Washington State Department of Social and Health Services

Transforming Lives

REPORT TO THE LEGISLATURE, DSHS, ESD and HCA

Long-Term Services and Supports Trust Commission Recommendations Report DRAFT

RCW 50B.04.030 (4)

January 1, 2021

Aging and Long-Term Support Administration
PO Box 45600
Olympia, WA 98504-5600
(360) 725-2300
https://www.dshs.wa.gov/altsa/stakeholders/long-term-services-and-supports-ltss

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Executive Summary

Enacted in 2019, the LTSS Trust (RCW 50B.04) is a contributory long-term services and supports insurance program with a lifetime maximum benefit of $36,500 for all eligible Washington employees. It is financed by an employee premium of 0.58 percent of wages ($0.58 for every $100 earned). Individuals who have met the Trust's work and contribution requirements (10 years with no more than a 5 year interruption, or 3 out of the last 6 years) and who are determined to need assistance with activities of daily living (ADL) may claim LTSS Trust benefits from approved providers. The Trust is a cross-agency project administered collaboratively by the Department of Social and Health Services, the Employment Security Department, the Health Care Authority, and the Office of the State Actuary. It is overseen by the 21-member LTSS Trust Commission. On January 1, 2022, the Employment Security Department will begin collecting premiums from workers, and self-employed individuals can begin opting in. On January 1, 2025, the Department of Social and Health Services will begin paying benefits on behalf of eligible beneficiaries.

Per Chapter 50B.04.030 RCW, beginning January 1, 2021, the Long-Term Services and Supports Trust Commission shall propose recommendations to the Legislature or the appropriate Executive Agency on specific aspects of the LTSS Trust Program. The Commission's recommendations and decisions are guided by the joint goals of maintaining benefit adequacy and maintaining LTSS Trust solvency and sustainability. For this January 1, 2021 report, the following recommendations are included.

1) Recommendations on whether and how to extend coverage to individuals who became disabled before the age of eighteen, including the impact on the financial status and solvency of the trust;
2) The establishment of criteria for determining that an individual has met the requirements to be a qualified individual under the 'three of the last six years' criteria;
3) Change to rules or policies to improve the operation of the program;
    a. Pathways to include tribes
4) Recommendations on actions necessary to achieve trust solvency;
    a. Private opt-out policies
    b. Self-employed opt-in policies

In future reports, the Commission will make recommendations on additional items as required in RCW 50B.04.030 (described at the end of this report).

Recommendations in January 1, 2021 Commission Report

1) **Recommendations on whether and how to extend coverage to individuals who became disabled before the age of eighteen, including the impact on the financial status and solvency of the trust. The Commission shall engage affected stakeholders to develop this recommendation.**

STATUTORY FRAMEWORK

The LTSS Trust Statute (RCW 50B.04) requires the LTSS Trust Commission to provide "recommendations on whether and how to extend coverage to individuals who became disabled before the age of eighteen, including the impact on the financial status and solvency of the trust. The Commission shall engage affected stakeholders to develop this recommendation." These recommendations are due January 1, 2021.

Individuals who became disabled before the age of eighteen are excluded from eligibility per RCW 50B.04.010. RCW 50B.04.010 (6) defines "Eligible beneficiary" as a qualified individual who is age eighteen or older, residing in the state of Washington, was not disabled before the age of eighteen, has been determined to meet the minimum level of assistance with activities of daily living necessary to receive benefits through the trust program, as established in this chapter, and who has not exhausted the lifetime limit of benefit units. RCW 50B.04.010 (14) "Qualified individual" means an individual who meets the duration of payment requirements, as established in this chapter. There is no definition provided in RCW 50B.04 for "disabled."

Per RCW 50B.04.060 regarding determination for eligible beneficiaries, (2) A qualified individual may become an eligible beneficiary by filing an application with the department of social and health services and undergoing an eligibility determination which includes an evaluation that the individual requires assistance with at least three activities of daily living.

