

HOUSE BILL REPORT

HB 1320

As Reported by House Committee On:

Labor & Workplace Standards

Appropriations

Title: An act relating to access to personnel records.

Brief Description: Concerning access to personnel records.

Sponsors: Representatives Reed, Berry, Ortiz-Self, Ramel, Pollet and Fosse.

Brief History:

Committee Activity:

Labor & Workplace Standards: 2/14/23, 2/15/23 [DPS];

Appropriations: 2/23/23, 2/24/23 [DP2S(w/o sub LAWS)].

Brief Summary of Second Substitute Bill

- Specifies that an employer must provide the employee's complete, unredacted personnel file within 14 calendar days of the request from the employee, former employee, or their attorney, agent, or fiduciary.
- Requires an employer to provide to a former employee, upon request, a statement of the employee's discharge date and reasons, if any, for the discharge.
- Creates a private cause of action to enforce the requirements.
- Requires the Department of Labor and Industries and the Employment Security Department to provide employers with information regarding the employer's obligations and the employee's rights.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 6 members: Representatives Berry, Chair; Fosse, Vice Chair; Bronoske, Doglio,

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.

Ormsby and Ortiz-Self.

Minority Report: Without recommendation. Signed by 3 members: Representatives Robertson, Ranking Minority Member; Schmidt, Assistant Ranking Minority Member; Connors.

Staff: Trudes Tango (786-7384).

Background:

Industrial Welfare Act.

Under the Industrial Welfare Act (IWA), an employer is required, at least annually, to allow an employee to inspect the employee's own personnel file upon the employee's request. The employer must make the file available locally within a reasonable period of time after the request.

The Department of Labor and Industries (Department) administers the IWA, and interprets the statute to include former employees who retain the right to inspect their personnel records after termination. The Department also interprets "reasonable period of time" to generally mean within 10 business days unless good cause is shown that more time is needed.

The right to inspect does not apply to records of any employee relating to an investigation of possible criminal offenses. It also does not apply to records or information compiled in preparation of a lawsuit which would not be available to another party under the rules of pretrial discovery for causes pending in superior courts.

Regarding payroll records, employers are required to keep, for at least three years, records of each employee's name, address, occupation, dates of employment, rates of pay, hours worked, and other information. Employers must make that information available to the employee upon request at any reasonable time. Upon request from a former employee, an employer must furnish within 10 business days a signed, written statement stating the reasons for, and effective date of, discharge.

An employee may file a complaint with the Department if the employee has been denied access to their personnel records, and the Department will contact the employer to request compliance.

Public Records Act.

Under the Public Records Act, state and local agencies are required to make written records available to the public for inspection and copying upon request, unless an exemption applies. Investigative records compiled by an employing agency in connection with pending investigations of unfair practices under the Washington Law Against Discrimination or other possible violations involving discrimination or harassment in

employment are exempt. After the outcome of the investigation, the employing agency may disclose the records after the names of complainants, accusers, and witnesses are redacted, unless there is consent to disclosure. In addition, personal identifying information in an employee personnel file held by a postsecondary educational institution that reveals the identity of witnesses or victims of sexual misconduct committed by an employee of the institution are exempt from public disclosure, unless the victim or witness indicates a desire for disclosure.

Summary of Substitute Bill:

The Legislature intends to increase transparency, provide consistency, and encourage equitable compliance regarding access to personnel records.

Within 14 calendar days of a request from an employee, former employee, or their attorney, agent, or fiduciary, an employer must furnish to the employee a complete, unredacted electronic or paper copy of the employee's personnel file, as it exists at the time of the request, at no cost to the employee.

For requests from former employees or their attorney, agent, or fiduciary, the employer must also furnish a signed written statement to the former employee stating the effective date of discharge, whether the employer had a reason for the discharge, and if so, the reasons.

An employee or former employee may enforce the provisions through a private cause of action in superior court, without exhausting any administrative remedy. The employee or former employee is entitled to equitable relief, statutory damages, and reasonable attorneys' fees and costs. Statutory damages for each violation are:

- \$250 if the complete file, statement, or redaction log is not provided within 14 days from the due date;
- \$500 if the complete file, statement, or redaction log is not provided within 28 days of the due date;
- \$1,000 if the complete file, statement, or redaction log is provided later than 28 days from the due date; and
- \$500 for any other violations.

