

INITIAL CONSIDERATION

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ISSUE STATEMENT

The legislature tasked the LEOFF 2 Board with studying the tax, legal, fiscal, policy, and administrative issues related to allowing tribal law enforcement officers to become members of the LEOFF 2 plan. The report is due to the legislature by January 1, 2020.

OVERVIEW

Federal law allows for tribal employees meeting certain criteria to be eligible for membership in public pension plans; however, tribal police officers are not eligible for membership in LEOFF 2 under state law.

BACKGROUND AND POLICY ISSUES

Background

The Pension Protection Act of 2006 changed the definition of governmental plans to include Indian tribal plans “covering workers doing governmental work”.¹ This made it possible for tribes to create their own governmental plans and state or local government plans to allow tribes to join their systems. However, there are federal restrictions and state laws that prevent some tribal employees from joining state government plans.

Federal Law

Federal restrictions with tribal employees joining a governmental plan include barring tribal employees engaged in commercial activities.² Tribal employees performing commercial activities would instead be covered by the Employee Retirement Income Security Act (ERISA), like a private sector employer. If a governmental plan covers even one commercial employee, the plan risks losing its governmental plan status.³

¹ <https://www.govinfo.gov/content/pkg/PLAW-109publ280/html/PLAW-109publ280.htm>

² <https://www.irs.gov/pub/irs-drop/n-06-89.pdf>

³ Prop. Reg. Sec. 1.414(d)-1(g)(6), https://www.irs.gov/pub/irs-tege/reg_133223_08.pdf

The determination of whether a position may be covered by a governmental plan or must be covered by ERISA is further addressed by the IRS through a two part test.⁴ The first part of the test is to determine whether the activities are commercial or governmental. Governmental activities include “activities relating to providing criminal protection services such as police and fire departments”.⁵ Examples of commercial activities include activities relating to the operation of a hotel, casino, service station, convenience store, or marina.⁶ The IRS utilizes a “facts and circumstances test” to determine whether an activity is commercial or governmental.⁷

Under this facts and circumstances test, the factors considered in making a determination of whether an activity is a commercial activity, include whether the activity is:

- operated to earn a profit;
- typically performed by private businesses; and,
- where the customers are substantially from outside of the Indian tribal community, including whether the activity is located or conducted outside of Indian tribal land.⁸

The factors to determine if an activity is governmental include whether:

- The activity provides a public benefit to members of the Indian tribal government (not treating the generation of profits from commercial acts as providing a public benefit); and,
- The absence of one or more of the relevant factors listed for determining whether an activity is commercial.⁹

The second part of the IRS government plan test requires a determination be made whether an employee’s duties are substantially in the performance of a governmental activity or a commercial activity.¹⁰ In making this determination the IRS considers the location of the employees’ services, along with the source of the employees’ payroll, and the employee’s assigned duties and responsibilities.¹¹

⁴ Prop. Reg. Sec. 1.414(d)-1(g)(6), https://www.irs.gov/pub/irs-tege/reg_133223_08.pdf

⁵ Prop. Reg. Sec. 1.414(d)-1(g)(6), https://www.irs.gov/pub/irs-tege/reg_133223_08.pdf

⁶ 26 CFR Sec 7871(e)

⁷ Prop. Reg. Sec. 1.414(d)-1(g)(6), https://www.irs.gov/pub/irs-tege/reg_133223_08.pdf

⁸ Prop. Reg. Sec. 1.414(d)-1(g)(6), https://www.irs.gov/pub/irs-tege/reg_133223_08.pdf

⁹ Prop. Reg. Sec. 1.414(d)-1(g)(6), https://www.irs.gov/pub/irs-tege/reg_133223_08.pdf

¹⁰ Prop. Reg. Sec. 1.414(d)-1(g)(6), https://www.irs.gov/pub/irs-tege/reg_133223_08.pdf

¹¹ Prop. Reg. Sec. 1.414(d)-1(g)(6), https://www.irs.gov/pub/irs-tege/reg_133223_08.pdf

A key question in this analysis is who pays the employee. According to the IRS:

If an employee is on the payroll of an ITG [Indian Tribal Government] entity that is engaged in a commercial activity, the employee's assigned duties and responsibilities are treated as being for a commercial activity and, thus, the employee is a commercial ITG employee.

