

SENATE BILL REPORT

SB 5130

As Reported by Senate Committee On:
Labor, Commerce & Tribal Affairs, February 15, 2021

Title: An act relating to employee's rights concerning personnel files and disciplinary actions.

Brief Description: Concerning employee's rights concerning personnel files and disciplinary actions.

Sponsors: Senators Kuderer, Keiser, Das, Hunt, Robinson, Saldaña, Stanford and Wilson, C..

Brief History:

Committee Activity: Labor, Commerce & Tribal Affairs: 1/25/21, 2/15/21 [DPS, DNP].

Brief Summary of First Substitute Bill

- Requires an employer to furnish an employee with a complete, unredacted copy of the personnel file at no cost within 14 days of a request.
- Mandates an employer to furnish a former employee with a signed written statement of the reasons for and effective date of discharge within 14 days of the written request.
- Allows an employee to bring a private action for violations of certain rights regarding personnel files and discharge information and entitles the employee to equitable relief, graduated statutory damages up to \$1,000, and reasonable attorneys' fees and costs of each violation.
- Defines personnel file, agent, and fiduciary.

SENATE COMMITTEE ON LABOR, COMMERCE & TRIBAL AFFAIRS

Majority Report: That Substitute Senate Bill No. 5130 be substituted therefor, and the substitute bill do pass.

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.

Signed by Senators Keiser, Chair; Conway, Vice Chair, Labor; Stanford, Vice Chair, Commerce & Tribal Affairs; Robinson and Saldaña.

Minority Report: Do not pass.

Signed by Senators King, Ranking Member; Braun, Honeyford and Schoesler.

Staff: Susan Jones (786-7404)

Background: At least annually, every employer must, upon the request of an employee, permit that employee to inspect any or all of the employee's own personnel files. Each employer must make such files available locally within a reasonable period of time after the employee requests the files.

An employee may annually petition that the employer review all information in the employee's personnel files that are regularly maintained by the employer as a part of the employer's business records, or are subject to reference for information given to persons outside of the company. The employer must determine if there is any irrelevant or erroneous information in the files, and must remove all such information from the file.

If an employee does not agree with the employer's determination, the employee may request to have a statement containing the employee's rebuttal or correction placed in the employee's personnel file. This requirement does not prevent the employer from removing information more frequently. A former employee retains the right of rebuttal or correction for a period not to exceed two years.

These requirements do not apply to:

- the records of an employee relating to the investigation of a possible criminal offense; or
- information or records compiled in preparation for an impending lawsuit which would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.

The Department of Labor and Industries (L&I) rules provide that employers, subject to the minimum wage laws, must keep certain employee payroll and employment information. Under L&I rules, every employer must:

- keep, for at least three years, a record of the name, address, and occupation of each employee, dates of employment, rate or rates of pay, amount paid each pay period to each such employee and the hours worked;
- make the these record available to the employee, upon request, at any reasonable time; and
- within ten business days of receiving a written request by a former employee, furnish a signed written statement stating the reasons for and effective date of discharge.

Summary of Bill (First Substitute): Within 14 calendar days of a request by an employee,

former employee, or their attorney, agent or fiduciary, each employer must furnish to the employee a complete, unredacted electronic or paper copy of the employee's personnel files at no cost to the employee.

The employee's ability to petition for the employer's review of the personnel file is not limited, in part, to those files maintained as part of the employer's business records.

Within 14 business days of receiving a written request by a former employee or their attorney, agent, or fiduciary, the employer must furnish a signed written statement to the employee stating the reasons for and effective date of discharge.

An employee may enforce the employee's rights through a private cause of action in superior court, without exhausting any administrative remedies. For each violation, the employee is entitled to equitable relief; statutory damages of \$250 if it is not provided within 14 days from the due date; \$500 if not provided within 28 days from the due date; and \$1,000 if provided later than 28 days from the due date; and reasonable attorneys' fees and costs.

