

# SENATE BILL REPORT

## SB 5115

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As of January 18, 2021

**Title:** An act relating to establishing health emergency labor standards.

**Brief Description:** Establishing health emergency labor standards.

**Sponsors:** Senators Keiser, Liias, Conway, Kuderer, Lovelett, Nguyen, Salomon, Stanford and Wilson, C..

**Brief History:**

**Committee Activity:** Labor, Commerce & Tribal Affairs: 1/18/21.

### Brief Summary of Bill

- Creates an occupational disease presumption for frontline workers during a public health emergency for the purposes of workers' compensation.
- Requires employers to accommodate an employee's voluntary use of protective equipment during a public health emergency.
- Prohibits discrimination against an employee who raises a reasonable concern about infection control in the workplace during a public health emergency and authorizes a person to bring actions on behalf of the Department of Labor and Industries (L&I) in court for violations of the retaliation provisions of the bill.
- Expands the eligibility for Family and Medical Leave to employees that earn at least \$1,000 in covered employment if their qualifying period includes a public health emergency.
- Requires an employer to pay its lower-paid frontline employees health emergency pay during a public health emergency.
- Requires employers to notify L&I when a certain percentage of their workforce becomes infected during a public health emergency.
- Establishes additional sick leave for employees who are quarantined or

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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.*

infected, caring for someone who is quarantined or infected, or caring for their child due to school or child care closures during a public health emergency.

- Requires employers with 50 or more employees to provide emergency child care leave during a public health emergency.
- Establishes a business and occupation tax credit for the wages paid by an employer under the new sick leave and childcare leave requirements in the bill.

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## SENATE COMMITTEE ON LABOR, COMMERCE & TRIBAL AFFAIRS

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

**Background:** Workers' Compensation. Under the state's industrial insurance laws, a worker who, in the course of employment, is injured or suffers disability from an occupational disease is entitled to certain benefits. To prove an occupational disease, the worker must show that the disease arose naturally and proximately out of employment. For certain occupations, such as firefighters, there is a presumption that certain medical conditions are occupational diseases.

Washington Industrial Safety and Health Act. Under the Washington Industrial Safety and Health Act (WISHA), an employer must provide a workplace free from recognized hazards. The Department of Labor and Industries (L&I) administers WISHA. L&I has adopted general safety standards that apply to most industries, and has safety standards that apply only to specific industries.

Employers must develop a formal accident prevention program that is tailored to the particular workplace and hazards involved. Employers must provide their employees with appropriate protective measures for each hazard involved. For certain hazards, personal protective equipment (PPE) must be provided. By L&I rule, PPE must be provided at no cost to the employee if:

- the type of PPE would not reasonably or normally be worn away from the workplace, such as single use or disposable PPE; and
- is required to comply with safety and health standards to protect employees wherever hazards exist from processes; environmental hazards; physical, chemical, or radiological hazards; or mechanical irritants that could cause injury to the function of any body part through absorption, inhalation, or physical contact.

Prohibited Discrimination Under the Washington Industrial Safety and Health Act. WISHA prohibits discharging or in any manner discriminating against any employee who has, under WISHA:

- filed any complaint;
- instituted or caused to be instituted a proceeding;
- testified or is about to testify in a proceeding; or
- exercised any rights afforded them.

An employee who believes they have been discriminated against must file a complaint within 30 days after the violation occurred. L&I must investigate, and, if it determines a violation has occurred, may bring a civil action against the violator in superior court. The superior court may restrain violations and grant other appropriate relief, including rehiring or reinstating the employee to their former position with back pay.

Family and Medical Leave. Paid Family and Medical Leave (PFML) provides partial wage replacement to employees on leave for specified family and medical reasons. Employees are eligible for PFML benefits after working at least 820 hours in a qualifying period. The program provides paid family leave of up to 12 weeks to bond after the birth or placement of a child or to care for a family member with a serious health condition. It also provides paid medical leave up to 12 weeks for an employee's serious health condition. The paid leave limits may be combined to 16 weeks of leave in a year, plus an additional two weeks if there are pregnancy complications, for a possible total of 18 weeks.

Minimum Wage and Sick Leave. The Minimum Wage Act (MWA) sets the state's minimum wage and overtime requirements. Employers covered under the MWA are required to pay employees age 18 or older at least the minimum hourly wage. The current state minimum wage is \$13.69 per hour.

