LEGISLATIVE REPORT

# Transportation network companies

DECEMBER 2022

Employment Security Department
WASHINGTON STATE


Contact

Daniel Zeitlin

*Employment System Policy Director*

Daniel.Zeitlin@esd.wa.gov | 360.522.3736


Learn more at esd.wa.gov

# Table of Contents


Executive summary ..... 1
Background ..... 2
Bill overview ..... 2
Stakeholder meetings ..... 2
Unemployment insurance ..... 3
Eligibility basics ..... 4
Funding basics ..... 4
Including TNCs in unemployment insurance ..... 5
Workgroup recommendation ..... 5
ESD response ..... 6
Reporting hours worked ..... 6
Workgroup recommendation ..... 7
ESD response ..... 7
Federal requirements for tax rates, benefit charges ..... 7
Workgroup discussion ..... 10
ESD response ..... 10
Relief of benefit charges ..... 10
Workgroup discussion ..... 10
ESD response ..... 11
Job separations ..... 12
Voluntary quits ..... 12
Quitting due to change in worksite ..... 13
Quitting due to deterioration in worksite safety ..... 14
Quitting due to reduction in hours, compensation by 25% or more ..... 15
Discharges for misconduct ..... 16
Workgroup agreement on 'discharge' definition ..... 16
Able, available and actively seeking work ..... 19

Able to work ..... 20
Actively seeking work ..... 21
Refusing offers of suitable work ..... 22
Stakeholder feedback ..... 23
ESD response ..... 23
Paid Family and Medical Leave ..... 24
Eligibility ..... 24
Qualifying event ..... 24
Elective coverage ..... 25
Premiums ..... 26
Worker benefits ..... 27
Including TNCs in Paid Family and Medical Leave ..... 28
Workgroup recommendation ..... 28
ESD response ..... 29
Considerations for implementation ..... 29
WA Cares Fund ..... 30
Eligibility ..... 30
Elective coverage ..... 31
Exemptions ..... 31
Premiums ..... 32
Benefits ..... 32
Including TNCs in WA Cares ..... 33
Workgroup discussion ..... 33
ESD response ..... 34

# Executive summary

The 2022 Legislature created a workgroup to study and discuss whether and how TNC drivers should be incorporated into state unemployment, paid family and medical leave, and long-term care insurance programs. The workgroup consisted of representatives from the Employment Security Department, transportation network companies (TNCs), Washington businesses, TNC drivers and labor unions.

For unemployment insurance, the workgroup concluded that the Legislature should adopt a statutory provision that explicitly includes TNC drivers within unemployment insurance coverage. The workgroup raised multiple concerns and issues, which were either already addressed by current state law or could not be addressed due to federal limits on state unemployment law. However, there were some issues and concerns that could be addressed by changing state law, primarily through the administrative rulemaking process. Those changes included:

- Amend state statute to grant businesses relief of benefit charges when they continue to employ someone on a permanent part-time basis, even if the worker is not regularly scheduled.
- Add a TNC-specific rule to state that a driver's "hours worked" consists of the driver's "passenger platform time" doubled.
- Adopt a rule that expands what counts as a work search activity to include logging onto a TNC or similar gig economy platform.
- Use rulemaking to possibly refine when someone has "good cause" to quit a job due to a deterioration in worksite safety or due to a reduction of 25% or more in their compensation or hours.

Amendments adopted by the Legislature in the 2022 session largely exempted TNC drivers from coverage under paid family and medical leave and long-term care insurance. Moving forward, for paid family and medical leave insurance, the workgroup suggested a three-year pilot program where:

- TNC drivers could opt into coverage.
- TNCs would pay the TNC-related portion of the premium.

For long-term care insurance, labor representatives advocated for gradually integrating drivers into the long-term care program over the next three years. Business representatives advocated for leaving TNC drivers exempted from coverage.

# Background

## Bill overview

In 2022, the Legislature passed, and the governor signed, Engrossed Substitute House Bill (ESHB) 2076: "An act relating to rights and obligations of transportation network company drivers and transportation network companies." This bill sets standards for minimum compensation, paid sick time, and industrial insurance, and, among other things, also exempts certain transportation network company (TNC) drivers from coverage under state paid family and medical leave insurance and state long term care insurance.[1] The bill requires the Employment Security Department (ESD) to "commence a work group of stakeholders, comprised of equal representation of industry and labor, to study the appropriate application of Titles 50 [unemployment], 50A [paid family and medical leave] and 50B [long term care] RCW on transportation network companies and drivers in this state."[2] Following these stakeholder meetings, ESD must submit a report to the Governor and Legislature "on findings and suggested changes to state law to establish applicable rates and terms by which transportation network companies and drivers participate" in state unemployment insurance, paid family and medical leave insurance, and long term care insurance.[3]

## Stakeholder meetings

Following the effective date of ESHB 2076, ESD convened a workgroup consisting of representatives from:

- Association of Washington Business
- Washington Hospitality Association
- Uber
- Lyft
- Washington State Labor Council, AFL-CIO
- Unemployment Law Project
- Teamsters Local 117
- Drivers Union

[1] ESHB 2076, Laws of 2022, ch. 281, s. 1(1)(i) (codified at RCW 49.46.300(1)(i)).
[2] Laws of 2022, ch. 281, s. 34(1).
[3] *Id*.

The workgroup met throughout the course of this study. ESD staff gave broad overviews of unemployment insurance benefit eligibility, unemployment insurance taxes, paid family and medical leave benefits and contributions, and long-term care benefits and contributions.

The workgroup formed subgroups to discuss specific unemployment insurance topics of interest, organized by monetary and non-monetary issues.

Monetary issues. These cover mathematical calculations used in the unemployment insurance system to determine:

- The number of hours people must work to receive benefits.
- Benefit amounts.
- How remuneration affects weekly benefits.
- Tax rates.
- The amount of tax owed.

Non-monetary issues. These cover mostly eligibility requirements that are not based on numbers. Examples include:

- Voluntary quits.
- Discharges for misconduct.
- Claimants being able, available and actively searching for work.

# Unemployment insurance

State unemployment insurance (UI) programs compensate people who lose work through no fault of their own.[4] Unemployment insurance is funded through regular contributions to be drawn on after the loss of a job.

Unemployment insurance is a critical safety net for unemployed workers. It allows them to continue paying bills and supporting their family — and, by extension, their local economy — until they find a new job. Because unemployment insurance provides economic stability, it is vital not only to individuals but also families, businesses and the broader economy.

[4] RCW 50.01.010.

## Eligibility basics

Claimants must show they:

- Have a significant and recent "attachment to the labor market." This means they work enough that losing their job or work has a significant economic impact. Requirements vary by state, but under existing Washington state law, claimants must work at least 680 hours within four of the previous five quarters before filing for unemployment.
- Are "unemployed" during the week in which they claim benefits.
- Became unemployed "through no fault of their own." This means they didn't voluntarily quit without good cause or weren't discharged for work-related misconduct.
- Are actively trying to return to work. While receiving unemployment benefits, claimants must display their willingness to return to work by showing they are able to work, available for work, and actively seeking work. Claimants may not refuse an offer of suitable work without good cause and still collect unemployment benefits.

## Funding basics

Generally, there are two types of taxes that fund unemployment insurance: federal and state unemployment taxes.

Federal unemployment tax. The U.S. Department of Labor (USDOL) gives these funds to states for administration of their unemployment insurance programs.

State unemployment tax. Businesses pay this tax and ESD deposits their payments in the state's trust fund, which can only be used to pay unemployment benefits.

