

September 2022

Long-Term Services and Supports Trust/WA Cares Fund

Proposed new and amended rules related to implementation of Substitute House Bill (SHB) 1732, Engrossed Substitute House Bill (ESHB) 1733, and Phase 3.

REASONS FOR ADOPTING THE RULE

Rulemaking history:

CR-101 filed for Phase 3: November 2, 2021 as WSR # 21-22-107

CR-101 filed for SHB 1732 and ESHB 1733: March 30, 2022 as WSR # 22-08-039

CR-102 filed (combining SHB 1732, ESHB 1733, and Phase 3): August 3, 2022 as WSR # 22-16-111

Stakeholder meeting: July 18, 2022

Public rulemaking hearing: September 6, 2022

CR-103 filed as WSR # 22-20-044 and rules adopted: September 28, 2022

Rules effective: October 29, 2022

This Concise Explanatory Statement is regarding adoption of the following new and amended rules:

WAC 192-905-005 Eligibility requirements for an employee to receive a permanent exemption from the long-term services and supports trust program.

The adopted rule amendments implement portions of ESHB 1733 (codified in RCW 50B.04.055) to add the voluntary exemption for veterans with a service-connected disability rating of 70 percent or greater. The rule also clarifies that the two referenced exemption types are permanent and provides the application dates for these exemptions required by RCW 50B.04.055 and RCW 50B.04.085.

WAC 192-905-006 Eligibility requirements for an employee to receive a conditional exemption from the long-term services and supports trust program.

The adopted new rule implements portions of ESHB 1733 (codified in RCW 50B.04.055) to add three types of voluntary exemptions that must be discontinued when the employee no longer meets exemption criteria. The rule also references that notification requirements and penalties for failure to provide the required notifications are outlined in WAC 192-905-007. The rule also outlines that these exemptions will be effective the quarter following approval in order to align with employer reporting and premium assessment.

WAC 192-905-007 Notification requirements and penalties for discontinuing conditional exemptions.

The adopted new rule implements a portion of ESHB 1733 (codified in RCW 50B.04.055) that requires employees to notify the department and their employer(s) within 90 days of no longer qualifying for their conditional exemption. The rule also outlines that the discontinued exemption is effective the quarter immediately following notification in order to align with employer reporting and premium assessment.

WAC 192-905-010 How and when can an employee apply for an exemption from the long-term services and supports trust program?

The adopted rule amendments implement portions of ESHB 1733 (codified as RCW 50B.04.055) to clarify the requirement in RCW 50B.04.085 for individuals to have purchased long-term care insurance prior to November 1, 2021. The rule also outlines the dates the department may accept applications for all types of voluntary exemptions.

WAC 192-910-015 What are the employer's responsibilities for premium deductions?

The adopted rule amendments implement ESHB 1733 (codified as RCW 50B.04.055) by clarifying employer responsibilities regarding employees who have approved exemptions and employees who have discontinued exemptions.

WAC 192-915-005 Election of coverage for self-employed persons.

The adopted rule amendments implement SHB 1732 by delaying the dates self-employed individuals may begin electing coverage.

WAC 192-915-015 How will the department determine the wages earned and hours worked for self-employed persons electing coverage?

The adopted rule amendments clarify a portion of RCW 50B.04.090 that requires the department to adopt rules for determining the hours worked and the wages of individuals who elect program coverage. The amendments are necessary to provide clarity for the differences in WA Cares Fund requirements and Paid Family and Medical Leave requirements for self-employed elective coverage.

WAC 192-930-005 Audit procedures.

The adopted new rule relates to Phase 3 of the department's initial program implementation. The rule outlines employer audit procedures to ensure that standards and procedures for employer audits are

coordinated with the same activities conducted under Title 50A RCW. The proposed rule is necessary to comply with the requirements of RCW 50B.04.020 (4)(c).

WAC 192-930-010 What happens if an employer fails to provide requested information to the department for an audit?

The adopted new rule relates to Phase 3 of the department’s initial program implementation. The rule outlines employer audit procedures to ensure that standards and procedures for employer audits are coordinated with the same activities conducted under Title 50A RCW. The proposed rule is necessary to comply with the requirements of RCW 50B.04.020 (4)(c).

VARIANCE BETWEEN PROPOSED RULE AND FINAL RULE

No changes were made between the proposed rules and the final, adopted rules.

