
SUBSTITUTE HOUSE BILL 2944

State of Washington

65th Legislature

2018 Regular Session

By House Labor & Workplace Standards (originally sponsored by Representatives Chapman, Muri, Gregerson, Stokesbary, McBride, Rodne, Ryu, Young, Kilduff, Harris, Sells, Holy, Peterson, Volz, Valdez, Haler, Stonier, Stambaugh, Fitzgibbon, Walsh, Robinson, Irwin, Blake, Appleton, Bergquist, Ortiz-Self, Stanford, Tarleton, Wylie, Barkis, Goodman, Santos, Ormsby, Pollet, and Macri)

READ FIRST TIME 02/02/18.

1 AN ACT Relating to safeguarding the public safety by protecting
2 railroad workers; amending RCW 49.78.220, 49.78.020, and 49.78.270;
3 adding new sections to chapter 81.40 RCW; creating new sections;
4 prescribing penalties; and declaring an emergency.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** The legislature finds that railroad
7 employees are susceptible to illness from working in confined spaces
8 as well as the illnesses and injuries that affect the general
9 population, yet have no paid sick leave and may be subject to
10 discipline for absence due to illness and injury. Further, the
11 legislature recognizes that chronic fatigue is endemic to railroad
12 operating craft employees due to erratic work schedules, inaccurate
13 train line up information, and on duty periods of twelve hours or
14 longer. Academic studies have found that fatigue has the equivalent
15 negative impact on alertness, awareness, and job performance as
16 alcohol intoxication. Research indicates that fatigue is related to
17 higher rates of depression, anxiety, sleep apnea, and suicide, and
18 that these conditions are more prevalent among railroad workers. The
19 federal railway safety improvement act of 2008 directed the
20 appropriate federal agencies to address fatigue, but those agencies
21 have not adequately done so.

1 The legislature further finds that railroad operating craft
2 employees may report to work while ill or fatigued to avoid
3 disciplinary action by railroad carrier companies, which creates a
4 dangerous and unnecessary public safety issue. In addition, the
5 legislature finds that the unique operational practices utilized to
6 summon railroad crew employees to duty necessitate modifications to
7 existing family and medical leave laws to provide railroad carrier
8 employees with comparable sick leave and family leave rights to those
9 previously granted to all other workers in this state.

10 Therefore, in the interest of public safety and operating craft
11 employee safety, the legislature intends to take steps to assure that
12 railroad crew employees are healthy and rested and to assure that
13 railroad crew employees receive fair family and medical leave.

14 NEW SECTION. **Sec. 2.** The definitions in this section apply
15 throughout sections 1 through 5 of this act unless the context
16 clearly requires otherwise.

17 (1) "Operating craft employee" means any employee of a railroad
18 carrier who performs service in an operating craft on a railroad or
19 directs the work of an operating craft employee as a scheduled
20 employee, and includes any other employee of a railroad carrier who
21 performs safety sensitive tasks associated with railroad operations.

22 (2) "Railroad carrier" means any employer subject to the
23 jurisdiction of the surface transportation board under 49 U.S.C. Sec.
24 7, as it exists on the effective date of this section. "Railroad
25 carrier" includes the officers and agents of the railroad operations
26 regardless of physical location.

27 NEW SECTION. **Sec. 3.** (1) No railroad carrier may dismiss,
28 suspend, layoff, demote, or otherwise discipline an employee because
29 of absence due to illness or injury of the employee or the employee's
30 spouse or child if:

31 (a) The employee has completed three consecutive months of
32 continuous employment by the railroad carrier prior to the absence;

33 (b) The period of absence does not exceed twelve weeks; and

34 (c) The employee, if requested in writing by the railroad carrier
35 within ten days after the employee's return to work, provides the
36 railroad carrier with documentation from a health care provider that
37 the employee was incapable of working due to illness or injury of the
38 employee or the employee's spouse or child during the employee's

1 absence from work. The railroad carrier must grant the employee no
2 fewer than thirty days to obtain and provide any requested
3 documentation.

4 (2) Any employee absences used pursuant to this section are not
5 subject to any type of carrier availability or attendance policy and
6 are separate from any protected leave under chapter 49.78 RCW or
7 Title 50A RCW.

8 NEW SECTION. **Sec. 4.** (1) No railroad carrier may dismiss,
9 suspend, layoff, demote, or otherwise discipline an operating craft
10 employee because of layoff due to fatigue.