There are three factors that determine a business's unemployment tax rates:

- Amount of remuneration paid to workers.
- Amount of unemployment benefits paid to their workers.
- Annual social tax.

Amount of remuneration paid to workers. Businesses report this to the state unemployment agency on a quarterly basis. ESD also uses this variable to determine the amount of benefits eligible workers may receive when they file an unemployment claim.

Amount of unemployment benefits paid to business' workers. The more benefits a business's workers receive, the higher that business's unemployment tax is going to be. Known as the "experience rating," it is intended to encourage worker retention.

Annual social tax. The social tax accounts for benefit payments the state can't recover through experience taxes. All Washington businesses share this expense, which includes both a flat and graduated tax. ESD calculates the flat social tax every year, using a formula that balances benefits paid, taxes paid and the trust fund's balance. ESD assigns businesses a "graduated social tax" based on their experience rating.

# Including TNCs in unemployment insurance

The workgroup considered several options to possibly include TNCs and TNC drivers within the legal framework of state unemployment insurance. Those options included:

- Applying current law in this sector would mean that drivers meet the definition of being in "employment" and that drivers do not meet the state independent contractor test for purposes of state unemployment insurance.[5]
- Modifying the statute to cover TNC drivers within the state unemployment insurance program, without necessarily labeling the drivers as being within the "employment" of the TNCs.

## Workgroup recommendation

TNCs support the option of modifying the statute. Members of the workgroup have agreed on adding a new section to Chapter 50.04 RCW to read as follows:

> Notwithstanding RCW 50.04.140, services performed by a driver, as defined in RCW 49.46.300, which are facilitated through a digital network, as defined in RCW 49.46.300, shall be deemed to be subject to this title. The same laws and regulations which apply under Title 50 to a relationship meeting the requirements of RCW 50.04.100 shall also apply to the relationship between a driver and a transportation network company, as defined in RCW 49.46.300.

[5] *See Swanson Hay Co. v. Empl. Sec. Dep't*, 1 Wn. App. 2d 174, 180-81, 404 P.3d 517 (2017) (recognizing that different laws have different definitions for who is an employee and who is an independent contractor, and that someone cannot be an independent contractor for unemployment purposes, but still be an independent contractor for other purposes).

### ESD response

The proposed language would accomplish the workgroup's goal of including TNCs and TNC drivers within the legal framework of state unemployment insurance. It would result in TNCs filing quarterly reports and paying unemployment taxes, so drivers could apply their hours and earnings towards an unemployment claim.

## Reporting hours worked

Washingtonians need to work 680 hours in the qualifying period to be eligible for unemployment insurance benefits.[6] It is critical that the number of hours worked, even the hours from multiple types of work, are counted accurately and in full. If workers have even one hour less than 680 hours, they are not entitled to any unemployment benefits.[7]

On a quarterly basis, businesses report to ESD the hours worked for each of their workers.[8] They report only the hours actually worked — not hours when a worker was on-call or on standby.[9] TNCs will need a standard way to calculate hours worked, so they can report accurate information. The workgroup discussed the various ways TNCs record each drivers' time on the platform.

The workgroup identified three categories of hours:

- Available platform time. The time when drivers are logged into the driver platform and available to accept trip requests.[10]
- Dispatch platform time. The travel time to a passenger's location after drivers accept a trip request.[11]
- Passenger platform time. When drivers are transporting one or more passengers.[12]

[6] RCW 50.04.030. A claimant's base year consists of the first four of the last five completed calendar quarters before a claimant filed their initial unemployment claim. RCW 50.04.020. A claimant's alternate base year consists of the last four completed calendar quarters before the claimant filed their initial unemployment claim. *Id*.
[7] Once an individual crosses the 680-hour threshold, the calculation of the amount of unemployment benefits that individual can receive each week is based not on the hours the claimant worked, but the wages the claimant received during their base year. RCW 50.20.120.
[8] RCW 50.12.070(2), WAC 192-310-010(3)(b).
[9] WAC 192-310-040(13).
[10] Seattle Municipal Code (SMC) 14.33.020.
[11] RCW 49.46.300(1)(g).
[12] RCW 49.46.300(1)(r).

Workgroup members all agreed that dispatch platform time and passenger platform time should count towards the hours a TNC driver worked.

There was discussion about what, if any, available platform time should count toward hours worked:

- TNCs noted that drivers can perform personal tasks during this period and are under no obligation to accept a trip request. They can also be in "available platform time" for multiple TNC companies or other platform companies at the same time.
- Labor representatives noted that drivers are often engaged in activities critical to performing work during this time. These activities include sitting in line at the airport to pick up passengers, circling the block before another trip request is available or cleaning the car in between passengers.

TNCs may have difficulty knowing when a driver is engaged in work-related activities, for which a driver's hours should be counted, during "available platform time." This would make accurate reporting difficult for TNCs.

### Workgroup recommendation

TNC and driver representatives reached agreement that, for purposes of unemployment insurance only, TNCs should calculate and report the hours that drivers work as "passenger platform time X 2." Doubling "passenger platform time," is a compromise intended to create an easy, clear standard that will indirectly capture hours worked in "dispatch platform time" as well as in "available platform time."

### ESD response

ESD can formalize this recommendation through the administrative rulemaking process, most likely through amendments to WAC 192-310-040, which governs how businesses must report hours worked.

## Federal requirements for tax rates, benefit charges

Federal standards dictate key requirements for the operation of a state unemployment insurance system. Each of these following requirements are important for understanding states' limitations to adjust tax rates for a particular industry or work sector.

- States must meet federal criteria for businesses to get federal tax credits.

- States must calculate tax rates based on experience.
- Non-charging of benefits must be reasonable and in relation to experience rating.
- States must apply uniform methods to calculate tax rates.

Federal tax credits. The federal unemployment tax rate for businesses is 6.00% on the first $7,000 that a business pays its workers.[13] However, businesses may claim a 90% credit on the federal unemployment tax if they pay state unemployment taxes to a state unemployment agency that meets certain federal criteria.[14] This means that if a state's unemployment laws do not conform to federal standards, businesses pay $420 per worker in federal unemployment taxes instead of $42 per worker.

States must calculate tax rates based on experience. Federal law requires states to calculate a business's tax rates based on their "experience with respect to unemployment."[15] Washington meets this "experience rating" requirement through a calculation that charges a business for unemployment benefits claimed by its staff. To administer these laws, ESD:

- Charges businesses a proportional amount for every dollar a former worker receives in unemployment benefits.
- Calculates the annual experience rate by adding all benefit charges from the previous four fiscal years and dividing this total by the business's total taxable wages from the previous four fiscal years.
    - This derives a six-digit decimal called a "benefit ratio."[16]
    - This benefit ratio falls into 1 of 40 rate classes, each of which has a specific experience rate assigned to it.[17]

For example:

- If a business has a benefit ratio of 0.000000, ESD would assign rate class 1. This business would pay an experience rate of 0%.
- If a business has a benefit ratio of 0.057500 or higher, ESD would assign rate class 40. This business would pay an experience rate of 5.40%.[18]

---

[13] 26 U.S.C. §§ 3301, 3306(b)(1).
[14] 26 U.S.C. § 3302.
[15] 26 U.S.C. § 3303(a)(1). *See also* U.S. Dep't of Labor, Unemployment Insurance Program Letter (UIPL) 29-83, Attachment, (June 23, 1983) (providing a summary of the different federally-approved ways states measure unemployment experience).
[16] RCW 50.29.027.
[17] RCW 50.29.025(1)(a).
[18] *Id*.

