SENATE BILL REPORT
SB 5264

As Reported By Senate Committee On:
Labor, Commerce & Financial Institutions, February 19, 2001
Ways & Means, March 8, 2001

Title: An act relating to unfair practices by public employers with respect to eligibility for employment-based benefits.

Brief Description: Prohibiting public employers from firing employees to avoid providing benefits.

Sponsors: Senators Prentice, Fraser, Patterson, Costa, Shin, Kline, Kohl-Welles, Constantine, Jacobsen, Winsley and Gardner.

Brief History:
Committee Activity: Labor, Commerce & Financial Institutions: 1/18/01, 2/19/01 [DP, DNP].
Ways & Means: 3/8/01 [DPS, DNP].

SENATE COMMITTEE ON LABOR, COMMERCE & FINANCIAL INSTITUTIONS

Majority Report: Do pass.
Signed by Senators Prentice, Chair; Gardner, Vice Chair; Fairley, Franklin, Rasmussen, Regala and Winsley.

Minority Report: Do not pass.
Signed by Senator Hochstatter.

Staff: Jack Brummel (786-7428)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Substitute Senate Bill No. 5264 be substituted therefor, and the substitute bill do pass.
Signed by Senators Brown, Chair; Constantine, Vice Chair; Fairley, Vice Chair; Fraser, Kline, Kohl-Welles, Rasmussen, Regala, B. Sheldon, Snyder, Spanel, Thibaudeau and Winsley.

Minority Report: Do not pass.
Signed by Senator Rossi.

Staff: Pete Cutler (786-7454)

Background: Public employers sometimes provide a lower level of health insurance coverage, retirement plan coverage, sick or annual leave, or other employment-based benefits

to persons who are employed on a part-time, temporary, leased, contract, or other contingent basis. The practice of providing less generous compensation to some contingent workers is sometimes justified on the basis that the employer should provide more generous compensation to persons who perform full-time services, or have performed services for a longer period of time. However, in some cases public employers use labels to justify providing different levels of benefits to employees who have rendered identical levels of service, for identical periods of time, for the employer. In these cases, the employer may misclassify an employee as "temporary" or "leased" or "seasonal," when in fact the employee renders exactly the same services, for the same period of time as another employee who is labeled "permanent" or "full-time," and hence qualifies for better benefits.

Also, some times an employers will label an employee as an "independent contractor" or "leased employee," when in fact the person is rendering services in an employee-employer relationship, as determined by the tests applied under common law. Sometimes this occurs where the employer wants to fill a position that requires special skills or expertise and cannot fill it using the salary level in the salary plan. The federal Internal Revenue Service (IRS) has developed a 20 question test to determine whether a person is an employee or an independent contractor; the fact that the parties involved agree to label the employee as an "independent contractor" is given very little weight. Versions of the IRS tests are often also used by federal and state agencies that administer employment-based benefits, such as the state Department of Retirement Systems (DRS), the Health Care Authority, the Employment Security Department, and the Department of Labor and Industries. These agencies sometimes review a job situation where a person claims they are entitled to benefits because they are actually in an employee-employer relationship.

In recent years some public employers, such as Metro-King County, and the State Board for Community Colleges, have been taken to court by employees who claimed that they had been misclassified in some manner. The law in this field has developed through judicial application and there is little statutory warning to public employers of the consequences they may face. Over the last decade, public entities in Washington have paid out over $60 million in misclassification cases. A large case involving part-time community college faculty eligibility for retirement and health benefits is still pending.

Summary of Substitute Bill: The Legislature declares that public employers should be prohibited from misclassifying employees, or taking other action to avoid providing employment-related benefits to which employees are entitled under state law or employer policies. The statement of intent also states that it does not intend to modify or mandate in any way the provision of employment-related benefits by public employers, but instead intends that whatever eligibility rules public employers have should be applied on an objective basis.

It is an unfair practice for a public employer to misclassify an employee to avoid providing employment-based benefits, or to include language in an employment contract requiring an employee to forego employment-based benefits. Employment-based benefits– mean any benefits to which an employee is entitled under any state law or employer written policies. "Misclassify" means to incorrectly label a long-term public employee in a manner that does not objectively describe the employee's actual work circumstances.

Any person who believes he or she has been harmed by being misclassified may either:

- seek a review by the Department of Retirement Systems of whether the person has been misclassified; or
- bring a civil action.

If requested, the department may investigate and render a decision regarding whether the person has been misclassified in a manner that has had a negative impact on the employee's right to retirement benefits. If the department finds that an employee has been misclassified, the public employer must pay the department an amount equal to the full cost of the investigation and review.

Substitute Bill Compared to Original Bill: The substitute does not create any new penalties for misclassification of employees and does not award attorney fees and costs. The term "misclassify" is defined, and the range of employer actions that qualify as an unfair practice is reduced. The statement of legislative intent is expanded. An employee who believes she has been misclassified may either bring a civil action, or may seek a review by the Department of Retirement Systems. If DRS determines that an employee has been misclassified, the employer must pay DRS for the cost of its investigation and review.

Appropriation: None.

Fiscal Note: Requested on March 9, 2001.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For (Labor, Commerce & Financial Institutions): When a worker is labeled temporary even when they have worked at the same place for more than a year doing the same work as a regular employee, they are being misclassified and being denied benefits they should get. This bill states clearly that public employers cannot misclassify employees to deny them benefits. It isn't fair to pretend someone is temporary when they really aren't.

Testimony Against (Labor, Commerce & Financial Institutions): None.

Testified (Labor, Commerce & Financial Institutions): David West, Susan Coles, Center for a Changing Workforce.

Testimony For (Ways & Means): Public employers would benefit from having a clear statement of legislative policy regarding the importance of using objective standards to determine eligibility for employee benefits, rather than arbitrary labels. Employees who are hired as "temporary" or "leased" employees deserve to be treated in a consistent manner with other employees. Those that are, in fact, long-term employees, should have the same benefits provided to other long-term employees. This bill provides a process by which employees can get a review by an objective third party (DRS) of their employment status. The substitute bill has eliminated any new penalties for employers.

Testimony Against (Ways & Means): Local employers need to have as much flexibility as possible to structure their employment situations, especially in light of current budget problems. There would still be a risk of increased litigation under the bill. **Concerns:** It is still not clear how the substitute bill would apply to many situations, such as student-employees at institutions of higher education.

Testified (Ways & Means): PRO: David West, Center for a Changing Workforce; Lynn McKinon, WPEA; CONCERNS: Edie Harding, TESC; Jim Justin, AWC; Bill Vogler, Assoc. of Counties; CON: Larry Ganders, WSU.