POLICY PROBLEM

Adults with disabilities that onset prior to age 18 are required to pay LTSS premiums throughout their working lives, but are not eligible for LTSS Trust benefits. Furthermore, there will be no cost-effective means – and perhaps no feasible means whatsoever – to determine whether, for example, an older adult applying for LTSS benefits had a disability that onset prior to age 18, up to five or more decades in the past. Yet under current statute, DSHS would need to conduct such a determination for every applicant for LTSS Trust benefits to rule out whether they had had a disability that onset prior to age 18.

[The Workgroup on Whether and How to Extend Coverage to Adults with Disabilities That Onset Prior to Age 18 proposes that the Commission adopt the following recommendation. The Workgroup considered but rejected two other options (for those, see Appendix).]

PROPOSED RECOMMENDATION

The Commission recommends extending LTSS Trust coverage to all adults with disabilities that onset prior to age 18, by removing the restriction in RCW 50B.04.010(6) defining eligible beneficiary. A statute change would be necessary in RCW 50B.04.010 (6) reflected below.

> *(6) "Eligible beneficiary" means a qualified individual who is age eighteen or older, residing in the state of Washington, ~~was not disabled before the age of eighteen~~, has been determined to meet the minimum level of assistance with activities of daily living necessary to receive benefits through the trust program, as established in this chapter, and who has not exhausted the lifetime limit of benefit units.*

Stakeholders from the disability and business community gathered in September 2020 to provide feedback on whether and how to extend coverage to individuals who became disabled prior to the age of 18. Stakeholders identified LTSS Trust coverage as a way to fill gaps in care for individuals who became disabled prior to the age of 18, will pay premiums and have the required work history to be vested. This approach eliminates the inequity and potential for lawsuits created by the current legislation and reduces the administrative costs and potential eligibility delays associated with determining disability for every individual who applies, most of whom will be older adults.

According to baseline LTSS Trust actuarial analysis,[1] the level of premium assessment required to cover the cost of services is 0.55% (if the 2020 ballot initiative SSJR 8212 passes, or 0.66% if it fails), excluding coverage for individuals disabled prior to the age of 18. However, this modeling made assumptions that were not clear in the statute. It assumed that the only people with disabilities that onset prior to age 18 who would be excluded from the Trust would be those with intellectual and developmental disabilities. Removing their exclusion from Trust benefits – that is, allowing them to potentially vest and claim benefits – would only increase the premium required to cover program costs by 0.01% or 0.02%. This increase would require the average worker to contribute approximately $5-$10 more per year to the Trust. This analysis assumes that individuals with disabilities that onset prior to age 18 still need to work and vest (and be age 18 or older) like any other workers to become qualified individuals and eligible beneficiaries.

[1] Washington Office of the State Actuary. Long-Term Services and Supports Trust Actuarial Study Report, October 1, 2020 draft

2) Recommendation on the establishment of criteria for determining that an individual has met the requirements to be a qualified individual as established in RCW 50B.04.050

STATUTORY FRAMEWORK

The LTSS Trust Statute (Chapter 50B.04 RCW) requires the LTSS Trust Commission to "propose recommendations to the appropriate executive agency or the legislature regarding the establishment of criteria for determining that an individual has met the requirements to be a qualified individual as established in RCW 50B.04.050."

According to RCW 50B.04.050, the Employment Security Department (ESD) shall deem a person to be a qualified individual if the person has paid the LTSS premiums required by RCW 50B.04.080 for the equivalent of either:

(1)(a) A total of ten years without interruption of five or more consecutive years; or

(1)(b) Three years within the last six years.

POLICY PROBLEM

It is not clear in RCW 50B.04.050, (1)(b) when the test of three years within the last six years is to be applied. It could mean that if someone has paid LTSS premiums three years within any six years, they have permanently achieved qualified individual status. Or, it could mean that at the time of applying for LTSS Trust benefits, a person must have paid LTSS premiums three out of the last six years in order to be a qualified individual.