11 (2) A railroad carrier must establish a fatigue layoff program
12 under which an operating craft employee may layoff due to fatigue
13 without being subjected to discipline or any type of availability or
14 attendance policy. A railroad carrier must submit the fatigue layoff
15 program to the commission for review and approval within ninety days
16 from the effective date of this section. Prior to approving a fatigue
17 layoff program, the commission must submit the program to the
18 leadership of the operating craft rail labor organizations state
19 legislative boards for review and input.

20 (3) A railroad carrier must report all data as requested by the
21 commission to implement and enforce this section. If the commission
22 identifies additional actions to address fatigue that require
23 legislative action, the commission shall report its findings to the
24 appropriate legislative committees.

25 (4) The commission shall adopt rules to implement this section.
26 In adopting rules, the commission shall review and consider research
27 addressing alertness, depression, and other consequences of
28 irregular, nonscheduled "on-call" working conditions. The commission
29 shall also recognize the importance of ensuring fatigue layoffs are
30 reasonable and legitimate.

31 (5) This section applies to class I railroad carriers and any
32 class II or III railroad carriers with regular operating craft
33 working hours extending beyond sixteen consecutive hours a day more
34 frequently than once per week, exclusive of unusual unforeseen events
35 such as natural disasters or similar emergencies.

36 NEW SECTION. **Sec. 5.** A railroad carrier must provide data to
37 the commission regarding the number of employees laying off for
38 injury, illness, or fatigue and the length of layoff no later than

1 January 31st of each year for the preceding year. No personally
2 identifying information of employees may be submitted.

3 NEW SECTION. **Sec. 6.** (1) Upon complaint by an employee of a
4 railroad carrier, the commission shall investigate to determine if
5 there has been compliance with sections 3 and 4 of this act. If the
6 investigation indicates that a violation has occurred, the commission
7 shall issue a notice of infraction. Appeal from the commission's
8 decision is governed by chapter 34.05 RCW.

9 (2) If a railroad carrier is found to have committed an
10 infraction under this section, the commission may impose upon the
11 carrier a fine of up to five hundred dollars for the first
12 infraction; a fine of up to five thousand dollars for a second
13 infraction; and a fine of up to twenty-five thousand dollars for each
14 subsequent infraction committed within three years of a previous
15 infraction. The commission may also order other remedies such as back
16 pay and reinstatement, and may increase the penalties by rule based
17 on changing economic conditions.

18 **Sec. 7.** RCW 49.78.220 and 2006 c 59 s 3 are each amended to read
19 as follows:

20 (1) Subject to RCW 49.78.260, an employee is entitled to a total
21 of twelve workweeks of leave during any twelve-month period for one
22 or more of the following:

23 (a) Because of the birth of a child of the employee and in order
24 to care for the child;

25 (b) Because of the placement of a child with the employee for
26 adoption or foster care;

27 (c) In order to care for a family member of the employee, if the
28 family member has a serious health condition; or

29 (d) Because of a serious health condition that makes the employee
30 unable to perform the functions of the position of the employee.

31 (2) The entitlement to leave for the birth or placement of a
32 child expires at the end of the twelve-month period beginning on the
33 date of such birth or placement.

34 (3) In determining the duration of leave time remaining in fifty-
35 two consecutive calendar weeks, a railroad carrier may deduct only
36 the actual amount of leave taken by an employee in increments no
37 greater than twenty-four hours, and may not deduct more than one day
38 for each date the employee specifically applied for leave.

1 **Sec. 8.** RCW 49.78.020 and 2009 c 521 s 135 are each amended to
2 read as follows:

3 Unless the context clearly requires otherwise, the definitions in
4 this section apply throughout this chapter.

5 (1) "Child" means a biological, adopted, or foster child, a
6 stepchild, a legal ward, or a child of a person standing in loco
7 parentis, who is: (a) Under eighteen years of age; or (b) eighteen
8 years of age or older and incapable of self-care because of a mental
9 or physical disability.

10 (2) "Department" means the department of labor and industries.

11 (3) "Director" means the director of the department.

