

SENATE BILL REPORT

SB 5924

As of February 3, 2024

Title: An act relating to access to personnel records.

Brief Description: Concerning access to personnel records.

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

Brief History:

Committee Activity: Labor & Commerce: 1/11/24, 1/23/24 [DPS, DNP].
Ways & Means: 2/03/24.

Brief Summary of First Substitute Bill

- Requires an employer to furnish an employee, former employee, or their designee with a copy the employee's personnel file at no cost within 21 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 21 calendar days of the written request.
- Allows an employee or former employee to bring a private action, after five days notice, for violations of certain rights regarding personnel files, and discharge information, for 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. 5924 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; Hansen 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 these 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 of all information in the employee's personnel files 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 that information from the file. This requirement does not prevent the employer from removing information more frequently. 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. 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 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.

For purposes of making the personnel file available, L&I administrative policy provides the terms:

- locally means at the location where the requesting employee works or at a mutually convenient location agreed upon between the employer and employee; and
- within a reasonable period generally means within ten business days of the request unless good cause shows that more time is needed.

The policy also provides definitions of personnel file and irrelevant or erroneous information and a process for taking complaints. After a complaint L&I will request the employer comply.

Summary of Bill (First Substitute): An employer must provide a copy of a personnel file within 21 calendar days after a request. In addition to the employee, a former employee or their designee may request the file. The file must be provided at no cost.

Every employer must, within 21 calendar days of receiving a written request from a former employee or their designee, furnish a signed written statement to the former employee or their designee stating the effective date of discharge, whether the employer had a reason for the discharge and, if so, the reasons. Former employee means a person who separated from the employer within three years of the date of the person's request.

An employee or former employee may enforce these requirements through a private cause of action and for each violation will be entitled to equitable relief, statutory damages, and reasonable attorneys' fees and costs. Prior to enforcing through a private cause of action, five calendar days' notice must be given to the employer, which must reference that the employee or former employee has the right to bring a legal action under Washington State law.

The statutory damages for violations range from \$250 to \$1,000 depending how late the file or statement is provided. The statutory damages for other violations is \$500.

If the employer creates these records, the term personnel file includes all job application records, performance evaluations, nonactive or closed disciplinary records, medical, leave, reasonable accommodation records, payroll records, employment agreements, and other records by the employer as part of the employee's personnel file. A retention schedule for records is not required nor is the employer required to create personnel records.

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

- Limits disciplinary records to nonactive and closed disciplinary records for the

- purposes of personnel files.
- Limits all other records for purposes of personnel files to all other records designated by the employer as part of the employee's personnel file.
- Provides that the act does not require an employer to create personnel records.
- Provides that employer is required to provide a copy of the personnel file, rather than the actual personnel file.

Appropriation: None.

Fiscal Note: Requested on December 31, 2023.

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 (Labor & Commerce): *The committee recommended a different version of the bill than what was heard.* PRO: The bill creates an enforcement mechanism for a law that has been on books for over 20 years. Employees already have the right to access. They are important in many ways but employers ignore the law and the L&I rules. Getting the information is important for employees that don't have copies of documents like noncompete or need information for unemployment, workers compensation, or discrimination cases. It allows them to get legal advice. Some employers won't give a copy. Some employers make employees drive to workplace and look at a file and take notes. The private right of action is the best way to enforce this law. It will be more efficient and fairer to the taxpayers. The statutory damages are not intended to punish the employers and are graduated. We listened to a lot of stakeholders and made changes. We increased from 10 days to 21 days and changed former employees to the last three years.

An employee gave example of being labelled an underperforming employee. He did not get an explanation. Documents weren't made part of his personnel file. They did not disclose how he was being evaluated. He reached out to L&I and they said they couldn't enforce the law. People deserve honest and transparent evaluation procedures. People deserve an explanation for termination.

The bill provides much needed clarification for employers. Employers only provide what they can think of and what is handy. Some employers avoid turning over documents because they are not sure of their actions. They get away with not turning over the documents because there is no enforcement. The bill doesn't require creation of documents, only that they turn over what they have. This avoids disputes and encourages employers to gather records rather than wait. Many employers have electronically controlled files but many employees don't allow access to the files. The catch all is most important. If you do keep records, the employee has the right to get it.

For workers' compensation, the injured workers only receive 60-65 percent of the wages. The calculation of wages depends on payroll and the employer's contribution to medical insurance. Employees never have information the health insurance contribution. This is time sensitive information.

CON: We agree that personnel records should be provided in a timely manner. We appreciate the increase to 21 days having more time if there is a reason would help. But there are still concerns with the all other records in file. This may cause litigation. Some employers rely on outside vendors for payroll. We understand the need for personnel records but would like specific list so they know what needs to be kept. We need clarification of what employers need to keep. Redaction may be needed. The language about all other records language could be open in interpretation in legal actions. We would like to remove private right of action and replace it with L&I enforcement, including education and mitigation. Private right of action needs to have a right to cure. We have concerns about the designee. How will an employer know if they are authorized? We would like something from the employee.

OTHER: We appreciate the extension to 21 calendars days. Holidays and vacations can be hard for small cities. The private right of action is challenging. The damages are limited but attorneys' fees can be a big problem. We are concerned about the all other records language. They prefer the public records act allowing an extension of time.

There is a problem with the comma after the word medical. There is a concern about how hospitals would deal with medical records of their employees. Also they need to redact patient information under HIPAA and other state laws. There is a conflict with state law. There needs to be a carve out for patient health info as protected by state or federal law and allow redaction.

Persons Testifying (Labor & Commerce): PRO: Senator Patty Kuderer, Prime Sponsor; Patrick McGah; Brian Wright, Washington State Association for Justice; Jesse Wing, Washington Employment Lawyers Association; Lauren Richardson-Berg, Washington Employment Lawyers Association; Matthew Hepner, IBEW/ceww.

CON: Bruce K Beckett, Wa Retail Association; Carolyn Logue, Washington Food Industry Association; Robert (Bob) Battles, Association of Washington Business (AWB); Tricia Gullion, Building Industry Association of Washington; Julia Gorton, Washington Hospitality Association.

OTHER: Candice Bock, Association of Washington Cities; Tim O'Connell, Washington State Hospital Association.

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

Staff Summary of Public Testimony on First Substitute (Ways & Means): PRO: The right for employees to access personnel records already exists but we need an enforcement

mechanism to enforce that right. This does not require employers to create a new personnel file, but if they do it must be given to the worker. There have been significant changes in the language since the bill was first considered last year and we have taken into serious account the concerns raised by state agencies and businesses. The point of the five day notice to employers before any enforcement action can be taken is to help get the files into the hands of the individual.

CON: We have concerns about the current language that discusses the personnel file, which includes disciplinary records. There may be patient information in those records if a disciplinary action is related to the care of a patient. We would like to see language that does not preempt federal privacy laws by allowing for redaction of that information. We would like clarity on what, precisely, should be included in these personnel files rather than the catchall language that is currently in the bill. While the bill may not require creation of a personnel file, if those are created then the records in that file are subject to these requirements. This creates the potential for litigation and we are concerned about the private right of action. Employers could be in a position of having to defend themselves for administrative errors, which do happen.

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

CON: Lisa Thatcher, Washington State Hospital Association; Samantha Louderback, Washington Hospitality Association; Robert (Bob) Battles, Association of Washington Business (AWB); Katie Beeson, WFIA.

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