

SENATE BILL REPORT

SB 5065

As of February 10, 2021

Title: An act relating to safeguarding the public safety by protecting railroad workers.

Brief Description: Safeguarding the public safety by protecting railroad workers.

Sponsors: Senators Kuderer, Stanford, Conway, Hasegawa, Hunt, Keiser, Lovelett, Saldaña, Salomon and Wilson, C..

Brief History:

Committee Activity: Labor, Commerce & Tribal Affairs: 2/10/21.

Brief Summary of Bill

- Prohibits railroad carriers from disciplining employees due to layoff resulting from illness or injury.
- Requires Class I railroad carriers and certain Class II and III railroad carriers to establish a fatigue layoff program.
- Establishes family and medical leave provisions for railroad carriers.

SENATE COMMITTEE ON LABOR, COMMERCE & TRIBAL AFFAIRS

Staff: Matt Shepard-Koningsor (786-7627)

Background: Sick Leave. The state paid sick leave law applies to employees covered by the state's Minimum Wage Act (MWA). Carriers, such as railroad carriers, subject to certain regulations of the federal Interstate Commerce Act, are exempt from the MWA. Under the federal Railroad Unemployment Insurance Act (RUIA), qualified employees of railroad carriers are eligible for sickness benefits for a qualifying sickness after the fourth consecutive day. The RUIA preempts sickness benefits under a state sickness law.

Fatigue Management. The federal Rail Safety Improvement Act of 2008 directed the

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Federal Railroad Administration (FRA) to adopt rules requiring Class I railroad carriers and certain other carriers to develop a railroad safety risk reduction program, to include a fatigue management plan. The Rail Safety Advisory Committee of the FRA formed a working group in 2011 to provide advice related to fatigue management plans, but did not reach consensus on a recommendation for a rule.

Family and Medical Leave. The federal Family and Medical Leave Act (FMLA) allows eligible employees to take up to 12 weeks of job-protected unpaid leave in a 12-month period for the birth or placement of a child, or the serious health condition of the employee or the employee's family member. Generally, the FMLA applies to employees who work for a private employer with 50 or more employees, who have worked for at least 12 months for the employer, and for at 1250 hours during the previous 12 months. Upon return from leave, the employee is entitled to be returned to the same or an equivalent position. An employer may require certification of a serious health condition. An employer may request a second opinion and a third, binding opinion, under specified circumstances. An employer may require recertification on a reasonable basis.

The state Paid Family and Medical Leave Program (PFML) provides paid family and medical leave to qualifying employees after working 820 hours in a qualifying period. Paid family leave benefits are provided: when an employee is bonding after the birth or placement of a child, under the age of 18; because of a family member's serious health condition; or for a military exigency. Paid medical leave benefits are provided for an employee's own serious health condition.

Other. The federal Department of Transportation's Surface Transportation Board (STB) is responsible for a variety of aspects of federal railroad regulatory oversight. The STB classifies types of railroads by annual carrier operating revenue:

- Class I—\$448 million or more;
- Class II—\$36 million or more; and
- Class III—less than \$36 million.

The state Utilities and Transportation Commission (UTC) administers a railroad safety program and also enforces certain laws relating specifically to railroad employees.

Summary of Bill: The Safe Leave Act for Washington Railroad Workers (act) is enacted.

Sick and Fatigue Leave. *Sick Leave—Discipline, Documentation.* A railroad carrier is prohibited from disciplining an employee because of absence due to the illness or injury of the employee or the employee's spouse or child, if the employee has completed three consecutive months of continuous employment and the period of the absence does not exceed 12 weeks. The carrier may, within ten days after the employee returns to work, require the employee to provide documentation from a health care provider that the employee was incapable of working due to illness or injury. The employer must make the request for documentation in writing and give the employee at least 30 days to provide the

documentation. Employee absences for illness or injury are not subject to any type of carrier availability or attendance policy and are stated to be separate from the PFML.

Fatigue Leave. No railroad carrier may dismiss, suspend, layoff, demote, or otherwise discipline an operating craft employee because of, layoff due to fatigue. Class I railroad carriers and any Class II and III railroad carriers with operating craft working hours extending beyond 16 consecutive more frequently than once per week, exclusive of unusual unforeseen events, must establish a fatigue layoff program (program) under which an operating craft employee may layoff due to fatigue without being subjected to discipline or any type of attendance or availability policy.

The carrier must submit the program to the UTC for review and approval within 90 days from the effective date of the act. Before approving a program, the UTC must submit the program to the leadership of the operating craft rail labor organizations state legislative boards. The UTC must adopt rules to implement the fatigue layoff requirements. In adopting rules, the UTC must consider research addressing alertness, depression, suicide, and other consequences of irregular, nonscheduled on-call working conditions; reputable research relating to sleep and rest associated topics; and other specified factors, including impacts of lengthy anticipatory time periods, operational factors relating to the unpredictability of reporting times, and the importance of ensuring fatigue layoffs are reasonable, necessary, and legitimate.

