

HOUSE BILL REPORT

ESSB 5115

As Reported by House Committee On:
Labor & Workplace Standards

Title: An act relating to establishing health emergency labor standards.

Brief Description: Establishing health emergency labor standards.

Sponsors: Senate Committee on Labor, Commerce & Tribal Affairs (originally sponsored by Senators Keiser, Lias, Conway, Kuderer, Lovelett, Nguyen, Salomon, Stanford and Wilson, C.).

Brief History:

Committee Activity:

Labor & Workplace Standards: 3/12/21, 3/24/21 [DPA].

**Brief Summary of Engrossed Substitute Bill
(As Amended By Committee)**

- Creates an occupational disease presumption, for the purposes of workers' compensation, for frontline employees during a public health emergency.
- Requires certain employers to notify the Department of Labor and Industries when 10 or more employees have tested positive for the infectious disease during a public health emergency.
- Requires employers to provide written notice to employees of potential exposure to the infectious disease during a public health emergency.
- Prohibits discrimination against high-risk employees who seek accommodations or use leave options.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: Do pass as amended. Signed by 6 members: Representatives Sells,

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.

Chair; Berry, Vice Chair; Hoff, Ranking Minority Member; Bronoske, Harris and Ortiz-Self.

Minority Report: Without recommendation. Signed by 1 member: Representative Mosbrucker, Assistant Ranking Minority Member.

Staff: Trudes Tango (786-7384).

Background:

Workers' Compensation.

Workers who are injured in the course of employment or who are affected by an occupational disease are entitled to workers' compensation benefits, which may include medical, temporary time-loss, and other benefits. Regarding time-loss benefits, the first three days are not paid unless the worker is unable to return to work for 14 consecutive days.

To prove an occupational disease, the worker must show that the disease arose naturally and proximately out of employment. For certain occupations, such as firefighters, there is a presumption that certain medical conditions are occupational diseases.

The Department of Labor and Industries (Department) administers the state's workers' compensation system. Regarding COVID-19, the Department considers specific criteria regarding exposure when determining, on a case-by-case basis, whether a claim will be allowed. In general, a claim may be allowed for treatment of COVID-19 when work-related activity has resulted in probable exposure to the virus and certain criteria are met. The worker's occupation must have a greater likelihood of contracting the disease because of the job (such as first responders or health care workers). There must also be a documented or probable work-related exposure and an employee-employer relationship.

Washington Industrial Safety and Health Act.

Under the Washington Industrial Safety and Health Act (WISHA), administered by the Department, an employer must provide a workplace free from recognized hazards.

Summary of Amended Bill:

Occupational Disease Presumption For Frontline Employees.

For frontline employees covered under workers' compensation, a presumption is established that any infectious or contagious disease transmitted through respiratory droplets or aerosols, or through contact with contaminated surfaces and are subject to a public health emergency, are occupational diseases during a public health emergency, for the purposes of workers' compensation. The employee must provide verification, as required by Department rule, that the employee contracted the infectious disease.

The presumption may be rebutted by a preponderance of the evidence that:

- the exposure occurred from other employment or nonemployment activities; or
- the employee was working from home, was on leave, or a combination of both, for the period of quarantine immediately prior to the employee's injury, occupational disease, or period of incapacity resulting from exposure to the disease.

The provision not allowing time-loss benefits for the first three days does not apply, except that no benefits will be paid for the first day on which the occupational disease was contracted. The day on which the disease was contracted is the sooner of: the date the worker first missed work due to symptoms; the date the worker was quarantined; or the date the worker received a positive test result.

Definition of Frontline Employee.

Frontline employees include the following employees:

- first responders, including law enforcement officers, firefighters, emergency medical service providers, paramedics, and ambulance drivers;
- employees performing food processing, food manufacturing, food distribution, farm, and meat packing work;
- maintenance, janitorial, and food service workers at any facility treating patients diagnosed with the infectious or contagious disease that is the subject of the public health emergency;
- drivers and operators employed by a transit agency or any public entity authorized to provide mass transportation services to the general public;
- employees working at a child care facility licensed by the Department of Children, Youth, and Families, if the employee has in-person interaction with children or the general public as part of their job duties;
- employees of a retail store that remains open during the public health emergency, if the employee has in-person interaction with the general public as part of their job duties or has in-person interaction with other employees;
- employees of hotels, motels, or other transient accommodations that remain open to the public during the public health emergency, if the employee has in-person interaction with the public as part of their job duties or has in-person interaction with other employees;
- employees of restaurants, if the employee has in-person interaction with the public as part of their job duties or works in the kitchen and has in-person interaction with other employees;
- certified home care aides and home health aides that primarily work in the home of the individual receiving care;
- corrections officers and correctional support employees working at a correctional institution;
- educational employees, including classroom teachers, paraeducators, principals, librarians, school bus drivers, and other educational support staff, of any school district, or a contractor of a school district, that are required to be physically present

- at a school or on school grounds where classes are being taught in person, in a transportation vehicle necessary for school operations, or in the home of a student as part of their job duties, if the employee has in-person interaction with students, family members of students, or other employees as part of their job duties;
- employees of institutions of higher education that are required to be physically present on campus when classes are being taught in person, if the employee has in-person interaction with students or the public as part of their job duties; and
 - employees of public libraries that remain open to the public during the emergency, if the employee has in-person interaction with the public as part of their job duties or has in-person interaction with other employees.

Public health emergency means a declaration or order concerning any infectious or contagious diseases that is issued by: (1) the President of the United States declaring a national or regional emergency covering every county of the state; or (2) the Governor of Washington declaring a state of emergency.

Costs and Fees.

