

SENATE BILL REPORT

SB 5109

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

Title: An act relating to creating a wage replacement program for certain Washington workers excluded from unemployment insurance.

Brief Description: Creating a wage replacement program for certain Washington workers excluded from unemployment insurance.

Sponsors: Senators Saldaña, Valdez, Dhingra, Frame, Hasegawa, Keiser, Kuderer, Lias, Lovelett, Nguyen, Nobles, Stanford and Wilson, C..

Brief History:

Committee Activity: Labor & Commerce: 1/26/23, 2/07/23 [DPS-WM, DNP, w/oRec].

Brief Summary of First Substitute Bill

- Establishes a state wage replacement program (program) for certain eligible and qualified unemployed workers who are ineligible for benefits through the unemployment insurance system as a result of not being authorized to work in the United States, to be administered by the Employment Security Department (ESD).
- Creates the Washington Wage Replacement Account.
- Requires ESD to appoint an advisory committee to review issues and topics of interest related to the program.

SENATE COMMITTEE ON LABOR & COMMERCE

Majority Report: That Substitute Senate Bill No. 5109 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

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

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: Do not pass.

Signed by Senators Braun, MacEwen and Schoesler.

Minority Report: That it be referred without recommendation.

Signed by Senator King, Ranking Member.

Staff: Matt Shepard-Koningsor (786-7627)

Background: Unemployment Insurance System. The unemployment insurance (UI) system, administered by the Employment Security Department (ESD), is designed to provide partial wage replacement for unemployed workers. Its primary purpose is to alleviate the hardships resulting from the loss of income during unemployment. A claimant is eligible to receive UI benefits if the claimant (1) worked at least 680 hours in their base year, (2) was separated from employment through no fault of their own, or quit work for good cause, and (3) is available to work and actively seeking suitable work. Claimants must submit weekly claims to receive benefits. Benefits are based on the claimant's earnings in their base year, adjusted in accordance with a statutory formula. The weekly benefit amount varies from claimant-to-claimant and currently, the minimum amount is \$317 and the maximum amount is \$999, but a claimant may not receive a weekly benefit amount exceeding their individual weekly wage. The maximum amount of benefits is equal to the lesser of 26 times the weekly benefit amount or one-third of the individual's base year wages.

UI benefits may not be paid unless the claimant was lawfully admitted for permanent residence, was lawfully present for purposes of performing such services, or otherwise was permanently residing in the U.S. under certain conditions. Federal law requires a claimant to declare under penalty of perjury whether the claimant is a citizen or national of the U.S. Otherwise, the claimant must present appropriate registration documentation to verify their authorization to work in the U.S., which is then confirmed by ESD. Federal law places certain restrictions on the state UI system. To enforce these restrictions, federal funding provided to the state administering the UI system is conditioned upon compliance with federal law, which includes verifying the immigration status of claimants. Individual employers also receive a credit on their federal unemployment taxes if the state complies with applicable federal law.

Unemployment Insurance Taxes. The UI system is funded by a federal and state unemployment tax, paid by most employers. The federal tax is equal to 6 percent on the first \$7,000 paid to each employee as wages during the year, which is passed down to states to administer UI systems. The state tax includes an experience rating tax based on an average of the employer's layoff history over the past four fiscal quarters and a shared cost—or social—tax based on costs from the previous year that cannot be attributed to a specific employer. There is also a delinquent tax in certain cases and new employers have an adjusted experience tax. ESD estimates the average total state tax rate for 2023 is 1.43 percent. State taxes are deposited into the UI trust fund, which can only be used to pay UI

benefits.

Employers pay federal and state UI taxes on services performed by most undocumented workers unless performed by certain workers described in the definition of "immigrant" in the Federal Immigration and Naturalization Act. Therefore, unless an exemption applies or the employer is paying the worker privately, the employer must pay taxes on such services. A New York State report estimates around \$13 billion was contributed to UI trust funds in the U.S. between 2010 and 2019 based on the employment of undocumented workers.

Undocumented Workers. Federal law restricts the payment of state unemployment benefits to undocumented workers in two ways. First, if an employee is not legally authorized to work in the U.S. at the time they are working for an employer, that work cannot be used as the basis for a UI claim. Second, employees who are not legally authorized to work in the U.S. at the time of filing their UI claim cannot be considered available to work. Despite these federal restrictions, federal law provides that a state may extend benefits to certain individuals not lawfully present in the U.S., which the person would not otherwise be eligible for, if affirmatively provided for in state law.

