

SENATE BILL REPORT

SB 5259

As Reported by Senate Committee On:
Labor & Commerce, February 13, 2023

Title: An act relating to ensuring commerce and workplaces are safe from product theft.

Brief Description: Ensuring commerce and workplaces are safe from product theft.

Sponsors: Senators Keiser, King, Conway, Lovick, Hunt, Kuderer, Nobles and Wilson, C..

Brief History:

Committee Activity: Labor & Commerce: 1/26/23, 2/13/23 [DPS-WM, DNP, w/oRec].

Brief Summary of First Substitute Bill

- Establishes the Organized Retail Theft Task Force.
- Establishes a business and occupation tax credit for physical security improvements to mercantile establishments.
- Reduces the cannabis excise tax for physical security improvements to cannabis retail establishments.
- Prohibits certain retail establishments from disciplining an individual who intervenes with the purpose of investigating or questioning the ownership of merchandise at a mercantile establishment, subject to certain conditions.

SENATE COMMITTEE ON LABOR & COMMERCE

Majority Report: That Substitute Senate Bill No. 5259 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Keiser, Chair; Conway, Vice Chair; Saldaña, Vice Chair; Robinson and Stanford.

Minority Report: Do not 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 Senator Schoesler.

Minority Report: That it be referred without recommendation.

Signed by Senators King, Ranking Member; Braun and MacEwen.

Staff: Jarrett Sacks (786-7448)

Background: Organized Retail Theft. A person is guilty of organized retail theft if the person:

- commits theft of property with a value of at least \$750 from a mercantile establishment with an accomplice;
- possesses stolen property with a value of at least \$750 from a mercantile establishment with an accomplice;
- commits theft of property with a cumulative value of at least \$750 from one or more mercantile establishments within a period of 180 days; or
- commits theft of property with a cumulative value of at least \$750 from a mercantile establishment with no less than six accomplices and makes or sends at least one electronic communication seeking participation in the theft in the course of planning or commission of the theft.

A person is guilty of organized retail theft in the first degree if the property stolen or possessed has a value of \$5,000 or more. Organized retail theft in the first degree is a class B felony. A person is guilty of organized retail theft in the second degree if the property stolen or possessed has a value of at least \$750, but less than \$5,000. Organized retail theft in the second degree is a class C felony.

Retail Theft with Special Circumstances. Retail theft with special circumstances is theft from a mercantile establishment with one of the following special circumstances:

- to facilitate the theft, the person leaves the mercantile establishment through a designated emergency exit;
- the person was, at the time of the theft, in possession of an item, article, implement, or device designed to overcome security systems including, but not limited to, lined bags or tag removers; or
- the person committed theft at three or more separate and distinct mercantile establishments within a 180-day period.

Retail theft with special circumstances in the first degree involves theft of property worth \$5,000 or more. It is a class B felony. A person is guilty of retail theft with special circumstances in the second degree if the property is worth \$750 to \$4,999. Retail theft with special circumstances in the second degree is a class C felony. Retail theft with special circumstances in the third degree involves theft of property worth under \$750. It is also a class C felony.

Organized Retail Theft Task Force. In June of 2022, Attorney General Bob Ferguson

announced the creation of the Organized Retail Theft Task Force to improve coordination and collaboration among law enforcement agencies to address organized retail theft. The first meeting of the task force occurred July 7, 2022.

Business and Occupation Tax. The business and occupation (B&O) tax is imposed on the gross receipts of business activities conducted within the state, without any deduction for the costs of doing business. The B&O tax rate varies by classification.

Cannabis Excise Tax. The cannabis excise tax is equal to 37 percent of the selling price on each retail sale in Washington of cannabis concentrates, useable cannabis, and cannabis-infused products. This tax is separate and in addition to general state and local sales and use taxes that apply to retail sales of tangible personal property, and is not part of the total retail price to which general state and local sales and use taxes apply. The tax must be reflected in the price list or quoted shelf price in the licensed cannabis retail store and in any advertising that includes prices for all cannabis products. All revenues collected from the cannabis excise tax must be deposited each day in the Dedicated Cannabis Account.

