

SENATE BILL REPORT

SB 5690

As of February 3, 2019

Title: An act relating to creating the universal worker protections act.

Brief Description: Creating the universal worker protections act.

Sponsors: Senators Saldaña, Keiser, Conway and Nguyen.

Brief History:

Committee Activity: Labor & Commerce: 2/05/19.

Brief Summary of Bill

- Creates the Employee Fair Classification Act (EFCA), which prohibits misclassification and creates remedies.
- Defines independent contractor for purposes of the EFCA, the Minimum Wage Act, prevailing wage, unemployment insurance, industrial insurance, and other employment laws.
- Provides for the creation of workers' boards to set minimum pay rates and other labor standards for workers in certain industries.
- Establishes procedures for creating portable benefits for workers in certain industries.
- Specifies certain rights for workers and prohibits retaliation.
- Requires contributing agents to provide data and reports about workers.
- Requires the Department of Labor and Industries to investigate complaints, impose sanctions, conduct surveys, and fulfill other duties.

SENATE COMMITTEE ON LABOR & COMMERCE

Staff: Susan Jones (786-7404)

Background: Employment standards and benefits generally apply only if an employer-employee relationship exists, rather than an independent contractor relationship. Various multipart tests are used to determine whether an individual is an independent contractor. For

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purposes of prevailing wage, industrial insurance, and unemployment insurance, a six-part statutory independent contractor test is applied. This test requires:

- the individual has been and will be free from direction and control, both under the contract and in fact;
- the individual's services are outside the usual course of business for which the service is performed, or outside all the places of business, or the individual must pay the costs of the principal place of business where the services are performed;
- the individual has an independently established business, or a principal place of business that qualifies for an Internal Revenue Service (IRS) deduction;
- the individual is responsible for filing a schedule of expenses with the IRS;
- the individual has a separate set of books and records that reflect all items of income and expenses; and
- the individual has an active and valid registration with the Department of Revenue (DOR), has a Unified Business Identifier number, and has any other required state accounts for the payment of taxes.

In the construction industry, a seventh required element is the individual be registered as a contractor or licensed as an electrical contractor. For industrial insurance, a threshold question is whether a person under contract brings more than their personal labor to the job. For unemployment insurance, persons outside construction may also be independent contractors under an alternative three-part test.

For purposes of the Minimum Wage Act (MWA), which also addresses overtime, a common law economic dependence test applies. The inquiry under this test is whether the worker is economically dependent on the alleged employer or instead the worker is in business. Other wage laws also do not have statutory tests. These include the Wage Payment Act (WPA), which provides for an administrative or court action to collect wages under the MWA and other wage laws, as well as establishing other requirements. Other laws address deductions from wages and otherwise address failure to pay wages.

Summary of Bill: Prohibitions and Requirements. The bill creates the Employee Fair Classification Act (EFCA). Under the EFCA, the following actions by employers or other persons are prohibited:

- willfully misclassifying an employee as an independent contractor;
- charging a misclassified employee a fee or making unlawful deductions from compensation;
- requiring or requesting an employee make an agreement or sign a document that results in misclassification;
- forming, assisting in, or inducing the formation of a business entity, or paying or collecting a fee for the use of a business entity, for the purposes of facilitating or evading detection of a violation of the EFCA; and
- for pay, conspire with, aid and abet, assist, or advise an employer with the intent of violating the EFCA.

Employers who engage independent contractors must post a notice stating a worker has a right to be classified as an employee if the worker does not meet independent contractor requirements, and a complaint may be filed with the Department of Labor and Industries (L&I) or in a court if a person believes misclassification occurred. Misclassification means

designating an employee as a nonemployee. Willful is a knowing and intentional action, not accidental or the result of a bona fide dispute.

Definition of Independent Contractor. The EFCA's independent contractor test applies to prevailing wage, wage deductions, the WPA, the MWA, unemployment insurance, and industrial insurance. Independent contractor means an individual who performs labor or services for a party when all of the following elements are established:

- the individual is and will continue to be free from control or direction over the performance of the labor or services by the party for whom the labor and services are performed, both under the contract and in fact;
- the labor or service is outside the usual course of business for which the labor or service is performed;
- the individual is customarily engaged in an independently established trade, occupation, business, or profession of the same nature as that involved in the contract of labor or service, for which the individual independently establishes the price of the individual's labor or service;
- the individual is responsible for filing a schedule of expenses with the IRS for the type of business the individual is conducting;
- the individual has an active and valid account with the DOR, and other required state agencies, for the business being conducted;
- the individual maintains a separate set of books or records; and
- if the individual is performing services as a contractor or electrical contractor, the individual has a valid contractor registration or electrical contractor license, respectively.

Workers' Boards & Minimum Base Rate. L&I must establish a minimum base rate for all intermediary employees. An intermediary employee is any worker who is not an employee and who provides services for financial compensation through a contributing agent. A contributing agent is any entity that facilitates the provision of services by intermediary employees to consumers. Covered intermediary employee is an intermediary employee eligible for representation by a workers' board. Covered intermediary employees may not be paid less than the rate determined by the workers' board.

Procedures for Establishing a Workers' Board. Procedures are established to create workers' boards for specified industries, if certain conditions are met. For the purposes of convening workers' boards, L&I must create five distinct nonemployee industry categories: (1) caregiving and domestic services or other services performed in and about the home; (2) passenger transport; (3) product movement; (4) sales; and (5) certificated professional services. Every three years, L&I must evaluate and redefine industry categories, based on data and surveys.