In 2020, Washington established the COVID-19 Immigrant Relief Fund (WIRF), which provided direct payments of between \$1,000 and \$3,000 to individuals and families significantly impacted by COVID-19 but ineligible for federal stimulus funds or unemployment benefits because of their immigration status. It is estimated WIRF provided more than \$60 million in economic relief, and the program is now closed.

Public Records Act. The Public Records Act (PRA) requires state and local agencies to make records available to the public for inspection and copying upon request, unless a specific statutory exemption applies. The stated policy of the PRA favors disclosure and requires narrow application of the statutory exemptions.

Report on Unemployment Insurance Benefits for Undocumented Workers. In the 2021 Operating Budget, the Legislature directed ESD to study the feasibility of replicating a UI program for, and expanding other social net programs to individuals regardless of their citizenship status. ESD submitted its report to the Legislature in December 2021. The report stated, in part, that if Washington wishes to provide an unemployment benefit to individuals regardless of citizenship status, it can only do so through a program separate and apart from the existing UI program.

Other States. Some states have created limited or temporary programs providing benefits to undocumented workers and their families. Colorado was the first state to create a long-term, forward-looking program that provides benefits to immigrants who lack work authorization if they become unemployed.

Summary of Bill (First Substitute): Wage Replacement Program. ESD is required to administer a weekly wage replacement program (program) similar to the UI system for

workers who are ineligible for UI benefits as a result of not being authorized to work in the U.S. In addition to definitions created in the program, existing definitions in the UI system are referenced and apply to the program unless the context clearly requires otherwise.

General Eligibility Requirements. Beginning January 1, 2026, a claimant is eligible to receive benefits under the program with respect to any week of unemployment in their benefit year if ESD determines the following steps are satisfied in sequential order:

- the claimant files an application for benefits under the UI system;
- ESD denies the claimant's application based on the claimant not being authorized to work in the U.S. at the time the work was performed or during the week for which the claimant is applying for benefits under the UI system; and
- ESD invites the claimant to apply for benefits under the program.

The claimant must then file an application for benefits under the program, which includes providing information or documentation verifying the claimant:

- is a state resident and has sufficient photographic identification confirming their identity;
- worked 680 hours in employment in the base year or earned wages during the base year equal to 680 times the minimum wage in effect during the first quarter of the base year;
- is unemployed through no fault of their own; and
- has been unemployed for a waiting period of one week.

Proving Residency. To be considered a Washington State resident, the claimant must have taken actions indicating they intend to live in Washington State on more than a temporary or transient basis throughout the duration of receiving benefits under the program. Unless ESD has information indicating otherwise, it must presume that a claimant is a state resident if the claimant:

- maintains a residence in Washington for personal use with a utility bill showing the claimant's full name and Washington address;
- lives in a motor home or vessel not permanently attached to any real property if the claimant previously lived in this state and does not have a permanent residence in any other state;
- is attending school in this state and paying tuition as a Washington resident, is a custodial parent with a child attending a public school in this state, or has correspondence from a school in this state showing the claimant's full name and Washington address;
- has a Washington identification card showing the claimant's full name and Washington address;
- has a current library card issued in this state;
- has correspondence from a community or faith-based organization in this state showing the claimant's full name and Washington address; or
- has a medical document showing the claimant's full name and Washington address;

ESD may adopt additional methods by which a claimant may prove they are a Washington resident.

Qualifying for Benefits. An eligible claimant may qualify for weekly benefits by self-attesting that they are actively seeking work in any trade, occupation, profession, or business for which they are reasonably fitted, and they report any wages or remuneration received to ESD. Actively seeking work includes participating in job search, educational, or professional development activities adopted in rule by ESD. ESD must consider the unique circumstances of a claimant under this program. ESD may conduct random audits to confirm the claimant is actively seeking work and their unemployment status.

An eligible and qualified claimant must receive a weekly benefit amount calculated based on the state formula for UI benefits. The maximum amount of benefits payable to an eligible and qualified claimant during their benefit year is equal to the maximum amount in the UI system.