Summary of Bill: The bill as referred to committee not considered.

Summary of Bill (First Substitute): Retail Theft Task Force. The organized retail theft task force is established to improve coordination and collaboration among law enforcement agencies. The attorney general must appoint members on the task force and may increase the size of the task force as necessary. Staff support for the task force is provided by the Attorney General's Office. The task force must work with mercantile establishments and their associations to collect and aggregate data on incidents of organized retail theft. The task force must also work with the Liquor and Cannabis Board and its retail licensees to collect and aggregate similar data. Mercantile establishments and cannabis retail licensees that experience incidents of retail theft must report incidents to the task force. The attorney general must transmit any data received by the task force on organized retail theft to the Washington Association of Sheriffs and Police Chiefs (WASPC) and WASPC must remit the information to the appropriate law enforcement agencies. Incidents or organized retail theft that are reported, transmitted, or remitted under the bill are exempt from the Public Disclosure Act.

Business and Occupation Tax Credit and Cannabis Excise Tax Reduction. A person is allowed a B&O tax credit for physical security improvements to a mercantile establishment owned by the person claiming the credit. The credit equals the amount spent on physical security improvements in the previous four quarters up to \$3,000. Unused credit may be carried over and used in subsequent tax reporting periods, but may not be claimed more than 12 months after the reporting period in which the credit was earned. A person must apply with the Department of Revenue (DOR) prior to claiming the credit and file documents electronically as required by DOR. The tax credit expires on June 30, 2030.

The cannabis excise tax is reduced from 37 percent to 32 percent for cannabis retailers that

spend \$3,000 or more for physical security improvements to prevent theft at a cannabis retail establishment in a calendar year. The reduced rate begins the month after the \$3,000 threshold is met and expires after 12 months. The reduced tax may be applied to multiple cannabis retail stores owned by the same person if the \$3,000 threshold is met at each individual retail store. The reduced tax rate may only be claimed once for each cannabis retail establishment. The provisions related to the excise tax reduction expire June 30, 2030.

"Physical security improvements" means physical improvements, additions, or other similar changes to a mercantile establishment exclusively for the purposes of preventing the theft of merchandise, including, but not limited to:

- security cameras;
- antitheft mirrors and signage;
- merchandising security equipment;
- locking display cases or display locks;
- electronic article surveillance; and
- storefront crash barriers or safety bollards.

A tax preferences performance statement is included, stating that the public policy objective is to reduce theft at retailers in Washington and to incentivize retailers to implement security precautions that reduce or prevent theft and ensure that such measures are accessible to all retailers.

Employee Intervention in Retail Theft. Retail establishments with 50 or more employees are prohibited from suspending without pay, terminating from employment, or discriminating in employment against an individual who engaged, intervened, or attempted to intervene with a person for the purpose of investigation or questioning as to the ownership of any merchandise, provided:

- the employee does not single out, profile, or select the person based on the person's actual or perceived race, creed, color, national origin, citizenship or immigration status, sex, sexual orientation, age, veteran or military status, or sensory, mental, or physical impairment;
- the employee does not physically detain or restrain the person;
- the person is engaged in a reasonable manner and for not more than a reasonable time to permit an investigation or questioning by a peace officer or by the owner of the mercantile establishment or their authorized employees; and
- the employee had reasonable grounds to believe that the person was committing or attempting to commit theft on the premises of the merchandise.

Retail establishments are also prohibited from suspending without pay, terminating from employment, or discriminating in employment against an individual for notifying or summoning law enforcement to report an incident of organized retail theft or for cooperating with an official law enforcement investigation into organized retail theft.

After an employee or former employee has exhausted administrative remedies, an employer

who violates the prohibitions is liable to the impacted employee or former employee in a civil cause of action for actual or statutory damages of \$10,000, whichever is more, as well as reasonable attorneys' fees and costs. In any administrative or civil action, the employer has the burden to prove that the adverse job action against an employee for intervening was lawful. An employer is not liable for any civil claims or actions resulting from an act by an employee that is protected under the bill, as long as the act was not directed by the employer.

