

SENATE BILL REPORT

2SHB 1076

As of March 30, 2021

Title: An act relating to allowing whistleblowers to bring actions on behalf of the state for violations of workplace protections.

Brief Description: Allowing whistleblowers to bring actions on behalf of the state for violations of workplace protections.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Hansen, Fitzgibbon, Berry, Dolan, Johnson, J., Ramos, Simmons, Ramel, Ortiz-Self, Gregerson, Ryu, Bronoske, Valdez, Callan, Kloba, Hackney, Chopp, Ormsby, Stonier, Frame, Santos, Macri, Pollet and Harris-Talley).

Brief History: Passed House: 3/5/21, 53-44.

Committee Activity: Labor, Commerce & Tribal Affairs: 3/15/21, 3/18/21 [DP-WM, DNP].

Ways & Means: 3/30/21.

Brief Summary of Bill

- Authorizes a *qui tam* action, where a relator pursues relief on behalf of an agency, for the enforcement of various employment laws.
- Establishes the distribution of any penalties or damages awarded pursuant to a *qui tam* action.

SENATE COMMITTEE ON LABOR, COMMERCE & TRIBAL AFFAIRS

Majority Report: Do pass and be referred to Committee on Ways & Means.

Signed by Senators Keiser, Chair; Conway, Vice Chair, Labor; Stanford, Vice Chair, Commerce & Tribal Affairs; Robinson and Saldaña.

Minority Report: Do not pass.

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

Signed by Senators King, Ranking Member; Braun, Honeyford and Schoesler.

Staff: Jarrett Sacks (786-7448)

SENATE COMMITTEE ON WAYS & MEANS

Staff: Sarah Emmans (786-7478)

Background: Wage Payment Laws. The Department of Labor and Industries (L&I) enforces the Minimum Wage Act, which includes requirements for the state minimum wage, overtime, and paid sick leave. The Wage Payment Act allows an employee to file a wage complaint with L&I. L&I may obtain unpaid wages and interest for an employee for a violation of the state's wage payment laws and may order the employer to pay a civil penalty if the violation was willful. L&I may also obtain unpaid wages and assess a civil penalty for a failure to pay prevailing wages.

State law also prohibits mandatory overtime for employees of health care facilities. Under these provisions, L&I investigates complaints and may issue civil infractions and statutory penalties.

Washington Law Against Discrimination. The Washington Law Against Discrimination (WLAD) generally prohibits discrimination in employment and public accommodation based on race; creed; color; national origin; sex; marital status; honorably discharged veteran or military status; sexual orientation; the presence of any sensory, mental, or physical disability; or the use of a trained dog guide or service animal by a person with a disability.

The Washington State Human Rights Commission (HRC) is responsible for administering and enforcing WLAD. If HRC finds reasonable cause to believe discrimination has occurred, it must first try to eliminate the unfair practice via conference and conciliation. If this process fails, HRC must refer the matter to an administrative law judge who, after a hearing, may issue an order providing relief to the complainant. Any person injured by an unfair practice or act in violation of WLAD may bring a civil lawsuit to enjoin further violations and recover actual damages and reasonable attorneys' fees.

Washington Industrial Safety and Health Act. Under the Washington Industrial Safety and Health Act (WISHA), an employer must provide a workplace free from recognized hazards. L&I administers WISHA. If L&I believes an employer has committed a violation, L&I issues a citation and, depending on the violation, may assess civil penalties. Civil penalties may be adjusted based on the employer's inspection history, the size of the workforce, and other factors. Civil penalties are mandatory for serious or willful violations.

Washington Equal Pay and Opportunities Act. State law prohibits discrimination in pay

based on gender. An employee may file a complaint with L&I. If L&I determines a violation has occurred, L&I must first attempt to resolve the violation by conference and conciliation. If no resolution occurs, L&I may issue a citation and notice of assessment for actual damages, statutory damages equal to the actual damages, or \$5,000, whichever is greater; interest on all compensation owed; payment to L&I for the costs of the investigation; and any other appropriate relief.

