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**SENATE BILL 5090**

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**State of Washington 67th Legislature 2021 Regular Session**

**By** Senators Keiser, Conway, Liias, Lovelett, Nguyen, Saldaña, Stanford, and Wilson, C.; by request of Office of the Governor

AN ACT Relating to increasing worker protections; amending RCW 49.17.130, 49.17.140, 49.17.160, and 49.17.180; adding a new section to chapter 51.04 RCW; creating a new section; prescribing penalties; and providing an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

**Sec.**  RCW 49.17.130 and 2010 c 8 s 12012 are each amended to read as follows:

(1) If upon inspection or investigation, the director, or his or her authorized representative, believes that an employer has violated a requirement of RCW 49.17.060, or any safety or health standard promulgated by rules of the department, or any conditions of an order granting a variance, which violation is such that a danger exists from which there is a substantial probability that death or serious physical harm could result to any employee, the director or his or her authorized representative shall issue a citation and may issue an order immediately restraining any such condition, practice, method, process, or means in the workplace. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such danger and prohibit the employment or presence of any individual in locations or under conditions where such danger exists, except individuals whose presence is necessary to avoid, correct, or remove such danger or to maintain the capacity of a continuous process operation in order that the resumption of normal operations may be had without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner. In addition, if any machine or equipment, or any part thereof, is in violation of a requirement of RCW 49.17.060 or any safety or health standard promulgated by rules of the department, and the operation of such machine or equipment gives rise to a substantial probability that death or serious physical harm could result to any employee, and an order of immediate restraint of the use of such machine or equipment has been issued under this subsection, the use of such machine or equipment is prohibited, and a notice to that effect shall be attached thereto by the director or his or her authorized representative.

(2) Whenever the director, or his or her authorized representative, concludes that a condition of employment described in subsection (1) of this section exists in any workplace, he or she shall promptly inform the affected employees and employers of the danger.

(3) An employer may contest an order restraining any condition of employment or practice issued under subsection (1) of this section within five working days of the effective date of the order by making an application to the superior court of the county wherein such condition of employment or practice exists for injunctive relief or temporary restraining. Upon the filing of any such petition, the superior courts of the state of Washington shall have jurisdiction to grant such injunctive relief or temporary restraining order pending the outcome of enforcement proceedings pursuant to this chapter.

(4) At any time that a citation or a citation and order restraining any condition of employment or practice described in subsection (1) of this section is issued by the director, or his or her authorized representative, he or she may in addition request the attorney general to make an application to the superior court of the county wherein such condition of employment or practice exists for a temporary restraining order or such other relief as appears to be appropriate under the circumstances.

**Sec.**  RCW 49.17.140 and 2017 c 13 s 1 are each amended to read as follows:

(1) If after an inspection or investigation the director or the director's authorized representative issues a citation under the authority of RCW 49.17.120 or 49.17.130, the department, within a reasonable time after the termination of such inspection or investigation, shall notify the employer using a method by which the mailing can be tracked or the delivery can be confirmed of the penalty to be assessed under the authority of RCW 49.17.180 and shall state that the employer has fifteen working days within which to notify the director that the employer wishes to appeal the citation or assessment of penalty. If, within fifteen working days from the communication of the notice issued by the director the employer fails to notify the director that the employer intends to appeal the citation or assessment penalty, and no notice is filed by any employee or representative of employees under subsection ((~~(3)~~)) (4) of this section within such time, the citation and the assessment shall be deemed a final order of the department and not subject to review by any court or agency.

(2) If the director has reason to believe that an employer has failed to correct a violation for which the employer was previously cited and which has become a final order, the director shall notify the employer using a method by which the mailing can be tracked or the delivery can be confirmed of such failure to correct the violation and of the penalty to be assessed under RCW 49.17.180 by reason of such failure, and shall state that the employer has fifteen working days from the communication of such notification and assessment of penalty to notify the director that the employer wishes to appeal the director's notification of the assessment of penalty. If, within fifteen working days from the receipt of notification issued by the director the employer fails to notify the director that the employer intends to appeal the notification of assessment of penalty, the notification and assessment of penalty shall be deemed a final order of the department and not subject to review by any court or agency.