For example, if a cashier is on the payroll of a convenience store (which is a commercial activity) owned by an ITG, the cashier is a commercial ITG employee. However, in the case of an employee who is not on a payroll of an ITG that engages in a commercial activity, the result would depend on the employee's assigned duties and responsibilities.¹²

Sovereign Immunity

Tribes are considered sovereign nations and therefore, under the legal doctrine of sovereign immunity, have immunity from suit in state or federal court. A tribe is subject to suit in state court only where the Tribe has waived its own sovereign immunity.

In Washington State, all tribes have signed limited waivers of sovereign immunity subjecting themselves to suit in state court for specific issues. An example of these compacts are gaming compacts, which include waivers for the limited purposes of the state being able to enforce the provisions of the compact.¹³ The Indian Regulatory Act of 1988 (IGRA) requires states to negotiate gaming compacts with tribes to allow them to offer casino-style gaming on their reservations. All 29 tribes in Washington State have signed gaming compacts with the state. State-tribal gaming compacts are only required for Class III gaming, which includes activities such as lotteries, casino games, house-banked card games, horse racing, off-track betting, and machine gaming. Under Washington State law, the director of the Washington State Gambling Commission is delegated the responsibility of negotiating Class III gaming compacts. Gaming compacts receive a final approval when signed by the Governor and the Tribal Chair.

In addition to gaming compacts, six tribes have signed cigarette compacts with the state.¹⁴ Tribes, as sovereign nations, are exempt from state tobacco excise taxation. Therefore, those who are enrolled members of the Indian Tribe are exempt from paying a tax on cigarettes sold on their reservation. Under Federal law, state excise taxes are owed by non-members purchasing tobacco on tribal land, although states are limited in how they enforce or collect

¹² Prop. Reg. Sec. 1.414(d)-1(g)(6), https://www.irs.gov/pub/irs-tege/reg_133223_08.pdf

¹³ <https://www.wsgc.wa.gov/tribal-gaming/gaming-compacts>

¹⁴ <https://goia.wa.gov/resources/cigarette-compacts>

these taxes. The statutory duties applicable to administration and enforcement of the cigarette tax are divided between the Department of Revenue and the Washington State Liquor and Cannabis Board. After all negotiations are final, the cigarette compacts are signed by the Governor and the Tribal Chair.

In 2015, House Bill 2000 authorized the Governor of Washington State to enter into marijuana compacts with federally recognized Indian Tribes, codified under RCW 43.06.490. The Washington State Liquor and Cannabis Board (WSLCB) has completed marijuana compacts with 11 tribes and is actively negotiating several more. There are currently six tribes in the cannabis industry with their own marijuana stores, all of which operate under the I-502 system as regulated by the WSLCB. Final approval of a marijuana compact requires the signatures of the Governor, Tribal Chair, WSLCB Chair, WSLCB Agency Director, and two additional members of WSLCB.

Similar to these compacts, for a tribe to join LEOFF 2, they would need to sign a limited waiver of sovereign immunity in order for the state to enforce the rules and requirements of the LEOFF 2 system. The waiver would be in the form of a compact, and need to be signed by the Governor and tribal chair, or designee.

LEOFF 2 Eligibility

For tribal law enforcement officers to be eligible for LEOFF 2 both the officers and the employers would need to meet the eligibility requirements of LEOFF 2.

The state definition of “Tribal Police Officer” is:

“[...] any person in the employ of one of the federally recognized sovereign tribal governments, whose traditional lands and territories lie within the borders of the state of Washington, to enforce the criminal laws of that government.”¹⁵

A Law Enforcement Officer is eligible for LEOFF 2 if they are:

- Employed by a LEOFF 2 employer;
- Commissioned;
- Full-Time; and,
- Fully Compensated.

¹⁵ RCW 10.92.010(2)

Therefore, for an officer to be eligible for LEOFF 2 they must be employed by a LEOFF 2 employer. The current definition of employer in LEOFF 2 is limited to:

1. The legislative authority of any city, town, county, district, or public corporation established under RCW 35.21.730 to provide emergency medical services as defined in RCW 18.73.030;
2. The elected officials of any municipal corporation;
3. The governing body of any other general authority law enforcement agency;
4. A four-year institution of higher education having a fully operational fire department as of January 1, 1996; or,
5. The department of social and health services or the department of corrections when employing firefighters serving at a prison or civil commitment center on an island.

