

SENATE BILL REPORT

ESB 5765

As Passed Senate, March 8, 2019

Title: An act relating to clarifying responsibilities for mandatory industrial insurance coverage for persons transporting freight.

Brief Description: Clarifying responsibilities for mandatory industrial insurance coverage for persons transporting freight.

Sponsors: Senators Kuderer, Warnick, King, Fortunato, Walsh, Keiser and Hobbs.

Brief History:

Committee Activity: Labor & Commerce: 2/19/19, 2/21/19 [DPS, DNP, w/oRec].

Floor Activity:

Passed Senate: 3/08/19, 44-3.

Brief Summary of Engrossed Bill

- Provides that, for industrial insurance coverage, a freight broker or forwarder with an agreement with a licensed common or contract carrier to transport freight is not the employer of the carrier's drivers operating the commercial vehicles owned or operated by the carrier, unless the carrier is the driver.
- Permits an excluded individual to elect industrial insurance coverage.

SENATE COMMITTEE ON LABOR & COMMERCE

Majority Report: That Substitute Senate Bill No. 5765 be substituted therefor, and the substitute bill do pass.

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

Minority Report: Do not pass.

Signed by Senators King, Ranking Member; Braun.

Minority Report: That it be referred without recommendation.

Signed by Senator Walsh.

Staff: Susan Jones (786-7404)

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.

Background: Industrial Insurance—Workers' Compensation. 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 injury or disability, workers are entitled to medical, temporary time-loss, and vocational rehabilitation benefits, as well as benefits for permanent disabilities.

Worker Definition for Industrial Insurance. Worker means every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is the person's personal labor for an employer under the industrial insurance act, whether by way of manual labor or otherwise, in the course of the person's employment, or as an exception to the definition of worker, a person is not a worker if the person meets the six-part independent contractor test below. A person is not a worker with respect to the person's activities attendant to operating a truck which the person owns, and which is leased to a common or contract carrier.

Six-Part Independent Contractor Test. As an exception to the definition of employer and the definition of worker, services performed by an individual for remuneration do not constitute employment if it is shown that:

- 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 is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for an Internal Revenue Service (IRS) deduction;
- the individual is responsible for filing a schedule of expenses with the IRS;
- the individual has an active and valid registration with the Department of Revenue;
- the individual has a Unified Business Identifier number, and has any other required state accounts for the payment of taxes; and
- the individual has a separate set of books and records that reflect all items of income and expenses of the business.

Summary of Engrossed Bill: Solely for purposes of the industrial insurance act, a freight broker or freight forwarder that enters into an agreement with a licensed common or contract carrier for the transportation of freight on behalf of such broker or forwarder is not the employer of the drivers engaged by the carrier to operate commercial vehicles owned or operated by the carrier unless the carrier is also the driver.

This must not be construed as relieving the owner or lessee of a commercial vehicle from treating the individual operating the vehicle as a worker under the industrial insurance act unless the individuals are not workers within the general worker definition or are excluded from coverage under the six-part independent contractor test.

If an individual is excluded from coverage under this act, the individual may elect industrial insurance coverage.

Appropriation: None.

Fiscal Note: Available.

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

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: This bill is not without controversy. It is simply to provide clarity to who is responsible for paying for workers' compensation, freight brokers or carriers. Some have raised an issue that some people may try to create a workers' compensation exemption under this bill; they would have to change their business model. There could be an amendment if the sole purpose of a change is to avoid workers' compensation. The new title more accurately reflects what the bill does.

This simple legislation is vitally needed. There are 64 freight brokers in the state. Their employees deal with the details of shippers, sales, marketing, and collection. The broker is the middleman. A freight broker can only use a common carrier. They are two separately licensed entities, through the UTC, each with its own set of rules. The problem is that brokers are held to the standard of an employer but they do not have control over the people. Brokers have nothing to do with the carrier's employees. They also do not have access to L&I's safety and other assistance. The bill makes sure brokers and carriers are treated fairly. These are not gig employees.

When the fiscal note comes in, it is important to look at the assumptions since there is limited data.

CON: The concern is equity. This creates special rules and shifts the balance and cost onto the workers. There have been many previous versions of the bill. Statutory exemptions are precious and rare and work to the groups they were intended to. This risks taking workers out of workers' compensation. The bill uses labelling to determine who is covered for workers' compensation rather than the facts of the situation, such as direction and control. This bill covers many workers. There is litigation pending and this should wait until that is resolved.

OTHER: L&I does not usually support legislation that reduces workers' compensation coverage. The bill moves people from coverage without the six-part independent contractor test or other exemptions. This will impact many workers unintentionally. If amended, L&I would have to analyze each situation.

Persons Testifying: PRO: Senator Patty Kuderer, Prime Sponsor; Dave Hamilton, Delivery Express Inc; Andy Shafer, Simburg, Ketter, Sheppard & Purdy, LLP; Ken Johnson, Delivery Express; Toni Williamson, Local Transports LLC; Chester Baldwin, Delivery Express.

CON: Shaunie Wheeler James, Joint Council of Teamsters; Sheri Call, Washington Trucking Associations; Joe Kendo, Washington State Labor Council, AFL-CIO.

OTHER: Chris Bowe, Labor & Industries; Tammy Fellin, Labor and Industries; David Kennerud, Milliman, Inc.

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