



The New Law You Haven't Heard About

By Rick Kaiser

Sexual orientation discrimination was not the only employment related issue that consumed the Washington Legislature this year. Our representatives in Olympia passed another piece of legislation that will impact employers, and you probably haven't heard about it. The new law authorizes the Department of Labor and Industries to issue citations to employers for violating any wage payment requirement. The law goes into effect June 7, 2006. This new law, which is not yet codified and exists as Substitute House Bill 3185, reflects a reasonable compromise between Washington employers and employee advocates who did not want to resort to legal action in court to recover unpaid wages. As with any compromise, SHB 3185 is a mixed bag.

Why the Legislature Concluded SHB 3185 Was Necessary.

As you know, the state Minimum Wage Act and other laws require employers to pay employees their wages owed under a contract or statute. Previously, employees could file a lawsuit to recover unpaid wages or file a complaint with the Department if the unpaid amount was less than \$4,000. If an employee chose the latter, the Department could investigate the complaint and order the employer to pay the wages owed. The Department had no timetable for completing its investigation. Furthermore, the Department had to file a lawsuit against the employer to enforce its order, which it rarely did. Instead, it directed the employee to file a private lawsuit. The result? Wage complaints filed with the Department languished, and employees typically bypassed the Department, subjecting employers to costly and time-consuming lawsuits for relatively minor amounts of wages owed.

The New General Framework: The Department's Authority to Investigate and Fine Employers.

SHB 3185 creates an administrative procedure that requires the Department to investigate a complaint and issue either a citation and notice of assessment or a determination of compliance *no later than 60 days* after receiving the complaint and within three years after the date when the wages were due. If the Department finds a violation, it may order the employer to pay the employee all wages owed, including interest of one percent per month. If the violation is willful, the Department may also order the employer to pay a civil penalty. The penalty must be not less than \$500 or an amount equal to 10% of the total amount of the unpaid wages, whichever is greater. The maximum civil penalty is \$20,000.

SHB 3185 also authorizes the Department to create administrative procedures for an employer to contest the citation. The Department has not yet drafted these regulations, but they may be similar to the administrative process for appealing a WISHA citation.

If the employer does not contest the Department's citation and pays the alleged wages owed within ten days of receiving the citation, the Department *must* waive civil penalties. The Department *may* waive civil penalties if the employer pays the wages owed after ten days.

SHB 3185 Requires Employees to Elect Where They Seek their Remedies.

Unfortunately, SHB 3185 still gives employees the option of bypassing the Department and directly filing a lawsuit. However, SHB 3185 does set forth procedural requirements for employees who file a complaint with the Department and then abandon it in favor of filing a lawsuit. Under SHB 3135, an employee who has filed a complaint with the Department may terminate the Department's administrative action, and thereby preserve any private right of action, by giving written notice to the Department within five business days of the Department's issuance of a citation and notice of assessment. The Department also must discontinue its action against the employer and vacate any previously issued citation and notice of assessment, which would not be admissible in a private action.

The "Reasonable Reliance Rule."

SHB 3185 also provides employers a defense against the Department's civil penalties. It requires the Department to waive civil penalties if the employer reasonably relied on a rule, or an interpretive bulletin or administrative policy. In addition, an employer is immune from the Department's civil penalties if the employer reasonably relied on a written order, ruling, approval, opinion, advice, determination or interpretation by the director of the Department.

Why Employers May Benefit from the New Law.

Ideally, SHB 3185 will result in fewer wage claims being litigated in court. If presented with a wage claim, employers should quickly resolve it. Under SHB 3185, an employee who has accepted payment of the wages owed, including interest, is barred from initiating or pursuing other actions based on such requirements. Thus, employers are less likely to face claims under 49.52.070, which allows employees to collect "double damages," attorneys' fees, and costs if a Court were to find that it willfully withheld an employee's wages.

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