For tribal law enforcement officers to be eligible for LEOFF 2 the definition of employer would need to be amended to include tribal police departments. Currently, if an employer is eligible for LEOFF 2 then they are automatically a LEOFF 2 employer. There is no employer opt-in requirement. This would create an issue related to tribal sovereignty, as the state could not force a tribe to be subject to the requirements of LEOFF 2 without the tribe waiving sovereign immunity. Therefore, for tribes to be eligible for LEOFF 2 the law would need to include an opt-in process for tribes. This would be a change in policy for LEOFF 2.

For a tribal law enforcement officer to be eligible for LEOFF 2 they must be commissioned. Under WAC 415-104-011, DRS defines “commissioned” as “an employee is employed as an officer of a general authority Washington law enforcement agency and is empowered by that employer to enforce the criminal laws of the state of Washington”.

RCW 10.93.020(3) defines “general authority Washington peace officer” as “any full-time, fully compensated and elected, appointed, or employed officer of a general authority Washington law enforcement agency who is commissioned to enforce the criminal laws of the state of Washington generally.”

Every fully commissioned law enforcement officer in Washington State is required to be certified through the Washington State Criminal Justice Training Commission (CJTC). All Washington law enforcement officers must meet the requirements for certification by attending the basic academy at the CJTC, equivalency academy or obtaining an exemption from those requirements.

Tribal police officers are authorized to act as general authority Washington State Peace Officers when the appropriate tribal government meets specified requirements regarding certification with the CJTC, insurance liability, and administration.¹⁶

The Washington State Criminal Justice Training Commission offers voluntary certification for tribal police officers.¹⁷ Officers making this certification must meet the statutory requirements for all certified state police officers, including submitting to psychological tests and criminal background checks. A tribe must enter into a written agreement for its officers to attend the CJTC for this certification program.¹⁸ The written agreement requires the tribal law enforcement agency and its officers to comply with all of the requirements for granting, denying, and revoking certification as they are applied to state general authority peace officers. The agreement does not include any waiver of sovereign immunity.

The tribal government must submit proof of the required certification and other information to the Department of Enterprise Systems (DES) for review and verification.¹⁹ Only when this information has been provided to DES are the tribal police officers authorized to act as general authority Washington State Peace Officers.

The authority is granted only within the exterior boundaries of the reservation or outside the exterior boundaries of the reservation pursuant to statute: with consent of the local sheriff; in response to an emergency involving threat to human life or property; in response to a request for assistance pursuant to a mutual law enforcement assistance agreement; when transporting a prisoner; when the officer is executing an arrest or search warrants; or when an officer is in fresh pursuit.

Therefore, those tribal law enforcement officers who have been certified by the CJTC appear to meet the definition of “commissioned” under LEOFF 2. The officers would also need to work full-time and be fully-compensated to meet the definition of being a law enforcement officer in LEOFF 2.

¹⁶ RCW 10.92.020

¹⁷ RCW 43.101.157

¹⁸ RCW 43.101.157

¹⁹ RCW 10.92.020

Tribal Law Enforcement in Washington State

There are 29 federally recognized tribes in Washington State.²⁰ Twenty-eight of those tribes have tribal police departments.²¹ Two of those tribes (Hoh and Muckleshoot) contract out law enforcement services to a county.

Currently, there are 23 tribes with agreements with the CJTC.²² Only the Hoh, Lummi, Jamestown S’Klallam, and Yakama tribes do not have agreements. Of those 23 tribes, there are a total of approximately 293 tribal police officers that have been certified by the CJTC.

Criminal Jurisdiction on Indian Reservations

Currently, the state has complete jurisdiction over Indian reservations in eight areas: compulsory school attendance; public assistance; domestic relations; mental illness; juvenile delinquency; adoption proceedings; dependent children; and the operation of motor vehicles on public streets, roads, alleys, and highways.²³

In Washington, criminal jurisdiction on Indian reservations is based partly on whether the tribe has Public Law 280 (PL 280) status, the status of the individual parcels of the land, the type of crime committed, and whether the individual in question is Indian or non-Indian.

PL 280 is a federal law enacted in 1953, whereby states may assume jurisdiction over criminal offenses on Indian Reservations. The law mandates transfer of federal law enforcement authority within certain tribal governments to state government authority. Washington State was added to the federal statute in 1957.

