

# HOUSE BILL REPORT

## ESSB 6035

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**As Reported by House Committee On:**  
Commerce & Labor

**Title:** An act relating to retrospective rating plans.

**Brief Description:** Concerning retrospective rating plans.

**Sponsors:** Senate Committee on Labor, Commerce & Consumer Protection (originally sponsored by Senators Kohl-Welles, McDermott, Franklin, Keiser, Jacobsen, Fraser, Regala, Haugen, Murray, Kline and McAuliffe).

**Brief History:**

**Committee Activity:**

Commerce & Labor: 3/24/09, 3/27/09 [DP].

### Brief Summary of Engrossed Substitute Bill

- Requires the Department of Labor and Industries (Department) to conduct an annual actuarial review of the industrial insurance retrospective rating program for five years beginning January 1, 2010.
- Requires sponsors of retrospective rating groups (sponsors) to provide a distribution plan to the Department upon enrollment and annually to employer members, and to report to the Department and employer members a detailed list of costs for which a portion of a refund was retained for administration, safety, claims assistance, and reserves.
- Provides that sponsors may retain a portion of a refund for other legal purposes if the employer member provides annual written authorization.
- Places limits on a sponsor's placement of conditions on employer members or applicants with respect to reenrollment, membership, and contributions.

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### HOUSE COMMITTEE ON COMMERCE & LABOR

**Majority Report:** Do pass. Signed by 5 members: Representatives Conway, Chair; Wood, Vice Chair; Green, Moeller and Williams.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Minority Report:** Do not pass. Signed by 3 members: Representatives Condotta, Ranking Minority Member; Chandler and Crouse.

**Staff:** Joan Elgee (786-7106)

**Background:**

Legislation enacted in 1999 requires the Department of Labor and Industries (Department) to offer an industrial insurance retrospective rating plan (retro) for any qualified employer or group of employers. (Previously, the Department offered retro but was not required to do so.) Participation in retro allows an employer or a group of employers to assume a portion of industrial insurance risk and receive premium refunds or be assessed additional premiums based on claim losses. Retro is designed to reward employers that are able to keep claim costs below a preselected level as a result of improvements in workplace safety and injured worker outcomes.

Participation in retro is available to any employer or group of employers who elect to participate and meet requirements set forth in law and rule. An entity sponsoring a retro group (sponsor) must obtain initial approval from the Department and meet certain criteria: (1) the sponsor must have been in existence for at least four years; (2) the sponsor must exist primarily for a purpose other than obtaining or offering insurance; (3) the sponsor must have a safety and accident prevention plan; (4) all employer members must be members of the sponsoring entity; (5) 50 percent of the original employers in the group must have been members of the sponsor for one year before the group's entrance into retro; (6) the group must be composed of employers who are substantially similar considering the services or activities performed by the employees; (7) the initial premium for the group must be at least \$1.5 million; and (8) the formation and operation of the group must seek to substantially improve workplace safety and accident prevention for the employers in the group. A safety plan must be submitted with the application.

A sponsor selects a 12-month coverage period and chooses from among various plans. By rule, the Department makes three adjustments (refunds or assessments), the first at approximately nine months from the end of the coverage period and then at the end of the two subsequent 12-month periods. Claims with injury dates within the coverage period are considered at each adjustment. To reenroll, a sponsor must submit a new agreement and a safety report and must secure authorization from each employer member. Refunds are made from and assessments paid into the industrial insurance Accident Fund.

In February 2009 the Department discovered a computer coding error going back many years which resulted in higher refunds to retro participants than should have been made.

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**Summary of Bill:**

Intent.

Legislative findings are made regarding the miscalculation of refunds to sponsors of industrial insurance retrospective rating plans (retro). The Legislature finds a miscalculation

depleted the industrial insurance Accident Fund of more than \$100 million and perhaps as much as \$150 million. The Legislature further finds that the miscalculation required base premiums to be set at a level higher than would otherwise be necessary, which caused non-retro employers to subsidize retro employers. Further, legislative findings are made that additional evaluations and increased transparency of the retro system are needed.