Non-charging of benefits must be reasonable and in relation to experience rating. In specific circumstances, federal law allows states to not charge businesses for benefits paid to their former workers. This is called "non-charging" and it occurs when both of the following apply:

- It is not "reasonable" to charge workers' benefits to an individual business.
- The benefit charging still reasonably measures a business's relative unemployment risk.[19]

Washington relieves businesses of benefit charges in limited cases. Examples include:

- A business continues to employ a claimant on a regularly scheduled, permanent, part-time basis.
- A worker quits work for a good-cause reason that isn't attributable to the business.
- A business discharges a worker for misconduct.
- A business discharges a worker due to an inability to satisfy a job prerequisite required by law or administrative rule.[20]

States must apply uniform methods to calculate tax rates. Federal requirements dictate that a "uniform method" be used to calculate tax rates.[21]

A state violates this "uniform method" requirement when the formula used to calculate tax rates applies to some businesses but not others.[22] For example, Oregon was found to have violated this requirement when it created a special benefit charging provision that only applied to food processors and not to other business.[23]

Also, states are not allowed to create different taxable wages bases, as that would "produce distortions of the measurement of employers' experience rating."[24]

---

[19] U.S. Department of Labor, Unemployment Insurance Program Letter No. 29-83, Attachment (June 23, 1983); Federal Security Agency, Unemployment Compensation Program Letter No. 78 (Dec. 29, 1944).
[20] RCW 50.29.021(3)(a)(i), (ii), (iv), (viii).
[21] U.S. Department of Labor, Unemployment Insurance Program Letter No. 29-83, Change 1 (Sept. 24, 1991). "A uniform method of measuring experience is essential in order to assure that a State's experience rating system measures the experience of each employer relative to the experience of all other employers subject to the State's system, so that each employer's contribution rate may be said to be based upon '[their] experience.'" *Id*.
[22] *Id*.
[23] U.S. Department of Labor, Unemployment Insurance Program Letter No. 24-77, Attachment (Apr. 5, 1977).
[24] U.S. Department of Labor, Unemployment Insurance Program Letter No. 15-84 (Feb. 17, 1984).

### Workgroup discussion

The workgroup discussed multiple ways of adjusting tax charging and calculations to accommodate TNCs. TNCs took the position that federal law would not be implicated if a unique tax basis and/or alternative experience rating applied to TNCs. The TNCs reasoned that drivers are not "employees" of TNCs under federal and state law, and since the Federal Unemployment Tax Act only applies to "employees" as defined by the Internal Revenue Service's code, a unique unemployment tax for TNCs could be established.

### ESD response

Federal law requires that if a business is "subject to the state [unemployment] law," then that business's tax rate must be based on its experience with unemployment.[25] It does not matter if the business is exempted from or required to pay federal unemployment taxes, since federal unemployment law taxes some wages that are exempted from state law, and vice versa.[26]

Therefore, if TNC drivers are going to be covered by Washington's unemployment insurance system, then the taxes TNCs pay on the remuneration paid to those drivers need to be calculated in the same way as all other contributing businesses. Otherwise, Washington would risk being out of conformity with the federal experience rating requirements. As a result, ESD recommends against making adjustments to taxable wage bases and tax rate calculations.

## Relief of benefit charges

### Workgroup discussion

TNCs raised a concern about whether they should be charged for benefits when:

- A driver, whose primary work is elsewhere, is laid off from that job.
- The driver is eligible for benefits based on that separation.
- The TNC receives a proportion of those benefit charges because the claimant has TNC wages in their base or alternate base year.

[25] 26 U.S.C. § 3303(a). See also U.S. Department of Labor, Unemployment Insurance Program Letter No. 29-83, Change 1 (Sept. 24, 1991) (explaining state need to use a uniform method of measuring experience across all employers "subject to the State's system").
[26] *See e.g.* 26 U.S.C. § 3306(b)(11) (exempting from federal unemployment taxes "remuneration for agricultural labor paid in any medium other than cash;" state unemployment law does not exempt these wages); RCW 50.04.246 (exempting amateur sports officials from state unemployment coverage, even though wages paid to amateur sports officials are not exempted from federal unemployment taxes).

TNCs asked ESD to consider changes to rules and statutes associated with proportional charging. Proposed changes included relieving such benefit charges and the associated socialized cost of doing so, as well as the administrative burden of managing an increased number of charging relief requests from TNCs. For example, one proposal by TNCs was to grant automatic relief of benefit charges if a business is responsible for only a tiny percent of the remuneration in a claimant's base year.

## ESD response

Federal law requires that states grant relief of benefit charges only when:

- It is not reasonable to charge those benefits to a business.
- And when granting relief does not frustrate the principle of measuring the business's unemployment risk.

Granting relief of benefit charges because a business is responsible for only a small portion of the remuneration on the claim would be inconsistent with these principles. Ultimately, when a business lays off workers, that causes those workers to be unemployed. This would still create an unemployment risk, regardless of the amount of remuneration the business paid the claimant before the layoff occurred.

ESD recognizes that requiring TNCs to affirmatively request relief of benefit charges every time, especially when they may only be responsible for a tiny percentage of the remuneration in the claimant's base year, creates an administrative burden on both TNCs and ESD. Because of this, ESD is committed to working with TNCs to explore operational efficiencies.

When workers file an unemployment claim and driving for a TNC was only a small percent of the remuneration in their base year, it's likely that one of two common scenarios occurred.

It could be that workers try driving for a TNC, do not enjoy the work, leave the platform and then work for other businesses long enough that quitting their TNC work does not disqualify them from receiving benefits.[27] In this scenario, the TNC would most likely be eligible for relief of benefit charges, because the driver voluntarily quit for reasons not attributable to the TNC.[28]

In the second scenario, workers could drive for a TNC on a part-time basis before they lose their primary job. After being laid off, they could continue driving part-time for the TNC. While

[27] A claimant who, after voluntarily quitting work without good cause, will no longer be disqualified from receiving benefits after seven weeks have passed and the claimant has earned seven times their weekly benefit amount from other work. RCW 50.20.050(2)(a).
[28] RCW 50.29.021(3)(a)(i).

state statute does permit businesses to receive relief of benefit charges if the claimant "continues to be employed on a regularly scheduled permanent part-time basis,"[29] TNC drivers do not work a regular schedule, so TNCs would not qualify for relief of benefit charges in this second scenario. However, the Legislature could amend state statute to remove the requirement that a claimant be "regularly scheduled." For example, Oregon grants relief of benefit charges to businesses if all of the following apply:

a) The employer furnished part-time work to the individual during the base year;
b) The individual has become eligible for benefits because of loss of employment with one or more other employers; and
c) The employer has continued to furnish part-time work to the individual in substantially the same amount as during the individual's base year.[30]

If the Legislature replaced Washington's existing statute with Oregon's provision, it would be more likely for TNCs and other businesses to be relieved of benefit charges if their part-time workers are laid off from their primary jobs.[31] Those costs would then be socialized across all Washington businesses.

ESD acknowledges the policy value in amending state statute to mirror Oregon's.

# Job separations

How workers separate from their job affects their eligibility for benefits as well as the experience rating of the businesses they work for.