Employers are also required to provide paid sick leave to their employees. Every employee accrues a minimum of one hour of paid sick leave for every 40 hours worked. An employee may use paid sick leave for the following reasons:

- mental or physical illness, injury, or health condition, or the need for medical diagnosis; or preventative medical care;
- a family member needs care for a mental or physical illness, injury, or health condition, or needs a medical diagnosis or preventative medical care;
- the employee's workplace or child's school or place of care has been closed by a public official for any health-related reason; or
- the absence qualifies for leave under the Domestic Violence Leave Act.

**Summary of Bill:** Occupational Disease Presumption for Frontline Employees. For frontline employees, there exists a presumption that any infectious or contagious diseases that are the subject of a public health emergency are occupational diseases during a public health emergency for the purposes of workers' compensation. The employee must provide verification, as required by L&I, that the employee has contracted the infectious or contagious disease.

The presumption may be rebutted by clear and convincing evidence that:

- the exposure to the disease occurred from other employment or non-employment activities; or
- the employee was working from the employee's home or was on leave for a period of 14 days or more consecutive days immediately prior to the employee's injury, occupational disease, or period of incapacity resulting from exposure to the disease.

Personal Protective Equipment Accommodation. During a public health emergency, if an employer requires its employees or contractors to wear PPE, the employer must provide the required equipment at no cost to the employee.

Every employer that does not have a PPE requirement must accommodate its employee's or contractor's voluntary use of protective devices or equipment as the employee or contractor deems necessary, as long as:

- the use of these protective devices and equipment does not introduce hazards to the work environment and is consistent with WISHA; and
- the use of facial coverings does not interfere with an employer's security requirements.

An employer may not apply for a variance to these requirements.

Whistleblower Complaints and Retaliation. During a public health emergency, a person may not discharge or discriminate against an employee who:

- raises a reasonable concern to the employer, the employer's agent, the employee's family, a government agency, or the public, including concerns raised through print, online, or social media about infection control in the workplace of any disease that is the subject of the public health emergency; or
- files written notice or institutes a proceeding of, or testifies in, a whistleblower action authorized in the bill.

Prohibited discrimination under the bill is added to the retaliation complaint process and penalties in the Equal Pay Act. After a complaint by an employee, L&I must investigate. If L&I determines a violation occurred, it must attempt to resolve the violation by conference and conciliation. If no agreement is reached, L&I may issue a citation and notice of assessment and order the payment of actual damages or \$5,000, whichever is greater, plus interest on all compensation owed. L&I may also order payment for the costs of the investigation and enforcement.

L&I may also issue the following civil penalties:

- for a first violation, no more than \$500; and
- for repeat violations, no more than \$1,000 or 10 percent of the damages, whichever is greater.

An employee may also bring a civil action against an employer for actual damages, statutory damages, and attorneys' fees. The court may order reinstatement or injunctive

relief. An employee bringing a civil action is only entitled to relief if the court determines the employer committed a pattern of violations as to the employee, or committed a violation through application of a formal or informal employer policy or practice.

A person, known as the relator, on behalf of L&I, may bring a whistleblower action in court for violations of the retaliation provisions of the bill. Relief is subject to the same conditions and limitations that apply to L&I, including conference and conciliation and penalty amounts. A relator that prevails in a whistleblower action is entitled to attorneys' fees and costs. No whistleblower action may be brought if L&I has already issued a citation or notice of assessment, or has otherwise resolved the complaint. An employee of the entity alleged to have committed a violation may designate a representative organization to initiate an action on their behalf.

The relator must provide written notice to L&I and the employer prior to filing a whistleblower action. After receiving notice, L&I must notify the relator within 30 days of its intent to investigate the complaint. If L&I investigates, it must make a determination within 90 days. If L&I does not investigate, or does not make a determination within 90 days, the relator may bring a whistleblower action.

L&I may intervene in a whistleblower action within 30 days after the filing of the action. After 30 days, L&I may intervene for good cause shown. If L&I intervenes, it has the primary responsibility for litigating the action. If L&I proposes a settlement, it must provide notice to the relator. L&I may dismiss or settle the action if the court finds that it is fair, adequate, reasonable and in the public interest.