"Personnel file" includes the following records, regardless of the labels of the files or folders in which they are maintained:

- all job application records;
- all performance evaluations;
- all disciplinary records;
- all medical, leave, and reasonable accommodation records, which an employer should maintain separately from other personnel records for medical privacy;
- all payroll records;

- all employment agreements; and
- all other records the employer actually maintained in a personnel or employment file for that employee, however designated.

The requirements must not be construed to: create a records retention schedule; entitle an employee to an employer's protected legal file; or require an employer to create personnel records.

An employer that is a health care provider may redact patient information to the extent required by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Within 14 calendar days of furnishing the file, a health care provider employer must identify what information is redacted and the specific provisions of HIPAA requiring redaction. The employer has the burden of proving that redaction was required by law and that it provided the redaction log as required. The employer is subject to liability for bad faith redaction or failure to provide the redaction log.

A public employer must treat an employee's or former employee's request for personnel files as a request under these provisions, unless the request specifies that it is made under the Public Records Act (PRA). The public employer must treat requests for any other records that accompany the request for the personnel file as requests made under the PRA.

The Department must develop and furnish to each employer information describing an employer's obligations and an employee's rights. The Department and the Employment Security Department (ESD) must provide this information to employers at least annually. Failure to provide the information does not relieve an employer of its obligations.

Agents and fiduciaries must provide the document evidencing their legal authority to represent the employee or former employee. An agent is an attorney-in-fact granted authority under a durable or nondurable power of attorney. A fiduciary is an original, additional, or successor personal representative; guardian; or trustee.

Substitute Bill Compared to Original Bill:

The substitute bill:

- provides that the personnel files to be provided are the files as they exist at the time of the request;
- amends the penalty provisions by adding \$500 statutory damages for any other violations and clarifying that penalties apply if the complete file or redaction log was not provided within the specified time period;
- allows health care provider employers to redact patient information if required by HIPAA and requires such employers to provide a redaction log;
- removes provisions for redaction by public employers, and instead requires public employers to treat requests for personnel files as requests under the provisions of the act, and not under the PRA, unless the request specifies otherwise;

- provides a specific definition of "employer" for the purposes of ESD providing information to employers;
- allows a former employee to bring a private cause of action;
- clarifies that the provisions of the bill do not require an employer to create personnel records;
- corrects inconsistency by making all time periods calendar days; and
- delays the effective date to January 1, 2024.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available. New fiscal note requested on February 15, 2023. .

Effective Date of Substitute Bill: The bill takes effect on January 1, 2024.

Staff Summary of Public Testimony:

(In support) This bill is about fairness and clarifies existing rights for employees accessing their files. It defines what records must be produced within reasonable deadlines and creates an enforcement mechanism. When employees are discharged they should be able to review their personnel file. Reasonable accommodations have been made to address privacy issues. Employers currently ignore requests from employees, which causes problems for employees who want their performance reviews and who are seeking new employment. Employees have to file a lawsuit just to get basic information in their files. Employers often will delay for months. Not having access to records also impacts workers' compensation claims when employees are trying to determine what their true wages are for purposes of calculating time loss benefits. There is no mechanism to compel employers to comply and this bill puts teeth into the law.

(Opposed) The bill establishes a private right of action as the only method of recourse. Employees should have an administrative remedy first. This bill will be hard on small employers. There are very limited provisions for redacting information and this will cause issues with protecting information about co-workers or third parties. There can be domestic violence and safety concerns. The 14-day time period to comply assumes these records are easy to find and are all in one place, which is not the case. The definition of "personnel file" includes a catch-all that encompasses any records kept in a personnel file, no matter where it is located. It will take time compile these records. The employer should be allowed a good faith extension on the time.

(Other) Cities are concerned with how it applies to public employers. The 14-day timeframe is not enough time given the size of some of the records and where the employer might need to go to track down those records. Smaller cities do not have enough staff. Requiring business days instead of calendar days would help. The bill needs to exempt

small businesses. The term "request" is vague and needs defining. The Department needs time to implement the bill. There is concern that health information about patients might be disclosed in violation of federal health care laws.

