

Indian Gaming

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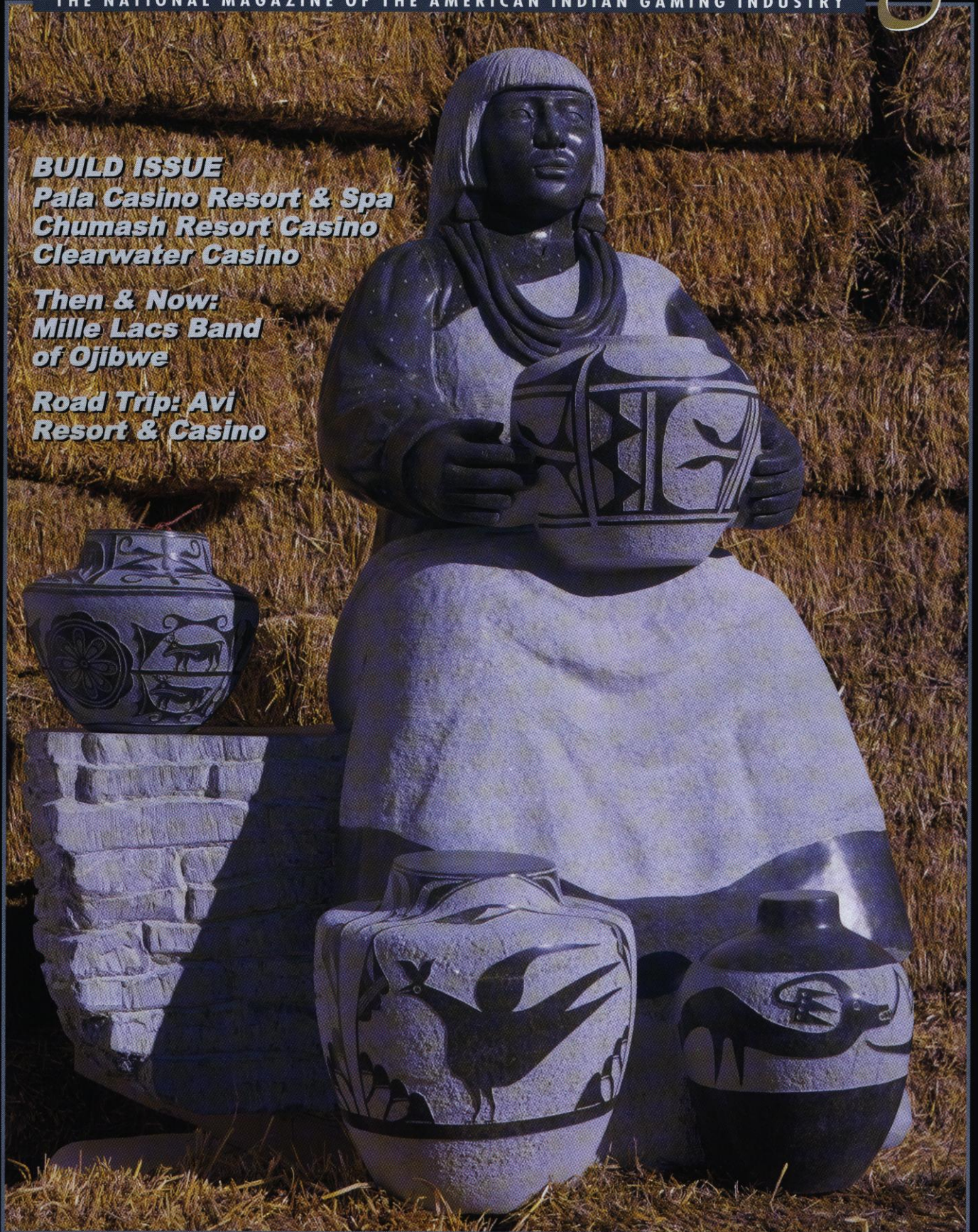
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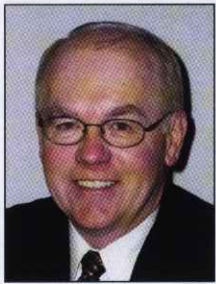
BUILD ISSUE

***Pala Casino Resort & Spa
Chumash Resort Casino
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***Then & Now:
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***Road Trip: Avi
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Does ERISA Apply to Your Employee Benefit Plans?

by Robert A. Burns & Timothy D.S. Goodman

Employers provide an array of benefits to employees – including 401(k) plans, health insurance, and disability benefits. Employees assume they will receive such benefits and increasingly employers, including tribal employers such as casinos, must provide them to be competitive in attracting and retaining employees. Employee benefits, however, are highly regulated by federal law. A question that often arises is to what extent these federal laws regulating employee benefits apply to Indian tribes and tribal employers.

The primary federal laws that regulate employee benefits are the Internal Revenue Code (the Code), which governs the federal tax treatment of employee benefits, and the Employee Retirement Income Security Act of 1974 (ERISA). Although there is a lack of guidance on the application of certain provisions in the Code, it is generally understood that the Code applies to tribes. There is far less guidance on the application of ERISA to tribes. In the guidance that exists, federal courts have uniformly concluded that ERISA applies to employee benefit plans established by tribes. This, however, is not the end of the analysis because of an exception under ERISA for “governmental plans.” This article reviews the guidance on ERISA’s applicability to employee benefit plans established by tribes and considers whether, if ERISA does apply, the governmental plan exception is available.

ERISA - Background

When Congress enacted ERISA in 1974, the primary goal was to promote confidence in the retirement benefits promised by private employers. This was in response to several high-profile pension plan failures. ERISA imposed federal requirements:

- To guarantee and to protect funding for retirement plans.
- To increase participant vesting in retirement plans.
- To require reporting and disclosure regarding plans to inform participants.
- To impose fiduciary responsibility on employers.

