

SENATE BILL REPORT

ESSB 5190

As Amended by House, April 8, 2021

Title: An act relating to providing health care workers with presumptive benefits during a public health emergency.

Brief Description: Providing health care workers with presumptive benefits during a public health emergency.

Sponsors: Senate Committee on Labor, Commerce & Tribal Affairs (originally sponsored by Senators Holy, Frockt, Conway, Hasegawa, Honeyford, Keiser, King, Lovelett, Randall, Salomon, Van De Wege, Warnick, Wilson, C. and Wilson, J.).

Brief History:

Committee Activity: Labor, Commerce & Tribal Affairs: 1/28/21, 2/11/21 [DPS, DNP, w/oRec].

Floor Activity: Passed Senate: 2/25/21, 34-15.
Passed House: 4/8/21, 84-14.

Brief Summary of Engrossed First Substitute Bill

- Makes health care employees who left work to quarantine during a public health emergency eligible for unemployment insurance benefits.
- Provides that misconduct for unemployment insurance purposes does not include entering quarantine or contracting the disease that is the subject of a public health emergency.
- Provides presumptive workers' compensation coverage for health care employees who are in quarantine or contract the disease that is the subject of a public health emergency.

SENATE COMMITTEE ON LABOR, COMMERCE & TRIBAL AFFAIRS

Majority Report: That Substitute Senate Bill No. 5190 be substituted therefor, and the

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substitute bill do pass.

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

Minority Report: Do not pass.

Signed by Senator Schoesler.

Minority Report: That it be referred without recommendation.

Signed by Senator Braun.

Staff: Susan Jones (786-7404)

Background: Unemployment Insurance. An unemployed individual (claimant) is eligible to receive unemployment insurance benefits (UI benefits) if the individual: (1) worked at least 680 hours in the base year; (2) was separated from employment through no fault of the claimant's or quit work for good cause; and (3) is able to work, available to work, and is actively searching for suitable work. The Employment Security Department (ESD) administers Washington State's unemployment insurance program.

Benefits paid are charged to the experience-rating of base year employers on a pro rata basis according to the amount of wages paid to the claimant by the employer in the claimant's base year compared to the wages paid by all employers. Some benefits, such as those paid for certain good cause quits, are charged only to the separating employer, or are not charged to any employer.

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.

No worker will receive compensation for or during the day on which injury was received, or the three days following the same, unless their disability continues for a period of 14 consecutive calendar days from the date of injury.

Summary of Engrossed First Substitute Bill: Unemployment Insurance. For unemployment insurance claims, after July 4, 2021, and during the weeks of a public health emergency (PHE), an unemployed individual, who worked at a health care facility and was directly involved in the delivery of health services, and left from work due to entering quarantine because of exposure to or contracting the disease that is the subject of the declaration of the PHE, is eligible for UI benefits.

During the weeks of a PHE, an unemployed individual may also meet the requirements of being able to work, available to work, and is actively searching for suitable work, if

unemployed health care worker, who was terminated or left work to quarantine, is able to perform, available to perform, and actively seeking suitable work which will commence after quarantine or which can be performed for an employer from the individual's home.

The benefits paid to a health care worker, who was terminated due to quarantine because of exposure to or contracting the disease that is the subject of the PHE, are only charged to the experience rating of the separating employer. The benefits paid to a health care worker who left to quarantine are not charged to contribution paying employers.

Misconduct for unemployment insurance eligibility does not include entering quarantine because of exposure to or contracting the disease that is the subject of the declaration of the PHE.

Workers' Compensation. For health care employees, there exists a prima facie presumption that any infectious or contagious diseases which are the subject of a PHE are occupational diseases during a PHE. The presumption applies to health care workers of any health care facility or other organization that provides emergency or medical services, who may have direct contact with any person who has been exposed to or tested positive for any infectious or contagious diseases which are the subject of the PHE. There is a presumption that the health care employee contracted or was exposed to the disease at the health care facility. The health care employee must provide verification to the Department of Labor and Industries or the self-insurer, that the employee is in quarantine or has contracted the disease after exposure to the infectious or contagious disease.

The presumption takes effect on the day the national, regional, or state emergency is declared and continues until this declaration is revoked. The two year time limits for filing claims for occupational disease apply to claims covered under this section.

This presumption of occupational disease may be rebutted by clear and convincing evidence that:

- the exposure to the disease occurred from other employment or nonemployment activities; or
- the employee was working from the employee's home or other location not under the employer's control, on leave from the employee's employment, for the period of quarantine outlined for the disease before the employee's date of disease contraction or period of incapacity resulting from exposure to the disease.

Temporary total disability benefits is payable beginning the first day the worker is directed to quarantine or is unable to work due to the exposure or contraction of the disease, whichever comes first. If leave or similar benefits are paid to the worker as part of a federal or state program for these employees during the PHE, total temporary disability benefits are not payable for the same period of time covered by this federal or state program.

When a determination involving the presumption is appealed and the final decision allows

the claim of benefits, the Board of Industrial Insurance Appeals (BIIA) or court must order that all reasonable costs of the appeal, including attorneys' fees and witness fees, be paid to the worker or the worker's beneficiary by the opposing party. If the opposing party is a state fund employer or retrospective rating group, the costs and fees are paid by the employer or retrospective rating group. When reasonable costs of the appeal must be paid by the L&I as the opposing party in a state fund case, the costs shall be paid from the accident fund and charged to the costs of the claim. Costs of claims allowed may not affect the experience rating of state fund employers.