In Washington, the Muckleshoot, Squaxin, Nisqually, and Skokomish tribes have requested full state civil and criminal and adjudicatory authority in Indian Country. These tribes are subject to the 1957 law, which allows the state to have jurisdiction over Indian Country only if a tribe has requested the state to exercise such power.²⁴

ACCUSED	VICTIM	JURISDICTION
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²⁰ <https://goia.wa.gov/resources/frequently-asked-questions>

²¹ Chehalis, Colville, Cowlitz, Elwha, Hoh, Jamestown S’Klallam, Kalispel, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Port Gamble S’Klallam, Puyallup, Quileute, Quinault, Sauk-Suiattle, Shoalwater Bay, Skokomish, Snoqualmie, Spokane, Squaxin Island, Stillaguamish, Suquamish, Swinomish, Tulalip, Upper Skagit, Yakama

²² Chehalis, Colville, Cowlitz, Kalispel, Elwha Klallam, Muckleshoot, Nisqually, Nooksack, Port Gamble S’Klallam, Puyallup, Quileute, Quinault, Sauk-Suiattle, Shoalwater Bay, Skokomish, Snoqualmie, Spokane, Squaxin Island, Stillaguamish, Suquamish, Swinomish, Tulalip, Upper Skagit

²³ RCW 37.12.010

²⁴ http://blogs.gonzaga.edu/gulawreview/files/2012/06/Leonhard.final_revised.pdf

Indian	Indian/Victimless	Tribe; State
Indian	Non-Indian	Tribe; State
Non-Indian	Indian	State
Non-Indian	Non-Indian/Victimless	Exclusively State
Anyone	Anyone	Federal jurisdiction if a crime of nationwide applicability, or statute otherwise applies

In 1963, Washington amended its law and asserted limited PL 280 jurisdiction over all of Indian Country, without the need for tribal consent. Tribes that are subject to the 1963 amendments include: Chehalis, Colville, Hoh, Kalispel, Lower Elwha Klallam, Lummi Nation, Makah, Port Gamble S’Klallam, Puyallup, Quileute, Quinault Nation, Shoalwater Bay, Spokane, Suquamish, Swinomish, Tulalip, and Yakama Nation. These partial-PL 280 tribes have their own tribal governments including comprehensive court systems and codes and law enforcement agencies.²⁵

ACCUSED	VICTIM	JURISDICTION
Indian	Indian/Victimless	Tribe; State unless within Indian reservation and on trust or restricted land and not among 8 enumerated categories*
Indian	Non-Indian	Tribe; State unless within Indian reservation and on trust or restricted land and not among 8 enumerated categories
Non-Indian	Indian	State
Non-Indian	Non-Indian/Victimless	Exclusively State
Anyone	Anyone	Federal jurisdiction if a crime of nationwide applicability, or statute otherwise applies

After 1968, Congress amended PL 280 so that tribal consent is required for the state to extend jurisdiction. This also authorized states to give jurisdiction back to the federal government. These amendments apply to the Cowlitz, Jamestown S’Klallam, Nooksack, Samish Nation, Sauk-Suiattle, Snoqualmie, Stillaguamish, and Upper Skagit tribes.²⁶

ACCUSED	VICTIM	JURISDICTION
Indian	Indian/Victimless	Tribe; Sometimes concurrent with Feds if Major Crimes Act applies

²⁵ http://blogs.gonzaga.edu/gulawreview/files/2012/06/Leonhard.final_revised.pdf

²⁶ http://blogs.gonzaga.edu/gulawreview/files/2012/06/Leonhard.final_revised.pdf

Indian	Non-Indian	Tribe; Sometimes concurrent with Feds if Major Crimes Act or General Crimes Act applies
Non-Indian	Indian	Exclusively Feds
Non-Indian	Non-Indian/Victimless	Exclusively State
Anyone	Anyone	Federal jurisdiction if a crime of nationwide applicability, or statute otherwise applies

Tribal Compact Schools

In 2013, a state-wide initiative (Initiative 1240) passed authorizing charter schools in Washington State. After a Supreme Court decision ruled that the funding mechanism for Charter Schools was unconstitutional the legislature passed SB 6194 (2016) and charter schools began operating in 2016. The charter school initiative and subsequent law mandated that like public schools, charter schools employers and their employees are members of Teacher Retirement System (TRS), School Employee Retirement System (SERS), and Public Employee Retirement System (PERS).