## Voluntary quits

What constitutes a "good cause" quit is limited to 13 specific reasons set in statute.[32] This only applies when workers have "left work." In statute, this means workers have severed and completely terminated the relationship through their own voluntary and unilateral action.[33]

[29] RCW 50.29.021(3)(a)(iv), (v).
[30] ORS 657.471(9).
[31] The Legislature would likely need to change both RCW 50.29.021(3)(a)(iv) (providing benefit charge relief to part-time employers in the claimant's original base year) and RCW 50.29.021(3)(a)(v) (providing benefit charge relief to part-time employers if the claimant qualifies for a second consecutive base year).
[32] RCW 50.20.050(2)(b), (3); *Campbell v. State Dep't of Employment Sec.*, 174 Wn. App. 210, 216-17, 297 P.3d 757 (2013); *In re Meyer*, Empl. Sec. Comm'r Dec.2d 1034 (2020).
[33] *In re Zarrabi*, Empl. Sec. Comm'r Dec.2d 885 (2001).

This is an important distinction. In some cases, benefits are not charged to a business's experience rate when workers quit for good cause.[34]

### Workgroup discussion

The workgroup discussed whether a clear line could be established to help determine when a TNC driver has severed and completely terminated their relationship with a TNC. TNCs brought up the fact that drivers tend to simply stop using the app. Rarely do they inform the TNC of their intent to quit. Drivers can stop and resume use of the app, even after long periods. This makes it impossible to know if they have completely severed their relationship with the TNC, or if they are just taking a break.

### ESD response

ESD does not recommend changing the state's UI voluntary quit laws for TNCs. Already, ESD must consider the totality of circumstances to determine if workers intended to quit. If current statutes applied to TNCs, ESD would contact both parties — the drivers and the TNCs — to gather all necessary facts and evidence before determining intent when they stop logging onto the TNC platform.

TNCs, as part of their own individual contracts with TNC drivers, may have their own guidelines for how frequently drivers must log onto the platform. ESD would determine drivers have voluntarily quit working for TNCs if the results of an investigation confirmed that all the following applied:

- The TNC warned their drivers that failure to meet guidelines for frequency of logging onto the platform will result in deactivation.
- The driver intentionally fails to meet those guidelines

Each TNC would need to set these guidelines according to their own business needs. ESD does not recommend applying any one-size-fits-all rules.

## Quitting due to change in worksite

Existing rules state that, in order for a claimant to have good cause to quit due to a change in worksite, the location "must have changed due to employer action."[35]

[34] RCW 50.29.021(1)(c), (3)(a)(i); WAC 192-320-070.
[35] WAC 192-150-125(1).

## Workgroup discussion

The workgroup considered several suggestions for adjusting the 13 allowable reasons to quit for good cause. For example, TNCs proposed that ESD adopt a rule categorically excluding TNC drivers from being able to quit with good cause due to a change in the claimant's worksite. The reasoning was that TNC drivers are free to drive anywhere at any time without input or direction from TNCs.[36]

## ESD response

ESD does not recommend adopting this proposed rule, as existing rules already address this situation. Under current rules, if TNCs do not mandate a change in location, drivers would not have good cause to quit.

# Quitting due to deterioration in worksite safety

Under current rules, there are two conditions, both of which must apply, for determining good cause due to a deterioration in worksite safety:

- Claimants must have reported the safety deterioration to the business they work for.
- The business failed to correct the hazards within a reasonable amount of time.[37]

## Workgroup discussion

TNCs proposed that ESD adopt rules for determining good cause when drivers quit due to a deterioration in worksite safety. The workgroup's rationale for this suggestion was that the worksite for TNC drivers is their personal vehicle, unless the driver is renting the vehicle through a program associated with the TNC.

Labor believes the actions of TNCs can sometimes affect the safety of personal vehicles, such as when TNCs adopted policies related to passengers wearing masks in vehicles.[38] However,

[36] RCW 50.20.050(2)(b)(vii) says a claimant has good cause to voluntarily quit if "the claimant's worksite changed, such change caused a material increase in distance or difficulty of travel, and, after the change, the commute was greater than is customary for workers in the individual's job classification and labor market."
[37] RCW 50.20.050(2)(b)(viii).
[38] *See* Adam Satariano and Melina Delkic, *Uber and Lyft End Mask Requirements for Riders and Drivers*, N.Y. TIMES (Apr. 19, 2022) *available at* https://www.nytimes.com/2022/04/19/business/uber-mask-requirements.html

TNCs have a limited ability to correct safety hazards in drivers' personal vehicles. An example is when drivers allow their brake pads to deteriorate.

### ESD response

Clarification through rule may be warranted to address whether a TNC driver has good cause to quit due to a deterioration in worksite safety. The existing language appears to assume that businesses are in a position to correct safety hazards at their worksites. It doesn't account for situations where businesses are unable to do so.

## Quitting due to reduction in hours, compensation by 25% or more

Current statutory language gives claimants good cause to quit if "the claimant's *usual* compensation" or "the claimant's *usual* hours" were reduced by 25% or more.[39] Current rules require that "employer action" be the cause for reduction in either hours or compensation."[40]

### Workgroup discussion

The workgroup agreed that what constitutes "usual" hours or compensation, and what constitutes "employer action" may prove challenging to determine in a TNC context.

Drivers. Drivers proposed TNC-specific rules to measure "usual hours" by calculating the number of hours with a passenger in a vehicle per 40 hours of logged on time, while still maintaining a similar "trip acceptance rate." Based on this standard calculation, a reduction in trips offered through a TNC platform could then be counted as an "employer action" for the purpose of determining a good cause reason to quit.

TNCs. TNCs provided a counterproposal, suggesting that the rules to measure "usual hours" be based on total ride volume per quarter. Then a reduction of total rides in the market below the threshold could then be counted as an "employer action" for the purpose of determining a good cause reason to quit.

### ESD response

ESD agrees that rulemaking may be appropriate to help clarify when TNC drivers have good cause to quit working for a TNC due to a 25% or more reduction in usual compensation or

[39] RCW 50.20.050(2)(b)(v), (vi).
[40] WAC 192-150-115(3), 192-150-120(2).

hours. ESD would follow the rulemaking process, gathering feedback from the public and stakeholders to develop specific criteria.

It should be noted, however, that individual drivers who suffer a reduction in compensation would not need to "quit" or completely sever their relationship with the TNC in order to be eligible for benefits. A driver can still be eligible for benefits simply if the amount of money they are receiving in the week is less than one and one-third time their weekly unemployment benefit.[41] As discussed below, these individuals would still need to show they are able and available for work, are actively seeking work, and have not refused a suitable offer of work during the claimed weeks. This would apply whether or not the circumstance would be considered a "quit."

# Discharges for misconduct

The prevailing definition of "misconduct" across states is the definition adopted by the Wisconsin Supreme Court in its *Boynton Cab* decision issued in 1941.[42] In 2003, the Washington State Legislature created a statutory definition of "misconduct" that essentially codified this *Boynton Cab* standard, such as the distinction between "inadvertence or ordinary negligence" and "carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest."[43]

The biggest difference is that Washington's statute adds a non-exclusive list of examples of behavior that would constitute misconduct. For example, "dishonesty related to employment, including but not limited to deliberate falsification of company records, theft, deliberate deception or lying."[44]

## Workgroup agreement on 'discharge' definition

Within the context of TNCs, the workgroup agreed to define "discharge" as when a TNC "deactivates" a driver by restricting their access to the TNC's driver platform.[45]

[41] RCW 50.04.310(1)(a).
[42] *Boynton Cab Co. v. Neubeck*, 296 N.W. 636, 640 (Wis. 1941); U.S. Dep't of Labor, *Comparison of State Unemployment Laws 2021*, Chapter 5 Nonmonetary Eligibility, p. 5-11 (2021) *available at* https://oui.doleta.gov/unemploy/pdf/uilawcompar/2021/nonmonetary.pdf.
[43] RCW 50.04.294(1)(d), (3)(b).
[44] RCW 50.04.294(2).
[45] See RCW 49.46.300(1)(a) (providing statutory definition of "account deactivation").

