



November 20, 2019
Tribal Police Study

COMPREHENSIVE REPORT

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ISSUE STATEMENT

The legislature tasked the Law Enforcement Officer and Fire Fighter (LEOFF) Plan 2 Board with studying the tax, legal, fiscal, policy, and administrative issues related to allowing Tribal Police Officers to become members of LEOFF Plan 2.¹ The report is due to the legislature by January 1, 2020.²

OVERVIEW

The Pension Protection Act of 2006 changed the definition of governmental plans to include Indian tribal plans “covering workers doing governmental work”.³ This made it possible for tribes to create their own governmental plans and state or local government plans to allow tribes to join their pension systems. However, there are federal restrictions and state laws that prevent some tribal employees from joining state governmental plans, including LEOFF Plan 2.

BACKGROUND AND POLICY ISSUES

Nongovernmental Employees Risk

Federal restrictions for tribal employees joining a governmental plan include barring tribal employees engaged in commercial activities.⁴ 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.⁵

The determination of whether a position may be covered by a governmental plan or must be covered by ERISA is further addressed by the Internal Revenue Service (IRS) through a two part test.⁶ The first part of the test is to determine whether the activities are commercial or

¹ Engrossed Substitute House Bill 1109. (2019). *Operating Budget*. [online] Available at: <http://lawfilesexternal.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/House/1109-S.SL.pdf>

² id.

³ Govinfo.gov. (2019). *Pension Protection Act of 2006*. [online] Available at: <https://www.govinfo.gov/content/pkg/PLAW-109publ280/html/PLAW-109publ280.htm>

⁴ Grinde, I. (2019). *Transition Relief for Indian Tribal Governmental Plans*. [online] Irs.gov. Available at: <https://www.irs.gov/pub/irs-drop/n-06-89.pdf>

⁵ Irs.gov. (2019). *Advance notice of proposed rulemaking*. [online] Available at: https://www.irs.gov/pub/irs-tege/reg_133223_08.pdf

⁶ id.

governmental. Examples of commercial activities include activities relating to the operation of a hotel, casino, service station, convenience store, or marina.⁷ Governmental activities include “activities relating to providing criminal protection services such as police and fire departments”.⁸ The IRS utilizes a “facts and circumstances test” to determine whether an activity is commercial or governmental.⁹

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,
- For customers who are substantially from outside of the Indian tribal community, including whether the activity is located or conducted outside of Indian tribal land.¹⁰

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.¹¹

The second part of the IRS government plan test requires determining whether an employee’s duties are substantially in the performance of a governmental activity or a commercial activity.¹² In making this determination, the IRS considers the location of the employee’s services, along with the source of the employee’s payroll, and the employee’s assigned duties and responsibilities.¹³

According to the IRS, if an employee is on the payroll of an Indian Tribal Government (ITG) entity 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.¹⁴

When determining whether an employee’s services are in the performance of a governmental activity, the IRS does not require that the funds from commercial activities and the funds from governmental activities remain completely separate. The tribal police department may

⁷ 26 CFR Sec 7871(e)

⁸ Irs.gov. (2019). *Advance notice of proposed rulemaking*. [online] Available at: https://www.irs.gov/pub/irs-tege/reg_133223_08.pdf.

⁹ id.

¹⁰ id.

¹¹ id.

¹² id.

¹³ id.

¹⁴ id.

indirectly receive funding from revenue generated by commercial activity; however, the police officers must be on the payroll for the police department, not the commercial entity (see Appendix A).

For tribes in Washington, money from commercial activities (such as casinos) is collected by the tribal government and then allocated out to the different tribal departments, including the tribal police department. The Tribal Police Officers are on the payroll of the police department, so a tribal police department receiving funding which originated from commercial activities does not disqualify the Tribal Police Officers from government employee status (see Appendix A).

Waiver of 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, typically in state-tribal compacts.

In order for Tribal Police Officers to become members of LEOFF Plan 2, a retirement compact would need to be negotiated and signed between the tribe and the State. This compact must include a limited waiver of the tribe's sovereign immunity for purposes of enforcing the laws, rules, and regulations of the LEOFF Plan 2.

