THE HONORABLE _____

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PACIFIC BELLS, LLC; BRUNSWIKST., LLC; and WOW DISTRIBUTING, INC., on their own behalf and on behalf of similarly situated employers,

and

MELISSA JOHNSTON; LENA MADDEN; JUDI CHAPMAN; KATHERINE SOLAN; JOHN EDMUNDSON; and MIKE LINDBO, individuals on their own behalf and on behalf of similarly situated employees,

Class Plaintiffs,

v.

JAY INSLEE, in his capacity as Governor of the State of Washington; CAMI FEEK, in her capacity as the Commissioner and Chief Executive Officer of the Washington Employment Security Department; DONALD CLINTSMAN, in his capacity as the Acting Secretary of the Washington Department of Social and Health Services; and THE LONG-TERM SERVICES AND SUPPORTS TRUST FUND, an employee benefit plan,

Defendants.

No. _____

ERISA COMPLAINT—CLASS ACTION COMPLAINT FOR DECLARATORY RELIEF, FIDUCIARY BREACH, AND RESTITUTION OF AMOUNTS WRONGFULLY WITHHELD

Class Plaintiffs, Pacific Bells, LLC, BrunswikSt., LLC, and WOW Distributing, Inc., on their own behalf and on behalf of similarly situated employers, and Melissa Johnston, Lena Madden, Judi Chapman, Katherine Solan, John Edmundson, and Mike Lindbo, on their own behalf and on behalf of similarly situated employees (collectively "Plaintiffs" or "Class

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Plaintiffs"), by their undersigned attorneys, file the following complaint against Defendants, and allege as follows:

I. INTRODUCTION

1.1 Beginning January 1, 2022, Washington State workers will pay $0.58 per $100 (.58%) of earnings to the Long-Term Services and Support Trust Fund (the "Trust") pursuant to the Long-Term Services and Support Trust Program, referred to as "WA Cares" or the "Act" and codified at RCW 50B.04, *et seq*. This action challenges the Act and requests a declaratory judgment that the Act is unenforceable as it violates ERISA and federal and state laws governing employee benefit plans and multiple employer welfare arrangements ("MEWAs").

1.2 Specifically, Pacific Bells, LLC, BrunswikSt., LLC, and WOW Distributing, Inc, on their own behalf and on behalf of all others similarly situated (collectively, the "Employer Class") and Melissa Johnston, Lena Madden, Judi Chapman, Katherine Solan, John Edmundson, and Mike Lindbo, on behalf of themselves and all similarly situated employees (collectively the "Employee Class") bring this action against Defendants for declaratory relief that (1) WA Cares is preempted by ERISA; (2) WA Cares and its Trust constitute a MEWA as defined by ERISA, subject to both ERISA and state insurance law; (3) as a MEWA, the forfeiture provisions of WA Cares are impermissible and violate ERISA, state insurance law and the requirements of I.R.C. § 7702B, which have been adopted by WA Cares; (4) employers are not required to withhold and remit a premium equal to .58% (0.0058) of wages paid to individuals in "employment" with an "employer," as defined by RCW 50B.04.010, to the Employment Security Department of the State of Washington ("ESD") or report any related information thereto; (5) WA Cares violates the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of the U.S. Constitution; (6) WA Cares Act violates the Age Discrimination in Employment Act of 1967 ("ADEA") and the Older Workers Benefit Protection Act; (7) all provisions of RCW 50B.04, *et seq*., are void and unenforceable because the offending provisions are not severable; and (8) the enforcement of employee benefit plan provisions that violate ERISA or other federal and state statutes constitutes a breach of Defendants' fiduciary duty

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under ERISA and at common law. The Employee Class also seeks restitution of their own contributions pursuant to ERISA and/or the common law governing trusts to restore their own after-tax funds that were deposited in the Trust to provide long-term care insurance on their behalf, plus earnings, increased by any ancillary expenses.

II. JURISDICTION AND VENUE

2.1 This Court has subject matter jurisdiction over this action pursuant to 29 U.S.C. §§ 1331 (federal question) and 1132(e)(1) (ERISA). The claims described herein are brought as a class action under Rule 23 of the Federal Rules of Civil Procedure. This Court has ancillary jurisdiction over all other related state law claims.

2.2 Venue is proper in the Western District of Washington pursuant to 29 U.S.C. § 1132(e)(2) as the breach took place in Washington State, Plaintiffs reside or are employed in Washington State, and one or more Defendants reside in Washington State.

2.3 Plaintiffs bring this action under, and the declaratory, prospective injunctive and other relief requested in this action is authorized pursuant to, 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(2) and 1132(a)(3), 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 1983.

2.4 This Court has authority to award attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and 29 U.S.C. § 1132(g).

III. PARTIES

3.1 The Employer Class. The named representatives of the Employer Class are employers based in Washington State with employees subject to WA Cares. Pacific Bells, LLC is headquartered in Vancouver, WA; WOW Distributing, Inc. is headquartered in Mukilteo, WA; and BrunswikSt., LLC is headquartered in Seattle, WA. The named representatives file this action on their behalf and on behalf of a class of all similarly situated employers. Beginning January 1, 2022, each named representative of the Employer Class will have a statutory obligation to withhold .58% of wages paid to its Washington employees and remit the withheld wages to ESD. Under the WA Cares administrative scheme, the Employer Class has administrative responsibility, makes discretionary decisions with respect to payroll withholding,

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and acts as a statutory agent of its employees. RCW 50B.04.080. As a plan administrator maintaining the plan, fiduciary, and agent of a plan participant, the Employer Class has standing to bring a declaratory judgment action under ERISA to clarify the rights of the participants under WA Cares.

3.2 The Employee Class. The named representatives of the Employee Class are employees whose wages will be subject to mandatory withholding at the rate of .58% beginning January 1, 2022, pursuant to WA Cares. Melissa Johnston resides in Eagle Point, Oregon. She is an out-of-state resident whose wages will be subject to payroll withholdings under WA Cares based on her place of employment. Lena Madden resides in King County, Washington and has wages that will be subject to payroll withholdings under WA Cares. She plans to retire out of state. Judi Chapman resides in King County, Washington. She plans to retire within ten years. Katherine Solan resides in King County, Washington and has wages that will be subject to payroll withholdings under WA Cares. John Edmundson resides in King County, Washington. He has wages that will be subject to payroll withholdings under WA Cares and plans to retire within ten years. Mike Lindbo resides in Pierce County, Washington and has wages that will be subject to payroll withholdings under WA Cares. He is considering retiring out of state. None of the named individuals in the Employee Class purchased private long-term care insurance before November 1, 2021, to qualify for exemption and their wages will be subject to mandatory withholding under WA Cares, effective January 1, 2022, based on their employment for an employer in Washington State. Each named representative earned higher wages after attaining age 40. The named representatives of the Employee Class are plan participants pursuant to 29 U.S.C. § 1002(7), ERISA Section 3(7), because they are subject to mandatory employee contributions under WA Cares and may be entitled to benefits in the future based on those contributions. As participants, the Employee Class members have standing pursuant to 29 U.S.C. § 1332, ERISA Section 502, to clarify their rights to benefits under WA Cares. The named representatives of the Employee Class file this action on behalf of a class of similarly situated employees subject to WA Cares mandatory withholding.