## TNC recommendations

TNCs proposed expanding the statutory definition of "misconduct" to include the following five examples:

1. Deactivation related to a verified allegation of discrimination, harassment, and assault, including sexual harassment or harassment due to someone's membership in a protected class, or physical or sexual assault, or willful or knowing commitment of fraud.

2. Deactivation related to a verified allegation that the driver was under the influence of drugs or alcohol.[46]

3. Deactivation due to any conduct or attempted conduct by the TNC driver that results in the TNC driver claimant being included on any list or database compiled by a sharing safety program established by two or more network companies to document sexual misconduct, physical assault or other serious customer safety concerns raised by the conduct of TNC drivers, provided that any of the following apply:

    i. The TNC driver is duly convicted of a crime arising from such conduct or has signed a statement admitting that he or she has committed such conduct;

    ii. The TNC driver has failed to issue a timely challenge to their inclusion in such a list or database using grievance or appeal procedures established by the sharing program.; or

    iii. The TNC driver's inclusion on such list or database has been conclusively and finally determined through the grievance or appeal procedures established by the sharing safety program or dispute resolution center appeals process.

4. Deactivation related to unsafe driving that rises to the level of substantial negligence.

5. Deactivation related to failure to satisfy legal and/or regulatory requirements and/or pass a background check, or failure to meet minimum requirements for access to TNC platforms as set forth by TNCs in established policies.

[46] For example, state law requires TNCs to implement a "zero tolerance policy" for drivers who use drugs or alcohol while on their platform. RCW 46.72B.080. State law also requires TNCs to bar individuals who have a DUI conviction in the past seven years from being a driver on the platform. RCW 46.72B.090(2)(b)(iv).

## ESD response

Because most of these reasons are largely covered in current statute, ESD does not recommend amending statutes or rules related to the definition of misconduct.

- Workers engaging in unsafe or illegal activities while on the job, such as discrimination, harassment, assault, fraud, and driving under the influence, already meet statutory definitions of misconduct.[47]
- "Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of an employer's interest" is also part of the definition of misconduct.[48]
- In most circumstances, violations of a known and reasonable company rule is also misconduct.[49] In the following example, TNC drivers would be disqualified due to misconduct in nearly all cases:
    - A TNC informs drivers of a policy that they will be deactivated if they engage in conduct that results in them being included on a list compiled by a sharing safety program — even when those actions occur off-duty.
    - A driver engages in those actions and ends up on that list will be disqualified due to misconduct.[50]
- It isn't always misconduct when workers fail to satisfy a legally required job prerequisite.[51] Either way, if that worker is discharged, the business is entitled to relief of benefit charges for that claimant, so as not to affect its experience rating account and tax rate.[52]

[47] RCW 50.04.294(1)(b), (1)(c), (2)(e), (2)(f), (2)(g).
[48] RCW 50.04.294(1)(d), (3)(b).
[49] RCW 50.04.294(2)(f).
[50] *See In re Brooks*, Empl. Sec. Comm'r Dec.2d 967 (2011) (explaining how off-duty actions that violate workplace policy can constitute misconduct).
[51] *Compare In re Moncrief*, Empl. Sec. Comm'r Dec.2d 997 (2015) (employee's loss of federal security clearance was misconduct) *with Gerimonte v. Valley Pines Retirement Home*, 2018 WL 2753183 (Wn. Ct. App. 2018) (employee's failure to pass background check required for employment was not misconduct).
[52] RCW 50.29.021(3)(a)(viii).

# Able, available and actively seeking work

Under federal law, benefits can only be paid to claimants who are able and available for work during the week for which they filed their unemployment claim.[53] Broadly speaking:

- "Able to work" means the claimant is "physically and mentally able to perform work."[54]
- "Available for work" means the claimant is "ready and willing to accept suitable work."[55]

In Washington, claimants are considered able and available for work if they:

- Can accept and report for any suitable work within their labor market.[56]
- Are willing to accept suitable full-time, part-time and temporary work during the hours and days customary for their occupation. Claimants do not have to accept part-time or temporary work if it would substantially interfere with returning to their regular occupation.[57]
- Are available for work for at least forty hours during the week, which must also be hours that are customary for their occupation.[58]
- They do not impose any conditions on their availability that substantially reduce or limit their opportunity to return to work at the earliest possible time.[59]

Washington mandates that claimants actively search for suitable work by conducting at least three work search activities per week.[60] All claimants must keep a record or log of their job search contacts and activities that contain "sufficient information to establish to the Department's satisfaction" that they meet the job search requirements.[61] ESD can audit claimants' job search logs.[62]

---

[53] 20 C.F.R. § 604.3(a).
[54] U.S. Department of Labor, ET Handbook No. 301, 5th Ed., p. VI-7 (July 29, 2005).
[55] *Id*.
[56] WAC 192-170-010(1)(b).
[57] WAC 192-170-010(1)(a).
[58] WAC 192-170-010(1)(d).
[59] WAC 192-170-010(1)(c).
[60] RCW 50.20.010(1)(c)(i), 50.20.240(1)(b); WAC 192-180-010(3)(a); In re Meyer, Empl. Sec. Comm'r Dec.2d 1034 (2020). Federal law does not dictate that states require claimants to be actively seeking work in order to be eligible for unemployment benefits. 20 C.F.R. § 604.5(h).
[61] WAC 192-180-015(1), (2).
[62] WAC 192-180-025.

"Suitable" work is also an important distinction. Generally speaking, "suitable work" is "in keeping with the individual's prior work experience, education or training."[63] When assessing whether work is suitable, Washington looks at a number of factors, including the:

- Risk to the individual's health, safety, and morals.
- Individual's physical fitness.
- Individual's work shifts.
- Length of time the individual has been unemployed.[64]

The definitions of what constitutes suitable work focus on what is suitable for the "individual." As a result, there is wide variation for what constitutes suitable work, even claimants who work within the same profession.

The workgroup considered a range of suggestions related to TNC drivers being able, available and actively seeking work. Ultimately, the workgroup narrowed in on three proposals for this report, which pertain to being able and actively seeking work.

## Able to work

The workgroup discussed a proposal that would allow TNC drivers to still be considered able to work, even if their personal vehicle is inoperable.

### Workgroup discussion

Driver representatives cautioned ESD against adopting a rule or policy that automatically determines a TNC driver is not able to work if their personal vehicle breaks down. Driver representatives noted there are still suitable jobs available to TNC drivers who do not have their own personal vehicle. They provided examples such as driving buses for schools and transit. In some cases, drivers can also rent a vehicle through a rental program associated with a TNC.

### ESD response

ESD agrees that drivers who are unable to work using a particular TNC platform because their personal vehicle is inoperable may still be able to perform other suitable work. Therefore, ESD recommends that it continue its current practice of assessing whether a person is able and available for suitable work on an individualized, case-by-case basis.

[63] RCW 50.20.100(1).
[64] RCW 50.20.100(1); WAC 192-170-050(1)(c).

## Actively seeking work

The workgroup discussed proposals about work search activities and requirements.