Also, in 2013 the Legislature enacted state-tribal compact authority, allowing the Office of Superintendent of Public Instruction (OSPI) to enter into compacts with tribes, creating tribal compact schools. A benefit for the state entering into a state-tribal compact is that the schools agree to certain conditions (i.e. standards for teachers, staff, and curriculum; reporting requirements on student enrollment) and a benefit for tribal compact schools is that they receive state funding. The tribal compact is typically renewed every two years. This means that a tribal compact school can convert back to a non-compact tribal school. The 2013 law did not amend the definition of employer under the state pension systems to include tribal compact schools.

In 2018, the Select Committee on Pension Policy (SCPP) convened a staff level workgroup to review legal and practical implications of expanding the state's retirement plans to include tribal schools. Key areas of consideration were related to Internal Revenue Code compliance and tribal sovereignty. The workgroup included staff from the Office of the State Actuary (OSA), Department of Retirement Systems (DRS), and the Office of the Student Superintendent of Public Instruction (OSPI) including representation from the Office of Native Education.

As a result of that workgroup, the SCPP endorsed and the legislature passed SB 6210 (2018) which made tribal compact schools eligible to opt in as an employer under TRS and SERS, and

their employees' members of the respective pension systems. To become employers under TRS and SERS tribal compact schools were required to sign a limited waiver of sovereign immunity, for purposes of enforcing the laws and regulations of the pension system. Similarly to other TRS and SERS employers, tribal compact schools are required to adhere to reporting, contribution, and auditing requirements with DRS, as well as consent to the jurisdiction of Washington State courts for the purposes of enforcing these requirements. Because tribal compact schools can convert back to tribal schools, tribal compact school may choose to withdraw from TRS and SERS participation once their compact with OSPI has expired. SB 2610 (2018) also contained a null and void clause, that if the IRS issued guidance that resulted in tribal compact schools jeopardizing plan qualification, and these issues could not be remedied through administrative action or a change in state law, the schools would be removed from the pension system and the law would be null and void.

There are currently five tribal compact schools operating in Washington State.²⁷ The Quileute Compact Tribal School is the only tribal compact school to become a DRS employer under this law. The Quileute Compact Tribal School joined the state retirement system through the compact they signed with the Office of the Superintendent of Public Instruction (OSPI). The compact was amended to include an agreement regarding membership in TRS and SERS, including a limited waiver of sovereign immunity.

The Quileute Compact Tribal School is currently reporting the following members:

System	Active Members	Retiree Return to Work	Substitutes
SERS	20	2	6
TRS	18	2	0

Other States

Arizona

In Arizona an Indian tribe may participate in the state pension system. Two tribal police departments and one tribal fire department in Arizona are currently participating in the Arizona Public Safety Personnel Retirement System.²⁸ To do so the tribe must pay for "[...] a preliminary actuarial survey to determine the estimated cost of participation, the benefits to be derived and other such information as may be deemed appropriate."²⁹ Additionally, the tribe by resolution, must:

²⁷ <http://www.k12.wa.us/IndianEd/STECs.aspx>

²⁸ http://www.psprs.com/uploads/sites/1/Participating_Employers_of_PSPRS.pdf

²⁹ [AZ Rev Stat § 38-851 \(2016\)](#)

1. Agree that all disputes involving interpretation of state statutes involving the system, and any amendments to such statutes, will be resolved through the court system of this state;
2. Agree to be bound by statute statutes and laws that regulate and interpret the provisions of the system, including eligibility to membership in the system, service credits and the rights of any claimant to benefits and the amount of such benefits;
3. Agree to meet any requirements that the board may prescribe to ensure timely payment of member and employer contributions and any other amounts due from the employer to the system; and,
4. Include in the joinder agreement any other provision deemed necessary by the board for the administration or enforcement of the agreement. ARIZ. REV. STAT. § 38-851(E). In addition, employees of the Indian Oasis Unified School District, which consists of five schools that serve as the education center for the Tohono O'odham Nation, participate in the Arizona Teachers' Retirement System because the school is deemed a state public school.³⁰

Other Issues

State Contributions

If tribal law enforcement officers are allowed into LEOFF 2 the law will need to address what percentage of contributions the employer and state pay. For most LEOFF 2 members the employer pays 30 percent of the contributions and the state pays 20 percent. However, for port districts and institutions of higher education, the employer pays the full 50 percent.³¹

Retiree Return to Work

Since tribal police departments are not DRS employers, they are not subject to retiree return to work laws. If tribal police departments became DRS employers, LEOFF 2 retirees who work for tribes would no longer be able to work for them without rejoining LEOFF 2 membership and stopping their LEOFF 2 retirement benefit.

