

# HOUSE BILL REPORT

## HB 1440

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**As Reported by House Committee On:**  
Labor & Workforce Development  
Finance

**Title:** An act relating to ensuring fairness to employers by protecting employees.

**Brief Description:** Ensuring fairness to employers by protecting employees.

**Sponsors:** Representatives McCoy, Sullivan, Ryu, Sells, Green, Cody, Moscoso, Goodman, Bergquist, Riccelli, Hunt, Fitzgibbon, Pollet, Seaquist, Roberts, Ormsby, Stonier, Pettigrew, Van De Wege, Hudgins, Reykdal, Blake, Freeman, Moeller, Jinkins, Appleton and Kagi.

**Brief History:**

**Committee Activity:**

Labor & Workforce Development: 1/31/13, 2/7/13 [DPS];

Finance: 2/18/13, 2/28/13 [DP2S(w/o sub LWD)].

**Brief Summary of Second Substitute Bill**

- Prohibits misclassification of employees.
- Creates a new test to determine whether an individual is an independent contractor for purposes of the new Employee Fair Classification Act, the Minimum Wage Act, the Wage Payment Act, and laws on prevailing wage, wage deductions, industrial insurance, and unemployment compensation.
- Prohibits retaliation against employees and permits enforcement in administrative proceedings and in court.
- Creates a statutory lien for wage claims.

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### HOUSE COMMITTEE ON LABOR & WORKFORCE DEVELOPMENT

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Sells, Chair; Reykdal, Vice Chair; Green, Moeller and Ormsby.

**Minority Report:** Do not pass. Signed by 4 members: Representatives Manweller, Ranking Minority Member; Condotta, Assistant Ranking Minority Member; Holy and Short.

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*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:** Alexa Silver (786-7190).

**Background:**

Independent Contractor Status.

Employment standards generally apply only if there is an employer-employee relationship rather than an independent contractor relationship. Several different multi-part tests are used to determine whether an individual who performs services for remuneration is an independent contractor. For purposes of prevailing wage, unemployment insurance, and industrial insurance, a seven-part test is used, while a three-part test is used in the context of the Minimum Wage Act and as an alternative test for unemployment insurance.

Washington Labor Laws.

The state Minimum Wage Act (MWA), Wage Payment Act (WPA), and other laws establish standards for the payment of wages. It is unlawful for an employer to withhold an employee's wages except for certain purposes or to willfully pay an employee less than the employer is obligated to pay. If an employer fails to pay an employee, the employee may file a wage complaint with the Department of Labor & Industries (Department) or pursue the claim in court.

If it appears to the Department that the employer has represented to its employees that he or she is able to pay wages, and the employees are not being paid, the Department may require the employer to give a bond conditioned that the employer will pay his or her employees as required by law for a period not to exceed six months. If the employer fails to provide the bond, the Department may file suit against the employer to compel the employer to furnish the bond.

If the employee files a complaint and the Department determines that the employer violated a wage payment requirement, the Department may order the employer to pay the wages owed, plus interest. In addition, if the violation was willful, the Department may order the employer to pay a civil penalty of \$1,000 or 10 percent of the unpaid wages, whichever is greater, up to \$20,000. If the employee files a civil suit instead of a complaint, the employee may be able to recover double the amount of the unpaid wages, plus attorneys' fees and costs, if the employer willfully paid lower wages.

The MWA also prohibits retaliation against an employee who makes a complaint, institutes a proceeding, or testifies in a proceeding.

Mechanics' Liens.

State law authorizes mechanics' and materialmen's liens to benefit any person furnishing labor, professional services, material, or equipment for the improvement of real property. If the person is not paid for services or materials, the lien procedures may be used to recover the payment. A person claiming a lien must file a notice of claim of lien and record the lien claim in the county where the property is located. To foreclose the lien, the person claiming the lien files a civil action.

## **Summary of Substitute Bill:**

### Independent Contractor Status.

An individual who performs services for remuneration is presumed to be an employee, and a person asserting that an individual is not an employee must prove independent contractor status by a preponderance of the evidence. An individual is an independent contractor if:

- he or she is and will continue to be free from control or direction over the performance of the service;
- the service is outside the usual course of business for which the service is performed, or the service is performed outside all the places of business of the enterprise for which the service is performed; and
- the individual is customarily engaged in an independently established trade.

An individual is an employee if the party for whom the services are performed exercises or has the right to exercise general control over the individual's physical activities. The withholding of federal income taxes is irrelevant to a determination of independent contractor status.

