

LEGISLATIVE REPORT

Unemployment benefits for undocumented workers

DECEMBER 2021



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Executive summary

The Unemployment Insurance program is a federal-state partnership financed by employer state and federal taxes that provides partial wage replacement to workers that lost employment through no fault of their own and are able, available, and actively seeking work on a weekly basis for up to 26 weeks. Federal law prohibits states from providing unemployment benefits to individuals who are not legally authorized to work in the United States, whether unauthorized at the time they were employed or unauthorized at the time of their unemployment claim. Therefore, to provide an unemployment benefit to undocumented workers, Washington would need to create a separate, standalone program using only state funds to pay for benefits and program administration.

The unemployment system is predicated on employers reporting employee names, wages, and hours to the state every quarter. Since employers are not likely to wish to report undocumented individuals they employ and undocumented workers are not likely to wish to report their undocumented status to their employers, an unemployment benefit based off employers reporting their undocumented workers to the state would most likely be unreliable and unsuccessful. A program can, however, be created to provide an unemployment benefit to this population that takes into account a number of unique challenges undocumented individuals face in accessing government benefits. It is estimated that such a program would cost \$11,876,000 over 3 years to stand up, and then once the program reaches full maturity, it would serve approximately 5,300 undocumented workers each year, provide \$79,290,000 in unemployment benefits each year, and cost \$6,268,000 each year to administer.

Even so, there remain other programs within Washington that either already exist or will soon exist that provide economic relief and security to undocumented workers. For example, the Washington COVID-19 Immigrant Relief Fund provided economic benefits to undocumented workers who did not qualify for unemployment benefits due to their immigration status. Maintaining or modifying such programs, could provide financial assistance to such workers who lose income from employment. It is important to note, however, that the Washington COVID-19 Immigrant Relief Fund was established to address the unique and devastating impacts of a global pandemic while the aim of an unemployment benefit program for undocumented workers would be, in part, to ensure that such stop gap measures will not be necessary in the future.

Background

Proviso overview

In the 2021 Operating Budget, the Legislature directed the Employment Security Department (Employment Security) to study the feasibility of replicating an Unemployment Insurance program for and expanding other social net programs to individuals regardless of their citizenship status.¹ The Legislature mandated that the study contain the following components:

- An assessment of the legality of expanding existing programs to serve undocumented individuals and families;²
- A list of programmatic changes that would mitigate barriers and reduce fear of participation;³
- An assessment of the operational and caseload costs associated with replicating or expanding the existing program to serve undocumented individuals. If it is contrary to federal law or not feasible to expand the existing program, then there must be an assessment of operational and caseload costs of the creation of a similar program to serve undocumented individuals;⁴ and
- Recommendations for expanding or replicating existing programs to serve undocumented individuals.⁵

In preparing the report, Employment Security was required to work with the Office of the Governor, the Department of Labor and Industries, the Department of Social and Health Services, and the Department of Commerce.⁶ The proviso required Employment Security to meet at least three times with a group of external stakeholders that included immigrant advocacy groups, labor organizations, workers' rights groups, and legal and policy advocacy groups focused on immigration and employment law.⁷ Furthermore, the proviso mandated that Employment Security hold at least one listening session with members of the community.⁸

¹ ESSB 5092, Laws of 2021, c. 334, s. 225(11), 1223(12)(a).

² *Id.* at s. 1223(12)(b).

³ *Id.* at s. 225(11), 1223(12)(b).

⁴ *Id.*

⁵ *Id.* at s. 1223(12)(c).

⁶ *Id.* at s. 225(11)(a).

⁷ *Id.* at s. 225(11)(b).

⁸ *Id.* at s. 225(11)(c).

Stakeholder meetings

On July 7, 2021, and August 5, 2021, Employment Security, in partnership with the Department of Social and Health Services, the Department of Commerce, the Department of Labor and Industries, and the Office of the Governor, hosted virtual meetings with external stakeholders to discuss the barriers undocumented workers face when attempting to access social safety net programs, and how those programs can be designed to reduce or remove those barriers. Representatives from the following organizations attended one or both meetings:

- Colectiva Legal del Pueblo
- Northwest Immigrant Rights Project
- Northwest Kenyan Community Association
- OneAmerica
- United Farm Workers
- Unemployment Law Project
- Washington Budget and Policy Center
- Washington Community Alliance
- Washington State Labor Council

During the meetings, stakeholders expressed that undocumented workers face unique barriers to accessing social safety net programs. First, an individual's immigration status can be quite fluid, as work permits may expire, requests to renew those permits can be delayed, and changes in federal leadership often lead to changes in the administrative rules governing immigration. This means that, within a short period of time, a person's immigration status can change from authorized, to unauthorized, to authorized again. Second, undocumented individuals are often reluctant to apply for government benefits out of fear that the information they supply in their application will be shared with or accessed by federal immigration officials. Third, even if undocumented workers do try and apply for social safety net benefits, they are less likely to have the documentation necessary to support their application, such as proof of employment, proof of income, or proof of identity. For example, undocumented workers, just by virtue of being undocumented, do not have Social Security numbers. Also, undocumented workers, fearful of federal immigration authorities, are more likely to avoid creating a personal paper trail, so they are less likely to open bank accounts, or put their names on leases or utility bills. In addition, employers, who are also afraid of the legal consequences of employing undocumented workers, are more likely to pay undocumented workers in cash, misclassify the workers as independent contractors, and take other measures to avoid creating a paper trail showing they are employing undocumented workers.

Because undocumented workers are less likely to access safety net programs, they are less likely to be able to protect themselves. If they find themselves in a dangerous or exploitative workplace, they are less likely to be able to leave that job. If undocumented workers get sick, they are more likely to still go to work anyway. When undocumented workers cannot access health insurance, rental assistance, or food assistance, they are more likely to go into deep medical debt when they do try and seek it out, more likely to be unhoused, and more likely to go hungry.

Stakeholders highlighted a few social safety net programs that more successfully served undocumented workers and their families:

Washington COVID-19 Immigrant Relief Fund. The Washington COVID-19 Immigrant Relief Fund provided one-time \$1,000 payments to low-income adult Washington residents who were significantly affected by the pandemic but were ineligible to receive unemployment benefits or federal stimulus funds because of their immigration status.⁹ Stakeholders praised the program for heavily investing in partnering with community-based, immigrant-led organizations as the program was being designed. Additionally, the application for the program asked unobtrusive questions. Ultimately, the program was able to pay benefits securely and quickly to many individuals.

Pandemic-EBT. The Pandemic-EBT program provides food assistance to families whose children qualify for free or reduced-priced lunches at school, but their school was closed due to the COVID-19 pandemic.¹⁰ Stakeholders noted that when this program first launched, it required an application process, which may have deterred undocumented workers from pursuing benefits due to fear that their personal information would be shared with federal authorities. The customer experience improved, however, once the application process was eliminated. Instead, school districts themselves provided the data on eligible families to the Pandemic-EBT vendor, and the vendor then provided the benefit cards to the eligible families.

Stakeholders also mentioned state programs in Colorado and New York that attempted to provide an unemployment-type benefit to undocumented workers.

New York Excluded Workers Fund. In 2021, the New York Legislature allocated \$2.1 billion for the Excluded Workers Fund to provide a one-time payment to individuals who were not eligible to receive federal stimulus checks or state or federal benefits.¹¹ To receive any funds under New York's program, applicants must provide three sets of documentation: one establishing

⁹ www.immigrantreliefwa.org/faq

¹⁰ www.dshs.wa.gov/esa/community-services-offices/pandemic-ebt-p-ebt

¹¹ 2021 Sess. Law News of N.Y. Ch. 29, part EEE (McKinney). Annie Correal and Luis Ferré-Sadurní, *\$2.1 Billion for Undocumented Workers Signals New York's Progressive Shift*, NEW YORK TIMES (Apr. 8, 2021) available at www.nytimes.com/2021/04/08/nyregion/covid-relief-undocumented-workers-nyc.html.

their identity, a second establishing their residency in New York, and a third establishing their work eligibility.¹² In administering this program, New York's Department of Labor created a point-system for the various types of documents applicants need to submit, with more reliable documents worth more points while less reliable documents worth fewer points.¹³ For example, for the documents to establish work eligibility, New York has a set of documents worth 5 points (e.g., an IRS Form 1099), a set of documents worth 3 points (e.g., a record of regular direct deposits from an employer) and a set of documents worth 1 point (e.g., an employer issued ID card).¹⁴ An applicant who provides 3 points of documents is eligible for a one-time payment of \$3,200, while an applicant who provides 5 points of documents (including at least one document worth at least 3 points) is eligible to for a one-time payment of \$15,600.¹⁵

Colorado Left-Behind Workers Fund. In the early months of the COVID-19 pandemic, a coalition of non-profit organizations raised funds to provide \$1,000 grants to undocumented workers who did not qualify for unemployment benefits or federal stimulus checks.¹⁶ Eventually, municipal governments within Colorado, such as the City of Denver, also contributed to the effort.¹⁷ In 2021, members of the Colorado General Assembly proposed Senate Bill 21-233 to establish a Left-Behind Workers Fund in state law. The bill, as originally introduced, would have allocated a portion of state unemployment taxes to a third-party administrator that would pay unemployment benefits to persons who do not qualify for state unemployment benefits due to their immigration status in the same amounts and using the same eligibility criteria as those whose immigration status is not a barrier to receiving unemployment benefits.¹⁸ The version of the bill that ultimately passed, however, only required

¹² New York Department of Labor, *Excluded Workers Fund Application FAQs*, available at dol.ny.gov/EWFApply. See also N.Y. Comp. Codes R. & Regs. Tit. 12 sec. 704 (2021)).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Impact Charitable, *Case Study: Left Behind Workers Fund*, available at impactcharitable.org/wp-content/uploads/2021/08/Impact-Charitable-CS-Left-Behind-Workers-Fund.pdf; Victoria De Leon, *Fund Providing Financial Help for Those that Don't Get Federal Aid Because of Their Citizenship Status*, KUSA 9News (March 10, 2021) available at www.9news.com/article/news/health/coronavirus/left-behind-workers-fund-stimulus/73-43d2bd04-e040-49a0-ac6d-d4053998e1ed

¹⁷ Andrew Kenney, *Colorado's Undocumented Workers had to Survive the Pandemic without Government Aid. Next Time may be Different*, CPR News (June 18, 2021) available at <https://www.cpr.org/2021/06/18/colorados-undocumented-workers-had-to-survive-the-pandemic-without-government-aid-next-time-may-be-different/>

¹⁸ S. 21-233, 73rd Gen. Assembl., 1st Reg. Sess. (Colo. 2021) (as originally introduced Apr. 5, 2021). The bill as introduced would have been out of conformity with federal unemployment law. All state unemployment taxes paid by employers based on their experience with unemployment must be immediately deposited into the unemployment trust fund. 26 U.S.C. §§ 3302(a)(1), 3304(a)(3); 42 U.S.C. § 503(a)(4). Then, once it is deposited in the trust fund, the money cannot be withdrawn except to pay unemployment benefits or refund overpaid taxes. 26 U.S.C. § 3304(a)(4), 42 U.S.C. § 303(a)(5). Therefore, diverting an employer's unemployment taxes into a different

the Colorado Department of Labor and Employment to study the idea of creating a separate unemployment program to serve undocumented workers and write a report and recommendations.¹⁹

If Washington were to create its own state-run, state-funded unemployment benefit for undocumented workers, stakeholders provided suggestions on how the program should be designed. Stakeholders universally agreed that the program would need to keep applicant information strictly confidential and strictly prohibit disclosing the data to federal authorities. One suggestion was to open the benefit programs to persons other than undocumented workers, such as gig workers or individuals too new to the labor force to qualify for regular unemployment benefits, so the program itself would not just be a registry of undocumented workers. Another suggestion was made to allow individuals to meet program requirements through self-attestation, rather than documentary proof. Some stakeholders were also concerned that if the state adopted requirements for undocumented workers to prove their identity in order to prevent fraud, it may end up excluding workers who end up disguising their identity in order to get employment in the first place. Nonetheless, regardless of the legal requirements for the program, stakeholders consistently suggested that the agency administering the program focus on employing multi-lingual and culturally sensitive staff, that program information be available in a wide variety of languages, and that the agency work with community organizations to help promote the program so undocumented workers would be more willing to trust and utilize the program.

On November 4, 2021, Employment Security, in partnership with the Department of Social and Health Services, the Department of Commerce, the Department of Labor and Industries, and the Office of the Governor, hosted a third virtual meeting with external stakeholders to review and discuss a draft of the report. Much of the stakeholder feedback is incorporated into the report, with feedback also noted here:

- Stakeholders noted that employers are paying into the overall unemployment fund for undocumented workers who cannot access those benefits as a reason for why creating and funding the program is necessary and suggested potential revenue sources for the program. As noted below, Employment Security assumes that funding for benefits and program administration would be determined by the Legislature.
- The report details how the use of Systematic Alien Verification for Entitlements (SAVE) program may be necessary to administer the state unemployment benefit program. Stakeholders noted drawbacks of utilizing the SAVE program, suggesting its limited

fund to be used to pay different benefits would violate federal law. See U.S. Dept. of Labor, Unemployment Insurance Program Letter No. 22-96 (May 22, 1996).

¹⁹ S. 21-233, 73rd Gen. Assembl., 1st Reg. Sess. (Colo. 2021).

utility as a fraud-prevention mechanism and potential deterrent for people who are otherwise eligible to apply for unemployment benefits due to the fear of their information being reported to the Department of Homeland Security.

- The report highlights that the Individual Taxpayer Identification Number (ITIN) is a tool used by individuals who do not have a Social Security number to report and pay the federal income tax they owe, and it highlights the challenges related to the ITIN. Stakeholders noted that limiting the program to ITIN filers would severely curtail the impact of unemployment as a social safety net. Stakeholders further suggested Employment Security could provide payments to individuals without ITINs or Social Security numbers.
- Stakeholders emphasized that the Washington COVID-19 Immigrant Relief Fund, while a success, is a temporary emergency program meant to specifically address the unique and devastating impacts of a global pandemic. Moreover, stakeholders expressed that a permanent unemployment program is meant to ensure that such stop gap measures will not be necessary for the survival of undocumented workers in the future. Stakeholders believe the COVID-19 Immigrant Relief Fund is not a sustainable model as it is currently structured.
- Stakeholders requested a chart that compares a potential unemployment benefit for undocumented workers with other benefit programs, such as State Family Assistance and the Food Assistance Program. The chart is provided in the appendix.

Listening sessions

On Sept. 8 and 9, 2021, Employment Security hosted two public listening sessions with undocumented workers and others who support them. Meetings were hosted on Zoom, with simultaneous interpretation offered in several languages. Each session had more than eighty participants.

During the listening sessions, Employment Security asked participants to address four questions:

- What has your experience been like accessing state benefit programs?
- What barriers have you faced and what would make it easier to access state benefit programs?
- How can state government agencies strengthen trust with immigrant communities they are trying to serve?

- If you became unemployed, and Washington state had a program to provide benefits regardless of immigration status, would you apply?

Through their personal stories and lived experiences, several themes emerged: barriers to accessing benefits; lack of trust in government officials; and frustration with equity and discrimination.