Just prior to enactment, ERISA was amended to also cover welfare plans (such as group health plans). Whenever an employer considers providing a new benefit for its employees, a threshold question is whether the benefit is subject to ERISA and the answer is generally “yes.”

The plans of some employers are statutorily exempt from ERISA. The two most commonly used exemptions are for plans maintained by churches and by state and local governments (the “governmental plan” exception). These employers escape

ERISA’s compliance burdens as well as potential penalties for compliance failures.

ERISA does not expressly apply to tribes, but it also does not expressly exempt tribes. The federal courts and a federal agency that have considered the issue have found that ERISA applies to tribes.

Federal Court Guidance

Three federal courts have addressed the applicability of ERISA to tribes. The first case that addressed the issue was *Smart v. State Farm Insurance Company* in 1986. In *Smart*, a health center owned and operated by a tribe provided health insurance to its employees. One employee brought a claim seeking reimbursement of hospitalization expenses. In addressing the claim, the court noted ERISA did not explicitly address its applicability to tribes. The court then examined whether ERISA was a statute of general applicability. Citing *Federal Power Commission v. Tuscarora Indian Nation*, the court stated that statutes of general applicability apply to tribes unless (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by treaties; or (3) there is proof that Congress intended the statute not apply to tribes. The court found that ERISA was a statute of general applicability and that it applied to tribes.

The next case was *Lumber Industry Pension Fund v. Warm Springs Forest Product Industries*, decided in 1991. In that case, a tribally owned and operated sawmill was obligated under a collective bargaining agreement to contribute to the Lumber Industry Pension Fund. The fund brought a claim against the tribe’s sawmill seeking recovery of pension contributions. Like the court in *Smart*, the court in this case found that ERISA did not “usurp the tribe’s decision-making power.” The court found the tribal ordinance at issue only required “all retirement plans covering tribal member employees... provide benefits at least as favorable as those of the tribal [pension] plan.” Based in part on this, the court held ERISA did not encroach on tribal rights of self-governance.

Finally, in 2000, the court in *Colville Confederated Tribes v. Somday* addressed the issue and examined ERISA’s governmental plan exception. The court did not directly address ERISA’s applicability to tribes, but noted the plan had been reviewed by the Pension Benefit Guaranty Corporation and was under investigation by the Pension and Welfare Benefits Administration (now the Employee Benefits Security Administration) of the Department of Labor (DOL). These agencies oversee plans covered under ERISA. The court’s description of the case indicates that the tribe did not seek a declaration that ERISA did not apply to tribes. Rather, the tribe sought a declaratory

judgment that its plan was a governmental plan. The court granted the tribe summary judgment on that issue.

No federal court has yet held that ERISA does not apply to tribes.

Federal Agency Guidance

As noted above, the Pension Benefit Guaranty Corporation (PBGC) is charged with administering certain aspects of ERISA. The PBGC has issued two letters addressing ERISA's applicability to a tribe's plan. In the first letter, a council of tribes maintained a plan for its employees. The PBGC found that by creating the council the tribes were acting as sovereign nations and held that applying ERISA to the plan would affect the relationship between the council and its employees. The PBGC did not provide in-depth analysis of the applicability of ERISA to tribes. In the second letter, a tribally owned and operated factory, which was located off the tribal reservation, maintained a plan. The PBGC this time conducted an in-depth analysis of ERISA and concluded that ERISA was a statute of general applicability. The PBGC went on to hold that operating the factory was not related to tribal self-governance and, therefore, that ERISA was applicable.

ERISA's Governmental Plan Exception

ERISA contains a number of exceptions that exempt certain plans from all or a part of ERISA, including a governmental plan exception. Under ERISA, a governmental plan is: "[A] plan established for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." Generally, a governmental plan is a plan established by a government that covers employees employed in traditional governmental roles (such as police, fire, and administration).

The courts have not agreed on whether the governmental plan exception applies to tribes. In *Smart*, the court concluded the governmental plan exception did not apply after a cursory analysis. More recently, in *Somday* the court applied the governmental plan exception. Thus, the limited guidance that exists on ERISA's applicability to Indian tribes is divided as to the applicability of ERISA's governmental plan exception. Only tribes in Indiana, Illinois, and Wisconsin (covered by the *Smart* decision), and the Eastern District of Washington (covered by the *Somday* decision) have any court precedent. Tribes located in other states have no guidance and must make a good-faith interpretation of the law.

With respect to the governmental plan exception, the DOL has taken the position that if more than a small percent of the plan's participants perform non-governmental functions or are not governmental employees, then the governmental plan exception does not apply. What is a traditional "governmental function" and who is a "non-governmental" employee are not well defined and have not been considered in the context of tribes. For example, there is no guidance on whether the oper-

ation of a casino would be viewed as a governmental function. The more distant the relationship between a tribe and an entity, the smaller the degree of control exercised by a tribe over an entity, and the entity's location off land held in trust for a tribe all increase the likelihood that the DOL would view the employees as "non-governmental" employees.

Conclusion

Only three federal courts and a few PBGC letters have addressed the applicability of ERISA to tribes. Thus, the guidance on the applicability of ERISA to tribes is very limited. Nevertheless, all but the earliest PBGC letter have held that ERISA applies to tribes. The guidance regarding the availability of the governmental plan exception under ERISA is even more sparse, but indicates the exception may only be available to a plan that covers only employees performing a governmental function. ♣

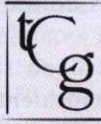
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