(3) If the director has reason to believe that an employer violated an order immediately restraining a condition, practice, method, process, or means in the workplace issued under RCW 49.17.130 or this section or a notice prohibiting the use of a machine or equipment to which a notice prohibiting such use has been attached, the director shall notify the employer using a method by which the mailing can be tracked or the delivery can be confirmed of such violation of the order and of the penalty to be assessed under RCW 49.17.180 by reason of violation of the order and shall state that the employer has 15 working days from the communication of such notification and assessment of penalty to notify the director that the employer wishes to appeal the director's notification of the assessment of penalty. If, within 15 working days from the receipt of notification issued by the director the employer fails to notify the director that the employer intends to appeal the notification of assessment of penalty, the notification and assessment of penalty shall be deemed a final order of the department and not subject to review by any court or agency.

(4) If any employer notifies the director that the employer intends to appeal the citation issued under either RCW 49.17.120 or 49.17.130 or notification of the assessment of a penalty issued under subsections (1) or (2) of this section, or if, within fifteen working days from the issuance of a citation under either RCW 49.17.120 or 49.17.130 any employee or representative of employees files a notice with the director alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the director may reassume jurisdiction over the entire matter, or any portion thereof upon which notice of intention to appeal has been filed with the director pursuant to this subsection. If the director reassumes jurisdiction of all or any portion of the matter upon which notice of appeal has been filed with the director, any redetermination shall be completed and corrective notices of assessment of penalty, citations, or revised periods of abatement completed within a period of thirty working days. The thirty-working-day redetermination period may be extended up to forty-five additional working days upon agreement of all parties to the appeal. The redetermination shall then become final subject to direct appeal to the board of industrial insurance appeals within fifteen working days of such redetermination with service of notice of appeal upon the director. In the event that the director does not reassume jurisdiction as provided in this subsection, the director shall promptly notify the state board of industrial insurance appeals of all notifications of intention to appeal any such citations, any such notices of assessment of penalty and any employee or representative of employees notice of intention to appeal the period of time fixed for abatement of a violation and in addition certify a full copy of the record in such appeal matters to the board. The director shall adopt rules of procedure for the reassumption of jurisdiction under this subsection affording employers, employees, and employee representatives notice of the reassumption of jurisdiction by the director, and an opportunity to object or support the reassumption of jurisdiction, either in writing or orally at an informal conference to be held prior to the expiration of the redetermination period. Except as otherwise provided under subsection ((~~(4)~~)) (5) of this section, a notice of appeal filed under this section shall stay the effectiveness of any citation or notice of the assessment of a penalty pending review by the board of industrial insurance appeals, but such appeal shall not stay the effectiveness of any order of immediate restraint issued by the director under the authority of RCW 49.17.130. The board of industrial insurance appeals shall afford an opportunity for a hearing in the case of each such appellant and the department shall be represented in such hearing by the attorney general and the board shall in addition provide affected employees or authorized representatives of affected employees an opportunity to participate as parties to hearings under this subsection. The board shall thereafter make disposition of the issues in accordance with procedures relative to contested cases appealed to the state board of industrial insurance appeals.

Upon application by an employer showing that a good faith effort to comply with the abatement requirements of a citation has been made and that the abatement has not been completed because of factors beyond the employer's control, the director after affording an opportunity for a hearing shall issue an order affirming or modifying the abatement requirements in such citation.

((~~(4)~~)) (5) An appeal of any violation classified and cited as serious, willful, repeated serious violation, or failure to abate a serious violation does not stay abatement dates and requirements except as follows:

(a) An employer may request a stay of abatement for any serious, willful, repeated serious violation, or failure to abate a serious violation in a notice of appeal under subsection ((~~(3)~~)) (4) of this section;

(b) When the director reassumes jurisdiction of an appeal under subsection ((~~(3)~~)) (4) of this section, it will include the stay of abatement request. The issued redetermination decision will include a decision on the stay of abatement request. The department shall stay the abatement for any serious, willful, repeated serious violation, or failure to abate a serious violation where the department cannot determine that the preliminary evidence shows a substantial probability of death or serious physical harm to workers. The decision on stay of abatement will be final unless the employer renews the request for a stay of abatement in any direct appeal of the redetermination to the board of industrial insurance appeals under subsection ((~~(3)~~)) (4) of this section;

