

# HOUSE BILL REPORT

## HB 2764

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### As Reported by House Committee On: Commerce & Labor

**Title:** An act relating to protecting employees from adverse employment actions because of influenza.

**Brief Description:** Protecting employees from adverse employment actions because of influenza.

**Sponsors:** Representatives Conway, Green, Nelson and Simpson.

#### **Brief History:**

##### **Committee Activity:**

Commerce & Labor: 1/19/10, 2/2/10 [DPS].

#### **Brief Summary of Substitute Bill**

- Prohibits an employer from discharging or disciplining an employee because of an absence from employment related to symptoms of pandemic influenza.

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### HOUSE COMMITTEE ON COMMERCE & LABOR

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Conway, Chair; Wood, Vice Chair; Green, Moeller and Williams.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Condotta, Ranking Minority Member; Chandler and Crouse.

**Staff:** Jill Reinmuth (786-7134).

#### **Background:**

In Washington the general rule is that employment is "terminable at-will." In other words, an employer may discharge an employee at any time without cause, and an employee may quit employment at any time without cause. Similarly, an employer may take other employment action that he or she deems appropriate.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

Exceptions to the general rule that employment is "terminable at-will" have been enacted by Congress and the Legislature, and recognized by Washington courts. For example, an employer may not discharge an employee for exercising rights under certain state and federal laws (e.g., the federal Family and Medical Leave Act [FMLA] and the state Minimum Wage Act). An employer also may not discharge an employee because he or she is a member of a protected class under the Washington Law Against Discrimination or other anti-discrimination laws. An employer may be liable for wrongful discharge for terminating an employee because he or she refused to commit an illegal act or because he or she performed a public duty.

Exceptions to the general rule that an employer may take other employment action that he or she deems appropriate also have been enacted by Congress and the Legislature. For example, an employer may not use the taking of FMLA-leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions. An employer also may not discriminate against a person in compensation or in other terms or conditions of employment because he or she is a member of a protected class under anti-discrimination laws.

In 2009 after the H1N1 virus was first detected in people in the United States, the Centers for Disease Control and Prevention issued guidance recommending that people with influenza-like illness remain at home until at least 24 hours after they are free of fever, or signs of a fever without the use of fever-reducing medications.

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### **Summary of Substitute Bill:**

An employer is prohibited from discharging or disciplining an employee because he or she was absent from employment because he or she experienced symptoms of pandemic influenza, or needed to obtain medical diagnosis or care for such symptoms. An employer is permitted to require that such an absence be supported by a certification issued by the employee's health care provider. These provisions apply during an influenza pandemic declared by the Secretary of the Department of Health.

An employee who is discharged or disciplined because of such an absence may file a complaint with the Director of the Department of Labor and Industries (Director) within 90 days of the discharge or the disciplinary action. Upon receipt of a complaint, the Director must investigate and determine whether the employee was discharged or disciplined because of such an absence. The Director also must send a notice of his or her determination to the employee and the employer within 90 days of receipt of the complaint. If the Director determines that the employee was discharged or disciplined because of such an absence and the employer fails to reinstate the employee or withdraw the disciplinary action within 30 days of receipt of notice of the Director's determination, the employee may bring an action against the employer in superior court seeking reinstatement or withdrawal of the disciplinary action. Reinstatement or withdrawal of the disciplinary action must be with back pay, without loss of seniority or benefits, and with removal of any related adverse material from the employee's personnel file.

An employer is a person who employed 20 or more full-time equivalent employees in the previous year.

Symptoms of pandemic influenza are symptoms identified by the State Health Officer and specified in the declaration of an influenza pandemic by the Secretary of the Department of Health.

**Substitute Bill Compared to Original Bill:**

Discharge or discipline because of an absence from employment related to symptoms of pandemic influenza (instead of influenza-like symptoms) is prohibited. This prohibition applies during an influenza pandemic declared by the Secretary of the Department of Health (instead of during periods in which a period of exclusion is recommended). "Symptoms of pandemic influenza" is defined.

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**Appropriation:** None.

**Fiscal Note:** Available. New fiscal note on the substitute bill requested on February 2, 2010.

**Effective Date of Substitute Bill:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) This bill is important to the workers of our state and the public health of our communities. The world has experienced a pandemic. When the Centers for Disease Control and Prevention (CDC) and the Department of Health say that workers should stay home if they have the H1N1 virus, it is imperative that businesses pay attention and allow workers to stay home. Otherwise, public health, productivity, and family security are at risk.

Absentee policies encourage workers to be at work. However, they also force workers to come in ill. Co-workers and consumers are exposed to the flu. Discipline for use of sick leave is common. But sometimes the absence is related to the H1N1 virus. There are examples of workers who have been disciplined (e.g., nurses) or terminated (e.g., a restaurant worker).

The CDC issues specific public health recommendations for employers to follow regarding the flu. Some employers fired employees for complying with such practices.

Workers should not have to choose between their health and their livelihood. They should be able to get well without the fear of discipline.

It is not clear that the federal Family and Medical Leave Act and the state Family Leave Law would protect workers with the flu. The definition of "serious health condition" specifically excludes the flu unless it develops into something more serious.

The bill is modeled on the volunteer firefighter law, which addresses termination of firefighters who responded to fire situations. It requires a written statement to employers.

(In support with amendment) A different approach would be to encourage workers to be vaccinated against the flu. If they were vaccinated, they would receive one extra occurrence that would not count towards the occurrence policy.

(Opposed) There are distinctions between volunteer fire fighters and this bill. Not many employers have policies applicable to volunteer fire fighters.

The necessity of the bill is questionable. Most employers have some form of sick leave, paid time off, or leave on a case-by-case basis. There has been testimony about the degree of flexibility and accommodation in the workforce for employees facing these circumstances.

The breadth of the bill is also questionable. The "period of exclusion" during which the bill operates is not defined. A symptom of influenza could mean a scratchy throat.

Finally, the coordination of this proposal with existing leave policies is questionable. State and federal leave laws may apply. Influenza might qualify as a serious health condition or disability.

The grocery industry does its best to educate workers on how to avoid contagions. Employers have well-defined sick leave policies, 40 percent of which are negotiated under union contracts. Establishing another cause of action is not the right way to go.

Small employers want workers and customers to stay healthy. However, it is not clear whether a declaration is needed, what a flu-like symptom is, and how recordkeeping for absences would be done. It would force employers to prove a negative, that the employee was terminated for a reason other than having the H1N1 virus.

**Persons Testifying:** (In support) Sharon Ness, United Food and Commercial Workers Local 141; Ellie Menzies, Service Employees International Union Healthcare 1199NW; Sarah Cherin, United Food and Commercial Workers Local 21; Rebecca Johnson, Washington State Labor Council; and Anne Jancovich, Teamsters Local 117.

(In support with amendment) Lisa Thatcher, Washington State Hospital Association.

(Opposed) Kris Tefft, Association of Washington Business; Carolyn Logue, Washington Food Industry; Patrick Conner, National Federation of Independent Business; Gary Smith, Independent Business Association; and Mark Johnson, Washington Retail Association.

**Persons Signed In To Testify But Not Testifying:** None.