
Labor & Workforce Development Committee

HB 1440

Brief Description: Ensuring fairness to employers by protecting employees.

Sponsors: Representatives McCoy, Sullivan, Ryu, Sells, Green, Cody, Moscoso, Goodman, Bergquist, Riccelli, Hunt, Fitzgibbon, Pollet, Seaquist, Roberts, Ormsby, Stonier, Pettigrew, Van De Wege, Hudgins, Reykdal, Blake, Freeman, Moeller, Jinkins, Appleton and Kagi.

Brief Summary of Bill

- Prohibits misclassification of employees.
- Creates a new test to determine whether an individual is an independent contractor for purposes of the new Employee Fair Classification Act, the Minimum Wage Act, the Wage Payment Act, and laws on prevailing wage, wage deductions, industrial insurance, and unemployment compensation.
- Prohibits retaliation against employees and permits enforcement in administrative proceedings and in court.
- Creates a statutory lien for wage claims.

Hearing Date: 1/31/13

Staff: Alexa Silver (786-7190).

Background:

Independent Contractor Status.

Employment standards generally apply only if there is an employer-employee relationship rather than an independent contractor relationship. Several different multi-part tests are used to determine whether an individual who performs services for remuneration is an independent contractor. For purposes of prevailing wage, unemployment insurance, and industrial insurance,

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a seven-part test is used, while a three-part test is used in the context of the Minimum Wage Act and as an alternative test for unemployment insurance.

Washington Labor Laws.

The state Minimum Wage Act, Wage Payment Act, and other laws establish standards for the payment of wages. It is unlawful for an employer to withhold an employee's wages except for certain purposes or to willfully pay an employee less than the employer is obligated to pay. If an employer fails to pay an employee, the employee may file a wage complaint with the Department of Labor & Industries (Department) or pursue the claim in court.

If it appears to the Department that the employer has represented to its employees that he or she is able to pay wages, and the employees are not being paid, the Department may require the employer to give a bond conditioned that the employer will pay his or her employees as required by law for a period not to exceed six months. If the employer fails to provide the bond, the Department may file suit against the employer to compel the employer to furnish the bond.

If the employee files a complaint and the Department determines that the employer violated a wage payment requirement, the Department may order the employer to pay the wages owed, plus interest. In addition, if the violation was willful, the Department may order the employer to pay a civil penalty of \$1,000 or 10 percent of the unpaid wages, whichever is greater, up to \$20,000. If the employee files a civil suit instead of a complaint, the employee may be able to recover double the amount of the unpaid wages, plus attorneys' fees and costs, if the employer willfully paid lower wages.

The Minimum Wage Act also prohibits retaliation against an employee who makes a complaint, institutes a proceeding, or testifies in a proceeding.

Mechanics' Liens.

State law authorizes mechanics' and materialmen's liens to benefit any person furnishing labor, professional services, material, or equipment for the improvement of real property. If the person is not paid for services or materials, the lien procedures may be used to recover the payment. A person claiming a lien must file a notice of claim of lien and record the lien claim in the county where the property is located. To foreclose the lien, the person claiming the lien files a civil action.

Summary of Bill:

Independent Contractor Status.

An individual who performs services for remuneration is presumed to be an employee, and a person asserting that an individual is not an employee must prove independent contractor status by a preponderance of the evidence. An individual is an independent contractor if:

- he or she is and will continue to be free from control or direction over the performance of the service;
- the service is outside the usual course of business for which the service is performed, or the service is performed outside all the places of business of the enterprise for which the service is performed; and
- the individual is customarily engaged in an independently established trade.

The withholding of federal income taxes is irrelevant to a determination of independent contractor status.

This definition of independent contractor applies to the Employee Fair Classification Act (EFCA), the Minimum Wage Act (MWA), the Wage Payment Act (WPA), and laws on prevailing wage, wage deductions, industrial insurance, unemployment compensation, and wage liens.

Retaliation.

An employer may not take adverse action against an employee for specified reasons, including making a complaint, instituting a proceeding, testifying, and exercising his or her rights. If an employer takes adverse action against an employee within 90 days of the employee engaging in a protected act, the employer is presumed to have acted in retaliation. Retaliation is a gross misdemeanor.

The Department may investigate retaliation and order an employer to: pay a civil penalty of \$1000 to \$10,000 per employee; pay an aggrieved employee the greater of \$10,000 or treble damages; or reinstate the employee. An interested party or aggrieved individual may file suit, including a class action. The court:

- must order the greater of either treble damages or statutory damages of \$10,000 per aggrieved employee, or \$10,000 to \$25,000 where there is a pattern or practice of violations;
- may award injunctive or other equitable relief, including reinstatement or front pay in lieu of reinstatement; and
- must award attorneys' fees and costs.