[The Workgroup on Qualified Individual Status proposes that the Commission choose the following recommendation. The Workgroup considered but rejected two other options (for those, see Appendix).]

PROPOSED RECOMMENDATION

The Commission recommends that when assessing whether a person is a qualified individual under RCW 50B.04.050, (1)(b) three years within the last six years, that the test of 'three of the last six years' is applied is at the time when an individual is applying for LTSS Trust benefits. This clarification could be implemented without a statute change. However, the change to RCW 50B.04.050 denoted below would provide greater clarity.

Qualified individuals.
(1) The employment security department shall deem a person to be a qualified individual as provided in this chapter if the person has paid the long-term services and supports premiums required by RCW 50B.04.080 for the equivalent of either:

(a) A total of ten years without interruption of five or more consecutive years; or

(b) Three years within the last six years <u>from the date of application for benefits</u>.

It is our understanding that this interpretation of RCW 50B.04.050, (1)(b) reflects legislative intent; it also aligns with the interpretation used in the baseline actuarial modeling for the program.

This approach would not provide meaningful coverage for near-retirees who need LTSS more than three years after retiring, but would provide coverage for most individuals who have an immediate need for LTSS during their working years or shortly after retiring.

The Commission remains interested in considering other options to cover today's retirees as well as to cover workers nearing retirement today throughout retirement. However, it was determined that the challenges of covering these groups would be too complex to navigate now and the costs would drive up program premium rates significantly. The LTSS Trust Commission will request additional actuarial modeling in 2021 and consider then whether to make additional recommendations on how to cover these groups.

Other possible interpretations of RCW 50B.04.050, (1)(b) were considered by the Commission Workgroup on Qualified Individual Status but rejected. These can be found in the Appendix.

3) Changes to rules or policies to improve the operation of the program

a. Pathways to include tribes

STATUTORY FRAMEWORK

Under the current LTSS Trust statute, any tribal member who works for a Washington employer (or is self-employed and opts in) will pay premiums into the LTSS Trust like any other worker and be able to receive benefits when needed.

"Employer" under the LTSS Trust law has the same definition used in Paid Family and Medical Leave (PFML) (RCW 50A) and does not include Tribal governments, nor an opt-in option similar to PFML. Tribal employers will not have a mechanism to participate under current law. According to the Washington Indian and Gaming Association's report, "The Economic & Community Benefits of Tribes in Washington" there were nearly 31,000 individuals employed by tribal organizations in 2018.

POLICY PROBLEM

Individuals working for tribal employers cannot participate in the LTSS Trust.

[The Workgroup on Tribal Participation in the Trust proposes that the Commission choose one of the following three recommendations to create a pathway for Tribal participation. The following options were developed. Once the Commission has determined the preferred pathway, additional options will be removed.]

RECOMMENDATION ALTERNATIVE #1

Tribal employer opt-in: Revise RCW 50B.04 to add a tribal employer opt-in provision that gives tribal employers the option to participate in the Trust. When a tribe opts-in, all of their employees will be covered. Tribal employers will withhold .58% from wages, and remit these premium payments to ESD. If a tribe does not opt-in, its employees will not have coverage.

This provides a pathway for tribes to choose whether or not to participate and is easy for the Employment Security Department to implement as precedent exists with Paid Family and Medical Leave.

RECOMMENDATION ALTERNATIVE #2

Tribal employee permanent opt-in: Revise RCW 50B.04 to add an opt-in provision that gives employees of tribes a window of opportunity to permanently opt-in. These individuals would pay .58% of their wages as a premium toward the LTSS Trust, directly to ESD. Wages paid by the tribe would not be withheld. The Tribe would not have any administrative duties. There is not currently a mechanism in place for ESD to implement this option and there is no precedent in PFML.

This provides a pathway for employees of tribes to opt-in permanently independent of the decision of the tribe. Individual employees will need to take action to opt-in and pay premiums to the Employment Security Department. The Commission acknowledges this pathway does not have a precedent and may need additional consideration by the Employment Security Department to effectively implement.