Penalty amounts recovered in a whistleblower action must be distributed as follows:

- if L&I has not intervened, 40 percent to the relator and 60 percent to L&I;
- if L&I has intervened, 20 percent to the relator and 80 percent to L&I.

Employer Reporting Requirements. During a public health emergency, an employer with more than 50 employees at a workplace, within 24 hours of learning that 5 percent or more of their employees at the workplace have tested positive for the infectious or contagious disease that is the subject of the public health emergency, or have symptoms of the disease, must report the positive tests or symptomatic workers to L&I.

An employer with 50 or fewer employees must report to L&I when 10 percent or more of their employees at the workplace test positive or become symptomatic.

Reports to L&I are prohibited from including any employee's name or personal identifying information. L&I may use the reports to identify potential clusters of infections at specific workplaces or industries and investigate workplaces for violations of WISHA. An employee is not required to disclose any medical condition or diagnosis to their employer.

Family and Medical Leave. An employee is eligible for family and medical leave after they

have earned at least \$1,000 in covered employment if their qualifying period includes a public health emergency.

Health Emergency Pay. Every employer must provide its frontline employees who earn less than the state minimum wage plus \$1, with health emergency pay during a public health emergency. Health emergency pay is an additional sum equal to 25 percent of the state's minimum wage that is added to the employee's pay for each hour worked.

Sick Leave. Every employer must provide additional sick leave to its employees during a public health emergency when the employee is:

- absent or unable to work for telework because the employee is subject to a quarantine order; the employee has been advised to self-quarantine by a health care provider; or the employee is experiencing symptoms of the infectious or contagious disease;
- caring for a family member who is subject to a quarantine order to has been advised to self-quarantine;
- caring for their child if the child's school or place of care has been closed, or the child's care provider is unavailable, due to the public health emergency; or
- experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services in consultation with the U.S. Department of Treasury and the U.S. Department of Labor, or the Washington State Department of Health.

The number of hours of additional paid sick time for full-time employees is 80 hours. For part-time employees, the number of hours is equal to the number of hours the employee works, on average, over a two-week period.

The additional paid sick time may not carry over to a subsequent year. The employee is entitled to this sick leave with no restriction on their length of employment.

An employer may require employees to provide reasonable notice of an absence of work, so long as the notice does not interfere with the employee's lawful use of the sick leave. For absences exceeding three days, an employer may require verification that the use of sick leave is for an authorized purpose. An employer may not require an employee to find a replacement worker to cover the hours when the employee is on paid sick leave.

Child Care Leave. Every employer with 50 or more employees must provide each of its employees with 12 weeks of emergency child care leave during a public health emergency when the employee is unable to work or telework because the employee is caring for their child because the child's school or place of care has been closed, or the child's care provider is unavailable, due to the public health emergency.

The first ten days of leave taken are unpaid, but an employee may substitute any paid time off offered by the employer under the employer's established policy. After the first ten days, for each hour of emergency child care leave, the employee must be paid at least two-

thirds of the employee's normal hourly compensation or salary, not to exceed \$200 per day or an aggregate of \$10,000 annually.

Emergency child care leave does not carry over to a subsequent year. An employee is entitled to emergency child care leave after 90 days of employment with the employer, with no restriction on the minimum hours worked.

An employer may require employees to provide reasonable notice of an absence of work, so long as the notice does not interfere with the employee's lawful use of the child care leave. For absences exceeding three days, an employer may require verification that the use of the leave is for an authorized purpose. An employer may not require an employee to find a replacement worker to cover the hours when the employee is on emergency child care leave.

B&O Tax Credit. A credit against the business and occupation tax (B&O tax) and the public utility tax is allowed for any employer who meets the public health emergency paid sick or child care leave requirements in the bill. The credit is equal to the full amount of wages paid by an employer in qualifying public health emergency paid sick or child care leave in the previous calendar quarter.

The tax credit may not be claimed if a federal tax credit is available for wages paid under the same qualifying public health emergency.

No person can claim a credit against both the B&O tax and the public utility tax. Credits earned may only be claimed on returns filed electronically with the Department of Revenue.

Public Health Emergency. A public health emergency is a declaration or order that covers the jurisdiction where the individual or business performs work concerning any infectious or contagious disease, including a pandemic and is issued as follows:

- the President of the United States has declared a national or regional emergency; or
- the Governor has declared a state of emergency.

