

# SENATE BILL REPORT

## SB 5513

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As of January 28, 2019

**Title:** An act relating to simplifying, clarifying, and making consistent employee status under industrial insurance laws, prevailing wage laws, wage deduction laws, wage payment laws, minimum wage laws, and unemployment compensation laws, and creating the employee fair classification act.

**Brief Description:** Concerning the employer-employee relationship.

**Sponsors:** Senators Keiser, Conway, Wellman, Frockt and Saldaña.

**Brief History:**

**Committee Activity:** Labor & Commerce: 1/28/19.

**Brief Summary of Bill**

- Creates the Employee Fair Classification Act (EFCA), which prohibits misclassification of employees as independent contractors, and creates remedies, including civil penalties and damages.
- Defines independent contractor for purposes of the EFCA and establishes the same definition for purposes of the Minimum Wage Act, prevailing wage, unemployment insurance, industrial insurance, and other employment laws.

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**SENATE COMMITTEE ON LABOR & COMMERCE**

**Staff:** Jarrett Sacks (786-7448)

**Background:** Employment standards and benefits generally apply only if an employer-employee relationship exists, rather than an independent contractor relationship. Various multipart tests are used to determine whether an individual is an independent contractor. For purposes of prevailing wage, industrial insurance, and unemployment insurance, a six-part statutory independent contractor test is applied. This test requires:

- the individual has been and will be free from direction and control, both under the contract and in fact;

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*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.*

- the individual's services are outside the usual course of business for which the service is performed, or outside all the places of business, or the individual must pay the costs of the principal place of business where the services are performed;
- the individual has an independently established business, or a principal place of business that qualifies for an Internal Revenue Service (IRS) deduction;
- the individual is responsible for filing a schedule of expenses with the IRS;
- the individual has a separate set of books and records that reflect all items of income and expenses; and
- the individual has an active and valid registration with the Department of Revenue (DOR), has a Unified Business Identifier number, and has any other required state accounts for the payment of taxes.

In the construction industry, a seventh required element is the individual be registered as a contractor or licensed as an electrical contractor. For industrial insurance, a threshold question is whether a person under contract brings more than their personal labor to the job. For unemployment insurance, persons outside construction may also be independent contractors under an alternative three-part test.

For purposes of the Minimum Wage Act (MWA), which also addresses overtime, a common law economic dependence test applies. The inquiry under this test is whether the worker is economically dependent on the alleged employer or is instead in business for themselves. Other wage laws also do not have statutory tests. These include the Wage Payment Act (WPA), which provides for an administrative or court action to collect wages under the MWA and other wage laws, as well as establishing other requirements. Other laws address deductions from wages and otherwise address failure to pay wages.

**Summary of Bill:** The bill creates the Employee Fair Classification Act (EFCA).

Prohibitions and Requirements. Under the EFCA, the following actions by employers or other persons are prohibited:

- willfully misclassifying an employee as an independent contractor;
- charging a misclassified employee a fee or making unlawful deductions from compensation;
- requiring or requesting an employee make an agreement or sign a document that results in misclassification;
- forming, assisting in, or inducing the formation of a business entity, or paying or collecting a fee for the use of a business entity, for the purposes of facilitating or evading detection of a violation of the EFCA; and
- for pay, conspire with, aid and abet, assist, or advise an employer with the intent of violating the EFCA.

Employers who engage independent contractors must post a notice stating a worker has a right to be classified as an employee if the worker does not meet independent contractor requirements, and a complaint may be filed with the Department of Labor and Industries (L&I) or in a court if a person believes misclassification occurred.

Misclassification means designating an employee as a nonemployee. Willful is a knowing and intentional action, not accidental or the result of a bona fide dispute.

Definition of Independent Contractor. The EFCA's independent contractor test applies to prevailing wage, wage deductions, the WPA, the MWA, unemployment insurance, and industrial insurance. Independent contractor means an individual who performs labor or services for a party when all of the following elements are established:

- the individual is and will continue to be free from control or direction over the performance of the labor or services by the party for whom the labor and services are performed, both under the contract and in fact;
- the labor or service is outside the usual course of business for which the labor or service is performed;
- the individual is customarily engaged in an independently established trade, occupation, business, or profession of the same nature as that involved in the contract of labor or service, for which the individual independently establishes the price of the individual's labor or service;
- the individual is responsible for filing a schedule of expenses with the IRS for the type of business the individual is conducting;
- the individual has an active and valid account with the DOR, and other required state agencies, for the business being conducted;
- the individual maintains a separate set of books or records; and
- if the individual is performing services as a contractor or electrical contractor, the individual has a valid contractor registration or electrical contractor license, respectively.

Existing statutory independent contractor tests are repealed.

Employer-Employee Relationship. An employer-employee relationship exists when an individual performs labor or services for another individual or entity. The party asserting an individual is not an employee must establish, by a preponderance of the evidence, that the individual is an independent contractor or is otherwise not an employee.

A general contractor is not responsible for violations of an independent contractor or subcontractor unless the general contractor exerts substantial control over the day-to-day work of the independent contractor or subcontractor.

Enforcement. L&I may investigate violations and, for any of the prohibited acts, may order payment of:

- a civil penalty of \$1,000 to \$10,000 per employee, or \$10,000 to \$25,000 if the person engaged in a pattern or practice;
- damages of three times the amount of wages, salary, and employment benefits denied; and
- reimbursement for payroll taxes.

