

HOUSE BILL REPORT

2SHB 2333

As Passed House:
February 13, 2014

Title: An act relating to the employment antiretaliation act.

Brief Description: Concerning the employee antiretaliation act.

Sponsors: House Committee on Appropriations Subcommittee on Health & Human Services (originally sponsored by Representatives Ryu, Sells, Moscoso, Seaquist, S. Hunt, Green, Stanford, Appleton, Reykdal, Fitzgibbon, Habib, Bergquist, Goodman, Farrell, Ormsby, Pollet and Walkinshaw).

Brief History:

Committee Activity:

Labor & Workforce Development: 1/21/14, 1/24/14 [DPS];
Appropriations Subcommittee on Health & Human Services: 2/6/14 [DP2S(w/o sub LWD)].

Floor Activity:

Passed House: 2/13/14, 53-45.

Brief Summary of Second Substitute Bill

- Creates parallel retaliation provisions in several wage and related laws.
- Establishes criminal penalties and administrative and court enforcement for violation of retaliation provisions.

HOUSE COMMITTEE ON LABOR & WORKFORCE DEVELOPMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Sells, Chair; Reykdal, Vice Chair; Green, Moeller and Ormsby.

Minority Report: Do not pass. Signed by 4 members: Representatives Manweller, Ranking Minority Member; Condotta, Assistant Ranking Minority Member; Christian and G. Hunt.

Staff: Joan Elgee (786-7106).

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.

HOUSE COMMITTEE ON APPROPRIATIONS SUBCOMMITTEE ON HEALTH & HUMAN SERVICES

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Labor & Workforce Development. Signed by 6 members: Representatives Morrell, Chair; Cody, Green, Kagi, Ormsby and Tharinger.

Minority Report: Do not pass. Signed by 4 members: Representatives Harris, Ranking Minority Member; G. Hunt, Ross and Schmick.

Staff: Mary Mulholland (786-7391).

Background:

Several laws address employment standards. The Minimum Wage Act (MWA) sets forth overtime in addition to minimum wage requirements. The Industrial Welfare Act deals with wages, hours, and working conditions, including child labor, work apparel, and other matters. Under prevailing wage provisions, contractors and subcontractors on public works projects and public building service maintenance contracts must pay their workers prevailing wages. The Wage Payment Act provides for an administrative or court action to collect wages under the MWA and other wage laws, as well as establishes other requirements. It is unlawful to make certain deductions from wages and to otherwise fail to pay wages under other laws.

Under the MWA, it is a gross misdemeanor for an employer to discriminate against an employee because the employee complained to the employer or the Department of Labor and Industries (Department) that the MWA has been violated, or because the employee instituted or is about to institute or testified or is about to testify in a proceeding under or related to the MWA.

Summary of Second Substitute Bill:

Retaliation provisions are established in the MWA, the Industrial Welfare Act, the Wage Payment Act, prevailing wage provisions, and wage deduction and other provisions.

Prohibited Activities. Employers are prohibited from taking adverse action against an individual because an employee (or former employee for most activities) engaged in specified activities:

- informed another person or complained (or the employer so believes) to the employer, the Department, the Attorney General, or any other person that the employer has engaged in conduct that the employee reasonably believes violates the particular law;
- demands a lawful claim under the particular law;
- instituted or is about to institute, or testified or is about to testify in, a proceeding under the particular law, or has otherwise exercised rights (or the employer so believes) under the particular law;
- refused to participate in an illegal activity;
- sought information or informed others about rights under the particular law; and

- filed a complaint with the Department or brought suit where the Department was found to have violated the particular law.

A presumption is created that if an employer takes adverse action within 90 days of any of the specified activities, the employer is presumed to have acted in retaliation in violation of the prohibition on adverse action. The presumption also applies in the case of seasonal work lasting fewer than 90 days if the employer fails to rehire a worker at the next opportunity for work in the same position. The presumption may be rebutted by clear and convincing evidence that the adverse action was taken for a permissible purpose.

"Adverse action" means discharging, threatening, failing to rehire after a seasonal interruption of work, engaging in unfair immigration-related practices, filing a false report with a government agency, changing an employee's status to a nonemployee, other listed activities, or otherwise discriminating against an employee. An "unfair immigration-related practice" includes requesting more or different documents than are required under federal law, using the electronic-verify system at a time or in a manner not allowed, threatening to file a false police report or contact immigration authorities, withholding or threatening to destroy immigration documents, and other listed activities.

Enforcement. Administrative and court remedies are provided.

Administrative. The Department may investigate complaints filed by an aggrieved individual or an interested party. If the Department determines a violation occurred, the Department may order:

- payment of a civil penalty of \$1,000 to \$10,000 per individual aggrieved;
- damages of \$1,000 to \$10,000 to each aggrieved individual, except that if the individual is an employee or former employee, the damages are the greater of the civil penalty or three times the amount of any wages and benefits unlawfully denied or withheld; and
- reinstatement of a former employee or front pay in lieu of reinstatement.

Prevailing parties on appeal are entitled to reasonable costs and attorneys' fees. An "interested party" includes the Director of the Department, a contractor, a union, and other listed entities. Civil penalties are deposited into the Supplemental Pension Fund.

Cause of Action. An aggrieved individual may bring an individual or class action in court. If the court determines a violation occurred, the court must order statutory damages of \$1,000 to \$10,000, or \$10,000 to \$25,000, if the employer engaged in a pattern or practice of violations, and attorneys' fees and costs. However, if the aggrieved individual is an employee or former employee the damages are the greater of the statutory damages or three times the wages and benefits withheld. The court may also order actual damages, reinstatement or front pay in lieu of reinstatement or other equitable relief, and suspension of licenses that are specific to the business where the adverse action occurred. The time period for license suspension ranges from 14 to 90 days depending on whether it is a first, second, or third violation. A "pattern or practice" is shown if within the previous 10 years, the employer was convicted of a violation of a retaliation law or is delinquent in payment of a court order or administrative assessment for violation of the retaliation provisions.

