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Washington's "Long-Term Care Act" & Exemptions

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Witherspoon Kelley
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2:15 PM to 3:15 PM**

EMPLOYMENT LAW CLE: DEEP DIVE

Your Presenter



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Agenda

- Washington Cares Program Intro/Basics
- Exemptions from WA Cares
- Challenges to WA Cares Program
- Multi-State Employees: When Is Employee Subject to WA Cares Premium?
- Questions



WA Cares Program Introduction/Basics



Long-Term Care (LTSS or WA Cares)

Background

- Washington legislature approved Long-Term Services and Supports Trust Act (LTSS/WA Cares) in 2019
- Universal social care program (akin to Social Security) to provide benefits for long-term care needs
 - First of its kind in nation
- Funded by premiums assessed against covered employee's wages
- Premium assessment begins Jan. 1, 2022
- First benefit availability Jan. 2025
- Administered jointly by various state agencies/programs
- Codified at RCW Ch. 50B (Page 1-16 of Materials)



WA Cares Basic Features

- Benefits can be used for long-term care needs (e.g., residential/facility care setting, home-care aides, home modifications, etc.)
- Maximum benefit payable is \$100/day up to maximum lifetime benefit of \$36,500 (adjusted for inflation)
- Premium assessment is a percentage of wages (0.58) and lifetime against “individuals in employment” in Washington



WA Cares Benefit Amounts/Eligibility

- Must be a Washington state resident to obtain benefits
 - E.g., workers who live in Idaho, but work in WA must pay premiums, but can't get benefit.
 - E.g., retiring out-of-state disqualifies from benefits
- Must have contributed premiums at least 10 years (without a break of 5 or more years), or have contributed 3 of the past 6 years at time of benefit application
 - E.g., workers near retirement must pay, but can't get benefit.
- Must have worked 500 hours in each of above-applicable years
- Must need assistance with three (3) activities of daily living



WA Cares Premiums

- Beginning January 1, 2022, ESD will assess each “individual in employment” (unless granted exemption) a premium based on wages
- **Initial premium rate is fifty-eight hundredths of one (1) percent of wages (0.58)**
 - Adjusted based on CPI
- Employer must collect the premiums from employees and remit to ESD quarterly
- ESD places in LTSS trust account
- **Premium assessment is lifetime against individuals in “employment”**



WA Cares Premiums (cont.)

EXAMPLES

- 0.58 = \$0.58 per \$100
 - Includes all wages and remuneration (e.g., stock-based compensation, bonuses, paid time off, severance, etc.)
- Employee earning **\$50,000 per year** will pay **\$290 per year** (\$12.08 per paycheck)
- Employee earning **\$65,000 per year** will pay **\$377 per year**
- Employee earning **\$250,000 per year** will pay **\$1,450 per year**



Exemptions from WA Cares



Premium Exemptions

- Otherwise covered employee who “attests that the employee has **long-term care insurance** purchased before November 1, 2021, may apply for an exemption from the premium assessment.”
- Employee must also be at least 18-years-old on application date.
- ESD will only accept exemption applications from October 1, 2021 to December 31, 2021.
- Takes effect first day of quarter after ESD approval
- Once an “exempt employee,” employee can never opt back into WA Cares Program or receive benefits.

RCW 50B.04.085



What Is Qualifying Alternative Long-Term Care (LTC) Insurance?

- See Page LTC 029 of Materials
- “[A]n insurance policy, contract or rider that provides coverage for at least 12 consecutive months to an insured person if they experience a debilitating prolonged illness or disability.”



