

# SENATE BILL REPORT

## ESSB 5355

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As Passed Senate, March 9, 2021

**Title:** An act relating to establishing wage liens.

**Brief Description:** Establishing wage liens.

**Sponsors:** Senate Committee on Labor, Commerce & Tribal Affairs (originally sponsored by Senator Conway).

**Brief History:**

**Committee Activity:** Labor, Commerce & Tribal Affairs: 2/03/21, 2/15/21 [DPS-TRAN, DNP].

**Floor Activity:** Passed Senate: 3/9/21, 25-24.

**Brief Summary of Engrossed First Substitute Bill**

- Creates a statutory wage lien for claims on unpaid wages.
- Creates procedures for establishing, foreclosing, extinguishing, and prioritizing wage liens.

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### SENATE COMMITTEE ON LABOR, COMMERCE & TRIBAL AFFAIRS

**Majority Report:** That Substitute Senate Bill No. 5355 be substituted therefor, and the substitute bill do pass and be referred to Committee on Transportation.

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 King, Ranking Member; Braun, Honeyford and Schoesler.

**Staff:** Matt Shepard-Koningsor (786-7627)

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*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:** Wage Laws. Various laws, such as the Minimum Wage Act and Wage Payment Act, establish standards for paying wages. It is unlawful for an employer to deprive employees of their wages. An aggrieved employee may file a wage complaint with the Department of Labor and Industries (L&I). L&I must investigate wage complaints and has authority to order citations and notices of assessment against employers.

An employee also has the option of bringing a civil action in court to enforce a wage claim against the employer. Depending on the circumstances, an employer and the employer's vice principal, officer, or agent may be liable for additional damages if the wage violation was willful and intentional.

Liens. A lien gives a lien claimant rights to another's property as a means to enforce a debt owed to the lien claimant. There are a variety of liens created by statute. One of the more common liens is the materialmen's lien or construction lien that may be used by persons furnishing labor, professional services, materials, or equipment for real property improvement. If the person is not paid for services or materials, the person may have a lien on the real property. Notice and recording requirements must be met. To foreclose on the lien, the lien claimant must file a civil action in court. Other lien statutes include, for example, crop liens, liens on timber and lumber, and liens on orchard land.

**Summary of Engrossed First Substitute Bill:** Wage Liens. A lien for wage claims is created. A wage claim is a claim for any unpaid wages owed to the claimant as an employee of an employer, as well as any other compensation, interest, statutory damages, liquidated damages, attorneys' fees and costs, or statutory penalties that may be owed for violation of a local, state, or federal wage law, but does not include vacation or severance pay, contributions to an employee benefit plan, or paid leave except paid leave that is statutorily mandated. Any wage lien or right to a wage lien and the right of action to recover the lien is assignable.

Highly compensated employee means any employee who was a 5 percent owner of the business at which the employee is employed during the current year or preceding year, or who received compensation from the employer in excess of the indexed compensation established by the United States Department of the Treasury— \$130,000 in 2020. A highly compensated employee may not establish a wage lien.

Property Affected by Wage Liens. Property subject to a wage lien includes certain real and personal property in the state owned or subsequently acquired by the claimant's employer and real property in the state the wage claimant has maintained.

A wage lien is effective against the estate of the employer. A wage lien does not apply to any claim that is or would be subject to a lien by that person under the construction lien statutes. Wage liens do not affect the ownership of, or title in, personal or real property of the state or other public ownership.

Recording Requirements. Procedures are established for recording wage liens, including

requirements to file a notice of wage lien with the appropriate entity. For wage liens on real property commenced in any court, a notice must be filed within eight months in the county auditor's office where the property is located. The notice must include specified information and the auditor must index the notice in a manner similar to the practice for filing a lis pendens notice.

The filing of the notice is constructive notice to a purchaser or encumbrancer of the property, and every subsequent purchaser or encumbrancer, and is bound by all proceedings taken after the filing of the notice. The court in which the action was commenced may, with notice and on a showing of good cause, order the notice canceled, and that cancellation order must be recorded with the county auditor. Similar notices must also be filed with the county auditor's office for wage claims filed by an administrative agency of a local government or by L&I for claims filed with the agency.

For personal property, including vehicles or vessels, the notice must be filed with the Department of Licensing (DOL). In addition to filing a notice of wage lien, the claimant must provide notice to the employer. A wage lien must be filed within two years from when the wages were first due. Statutory forms for notice are provided.