An eligible worker representative is an organization or association eligible to represent covered intermediary employees in a given industry through a workers' board. Once an eligible worker representative provides a showing of interest by presenting evidence that it represents either 250 covered intermediary employees or 0.5 percent of the industry, whichever is less, then L&I must indicate that the representative is validated, and a workers' board must be established for that industry. Within 90 days of validation:

- all contributing agents in that industry must provide the validated representative physical access to the intermediary employees and a list of names and contact information; and
- all contributing agents must notify all its covered intermediary employees of the workers' board and their right to choose a representative.

For positions or jobs that require certification or licensure, L&I must make a determination of the workers' board's scope. For all other positions or jobs, the validated worker representatives must provide L&I with the list of contributing agents that fall within the workers' board's scope. A contributing agent may appeal the inclusion of its intermediary employees in the workers' board's scope.

Composition and Duties of the Workers' Board. The workers' board must be composed of three validated worker representatives, three validated contributing agent representatives, and four L&I representatives. There are provisions regarding the distribution of seats when there are multiple validated representatives, the members' terms, bylaws, voting, meetings, staffing, required public hearing, and other procedures.

The workers' board must: (1) ascertain wages and benefits necessary to provide for the full participation in society of covered intermediary employees; (2) promote safe working conditions, training, and professional development of covered intermediary employees; and (3) promote effective enforcement of standards across the industry. Every three years, the workers' board must issue determinations on aspects of the industry, including minimum standards for, among other things: (1) hourly wages or rates; (2) rules about scheduling; (3) portable benefit contribution rates; (4) leave policies; (5) certification standards and access to training; and (6) other aspects of working conditions raised by board members.

The workers' board's determinations must be adopted by L&I as policy. If the workers' board fails to reach a determination within the required time period, L&I's minimum base rates take effect and L&I must institute increases in the minimum rates and benefit contributions based on inflation.

Portable Benefits. Contributing agents must contribute funds to benefit providers to provide benefits to eligible beneficiaries. Benefit providers are nonprofit entities that meet certain minimum requirements. Eligible beneficiaries are intermediary employees who meet minimum thresholds to receive contributions. Contributions from contributing agents must be 5 percent of the total charge collected from the consumer for each transaction of services provided, or \$1 for every hour that the worker provided services, whichever is less. Contributions are in addition to pay and do not count toward the minimum base rate. The contribution amounts belong to the eligible beneficiary. The eligible beneficiary may accrue benefits based on contribution from more than one contributing agent. Benefit providers must provide some or all of the following benefits: (1) health insurance; (2) paid time off; (3) retirement benefits; and (4) other benefits as determined by benefit providers. Benefit providers may use up to 10 percent of contribution funds for administration costs. Eligible beneficiaries must select a benefit provider and may change providers once per year.

All eligible beneficiaries must receive industrial insurance under the state's system. Contributing agents must collect the amount sufficient to provide industrial insurance, as determined by L&I, and remit those amounts to L&I

Rights of Intermediary Employees. Specific rights are established for covered intermediary employees, including the right to organize, communicate freely with other workers, discuss terms and conditions of work with other workers, without interference or retribution from contributing agents. Contributing agents are prohibited from engaging in certain conduct, such as performing surveillance of workers' organizing activities, reducing a worker's access to wages for exercising worker rights, adopting work rules that reasonably tend to inhibit workers from exercising their rights. There is a rebuttable presumption of retaliation if a contributing agent takes an adverse action against a person within 90 days of the person exercising the rights. The requirements of contributing agents and the benefits provided may not be considered in determinations of an eligible beneficiary's employment status or the contributing agent's employment relationship to the eligible beneficiary.

Reports from Contributing Agents. Contributing agents must submit annual reports to L&I disclosing certain information. Contributing agents with fewer than five intermediary employees must report aggregated data about intermediary employees and data about wage theft and sexual abuse reported by intermediary employees. Contributing agents with five or more intermediary employees must submit reports that also disclose (1) disaggregated data about intermediary employees; (2) data about worker turnover and retention; (3) data about payment rates; (4) data about benefits and benefit contributions; (5) policies, practices, and algorithms of the contributing agent; and (6) certain conflicts of interest.

Duties of the Department of Labor and Industries. L&I must designate staff dedicated to investigation and enforcement; monitor compliance; establish fees on contributing agents to fund L&I's compliance efforts; provide procedures for worker-led complaints; establish monetary penalties; and adopt other implementation rules. L&I must contract with eligible worker representatives to conduct outreach and education. Contributing agents must provide organizations conducting outreach and education access to workers through all reasonable means, including worksites, user data, and payment data.

Every three years, L&I must contract with two third-party entities to conduct surveys addressing, among other things (1) the number of intermediary employees, eligible beneficiaries, and covered intermediary employees in the state; (2) demographic data; (3) benefits eligible beneficiaries receive from portable benefit accounts; and (4) unmet needs of eligible beneficiaries and covered intermediary employees. One contract must be issued to a worker organization that meets certain specified qualifications. One contract must be issued to a university research department or similar nonpartisan entity. Reports must be submitted to the appropriate committees of the Legislature.

Appropriation: None.

Fiscal Note: Requested on January 28, 2019.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains several effective dates. Please refer to the bill.