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3.3 Defendants. Defendant Jay Inslee is the Governor of the State of Washington and he is being sued in his official capacity as the executive responsible for appointing the commission members who oversee the Long-Term Services and Support Trust Fund and receiving annual reports regarding administrative expenses under WA Cares and as an ERISA fiduciary charged with sponsoring and monitoring WA Cares. Defendant Cami Feek is the Commissioner and Chief Executive Officer of ESD and she is being sued in her official capacity as the head of the state department charged with the collection and assessment of WA Cares premiums and for developing rules and educational materials for the Act and as an ERISA fiduciary charged with the administration of a welfare benefit plan. RCW 50B.04.020(4). Defendant Donald Clintsman is the acting Secretary of the Washington State Department of Social and Health Services and he is being sued solely in his official capacity as the head of the agency charged with educating employees about WA Cares and with the authority to authorize disbursements from the Trust and as an ERISA fiduciary charged with the administration of a welfare benefit plan. RCW 50B.04.020(3). The final defendant, the Long-Term Services and Support Trust Fund (the "Trust"), is a trust maintained separate and distinct from the State and its general fund. RCW 50B.04.100. The Trust is entirely funded by and holds only employee after-tax contributions and the earnings thereon. No state funds are contributed to the Trust. No state funds are used to pay the benefits under WA Cares. The Trust is the sole source of payments of benefits under WA Cares. The Trust, together with WA Cares, is an employee benefit plan within the meaning of 29 U.S.C. §§ 1002(5) and 1332(d)(1), ERISA Sections 3(5) and 502(d)(1), and is a legal entity that may be sued in federal court. It is not a governmental plan within the meaning of 29 U.S.C. § 1002(32), ERISA Section3(32), as it is not providing benefits for only employees of the state. A substantial number of non-governmental employees will be subject to mandatory employee contributions to the Trust. The Trust is therefore a MEWA within the meaning of 29 U.S.C. § 1002(40)(A), ERISA Section 3(40)(A), subject to both ERISA and state insurance law. At all times, Defendants were acting and continue to act under color of state law and as ERISA fiduciaries.

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IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

4.1 Plaintiffs lack an "adequate, available or non-futile and clearly defined" administrative remedy. Specifically, there is no administrative remedy under WA Cares that would permit Plaintiffs to redress the violations alleged or obtain the relief sought herein.

V. FACTUAL ALLEGATIONS

5.1 WA Cares is the nation's first public state-operated long-term care insurance program. WA Cares provides long-term care insurance and not unemployment or disability insurance. WA Cares, which is codified at RCW Chapter 50B.04, will be funded by a .58% premium on all employee wages, beginning January 1, 2022. The premium assessment, however, is not sufficient to fund the promised benefits and the Trust through which WA Cares benefits will be paid is currently projected to be depleted by 2076.

5.2 Employers will be required to collect this premium assessment beginning on January 1, 2022, via after-tax payroll withholdings and must remit those premiums to ESD as part of their quarterly reporting. Employers are not required to separately contribute to WA Cares, but must remit the employee-paid premiums. Employers are also required to exercise discretion when they determine which employees are subject to the premium and must keep records of hours worked. Employers are the statutory agent of the employee for purposes of WA Cares.

5.3 Of significance, and unlike other state programs, there is no cap on wages subject to the premium assessment under WA Cares. All wages and remuneration, including stock-based compensation, bonuses, paid time off, and severance pay, are subject to the premium. For example, an employee with wages of $65,000 will pay $377 in premiums each year, while an employee with wages of $250,000 will pay $1,450 in premiums each year.

5.4 All individuals in "employment" with an "employer," as defined by RCW 50B.04.010, will be required to pay premiums for long-term care insurance starting January 1, 2022. The exceptions are self-employed individuals, employees of the federal

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government, employees of a federally recognized tribe, certain collectively bargained employees, and employees who qualify for an exemption (discussed below).

5.5 For purposes of WA Cares, an employee is treated as employed in Washington if the employee's service is localized in Washington or, if the service is not localized in any state, the employee performs some services in Washington and the services are directed or controlled from Washington. Out-of-state employers must collect and remit premiums for any employees that primarily work in Washington.

5.6 Benefits are limited to Washington State residents who have paid premiums under WA Cares for either (a) a total of ten years without interruption of five or more consecutive years, or (b) three years within the last six years from the date the application for benefits is made. In addition, to qualify for WA Cares benefits, an employee must have worked at least 500 hours during each of the ten years or each of the three years, as applicable.

5.7 From a practical standpoint, this means that older employees who plan to retire in the next ten years will be required to pay premiums to ESD but may never qualify for the benefits. It also means that retirees who move out of Washington will not qualify for the benefits. WA Cares thereby restricts the ability of employees to travel out-of-state.

5.8 Benefits under WA Cares will first become available January 1, 2025. If an individual is eligible, and if the Department of Social and Health Services determines that an individual requires assistance with at least three activities of daily living, WA Cares provides benefits of up to $100 per day, up to a maximum lifetime limit of $36,500.

5.9 An employee may permanently opt out of WA Cares and all associated premiums and benefits if (a) the employee is 18 years or older on the date he or she applies for the exemption, and (b) the employee attests that he or she has other long-term care insurance, as defined in RCW 48.83.020, purchased on or before November 1, 2021.

5.10 WA Cares was amended in April of 2020 to require that employees must purchase long-term care insurance before November 1, 2021, to be eligible to opt out of the Act. This provided a very short window to purchase long-term care insurance. For many employees, the

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opt-out process was illusory. Three months before the November 1 deadline, many insurance companies in Washington froze the application process. For those companies that continued to write insurance, the underwriting process would take more than 90 days. Even for those employees who were able to find insurance, the opt-out process was a Hobson's Choice—pay .58% of wages to Washington State or purchase private insurance that they previously did not want or need. Many employers were forced to adopt an ERISA long-term care plan to provide a mechanism for their employees to timely opt out.

5.11 To opt out of WA Cares, a qualifying employee must provide identification to verify his or her age and must apply for an exemption with ESD between October 1, 2021, and December 31, 2022. If approved, an employee's exemption will be effective for the quarter immediately following approval. Once an employee opts out, the employee cannot opt back into WA Cares, *i.e.,* the opt-out is permanent.

5.12 After an employee's application for exemption is processed and approved, he or she will receive an approval letter from ESD. The employee must provide this approval letter to all current and future employers. Employers must maintain copies of any approval letters received.

5.13 If an employee who is exempt from WA Cares fails to provide the exemption approval letter, the employer must collect and remit premiums beginning January 1, 2022. An employee will not be entitled to a refund of any premiums collected before the employee's exemption took effect or before the employee provided the approval letter to their employer.

5.14 If an employer deducts premiums after an employee provides the employer with the exemption approval letter, the employer must refund the deducted premiums and will be responsible for restoring the premiums to the employee. The employer is not eligible to receive a refund of the premiums from ESD.

5.15 Because benefits are limited to Washington State residents, employees who move out of the state will not be eligible to receive benefits under WA Cares. This provision restricts

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the ability of those that desire to receive the benefit to move or travel out-of-state, as WA Cares will also not pay out-of-state providers.

5.16 Self-employed individuals are exempt from WA Cares but may choose to opt in. Under the Act, self-employed individuals must elect coverage by January 1, 2025, or within three years of becoming self-employed for the first time.

5.17 Parties to a collective bargaining agreement in existence on October 19, 2017, are not subject to WA Cares unless and until the existing agreement is reopened and renegotiated or the existing agreement expires. Parties must notify ESD when the collective bargaining agreement becomes open.

5.18 WA Cares has two forfeiture provisions that are contrary to ERISA, I.R.C. § 7702B, which the state represented would control the taxation of benefits, and state insurance laws governing a MEWA. These laws prohibit the forfeiture of mandatory employee contributions without providing any benefit. WA Cares impermissibly forfeits benefits based on years of employment and place of residence.

Factual Allegations Regarding ERISA Preemption

5.19 Under 29 U.S.C. § 1002, ERISA Section 3, benefit plans are covered by ERISA if the plan provides for medical benefits and/or benefits in the event of sickness, accident, or disability. RCW 48.83.020(5) defines long-term care insurance as a policy, practice or program that provides coverage for one or more necessary or medically necessary diagnostic, preventative, therapeutic, rehabilitative, maintenance, or personal care services, provided in a setting other than an acute care unit of a hospital. Given this statutory definition and the requirement that the insured be unable to perform certain basic activities, WA Cares provides a benefit that is subject to ERISA. *Schneider v. UNUM Life Ins. Co. of America*, 149 F. Supp. 2d 169 (E.D. Pa. 2001) (long-term care policy is an ERISA employee welfare plan).

5.20 ERISA supersedes any state laws that "relate to any employee benefit plan." 29 U.S.C. § 1144(a). The Supreme Court has identified two threads of ERISA preemption—"reference to" and "connection with" preemption. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-

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97, 103 S. Ct. 2890 (1983). A state law inappropriately makes "reference to" a plan if the law "specifically refers" to ERISA-covered plans, *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130, 113 S. Ct. 580 (1992), if the law acts "immediately and exclusively" upon ERISA plans, or if the existence of ERISA plans is "essential to the law's operation." *Cal. Div. of Labor Stds. Enforcement v. Dillingham Const., N.A., Inc*. 519 U.S. 316, 325, 117 S. Ct. 832 (1996). A state law has an impermissible "connection with" ERISA plans if it governs a central matter of plan administration, thereby "interfer[ing] with nationally uniform plan administration." *Gobeille v. Liberty Mut. Ins. Co*., 577 U.S. 312, 320, 136 S. Ct. 936 (2016). Under either thread, the preemption provision "displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829, 108 S. Ct. 2182 (1988). WA Cares is preempted under both preemption doctrines.