Costs of workers' compensation payments must not affect the experience rating of employers insured by the state fund. For self-insured employers, when calculating assessments owed to the Department, self-insured employers and self-insured hospital groups may deduct the cost of payments made from the total of all claim costs reported.

When a determination involving the presumption is appealed to the Board of Industrial Insurance Appeals (Board) or to a court, and the final Board decision or court order allows the claim of benefits, the Board or the court must order the opposing party to pay all reasonable costs of the appeal, including attorneys' and witness fees, to the worker. When reasonable costs of appeal must be paid by the Department in a state fund case, the costs must be paid from the Accident Fund and charged to the costs of the claim.

Employer's Reporting Requirements to the Department.

During a public health emergency, an employer with more than 50 employees at a workplace or worksite must submit a report to the Department within 24 hours of confirming that 10 or more of its employees at the workplace or worksite in the state have tested positive for the infectious disease that is the subject of the emergency. Reports must be in a form prescribed by the Department and may not include any employee names or personal identifying information.

The Department may use reports to identify potential clusters of infectious disease and investigate workplaces for violations. During a public health emergency, the name, electronic mail and residential addresses, license plate number, and other personally identifiable information regarding Department employees are exempt from public disclosure to the extent that disclosure would violate their privacy rights or pose a risk to their personal safety.

Employer's Notice Requirements to Employees.

During a public health emergency, if an employer receives a "notice of potential exposure," the employer must, within one business day of potential exposure, provide written notice to all employees, the exclusive representative of employees, and the employers of subcontracted employees, who were on the premises at the same worksite as the exposed individual, informing them that they may have been exposed. The notice must be in a manner the employer normally uses to communicate employment-related information and must be in both English and the language understood by the majority of employees. The notice may not include the names or personal identifying information of employees.

"Notice of potential exposure" means the employer: (1) received notice from a public health official or medical provider that an employee was exposed to a person who tested positive, had a positive diagnosis, was subject to an order to isolate, or died of the infectious disease; or (2) received notice from an employee or employee's emergency contact, that the employee has tested positive, had a positive diagnosis, is subject to an order to isolate, or has died of the infectious disease; or (3) received notice through the employer's own testing protocol.

The notice requirement does not apply to employers that are health care facilities. For employees of health care facilities with known or suspected high-risk exposure, notice to the employee, and with the employee's authorization, to the union representative, by the facility must occur within 24 hours of confirmed exposure.

High-Risk Employees.

During a public health emergency, an employer may not discharge, replace, or in any manner discriminate against a "high-risk" employee because the employee: (1) sought accommodation that protects them from the risk of exposure to the infectious disease; or (2) if no accommodation was reasonable, used all available leave options, including leave without pay and unemployment insurance. An employee is "high-risk" if either: (1) due to age or an underlying health condition, the employee has a high risk of severe illness from the infectious disease; or (2) a medical provider has recommended the employee be removed from the workforce because of their risk of severe illness.

These provisions do not require an employee to disclose any medical condition or diagnosis to the employer.

For the purposes of employer reporting and the treatment of "high-risk" employees, the Department must consult with the Department of Health: (1) before issuing regulatory guidance, rules, directives, or orders for health care facilities; and (2) when investigating health care entities and issuing citations.

Amended Bill Compared to Engrossed Substitute Bill:

The striking amendment makes the following changes:

- removes employees of hospitals, health care facilities, nursing homes, and assisted living facilities from the bill;
- removes the provision expiring the bill upon the expiration of the Governor's proclamation related to COVID-19;
- provides that an employee is a "high-risk employee" if either: (1) the employee meets the definition of high-risk as defined by the Centers for Disease Control and Prevention; or (2) a medical provider has recommended the employee be removed from the workplace due to their high risk of severe illness (rather than requiring the employee to meet both conditions);
- specifies that if leave or similar benefits are paid to a frontline employee under a federal or state program for such employees during the public health emergency, time-loss benefits will not be paid to the employee for the same time period covered by the federal or state program;
- provides that a retrospective rating group may be liable for the costs of appeal, if the retrospective group is the opposing party; and
- removes the provision specifying that the costs of claims must be paid from the Accident Fund.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on March 24, 2021.

Effective Date of Amended Bill: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) For many workers, earning a living during the pandemic has meant risking their lives. This bill recognizes the hazards that frontline workers face. It is difficult to determine where an infection like COVID-19 was contracted and whether it was job-related. This bill gives these workers the benefit of the doubt and will allow them to have their medical expenses covered and a portion of their wages replaced. The presumption would be used in very narrow circumstances. The notice provisions in the bill are critical because these workers, once infected, end up exposing their families. The Department needs to receive actual information about exposures.

(Opposed) None.

(Other) This bill is a grand compromise. The preponderance of the evidence standard is the correct standard, rather than the clear and convincing standard in Engrossed Substitute Senate Bill 5190. Creating a presumption means shifting the burden of proof from the employee to the employer. The bill says costs will not be charged to employers, but those costs will be socialized. It is a matter of whether everyone pays for it or just some pay for

it. The Department is already allowing about 97 percent of claims from first responders, so the presumption in this bill is not necessary. The presumption standard should be consistent between the two bills. The bill specifies that costs will be paid out of the Accident Fund, but medical costs are not paid out of that fund.

Persons Testifying: (In support) Richard May; and Joe Kendo, Washington State Labor Council, American Federation of Labor and Congress of Industrial Organizations.

(Other) Tammy Fellin, Department of Labor and Industries; Robert Battles, Association of Washington Business; and Christine Brewer, Washington Self Insurers Association.

Persons Signed In To Testify But Not Testifying: None.