
SUBSTITUTE SENATE BILL 5368

State of Washington

68th Legislature

2023 Regular Session

By Senate Labor & Commerce (originally sponsored by Senators Keiser, King, Conway, Schoesler, Randall, Torres, and C. Wilson)

READ FIRST TIME 02/08/23.

1 AN ACT Relating to establishing equitable access to the workers'
2 compensation stay-at-work program by allowing employers to offer off-
3 site light duty return to work opportunities to injured workers;
4 amending RCW 51.32.090; creating a new section; and providing an
5 effective date.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 NEW SECTION. **Sec. 1.** (1) The state established the stay-at-work
8 program to reduce long-term disability and the cost of injuries by
9 incentivizing employers to provide injured workers light duty and
10 transitional return-to-work opportunities. Data from the department
11 of labor and industries illustrates that the program has been
12 successful for both workers and employers by lowering the risk of
13 long-term disability and improving mental health and well-being
14 through the return of more workers to positions that allow for the
15 time necessary for healing and rehabilitation.

16 (2) However, current policy only allows for light duty return to
17 work with the employer of injury, limiting opportunities and creating
18 inequities for workers and employers. Small employers are less likely
19 to have suitable light duty jobs. Frontline workers, particularly in
20 small businesses, are less likely to have access to remote light duty
21 work. Injured workers who move out-of-state are also less likely to

1 have access to return-to-work opportunities, especially when the
2 employer of injury cannot offer remote work options. Inequitable
3 access to return to work is more acute for lower wage workers, many
4 of whom are frontline workers. The COVID-19 pandemic has illuminated
5 the particularly limited and inequitable access to return to work
6 between frontline and remote workers.

7 (3) The legislature hereby intends to provide more opportunities
8 for workers to access return to work and for employers to take
9 advantage of the stay-at-work program by allowing flexibility in
10 matching injured workers to temporary positions with local nonprofits
11 to perform light duty work. This is a proven approach that has been
12 successful with return-to-work employment agencies nationally and
13 within the state. This approach preserves all protections for injured
14 workers, reduces claim costs, transitions workers back to productive
15 work more quickly while allowing for recuperation, and benefits local
16 nonprofits by providing experienced workers for important service
17 roles.

18 **Sec. 2.** RCW 51.32.090 and 2011 1st sp.s. c 37 s 101 are each
19 amended to read as follows:

20 (1) When the total disability is only temporary, the schedule of
21 payments contained in RCW 51.32.060 (1) and (2) shall apply, so long
22 as the total disability continues.

23 (2) Any compensation payable under this section for children not
24 in the custody of the injured worker as of the date of injury shall
25 be payable only to such person as actually is providing the support
26 for such child or children pursuant to the order of a court of record
27 providing for support of such child or children.

28 (3)(a) As soon as recovery is so complete that the present
29 earning power of the worker, at any kind of work, is restored to that
30 existing at the time of the occurrence of the injury, the payments
31 shall cease. If and so long as the present earning power is only
32 partially restored, the payments shall:

33 (i) For claims for injuries that occurred before May 7, 1993,
34 continue in the proportion which the new earning power shall bear to
35 the old; or

36 (ii) For claims for injuries occurring on or after May 7, 1993,
37 equal eighty percent of the actual difference between the worker's
38 present wages and earning power at the time of injury, but: (A) The
39 total of these payments and the worker's present wages may not exceed

1 one hundred fifty percent of the average monthly wage in the state as
2 computed under RCW 51.08.018; (B) the payments may not exceed one
3 hundred percent of the entitlement as computed under subsection (1)
4 of this section; and (C) the payments may not be less than the worker
5 would have received if (a)(i) of this subsection had been applicable
6 to the worker's claim.

7 (b) No compensation shall be payable under this subsection (3)
8 unless the loss of earning power shall exceed five percent.