12 (4)(a) "Employee" means a person who has been employed: (i)(A)
13 For at least twelve months by the employer with respect to whom leave
14 is requested under RCW 49.78.220; and (~~(+ii+)~~) (B) for at least one
15 thousand two hundred fifty hours of service with the employer during
16 the previous twelve-month period; or

17 (ii) Is an employee of a railroad carrier and:

18 (A) Has been assigned to and worked on a guaranteed extra call
19 board for at least the twelve months immediately preceding the date
20 on which leave will commence and has worked or been paid for:

21 (I) Not less than sixty percent of the applicable total monthly
22 guarantee, or the equivalent, during the twelve-month period; and

23 (II) Not less than five hundred four hours (not counting personal
24 commute time or time spent on vacation leave, sick leave, personal
25 leave, or medical leave) during the twelve-month period, for or by
26 that employer; or

27 (B) If the employee has not been assigned to and worked on a
28 guaranteed extra call board for at least twelve consecutive months
29 preceding, the employee has worked not less than five hundred four
30 hours (not counting personal commute time or time spent on vacation
31 leave, sick leave, personal leave, or medical leave) during the
32 preceding twelve months of time that the employee was actively
33 working for or by that employer.

34 (b) "Employee" does not mean a person who is employed at a
35 worksite at which the employer as defined in (a) of this subsection
36 employs less than fifty employees if the total number of employees
37 employed by that employer within seventy-five miles of that worksite
38 is less than fifty.

39 (c) "Applicable monthly guarantee" means:

1 (i) For an employee described in (a)(ii)(A) of this subsection
2 other than an employee on reserve status, the minimum number of hours
3 for which an employer has agreed to compensate such employee for any
4 given month; and

5 (ii) For an employee described in (a)(ii)(A) of this subsection
6 who is on reserve status, the number of hours for which an employer
7 has agreed to pay such employee on reserve status for any given
8 month, as established in the applicable collective bargaining
9 agreement or, if none exists, in the employer's policies.

10 (5) "Employer" means: (a) Any person, firm, corporation,
11 partnership, business trust, legal representative, or other business
12 entity which engages in any business, industry, profession, or
13 activity in this state and includes any unit of local government
14 including, but not limited to, a county, city, town, municipal
15 corporation, quasi-municipal corporation, or political subdivision,
16 which employs fifty or more employees for each working day during
17 each of twenty or more calendar workweeks in the current or preceding
18 calendar year; (b) the state, state institutions, and state agencies;
19 and (c) any unit of local government including, but not limited to, a
20 county, city, town, municipal corporation, quasi-municipal
21 corporation, or political subdivision.

22 (6) "Employment benefits" means all benefits provided or made
23 available to employees by an employer, including group life
24 insurance, health insurance, disability insurance, sick leave, annual
25 leave, educational benefits, and pensions except benefits that are
26 provided by a practice or written policy of an employer or through an
27 employee benefit plan as defined in 29 U.S.C. Sec. 1002(3).

28 (7) "Family member" means a child, parent, spouse, or state
29 registered domestic partner of an employee.

30 (8) "Health care provider" means: (a) A person licensed as a
31 physician under chapter 18.71 RCW or an osteopathic physician and
32 surgeon under chapter 18.57 RCW; (b) a person licensed as an advanced
33 registered nurse practitioner under chapter 18.79 RCW; or (c) any
34 other person determined by the director to be capable of providing
35 health care services.

36 (9) "Intermittent leave" is leave taken in separate blocks of
37 time due to a single qualifying reason.

38 (10) "Leave for a family member's serious health condition" means
39 leave as described in RCW 49.78.220(1)(c).

1 (11) "Leave for the birth or placement of a child" means leave as
2 described in RCW 49.78.220(1) (a) or (b).

3 (12) "Leave for the employee's serious health condition" means
4 leave as described in RCW 49.78.220(1)(d).

5 (13) "Parent" means the biological or adoptive parent of an
6 employee or an individual who stood in loco parentis to an employee
7 when the employee was a child.

8 (14) "Period of incapacity" means an inability to work, attend
9 school, or perform other regular daily activities because of the
10 serious health condition, treatment of that condition or recovery
11 from it, or subsequent treatment in connection with such inpatient
12 care.

13 (15) "Railroad carrier" means any employer subject to the
14 jurisdiction of the surface transportation board under 49 U.S.C. Sec.
15 7, as it exists on the effective date of this section.

16 (16) "Reduced leave schedule" means a leave schedule that reduces
17 the usual number of hours per workweek, or hours per workday, of an
18 employee.