Barriers to access

Many speakers identified the lack of information in languages they could understand as a key barrier to accessing services. Written materials may be available in several languages, but dialects and regional vocabulary differences can make those translated materials confusing. The alternative of offering access to language speakers and interpretation services by phone is important because literacy in any language can be limited. Long wait times for responses and service has been exacerbated by pandemic, and then further impacted by lack of language speakers available to provide service.

The participants also expressed frustration with internet platforms and technology, because technical literacy and access is generally lower in this population. One concern about technology platforms was confusion about naming conventions – in some cultures, names do not fall into typical “first-name last-name” patterns. If the name is entered incorrectly, it can cause benefits to be denied.

Participants expressed that the deeply bureaucratic language in letters and written materials makes understanding requirements very difficult. The vocabulary, even when translated into other languages, causes confusion and fear for beneficiaries.

Of key importance to participants was the need for some accommodation or adjustment when a beneficiary lacks required identification and documents because currently there are few-to-no alternative options. This includes identity documents, Social Security numbers, and documents to prove employment, which are especially difficult to produce when the worker is paid in cash.

Lack of trust in government

Through their stories of encounters with law enforcement, government agencies, and others, participants expressed deep fears and a lack of trust in government agencies, services, and employees. The participants expressed fear of the impacts of information sharing between agencies, especially considering what are seen as intrusive, detailed questions to gather information needed to access services and benefits. Paired with this were stories detailing a

lack of respectful treatment from government employees, especially when the claimant questioned the need for detailed information or stumbled with language barriers. Participants spoke of feeling “less than” or “made to feel small” in these encounters and asked that employees in front-line positions act with compassion toward them.

Equity and discrimination

Participants told stories that demonstrated experiences with acute discrimination, as well as a basic lack of equity in the provision of services. Many undocumented workers are victimized by employers, paid less than other workers, receive no benefits through the employer (e.g. health insurance), and are placed in unsafe situations. When workers try to use channels available to report employer mistreatment to government agencies, they could be fired by the employer and/or ignored by the agency. At the same time, all workers have taxes withheld from paychecks to provide services, yet many immigrants cannot access the services the taxes pay for.

Survey results

Employment Security recognized that listening sessions may not be accessible or convenient for all, due to technology barriers and scheduling limitations. To allow for maximum reach, Employment Security also created a survey to ask similar questions. This survey was translated into English and Spanish, posted to Employment Security's website from August 23, 2021, through October 14, 2021, and made available for additional translation upon request. Stakeholders were encouraged to promote the survey with the undocumented worker community. Employment Security only received 29 responses to the survey.

The survey first asked respondents if they applied for or received benefits from the state of Washington, such as Washington COVID-19 Immigrant Relief Fund, Paid Family and Medical Leave, Workers' Compensation, and the Disaster Cash Assistance Program.²⁰ About half of the respondents said “yes.” Respondents were then asked a series of questions to evaluate their experience with these benefit programs. The responses reflected some positive aspects of applying for these programs, with a majority saying that they were able to complete the application in their primary or preferred language, that they knew which documents they needed to apply, and that the website and application were easy to use. Most respondents, however, also said they needed customer service or community organization assistance to

²⁰ The exact survey questions that were asked and the raw count of the answers submitted appear in the appendix to this report.

complete their application, and that they were unable to easily find that customer service or community organization assistance.

The survey next asked respondents about whether they would be able to provide an Individual Taxpayer Identification Number (ITIN) if they wanted to apply for a new program. A substantial majority of respondents said “yes.” An even larger majority said they would be able to provide wage or employment records for the past 15-18 months to apply for a new benefit program. The survey then asked respondents: “If you became unemployed, and Washington state had a program to provide benefits regardless of immigration status, would you apply?” Only one person answered “No.” When asked to explain why they would not apply for such an unemployment program, the person selected “I am concerned that receiving help will impact my immigration status.”

Unemployment insurance overview

Key foundations

Generally, state Unemployment Insurance programs are a lot like other private or public insurance policies – they insure against the risk of unemployment by accumulating funds during times of employment to pay benefits to those who lose their job through no fault of their own. As the loss of employment financially impacts not only the unemployed person, but also that person’s dependents and creditors, state unemployment insurance benefits serve as economic stabilizers for both the individual and the larger economy.

With these goals in mind, state Unemployment Insurance programs share the following foundational characteristics when it comes to whether someone is eligible for benefits:

- Claimants must have a significant and recent “attachment to the labor market” so that when they do become unemployed, their loss is significant enough to warrant the payment of unemployment benefits. In Washington state law, this is reflected by requiring an individual to work at least 680 hours within four of the previous five quarters before they file their unemployment claim. Other states require a certain amount of money earned across more than one calendar quarter.
- To receive benefits for the week, claimants must be “unemployed,” which means they are not performing services for the week and no remuneration is payable to them.

- Claimants must also become unemployed “through no fault of their own” – a phrase that is shorthand for the idea that the individual neither voluntarily quit work without good cause nor was discharged for misconduct connected to the work.
- Generally, unemployment benefits should only partially replace the wages individuals earned while they were employed. When calculating the benefit amounts, states try to strike a balance between not making the benefit amount so high that they match the wages the individual made while they were employed and making the benefit amount so low that they do not meet the individual’s basic needs.
- While receiving unemployment benefits, the individual must display their willingness to return to employment by showing they are able to work, available for work, and actively seeking work. Similarly, individuals may not refuse an offer of suitable work and still collect unemployment benefits.

The funding for the Unemployment Insurance program generally comes from two types of employer taxes: one, a federal unemployment tax, which is then passed down to states for the administration of their Unemployment Insurance programs; and two, a state unemployment tax which is deposited in a trust fund which can only be used to pay unemployment benefits. The amount of state unemployment tax an employer pays is calculated based on two factors. The first factor is the amount of wages an employer pays its employees, which is reported by the employer to the state unemployment agency on a quarterly basis.²¹ These reports are also used to determine the amount of benefits an individual may receive if they become unemployed and eligible for benefits. The second factor is the individual employer’s experience with its employees receiving unemployment benefits, such that the more benefits an employer’s workers receive, the higher the employer’s unemployment tax is going to be.²² This second factor is intended serve as an incentive for employers to consistently employ their staff and to minimize the number of times they lay off their staff.

Undocumented workers not covered

Much as a building code sets limits on how a homeowner can design and build their house, federal laws set limits on how states can design their unemployment insurance systems. This federal control comes in two forms. First, under the Federal Unemployment Tax Act, Washington employers receive a 90% credit on their federal unemployment taxes so long as Washington law conforms with federal unemployment laws.²³ Second, under the Social

²¹ To use an analogy to car insurance, this is the equivalent of determining the value of the car being insured.

²² To extend the same car insurance analogy, this is the equivalent of looking at the driver’s history to see how likely the driver is going to crash the car being insured.

²³ 26 U.S.C. §§ 3302, 3304(c)

Security Act, the federal government provides the funding Washington uses to administer its state Unemployment Insurance program, again, so long as Washington complies with federal unemployment laws.²⁴ Therefore, if Washington falls out of step with federal unemployment law, Washington employers may face a substantial increase in their federal unemployment taxes and Washington may no longer have access to the federal funds it uses to administer its Unemployment Insurance program.

Federal unemployment law restricts the payment of state unemployment benefits to undocumented workers in two ways. First, if an employee is not legally authorized to work in the United States at the time they are working for an employer, the work for that employer cannot be used as the basis for an unemployment claim.²⁵ Second, employees who are not legally authorized to work in the United States at the time they are filing their unemployment claims cannot be considered “available for work,” which makes them ineligible for benefits.²⁶ States are also required to obtain each individual’s citizenship or immigration status at the time they file an unemployment claim and verify the individual’s immigration status with federal immigration authorities through the Systematic Alien Verification for Entitlements (SAVE) program.²⁷

Therefore, absent a change in federal law, Washington cannot provide unemployment insurance benefits to individuals not authorized to work in the United States within the existing unemployment insurance framework. This is so, even though the current state unemployment statute taxes employers on the wages they pay to undocumented workers.²⁸ Accordingly, if Washington wishes to provide an unemployment benefit to individuals regardless of citizenship status, it can only do so through a program separate and apart from the existing Unemployment Insurance program.

²⁴ 42 U.S.C. §§ 502, 503.

²⁵ 26 U.S.C. § 3304(a)(14); RCW 50.20.098(1). Additionally, undocumented workers are also ineligible to receive any federal unemployment benefits. 8 U.S.C. § 1611(a), (c)(1)(B).

²⁶ U.S. Department of Labor, Unemployment Insurance Program Letter No. 01-86 (Oct. 28, 1985); *In re Sidhu*, Empl. Sec. Comm’r Dec.2d 1018 (2018).

²⁷ 42 U.S.C. § 1320b-7; U.S. Department of Labor, Unemployment Insurance Program Letter No. 23-20 (May 11, 2020).

²⁸ RCW 50.04.205.

Undocumented workers' unemployment

Considerations

Since it is necessary to create a distinct program to provide unemployment benefits to undocumented workers, a set of assumptions should be made for what such a program would look like. Based on the feedback from stakeholders regarding the reality of serving undocumented workers, as well as other legal considerations, it was determined that using an exact duplicate of the existing Unemployment Insurance program was not feasible. Instead, these assumptions attempt to balance the Legislature's goal of determining the costs to replicate the existing Unemployment Insurance program against the legal restrictions facing undocumented workers and their day-to-day experiences.

Outline of possible program

Regarding revenue for the program, it is assumed that funding for benefits and program administration would be determined by the Legislature. The existing Unemployment Insurance program collects revenue to pay benefits from a tax on wages employers pay their employees.²⁹ In order to calculate the tax an employer owes, Employment Security needs employers to file a quarterly report that lists all of their employees along with the wages paid to those employees.³⁰ If a tax on employee wages were utilized to fund an Unemployment Insurance program specific to undocumented workers, employers would have to file a specific report with Employment Security that explicitly lists all of the undocumented workers they employ and the wages that were paid to those undocumented workers.

This is problematic for several reasons. First, employers would be unlikely to comply with this requirement as doing so would be an admission that they had violated federal laws prohibiting businesses from employing undocumented workers. Second, even if there are robust and strict restrictions in the law that prohibit the disclosure of program information to federal authorities, immigrant advocates fear that federal authorities would still find a way to get access to a list of all undocumented workers in the state. Third, such reports would be underinclusive, as some undocumented workers hide their immigration status from their

²⁹ RCW 50.20.010.

³⁰ RCW 50.12.070(2)(a), WAC 192-310-010(3).

employers and some employers choose to avoid knowing the immigration status of their employees.

Accordingly, employers will not be required to file quarterly reports under this program, nor will employers be required to pay new quarterly unemployment taxes. This also means that there will be no experience-rating system wherein employers who lay off more of their staff pay more on their quarterly taxes.

With regard to the amount of benefits claimants could receive, it is assumed that the calculation of the amount of benefits an eligible claimant could receive would be roughly modeled on the federal Pandemic Unemployment Assistance program – a program administered by Employment Security to provide unemployment benefits to individuals who do not qualify for the existing Unemployment Insurance program.³¹ In this model, the minimum weekly benefit would be set at fifty percent of the state average weekly benefit amount for the quarters in the claimant’s base year.³² If a claimant wants a higher weekly benefit amount, the claimant would have to provide documentation showing their wages during their base year.³³ If such documentation is provided, the weekly benefit amount would then be calculated using the formulas set in the existing unemployment insurance system, up to the state maximum weekly benefit amount.³⁴

If a claimant did not want a weekly benefit amount higher than the minimum weekly benefit amount, they would not have to provide any other documentation.³⁵ In order to ensure this is a benefit to help individuals who recently became unemployed, however, all claimants applying for this program would have to provide documentation showing they were recently employed in order to be eligible for any benefit.³⁶ Once a weekly benefit amount is established, claimants would then be eligible to receive up to 26 times their weekly benefit amount in unemployment benefits.

Regarding overall benefit eligibility, it will be assumed that undocumented workers would have to meet the same benefit eligibility criteria currently set for the existing Unemployment Insurance program. For example, they must have become unemployed through no fault of their own – they cannot quit without good cause, be discharged for misconduct, or be

³¹ See 15 U.S.C. § 9021.

³² 15 U.S.C. § 9021(d)(1)(A)(i), 20 C.F.R. § 625.6(b). For example, if a claim is filed in the fourth calendar quarter of 2021, the minimum weekly benefit amount would be \$218.00. Unemployment Insurance Program Letter No. 26-21 (Sept. 24, 2021).

³³ 20 C.F.R. § 625.6(e); Unemployment Insurance Program Letter No. 16-20, Change 1, Attachment I, pp. I-3 to I-6 (Apr. 27, 2020).

³⁴ 20 C.F.R. § 625.6(a).

³⁵ Unemployment Insurance Program Letter No. 16-20, Change 1, Attachment I, p. I-5 (Apr. 27, 2020).

³⁶ See 15 U.S.C. § 9021(a)(3)(A)(iii).

unemployed due to a strike or lockout.³⁷ However, an undocumented worker who is discharged when their employer discovers their immigration status would be considered to have become unemployed through no fault of their own. Individuals cannot claim industrial insurance benefits at the same time as unemployment benefits.³⁸ Any income the claimant receives would be deducted from their weekly benefits³⁹ and they cannot refuse any suitable offers of work.⁴⁰ If it is determined a claimant is not eligible for benefits, they will be afforded the right to an administrative appeal equivalent to what is afforded claimants in the existing Unemployment Insurance program.⁴¹

A requirement for individuals to be able to work, available to work, and actively seeking work,⁴² will have to be carefully considered when applied to undocumented workers as federal law prohibits employers from employing undocumented workers.⁴³ The breadth of this prohibition is not well defined, although, at the very least, state agencies would not be permitted to refer undocumented individuals for employment,⁴⁴ and no federal funds could be used to support state-level work-search programs. Whether additional services such as job training or resume or interview assistance are also prohibited, even if funded exclusively with state dollars, is unclear. Also unclear is whether a state program that requires undocumented workers to search for work would be preempted by the federal prohibition.

Separate program infrastructure

It is also assumed that it will be necessary for Employment Security to create a separate unit with a separate IT system to implement an unemployment benefits program for undocumented workers, and that this new program will not share any resources with the existing Unemployment Insurance program. First, Employment Security cannot legally use federal funds allocated for the administration of its existing Unemployment Insurance program to administer any other program.⁴⁵ While it is theoretically possible for Employment Security to share resources, such as physical and digital infrastructures, between the existing Unemployment Insurance program with other state governmental programs, Employment Security would have to enter into a cost allocation plan with the U.S. Department of Labor, which would calculate how much of the resources are being used for the federally-funded

³⁷ See RCW 50.20.050, 50.20.060, 50.20.090.

³⁸ See RCW 50.20.085.

³⁹ See RCW 50.20.130(2).

⁴⁰ See RCW 50.20.080.

⁴¹ See *generally* RCW Chapter 50.32; WAC Chapter 192-04.

⁴² See RCW 50.20.010(1)(c).

⁴³ 8 U.S.C. § 1324a(a).

⁴⁴ 8 U.S.C. § 1324a(a)(5).

