

# SENATE BILL REPORT

## ESHB 1187

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As of March 23, 2023

**Title:** An act relating to privileged communication between employees and the unions that represent them.

**Brief Description:** Concerning privileged communication between employees and the unions that represent them.

**Sponsors:** House Committee on Civil Rights & Judiciary (originally sponsored by Representatives Hackney, Berry, Bateman, Ramel, Doglio, Simmons, Lekanoff, Bronoske, Wylie, Stonier, Pollet and Ormsby).

**Brief History:** Passed House: 3/6/23, 95-0.

**Committee Activity:** Law & Justice: 3/23/23.

### Brief Summary of Bill

- Creates a privilege from examination and disclosure for a union representative and a union employee concerning any communication between the union representative or union employee made during union representation, and creates exceptions to this privilege.
- Applies the privilege from examination and disclosure to the union members and organizations that represent employees of college districts, employees of school districts, public employees, faculty at public four-year institutions of higher education, civil service employees, ferry employees, port employees, and labor unions.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Staff:** Ryan Giannini (786-7285)

**Background:** Testimonial Privilege. The judiciary has the power to compel witnesses to

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appear and testify in judicial proceedings so the court will receive all relevant evidence. Common law and statutory law recognize exceptions to certain communications when certain classes of relationships or communications within those relationships are deemed of such importance that they should be protected from being compelled to testify in judicial proceedings.

Washington statutory law establishes a number of testimonial privileges, including communications between the following persons:

- spouses or domestic partners;
- attorney and client;
- clergy and confessor;
- physician and patient;
- public officers and another person if the public interest would suffer due to the disclosure;
- peer support group counselor and law enforcement officer, limited authority law enforcement officer, or firefighter;
- sexual assault advocate and victim;
- mental health counselor and client; and
- alcohol or drug addiction sponsor and addiction recovery fellowship participant.

**Summary of Bill:** Testimonial Privilege. Neither a union representative nor an employee the union represents or has represented shall be examined or required to disclose any communication between an employee and union representative or between union representatives made in the course of union representation. Exceptions to this privilege are established that permit examination and disclosure of such communications under the following circumstances:

- when such examination or disclosure appears necessary to prevent the commission of a crime likely to result in a clear, imminent risk of serious physical injury or death of a person;
- in civil or criminal actions in which the represented employee is accused of a crime or assault or battery;
- in civil or criminal actions where a union member is a party to the action, the union member may obtain a copy of any statement previously given that concerns the subject matter of the action and may elicit testimony concerning such statements, however, this right does not render the statements discoverable over the objection of the union member;
- in civil, criminal, or regulatory actions against the union or its affiliated, subordinate, or parent bodies or their agents; or
- when a union employee discloses information to a union representative about the employee's commission of a crime or intent to engage in criminal conduct.

The testimonial privilege does not apply to any record of communications that would otherwise be subject to disclosure under the Public Records Act. A communication includes any oral, written, or electronic communication or document containing such

communication.

Union Employees and Representatives. The testimonial privilege applies to employees and representatives of any organization that represents the following employees in negotiations with employers:

- academic employees of community and technical colleges;
- public employees;
- certificated employees of school districts;
- faculty at a public four-year institution of higher education;
- state employees;
- ferry employees;
- labor unions; and
- port employees.

**Appropriation:** None.

**Fiscal Note:** Not requested.

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

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: Unions have a duty of fair representation to their members and a fiduciary duty to protect confidences of employees. This bill codifies previous practice and protects privileged conversations between unions and employees that occur when trying to address problems in the workplace and assessing strategies to achieve their members' ends. If members cannot trust that their conversations will be protected, then union stewards cannot do their jobs. The bill does not protect criminal or illegal acts. For unions to address professional and personal issues, they need to conduct investigations to have the full information from union members. When an individual union member files a lawsuit, employers have subpoenaed the union for union files even though the union is not a party to the litigation. Without the protections of this bill, these subpoenas would have a chilling effect on union-employee communications. This bill strikes a balance between the union and the needs of individuals engaged in litigation by allowing union members to get records and testimony made during union representation, but protects conversations between union staff.

CON: This bill would undermine the justice system in the search for truth and elevate the union relationship above that of a doctor-patient relationship. Plaintiff employees usually identify union representatives as witnesses in trial, and witnesses have a duty to disclose pertinent information including their communications. This bill would unfairly allow union representatives to testify and rely upon documents exchanged with their unions while simultaneously hiding their own communications. There is no ability to use union communications because the material still remains privileged in cases where employees are

suing the employer. A claims-based waiver of privileged communication is absent from the bill. The bill would expressly allow union members to rely on their union records without waiving the privilege even when there is a civil claim. Allowing plaintiffs to rely upon evidence and witnesses that are not subject to discovery unfairly favors plaintiff-union members who sue their employers. This legislation would unintentionally create a circumstance where a police officer is both bound by statute and prohibited by statute from reporting.

OTHER: There are concerns about when someone is acting in a union capacity versus in a witness capacity. The privilege should be waived when a union representative is going to be a witness. There should be some ability to look at communications and conduct cross-examinations in these instances. There are also concerns about the broad nature of the privilege. This privilege is more similar to an attorney-client privilege. There is nothing similar on the employer side. There is no privilege between a human resource director and employees. Public employers are also subject to the Public Records Act and there is no level of privilege here. Since this is a seemingly broad privilege being created that does not exist elsewhere in the employer-employee relationship, the committee is encouraged to look at some of the suggestions that have been made in terms of civil litigation and in situations when the individual is a witness. The line between employee and union representative is blurred, which might put the employer in awkward situations where there is allegation of wrongdoing and the employer does not have an ability to investigate, but will still be held liable.

**Persons Testifying:** PRO: Representative David Hackney, Prime Sponsor; Cory Taylor, SEIU 925; Samantha Grad, Teamsters 117; Erin Haick, SEIU 925; Kathy Barnard, Barnard Iglitzin & Lavitt LLP.

CON: James McMahan, WA Assoc Sheriffs & Police Chiefs; Seth Berntsen, Washington Defense Trial Lawyers; Bob Battles, Association of Washington Business (AWB).

OTHER: Candice Bock, Association of Washington Cities; Mike Hoover, Washington State Association of Counties.

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