

HOUSE BILL REPORT

HB 1965

As Reported by House Committee On:
Labor & Workplace Standards
Appropriations

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: Representatives Hansen, Stonier, Sullivan, Riccelli, Lekanoff, Cody, Macri, Ormsby, Appleton, Fitzgibbon, Ortiz-Self and Pollet.

Brief History:

Committee Activity:

Labor & Workplace Standards: 2/18/19, 2/21/19 [DPS];
Appropriations: 2/27/19, 2/28/19 [DP2S(w/o sub LAWS)].

Brief Summary of Second Substitute Bill

- Authorizes a qui tam action for enforcement of various employment laws under which a relator on behalf of an agency may pursue relief the agency may pursue.
- Specifies the division of any penalties awarded between the agency and the relator.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 4 members: Representatives Sells, Chair; Chapman, Vice Chair; Gregerson and Ormsby.

Minority Report: Do not pass. Signed by 3 members: Representatives Mosbrucker, Ranking Minority Member; Chandler, Assistant Ranking Minority Member; Hoff.

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.

Background:

Multiple state laws provide protections for employees and contain various mechanisms to enforce the protections. Administrative remedies include civil penalties, recovery of back wages, and other remedies.

Wages.

Wage laws include the Minimum Wage Act and the laws relating to prevailing wage. The Wage Payment Act (WPA) authorizes an employee to file a wage complaint with the Department of Labor and Industries (L&I) regarding a failure to pay minimum wage or overtime, a failure to pay contracted for wages, and other wage claims. The L&I may obtain wages and interest for an employee and may order the employer to pay a civil penalty if the violation was willful. Under prevailing wage laws, the L&I may also obtain wages and assess a civil penalty for a failure to pay prevailing wages. Other wage laws include provisions on health care facility employee overtime and seasonal labor provisions.

Safety.

The Washington Industrial Safety and Health Act (WISHA) authorizes, and in some cases requires, a civil penalty be imposed on an employer for violation of safety and health standards. Under the WISHA, an employer may request a consultation during which time no penalties may be imposed. Other laws specific to certain industries, such as late-night retail establishments and health care settings, are enforced under the WISHA. Child labor laws allow minors to perform only certain duties and require a business hiring minors to have a minor work permit. The L&I may impose a penalty and revoke the work permit for a violation.

Leave.

Leave laws include paid sick leave and military family leave. The L&I may assess penalties for violations of these laws and may also order a reinstatement of hours or compensation under paid sick leave.

Discrimination.

If an employer discriminates against an employee based on a protected-class status, the Washington State Human Rights Commission may order back pay, hiring, reinstatement, and other remedies.

Other.

The Industrial Welfare Act contains a number of standards, such as the Family Care Act, which allows employees to use paid time off to care for family members. It is also the authority for the L&I's rules on meals and rest breaks. Other employment laws include regulation of farm labor contractors and laws protecting health care employee whistleblowers.

A medical provider may be subject to a peer review process. In addition, a hospital quality improvement committee has statutory authority to review the conduct of health care providers.

Medicaid Fraud False Claims Act.

The Medicaid Fraud False Claims Act (MFFCA) authorizes a person, the relator, to bring an action, known as a qui tam action, to seek a civil penalty for medical fraud. The relator files a complaint in superior court in camera and serves a copy of the complaint on the Attorney General (AG). The AG has 60 days, or longer if it requests, to decide whether to intervene. The relator receives a percentage of the penalty, with the percentage depending on whether the AG intervened and other factors, and attorney's fees and costs.

Summary of Substitute Bill:

The Worker Protection Act is established, under which a qui tam action is authorized for violations of employment laws.

Qui Tam Action Authorized.

Any natural person, corporation, association, or other legal entity, or a local government of the state (the relator) may bring a qui tam action in court for any relief the specified state agency (agency) may seek, including penalties, equitable relief, and any relief specified in rule. The action may allege multiple violations affecting multiple employees. The granting of relief is subject to the same conditions and limitations that apply to the agency, and the qui tam action must be commenced within the same statute of limitations applicable to the agency.

A qui tam action may be brought to enforce the following laws enforced by the L&I:

- the Minimum Wage Act;
- laws relating to the payment of wages, including the WPA, and wage rebate laws;
- prevailing wage;
- health care facility employee overtime;
- the WISHA, and other safety laws enforced under the WISHA, including standards for late night retail establishments and underground workers;
- leave laws, including military family leave and paid sick leave;
- laws relating to gender equal pay and advancement opportunities;
- laws relating to agricultural labor, seasonal labor, and farm labor contractors; and
- laws granting the authority to the L&I for meal and rest break rules and which contain other labor standards.