⁴⁵ 42 U.S.C. §§ 501, 502(a), 503(a)(8).

existing Unemployment Insurance program and how much of those resources would be used for other state programs.⁴⁶ This cost allocation plan would then be subject to audit by federal agencies.⁴⁷

Furthermore, integrating a program for undocumented workers within the existing Unemployment Insurance program increases the likelihood that changes in one program will create unintended consequences for the other program. Therefore, to reduce the possibility of disclosing information regarding undocumented workers to federal agencies and to ease ongoing administration of both unemployment programs, the unemployment program for undocumented workers should be developed and maintained separate and apart from the existing Unemployment Insurance program.

Program integrity and fraud prevention

With any government benefit program, there will be those who will try to fraudulently obtain these benefits, which will then reduce the amount of funds available for eligible individuals who truly need the benefit.⁴⁸ Therefore, some attention must be paid to measures to protect the integrity of any unemployment benefit program and to prevent individuals from fraudulently obtaining these benefits.

Systematic Alien Verification for Entitlements program

Borne out of the Immigration Reform and Control Act of 1986, the Systematic Alien Verification for Entitlements (SAVE) program serves as the primary tool for federal, state, and local agencies to confirm an applicant's immigration status.⁴⁹ Customarily, the tool is used by Washington agencies to ensure that a federal or state program under state administration is accessed only by those individuals carrying an eligible immigration status. In other contexts, however, it can also be used to redirect an individual's application to a separate program, where immigration status is not a factor for eligibility. This redirection based on an applicant's

⁴⁶ See Unemployment Insurance Program Letter No. 20-96 (June 30, 1997); Training and Employment Guidance Letter No. 06-05 (Sept. 29, 2005).

⁴⁷ See OMB Circular A-87, OMB Circular A-133, 29 C.F.R. Part 96.

⁴⁸ See e.g. Paul Roberts, *Massive Washington Unemployment Fraud Investigation Nabs Another Suspect*, SEATTLE TIMES (June 25, 2021) available at <https://www.seattletimes.com/business/feds-charge-another-suspect-in-washington-state-unemployment-fraud-case/>.

⁴⁹ U.S. Citizenship and Immigration Services, *Guide to Understanding SAVE Verification Responses* (Aug. 2021) available at https://save.uscis.gov/web/media/resourcesContents/SAVE_GuideToUnderstandingSAVEVerificationResponses.pdf

immigration status could potentially be done automatically by the state agency without necessarily requiring any additional actions by the applicant.

When a federal benefits program has a state-funded analogue, the use of SAVE may nonetheless be necessary to administer the state program for three primary reasons. First, SAVE will allow the two programs to utilize a single client application since, as noted above, the routing of the individual's application can be handled internally. Second, using SAVE will protect against state funds being drawn down unnecessarily by individuals who are, in fact, eligible for the existing Unemployment Insurance program. Third, to the extent that the state program has a real or perceived advantage over the existing Unemployment Insurance program, SAVE will prevent individuals with lawful status from fraudulently accessing the program for undocumented workers. Although protections from detainment or removal are never guaranteed, information submitted to the SAVE system does not appear to be used for civil immigration enforcement.⁵⁰

SAVE is not without flaws. For example, a 2012 report from the Department of Homeland Security's Office of the Inspector General highlighted issues with accuracy in the results returned from SAVE inquiries.⁵¹ For purposes of this program, however, the issue would be mitigated by the fact that a negative response from SAVE will merely direct the individual to the correct program instead of excluding the individual. A more significant drawback, however, is the potential effect its use will have on program participation. As discussed elsewhere in the report, fear of providing information to governmental entities can inhibit an individual's willingness to access benefits and services.

⁵⁰ See National Immigration Law Center, *Overview of Immigrant Eligibility for Federal Programs* (Oct. 2021), available at <https://www.nilc.org/issues/economic-support/overview-immeligfedprograms/> (saying "information submitted to the SAVE system may not be used for civil immigration enforcement purposes"); U.S. Citizenship and Immigration Services, *SAVE Program Guide*, p. 9 (Mar. 2019) available at <https://save.uscis.gov/web/media/resourcesContents/SAVEProgramGuide.pdf> (saying SAVE may forward documentation a user "submits to a status verifier that indicates *criminal* misuse of government documents, information, or the SAVE Program to U.S. Immigration & Customs Enforcement (ICE) or other law enforcement agencies to initiate an investigation or prosecution under federal *criminal* law." (emphases added)). *But see* 85 Fed. Reg. 31798-01 (May 27, 2020) (Privacy Act Notice stating disclosures of records in the SAVE system may be made to federal agencies or others charged with enforcing a law or order when the record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, including civil and regulatory violations).

⁵¹ Department of Homeland Security Office of Inspector General, *Improvements Needed for SAVE to Accurately Determine Immigration Status of Individuals Ordered Deported* (Dec. 2012), available at https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-11_Dec12.pdf.

Impact on current unemployment insurance fraud investigative tools

Because any new unemployment benefit that would serve undocumented workers would be entirely state funded, there would be no access to federal resources currently used to verify claimant identities and discover potential fraud. These includes the following tools and resources, currently used by Employment Security, in the administration of the current unemployment insurance benefit:

- Social Security Administration Social Security number crossmatches
- National Association of State Workforce Agencies Integrity Data Hub⁵²
- National Association of State Workforce Agencies Identity Verification⁵³
- National Directory of New Hires⁵⁴

There are, however, some fraud discovery tools that could still be used in a potential state-only program:

- State Directory of New Hires⁵⁵

⁵² The Integrity Data Hub is a “secure, robust, centralized, multi-state data system that allows participating states [unemployment insurance] agencies to submit claims for crossmatching and analysis to support the prevention and detection of improper payments, fraud and ID theft.” Unemployment Insurance Program Letter No. 16-21, p. 11 (Apr. 13, 2021). Some of the capabilities currently included in the Integrity Data Hub include a suspicious actor repository, list of suspicious e-mail domains, foreign IP address detection, multi-state crossmatches, and data analytics. *Id.* at p. 11-12.

⁵³ The Identity Verification provides states with “advanced ID verification scoring to maximize front-end ID verification, enabling states to assess whether an individual is using a false, stolen, or synthetic ID.” Unemployment Insurance Program Letter No. 16-21, p. 11-12 (Apr. 13, 2021).

⁵⁴ All employers are required to send the name, Social Security number or tax identification number, and address of all newly hired employees to the State Directory of New Hires. Office of Child Support Enforcement, *A Guide to the National Directory of New Hires*, p. 2 (Feb. 2021) available at https://www.acf.hhs.gov/sites/default/files/documents/ocse/a_guide_to_the_national_directory_of_new_hires.pdf. Then the various states send that information to the National Directory of New Hires. *Id.* Crossmatching with this database allows unemployment agencies to detect individuals who have returned to work, but do not report their earnings on their weekly unemployment claims, therefore allowing to receive the same amount of benefits as if they were fully unemployed. Unemployment Insurance Program Letter No. 13-19 pp. 2-3 (June 7, 2019). Searching the national directory, instead of relying only on a state directory, allows unemployment agencies to discover claimants who returned to work in another state, or claimants who returned to work for a multi-state employer that happened to report the hire to a different state. *Id.*

⁵⁵ All employers are required to send the name, Social Security number or tax identification number, and address of all newly hired employees to the State Directory of New Hires. Office of Child Support Enforcement, *A Guide to the National Directory of New Hires*, p. 2 (Feb. 2021) available at https://www.acf.hhs.gov/sites/default/files/documents/ocse/a_guide_to_the_national_directory_of_new_hires.pdf. Crossmatching with this database allows unemployment agencies to detect individuals who have returned to work, but do not report their earnings on their weekly unemployment claims, therefore allowing to receive the same amount of benefits as if they were fully unemployed. Unemployment Insurance Program Letter No. 13-19, pp. 2-3 (June 7, 2019).

- Crossmatch with Department of Corrections and County Jails⁵⁶
- Department of Licensing⁵⁷

Due to the reduced number of tools to help detect fraud, especially tools that help verify the identity of claimants, it will most likely be necessary to have undocumented workers provide proof of their identity up front when they file their application. This is a requirement of all applicants seeking to claim Washington paid family and medical leave benefits.⁵⁸ And this is also a requirement for undocumented workers seeking benefits under New York's Excluded Workers Fund.⁵⁹

Interaction with workers' compensation

Under the current Unemployment Insurance program, individuals cannot receive both workers' compensation and unemployment insurance concurrently.⁶⁰ This is a necessary requirement for the two programs to coexist, because unemployment compensation is provided to those who are able and available to work,⁶¹ while workers' compensation is targeted toward workers injured and temporarily or totally disabled.⁶² It is assumed that an unemployment program for undocumented workers would similarly forbid claimants from being able to simultaneously receive unemployment benefits and workers' compensation benefits.

Currently, to quickly verify that an individual is not accessing both unemployment and industrial insurance programs, Employment Security compares the application data with records held by the Department of Labor and Industries. The same holds true for workers' compensation applicants, where Labor and Industries checks against Employment Security's records. A key identifier is the applicant's Social Security number, which, when used in conjunction with other personal information, helps confirm identity. Labor and Industries does not require a Social Security number to qualify for workers' compensation, but rather asks for one as part of the claim process. Consequently, if an unemployment compensation program

⁵⁶ Crossmatching with these agencies allows Employment Security to discover if incarcerated individuals are claiming unemployment benefits. Incarcerated individuals are generally considered unavailable for work, and therefore ineligible for unemployment benefits. WAC 192-170-090(4).

⁵⁷ Crossmatching with Department of Licensing helps Employment Security verify the identities of applicants.

⁵⁸ WAC 192-610-010(1). *See also* Employment Security Department, *Identity Verification Documents* (updated November 2019) *available at* paidleave.wa.gov/app/uploads/2019/12/Identification-document-list-and-instructions.pdf (containing the list of currently acceptable identity verification documents).

⁵⁹ New York Department of Labor, *Excluded Workers Fund Application FAQs*, *available at* dol.ny.gov/EWFApply.

⁶⁰ RCW 50.20.080.

⁶¹ RCW 50.20.010(1)(c).

⁶² *See* chapter 51.32 RCW, including RCW 51.32.060 and .090.

does become available to individuals without a Social Security number, both departments will need to create separate work processes to verify eligibility.

Customer service

Members of the undocumented worker community and the community groups that serve them consistently noted the special barriers that undocumented workers face when trying to access government programs, including difficulties with language and the community's distrust and fear of government. Consequently, any successful program that will provide unemployment benefits to undocumented workers should dedicate extra resources to hiring multi-lingual staff and creating multi-lingual communications to make sure undocumented workers have the information they need to apply for the benefit. Additionally, extra resources should be dedicated to working with community groups that serve undocumented workers so those groups can serve as ambassadors on behalf of the program, thereby helping to reduce the fear and hesitancy undocumented workers may have about applying for the program and accessing the benefit.

Costs

Calculating participation rates and benefit levels

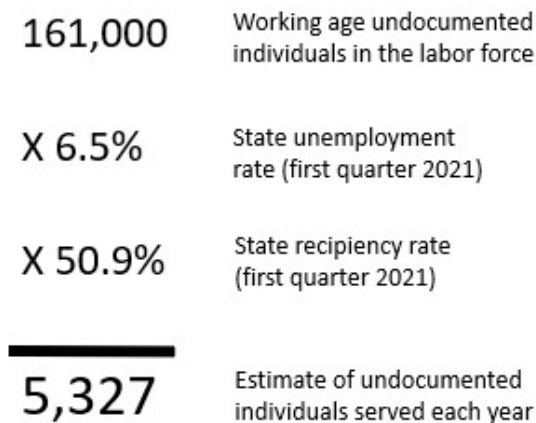
Undocumented workers typically find employment by either providing false documentation to their employers or by being paid under the table by their employers.⁶³ Since the employment of undocumented workers is often obfuscated, there is no reliable data on the employment, and unemployment, of undocumented workers. This creates difficulties projecting the costs of a program to provide unemployment benefits to undocumented workers. Therefore, in the absence of reliable data about undocumented workers specifically, Employment Security utilized known data about the larger Washington workforce, which is predominated by persons who are legally authorized to work in the United States.

The most recent estimate is that there are 240,000 undocumented individuals living in Washington and that 94% of these undocumented individuals are of working age.⁶⁴ Of the 226,000 undocumented individuals of working age, 65,000 of those individuals are not in the

⁶³ Wash. Dept. of Commerce, *2020 Keep Washington Working Report*, p. 9 (Dec. 2020).

⁶⁴ Migration Policy Institute, *Profile of the Unauthorized Population: Washington*, available at <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/WA>.

labor force, leaving 161,000 undocumented individuals who are participating in the labor force.⁶⁵ The average non-seasonally adjusted unemployment rate for the first quarter of 2021 was 6.5%.⁶⁶ Assuming undocumented workers are unemployed at the same rate, there were approximately 10,465 unemployed undocumented workers in Washington. Not all unemployed individuals, however, receive unemployment benefits. For Washington, the reciprocity rate for the first quarter of 2021, meaning the percent of total unemployed workers who receive regular unemployment benefits, was 50.9%.⁶⁷ Assuming undocumented workers would have the same reciprocity rate, an unemployment program for undocumented workers would pay unemployment benefits to an estimated 5,327 undocumented individuals each year.



Source: Migration Policy Institute, U.S. Dept. of Labor

In 2020, the state’s average annual wage was \$73,504.⁶⁸ A regularly paid employee earning the state average annual wage would receive a weekly unemployment benefit of \$707.⁶⁹

⁶⁵ *Id.*

⁶⁶ Employment Security Department, *Labor Force (LAUS)*, available at <https://esd.wa.gov/labormarketinfo/labor-force>; U.S. Dept. of Labor, *Unemployment Insurance Data*, (updated Sept. 24, 2021), available at https://oui.doleta.gov/unemploy/data_summary/DataSum.asp

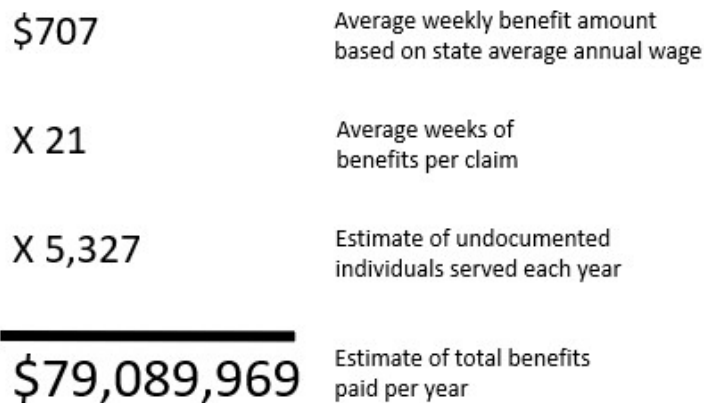
⁶⁷ U.S. Dept. of Labor, *Unemployment Insurance Data*, (updated Sept. 24, 2021), available at https://oui.doleta.gov/unemploy/data_summary/DataSum.asp.

⁶⁸ Employment Security Department, *Covered Employment (QCEW)*, available at <https://esd.wa.gov/labormarketinfo/covered-employment>. A breakdown of average annual wages for industries in which undocumented workers are most likely to be employed appears in the appendix.