Practical Limitations of WA Cares

“Exemption”

- Window to Obtain Alt. LTC Insurance
 - WA Cares amended in April 2020 to require would-be exempt workers to purchase alternative LTC insurance by November 1, 2021
 - Employees turning 18 after deadline to apply can never be exempt from WA Cares
- LTC Market
 - According to WA Cares act “Findings,” only twelve (12) companies today offer long-term care insurance coverage
 - By summer of 2021, many WA insurance companies froze LTC coverage application process; many stopped offering coverage
- ESD Limits
 - ESD announced that it could not guarantee processing of exemptions by Jan. 1, 2022, unless applicant applied by Dec. 1, 2021
 - Over 200,000 have applied to date



Challenges to WA Cares



WA Cares Challenges: Legal

- *Pacific Bells LLC et al v. Inslee et al*, 2:21-cv-01515 (W. Wash. Nov. 9, 2021) (see LTC Page 034)
 - Plaintiffs
 - Employer Class
 - Washington-based employers with Washington employees
 - Employee Class
 - Employees who live outside WA, but work in WA
 - Employees who plan to retire within 10 years
 - Employees who plan to retire outside WA
 - Defendants
 - Gov. Inslee (appoints LTSS commission); ESD Commissioner; DSHS Secretary; LTSS Trust
- Lawsuit requests the court prospectively enjoin state from collecting premiums and enforcing act and return previously paid premiums



WA Cares Challenges: Legal (cont.)

- *Pacific Bells LLC et al v. Inslee et al*, 2:21-cv-01515 (W. Wash. Nov. 9, 2021) (see LTC Page 034) (cont.)
 - Allegations
 - (1) WA Cares is subject to the federal Employee Retirement Income Security Act of 1974 (ERISA) and preempted because requirements are so significant that Act is an employer-sponsored benefit plan and ERISA does not require employers to provide long-term care benefits.
 - (2) WA Cares violates the Equal Protection Clause of 14th Amendment because charges out-of-state residents premiums, but denies them the benefits.
 - (3) WA Cares violates the Privileges and Immunities Clause because those who retire and move out of state cannot receive benefit.
 - (4) WA Cares violates the Age Discrimination in Employment Act (ADEA) because older workers must pay into the trust, but may never vest in the benefit.
 - (5) WA Cares violates Washington insurance and multiple employer welfare (MEWA) arrangement laws because it does not satisfy underwriting requirements for long-term care plans, etc.
- Bottom Line: WA Cares is still on the books as of now.



WA Cares Challenges: Initiative 1436

- NEW SECTION. **Sec. 2.** A new section is added to chapter 50B.04 RCW to read as follows: An employee in Washington must elect to keep coverage under RCW 50B.04.080. If an employee has elected coverage under this section, the employee must also have the option to opt out at any time for any reason the employee deems necessary. The employment security department shall adopt rules to implement this section.
- Repeals any provision contrary to above.
- In signature-gathering phase



Multi-State Employees: When Is Employee Subject to WA Cares Premium?



Premium Application: “Individual in Employment”

Beginning January 1, 2022, the employment security department shall assess for each individual in **employment** with an employer a premium based on the amount of the individual's wages." RCW 50B.04.080(1) (emphasis added). "**Employment**" includes "an individual's entire service performed within or without [Washington] or both within and without [Washington]," if:

- (i) The service is **localized** in [Washington]; **or**
- (ii) The service is **not localized in any state**, but **some of the service is performed in [Washington]; and**
 - (A) The **base of operations of the employee** is in [Washington], **or** if there is no base of operations, then **the place from which such service is directed or controlled** is in [Washington]; **or**
 - (B) The base of operations from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in [Washington].

RCW 50A.05.010(8)(a) (emphasis added) (directed from RCW 50B.04.010(23)); RCW 50.04.110; see also Ex. A (US DOL Guidance at LTC Page 061).



Premium Application: Test 1 - “Localized”

Employment—Localized service.

Service shall be deemed to be localized within a state, if

- (1) the service is performed entirely within the state; or
- (2) the service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; for example, is temporary or transitory in nature or consists of isolated transactions.

RCW 50.04.120



Premium Application: Test 1 “Localized” (cont.)

SCENARIO - Barry

Barry is employed by XYZ Corporation, which is headquartered in Spokane, WA. Barry physically works from an XYZ branch in Post Falls, Idaho. Once a quarter for two days, Barry travels to XYZ’s Spokane headquarters for the informational company quarterly meeting.

Is Barry subject to the WA Cares premium?