RECOMMENDATION ALTERNATIVE #3

Tribal employer opt-in, and tribal employee permanent opt-in for tribes that do not opt-in: Revise RCW 50B.04 to allow individual tribes to opt-in as employers, and individual employees of the tribes to permanently opt-in if the tribe as an employer does not opt-in. When a tribe opts in, they withhold premiums and remit payment to ESD for all of their employees. When a tribe does not opt-in, individual employees have the opportunity to opt-in and remit premium payments directly to ESD.

This provides a pathway for tribes as employers to opt-in and employees of the tribes that choose not to participate to permanently opt-in. The Commission acknowledges this pathway does not have a precedent and may need additional consideration by the Employment Security Department to effectively implement.

4) Recommendations on actions necessary to achieve trust solvency;

a. Private LTC Insurance Lifetime Opt-Out (Exemption)

STATUTORY FRAMEWORK

RCW 50B.04.085 allows an employee who attests that they have long-term care insurance to apply for an exemption from paying the LTSS Trust premium. An exempt employee may not become a qualified individual or eligible beneficiary and is permanently ineligible for the LTSS Trust benefit. The Employment Security Department (ESD) must accept applications for exemptions only from October 1, 2021, through December 31, 2022. ESD is not required to verify the attestation of an employee that they have long-term care insurance, but is also not prohibited from doing so. ESD must adopt rules necessary to implement and administer the activities specified in this section related to the program, including rules on the submission and processing of applications for exemptions.

POLICY PROBLEM

Any time a voluntary aspect to participation in a social insurance program is introduced, adverse selection is introduced, which both drives up premiums for everyone else and introduces unpredictability that can make rate-setting challenging. According to actuarial analysis,[2] if the top 5% of all wage earners opt-out, the level of premium assessment required is increased from .55% to .58% (or .66% to .69% if the SSJR8212 ballot initiative fails). If the top 45% of all wage earners opt-out, the level of premium assessment required is increased from .55% to .64% (or .66% to .69% if the SSJR 8212 ballot initiative fails).

Allowing any prospective opt out is contrary to social insurance best practice, poses risks to the Trust's long-term solvency, and increases administrative costs to process exemption requests, conduct additional outreach, and cope with cases where workers either forget to tell their new employer that they have opted out or the employer erroneously withholds premiums on behalf of workers who have opted out.

[The Workgroup on Non-Participation and Adverse Selection proposes that the Commission adopt the following recommendation. The Workgroup considered but rejected three other options (for those, see Appendix).]

[2] Washington Office of the State Actuary, Long-Term Services and Supports Actuarial Study Interim Report, October 1, 2020 draft

PROPOSED RECOMMENDATION

The Commission recommends limiting opt-out to those who had private long-term care insurance prior to the enactment of the LTSS Trust. The following legislative change would address this recommendation:

RCW 50B.04.085
Premium assessment—Exemptions.
(1) An employee who attests that the employee has long-term care insurance purchased before July 28, 2019 *may apply for an exemption from the premium assessment under RCW 50B.04.080. An exempt employee may not become a qualified individual or eligible beneficiary and is permanently ineligible for coverage under this title.*

This approach supports the intent of the original legislation and promotes consumer protection, public support and take up of the program. The limited number of Washington workers with existing policies do not have to contribute twice, and workers without private policies will not be encouraged to purchase inadequate coverage that rises in cost as they age in order to opt-out. The premium assessment needed to cover benefits will not be impacted by this recommendation and adverse selection will be eliminated.

4) **Recommendations on actions necessary to achieve trust solvency;**
    b. **Self-Employed Opt-In Policies**

STATUTORY FRAMEWORK

RCW 50B.04.090 allows self-employed individuals to elect LTSS Trust coverage. Those electing coverage are responsible for paying premiums. Self-employed individuals must file a notice of election in writing with ESD, in the manner required by ESD in rule. Self-employed individuals are eligible for the LTSS Trust benefit after paying premiums and becoming vested. Self-employed individuals may withdraw from coverage, at such times as ESD adopts by rule, by filing a notice of withdrawal in writing. ESD must adopt rules for determining the hours worked and the earnings of self-employed individuals who elect coverage and rules for enforcement of this section.