19 ((+16+)) (17)(a) "Serious health condition" means an illness,
20 injury, impairment, or physical or mental condition that involves:

21 (i) Inpatient care in a hospital, hospice, or residential medical
22 care facility, including any period of incapacity; or

23 (ii) Continuing treatment by a health care provider. A serious
24 health condition involving continuing treatment by a health care
25 provider includes any one or more of the following:

26 (A) A period of incapacity of more than three consecutive
27 calendar days, and any subsequent treatment or period of incapacity
28 relating to the same condition, that also involves:

29 (I) Treatment two or more times by a health care provider, by a
30 nurse or physician's assistant under direct supervision of a health
31 care provider, or by a provider of health care services under orders
32 of, or on referral by, a health care provider; or

33 (II) Treatment by a health care provider on at least one occasion
34 which results in a regimen of continuing treatment under the
35 supervision of the health care provider;

36 (B) Any period of incapacity due to pregnancy, or for prenatal
37 care;

38 (C) Any period of incapacity or treatment for such incapacity due
39 to a chronic serious health condition. A chronic serious health
40 condition is one which:

1 (I) Requires periodic visits for treatment by a health care
2 provider, or by a nurse or physician's assistant under direct
3 supervision of a health care provider;

4 (II) Continues over an extended period of time, including
5 recurring episodes of a single underlying condition; and

6 (III) May cause episodic rather than a continuing period of
7 incapacity;

8 (D) A period of incapacity which is permanent or long-term due to
9 a condition for which treatment may not be effective. The employee or
10 family member must be under the continuing supervision of, but need
11 not be receiving active treatment by, a health care provider; or

12 (E) Any period of absence to receive multiple treatments,
13 including any period of recovery from the treatments, by a health
14 care provider or by a provider of health care services under orders
15 of, or on referral by, a health care provider, either for restorative
16 surgery after an accident or other injury, or for a condition that
17 would likely result in a period of incapacity of more than three
18 consecutive calendar days in the absence of medical intervention or
19 treatment, such as cancer, severe arthritis, or kidney disease.

20 (b) Treatment for purposes of (a) of this subsection includes,
21 but is not limited to, examinations to determine if a serious health
22 condition exists and evaluations of the condition. Treatment does not
23 include routine physical examinations, eye examinations, or dental
24 examinations. Under (a)(ii)(A)(II) of this subsection, a regimen of
25 continuing treatment includes, but is not limited to, a course of
26 prescription medication or therapy requiring special equipment to
27 resolve or alleviate the health condition. A regimen of continuing
28 treatment that includes taking over-the-counter medications, such as
29 aspirin, antihistamines, or salves, or bed-rest, drinking fluids,
30 exercise, and other similar activities that can be initiated without
31 a visit to a health care provider, is not, by itself, sufficient to
32 constitute a regimen of continuing treatment for purposes of this
33 chapter.

34 (c) Conditions for which cosmetic treatments are administered are
35 not "serious health conditions" unless inpatient hospital care is
36 required or unless complications develop. Unless complications arise,
37 the common cold, the flu, ear aches, upset stomach, minor ulcers,
38 headaches other than migraine, routine dental or orthodontia
39 problems, and periodontal disease are examples of conditions that do
40 not meet the definition of a "serious health condition" and do not

1 qualify for leave under this chapter. Restorative dental or plastic
2 surgery after an injury or removal of cancerous growths are serious
3 health conditions provided all the other conditions of this section
4 are met. Mental illness resulting from stress or allergies may be
5 serious health conditions provided all the other conditions of this
6 section are met.

7 (d) Substance abuse may be a serious health condition if the
8 conditions of this section are met. However, leave may only be taken
9 for treatment for substance abuse by a health care provider or by a
10 provider of health care services upon referral by a health care
11 provider. Absence from work because of the employee's use of the
12 substance, rather than for treatment, does not qualify for leave
13 under this chapter.

14 (e) Absences attributable to incapacity under (a)(ii)(B) or (C)
15 of this subsection qualify for leave under this chapter even though
16 the employee or the immediate family member does not receive
17 treatment from a health care provider during the absence, and even if
18 the absence does not last more than three days.

19 (~~(17)~~) (18) "Spouse" means a husband or wife, as the case may
20 be, or state registered domestic partner.