Premium Application: Test 1 “Localized” (cont.)

ANSWER - SCENARIO - Barry

Likely not. Barry’s employment is likely localized to *Idaho*; his eight days per year he spends at HQ in Spokane, WA for the company quarterly meeting is likely “incidental to the [his] service within [Idaho].”

RCW 50.04.120



Premium Application: Test 1 “Localized” (cont.)

SCENARIO - Jane

Jane is also employed by XYZ Corporation, headquartered in Spokane. Thirty-five (35) percent of the time, regularly Jane physically works in Spokane and surrounding communities. Sixty percent of the time, Jane works from XYZ’s Post Falls, Idaho location.

Is Jane subject to the WA Cares premium?



Premium Application: Test 1 “Localized” (cont.)

ANSWER - SCENARIO - Jane

We need more information and need to proceed to Test 2. Jane is likely not localized to *either* Washington or Idaho because spending 35 percent of her worktime in Washington likely defeats her being localized to Idaho (and thus not subject to WA Cares premium) because forty percent of worktime is not “transitory or incidental.” By the same token, spending 65 percent of worktime outside of Washington means she is not “localized” to Washington.

RCW 50.04.120; see *In re Don E. Bear, E.S.D. Case No. 169* (May 4, 1976) (traveling saw-mill engineer who travelled between Washington and Idaho and visited and Washington-based and Idaho-based mills roughly equally not localized in any state); *Puget Sound Bridge & Dredging Co. v. State Unemployment Compensation Comm'n.*, 168 Or. 614, 126 P.2d 37 (1942) (crews of dredging barge that dredged both the Oregon side and Washington side of Columbia River equally not localized in any state).



Premium Application: Test 2 “Base of Operations”

SCENARIO - Continuing with Jane . . .

Jane lives on the east side of Liberty Lake, WA. Jane does not work from home. Her physical primary office space is located at the Post Falls, Idaho location. When working in Washington, Jane is typically making “house calls” to individual clients located in Spokane and the surrounding areas. Jane stops into XYZ’s Spokane HQ location only itinerantly if she needs to occasionally pick up forgotten supplies or similar quick errands. She has no office space in Washington. She receives instructions on where to proceed for the day from the Post Falls location.

Is Jane subject to the WA Cares premium?



Premium Application: Test 2 “Base of Operations”

ANSWER SCENARIO - Continuing with Jane . . .

Probably not. Jane’s “base operations” is most likely Idaho, which (absent localization in a state) controls which state governs, despite XYZ’s HQ, Jane’s residence in WA, and some of her work being performed in WA.

Test 2:

- (ii) The service is not localized in any state, but some of the service is performed in the state and
(A) The base of operations of the employee is in the state. RCW 50A.05.010(8)(a)(ii)(B).

“Base of Operations”

[T]he place or fixed center of more or less permanent nature from which the employee starts work and to which he customarily returns in order to receive instructions from his employer, or communications from his customers or other persons, or to replenish stocks and materials, to repair equipment, or to perform any other functions necessary to the exercise of his trade or profession at some or other point or points. This base of operations may be the employee's business office which may be located as his residence, or the contract of employment may specify a particular place at which the employee is to receive his directions and instructions. This test is applicable principally to employees, such as salesman, who customarily travel in several states.

In re Don Bear (ESD 1976); U.S. DOL Guidance, Exhibit A, at 5-6.



Premium Application: Test 3 and Test 4

- **Test 3 - State of “Direction or Control” of Work** (Consider only if the employee does not have a "base of operations" in any one state, e.g., if an employee has a base of operation *in more than one state*, this does not satisfy the base of operations test as the employee can only have one "base of operations").
- **Test 4 – Employee Residency Controls** (Consider only if the first three tests are indeterminate, the employee may still be considered in Washington for WA Cares premium purposes if the employee is a Washington resident and the "base of operations from which such service is directed or controlled is not in any state in which some part of the service is performed.") (Very rare).

RCW 50A.05.010(8)(a)(ii)



QUESTIONS?

THANK YOU!

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