POLICY PROBLEM

Any time a voluntary aspect to participation in a social insurance program is introduced, unpredictability related to adverse selection can make rate-setting challenging. The baseline assumption of the actuarial analysis is that premiums are collected on only 10% of earnings by the self-employed, but that virtually all of the self-employed become qualified individuals. If the self-employed were treated the same as employees under the Trust, with universal participation required, the level of premium required to pay program costs would drop by four basis points to 0.51% (if SJR8212 passes, or five basis points from 0.66% to 0.61% if SJR8212 fails).[3]

For a social insurance program like the Trust (or Medicare, for example), giving people the option of whether or not to participate and how long to participate incentivizes non-participation, participating only long enough to become vested and/or only participating when their earnings are low. In addition, unhealthy individuals are more likely to opt-in. Finally, without any method of verifying self-employed earnings, there is a high risk of underreporting of earnings by the self-employed. Nationally the self-employed are estimated to report only about half of their income. This is far less consequential in the PFML program, where the benefit replaces a percentage of prior earnings, than it is in a program with a uniform benefit not based on the amount of prior earnings, like the LTSS Trust.

PROPOSED RECOMMENDATION

[The Working Group on Non-Participation and Adverse Selection is still meeting on this issue and has not yet agreed on recommendations.]

Future Recommendations

In future reports, the LTSS Trust Commission will propose recommendations to the Legislature or the appropriate Executive Agency regarding the remaining items outlined in RCW 50B.04.030:

1) The establishment of criteria for determining that an individual has met the requirements to be an eligible beneficiary
2) The establishment of criteria for minimum qualifications for the registration of long-term services and supports providers who provide approved services to eligible beneficiaries
3) The establishment of payment maximums for approved services
4) Changes to rules or policies to improve the operation of the program
5) Assisting the State Actuary with the preparation of regular actuarial reports on the solvency and financial status of the program and advising the Legislature on actions necessary to maintain trust solvency. The Office of the State Actuary shall provide any recommendations to the Commission and the Legislature on actions necessary to maintain trust solvency

[3] Washington Office of the State Actuary, Long-Term Services and Supports Actuarial Study Interim Report, October 1, 2020 draft

APPENDIX: Options Considered but Rejected by Commission Workgroups
[This Appendix provides additional options for consideration by the full Commission in the October 20 Commission Meeting but is not intended to be included in the final Commission report.]

1) **Recommendations on whether and how to extend coverage to individuals who became disabled before the age of eighteen, including the impact on the financial status and solvency of the trust. The Commission shall engage affected stakeholders to develop this recommendation.**

   The Workgroup on Whether and How to Extend Coverage to Adults with Disabilities That Onset Prior to Age 18 considered but rejected the following options:

   Option #2

   The Commission recommends extending LTSS Trust coverage to individuals that became disabled before the age of eighteen who do not have a pre-existing LTSS need. This can be accomplished by a clarifying the definition of 'disabled' in statute or agency rules. The definition should be consistent with actuarial modeling that required a premium assessment of 0.55% (if the 2020 ballot initiative SSJR 8212 passes, or 0.66% if it fails) to cover the cost of services. Although this recommendation adds administrative complexity, it has no direct impact on solvency and could be implemented without a statute change.

   Option #3

   The Commission does not recommend extending coverage to individuals that became disabled before the age of eighteen. This requires no change to the statute and will not impact solvency.