⁶⁹ State unemployment insurance law calculates an individual’s weekly benefit amount by averaging the two highest-paid quarters in a claimant’s base year, and multiplying that average by 3.85%, and then rounding the result down to the next whole dollar amount. RCW 50.20.120(2), (4). So, averaging an average annual wage across 4 quarters ($\$73,504 \div 4 = \$18,376$), multiplying that average by 3.85% ($\$18,376 \times 3.85\% = \707.48) and then rounding down yields an average weekly benefit amount of \$707.

Individuals who filed unemployment claims in Washington starting in the first quarter of 2021, on average, received unemployment benefits for 21 weeks.⁷⁰ So, assuming undocumented workers earned the state average annual wage and received unemployment benefits for the average number of weeks, the state would pay \$14,847 in benefits per claim, for an estimated total of \$79,089,969 each year in benefits to undocumented individuals.

Figure 2: Estimate of benefits paid to undocumented individuals



Source: Employment Security Department, U.S. Dept. of Labor

It should be noted that the state unemployment rate, the state reciprocity rate and the average duration of an unemployment claim were higher in the first quarter of 2021 than the average and median numbers for the preceding five years.⁷¹ Nonetheless, this report still uses the data points from the first quarter of 2021 as this is the most recent quarter for which all three data points are available, at least as of the date of this report. Of course, changes in any of these number would of course lead to vastly different calculations of the number of people served and benefits paid. For example, if the average unemployment rate for 2019, which was 4.1%,⁷²

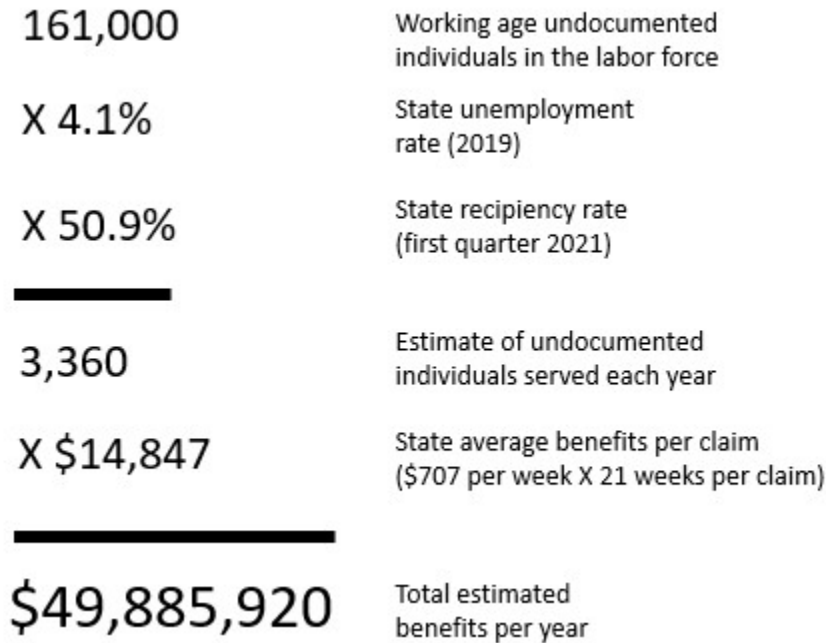
⁷⁰ U.S. Dept. of Labor, *Unemployment Insurance Data*, (updated Sept. 24, 2021), available at https://oui.doleta.gov/unemploy/data_summary/DataSum.asp.

⁷¹ U.S. Dept. of Labor, *Unemployment Insurance Data*, (updated Sept. 24, 2021), available at https://oui.doleta.gov/unemploy/data_summary/DataSum.asp. The average state non-adjusted unemployment rate for 2016 was 5.3%, for 2017 was 4.7% for 2018 was 4.5%, for 2019 was 4.1% and for 2020 was 8.4%. Employment Security Department, *Labor Force (LAUS)*, available at <https://esd.wa.gov/labormarketinfo/labor-force>. From the first quarter of 2016 through the first quarter of 2021, the median reciprocity rate was 29.5% and the average reciprocity rate was 36.91%. U.S. enDept. of Labor, *Unemployment Insurance Data*, (updated Sept. 24, 2021), available at https://oui.doleta.gov/unemploy/data_summary/DataSum.asp. From the first quarter of 2016 through the first quarter of 2021, the median length of an unemployment claim was 15 weeks and the average length of an unemployment claim was 15.74 weeks. *Id.*

⁷² Employment Security Department, *Labor Force (LAUS)*, available at <https://esd.wa.gov/labormarketinfo/labor-force>.

was used, then the program would serve 3,360 undocumented individuals per year and pay \$49,885,929 in benefits.

Figure 3: Estimate of undocumented individuals served (low unemployment rate)

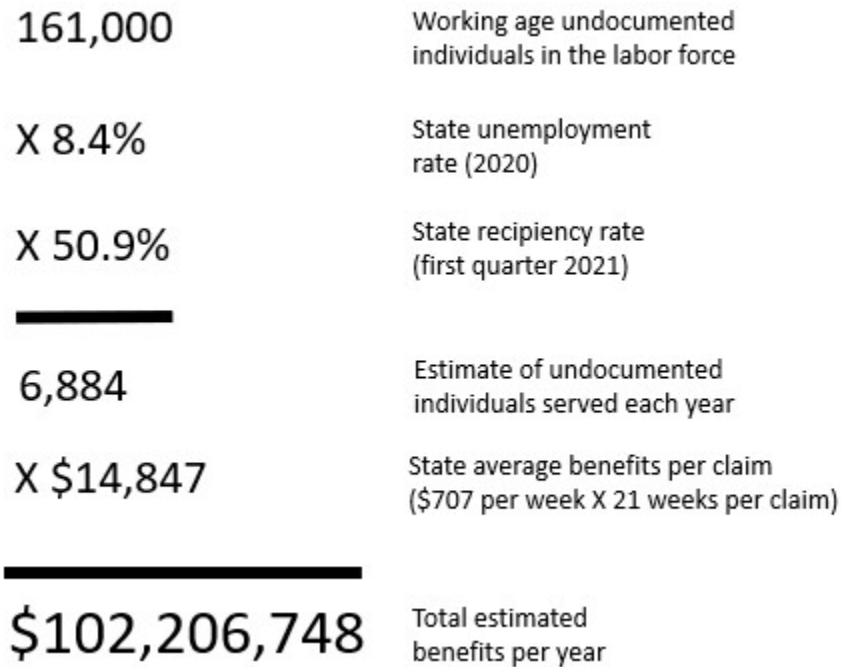


Source: Employment Security Department

On the other hand, if the average unemployment rate for 2020, which was 8.4%,⁷³ was used, then the program would serve 6,884 individuals and pay \$102,206,748 in benefits.

⁷³ Employment Security Department, *Labor Force (LAUS)*, available at <https://esd.wa.gov/labormarketinfo/labor-force>.

Figure 4: Estimate of undocumented individuals served (high unemployment rate)



Source: Employment Security Department

It should also be noted that these calculations also assume all undocumented workers receive the state average annual wage. In truth, undocumented workers typically earn lower wages than legal immigrants and U.S.-born workers.⁷⁴ However, it would be unfair to make a blanket assumption that all undocumented workers served by this benefit would automatically be in lower-paying jobs. For example, an unemployment benefit for undocumented workers could serve individuals who were previously authorized to work, but whose work authorization expired when they became unemployed. Also, a not insignificant number of undocumented workers work in industries providing professional, scientific, and technical services, where the average wage is typically above the overall state average wage.⁷⁵

At present, the minimum weekly unemployment benefit an undocumented worker could receive under the proposed program is \$218.⁷⁶ Assuming all undocumented workers received the weekly minimum, the estimated total benefits paid per year would be \$24,387,006.

⁷⁴ Francesc Ortega and Amy Hsin, *What Explains the Wages of Undocumented Workers*, ECONOFACT (July 24, 2019), available at <https://econofact.org/what-explains-the-wages-of-undocumented-workers>.

⁷⁵ Refer to the Appendix for a chart outlining the industries where undocumented workers are most likely to be employed and the average wages for those industries.

⁷⁶ Unemployment Insurance Program Letter No. 26-21 (Sept. 24, 2021).

Figure 5: Estimate of benefits paid (low weekly benefit amount)

\$218	Minimum weekly benefit amount under Disaster Unemployment Assistance (fourth quarter 2021)
X 21	Average weeks of benefits per claim
X 5,327	Estimate of undocumented individuals served each year
<hr/>	
\$24,387,006	Total estimated benefits per year

Source: Employment Security Department

On the other hand, the current the maximum weekly unemployment benefit is \$929.⁷⁷ Assuming all undocumented workers received the weekly maximum, the estimated total benefits paid per year would be \$103,924,443.

Figure 6 : Estimate of Benefits Paid (High weekly benefit amount)

\$929	Maximum weekly benefit amount under state unemployment insurance (fourth quarter 2021)
X 21	Average weeks of benefits per claim
X 5,327	Estimate of undocumented individuals served each year
<hr/>	
\$103,924,443	Total estimated benefits per year

Source: Employment Security Department

The calculations thus far, however, assume a fully mature insurance program. As unemployment insurance for undocumented individuals would be a new state insurance

⁷⁷ Employment Security Department, *Estimate Your Benefit*, available at <https://esd.wa.gov/unemployment/calculate-your-benefit>.

program and, as with most new programs, the early years would likely see fewer customers taking advantage of the program due to a lack of customer awareness and confidence.

As no state has yet replicated an Unemployment Insurance program for undocumented workers, there is no direct predecessor on which to model a maturity schedule. Nonetheless, a fiscal analysis for a 2007 bill proposing a paid family and medical leave insurance program utilized a maturity schedule for the new insurance program based on California's experience establishing its own paid leave program.⁷⁸ The schedule assumed that the number of claims in the first year of the program would be 68.058% of the number of claims at full maturity, and that this percentage of claims would increase incrementally until it reached full maturity in the sixth year.⁷⁹

Table 1: Maturity schedule

Years until program reaches full maturity	Percent of individuals served
First year of program (5 years until maturity)	68.058%
Second year of program (4 years until maturity)	73.503%
Third year of program (3 years until maturity)	79.383%
Fourth year of program (2 years until maturity)	85.734%
Fifth year of program (1 year until maturity)	92.593%
Sixth year of program (full maturity)	100.000%

Source: Employment Security Department, Department of Labor and Industries

This same maturity schedule will be assumed for a new Unemployment Insurance program for undocumented workers.

Calculating administrative costs

The fiscal analysis for this report assumes that legislation establishing an unemployment benefit for undocumented workers will be passed and signed during the 2022 regular session, with funding allocated toward the program beginning with the 2023 fiscal year, which begins on July 1, 2022. Employment Security anticipates it will take 2.5 years – from July 1, 2022 through December 31, 2024 – for the planning and implementation of this program. Then, starting January 1, 2025, Employment Security will be able to begin operating the program and paying unemployment benefits to undocumented workers.

⁷⁸ Department of Labor and Industries, *Individual State Agency Fiscal Note, E2SSB 5659*, p. 12-14 (Mar. 28, 2007, 11:51:27 a.m.) available at <https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=17725>.

⁷⁹ *Id.*

The costs reflected in this section are very rough, preliminary estimates, with numerous unknown variables. For example, the specific requirements of any legislation enacting this program may significantly impact the costs of the program planning, administration, and on-going implementation. Also, the number of undocumented individuals who would take advantage of this program is unknown, which may impact the number of staff needed for on-going implementation.

Planning and implementation

Estimated total cost to plan and implement this new program is \$11,875,776.

Table 2: Costs associated with planning and implementation

	FY2023	FY2024	FY2025
Staffing	\$2,455,262	\$3,912,008	\$1,956,006
Contractor	\$400,000	\$1,380,000	\$1,165,500
Community partners	\$242,800	\$242,800	\$121,400
Total	\$3,098,062	\$5,534,808	\$3,242,906

Source: Employment Security Department

Staffing costs

Employment Security estimates the following full-time employees (FTE) will be needed for planning and implementation in the following categories:

Information technology

The following staff will be needed to create the business requirements for the new IT system and working with IT contractors to build the system, along with creating policies and trainings for the new program:

- IT business analyst – 1.00 FTE
- Business subject matter experts – 2.50 FTE
 - Adjudication unemployment insurance specialist 4 – 2.00 FTE
 - Fraud investigator 3 – 0.25 FTE
 - Fiscal analyst 5 – 0.25 FTE
- Business testers – 2.50 FTE
 - Adjudication unemployment insurance specialist 4 – 2.00 FTE
 - Fraud investigator 3 – 0.25 FTE

- Fiscal analyst 5 – 0.25 FTE
- IT developers – 3.00 FTE
 - IT application developer senior specialist – 1.00 FTE
 - IT application developer journey – 1.00 FTE
 - IT application developer entry – 1.00 FTE
- IT quality assurance tester journey – 1.00 FTE
- IT systems administration manager – 0.25 FTE
- Technical training consultant – 0.50 FTE
- Policy analyst (tax policy specialist 3) – 1.00 FTE
- Fraud investigator 3 – 1.00 FTE

Communications

The following staff will be needed to create a robust, multi-lingual communication effort surrounding the program:

- Washington management service 1 – 1.00 FTE
- Communications consultant 5 – 2.00 FTE
- Communications consultant 4 – 6.00 FTE
- Communications consultant 3 – 2.00 FTE
- Communications consultant 2 – 1.00 FTE

Customer experience

The following staff will be needed to optimize the customer experience for undocumented workers when they apply for benefits after the program launches:

- Product analyst – management analyst 5 – 1.00 FTE
- User experience designer – management analyst 5 – 1.00 FTE
- IT project manager senior specialist – 1.00 FTE

Contractor costs

Employment Security assumes for the purposes of this exercise that it will use the current vendor for Employment Security's Unemployment Tax and Benefit system, as the chosen vendor. This vendor created stand-alone unemployment benefits systems to pay Pandemic Unemployment Assistance for other states. Based on that experience, it estimated a total cost of \$1,000,000 to create a standalone benefits system to pay undocumented workers. This estimate is based on the limited information known at this time and can change in the future.

In addition to the IT contract, Employment Security estimates that its Communications division will need to contract for marketing websites to help with a robust outreach effort. Estimates are \$980,000 in FY2024 and \$965,500 in FY 2025.

Community outreach

Employment Security estimates it will need \$607,000 spread over two and a half years for community-based organizations to conduct outreach and application assistance. This mirrors the effort used with the Washington COVID-19 Immigrant Relief Fund.

Ongoing administration

Employment Security assumes that the program will begin accepting applications for benefits January 1, 2025. Estimated total cost of ongoing administration of the program starting Jan. 1, 2025 is \$6,268,000.