Retail establishments must provide training to employees at the beginning of their employment and at least annually on the protections provided by the bill. Employers may designate through policy certain employees, classes of employees, or both, who are not to engage with customers suspected of theft and the employer must provide training to its employees on this policy.

Reasonable grounds includes, but is not limited to, knowledge that a person has unpurchased merchandise of a mercantile establishment. A reasonable time means the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise.

Effective Dates. The bill contains an emergency clause and the non-tax related provisions take effect immediately. The tax-related provisions take effect January 1, 2024.

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

Requires the attorney general to transmit the data the Organized Retail Theft Task Force receives under the bill to the Association of Sheriffs and Police Chiefs for remittance to the appropriate law enforcement agencies. Excludes employees who single out or profile a person for intervention based on a listed protected class from the protections for employee interventions to prevent retail theft. Prohibits retail establishments from suspending without pay, terminating from employment, or discriminating in employment against an individual who notifies law enforcement of organized retail theft incidents or who otherwise cooperates with law enforcement investigations into organized retail theft.

Changes, for the purposes of the employee intervention protections, the prohibited actions of a retail establishment, prohibiting a retail establishment from suspending without pay, terminating from employment, or discriminating in employment against an individual who engages in a protected intervention to prevent retail theft under the bill. Modifies, for the purposes of the employee intervention protections, the definition of reasonable grounds to include knowledge that a person has possession of unpurchased merchandise, rather than knowledge a person has concealed possession of the merchandise.

Requires an employee to exhaust administrative remedies before engaging in a civil action

for violations of the employee intervention protections. Provides that the employer has the burden to establish that an adverse job action against an employee for intervening was lawful. Provides that an employer is not liable for civil claims or actions resulting from an act by an employee that is protected under the bill, as long as the action was not directed by the employer. Requires retail establishments to provide training to employees at the commencement of employment and at least annually on the protections provided by the bill. Allows employers to designate through policy certain employees or classes of employees who are not to engage with customers suspected of theft. Requires employers to train employees on the policy.

Appropriation: None.

Fiscal Note: Available.

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

Effective Date: The bill contains several effective dates. Please refer to the bill.

Staff Summary of Public Testimony on Proposed Substitute: *The committee recommended a different version of the bill than what was heard.* PRO: The bill from last year was broader, but Congress passed the INFORM Act, which regulates the online marketplaces. The bill attempts to deal with losses from organized retail theft and incentivizes retailers to harden stores against retail theft. Employees are fired for intervening to stop product theft, even if told by management to intervene. The bill empowers workers to make their jobs safer. Assaults in grocery stores are increasing but workers are being punished for putting hands on carts or standing in doorways. The bill ensures the safety of workers at cannabis stores and the excise tax reduction is an important step. Robberies in cannabis stores have increased recently. The bill allows the AGO to continue work with the organized retail theft task force.

OTHER: Employers have policies prohibiting intervention because safety is more important than the goods. They make it clear that no intervention is appropriate inside or outside of the store. The bill could put employers at risk by increasing their liability. The bill puts enforcement of organized retail theft under the attorney general, but the attorney general is not a law enforcement agency. The bill should address all retail theft, not just organized retail theft. Only trained employees should be allowed to intervene.

Persons Testifying: PRO: Senator Karen Keiser, Prime Sponsor; Adan Espino Jr, Craft Cannabis Coalition; Suzanne Geffre; Naomi Oligario; Anna McCallister; Sarah Cherin, UFCW 3000; Debbie Gath, Teamsters Local 38; Jennifer Woods, WA State Attorney General's Office; James McMahan, WA Assoc. Sheriffs & Police Chiefs.

OTHER: Bruce Beckett, WA Retail Association; Katie Beeson, Washington Food Industry Association (WFIA); Larry Shannon, Washington State Association for Justice; Brandon

Houskeeper, Northwest Grocery Association.

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