HOUSE BILL REPORT
HB 2771

As Reported by House Committee On:
Ways & Means

Title: An act relating to employer and employee relationships under the state retirement systems.

Brief Description: Addressing employer and employee relationships under the state retirement systems.

Sponsors: Representatives Pettigrew, Cody and Springer.

Brief History:
Committee Activity:
Ways & Means: 2/6/12, 2/7/12 [DP].

Brief Summary of Bill

- Clarifies that a governmental contractor legal entity is not an employer for purposes of the Washington State Retirement Systems, and that employees of governmental contractors are not eligible for state retirement system membership.
- Limits the determination of whether an employer-employee relationship exists solely to the relationship between a government contractor's employee and a retirement system employer, and not the relationship between a government contractor and a retirement system employer.

HOUSE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass. Signed by 17 members: Representatives Hunter, Chair; Darneille, Vice Chair; Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Dammeier, Assistant Ranking Minority Member; Carlyle, Chandler, Cody, Dickerson, Haigh, Kagi, Kenney, Pettigrew, Seaquist, Springer, Sullivan and Wilcox.

Minority Report: Do not pass. Signed by 10 members: Representatives Hasegawa, Vice Chair; Orcutt, Assistant Ranking Minority Member; Haler, Hinkle, Hudgins, Hunt, Ormsby, Parker, Ross and Schmick.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Staff: David Pringle (786-7310).

Background:

The Department of Retirement Systems (DRS) was created in 1976 to administer the various retirement systems that provide benefits for state and local government employees in Washington, collectively referred to as the Washington State Retirement Systems. The retirement systems include the Public Employees' Retirement System (PERS); the Teachers' Retirement System (TRS); the School Employees' Retirement System (SERS); the Law Enforcement Officers' and Fire Fighters' System (LEOFF); the Washington State Patrol Retirement System (WSPRS); and the Public Safety Employees' Retirement System (PSERS).

The retirement systems administered by the DRS are limited to government employees under the federal Internal Revenue Code. By operating the retirement systems in conformance with these federal laws, certain employer and employee contributions, as well as investment earnings upon those contributions, receive preferential individual federal income tax treatment for their employees. A retirement system or retirement plan operated in conformance with federal rules is commonly referred to as a "qualified plan."

A private employer entity acting as a governmental contractor may be found under federal tax law to be an instrumentality of a public agency if specified criteria are met. The employees of a private nonprofit or for-profit entity that does not meet the federal law definition of an instrumentality of a public agency may not participate in a federal tax law-qualified governmental retirement plan such as the PERS.

If employees of a private nonprofit entity that the Internal Revenue Service does not regard as agencies or instrumentalities of a public agency are included in the PERS plan, it may adversely affect the qualified status of the plan and potentially all of the participants in the plan.

Under federal and state law whether an individual may be considered an employee, rather than an independent contractor, depends on a set of behavioral, financial, and business relationship factors. The tests for an employment relationship with a worker are similar under each of state and federal law. Among the ways these factors are considered include whether the entity has a right to control what the worker does, and how the worker does it; whether there are written contracts between the entity and the worker; and whether employee-type benefits like pensions and health benefits are exchanged between them. For purposes of the state retirement systems, the factors considered in evaluating an employer-employee relationship are detailed in WAC 415-02-110.

In January 2012, the Supreme Court of Washington ruled upon reconsideration in *Dolan v. King County, Case No. 82842-3*. The court ruled that employees of several private non-profit public defender agencies that provide services to King County by contract are also employees of King County for purposes of the PERS, and that King County has such a right of control over the defender organizations that they are arms and agencies of the county.

Summary of Bill:

The intent of the Legislature in providing the Washington State Retirement Systems is not to provide eligibility to the employees of government contractors. The Legislature intends to more clearly state that employees of for-profit and not-for-profit corporations providing services under government contracts are not eligible for membership in the Washington State Retirement Systems. The act is curative and remedial, but shall have no application to any final decision of the Supreme Court of Washington.

For the PERS, TRS, SERS, PSERS, and LEOFF, "employer" for the retirement system does not include a government contractor. Government contractors are defined to include partnerships, limited liability companies, for-profit and nonprofit corporations, or persons, that provide services pursuant to a contract with a retirement system employer.

The determination of whether an employer-employee relationship exists is not based on the relationship between a government contractor and a retirement system employer, but solely on the relationship between a government contractor's employee and a retirement system employer.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) This provides appropriate clarification about what employers need to determine if an employer-employee relationship exists, confirming the past and current practices of the Department of Retirement Systems in this area, a practice conforming with state law and federal standards. The bill has one goal—prospectively clarifying the relationship between government employers and contractors. The Supreme Court of Washington (Court) found the employees of the *Dolan* contractors eligible for the PERS, and our intention is not to affect this class of employees. We may need to clarify the remedial language to ensure that the *Dolan* class is not affected. We want to move forward with certainty. This has statewide ramifications, as counties and other local governments all use contractors for many purposes and may face similar claims. This is narrowly drafted clarifying legislation that puts the parties back in the situation that all thought that we were in prior to the *Dolan* decision.

(Opposed) We oppose the bill as written, and would like to clear up some misconceptions about the case. In *Dolan,* the Court made a narrow fact-based decision. The facts matter, not labels or forms. The Court explained that these employees were not genuine independent contractors. Other counties do the right thing—either employ the public defenders or have genuinely independent ones. The *Dolan* suit began many years ago. I realized one day that everyone in the courtroom but the defendant and the public defender were members of the PERS system. King County determined all the conditions of my employment, but I was not

their employee. The King County public defenders are not independent, they are employees. King County violated the basic tenent of employment law, that if you exercise too much control over contractors, they become your employees. This is contrary to decades of employment law. We are willing to work to clarify the bill, but the Court found in *Dolan* that these were not genuine independent contractors. In other past instances, employees of contracting agencies have been enrolled in the PERS. This bill may address a situation in King County. This may also unintentionally snare cases in other counties, and may conflict with federal law. It is bad public policy to try to define who is and is not a public employee.

Persons Testifying: (In support) Dave Nelson, Department of Retirement Services; Genesee Adkins, King County; Scott Merriman, Association of Counties; and James McMahan, Washington Association of County Officials.

(Opposed) Lynn Prunhuber and David Stobaugh, Benedich, Stobaugh and Strong; Kevin Dolan, Associated Counsel for the Accused; Ramona Brandeis, King County Public Defense Counsel and Service Employees International Union Local 925; and Bob Cooper, Washington Association of Criminal Defense Lawyers and Washington Defender Association.

Persons Signed In To Testify But Not Testifying: None.