

2SHB 1762 - S AMD 464

By Senator Keiser

ADOPTED 04/22/2023

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** The definitions in this section apply
4 throughout this chapter unless the context clearly requires
5 otherwise.

6 (1) "Affiliate" means a person that directly or indirectly,
7 through one or more intermediaries, controls, is controlled by, or is
8 under common control with another person. For purposes of this
9 subsection, "control" means the possession, directly or indirectly,
10 of more than 50 percent of the power to direct or cause the direction
11 of the management and policies of a person, whether through the
12 ownership of voting shares, by contract, or otherwise.

13 (2) "Aggregated data" means information that an employer has
14 combined or collected in summary or other form such that the data
15 cannot be identified with any individual.

16 (3) "Defined time period" means any unit of time measurement
17 equal to or less than the duration of an employee's shift, and
18 includes hours, minutes, and seconds and any fraction thereof.

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

20 (5) "Designated employee representative" means any employee
21 representative, including but not limited to an authorized employee
22 representative that has a collective bargaining relationship with the
23 employer.

24 (6) "Director" means the director of the department of labor and
25 industries or the director's designee.

26 (7) "Employee" means an employee who is not exempt under RCW
27 49.46.010(3)(c) and works at a warehouse distribution center.

28 (8)(a) "Employee work speed data" means information an employer
29 collects, stores, analyzes, or interprets relating to an individual
30 employee's performance of a quota including, but not limited to,
31 quantities of tasks performed, quantities of items or materials
32 handled or produced, rates or speeds of tasks performed, measurements

1 or metrics of employee performance in relation to a quota, and time
2 categorized as performing tasks or not performing tasks.

3 (b) Employee work speed data does not include qualitative
4 performance assessments, personnel records, or itemized wage
5 statements pursuant to department rules, except for any content of
6 those records that includes employee work speed data as defined in
7 this subsection.

8 (9) (a) "Employer" means a person who directly or indirectly, or
9 through an agent or any other person, including through the services
10 of a third-party employer, temporary services, or staffing agency,
11 independent contractor, or any similar entity, at any time, employs
12 or exercises control over the wages, hours, or working conditions of
13 100 or more employees at a single warehouse distribution center in
14 the state or 1,000 or more employees at one or more warehouse
15 distribution centers in the state.

16 (b) For the purposes of determining the number of employees
17 employed at a single warehouse distribution center or at one or more
18 warehouse distribution centers, all employees employed directly or
19 indirectly, or through an agency or any other person, and all
20 employees employed by an employer and its affiliates, must be
21 counted.

22 (c) For the purposes of determining responsible employers, all
23 agents or other persons, and affiliates must be deemed employers and
24 are jointly and severally responsible for compliance with this
25 chapter.

26 (10) "Person" means an individual, corporation, partnership,
27 limited partnership, limited liability partnership, limited liability
28 company, business trust, estate, trust, association, joint venture,
29 agency, instrumentality, or any other legal or commercial entity,
30 whether domestic or foreign.

31 (11) "Quota" means a work performance standard, whether required
32 or recommended, where: (a) An employee is assigned or required to
33 perform at a specified productivity speed, or perform a quantified
34 number of tasks, or to handle or produce a quantified amount of
35 material, within a defined time period and under which the employee
36 may suffer an adverse employment action if they fail to complete the
37 performance standard; or (b) an employee's actions are categorized
38 between time performing tasks and not performing tasks, if the
39 employee may suffer an adverse employment action if they fail to meet
40 the performance standard.

1 (12) "Warehouse distribution center" means an establishment
2 engaged in activities as defined by any of the following North
3 American industry classification system codes, however such
4 establishment is denominated:

5 (a) 493 for warehousing and storage, but does not include 493130
6 for farm product warehousing and storage;

7 (b) 423 for merchant wholesalers, durable goods;

8 (c) 424 for merchant wholesalers, nondurable goods; or

9 (d) 454110 for electronic shopping and mail-order houses.