When there is an appeal of a BIIA decision and the worker or beneficiary's right to relief is sustained, the court approved attorneys' fees and the medical fees and the costs are payable directly by the person filing the appeal. Where an appealing party, other than the L&I or a self-insurer, is ordered to pay attorneys' fees and costs and fails to do so, the Director or the person entitled to compensation may file injunctive or other appropriate relief in the superior court; provided such a filing does not preclude other methods of enforcement under the Industrial Insurance Act.

Definitions. Health care facility means a facility that provides health care services directly to patients, including but not limited to, a hospital, clinic, health care provider's office, health maintenance organization, diagnostic or treatment center, neuropsychiatric or mental health facility, hospice, or nursing home.

Public health emergency means a declaration or order that covers the jurisdiction where the individual was working on the date the individual became unemployed or of exposure concerning any dangerous, contagious, or infectious diseases, including a pandemic, and is issued by the President of the United States, has declared a national or regional emergency, or the Governor declared a state of emergency. For unemployment purposes, it also includes a state of emergency declared by the Governor or state executive of another state where the unemployed individual was working at the time of the declaration.

Appropriation: None.

Fiscal Note: Available.

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 on Proposed Substitute: *The committee recommended a different version of the bill than what was heard.* PRO: This is a common sense measure to solve a problem faced by health care workers during the COVID crisis. Police and fire workers have certain presumptions when there is a strong correlation. There is a much more direct and immediate correlation with infectious diseases for health care workers. In a time of a national or state emergency, we need to take care of the people we

are asking to step up.

Many workers in long-term care and nursing home facilities are risking their lives and being exposed and having to take time off. They need to have access to these important benefits. When the pandemic first started, personal protection equipment (PPE) was in short supply and some health care workers, even with direct patient contact, did not get PPE for several months. Doors of COVID patients were not always labelled. Examples were given of many workers getting COVID and they were deemed to have a community exposure, even though they are using PPE. They were told they could not get workers' compensation without a formal exposure.

Health care employees should not have to fight with their employers to get protection. We want to make sure all the workers in health care facilities, including receptionists, those delivering meals, and workers in infection control and sanitation, are covered.

COVID has brought to light ways we can protect health care workers. Because of ridiculous technicalities, health workers had to use their sick leave. We need to make it very clear and easy to understand that benefits are available. During COVID, the presumptive eligibility has been piecemeal. Some employers have pushed back on eligibility. Clear communication is needed.

CON: We did not have a lot of time to digest the proposed substitute. For the UI section and the employees leaving work, we are concerned about unintended consequences for staffing. We need to have proper staffing.

For workers' compensation, it protects self-insurers but the same protection is not in the UI provisions. We would like consistency.

We would like consistency in having the preponderance of the evidence standard like the Legislature provided for firefighters and fire investigators, rather than the clear and convincing evidence standard in the bill. The burden is one step below the beyond a reasonable doubt standard. This opens employers up to third party claims by shifting the burden as opposed to the shield employers have for workers compensation.

This bill, like the HELSA bill, applies to any contagious and infectious disease. The Zika virus seems to still be a public health emergency and transmission was through a mosquito bite. That would be covered under the bill. To presume that the bite occurred in a health care setting is too broad. Exposure is not defined.

OTHER: There are some technical changes to make, the bill covers the workers the sponsor intends to cover.

Under the Governor's proclamation, there is no presumption. L&I has criteria. It is highly likely that a health care worker is going to meet the criteria for a workers' compensation.

Under the Governor's proclamation, the employer has an obligation to let the employee choose which leave to take.

There have been 3700 workers' compensation claims. About 3 percent have been rejected. Regular workers' compensation claims have a 10 percent rejection. The number of claims is low. There may be misinformation or lack of information for workers' compensation for these claims.

Persons Testifying: PRO: Senator Jeff Holy, Prime Sponsor; Mindy Brandli, Washington State Nurses Association; Erin Haick, SEIU 925; Madeleine Foutch, SEIU 775 Long-Term Caregivers Union; Scott Lawrence, UFCW Local 21.

CON: Kris Tefft, Washington Self Insurers Association; Robert Battles, Association of Washington Business.

OTHER: Vickie Kennedy, Labor and Industries; Lisa Thatcher, Washington State Hospital Association.

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

EFFECT OF HOUSE AMENDMENT(S):

Unemployment Insurance

- Specifies that health care employee unemployment insurance eligibility related to quarantine is for the period of quarantine consistent with recommended guidance or direction from certain entities; and
- Applies the misconduct exception related to quarantine and the availability to work provisions specifically to health care workers.

Presumption of Occupational Disease Under Workers' Compensation

- Removes the specification that there is a presumption that the health care employee contracted or was exposed to the disease at the health care facility.
- Disallows payment of benefits on the date the disease was contracted but waives the three-day waiting period.
- Provides for deduction of the costs of payments for certain assessments from self-insured employers and self-insurance hospital groups.
- Modifies the definition of "health care employee" from one who may have direct contact with certain persons, to having or likely having had such contact.
- Removes the requirement that the opposing party pay the costs of appeal when the claim is allowed on appeal on the presumption, and the provision specifying that when costs of appeal are paid by L&I in a state fund case, the costs must be paid from the accident fund and charged to the costs of the claim.
- Removes provisions authorizing L&I or the person entitled to compensation to file for injunctive or other appropriate relief in court, if an appealing party fails to comply with an order to pay attorneys' fees and costs.

- Removes the requirement that attorneys' fees and costs be paid by the employer or other aggrieved party who filed the appeal from the board, if a court on appeal sustains the worker's right to relief.
- Removes the requirement that, for purposes of an appeal to the superior or appellate court involving the presumption, attorneys' fees and costs must be paid by the opposing party when the claim for benefits is allowed.