### Work search activities

At present, ESD's rules do not list logging onto a TNC platform to look for work, or logging onto a similar gig economy platform to look for work, as an acceptable work search activity.[65]

#### *Workgroup recommendation*

The workgroup recommended adding to the list of acceptable work search activities, so it includes logging onto a TNC — or gig economy platform — to look for work.

#### *ESD response*

ESD agrees with the recommendation, which can be accomplished through the administrative rulemaking process. This would allow ESD to further engage with interested stakeholders on two points:

- The required level of effort for TNC drivers to find and accept rides on a TNC platform
- How TNC drivers would need to document their efforts.

### Work search requirements

Current rules require claimants to maintain a weekly log of their job search activities. ESD also retains the right to their logs.

#### *Workgroup discussion*

TNCs recommended ESD establish work search requirements specific to TNC drivers, such as demonstrating reasonable efforts to gain access to other TNC and gig economy platforms.

In addition, TNCs suggested that drivers be required to maintain and provide proof of their work search efforts. The workgroup discussed options such as:

- A written record consisting of an itemized list of network company and gig platforms the worker accessed.
- The number of weekly hours the claimant was logged onto such platforms.
- The number of rides accepted or rejected.

[65] *See* WAC 192-180-010.

The rationale for these suggestions was that work search for full-time TNC drivers is unique due to the nature of the work being available to a driver at all times.

### *ESD response*

ESD does not recommend adopting TNC-specific rules that require all drivers to focus on gaining access to TNC platforms. This would be inconsistent with the more individualized approach to helping claimants return to suitable work.

The ultimate goal of the work search requirement is for claimants to be "actively engaged in searching for work," but the details of those work search efforts will vary from person to person.[66] For example, Claimants whose sole work experience consists of driving for a TNC are likely to focus their work search and availability on TNCs and TNC-adjacent work. On the other hand, claimants who only occasionally drive for a TNC as a supplement to their primary full-time profession, are more likely to focus their work search and availability on their primary full-time profession.

Ultimately, ESD wants to continue engaging with the workgroup and the Unemployment Insurance Advisory Committee (UIAC). ESD would also monitor TNC drivers as they file unemployment claims, with a specific focus on how they demonstrate meeting requirements of being able, available and actively seeking work. Continued stakeholder engagement, combined with data from TNC drivers' experiences, would support workgroup members and ESD in making recommendations on if or how to adjust statutes, rules and policies on these issues moving forward.

## Refusing offers of suitable work

A claimant who does not accept an offer of suitable work without good cause is disqualified from receiving unemployment benefits.[67] Disqualification requires that all of the following apply:

- The individual must be offered something more than an invitation to apply for a job or an advertised "opportunity for employment" that is missing key details like the pay, hours, or date to commence work.[68]
- The job being offered must meet the definition of "suitable work."[69]

[66] RCW 50.20.240(1)(a).
[67] RCW 50.20.080
[68] *In re Berday*, Empl. Sec. Comm'r Dec.2d 921 (2008); *In re Mandac*, Empl. Sec. Comm'r Dec2d 680 (1981).
[69] RCW 50.20.080; *In re Eichelberg*, Empl. Sec. Comm'r Dec.2d 946 (2010).

- The pay, hours, or other conditions of the work cannot be substantially less favorable to the individual than those prevailing for similar work in the individual's locality.[70]
- The individual cannot currently be working for the business offering the work.[71]
- The individual must have a good cause reason for refusing the job, which is generally measured using a reasonableness standard.[72]

## Stakeholder feedback

Labor and driver representatives on the workgroup suggested that not all gig economy jobs may be suitable for every TNC driver. Depending on the circumstances, a TNC driver may have good cause to refuse a solicitation of other gig economy work.

For example, an unemployed TNC driver may receive only a promotion or advertisement for gig economy work, rather than a true job offer. Promotions do not meet the standards of a true job offer.

Additionally, some gig economy jobs may provide remuneration, hours, and working conditions that are substantially less favorable for an individual TNC driver who has lost work. Typically, app-based delivery work is paid less than passenger transportation, while TNC drivers have higher costs of operation. Often, TNC drivers must have newer, more expensive vehicles for passenger transportation. It may not be financially viable for a driver to repurpose a TNC-eligible vehicle with higher costs of operation for a delivery job with lower pay.

## ESD response

These suggestions do not necessitate a change to existing rule or policy. Existing law already establishes that an advertisement for a job does not count as a true job offer. And when determining suitability, ESD already takes an individualized approach for considering if the:

- Terms and conditions of the job being offered are substantially less favorable than the prevailing terms and conditions in the local labor market
- Claimant has good cause to refuse an offer of suitable work.

---

[70] RCW 50.20.110(2); U.S. Department of Labor, Unemployment Insurance Program Letter No. 41-98 (August 17, 1998).
[71] In re Ulver, Empl. Sec. Comm'r Dec.2d 1028 (2019); In re Taylor, Empl. Sec. Comm'r Dec.2d 983 (2012).
[72] *In re Tamburello*, Empl. Sec. Comm'r Dec.2d 134 (1976); *In re Nielsen*, Empl. Sec. Comm'r Dec.2d 845 (1970).

# Paid Family and Medical Leave

Paid Family and Medical Leave (Paid Leave) is a program that provides paid time off for those who meet eligibility requirements when they experience a serious health condition, need time to care for a family member with a serious health condition or bond with a new child. Paid Leave is also available for certain military-related events.

## Eligibility

Individuals can receive Paid Leave benefits if they meet eligibility requirements and experience a qualifying event.[73] To be eligible, a person must have worked at least 820 hours in Washington during either the:

- First four of the last five completed calendar quarters.
- Last four completed calendar quarters immediately before the application for leave is submitted.[74]

## Qualifying event

To receive paid family or medical leave benefits, a person must experience a qualifying event.

Family leave can be used for any of the following reasons:

- To provide care for a family member due to the family member's serious health condition.[75]
- To bond with the individual's child during the first 12 months after the child's birth, or the first 12 months after the placement of a child under the age of 18 with the individual.[76]
- Because of a qualifying military exigency as permitted under federal Family Medical Leave Act.[77]

[73] RCW 50A.15.010; WAC 192-500-080, 192-610-010.
[74] RCW 50A.05.010(21); 50A.15.010.
[75] RCW 50A.15.010(10)(a)
[76] RCW 50A.15.010(10)(b)
[77] RCW 50A.15.010(10)(c)

Medical leave can be used for a worker's own serious health condition, as determined by a healthcare provider.[78] A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves circumstances such as:

- An illness that incapacitates the person for more than three consecutive days.[79]
- A chronic serious health condition (like diabetes).[80]
- Incapacity during pregnancy or for prenatal care.[81]
- Treatment for substance abuse.[82]
- Any period of absence from work to receive and recover from treatments, such as radiation, chemotherapy, or dialysis.[83]

Medical leave can also be used for the postnatal period, or the first six weeks after a person has given birth.[84] Certification of a serious health condition is not required for the postnatal period.

