

SENATE BILL REPORT

E2SHB 1320

As of March 31, 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: Passed House: 3/1/23, 56-40.

Committee Activity: Labor & Commerce: 3/16/23, 3/23/23 [DPA-WM, DNP].
Ways & Means: 3/31/23.

Brief Summary of Amended Bill

- Requires an employer to furnish an employee or former employee with a complete copy of their personnel file at no cost within 15 business days of a request.
- Mandates an employer to furnish a former employee with a signed written statement with the effective date of discharge, whether the employer had a reason for the discharge, and if so, the reasons, within 14 calendar days of the written request.
- Allows an employee or former employee to bring a private action for violations of certain rights regarding personnel files, discharge information, and redaction logs, and entitles the employee to equitable relief, graduated statutory damages up to \$1,000, and reasonable attorneys' fees and costs of each violation.
- Allows for redaction of personnel files under certain circumstances.

SENATE COMMITTEE ON LABOR & COMMERCE

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.

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.

Signed by Senators Keiser, Chair; Conway, Vice Chair; Saldaña, Vice Chair; Robinson and Stanford.

Minority Report: Do not pass.

Signed by Senators King, Ranking Member; Braun, MacEwen and Schoesler.

Staff: Susan Jones (786-7404)

SENATE COMMITTEE ON WAYS & MEANS

Staff: Amanda Cecil (786-7460)

Background: At least annually, every employer must, upon the request of an employee, permit that employee to inspect any or all of the employee's own personnel files. Each employer must make such files available locally within a reasonable period of time after the employee requests the files.

An employee may annually petition the employer for a review all information in the employee's personnel files that are regularly maintained by the employer as a part of the employer's business records, or are subject to reference for information given to persons outside of the company. The employer must determine if there is any irrelevant or erroneous information in the files, and must remove all such information from the file.

If an employee does not agree with the employer's determination, the employee may request to have a statement containing the employee's rebuttal or correction placed in the employee's personnel file. This requirement does not prevent the employer from removing information more frequently. A former employee retains the right of rebuttal or correction for a period not to exceed two years.

These requirements do not apply to:

- the records of an employee relating to the investigation of a possible criminal offense; or
- information or records compiled in preparation for an impending lawsuit which would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.

The Department of Labor and Industries (L&I) rules provide that employers, subject to the minimum wage laws, must keep certain employee payroll and employment information. Under L&I rules, every employer must:

- keep, for at least three years, a record of the name, address, and occupation of each employee, dates of employment, rate or rates of pay, amount paid each pay period to each such employee and the hours worked;
- make these records available to the employee, upon request, at any reasonable time;

and

- within ten business days of receiving a written request by a former employee, furnish a signed written statement stating the reasons for and effective date of discharge.

Summary of Amended Bill: Within 15 business days of a request by an employee, former employee, or their attorney, agent, or fiduciary, each employer must furnish to the employee or former employee a complete electronic or paper copy of the employee's personnel file at no cost.

The employee's ability to petition for the employer's review of the personnel file is not limited, in part, to those files maintained as part of the employer's business records.

Within 14 calendar days of receiving a written request by a former employee or their attorney, agent, or fiduciary, the employer must furnish a signed written statement to the 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 employee's rights through a private cause of action in superior court, without exhausting any administrative remedies. For each violation, the employee is entitled to:

- equitable relief;
- statutory damages of \$250 if the complete file, statement, or redaction log is not provided within the due date;
- \$500 if not provided within 7 days after the due date;
- \$1,000 if provided later than 17 days after the due date; and
- reasonable attorneys' fees and costs.

The statutory damages for any other violations shall be \$500. An employee or former employee must provide five calendar days' notice of intent to sue, which must include a reference that the person has the right to bring a legal action under Washington State law.

Personnel file includes:

- all job application records;
- performance evaluations;
- disciplinary records;
- medical, leave, and reasonable accommodation records;
- payroll records;
- employment agreements; and
- other records maintained in a personnel or employment file for that employee, however designated.

These requirements may not be construed to create a retention schedule for records or to entitle an employee to an employer's protected legal file.

Agents and fiduciaries must provide the document evidencing their legal authority to represent the employee or former employee at the time of any request.

An employer that is a health care provider may redact patient information before sending the copy of the personnel file only to the extent required by the federal Health Insurance Portability and Accountability Act of 1996. Within 14 calendar days after furnishing the file, such employer must identify what information is redacted and the specific provision of the federal Health Insurance Portability and Accountability Act of 1996 requiring the redaction. The health care provider employer bears the burden of proving the redactions were required by law and that it provided the redaction log as required. The health care provider employer is subject to liability under this section for bad faith redaction or failure to provide the redaction log.

