

SENATE BILL REPORT

ESSB 5115

As Amended by House, April 5, 2021

Title: An act relating to establishing health emergency labor standards.

Brief Description: Establishing health emergency labor standards.

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

Brief History:

Committee Activity: Labor, Commerce & Tribal Affairs: 1/18/21, 2/15/21 [DPS, DNP, w/oRec].

Floor Activity: Passed Senate: 2/23/21, 48-1.

Passed House: 4/5/21, 70-27; 4/5/21, 68-30.

Brief Summary of Engrossed First Substitute Bill

- Creates an occupational disease presumption for frontline employees during a public health emergency for the purposes of workers' compensation.
- Requires employers to notify L&I when a certain percentage of their workforce becomes infected during a public health emergency.
- Requires employers to provide written notice to employees on the premises and their union of potential exposure to the infectious or contagious disease during a public health emergency.
- Prohibits discrimination against an employee who is high risk for seeking accommodation that protects them from the disease or using all available leave options if no accommodation is reasonable.

SENATE COMMITTEE ON LABOR, COMMERCE & TRIBAL AFFAIRS

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.

Majority Report: That Substitute Senate Bill No. 5115 be substituted therefor, and the substitute bill do pass.

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

Minority Report: Do not pass.

Signed by Senators Honeyford and Schoesler.

Minority Report: That it be referred without recommendation.

Signed by Senators King, Ranking Member; Braun.

Staff: Jarrett Sacks (786-7448)

Background: Workers' Compensation. Under the state's industrial insurance laws, a worker who, in the course of employment, is injured or suffers disability from an occupational disease is entitled to certain benefits. To prove an occupational disease, the worker must show that the disease arose naturally and proximately out of employment. For certain occupations, such as firefighters, there is a presumption that certain medical conditions are occupational diseases.

Washington Industrial Safety and Health Act. Under the Washington Industrial Safety and Health Act (WISHA), an employer must provide a workplace free from recognized hazards. The Department of Labor and Industries (L&I) administers WISHA. L&I has adopted general safety standards that apply to most industries, and has safety standards that apply only to specific industries.

Summary of Engrossed First Substitute Bill: Occupational Disease Presumption for Frontline Employees. For frontline employees, there exists a presumption that any infectious or contagious diseases that are transmitted through respiratory droplets or aerosols, or through contact with contaminated surfaces and are the subject of a public health emergency are occupational diseases during a public health emergency for the purposes of workers' compensation. The employee must provide verification, as required by L&I, that the employee has contracted the infectious or contagious disease.

The presumption may be rebutted by a preponderance of the evidence that:

- exposure to the disease occurred from other employment or non-employment activities; or
- the employee was working from the employee's home or was on leave for a period of quarantine consistent with recommended guidance from state and federal health officials immediately prior to the employee's injury, occupational disease, or period of incapacity that resulted from exposure to the disease.

Costs of the payments under the occupational disease presumption do not affect the experience rating of the employers insured by the state fund.

When calculating assessments due to L&I, self-insured employers and self-insurance hospital groups may deduct the cost of payments made for the occupational disease presumption from the total of all claim costs reported.

Employer Reporting to L&I. During a public health emergency, an employer with more than 50 employees at a workplace, within 24 hours of confirming that ten or more of their employees at the workplace have tested positive for the infectious or contagious disease that is the subject of the public health emergency must report the positive tests to L&I.

Reports to L&I are prohibited from including any employee's name or personal identifying information. L&I may use the reports to identify potential clusters of infections at specific workplaces or industries and investigate workplaces for violations of WISHA. An employee is not required to disclose any medical condition or diagnosis to their employer.

L&I must consult with the Department of Health on the infectious or contagious disease:

- before issuing regulatory guidance, rules, directives, or orders related to the reporting requirement for health care facilities; and
- when investigating health care entities and issuing citations related to the reporting requirement.

During a public health emergency, the name, email and residential address, license plate number, and other personally identifiable information regarding employees of L&I is exempt from disclosure under the Public Records Act to the extent the disclosure would violate their right to privacy or pose a risk to their personal safety.

Employer Reporting to Employees. During a public health emergency, if an employer receives a notice of potential exposure to the infectious or contagious disease that is the subject of the public health emergency, the employer must provide written notice of potential exposure to employees, and, when applicable, their union, and employers of subcontractors who were on the premises at the same worksite.

Notice of potential exposure means:

- notification from a public health official or licensed medical provider that an employee was exposed to a qualifying individual at the worksite;
- notification to the employer from an employee, or their emergency contact, that the employee is a qualifying individual; or
- notification through a testing protocol of the employer that the employee is a qualifying individual.

A qualifying individual means a person who has:

- a positive laboratory test;
- a positive diagnosis from a licensed health care provider;
- an order to isolate by a public health official; or
- died due to the infectious or contagious disease, in the determination of a local health department.

Employers who are health care facilities are required to notify employees with known or suspected high-risk exposure and their union within 24 hours of confirmed exposure.

High Risk Employees. During a public health emergency, no employer may discharge, permanently replace, or discriminate against an employee who is high risk as a result of the employee seeking accommodation that protects them from exposure to the infectious or contagious disease or, if no accommodation is reasonable, using all available leave options.

An employee who is high risk is an employee who, due to age or an underlying health condition is at a high risk of severe illness from the disease and a medical provider has recommended the employee's removal from the workforce.