Disqualification for Benefits. A claimant is disqualified for benefits under the program for specified reasons, including, for example, if the claimant left their work voluntarily without good cause or was discharged for misconduct, or if the claimant knowingly made a false statement or representation to obtain benefits. A claimant may not receive benefits under this program for any week the claimant has received, is receiving, or will receive compensation under the UI system, the Paid Family and Medical Leave program, the Industrial Insurance program, or any other applicable federal unemployment compensation, industrial insurance, or state disability insurance laws. ESD must use similar provisions in the UI system to determine whether a claimant is disqualified for benefits, while accounting for the unique circumstances of a claimant under the program. Durations of disqualifications must conform to comparable durations in the UI system.

Verifying Wages and Unemployment Circumstances. If a claimant's wages are not verified by employer reports, ESD must request additional information or documentation from the claimant. If the claimant does not provide sufficient information or documentation, they may be denied benefits. ESD may request information or documentation from the claimant's former employers to verify whether the claimant is unemployed through no fault of their own. If an employer does not respond, ESD must consider the standard satisfied unless it has independent, verified information indicating the contrary. ESD may contract with a third-party, community-based organization to assist claimants in gathering information or documentation, however, ESD is responsible for making the final decision on claimant eligibility.

Review and Appeals. A determination of the amount of benefits potentially payable under the program must not serve as a basis for appeal but must be subject to request by the claimant for reconsideration or redetermination by ESD within one year. If ESD denies a claimant benefits, it must promptly issue written notice with the reasons. ESD is required to establish a procedure for hearings and appeal, in addition to receiving and reviewing reports

of fraud, comparable to those for the UI system. The same penalties for fraud in the UI system apply to the program.

Funding for Benefits. Benefits are due and payable to a claimant only to the extent that moneys are available in the Washington Wage Replacement Account (Account), which is established in the bill. Revenues to the Account must consist of appropriations and transfers by the Legislature and all other funding directed for deposit into the Account. Expenditures from the Account may be used only for providing benefits, contracting with community-based organizations to notify individuals who may be eligible for benefits, and administrative expenses of ESD. Taxes are not imposed in the bill.

Restrictions on Collecting and Maintaining Certain Information. ESD is prohibited from taking specified actions, including:

- soliciting from the claimant, orally or in written form, a claimant's nationality, race, ethnicity, place of birth, citizenship, or immigration status;
- indicating in its records which documents the claimant used to prove their age or identity;
- compelling a claimant to admit in writing whether they have proof of lawful presence in the U.S. or to explain why they are ineligible for a social security number;
- contacting a claimant's current, former, or prospective employers including, but not limited to, for the purposes of verifying employment status, except for the purposes of verifying wages; and
- attempting to ascertain a claimant's immigration or citizenship status, except to determine whether a claimant is excluded from UI benefits and potentially eligible for benefits under the program.

Public Records, Destruction of Records, and Confidentiality. Except as ESD determines necessary to comply with other legal requirements, it must destroy all records containing information that were provided by a claimant or collected by ESD to verify eligibility for the program within 15 days of a claimant's written statement that they are no longer using the program. Any information or records concerning a claimant or employing unit obtained by ESD for the purpose of administering the program must be held private and confidential, unless the release is:

- to the person who is the subject of such records or an authorized representative;
- necessary to comply with a lawful court order, judicial warrant signed by a judge appointed pursuant to Article III of the U.S. Constitution, or judicial subpoena for specific records issued pursuant to the criminal procedure law or the civil practice law and rules; or
- disclosed in a manner that could not be used to determine the identities of the claimants or employers to whom the data pertains, alone or in combination with other data.

All information and records maintained by ESD for the program are exempt from disclosure under the PRA, except when released under one of the three circumstances above. If a court

order or judicial warrant or subpoena is made for individual records, only those records specifically sought may be disclosed. Information collected under the program may not be used for purposes of investigating, locating, or apprehending claimants for federal immigration-related violations.

Additional requirements for maintaining confidentiality of records are established. If information provided to ESD by another governmental agency is held private and confidential by state or federal laws, ESD may not release it. ESD must comply with certain agreements where information is provided on the condition of privacy and confidentiality. ESD must establish additional prohibitions and safeguards against unauthorized access to, and use of, any information collected under the program by private or public entities.