The statute of limitations on retaliation is three years. These provisions on retaliation apply to the MWA, the WPA, and laws on prevailing wage and wage deductions. The definition of retaliation also applies to the new EFCA. Current law related to retaliation and hindering the Department in the performance of its duties is repealed.

Employee Fair Classification Act.

Under the new EFCA, an employer may not misclassify an employee as an independent contractor, charge a misclassified employee a fee, or make prohibited deductions. No person may form a business entity or pay a fee to use a business entity for the purpose of facilitating misclassification of an employee. An employer who engages an individual to perform services but does not consider the person to be an employee must post a notice regarding rights under the EFCA in the employer's offices and at job sites. Failure to post the notice may result in a penalty of \$1,000 to \$10,000.

The Department may investigate violations of the EFCA. If the Department determines that an employer violated the provisions related to misclassification or retaliation, it may:

- impose a civil penalty of \$1,000 to \$10,000 per employee, or \$10,000 to \$25,000 where there is a pattern or practice of violations;
- order the employer to pay an aggrieved employee the greater of \$10,000 or treble damages;
- order the employer to reinstate the employee; and
- determine whether to initiate collection procedures and refer the case to the Employment Security Department (ESD).

There is a "pattern or practice" of violations if, in addition to the current violation, the employer or successor employer was in the previous ten years: (1) convicted of a crime concerning nonpayment of wages; or (2) subject to a final court order or citation for a violation of a wage-related law if the judgment or citation was not satisfied within 30 days.

The ESD may initiate procedures for improper recordkeeping and recovery of contributions upon referral from the Department.

An aggrieved individual or interested party may file suit, including a class action, for retaliation.

The court:

- must award the greater of either treble damages or statutory damages of \$10,000 per aggrieved employee, or \$10,000 to \$25,000 per employee where there is a pattern or practice of violations;
- may award injunctive or other equitable relief, including reinstatement or front pay in lieu of reinstatement; and
- must award attorneys' fees and costs.

If the court finds a violation, the Department and the ESD must accept referrals based on the finding.

The statute of limitations is three years. Contractors who have twice in five years violated the EFCA or certain provisions of prevailing wage law are barred from bidding on public works for one year. Penalties are deposited in a new EFCA account created in the state Treasury.

Wage Liens.

An employee has a wage lien on improvements and on an employer's real or personal property. An "improvement" is property upon which the employee has performed work or furnished materials at the instance of the owner or any person acting by the owner's authority or under the owner as a contractor or otherwise. "Improvement" does not include an improvement that is subject to a construction lien or would be subject to a construction lien if filed during the period of limitation.

A notice of claim of lien must be filed in the county where the real property or improvements are located or with the Department of Licensing for personal property. In the notice of claim of lien, the lien claimant must provide certain information, be acknowledged and certified, pay a filing fee, and mail a copy of the notice to the employer. Filing forms are provided. The claim of lien is notice on the spouse or domestic partner of the property owner and subjects the community interest of both spouses or domestic partners to the lien.

An action to foreclose the lien must be filed within one year of recording. If the lien claimant has also filed suit for a wage claim, that action must also be deemed an action to foreclose on the lien. A foreclosure action or action for a wage claim may be filed by the Department, the U.S. Department of Labor, the Attorney General's Office, or a representative of the employee.

An employer or party in interest may also file a surety bond or make a deposit to release the property from the lien. The amount deposited must be equal to the greater of \$1,000 or one and one-half times the amount claimed. The person posting bond or making a deposit must provide

notice to the lien claimant. The lien claimant is liable to the person if the lien claimant does not release or foreclose on the lien within 15 days.

A wage lien is extinguished if:

- an action for the underlying wage claim is not brought within one year;
- the action for the underlying wage claim is dismissed and no appeal is filed; or
- the amount due to the lien claimant is paid.

If the lien is extinguished, the lien claimant must file a release of lien upon demand and 15 days' notice.

Wage liens have priority over all other debts, liens, judgments, and security interests, except for other wage liens. A lien may be assigned. The right to a lien may not be waived.

Other.

Penalties for an employer making unlawful rebates and willfully paying a lower wage than he or she is obligated to pay are changed from double to treble damages. An interested party may bring complaints under the WPA. The bond that the Department may require under the WPA may be conditioned that the employer pay employees for a period of one year. The Department must revoke an employer's industrial insurance certificate if the employer fails to post the bond as required instead of filing suit.

Appropriation: None.

Fiscal Note: Requested on 1/25/13.

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