

HOUSE BILL REPORT

SHB 1521

As Amended by the Senate

Title: An act relating to industrial insurance self-insured employer and third-party administrator penalties and duties.

Brief Description: Concerning the duties of industrial insurance self-insured employers and third-party administrators.

Sponsors: House Committee on Labor & Workplace Standards (originally sponsored by Representatives Bronoske, Stonier, Wylie, Berry and Pollet).

Brief History:

Committee Activity:

Labor & Workplace Standards: 2/1/23, 2/14/23 [DPS].

Floor Activity:

Passed House: 3/1/23, 69-27.

Senate Amended.

Passed Senate: 4/10/23, 32-17.

Brief Summary of Substitute Bill

- Specifies that self-insured employers and third-party administrators have a duty of good faith and fair dealing to workers with respect to all aspects of workers' compensation.
- Requires the Department of Labor and Industries to enforce the duty of good faith and fair dealing.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 6 members: Representatives Berry, Chair; Fosse, Vice Chair; Bronoske, Doglio, Ormsby and Ortiz-Self.

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.

Minority Report: Without recommendation. Signed by 3 members: Representatives Robertson, Ranking Minority Member; Schmidt, Assistant Ranking Minority Member; Connors.

Staff: Kelly Leonard (786-7147).

Background:

Self-Insured Employers.

Under the state's workers' compensation laws, employers must either insure through the State Fund administered by the Department of Labor and Industries (Department) or, if qualified, may self-insure. Self-insurance is a program in which the employer, the self-insurer, provides any and all appropriate benefits to the injured worker. Self-insurers manage some aspects of injured worker claims, including closing certain types of claims. Self-insurers must maintain records of all payments of compensation and provide to the Department all information the self-insurer has relating to a disputed claim. Self-insurers may contract with a third-party administrator (TPA) to administer claims. Third-party administrators must be licensed by the Department, and claims administrators must maintain certification through the Department.

Penalties.

Employers are subject to penalties for violations of various workers' compensation requirements, including: (1) unreasonably delaying or failing to pay benefits by a self-insurer; (2) failing to pay premiums; (3) misrepresenting the amount of payroll or employee hours; (4) failing to keep, file, or provide adequate records and reports; or (5) failing to comply with any other applicable workers' compensation laws or rules. The amounts of penalties are adjusted every three years based on changes in the Consumer Price Index.

Penalty amounts vary, but include:

- a maximum of \$1,000 or 25 percent of the amount due, or the underpayment, for a self-insurer who unreasonably delays or refuses to pay benefits; and
- a maximum of \$1,000 for failure to comply with Department rule or other provision pertaining to workers' compensation.

Summary of Substitute Bill:

All self-insured employers and TPAs have a duty of good faith and fair dealing to workers. A self-insured employer or a TPA violates its duty if it coerces a worker to accept less than the compensation due to him or her, or otherwise fails to act in good faith or fair dealing regarding its obligations. The Department must adopt rules establishing additional applications of the duty of good faith and fair dealing as well as criteria for determining appropriate penalties for violations.

The Department must investigate each alleged violation of the duty of good faith and fair

dealing upon the filing of a written complaint or upon its own motion. After receiving notice, the employer or the TPA may file a written response within 10 working days. If the employer or the TPA fails to file a timely response, the Department must issue an order based on available information. The Department must issue an order determining whether a violation has occurred within 30 calendar days of receipt of a complete complaint or its own motion.

If an employer or a TPA violates the duty of good faith and fair dealing, it must be ordered to pay a penalty of one to 52 times the average weekly wage at the time of the order, depending upon the severity of the violation, which accrues for the benefit of the worker. In addition, if a self-insured employer violates the duty of good faith and fair dealing, the Department may impose the following penalties:

- a maximum of \$3,000 or 75 percent of the amount due, or the underpayment, for a self-insurer who unreasonably delays or refuses to pay benefits; and
- a maximum of \$3,000 for failure to comply with Department rule or other provision pertaining to workers' compensation.

The duty of good faith and fair dealing applies to all claims regardless of the date of injury.