## Elective coverage

Self-employed people can elect coverage under Paid Leave for an initial period of three years, then subsequent periods of no less than one year.[85] Self-Employed people who elect coverage are responsible to report all of their self-employment wages and pay the worker share of the Paid Leave premiums on a quarterly basis.[86] After the coverage period ends, they may withdraw their coverage.[87] If they fail to file reports and pay premiums, ESD may cancel their elective coverage.[88]

---

[78] RCW 50A.15.010(15)
[79] RCW 50A.15.010(23)(a)(ii)(A)
[80] RCW 50A.15.010(23)(a)(ii)(C)
[81] RCW 50A.15.010(23)(a)(ii)(B)
[82] RCW 50A.15.010(23)(g)
[83] RCW 50A.05.010(23)(a)(ii)(E). The existence of a serious health condition must be certified by a health care provider. WAC 192-610-020. See WAC 192-500-090 (providing list of approved "health care providers" for purposes of Paid Leave).
[84] RCW 50A.15.020(4)(a). Certification of a serious health condition is not required for the postnatal period. RCW 50A.15.020(4)(b).
[85] RCW 50A.10.010(1); WAC 192-510-010(1).
[86] RCW 50A.10.010(1); WAC 192-510-031.
[87] RCW 50A.10.010(2).
[88] RCW 50A.10.010(3).

Self-employed people that elect coverage must, like anyone else who applies for benefits, experience a qualifying event and have worked at least 820 hours during the qualifying period.[89] To calculate people's self-employed hours, ESD divides their reported earnings by the state's minimum wage.[90]

Any federally recognized tribe in Washington may also elect program coverage.[91]

## Premiums

In most cases, premium responsibility is shared between workers and businesses using premium rate calculations fixed in statute.[92]

- For 2019 - 2021, the premium rate was set at 0.4% of wages paid.
- In 2022, the premium rate was set at 0.6% of wages paid, and in 2023, the rate will be 0.8%.[93]

To calculate the rate, statute instructs ESD to divide the balance of the family and medical leave insurance account as of September 30 by the total covered wages remitted by employers and those electing coverage.[94]

Businesses with fifty or more workers fund 55% of medical leave premiums, while workers fund 45% of medical leave premiums and 100% of family leave premiums.[95] When benefits launched in 2020, one-third of the collected premiums were for family leave and two-thirds of collected premiums were for medical leave.[96]

The premium rate set for 2022 was 0.6%, and of the premiums collected so far:

- 51% have been for family leave.
- 49% have been for medical leave.[97]

---

[89] RCW 50A.05.010(21); RCW 50A.10.010(1).
[90] WAC 192-510-030(1).
[91] RCW 50A.10.020; WAC 192-510-010(1).
[92] RCW 50A.10.030.
[93] RCW 50A.10.030(3)(a); https://paidleave.wa.gov/help-center/employers/premiums.
[94] RCW 50A.10.030(6).
[95] RCW 50A.10.030(3)(b), (3)(c), (5)(a).
[96] RCW 50A.10.030(1)(b), (c).
[97] Employment Security Department, Washington Paid Family & Medical Leave Annual Report, p. 11 (Dec. 2021) available at https://media.esd.wa.gov/esdwa/Default/ESDWAGOV/newsroom/Legislative-resources/2021-paid-family-and-medical-leave-annual-report-to-legislature.pdf.

Also this year, workers have paid around 73% of the premiums and businesses have paid around 27%.[98]

## Worker benefits

During a claim year, eligible employees can receive up to any one of the following three amounts of leave:

- 12 weeks of family OR medical leave.
- 16 weeks of combined medical and family leave.
- 18 weeks combined medical and family leave (16 weeks) plus 2 weeks for pregnancy or birth complications.[99]

ESD calculates typical workweek hours if workers eligible for benefits.[100] Full-time salaried employees' typical workweek hours are determined to be 40 hours per week.[101] For all other applicants, ESD will look at their qualifying period, add all reported hours, and divide by 52 to determine typical work week hours.[102]

ESD takes the following steps to calculate the benefit amount an applicant will receive each week:

1. Review the applicant's qualifying period.
2. Identify the top two highest earning quarters.
3. Add all wages reported for those two quarters.
4. Divide by 26.[103]

Workers can receive up to 90% of their average weekly wage, or up to $1,327 for weekly claims which is the maximum benefit amount for 2022.[104] On an annual basis, ESD adjusts the maximum benefit amount so that it is 90% of the state's average weekly wage.[105]

---

[98] *Id.*
[99] RCW 50A.15.020(3).
[100] RCW 50A.15.020(2).
[101] RCW 50A.05.010(28)(b); WAC 192-610-050(1)(a).
[102] RCW 50A.05.010(28)(a); WAC 192-610-050(1)(b).
[103] RCW 50A.05.010(6).
[104] RCW 50A.15.020(5); Employment Security Department, How Much Money Will I Receive? https://paidleave.wa.gov/question/how-much-money-will-i-receive/.
[105] RCW 50A.15.020(6)(a).

# Including TNCs in Paid Family and Medical Leave

ESHB 2076 established a definition of "driver" which specifies for the purposes of numerous statutes, including Paid Leave, that a driver is not an employee or agent of a TNC if certain factors are met.[106] As a result, for claims under current law, ESD will not pay benefits to people based on wages earned as a TNC driver, unless the driver has voluntarily opted into the program through elective coverage and paid premiums.

## Workgroup recommendation

Workgroup members agreed on the importance of aiding TNC drivers' participation in the Paid Leave program. The workgroup proposes a three-year pilot program focused on TNC drivers that would have the following broad terms:

- TNC drivers could opt in to Paid Leave coverage as a self-employed individual.
- Following the end of the calendar quarter, the TNC would make payment for premiums associated with these drivers' TNC work equal to the:
    - Amount of remuneration the TNC paid them in the quarter.
    - Multiplied by the premium rate charged to self-employed persons.
- TNC drivers, if they wanted, could opt to have any other non-TNC work covered by Paid Leave so long as they reported that income and paid the associated premiums.
- If drivers withdrew their Paid Leave coverage, or if ESD canceled their Paid Leave coverage, the TNCs would stop making payments on behalf of the drivers.
- To support this pilot, ESD would share data with TNCs on which drivers:
    - Have elected Paid Leave coverage.
    - Have paid their premiums and coverage has not been withdrawn or cancelled.
- ESD would evaluate the pilot program for impacts on removing barriers to accessing Paid Leave as well as any impacts on trust fund solvency.

[106] Laws of 2022, ch. 281, s. 1(1)(i).

## ESD response

This pilot program allows TNC drivers to receive some support from TNCs to help pay for Paid Leave coverage, which drivers could then combine with other exempt work, such as self-employment, or covered employment for more hours during the qualifying period and a greater Paid Leave benefit. Operational details will still need to be worked out, but ESD and the workgroup agree they will work collaboratively to reach consensus on those operational details. Structured as a time-limited pilot, this proposal allows ESD to work with stakeholders and lawmakers to better understand barriers to access and how to best serve workers in this sector.

There is a risk that this pilot may negatively impact the solvency of the Paid Leave trust fund. ESD has found that people who voluntarily elect Paid Leave coverage receive benefits at roughly five times the rate of employees covered by the statute. Also, those who voluntarily elect coverage do not pay the employer portion of the premium, resulting in fewer premiums for the fund.

This solvency risk could be further exacerbated if a large number of drivers opt in and do not report all their wages. The scale of the risk is unknown and not great enough to prohibit this pilot concept. ESD would monitor the opt-in rate as a result of this pilot program and any impact it has on fund solvency.

## Considerations for implementation

To implement this pilot program, the Legislature would need to amend statutes protecting the confidentiality and privacy of Paid Leave information. This would be necessary for ESD to share information about driver coverage with TNCs.[107] There would also need to be a change to state law to allow drivers who wish only to include just their TNC work in their elective coverage claim, as current rule[108] requires an individual to report all earnings across all types of self-employment.