5.21 WA Cares is a state mandate for employers to provide a long-term care benefit to employees. Because this mandate can only be satisfied with an ERISA-covered plan, ERISA preempts the Act under "reference to" preemption.

5.22 The Act also has an impermissible "connection with an ERISA plan." The Act requires that the employer must remit premium payments to ESD by payroll withholdings, as an agent of the employees. RCW 50B.04.080. As such, the employer must determine the wages that are subject to the Act, which employees are subject to the Act, and whether any employees are exempt from the Act. *Id*. Employers must also coordinate the payment of benefits under the Act with any long-term care plan the employer maintains. The employee's premium collection is subject to appeal procedures adopted pursuant to RCW 50B.04.120. Such appeal procedures are inconsistent with ERISA, which permits the employer the right to structure the employee benefit plan and to establish claims procedures with a discretionary standard of review. Such requirements and procedures interfere with the administration of the plan—and differing laws in different states would interfere with the uniform administration of the plan. By performing the acts required by WA Cares, the employer is maintaining the plan. *Medina v. Catholic Health*

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Initiatives, 877 F.3d 1213, 1227 (10th Cir. 2017); *Sanzone v. Mercy Health*, 954 F.3d 1031, 1042 (8th Cir. 2020); *Simas v. Quaker Fabric Corp. of Fall River*, 6 F.3d 849, 852-53 (1st Cir. 1993). As such, the Act is also preempted under the "connection to" test.

5.23 To the extent that Defendants argue the premium withholding arrangement is instead established or maintained by a state agency, courts have found that government-sponsored employee benefit arrangements dominated by private employees are not exempt from ERISA. Granted, a governmental plan is one type of plan that is exempt from ERISA coverage. 29 U.S.C. § 1003(b). However, the exemption applies only where the state established and maintained a plan for its employees, and not employees in general. Similarly, the same provision exempts from coverage Indian Tribal government plans that meet the statutory definition, but does not offer the exemption if substantially all the employees of the tribe perform commercial activities. *Alley v. Resolution Tr. Corp.*, 984 F.2d 1201, 1206 (D.C. Cir. 1993). Such an argument would erase ERISA protection for private employers if the state could require employers to maintain state-established retirement plans that only cover private employees.

5.24 The Act is not a payroll practice exempt from ERISA because it requires all employers to adopt a mandatory scheme, even if that scheme conflicts with the employer's ERISA long-term care plan. No court has ever held that a mandatory program is a payroll practice exempt from ERISA. Only those programs that are voluntary or contain an opt out provision have been held to be an exempt payroll practice. 29 C.F.R. § 2510.3-2(d); *Howard Jarvis Taxpayers Ass'n v. California Secure Choice Ret. Sav. Program*, 997 F.3d 848 (9th Cir. 2021). While the Act contains an opt-out provision, the opt-out is an illusory, one-time opt-out only during the period from October 1, 2021, through December 31, 2022, for employees 18 years of age or older. The opt-out provision presents the employee with a Hobson's Choice—pay .58% of wages to Washington State or attempt to purchase private insurance that the employee previously did not want or need. In addition, younger employees or employees employed in Washington after that date will not have the ability to opt out, making WA Cares mandatory for them. The opt-out also requires the purchase of long-term care insurance before

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November 1, 2021. Due to the rush to opt out of this ill-conceived program and the limited number of insurers in Washington, many employees were effectively denied the opportunity to timely opt out, making the program mandatory for this group of employees as well. While an opt-out program like the California Secure Choice Retirement Savings Program can be held to be a plan established and maintained by the employee as a voluntary arrangement, a mandated plan is clearly not a plan established by the employee. A mandatory program for employees is a plan or program that is subject to ERISA and no court has ever held otherwise. The Act is preempted by ERISA.

Factual Allegations Regarding Violations of the Equal Protection Clause of the Fourteenth Amendment, the Right to Travel, and Privileges and Immunities Clause

5.25 The Fourteenth Amendment requires that "no state . . . shall deny any person within its jurisdiction equal protection of laws." WA Cares violates the Equal Protection guarantees of the Fourteenth Amendment in that: (a) it charges out-of-state residents working in the State of Washington a premium, but denies them the benefit of the premium because they must be a state resident in order to receive benefits; (b) it restricts the fundamental right to travel, as an individual who retires and moves out of the State of Washington will no longer receive the benefits; (c) it charges similarly situated individuals different premiums based solely on income and there is no compelling state interest for the difference in rate. The Privileges and Immunities Clause, Article IV, Section 2, Clause 1 states: "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. WA Cares violates the Privileges and Immunities Clause because it discriminates against a class of individuals that live out of state. For example, an employee who resides in Oregon or Idaho, works in Washington and pays the premium for at least ten years would nevertheless be denied the benefit if not a Washington resident at the time the employee applies for benefits. A similarly situated Washington resident would receive the benefit. The only difference between the two classes of employees is their place of residence. There is no compelling state interest for

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this discrimination, other than residency, in violation of the Privileges and Immunities Clause of the U.S. Constitution.

5.26 Durational residency requirements are subject to strict scrutiny as such requirements impede the constitutional right to travel. *Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995 (1972). Exacting scrutiny is also required where the right involves a fundamental necessity, such as obtaining assistance when an individual cannot perform activities necessary for daily living. Under strict scrutiny, there is no compelling state reason for a residency requirement when the benefits provided are paid out of employee premiums and are not dependent on the state fisc.

5.27 WA Cares forfeits contractual insurance benefits that were paid for by the employee with after-tax dollars due to the following durational residency requirements:

i) The Act requires out-of-state residents who paid for such benefit while working in Washington to forfeit the insurance that they paid for with after-tax dollars unless they abandon their state and move to Washington and remain in Washington for an indefinite period of time;

ii) The Act requires in-state residents to maintain their residency in perpetuity or else forfeit the contractual benefits that they paid for with after-tax wages.

As the benefits paid under WA Cares are funded by premiums paid by the employee over the employee's working life and held in trust, the payment of benefits from that trust has no impact on the state fisc and, therefore, there is no compelling state interest for the forfeiture provisions.

5.28 Insurance premiums are generally established by health underwriting criteria, including age and health, and the insurance for which those premiums pay for is nonforfeitable. In the instant case, premiums are based solely on income, not health underwriting, and can be forfeited due to residency or failure to vest. There is no compelling state interest to justify the state's setting of premiums based on income or residency. Defendants thus violate ERISA as well as the Equal Protection and the Privileges and Immunities clauses of the Fourteenth

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Amendment, infringe on the right to travel, and restrict access to the fundamental right to receive essential life care when an employee cannot perform the basic functions of self-care by enforcing WA Cares. Even if a less deferential standard of review were utilized, such as a rational basis standard, the income and residency requirements are not rationally related to an insured premium rate. Enforcement of such impermissible provisions is also a breach of fiduciary duty under ERISA and at common law.

Factual Allegations Regarding Violations of the ADEA and the Older Workers Benefit Protection Act

5.29 The Older Workers Benefit Protection Act is an amendment to the Age Discrimination in Employment Act of 1967 ("ADEA") and is designed to prohibit states, employee benefit plans, and ERISA fiduciaries from discriminating on the basis of age. *Mount Lemmon Fire District v. Guido*, 139 S. Ct. 22 (1980) (states are employers under the ADEA). WA Cares, on its face, violates the ADEA. It is unlawful to discriminate on the basis of age with respect to any employee benefit plan. 29 U.S.C. § 630(l). Any disparity in benefit costs between older and younger workers must be justified on the cost of the benefit provided to the employee. 29 U.S.C. § 623(f)(2)(B). It is not permissible under the ADEA to base premiums provided to older workers on income when traditional health underwriting would result in a lower premium. Thus, Defendants' maintenance and enforcement of WA Cares violates both the ADEA and ERISA.

