in following years.

- Some bills ultimately did not pass in the 2023 legislative session. These include HB23-1302 (lost) and HB23-1171 (laid over). However, along with bills that were amended and passed in 2023, they are mentioned in this report because legislation that does not pass in a particular year sometimes returns and passes in whole or in part in following years.
- Construction-defect law is an example of an issue in which Colorado stands out, and not in a good way, from peer competitor states. The negative impact of this legal environment on the availability of affordable housing, specifically condominiums, has long been affirmed by many members of the business community and will be the subject of a future CSI report.

## Recommendations

1. Given the breadth of recent reforms, and the likelihood that the costs of new, expanded or modified civil causes of action are outpacing similar costs in competitor states, the Colorado legislature should establish an interim committee to systematically review the aggregate cost and overlaps among recent reforms, how they compare to other states, and to determine ways to alleviate those costs and prevent adverse outcomes. This should include the routine update of the recent legislative council staff report that lists recent legislation.
2. Prior to adopting new legislation that would further expand civil liability, the legislature should closely examine how the proposed reforms compare to laws in other states, and the extent to which they could impose excessive cost burdens on businesses.

## Appendix: List of Civil Action Bills

1. **HB19-1289:** Expands the Colorado Consumer Protection Act—lowers the threshold for liability from “knowing” to “reckless,” increases penalties significantly, and abolishes the cap on damages
2. **HB19-1309:** Creates certain protections for mobile homeowners and establishes the Mobile Home Park Act Dispute Resolution and Enforcement Program Fund
3. **SB19-085:** Prohibits employers from paying different wages to employees of different sexes for substantially similar work, unless employers can demonstrate that pay is based on at least one of several qualifying methodologies, and prohibits employers from asking prospective employees about wage histories or preventing employees from revealing their wage rates
4. **SB19-107:** Allows property owners to seek remedy of any damage or injury to property incurred as a result of negligence by a broadband supplier through a civil court process
5. **HB20-1290:** Bars an insurer from using a failure-to-cooperate defense in an action regarding the insurer’s request for information from the insured about a claim unless one of several conditions is met
6. **HB20-1414:** Establishes that a person engages in a deceptive trade practice if the person, within 180 days following the declaration of a disaster or disaster emergency by the president of the United States or the Governor and in the geographic area for which the disaster was declared, sells, offers for sale, provides, or offers to provide goods or services deemed “essential” at prices “so excessive as to amount to price gouging”
7. **SB20-205:** Requires employers to offer 48h of accrued sick leave per year
8. **HB21-1188:** Reversing a 2017 Colorado Supreme Court decision, allows a plaintiff to assert direct negligence claims against an employer arising out of the same incident in which the employer or principal admits liability for the tortious actions of its employee or agent
9. **HB21-1193:** Expands civil and criminal liability concerning supplemental restraint systems
10. **HB21-1282:** Allows the Attorney General to impose notification, record-keeping, inspection, and other requirements on non-bank lenders and enforce violations through monetary penalties. The AG may hire attorneys and other professionals and file suit against suspected offenders at his/her discretion

11. **SB21-057:** Provides legal recourse for borrowers and cosigners who are harmed by student loan predatory acts and practices, defines violations as a deceptive trade practice under the CCPA, and imposes penalties on private education lenders and collection agencies that do not comply with the certain requirements
12. **SB21-087:** Grants a host of labor rights, including collective bargaining rights, and the right to strike, to agriculture workers
13. **SB21-169:** Protects Colorado consumers from insurance practices that result in unfair discrimination on the basis of race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression [significantly amended during session]
14. **SB21-173:** Provides protections for tenants related to late fees, evictions proceedings, and rental agreements
15. **HB22-1071:** States that, in a class action under the Colorado Consumer Protection Act, a successful plaintiff in a class action lawsuit may recover actual damages, injunctive relief allowed by law, and reasonable attorney fees and costs
16. **HB22-1137:** Provides homeowners the legal remedy of filing a civil suit against an HOA for up to \$25,000 plus costs and attorney fees if the owners prove the HOA violated foreclosure laws
17. **HB22-1272:** States that a defendant may not be awarded reasonable attorney fees in cases dismissed prior to trial in which the plaintiff brought non-frivolous claims in order to challenge precedent or for a similar reason
18. **HB22-1284:** Creates a deceptive trade practice if a health care provider fails to provide certain disclosures to consumers
19. **HB22-1287:** Updates the Mobile Home Park Act and the Mobile Home Park Act Dispute Resolution and Enforcement Program, grants the Attorney General enforcement powers, and allows homeowners to file civil actions
20. **SB22-097:** Expands whistleblower-protection law to all health and safety concerns regardless of whether there is a declared public health emergency
21. **SB22-161:** Updates and modifies laws pertaining to the payment of wages and employee misclassification and the enforcement procedures and remedies for violations of those laws
22. **HB23-1004:** Adds attorney fees to disputes over insurance document language
23. **HB23-1030:** Creates new private rights of action and civil penalties concerning health care staffing
24. **HB23-1032:** Adds emotional distress damages and attorney fees for prevailing plaintiff in state ADA lawsuits and eliminates the requirement to exhaust administrative remedies
25. **HB23-1076:** Increases the maximum contingent attorney fee that can be charged for uncontested worker's compensation cases from 20% of the value of the contested benefit to 25%