10 NEW SECTION. **Sec. 2.** (1) An employer must provide to each
11 employee, upon hire, or within 30 days of the effective date of this
12 section, a written description of:

13 (a) Each quota to which the employee is subject, including the
14 quantified number of tasks to be performed or materials to be
15 produced or handled within a defined time period;

16 (b) Any potential adverse employment action that could result
17 from failure to meet each quota; and

18 (c) Any incentives or bonus programs associated with meeting or
19 exceeding each quota.

20 (2) Whenever there is a change to the quota that results in a
21 different quota than the most recent written description provided to
22 the employee, the employer must: (a) Notify the employee verbally or
23 in writing as soon as possible and before the employee is subject to
24 the new quota; and (b) provide the employee with an updated written
25 description of each quota to which the employee is subject within two
26 business days of the quota change.

27 (3) Whenever an employer takes an adverse action against an
28 employee in whole or in part for failure to meet a quota, the
29 employer must provide that employee with the applicable quota for the
30 employee and the personal work speed data for the employee that was
31 the basis for the adverse action.

32 (4) The written description must be understandable, in plain
33 language, and in the employee's preferred language. The department
34 may adopt rules regarding the format, plain language, and language
35 access requirements for the written description.

36 NEW SECTION. **Sec. 3.** (1) The time period considered in a quota,
37 including time designated as productive time or time on task must
38 include:

1 (a) Time for rest breaks and reasonable time to travel to
2 designated locations for rest breaks;

3 (b) Reasonable travel time to on-site designated meal break
4 locations. Meal breaks are not considered time on task or productive
5 time unless the employee is required by the employer to remain on
6 duty on the premises or at a prescribed worksite in the interest of
7 the employer;

8 (c) Time to perform any activity required by the employer in
9 order to do the work subject to any quota;

10 (d) Time to use the bathroom, including reasonable travel time;
11 and

12 (e) Time to take any actions necessary for the employee to
13 exercise the employee's right to a safe and healthful workplace
14 pursuant to chapter 49.17 RCW, including but not limited to time to
15 access tools or safety equipment necessary to perform the employee's
16 duties.

17 (2) Reasonable travel time must include consideration of the
18 architecture and geography of the facility and the location within
19 the facility that the employee is located at the time.

20 NEW SECTION. **Sec. 4.** (1) Except as provided in section 5 of
21 this act, a quota violates this chapter if the quota:

22 (a) Does not provide sufficient time as required under section
23 3(1) (a) through (c) of this act; or

24 (b) Prevents the performance of any activity required by the
25 employer for the employee to do the work subject to any quota.

26 (2) An employee is not required to meet a quota that violates
27 this section.

28 (3) An employer may not take adverse action against an employee
29 for failing to meet a quota that violates this section or that was
30 not disclosed to the employee as required under section 2 of this
31 act.

32 NEW SECTION. **Sec. 5.** (1) A quota violates chapter 49.17 RCW if
33 the quota:

34 (a) Does not provide sufficient time as required under section
35 3(1) (d) and (e) of this act;

36 (b) Prevents the performance of any activity related to
37 occupational safety and health required by the employer for the
38 employee to do the work subject to any quota; or

1 (c) Exposes an employee to occupational safety and health hazards
2 in violation of the requirements of chapter 49.17 RCW and the
3 applicable rules or regulations.

4 (2) An employee is not required to meet a quota that violates
5 this section.

6 (3) An employer may not take adverse action against an employee
7 for failing to meet a quota that violates this section.

8 (4) All provisions of section 8 of this act apply to any person
9 who complains to the employer, the director, or any local, state, or
10 federal governmental agency or official, related to a quota alleging
11 any violations of this section.

12 (5)(a) This section must be implemented and enforced, including
13 penalties, violations, citations, and other administrative
14 procedures, pursuant to chapter 49.17 RCW.

15 (b) An employer who fails to allow adequate inspection of records
16 in an inspection by the department within a reasonable time period
17 may not use such records in any appeal to challenge the correctness
18 of any citation and notice issued by the department.

19 NEW SECTION. **Sec. 6.** (1) An employer must establish, maintain,
20 and preserve contemporaneous, true, and accurate records of the
21 following:

22 (a) Each employee's own personal work speed data;

23 (b) The aggregated work speed data for similar employees at the
24 same warehouse distribution center; and

25 (c) The written descriptions of each quota the employee was
26 provided pursuant to section 2 of this act.