Foreclosure of a Wage Lien. Generally, an action to foreclose on a wage lien must be filed within eight months of the date the wage lien was recorded. A wage lien may be foreclosed either judicially, by bringing an action in the appropriate court, or administratively by L&I when the claimant has pursued a wage claim administratively. Judicial foreclosures must be filed in superior court or federal district court for real property; in district court for actions against personal property not exceeding the court's jurisdictional limits; and superior court for personal property when exceeding the district court limits.

If a wage claimant receives a judgment on a wage claim from a federal, state, or municipal court not authorized to adjudicate the foreclosure, a separate action to foreclose the lien must be filed within 90 days of the date of that court's judgment and such a judgment does not revive an extinguished lien. If a wage claimant receives a judgment on a wage claim from a federal, state, or municipal court, the judgment and any applicable post-judgment interest establishes the amount owed for the purposes of foreclosure.

A claimant may foreclose on a wage lien if a final and binding citation and notice of assessment has been issued by L&I and the claimant has timely notified they will pursue foreclosure without L&I's assistance. The foreclosure affecting real property must be commenced in the county where the real property is located within 90 days of the date L&I's citation and notice of assessment becomes final and binding.

A foreclosure action may be brought by the employee, L&I, an administrative agency of local government, the United States Department of Labor, the Office of the Attorney General, or a representative of the employee such as a union representative. A lien claimant who prevails in a foreclosure action is entitled to reasonable attorneys' fees and costs.

L&I may use current collection procedures to foreclose on wage liens. When L&I is foreclosing on a wage lien, the date the wage lien was originally filed shall determine priority. If a claimant has timely notified L&I they will pursue foreclosure on their own, L&I does not have to file a warrant for collection and is relieved from any liability relating to such foreclosure.

In a judgment resulting from an action to foreclose on the wage lien, the court may order the sale at a sheriff's auction, or transfer the title or possession of any property to the claimant. A writ of sale may be issued for any property for ten years after a judgment is issued. An action to foreclose a wage lien on a vehicle or vessel must comply with any other requirements of DOL regarding transferring title and taking ownership.

In any action brought to foreclose a lien, the owner shall be joined as a party. If any person has a recorded interest in property subject to a lien prior to the commencement of foreclosure, the person shall not be foreclosed or affected unless joined as a party. A person must not begin an action to foreclose a lien on any property while a prior action to foreclose another lien on the same property is pending. The person may apply to the court to be joined as a party to the prior action and the court may foreclose the latter lien with the former on the same property. In most cases, the court must grant the application for joinder. The court may consolidate lien foreclosure actions under certain circumstances.

Extinguishing a Wage Lien. A wage lien is extinguished if an action for the underlying wage claim is not brought within eight months of recording the wage lien, or if the required notice to the county auditor's office was not filed within eight months. A wage lien is also extinguished if the wage claim is dismissed with prejudice, upon payment and acceptance of payment, or upon proper recording or notice of a surety bond in lieu of lien. Requirements to file a release of an extinguished wage lien are provided, as are statutory forms to release the wage lien.

Priority. Generally, priority among wage liens is determined by the date of recording. For real property, a wage lien properly recorded shall be prior to any security interest, lien, mortgage, deed of trust, or other encumbrance attached to the property after, or was unrecorded at the time the wage lien was recorded. A wage lien on real property shall be subject and subordinate to any prior perfected security interest, lien, mortgage, deed of trust, or other encumbrance.

For personal property, a security interest perfected under the Washington Uniform Commercial Code has priority over a wage lien properly recorded if the security interest was perfected or a financing statement covering the collateral was filed before the wage lien was recorded. The time of filing or perfection applies to both the collateral and the collateral's proceeds. A buyer of goods subject to a certificate of title that does not contain a statement the goods are or may be subject to a wage lien, takes free of such wage lien if the buyer gives value and receives delivery without knowledge of the wage lien.

With respect to goods, a wage lien is ineffective against the following persons, their heirs, successors, or assigns:

- a buyer in the ordinary course of business; and
- a buyer of goods from a person who used or bought the goods primarily for personal, family, or household purposes.

For property other than goods, a wage lien is ineffective against third persons who acquired title in good faith prior to the wage lien filing if such person gave value and had no actual notice of the wage lien.

Frivolous Claims of Wage Liens. The owner of real or personal property subject to a recorded claim of a wage lien or a lender or another lien claimant, who believes the claim to be frivolous and made without reasonable cause, or is clearly excessive, may file a motion to the appropriate court for an order directing the lien claimant to appear before the court no earlier than six, and no later than 15 days following the date of service, to show cause why the requested relief should not be granted. The motion must state the grounds upon which relief is asked and must be supported by an affidavit. If the lien claimant fails to appear, the lien shall be released with prejudice. If there is a pending foreclosure action, the application shall be made part of that action. If there is no pending foreclosure action, the court clerk shall assign a cause number and collect a filing fee. After a hearing, the court must issue an order releasing, reducing, or verifying the validity of the lien. Costs and reasonable attorneys' fees are awarded to the prevailing party.