EFFECT OF SENATE AMENDMENT(S):

The Senate amendments make the following changes pertaining to the duty of good faith and fair dealing:

- limiting the duty to self-insured municipal employers and their third party administrators (rather than applying it to all self-insured employers and third party administrators as provided in the underlying bill);
- defining "municipal" as counties, cities, towns, port districts, water-sewer districts, school districts, metropolitan park districts, fire districts, public hospital districts, regional fire protection service authorities, education service districts, or such other units of local government; and
- specifying that the bill does not create a private cause of action outside of the original jurisdiction of the Department of Labor and Industries (L&I) to assess penalties and rights to appeal.

The Senate amendments also expand the grounds upon which L&I must withdraw the certification of a self-insured employer to include circumstances where such an employer violates the duty of good faith and fair dealing three times within a three-year period. For purposes of determining whether there have been three violations within a three-year period, L&I must use the date of the departmental order. Any subsequent order of L&I, the Board of Industrial Insurance Appeals, or courts affirming a violation occurred relates back to the date of the departmental order. L&I may delay withdrawing certification while an employer has an enforceable contract with a licensed third-party administrator that may not be legally terminated. However, the employer may not renew or extend the contract.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect on July 1, 2024.

Staff Summary of Public Testimony:

(In support) Self-insured employers and TPAs are incentivized to keep their costs low, hurting workers in the process. There are many instances where firefighters and other first responders have made claims for presumptive occupational diseases, including lung cancer and other similar diagnoses, as well as post-traumatic stress disorder, where the self-insured employer or the TPA made objections, delayed the process, and sought to deny otherwise legitimate claims. Many workers are forced to hire attorneys. They typically prevail in their claims, but the process can take many years and their benefits are reduced due to attorneys' costs. This is all done to cut costs. This is incredibly unfair to persons who have risked their lives in the interest of public service. It is a disgrace to the entire system. The bill establishes a duty of good faith and fair dealing on the part of self-insured employers and TPAs, including penalties. This will deter frivolous and unfair conduct, and it will allow workers to recoup some of their losses.

(Opposed) Self-insured employers and TPAs are already heavily regulated by the Department. For any claim, a final determination cannot be made without the Department's approval. Employees of self-insured employers have all the same rights as other workers, and it is not necessary to hire an attorney for workers' compensation claims or appeals. The concerns of the proponents have already been heard and addressed. In 2019, the state passed Substitute House Bill (SHB) 2409, which was highly controversial. The original version of SHB 2409 included a provision similar to this bill; however, it was removed. Instead, SHB 2409 created a new regulatory structure for TPAs, requiring licensing and certification and establishing a dispute-resolution process. Self-insured employers and TPAs accepted this oversight with the understanding that the Legislature would not impose a duty of good faith and fair dealing. It is unfair to come back and do it now. It is unclear what the bill aims to accomplish. Self-insured employers and TPAs need to be able to review claims, and sometimes they make mistakes. The Department can already intervene when there are problems. This bill only serves to help lawyers, and the workers and employers will lose.

(Other) There are technical issues with the bill, particularly with the timelines that are out of sync with current law. The Department is still in the process of implementing SHB 2409, and its employees are still getting trained on its requirements. This bill should be amended with a delayed effective date in order to allow the Department time to conduct rulemaking and conduct implementation. The duty of good faith and fair dealing is an insurance concept, and it will be new for workers' compensation. It will take time for the Department to make adjustments for this to work properly.

Persons Testifying: (In support) Representative Dan Bronoske, prime sponsor; Doug Palmer, Washington State Association for Justice; Eric Becker, Jerry Underwood, Steve Bradley, and Jamison Smith Washington State Council of Fire Fighters; Greg Weber; Steve Austin; and Jarl Peterson.

(Opposed) Kris Tefft, Washington Self-Insurers Association; Bernadette Pratt, Pratt, Day and Stratton, Washington Self-Insurers Association; and Kelly Early, Educational Service District 113.

(Other) Tammy Fellin, Department of Labor and Industries.

Persons Signed In To Testify But Not Testifying: None.