(c) The board of industrial insurance appeals shall adopt rules necessary for conducting an expedited review on any stay of abatement requests identified in the employer's notice of appeal, and shall issue a final decision within forty-five working days of the board's notice of filing of appeal. This rule making shall be initiated in 2011;

(d) Affected employees or their representatives must be afforded an opportunity to participate as parties in an expedited review for stay of abatement;

(e) The board shall grant a stay of an abatement for a serious, willful, repeated serious violation, or failure to abate a serious violation where there is good cause for a stay unless based on the preliminary evidence it is more likely than not that a stay would result in death or serious physical harm to a worker;

(f) As long as a motion to stay abatement is pending all abatement requirements will be stayed.

((~~(5)~~)) (6) When the board of industrial insurance appeals denies a stay of abatement and abatement is required while the appeal is adjudicated, the abatement process must be the same process as the process required for abatement upon a final order.

((~~(6)~~)) (7) The department shall develop rules necessary to implement subsections ((~~(4) and~~)) (5) and (6) of this section. In an application for a stay of abatement, the department will not grant a stay when it can determine that the preliminary evidence shows a substantial probability of death or serious physical harm to workers. The board will not grant a stay where based on the preliminary evidence it is more likely than not that a stay would result in death or serious physical harm to a worker. This rule making shall be initiated in 2011.

**Sec.**  RCW 49.17.160 and 2010 c 8 s 12013 are each amended to read as follows:

(1)(a) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or herself or others of any right afforded by this chapter. Prohibited discrimination includes a materially adverse action.

(b) For purposes of this section, "materially adverse action" is action which would: (i) Deter a reasonable employee from exercising their rights under this chapter; or (ii) have a chilling effect on a reasonable employee's engagement in protected activities.

(2) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person in violation of this section may, within ((~~thirty~~)) 90 days after such violation occurs, file a complaint with the director alleging such discrimination. ((~~Upon receipt of such complaint, the director shall cause such investigation to be made as he or she deems appropriate. If upon such investigation, the director determines that the provisions of this section have been violated, he of [or] she shall bring an action in the superior court of the county wherein the violation is alleged to have occurred against the person or persons who is alleged to have violated the provisions of this section. If the director determines that the provisions of this section have not been violated, the employee may institute the action on his or her own behalf within thirty days of such determination. In any such action the superior court shall have jurisdiction, for cause shown, to restrain violations of subsection (1) of this section and order all appropriate relief including rehiring or reinstatement of the employee to his or her former position with back pay.~~

~~(3) Within ninety days of the receipt of the complaint filed under this section, the director shall notify the complainant of his or her determination under subsection (2) of this section.~~)) The department may, at its discretion, extend the time period on recognized equitable principles or due to extenuating circumstances.

(3) Within 90 days of the receipt of the complaint filed under this section, the director shall notify the complainant and the employer of his or her determination under subsections (4) and (5) of this section unless the matter is otherwise resolved. The department may extend the period by providing advance written notice to the complainant and the employer setting forth good cause for an extension of the period, and specifying the duration of the extension.

(4)(a) If the director determines that the provisions of this section have been violated, the director will issue a citation and notice of assessment describing the violation to the employer, ordering all appropriate relief, and assessing a civil penalty. Such relief may include, but is not limited to, the following:

(i) Restoring the employee to the position of employment held by the employee when the discrimination occurred, or restoring the employee to an equivalent position with equivalent employment hours, work schedule, benefits, pay, and other terms and conditions of employment; and

(ii) Ordering the employer to make payable to the employee earnings that the employee did not receive due to the employer's discriminatory action, including interest of one percent per month on all earnings owed. The earnings and interest owed will be calculated from the first date earnings were owed to the employee.

(b) A civil penalty not to exceed the maximum penalty for a serious violation under this chapter may be assessed for the first occurrence. A civil penalty not to exceed the maximum penalty for a repeat violation under this chapter may be assessed for each repeat occurrence. Civil penalties are not contingent upon relief being granted to the worker.

(5) If the director finds there is insufficient evidence to determine that the provisions of this section have been violated, the director will issue a letter of closure and the employee may institute the action on his or her own behalf within 30 days of such determination. In any such action the superior court shall have jurisdiction, for cause shown, to restrain violations of subsection (1) of this section and order all appropriate relief including rehiring or reinstatement of the employee to his or her former position with back pay.