27 (2)(a) The required records must be maintained and preserved
28 throughout the duration of each employee's period of employment and
29 for the period required by this subsection.

30 (b) Except as required under (c) of this subsection, subsequent
31 to an employee's separation from the employer, records relating to
32 the six-month period prior to the date of the employee's separation
33 from the employer must be preserved for at least three years from the
34 date of the employee's separation.

35 (c) Where an employer has taken adverse action against an
36 employee in whole or in part for failure to meet a quota, the
37 employer must preserve the records relating to the basis for the
38 adverse action for at least three years from the date of the adverse
39 action.

1 (d) The employer must make records available to the director upon
2 request.

3 (3) Nothing in this section requires an employer to collect or
4 keep such records if the employer does not use quotas or monitor work
5 speed data.

6 (4) An employer who fails to allow adequate inspection of records
7 in an inspection by the department within a reasonable time period
8 may not use such records in any appeal to challenge the correctness
9 of any citation and notice issued by the department.

10 NEW SECTION. **Sec. 7.** (1) An employee has the right to request,
11 at any time, a written description of each quota to which the
12 employee is subject, a copy of the employee's own personal work speed
13 data for the prior six months, and a copy of the prior six months of
14 aggregated work speed data for similar employees at the same
15 warehouse distribution center.

16 (2) A former employee has the right to request, within three
17 years subsequent to the date of their separation from the employer, a
18 written description of the quota to which they were subject as of the
19 date of their separation, a copy of the employee's own personal work
20 speed data for the six months prior to their date of separation, and
21 a copy of aggregated work speed data for similar employees at the
22 same warehouse distribution center for the six months prior to their
23 date of separation.

24 (3) An employer must provide records requested under this section
25 at no cost to the employee or former employee.

26 (4) An employer must provide records requested under this section
27 as soon as practicable and subject to the following:

28 (a) Requested records of written descriptions of a quota must be
29 provided no later than two business days following the date of the
30 receipt of the request; and

31 (b) Requested personal work speed data and aggregated work speed
32 data must be provided no later than seven business days following the
33 date of the receipt of the request.

34 (5) Nothing in this section requires an employer to use quotas or
35 monitor work speed data. An employer that does not use quotas or
36 monitor work speed data has no obligation to provide records under
37 this section.

1 NEW SECTION. **Sec. 8.** (1) A person, including but not limited to
2 an employer, his or her agent, or person acting as or on behalf of a
3 hiring entity, or the officer or agent of any entity, business,
4 corporation, partnership, or limited liability company, may not
5 discharge or in any way retaliate, discriminate, or take adverse
6 action against an employee or former employee for exercising any
7 rights established in this chapter, or for being perceived as
8 exercising rights established in this chapter including, but not
9 limited to:

10 (a) Initiating a request for information about a quota or
11 personal work speed data pursuant to section 7 of this act; and

12 (b) Making a complaint to the employer, the director, or any
13 local, state, or federal governmental agency or official, related to
14 a quota that is allegedly in violation of this chapter or chapter
15 49.17 RCW.

16 (2) An employee or former employee need not explicitly refer to
17 this section or the rights established in this chapter to be
18 protected from an adverse action. The protection provided in this
19 section applies to former employees and to employees who mistakenly
20 but in good faith allege violations of this chapter.

21 (3) (a) If a person takes adverse action against an employee or
22 former employee within 90 days of the employee engaging or attempting
23 to engage in activities protected by this chapter, there is a
24 rebuttable presumption that the adverse action is a retaliatory
25 action in violation of this section.

26 (b) The presumption may be rebutted by a preponderance of the
27 evidence that: (i) The action was taken for other permissible
28 reasons; and (ii) the engaging or attempting to engage in activities
29 protected by this chapter was not a motivating factor in the adverse
30 action.

31 (4) Except as provided for in section 5 of this act, the
32 department must carry out and enforce the provisions of this section
33 and section 4(3) of this act pursuant to procedures established under
34 chapter 49.46 RCW and any applicable rules. The department may adopt
35 new rules to implement or enforce this subsection.