5.30 Under WA Cares, employees are required to pay the insurance premium regardless of age, but those that are within ten years of retirement and who do not need assistance with self-care within three years of retirement will be denied the benefit because (a) the employee did not pay WA Cares premiums for ten years, and (b) at the time of the application for benefits, the employee will not have paid the premium in three of the last six years. The Act discriminates against employees of advanced age, denying them any benefit for the premium paid in violation of the ADEA. It is not permissible under the ADEA to charge an older worker within ten years of retirement a premium and then deny the employee a benefit

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based on age. While the Act does permit a benefit to be paid if an employee both qualifies and applies for the benefits within three years of retirement, that provision cannot justify the cost of the forfeiture as only nine percent (9%) of long-term care assistance is provided to individuals in their 60s according to the data gathered by the American Association for Long Term Care Insurance in 2012.

5.31 Older employees, due to age and tenure, have higher wages than when they were younger, and their premium increase is due to their tenure rather than health underwriting requirements. The increase in premium that relates to age and tenure and not the underwriting cost of the benefit discriminates against older workers in violation of the ADEA.

5.32 Under the Older Workers Benefit Protection Act, any discrimination in benefits due to age must be justified on the basis of cost. The forfeiture of any benefit on premiums actually paid by an older worker within ten years of retirement is not justified on the basis of cost and violates the Older Workers Benefit Protection Act. Enforcement of such impermissible provisions is also a fiduciary breach under ERISA and at common law.

Factual Allegations Regarding MEWA Status and Violations of Insurance Law and Fiduciary Duties

5.33 The Trust, together with WA Cares, is an employee benefit plan within the meaning of 29 U.S.C. §§ 1002(5) and 1332(d)(1), ERISA Sections 3(5) and 502(d)(1). It is not a governmental plan within the meaning of 29 U.S.C. § 1002(32) as it is not providing benefits solely for employees of the state. A substantial number of non-governmental employees are mandatorily contributing to WA Cares. As such, the Trust, together with WA Cares, is a MEWA, 29 U.S.C. § 1002(40(A), as defined by federal law and is subject to both ERISA and state insurance laws and regulations.

5.34 Defendants have represented that the long-term care benefits paid from the Trust will be taxed in accordance with I.R.C. § 7702B. Both I.R.C. § 7702B and state insurance law prohibit the forfeiture of the long-term care benefits due to residency or years of service. State insurance law also has strict underwriting requirements for insurance premiums and those

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underwriting requirements are not based on income or residency. As a MEWA, WA Cares is operating without a certificate of authority required by RCW 48.125.020 and offering benefits not authorized by RCW 48.125.030(3), which limits MEWA offerings to health care services only. As such, the MEWA operations are not permissible in Washington State and violate state insurance law.

5.35 Defendants' maintenance and enforcement of WA Cares thus violates ERISA and state insurance law. Defendants, as ERISA fiduciaries, violated their ERISA fiduciary duties by administering WA Cares in violation of state and federal laws.

Factual Allegations Requiring Return of the Employee Class's Own Mandatory After-Tax Contributions

5.36 The premiums withheld from the Employee Class's paychecks are mandatory after-tax employee payments, for insurance that both Washington State and the tax code treat as employee contributions to ensure the tax-free treatment of the benefit payments.

5.37 These employee contributions are held in the Trust, a MEWA, and are not aggregated with Washington State's general funds. The employee contributions are held in the Trust for the sole purpose of paying for long-term care and ancillary expenses and may not be used for any other purposes. Therefore, the premiums paid by employees are not state funds and the return of the premiums does not affect the state's fiscal autonomy.

5.38 Upon this Court's declaration that WA Cares and the purpose of the Trust are unlawful, employees who paid mandatory after-tax contributions to Washington State are entitled to a return of such contributions, increased by any expenditure made from the Trust, and the earnings thereon, under ERISA and the general common law principles of trusts.

VI. CLASS ALLEGATIONS

6.1 Class Definition. Pursuant to Rule 23(b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure, Plaintiffs bring this case as a class action on behalf of an Employer Class and Employee Class (the "Class") defined as follows:

> Employer Class – All employers as defined by RCW 50B.04.010 who are required to withhold and remit a premium equal to .58%

of employee wages to ESD on or after January 1, 2022, pursuant to WA Cares.

Employee Class – All employees as defined by RCW 50B.04.010 who will have their wages reduced by .58% and remitted to ESD on or after January 1, 2022, pursuant to WA Cares.

6.2 Numerosity. According to data published by ESD, there are over 256,000 employers in Washington State with over 3,500,000 employees. Thus, the numerosity requirement is satisfied.

6.3 Commonality. The claims of the Employer Class and the Employee Class both seek the same unified goals:

a. That WA Cares and the purpose of the Trust should be declared unlawful;

b. That Defendants should be prospectively enjoined from (1) requiring employers to withhold .58% of Washington employees' wages; (2) enforcing WA Cares; (3) making further expenditures from the Trust; and (4) retaining the illegally created Trust funds; and

c. That the Employee Class shall be entitled to a return of any employee contributions remitted to ESD and held in Trust pursuant to WA Cares, including any expenditures from the Trust, plus the earnings thereon.

Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class because all individual differences still lead to the same unified results, a declaration that WA Cares is invalid.

6.4 Typicality. The claims of the representative Plaintiffs are typical of the claims of the Class. Plaintiffs' claims, like the claims of the Class, arise from WA Cares and the goal to have the Act declared unlawful and unenforceable.

6.5 Adequacy. Plaintiffs will fairly and adequately protect the interests of the Class. Plaintiffs have retained competent and capable attorneys who are experienced trial lawyers with significant experience in complex and class action litigation. Plaintiffs and counsel are committed to prosecuting this action vigorously on behalf of the Class and have the financial

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resources to do so. Neither Plaintiffs nor their counsel has interests that are contrary to or that conflict with those of the proposed Class.

6.6 Predominance. Defendants have engaged in a common course of conduct toward Plaintiffs and members of the Class. The common issues arising from this conduct that affect Plaintiffs and members of the Class predominate over any individual issues. Adjudication of these common issues in a single action has important and desirable advantages of judicial economy, and class action treatment is superior to the other available methods for the fair and efficient adjudication of this controversy.

6.7 Superiority. Plaintiffs and Class members will suffer and will continue to suffer harm and damages as a result of Defendants' unlawful collection of .58% of wages. Absent a class action, however, most Class members likely would find the cost of litigating their claims prohibitive. Class treatment is superior to multiple individual suits or piecemeal litigation because it conserves judicial resources, promotes consistency and efficiency of adjudication, provides a forum for small claimants, and deters illegal activities. Plaintiffs and their counsel are unaware of any litigation that has already commenced concerning Defendants' actions. There will be no significant difficulty in the management of this case as a class action. The Class members who have amounts withheld will be readily identified by the records of ESD. Because the amounts withheld will be held in trust, the amounts to be restored to each Class member, and the earnings thereon, are readily determinable and are readily identifiable from Defendants' records.

6.8 Appropriateness of Declaratory Relief. Defendants have acted on grounds generally applicable to the Class, thereby making declaratory relief appropriate with respect to the Class as a whole. Furthermore, the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class that would establish incompatible standards of conduct for Defendants.

VII. CLAIMS FOR RELIEF

First Claim for Relief – ERISA Preemption

7.1 Plaintiffs reallege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

7.2 Plaintiffs seek a declaration that WA Cares is preempted by ERISA.

Second Claim for Relief – Violations of U.S. Constitution and ERISA

7.3 Plaintiffs reallege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

7.4 Plaintiffs seek a declaration that WA Cares violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, the right to travel, the Privileges and Immunities Clause, and ERISA and the enforcement of such impermissible provisions is a fiduciary breach under ERISA and common law.

Third Claim for Relief – Violations of ADEA, OWBPA, and ERISA

7.5 Plaintiffs reallege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

7.6 Plaintiffs seek a declaration that WA Cares violates the ADEA, the Older Workers Benefit Protection Act, and ERISA and the enforcement of such impermissible provisions is a fiduciary breach under ERISA and common law

Fourth Claim for Relief – Violations of ERISA, Fiduciary Duties, and Insurance Law

7.7 Plaintiffs reallege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

7.8 Plaintiffs seek a declaration that WA Cares and the Trust are a MEWA as defined by ERISA, that the MEWA is operating without a certificate of authority and is providing benefits not authorized by Washington law and that the forfeiture provisions, the offering of impermissible benefits, and setting of premiums based on income violate ERISA, Defendants' fiduciary duties under ERISA and at common law, and insurance law.