A three-year statute of limitations for both administrative and court actions is tolled during any time that an employer deterred an action.

A violation of the provisions is a gross misdemeanor.

The criminal violation for retaliation under the MWA is repealed.

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 (Labor & Workforce Development):

(In support) This is a fairness bill. Most employers treat workers well, but some employers are bad actors and fail to pay wages. Even worse, some employers retaliate by such actions as cutting hours, firing workers, or threatening immigration-related actions. These actions are immoral. The small businesses that are following the law will not have to make any changes because they are being ethical. This bill would level the playing field and stop these bad practices.

This is common sense legislation to protect workers from those who steal from them. In one study, almost half of the workers who complained were retaliated against and 20 percent decide not to complain because they feared retaliation. Retaliation against employees happens regularly. Employees are scared to come forward. The economy works because workers have channels to enforce wages. The system is broken, especially for low-wage workers. Berry pickers are often paid by the pound but do not receive minimum wage as required. Ninety percent of berry pickers with wage claims were afraid to do so. One family was owed thousands of dollars for a few weeks' work but stated that if they made trouble, they risked their jobs. Workers should not have to make a choice between seeking wages owed and getting jobs back.

Current laws are weak; the only remedy is a misdemeanor. Wage retaliation laws are out of line with workers' compensation and the Washington Industrial Safety and Health retaliation laws, which are robust.

People should be able to work hard and earn an honest living. Regardless of a person's immigration status, all workers in the country have a right to be fairly paid.

(Opposed) Interested parties include unions even when employers have already rejected unionization. The bill gives unions a way to influence employees who have rejected them.

This is a confusing and complex bill. The immigration provisions are probably preempted. It creates a "catch-22" with federal law regarding immigrant employment. It makes unlawful something that federal law permits. The bill calls for mandatory regulatory action and does not allow for discretion. The bill also raises a question about double recovery. Under the

bill, a pattern can be established after a single incident. Damages in the bill are excessive. The successor liability provision in the bill is in conflict with the Uniform Commercial Code. There are constitutional issues. The bill makes it a crime to contact immigration authorities when the Constitution allows one to petition government for grievances. In addition, the bill creates a presumption of guilt for a crime.

This bill does not work for small businesses, which employ about 85 percent of the people in the state. The complexity is overwhelming. The requirements are onerous and burdensome.

Staff Summary of Public Testimony (Appropriations Subcommittee on Health & Human Services):

(In support) Most employers play by the rules. However, some bad actors do not pay wages owed and retaliate against workers who seek their wages by firing them or committing unfair immigration practices. This is immoral. There are few protections under current law, which provides only criminal remedies. Other employment laws have strong retaliation provisions. We need robust retaliation provisions for wage theft. The bill will create a safe space for workers to ask for wages. The Bible, and likely other religious sources, say you should pay workers wages owed.

The economy works because there are channels for people to obtain wages. If people are afraid to use those channels, the system breaks down. In agriculture, about 90 percent of workers reported being afraid of losing their job if they complained. In a survey, 43 percent of workers had experienced retaliation. Threat of retaliation deters thousands of workers from filing complaints. A huge increase in retaliation has taken place recently. Death threats have been made against workers who sought wages owed. A company charged with \$1.1 million in prevailing wage violations threatened workers. Workers get deported and threatened with guns because they seek unpaid wages. A worker was arrested after she sought wages owed, the employer's check bounced, and the employer reported that the worker abused a patient.

The cost of the bill, which is questioned, will be recouped when people come forward with wage complaints, the underground economy is revealed, and payments owed to the state are made. The bill will increase state revenue collection and reduce worker reliance on state resources.

(Opposed) None.

Persons Testifying (Labor & Workforce Development): (In support) Representative Ryu, prime sponsor; Teresa Mosqueda, Washington State Labor Council; Diego Rondón Ichikawa, National Employment Law Project; Andrea Schmitt, Columbia Legal Services; Joel Coronado and Cariño Barragan, Casa Latina; Robert Bruner, Teamsters Local 117; Larry Boyd, Teamsters Local 174; Neil Hartman, Washington State Building and Construction Trades Council; Billy Wallace, Washington and Northern Idaho District Council of Laborers; Matt Haney, Service Employees International Union 6; Nicole Grant, Certified Electricians of Western Washington; Miguel Perez Gibson, Progreso Latino; Emily Murphy, One America; and Simon Gorbaty.

(Opposed) Tim O'Connell, Association of Washington Business; Philip Talmadge, Washington Trucking Association; Van Collins, Associated General Contractors; Mark Johnson, Washington Retail Association; Jeff Hansrom, Direct Sellers Association; Susan Eerdmans, Avon; and Gary Smith, Independent Business Association.

Persons Testifying (Appropriations Subcommittee on Health & Human Services): Representative Ryu, prime sponsor; Andrea Schmitt, Columbia Legal Services; Larry Boyd, Teamsters Local 174; Neil Hartman, Washington State Building and Construction Trade Council; Omar Rubi, Painters and Allied Trades; Diego Rondón Ichikawa, National Employment Law Project; Elba Juarez; and Cariño Bragan and Velma Veloria, Faith Action Network.

Persons Signed In To Testify But Not Testifying (Labor & Workforce Development): None.

Persons Signed In To Testify But Not Testifying (Appropriations Subcommittee on Health & Human Services): None.