Release of Lien by Filing a Surety Bond. Any owner of real property subject to a recorded claim of a wage lien, or contractor, subcontractor, lender, or another lien claimant who disputes the correctness or validity of the claim of lien may record a surety bond, in a specified amount, to obtain the release of a lien on real property. The bond shall contain a description of the claim of lien and property involved. If the lien claimed is \$10,000 or less, the bond must be in an amount equal to the greater of \$5,000, or two times the amount claimed. If the lien claimed is in excess of \$10,000, the bond must be in an amount equal to or greater than one and one-half times the amount claimed.

If the bond relates to a claim of lien affecting more than one parcel of real property and the claim is segregated to each parcel, the bond may be similarly segregated. A separate bond is required for each claim of lien made by separate claimants. A single bond may be used to guarantee payment of amounts claimed by more than one claim of lien by a single claimant if the bond complies with the requirements of bond amounts above.

For a lien on real property, the bond must be recorded in the same manner as the underlying lien and such recording releases the lien and any action brought to recover the amount claimed. For a lien on personal property, within five days of furnishing a bond, the person furnishing the bond shall send notice to the lien claimant with certain information and documentation. Requirements for the lien claimant to release the lien are provided.

The surety shall be discharged from liability under the bond in the following circumstances:

- unless otherwise prohibited, when no action is commenced to recover on a lien within eight months; or
- following an action to enforce a lien, when payment of any judgment or administrative assessment is entered or on full payment of the bond to the judgment or administrative assessment holder.

Affected parties may also use other methods to secure the obligations underlying a lien claim and to obtain a release of lien on real property.

Miscellaneous. A contract between an employer and employee may not waive the right to a wage lien. A properly filed notice of wage lien constitutes notice to the spouse or domestic partner of the owner of the property and subjects all community property interest of both spouses or domestic partners to the wage lien. The wage lien provisions must be liberally construed to provide security for all persons intended to be protected by the provisions. A \$35.00 fee must be paid to the appropriate county office for filing a claim of frivolous lien or filing an action to release a lien.

A wage lien account is created, in the custody of the state treasurer, for DOL to deposit filing fees for wage liens. DOL may, by rule, create specific wage lien forms to implement notice and filing requirements.

**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 on Original Bill:** *The committee recommended a different version of the bill than what was heard.* PRO: These provisions are not new in Washington State. All three pathways for wage claims are not necessarily successful in collecting on wage claims. The system does not apply to many types of workers and this bill allows all industries the ability to collect unpaid wages. Wage theft disproportionately affects women and people of color. This bill has been worked on for many years. I worked as a cook in Seattle and my employer robbed me of \$9,000. I have taken many steps to recover my money but nothing has worked. This bill would allow a lien on the property to guarantee I am paid owed wages. This bill will strengthen wage theft protections. A claimant may win a judgment but have no way to collect on that judgment. Some employers do not pay even when told they owe wages. The problem addressed here is wage theft, a major issue in our economy. L&I has a 50 percent collection rate. This bill does create a pre-judgment lien and construction workers have had similar liens for years. The

bill does not provide for seizure of property but rather places a lien to guarantee wage collection.

CON: The L&I system has a low barrier for workers to collect owed wages and that is important to utilize. Other statutory liens on property have a nexus with the property, this lien does not. There are two sides to every wage claim. This bill provides a sentence first and a verdict afterwards. This bill represents bad policy and legislative overreach. The processes in place are effective when utilized and the new process created by this bill could be devastating to small businesses. This is an extremely slow, complex, and costly method to collect wages. We have a major concern with the frivolous actions section addressed in this bill. We need to make current mechanisms work and not add new ones.

**Persons Testifying:** PRO: Senator Steve Conway, Prime Sponsor; Sybill Hyppolite, Washington State Labor Council, AFL-CIO; Veronique Facchinelli (interpreter), CASA Latina; Eligio Benito Mendez (using interpret), CASA Latina; Danielle Alvarado, Fair Work Center; Andrea Schmitt, Columbia Legal Services.

CON: Tom Kwieciak, Building Industry Association of Washington; Robert Battles, Association of Washington Business; Glen Smith; Gary Smith, AROW; Bruce Beckett, Washington Retail Association; Carolyn Logue, Washington Food Industry Association.

**Persons Signed In To Testify But Not Testifying:** CON: Jerry VanderWood, Associated General Contractors of Washington.

OTHER: Tammy Fellin, Labor & Industries.