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**SUBSTITUTE HOUSE BILL 2944**

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**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)

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

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

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

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

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

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

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

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

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

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

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

(c) The employee, if requested in writing by the railroad carrier within ten days after the employee's return to work, provides the railroad carrier with documentation from a health care provider that the employee was incapable of working due to illness or injury of the employee or the employee's spouse or child during the employee's absence from work. The railroad carrier must grant the employee no fewer than thirty days to obtain and provide any requested documentation.

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

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

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

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

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

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

NEW SECTION. **Sec.**  A railroad carrier must provide data to the commission regarding the number of employees laying off for injury, illness, or fatigue and the length of layoff no later than January 31st of each year for the preceding year. No personally identifying information of employees may be submitted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) "Applicable monthly guarantee" means:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Conditions for which cosmetic treatments are administered are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, and periodontal disease are examples of conditions that do not meet the definition of a "serious health condition" and do not qualify for leave under this chapter. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this section are met. Mental illness resulting from stress or allergies may be serious health conditions provided all the other conditions of this section are met.

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

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

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

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

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

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

(a) The date on which the serious health condition commenced;

(b) The probable duration of the condition;

(c) The appropriate medical facts within the knowledge of the health care provider regarding the condition;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**--- END ---**