Personnel file includes all:

- job application records;
- performance evaluations;
- disciplinary records;
- medical, leave, and reasonable accommodation records, which an employer should maintain separately from other personnel records for medical privacy;
- payroll records;
- employment agreements; and
- other records maintained in a personnel or employment file for that employee, however designated.

These requirements may not be construed to create a retention schedule for records or to entitle an employee to an employer's protected legal file.

Agents and fiduciaries must provide the document evidencing their legal authority to represent the employee or former employee at the time of any request.

A public employer may redact information before sending the copy of the personnel file if required by law. The public employer must provide the reasons for any redaction and the supporting laws when furnishing the file.

The terms agent and fiduciary are defined.

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

- Provides that an attorney, agent, or fiduciary may request documents.
- Allows the employer to provide electronic or paper copies of the personnel file.
- Changes the date for providing the statement for discharge from 10 days to 14 days.
- Makes the statutory penalties graduated depending on when the documents are provided after the due date.
- Modifies the definition of personnel file, including that an employer should maintain medical records separate from other personnel records.
- Provides that the statute may not be construed to create an employer retention schedule.
- Requires agents and fiduciaries to provide documents evidencing their legal authority.
- Allows a public employer to redact information as required by law.
- Defines the terms agent and fiduciary.

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: Personnel files change after an employee has left employment and after litigation begins in order to help the employer. We can stop this practice of changing the facts after an employer gets sued. This would allow the employee or someone representing them to request the personnel files. It defines personnel file. This would end the practice of getting the personnel file and in litigation, other information dribbles in. Allowing a private right of action is the gold standard for ensuring compliance with the law. If employers comply, that will ensure them not being on the other side of a lawsuit. This will help employers and employees.

In workers' compensation claims, only employers have all information needed to make sure that benefits are correctly paid. We are not asking for new records to be created or to put a burden on employers. L&I often has a very difficult time getting this information.

Employees and former employees need personnel files to abide by noncompete, confidentiality agreements; to verify and correct erroneous information; and to determine reasonable accommodations; and to get legal advice. It is hard to get legal advice without the documents. Personnel records are not defined and often employers only give traditional information. There is no deadline in the law. No copy is required. They must review the file at the office, which may be out of state. The law does not help those with disabilities or who do not read English.

Courts may say that you have to go through L&I. However, there is no record of L&I enforcing the current provisions. Records are often electronic and can be sent by email.

Many employees do not have records because they are careless or very often they were never given copies or they do not keep them for 10 to 15 years. Sometimes there is information in portal but former employees cannot log back in.

The bill gives employers a checklist of documents to keep in personnel file. They will not need to call an attorney and ask what to keep in the file. The bill does not require that employers create records, just to keep them in the file and make them available to the employee. It facilitates legal advice and reduces lawsuits or expedites the advice and reduces cost. If both parties' attorneys have records, frivolous lawsuits are less likely to happen.

CON: We are concerned about this bill. The bill will help attorneys but will be difficult for 90 percent of small employers who do not keep these records. Many records are not required to be kept. With respect to discharge, this is an at-will state. An employer does not have to give a reason for discharge. Most small businesses do not have to give a reason for discharge. This will give an expectation that employees will get a reason. If they are not happy with the reason, there will be lawsuits. Human resources for small business is the owner at the kitchen table.

OTHER: The time periods for records retention are inconsistent. L&I rules and policies, and federal rules outline certain records and time periods to be kept. Section 6 of the bill melds the concepts of payroll records and personnel records. It adds two new records, application and employment agreements. It is unsure if this is prospective. It is silent on the length of record retention. It includes medical and leave files. But the ADA prohibits keeping medical records in a personnel file.

Persons Testifying: PRO: Senator Patty Kuderer, Prime Sponsor; Jesse Wing, Washington Employment Lawyers Association; Lawrence Cock, CFL Group LLP; Katherine L. Mason.

CON: Jim King, Independent Business Association.

OTHER: Bruce Beckett, Washington Retail Association.

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