Other Employment Laws. The Industrial Welfare Act (IWA), administered by L&I, contains a number of provisions dealing with wages, hours, and working conditions, including child labor, work apparel, and other matters. Other employment laws include regulation of farm labor contractors.

Summary of Bill: Aggrieved persons, whistleblowers, or their designated representative entity, known as a relator, may bring a *qui tam* action as a relator for any relief the specified state agency may seek, including penalties and damages, subject to the same conditions and limitations that apply to the agency for the following laws and associated rules:

- the Minimum Wage Act, the Wage Payment Act, and wage rebate and prevailing wage laws;
- WISHA;
- health care facility employee overtime laws;
- WLAD;
- the Gender Equal Pay and Advancement Opportunities Act;
- farm labor contractor laws;
- IWA; and
- the retaliation provisions in the bill.

No *qui tam* action may be brought:

- if the employer demonstrates the agency already resolved the merits of the violation, including through settlement, in relation to the same facts and aggrieved employees;
- with respect to modifying, revoking, or suspending a license, variance, or permit;
- for any violation of a posting, notice, agency reporting, or filing requirement;
- solely with respect to a violation of a recordkeeping requirement, except where the requirement involves injury reporting or a safety or health violation; or
- with respect to WISHA, for any violation included within the scope of a consultative visit by L&I.

A *qui tam* action is a public action and does not preclude an action by an individual, but a court shall offset any award in one action by the amount paid to the same employee in another action.

Qui Tam Process. A relator must provide notice to the agency and employer. If the agency chooses to investigate the alleged violation, a resolution of the violation must occur within 180 days of the notice. If the agency chooses not to investigate, it must notify the relator within 60 days of the notice.

As part of its investigation, the agency may attempt to settle the violation. If the settlement provides not less than 100 percent of any wrongfully withheld wages or benefits, including 12-percent interest per annum, the settlement precludes further claims for the same wages or benefits.

A *qui tam* action must begin within 60 days after the relator receives notice that the agency will not investigate the alleged complaint. Otherwise, the *qui tam* action must be brought within 240 days of the notice to the agency.

Once a *qui tam* action has begun, the agency may intervene under certain conditions and assume primary responsibility. The agency and the attorney general (AG) may take certain actions to prevent representation by a particular attorney in a *qui tam* action.

The relator and the AG receive notice and opportunities to be heard if the agency proposes to settle or dismiss the action after intervening. If the relator proposes to settle a *qui tam* action, the settlement must be submitted to the agency and to the AG.

Distribution of Awards. Any penalty amounts recovered are distributed as follows:

- if the agency does not intervene, 40 percent to the relator and 60 percent to the agency; and
- if the agency intervenes, 20 percent to the relator and 80 percent to the agency.

Penalties received by the relator must be equitably distributed to the aggrieved parties, subject to review by the agency, except the relator is entitled to a proportionate service award. A relator that prevails is entitled to reasonable attorneys' fees and costs. Any damages recovered must be distributed to the aggrieved employees.

Retaliation. Retaliation against an employee for involvement in a *qui tam* action is prohibited. Remedies for retaliation are specified, including a *qui tam* action.

Appropriation: The bill contains a null and void clause requiring specific funding be provided in an omnibus appropriation act.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony (Labor, Commerce & Tribal Affairs): PRO: The bill allows workers to enforce the laws that protect them. Recent court cases have shown the need for the bill. The bill uses similar mechanism as the state and federal Medicaid fraud laws, that have worked very well. The bill is urgently needed to help the black

community from the impacts of the pandemic and racism in the workplace. The federal qui tam experience shows that it is relatively stable and not a runaway for litigation. Instead, it creates specialized firms that act as gatekeepers and have an incentive to only bring good cases. The Human Rights Commission currently has a backlog of cases and the bill is necessary to protect those who face discrimination for sexual orientation. Workers are afraid to file claims because of retaliation. Current laws are inadequate because many do not meet the class action requirements. Private actions are hampered by arbitration clauses and employment agreements.

