

SENATE BILL REPORT

SB 5528

As of January 30, 2018

Title: An act relating to the employment antiretaliation act.

Brief Description: Concerning the employee antiretaliation act.

Sponsors: Senators Hasegawa, Keiser, Conway and Kuderer.

Brief History:

Committee Activity: Labor & Commerce: 1/17/18.

Brief Summary of Bill

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

SENATE COMMITTEE ON LABOR & COMMERCE

Staff: Susan Jones (786-7404)

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 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 to the Department of Labor and Industries (L&I) that the MWA has been violated, or because the employee has taken or is about to take other specific actions related to the MWA.

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.

Summary of 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:

- informed another person or complained (or the employer so believes) to the employer, L&I, 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;
- instituted or is about to institute, or testified or is about to testify in, a proceeding, or has otherwise exercised certain rights—or the employer so believes;
- refused to participate in an illegal activity that would violate wage and hour law;
- sought information or informed others about rights under the particular law; and
- filed a complaint with L&I or brought suit where the employer 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 required or authorized, threatening to file a false police report or contact immigration authorities, withholding or threatening to destroy immigration documents, and other listed activities.

Administrative Enforcement. L&I may investigate complaints filed by an aggrieved individual or an interested party. If L&I determines a violation occurred, unless prohibited by federal law, L&I 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 L&I, 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 ten 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; however, the presumption of a violation if the employer takes adverse action within 90 days of specified activities does not apply.

The criminal violation for retaliation under the MWA is repealed.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This is a good bill. Retaliation is pervasive because there is a power imbalance in any employer-employee relationship. If an employee chooses to report a violation, there should be some sort of protection. This is an at-will state. Employees may join a union for protections. When workers step forward for pay that they have earned, they should be protected from retaliation. This is particularly important for an immigrant worker, who may not have a good grasp on the English language, does not know the worker's rights, or has an immigrant status that puts the worker at risk. Retaliation can have an enormous chilling effect on workers. In a survey we conducted, we found that nearly half of workers suffered or feared retaliation when they made claims. This bill institutes a rebuttable presumption. This is a common rule in retaliation law. It has been adopted by several states. The burden shifts to the employer.

CON: If there had been an opportunity for small businesses to be heard in the process, we would not be opposing the bill. There are several unanswered questions. The bill language is being inserted in a chapter with a number of exceptions to workers. We wonder about the loss of licensure, for example, with a hospital. What happens to the patients? There are some unexpected consequences. We are opposed to the dramatic change to the at-will

principal. This also reverses the presumption of innocence to the presumption of guilt. We believe this will lead to an extraordinary litigious society for years to come. The language will make it very difficult to comply. The law already protects workers from retaliation. This just creates a great jobs bill for lawyers. The 90-day presumption and the term "other communications" are very difficult. The penalties are usury in nature.

Persons Testifying: PRO: Senator Bob Hasegawa, Prime Sponsor; Joe Kendo, Washington State Labor Council, AFL-CIO; Rebecca Smith, National Employment Law Project; Andrea Schmitt, Columbia Legal Services.

CON: Bruce Beckett, Washington Retail Association; Bob Battles, Association of Washington Business; Patrick Connor, National Federation of Independent Business, Washington.

Persons Signed In To Testify But Not Testifying: No one.