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Fifth Claim for Relief –Restitution

7.9 Plaintiffs reallege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

7.10 After declaratory and injunctive relief are granted, the Employee Class seeks the return of all their own after-tax premiums that were deposited in the Trust, including any Trust expenditures for ancillary expenses, and the earnings thereon, as these assets are the employees' own assets and not the assets of the state and are to be returned to the employees under ERISA as well as the common law of trusts.

VIII. PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for judgment against Defendants as follows:

A. Certification of the proposed Class pursuant to Rule 23(b)(1) or (b)(2) or, in the alternative, Rule (b)(3) of the Federal Rules of Civil Procedure.

B. Appoint the undersigned counsel as Class counsel.

C. Appoint Pacific Bells, LLC, BrunswikSt., LLC, and WOW Distributing, Inc as class representatives for the Employer Class and Melissa Johnston, Lena Madden, Judi Chapman, Katherine Solan, John Edmundson, and Mike Lindbo as class representatives for the Employee Class and award compensation to the class representatives.

D. Declare that WA Cares is unlawful and unenforceable under ERISA, federal, and state law. In addition, if any provision of the Act is unenforceable, declare that the entire Act is unenforceable as the Act's provisions are not severability and the validity of every provision of the Act is necessary to fund the required benefits.

E. Prospectively enjoin Defendants from (1) collecting the payroll premium of .58% from employee wages; (2) enforcing WA Cares; (3) making further expenditures from the Trust; and (4) retaining the illegally created Trust funds.

F. Return the Employee Class their premiums paid to the Trust, any expenditures from the Trust, and the earnings thereon.

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G. Declare that Defendants are financially responsible for notifying Class members of their wrongful conduct and the return of any amounts withheld and the earnings thereon.

H. Award attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and 29 U.S.C. § 1132(g). In addition, attorneys' fees shall be awarded pursuant to a common fund created by the return of premiums and associated earnings to the Employee Class.

I. Grant such other relief as this Court deems necessary, just, and proper.

DATED this 9th day of November, 2021.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Pacific Bells, LLC, BrunswikSt., LLC, and WOW Distributing, Inc, and Melissa Johnston, Lena Madden, Judi Chapman, Katherine Solan, John Edmundson, and Mike Lindbo, *as well as the Employer and Employee Class*

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Applying Washington's Long-Term Care Act to "Multistate" Employees

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Washington Long-Term Care Act & Exemptions
December 1, 2021

This guidance gives an overview for how employers could approach evaluating whether employees—who may have multistate connections—should be assessed premiums ("LTC Assessment") under Washington's forthcoming Long-Term Services and Supports Trust Act (LTSS), effective January 1, 2022. Such guidance is not legal advice and readers should not the law is fact specific, in flux, and subject to change.

A. Basic LTSS Law and Whether a Worker Is Subject to LTC Assessment.

1. What Laws Govern Whether an Employer Must Assess LTC Premiums?

Under Washington's LTSS statute, "[b]eginning January 1, 2022, the employment security department shall assess for each individual in **employment** with an employer a premium based on the amount of the individual's wages." RCW 50B.04.080(1) (emphasis added) ("LTC Assessment"). "Employment" includes "an individual's entire service performed within or without [Washington] or both within and without [Washington]," if:

(i) The service is **localized** in [Washington]; **or**
(ii) The service is **not localized in any state**, but some of the service is performed in [Washington]; **and**
  (A) The **base of operations of the employee** is in [Washington], **or** if there is no base of operations, then **the place from which such service is directed or controlled** is in [Washington]; **or**
  (B) The base of operations from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in [Washington].

RCW 50A.05.010(8)(a) (emphasis added) (directed from RCW 50B.04.010(23)); RCW 50.04.110.

2. How Does an Employer Analyze Whether a Worker Is Subject to the LTC Assessment?

Based on the LTSS, an employer is to assess an employee the LTC Assessment if one of the four tests, applied consecutively, determines that the employee is in "employment" in Washington:

1. First Test – Is the employee's service "localized" in Washington?
2. Second Test – If the employee's service is not localized in any state, does the employee perform some service in Washington and is the employee's "base of operations" in Washington?

3. Third Test – If the employee's base of operations is not in any one state (or the employee does not perform work in the state where the employee's base of operations is located), does the employee perform some service in Washington and is the employee's service "directed or controlled" from Washington?

4. Fourth Test – If none of the above tests determine the applicable state, when does the employee's Washington residency control?

See RCW 50A.05.010(8)(a); U.S. Dep't of Labor, "Localization of Work Provisions," https://wdr.doleta.gov/directives/attach/UIPL20-04_AttachI.html (last visited Nov. 23, 2021), attached hereto as Exhibit A (hereinafter, "U.S. DOL Guidance, Exhibit A").

Importantly, an employer can only proceed to the next test if the prior test does not determine if the employee is employed in Washington or some other specific state. That is, if the first test shows that the employee is localized to *Idaho*, then then analysis stops and the employee is not subject to LTC Assessment, and so forth. RCW 50A.05.010(8)(a); U.S. DOL Guidance, Exhibit A, at 1.

3. What Does Service "In" or "Within" Washington Mean as Used in the Tests?

Note, for *all four tests,* it is likely that a worker must be *physically* in Washington boundaries when performing a service to be considered to be "perform[ing]" "within" or "in" the state for the analyses, rather than merely projecting service *into* the state while physically located out of state (e.g., telecommuting from Idaho, but serving Washington customers online or over the phone). *See generally infra* (cases); U.S. DOL Guidance, Attachment A, at 4. There is no Washington case directly addressing this question; however, the weight of topical guidance, case law, and commentary suggests that service "in" Washington means what it says, i.e., that, for localization/location of service-analysis purposes, the person providing the service must be *physically* within the state's boundaries when performing service. *See* U.S. DOL Guidance, Attachment A, at 4 (employee who moved from New York to Florida, but continued to telecommute to New York-based employer "localized in Florida . . . from the date she began telecommuting"). Likewise, a worker who is physically located in a state is working "in" that state, even if the worker is projecting all services out of state. *Id.*

B. FULL ANALYSIS OF TESTS FOR ASSESSING LTC ASSESSMENT APPLICATION.

1. First Test - When Is an Employee's Service "Localized" to Washington (LTC Assessment Applies), or to Another State (LTC Assessment Does Not Apply)?

Under the first test, if an employee's service is "localized" in Washington, the analysis ends and the LTC Assessment applies. Likewise, if the employee's service is localized in some other state, e.g., Idaho or Oregon, the analysis also ends and the LTC Assessment does not apply. Under the first test, "[s]ervice shall be deemed to be localized within a state [be it Washington or another specific state]," under two possible localization scenarios:

> (1) the service is performed entirely within the state ["Localization Scenario 1"]; or
> (2) the service is performed both within and without the state, but the service is performed without the state is incidental to the individual's service within the state; for example, is temporary or transitory in nature or consists of isolated transactions" ["Localization Scenario 2"].

RCW 50.04.120 (emphasis added); WAC 192-510-070 (regarding Paid Family Medical Leave.[1]).

a. Localization Scenario 1 – "Entirely" in Washington (or Other State)

Under Localization Scenario 1, employees who always physically work within Washington—whether at an employer's physical Washington location or remotely at the employee's Washington-based residence—are likely "localized" to Washington and thus subject to the LTC Assessment. Likewise, employees who always physically work within a state that is not Washington, such as Idaho, are likely localized in Idaho and thus not subject to the LTC Assessment. RCW 50.04.120.

b. Localization Scenario 2 – "Incidental" Out-of-State Work

Under Localization Scenario 2, an employee who typically physically works in Washington (be it physically at an employer's Washington location or remotely from the employee's Washington-based home), but has work outside of Washington that is "incidental, e.g., "temporary or transitory in nature" or "isolated transactions," is still considered "localized" in Washington and thus subject to the LTC Assessment. RCW 50.04.120. For example, if such an employee was only physically sent to an Idaho branch for a week or so, or worked remotely from the employee's Idaho-based home for a week or so, before resuming the employee's physical Washington-based work presence, such employee would be "localized" in Washington—and thus subject to the LTC Assessment—as the Idaho work was only "temporary or transitory." RCW 50.04.120; *see also* WAC 192-510-070. Likewise, an Idaho employee who only went to Washington physically to work for a week or so (be it at an actual branch in Washington or remotely from Washington) is still probably localized to Idaho and not subject to LTC Assessment. RCW 50.04.120; WAC 192-510-070.