Compact Process

Based on existing tribal compacts between Washington State and tribal governments, the process of creating a tribal compact for tribes to join LEOFF Plan 2 would likely start with the tribe expressing their interest in joining LEOFF Plan 2 to the State. The tribe would then meet with the state to discuss a compact, which should include discussing their goals, the general terms of the compact, and the waiver of sovereign rights. After the initial discussion, the drafting of the compact would begin.

Most tribal compacts with the state (i.e. Gaming Compacts, Cigarette Compacts, and Marijuana Compacts) rely on the use of templates, to ensure a consistent and efficient process. It may be useful to have a compact template created for all tribes to use. This would enable tribes to make their compacts unique to their own wants and needs, while maintaining a similar structure to the other tribes.

Once a compact draft has been made, the tribe and the State will work together to edit and make recommendations. After the final compact language is agreed upon, the compact becomes official when it receives all required signatures of approval.

If tribal police departments are made eligible to join LEOFF Plan 2, then the retirement compacts should include the following:

- Acknowledgment by the tribal police department that it affirmatively chooses to participate in LEOFF Plan 2.
- Evidence that the person or persons who sign the compact on behalf of a tribe have authority under tribal or community law to bind the tribe to all provisions in the compact, including any waiver of sovereign immunity.
- Agreement by the tribal police department that it meets the definition of a LEOFF Plan 2 employer as defined in RCW 41.26.030.
- Agreement by the tribal police department to adhere to all reporting, contribution, and auditing requirements and rules as defined in Chapter 41.26 RCW.
- Agreement by the tribe to a limited waiver of sovereign immunity and consent to the jurisdiction of the Washington state courts for the purpose of enforcing the reporting, contribution, and auditing requirements defined in Chapter 41.26 RCW.

Below are some questions tribes and the state should consider before drafting the compact:

- Who should represent the tribe in the LEOFF Plan 2 tribal compact process?
- Who should represent the state in the LEOFF Plan 2 tribal compact process?
- Who will need to sign the final compacts for the state and for the tribe?
- What would be the ongoing costs to the tribe?
- Should the tribe be required to complete an actuarial survey to have a full understanding of the costs associated with membership?
- How would this affect LEOFF Plan 2 retirees currently working for the tribe?
- How will this affect officers who have already been working for the tribe for many years?
- What sovereign rights is the tribe giving up?

LEOFF Plan 2 Eligibility

For Tribal Police Officers to be eligible for LEOFF Plan 2 both the officers and the employers would need to meet the eligibility requirements of LEOFF Plan 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 Plan 2 if they are:

- Employed by a LEOFF Plan 2 employer;
- Commissioned;
- Full-Time; and,

¹⁵ App.leg.wa.gov. (2019). *RCW 10.92.010: Definitions*. [online] Available at: <https://app.leg.wa.gov/RCW/default.aspx?cite=10.92.010>.

- Fully Compensated.¹⁶

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

- 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;
- The elected officials of any municipal corporation;
- The governing body of any other general authority law enforcement agency;
- A four-year institution of higher education having a fully operational fire department as of January 1, 1996; or,
- 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.¹⁷

For Tribal Police Officers to be eligible for LEOFF Plan 2, the definition of “employer” needs to be amended to include tribal police departments. Currently, if an employer falls within the definition for LEOFF Plan 2, then they are automatically a LEOFF Plan 2 employer. While the Public Employees’ Retirement System (PERS) allows for certain types of employers to opt-in to membership, LEOFF Plan 2 does not. This would create an issue related to tribal sovereignty, as the state could not require a tribe to be subject to the requirements of LEOFF Plan 2 without the tribe waiving sovereign immunity. Therefore, for tribes to be eligible for LEOFF Plan 2 the law would need to include an opt-in process for tribes. This would be a change in policy for LEOFF Plan 2.

There currently is a process for tribal compact schools to opt-in as an employer under the Teachers’ Retirement System (TRS) and School Employees’ Retirement System (SERS).¹⁸ Tribal compact schools are the only TRS and SERS employer not mandated into membership. The legislature could create a similar process for tribal police departments to opt-in to LEOFF Plan 2 Membership.

Once a Law Enforcement Officer is employed by an eligible employer, they must next be “commissioned”. Under WAC 415-104-011, the Department of Retirement Systems (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

¹⁶ App.leg.wa.gov. (2019). *RCW 41.26.030: Definitions*. [online] Available at: <https://app.leg.wa.gov/RCW/default.aspx?cite=41.26.030>.