Public Health Emergency. A public health emergency is a declaration or order concerning any infectious or contagious disease, including a pandemic and is issued as follows:

- the President of the United States has declared a national or regional emergency that covers every county in the state; or
- the Governor has declared a state of emergency in every county in the state.

Frontline Employee. Frontline employees are the following employees:

- first responders, including law enforcement officers, firefighters, emergency medical service providers, paramedics, and ambulance drivers;
- employees employed at a hospital, health care facility, nursing home, or assisted living facility who interact in person with patients or other members of the general public;
- employees performing food processing, food manufacturing, food distribution, farm, and meat packing work;
- maintenance, janitorial, and food service workers at any facility treating patients diagnosed with the infectious or contagious disease that is the subject of the public health emergency;
- drivers and operators employed by a transit agency or any other public entity providing mass transportation services;
- employees working at a licensed child care facility that interact in person with children or other members of the general public;
- retail employees at stores that remain open to the general public during the public health emergency if the employee has in-person interaction with the general public or other employees;
- employees of a hotel, motel, or other transient accommodation that remains open to the general public during the public health emergency, if the employee has in-person interaction with the general public or other employees;
- restaurant employees, if the employee has in-person interaction with the general public or other employees;
- home care aides and home health aides that primarily work in the home of the individual receiving care;

- corrections officers and correctional support employees;
- educational employees, including teachers, paraeducators, principals, librarians, school bus drivers, and other educational support staff and contractors that are required to be physically present at a school, or on the grounds of a school, where classes are being taught in person, in a school transportation vehicle, or in the home of a student as part of their job duties, if the employee has in-person interaction with students, a student's family members, or other employees;
- employees at higher education institutions that are required to be physically present on campus where classes are being taught in person, if the employee has in-person interaction with students or other employees; and
- employees employed by a public library that remains open, if the employee has in-person interaction with the general public or other employees.

Expiration. The bill expires upon the expiration of the Governor's emergency proclamation declaring a state of emergency due to COVID-19.

Appropriation: None.

Fiscal Note: Available.

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

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: The bill is meant to alleviate some of the issues that have arisen during the pandemic. The approach is comprehensive to help the many workers who are struggling. The workers' compensation presumption is important because employers claim that nurses who repeatedly treat COVID-19 patients are getting COVID-19 from community spread rather than work. Workers are running out of sick leave when they get COVID-19 and are worried about keeping their jobs while they are still in the hospital. Many people are losing jobs because of family care responsibilities. Many workers are denied Paid Family and Medical Leave because they do not have the required number of hours worked from being furloughed during pandemic. The definition of frontline employee could be expanded to include bus drivers.

CON: The Paid Family and Medical Leave threshold is too low. It would take only about two weeks to qualify and risks undermining the system which was a carefully crafted balance. Employers already do not have enough money and the bill piles on additional costs on businesses that are struggling to survive the pandemic. Qui tam is abused in California and have a large cost to employers. There are more important and effective ways to help frontline workers, such as vaccine rollout. Multiple jurisdictions are passing hazard pay and businesses will not know what controls or if they layer. The definition of frontline worker only applies to retail grocery stores and not direct shipping grocery providers. The

retaliation provisions are very broad. Similar federal leave laws made an exception for health care providers who have unique staffing needs during the pandemic, this bill should, too. There is no need for a presumption because L&I already has a policy and the current system is working. Many workplaces have a worker shortage due to pandemic and the new leave requirements will only contribute to it more.

OTHER: There are questions about how the leave provisions in the bill interact with current leave requirements. The whistleblower provisions in the bill needs to be consistent with the local whistleblower act. Cities do not pay B&O, so the bill would have costs for them. The bill could consider options to lessen the cost for cities, such as revenue sharing or a sales tax credit.

Persons Testifying: PRO: Senator Karen Keiser, Prime Sponsor; Laura Beal, citizen; Carolyn Brotherton, American Federation of Teachers Washington; Shelly Pollock Mead, Registered Nurse, Washington State Nurses Association; Joe Kendo, Washington State Labor Council, AFL-CIO; Samantha Grad, United Food and Commercial Workers International Union 21.

CON: Holly Chisa, North West Grocery Association; Lisa Thatcher, Washington State Hospital Association; June Altaras, MultiCare; Bruce Beckett, Washington Retail Association; Cliff Webster, Liability Reform Coalition; Bre Elsey, Washington Farm Bureau; Richard Clyne, Washington Farm Bureau; Jim King, Independent Business Association; Christine Brewer, Washington Self Insurers Association; Robert Battles, Association of Washington Business; Dan Coyne, Food Northwest; Tammie Hetrick, Washington Food Industry Association.

OTHER: Candice Bock, Association of Washington Cities.

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

EFFECT OF HOUSE AMENDMENT(S):

Employees of hospitals, health care facilities, nursing homes, and assisted living facilities are removed from the bill. Provisions expiring the bill upon the expiration of the Governor's proclamation related to COVID-19 are removed.

A provision is added specifying that if leave or similar benefits are paid to a frontline employee under a federal or state program during a public health emergency, time-loss benefits will not be paid to an employee for the same time period covered by the federal or state program.

Provisions requiring the opposing party pay the costs of an appeal when the claim for benefits is allowed on appeal, and, when costs of appeal are paid by L&I in a state fund case, the costs must be paid from the Accident Fund and charged to the costs of the claim are removed.

The definition of public health emergency for the purposes of the workers' compensation

presumption is changed to specify that a public health emergency based on a Governor's declaration must be in every in county in the state.