

SENATE BILL REPORT

ESSB 5065

As Reported by Senate Committee On:
Labor, Commerce & Tribal Affairs, January 20, 2022

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

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

Sponsors: Senate Committee on Labor, Commerce & Tribal Affairs (originally sponsored by Senators Kuderer, Stanford, Conway, Hasegawa, Hunt, Keiser, Lovelett, Saldaña, Salomon and Wilson, C.).

Brief History:

Committee Activity: Labor, Commerce & Tribal Affairs: 2/10/21, 2/15/21 [DPS, DNP]; 1/20/22 [DP2S, DNP].

Brief Summary of Second Substitute Bill

- Establishes family, medical, and bereavement leave for railroad workers.
- Establishes civil penalties and damages for violations of requirements related to the leave provisions.

SENATE COMMITTEE ON LABOR, COMMERCE & TRIBAL AFFAIRS

Majority Report: That Second Substitute Senate Bill No. 5065 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Keiser, Chair; Conway, Vice Chair, Labor; Stanford, Vice Chair, Commerce & Tribal Affairs; Rivers, Robinson and Saldaña.

Minority Report: Do not pass.

Signed by Senators King, Ranking Member; Braun and Schoesler.

Staff: Matt Shepard-Koningsor (786-7627)

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

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.

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 administers a railroad safety program and enforces certain laws relating to railroad employees, such as on crew size, shelters, apparel, and the cost of records or medical examinations.

Summary of Bill (Second Substitute): Leave. *Family and Medical Leave.* An employee is entitled to a total of 12 workweeks of leave during any 12-month period for the birth of a child of the employee and to care for the child; because of the placement of the child with the employee for adoption or foster care; to care for a family member of the employee, if the family member has a serious health condition; or because of a serious health condition that makes the employee unable to perform the employee's job. For spouses working for the same employer, the aggregate number of workweeks to which both may be entitled may be limited to 12 during any 12-month period, if such leave is taken for the birth or

placement of a child, or for a family member's serious health condition.

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 6 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
- 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.

An employer must allow their employees to take unpaid leave if the employee has completed three consecutive months of continuous employment by the carrier prior to the absence, consecutive periods of leave do not exceed 15 days, the total number of authorized absences are less than 91 days, and the absence is authorized. Absences are authorized for specified mental or physical illnesses, injuries, or health conditions of the employee; to allow the employee to provide care for a family member with a specified mental or physical illness, injury, or health condition; and when the employee or their spouse or registered domestic partner's place of business, or child's school or place of care has been closed due to an official public health order.

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 are not subject to any type of carrier availability or attendance policy and are stated to be separate from the PFML.

Bereavement Leave. Employees may take up to seven days for bereavement purposes including arranging or attending funeral services and other matters related to the decedent's estate.

Leave under these provisions is unpaid, but must be taken concurrently with leave under the PFML or the federal FMLA. Employers may allow employees to take accrued vacation or personal leave time for leave under the provisions.

Prohibited Acts and Retaliation. An employer may not interfere with the exercise of

employee rights under the leave provisions. Retaliation for specified actions is prohibited.

Enforcement and Penalties. L&I must investigate employee complaints regarding noncompliance with the act, and either issue a citation and notice of assessment or a closure letter within 90 days after receiving the complaint.

L&I may impose civil penalties as follows:

- for a Class I carrier, up to \$5,000 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 a three-year period; or
- for a Class II or III carrier, up to \$1,000, \$5,000, and \$10,000 for first, second, or subsequent infractions within those periods.

L&I may also order back pay and reinstatement, and may increase the penalties by rule based on changing economic conditions.

An employer who interferes with the exercise of rights of, or retaliates against, an employee is liable for specified damages. Liquidated damages of up to \$55 million are permitted for certain violations. Equitable relief may also be granted. Employees have a private right of action to pursue this relief on behalf of themselves and other employees similarly situated.

Provisions relating to appeal of L&I orders and collection procedures are specified.

EFFECT OF CHANGES MADE BY LABOR, COMMERCE & TRIBAL AFFAIRS COMMITTEE (Second Substitute):

- Creates a short title, to read, "This act may be known and cited as the Shahrain C. Allen safe leave act for Washington railroad workers."
- Removes the January 1, 2022, effective date.

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 (Labor, Commerce & Tribal Affairs) (Regular Session 2021): *The committee recommended a different version of the bill than what was heard.* 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 (Labor, Commerce & Tribal Affairs): PRO: Senator Patty Kuderer, Prime Sponsor; Luke Edington, SMART Transportation Division; Herb Krohn, SMART Transportation Division/United Transportation Union; Shahraim 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 (Labor, Commerce & Tribal Affairs): No one.

Staff Summary of Public Testimony on First Substitute (Regular Session 2022):

No public hearing was held.

Persons Testifying (Labor, Commerce & Tribal Affairs): N/A

Persons Signed In To Testify But Not Testifying (Labor, Commerce & Tribal Affairs): N/A