

HOUSE BILL REPORT

ESSB 5065

As Reported by House Committee On:
Labor & Workplace Standards

Title: An act relating to safeguarding the public safety by protecting railroad workers.

Brief Description: Safeguarding the public safety by protecting railroad workers.

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

Brief History:

Committee Activity:

Labor & Workplace Standards: 3/23/21, 3/26/21 [DP].

Brief Summary of Engrossed Substitute Bill

- Establishes family, medical, and bereavement leave for railroad workers.
- Establishes civil penalties and damages for violations of requirements related to the leave provisions.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: Do pass. Signed by 4 members: Representatives Sells, Chair; Berry, Vice Chair; Bronoske and Ortiz-Self.

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

Staff: Lily Smith (786-7175).

Background:

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.

Sick Leave.

Federal.

Under the federal Railroad Unemployment Insurance Act (RUIA), qualified employees of railroad carriers are eligible for sickness benefits for a qualifying sickness after the fourth consecutive day. The RUIA preempts "sickness benefits" under a state sickness law.

State.

The state paid sick leave law applies to employees covered by the state's Minimum Wage Act (MWA), and is administered by the Department of Labor and Industries (L&I). Carriers, such as railroad carriers, subject to certain regulations of the federal Interstate Commerce Act, are exempt from the MWA.

Family and Medical Leave.

Federal.

The federal Family and Medical Leave Act (FMLA) allows eligible employees to take up to 12 weeks of job-protected unpaid leave in a 12-month period for the birth or placement of a child, or the serious health condition of the employee or the employee's family member. Generally, the FMLA applies to employees who work for a private employer with 50 or more employees or a public employer, and have worked for at least 12 months for the employer and for at least 1,250 hours for the employer during the previous 12 months. Upon return from leave, the employee is entitled to be returned to the same or an equivalent position.

An employer may require certification of a serious health condition. An employer may request a second opinion and a third opinion, under specified circumstances.

An employer may not interfere with the exercise of employee rights under the leave provisions. Retaliation for specified actions is prohibited. Damages, including liquidated damages, and a private right of action are available. Employees may pursue an action on behalf of other employees similarly situated.

State.

The state Paid Family and Medical Leave Program (PFML) provides paid family and medical leave to qualifying employees after working 820 hours in a qualifying period. The PFML benefits are provided: when an employee is bonding after the birth or placement of a child; because of an employee's or family member's serious health condition; or for a military exigency.

An employee returning from PFML leave is entitled to be restored to a same or equivalent job when: the employer has 50 or more employees; the employee has been with the employer for 12 months or more; and the employee has worked for the employer for at least 1,250 hours during the immediately preceding 12-month period.

An employer may not interfere with the exercise of employee rights under the leave provisions. Retaliation for specified actions is prohibited. Damages, including liquidated damages, and a private right of action are available. Employees may pursue an action on behalf of other employees similarly situated.

Other.

Federal.

The federal Department of Transportation's Surface Transportation Board (STB) is responsible for a variety of aspects of federal railroad regulatory oversight. The STB classifies types of railroads by annual carrier operating revenue:

- Class I – \$505 million or more;
- Class II – \$40 million or more; and
- Class III – less than \$40 million.

State.

The state Utilities and Transportation Commission administers a railroad safety program and enforces some laws relating to railroad employees, such as on crew size, shelters, apparel, and the costs of records or medical examinations.

Summary of Engrossed Substitute Bill:

Leave.

Family and Medical Leave.

An employee of a railroad carrier (employer) is entitled to a total of 12 workweeks of unpaid leave during any 12-month period for the birth of a child of the employee and to care for the child, because of the placement of the child with the employee for adoption or foster care, to care for a family member of the employee, if the family member has a serious health condition, or because of a serious health condition that makes the employee unable to perform the employee's job. Leave and job protection applies to employees who:

- worked for the employer from whom leave is requested for at least six months, and for at least 504 hours during the previous 12-month period;
- worked on a guaranteed extra call board for at least the 12 months preceding leave, worked and was paid for not less than 60 percent of the applicable total monthly guarantee, or the equivalent, and not less than 504 hours; or
- did not work on a guaranteed extra call board for the 12 months before the leave, but worked not less than 504 hours during the preceding 12 months that the employee was actively working for or by that employer.

