

HOUSE BILL REPORT

HB 1320

As Reported by House Committee On:
Labor & Workplace Standards

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].

Brief Summary of 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, Ormsby and Ortiz-Self.

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.

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:

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.

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 to 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.