There may also be return to work implications for non-LEOFF 2 members working for the tribal police departments, and potentially for the tribe. For example, the 2008 Early Retirement Factors (ERF) return to work restrictions do not allow for a 2008 ERF retiree to return to work for a DRS employer in any capacity without having their pension benefit stopped. It is unclear in current law whether the tribal police department becoming a LEOFF 2 employer would result in

³⁰ [AZ Rev Stat § 38-851 \(2016\)](#)

³¹ [RCW 41.26.450](#)

the tribe being considered a DRS employer and all of the tribe's employees being subject to 2008 ERF restrictions or just the tribal police department.

Retroactive Service Credit

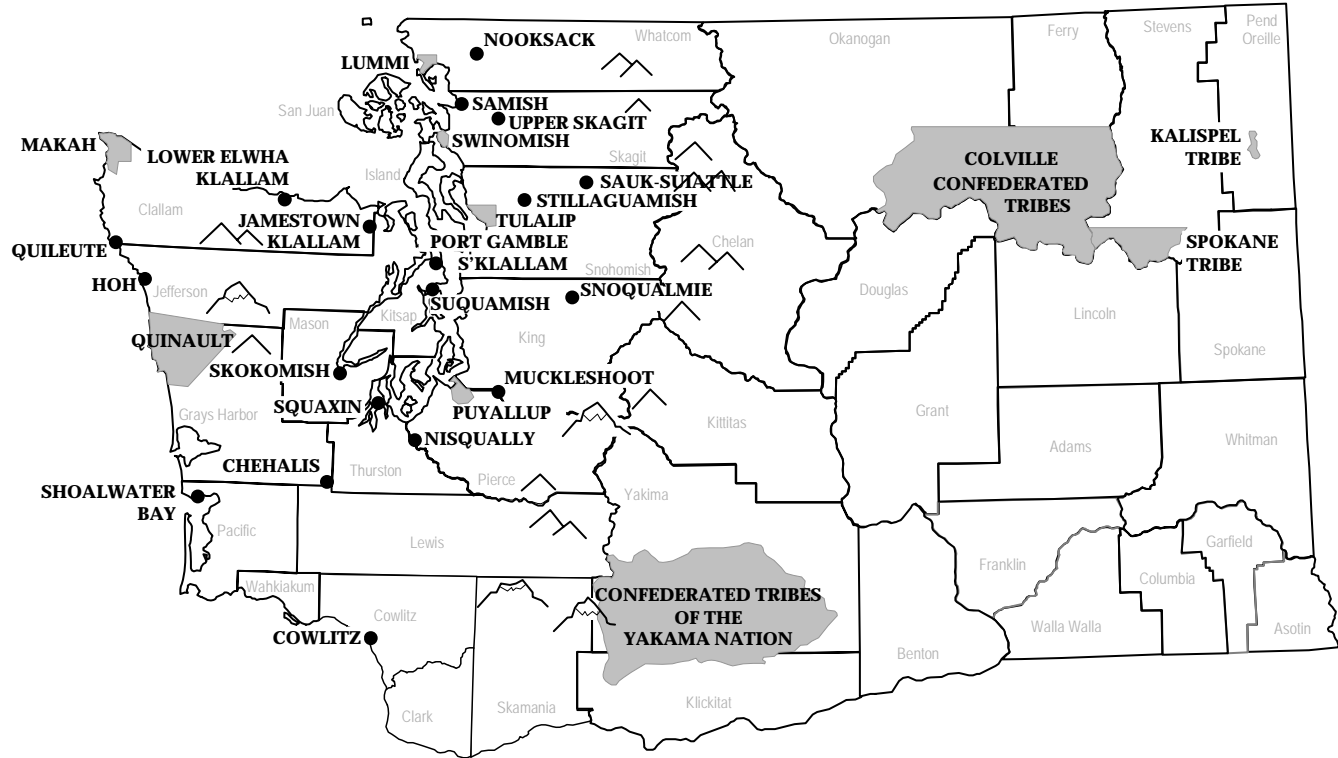
An issue that sometimes arises when new employers join a state pension system is whether the new members should have the ability to purchase past service credit that they would have earned if their employer had been an eligible employer. Groups of employees whose membership was changed from PERS to LEOFF 2 in the past, such as port police and fire fighters, higher education police and fire fighters, and emergency medical technicians were provided with an option to transfer their past eligible service from PERS to LEOFF 2.

