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**SUBSTITUTE SENATE BILL 5068**

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**State of Washington**

**62nd Legislature**

**2011 Regular Session**

**By** Senate Labor, Commerce & Consumer Protection (originally sponsored by Senators Conway, Prentice, and Kohl-Welles; by request of Department of Labor & Industries)

READ FIRST TIME 02/17/11.

1       AN ACT Relating to the abatement of violations of the Washington  
2 industrial safety and health act during an appeal; and amending RCW  
3 49.17.140.

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

5       **Sec. 1.** RCW 49.17.140 and 1994 c 61 s 1 are each amended to read  
6 as follows:

7       (1) If after an inspection or investigation the director or the  
8 director's authorized representative issues a citation under the  
9 authority of RCW 49.17.120 or 49.17.130, the department, within a  
10 reasonable time after the termination of such inspection or  
11 investigation, shall notify the employer by certified mail of the  
12 penalty to be assessed under the authority of RCW 49.17.180 and shall  
13 state that the employer has fifteen working days within which to notify  
14 the director that the employer wishes to appeal the citation or  
15 assessment of penalty. If, within fifteen working days from the  
16 communication of the notice issued by the director the employer fails  
17 to notify the director that the employer intends to appeal the citation  
18 or assessment penalty, and no notice is filed by any employee or  
19 representative of employees under subsection (3) of this section within

1 such time, the citation and the assessment shall be deemed a final  
2 order of the department and not subject to review by any court or  
3 agency.

4 (2) If the director has reason to believe that an employer has  
5 failed to correct a violation for which (~~a citation has been issued~~  
6 ~~within the period permitted in the citation for its correction, which~~  
7 ~~period shall not begin to run until the entry of a final order in the~~  
8 ~~case of any appeal proceedings under this section initiated by the~~  
9 ~~employer in good faith and not solely for delay or avoidance of~~  
10 ~~penalties~~) the employer was previously cited and which has become a  
11 final order, the director shall notify the employer by certified mail  
12 of such failure to correct the violation and of the penalty to be  
13 assessed under RCW 49.17.180 by reason of such failure, and shall state  
14 that the employer has fifteen working days from the communication of  
15 such notification and assessment of penalty to notify the director that  
16 the employer wishes to appeal the director's notification of the  
17 assessment of penalty. If, within fifteen working days from the  
18 receipt of notification issued by the director the employer fails to  
19 notify the director that the employer intends to appeal the  
20 notification of assessment of penalty, the notification and assessment  
21 of penalty shall be deemed a final order of the department and not  
22 subject to review by any court or agency.

23 (3) If any employer notifies the director that the employer intends  
24 to appeal the citation issued under either RCW 49.17.120 or 49.17.130  
25 or notification of the assessment of a penalty issued under subsections  
26 (1) or (2) of this section, or if, within fifteen working days from the  
27 issuance of a citation under either RCW 49.17.120 or 49.17.130 any  
28 employee or representative of employees files a notice with the  
29 director alleging that the period of time fixed in the citation for the  
30 abatement of the violation is unreasonable, the director may reassume  
31 jurisdiction over the entire matter, or any portion thereof upon which  
32 notice of intention to appeal has been filed with the director pursuant  
33 to this subsection. If the director reassumes jurisdiction of all or  
34 any portion of the matter upon which notice of appeal has been filed  
35 with the director, any redetermination shall be completed and  
36 corrective notices of assessment of penalty, citations, or revised  
37 periods of abatement completed within a period of thirty working days.  
38 The thirty-working-day redetermination period may be extended up to