9 (c) The prior closure of the claim or the receipt of permanent
10 partial disability benefits shall not affect the rate at which loss
11 of earning power benefits are calculated upon reopening the claim.

12 (4)(a) The legislature finds that long-term disability and the
13 cost of injuries is significantly reduced when injured workers remain
14 at work following their injury. To encourage employers at the time of
15 injury to provide light duty or transitional work for their workers,
16 wage subsidies and other incentives are made available to employers
17 insured with the department.

18 (b) Whenever the employer of injury requests that a worker who is
19 entitled to temporary total disability under this chapter be
20 certified by a physician or licensed advanced registered nurse
21 practitioner as able to perform available work other than his or her
22 usual work, the employer shall furnish to the physician or licensed
23 advanced registered nurse practitioner, with a copy to the worker, a
24 statement describing the work available with the employer of injury,
25 or with an approved nonprofit pursuant to (m) of this subsection, in
26 terms that will enable the physician or licensed advanced registered
27 nurse practitioner to relate the physical activities of the job to
28 the worker's disability. The physician or licensed advanced
29 registered nurse practitioner shall then determine whether the worker
30 is physically able to perform the work described. The worker's
31 temporary total disability payments shall continue until the worker
32 is released by his or her physician or licensed advanced registered
33 nurse practitioner for the work, and begins the work with the
34 employer of injury or with an approved nonprofit pursuant to (m) of
35 this subsection. If the work thereafter comes to an end before the
36 worker's recovery is sufficient in the judgment of his or her
37 physician or licensed advanced registered nurse practitioner to
38 permit him or her to return to his or her usual job, or to perform
39 other available work offered by the employer of injury, the worker's
40 temporary total disability payments shall be resumed. Should the

1 available work described, once undertaken by the worker, impede his
2 or her recovery to the extent that in the judgment of his or her
3 physician or licensed advanced registered nurse practitioner he or
4 she should not continue to work, the worker's temporary total
5 disability payments shall be resumed when the worker ceases such
6 work.

7 (c) To further encourage employers to maintain the employment of
8 their injured workers, an employer insured with the department and
9 that offers work to a worker pursuant to this subsection (4) shall be
10 eligible for reimbursement of the injured worker's wages for light
11 duty or transitional work equal to fifty percent of the basic, gross
12 wages paid for that work, for a maximum of (~~sixty-six~~) 66 workdays
13 within a consecutive (~~twenty-four~~) 24-month period. In no event may
14 the wage subsidies paid to an employer on a claim exceed (~~ten~~
15 ~~thousand dollars~~) \$10,000. Wage subsidies shall be calculated using
16 the worker's basic hourly wages or basic salary, and no subsidy shall
17 be paid for any other form of compensation or payment to the worker
18 such as tips, commissions, bonuses, board, housing, fuel, health
19 care, dental care, vision care, per diem, reimbursements for work-
20 related expenses, or any other payments. An employer may not, under
21 any circumstances, receive a wage subsidy for a day in which the
22 worker did not actually perform any work, regardless of whether or
23 not the employer paid the worker wages for that day.

24 (d) If an employer insured with the department offers a worker
25 work pursuant to this subsection (4) and the worker must be provided
26 with training or instruction to be qualified to perform the offered
27 work, the employer shall be eligible for a reimbursement from the
28 department for any tuition, books, fees, and materials required for
29 that training or instruction, up to a maximum of one thousand
30 dollars. Reimbursing an employer for the costs of such training or
31 instruction does not constitute a determination by the department
32 that the worker is eligible for vocational services authorized by RCW
33 51.32.095 and 51.32.099.

34 (e) If an employer insured with the department offers a worker
35 work pursuant to this subsection (4), and the employer provides the
36 worker with clothing that is necessary to allow the worker to perform
37 the offered work, the employer shall be eligible for reimbursement
38 for such clothing from the department, up to a maximum of (~~four~~
39 ~~hundred dollars~~) \$400. However, an employer shall not receive
40 reimbursement for any clothing it provided to the worker that it

1 normally provides to its workers. The clothing purchased for the
2 worker shall become the worker's property once the work comes to an
3 end.