This definition of independent contractor applies to the Employee Fair Classification Act (EFCA), the MWA, the WPA, and laws on prevailing wage, wage deductions, industrial insurance, unemployment compensation, and wage liens.

### Retaliation.

An employer may not take adverse action against an employee for specified reasons, including making a complaint, instituting a proceeding, testifying, and exercising his or her rights. If an employer takes adverse action against an employee within 90 days of the employee engaging in a protected act, the employer is presumed to have acted in retaliation. Retaliation is a gross misdemeanor.

The Department may investigate retaliation and order an employer to: pay a civil penalty of \$1,000 to \$10,000 per employee; pay an aggrieved employee the greater of \$10,000 or treble damages; or reinstate the employee. An interested party or aggrieved individual may file suit, including a class action. The court:

- must order the greater of either treble damages or statutory damages of \$10,000 per aggrieved employee, or \$10,000 to \$25,000 where there is a pattern or practice of violations;
- may award injunctive or other equitable relief, including reinstatement or front pay in lieu of reinstatement; and
- must award attorneys' fees and costs.

The statute of limitations on retaliation is three years. These provisions on retaliation apply to the MWA, the WPA, and laws on prevailing wage and wage deductions. The definition of retaliation also applies to the new EFCA. Current law related to retaliation and hindering the Department in the performance of its duties is repealed.

### Employee Fair Classification Act.

Under the new EFCA, an employer may not misclassify an employee as an independent contractor, charge a misclassified employee a fee, or make prohibited deductions. No person

may form a business entity or pay a fee to use a business entity for the purpose of facilitating misclassification of an employee. An employer who engages an individual to perform services but does not consider the person to be an employee must post a notice regarding rights under the EFCA in the employer's offices and at job sites. Failure to post the notice may result in a penalty of \$1,000 to \$10,000.

The Department may investigate violations of the EFCA. If the Department determines that an employer violated the provisions related to misclassification or retaliation, it may:

- impose a civil penalty of \$1,000 to \$10,000 per employee, or \$10,000 to \$25,000 where there is a pattern or practice of violations;
- order the employer to pay an aggrieved employee the greater of \$10,000 or treble damages;
- order the employer to reinstate the employee; and
- determine whether to initiate collection procedures and refer the case to the Employment Security Department (ESD).

There is a "pattern or practice" of violations if, in addition to the current violation, the employer or successor employer was in the previous 10 years: (1) convicted of a crime concerning nonpayment of wages; or (2) subject to a final court order or citation for a violation of a wage-related law if the judgment or citation was not satisfied within 30 days.

The ESD may initiate procedures for improper recordkeeping and recovery of contributions upon referral from the Department.

An aggrieved individual or interested party may file suit, including a class action, for retaliation. The court:

- must award the greater of either treble damages or statutory damages of \$10,000 per aggrieved employee, or \$10,000 to \$25,000 per employee where there is a pattern or practice of violations;
- may award injunctive or other equitable relief, including reinstatement or front pay in lieu of reinstatement; and
- must award attorneys' fees and costs.

If the court finds a violation, the Department and the ESD must accept referrals based on the finding.

The statute of limitations is three years. Contractors who have twice in five years violated the EFCA or certain provisions of prevailing wage law are barred from bidding on public works for one year. Penalties are deposited in a new EFCA account created in the state Treasury.

#### Wage Liens.

An employee has a wage lien on improvements and on an employer's real or personal property. An "improvement" is property upon which the employee has performed work or furnished materials at the instance of the owner or any person acting by the owner's authority or under the owner as a contractor or otherwise. "Improvement" does not include an improvement that is subject to a construction lien or would be subject to a construction lien if filed during the period of limitation.

A notice of claim of lien must be filed in the county where the real property or improvements are located, or with the Department of Licensing for personal property. In the notice of claim of lien, the lien claimant must provide certain information, be acknowledged and certified, pay a filing fee, and mail a copy of the notice to the employer. Filing forms are provided. The claim of lien is notice on the spouse or domestic partner of the property owner and subjects the community interest of both spouses or domestic partners to the lien.

An action to foreclose the lien must be filed within one year of recording. If the lien claimant has also filed suit for a wage claim, that action must also be deemed an action to foreclose on the lien. A foreclosure action or action for a wage claim may be filed by the Department, the United States Department of Labor, the Attorney General's Office, or a representative of the employee.