A carrier must report data requested by the UTC. If the UTC identifies additional actions to address fatigue that require legislative action, the UTC must report its findings to the appropriate legislative committees.

An operating craft employee is an employee who performs service in an operating craft on a railroad or directs the work of an operating craft employee as a scheduled employee and other employees who perform safety sensitive tasks.

Data. A carrier must provide data to the UTC regarding the number of employees laid off for injury, illness, or fatigue and the length of layoff no later than January 31st of each year for the preceding year. No personally identifying information may be submitted.

Enforcement. Upon complaint by an employee regarding the sick and fatigue leave provisions, the UTC must investigate. If the UTC finds a violation, it must issue a notice of infraction and may impose a fine, for a Class I carrier, up to \$500 for the first infraction, up to \$25,000 for a second infraction within a three-year period, and up to \$100,000 for each subsequent infraction within the three-year period. For a Class II or III railroad carrier, the parallel fines are \$1,000, \$5,000, and \$10,000. The UTC may also order back pay and reinstatement, and may increase the penalties by rule based on changing economic conditions.

Family and Medical Leave. Provisions similar to the PFML are adopted for employees of

railroad carriers, to be administered by the Employment Security Department (ESD). In determining the duration of leave time remaining in a year, a carrier may deduct only the actual amount of leave taken by an employee in increments no greater than 24 hours, and may not deduct more than one calendar day for each 24-hour period the employee specifically applied for leave.

Leave and job protection applies to railroad carrier employees who:

- worked for the employer from whom leave is requested for at least 12 months and worked for at least 504 hours during the previous 12-month period;
- worked on a guaranteed extra call board for at least the 12 months preceding leave, worked and was paid for not less than 60 percent of the applicable total monthly guarantee, or the equivalent, and not less than 504 hours, not counting vacation leave and other specified time, for or by that employer; or
- for those employees who did not work on a guaranteed extra call board for the 12 months before the leave, worked not less than 504 hours, not counting vacation leave and other specified time, during the preceding 12 months that the employee was actively working for or by that employer.

In adopting rules to implement the health condition certification requirements, ESD must adopt rules applicable to carriers that at least address what constitutes complete and sufficient certification from a medical provider, such that no additional details may be requested; and limits on employer requests for recertification after approval has been granted for that year.

Leave under these provisions must be taken concurrently with leave under the PFML or the federal FMLA. The provisions must be construed to the extent possible, consistent with the PFML and the federal FMLA.

A railroad carrier is subject to civil penalty for violating the leave provisions, which are similar to the penalties for fatigue and sick leave violations. For a retaliation violation, the civil penalty is up to \$5 million.

A Safe Leave for Railroad Workers Account is created, into which penalties are deposited and the funds used for the family and medical leave provisions.

Appropriation: None.

Fiscal Note: Available.

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

Effective Date: The bill takes effect on January 1, 2022.

Staff Summary of Public Testimony: PRO: Railroad workers are the only employees in

Washington State without paid sick leave benefits. Employees are reporting to work ill or injured to avoid disciplinary action, which creates a dangerous public health and safety issue. This work has been attempted in other states but nothing has occurred. Railroad workers must take a sick day for any appointments and are likely called-in before the appointment because they are on-call 24/7. For some carriers, if an employee misses four days a month they will be terminated. Carriers refuse to negotiate their policies and requirements are becoming stricter. The FMLA provisions in the bill are nearly identical to provisions granted to airline workers in 2013. Sickness benefits are not automatic for railroad workers as they are for others. Generally, railroad workers only apply for sickness benefits through the Railroad Retirement Board if they will be off for multiple weeks due to a serious illness or injury. Receiving sickness benefits does not provide protection from disciplinary action.

CON: This bill would negatively affect many aspects of railroads, causing higher costs and delays. Railroad safety incidents have decreased significantly in the last 20 years. In terms of injury and incidents, it is safer to work on a railroad than in a grocery store. The issues addressed in the bill are already addressed by federal law and collective bargaining agreements. There are federal preemption concerns here. The bill creates confusion because it defines terms differently than in federal law. This bill should be sent to the Transportation Committee to review and assess the impact to the state's rail system overall.

Persons Testifying: PRO: Senator Patty Kuderer, Prime Sponsor; Luke Edington, SMART Transportation Division; Herb Krohn, SMART Transportation Division/United Transportation Union; Shahrain Allen, Brotherhood of Locomotives Engineers and Trainmen.

CON: Aaron Hunt, Union Pacific Railroad; Bill Stauffacher, BNSF Railway; Mike Ennis, Association of Washington Business; Chris Herman, Washington Public Ports Association.

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