Persons Testifying: (In support) Representative Julia Reed, prime sponsor; Patrick McGah; Cher Scarlett; Elizabeth Hanley and Jane Dale, Washington State Association for Justice; and Andrea Schmitt, Washington Employment Lawyers Association.

(Opposed) Patrick Connor, National Federation of Independent Business; and Bob Battles, Association of Washington Business.

(Other) Candice Bock, Association of Washington Cities; Rose Gundersen, Washington Retail Association; Tammy Fellin, Department of Labor and Industries; and Remy Kerr, Washington State Hospital Association.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Labor & Workplace Standards. Signed by 18 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Berg, Chopp, Davis, Fitzgibbon, Lekanoff, Pollet, Riccelli, Ryu, Senn, Simmons, Slatter, Springer, Stonier and Tharinger.

Minority Report: Do not pass. Signed by 10 members: Representatives Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; Chandler, Connors, Couture, Dye, Sandlin, Schmick and Steele.

Minority Report: Without recommendation. Signed by 2 members: Representatives Harris and Rude.

Staff: Emily Stephens (786-7157).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Labor & Workplace Standards:

The second substitute bill:

- requires public employers to apply redaction requirements of the Public Records Act, which require the redaction of the names of complainants, accusers, and witnesses in records compiled by the employer in connection with investigations of unfair practices under the Washington Law Against Discrimination or of other violations of law or the employer's internal policy prohibiting employment discrimination or harassment;

- specifies that postsecondary educational institutions must redact personal identifying information of a complainant and witnesses from any substantiated findings of sexual misconduct committed by the employee that are included in the employee's personnel file, and provides that the institution bears the burden of proving that it redacted only personal identifying information, and may be liable for bad faith redaction; and
- provides that if there is a conflict between the provisions of the bill and a collective bargaining agreement in existence on the effective date of the bill, the parties are not required to reopen negotiations or apply the provisions of the bill until the agreement expires or is reopened by the parties.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available.

Effective Date of Second Substitute Bill: The bill takes effect on January 1, 2024.

Staff Summary of Public Testimony:

(In support) The current personnel file statute is not sufficient to meet the needs of employees. Employees deserve the dignity of honest and transparent explanations of their job performance. Employers refuse responses to requests for personnel files, or the files are incomplete. Employers will require employees to drive hours to view their personnel files. The bill is enforceable because it creates a cause of action. Current law already says these files should be provided within 10 days, so this bill expands the timeline to 14 days. None of the costs of this bill are from the State General Fund. There are many reasons employees may need the information in their personnel files, including for unemployment benefits, for workers' compensation, or to understand their nondisclosure obligations.

(Opposed) The cost to implement the bill is larger than the fiscal note represents. It does not cover agencies, cities, and states that have to comply. Entities cannot call this a public records request. Personnel records should be provided in a timely manner, but the 14-day timeline in this situation is unreasonable. The business owner may be out of town, or there may be a delay in the process, leaving the businesses vulnerable. The timeline to comply should be extended and very small businesses should be excluded. This bill adds a catchall that will increase the chances of litigation. A regulatory approach, similar to the Wage Payment Act and other legislation, would be a low-cost solution allowing employees more timely access to these documents without having to go to court. Many requests could overwhelm the limited resources of a business owner or a small human resources department.

(Other) The requirements for disclosure include all performance review files. The substitute bill does not cover all protected information. A number of state and federal laws are not allowed to be redacted under this bill. Other sensitive information would not be redacted under this bill. The bill requires a lengthy list of documents be given to employees

that don't all live in the same place, so 14 days is a tight turnaround. Many cities are small, and this would fall on a lone city clerk. An amendment to provide more time to respond to these requests would improve the bill, particularly given the legal ramifications of not responding within the timeframe.

Persons Testifying: (In support) Larry Shannon, Washington State Association for Justice; Patrick McGah; and Jesse Wing, Washington Employment Lawyers Association.

(Opposed) Bob Battles, Association of Washington Business; Patrick Connor, National Federation of Independent Business; and Bruce Beckett, Washington Retail Association.

(Other) Remy Kerr, Washington State Hospital Association; and Candice Bock, Association of Washington Cities .

Persons Signed In To Testify But Not Testifying: None.