An employer must allow their employees to take unpaid leave if the employee has completed three consecutive months of continuous employment by the carrier prior to the

absence, consecutive periods of leave do not exceed 15 days, the total number of authorized absences are less than 91 days, and the absence is authorized. Absences are authorized for specified health reasons; to allow for care of a family member with specified health conditions; and when the employee or their partner's place of business, or child's school or place of care has been closed due to an official public health order. A railroad carrier may not dismiss or otherwise engage in an adverse action due to leave taken under these provisions.

An employer may require certification from a health care provider for leaves related to a serious health condition, and may also require a second and third provider's opinion if the employer has reason to doubt the validity of the certification.

Employee absences are not subject to any type of carrier availability or attendance policy and are stated to be separate from PFML.

An employer must allow an employee to continue medical and dental insurance coverage during family or medical leave.

Bereavement Leave.

Employees may take up to seven days of unpaid leave for bereavement purposes, including arranging or attending funeral services and other matters related to the decedent's estate.

Prohibited Acts and Retaliation.

An employer may not interfere with the exercise of employee rights under the leave provisions. Retaliation for specified actions is prohibited.

Employer Notice Requirements.

An employer must post a notice of the provisions and information on filing a charge. Willful violations of this requirement may be subject to a civil penalty of up to \$1,000 for each offense.

Enforcement and Penalties.

The L&I must investigate employee complaints regarding noncompliance with the act, and either issue a citation and notice of assessment or a closure letter within 90 days after receiving the complaint.

The L&I may impose civil penalties as follows:

- for a Class I carrier, up to \$5,000 for the first infraction, up to \$25,000 for a second infraction within a three-year period, and up to \$100,000 for each subsequent infraction within the three-year period; or
- for a Class II or III carrier, up to \$1,000, \$5,000, and \$10,000 for first, second, or subsequent infractions within those periods.

The L&I may also order back pay and reinstatement, and may increase the penalties by rule

based on changing economic conditions.

An employer who interferes with the exercise of rights of, or retaliates against, an employee is liable for specified damages. Liquidated damages of up to \$5 million are permitted for certain violations. Equitable relief may also be granted. Employees have a private right of action to pursue this relief on behalf of themselves and other employees similarly situated.

Provisions relating to appeal of L&I orders and collection procedures are specified.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect on January 1, 2022.

Staff Summary of Public Testimony:

(In support) This bill is needed to help railroad workers avoid retaliation when they take leave. Railroads use various practices to diminish available leave, make it difficult to take, or discipline employees that do take it. This can have safety consequences that extend through the areas that trains move through. Residents should be able to have confidence that railroad workers are well rested and operating safely. Since this bill does not involve paid leave or benefits, there is no preemption issue. Safety is not negotiable.

(Opposed) Railroad workers already have federal sickness benefits, and some also have supplemental benefits through their collective bargaining agreements. Railroads have fully covered COVID-19-related sicknesses and quarantines. The bill appears to advantage operating employees at the disadvantage of nonoperating employees. It would increase costs, reduce reliability, and impact rail traffic timeliness in multiple important industries.

(Other) There remains concern about the bill despite its improvement. Clarity of certain definitions would be helpful. Class III railroads should be exempt. These short line railroads are important for local ports, and are very small, with marginal budgets. Many of these railroads already subscribe to PFML.

Persons Testifying: (In support) Mike Elliott; Luke Edington, Herb Krohn, James Larkin, and Jeremy Ferguson, SMART-Transportation Division; Shahrain Allen, Brotherhood of Locomotive Engineers and Trainmen – Washington State Legislative Board; Rob Holton, Steve Snyder, Candace Simmons, David Beech, and Joshua Andersen, Brotherhood of Locomotive Engineers and Trainmen.

(Opposed) Aaron Hunt and Rod Doerr, Union Pacific Railroad; Mike Ennis, Association of Washington Business; and Johan Hellman, Burlington Northern Santa Fe Railway.

(Other) Chris Herman, Washington Public Ports Association.

Persons Signed In To Testify But Not Testifying: None.