An employer or party in interest may also file a surety bond or make a deposit to release the property from the lien. The amount deposited must be equal to the greater of \$1,000 or 1.5 times the amount claimed. The person posting bond or making a deposit must provide notice to the lien claimant. The lien claimant is liable to the person if the lien claimant does not release or foreclose on the lien within 15 days.

A wage lien is extinguished if:

- an action for the underlying wage claim is not brought within one year;
- the action for the underlying wage claim is dismissed and no appeal if filed; or
- the amount due to the lien claimant is paid.

If the lien is extinguished, the lien claimant must file a release of lien upon demand and 15 days' notice.

Wage liens have priority over all other debts, liens, judgments, and security interests, except for other wage liens, for which priority is based on the order the liens are filed, and except for child support withholding income, which has priority. A lien may be assigned. The right to a lien may not be waived.

#### Other.

Penalties for an employer making unlawful rebates and willfully paying a lower wage than he or she is obligated to pay are changed from double to treble damages. An interested party may bring complaints under the WPA. The bond that the Department may require under the WPA may be conditioned that the employer pay employees for a period of one year. The Department must revoke an employer's industrial insurance certificate if the employer fails to post the bond as required instead of filing suit.

#### **Substitute Bill Compared to Original Bill:**

The substitute bill modifies the element of the independent contractor test related to the right to control. It deletes from the test that an individual is an employee if the control is exercised "directly or indirectly" and that the control need not extend to all the details of the physical performances of services for an individual to be an employee.

The substitute bill also provides that child support income withholding has priority over wage liens.

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**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Substitute Bill:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) There is an anti-competitive malignancy growing in our economy that involves the theft of wages, revenue, market share, and profit from honest employers. It involves not paying wages, minimum wage, and overtime, not providing meal and rest breaks, and misclassifying workers as independent contractors. Misclassification harms workers, legitimate businesses, and taxpayers because money is not paid into the state system, and businesses cannot compete when they are forced to play on an unlevel playing field. This bill builds on the WPA, which has been successful in going after the underground economy and recovering lost wages. If employers knew they would get in trouble, they would be more likely to obey the law.

The ABC test for independent contractors is straightforward and gets at the issue of whether a person is in business for him or herself. The test has a track record, and using the same test would create consistency across the board.

It is common for workers to be fired when they ask for their pay. More workers should be protected so they can speak out without fear for their jobs. Current law is inadequate because prosecutors do not charge employers with retaliation. Employers' assets need to be preserved, because even when a case results in a finding, workers are unable to get a dime.

(Information only) Misclassification is a significant issue. The bill creates a unified definition of independent contractors.

(Opposed) The original WPA was agreed to by business, labor, and the Department. This bill is a marked departure from existing employment law. It will create an unlevel playing field for employers who believe they are complying and will increase underground activity.

The language in the independent contractor test on general control radically revises longstanding law and creates uncertainty. It creates a presumption of independent contractor status, which will ensnare well-meaning employers. Independent contractors must be provided with some instruction so they can do their work. In the trucking industry, if a carrier hires an independent owner-operator and tells them where to take a load, that might be control that makes the owner-operator an employee. In the construction industry, there is a duty to maintain a safe work environment and control the activities of people on the job site. Farmers need flexibility to contract with drivers for the shipment of agricultural goods. The

bill will hurt the competitive position of ports and reduce family wage jobs in the maritime industry. The bill converts most independent contractors into employees and takes away the right to be self-employed.

The enforcement tools are far beyond anything seen before. There is a massive expansion of third-party standing for interested groups to pursue complaints and litigation against employers. The new lien rights would attach to an individual's property. The presumption of retaliation and burden shifting to the employer is unconstitutional. There are problems related to federal preemption and the commerce clause. The Department should enforce the current law better.

**Persons Testifying:** (In support) Representative McCoy, prime sponsor; Jeff Johnson, Washington State Labor Council AFL-CIO; Rebecca Smith, National Employment Law Project; Andrea Schmitt, Columbia Legal Services; Susan Bittner, Fryer-Knowles, Inc.; Kevin Sutherland, Commercial Floor Distributors, Inc.; Bob Abbott, Washington and Northern Idaho District Council of Laborers; Mohammed Archane and Crystal Doll, UniteHere; and Hilary Stern, Joel Coronado, Klayson Braga, and Angelica Villa, Casa Latina.

(Information only) Tamara Jones and Suchi Sharma, Department of Labor and Industries.

