

MEMORANDUM

TO: Tribal Clients

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RE: Proposed Tribal Employee Benefit Legislation

Several bills have been introduced in Congress that would significantly impact Tribes' employee benefit plans. The legislation would expand the definition of "governmental plan" under the Internal Revenue Code and ERISA to include plans maintained by Tribes and tribal entities. This would clarify the status of these plans but also would indicate that ERISA applies to these plans. This legislation has taken on new importance for two reasons:

- Last year the Internal Revenue Service stopped providing determinations to Tribes on whether their plans are governmental plans.
- Recently, the provisions on tribal employee benefit plans have been included in larger bills, increasing the likelihood that these provisions will be enacted.

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

Proposed Changes

"Governmental Plan" Definition

The legislation would expand the definition of "governmental plan" under the Internal Revenue Code and ERISA to include plans maintained by (i) a tribal government, (ii) a subdivision of a tribal government, (iii) an agency or instrumentality of a tribal government or subdivision thereof, or (iv) an entity established under federal, state, or tribal law wholly owned or controlled by any of the foregoing. If adopted, the change would apply to tribal employees and employees of wholly owned tribal entities. It is unclear how the legislation would apply to joint ventures where a Tribe owns a controlling interest but less than 100% of the joint venture.

Clarification of Nondiscrimination Rules

The legislation would amend the Internal Revenue Code so that tribal plans, like other governmental plans, would be exempt from a number of nondiscrimination rules enacted as part of ERISA. Instead, tribal plans would be subject to the pre-ERISA rules regarding minimum participation standards, minimum nondiscrimination requirements, and vesting standards.

Defined Benefit Rules

The legislation would also affect the rules that apply to defined benefit plans.

Potential Impact

Clarification of the Code and ERISA

The legislation would clarify the Internal Revenue Code and ERISA. Tribes and practitioners have had to confront the absence of guidance in this area, exposing the Tribes to potential liability.

Application of ERISA to Tribes and Tribal Entities

The legislation does not specifically amend ERISA to indicate that ERISA applies to tribes. By indicating that Tribes' plans are exempt from ERISA under the governmental plan exception, the legislation implies that ERISA is applicable. ERISA itself is silent as to its applicability to Tribes, but every federal court that has considered this issue has concluded that ERISA applies. This includes the Seventh and Ninth Circuit U.S. Courts of Appeals. If enacted, this legislation makes it almost a certainty that other courts would similarly find ERISA applies to Tribes.

Aspects

The legislation will affect a number of aspects of tribal plans, including the following:

- The exemption from the reporting (Form 5500) and disclosure requirements under ERISA.
- The exemption from the participation and vesting requirements under ERISA.
- The exemption from the average deferral percentage ("ADP") test for 401(k) plans.
- The exemption from excise taxes related to employee benefit plans under the Internal Revenue Code.
- The indication that ERISA applies to Tribes (for those Tribes that have taken a contrary position).
- The difficulty of obtaining documents for plans exempt from ERISA (most prototype documents are not designed for governmental plans and include provisions regarding ERISA).

Conclusion

The legislation, which includes several bills in the U.S. House of Representatives (H.R. 331, H.R. 1960, and H.R. 1961) and the U.S. Senate (S. 673) may be found on Thomas (<http://thomas.loc.gov/>).

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