Table 3: Costs associated with ongoing administration

	FY2025	FY2026	FY 2027+
Staffing	\$2,777,485	\$4,873,911	\$4,496,779
Contractor	\$2,076,434	\$1,518,934	\$1,260,934
Interagency payments	\$255,360	\$510,720	\$510,720
Total	\$5,109,279	\$6,903,565	\$6,268,433

Source: Employment Security Department

Staffing costs

Employment Security estimates the following full-time employees (FTE) will be needed for ongoing administration of the program in the following categories:

Information technology

The following staff will be needed for ongoing maintenance of the software used to administer the program:

- IT business analyst – 1.00 FTE
- Business subject matter experts – 2.50 FTE
 - Adjudication unemployment insurance specialist 4 – 2.00 FTE
 - Fraud investigator 3 – 0.25 FTE
 - Fiscal analyst 5 – 0.25 FTE
- Business testers – 2.50 FTE

- Adjudication unemployment insurance specialist 4 – 2.00 FTE
- Fraud investigator 3 – 0.25 FTE
- Fiscal analyst 5 – 0.25 FTE
- IT developers – 3.00 FTE
 - IT application developer senior specialist – 1.00 FTE
 - IT application developer journey – 1.00 FTE
 - IT application developer entry – 1.00 FTE
- IT quality assurance tester journey – 1.00 FTE
- IT systems administration manager – 0.25 FTE
- Technical training consultant – 0.50 FTE

Communications

Because this is going to be a new program, the staffing needs for external communications efforts will be higher at the initial launch of the program and will taper off as the program is established and undocumented workers become more familiar with the program. The following staff will be needed for ongoing external communications:

FY 2025:

- Washington management service 1 – 0.50 FTE
- Communications consultant 5 – 1.00 FTE
- Communications consultant 4 – 3.00 FTE
- Communications consultant 3 – 1.00 FTE
- Communications consultant 2 – 0.50 FTE

FY 2026:

- Washington management service 1 – 1.00 FTE
- Communications consultant 4 – 6.00 FTE
- Communications consultant 3 – 1.00 FTE
- Communications consultant 2 – 1.00 FTE

FY 2027:

- Communications consultant 4 – 5.00 FTE
- Communications consultant 2 – 1.00 FTE

Customer experience

The following staff will be needed to consistently work on improving the customer experience of individuals applying for the program:

- Product analyst – management analyst 5 – 1.00 FTE

Operational staff

To administer the program, it will be necessary to have staff to answer customer inquiries, review claims for benefits, investigate potential issues, and make determinations as to whether claimants are eligible to receive benefits. Staff will also need to investigate potential fraud as well as adjust policies. Finally, staff will be needed to review and process appeals, forward those appeals to the Office of Administrative Hearings to hold a hearing, and then review any petitions for review that challenge decisions made by the Office of Administrative Hearings. The staff that will be needed for those tasks are:

- Program coordinator 2 – 1.00 FTE
- Unemployment insurance specialist 3 – 5.50 FTE
- Unemployment insurance specialist 4 – 5.50 FTE
- Unemployment insurance specialist 5 – 2.00 FTE
- Unemployment insurance specialist 6 – 2.00 FTE
- Washington management service 2 – 1.00 FTE
- Training consultant (0.52 FTE)
- Policy analyst (tax policy specialist 3) – 1.00 FTE
- Fraud investigator 3 – 1.00 FTE
- Office assistant 3 (0.19 FTE)
- Review judge – 1.00 FTE
- Legal assistant 3 – 1.00 FTE

Contractor costs

An unemployment benefit for undocumented workers would require additional changes to increase the capacity of the Employment Security phone system and to provide Language Link Interpreter Services. This is estimated to create on-going costs of \$960,934 per year.

In addition, the Employment Security Communications division will need to contract for marketing websites after the program launches as part of a robust communications plan. This is estimated to cost \$965,000 in Fiscal Year 2025 and \$258,000 in Fiscal Year 2026.

Finally, assuming the same IT vendor will host the servers that contain the IT software and data for administering unemployment benefits to undocumented workers, the fee for hosting the servers will be \$300,000 per year. If there are any additional changes to the underlying legislation or program requirements that necessitate a change to the IT program, additional funding will be needed for contractor time and materials to make those changes. Since such changes would be completely speculative at this point, they are not included in these estimates.

Interagency payments

Assuming that administrative appeals will be initially heard by the Office of Administrative Hearings, \$510,720 each year will be needed to pay the Office of Administrative Hearings to hear and rule on those appeals.

Additional considerations

Federal income tax

Unemployment benefits

For purposes of federal income tax, state unemployment insurance benefits count as gross income that needs to be reported.⁸⁰ Even though unemployment benefits count towards gross income, the recipient may not have an obligation to file or pay federal income taxes. For example, an individual whose income falls below a certain threshold has no filing obligation.⁸¹ This threshold can extend to undocumented workers who have been present in the United States for a prescribed length of time, as they will be treated in the same manner as U.S. citizens.⁸²

⁸⁰ 26 U.S.C. § 85(a); I.R.S. PUB 525, p. 28-29 (Apr. 6, 2021) available at <https://www.irs.gov/pub/irs-pdf/p525.pdf>.

⁸¹ See I.R.S. Instructions for Forms 1040 and 1040-SR at 9 (Apr. 13, 2021) <https://www.irs.gov/pub/irs-pdf/i1040gi.pdf>. This does not always mean, however, that all deductions and credits are allowable to an individual without an SSN. See, e.g., I.R.S., *Who Qualifies for the Earned Income Tax Credit* (Sept. 13, 2021), available at <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/who-qualifies-for-the-earned-income-tax-credit-eitc>.

⁸² See I.R.S., *Introduction to Residency Under U.S. Tax Law* (Sept. 9, 2021) available at <https://www.irs.gov/individuals/international-taxpayers/introduction-to-residency-under-us-tax-law>.

Nevertheless, any agency that pays unemployment benefits must provide to both the claimant and the IRS a form “prescribed by the Secretary [of the Treasury].”⁸³ Today, the form is catalogued as 1099-G.⁸⁴ A properly filed 1099-G includes the recipient’s taxpayer identification number, either a Social Security number or individual taxpayer identification number, their name, address, and the total amount of unemployment compensation paid.⁸⁵ This means that, in order to properly issue a proper 1099-G, the agency must have the claimant’s taxpayer identification number.⁸⁶ Therefore, any new program that is deemed by the IRS as “unemployment compensation” should include a process for obtaining taxpayer identification numbers before payments are issued.

While many taxpayers rely on withholdings to help ensure their income taxes are paid, the options to provide this service to undocumented individuals receiving an unemployment benefit are limited. For example, unemployment benefit recipients could ask a state agency to withhold ten percent of the benefits by sending a Form W-4V to the agency.⁸⁷ Box 2 of Form W-4V, however, requires the benefit recipient to provide their Social Security number – a number not all undocumented workers possess.⁸⁸ Moreover, while backup withholding at a rate of 24% is permissible for certain types of payments made to individuals who do not have a taxpayer identification number, unemployment compensation is excluded from that list of permissible payments.⁸⁹

When establishing a new unemployment compensation program, the population to be served may not have previous experience with federal income tax requirements. This can be problematic for any complex legal system, but most especially when liabilities attach to income received, as is the case with many payments issued under a Form 1099. Irrespective of the tax outcome of any one individual, a new unemployment compensation program will be well-served by a robust low-income taxation preparation infrastructure. Part of the administering agency’s outreach and communications plan should, therefore, include liaising with the existing Volunteer Income Tax Assistance Program,⁹⁰ area tax clinics and other tax preparer networks.

⁸³ 26 U.S.C. § 6050B.

⁸⁴ I.R.S., *About Form 1099-G, Certain Government Payments* (Mar. 4, 2021) available at <https://www.irs.gov/forms-pubs/about-form-1099-g>.

⁸⁵ See I.R.S. Form 1099-G, *Certain Government Payments (2021)* available at <https://www.irs.gov/pub/irs-pdf/f1099g.pdf>

⁸⁶ 26 USC § 6109(a)(3).

⁸⁷ See I.R.S. Form W-4V at 1 (Feb. 2019), available at <https://www.irs.gov/pub/irs-pdf/fw4v.pdf>.

⁸⁸ *Id.*

⁸⁹ See 26 U.S.C. § 3406 (unemployment compensation, governed by 8 USC § 6050B, is absent from the exhaustive list of payment types subject to backup withholding). See also, I.R.S. PUB.1281, p. 4 (May 2021), available at <https://www.irs.gov/pub/irs-pdf/p1281.pdf>.

⁹⁰ <https://www.irs.gov/individuals/free-tax-return-preparation-for-qualifying-taxpayers>

Need-based benefits

Contrary to the tax treatment of unemployment compensation, the Internal Revenue Service does not consider need-based payments as includable in gross income.⁹¹ For example, State Family Assistance, the Food Assistance Program, Diversion Cash Assistance, and the Consolidated Emergency Assistance Program are considered need-based benefits and, as a result, are neither taxed nor reported.

Individual taxpayer identification number

The Individual Taxpayer Identification Number (ITIN) is a tool used by individuals who do not have a Social Security number, such as some undocumented workers, to report and pay the federal income tax they owe.⁹² Individuals apply for ITINs by filing an IRS Form W-7 along with their return in the year in which a return is due.⁹³ The form asks questions about a person's identity and the reason for seeking an ITIN, but notably the form omits any direct question about immigration status.

Although receipt of an ITIN does not confer work authorization, it is also not a tool for immigration enforcement. The ITIN does, however, create different challenges. At this time, new ITIN filers are not permitted to e-file, and the processing of paper returns as well as ITIN requests is backlogged. According to the Taxpayer Advocate Service,⁹⁴ the IRS received over one million ITIN applications in 2020, and because of the COVID-19 pandemic, processing delays can amount to many months.⁹⁵ Consequently, an undocumented individual who needs immediate unemployment support may have difficulty accessing it unless they already have an unexpired ITIN.

Internal Revenue Service data protection

Federal law permits the IRS to disclose federal income tax information to other federal agencies in only very limited circumstances.⁹⁶ Civil immigration enforcement is not one of

⁹¹ See I.R.S. PUB 525 at 29 (Apr. 6, 2020), available at <https://www.irs.gov/pub/irs-pdf/p525.pdf>.

⁹² See I.R.S. Form W-7 (Aug. 2019), available at <https://www.irs.gov/pub/irs-pdf/fw7.pdf>.

⁹³ *Id.* at 4.

⁹⁴ The Taxpayer Advocate Service is housed within the IRS but is an independent resource for taxpayers with tax disputes. See Taxpayer Advocate Service, *The Taxpayer Advocate Service is Your Voice at the IRS*, Sept. 29, 2021), available at <https://www.irs.gov/advocate/the-taxpayer-advocate-service-is-your-voice-at-the-irs>

⁹⁵ Taxpayer Advocate Service, *NTA Blog: Most Taxpayers Needing a New ITIN are Prohibited from Filing Electronically, Causing Unnecessary Refund Delays*, (Apr. 13 2021), available at <https://www.taxpayeradvocate.irs.gov/news/nta-blog-most-taxpayers-needing-a-new-itin-are-prohibited-from-filing-electronically-causing-unnecessary-refund-delays/>.

⁹⁶ 26 U.S.C. § 6103(i).

those circumstances.⁹⁷ A search of news articles speaking to this issue uncovered no information indicating the IRS is sharing federal income tax information in order to enforce civil immigration laws.⁹⁸ Indeed, as the focus of the IRS is revenue collection, turning over taxpayer data to the Department of Homeland Security would not only be a statutory violation but also impede its efforts at collecting revenue.⁹⁹

Immigrants paying taxes

Nothing in this report should be read to mean that undocumented immigrants do not pay taxes. To the contrary, a 2017 study showed that in Washington state alone, undocumented immigrants paid an estimated \$316,624,000 in state and local taxes, including sales taxes.¹⁰⁰ Furthermore, many undocumented immigrants working for Washington employers have federal income and payroll taxes withheld from their paychecks under Social Security numbers derived from now-expired visas or incorrect Social Security numbers.¹⁰¹ Since those immigrants are less likely to file annual returns, are more likely to fall into lower income brackets, and less likely to draw Medicare and Social Security, many could be paying more than their share of federal taxes.¹⁰²

State data security

It has long been recognized that information pertaining to unemployment insurance claims must be kept confidential, as disclosure of this information “may discourage individuals

⁹⁷ See *Id.*

⁹⁸ See American Immigration Council, “The Facts About the Individual Taxpayer Identification Number (ITIN),” September 2021, <https://www.americanimmigrationcouncil.org/research/facts-about-individual-taxpayer-identification-number-itin>; *cf.*, Newell, Jennifer Chang, “Will Immigration Authorities Use Our Taxes to Go After Immigrants,” April 2018, <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/will-immigration-authorities-use-our-taxes-go>,

⁹⁹ See United States Government Accountability Office, Report No. GAO-04-529T (2004) *available at* <https://www.govinfo.gov/content/pkg/GAOREPORTS-GAO-04-529T/html/GAOREPORTS-GAO-04-529T.htm> (“IRS officials said that they cannot share . . . data with [Department of Homeland Security] under current statutory restrictions on the sharing of tax data. IRS officials also said that any consideration of additional sharing of tax data with federal agencies requires substantial justification and should be considered in rare circumstances because the confidentiality of tax data is considered to be fundamental to taxpayers’ willingness to voluntarily and accurately report their tax obligations. Finally, IRS officials also noted a potential adverse effect of increased data sharing. To the extent that [undocumented individuals] become aware of greater sharing of information by IRS with other agencies, some of the individuals may move into “underground” jobs and avoid their tax obligations.”).

¹⁰⁰ Lisa Christensen Gee et. al., *Undocumented Immigrants State and Local Tax Contributions*, INST. ON TAX’N AND ECON. POL’Y, p. 3 (Mar. 2017).

¹⁰¹ See Nneka Obiokoye, *Taxation of Undocumented Immigrants: The Uneasy Connection Between Regulating the Undocumented Immigrant and Fostering Illegal Activity*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 359, 383-384 (2018).

¹⁰² See *Id.* at 379-381, 384.

claiming benefits from exercising their rights under the law.”¹⁰³ As discussed further below, there already are state laws that protect the confidentiality of persons, including undocumented workers, who apply for government benefits. It is assumed, then, that any unemployment compensation program for undocumented individuals will enact similar confidentiality provisions.

The Keep Washington Working Act

Passed in 2019, the Keep Washington Working Act entered into law elements of Gov. Inslee’s Executive Order 17-01, “Reaffirming Washington’s Commitment to Tolerance, Diversity, and Inclusiveness.”¹⁰⁴ The Act generally limits the transmission of personally identifiable data to federal agencies absent specific conditions. For data collected by state agencies administering benefits and services, the Act prohibits state agencies from complying with requests that target individuals based solely on their immigration or citizenship status. Stated another way, unless a request from a federal immigration agency is compelled by an existing law or court order, any agency administering an unemployment program would not provide information or other assistance for civil immigration enforcement. Moreover, because any program providing unemployment benefits to undocumented workers would be funded and administered solely by the state, there is a low chance that any federal statute will compel the transfer of personally identifiable information by operation of existing law.¹⁰⁵

Other data protection laws

In addition to the Keep Washington Working Act, federal and state benefit programs have a host of more general confidentiality provisions. For example, Washington’s existing Unemployment Insurance program broadly deems all unemployment records private and confidential, places conditions on the provision of unemployment records to another governmental entity and protects the release of information gathered from another governmental entity.¹⁰⁶

¹⁰³ Unemployment Insurance Program Letter No. 34-97 (June 10, 1997).