Also included are the Washington Law Against Discrimination and the health care employee whistleblower retaliation protection law, enforced by the Washington State Human Rights Commission.

If no civil penalty is provided for a particular violation, a civil penalty of \$500 is established, and a penalty must be awarded for each aggrieved employee for each two-week time period. A court may award a lesser penalty if based on the particular facts, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.

No qui tam action may be brought if the agency issued an order or otherwise resolved the complaint. Also, no qui tam action may be brought with respect to a license, variance or permit, or for specified violations, such as violations of posting or reporting requirements,

unless the requirement involves injury reporting or a safety or health violation. Also, with respect to the WISHA, no qui tam action may be brought with respect to any violation that is included within the scope of a consultative visit by L&I. An employer who received notice of a qui tam action may not enter into consultation to avoid a qui tam action.

Civil Rule 23 regarding class actions does not apply to a qui tam action. The right to bring an action may not be impaired by a private agreement. A qui tam action does not preclude an action by an individual, but no double recovery is permitted.

Qui Tam Process.

A relator must first give the appropriate agency written notice of the claim and notify the employer by certified mail. If the agency decides to investigate the claim, it must notify the relator and make a determination within 180 days. If the agency decides not to investigate, it must notify the relator within 60 days. The relator may commence the qui tam action if it receives notice that the agency does not intend to investigate or the agency does not make a determination within 180 days.

The statute of limitations is tolled from the date a relator files a notice or the date the agency commences an investigation. The agency may object to the state being represented by an attorney proposed by the relator by filing an objection with the AG. Under specified standards, the AG may order that the qui tam action not be filed or maintained by the particular attorney.

As part of its investigation, the agency may attempt to settle the violation. If the aggrieved employee receives not less than 100 percent of any wrongfully withheld wages or benefits, including 12 percent interest per year, within the 180-day investigation period, the settlement precludes further claims for the same wages or benefits.

Once the lawsuit has commenced, the agency may intervene as of right within 30 days of the filing and for good cause after the 30-day period. If the agency intervenes, the agency has primary litigation responsibility. If the agency proposes to settle or dismiss the action, it must give notice to the relator and the AG, and the court may allow the AG to intervene and object. The relator has the opportunity to be heard regarding any dismissal. The agency may dismiss or settle the action if the court determines that the dismissal or settlement is fair, adequate, reasonable, and in the public interest.

If the agency does not intervene and the relator proposes to settle, the settlement must be submitted to the agency and to the AG and the agency may present its position or intervene. The court may also allow the AG to intervene and object. The settlement must be approved under the same standard as a settlement proposed by the agency.

Distribution of Awards.

Penalty amounts are distributed as follows: (1) if the agency intervenes, 20 percent to the relator and 80 percent to the agency; and (2) if the agency does not intervene, 40 percent to the relator and 60 percent to the agency.

Any damages must be awarded to the agency for distribution to aggrieved employees. The agency may request the appointment of an administrative law judge or special master to assist in the distribution.

A relator who prevails is entitled to reasonable attorneys' fees and costs.

Retaliation.

Retaliation against an employee for filing a notice or testifying or exercising the employee's rights under the provisions is prohibited. A rebuttable presumption is established that the discharge of any employee engaged in conduct allowed under the provisions within 90 days of the conduct is retaliatory. The employer may rebut the presumption by clear and convincing evidence that it had a legitimate nondiscriminatory reason to discharge the employee, which was not motivated in any part by the allowed conduct. Remedies for retaliation are specified, including a qui tam action. The commencement of a peer review process or action by a quality improvement committee for a medical provider is not retaliation if there is sufficient cause for the process or action independently of the qui tam action.

Database.

The L&I must publish online a database of qui tam notices, which must include the names of the parties, the disposition, and other information the L&I determines by rule. The other agencies must provide information for the database to the L&I.

Other.

Accounts are created for receipt of penalties for the L&I, the Washington State Human Rights Commission, and the Department of Health. Expenditures from the accounts are for education and enforcement regarding specified laws.

Substitute Bill Compared to Original Bill:

The substitute bill:

- gives agencies additional time to decide whether to investigate and also to make a determination;
- adds the provisions regarding health care providers and retaliation;
- adds the requirement that the relator notify the employer;
- eliminates the filing fee;
- removes payroll filing or reporting requirements from violations for which a qui tam action may be brought, a specific reference to penalty amounts as rules that apply to the granting of relief in a qui tam action are added; and
- removes the reference to incentivizing persons in the intent section.

