

# HOUSE BILL REPORT

## ESHB 1097

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### As Passed Legislature

**Title:** An act relating to increasing worker protections.

**Brief Description:** Increasing worker protections.

**Sponsors:** House Committee on Labor & Workplace Standards (originally sponsored by Representatives Sells, Bateman, Ortiz-Self, Kloba, Chopp, Ormsby, Stonier and Macri; by request of Office of the Governor).

### Brief History:

#### Committee Activity:

Labor & Workplace Standards: 1/20/21, 2/3/21 [DPS];

Appropriations: 2/17/21, 2/18/21 [DPS(LAWS)].

#### Floor Activity:

Passed House: 3/4/21, 53-44.

Senate Amended.

Passed Senate: 4/6/21, 30-19.

House Concurred.

Passed House: 4/13/21, 53-45.

Passed Legislature.

### Brief Summary of Engrossed Substitute Bill

- Establishes statutory procedures for an employer to contest an order of immediate restraint (OIR) and appeal alleged violations of the OIR, and authorizes the imposition of daily civil penalties.
- Amends the Washington Industrial Safety and Health Act's antiretaliation provision by explicitly prohibiting acts that would deter a reasonable employee from exercising their rights, and by expanding the time for filing a complaint, authorizing civil penalties, and making other changes.
- Creates a grant program to assist small businesses in equipment

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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 part of the legislation nor does it constitute a statement of legislative intent.*

purchases or capital costs during a state of emergency proclamation.

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## HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

**Majority Report:** The substitute bill be substituted therefor and the substitute bill 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:** Trudes Tango (786-7384).

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** The substitute bill by Committee on Labor & Workplace Standards be substituted therefor and the substitute bill do pass. Signed by 19 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Chopp, Cody, Dolan, Fitzgibbon, Frame, Hansen, Johnson, J., Lekanoff, Pollet, Ryu, Senn, Springer, Stonier, Sullivan and Tharinger.

**Minority Report:** Do not pass. Signed by 14 members: Representatives Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Boehnke, Caldier, Chandler, Dye, Harris, Hoff, Jacobsen, Rude, Schmick and Steele.

**Staff:** Heidi Cao (786-7157).

### **Background:**

#### Washington Industrial Safety and Health Act.

The Washington Industrial Safety and Health Act (WISHA) requires employers to provide a workplace free from recognized hazards and authorizes the Department of Labor and Industries (Department) to inspect and investigate workplaces for compliance with safety and health standards.

If the Director of the Department believes that an employer has violated the WISHA, the Director issues a citation and, depending on the violation, may assess civil penalties. Civil penalties may be adjusted based on the employer's inspection history, the size of the workforce, and other factors. Civil penalties are mandatory for violations that are serious or willful. The minimum civil penalty for a serious violation is \$100. Maximum penalties are \$7,000 (or \$70,000 for willful or repeated violations). The maximum penalties will be

adjusted annually in accordance with federal penalty levels.

The Department must notify the employer of the citation and assessment of penalties. The employer has 15 working days to notify the Director that the employer intends to appeal the citation and assessment. If the employer appeals, the Department may either reassume jurisdiction of the matter and issue any corrective notices of assessment or citation, or the Department may decline to reassume jurisdiction and send the appeal to the Board of Industrial Insurance Appeals (BIIA). If the employer fails to timely notify the Director of the intent to appeal, the citation and assessment is deemed a final order and not subject to review by any court or agency.

#### Orders of Immediate Restraint.

If the Director believes an employer has violated a safety or health standard to the extent the violation creates a substantial probability that death or serious physical harm could result, the Director must issue a citation and assess penalties. The employer may appeal the citation and assessment of penalties through the Department and eventually to the BIIA.

Distinct from the citation, the Director may also issue an order immediately restraining (OIR) the condition, practice, method, process, or means in the workplace and to require steps to be taken to avoid, correct or remove the danger. An OIR may also be issued related to the use of machinery or equipment. Although there is no procedure in statute addressing contesting an OIR, the Department's policy provides that an employer seeking to contest the issuance of an OIR must file an action in court. An employer who violates an OIR may be guilty of a gross misdemeanor and subject to criminal penalties.

#### Antiretaliation.

No person may discriminate against any employee because the employee has filed a complaint or instituted a proceeding under the WISHA, or has testified or is about to testify in a WISHA proceeding, or because the employee exercised any right granted under the WISHA.

Employees who believe they have been discriminated against may file a complaint with the Director within 30 days after the alleged violation occurs. If the Director determines a violation has occurred, the Director must bring an action in superior court. If the Director determines that no violation has occurred, the employee may institute a court action. The superior court may restrain violations and order appropriate relief, including rehiring or reinstatement with back pay.

#### **Summary of Engrossed Substitute Bill:**

##### Contesting an Order of Immediate Restraint.

Statutory procedures are established for an employer contesting an OIR. The employer may contest an OIR by applying to the superior court for appropriate relief within 10 working days of the effective date of the OIR.

### Violations of an Order of Immediate Restraint.

If the Director has reason to believe an employer violated an OIR, the Director must notify the employer of the violation and the penalty to be assessed. The employer has 15 working days to notify the Director that the employer will appeal the notice of violation. If the employer does not notify the Director within 15 days, the notice and assessment of penalty is deemed a final order of the Department and not subject to review by any court or agency.

A civil penalty may be imposed for each day the employer continues operation in violation of the OIR. The daily civil penalty may be up to the maximum daily penalty for a serious violation.

### Antiretaliation.

The antiretaliation provision under the WISHA is amended to explicitly prohibit action that would deter a reasonable employee from exercising their rights under the WISHA.

