

# SENATE BILL REPORT

## SB 5217

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As Reported by Senate Committee On:  
Labor & Commerce, February 20, 2019

**Title:** An act relating to industrial insurance wage loss.

**Brief Description:** Concerning industrial insurance wage loss.

**Sponsors:** Senators Keiser, Conway, Kuderer, Frockt and Saldaña.

**Brief History:**

**Committee Activity:** Labor & Commerce: 1/22/19, 2/20/19 [DP, w/oRec].

**Brief Summary of Bill**

- Changes the methods to calculate wages for injured workers with industrial insurance claims.
- Entitles an injured worker to receive 70 percent of the worker's wages for injuries beginning on or after September 1, 2019.
- Provides that wages generally includes overtime, shift differentials, and paid leave; and the value of board, housing, utilities, fuel, and the employer's payment for health care benefits.

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### SENATE COMMITTEE ON LABOR & COMMERCE

**Majority Report:** Do pass.

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

**Minority Report:** That it be referred without recommendation.

Signed by Senators King, Ranking Member; Walsh.

**Staff:** Susan Jones (786-7404)

**Background:** Under the state's industrial insurance laws, workers who, in the course of employment, are injured or disabled from an occupational disease are entitled to benefits. Depending on the disability, workers are entitled to medical, temporary time-loss, and vocational rehabilitation benefits, as well as benefits for permanent disabilities.

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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.*

Time-loss benefits are wage replacement benefits for workers who cannot work because of their injury. The amount of time-loss benefits is a percentage of the worker's pre-injury wages, and adjusts depending on the marital status of the worker and the number of the worker's children. An unmarried worker with no children receives 60 percent of their wages, while a married worker with no children receives 65 percent. The percentage is increased by 2 percent for each child of the injured worker, up to a maximum of 10 percent. The monthly time-loss benefit is capped at 120 percent of the state's average monthly wage, as determined by the Employment Security Department. Time-loss benefits cease as soon as the worker's recovery is complete and the worker's earning power is restored to that existing at the time of the injury.

Workers who suffer certain types of injuries and workers whose injuries preclude any further gainful employment are entitled to permanent total disability pensions. Pension benefits are paid monthly, and are based on the amount of time-loss compensation to which the worker is entitled. Pension benefits are paid for the life of the injured worker. If a worker receiving a pension returns to gainful employment for wages, the Department of Labor and Industries may suspend or terminate the pension.

When death results from the work-related injury, the surviving spouse receives a pension, calculated in the same manner as time-loss benefits, until the spouse remarries. Dependent children of a worker who dies from a work-related injury are also entitled to benefits, as are other dependents.

The monthly wages the worker received from all employment at the time of injury are used to calculate time-loss benefits. In cases where the worker's wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was receiving at the time of the injury:

- by five, if the worker was normally employed one day a week;
- by nine, if the worker was normally employed two days a week;
- by thirteen, if the worker was normally employed three days a week;
- by eighteen, if the worker was normally employed four days a week;
- by twenty-two, if the worker was normally employed five days a week;
- by twenty-six, if the worker was normally employed six days a week; and
- by thirty, if the worker was normally employed seven days a week.

The statutory definition of wages includes medical, dental, and vision benefits; the reasonable value of room and board, housing, heating fuel, or similar considerations received from the employer as part of the worker's income; bonuses received as a part of a contract for hire in the last 12 months from the employer of injury; and tips reported to the employer for federal income tax purposes. The monthly wage calculation for seasonal and part-time workers is determined using the total wages earned, including overtime, from all employment in a consecutive 12-month period preceding the injury, which fairly represents the employment pattern.

There are limitations and provisions related to whether the injured worker has legal custody of a child.

In 2015, the Legislature passed a bill requiring L&I to convene the benefit accuracy working group to focus on improving the accuracy, simplicity, fairness, and consistency of calculating and providing wage replacement benefits under the industrial insurance program. The working group had a number of meetings.

**Summary of Bill:** Wages must generally be calculated in a fair and reasonable manner. Methods to calculate wages for workers with industrial insurance injuries are generally as follows:

- if a worker's wages are fixed by the month, the fixed monthly wage will generally be used;
- if a worker's wages are not fixed by the month, they are based on the pattern or frequency at which the worker's employer makes wage payments to the worker;
- for workers paid monthly or semimonthly, the monthly wage will be the gross wages paid for the most recent three months divided by three;
- for workers paid weekly, the monthly wage will be the gross wages paid for the most recent thirteen weeks divided by three; and
- for workers paid every two weeks, the monthly wage will be the gross wages paid for the most recent fourteen weeks divided by fourteen multiplied by four and one-half.

Commissions and piecework rates are generally added to the regular wages in these calculations.

Where monthly earning capacity cannot be reasonably and fairly determined using the new methods, the monthly wage will be based on the usual wage paid other employees of the employer with similar work patterns and job titles.

There are provisions for workers whose wages are not fixed by the month and who worked less than three months or who have had a substantial change in their compensation paid during the three months before the injury.

For workers who are working for more than one employer, the wages for each job are calculated separately using the appropriate method under the bill and the amounts from all employers are then combined.

Wages include overtime, shift differentials, and paid leave, and the value of board, housing, utilities, and fuel, and the employer's payment or contributions for health care benefits. Tips are still included if they are reported to the employer for federal income tax purposes. Bonuses are not included except where the average monthly value of the bonus will be included if the bonus was received with twelve months before the injury. Definitions are provided for the terms board, bonus, commission, health care benefits, housing, relevant geographic area, and utilities.