4 (f) If an employer insured with the department offers a worker
5 work pursuant to this subsection (4) and the worker must be provided
6 with tools or equipment to perform the offered work, the employer
7 shall be eligible for a reimbursement from the department for such
8 tools and equipment and related costs as determined by department
9 rule, up to a maximum of (~~two thousand five hundred dollars~~)
10 \$2,500. An employer shall not be reimbursed for any tools or
11 equipment purchased prior to offering the work to the worker pursuant
12 to this subsection (4). An employer shall not be reimbursed for any
13 tools or equipment that it normally provides to its workers. The
14 tools and equipment shall be the property of the employer.

15 (g) An employer may offer work to a worker pursuant to this
16 subsection (4) more than once, but in no event may the employer
17 receive wage subsidies for more than (~~sixty-six~~) 66 days of work in
18 a consecutive (~~twenty-four~~) 24-month period under one claim. An
19 employer may continue to offer work pursuant to this subsection (4)
20 after the worker has performed (~~sixty-six~~) 66 days of work, but the
21 employer shall not be eligible to receive wage subsidies for such
22 work.

23 (h) An employer shall not receive any wage subsidies or
24 reimbursement of any expenses pursuant to this subsection (4) unless
25 the employer has completed and submitted the reimbursement request on
26 forms developed by the department, along with all related information
27 required by department rules. No wage subsidy or reimbursement shall
28 be paid to an employer who fails to submit a form for such payment
29 within one year of the date the work was performed. In no event shall
30 an employer receive wage subsidy payments or reimbursements of any
31 expenses pursuant to this subsection (4) unless the worker's
32 physician or licensed advanced registered nurse practitioner has
33 restricted him or her from performing his or her usual work and the
34 worker's physician or licensed advanced registered nurse practitioner
35 has released him or her to perform the work offered.

36 (i) Payments made under (b) through (g) of this subsection are
37 subject to penalties under RCW 51.32.240(5) in cases where the funds
38 were obtained through willful misrepresentation.

39 (j) Once the worker returns to work under the terms of this
40 subsection (4), he or she shall not be assigned by the employer to

1 work other than the available work described without the worker's
2 written consent, or without prior review and approval by the worker's
3 physician or licensed advanced registered nurse practitioner. An
4 employer who directs a claimant to perform work other than that
5 approved by the attending physician and without the approval of the
6 worker's physician or licensed advanced registered nurse practitioner
7 shall not receive any wage subsidy or other reimbursements for such
8 work.

9 (k) If the worker returns to work under this subsection (4), any
10 employee health and welfare benefits that the worker was receiving at
11 the time of injury shall continue or be resumed at the level provided
12 at the time of injury. Such benefits shall not be continued or
13 resumed if to do so is inconsistent with the terms of the benefit
14 program, or with the terms of the collective bargaining agreement
15 currently in force.

16 (l) In the event of any dispute as to the validity of the work
17 offered or as to the worker's ability to perform the available work
18 offered by the employer, the department shall make the final
19 determination pursuant to an order that contains the notice required
20 by RCW 51.52.060 and that is subject to appeal subject to RCW
21 51.52.050.

22 (m) An employer with 100 or fewer employees may offer off-site
23 light duty return to work to a worker pursuant to this subsection (4)
24 with an established nonprofit organization approved by the
25 department, subject to the following parameters and conditions:

26 (i) The employer of injury may not disclose the worker's medical
27 restrictions with the nonprofit organization without the worker's
28 written consent. If the worker does not consent to the disclosure of
29 their medical restrictions with the nonprofit organization, any
30 approved light duty work must be with the employer of injury;

31 (ii) The employer of injury remains accountable for all reporting
32 requirements;

33 (iii) The employer of injury remains responsible for any new
34 injury or occupational disease incurred while the worker is on off-
35 site light duty return to work;