Frontline Employee. Frontline employees are the following employees:

- first responders, including law enforcement officers, firefighters, emergency medical service providers, paramedics, and ambulance drivers;
- employees employed at a hospital, health care facility, nursing home, or assisted living facility who interact in person with patients or other members of the general public;
- employees performing food processing, food manufacturing, food distribution, farm, and meat packing work;
- maintenance, janitorial, and food service workers at any facility treating patients diagnosed with the infectious or contagious disease that is the subject of the public health emergency;

- drivers and operators employed by a transit agency or any other public entity providing mass transportation services;
- employees working at a licensed child care facility that interact in person with children or other members of the general public;
- retail employees at stores that remain open to the general public during the public health emergency if the employee has in-person interaction with the general public or other employees;
- employees of a hotel, motel, or other transient accommodation that remains open to the general public during the public health emergency, if the employee has in-person interaction with the general public or other employees;
- restaurant employees, if the employee has in-person interaction with the general public or other employees;
- home care aides and home health aides that primarily work in the home of the individual receiving care;
- corrections officers and correctional support employees;
- educational employees, including teachers, paraeducators, principals, librarians, and other educational support staff that are required to be physically present at a school where classes are being taught in person, if the employee has in-person interaction with students or other employees; and
- employees at higher education institutions that are required to be physically present on campus where classes are being taught in person, if the employee has in-person interaction with students or other employees.

**Appropriation:** None.

**Fiscal Note:** Requested on January 10, 2021.

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

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Staff Summary of Public Testimony:** PRO: The bill is meant to alleviate some of the issues that have arisen during the pandemic. The approach is comprehensive to help the many workers who are struggling. The workers' compensation presumption is important because employers claim that nurses who repeatedly treat COVID-19 patients are getting COVID-19 from community spread rather than work. Workers are running out of sick leave when they get COVID-19 and are worried about keeping their jobs while they are still in the hospital. Many people are losing jobs because of family care responsibilities. Many workers are denied Paid Family and Medical Leave because they do not have the required number of hours worked from being furloughed during pandemic. The definition of frontline employee could be expanded to include bus drivers.

CON: The Paid Family and Medical Leave threshold is too low. It would take only about two weeks to qualify and risks undermining the system which was a carefully crafted



balance. Employers already do not have enough money and the bill piles on additional costs on businesses that are struggling to survive the pandemic. Qui tam is abused in California and have a large cost to employers. There are more important and effective ways to help frontline workers, such as vaccine rollout. Multiple jurisdictions are passing hazard pay and businesses will not know what controls or if they layer. The definition of frontline worker only applies to retail grocery stores and not direct shipping grocery providers. The retaliation provisions are very broad. Similar federal leave laws made an exception for health care providers who have unique staffing needs during the pandemic, this bill should, too. There is no need for a presumption because L&I already has a policy and the current system is working. Many workplaces have a worker shortage due to pandemic and the new leave requirements will only contribute to it more.

OTHER: There are questions about how the leave provisions in the bill interact with current leave requirements. The whistleblower provisions in the bill needs to be consistent with the local whistleblower act. Cities do not pay B&O, so the bill would have costs for them. The bill could consider options to lessen the cost for cities, such as revenue sharing or a sales tax credit.

**Persons Testifying:** PRO: Senator Karen Keiser, Prime Sponsor; Laura Beal, citizen; Carolyn Brotherton, American Federation of Teachers Washington; Shelly Pollock Mead, Registered Nurse, Washington State Nurses Association; Joe Kendo, Washington State Labor Council, AFL-CIO; Samantha Grad, United Food and Commercial Workers International Union 21.

CON: Holly Chisa, North West Grocery Association; Lisa Thatcher, Washington State Hospital Association; June Altaras, MultiCare; Bruce Beckett, Washington Retail Association; Cliff Webster, Liability Reform Coalition; Bre Elsey, Washington Farm Bureau; Richard Clyne, Washington Farm Bureau; Jim King, Independent Business Association; Christine Brewer, Washington Self Insurers Association; Robert Battles, Association of Washington Business; Dan Coyne, Food Northwest; Tammie Hetrick, Washington Food Industry Association.

OTHER: Candice Bock, Association of Washington Cities.

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