Legislative findings are also made that the primary purposes of the retro program are increasing workplace safety, preventing accidents, and improving worker outcomes. Further, the Legislature finds that any retro refunds not used to administer the group or support the purposes of the program belong to and should be returned to the employer members, except that employer members may authorize the use of refunds for purposes unrelated to worker safety and accident prevention, similar to the annual authorization required from the members of union organizations. Finally, intent is stated that to restore public confidence in the use of retro funds, the Legislature intends to make information concerning the sponsors' administration of the retro program available to the public.

#### Actuarial Review.

The Department of Labor and Industries (Department) must conduct an actuarial review of the retro program annually for five years beginning January 1, 2010. The review must include an examination of: (1) the method used to calculate premiums, refunds, and assessments; (2) the impact retro refunds and assessments have on the industrial insurance Accident Fund; and (3) any other factors necessary to conduct a thorough actuarial review. The Department must report the contents of the review by December 31 of each year to the appropriate committees of the Legislature.

#### Refunds.

Requirements are established for refunds made by sponsors of retro groups (sponsors). Sponsors must distribute a refund or adjustment to member employers based on a distribution plan within a time period set forth in the plan. The plan must be provided to the Department upon enrollment and annually to the group members. The Department must make the plan publicly available, excluding financial information specific to individual employer members.

A portion of the refund may be retained for:

- *Reasonable administrative costs.* When a refund is distributed, the sponsor must disclose to employer members and the Department the purposes for which the costs were incurred.
- *Safety plan costs.* The Department must adopt rules to define the required elements of a safety plan and the sponsor must submit the safety plan to the Department annually.
- *Claims assistance.*
- *Reserves.* The portion of the refund retained for reserves must be for the sole and exclusive purpose of covering the costs of future potential retro assessments, penalties, or other unexpected costs incurred during the same or subsequent coverage year.

The sponsor must keep a detailed list of costs relating to administration, the safety plan, claims assistance, and reserves and report this list to the Department and employer members when refunds or adjustments are distributed.

A sponsor may also retain a portion of a refund due to a group member for any legal purpose if the member has provided written authorization. Any authorization is effective for not more than one year. The sponsor must inform the employer member of the amount withheld. The Department must develop a form authorizing the retention of refunds. The form must authorize the retention of either a percentage of the refund or a fixed dollar amount and inform the member that the authorization is irrevocable for one year. A sponsor may also use a form it has prepared which is approved by the Department.

A sponsor must comply with the refund requirements to be approved by the Department for future enrollment.

Conditions on Employer Members.

A sponsor may not require an employer member or applicant to agree to: (1) reenroll in the group's future coverage period; (2) maintain membership in the sponsor or any other organization beyond the coverage period, which includes the three-year period during which further refunds and assessments may be made; or (3) contribute funds to the sponsor or the organization in excess of amounts authorized.

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**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) The overpayment that occurred is a serious issue with up to \$150 million in industrial insurance retrospective rating plan (retro) refunds possibly overpaid. Because of errors, non-retro employers are subsidizing retro groups. Refunds are based in part on contributions of employees who do not get any part of the refunds. It is shocking that it took 15 years to discover the error.

Retro programs do work to improve safety and get injured workers back to work, and are strongly supported. However, greater oversight and accountability is needed. Some employers have not known they could get all or part of a refund and this is a cost for business. Some sponsors of retro groups (sponsors) do not provide an accounting with refunds. The system is a black box for small businesses. Some employers learned that refunds were diverted for partisan purposes. An employer was terminated from a group after filing a lawsuit. Employers should not have to spend money filing lawsuits to find out about their tax refunds. A declaration by a professor in the lawsuit shows a sponsor grossly mismanaged funds by depriving members of \$4.9 million above the 20 percent marketing assistance fee. Transparency and reform are needed. There are powerful economic incentives to join what is a government program. The refunds belong to employers and groups should not be allowed to spend refunds except for insurance and safety. The diversion of refunds into political campaigns is troubling. The Department of Labor and

Industries (Department) should not be allowed to operate on standards that would not pass muster in another government agency. Failure to adopt this reform bill sends a message the state is not meeting its fiduciary responsibilities.