26. **HB23-1095:** Prohibits residential rental agreements from including certain provisions including jury trial waivers (except in certain circumstances), penalties for eviction notices based on violations of the rental agreement, and waivers of the ability to join a class action related to the tenancy
27. **HB23-1099:** Requires landlords to accept “screening reports” (employment history, income, credit and criminal history, etc.) from prospective tenants without charging application fees. Attorney General empowered to bring civil enforcement action
28. **HB23-1120:** Requires landlords, with some exceptions, to mediate with residential tenants who receive public assistance before attempting eviction
29. **HB23-1162:** Facilitates plaintiff litigation with lawsuit lending
30. **HB23-1171 [laid over]:** Expands civil claims for unlawful removal, which includes treble damages and attorney fees
31. **HB23-1190 [vetoed]:** Creates Attorney General enforcement, new private rights of action, prevailing attorney fees, and statutory penalties
32. **HB23-1192:** Enacts the Colorado State Antitrust Act of 2023 to replace the Colorado Antitrust Act of 1992 and adds a cause of action for facilitating or aiding and abetting violations of the Act. Attorney General can bring civil or criminal actions on behalf of state, and civil actions on behalf of injured parties. Individuals can bring civil actions
33. **HB23-1196:** Amends the Colorado Youth Employment Opportunity Act of 1971 to allow aggrieved parties, including parents of children protected by the act, to pursue remedies at law and in equity for violations of the act in addition to worker’s compensation remedies
34. **HB23-1201:** Requires that insurance carriers and pharmacy benefits managers charge policyholders no more for prescription drugs than these entities paid to acquire those drugs
35. **HB23-1215:** Prohibits health care providers, with certain exceptions, from charging facility fees (charges that compensate for provider expenses other than direct medical care) for preventative outpatient care if they are not covered by patients’ insurance policies
36. **HB23-1254:** Expands conditions covered under the warranty of habitability for residential premises to include damage due to an environmental public health event
37. **HB23-1302 [failed]:** Modifies standards for disability-accessible housing and creates rights of action for the Attorney General and disabled people against developers and landlords who do not comply with the standards
38. **SB23-017:** Expands the scope of potential civil claims against employers under the paid sick leave statute
39. **SB23-046:** Expands the scope of potential civil claims against employers under paid family and medical leave law

40. **SB23-077:** Prohibits certain terms from being included in residential real estate broker engagement contracts and designates violations as unfair or deceptive trade practices
41. **SB23-093:** Expands the scope of medical transactions that are considered violations to the CCPA to include those involving “medical debt”
42. **SB23-098 [failed]:** Creates new causes of actions enabling drivers and passengers to sue transportation and delivery network companies
43. **SB23-105:** Adding to existing 2019 law (Equal Pay for Equal Work Act), which included a private right of action, makes CDLE investigation and enforcement mandatory and broadens employer disclosure requirements
44. **SB23-168:** Permits product liability actions against firearms manufacturers, creates a new private right of action, and grants the CCPA and the Attorney General enforcement against violations of standard of conduct
45. **SB23-172:** For purposes of addressing discriminatory or unfair employment practices pursuant to Colorado’s anti-discrimination laws (which provide for private actions), the bill enacts the “Protecting Opportunities and Workers’ Rights (POWR) Act,” which expands definitions of several offenses
46. **SB23-184:** Expands causes of actions against landlords
47. **SB23-252:** Requires CDPHE to assess hospital adherence to federal price transparency rules and identifies violations of such as deceptive trade practices under the CCPA identifies violations of such as deceptive trade practices under the CCPA

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