



## Employment Law Note

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# Are You and Your Employees Ready for the Long-Term Care Mandate?



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A first-in-the-nation long-term care benefit and payroll tax mandated by the Washington Legislature in 2019 will soon go into effect, and employers and employees who have been focused on dealing with the coronavirus pandemic will need to shift their focus towards this new mandate and its fast-approaching deadlines for compliance.

In 2019, the Washington State Legislature established the Long-Term Services and Supports Trust Program (LTSS Trust Program), which provides up to \$36,500 in lifetime benefits for eligible beneficiaries to apply to the cost of their long-term care. The LTSS Trust Program is funded through a 0.58 percent premium assessment on an employee's wages for employees who have worked at least 500 hours during a calendar year. The premium assessment begins January 1, 2022, and eligible beneficiaries may begin receiving benefits on January 1, 2025.

Governor Inslee signed a 2021 amendment to the law (SHB 1323) on April 21<sup>st</sup> that clarified certain provisions of the law. An individual who is a Washington resident, at least 18 years old, not disabled before the age of 18, assessed as needing assistance with at least three (out of ten designated) activities of daily living, and paid into the program for either three of the last six years prior to the application, or a total of ten years with no more than a five-year interruption, is eligible to receive benefits. From October 1, 2021, through December 31, 2022, employees who attest to having long-term care

insurance may apply to the Employment Security Department (ESD) for an exemption from the premium assessment. An exempt employee is permanently ineligible from receiving LTSS Trust Program benefits. The LTSS Trust Program is administered jointly by the Department of Social and Health Services, the ESD, and the Health Care Authority. Oversight is provided by the Long-Term Services and Supports Trust Commission, which includes legislators, agency directors, and representatives from area agencies on aging, stakeholders, and consumers of approved services.

An employee who wishes to opt out of the LTSS Trust Program must have purchased long-term care insurance **before November 1, 2021**. Premium assessments will begin on **January 1, 2022**. The LTSS Trust Commission must work with insurers to develop long-term care insurance products that supplement the LTSS Trust Program's benefit. A self-employed person who wishes to elect coverage under the LTSS Trust Program must exercise that option before January 1, 2025, or within three years of becoming self-employed for the first time. Once a self-employed person has elected coverage under the LTSS Trust Program, the person may not withdraw from coverage. A self-employed person who has elected coverage must continue to pay premiums until retirement or until the person is no longer self-employed.

In summary:

- All employees employed in Washington will be required to pay the long-term care tax

except for self-employed individuals (see different rules, above), employees of a federally recognized tribe, certain collectively bargained employees, and employees who qualify for an exemption.

- All eligible employees will be automatically enrolled in the program unless the employee opts out by providing proof of alternate long-term care coverage purchased before November 1, 2021.
- There is a limited opt-out period from October 1, 2021, through December 31, 2022.
- Though employers are not obligated to notify employees of this new law, many employers will notify their employees to give their employees the opportunity to purchase long-term care coverage elsewhere by the November 1<sup>st</sup> deadline.
- Employees who do not purchase alternate coverage will be enrolled in the long-term care program permanently with no further opt-out opportunity.

- The .0058 (.58 percent) payroll tax will commence January 1, 2022, with no cap on taxable wages.
- Benefits under the Program will first become available January 1, 2025.
- It is recommended that unionized employers notify their unions of this new payroll tax and give the unions an opportunity to bargain over the tax. Some unions are already proposing that employers pay for the tax through reimbursement to employees of the withheld tax.

There are potential legal challenges to this law on ERISA preemption grounds, but unless a federal court enjoins this law, employers should plan on complying with the payroll tax provision beginning January 1, 2022. The Employment Security Department will also be providing further guidance and implementing regulations, so be sure to stay tuned as new developments arise.

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