This bill is a sunshine bill. It does not create burdensome disclosure requirements, drive businesses out of state, or restrict the purposes for which sponsors use refunds. All that is required is an annual disclosure to employer members of what the refund is used for. Since it is a legislatively created program, there is no constitutional issue. All provisions related to the proviso study have been removed. There was business input for the striker. The bill is a bare minimum. Reform is long overdue. The state needs make sure funds are used wisely since employers have to pay workers' compensation premiums.

(Neutral) The Department assumed the Legislature wanted a more in-depth audit and would plan to have the State Auditor conduct the audits.

(Opposed) This bill is an inappropriate intrusion into a contractual relationship. Retro groups are already transparent to their members, who do not need protection from their own associations. Members choose to sign up for retro and choose which retro group to belong to. Employers can also join retro as an individual employer. Associations do not hide from members how they spend their money and members have a chance to share their views. Associations differ and employers choose which retro group to belong to. Refunds are not used for political purposes by one association and association members manage another group. Retro groups do not want to be told how to spend their money. The refunds are not public funds. No worker money is refunded. The bill is not a sunshine bill. It imposes restrictions and requires disclosures of privileged information. The information should not be available to adversaries and the public. How attorneys use contingency fees does not have to be disclosed or permission obtained. The definitions and processes in the bill are unclear. The bill is unconstitutional because it violates free speech rights and the ability to contract. It is un-American to regulate speech.

The bill could jeopardize the services offered to employers such as return-to-work training. It would require groups to get annual permission to offer services such as supervisory training. The bill does not permit use of funds for human resources or legal advice. It is not clear how the bill affects current contracts. Groups may withhold more of a refund to guard against future liabilities. It is a dangerous time to be making changes when the Department will be seeking overpayments from sponsors. The administrative costs of compliance will siphon money from safety programs. Groups will need to hire accountants and attorneys. Having three different disbursement agreements because of three different retro years will increase costs. The bill has technical problems and there are ambiguities. What happens if one employer does not agree to a use of funds?

The retro program is working fine and increases safety. It saves the state a lot of money because of increased worker safety. Retro has helped employers and workers. Members are willing to pay for the services. Why is the retro program being blamed for the computer problem? The retro proviso study underway is looking at many aspects and the Legislature should wait until the study is completed before acting. It is an inappropriate use of public money to spend \$600,000 on the study but then make changes before the study is complete. The bill is unnecessary. The Department already does audits.

**Persons Testifying:** (In support) Senator Kohl-Welles, prime sponsor; Dan McShane, Stratum Group; Rick Dubrow, A-1 Builders; Laura Feshbach, Harmatta Construction; and Scott Royer, Windfall Lumber.

(Neutral) Vickie Kennedy, Department of Labor and Industries.

(Opposed) Mark Shaffer, Mark's Drywall; Audrey Borders, Borders and Son Roofing; Stephen Seger, Fou Shee and Associates; James Curry, Associated Builders and Contractors; Dan Fazio, Washington Farm Bureau; Larry Jensen, Country Cousins; Britt Dudek, Dudek Orchards; Rick Anderson, Sakuma Brothers; Tammie Hetrick, Washington Retail Association; Kris Tefft, Association of Washington Business; Bruce Beckett, Washington Restaurant Association; Don Rhodes; and Sandra Miller, Governor Hotel.

**Persons Signed In To Testify But Not Testifying:** More than 20 persons signed in. Please see committee staff for information.