When this occurs the law must address who will pay the full actuarial cost of the benefit. Typically, the member is responsible for the full actuarial cost of the service credit, however there have been instances where the employer and/or pension plan has shouldered a portion of that cost. If the member has a retirement account that they and their employer have previously been paying into for the prior service the member may be able to roll that money over to purchase the service credit in LEOFF 2.

SUPPORTING INFORMATION

Appendix A: Washington State Federally Recognized Tribal Map

FEDERALLY RECOGNIZED TRIBES OF WASHINGTON STATE





Tribal Law Enforcement Study

Initial Consideration
July 24, 2019

Issue

- The legislature tasked the LEOFF 2 Board with studying the tax, legal, fiscal, policy, and administrative issues related to allowing tribal law enforcement officers to become members of the LEOFF 2 plan
- The report is due to the legislature by January 1, 2020

Tribal Law Enforcement in Washington State

- 29 federally recognized tribes in Washington State
- 28 of those tribes have tribal police departments
 - 2 contracted out services
- 23 tribes have agreements with the CJTC
- 293 tribal police officers certified by the CJTC

Criminal Jurisdiction of Tribes

- Criminal jurisdiction on Indian reservations is based partly on whether the tribe has Public Law 280 (PL 280) status, the status of the individual parcels of the land, the type of crime committed, and the status of the individuals involved
- PL 280: Authorized states to exercise jurisdiction over criminal offenses by or against Indians on tribal land

Washington's PL 280 Jurisdiction Charts

Tribes Subject to the 1957 Law: Muckleshoot, Nisqually, Skokomish, and Squaxin Island

ACCUSED	VICTIM	JURISDICTION
Indian	Indian/Victimless	Tribe; State
Indian	Non-Indian	Tribe; State
Non-Indian	Indian	State
Non-Indian	Non-Indian/Victimless	Exclusively State
Anyone	Anyone	Federal jurisdiction if a crime of nationwide applicability, or statute otherwise applies

Washington's PL 280 Jurisdiction Charts

Tribes Subject to the 1963 Amendments: Chehalis, Colville, Hoh, Kalispel, Lower Elwha Klallam, Lummi Nation, Makah, Port Gamble S'Klallam, Puyallup, Quileute, Quinault Nation, Shoalwater Bay, Spokane, Suquamish, Swinomish, Tulalip, and Yakama Nation

ACCUSED	VICTIM	JURISDICTION
Indian	Indian/Victimless	Tribe; State unless within Indian reservation and on trust or restricted land and not among 8 enumerated categories*
Indian	Non-Indian	Tribe; State unless within Indian reservation and on trust or restricted land and not among 8 enumerated categories
Non-Indian	Indian	State
Non-Indian	Non-Indian/Victimless	Exclusively State
Anyone	Anyone	Federal jurisdiction if a crime of nationwide applicability, or statute otherwise applies

Washington's PL 280 Jurisdiction Charts

Tribes Affected by the 1968 Amendments to PL 280: Cowlitz; Jamestown S'Klallam, Nooksack, Samish Nation, Sauk-Suiattle, Snoqualmie, Stillaguamish, and Upper Skagit

ACCUSED	VICTIM	JURISDICTION
Indian	Indian/Victimless	Tribe; Sometimes concurrent with Feds if Major Crimes Act applies
Indian	Non-Indian	Tribe; Sometimes concurrent with Feds if Major Crimes Act or General Crimes Act applies
Non-Indian	Indian	Exclusively Feds
Non-Indian	Non-Indian/Victimless	Exclusively State
Anyone	Anyone	Federal jurisdiction if a crime of nationwide applicability, or statute otherwise applies

Public Pension Plan Eligibility

- Federal law (Pension Protection Act) allows for tribal employees meeting certain criteria to be eligible for membership in public pension plans
- Tribal police officers are not eligible for membership in LEOFF 2 under state law

Governmental Plan or ERISA Test – Part 1

- Are activities commercial or governmental?
 - Specific examples provided by IRS
 - Governmental activities include police and fire departments
 - Commercial activities include operation of a hotel, casino, service station, convenience store, or marina
 - Facts and Circumstances Test