21 **Sec. 9.** RCW 49.78.270 and 2006 c 59 s 8 are each amended to read
22 as follows:

23 (1) An employer may require that a request for leave for a family
24 member's serious health condition or the employee's serious health
25 condition be supported by a certification issued by the health care
26 provider of the employee or of the family member, as appropriate. The
27 employee must provide, in a timely manner, a copy of the
28 certification to the employer.

29 (2) Certification provided under subsection (1) of this section
30 is sufficient if it states:

- 31 (a) The date on which the serious health condition commenced;
- 32 (b) The probable duration of the condition;
- 33 (c) The appropriate medical facts within the knowledge of the
34 health care provider regarding the condition;

35 (d)(i) For purposes of leave for a family member's serious health
36 condition, a statement that the employee is needed to care for the
37 family member and an estimate of the amount of time that such
38 employee is needed to care for the family member; and

1 (ii) For purposes of leave for the employee's serious health
2 condition, a statement that the employee is unable to perform the
3 functions of the position of the employee;

4 (e) In the case of certification for intermittent leave, or leave
5 on a reduced leave schedule, for planned medical treatment, the dates
6 on which the treatment is expected to be given and the duration of
7 the treatment;

8 (f) In the case of certification for intermittent leave, or leave
9 on a reduced leave schedule, for the employee's serious health
10 condition, a statement of the medical necessity for the intermittent
11 leave or leave on a reduced leave schedule, and the expected duration
12 of the intermittent leave or reduced leave schedule; and

13 (g) In the case of certification for intermittent leave, or leave
14 on a reduced leave schedule, for a family member's serious health
15 condition, a statement that the employee's intermittent leave or
16 leave on a reduced leave schedule is necessary for the care of the
17 family member who has a serious health condition, or will assist in
18 their recovery, and the expected duration and schedule of the
19 intermittent leave or reduced leave schedule.

20 (3) If the employer has reason to doubt the validity of the
21 certification provided under subsection (1) of this section for leave
22 for a family member's serious health condition or the employee's
23 serious health condition, the employer may require, at the expense of
24 the employer, that the employee obtain the opinion of a second health
25 care provider designated or approved by the employer concerning any
26 information certified under subsection (2) of this section for the
27 leave. The second health care provider may not be employed on a
28 regular basis by the employer.

29 (4) If the second opinion described in subsection (3) of this
30 section differs from the opinion in the original certification
31 provided under subsection (1) of this section, the employer may
32 require, at the expense of the employer, that the employee obtain the
33 opinion of a third health care provider designated or approved
34 jointly by the employer and the employee concerning the information
35 certified under subsection (2) of this section. The opinion of the
36 third health care provider concerning the information certified under
37 subsection (2) of this section is considered to be final and is
38 binding on the employer and the employee.

39 (5) The employer may require that the employee obtain subsequent
40 recertifications on a reasonable basis.

1 (6) In adopting rules to implement this section, the department
2 shall adopt rules applicable to railroad carriers that at least
3 address the following matters:

4 (a) What constitutes complete and sufficient certification from a
5 medical provider, such that no additional details may be requested;
6 and

7 (b) Limits on employer requests for recertification after
8 approval has previously been granted for that year.

9 NEW SECTION. Sec. 10. Sections 1 through 6 of this act are each
10 added to chapter 81.40 RCW.

11 NEW SECTION. Sec. 11. This act shall be known and cited as the
12 safe leave act for Washington railroad workers.

13 NEW SECTION. Sec. 12. Sections 1 through 6 of this act are
14 necessary for the immediate preservation of the public peace, health,
15 or safety, or support of the state government and its existing public
16 institutions, and take effect immediately.

17 NEW SECTION. Sec. 13. If any part of this act is found to be in
18 conflict with federal requirements that are a prescribed condition to
19 the allocation of federal funds to the state, the conflicting part of
20 this act is inoperative solely to the extent of the conflict and with
21 respect to the agencies directly affected, and this finding does not
22 affect the operation of the remainder of this act in its application
23 to the agencies concerned. Rules adopted under this act must meet
24 federal requirements that are a necessary condition to the receipt of
25 federal funds by the state.

26 NEW SECTION. Sec. 14. If any provision of this act or its
27 application to any person or circumstance is held invalid, the
28 remainder of the act or the application of the provision to other
29 persons or circumstances is not affected.

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