



Get Ready for New Obligations under Washington’s New Long-Term Care Program: *What Employers Need to Know Now*

Billed as a “first of its kind” program, Washington’s Long-Term Services and Supports Trust Act established a state-operated long-term care insurance program funded by a payroll tax on employee wages. Beginning January 1, 2022, the State will begin assessing a 0.58 percent payroll tax on all employee wages. By January 2025, eligible individuals who have become vested in the program may begin accessing long-term care benefits. These benefits may be used for a range of services, including professional care at home or at a licensed facility; training, pay and support for family members who provide care; memory care; home-delivered meals; rides to a health care provider; adaptive equipment and technology; home safety evaluation; and emergency alert devices.

Although the law establishing the Long-Term Care (LTC) program was adopted by the Washington State Legislature in 2019, this new program has received limited attention given all of the other challenges employers have faced over the last year. But with the clock ticking toward implementation, employers should act now to understand their new payroll tax obligations and be ready to help employees understand the impact of this new State program. Below are answers to some of the frequently asked questions Summit is receiving regarding the new LTC program, as well as some suggested action items for employers to consider.

Frequently Asked Questions

How is this program funded?

The LTC program will be funded by employee contributions, which will be collected by employers via payroll deductions and remitted to the State through quarterly reporting. [RCW 50B.04.080](#). As noted, workers will pay 0.58 percent of their wages into the State fund. Wages are defined the same as under the Paid Family and Medical Leave law. See [RCW 50A.05.010](#) (PFML definitions). Unlike other payroll taxes, there is no cap on the wages subject to this tax, which may result in substantial annual contributions for high-earning employees. By way of example, an employee earning \$50,000 per year would contribute \$290 annually, while an employee earning \$150,000 would contribute \$870 annually.

The statutory language does not contemplate that employers would pay all or part of the LTC premium on behalf of employees. This new law provides that the “employer must collect from the employees the premiums” required under the law via payroll deductions, then “shall act as the agent of the employees” by remitting the premiums to the State. [RCW 50B.04.080](#). This language clearly contrasts with the PFML statute, which states that an employer “may elect to pay all or any portion of the employee’s share” of the PFML premium. Given the choice of language, it does not appear that the Legislature intended that employers would have the option of paying LTC premiums on behalf of their employees.

Which workers are covered by the LTC program?

Subject to a few exceptions, all employees in Washington will be required to participate in the LTC program. Exceptions include:

- Workers who are self-employed. These individuals may elect to opt in to the program and pay premiums based on their earnings, but they are not required to do so.
- Employees of federally-recognized tribes. Under the existing law, employees of tribes are excluded. However, a bill currently under consideration by the Legislature ([Substitute House Bill 1323](#)) would permit tribes to elect to collect the premium assessment for their employees.
- Employees covered by a current collective bargaining agreement in effect as of October 2017. The statute provides that employers and employees who are subject to a collective bargaining agreement that was in existence on October 19, 2017, will not be subject to any of the responsibilities under the law unless and until the existing agreement is reopened or renegotiated by the parties or expires.¹ Thus, if on January 1, 2022, an employer is a party to an unexpired CBA that was effective as of October 2017, that employer would not implement the LTC payroll deductions for the employees covered by that CBA until it expired. As was the case for PFML, employers would immediately become obligated to begin collecting premiums once the labor agreement expires. Under draft rules, employers will be obligated to notify the Employment Security Department (ESD) immediately upon the reopening, renegotiation, or expiration of a CBA.
- Employees who opt out and attest that they have other qualifying long-term care insurance. As explained in the next section, there may be limited time to preserve this “opt out” option.

Can employees opt out?

Yes, it is possible to opt out, but employees should act quickly to preserve this ability. The statute provides that an employee who is age 18 or older and who attests that they have long-term care insurance may apply to ESD for an exemption from the LTC premium assessment. Under proposed rules (draft WAC 192-905-005) the alternative long-term care coverage must meet the definition set forth in [RCW 48.83.020](#). If an exemption is approved, the individual is “permanently ineligible” for coverage under the LTC Program.