36 NEW SECTION. **Sec. 9.** (1) (a) An employee may file a complaint
37 with the department alleging a violation under this chapter or
38 applicable rules, except for violations and enforcement of sections 5
39 and 8 of this act. The department must investigate the complaint.

1 (b) The department may not investigate any such alleged violation
2 of rights that occurred more than three years before the date that
3 the employee filed the complaint.

4 (c) If an employee files a timely complaint with the department,
5 the department must investigate the complaint and issue either a
6 citation and notice of assessment or a determination of compliance
7 within 90 days after the date on which the department received the
8 complaint, unless the complaint is otherwise resolved. The department
9 may extend the period by providing advance written notice to the
10 employee and the employer setting forth good cause for an extension
11 of the period and specifying the duration of the extension.

12 (d) The department must send the citation and notice of
13 assessment or the determination of compliance to both the employer
14 and the employee by service of process or using a method by which the
15 mailing can be tracked or the delivery can be confirmed to their last
16 known addresses.

17 (2) If the department's investigation finds that the employee's
18 allegation cannot be substantiated, the department must issue a
19 determination of compliance to the employee and the employer
20 detailing such finding.

21 (3) The director may initiate an investigation without an
22 employee's complaint to ensure compliance with this chapter.

23 (4) The department may request an employer perform a self-audit
24 of any records relating to this act, which must be provided within a
25 reasonable time. Reasonable timelines will be specified in the self-
26 audit request. The department must determine reasonable time based on
27 the number of affected employees and the period of time covered by
28 the self-audit. The records examined by the employer in order to
29 perform the self-audit must be made available to the department upon
30 request.

31 (5) Upon the department's request, an employer must notify
32 affected employees in writing that the department is conducting an
33 investigation. The department may require the employer to include a
34 general description of each investigation as part of the
35 notification, including the allegations and whether the notified
36 employee may be affected. The employer may consult with the
37 department to provide the information for the description of the
38 notification or investigation.

39 (6) If the department determines that the employer has violated a
40 requirement of this chapter or any rule adopted under this chapter,

1 the department also may order the employer to pay the department a
2 civil penalty of not less than \$1,000. The first violation may not
3 exceed \$1,000. The department may, at any time, waive or reduce any
4 civil penalty assessed against an employer under this section if the
5 department determines that the employer has taken corrective action
6 to remedy a violation. The department must adopt rules creating a
7 schedule to enhance penalties, not to exceed \$10,000 per violation,
8 based on repeat violations by the employer. Civil penalties must be
9 collected by the department and deposited into the supplemental
10 pension fund established under RCW 51.44.033.

11 (7) Except as provided under subsection (1) of this section, an
12 employer who is found to have violated a requirement of this chapter
13 and the rules adopted under this chapter resulting in a rest or meal
14 period violation, must pay the employee one additional hour of pay at
15 the employee's regular rate of pay for each day there is a violation.

16 (8) Upon receiving a complaint, the department may request or
17 subpoena the records of the warehouse distribution center.

18 (9) For enforcement actions under this section, if any person
19 fails to pay an assessment under this chapter, or under any rule
20 under this chapter, after it has become a final and unappealable
21 order, or after the court has entered final judgment in favor of the
22 agency, the director may initiate collection procedures in accordance
23 with the collection procedures under RCW 49.48.086.

24 (10) If the department finds that a quota violates this act, the
25 department may order the employer to review and provide a corrected
26 written quota to the affected employee or employees within 15
27 calendar days and place a letter in the employee's personnel file to
28 acknowledge the correction. If the employer fails to do so, the
29 employer may be subject to the penalties under subsection (6) of this
30 section and associated rules.

31 (11) In addition to any enforcement authority provided in this
32 chapter or applicable rules, the department may enforce any violation
33 under this chapter or applicable rules, except for violations and
34 enforcement of section 5 of this act, by filing an action in the
35 superior court for the county in which the violation is alleged to
36 have occurred. If the department prevails, it is entitled to
37 reasonable attorneys' fees and costs, in the amount to be determined
38 by the court.

