

MEMORANDUM

TO: Tribal Clients

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RE: ERISA's Applicability to Tribal Entities

This memorandum discusses the general application to Indian tribes of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and the availability to Indian tribes of the “governmental plan” exception under ERISA. Although ERISA does not expressly apply to Indian tribes, it also does not expressly exempt Indian tribes from its application.¹ The limited guidance available on the applicability of ERISA has held that ERISA applies to Indian tribes. Legislation pending before Congress would clarify that the governmental plan exception under ERISA and the Internal Revenue Code applies to tribal plans and would have the effect of generally exempting tribal plans from ERISA.

Court Guidance

Four federal courts have addressed the applicability of ERISA to Indian tribes. The first case that addressed the issue was *Smart v. State Farm Insurance Company*.² In *Smart*, the court noted ERISA did not explicitly address its applicability to Indian tribes. Citing *Federal Power Commission v. Tuscarora Indian Nation*,³ the court stated that statutes of general applicability apply to Indian 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 Indian tribes”;
- or (3) there is proof “by legislative history or some other means that Congress intended [the law] not apply to Indians on their reservations.”⁴

The court went on to find that ERISA was a statute of general applicability and that the application of ERISA “would not impermissibly upset the Tribe’s self-governance in intramural matters.”

The second case that addressed the issue was *Lumber Industry Pension Fund v. Warm Springs Forest Product Industries*.⁵ Like the court in *Smart*, the court found that ERISA did not “usurp the tribe’s decision-making power.” Based in part on this, the court held ERISA did not encroach on tribal rights of self-governance.

¹ ERISA offers some protection to employers, but it also imposes some burdens. ERISA imposes fiduciary responsibilities and reporting and disclosure duties. It also contains both civil and criminal penalties that may be imposed, and litigated issues involving ERISA must be resolved in federal courts.

² 868 F.2d 929 (7th Cir. 1989). The jurisdiction of the Seventh Circuit Court of Appeals encompasses Illinois, Indiana, and Wisconsin.

³ 362 U.S. 99, 80 S. Ct. 543 (1960).

⁴ 868 F.2d at 932-33 (citing *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985)).

⁵ 939 F.2d 683 (9th Cir. 1991). The jurisdiction of the Ninth Circuit Court of Appeals encompasses Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington.

The third case, *Colville Confederated Tribes v. Somday*,⁶ similarly analyzed an employee benefit plan in the context of ERISA, but it also examined the tribe’s employee benefit plan in the context of ERISA’s exception to coverage for governmental plans. Although the court does not directly address this issue, the opinion notes the plan at issue had been reviewed by the Pension Benefit Guaranty Corporation (“PBGC”) and was under investigation by the Pension and Welfare Benefits Administration (“PWBA”) of the Department of Labor (“DOL”). The court’s description of the procedural posture of the case indicates that the tribe did not seek a declaration that ERISA does not apply to Indian tribes. Rather, the tribe sought a declaratory judgment that its plan was a governmental plan and, therefore, exempt from most of ERISA’s requirements. The tribe also sought a declaratory judgment that the amendment to the plan was effective. The court granted the tribe summary judgment on both issues.

The fourth case, *Prescott v. Little Six, Inc.*,⁷ did not result in a holding on the applicability of ERISA, but rather held the plans at issue had not been properly adopted by Little Six, Inc. The district court in *Prescott v. Little Six, Inc.*⁸ made two significant holdings. First, it concluded ERISA applied to Little Six, Inc., a tribally-chartered and tribally-owned corporation. Second, it concluded that some common language in plan documents waived a tribal entity’s sovereign immunity with respect to the plan. The Eighth Circuit reversed, but did so in such a manner that ERISA’s applicability remained an open question in the Eighth Circuit. The Eighth Circuit found that the tribal appeals court had (i) held that whether the plans had been properly adopted was a matter governed by tribal law and (ii) found that the plans had not been adopted in conformance with tribal law. The Eighth Circuit concluded that the district court erred in not deferring to the tribal appeals court determination and stated, “Because as a matter of tribal law no benefit plan exists, there is nothing here to which ERISA could apply.” The Eighth Circuit decision in *Prescott* illustrates the importance of following the proper formalities when adopting, amending, and terminating plans. The district court’s decision illustrates the importance of removing inappropriate language (*i.e.*, language stating that ERISA does apply or that participants may bring suit in federal court) from plan documents.

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

ERISA’s Governmental Plan Exception

ERISA contains a number of exceptions that exempt certain plans from all or a part of ERISA. These exceptions include an exception for plans maintained by governmental entities. 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.⁹

Generally, the clearest case of a plan being a governmental plan is a plan that covers solely employees employed in traditional governmental roles (such as police, fire, and administration).

⁶ 96 F. Supp. 2d 1120 (E.D. Wash. 2000).

⁷ 387 F.3d 753 (8th Cir. 2004). The jurisdiction of the Eighth Circuit Court of Appeals encompasses Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

⁸ 284 F. Supp. 2d 1224 (D. Minn. 2003).

⁹ 29 U.S.C. § 1002(32) (2000). Although the definition does not address Indian tribes, because ERISA does not address its applicability to Indian tribes in general this is not surprising.

The courts have not agreed on whether the governmental plan exception applies to Indian tribes. In *Smart*, the Seventh Circuit concluded the governmental exception under ERISA did not apply after a cursory analysis.¹⁰ More recently, however, in *Somday* the court applied the governmental plan exception. Although the court found the plan was a governmental plan, it did not discuss the nature of the employees covered under the plan. The court only states that the plan covered “employees” of the tribe.¹¹ 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 Indian tribes in Indiana, Illinois, Wisconsin, and the Eastern District of Washington have any court precedent. Indian tribes located in other states have no guidance and must make a good-faith interpretation of the law.

Broad pension reform legislation is pending before Congress that would amend ERISA and the Internal Revenue Code. The Senate version of this legislation includes a provision that would specifically include tribal plans under the governmental plan exception under ERISA and certain provisions of the Internal Revenue Code.¹² The House version of this legislation does not include such a provision. A conference committee is currently meeting to resolve differences between the bills passed by the Senate and House.

Conclusion

Although addressed in a number of court cases, ERISA’s applicability to tribal governments is not settled. In addition, legislation pending before Congress may impact this issue. If you have a question regarding ERISA’s applicability to tribal entities or would like to discuss employee benefit issues, 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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¹⁰ *Smart*, 868 F.2d at 936. The Ninth Circuit in *Lumber Industry Pension Fund* did not address whether ERISA’s governmental plan exception applied to the governmental plan at issue. 939 F.2d 683.

¹¹ *Colville Confederated Tribes*, 96 F. Supp. 2d at 1122. The *Colville* case is interesting because it also indicates that the PBGC has applied the exception for governmental plans under Title VI of ERISA, *see* 29 U.S.C. § 1321(b)(2) (2000), to Indian tribes.

¹² H.R. 2830, 109th Cong. 2nd Sess. §§ 1311-14 (2006)