(6) The department must notify an employer and an employee of a citation and notice of assessment issued under subsection (4) of this section using a method by which the mailing can be tracked or the delivery can be confirmed. Citations and notices of assessments shall state that the employer has 15 working days within which to notify the department that the employer wishes to appeal the citation. If, within 15 working days from the communication of the notice issued by the director, the employer fails to notify the department that the employer intends to appeal the citation, the citation shall be deemed a final order of the department and not subject to review by any court or agency.

(7) If an employer notifies the department of an appeal, the department may reassume jurisdiction according to the timeline under RCW 49.17.140(4). The redetermination shall become final subject to direct appeal to the board of industrial insurance appeals within 15 working days of such redetermination with service of notice of appeal upon the director. In the event that the director does not reassume jurisdiction as provided in this subsection, the director shall promptly notify the state board of industrial insurance appeals of all notifications of intention to appeal the citation and notice of assessment and certify a full copy of the record in such appeal matters to the board. The board of industrial insurance appeals shall afford an opportunity for a hearing in the case of each such appellant and the department shall be represented in such hearing by the attorney general and the board shall in addition provide the complainant an opportunity to participate as a party to hearings under this subsection. The board shall thereafter make disposition of the issues in accordance with procedures relative to contested cases appealed to the state board of industrial insurance appeals. A notice of appeal filed under this section shall stay the effectiveness of any citation or notice of assessment except orders of reinstatement pending review by the board of industrial insurance appeals.

(8) Civil penalties imposed under this section shall be paid to the director for deposit in the supplemental pension fund established in RCW 51.44.033.

(9) Collections of amounts owed for unpaid citations and notices of assessment will be handled pursuant to the procedures outlined in RCW 51.48.120 through 51.48.150.

(10) Nothing in this section diminishes the rights, privileges, or remedies of any employee under any federal or state law or under any collective bargaining agreement. The department and complainant may pursue remedies in superior court that are outside the board of industrial insurance appeals' jurisdiction.

**Sec.**  RCW 49.17.180 and 2018 c 128 s 1 are each amended to read as follows:

(1) Except as provided in RCW 43.05.090, any employer who willfully or repeatedly violates the requirements of RCW 49.17.060, of any safety or health standard adopted under the authority of this chapter, of any existing rule or regulation governing the conditions of employment adopted by the department, or of any order issued granting a variance under RCW 49.17.080 or 49.17.090 may be assessed a civil penalty not to exceed seventy thousand dollars for each violation. However, if the state is required to have a higher maximum penalty to qualify a state plan under the occupational safety and health administration, then the maximum civil penalty is the higher maximum penalty required under the occupational safety and health administration. A minimum penalty of five thousand dollars shall be assessed for a willful violation; unless set to a specific higher amount by the federal occupational safety and health administration and this state is required to equal the higher penalty amount to qualify a state plan.

(2) Any employer who has received a citation for a serious violation of the requirements of RCW 49.17.060, of any safety or health standard adopted under the authority of this chapter, of any existing rule or regulation governing the conditions of employment adopted by the department, or of any order issued granting a variance under RCW 49.17.080 or 49.17.090 as determined in accordance with subsection ((~~(6)~~)) (7) of this section, shall be assessed a civil penalty not to exceed seven thousand dollars for each such violation. However, if the state is required to have a higher maximum penalty to qualify a state plan under the occupational safety and health administration, then the maximum civil penalty is the higher maximum penalty required under the occupational safety and health administration.

(3) Any employer who has received a citation for a violation of the requirements of RCW 49.17.060, of any safety or health standard adopted under this chapter, of any existing rule or regulation governing the conditions of employment adopted by the department, or of any order issued granting a variance under RCW 49.17.080 or 49.17.090, where such violation is specifically determined not to be of a serious nature as provided in subsection ((~~(6)~~)) (7) of this section, may be assessed a civil penalty not to exceed seven thousand dollars for each such violation, unless such violation is determined to be de minimis or, if the state is required to have a higher maximum penalty to qualify a state plan under the occupational safety and health administration, then the maximum civil penalty is the higher maximum penalty required under the occupational safety and health administration.