Beyond such short-stint examples, it is fact specific whether an employee's work outside of a state is otherwise "incidental," e.g., "temporary or transitory," or "consists of isolated transactions," and thus remains "localized" in the "main" state (be it Washington or otherwise).[2] Limited Washington

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[1] WAC 192-510-070 states: **What is "localization" and how does it affect conditional waivers?**

(1) An employee's work is subject to all [PFML] reporting requirements and premiums when the work is localized in Washington. An employee's work is considered localized in Washington when:
(a) All of the employee's work is performed entirely within Washington; or
(b) Most of the employee's services are performed within Washington, but some of the work which is temporary or transitory in nature, or consists of isolated transactions is performed outside of Washington.
(2) Services that are not localized in Washington will be subject to reporting requirements and premiums when the services are not localized in any state, but some of the services are performed in Washington, and:
(a) The base of operations of the employee is in Washington, or if there is no base of operations, then the place from which such services is directed or controlled is in Washington; or
(b) The base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in Washington.
Example: A storm hits Washington. An employer in Oregon dispatches an employee who typically lives and works in Oregon to help with repair work. The employee works temporarily in Washington for the employer for one week, and then returns to work in Oregon for the employer. The employment is localized within Oregon and is not subject to premium assessment. WAC 192-510-070.

[2] Washington previously had a temporary emergency rule directly addressing "localization" of employees teleworking out of state due to COVID-19, but that rule expired May 29, 2021. That rule stated:

WAC 192-510-091 Localization considerations due to COVID-19.

authority on this issue makes clear that where the employee's work is approximately half (or close to) physically in Washington and half (or close to) physically in another state, such as Idaho, the employee is not "localized" to Washington *or* Idaho because the work "in both states [is] too substantial to be considered temporary or transitory or isolated in nature" (again, this does not necessarily mean the LTC Assessment will not apply absent further analysis, *see below*). *In re Don E. Bear*, E.S.D. Case No. 169 (May 4, 1976) (traveling saw-mill engineer who travelled between Washington and Idaho and visited and Washington-based and Idaho-based mills roughly equally not localized in any state); *Puget Sound Bridge & Dredging Co. v. State Unemployment Compensation Comm'n.*, 168 Or. 614, 126 P.2d 37 (1942) (crews of dredging barge that dredged both the Oregon side and Washington side of Columbia River equally not localized in any state). Otherwise, other Washington authority suggests that even some more regular or episodic work outside of a state will not defeat "localization" in that state. *See In re Jets Hockey Club, Inc.*, E.S.D. Case No. 638 (Sept. 8, 1965) (players of Spokane-based hockey club who travelled to Canada for some hockey matches still "localized" in Washington).

Though not Washington-specific, the U.S. Department of Labor has guidance on whether work out of the determining state (be it Washington elsewhere) is "temporary and transitory":

1. Is it intended by the employer and the employee that the service be an isolated transaction or a regular part of the employee's work?
2. Does the employee intend to return to the original state upon completion of the work in the other state, or is the employee's intention to continue to work in the other state?
3. Is the work performed outside the state of the same nature as, or is it different from, the tasks and duties performed within the state?
4. How does the length of service with the employer within the state compare with the length of service outside the state?

U.S. DOL Guidance, Attachment A, at 2. The U.S. DOL Guidance notes that due to "the wide variation of facts in each particular situation, no fixed length of time can be used as a yardstick in determining whether the service is incidental or not." *Id.* It adds that service longer than 12 months would "generally not be considered incidental, however, flexibility should be applied and various circumstances under which the work performed." *Id.* at 2-3. It also provides various examples of when work remains "localized" in a state, including if the employee is out of the state for an extended period. *See id.* This guidance and examples likely would illuminate the COVID-19 situation. *See id.*

2. Second Test – If the Employee Is Not Localized in Any State, When Is the Employee in Washington Due to the Employee's "Base of Operations" Being in Washington?

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(1) For the purposes of paid family and medical leave, an employee's service is localized in Washington if:
(a) Prior to March 23, 2020, the employee's service with an employer was considered localized in Washington under RCW 50A.050.010 (8)(a);
(b) The employer requirements or the state's restrictions due to COVID-19 resulted in the employee temporarily working from a location that is not in Washington;
(c) The employee's residence or domicile was out of state prior to March 23, 2020; and
(d) The employer and employee intend for the employee to perform work exclusively or mostly in Washington once COVID-19 restrictions are lifted.

WSR 21-04-066 (Jan. 29, 2021) (WAC 192-510-091), *available at* http://lawfilesext.leg.wa.gov/law/wsr/2021/04/21-04-066.htm (last visited Nov. 23, 2021); RCW 34.05.350(2) (noting temporary emergency rules expire 120 days after issuance, absent reissuance). With the expiration of this rule, the default pre-existing rules and analysis of whether an employee's work remains localized in Washington (or vice versa with another state) likely applies.

Only if an employee's work is not localized in any state (e.g., if the employee performs work equally in Washington and Idaho, *see above*), should an employer proceed to the second test: Does (1) the worker perform some service in Washington;[3] and (2) is the worker's "base of operations" in Washington? RCW 50A.05.010(8)(a)(ii)(A).

Neither the LTSS, PFML, or unemployment compensation rules and regulations define "base of operations." No case authority defines "base of operations" under the PFML (and thus, LTSS) laws specifically. Though not determinative, it is likely that "base of operations" refers to the *employee's* "base" versus the "employer's" base because the PFML (and thus LTSS) statute specifically notes "base of operations **of the employee**." *Compare* RCW 50A.05.010(8)(a)(ii)(A) (emphasis added), *with* RCW 50.04.110(2)(b). This is consistent with a typical definition in unemployment compensation law for multi-state employees, defining "base of operations" as:

> [T]he place or fixed center of more or less permanent nature from which the employee starts work and to which he customarily returns in order to receive instructions from his employer, or communications from his customers or other persons, or to replenish stocks and materials, to repair equipment, or to perform any other functions necessary to the exercise of his trade or profession at some or other point or points. This base of operations may be the employee's business office which may be located as his residence, or the contract of employment may specify a particular place at which the employee is to receive his directions and instructions. This test is applicable principally to employees, such as salesman, who customarily travel in several states.

In re Don Bear (ESD 1976); U.S. DOL Guidance, Exhibit A, at 5-6. Thus, for example, if an employee regularly travels, even if extensively for work in another state (such that the work is not localized in any state), if some of the work is done in Washington and the employee's "base of operations," such as the employee's office (be it at an employer-owned location or home office) is in Washington, the employee is a Washington employee for LTC Assessment purposes. For the same reasons, if the employee's base office is in Idaho where the employee performs at least some work, but travels extensively in Washington, the employee may be an Idaho employee for LTC Assessment purposes, despite the employer being headquartered in Washington. U.S. DOL Guidance, Exhibit A, at 5, Examples A 1 & 2.

If the employee has a "base of operations" *in more than one state*, this does not satisfy the base of operations test as the employee can only have one "base of operations;" i.e., the employee effectively has no base of operations in any state. For example, an employee who works both 50% in Washington and 50% in Idaho and, e.g., has an equally important office in each state, may not have a specific "base of operations." *In re Don Bear* (ESD 1976) (noting employee who divided his time between working in shops in Spokane and Sandpoint each week did "not establish that the claimant's base of operations was in either the states of Washington or Idaho"). In such scenario, the employer should proceed to the third test.

[3] Under this and all tests, if the employee performs no work in Washington (save for only temporarily being outside of Washington such that the employee is may still be "localized" in Washington), the employee fails the tests and is not in "employment" in Washington and thus not subject to the LTC Assessment. RCW 50B.04.080(1)

3. Third Test – If the Employee Is Not Localized in Any State, and the Employee Has No "Base of Operations," When Is the Employee in Washington for LTC Assessment Purposes Due to Being Directed or Controlled from a Washington Site?