¹⁷ id.

¹⁸ App.leg.wa.gov. (2019). *Chapter 28A.715.010 RCW: Authority to enter into compacts—Process—Rules—Retirement systems*. [online] Available at: <https://app.leg.wa.gov/RCW/default.aspx?cite=28A.715.010>

commissioned to enforce the criminal laws of the state of Washington generally.” Therefore, Tribal Police Officers with general authority would be eligible for LEOFF Plan 2 if tribal police departments were added to the definition of “employer”.

General vs. Limited Authority

As explained above, Law Enforcement Officers are required to have general authority to be eligible for membership in LEOFF Plan 2. A general authority Washington State Peace Officer is any full-time, fully compensated and elected, appointed, or employed officer of a general authority law enforcement agency in the state.¹⁹ This includes local governments, the Washington State Patrol, and the Department of Fish and Wildlife. General authority peace officers may enforce criminal or traffic laws of the state throughout the territorial boundaries in the following circumstances: with the support and approval of an inter-local agreement; in response to an emergency involving immediate threat to human life or property; in response to a request for assistance pursuant to a law enforcement assistance agreement; when transporting prisoners; when executing an arrest warrant or search warrant; or, when in fresh pursuit.²⁰

A limited authority Washington State Peace Officer is “any full-time, fully compensated officer of a limited authority Washington law enforcement agency empowered by that agency to detect or apprehend violators of the laws in some or all of the limited subject areas for which that agency is responsible.”²¹ Limited authority officers include, but are not limited to, Liquor and Cannabis Board Enforcement Officers, Gambling Commission Special Agents, and Department of Natural Resources Police Officers. There have been bills proposed to the legislature to include limited authority officers in LEOFF Plan 2; however, none of those bills have been endorsed by the LEOFF Plan 2 Board. Instead, limited authority officers are typically covered by the Public Safety Employees’ Retirement System (PSERS).²²

Tribal police officers may have general authority or limited authority. In 2008, HB 2476 authorized Tribal Police Officers to act as general authority officers if the tribal government met specific requirements regarding certification, insurance liability, and administration.²³ The certification requirement is conducted through the Criminal Justice Training Commission (CJTC). Tribal governments must enter into a written agreement with the CJTC to receive this training and certification. These written agreements require the tribal law enforcement agency and its

¹⁹ App.leg.wa.gov. (2019). *Chapter 10.93.020 RCW: DEFINITIONS*. [online] Available at: <https://app.leg.wa.gov/RCW/default.aspx?cite=10.93.020>.

²⁰ Lawfilesext.leg.wa.gov. (2019). *FINAL BILL REPORT-EHB 2476*. [online] Available at: <http://lawfilesext.leg.wa.gov/biennium/2007-08/Pdf/Bill%20Reports/House/2476.FBR.pdf>.

²¹ App. leg.wa.gov. (2019). *Chapter 10.93.020 RCW: DEFINITIONS*. [online] Available at: <https://app.leg.wa.gov/RCW/default.aspx?cite=10.93.020>.

²² App.leg.wa.gov. (2019). *Chapter 41.37 RCW: WASHINGTON PUBLIC SAFETY EMPLOYEES’ RETIREMENT SYSTEM*. [online] Available at: <https://app.leg.wa.gov/RCW/default.aspx?cite=41.37>.

²³ App.leg.wa.gov. (2019). *Chapter 10.92 RCW: TRIBAL POLICE OFFICERS*. [online] Available at: <https://app.leg.wa.gov/RCW/default.aspx?cite=10.92>.

officers to comply with all of the requirements for granting, denying, and revoking certification as they are applied to state general authority peace officers. However, tribes may have agreements with CJTC for training and certifying officers without the tribe meeting the other requirements for general authority.

Eleven tribal police departments have met the general authority requirements and their Tribal Police Officers are considered general authority Washington State Peace Officers. Tribal police officers working for the other tribal police departments are considered limited authority Washington State Peace Officers. The legislature may want to consider whether to allow for limited authority Tribal Police Officers to be eligible for membership in PSERS. Similar to LEOFF Plan 2, PSERS would need to be amended to allow for tribes to be eligible employers and Tribal Police Officers to be eligible members.