CON: This bill is dangerously similar to California's law, which has led to large pay outs for technical violations. The process incentivizes settlements over just outcomes and only benefits trial lawyers. The bill will hinder getting people back to work after the pandemic because hiring employees becomes risky. L&I is not overwhelmed with cases and cases are resolved, on average, within 42 days. This is not an analogue for the Medicaid law because that requires intentional conduct while many labor laws are strict liability and the federal law is very limited on who can bring a qui tam claim. There is no right to cure in the bill. California has seen a large increase in qui tam cases since its bill passed and now averages over 4000 cases a year and L&I estimates the bill will cause 800 qui tam actions a year. In 2021, California has already had 1200 qui tam notices filed. There is no requirement for actual injury and attorneys use it to have statewide discover and uncover other violations. There are already several remedies workers can use. The threat of lawsuits to small business is detrimental and the pandemic has already hit businesses hard. The Legislature has already increased penalties and timelines for prevailing wage violations.

Persons Testifying (Labor, Commerce & Tribal Affairs): PRO: Representative Drew Hansen, Prime Sponsor; Paul Quinonez Figueroa, Working Washington; Linda Davis, Working Washington; Clare Thomas, Working Washington; Ian Stroup, Working Washington; David Engstrom, Stanford Law School; Agustin Lopez, Trabajadores Unidos por la Justicia; Kalkidan Mulatu, SEIU Local 6; Shellea Allen Allen, Pride at Work; Jiji Jally, Marshallese Women's Association; Lindsay Halm, Washington State Association for Justice; Julia Barcott, Washington State Nurses Association; Juniper Moon, African American Health Board.

CON: Kyle Levine, Alaska Air Group; Tom Manzo, California Business and Industrial Alliance; Bruce Beckett, Washington Retail Association; Robert Battles, Association of Washington Business; Tim O'Connell, Stoel Rives LLP; Dan Spurgeon, Martens + Associates | P.S.; Tom Manzo, California Business and Industrial Alliance; Samantha Louderback, Washington Hospitality Association; Ron Oh, Holiday Inn Express; Sandy Smith, Ethan Stowell Restaurants; Cliff Webster, Liability Reform Coalition; Lisa Thatcher, Washington State Hospital Association; Derek Bishop, Gordon Rees Scully Mansukhani; Scott Woerman, Architects and Engineers Legislative Council; Catherine Holm, Washington Food Industry Association; Jim King, Independent Business Association; Christine Brewer, Associated General Contractors of Washington.

Persons Signed In To Testify But Not Testifying (Labor, Commerce & Tribal Affairs): No one.

Staff Summary of Public Testimony (Ways & Means): PRO: Employees need the protections and remedies that this bill provides. Employers may still violate employees' rights without this bill. The fiscal note does not include the revenue and damages that will be generated due to this bill, which have been substantial in California.

CON: Employees who are collectively bargained already have rights written into their agreements. This bill will undermine collective bargaining agreements. Employees already have other remedies available to them, for example the prevailing wage law, which L&I administers with additional staff funded from employer fees. The existing systems already work; L&I does not report any backlog related to wage complaints. The bill will increase risks and costs to Washington's counties. This bill will generate wasteful lawsuits that will draw money from businesses that could be used for wages and other investments that could grow the economy. Businesses will also be fearful of hiring, at a time when job growth is critical. Because of these economic impacts, the full cost is actually higher than what is reflected in the fiscal note. The bill is unconstitutional because it represents a violation of due process.

Persons Testifying (Ways & Means): PRO: Zenia Javalera, SEIU 6; Shellea Allen, Pride at Work; Larry Shannon, Washington State Association for Justice.

CON: Kyle Levine, Alaska Air Group; Derek Bryan, Washington Counties Risk Pool; Lisa Thatcher, Washington State Hospital Association; Catherine Holm, Washington Food Industry Association; Cliff Webster, Liability Reform Coalition; Bruce Beckett, Washington Retail Association; Bill Symmes, Witherspoon Kelley; Sheri Call, Washington Trucking Associations; Christine Brewer, Associated General Contractors of Washington; Julia Gorton, Washington Hospitality Association; Jim King, Independent Business Association; Robert Battles, Association of Washington Business; Tim O'Connell, Stoel Rives LLP; Dan Spurgeon, Martens + Associates | P.S..

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.