2) **Recommendations on the establishment of criteria for determining that an individual has met the requirements to be a qualified individual as established in RCW 50B.04.050.**

   The Workgroup on Qualified Individual Status considered but rejected the following options for interpreting RCW 50B.04.050, (1)(b):

   <u>Option #2</u>

   The Commission recommends that when deeming a person to be a qualified individual under RCW 50B.04.050, (1)(b) three years within the last six years, that 'three of the last six years' is considered at any time when the individual inquires about their vesting status. If an individual satisfies the requirement to be vested, they are qualified for life regardless of when their ADL needs occur. This can be implemented without a statute change, however, RCW 50B.04.050 (1)(a), reflected below, would no longer be necessary.

Qualified individuals.
(1) The employment security department shall deem a person to be a qualified individual as provided in this chapter if the person has paid the long-term services and supports premiums required by RCW 50B.04.080 for the equivalent of either:
~~*(a) A total of ten years without interruption of five or more consecutive years; or*~~
(b) Three years within the last six years

This recommendation would offer coverage to most people nearing retirement in 2025 and to individuals who need coverage in their working years. The level of premium assessment may need to be increased by approximately 0.01%[4] for this option.

<u>Option #3</u>

The Commission recommends that when deeming a person to be a qualified individual under RCW 50B.04.050, (1)(b) three years within the last six years, that 'three of the last six years' is considered at any time when the individual inquires about their vesting status, but only for individuals born before 1960. If an individual satisfies the requirement to be vested, they are qualified for life regardless of when their ADL needs occur. A statute change would be necessary in RCW 50B.04.050 (1)(b), reflected below.

Qualified individuals.
(1) The employment security department shall deem a person to be a qualified individual as provided in this chapter if the person has paid the long-term services and supports premiums required by RCW 50B.04.080 for the equivalent of either:
(a) A total of ten years without interruption of five or more consecutive years; or
(b) Three years within the last six years <u>for individuals born before 1960</u>

This recommendation offers coverage to most people nearing retirement in 2025 and the level of premium assessment may need to be increased by less than 0.01%[5]. It does not offer coverage to individuals that may need it during their working years unless they were born before 1960.

Note: The recommendation on the criteria to be an eligible beneficiary is expected in the January 2022 report.

4) **Recommendations on actions necessary to achieve trust solvency;**
   a. **Private LTC Insurance Lifetime Opt-Out (Exemption)**

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[4] Washington State Office of the State Actuary, Long-Term Services and Supports Trust Actuarial Study Report, October 1, 2020 draft
[5] Washington State Office of the State Actuary, Long-Term Services and Supports Trust Actuarial Study Report, October 1, 2020 draft

The Workgroup on Non-Participation and Adverse Selection considered but rejected the following options:

Option #2

The Commission recommends limiting opt-out to equivalent coverage. This requires the Employment Security Department to determine a proxy for equivalent coverage, for example, aggregate benefit levels that reach the LTSS Trust threshold, and to evaluate coverage. Although this poses additional administrative complexity, it supports consumer protection. The limited number of Washington workers with adequate policies do not have to contribute twice, and workers without private policies will need to purchase adequate coverage in order to opt-out. This does not eliminate adverse selection, and private insurance may not continue coverage indefinitely, which poses additional risk.

Option #3

The Commission recommends excluding employer-paid coverage and riders on life-insurance from coverage that can qualify an employee for the opt-out exemption. Employer-paid coverage is typically dropped when a worker changes jobs, leaving individuals uncovered long-term. Only individual long-term care policies would be acceptable for the Employment Security Department to consider for an opt-out exemption. This does not eliminate adverse selection, and individually purchased private insurance may not continue coverage indefinitely, which poses additional risk.

According to actuarial analysis[6], if the top 5% of all wage earners opt-out, the level of premium assessment required is increased from .55% to .58% (or .66% to .69% if the SSJR8212 ballot initiative fails). If the top 45% of all wage earners opt-out, the level of premium assessment required is increased from .55% to .64% (or .66% to .69% if the SSJR 8212 ballot initiative fails).

[6] Washington Office of the State Actuary, Long-Term Services and Supports Actuarial Study Interim Report, October 1, 2020 draft