Upon receiving a request for an employee's or former employee's own personnel file, unless the request specifies that it is made under the Public Records Act, a public employer must treat the request as made under these laws and the request is not subject to the requirements of the Public Records Act. The public employer must treat requests for any other records that accompany the request for the personnel file as requests made under the Public Records Act. However, a public employer must apply redactions required under the law related to certain investigative records. A postsecondary educational institution redact complainant and witness personal identifying information related to any substantiated findings of sexual misconduct by an employee. The public employer and postsecondary institution bear the burden of proof and may be liable for bad faith redaction.

If a conflict exists between this law and a collective bargaining agreement in existence before the effective date, the parties are not required to reopen negotiation for the law to apply until the agreement is reopened or expires.

At least annually, L&I and the Employment Security Department must provide to employers L&I developed information that describes the obligations and rights.

The terms agent and fiduciary are defined. Legislative intent is provided.

EFFECT OF LABOR & COMMERCE COMMITTEE AMENDMENT(S):

- Changes the due date for personnel files to 15 business days, from 14 calendar days. Modifies the damages to reflect the due date change.
- Removes provisions that the personnel file must be unredacted unless redaction is required under the statute.
- Requires an employee or former employee to provide five calendar days' notice of intent to sue, which must include a reference that the person has the right to bring a legal action under Washington State law.

Appropriation: None.

Fiscal Note: Available.

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

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

Staff Summary of Public Testimony on Engrossed Second Substitute House Bill (Labor & Commerce): *The committee recommended a different version of the bill than what was heard.* PRO: This bill is about basic fairness. If employers add to employee personal records, employees should be able to see it since it will follow them through their career and potentially to UI applications or workers' compensation claims. Workers have the right to review and respond to performance reviews. Fourteen days is a reasonable timeframe. Big companies unreasonably surveil their employees but will not turn over the information they collect. Some employers heavily redact files. This bill is well thought out and logical. It will improve communication between employers and employees. If employers put a little care into the location of their documents, personnel records can be compiled in 30 minutes. Fourteen days is an extension compared to current law.

CON: This bill is very vague, especially the catch-all in section two. Small businesses need clear expectations on what is required of them. The 14-day timeline is concerning, and there should be an extension option. The fiscal note seems to be quite low. It is aimed at large businesses but will have the most impact on small businesses. Most small businesses do not have the files expected or requested.

OTHER: The timeframe of this bill is too short, and holidays will further shorten it. Hospitals needs an amendment to allow heightened protections on sensitive information; this is not about hiding information but aligning this bill with existing laws.

Persons Testifying (Labor & Commerce): PRO: Representative Julia Reed, Prime Sponsor; Patrick McGah, Individual citizen; John Traynor, Washington State Labor Council, AFL-CIO; Cher Scarlett; Jesse Wing, Washington Employment Lawyers Association; Jane Dale, Washington State Association for Justice; Lauren Richardson-Berg, Washington Employment Lawyers Association.

CON: James King, Independent Business Association; Samantha Louderback, Washington Hospitality Association; Katie Beeson, Washington Food Industry Association (WFIA); Bruce Beckett, Washington Retail Association; Bob Battles, Association of Washington Business (AWB).

OTHER: Candice Bock, Association of Washington Cities; Zosia Stanley, Washington State Hospital Association; Jennifer Combs, City of Fife, Assistant City Attorney.

Persons Signed In To Testify But Not Testifying (Labor & Commerce): No one.

Staff Summary of Public Testimony on Bill as Amended by Labor & Commerce

(Ways & Means): PRO: This requires employers treat employees with dignity and respect. This bill will reduce costly delays for employees getting workers compensation and to correct wage orders. There is no reason not to provide someone with all the basic information in their personnel file and HIPPA already protects medical records that do not belong in a personnel file. This is already the law under the L&I rule and this gives employers five more days. Most of the fiscal note comes from two agencies that assume this will take a full day to meet the requirements.

CON: The current language would be difficult to comply with and open employers open up to lawsuits. There needs to be clarity about what records need to be shared. This is not an appropriate expense from the 608 and 609 funds. This bill leaves out an exemption for certain medical conditions that could be fixed through an amendment. This bill is a gotcha that creates complicated requirements for small business that will not be able to comply with the requirements.

Persons Testifying (Ways & Means): PRO: Patrick McGah, concerned citizen; Jane Dale, Washington State Association for Justice; Jesse Wing, Washington Employment Lawyers Association; Larry Shannon, Washington State Association for Justice.

CON: Samantha Louderback, Washington Hospitality Association; Bob Battles, Association of Washington Business (AWB); Katie Kolan, Washington State Hospital Association (WSHA); Carolyn Logue, Washington Food Industry Association.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.