

HOUSE BILL REPORT

E2SHB 1320

As Passed House:

March 1, 2023

Title: An act relating to access to personnel records.

Brief Description: Concerning access to personnel records.

Sponsors: House Committee on Appropriations (originally sponsored by 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)].

Floor Activity:

Passed House: 3/1/23, 56-40.

Brief Summary of Engrossed Second Substitute Bill

- Specifies that an employer must provide the employee's complete personnel file within 14 calendar days of a request from the employee, former employee, or their attorney, agent, or fiduciary.
- Requires certain employers to redact specific information before providing personnel files.
- 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 with statutory damages.
- 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.

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.

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.

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

Staff: Trudes Tango (786-7384).

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).

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 (PRA), 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 Engrossed Second 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 or former employee a complete 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. The file must be unredacted unless redaction of information is required by the bill.

Upon request from a former employee or their attorney, agent, or fiduciary, an employer must 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 included and maintained in a personnel or employment file for that employee, however the file is designated.

An employer is not required to create personnel records; however, the employer must furnish records that the employer already created and included in a personnel file. In addition, the requirements must not be construed to create a records retention schedule or entitle an employee to an employer's protected legal file.

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 the provisions of the bill, unless the request specifies that it is made under the PRA. However, the public employer must redact information as required by the PRA for records pertaining to investigations of unfair practices, discrimination, and harassment in employment. The public employer bears the burden of proving that it redacted only such information as required and may be liable for bad faith redaction. The

public employer must treat requests for any other records that accompany the request for the personnel file as requests made under the PRA.

An employer that is a postsecondary educational institution 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. The institution bears the burden of proving that it redacted only personal identifying information and may be liable for bad faith redaction.

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.

If a conflict exists between provisions of the bill and a collective bargaining agreement in existence on the effective date of the bill, the parties to the agreement are not required to reopen the agreement or apply the provisions of the bill until the agreement expires, is reopened, or renegotiated.

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.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available. New fiscal note requested on February 28, 2023.

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

Staff Summary of Public Testimony (Labor & Workplace Standards):

(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.

Staff Summary of Public Testimony (Appropriations):

(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 (Labor & Workplace Standards): (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 Testifying (Appropriations): (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 (Labor & Workplace Standards): None.

Persons Signed In To Testify But Not Testifying (Appropriations): None.