(Opposed) Representative Vincent Buys, Dutchman Construction; Kris Tefft, Association of Washington Business; Phil Talmadge, Washington Trucking Association; Van Collins, Associated General Contractors; Tom Kwieciak, Building Industry Association of Washington; Tim O'Connell, Stoel Rives; Scott Dilley, Washington Farm Bureau; Gary Smith, Independent Business Association; Scott Hazlegrove, Pacific Merchant Shipping Association; Steve Salins, Shuttle Express; Mark Johnson, Washington Retail Association; and Lindsey O'Donnell, Washington State Floor Covering Association.

**Persons Signed In To Testify But Not Testifying:** Nicole Grant, Certified Electrical Workers of Washington; Paul Benz, Faith Action Network; Dave Meyers, Washington State Building and Construction Trades Council; Shane Zoy and Philip Abella, Teamsters Local 117; Miguel Perez-Gibson, Latino Progress Alliance; Chris Van Dyk, BYG Taxi Cooperative Association; Larry Pursley and Steve Gordon, Washington Trucking Association; Jim King, Washington State HVAC/R Association; April Sta. Rosa, Debbie Tott, Lona R. Hyatt, and Dean Johnson, Washington State Floor Covering Association; and Jim Fricke, Capital Aeroporter.

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## HOUSE COMMITTEE ON FINANCE

**Majority Report:** The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Labor & Workforce Development. Signed by 8 members: Representatives Carlyle, Chair; Tharinger, Vice Chair; Fitzgibbon, Hansen, Lytton, Pollet, Reykdal and Springer.

**Minority Report:** Do not pass. Signed by 5 members: Representatives Nealey, Ranking Minority Member; Orcutt, Assistant Ranking Minority Member; Condotta, Vick and Wilcox.

**Staff:** Jeff Olsen (786-7175).

## **Summary of Recommendation of Committee On Finance Compared to Recommendation of Committee On Labor & Workforce Development:**

The second substitute bill excludes from the definition of "employee" in the Employee Fair Classification Act: (1) an outside salesperson paid solely on commissions, as defined by the Department of Labor & Industries; and (2) an individual employed on a casual and sporadic basis. It also eliminates references to "remuneration" in the definition of "employee" and the independent contractor test. It provides that a wage lien is subordinate to a tax lien that the Department of Revenue is authorized or required to collect and that originates before a wage lien. It also makes a technical correction by adding "and" between the last two elements of the independent contractor test.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Second Substitute Bill:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

### **Staff Summary of Public Testimony:**

(In support) Misclassification of employees is a big problem for low-income workers. The amount of taxes lost is in the billions. Misclassification is a problem that is increasing in each state. An amendment is in the works with the Department of Revenue to address the priority of the wage lien. This bill bolsters the economy by putting money back into the pockets of workers who will spend it. Fear of retaliation by businesses is a huge problem. This bill brings more people into the workers compensation and unemployment insurance programs. Many contractors are losing money to an underground economy. With respect to misclassifications, all of the responsibility is being placed on the worker.

(Opposed) The fiscal note reflects little or no increase in revenue. There will be a loss in business and occupation taxes. There will also be a loss in sales taxes because more business will be done on the internet. Our business could not operate without independent contractors. If the use of independent contractors is eliminated, there are two choices: move out of the state or do not use independent contractors. The loss in state taxes from the change in the priority of liens is not the direction that the state should go. Most independent contractors are legitimate and are not gaming the system. This bill would be a heavy blow to market research companies. This bill is so broad that it brings into question whether everybody on the jobsite is an employee. This bill will extend to officers of companies. Construction costs will go up.

**Persons Testifying:** (In support) Paul Benz, Faith Action Network; Rebecca Smith, National Employment Law Project; Andrea Schmitt, Columbia Legal Services; Nicole Grant, Certified Electrical Construction Workers of Washington; Miguel Perez, Latino Progress Alliance; and Teresa Mosqueda, Washington State Labor Council.

(Opposed) Larry Pursley, Washington Truckers Association; Mark Johnson, Washington Retail Association; John Webb, Direct Selling Association; Casey Harris, Univera; Tom



Kwieciak, Building Industry Association of Washington; Vera Cooley, Independent Market Researcher; Kriss Tefft, Association of Washington Business; Gary Smith, Independent Business Association; and Van Collins, Associated General Contractors.

**Persons Signed In To Testify But Not Testifying:** None.