

HOUSE BILL REPORT

HB 1354

As Reported by House Committee On:
Labor

Title: An act relating to the employment antiretaliation act.

Brief Description: Concerning the employee antiretaliation act.

Sponsors: Representatives Ryu, Goodman, S. Hunt, Riccelli, Farrell, Cody, Tharinger, Ortiz-Self, Sullivan, Bergquist, Pollet, Dunshee, Fitzgibbon, Moscoso, Appleton, Sells, Robinson, Reykdal, Walkinshaw, Wylie, Gregory, Moeller, Gregerson, Stanford and Ormsby.

Brief History:

Committee Activity:

Labor: 1/26/15, 1/29/15 [DPS].

Brief Summary of Substitute Bill

- Creates parallel retaliation provisions in several wage and related laws.
- Establishes criminal penalties and administrative and court enforcement for violation of retaliation provisions.

HOUSE COMMITTEE ON LABOR

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 4 members: Representatives Sells, Chair; Gregerson, Vice Chair; Moeller and Ormsby.

Minority Report: Do not pass. Signed by 3 members: Representatives Manweller, Ranking Minority Member; G. Hunt, Assistant Ranking Minority Member; McCabe.

Staff: Joan Elgee (786-7106).

Background:

Several laws address employment standards. The Minimum Wage Act (MWA) sets forth overtime in addition to minimum wage requirements. The Industrial Welfare Act deals with wages, hours, and working conditions, including child labor, work apparel, and other matters.

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.

Under prevailing wage provisions, contractors and subcontractors on public works projects and public building service maintenance contracts must pay their workers prevailing wages. The Wage Payment Act provides for administrative or court action to collect wages under the MWA and other wage laws, as well as establishes other requirements. It is unlawful to make certain deductions from wages and to otherwise fail to pay wages under other laws.

Under the MWA, it is a gross misdemeanor for an employer to discriminate against an employee because the employee complained to the employer or the Department of Labor and Industries (Department) that the MWA has been violated, or because the employee instituted or is about to institute or testified or is about to testify in a proceeding under or related to the MWA.

Summary of Substitute Bill:

Retaliation provisions are established in the MWA, the Industrial Welfare Act, the Wage Payment Act, prevailing wage provisions, and wage deduction and other provisions.

Prohibited Activities. Employers are prohibited from taking adverse action against an individual because an employee (or former employee for most activities) engaged in specified activities:

- informed another person or complained (or the employer so believes) to the employer, the Department, the Attorney General, or any other person that the employer has engaged in conduct that the employee reasonably believes violates the particular law;
- demands a lawful claim under the particular law;
- instituted or is about to institute, or testified or is about to testify in, a proceeding under the particular law, or has otherwise exercised rights (or the employer so believes) under the particular law;
- refused to participate in an illegal activity that would violate wage and hour law;
- sought information or informed others about rights under the particular law; and
- filed a complaint with the Department or brought suit where the employer was found to have violated the particular law.

A presumption is created that if an employer takes adverse action within 90 days of any of the specified activities, the employer is presumed to have acted in retaliation in violation of the prohibition on adverse action. The presumption also applies in the case of seasonal work lasting fewer than 90 days if the employer fails to rehire a worker at the next opportunity for work in the same position. The presumption may be rebutted by clear and convincing evidence that the adverse action was taken for a permissible purpose.

"Adverse action" means discharging, threatening, failing to rehire after a seasonal interruption of work, engaging in unfair immigration-related practices, filing a false report with a government agency, changing an employee's status to a nonemployee, other listed activities, or otherwise discriminating against an employee. An "unfair immigration-related practice" includes requesting more or different documents than are required under federal law, using the electronic-verify system at a time or in a manner not required or authorized,

threatening to file a false police report or contact immigration authorities, withholding or threatening to destroy immigration documents, and other listed activities.

Enforcement. Administrative and court remedies are provided.

Administrative.

The Department may investigate complaints filed by an aggrieved individual or an interested party. If the Department determines a violation occurred, the Department may order, unless prohibited by federal law:

- payment of a civil penalty of \$1,000 to \$10,000 per individual aggrieved;
- damages of \$1,000 to \$10,000 to each aggrieved individual, except that if the individual is an employee or former employee, the damages are the greater of the civil penalty or three times the amount of any wages and benefits unlawfully denied or withheld; and
- reinstatement of a former employee or front pay in lieu of reinstatement.

Prevailing parties on appeal are entitled to reasonable costs and attorneys' fees. An "interested party" includes the Director of the Department, a contractor, a union, and other listed entities. Civil penalties are deposited into the Supplemental Pension Fund.

Cause of Action.

An aggrieved individual may bring an individual or class action in court. If the court determines a violation occurred, the court must order statutory damages of \$1,000 to \$10,000, or \$10,000 to \$25,000 if the employer engaged in a pattern or practice of violations, and attorneys' fees and costs. However, if the aggrieved individual is an employee or former employee the damages are the greater of the statutory damages or three times the wages and benefits withheld. The court may also order actual damages, reinstatement or front pay in lieu of reinstatement or other equitable relief, and suspension of licenses that are specific to the business where the adverse action occurred. The time period for license suspension ranges from 14 to 90 days depending on whether it is a first, second, or third violation. A "pattern or practice" is shown if within the previous 10 years, the employer was convicted of a violation of a retaliation law or is delinquent in payment of a court order or administrative assessment for violation of the retaliation provisions.

A three-year statute of limitations for both administrative and court actions is tolled during any time that an employer deterred an action.

A violation of the provisions is a gross misdemeanor; however, the presumption of a violation if the employer takes adverse action within 90 days of specified activities does not apply.

The criminal violation for retaliation under the MWA is repealed.

Substitute Bill Compared to Original Bill:

The substitute bill provides that the presumption does not apply to the criminal penalties.

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) This bill lets all people share in America's prosperity and helps reduce income inequality. Honesty in employment relationships is needed. People need to be able to speak up without fear. In one survey, 43 percent of employers retaliated when workers complained. One person was threatened with deportation and arrest of his family. A security contractor knew of 12 people who had been fired for complaining. Existing laws do not protect workers from retaliation. The only remedy available is the MWA criminal provision and prosecutors don't take these cases. A lawyer cannot tell his farm worker clients they are protected. A worker got his wages but did not get his job back that he lost when he complained about not getting paid. Employees just take the retaliation. After a worker went on strike, his hours were cut and now he can barely pay for necessities. The presumption is not unusual; it is found in Arizona and California law. An employee refusing to participate has been narrowed to wage and hour law.

(Opposed) This bill is not needed as laws have been interpreted to allow a cause of action for retaliation as well as attorneys' fees. The definition of "interested party" would allow officious intermeddlers. The unlawful immigration practices provision is either contrary to or preempted by federal law. Contacting immigration authorities is allowed by federal law. A federal court in Arizona awarded an employer attorneys' fees, so this bill is setting the state up for liability. The 90-day presumption provision makes the employer prove their case by clear and convincing evidence while the employee only has to meet a preponderance of the evidence standard. The bill creates a presumption of guilt for a crime. The tolling provisions for the statute of limitations are unclear and guarantee years of uncertainty.

Persons Testifying: (In support) Representative Ryu, prime sponsor; Rebecca Smith, National Employment Law Project; Larry Boyd, Teamsters; Daniel Ford, Columbia Legal Services; Paul Benz, Faith Action Network; and Clifford Cawthorn, Working Washington.

(Opposed) Bob Battles, Association of Washington Business; Tim O'Connell, Stoel Rives LLP; and Scott Dilley, Washington Farm Bureau.

Persons Signed In To Testify But Not Testifying: None.