(4) Any employer who fails to correct a violation for which a citation has been issued under RCW 49.17.120 or 49.17.130 within the period permitted for its correction, which period shall not begin to run until the date of the final order of the board of industrial insurance appeals in the case of any review proceedings under this chapter initiated by the employer in good faith and not solely for delay or avoidance of penalties, may be assessed a civil penalty of not more than seven thousand dollars for each day during which such failure or violation continues. However, if the state is required to have a higher maximum penalty to qualify a state plan under the occupational safety and health administration, then the maximum civil penalty is the higher maximum penalty required under the occupational safety and health administration.

(5) Any employer who has been issued an order immediately restraining a condition, practice, method, process, or means in the workplace, pursuant to RCW 49.17.130 or 49.17.170, and who nevertheless continues such condition, practice, method, process, or means, or who continues to use a machine or equipment or part thereof to which a notice prohibiting such use has been attached, may be assessed a civil penalty of not more than the maximum daily penalty for a failure to abatement violation under this section for each day the employer continues such condition, practice, method, process, or means, or continues to use a machine or equipment or part thereof to which a notice prohibiting such use has been attached.

(6) Any employer who violates any of the posting requirements of this chapter, or any of the posting requirements of rules adopted by the department pursuant to this chapter related to employee or employee representative's rights to notice, including but not limited to those employee rights to notice set forth in RCW 49.17.080, 49.17.090, 49.17.120, 49.17.130, 49.17.220(1), and 49.17.240(2), shall be assessed a penalty not to exceed seven thousand dollars for each such violation. However, if the state is required to have a higher maximum penalty to qualify a state plan under the occupational safety and health administration, then the maximum civil penalty is the higher maximum penalty required under the occupational safety and health administration. Any employer who violates any of the posting requirements for the posting of informational, educational, or training materials under the authority of RCW 49.17.050(7), may be assessed a penalty not to exceed seven thousand dollars for each such violation. However, if the state is required to have a higher maximum penalty to qualify a state plan under the occupational safety and health administration, then the maximum civil penalty is the higher maximum penalty required under the occupational safety and health administration.

((~~(6)~~)) (7) For the purposes of this section, a serious violation shall be deemed to exist in a workplace if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such workplace, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

((~~(7)~~)) (8) The director, or his or her authorized representatives, shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the number of affected employees of the employer being charged, the gravity of the violation, the size of the employer's business, the good faith of the employer, and the history of previous violations.

((~~(8)~~)) (9) Civil penalties imposed under this chapter shall be paid to the director for deposit in the supplemental pension fund established by RCW 51.44.033. Civil penalties may be recovered in a civil action in the name of the department brought in the superior court of the county where the violation is alleged to have occurred, or the department may utilize the procedures for collection of civil penalties as set forth in RCW 51.48.120 through 51.48.150.

NEW SECTION. **Sec.**  A new section is added to chapter 51.04 RCW to read as follows:

(1) In the event of a state of emergency as defined in RCW 43.06.010(12), the director is authorized to expend up to two percent per year of the net premiums earned in the accident fund in the prior fiscal year for the purpose of a safety grant program so long as the assets of the accident fund and pension reserve fund were at least 10 percent in excess of their funded liabilities in the fiscal quarter immediately preceding the state of emergency proclamation.

(2) The safety grant program shall provide one-time grants to employers to purchase equipment, gear, or make capital improvements so long as the purchase is not covered by another grant, government program, or insurance contract. The department may require matching funds from employers. Employers must apply for grants using an application developed by the department.

(3) Employers shall apply the safety grants to purchases of equipment, gear, or capital costs to meet any new safety and health requirements related to the emergency that are required before they are permitted to continue or resume business operations.

(4) An appropriation is not required for expenditures under this section.

(5) Only employers who pay premiums to the state fund as defined in RCW 51.08.175, are not self-insured as defined in RCW 51.08.173, and have 25 or fewer full-time equivalent employees are eligible for funding under this section.

(6) The department may adopt rules as necessary to implement this section.

NEW SECTION. **Sec.**  The department of labor and industries may adopt rules as necessary to implement this act.

NEW SECTION. **Sec.**  Section 3 of this act takes effect July 1, 2022.

**--- END ---**