There is a potentially-narrow window for securing an exemption. Based on the statute as passed, an application for an exemption must be filed with ESD between October 1, 2021 and December 31, 2022. However, if passed, [SHB 1323](#) would require that alternative long-term care insurance has been purchased “before the effective date of this act.” The current

¹ This temporary exemption for employees covered by an unexpired labor agreement is similar to a temporary exemption that was included in Washington’s Paid Family Medical Leave Act. Because both PFML and the LTC program will be administered by the Employment Security Department, it is likely that the LTC exemption will be interpreted consistent with the PFML exemption. Under the PFML, ESD advised that “only CBAs that have been renegotiated in their entirety meet the definition of reopened, renegotiated or expired.” See <https://paidleave.wa.gov/question/how-do-i-know-if-our-cba-covered-employees-must-participate-in-paid-leave/>. Neither a memorandum of understanding (MOU) to address a narrow subject nor the negotiation of a future contract would constitute the reopening or renegotiation of a CBA. *Id.*

legislative session is scheduled to end on April 25, 2021; absent a special session, enacted legislation would become effective July 24, 2021. As a result, if SHB 1323 passes, an employee must have secured long-term care insurance by July 24 of this year in order to have the right to obtain an exemption. SHB 1323, which has passed the House and is currently being considered in the Senate, thus leaves employees very little time to preserve their ability to opt out of the LTC program.

It is worth noting that the Association of Washington Cities (AWC) Trust has been exploring benefit offerings that could provide alternative long-term care coverage allowing employees to opt out of the State program. Unfortunately, if SHB 1323 passes, the timeline will be too tight for making new coverage available prior to the July 24, 2021 deadline that could be established by the bill. According to an AWC representative, they are urging legislators to push that deadline back to later in 2021 to allow more time for employers to communicate to employees the financial implications and potential benefits of this program, as well as time to research and secure alternative coverage. Those interested in the availability of an exemption will want to monitor the fate of SHB 1323.

Interestingly, for those employees who do obtain alternative coverage and successfully opt out of the LTC program, the new law does not require employees to maintain their alternative LTC coverage once an exemption is obtained. As noted above, an employee who is granted an exemption will be permanently ineligible for coverage and cannot opt into the program at a later date. [RCW 50B.04.085](#).

How will employers know whether an employee has opted out of the LTC program?

An employee who obtains an exemption is required to provide written notification to all current and future employers of the exemption. Employers are required to maintain written notifications of employee exemptions. If an employer deducts premiums from an employee's wages after being notified that the employee has an exemption, the employer must refund any improper deductions to the employee and cannot obtain a refund of any premiums already remitted to the State. If an employee fails to notify the employer of an exemption and the employer therefore deducts premiums from that employee's pay, the employee is not entitled to a refund of any premium deductions made prior to giving the employer notice of an exemption.

Do we need to bargain the LTC payroll tax deductions with our union(s)?

Because the payroll deduction for the LTC program is mandatory, employers should not be required to bargain before unilaterally implementing the new payroll deductions. As explained above, the statutory language mandates that employers collect the premiums from employee wages and act as the employee's agent in remitting those premiums to the State. [RCW 50B.04.080](#) (stating that an employer "must collect" LTC premiums from employees through payroll deductions).

Where, as here, a statute imposes a mandatory obligation on employers to implement payroll deductions, the Public Employment Relations Commission (PERC) has held that an employer may unilaterally implement the deduction without bargaining, provided that the employer should engage in effects bargaining upon request. See [Skagit County, Decisions 8886-A and 8887-A \(PECB, 2007\)](#). In *Skagit County*, the employer was advised by its auditor that Washington's

workers compensation statute requires employers to deduct the full workers compensation premium from employee wages, and that the County's practice of paying the premiums on behalf of employees was unlawful. When the employer unilaterally implemented payroll deductions to comply with the law, the union filed an unfair labor practice based on the employer's failure to first bargain this change affecting employee wages. PERC focused on the mandatory nature of the language used in the workers compensation statutes. See [RCW 51.16.140](#) (stating that employer "shall deduct" premium from worker's pay); [RCW 51.32.073](#) (stating that "employer shall retain from the earnings of each worker" the designated amounts). Based on this language, the Commission found that the County had a legal necessity to implement pay deductions. The County therefore was not obligated to bargain the payroll deduction with the union prior to implementation, although PERC noted that the County would have had an obligation to bargain the effects of this change if requested by the union. *Id.*

The LTC premium language is similar to the statutory language addressing an employer's obligation to deduct workers compensation premiums from employee wages at issue in *Skagit County*. In both statutes, the Legislature used mandatory terms ("shall" and "must") to describe an employer's obligation. Accordingly, based on PERC precedent, public employers should not be obligated to bargain with unions prior to implementing payroll deductions to collect LTC premiums.² That said, unions may request or demand to bargain the effects of this new statutory requirement. For example, some unions may propose increased wages or other benefits to offset the impact of the new payroll deduction. Employers should engage in effects bargaining in good faith, but would not be obligated to agree to any particular union proposal and would not be permitted to delay implementation of the new payroll tax deduction pending effects bargaining.