SUMMARY OF COMMENTS TO PROPOSED RULES AND AGENCY RESPONSE

Referenced rule: None referenced	Dale K. Murray, KDA Architecture	Source of comment: Email
We would like to appeal any further movement on the additional tax for Long-term services, which is now called WA Cares Fund. We disagree with this tax. We feel that this is a personal choice, not an employer or government decision to be placing a burden upon individual taxpayers, nor employers for long term care tax requirements.		
Agency response: The WA Cares program was passed into law by the legislature. Any repeal or change to the law would need to be done by the legislature. The department does not have the authority to repeal or change any part of the law. The department must implement and administer portions of the program as directed by chapter 50B.04 RCW.		

Referenced rule: WAC 192-905-006, 010	From: Scott Dilley, wafla	Source of comment: Email and hearing
Emailed Comment: Wafla is a non-profit 501(c)(6) membership organization comprised of nearly 800 agricultural and seasonal employers. Wafla was formed to make labor stability a reality for all agricultural employers and for farmers and farmworkers to be treated with dignity and respect. We offer ways for our members to access several federal visa programs and receive assistance complying with state and federal labor standards. In 2021, wafla filed H-2A applications for more than 200 member employers who collectively employed more than 16,000 individual H-2A workers. In addition, wafla employer members employed more than		

20,000 domestic workers. For the sake of employers, employees, and consumers, we want to ensure that there is labor stability in agriculture.

These comments address the rules ESD has drafted to implement exemptions to the Long-Term Services and Supports Trust (WA Cares) Program pursuant to Engrossed Substitute House Bill 1733, which passed the Legislature in 2022.

Section 2 of this bill mandates that ESD “accept and approve applications for voluntary exemptions from the premium assessment under RCW 50B.04.080 for any employee who meets criteria established by the employment security department for an exemption based on the employees status as: ... (c) An employee who holds a nonimmigrant visa for temporary workers, as recognized by federal law, and is employed by an employer in Washington; or (d) An employee who is employed by an employer in Washington, but maintains a permanent address outside of Washington as the employee’s primary location of residence.”

We believe the Washington State Legislature was appropriate and fair in granting these exemptions to workers. Employees who cannot benefit from WA Cares because they are not permanent residents of Washington state should not be forced to pay premiums into a program they cannot use.

We are glad to see that the Employment Security Department is considering rules to implement these exemptions. However, we are concerned that the process outlined by ESD in these draft rules creates barriers for workers to exercise the exemption granted under the statute. Specifically, the rules contemplate that the employee is always the agent asking or officially applying for the exemption. For example, New Section WAC 192-905-006 states “(1) An employee may apply for a conditional exemption... (2) The employee must provide information...,” and “(3) The employee must provide documentation...”

These provisions in the proposed rules place the onus for exemption specifically and solely on the employee. In contrast, the exemption language found in ESHB 1733 for nonimmigrant visa holders and non-residents does not specify that the employee must apply for the exemption – only that application is made, and then accepted and approved by ESD, for an employee meeting the aforementioned exemptions. As such, the Legislature appears to have envisioned these exemptions as categorical and automatic.

We highlight this difference in the text because approximately 30,000 H-2A nonimmigrant visa holders travel to Washington to work each year in agriculture. Additional workers travel and work in Washington on H-2B visas or more than a dozen other nonimmigrant visa programs established by federal law. In these cases, mandating via rule that each of these employees must apply for an individual WA Cares exemption will cause a logistical nightmare for the employees themselves, for employers who need to collect and remit premiums, and for agency administration and oversight of the program. For example, forcing each employee to sign up for a Secure Access Washington account just to exercise a categorical exemption granted by the Legislature is a substantial burden for the worker and an unnecessary inefficiency in the program. This hurdle may be made even more cumbersome when language and cultural elements are involved.

Moreover, it is our understanding that exemptions from employees paying premiums to WA Cares begin the quarter following the granting of the exemption. Nonimmigrant visa holders (and perhaps workers who live permanently elsewhere in the United States but who temporarily migrated to Washington for seasonal work) may begin employment in the middle of a quarter and have premiums withheld for several weeks or months until the next quarter begins. These limitations adversely affect H-2A and other nonimmigrant workers who will not be able to receive benefits from the long-term care insurance program. We believe this situation is not congruent with the categorical exemption granted by the Legislature in ESHB 1733.

Delays in approval of exemptions will also cause problems. Many H-2A workers come to Washington on contracts that are less than 90-days in duration. These workers could arrive, have premiums withheld from their paychecks, and return to their country of origin before anyone knows if their exemptions have been approved. Returning withheld premiums to workers through international mail is problematic. Checks and mail get lost frequently, especially with many workers coming from very rural, remote areas of Mexico. For this reason, we believe it is best for nonimmigrant visa holders to be automatically exempt and not have any premiums withheld from their paychecks.

