Legal Update Article

New Washington Payroll Tax to Pay for 'Free' Long-Term Care Benefits from the State

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Related Services

Employee Benefits

Washington has adopted the nation's first state-run long-term care (LTC) services and support trust program.

Governor Jay Inslee signed SB 1323, amending RCW 50B.04 to provide that, beginning January 1, 2022, Washington employers must withhold a new 0.58 percent payroll tax from all employee wages, with no cap on the amount, and remit those payments to the state quarterly. Unlike the Washington Paid Family Medical Leave (WPFML) law, there is no employer-funded premium under the new law.

Covered Employers, Employees

The new trust program borrows from WPFML to define covered employees. All private and public employers with a Washington employee, except for the federal government and federal tribes, must collect the new tax. In general, all Washington employees must pay the new tax.

Limited exceptions include:

1. Self-employed individuals (unless they elect otherwise);
2. Employees of federal tribes (unless the tribe elects otherwise) or the federal government;
3. Employees subject to a collective bargaining agreement in existence as of October 19, 2017, unless and until such agreement is reopened, renegotiated, or expired.

The WPFML's complicated "localization test" is used to identify "Washington" employees.

Covered employees have a small window to receive an exemption from paying the tax if they attest to having sufficient LTC insurance *purchased before November 1, 2021*. The Employment Security Department (ESD) will accept applications for this exemption only between October 1, 2021, and December 31, 2022. If ESD approves the application, the exempt employee must submit written notification to the employer. Employers must retain those notifications. Exempted employees cannot opt back into the program.

ESD is drafting rules for the administration of this program, including what LTC insurance would be sufficient to support an exemption, which should be approved by June 2021, according to the current timeline. The current proposed rules would permit LTC insurance as defined in RCW 48.83.020 to qualify for an exemption. This means that employees who wish to avoid this tax would need to locate and purchase LTC coverage between sometime in June and November 1, 2021, unless they already have qualifying coverage in place. The new law requires ESD and the Department of Social and Health Services to conduct outreach to employers, including providing educational materials by October 1, 2021, the same day ESD will begin accepting exemption applications.

Benefit Provided

In general, beginning January 1, 2025, qualified employees can get up to $100 per day, up to a maximum lifetime amount of $36,500 (adjusted annually), for approved long-term care services and support for one year. The range of approved services is quite broad and includes nursing facilities, assisted living facilities or adult family homes, home healthcare, wheelchair ramps, emergency alert devices, Meals on Wheels, transportation, caregiver support, memory care, and much more.

Qualified employees include those who:

1. Paid premiums under the program for a total of 10 years without interruption of five or more consecutive years; or
2. Paid premiums for three of the last six years from the date of the application for benefits; and
3. Worked at least 500 hours during each of the 10- or three-year timeframes, respectively.

To receive benefits, eligible employees must receive a determination from the Department of Social and Health Services that they require assistance with at least three activities of daily living.

Other Considerations

The law is a progressive tax that benefits low-income earners most but is unlikely to cover a significant amount of expenses employees may actually incur. Some LTC coverages currently available on the private market may be prohibitively expensive, but, now that the state has created a new market of consumers, perhaps insurance providers will start offering coverages at a lower cost to compete for that business.

Higher income employees may pay more for benefits than what they ultimately receive from the program. Employees who pay their premiums as required and then leave the state would not be able to receive benefits. Finally, anyone close to retirement may start paying premiums, but never qualify for any benefits.

Options for Employers

Although employers are not required to offer any LTC coverage or provide any notices about the new law, employers might consider informing employees about the coming tax. Employers also can help employees by reminding employees of qualifying LTC benefits currently available to them or moving quickly to arrange for qualifying LTC coverage for employees.

Some practitioners believe that the ERISA preempts the new Washington law because it requires the employer to establish a plan that provides benefits that are ERISA welfare benefits. It is not clear the courts will agree, given recent decisions from the U.S. Court of Appeals for the Ninth Circuit regarding ERISA preemption of other state mandates related to benefits. Regardless, employers should not ignore the new law and rely on the courts and ERISA to protect them from state action.

Employers should consult with counsel to determine whether and how they are affected by the new law. Please contact the Jackson Lewis Employee Benefits Practice Group with any questions.