Who is eligible to receive benefits?

In order to be eligible for benefits beginning in 2025, an employee must be age 18 or older, must reside in the State of Washington, must be vested in the LTC program, and must establish to the State that they require assistance with at least three activities of daily living. See [RCW 50B.04.010\(6\)](#); [RCW 50B.04.060](#).

To become vested in the program, individuals must have:

1. paid LTC premiums for either: (a) a total of 10 years (without interruption of five or more consecutive years); or (b) three years within the last six years; and
2. worked a minimum of 500 hours per year during those ten or three years.

[RCW 50B.04.050](#). As a result of the eligibility criteria, employees who plan to retire in the near future may be required to pay in to the LTC program but may never become eligible for benefits.

² In contrast, where statutory language clearly permits employers to cover some or all of a payroll tax on employee wages, PERC has found a duty to bargain prior to unilateral implementation of payroll deductions. In [Whatcom County, Decision 13082-A \(PECB, 2020\)](#), for example, PERC considered the language of the PFML statute, which provides that "[a]n employer may elect to pay all or any portion of the employee's share" of the PFML premium. Because the employer had options as to how PFML premiums were funded, PERC found that the employer committed an unfair labor practice by implementing payroll deductions without exhausting the duty to bargain.

Notably, individuals who move out of Washington will not be eligible for LTC benefits, even if they satisfied the vesting criteria prior to relocating. Because this benefit will not be portable, individuals who do not intend to remain in Washington may prefer to seek private insurance coverage and opt out of the State LTC program.

What benefits are available?

Benefits will be paid out on behalf of eligible beneficiaries in “benefit units” of up to \$100, up to a lifetime maximum of \$36,500 in benefits. The benefit unit will be adjusted annually. Benefits are payable only to an approved long-term services and supports provider. As noted, family members of an eligible beneficiary may be an approved provider if they meet state law requirements for the approved service they are providing.

Will there be further guidance regarding this new law?

Yes, there are a number of actual or potential developments that may affect obligations under this new law. The State is currently in the process of developing rules to address details of how this LTC program will be administered. ESD’s rulemaking page for the LTC program is available [here](#); interested parties may sign up for email updates. Additionally, as mentioned, the Legislature is actively considering a bill that would amend the new law in certain material respects, including an amendment that would significantly limit the availability of exemptions from participation in the LTC program. Finally, some commentators have suggested that Washington’s Long-Term Care statute may be preempted by federal law. Employers are thus encouraged to watch for developments related to the new LTC program.

Employer Action Items

So what must an employer do right now? The new law does not impose any immediate requirements on employers. At this time, employers should simply focus on being prepared to implement new payroll deductions in January 2022 and being able to provide guidance to employees and their unions regarding this new program. The following checklist may be useful in ensuring your organization is informed and prepared:

- Determine whether you have any represented work groups who will initially be excluded from the LTC coverage due to an unexpired CBA that has been in effect since October 19, 2017.
- Consider whether to develop informational guidance for employees and/or unions regarding the LTC program, including the option to apply for an exemption and the potential urgency of securing alternative long-term care insurance to support an exemption. According to AWC representatives who have conferred with ESD, ESD plans to roll out fact sheets, media releases, website guidance, and employer communications the first week of May 2021. In the meantime, employers that are receiving inquiries from employees may elect to share a [Washington Department of Social and Health Services flyer](#) that provides a basic overview of the LTC program.
- Employers may want to research long-term care options and share resources with employees to assist them in comparing coverage options. As noted, depending on legislative action affecting the deadline for securing alternative coverage, the AWC

Trust may be able to begin offering alternative long-term care insurance. Employers may also want to confer with any union benefit trusts open to their employees about whether there are long-term care coverage options. There are also private insurers advertising coverage. Employers are not obligated to research options for employees, but may elect to compile resources to respond to anticipated employee inquiries once the State begins pushing out information about this new State program.

- Be prepared for union requests to bargain the impacts of the new law.
- Watch for instructions from ESD regarding LTC premium collection and requirements for quarterly remitting.
- Monitor the development of rules and statutory amendments addressing LTC program implementation. Among other things, it is likely that ESD rules will require employers to post notices explaining the new payroll deductions or otherwise communicate program details to employees.

If you have specific questions about the LTC program, please feel free to reach out to one of the attorneys in Summit Law Group's Labor & Employment group.

Important Notification

This summary is intended to provide an overview of recent legal developments. This summary is not intended to be, and should not be interpreted as, legal advice. Employers are encouraged to contact a Summit Law Group attorney or other legal counsel for guidance regarding particular situations.