

EQUAL TREATMENT FOR EMPLOYER-SPONSORED PENSION PLANS OF INDIAN TRIBAL GOVERNMENTS

Current Law

Current law defines “governmental plan” in a manner that requires Indian tribal governments to distinguish between “essential governmental” and “commercial” employees despite the fact that all services and employment, including governmental and commercial activities, provided by Indian tribal governments directly benefit tribal citizens by contributing to the health, education and general welfare of the Tribe.

Reasons for Change

Current law requires tribes to maintain separate employee welfare benefit plans and pension plans depending on whether employees are defined as “governmental” or “commercial” employees. This system places an undue cost and administrative burden on tribal governments to maintain two separate benefit plans and pension plans. Further this same burden is not placed on state or local governments, even while states maintain lottery employees, ABC liquor store employees, and other types of quasi-commercial employees that benefit from the same plans as other state employees.

Proposal

Indian tribes suggest amending the Internal Revenue Code with respect to the following: (1) adding the same distribution rights for tribal and state public safety employees, (2) removing the “essential government function” and “commercial” activity tests that already do not apply to state and local plans, (3) confirming that pension plans may honor tribal court domestic relations orders that meet the same standards applied to state court orders, (4) grandfathering tribal “457” plans that otherwise comply with the Code and were established when it was not clear what plans tribes could adopt, and (5) applying the same employment tax rules for tribal deferred compensation plans that apply to state and local plans. The common theme of these Code amendments is to provide government fairness between Indian tribal plans and other government plans.

This proposal may necessitate conforming amendments to the Employee Retirement Income Security Act (ERISA) provisions of federal law relating to governmental plans.

Suggested Language

SEC. 5. TREATMENT OF CERTAIN PENSION PLANS OF INDIAN TRIBAL GOVERNMENTS.

(a) Amendments to the Internal Revenue Code of 1986-

(1) QUALIFIED PUBLIC SAFETY EMPLOYEE- Section 72(t)(10)(B) of the Internal Revenue Code of 1986 (definition of qualified public safety employee) is amended by--

(A) striking `or political subdivision of a State' and inserting `, political subdivision of a State, or Indian tribe'; and

(B) striking `such State or political subdivision' and inserting `such State, political subdivision, or tribe'.

(2) GOVERNMENTAL PLAN- The last sentence of section 414(d) of such Code (definition of governmental plan) is amended to read as follows:

`The term `governmental plan' includes a plan established or maintained for its employees by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), an agency, instrumentality, or subdivision of an Indian tribal government, or an entity established under Federal, State, or tribal law which is wholly owned or controlled by any of the foregoing.'

(3) DOMESTIC RELATIONS ORDER- Section 414(p)(1)(B)(ii) of such Code (definition of domestic relations order) is amended by inserting `or tribal' after `State'.

(4) EXEMPT GOVERNMENTAL DEFERRED COMPENSATION PLAN- Section 3121(v)(3) of such Code (definition of governmental deferred compensation plan) is amended by inserting `by an Indian tribal government or subdivision thereof,' after `political subdivision thereof,'.

(5) GRANDFATHER OF CERTAIN DEFERRED COMPENSATION PLANS-- Section 457 of the Internal Revenue Code is amended by adding at the end the following new subsection:

"(h) Certain Tribal Government Plans Grandfathered--Plans established before [date of enactment] and maintained by an Indian tribal government (as defined in section 7701(a)(40), a subdivision of an Indian tribal government (determined in accordance with section 7871(d), an agency, instrumentality, or subdivision of an Indian tribal government, or an entity established under Federal, State, or tribal law which is wholly owned or controlled by any of the foregoing, in compliance with Section 457(b) or (f) shall be treated as if established by an eligible employer under Section 457(e)(1)(A).'

(b) Amendments to the Employee Retirement Income Security Act of 1974-

(1) IN GENERAL- The last sentence of section 3(32) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(32)) is amended to read as follows: 'The term 'governmental plan' includes a plan established or maintained for its employees by an Indian tribal government (as defined in section 7701(a)(40) of the Internal Revenue Code of 1986), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of such Code), an agency, instrumentality, or subdivision of an Indian tribal government, or an entity established under Federal, State, or tribal law which is wholly owned or controlled by any of the foregoing.'

(2) DOMESTIC RELATIONS ORDER- Section 206(d)(3)(B)(ii)(II) of such Act is amended by inserting 'or tribal' after 'State'.

(3) CONFORMING AMENDMENTS-

(A) Paragraph (2) of section 109(d) of the Worker, Retiree, and Employer Recovery Act of 2008 (Public Law 110-458; 122 Stat. 5112) is repealed, and, subject to subparagraph (B), the provisions amended by such paragraph shall read as if such paragraph had not been enacted.

(B) Section 4021(b)(14) of such Act (as in effect on the date of the enactment of the Pension Protection Act of 2006 (Public Law 109-280; 120 Stat. 780) and prior to the enactment of section 109(d)(2) of the Worker, Retiree, and Employer Recovery Act of 2008) is amended to read as follows:

(14) established or maintained for its employees by an Indian tribal government (as defined in section 7701(a)(40) of the Internal Revenue Code of 1986), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of such Code), an agency, instrumentality, or subdivision of an Indian tribal government, or an entity established under Federal, State, or tribal law which is wholly owned or controlled by any of the foregoing.'

(C) Section 4021(b)(2) of such Act (29 U.S.C. 1321(b)(2)) is amended by striking ', or which is described in the last sentence of section 3(32)' and inserting a period.