

SENATE BILL REPORT

SB 5524

As Reported by Senate Committee On:
Labor & Commerce, February 16, 2023

Title: An act relating to industrial insurance self-insured employer and third-party administrator penalties and duties.

Brief Description: Concerning the duties of industrial insurance self-insured employers and third-party administrators.

Sponsors: Senators Van De Wege, Keiser, Lovick, Cleveland, Conway, Hasegawa and Holy.

Brief History:

Committee Activity: Labor & Commerce: 2/07/23, 2/16/23 [DPS, DNP, w/oRec].

Brief Summary of First Substitute Bill

- Creates a duty of good faith and fair dealing for self-insured municipal employers and their third party administrators to workers in the workers' compensation system.
- Requires investigations by the Department of Labor and Industries.
- Provides penalties for violations of the duty.
- Adds as a grounds for withdrawal of a self-insured's certification that a self-insured municipal employer has been found to have violated the self-insurer's duty of good faith and fair dealing three times within a three-year period.

SENATE COMMITTEE ON LABOR & COMMERCE

Majority Report: That Substitute Senate Bill No. 5524 be substituted therefor, and the substitute bill do pass.

Signed by Senators Keiser, Chair; Conway, Vice Chair; Saldaña, Vice Chair;

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.

MacEwen, Robinson and Stanford.

Minority Report: Do not pass.

Signed by Senators King, Ranking Member; Schoesler.

Minority Report: That it be referred without recommendation.

Signed by Senator Braun.

Staff: Susan Jones (786-7404)

Background: General Penalty for Violation of Workers' Compensation Laws and Rules.

Every person, firm or corporation who violates or fails to obey, observe or comply with any statutory provision of Industrial Insurance (workers' compensation) laws or Department of Labor and Industry (L&I) rules is subject to a penalty not to exceed \$1,000.

Penalty for Self-insurer Delaying or Refusing to Pay Benefits. Every time a self-insurer unreasonably delays or refuses to pay benefits, the self-insurer must pay a penalty not to exceed the greater of \$1,000 or 25 percent of the amount due for each underpayment made to the claimant. The penalty accrues for the benefit of the claimant and must be paid to the claimant.

When making the determination of the penalty amount, L&I must weigh at least the following factors: the amount of any payment delayed, employer communication of the basis for or calculation of the payment, history or past practice of underpayments by the employer, L&I orders directing the payment, and any required adjustments to the amount of the payment. The L&I director must issue an order determining whether there was an unreasonable delay or refusal to pay benefits and the penalty amount owed within thirty days upon the request of the claimant.

Penalties Adjusted for Inflation. These and other penalties are adjusted for inflation every three years, beginning July 1, 2023, based upon changes in the consumer price index.

Summary of Bill (First Substitute): Self-Insured Municipal Employers and Third Party Administrators' Duty of Good Faith and Fair Dealing to Workers. All self-insured municipal employers and their third-party administrators have a duty of good faith and fair dealing to workers relating to all aspects of workers' compensation. A self-insured municipal employer violates its duty to the worker if the employer or its administrator wrongfully coerces a worker to accept less than the workers' compensation due, or otherwise fails to act in good faith and deal fairly regarding its obligations under workers' compensation laws.

Rules for Duty of Good Faith and Fair Dealing. L&I must adopt by rule additional applications of the duty of good faith and fair dealing as well as criteria for determining appropriate penalties for violations of its duties. In adopting a rule, L&I must consider, among other factors, recognized and approved claim processing practices within the

insurance industry, L&I's own experience, and the workers' compensation and insurance laws and rules of this state.

Labor and Industries Investigations. L&I must investigate each alleged violation upon filing of a written complaint or upon its own motion. After receipt of a notice from L&I, the self-insured municipal employer or its third-party administrator may file a written response within 30 calendar days. If the self-insured municipal employer or third-party administrator fails to file a timely response, L&I must issue an order based on available information.

An L&I order determining whether a violation has occurred must be issued within 30 calendar days of receipt of a complete complaint or its own motion.

Penalties for Violations of Duty of Good Faith and Fair Dealing. An order finding that a violation has occurred must also order the employer to pay a penalty of one to 52 times the average weekly wage at the time of the order, depending upon the severity of the violation, which accrues for the benefit of the worker.