Employees have 90 days, rather than 30, to file a complaint with the Director. The Department may extend that time based on equitable principles or due to extenuating circumstances.

If the Director determines a violation has occurred, the Director will notify the employer and complainant and issue a citation and notice of assessment, rather than having to bring an action in court. The Director may order appropriate relief, such as restoring the employee to the employee's position or ordering the employer to pay back wages, including interest of 1 percent per month on earnings owed. The employer has 30 days, from the communication of the notice, to notify the Department of the employer's intent to appeal the citation or notice of assessment. The complainant has 15 working days to appeal the order of appropriate relief. If there is an appeal, the Department may either reassume jurisdiction of the matter and issue a corrective notice of redetermination, which is final unless appealed to the BIIA, or the Department may decline to reassume jurisdiction and send the appeal directly to the BIIA. Both the employer and complainant may participate in hearings appealed to the BIIA.

The Director may also impose a civil penalty not to exceed the maximum penalty for a serious violation for the first occurrence and higher penalties for repeat violations. Civil penalties are deposited in the Supplemental Pension Fund.

### Grant Program.

A safety grant program is created to provide one-time grants to state-fund employers that have 25 or fewer full-time equivalent employees. In the event of a state of emergency, the Director may expend up to 2 percent per year of the net premiums earned in the Accident Fund in the prior fiscal year for the grant program, as long as assets of the Accident Fund and Pension Reserve Fund were at least 10 percent in excess of their funded liabilities in the

fiscal quarter immediately preceding the state-of-emergency proclamation. Funds expended from the Accident Fund must be reimbursed to the Accident Fund from the State General Fund in the subsequent biennium.

Employers must apply the safety grants to purchases of equipment, gear, or capital costs to meet any new safety and health requirements related to the emergency. Grants may not be used on purchases or improvements already covered by another grant, government program, or insurance contract. The Department must consult with stakeholders when adopting rules for the program, and the rules must include guidance for grants based on the type, scope and time frame of a specific declared emergency and criteria for prioritizing grants. The Department may require matching funds from employers.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed, except section 3, relating to antiretaliation, which takes effect July 1, 2022.

**Staff Summary of Public Testimony (Labor & Workplace Standards):**

(In support) The pandemic has presented an unprecedented challenge for the Department. There are more instances of intentional noncompliance with orders under the proclamations. Issuing a stop work order is the last resort. The Department would be able to impose a civil penalty for violating a stop work order, which would be preferable to criminal sanctions against an employer. There is no explicit provision for employers to challenge these stop orders, but the Department assumes that the employer needs to go to court to contest the order. Currently, there is no real incentive deterring an employer from retaliating against an employee, and there is no protection for workers threatened with future actions. The Department has seen an increase in worker complaints alleging discrimination. Workers must go to superior court to enforce their rights and the employer does not have to pay a penalty or interest. When employees see a coworker being retaliated against, they are afraid to speak up. Employees with limited resources rely on the Department to actively enforce safety and health standards. This bill creates more pathways for employee security and safety. It is appropriate to use workers' compensation funds to enhance safety and health. It has been shown that investments in safety and health reduce workers' compensation costs.

(Opposed) The Department has disregarded the concerns brought by small businesses, including that it could bankrupt small businesses. Employers have been diligent in trying to keep up with the constantly changing demands and orders of the different agencies during the pandemic. This bill would impose thousands of dollars in fines on businesses that are trying to provide essential goods and services. It doubles penalties on employers. Employers that want to contest a stop work order need more time than five days. The grant

program in the bill is not an effective use of workers' compensation dollars and will put undue pressure on the fund, which can lead to potential rate increases in the future. It is not clear whether the Department would equitably administer the grant program. This bill has vague standards and would create uncertainty for businesses in a time when businesses are already weary, stressed, and confused. Businesses need time to have better discussions on this bill. There are statutes already in place to protect against retaliation. The bill bypasses the ability for an employer to appeal administratively and requires the employer to hire an attorney and go to court. The model should be education before enforcement.

**Staff Summary of Public Testimony (Appropriations):**

(In support) With the passage of this legislation, the Department of Labor and Industries (Department) can provide additional tools to protect workers when reporting health and safety hazards at their workplace. Some nurses and doctors have feared reporting and suffering subsequent retaliation in the context of working during the pandemic. Some farm workers are in support of this bill that would allow the Departments to investigate negligent employers who remain noncompliant with an Order of Immediate Restraint. This bill embodies pragmatic statutes and tools of enforcement.

(Opposed) This legislation shifts costs to employers. Therefore, the current fiscal note does not accurately reflect the true cost of this bill, and would entail misappropriation of dedicated accounts and state funds.

**Persons Testifying (Labor & Workplace Standards):** (In support) Representative Sells, prime sponsor; Erin Allison, Washington State Nurses Association; Tammy Fellin and Maggie Leland, Department of Labor and Industries; Caitlyn Jekel, Office of the Governor; Zaira Sanchez, United Farm Workers Foundation; Joe Kendo, Washington State Labor Council, American Federation of Labor and Congress of Industrial Organizations; and Samantha Grad, United Food and Commercial Workers 21.

(Opposed) Patrick Connor, National Federation of Independent Businesses; Rose Gundersen, Washington Retail Association; Carolyn Logue, Washington Food Industry Association; Robert Battles, Association of Washington Business; and Corwyn Fischer, Washington Farm Bureau.

**Persons Testifying (Appropriations):** (In support) Elizabeth Strater, United Farm Workers; and Justin Gill, Washington State Nurses Association.

(Opposed) Robert Battles, Association of Washington Business.

**Persons Signed In To Testify But Not Testifying (Labor & Workplace Standards):** None.

**Persons Signed In To Testify But Not Testifying (Appropriations):** None.