We believe the Legislature has granted a categorical exemption such that each nonimmigrant visa holder need not go through a complicated and inefficient process of securing what has already been granted to them by the Legislature. Furthermore, we believe the Legislature has given ESD enough flexibility to address situations such as the ones mentioned above in this rulemaking process. We ask that ESD use that flexibility to ensure that nonimmigrant visa holders and non-resident employees are not unduly burdened when attempting to exercise their rights under these rules.

We ask that you consider other options for allowing applications to be submitted for this exemption. For example, employers, on behalf of these exempt employees, could transmit a batch entry or upload a database of workers qualifying for the exemption. This model would be similar to what ESD and employers already do for nonimmigrant workers and unemployment insurance tax reporting. Employees who meet the criteria for these exemptions should find the process easy to navigate – not difficult, inefficient, and personally costly. We have confidence that ESD, as the state workforce agency and the agency in charge of implementing H-2A in Washington, has the knowledge, resources, and legal basis for making this exemption work easily, efficiently, responsibly, and fairly.

If you have questions or need clarification about these comments, feel free to contact me. We are always available to collaborate and ensure that state laws, rules, and policies are appropriate, fair, and easily understood by agricultural employers, employees, and the department – while also working to keep the agriculture industry in Washington strong and viable.

Thank you for considering our perspective and comments on this rule proposal.

WAC 192-905-006, 010

**From: Elizabeth Hovde,
Washington Policy Center**

Source of Comment: Email and Hearing

Emailed comment:

Thank you for hearing my public comment today in rulemaking discussion concerning new WA Cares exemption groups, outlined in ESHB 1733.

As I said in the hearing, for an exemption to be a true exemption, as I hope the Legislature intended, people to whom ESHB 1733 applies should receive an automatic exemption, not one they have to apply for.

Further, I fear farmworkers, in particular, will slip through the cracks of the exemption carved out. Given possible language barriers and an often brief time working in our state, how will these agricultural workers know to apply in time to receive an exemption before money is withdrawn from their paychecks for WA Cares? The law says that no reimbursements will be given. It says that a worker needs to be granted an exemption and is responsible to show it to an employer before it takes effect. I'm unclear on the limitations you might have as rulemakers because of how the law is written. I would appreciate any clarity the Employment Security Department can offer.

Agriculture-rich Washington state has, according to a recent news article, around 29,000 H-2A workers. I'm concerned these workers will need to apply for an exemption from a tax they won't fully know about in a timeframe that is unrealistic.

All groups outlined in ESHB 1733 should be automatically exempted from WA Cares with the ability to opt into the fund. The state should not be putting up barriers for those lawmakers saw fit to exempt.

Agency response to Scott Dilley and Elizabeth Hovde:

RCW 50B.04.055 identifies the four new exemption types that were passed in ESHB 1733 as voluntary exemptions, and that the department must approve applications for employees who meet established criteria. The department does not have the authority to apply an automatic exemption for employees who hold nonimmigrant visas for temporary workers, or for any of the other exemption types outlined in ESHB 1733. In addition, under RCW 50B.04.055, the responsibility to provide notifications and manage exemptions is identified as a requirement of employees. Employees are required to notify employers of their exemption and notify the department and employers if they no longer meet exemption requirements for three of the four new exemption types. Employees may also incur personal liability for unpaid premiums for failure to begin paying premiums on time when they no longer meet exemption criteria. Allowing employers to apply on behalf of employees and notify the department through batch applications is inconsistent with the department's administrative capabilities and with the authority provided in RCW 50B.04.055.

System changes and changes to employer reporting requirements to start or stop exemptions mid-quarter would not align with rules, procedures, and systems the department already has in place for employer reporting and premium assessment. The department has also implemented exemptions under RCW 50B.04.085 to be effective the quarter following approval. RCW 50B.04.080 requires the department, to the extent feasible, to use the premium assessment, collection, and reporting procedures in Title 50A RCW for Paid Family and Medical Leave (PFML). It also gives the department discretion to determine the timing of when premium payments should be made. The department has rules in place in chapter 192-910 WAC

regarding assessing and collecting premiums that align with respective PFML rules. Changes to the quarterly reporting cycle would be operationally challenging and costly for the department and employers.

WAC 192-905-010 identifies that applications will be available online or in another format approved by the department. The department is committed to making the exemption application process efficient and effective for workers, which includes refining application processes to assist when there may be a language barrier or there is difficulty accessing technology to apply. The department has staff dedicated to processing and approving exemption applications and will process applications as expeditiously as possible. The department is also committed to working with stakeholders to identify ways to streamline the application process within the authority granted under RCW 50B.04.055.