1 NEW SECTION. **Sec. 10.** (1) For enforcement actions under section
2 9 of this act, a person, firm, or corporation aggrieved by a citation
3 and notice of assessment or determination of compliance by the
4 department or any rules adopted under this chapter may appeal the
5 citation and notice of assessment or determination of compliance to
6 the director by filing a notice of appeal with the director within 15
7 calendar days of the department's issuance of the citation and notice
8 of assessment or determination of compliance. A citation and notice
9 of assessment or determination of compliance not appealed within 15
10 calendar days is final and binding, and not subject to further
11 appeal.

12 (2) A notice of appeal filed with the director under this section
13 stays the effectiveness of the citation and notice of assessment or
14 determination of compliance pending final review of the appeal by the
15 director as provided in chapter 34.05 RCW.

16 (3) Upon receipt of a notice of appeal, the director must assign
17 the hearing to an administrative law judge of the office of
18 administrative hearings to conduct the hearing and issue an initial
19 order. The hearing and review procedures must be conducted in
20 accordance with chapter 34.05 RCW, and the standard of review by the
21 administrative law judge of an appealed citation and notice of
22 assessment must be de novo. Any party who seeks to challenge an
23 initial order must file a petition for administrative review with the
24 director within 30 days after service of the initial order. The
25 director must conduct an administrative review in accordance with
26 chapter 34.05 RCW.

27 (4) The director must issue all final orders after appeal of the
28 initial order. The final order of the director is subject to judicial
29 review in accordance with chapter 34.05 RCW.

30 (5) Orders that are not appealed within the time period specified
31 in this section and chapter 34.05 RCW are final and binding, and not
32 subject to further appeal.

33 (6) An employer who fails to allow adequate inspection of records
34 in an investigation by the department under this chapter within a
35 reasonable time period may not use such records in any appeal under
36 this section to challenge the correctness of any determination by the
37 department of the penalty assessed.

38 NEW SECTION. **Sec. 11.** The department may adopt and implement
39 rules to carry out and enforce the provisions of this chapter.

1 NEW SECTION. **Sec. 12.** If any provision of this act or its
2 application to any person or circumstance is held invalid, the
3 remainder of the act or the application of the provision to other
4 persons or circumstances is not affected.

5 NEW SECTION. **Sec. 13.** Sections 1 through 12 of this act
6 constitute a new chapter in Title 49 RCW.

7 NEW SECTION. **Sec. 14.** This act takes effect July 1, 2024."

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ADOPTED 04/22/2023

8 On page 1, line 1 of the title, after "warehouses;" strike the
9 remainder of the title and insert "adding a new chapter to Title 49
10 RCW; prescribing penalties; and providing an effective date."

EFFECT: (1) Increases the number of employees at one or more warehouse distribution centers in the state, for the purposes of the definition of "employer," to 1,000 or more employees, instead of 500.

(2) Removes from the definition of "warehouse distribution center," NAICS codes 493130 (farm product warehousing and storage) and 492110 (couriers and express delivery services).

(3) Modifies the standard to "a preponderance of the evidence," instead of "clear and convincing evidence," to rebut the presumption of retaliation if adverse action is taken against an employee or former employee within 90 days of the employee taking certain actions.

(4) Modifies the provisions related to L&I action to: (a) change "closure letter" to "determination of compliance"; (b) allows L&I to request that the employer self-audit their records and make them available upon request; (c) allows L&I to require an employer to notify affected employees of an L&I investigation; (d) modifies the penalty provision to allow L&I to waive or reduce penalties if the employer takes corrective action; (e) requires L&I to adopt rules to create a schedule of penalties for repeat violators, not to exceed 10,000 per violation; (f) allows L&I to order an employer to provide a corrected quota to affected employees within 15 calendar days; (g) allows L&I to take court action to enforce violations; (h) changes the time period to appeal a citation and notice of compliance to 15 calendar days, instead of 30 days, and adds determination of compliance to the allowable appeals.

(5) Removes the provisions (a) allowing an employee, former employee, or designated employee representative to bring an action for injunctive relief and, in the case of retaliation, for damages,

and (b) allowing the attorney general to bring a civil action for certain violations.

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