¹⁰⁴ Engrossed Substitute Senate Bill 5497, c. 440 s. 5 (2019), codified at RCW 43.17.425.

¹⁰⁵ *But see*, 8 U.S.C § 1644 (“Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”).

¹⁰⁶ RCW 50.13.015(1), (2); RCW 50.13.020; RCW 50.13.060. Corresponding federal regulations also require state unemployment agencies to keep unemployment insurance information strictly confidential. *See* 20 C.F.R. Part 603.

Similar provisions are contained in the governing statutes of programs such as Paid Family Medical Leave,¹⁰⁷ workers' compensation,¹⁰⁸ and public assistance.¹⁰⁹ Furthermore, although Washington's Public Records Act is decidedly in favor of transparency, unemployment records held by Employment Security are exempt from public disclosure.¹¹⁰

Also, agencies are generally required to retain data and records for at least six years, unless there is an approved exception.¹¹¹ Reducing this default retention period for records associated with an unemployment benefit for undocumented workers is something that can be considered as an additional protective measure, however, doing so would also reduce the ability of external auditors to conduct any necessary audits of the program.

Data-sharing agreements

To the extent other programs exist that (a) are available to undocumented individuals and (b) are not to be used together with unemployment insurance or are otherwise factored into eligibility criteria, data-sharing agreements between the administering agencies will be needed.¹¹² Programs could include state-funded unemployment insurance options in other states, as well as Washington's paid family and medical leave and workers' compensation programs. Similar data-sharing arrangements will likely be necessary to comply with federal child support enforcement under the Social Security Act.¹¹³

Public charge

Potential immigrants could be denied permission to enter the country if they are deemed likely to be a "public charge."¹¹⁴ Similarly, those immigrants already lawfully admitted into the United States could face deportation if they are currently deemed to be a "public charge."¹¹⁵

The criteria for when an immigrant or potential immigrant is a "public charge" has undergone significant changes in the past two years. In 2019, the federal government adopted new rules

¹⁰⁷ RCW Chapter 50A.25.

¹⁰⁸ RCW 50.16.070

¹⁰⁹ RCW 74.04.060.

¹¹⁰ RCW 42.56.410.

¹¹¹ RCW 40.14.060

¹¹² See RCW 50.13.0.060(10), (11); 20 C.F.R. § 603.10 (setting out requirements for data-sharing agreements for existing Unemployment Insurance program).

¹¹³ 42 U.S.C. § 654(19); 42 U.S.C. § 666(c)(1)(G)(i)(I).

¹¹⁴ 8 U.S.C. § 1182(a)(4).

¹¹⁵ 8 U.S.C. § 1227(a)(5).

defining what it meant for an immigrant to be a public charge.¹¹⁶ The rule defines an immigrant as a public charge if they receive more than “12 months” of government benefits within a 36-month period.¹¹⁷ Included in the types of government benefits for which the receipt of could qualify an immigrant as a public charge, are “any Federal, State, local, or tribal cash assistance for income maintenance,” including Supplemental Nutrition Assistance Program benefits, most forms of Medicaid, and Section 8 housing and rental assistance.¹¹⁸ The 2019 rule also counted the benefits separately and “stacked” them, “such that, for instance, receipt of two benefits in one month counts as two months.”¹¹⁹ Ultimately, federal courts ruled that the federal government could not enforce the 2019 rule on the basis that the rule was “arbitrary and capricious” and was not supported by statutory authority.¹²⁰ Even so, the 2019 rule still had a chilling effect on immigrant families, and deterred noncitizens from accessing public benefits for which they were eligible.¹²¹

In March 2021, the federal government withdrew its support of the 2019 rule, and stopped using it when making immigration decisions.¹²² Instead, federal authorities will utilize the “1999 Interim Field Guidance” that was in place before the 2019 rule in order to make “public charge” determinations.¹²³ Under the 1999 Field Guidance, an immigrant already admitted to the country cannot be deported on the basis of being a “public charge” unless the immigrant has, within five years after they entered the country, received a benefit they are legally obligated to repay, the government agency made a demand for payment from the immigrant, and the immigrant failed to repay the benefit.¹²⁴ For persons seeking admission into the United States, the past receipt of cash assistance is just one factor in a “totality of the circumstances test” that looks at whether the immigrant will, prospectively, become a public charge, after taking into account factors like the immigrant’s age, health, assets, resources, financial status, education, and skills.¹²⁵ The 1999 Field Guidance displays a philosophy that the term “public charge”

¹¹⁶ See 84 Fed. Reg. 41292-01 (Aug. 14, 2019); 84 Fed. Reg. 52357-01 (Oct. 2, 2019).

¹¹⁷ *Cook County, Ill. v. Wolf*, 962 F.3d 208, 215 (7th Cir. 2020); 84 Fed. Reg. 41501 (Aug. 14, 2019).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See *Cook County, Ill. v. Wolf*, 962 F.3d 208 (7th Cir. 2020).

¹²¹ Randy Capps, Michael Fix and Jeanne Batalova, *Anticipated “Chilling Effects” of the Public-Charge Rule are Real: Census Data Reflect Steep Decline in Benefits Use by Immigrant Families*, Migration Policy Institute (Dec. 2020) available at <https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real>; Hamutal Bernstein, Dulce Gonazalez, Sara McTarnaghan, and Sonia Torres Rodríguez, *Three in 10 Adults in California Immigrant Families with Low Incomes Avoided Safety Net Programs: Building Trust and Improving Access to Safety Net Programs In the Pandemic Recovery*, Urban Institute (July 2021) available at https://www.urban.org/sites/default/files/publication/104623/three-in-10-adults-in-california-immigrant-families-with-low-incomes-avoided-safety-net-in-2020_1.pdf.

¹²² U.S. Citizenship and Immigration Services, *Public Charge* (Aug. 19, 2021) available at <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge>.

¹²³ *Id.*

¹²⁴ 64 Fed. Reg. 28691 (Mar. 26, 1999).

¹²⁵ 64 Fed. Reg. 28690 (Mar. 26, 1999).

reflects “a complete, or nearly complete, dependence on the Government rather than the mere receipt of some lesser level of financial support.”¹²⁶

It is unclear whether the 1999 Field Guidance counts the receipt of unemployment benefits against immigrants when making a public charge analysis. On one hand, the 1999 Field Guidance counts “state and local cash assistance programs that provide benefits for income maintenance” in the public charge analysis.¹²⁷ Unemployment insurance programs are often considered cash assistance programs intended to provide income maintenance.¹²⁸ On the other hand, in the comments to the withdrawn 2019 rule, the Department of Homeland Security said it “would not consider...Social Security Disability...or unemployment benefits as public benefits under the public charge inadmissibility determination as these are considered to be earned benefits through the person’s employment.”¹²⁹ The currently applicable 1999 Field Guidance, while not referencing unemployment benefits specifically, also does not consider “cash benefits that have been earned” such as Social Security Disability payments when determining if an immigrant is a public charge.¹³⁰ Plus, current United States State Department policy says “cash benefits based on prior employment” are not considered for purposes of a public charge determination.¹³¹

Looking forward, the Department of Homeland Security gave notice on August 23, 2021 that it was pursuing formal rulemaking on the public charge issue, with the intent of promulgating new rules that will not “unduly impose barriers on noncitizens.”¹³² Consequently, any unemployment benefits program designed to assist immigrant communities must be cognizant of the existing public charge guidance and keep up with future changes in the rules. Equally important, the program administrator will need to account for the chilling effect that the 2019 rule imposed on immigrant communities, understanding that the lack of trust in government will be an ongoing challenge.

¹²⁶ *Cook County, Ill. v. Wolf*, 962 F.3d 208, 216-17 (2020).

¹²⁷ 64 Fed. Reg. 28692 (Mar. 26, 1999).

¹²⁸ See e.g. Daniel N. Price, *Unemployment Insurance, Then and Now, 1935-85*, 48 SOCIAL SECURITY BULLETIN 22, 24, 32 (Oct. 1985) available at <https://www.ssa.gov/policy/docs/ssb/v48n10/v48n10p22.pdf> (noting that “unemployment insurance is intended to offer workers income maintenance during periods of unemployment due to lack of work” and referring to unemployment insurance “as one of the Nation’s major income-maintenance programs.”)

¹²⁹ 84 Fed. Reg. 41390 (Aug. 14, 2019).

¹³⁰ 64 Fed. Reg. 28682, 28684 (Mar. 26, 1999).

¹³¹ U.S. State Department, *Foreign Affairs Manual*, 9 FAM 302.8-2(B)(1)(c)(3) (rev. Mar. 25, 2021) available at <https://fam.state.gov/fam/09fam/09fam030208.html>.

¹³² 86 Fed. Reg. 47025 (Aug. 23, 2021).

Other programs

This section provides an overview of programs that currently provide benefits to undocumented workers, programs that have already been authorized and will soon be implemented, and other programs that could also be amended to provide benefits to undocumented workers, thereby meeting the requirement that the study capture the feasibility of expanding other (non-unemployment insurance) social net programs to individuals regardless of their citizenship status.

Benefits currently available

Washington Paid Family and Medical Leave

Paid Family and Medical Leave is a state-run program that provides paid time off to individuals who have a serious health condition, or who need time to care for a family member or a new child, or to spend time with a family member who is about to be deployed overseas or who just returned from overseas.¹³³ The laws surrounding the program do not make any distinctions regarding a claimant's immigration status, so the program is available to undocumented workers.¹³⁴

Workers' compensation

Workers' compensation, otherwise known as industrial insurance, pays for medical care directly related to a workplace injury or illness, and can replace a portion of a worker's lost wages if they are unable to work due to their injury.¹³⁵ Again, the laws surrounding the program make no distinctions regarding a workers' immigration status, so the program is available to undocumented workers.¹³⁶

¹³³Employment Security Department, *Find Out How Paid Leave Works*, available at <https://paidleave.wa.gov/find-out-how-paid-leave-works/>.

¹³⁴ Employment Security Department, *Citizenship and Legal Right to Work*, available at <https://esd.wa.gov/unemployment/citizenship-and-legal-rights>.

¹³⁵ Department of Labor and Industries, *Injured? What you Need to Know*, available at <https://lni.wa.gov/claims/for-workers/injured-what-you-need-to-know/>.

¹³⁶ Department of Labor and Industries, *How Can We Help You Today?*, available at <https://www.lni.wa.gov/agency/languages/english>.

COVID-19 rental assistance

In 2021, the Legislature allocated over \$3.5 million to provide financial assistance to individuals who rent their homes to help pay for past due, current, and future rent.¹³⁷ This program is administered through a series of grants administered by the Department of Commerce to county governments, who then distribute the funds to those in need.¹³⁸ This program does not consider a renter's immigration status when they apply for assistance under the program.¹³⁹

Emergency cash assistance

There are two emergency cash assistance programs administered by the Department of Social and Health Services (DSHS) that do not look at a person's immigration status when determining eligibility: The Consolidated Emergency Assistance Program¹⁴⁰ and the Disaster Cash Assistance Program.¹⁴¹ Both of these programs are available only to individuals who are ineligible for other cash assistance programs, such as Temporary Assistance for Needy Families (TANF),¹⁴² and only have a finite amount of funds available for benefits.¹⁴³ Consolidated Emergency Assistance Program benefits are allowed to pregnant women and families with dependent children who have an emergency need for a basic requirement, such as food, shelter, clothing, minor medical care, or utilities.¹⁴⁴ The Disaster Cash Assistance Program pays for the same basic requirements for households without children, but can only be accessed pursuant to a Governor-declared disaster.¹⁴⁵

Washington COVID-19 Immigrant Relief Fund

Many people within the immigrant community were ineligible to receive any federal stimulus funds or federal and state unemployment benefits due to their immigration status, which left

¹³⁷ ESHB 1368, Laws of 2021, c. 3, s. 3.

¹³⁸ See *Id.*; Emergency Proclamation 21-09, p. 4 (June 29, 2021). See also Department of Commerce, *Treasury Rent Assistance Program (T-RAP)*, available at <https://www.commerce.wa.gov/serving-communities/homelessness/eviction-rent-assistance-program/>.

¹³⁹ See e.g., King County Rental Assistance, *Tenant Registration*, available at <https://eprap-prod.powerappsportals.us/tenant/>.

¹⁴⁰ WAC 388-436-0015 to 388-436-0050; Department of Social and Health Services, *Consolidated Emergency Assistance Program - CEAP* (revised July 1, 2021 [sic]) available at <https://www.dshs.wa.gov/esa/emergency-assistance-programs/consolidated-emergency-assistance-program-ceap>.

¹⁴¹ WAC 388-436-0055 to 388-436-0060; Department of Social and Health Services, *Disaster Cash Assistance Program* (revised Feb. 11, 2021) available at <https://www.dshs.wa.gov/esa/emergency-assistance-programs/disaster-cash-assistance-program>.

¹⁴² WAC 388-436-0030(1), 388-436-0055(1)(e).

¹⁴³ WAC 388-436-0015(5), 388-436-0055(7).

¹⁴⁴ WAC 388-436-0015(1), (3).

¹⁴⁵ WAC 388-436-0055.

them without economic support during the COVID-19 pandemic. To support undocumented immigrants living in Washington, the Governor and the legislature allocated \$127.6 million to the WA COVID-19 Immigrant Relief Fund between August 2020 and February 2021.¹⁴⁶ This funding provided one-time payments of \$1,000 to eligible and approved applicants across the state.¹⁴⁷

The Washington State Department of Social and Health Services – Office of Refugee and Immigrant Assistance (DSHS-ORIA) administered the Washington COVID-19 Immigrant Relief Fund, also known as the Immigrant Relief Fund, through partnerships and contracts with organizations across the state to ensure a successful implementation of the program. In October 2020, after a competitive procurement, DSHS-ORIA signed a contract with the Legal Foundation of Washington to oversee the Immigrant Relief Fund 2020. The Legal Foundation of Washington subcontracted with various community-based organizations, including the Washington Immigrant Solidarity Network, Scholarship Junkies, and the Fair Work Center to manage the outreach, application design, application processing, and grant disbursement. In December 2020, DSHS-ORIA extended the contract with the Legal Foundation of Washington in order to provide additional grants.

In February 2021, the Washington State Legislature allocated an additional \$65 million to the Washington COVID-19 Immigrant Relief Fund.¹⁴⁸ With limited time during the pandemic, DSHS-ORIA requested and received authority to do sole source contracts. DSHS-ORIA contracted with Submittable to manage the technology and funding disbursement, Scholarship Junkies to oversee the application review and processing, and the Washington Immigrant Solidarity Network to develop communication strategies and for their unique customer support hotline. DSHS-ORIA partnered with 22 ethnic community-based organizations across the state representing and serving Latinx/e, Black-African, and Asian-Pacific Islander immigrant communities to conduct outreach and application assistance.

One of the key successes for the Immigrant Relief Fund is the strong partnership built between the State of Washington and the impacted community. Administering the program through contracts with trusted organizations allowed for the community to take ownership of the program and build an infrastructure and response services that are more culturally relevant and linguistically appropriate. This model has provided impacted community with a sense of

¹⁴⁶ Office of the Governor, *Inslee Announces COVID-19 Immigrant Relief Fund Now Open for Applications* (Oct. 21, 2020) available at <https://www.governor.wa.gov/news-media/inslee-announces-covid-19-immigrant-relief-fund-now-open-applications>; Office of the Governor, *Washington COVID-19 Immigrant Relief Fund Opens for New Applications* (Apr. 21, 2021) available at <https://www.governor.wa.gov/news-media/washington-covid-19-immigrant-relief-fund-opens-new-applications>.

