



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

November 8, 2021

SENT VIA EMAIL and
U.S. POSTAL SERVICE

The Honorable Bob Ferguson
Attorney General of the State of Washington
P.O. Box 40100
Olympia, WA 98504-0100

Re: Cease and Desist from Unconstitutional Implementation and Enforcement
of Washington's Long-Term Care Program, RCW 50B.04

Dear Attorney General Ferguson:

I write to respectfully request that Washington cease and desist from implementing or enforcing its Long-Term Care Program, RCW 50B.04, (the "Program") as drafted. The Program is discriminatory and unconstitutional as to Idaho residents who work in Washington. To avoid legal action, please ensure that Washington refrains from implementing or enforcing the Program against Idaho residents by: (1) recognizing that such enforcement violates the Privileges and Immunities Clause, the Dormant Commerce Clause, and the Equal Protection Clause; and (2) creating an exemption for such individuals. The Program's significant constitutional violations render it legally unenforceable as to Idaho residents. I respectfully request that you provide legal guidance to the relevant state entities to avoid the need to litigate these issues and waste taxpayer funds.

This Office understands the Program requires that "each individual in employment with an employer" pay a "premium" based upon that individual's "wages." RCW 50B.04.080(1). Employers must collect the premium through a payroll deduction and remit it to the Washington Employment Security Department. RCW 50B.04.080(2)(a). The premiums are ultimately deposited in a trust account "for the individuals who become eligible for the program" and fund payments dispersed by the Washington Department of Social and Health Services for certain services and benefits. RCW 50B.04.080(6); RCW 50B.04.100(1); RCW 50B.04.06(3)(a). Individuals with private long-term care insurance may seek an exemption from the

premium, but, currently, individuals may not seek an exemption solely because they are nonresidents. RCW 50B.04.085. Only individuals residing in Washington, who otherwise qualify, are eligible for benefits under the Program. RCW 50B.04.010(6); *see also* RCW 50B.04.050 (defining the requirements for qualified individuals). In short, Idahoans working in Washington must pay the premium, but will never receive the benefits unless they move to Washington.

The Program violates the U.S. Constitution's Privileges and Immunities Clause because it discriminates against Idaho residents who work in Washington without a substantial reason. The Privileges and Immunities Clause, in broad terms, prohibits states from treating nonresidents differently from residents without a substantial reason. *See Marilley v. Bonham*, 844 F.3d 841, 850 (9th Cir. 2016) (*en banc*). Within this prohibition, the Privileges and Immunities Clause also protects an individual's right to "carry on business" in another state without being subjected to taxes or fees more onerous than the citizens of the latter state. *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998) (quotation omitted). The Program treats nonresident Idahoans differently from Washington's residents by forcing Idaho residents to pay a premium that has no value (i.e., they will never receive the benefit for which the premium is paid), while Washington residents, in general, can expect to receive the benefit for which they are required to pay. Given that it appears Washington could easily exempt Idaho residents from the premium based on their state of residency, there is no substantial reason for the difference in treatment. Indeed, Washington already has an exemption process for those who purchase qualifying private insurance. *See* RCW 50B.04.085.

The Program also violates the Dormant Commerce Clause by discriminating against interstate commerce to the benefit of local residents and businesses. The Dormant Commerce Clause prohibits state regulations from: (1) facially discriminating against interstate commerce; and (2) unduly burdening interstate commerce. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575, 578 (1997). Here, nonresident workers in Washington must pay the premium but see no benefits, while resident workers can obtain a benefit from the premium they are required to pay. Put differently, the law restricts access to benefits for which an employee has paid based on whether the employee is a resident of Idaho or Washington. The effect of the law is to award Idaho resident workers in Washington less compensation for the same work compared to Washington resident workers. This will dissuade Idaho residents from working in Washington and impede interstate commerce by discouraging travel by Idaho residents into Washington to work. The Program also impermissibly encourages Washington businesses to hire Washington employees by discouraging Idaho residents from working in Washington. *See id.* at 576. And, again, there is no legitimate reason to justify the

discriminatory law when Washington could have easily excluded Idaho residents from the assessment.

Finally, the Program violates the Equal Protection Clause of the Fourteenth Amendment. "[T]he Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening the residents of other state members of our federation." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985). As stated above, the Program discriminates against Idahoans working in Washington solely because of their out-of-state residency. And, the Program cannot survive even rational basis review. Regardless of any interest Washington may have in forcing Idahoans to participate in the Program, a state interest is not legitimate when it is achieved by plainly discriminating against nonresidents. *Id.* at 882-83. The Program violates the Equal Protection Clause as to nonresidents.

As demonstrated above, applying the Program against Idaho residents violates several well-settled principles of constitutional law. To avoid the necessity of legal action to protect the rights and interests of Idaho's citizens, I ask that you issue legal guidance that the Program is unenforceable as to Idaho residents and that Washington promptly exempt Idaho residents from the Program. If I do not receive a written response providing assurances that these actions have been taken by November 22, 2021, Idaho will have no choice but to pursue legal action in the best interests of Idaho's citizens. In the alternative, I and members of the Office are willing to meet with you and your team to identify a path forward to obviate the need for litigation.

Sincerely,



LAWRENCE G. WASDEN
Attorney General

LGW:jc

- C: President Pro Tempore Karen Keiser, Washington Senate
Speaker of the House Laurie Jinkins, Washington House of Representatives
Acting Secretary Don Clintsman, Washington Department of Social and
Health Services
Commissioner Cami Feek, Washington Employment Security Department