As of December 2022, it is unclear if a new statute is needed for TNCs to make premium payments to drivers, or if TNCs could do this on their own or through a collective bargaining agreement. Business members of the workgroup expressed a desire that any statutory requirement for TNCs to pay premiums on behalf of drivers, as described in this proposed pilot program, be established in TNC-specific statutes in Chapter 49.46 RCW rather than in the Paid Leave statutes at Title 50A RCW.

[107] *See* Chapter 50A.25 RCW
[108] WAC 192-510-031.

At the end of the recommended three-year pilot period, ESD would report to the Governor and appropriate committees of the Legislature on the participation rate, total premiums paid, total benefits paid, and any policy recommendations based on this data.

# WA Cares Fund

The WA Cares Fund (WA Cares), referred to in statute and rule as a long-term services and supports program, provides a long-term care benefit to Washington workers who have met contribution requirements and need help with activities of daily living. This is the first state-run program of its kind in the nation.

Multiple agencies administer WA Cares. ESD Department will administer exemptions, collect premiums and wage reports, and determine qualified individuals.[109] The Department of Social and Health Services will administer the benefits and manage providers. The Health Care Authority will process payments, track benefit usage, and coordinate benefits.[110] Lastly, the Office of the State Actuary will provide actuarial analysis to support solvency of the program's Trust Fund Account.[111]

## Eligibility

To vest into the program, a person must work and contribute payments for at least 10 years at any point in their life — and without a break of 5 or more years or three of the last six years from the time of application for benefits.[112] Near retirees (those born prior to January 1, 1968) can receive a prorated benefit, for each year they work before retiring, that is equal to one-tenth of the full benefit for each year worked.[113] People must have worked at least 500 hours in a year for it to count towards eligibility.[114] To be eligible for benefits, a person must be at least 18 years old, reside in Washington and require assistance with at least three activities of daily living, as determined by the Department of Social and Health Services.[115]

[109] RCW 50B.04.020(4), 50B.04.055.
[110] RCW 50B.04.020(2).
[111] RCW 50B.04.020(5).
[112] RCW 50B.04.050(1).
[113] RCW 50B.04.050(2).
[114] RCW 50B.04.050(3).
[115] RCW 50B.04.010(6), 50B.04.060(2).

## Elective coverage

Similar to Paid Leave, self-employed people can elect coverage under WA Cares.[116] The definition of "self-employed" for WA Cares is the same as it is for Paid Leave.[117] If they elect coverage, self-employed people must meet the minimum requirements stated above to access program benefits.[118] They will also report wages and pay premiums for WA Cares on their own behalf. [119]

Self-employed people must elect coverage before July 1, 2026, or within 3 years of becoming self-employed for the first time.[120] After electing coverage, they may not withdraw and must continue to pay premiums until they retire from the workforce or are no longer self-employed.[121]

Federally recognized tribes may also elect coverage for all their businesses.[122]

## Exemptions

People who do not want to participate in WA Cares, and who meet certain criteria, may apply for an exemption from the program.[123]

Currently, people who purchased a qualifying long-term care insurance policy before Nov. 1, 2021, may apply for an exemption.[124] People can apply for this exemption through Dec. 31, 2022.[125]

In 2022 the Legislature created four new voluntary exemptions. People who meet the following criteria can apply for an exemption:[126]

- Veterans of the United States military who have a disability rating of 70 percent or greater.[127]

[116] RCW 50B.040.090.
[117] Compare RCW 50A.10.010(1) with RCW 50B.04.090(1).
[118] RCW 50B.04.090(1), (5).
[119] RCW 50B.04.090(1); WAC 192-915-010.
[120] RCW 50B.04.090(1).
[121] RCW 50B.04.090(2); WAC 192-915-005(5).
[122] RCW 50B.04.095.
[123] See RCW 50B.04.055, 50B.04.085.
[124] RCW 50B.04.085(1).
[125] RCW 50B.04.085(2)(a).
[126] Laws of 2022, ch. 2, sec. 2 (Engrossed Substitute House Bill 1733).
[127] RCW 50B.04.055(1)(a).

- Workers who have a spouse or registered domestic partner that is an active-duty service member.
- Temporary workers who hold a nonimmigrant visa.
- Employees that hold a permanent residence outside of Washington.[128]

These exemptions must be discontinued if the conditions or circumstances no longer apply.[129] Workers are responsible for informing businesses if they have an approved exemption. Businesses are responsible for keeping track of workers' exemptions so they don't deduct WA Cares premiums from their wages.[130]

## Premiums

Unlike Paid Leave, only workers pay premiums for WA Cares. Beginning July 1, 2023, workers will contribute 0.58% of their wages.[131] Although businesses do not contribute to WA Cares premiums, they will collect the premiums and report on behalf of their workers the same way they do for Paid Leave.[132]

WA Cares premiums go into a dedicated trust fund that can only be used for WA Cares.[133] Unlike in Paid Leave, which caps the premium deductions at the Social Security cap, there is no cap on wages contributed to the WA Cares program.[134]

## Benefits

Beginning July 1, 2026, eligible beneficiaries can access services and supports costing up to $36,500.[135] This amount will be adjusted annually for inflation.[136] People can use their benefits for a range of services and supports.

Examples include, but are not limited to:

---

[128] RCW 50B.04.055(1)(b)-(d).
[129] RCW 50B.04.055(3)-(6).
[130] RCW 50B.04.055(8)-(9).
[131] RCW 50B.04.080(1).
[132] RCW 50B.04.080(2).
[133] RCW 50B.04.080(6), 50B.04.100.
[134] *Contrast* RCW 50A.10.030(4) (setting maximum wage base for contributions) with RCW 50B.04.080 (containing no provision for a maximum wage base for contributions).
[135] RCW 50B.04.010(3), 50B.04.060(3)(b).
[136] RCW 50B.04.010(3).

- Professional care;
- Home-delivered meals
- Adaptive equipment and technology;
- Rides to the doctor;
- Training family caregivers; and
- Home safety evaluations.[137]

# Including TNCs in WA Cares

Under current law, drivers wishing to be eligible for WA Cares will be required to opt in when elective coverage applications are available following July 1, 2023.

## Workgroup discussion

The workgroup discussed three different WA Cares options for TNC drivers:

1. Modify statute to identify transportation network companies (TNCs) and drivers as entities that participate in WA Cares.
2. Remove Title 50B from the current definition of "driver" in chapter 49.46 RCW and apply the conditions of 50B to drivers as employees of the TNC.
3. Make no changes to laws amended by ESHB 2076. To have coverage, TNC drivers may elect coverage as 'self-employed.'

## Labor perspective

It is good public policy to work towards ensuring TNC drivers, like all workers, have access to long-term care when they need it.

WA Cares is an important new program that is currently overcoming initial hurdles with implementation. At the same time, substantial changes are being made impacting TNC drivers' work to ensure drivers have access to a nation-leading minimum pay standard, labor protections, and the state's safety net.

Sequencing multiple changes in TNC drivers' work lives while the WA Cares program establishes a secure footing would benefit from a deliberate and measured approach. For that reason, we recommend a three-year implementation plan to bring long-term care security to

[137] RCW 50B.04.010(2), 50B.04.060(3)(a).

TNC drivers, providing drivers the same decision-making window afforded to other workers to determine the long-term care solution that best fits their needs.

## Industry perspective

Industry representatives do not believe title 50B (WA Cares) needs to be amended and we suggest Option 3 be utilized.

## ESD response

As the state and the Long-Term Services and Supports (LTSS) Trust Commission continue implementation of WA Cares over the coming years, affected parties should continue to discuss how TNC drivers should be covered by this benefit program.