

MEMORANDUM

TO: Tribal Clients

FROM: Robert A. Burns, Esq.
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Dorsey & Whitney LLP

DATE: October 4, 2004

RE: Proposed Tribal Employee Benefit Legislation Update

Senator Gordon Smith of Oregon has introduced proposed legislation that is a companion to legislation previously introduced in the U.S. House of Representatives. This memorandum updates our earlier tribal client memorandum regarding the companion proposed legislation.

Background

In November 2003, Representative J.D. Hayworth of Arizona introduced legislation entitled the “Governmental Pension Plan Equalization Act of 2003” (H.R. 3605). This legislation would have a significant impact on employee benefit plans maintained by tribes. The legislation would make several changes, including the following:

- Expand the definition of “governmental plan” under the Internal Revenue Code (the “Code”) and ERISA to include plans maintained by tribes and tribal entities.
- Amend the Code so that tribal plans, like other governmental plans, would be exempt from certain nondiscrimination rules.

The legislation would clarify the status of tribal plans but also would indicate, by implication, that ERISA applies to tribal plans.

Senate Legislation

On September 22, 2004, Senator Gordon Smith of Oregon introduced companion legislation in the Senate co-sponsored by Senator Jeff Bingaman (NM), Senator Kent Conrad (ND), Senator Thomas Daschle (SD), Senator Orrin Hatch (UT), and Senator Craig Thomas (WY). The legislation is identical to H.R. 3605. Introduction of the legislation in the Senate significantly increases the chances for eventual passage of the legislation.

Potential Impact

As noted in our earlier update on H.R. 3605, the legislation does not specifically amend ERISA to state that ERISA applies to tribes. Nevertheless, by indicating that tribal plans are exempt under the governmental plan exception, the legislation implies that ERISA applies. ERISA is silent as to its applicability to tribes, but every federal court that has considered this issue has concluded that ERISA applies to tribes. If enacted, this legislation makes it almost a certainty that other courts would similarly find ERISA applies to tribes.

Conclusion

Tribes and tribal entities should consider the impact of the legislation and whether they wish to act on the legislation.

- H.R. 3605 may be found at the following link:
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h3605ih.txt.pdf.
- S. 2831, the Senate companion bill, may be found at the following link:
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:s2831is.txt.pdf
- More information on the issues in the legislation may be found at the following link:
<http://www.pasca.org/WASH/PDF/tribalplans.pdf>

If you have a question regarding the legislation, please contact the attorney you work with or call us at (612) 340-2825 (Tim Goodman) or (612) 340-8788 (Bob Burns).

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