Appropriation: None.

Fiscal Note: Requested on February 7, 2019.

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

Staff Summary of Public Testimony:

(In support) This bill does not add any new rights but it makes it easier for workers to enforce their rights. Private enforcement is limited by arbitration requirements and workers are restricted from acting collectively. Workers are depending on the administrative remedy but the L&I only has a limited number of investigators, and it is too expensive to pursue individual claims in court. The bill provides a real-world mechanism which will help those afraid to come forward and provide a remedy in state law for retaliation for union activity. Employers have an unfair advantage. Qui tam is a common action found in the Sherman Antitrust Act and the MFFCA, and significant taxpayer dollars are recovered. The bill protects good employers and benefits the economy.

(Opposed) This bill is unnecessary because remedies are already available. There was no negotiation, which undermines the legislative process. There could be significant abuse and frivolous claims. California had to scale back because of abuse. Qui tam is not common and is powerful. The bill has many differences from the MFFCA, including that the MFFCA action must be based primarily on other than publicly available information. The retaliation section could shield doctors from peer review.

Persons Testifying: (In support) Representative Hansen, prime sponsor; Rachel Lauter, Working Washington; Toby Marshall, Terrell Marshal Law Group; and Lindsey Grad, Service Employees International Union, Healthcare 1199 Northwest.

(Opposed) Bob Battles, Association of Washington Business; Cliff Webster, Liability Reform Coalition; and Lisa Thatcher, Washington State Hospital Association.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

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 & Workplace Standards. Signed by 17 members: Representatives Ormsby, Chair; Bergquist, 2nd Vice Chair; Robinson, 1st Vice Chair; Cody, Dolan, Fitzgibbon, Hansen, Hudgins, Jinkins, Macri, Pollet, Ryu, Senn, Stanford, Sullivan, Tarleton and Tharinger.

Minority Report: Do not pass. Signed by 13 members: Representatives Stokesbary, Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Rude, Assistant Ranking Minority Member; Caldier, Chandler, Hoff, Kraft, Mosbrucker, Pettigrew, Springer, Steele, Sutherland and Ybarra.

Minority Report: Without recommendation. Signed by 1 member: Representative Dye.

Staff: Jessica Van Horne (786-7288).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Labor & Workplace Standards:

The second substitute bill specifies that an employee of the entity alleged to have violated a law that may be enforced through a qui tam action may designate in writing a representative organization to initiate a qui tam action on that person's behalf. The organization must be one that regularly assists in the enforcement of one or more of the laws that may be enforced by a qui tam action. References to the Department of Health (Department), including provisions establishing an account for penalty revenues received by the Department, are removed. A null and void clause is added.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available. New fiscal note requested on February 25, 2019.

Effective Date of Second Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed. However, the bill is null and void unless funded in the omnibus appropriations act.

Staff Summary of Public Testimony:

(In support) Current enforcement mechanisms for workplace standards are not strong enough. The Human Rights Commission currently does not have enough staff to enforce their own laws, which demonstrates why this bill is necessary. The bill outlines legal procedures that are well established and successful in California and at the federal level. The concepts in the bill have bipartisan support at the federal level. The fiscal note does not reflect what the state will recover. For example, the Washington Medicaid Fraud Unit annually recovers millions of dollars. The bill will benefit workers, businesses, and the public.

(Opposed) This bill does not provide new protections, but it does add costs. All referenced statutes already have enforcement provisions that are the result of careful negotiations. There is no data showing a need for the bill. The bill will create a professional plaintiffs class, where individuals will bring these types of actions even if they are frivolous. The relators are not required to be a party to the alleged harmful activities. States like California have not seen success, but rather abuse of the process. The comparison to the Medicaid Fraud Unit is not accurate, as in those cases the state is the entity that has been wronged, while the bill relates to issues between private parties. The recovery of attorney's fees is one-sided, as only plaintiffs, and not employers, can recover fees if they bring a successful action.

Persons Testifying: (In support) Lindsey Grad; and Larry Shannon, Washington State Trial Lawyers Association.

(Opposed) Bob Battles, Association of Washington Business; Cliff Webster, Liability Reform Coalition; and Lisa Thatcher, Washington State Hospital Association.

Persons Signed In To Testify But Not Testifying: None.