Advisory Committee. ESD must appoint an advisory committee, composed of 11 specified members, for the purposes of reviewing issues and topics related to the administration of the program. The advisory committee must provide comment on related rule-making, policies, implementation, utilization of benefits, and study relevant issues.

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

- Provides that ESD is not required to automatically consider the separation from work eligibility standard satisfied when an employer fails to respond to ESD's request for information if ESD has independent, verified information indicating the contrary.
- Sets the maximum amount of benefits payable to an eligible and qualified claimant during the claimant's benefit year equal to the maximum amount in the UI system.
- Removes "eligibility or ineligibility for a social security number" from the list of information ESD is prohibited from soliciting from the claimant.
- Adds an exception to the requirement that ESD destroy certain claimant records within 15 days of a claimant indicating they are no longer using the program when ESD determines the records are necessary to comply with other legal requirements.
- Makes other technical changes and corrects typographical errors.

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: During the pandemic, immigrant workers experienced tremendous inequality. Being unemployed is troubling, because of the

fear of being homeless and not having access to unemployment insurance. Immigrant workers accepted any job even if it would expose them to COVID. Many groups engaged in great detail to develop this program. As a Legislature, we need to decide the policy before deciding the funding source. We are all benefitting from the work performed by essential undocumented workers. Many employers, knowingly or unknowingly, hire these workers. These workers pay to the best of their ability into the UI system. Employers are paying in and the workers are not able to access this social safety net to care for themselves and their families. This policy shows that essential work is valued and the Washington economy would not have survived the pandemic without them. The UI system ensures stability when workers are laid off and unfortunately, many workers are excluded from this program due to immigration status even though they pay into the program and are necessary to our economy. This bill would provide excluded workers with the same protections other Washington workers have. Closing this gap is a racial justice issue. Job loss does not only affect the worker, it affects their family and the ability to pay medical bills, child support, and cover other basic necessities. Undocumented workers are no less important than other workers. The bill is modeled as closely as possible to the UI system with strong protections for both employers and employees. Despite paying taxes for over 25 years, I do not have access to unemployment during the winter season when my work ends and COVID has complicated this. This bill can help us immigrants recover our lives since we are hard working people who want to get ahead. The Washington Immigrant Relief Fund was not approved for all immigrants, and it was not enough for those who did receive it. This is not just a Latino issue but an issue for all communities with immigrant workers. We have to think about the children of these undocumented workers when considering this bill.

CON: From the employer's perspective, it is troubling the claimant may work with a third-party to gather information and documentation when applying to the program. This creates a privacy issue for HR departments and employers, in addition, some of the information may be proprietary. Legislative liability protections should be added if this bill moves forward, and any third-party should have HR training to ensure the appropriate handling of private information. This actually hurts the workers it seeks to help. The UI system is a federal program, and the U.S. Government has preemption over immigration policy and can levy significant fines against employers who violate this. If an employer has constructive knowledge, it is prohibited from hiring workers back. We are concerned with the \$150 million cost per biennium. There is federal preemption here because of the immigration issues. We would love to see the federal government address this, but we know that is not going to happen. The bill requiring ESD to destroy documents immediately is problematic because they have to issue 1099s. Even though employers are paying for these workers, UI system funds may not be used. I will be testifying against this bill at every step.

Persons Testifying: PRO: Senator Rebecca Saldaña, Prime Sponsor; Gloria Santiago, WA Immigrant Solidarity Network; Sybill Hyppolite, WA State Labor Council; Danielle Alvarado, Fairwork Center; Gloria Medina, Fairwork Center; Edith Enriquez, WA Immigrant Solidarity Network; Humberto Gonzalez-Interpreter, Interpreter/OneAmerica; Maricela Rodriguez-Interpreter, Interpreter-OneAmerica; Lilian Garcia, Fairwork Center;

Giovanni Severino, Progreso: Latino Progress; Hamdi Mohamed, City of Seattle; Maria Silva, One America.

CON: Jeff Pack, Me; Julia Gorton, Washington Hospitality Association; Robert Battles, Association of Washington Business (AWB); Tom Kwieciak, Building Industry Association of WA; Albert Zepeda, Kyle Mathison Orchards/WA Farm Bureau.

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