



September 6, 2022

Washington State Employment Security Department
Attn: Janette Benham
PO Box 9046
Olympia, WA 98507-9046

RE: Rulemaking regarding exemptions from the Long-Term Services and Supports Trust (WA Cares) Program pursuant to ESHB 1733

Dear Ms. Benham,

Wafla is a non-profit 501(c)(6) membership organization comprised of nearly 800 agricultural and seasonal employers. Wafla was formed to make labor stability a reality for all agricultural employers and for farmers and farmworkers to be treated with dignity and respect. We offer ways for our members to access several federal visa programs and receive assistance complying with state and federal labor standards.

In 2021, wafla filed H-2A applications for more than 200 member employers who collectively employed more than 16,000 individual H-2A workers. In addition, wafla employer members employed more than 20,000 domestic workers. For the sake of employers, employees, and consumers, we want to ensure that there is labor stability in agriculture.

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

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

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

We are glad to see that the Employment Security Department is considering rules to implement these exemptions. However, we are concerned that the process outlined by ESD in these draft rules creates barriers for workers to exercise the exemption granted under the statute.

Specifically, the rules contemplate that the employee is always the agent asking or officially applying for the exemption. For example, New Section WAC 192-905-006 states “(1) An employee may apply for a conditional exemption...(2) The employee must provide information...,” and “(3) The employee must provide documentation”

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

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

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

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

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

We ask that you consider other options for allowing applications to be submitted for this exemption. For example, employers, on behalf of these exempt employees, could transmit a batch entry or upload a database of workers qualifying for the exemption. This model would be similar to what ESD and employers already do for nonimmigrant workers and unemployment insurance tax reporting.

Employees who meet the criteria for these exemptions should find the process easy to navigate – not difficult, inefficient, and personally costly. We have confidence that ESD, as the state workforce agency and the agency in charge of implementing H-2A in Washington, has the knowledge, resources, and legal basis for making this exemption work easily, efficiently, responsibly, and fairly.

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

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

Sincerely,

A handwritten signature in blue ink, appearing to read "Enrique Gastelum".

Enrique Gastelum
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