Grounds for Withdrawal of Self-Insured Municipal Employers Certificate. There is an additional ground for withdrawal of a certification that a self-insured municipal employer has been found to have violated the self-insurer's duty of good faith and fair dealing three times within a three-year period. For purposes of determining whether there have been three violations within a three-year period, the director must use the date of the L&I's order and any subsequent orders of L&I, the Board, or courts affirming a violation occurred relates back to the date of L&I's order.

The L&I director may delay withdrawing the certification of a self-insured municipal employer while the employer has an enforceable contract with a licensed third-party administrator that may not be legally terminated. However, the self-insured municipal employer may not renew or extend the contract.

The act applies to alleged violations occurring on or after July 1, 2024.

EFFECT OF CHANGES MADE BY LABOR & COMMERCE COMMITTEE (First Substitute):

- Makes the duty of good faith and fair dealing provision apply only to self-insured municipal employers and their third-party administrators (TPAs), rather than all self-insured employers.
- Makes a written response from a self-insured municipal employer or its TPA to an L&I notice related to a violation be due within 30 calendar days, rather than 15 working days. If the self-insured municipal employer or TPA fails to file a timely response, L&I must issue an order based on available information.
- Requires an L&I order determining whether a violation has occurred to be issued within 30 calendar days of receipt of a complete complaint or its own motion, rather

- than 30 days of a request for an investigation.
- Increases the potential penalties for a violation to a maximum of 52 times the average weekly wage, rather than 10 times the average weekly wage.
 - Adds as a grounds for withdrawal of a self-insured's certification that the self-insured municipal employer has been found to have violated the self-insurer's duty of good faith and fair dealing three times within a three-year period. For purposes of determining whether there have been three violations within a three-year period, the director must use the date of the L&I's order and any subsequent orders of L&I, the Board, or courts affirming a violation occurred relates back to the date of the department's order.
 - Allows the L&I director to delay withdrawing the certification of a self-insured municipal employer while the employer has an enforceable contract with a licensed TPA that may not be legally terminated. However, the self-insured municipal employer may not renew or extend the contract.
 - Provides that the act applies to alleged violations occurring on or after July 1, 2024, rather than to all claims regardless of the date of the injury.
 - Removes the increase in penalties for violation of the duty of good faith and fair dealing under the provisions for general penalties and the penalties for self-insurers delaying or refusing to pay benefits.

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 on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: This bill makes sure that all workers in the state are covered to the same level as workers under the state fund by providing some penalties for third party administrators. The TPAs have the power to approve or deny treatments. Workers should not be forced to hire attorneys to get the health care that they need or pay for their own doctors' visits. When a worker has to hire an attorney, they do not get the full amount of the claim.

Third party administrators stall and avoid their responsibilities of providing care. They file appeals at the last minute. They need to be monitored under a higher level of scrutiny from the state Legislature.

CON: Self-insured employers have little authority to do final and binding adjudication in a claim. Self-insured does not mean self-regulated. The authority falls to the oversight of L&I. There are tools that aren't being used from 2020 legislation: TPAs licenses, training, and doubled penalties. L&I has developed rules to license TPAs. COVID slowed rolling

out these tools. The Legislature should give L&I authority to get the word out about the new tools.

The majority of self-insurers are doing the right thing. If the bill passes, all self-insurers will be impacted. The bill sends a terrible message that self-insurers won't take care of their workers without the threat of fines. The bill assumes that there is a perfect benefit. There are disputes. Litigation is the least efficient and slowest method. There are tools to resolve claims with lower cost than litigation. The bill will chill resolution of claims. If a worker resolves their claim and later decides they should have gotten more, they will have to re-litigate. There will be unintended consequences; and the main beneficiaries will be lawyers.

OTHER: L&I has some technical and rulemaking concerns on the timeframe of this bill. This bill will require an iterative rule making process based on the subject matter. Good faith duty does not exist in worker compensation. This is an insurance principal that is not currently applicable.

Persons Testifying: PRO: Senator Kevin Van De Wege, Prime Sponsor; Eric Becker; Jerry Underwood; Greg Weber; Jamison Smith; Steve Austin; Steve Bradley; Jarl Peterson; Doug Palmer, Washington State Association for Justice; Craig Patti, 1069 Adams st; Brenda Wiest, Teamsters Local 117.

CON: Kris Tefft, Washington Self-Insurers Association; Sheri Sundstrom, Hoffman Construction Company/WSIA; Bernie Pratt, Pratt Day & Stratton/WSIA; Candice Bock, Association of Washington Cities.

OTHER: Tammy Fellin, Labor & Industries.

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