¹⁴⁷ Washington COVID-19 Immigrant Relief Fund, *Frequently Asked Questions*, available at <https://www.immigrantreliefwa.org/faq>.

¹⁴⁸ Laws of 2021, c. 3, s. 8(4) (ESHB 1368).

safety that their personal information provided in the application is not being shared with a state agency.

Altogether, the Immigrant Relief Fund received \$127.5 million, spending just over \$5 million on contracted administration and almost \$122 million in grants to individuals and families. While DSHS-ORIA did not use the funds to fund implementation, DSHS-ORIA did dedicate two staff to ensure implementation. The Immigrant Relief Fund received a total of 160,618 applications through two open application processes from people across the state. Of those applications, 120,853 have been approved to receive a one-time payment of \$1,000, adding up to \$120,853,000, which were sent directly to eligible and approved applicants.

Table 4: COVID-19 Immigrant Relief Fund applications

	2020 applications Oct. 22 – Dec. 6, 2020	2021 applications March 22 – April 7, 2021	TOTAL applications
Total received	94,192	66,426	160,618
Total funded	59,103	47,982	120,853 (includes recertified)
Total unfunded	19,900	N/A	
Total recertified and funded*	N/A	13,768	
Total denied/ineligible	14,192	18,444	

Source: Washington Department of Social and Health Services, Office of Refugee and Immigrant Assistance

Applicants to the Washington COVID-19 Immigrant Relief Fund had to meet the following eligibility requirements:

- Live in Washington state.
- Be at least 18 years of age.
- Must have been significantly affected by the pandemic (such as losing work, contracting the virus, or caring for a family member who was diagnosed with COVID-19).
- Must not be eligible to receive federal stimulus funds or unemployment insurance because of immigration status.¹⁴⁹

¹⁴⁹ Laws of 2021, c. 3, s. 8(4)(a)(i)-(iv); David Groves, *Applications Now Open for WA COVID Immigrant Relief Fund*, THE STAND (Oct. 21, 2020) available at <https://www.thestand.org/2020/10/applications-now-open-for-wa-covid-19-immigrant-relief-fund/>.

Those who applied to the program implemented in 2021 had to meet an additional requirement of having an income at or below 250% of the federal poverty level.¹⁵⁰

In an effort to ensure equitable access to the fund across the state, geographical application caps were assigned to each region. The regions included: Benton-Franklin-Walla Walla, Clark, Grant-Kittitas, King, Pierce, Snohomish, Yakima, and rest of WA State. With limited funding, the program prioritized applications based on the following criteria:

- Housing instability.
- Lost income.
- Single parent or caregiver
- High risk for COVID-19.¹⁵¹

Most of the eligible and approved applicants resided in King, Yakima, Snohomish, Franklin, Grant, and Pierce counties. The majority of applications were submitted in Spanish and over 75% of applicants identify as being from Latin America. The program also saw representation from applicants who identify as White, Asian, Multiracial, Black/African, Native American, Middle Eastern or North African, and Native Hawaiian or Pacific Islander. At the time of the application, the majority of applicants worked in agriculture followed by restaurant and food services, construction, housekeeping, and day laborer and landscaping.

Table 5: Employment sectors for COVID-19 Immigrant Relief Fund recipients

Employment sector	2020 recipients	2021 recipients
Agriculture	29%	27%
Restaurant and food services	18%	13%
Construction	13%	9%
Housekeeping	10%	7%
Unemployed	7%	6%
Day laborer and landscaping	5%	4%
Other sectors	18%	34%

Source: Washington Department of Social and Health Services, Office of Refugee and Immigrant Assistance

The success of the Washington COVID-19 Immigrant Fund along with the advocacy of community leaders and organizations, prompted the Washington State Legislature to allocate

¹⁵⁰ Laws of 2021, c. 3, s. 8(4)(a)(v).

¹⁵¹ Laws of 2021, c. 3, s. 8(4)(c).

and approve an additional \$340 million to be implemented over the 2022-2023 biennium.¹⁵² This brings the total allocated funding for the Washington COVID-19 Immigrant Relief Fund to \$467 million, one of the largest programs of its kind in the country. As of the date of this report, no further funding has been allocated to the program beyond the 2022-2023 biennium.

Programs not yet operational

Working Families Tax Credit

Funded in the 2021 Operating Budget and amended to include persons who file their federal taxes using Individual Taxpayer Identification Numbers (ITINs),¹⁵³ the Working Families Tax Credit is set to debut in 2023.¹⁵⁴ The program will be administered by the Department of Revenue, which as of the date of this report, is working to adopt rules, develop a communication and outreach plan, and build the credit's infrastructure. Key elements of the credit include an annual payment ranging from \$50 to \$1,200, based on family size and income, and an interrelationship with the federal Earned Income Tax Credit.¹⁵⁵ Assuming that income has not reached the lower bound of the federal phase-out range,¹⁵⁶ the credit steps up by \$300, from \$300 per individual without children to \$1,200 per individual with three or more children.¹⁵⁷

As noted above, ITIN holders who have been filing federal tax returns and would otherwise qualify for the credit except for the fact that the individual filed a federal tax return in the prior year using a valid ITIN in lieu of a Social Security number will qualify for the Working Families Tax Credit. While the Department of Revenue engages in outreach to immigrant communities and highlights the importance of the Working Families Tax Credit, more undocumented

¹⁵² Laws of 2021, c. 334, s. 205(15) (ESSB 5092).

¹⁵³ HB 1297, Laws of 2021, c. 195, s. 2. While undocumented workers may need to file their taxes using an ITIN, other, lawfully admitted individuals, can file their taxes using an ITIN as well. IRS, *Individual Taxpayer Identification Number* (rev. Oct. 7, 2021) available at <https://www.irs.gov/individuals/individual-taxpayer-identification-number>.

¹⁵⁴ Department of Revenue, *Working Families Tax Credit*, available at <https://dor.wa.gov/taxes-rates/tax-incentives/credits/working-families-tax-credit>.

¹⁵⁵ *Id.*

¹⁵⁶ See Congressional Research Service, *The Earned Income Tax Credit (EITC): How it Works and Who Receives It*, pp. 5-9 (Jan. 12, 2021) available at <https://sgp.fas.org/crs/misc/R43805.pdf> (providing details on the federal phase-out range and how it is calculated).

¹⁵⁷ Department of Revenue, *Working Families Tax Credit*, available at <https://dor.wa.gov/taxes-rates/tax-incentives/credits/working-families-tax-credit>.

immigrants will become familiar with the federal income tax reporting system, obtain ITINs, and begin filing annual returns, all the while narrowing the gap described earlier in this report.

Programs not available to undocumented individuals

Undocumented individuals do not qualify for federal means-tested benefits.¹⁵⁸ Even many immigrants lawfully present in the United States are not eligible for these federal means-tested public benefits because they are considered “nonqualified” or are lawful permanent residents who entered the United States within the previous five years.¹⁵⁹ To counter this gap, many states have created complementary state-funded programs for immigrants who are lawfully present but otherwise excluded from federal benefits.¹⁶⁰ In Washington, some of these programs are not currently available to undocumented individuals. However, changes could be made to these programs to make them available to the undocumented workers of Washington.

State family assistance

The State Family Assistance program is the state-funded and administered analogue to the federal Temporary Assistance for Needy Families (TANF) program, which provides temporary cash for families in need.¹⁶¹ State Family Assistance is only available to individuals with dependent children or who are pregnant.¹⁶² Additionally, the applicant’s household income cannot exceed certain limits, which increase incrementally as based on the number of people in the applicant’s household also increases.¹⁶³

¹⁵⁸ 8 U.S.C. §1613(a), 8 U.S.C. § 1641(b); Tanya Broder, Gabrielle Lessard, and Avidah Moussavian, *Overview of Immigrant Eligibility for Federal Programs*, National Immigration Law Center (updated Oct. 2021) available at <https://www.nilc.org/issues/economic-support/overview-immeligfedprograms/>.

¹⁵⁹ *Id.* Included in the “nonqualified” category are individuals paroled into the United States for less than one year, granted temporary protected status, or present under a nonimmigrant visa. *Id.* Conversely, refugees, asylees, and certain other status holders are eligible for federal assistance. *Id.*

¹⁶⁰ National Immigration Law Center, *Table 8 State-Funded TANF Replacement Programs* (updated Apr. 2020) available at https://www.nilc.org/issues/economic-support/guide_tanf/.

¹⁶¹ Department of Social and Health Services, *TANF and Support Services*, available at <https://www.dshs.wa.gov/esa/community-services-offices/tanf-and-support-services>

¹⁶² WAC 388-408-0015(2), 388-454-0010.

¹⁶³ WAC 388-478-0035 (as amended by WSR 21-21-070). In addition, total family “resources,” including checking and savings accounts, financial assets, and vehicle equity above \$10,000, must fall below \$6,000. WAC 388-470-0005(6), 388-470-0012, 388-470-0045.

Table 6: Income limits for State Family Assistance

Number of people in household ¹⁶⁴	Monthly earned income limit ¹⁶⁵
1	\$834
2	\$1,056
3	\$1,308
4	\$1,542
5	\$1,776
6	\$2,019
7	\$2,330
8	\$2,578
9	\$2,832
10	\$3,078

Source: WAC 388-450-0155; WAC 388-408-0005, 0015, 0020, 0025, 0030

Similarly, the maximum monthly benefit payments an applicant can receive are also adjusted based on the number of people in the applicant’s household:

Table 7: Maximum benefit amounts for State Family Assistance

Number of people in household	Maximum monthly payment ¹⁶⁶
1	\$417
2	\$528
3	\$654
4	\$771
5	\$888
6	\$1,009
7	\$1,165
8	\$1,289
9	\$1,416
10 or more	\$1,539

Source: WAC 388-478-0020

¹⁶⁴ Household is termed “assistance unit” in and may or may not include all people living at the same address. See WAC 388-408-0005, 0015, 0020, 0025, 0030 (rules on how to calculate the number of people in an assistance unit)

¹⁶⁵ For immigrants sponsored by someone in the United States, the sponsor’s income may be counted as available to the immigrant. See WAC 388-450-0155.

¹⁶⁶ WAC 388-478-0020 (as adjusted by WSR 21-21-070).

These monthly benefit payments are, with some exceptions, limited to no more than 60 months any adult household member's lifetime.¹⁶⁷

Parents receiving State Family Assistance must also participate in the DSHS WorkFirst program, which provides training and support services necessary for recipients to become employed and earn a living for their family.¹⁶⁸ These individuals must participate in one or more activities, including paid employment, work experience, vocational training, or community service, and participation in approved activities is required up to full-time.¹⁶⁹ At the same time, the program offers significant advantages to the participant, including childcare expense assistance, job-search skill-building, training, and access to a case manager.¹⁷⁰

State Family Assistance is primarily designed to address gaps in federal cash assistance for a variety of immigrants lawfully present in Washington, such as immigrants offered temporary status in the U.S. for less than one year.¹⁷¹ Starting February 1, 2022, State Family Assistance, as well as Diversion Cash Assistance and the Food Assistance Program, will expand to include immigrant survivors of human trafficking and their qualifying family members.¹⁷² Nonetheless, the program is not available to undocumented workers.

To make State Family Assistance available to undocumented families and individuals, there must be some action by the State Legislature.¹⁷³ This can be accomplished either through passing a bill explicitly extending State Family Assistance to undocumented populations as well as by changes made by the Department of Social and Health Services (DSHS) through rulemaking, which are assented to by the Legislature by funding those changes in the next budget, and, in an associated budget proviso, direction DSHS to adopt the rules.

Extending State Family Assistance to undocumented workers does pose some difficulties. First, because the payments are recurring, they are more likely to count against immigrants when determining if they are a "public charge."¹⁷⁴ Second, the current requirement that State Family Assistance recipients participate in WorkFirst activities could prove legally tricky given federal

¹⁶⁷ WAC 388-484-0005.

¹⁶⁸ WAC 388-310-0200(1)(a); Department of Social and Health Services, *WorkFirst Handbook* (rev. Feb. 2, 2021) available at <https://www.dshs.wa.gov/esa/manuals/workfirst-handbook>.

¹⁶⁹ See WAC 388-310-0200.

¹⁷⁰ See generally WAC Chapter 388-310, Department of Social and Health Services, *WorkFirst Handbook* (rev. Feb. 2, 2021) available at <https://www.dshs.wa.gov/esa/manuals/workfirst-handbook>.

¹⁷¹ WAC 388-424-0001(2), (3), 388-424-0015(1).

¹⁷² Laws of 2020, c. 136 (3SSB 5164). In essence, this change will connect these benefit programs to the T visa, U visa, and asylum application processes under federal immigration law.

¹⁷³ 8 U.S.C. § 1621(d).

¹⁷⁴ See 64 Fed. Reg. 28692 (Mar. 26, 1999) (including benefits like recurring Temporary Assistance to Needy Families cash assistance as benefits to be considered for public charge purposes).

prohibitions against employing undocumented workers.¹⁷⁵ Third, similar to the federally funded TANF program, State Family Assistance is only eligible for adults with dependent children. Single or married adults without dependents would remain ineligible. On the other hand, State Family Assistance payments are not subject to federal income tax¹⁷⁶ and undocumented workers could benefit from ancillary case management services provided through the WorkFirst program, even if direct employment cannot be fully supported.¹⁷⁷

Washington Food Assistance Program

The Washington Food Assistance Program is the state-funded and administered analogue to the federal Supplemental Nutrition Assistance Program (SNAP).¹⁷⁸ The program provides individuals and families with electronic benefits transfer (EBT) cards, which can then be used to purchase food at groceries, convenience stores, and other retailers that accept EBT cards.¹⁷⁹ As with State Family Assistance, the limits on household income and the amount of monthly benefits adjust with the size of the applicant’s household:

Table 8: Income thresholds and maximum benefit amounts for Food Assistance Program

Number of people in household	Monthly income limit ¹⁸⁰	Maximum monthly benefit ¹⁸¹
1	\$2,147	\$250
2	\$2,903	\$459
3	\$3,660	\$658
4	\$4,417	\$835
5	\$5,173	\$992
6	\$5,930	\$1,190
7	\$6,687	\$1,316
8	\$7,443	\$1,504

¹⁷⁵ 8 U.S.C. § 1324a(a).

¹⁷⁶ See I.R.S. PUB 525 at 29 (Apr. 6, 2020), available at <https://www.irs.gov/pub/irs-pdf/p525.pdf>.

¹⁷⁷ See e.g. WAC 388-310-0200(2)(l) (including in the WorkFirst program other activities that will help with situations such as drug and/or alcohol abuse, homelessness, or mental health issues).

¹⁷⁸ Department of Social and Health Services, *State Food Assistance Program (FAP)*, available at <https://www.dshs.wa.gov/esa/community-services-offices/state-food-assistance-program-fap>.