If an employee's work is not localized in any state, and the employee otherwise does not have a distinct "base of operations" in one particular state, an employer can proceed to the third test to determine whether the employee could be subject to the LTC Assessment:[4] Does (1) the worker perform some service in Washington; and (2) is the worker's service "directed or controlled" from a place in Washington? RCW 50A.05.010(8)(a)(ii)(A).

Limited Washington authority defines "the place from which the service is directed or controlled" as "the place at which the basic authority exists and from which the general control emanates, rather than the place at which a manager or foreman directly supervises the performance of services under general instructions from the place of basic authority." *In re Don Bear* (ESD 1976) (quoting U.S. Dep't of Labor, Letter No. 291). For example, in one ESD case, the agency determined that an employee, an engineer who designed machinery, who spent his time roughly equally in the employer's Spokane location (the employer's headquarters) and a Sandpoint location (the location of the main "design" shop), and thus did not have a "base of operations" in either Washington or Idaho. *In re Don Bear* (ESD 1976). The agency held the employee was nonetheless a Washington employee under the "direction and control test" because, though the employee received direct supervision from the Sandpoint design shop, "the ultimate control originated at the employer's home office in Spokane." *Id.*; U.S. DOL Guidance, Exhibit A, at 6-7.

Thus, if the third test is reached, the location of the employer's headquarters will likely strongly, if not definitively, determine an employee's location for LTC Assessment.

4. Fourth Test – When Will the Employee's Washington Residency Control?

Under the fourth test, only if the first three tests are indeterminate, the employee may still be considered in Washington for LTC Assessment purposes if the employee is a Washington resident and the "base of operations from which such service is directed or controlled is not in any state in which some part of the service is performed." RCW 50A.05.010(8)(a)(ii)(B). The fourth test is not evaluated fully given that this test is for typically unique and limited situations; however, the U.S. DOL Guidance provides some initial guidance should and employer desire further discussion on this fourth test in the future. *See* U.S. DOL Guidance, Exhibit A, at 7-8 (discussing traveling circus workers).

[4] This third test may also be triggered if, for example, the employee's base of operations is in a state where the employee performs no work.

EX. A

U.S. DOL GUIDANCE

Localization of Work Provisions

The objective of "localization of work" provisions in state unemployment insurance laws is to cover under one state law all of the service performed by an individual for one employer, wherever it is performed. The following principles provide a guide for applying the states' statutory provisions relating to "localization of work." All of the examples provided are actual state decisions or have been taken from state manuals of interpretation or instruction.

The following language was included in the September 1950 edition of the Manual of State Employment Security Legislation and similar language now appears in all state laws:

> (1) Service that is localized within a state: The term "employment" shall include an individual's entire service, performed within, or both within and without, this state if the service is localized in this state. Service shall be deemed to be localized within a state if:
>
> > (A) the service is performed entirely within such state; or
> >
> > (B) the service is performed both within and without such state but the service performed without such state is incidental to the individual's service within the state; for example, is temporary or transitory in nature or consists of isolated transactions.
>
> (2) Service not localized in any state: The term "employment" shall include an individual's entire service, performed within, or both within and without this state if the service is not localized in any state but some of the service is performed in this state, and;
>
> > (A) the individual's base of operations is in this state; or
> >
> > (B) if there is no base of operations, the place from which such service is directed or controlled is in this state; or
> >
> > (C) the individual's base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

The above localization of work provisions of state law are ordinarily applied in the following sequence:

> (1) Is the individual's service localized in this state or some other state?
>
> (2) If his/her service is not localized in any state, does he/she perform some service in the state in which his/her base of operations is located?
>
> (3) If the individual does not perform any service in the state in which his/her base of operations is located, does he/she perform any service in the state from which the service is directed and controlled?
>
> (4) If the individual does not perform any service in the state from which his/her service is directed and controlled, does the individual perform any service in the state in which he/she lives?

Thus, a state agency must first determine whether an individual's service is localized in that state. That is, it must find out whether service performed outside the state, if any, is incidental to that performed in the state. If so, service is

localized in the state making the determination. If not, before going to the second test, it is necessary to find out whether the service is localized in some other state. Is the service performed in the state making the determination incidental to that performed in some other state? If so, all of the service is localized in the other state and is subject to the law of that state. It is possible, however, that part of the service is localized in one state, and part in another. In such a case, it may be desirable for the employer to elect to cover all of such individual's service in one state under the Interstate Reciprocal Coverage Arrangement.

Only if the service is not localized in any state is any other test necessary. If the service is not localized, it is necessary to determine the individual's base of operations state and whether any work is performed in that state. In other words, questions must be asked: Does the individual have a base of operations in this state? Is a service performed here? If the answer to either question is "no," the state must apply a second test: Is the individual's base of operations in any state where some work is performed? If it is, the law of that state covers all of the individual's service.

If the individual has no base of operations, or if no work is performed in the state in which the base of operations is located, and coverage is not determined by the second test, then it is necessary to apply the third test of "direction and control." If the individual performs no service in the state from which the service is directed and controlled and the service is, therefore, not covered by the third test in the state making the determination, or in any other state, then it is necessary to apply the fourth test. The state must determine whether the individual performs any service in the state in which he lives.

I. Guide for Determining the Place Where Work is Localized:

It is necessary to determine first whether the service in question is localized in any state. Service is localized in a state if it is performed entirely within the state, or, if it is performed both within and outside the state, and the service performed outside the state is incidental to the individual's service performed within the state. Service is considered incidental, for example, if it is temporary or transitory in nature, or consists of isolated transactions.

A. In determining whether the service of a worker is incidental or transitory in nature, some of the factors to be considered are:

1. Is it intended by the employer and the employee that the service be an isolated transaction or a regular part of the employee's work?
2. Does the employee intend to return to the original state upon completion of the work in the other state, or is it the employee's intention to continue to work in the other state?
3. Is the work performed outside the state of the same nature as, or is it different from, the tasks and duties performed within the state?
4. How does the length of service with the employer within the state compare with the length of service outside the state?

Because of the wide variation of facts in each particular situation, no fixed length of time can be used as a yardstick in determining whether the service is incidental or not. Service longer than 12 months would not generally be considered incidental, however, flexibility should be applied and various circumstances under which the work is performed, such as

the terms of the contract of hire, whether written or oral, should be considered.

B. Examples of services that are localized:

1. Service performed entirely in one state:

Example

A salesman employed by a New York corporation, who lives in Indiana and performs all of his work in Illinois, is covered by the Illinois law because all of his work is performed in Illinois, even though the corporation for which he works is located in New York and he lives in Indiana.

2. Service performed both in a state and outside that state:

Example

A contractor had a place of business in California where he maintained his records, stored his equipment and directed his various jobs wherever located. All of his jobs had been in California but he obtained a contract for a single job in Nevada which took seven months to complete. During and after the completion of his work in Nevada, the contractor continued his activities in California.

a. A resident of California was hired in California to work on the Nevada job. When the work in Nevada was completed, the employee was laid off and not rehired by this employer. The employee's travel from California, where he was hired, to Nevada, was incidental to the work performed in Nevada. All work was localized in Nevada and was subject to the Nevada law.

b. A resident of California had been a foreman on the employer's payroll for several years. The foreman was moved from a California job to the Nevada job where he worked until the completion of the job, at which time he came back to California for continued work with the same employer. Although this employee was in Nevada for 7 months, his regular work was in California, and the Nevada work was temporary in nature and incidental to the work performed in California. The foreman's work, therefore, was localized in California, and the work performed in Nevada was subject to California law.

c. A resident of Nevada was hired for the Nevada job only. After the end of several months of employment in Nevada, he continued working for this employer for an equal length of time on another job in California. While the employee was working in Nevada, his work was localized there and was covered by the Nevada law because that was the only job the individual was hired for, and the Nevada contract was an isolated transaction of the employer with no likelihood of future Nevada employment for the individual. Since his move to California was considered permanent,

the work in California was localized there and was subject to the California law.