1 fifteen additional working days upon agreement of all parties to the  
2 appeal. The redetermination shall then become final subject to direct  
3 appeal to the board of industrial insurance appeals within fifteen  
4 working days of such redetermination with service of notice of appeal  
5 upon the director. In the event that the director does not reassume  
6 jurisdiction as provided in this subsection, the director shall  
7 promptly notify the state board of industrial insurance appeals of all  
8 notifications of intention to appeal any such citations, any such  
9 notices of assessment of penalty and any employee or representative of  
10 employees notice of intention to appeal the period of time fixed for  
11 abatement of a violation and in addition certify a full copy of the  
12 record in such appeal matters to the board. The director shall adopt  
13 rules of procedure for the reassumption of jurisdiction under this  
14 subsection affording employers, employees, and employee representatives  
15 notice of the reassumption of jurisdiction by the director, and an  
16 opportunity to object or support the reassumption of jurisdiction,  
17 either in writing or orally at an informal conference to be held prior  
18 to the expiration of the redetermination period. Except as otherwise  
19 provided under subsection (4) of this section, a notice of appeal filed  
20 under this section shall stay the effectiveness of any citation or  
21 notice of the assessment of a penalty pending review by the board of  
22 industrial insurance appeals, but such appeal shall not stay the  
23 effectiveness of any order of immediate restraint issued by the  
24 director under the authority of RCW 49.17.130. The board of industrial  
25 insurance appeals shall afford an opportunity for a hearing in the case  
26 of each such appellant and the department shall be represented in such  
27 hearing by the attorney general and the board shall in addition provide  
28 affected employees or authorized representatives of affected employees  
29 an opportunity to participate as parties to hearings under this  
30 subsection. The board shall thereafter make disposition of the issues  
31 in accordance with procedures relative to contested cases appealed to  
32 the state board of industrial insurance appeals.

33 Upon application by an employer showing that a good faith effort to  
34 comply with the abatement requirements of a citation has been made and  
35 that the abatement has not been completed because of factors beyond the  
36 employer's control, the director after affording an opportunity for a  
37 hearing shall issue an order affirming or modifying the abatement  
38 requirements in such citation.

1       (4)(a) An appeal of any violation classified and cited as serious,  
2 willful, repeated serious violation, or failure to abate a serious  
3 violation does not stay abatement dates and requirements except as  
4 follows:

5       (i) An employer may request a stay of abatement for any serious,  
6 willful, repeated serious violation, or failure to abate a serious  
7 violation in a notice of appeal under subsection (3) of this section;

8       (ii) When the director reassumes jurisdiction of an appeal under  
9 subsection (3) of this section, it will include the stay of abatement  
10 request. The redetermination decision issued must include a decision  
11 on the stay of abatement request. The decision on stay of abatement is  
12 final unless the employer renews the request for a stay of abatement in  
13 any direct appeal of the redetermination to the board of industrial  
14 insurance appeals under subsection (3) of this section. The board of  
15 industrial insurance appeals must conduct an expedited review of a  
16 request for a stay of abatement;

17       (iii) Affected employees or their representatives must be afforded  
18 an opportunity to participate as parties in an expedited review for  
19 stay of an abatement period; and

20       (iv) Whenever an expedited review for a stay of abatement is before  
21 the board of industrial insurance appeals, each of the following  
22 factors must be considered prior to rendering a decision on the  
23 requested stay:

24       (A) Has the employer shown good cause for the stay;

25       (B) Will the employer suffer irreparable harm absent a stay; or

26       (C) Will a stay adversely affect the health and safety of workers.

27       (b) The board of industrial insurance appeals shall develop rules  
28 for conducting an expedited review on any stay of abatement requests  
29 identified in the employer's notice of appeal and shall issue a final  
30 decision within forty-five working days of the board's notice of filing  
31 of appeal. This rule making shall be initiated in 2011.

32       (5) When the board of industrial insurance appeals denies a stay of  
33 the abatement and abatement is required while the appeal is  
34 adjudicated, the abatement process must be the same as the process  
35 required for abatement upon a final order with the following  
36 exceptions:

37       (a) All abatement plans must be submitted to the department with  
38 the best available estimates of cost to implement; and

1       (b) The department must approve the abatement plans and  
2 implementation timelines.

3       (6) In the event of a final order vacating an underlying violation  
4 for which a stay of abatement was denied by the board of industrial  
5 insurance appeals, the employer may be reimbursed the amount spent on  
6 abatement for the vacated violation when the final order vacating the  
7 underlying violation contains a finding of fact that no hazard exists  
8 and under the following conditions:

9       (a) The employer may only be reimbursed for reasonable costs for  
10 implementation of approved abatement plans and timelines to the extent  
11 permitted by this subsection.

12       (b) Any reimbursement must first be applied to offset any  
13 outstanding penalties owed the department for the citation at the time  
14 of the final order. Any remaining reimbursement must be applied next  
15 to offset any outstanding debt the employer owes the department.

16       (7) The department shall develop rules necessary to implement  
17 subsections (4) through (6) of this section. This rule making shall be  
18 initiated in 2011.

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