36 (iv) The injured worker does not forfeit any protections or
37 benefits afforded to them under this title, and the injured worker
38 may reject an off-site light duty return-to-work offer or otherwise
39 terminate the off-site light duty return to work with the nonprofit

1 organization, in which case his or her temporary total disability
2 payments must continue or be resumed;

3 (v) Except as otherwise provided under this subsection (4)(m),
4 the offer of off-site light duty return to work with the nonprofit is
5 subject to the same parameters and conditions as an offer of
6 available work with the employer of injury;

7 (vi) The employer of injury may be eligible for reimbursement
8 under (c) through (g) of this subsection if the department determines
9 the employer qualifies; and

10 (vii) The injured worker's experience gained through off-site
11 light duty return to work with the nonprofit organization may not be
12 construed as acquisition of transferable skills and does not
13 disqualify the injured worker from accessing vocational
14 rehabilitation services or other retraining programs available under
15 this title.

16 (n) The department or the employer of injury may contract with an
17 established return-to-work employment agency for the purpose of
18 offering an injured worker off-site light duty return to work with a
19 nonprofit organization.

20 (5) An employer's experience rating shall not be affected by the
21 employer's request for or receipt of wage subsidies.

22 (6) The department shall create a Washington stay-at-work account
23 which shall be funded by assessments of employers insured through the
24 state fund for the costs of the payments authorized by subsection (4)
25 of this section and for the cost of creating a reserve for
26 anticipated liabilities. Employers may collect up to one-half the
27 fund assessment from workers.

28 (7) No worker shall receive compensation for or during the day on
29 which injury was received or the three days following the same,
30 unless his or her disability shall continue for a period of
31 (~~fourteen~~) 14 consecutive calendar days from date of injury:
32 PROVIDED, That attempts to return to work in the first fourteen days
33 following the injury shall not serve to break the continuity of the
34 period of disability if the disability continues fourteen days after
35 the injury occurs.

36 (8) Should a worker suffer a temporary total disability and
37 should his or her employer at the time of the injury continue to pay
38 him or her the wages which he or she was earning at the time of such
39 injury, such injured worker shall not receive any payment provided in
40 subsection (1) of this section during the period his or her employer

1 shall so pay such wages: PROVIDED, That holiday pay, vacation pay,
2 sick leave, or other similar benefits shall not be deemed to be
3 payments by the employer for the purposes of this subsection.

4 (9) In no event shall the monthly payments provided in this
5 section:

6 (a) Exceed the applicable percentage of the average monthly wage
7 in the state as computed under the provisions of RCW 51.08.018 as
8 follows:

| AFTER | PERCENTAGE |
|---------------|------------|
| June 30, 1993 | 105% |
| June 30, 1994 | 110% |
| June 30, 1995 | 115% |
| June 30, 1996 | 120% |

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14 (b) For dates of injury or disease manifestation after July 1,
15 2008, be less than (~~fifteen~~) 15 percent of the average monthly wage
16 in the state as computed under RCW 51.08.018 plus an additional (~~ten~~
17 ~~dollars~~) \$10 per month if the worker is married and an additional
18 (~~ten dollars~~) \$10 per month for each child of the worker up to a
19 maximum of five children. However, if the monthly payment computed
20 under this subsection (9)(b) is greater than (~~one hundred~~) 100
21 percent of the wages of the worker as determined under RCW 51.08.178,
22 the monthly payment due to the worker shall be equal to the greater
23 of the monthly wages of the worker or the minimum benefit set forth
24 in this section on June 30, 2008.

25 (10) If the supervisor of industrial insurance determines that
26 the worker is voluntarily retired and is no longer attached to the
27 workforce, benefits shall not be paid under this section.

28 (11) The department shall adopt rules as necessary to implement
29 this section.

30 NEW SECTION. **Sec. 3.** This act takes effect July 1, 2024.

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