World Trade Center Example

Approximately 40 employers and 1,500 employees, who were working in the area of the World Trade Center in New York City prior to the terrorist attack of September 11, 2001, were temporarily relocated to New Jersey. After the relocation, the employees' services were determined to be localized in the State of New York because their work performed in New Jersey was temporary, with the understanding that the employers intended to return to New York as soon as possible. A recommended definition of "temporary" was reiterated earlier in this document (paragraph I.A.4.) as being approximately 12 months or less, as long as it is applied with some flexibility, taking into consideration the various circumstances under which the work is performed. New York and New Jersey considered the circumstances that required this move and determined that "temporary" would be considered to extend beyond a one-year period through the end of calendar year 2002. At the end of that time, employers who continued to operate in New Jersey would be considered subject to New Jersey law effective January 1, 2003. In addition, employees who were hired while their employer was temporarily located in New Jersey, and who performed all services for that employer in New Jersey during 2001 and 2002, were considered to be performing services that were "localized" in New Jersey. As a result, their wages were subject to New Jersey law.

Telecommuting Example

A resident of New York was hired as a technical specialist for a financial information provider. All services were performed in New York for two years, after which the employee moved to Florida because her husband had changed jobs. Since the employer had invested time and money in training this individual, it agreed to allow her to telecommute from Florida. After the relocation took place, all of her assignments and work products were communicated via the Internet. Since this employee is now performing all duties in Florida, even though the employer is located in New York, her services are localized in Florida and subject to Florida law. Therefore, all wages from the date she began telecommuting from Florida, are reportable to Florida.

Airline Example

A major airline that flew out of New Jersey was acquired by another airline. The flight attendants for the defunct airline, who were previously assigned to fly out of New Jersey, were reassigned to St. Louis, Missouri. This action required the flight attendants to commute by plane from New Jersey to Missouri before beginning work. They always returned to their duty station in St. Louis before the end of their shift, at which time they commuted back

to New Jersey. Because the flight attendants began work in Missouri, their work outside of Missouri was incidental (temporary or transitory in nature) to the work within Missouri, and their flight shift ended in Missouri, their work was localized in Missouri, and they were covered under Missouri law.

II. Guide for Determining the Base of Operations:

If an individual's service is not localized in any state, it is necessary to apply the second test in the statute: Does the individual perform some service in the state in which his/her base of operations is located? The individual's base of operations should not be confused with the place from which his service is directed or controlled.

The "base of operations" is the place, or fixed center of more or less permanent nature, from which the individual starts work and to which the individual customarily returns in order to receive instructions from the employer, or communications from customers or other persons, or to replenish stocks and materials, to repair equipment, or to perform any other functions necessary to exercise the individual's trade or profession at some other point or points. The base of operations may be the employee's business office, which may be located at his residence, or the contract of employment may specify a particular place at which the employee is to receive his direction and instructions. This test is applicable principally to employees, such as salesmen, who customarily travel in several states.

A. Examples of non-localized service, where coverage is decided by the base-of-operations test:

1. A salesman, a resident of California, sold products in California, Nevada, and Oregon for his employer whose place of business was in New York. The salesman operated from his home where he received instructions from his employer, communications from his customers, etc. Once a year the salesman went to New York for a two-week sales meeting. His base of operations was in California, and he performed some service in California. Therefore, all of his service was covered by the California law.

2. An employee worked for a company whose home office was in Pennsylvania. He was made a regional director working out of a branch office in New York. He worked mostly in New York, but spent considerable time also in Pennsylvania and New Jersey. The individual's base-of-operations was in New York. Since he performed some service in New York and his base of operations was in New York, it is immaterial that the source of direction and control was in Pennsylvania, and all of the individual's service was covered by the New York law.

a. The base-of-operations test may also be used to determine the state of coverage of service performed by traveling bands and orchestras. When the owners or executive officers remain in the state where the main office is maintained, the application of the test to an organization other than a sole proprietorship creates no problem. In applying the test to a sole proprietorship, when the owner (usually the leader) travels with the band, factors to be considered are:

i. Residence and mailing address of the owner.

ii. Location of accountant or business manager who acts as the owner's agent.

iii. State in which income tax returns are filed by the owner.

iv. State in which the owner has a traveling card from a musician's union.

v. State from which the band starts and to which it returns after the completion of a tour.

Examples involving bands and orchestras:

1. The leader, the sole proprietor of a traveling independent band, resides in California, receives mail in California, carries a traveling card from a California musician's union,

and has a business agent in California. The band performs in several states, and its services are not localized in any state. All services of any employee who performs services in California as well as in other states are covered in California under the base-of-operations test. Even though the leader travels with the band, the principal base-of- operations for the leader and individual musicians remains fixed in California where the leader maintains his headquarters.

2. The band leader in the preceding example, while in Oregon, hired a resident of Oregon as a permanent member of the band. Under the contract of hire, the employee was to travel with the band in California and other states. Under the base-of-operations test, this employee's services are covered under California law during all periods. It is recognized that there may be a reporting period during which this employee performs services only in the State of Oregon. Also, there may be a reporting period or periods during which this employee may be performing services in several states but not in California. However, because of the period and location of employment expressed in the contract of hire, the services are considered covered in California.

3. Guide for Determining the Place From Which the Service is Directed or Controlled:

If the individual has no base-of-operations, or if he has such a base but does not perform any service in the state in which it is located, or if the base-of-operations moves from state to state, it is necessary to find out whether any of the individual's service is performed in the state from which his service is directed or controlled. The place from which an individual's service is directed or controlled is the place at which the basic authority exists and from which the general control emanates rather than the place at which a manager or foreman directly supervises the performance of services under general instructions from the place of basic authority.

Examples of service which is not localized in any state, where coverage is decided by the direction and control test:

a. A contractor whose main office is in California is regularly engaged in road construction work in California and Nevada. All operations are

under direction of a general superintendent whose office is in California. Work in each state is directly supervised by field supervisors working from field offices located in each of the two states. Each field supervisor has the power to hire and fire personnel; however, all requests for manpower must be cleared through the control office. Employees report for work at the field offices. Time cards are sent weekly to the main office in California where the payrolls are prepared. Employees regularly perform services in both California and Nevada. It is determined that neither the localization nor the base-of-operations test applies. Because the basic authority of direction and control emanates from the central office in California, the services of the employees are covered by California law.

b. A salesman residing in Cleveland, Ohio, works for a concern whose factory and selling office are in Chicago, Illinois. The salesman's territory is Kentucky, Arkansas, Oklahoma, Illinois, and Missouri. He does not use either the Chicago office or his home in Ohio as his base of operations. Since his work is not localized in any state and he has no base of operations, all of his service is covered by the Illinois law because his work is directed and controlled from his employer's Chicago office and some of his service is in Illinois.

4. Guide for Determining the Place of Residence:

If coverage cannot be determined by any of the tests above, it is necessary to apply the test of residence. Residence is a factor in determining coverage only when the individual's service is not localized in any state and he performs no service in the state in which he has his base of operations (if he has such a base) and he performs no service in the state from which the service is directed and controlled.

If none of the other tests apply, all of an individual's service is covered in the state in which he lives, provided that some of his service is performed in that state.

Examples of coverage determined by state of residence:

a. A salesman employed by an Indiana company lives in Illinois. His territory covers Iowa, Kentucky, and Illinois. The salesman's service is not localized in any state. He uses his employer's Indiana office as his base of operations, and his service is directed from that office. He performs no service in the state in which his base of operations is located, nor in the state from which his service is directed and controlled. He does some work in Illinois, the state in which he lives. Consequently, all of his service is subject to the Illinois law.

b. An individual who lives in California was hired as a member of a traveling circus to perform in California, Arizona, and New Mexico. The circus was directed and controlled from Florida. The employee performed in California and Arizona before quitting. Because none of the first three tests apply, and because he performed some service in the state in which he lived, all of his service is subject to the law of California.

If, after applying all of the above tests to a given set of circumstances, the individual's service is found not to be subject to any one state law, under most state laws the employer may elect to cover all of the individual's service in one state, either under a provision for election of coverage or under the Interstate Reciprocal Coverage Arrangement. Under the reciprocal coverage arrangement, the service may be covered in any one of the following states: (1) a state in which some part of the individual's service is performed, (2) the state in which he lives, or (3) a state in which the employer maintains a place of business.