Individual and class actions are authorized. If the court determines a person, including an employer, engaged in prohibited acts, the court must order payment:

- the greater of (1) three times the wages and benefits unlawfully denied or withheld or (2) statutory damages of \$1,000 to \$10,000 per employee or \$10,000 to \$25,000 per employee if a pattern or practice is shown; and
- attorneys' fees and costs.

A three-year statute of limitations for both administrative and court actions is tolled during any period an employer deterred an action. A pattern or practice means within the previous ten years, the employer was convicted for nonpayment of wages or delinquent in payment of a court-ordered or administrative assessment for nonpayment of wages.

After January 1, 2021, L&I must adjust penalty amounts to reflect changes in the consumer price index annually.

The EFCA Account (Account) is created. Civil penalties must be deposited into the Account, which is appropriated, and monies in the Account may be used only for enforcement of the EFCA.

Other Provisions. The statutory exemptions from industrial insurance for drivers providing commercial transportation services, chauffeurs, and taxicab operators are removed.

**Appropriation:** None.

**Fiscal Note:** Requested on January 23, 2019.

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

**Effective Date:** The bill contains several effective dates. Please refer to the bill.

**Staff Summary of Public Testimony:** PRO: Employment standards are contingent on an employer-employee relationship. Misclassification denies workers these standards and protections. The rest of society shoulders the cost of misclassification. Properly classified contractors can continue to operate under the bill. The bill ensures that independent contractors are truly independent business owners and ensures workers get benefits. The status quo creates unfair competition between those who classify workers correctly and those who do not. A Department of Labor study estimated that 30 percent of workers are misclassified. Misclassification happens often in low wage industries.

CON: The bill is premature since there is currently a study being done regarding independent contractors. The bill does not simplify the rules, it complicates them. The bill prescribes huge penalties for businesses and includes people that were formerly excluded, including workers the medical industry relies on. The joint and several liability in the bill can include people not involved in the misclassification. The bill changes how disputes are handled and makes it almost impossible for businesses to defend themselves. The bill does not require an individual exhaust administrative remedies first. Simply documenting a relationship could qualify as a willful violation under the bill. The bill makes certain businesses classify individuals that are currently independent contractors as employees, which they cannot afford.

**Persons Testifying:** PRO: Senator Karen Keiser, Prime Sponsor; Joe Kendo, Washington State Labor Council, AFL-CIO; Rebecca Smith, National Employment Law Project; Phil Lindquist, International Union of Painters and Allied Trades; Mia Kelly, Working Washington.

CON: Bruce Beckett, Washington Retail Association; Tom Kwieciak, Building Industry Association of Washington; Lisa Thatcher, Washington Hospital Association; Kay Neth, Rover.com; Bob Battles, Association of Washington Business; Sheri Call, Washington Trucking Associations.

**Persons Signed In To Testify But Not Testifying:** PRO: Lizzet Ibarra, citizen; April Sims, Washington State Labor Council; Mark Riker, Washington State Building and Construction Trades Council.

CON: Kathleen Rambo, Valley Hair Design; Jennifer Corbin, Ericksen Avenue Salon; Nikki Stansberry, Kaylin Nicole Salon; Jackie Barrett, Jaclyn Raen Salon; Cecilia Fisher, citizen; Cecilia Fisher, citizen; Susie Powers, citizen; Megan White, Stylists of Spokane; Eric Weir, Salon Owner/Booth Renter; Karli Britt, Owner, Salon 790 LLC; Darcy Harrison, D'Arcy Hair Design and Emerson Salon; Karly Kendall, Self Employed Stylist; Kelsie Wens, Owner, Fresh Salon and Spa; Lydia Kapfer, G2salon; Doug Faber, Owner of The Collage Salon; Molly Mitchell, Spruce Salon and Spa; Vicki Christophersen, Internet Association; Rachel Perez, Self Employed Stylist; Megan Crouch, citizen; Chelsea Fischer, citizen; Katie Edmonds, Kaylin Nicole Salon; Hanna Jones, citizen; Thien Son, Kaylin Nicole Salon; Breanne Guyette, Breanne Guyette, citizen; Christie Grondin, citizen; Alissa Nix, citizen; Lindsey Dougherty, The Proper Salon and Barber; Albon Dougherty, citizen; Christeenna Tiffin, citizen; Shari Bailey, Owner, Capelli Salon; Carol Reandeau, Owner, Carols Salon; Phil Talmadge, Washington Trucking Association; Heather Kerekfty, Salon Envy; Jenni Treutle, Studio 4; Bruce Shearer, Shearers Hair Salon; Raana Rader, citizen; Jan Himebaugh, Member, Department of Commerce Independent Contractor Advisory Committee; Steve Gano, Member, Department Commerce Independent Contractor Advisory Committee; Susan Bessey, citizen; Jilian George, Cosmetologist and Owner of Salon; Kristine Blake, citizen; Sheryl Fowler, citizen; Crystal Di Tomassi, citizen; Matthew Wald, Drive Forward; James Lockhart, Drive Forward; Lynn Reed, Drive Forward; Sarah Goodwin, citizen; Micaela Castanon, Hair Stylist; Chris Van Dyk, Assistant General Manager Eastside For Hire, Inc.; Kyung Lee, Kyung Lee; Christine Selden, citizen; Jessica Robertson, citizen; Karissa Maulsby, citizen; Heather Stokes, citizen; Nathan Straub, citizen; Gina Young, citizen; Shawn Manning, citizen; Nicholas Hearn, Salon Owner, Piper&Co Hair and Lash; Julie Berghammer, Owner, Cameo Hair & Beauty; Todd Gee, citizen.

OTHER: Steve Crandall, ProMotion Holdings; Priscilla Murphy, citizen.