¹⁷⁹ WAC 388-412-0046(2); Department of Social and Health Services, *How to Apply For and Use Basic Food Benefits*, p. 8 (rev. Apr. 2020) available at <https://www.dshs.wa.gov/sites/default/files/publications/documents/22-297.pdf>.

¹⁸⁰ Income limits for those who are categorically eligible for food assistance are set at 200% of the federal poverty guidelines. WAC 388-414-0001(2)(a). See U.S. Department of Health & Human Services, *Poverty Guidelines, 48 Contiguous States* (2021), available at <https://aspe.hhs.gov/sites/default/files/private/aspe-files/107166/2021-percentage-poverty-tool.xlsx> (presenting 2021 poverty guideline and various percentages above and below that guideline). For immigrants sponsored by someone in the United States, the sponsor’s income may be counted as available to the immigrant. See WAC 388-450-0155.

¹⁸¹ WAC 388-478-0060 (as adjusted by WSR 21-20-005).

Number of people in household	Monthly income limit ¹⁸⁰	Maximum monthly benefit ¹⁸¹
9	\$8,200	\$1,692
10	\$8,957	\$1,880

Source: U.S. Department of Health & Human Services, WAC 388-478-0060

Persons applying for the state-funded Food Assistance Program must meet all the other requirements of federally-funded SNAP with one difference – lawfully admitted immigrants excluded from SNAP can be eligible for the Food Assistance Program.¹⁸²

There are some key differences between the Food Assistance Program and State Family Assistance. First, while there is a requirement to “register for work” to receive food assistance, the requirements are less intense and apply to fewer people than the work-related requirements for State Family Assistance.¹⁸³ Second, not all adults need dependents to qualify for the Food Assistance Program.¹⁸⁴ However, “able-bodied adults without dependents” need to engage in more rigorous employment or employment-training programs to receive more than three months of food assistance.¹⁸⁵ Third, the income limits for food assistance are significantly higher than the income limits for State Family Assistance. However, benefits under the Food Assistance Program can only be used on grocery items and food-producing plants, while benefits under the State Family Assistance Program can be used on a wider variety of items, such as shelter, utilities, and clothing.¹⁸⁶

Extending the Food Assistance Program to undocumented workers would require an act by the Legislature, and rulemaking by DSHS to adjust the corresponding rules.¹⁸⁷ And while it will again be tricky to reconcile the “registration for work” requirement with federal prohibitions against employing undocumented workers, at least food nutrition programs currently do not count against immigrants when considering if they are a “public charge.”¹⁸⁸

Diversion Cash Assistance

The Diversion Cash Assistance program provides a one-time payment of up to \$1250 to individuals who are otherwise eligible for TANF or State Family Assistance, but who (a) elect to

¹⁸² RCW 74.08A.120; WAC 388-400-0050(1), (2).

¹⁸³ Compare WAC Chapter 388-444 with WAC Chapter 388-310. For example, individuals caring for children younger than six do not need to register for work to receive food assistance. WAC 388-444-0010(6)(a).

¹⁸⁴ See WAC 388-400-0040 (noting the program helps “low-income individuals and families buy food”).

¹⁸⁵ WAC 3888-444-0030.

¹⁸⁶ See WAC 388-412-0046.

¹⁸⁷ Specifically, RCW 74.08A.130(1) would need to be amended, as it specifically limits the Food Assistance Program to “legal immigrants.”

¹⁸⁸ 64 Fed. Reg. 28693 (Mar. 26, 1999)

take a single payment and (b) have bona fide emergency needs for support with childcare, housing, transportation, food, medical costs, or employment-related expenses.¹⁸⁹

Diversion Cash Assistance has a couple advantages over other benefits. First, Diversion Cash Assistance recipients are far less likely to be categorized as a “public charge” as it is a non-recurring payment, and second, Diversion Cash Assistance does not have a work search requirement.¹⁹⁰ On the other hand, Diversion Cash Assistance is only available to families with dependent children, and is limited to a single benefit payment per year.¹⁹¹ Additionally, if an individual applies for State Family Assistance within 12 months of receiving Diversion Cash Assistance, the Diversion Cash Assistance will be deducted from the individual’s State Family Assistance payments.¹⁹²

Making Diversion Cash Assistance available to undocumented immigrants would require an act by the Legislature, and rulemaking by DSHS to adjust the corresponding rules.¹⁹³

Emergency cash assistance

The Additional Requirements for Emergent Needs benefit allows an individual who is already enrolled in TANF or State Family Assistance additional payments for emergency housing or utility need.¹⁹⁴ The individual must present a good reason for the pressing circumstances and have an explanation for how they will afford the ongoing need in the future.¹⁹⁵ At present, the total annual benefit cannot exceed \$750.¹⁹⁶ To make this benefit available to undocumented workers, DSHS would have to engage in rulemaking to decouple eligibility for Additional Requirements for Emergent Needs from eligibility for TANF, State Family Assistance and Refugee Cash Assistance.¹⁹⁷

¹⁸⁹ RCW 74.08A.210; Department of Social and Health Services, *Diversion Cash Assistance (DCA)*, (revised Aug. 1, 2018) available at <https://www.dshs.wa.gov/esa/diversion-cash-assistance-dca>.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Currently, RCW 74.08A.210(5), (6) require Diversion Cash Assistance recipients to be “otherwise available for temporary assistance for needy families.” This would need to be changed, as temporary assistance for needy families categorically excluded undocumented immigrants. 8 U.S.C. §1613(a), 8 U.S.C. § 1641(b).

¹⁹⁴ WAC 388-436-0002; Department of Social and Health Services, *Emergency Assistance Programs – Additional Requirements for Emergent Needs (AREN)* (revised May 10, 2019) available at <https://www.dshs.wa.gov/esa/emergency-assistance-programs/emergency-assistance-programs-additional-requirements-emergent-needs-aren>.

¹⁹⁵ WAC 388-436-0002(6).

¹⁹⁶ WAC 388-436-0002(7)(a).

¹⁹⁷ See WAC 388-436-0002.

Barriers to expanding assistance programs

One of the largest barriers to expanding DSHS assistance programs to undocumented workers is that any assistance would not count towards Washington's maintenance of effort funds under the federal TANF program. Under TANF, the federal government gives states a block grant of federal funds to states, but in order to receive the federal funds, states must also spend their own state dollars, labeled by federal law as "maintenance of effort" on programs for needy families.¹⁹⁸ If a state does not spend enough "maintenance of effort" funds, the federal government will reduce the federal funds it will give that state in the following year.¹⁹⁹ "Maintenance of effort" spending above the required minimum also benefits the state by enabling it to meet otherwise unattainable federal performance targets and protecting the state from similar federal penalties.²⁰⁰ Notably, state funds spent to assist undocumented immigrants do not count towards a state's maintenance of effort funds.²⁰¹ This means that if Washington wants to expand existing benefit programs to include undocumented individuals, it cannot simply shift funds used for non-undocumented individuals over to assist undocumented individuals as doing so may reduce Washington's maintenance of effort funds below needed levels. This also means that DSHS would need additional funds to invest in systems and processes to help differentiate financial assistance given to undocumented workers and assistance given to non-undocumented workers.

In addition to concerns about maintenance of effort funding, any legislation that expands assistance programs to undocumented workers would need to give DSHS sufficient lead time to do the things it would need to get ready, such as rulemaking, policy updates, staff training, and external communications. DSHS is currently retooling its IT infrastructure, including its Automated Client Eligibility System (ACES), to implement 2020 legislation which expanded eligibility criteria for certain immigrant survivors of human trafficking.²⁰² DSHS's work on implementing this legislation may be instructive, but not representative, as to the full administrative costs and time commitment necessary should eligibility be expanded even further to include undocumented immigrants.

¹⁹⁸ Center on Budget and Policy Priorities, *Policy Basics: Temporary Assistance for Needy Families*, p. 2 (updated Mar. 31, 2021), available at <https://www.cbpp.org/sites/default/files/atoms/files/7-22-10tanf2.pdf>; U.S. Government Accountability Office, *Temporary Assistance for Needy Families: State Maintenance of Effort Requirements and Trends* (May 17, 2012) available at <https://www.gao.gov/assets/gao-12-713t.pdf>.

¹⁹⁹ *Id.*

²⁰⁰ Department of Social and Health Services, *Report to the Legislature: WorkFirst Maintenance of Effort and Work Participation Rate Fourth Quarter Calendar Year 2020* (July 1, 2021) available at [https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=2020_CY%20Q4_MOE_and_WPR_Report%20\(Final\)_c4980dae-1e27-450f-8b45-19b596ad7db1.pdf](https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=2020_CY%20Q4_MOE_and_WPR_Report%20(Final)_c4980dae-1e27-450f-8b45-19b596ad7db1.pdf)

²⁰¹ 45 C.F.R. § 263.2(b).

²⁰² See Laws of 2020, c. 136 (SB 5164).

Appendices

Survey results

Total survey respondents: **29**

Language:

- English: **20**
- Spanish: **9**

Have you ever applied for or received benefits provided in the state of Washington? Examples include the Washington COVID-19 Immigrant Relief Fund (WIRF); Paid Family Medical Leave (PFML); the Washington College Grant; Workers' Compensation; Women, Infants, and Children (WIC) Program; Emergency Medicaid (AEM); the Disaster Cash Assistance Program (DCAP); the School Lunch Program; and Pandemic EBT:

- Yes: **15**
- No: **14**

Please rank your experience accessing state benefits in the following categories. Examples include the Washington COVID-19 Immigrant Relief Fund (WIRF); Paid Family Medical Leave (PFML); the Washington College Grant; Workers' Compensation; Women, Infants, and Children (WIC) Program; Emergency Medicaid (AEM); the Disaster Cash Assistance Program (DCAP); the School Lunch Program; and Pandemic EBT:

I found the website and application easy to use:

- Strongly disagree: **2**
- Somewhat disagree: **0**
- Neither agree nor disagree: **3**
- Somewhat agree: **4**
- Strongly agree: **0**

I was able to complete the application in my primary or preferred language:

- Strongly disagree: **1**
- Somewhat disagree: **0**

- Neither agree nor disagree: 2
- Somewhat agree: 4
- Strongly agree: 3

I needed customer service or community organization assistance to complete my application:

- Strongly disagree: 0
- Somewhat disagree: 3
- Neither agree nor disagree: 0
- Somewhat agree: 4
- Strongly agree: 2

I easily found help from a customer service representative or community organization:

- Strongly disagree: 2
- Somewhat disagree: 3
- Neither agree nor disagree: 2
- Somewhat agree: 1
- Strongly agree: 2

I had an easy time understanding whether my immigration status would prevent me from receiving benefits:

- Strongly disagree: 2
- Somewhat disagree: 1
- Neither agree nor disagree: 3
- Somewhat agree: 3
- Strongly agree: 0

I knew which documents I needed to apply:

- Strongly disagree: 1
- Somewhat disagree: 1
- Neither agree nor disagree: 2
- Somewhat agree: 5
- Strongly agree: 0

Are there any other benefits that you heard about that you wish you could access? If so, please provide the name of the program and the administering agency or organization: (open-ended response)

- Goodwill
- N/A
- Puget Sound Training Center
- No (2)
- Unemployment (2)
- Not heard
- Medical insurance

If you wanted to apply for a new program, would you be able to provide an Individual Taxpayer Identification Number or ITIN (identification number used by individuals who cannot get a Social Security number)?:

- Yes: 11
- No: 5

If you wanted to apply to a new program, would you be able to provide wage or employment records for the past 15-18 months?

- Yes: 14
- No: 2

If you became unemployed, and Washington state had a program to provide benefits regardless of immigration status, would you apply?

- Yes: 15
- No: 1

What are some reasons you wouldn't apply to an unemployment program that provided benefits regardless of immigration status? (Choose all that apply):

- I am concerned about the government having access to my information: 0
- I am concerned that receiving help will impact my immigration status: 1
- I had a poor experience with government agencies in the past: 0
- I might not have the required documents: 0
- I am concerned that I will not be able to understand because of my language: 0

- I do not feel comfortable using the computer or other technology to apply: 0
- I do not know where to ask for help. (from the state or community organizations): 0
- Other (please specify): 0

Is there anything else you would like us to know? (open-ended response):

- No
- Most undocumented immigrants are fearful of being deported. Therefore, they are very hesitant to apply for benefits. I will like to suggest that the State should be mindful of this particular point when designing the program. A request for most identifying documents, particularly addresses will cause a sizable number of undocumented immigrants to sit out this all important life line. Thank you and I wish you success.
- How to help a person who received unemployment and now has received a letter of unemployment that you have to return everything you have received and what you have not yet received?
- We need people that help us with empathy, confidence, patience, and are from our state.
- that they bring back the funding for people affected by covid
- Yes immigrants have rights because they pay taxes like everyone else who lives here and never have received unemployment benefits and medical coverage that they pay for but cannot apply for medical insurance.
- Yes. ESD has been very hard to get a hold of and often times the wait is over an hour to get to speak with someone at the customer service. The operator is not user friendly either. The process to appeal is something that could be better and faster. The ESD portal is not user friendly. The payback process is very complicated and hard to reach someone in this department to find out what the issue is.
- Completed this as if a typical client at Refugees Northwest. Submitted by Refugees Northwest Refugee and Immigrant Services Program Supervisor.

Average annual wages

Table 9: Average annual wages for top industries of employment for undocumented workers

Industries Label	2020 Average Annual Wage ²⁰³	Percent of Employed Undocumented ²⁰⁴
Accommodation and food services, arts, entertainment, and recreation	\$24,726	16%
Agriculture	\$36,160	15%
Construction	\$69,813	13%
Retail trade	\$71,398	9%

Source: Migration Policy Institute, Employment Security Department

Comparison of benefit amounts

Stakeholders requested a chart that compares a potential unemployment benefit for undocumented workers with other benefit programs, such as State Family Assistance and the Food Assistance Program. Such a summary chart necessarily overlooks much of the details on how individuals become eligible for these benefits, specific factors that may change the amount of the benefit they receive, and specific factors that may change how long they may receive this benefit. With this caveat in mind, here is the chart as requested:

Table 10: Comparison of benefit amounts across programs

Benefit program	Monthly benefit	Benefit duration
State Family Assistance Minimum = 1-person household	\$417	60 months per lifetime
State Family Assistance Maximum – 10- person household or more	\$1,539	60 months per lifetime
Food Assistance Program Minimum = 1-person household	\$250	12 months per certification
Food Assistance Maximum = 10-person household or more	\$1,180	12 months per certification

²⁰³ Employment Security Department, *Covered Employment (QCEW), 2020 annual averages, revised* (September 24, 2021), available at <https://esd.wa.gov/labormarketinfo/covered-employment>.

²⁰⁴ Migration Policy Institute, *Profile of the Unauthorized Population: Washington*, available at <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/WA>.

Benefit program	Monthly benefit	Benefit duration
Unemployment for undocumented Minimum = average of 2 highest base year quarters is \$5,687 or less	\$872 (\$218 per week)	6 months per claim (26 weeks per claim)
Unemployment for undocumented Maximum = average of 2 highest base year quarters is \$24,129	\$3,716 (\$929 per week)	6 months per claim (26 weeks per claim)

Source: Washington State Department of Social and Health Services, Employment Security Department, U.S. Department of Health and Human Services