

TO DEDUCT OR NOT TO DEDUCT: THE WASHINGTON CARES ACT DILEMMA WILL REQUIRE EMPLOYERS TO MAKE A CHOICE THIS JANUARY

Insights
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Adding to the sea of troubles that employers faced in the year just gone by, the status of Washington State's new long-term care payroll tax is now up in the air. Employers in the Evergreen State are now faced with a dilemma when it comes to the WA Cares Act: to collect or not deduct this tax from your employees' wage starting with the first payroll period in 2022. This Insight provides a quick background and provides factors you should take into account before making a decision as to which road to take.

What Dreams May Come

Touted as the first law of its kind, the WA Cares Act seeks to establish an insurance fund to help Washington residents pay for certain long-term care services, such as assisted living facilities, after retirement. The Act requires that employees to pay for the insurance through mandatory wage withholding premiums, which employers must deduct from employee wages beginning January 2022.

Is Something Rotten in the State of Washington?

Since it passed, the Act has been under fire from employers, employees, and legal commentators. Many believe that the maximum benefit seems inadequate, some workers will pay into the fund with no ability to receive benefits (e.g. older residents will pay the tax yet not be eligible for the benefit, and retirees must live in Washington to access benefits), and the opt-out mechanism is extremely narrow and limited. Many legal commentators also believe the federal Employee Retirement Income Security Act (ERISA) preempts (and

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therefore voids) the law altogether. A class action lawsuit was filed in November raising these challenges, but the fate of that litigation is still to be determined. Nevertheless, employers have devoted significant efforts to be ready to start collecting this mandatory tax in January.

The State Doth Protest Too Much, Methinks

On December 17, Governor Jay Inslee, Senate Majority Leader Andy Billig, and House Speaker Laurie Jinkins issued a [press release](#) that threw a wrench into employer plans. The governor acknowledged that there are “areas [in the law] that need adjustments.” He then ordered the relevant state agency to “not to collect the premiums...before they come due in April” to “give legislators the opportunity to make refinements to the bill.” (We note that the next legislative session does not begin until January 11 and will run at least through March.)

Inslee also advised employers that they would “not be subject to penalties and interest for not withholding fees from employees’ wages during this transition.” Billig and Jinkins went even further, “strongly encouraging employers to pause collecting premiums from employee wages.”

This press release understandably led to employers wondering what to do given the law *requires* they collect the premiums, while the governor and two legislators *encouraged* them not to. Even poor Yorick would have been confused.

This led Inslee to issue a [second press release](#) on December 23. He stated that “only the Legislature has the authority to eliminate the requirement that employers pay a premium based on withholding from an employee’s wages at this time.” Inslee also volunteered that the State – as an employer - *would* withhold premiums from its employees because it “is following the law.”

Is There Method in this Madness?

Pelonious counseled neither a borrower or a lender be, but this confusion creates an employer dilemma. On one hand, it makes sense to collect the premium given that the Act is currently the law and it requires employers to deduct premiums beginning on January 1, 2022. Failing to collect it risks having to foot the bill for any entire uncollected premium if the law does not change. As Inslee [explained](#), “if

the Legislature fails to do so, employers will still be legally obligated to pay the full amount owed to state ESD to begin the long-term care program.” It is unlikely an employer can collect the tax from its employees in arrears.

But there is risk. If the legislature changes the law, employers will likely need to refund those premiums quickly – most likely within the next pay cycle – or risk a wrongful wage withholding claim. Employers may wish to hold any collected premiums in trust for employees and avoid commingling them with other business funds.

This leads to the other hand. The potential repayment issues may mean a significant administrative burden for employers. All signs seem to point to a change in the law, or even repeal, and the lack of civil penalties may make the risk of not following the current law more attractive. Employees also may object to employers withholding premiums in the meantime, leading to potential morale issues. These considerations should be weighed against the risks noted above

Since Brevity is the Soul of Wit, We’ll be Brief

The legislature will need to act quickly to dispel the confusion when it reconvenes on January 11, 2022. In the meantime, you should weigh your options to decide whether to withhold or not to withhold. Make your decision in consultation with your legal counsel and based on your own levels of risk tolerance, with full understanding of the ramifications of each course of action. This above all: to thine own self be true.

We will continue to monitor this confusing situation and provide updates as necessary. Make sure you are subscribed to [Fisher Phillips’ Insight System](#) to get the most up-to-date information directly to your inbox. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in [our Seattle office](#).