For injuries beginning on or after September 1, 2019, the worker will receive 70 percent of the wages during the period of disability. The percentage does not vary depending on the worker's marital status or number of children.

Language requiring that a child be in the legal custody and control of the worker is removed.

State fund employers are entitled to reimbursement of payments made for a worker's portion of health insurance premiums while the worker is receiving wage loss benefits.

**Appropriation:** None.

**Fiscal Note:** Requested on January 19, 2018.

**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:** PRO: A lot of people worked on this bill. It has been a long time coming because there have been concerns about the difficulty of wage calculation in the L&I program for quite some time and the inequity of the calculation being based on your marriage standing and how many children you had. This approach is much clearer, much more straightforward, and less intrusive in a lot of ways.

This bill is an attempt to address several issues that have been expressed before this committee over the last several years. The time loss calculations are very complicated, hard to track, and hard to ensure that the compensation is the right amount. This complexity leads to litigation and drawn out conflict, which does not really benefit any party. Several bills over the last years have come before this committee. Those bills simplify the calculation to the detriment of workers. This bill promotes simplicity and predictability, but is not a reduction in benefits for workers.

This bill eliminates wage calculations based on one's family construction and adopts a flat 70 percent rate. This is less than the current rate for a married worker with three dependent children. It clarifies definitions of wages and modernizes terms common in employment. It creates a more intuitive process for calculating benefits that starts with how often a worker gets paid and then provides a very simple basic pre-algebra level math calculation.

The current system of calculating wage loss is based on an antiquated formula for daily wages and in many cases is difficult, if not impossible, to reach. Wage orders are one of the most frequently litigated issues before the Board of Industrial Insurance Appeals. An issue about part time and seasonal employment has reached the Washington State Supreme Court twice in the last 20 years.

The bill takes into account many more situations in employment.

CON: Self-insured employers provide worker compensation benefits to injured workers. L&I audits self insured employers annually for benefit accuracy and can penalize them for getting it wrong. Unlike the state fund, self insured employers carry the full cost of these claims for as long as they last. Getting it right is very important. They have long championed the concept of wage simplification and the benefit actually working group. Self insurers have sought a solution that follows these principles—appropriately compensates workers, is simple to apply, promotes accurate calculation, and reduces the likelihood of appeals and litigation. The work group wrapped up its meetings without an agreement between the parties. This bill does echo some of the concepts from those discussions, it is not

the product of an agreement and in some areas it is quite the contrary. The primary concern is that it will cost more by virtue of the benefit increase to 70 percent. The average percentage for Washington is 64.5 percent and the national average is about 66 and two-thirds. Seventy percent is bit higher than that. It put Washington in one of the highest flat rates in the nation. This will not necessarily promote simpler calculations and reduce friction. It may end up substituting one complex system for another. We are not sure of the various averaging schemes are the right ones to promote in all instances.

This would create a situation in which workers would or could receive far more in time lost benefits than they did while working under certain situations, including the construction industry, seasonal industries, and high pay short term projects. They could make much more than when they are working and could result in people have been losing their incentive to go back to work.

The independent grocers are very sensitive to time loss cost, keeping the system affordable, and getting people back to work. We were willing to go as high as 66 and two-thirds, but it involved a lot of other nuances in the bill, such as 12 month averaging. It might exacerbate some unfairness that already exists between industries based on how they pay.

This bill does not simplify wages although it seem to on the surface. Hourly employees paid the same rate may receive different time loss benefits. For construction, those working light duty would actually be given up getting paid more than they would in their regular trade. Determining workers wage based on three months of employment is not an accurate depiction or fair representation for people in construction and many other industries.

A vast majority of retailers are small businesses nationwide. Ninety-eight percent of retailers employ fewer than 50 people. The flat rate is a problem for the retail industry. It is a huge increase that would be a significant impact to retailers and small businesses.

Employers in retail will pay a portion of the health care benefit of the employee with on time loss. If the employee does not pay their portion it increases their time loss benefit and becomes a disincentive to return to work.

OTHER: Some of the concepts in this bill were ideas that were talked about in the benefit accuracy work group but all of the parties did not agree to the model. The goal of the concepts before you to redefine wages are to provide more objective criteria, rather than some of the subjective criteria that we look at today, and based on some of the case law that has occurred. There is a lot of creativity in varied work patterns, varied work hours, and varied pay. The bill looks at how the worker was paid as a more objective method. However, it is a difficult bill to analyze because the L&I data does not contain all the documentation needed to determine the overall impact of these concepts. This was one of the barriers the benefit accuracy work group ran into. L&I is looking at any technical errors and ambiguities if the goal is to reduce ambiguities. L&I is also looking at the fiscal impact of the flat rate and reimbursing employers for covering employees' share of medical insurance payments, which was a creative idea developed through the workgroup.

**Persons Testifying:** PRO: Senator Karen Keiser, Prime Sponsor; Brian Wright, Washington State Association for Justice; Joe Kendo, Washington State Labor Council.

CON: Tom Kwieciak, Building Industry Association of Washington; Christine Brewer, Washington Self-Insurers Association; Bob Battles, Association of Washington Business; Carolyn Logue, Washington Food Industry Association; Tammie Hedtrick, Washington Retail Association; Richard Clyne, Washington Farm Bureau; Corinna Triance, AGC/claims consultant/vocational rehabilitation consultant.

OTHER: Vickie Kennedy, L&I.

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