Facts and Circumstances Test

- **Commercial activity**
 - Operated to earn a profit
 - Typically performed by private businesses
 - Customers are substantially from outside of the Indian tribal community, including whether the activity is located or conducted outside of Indian tribal land
- **Governmental activity**
 - Provides a public benefit to members of the Indian tribal government
 - not treating the generation of profits from commercial acts as providing a public benefit
 - The absence of one or more of the relevant factors listed for determining whether an activity is commercial

Governmental Plan or ERISA Test – Part 2

- Requires a determination be made as to whether an employee's duties are substantially in the performance of a governmental activity or a commercial activity
 - IRS considers the location of the employees' services, the source of the employee's payroll, and the employee's assigned duties and responsibilities

Funds from Commercial Activities

- An outstanding issue needing further research is whether a tribal police department receiving funds from the tribal government that originated from commercial activities would prevent their employees from being eligible for membership in a public plan

LEOFF 2 Eligibility

- A Law Enforcement Officer is eligible for LEOFF 2 if they are:
 - Commissioned
 - Full-time
 - Fully Compensated
 - Employed by a LEOFF 2 employer

Commissioned

- DRS defines “commissioned” as “an employee is employed as an officer of a general authority Washington law enforcement agency and is empowered by that employer to enforce the criminal laws of the state of Washington”
- **General Authority for Tribal Officers**
 - Must meet specified requirements regarding certification with the Criminal Justice Training Commission (CJTC), insurance liability, and administration
 - CJTC tribal police officer certification program
 - Submit proof of certification to DES

Sovereign Immunity

- Tribes are considered sovereign nations and therefore, under the legal doctrine of sovereign immunity, have immunity from suit in state or federal court
- A tribe is subject to suit in state court only where the tribe has waived its own sovereign immunity
 - Gaming compacts
 - Cigarette compacts
 - Marijuana compacts
 - Tribal Compact Schools

Gaming Compacts

- States and tribes enter into gaming compacts for tribes to conduct Class III gaming on Indian lands
- All 29 tribes in Washington have signed a gaming compact with the state
- The director of the Washington State Gambling Commission is delegated the responsibility of negotiating gaming compacts
- Signed by the Governor of Washington State and the Chairman/Tribal Chair

Cigarette Compacts

- Tribes collect a cigarette tax through the negotiation of cigarette compacts
- Native American tribes are exempt from state tobacco excise taxation
 - Members of the tribe are exempt from paying a tax on cigarettes sold on their reservation
 - Non-members of the tribe purchasing tobacco on tribal land must pay a state excise tax
- The Department of Revenue and the Washington State Liquor and Cannabis Board share the administration and enforcement of the cigarette tax responsibilities
- Signed by the Governor of Washington State and the Chairman/Tribal Chair

Marijuana Compacts

- In 2015, HB 2000 authorized the Governor of Washington State to enter into marijuana compacts with federally recognized Indian tribes
- 11 tribes have negotiated and signed marijuana compacts with the Washington State Liquor and Cannabis Board (WSLCB)
- Six tribes have opened cannabis stores on their land (under the I-502 system)
- Marijuana compacts require six signatures:
 - Governor of WA
 - Chairman/Tribal Chair of tribe
 - WSLCB Chair, Agency Director, and two members

Tribal Compact Schools

- 5 Tribal Compact Schools
- Compact with OSPI
 - Signed by Superintendent of Public Instruction and Chairman/Tribal Chair of tribe

Tribal Compact Schools

- In 2018, SB 6210 made tribal compact schools eligible to opt in as a DRS employer, and their employees' members of TRS or SERS
- **1 Tribal Compact School has joined**
- **Amended Compact with OSPI**
 - includes a limited waiver of sovereign immunity, for purposes of enforcing the laws and regulations of the pension system
 - Signed by Superintendent of Public Instruction and Chairman/Tribal Chair of tribe

Other States

- **Arizona - Two tribal police departments and one tribal fire department are in the Arizona Public Safety Personnel Retirement System**
 - Tribe must pay for an actuarial survey to determine the estimated cost of participation
 - Tribe must sign waiver of sovereign immunity

Other Issues

- **State/Employer Contributions**
- **Retiree Return to Work Laws**
- **Retroactive Service Credit**

Next Steps

- **Conduct Tribal Law Enforcement Survey**
- **Request Legal Advice**



Thank You

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