

SENATE BILL REPORT

SB 5061

As Reported by Senate Committee On:
Labor & Commerce, February 7, 2023

Title: An act relating to access to personnel records.

Brief Description: Concerning access to personnel records.

Sponsors: Senators Kuderer, Stanford, Conway, Frame, Hasegawa, Hunt, Keiser, Nobles, Valdez, Wellman and Wilson, C..

Brief History:

Committee Activity: Labor & Commerce: 1/12/23, 2/07/23 [DPS, DNP].

Brief Summary of First Substitute Bill

- Requires an employer to furnish an employee with a complete, unredacted copy of their personnel file at no cost within 14 calendar 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.

SENATE COMMITTEE ON LABOR & COMMERCE

Majority Report: That Substitute Senate Bill No. 5061 be substituted therefor, and the substitute bill do pass.

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.

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)

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 Bill (First Substitute): Within 14 calendar days of a request by an employee,

former employee, or their attorney, agent, or fiduciary, each employer must furnish to the employee a complete, unredacted electronic or paper copy of the employee's personnel file at no cost to the employee.

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 14 days from the due date; \$500 if not provided within 28 days from the due date; \$1,000 if provided later than 28 days from the due date; and reasonable attorneys' fees and costs. The statutory damages for any other violations shall be \$500.

Personnel file includes all:

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

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 CHANGES MADE BY LABOR & COMMERCE COMMITTEE (First Substitute):

- Provides that the personnel files that must be furnished are the files as the contents of the files exist at the time of the request.
- Makes all time periods calendar days.
- Add a former employee to the private right of action.
- For the statutory penalties, the files must be complete, it includes redaction logs, and provides \$500 statutory damages for any other violations.
- Provides that an employer is not required to create personnel records; rather the employer must furnish the records that the employer has already created.
- Removes provisions for redaction by public employers.
- Allows health care providers to redact patient information if required by HIPAA and provide a redaction log.
- Provides that unless a personnel file request specifies that it is made under the Public Records Act, a public employer must treat the request as made under this bill and the request is not subject to the Public Records Act.
- Provides a specific definition of employer for the requirement for ESD to provide information to employers in annually.

Appropriation: None.

Fiscal Note: Available.

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 on Original Bill: *The committee recommended a*

different version of the bill than what was heard. PRO: This bill codifies the WAC that has been on the books for many years and all employers are required to follow. The bill gives it teeth so that employers must respond in a timely manner and give records to employees who request them. Currently, many businesses and HR departments ignore records requests because they have no incentive and there is no enforcement that they respond in a timely manner, or at all. Some employers falsify records. L&I has no enforcement authority if the employer does not cooperate.

Employees who are terminated from their jobs without access to their records and evaluations can face consequences such as being unable to file for unemployment. Employees need these records: they should have the right to correct mistakes and improve performance, they may need them to take to the doctor for accommodations, and they may need them for a non-compete to see where else they can work.

Employees deserve honest performance reports as an explanation for termination or placement on low performance. Employment at will is not changed, but if there is a reason for termination it must be stated.

The bill does not create a retention schedule or require employers to create records. If they have the records, they must provide them. HR managers often don't know how to respond when asked for files, as they don't know what they are supposed to provide. This bill would clarify expectations and obligations. It will prevent disagreements and disputes between employers and employees. These disputes often happen more at small businesses, rather than large businesses.

CON: The bill's language provides that employers must, not may, provide the reason for a termination. It treats public and private employers different. If there is workplace misconduct and the business owner writes those complaints, that employer may have to provide the name of the victim/complainer/whistleblower. This bill creates a new call to action. We should instead use existing calls to actions from other laws. The employer should be able to charge for the files. Sometimes they are quite large. For small business, there often aren't personnel files. The bill needs to provide clarity to help employers understand their obligations. The catchall creates ambiguity. Litigation is not the answer—it takes forever and will not aid the employees. An administrative solution would be a preferred solution.

OTHER: Release of employment files could potentially leak confidential information, for example in hospitals if there is information that falls under HIPPA. We need specific language allowing the redaction of personnel identifiers in these situations.

This new policy will cause confusion since state employers already have records requirements, and two policies will not align. Employers will not know which policy they should follow.

More time is needed. It should be a minimum of 30 days, or even a timeframe to respond which can include “we need more time.” Sometimes records take a long time to gather, especially if an employee was employed for a long time. We would like more clarity of what should be in the personnel file without the ambiguity of a catch all. An administrative solution would be a better option.

The bill uses business days or calendar days. ESD has a concern about lack of a definition of employer.

Persons Testifying: PRO: Senator Patty Kuderer, Prime Sponsor; Patrick McGah; Jesse Wing, Washington Employment Lawyers Association; Lauren Richardson-Berg, Washington Employment Lawyers Association; Jane Dale, Washington State Association for Justice; John Traynor, Washington State Labor Council, AFL-CIO.

CON: James King, Independent Business Association; Patrick Connor, NFIB.

OTHER: Mike Hoover, Washington State Association of Counties; Bob Battles, Association of Washington Business (AWB); Zosia Stanley, Washington State Hospital Association; Caitlyn Jekel, WA State Employment Security Dept; Tammy Fellin, Labor & Industries.

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