The chart below displays the certifications described above for each tribal police department, and identifies those departments which contract out their police services:

Tribal Police Department	General Authority Certification	CJTC Certification	Contract Out Police Services
Chehalis	X	X	
Colville		X	
Cowlitz		X	
Elwha		X	
Hoh			X
Jamestown S’Klallam			
Kalispel	X	X	
Lummi			
Makah			X
Muckleshoot		X	X
Nisqually	X	X	
Nooksack		X	
Port Gamble S’Klallam	X	X	
Puyallup		X	
Quileute		X	
Quinalt	X	X	
Sauk-Suiattle	X	X	
Shoalwater Bay	X	X	
Skokomish		X	
Snoqualmie		X	
Spokane		X	
Squaxin Island		X	
Stillaguamish	X	X	

Suquamish	X	X	
Swinomish	X	X	
Tulalip	X	X	
Upper Skagit		X	
Yakama			

Preliminary Results of Tribal Survey

In July of 2019, LEOFF Plan 2 Board staff sent a brief survey to each tribal police department. The survey asked the tribal police department's interest in joining LEOFF Plan 2; the average age, years of service, and salary of all the full time officers employed by the tribe; the current pension plan offered to their officers; and, any concerns or questions they have about joining LEOFF Plan 2.

Twelve tribes responded to the survey questions and nine of those tribes expressed their interest in being a part of LEOFF Plan 2, along with questions and concerns about the system. The three tribes that did not express interest in joining the system cited the following reasons:

- Muckleshoot Tribal Police Department – They contract with the King County Sheriff's Office, and therefore their officers are already in the LEOFF Plan 2 system.
- Stillaguamish Tribal Police Department - They responded that they are not interested in joining LEOFF Plan 2 because the majority of their officers are LEOFF Plan 2 retirees and the impact joining LEOFF Plan 2 would have on those officers.
- The Spokane tribe responded that they were not interested in joining LEOFF Plan 2 at this time. They did not provide any additional detail.

Some of the shared concerns among the tribes included:

- How retired LEOFF Plan 2 members working for the tribe would be affected;
- What the general costs and benefits of the system are;
- Whether all officers in a participating tribe would be required to join or if it would be optional;
- Whether every tribe need to be a part of the system; and,
- How tribal sovereignty would be impacted if they were to join LEOFF Plan 2?

The most cited reason why the tribal police departments were interested in joining LEOFF Plan 2 was for the recruitment and retention of high quality police officers. The responses to the questions regarding salary and demographic data of the full time officers employed by the tribes varied substantially. These results are shown in the chart below:

Tribal Police Department	Number of Full Time Officers	Average Salary	Average Age	Average Years of Service
Chehalis	18	\$80,154.49	37.4	6.7
Muckleshoot				

Nooksack	8	\$61,380	33	5
Port Gamble S'Klallam	10	\$45,760	30	
Puyallup		\$96,063	45	14.5
Quileute		\$62,400.00	32	8
Quinault	10		37	6
Shoalwater Bay	5	\$60,000 - \$70,000	43	4
Spokane				
Stillaguamish	11	\$76,695	54	25-30
Suquamish		\$77,400	44.5	12.46
Upper Skagit	7	\$65,000	45	3

LEOFF Plan 2 staff requested this data in part to assist the Office of the State Actuary (OSA) with analyzing the potential financial costs to LEOFF Plan 2 of having Tribal Police Officers eligible for membership. LEOFF Plan 2 staff is continuing to work with OSA on the potential financial impacts.

In response to the survey question regarding current pension plans offered by the tribal police department, nine of the tribes currently offer a 401(k) retirement plan. One tribe also offers their officers a Profit Sharing Plan and a Tax Exempt Retirement Savings Plan, in addition to a 401(k) plan. Most of these 401(k) plans require matching contributions by the employee. The term “matching contribution” refers to a certain dollar amount contributed by an employer to the retirement savings account of an employee who makes a similar contribution. The maximum percentage of employer contribution rate for these 401(k) plans were all less than the current LEOFF Plan 2 employer contribution rate of 8.59 percent²⁴.

Retiree Return to Work Impacts

State pension plans, including LEOFF Plan 2, include restrictions on retirees returning to work and receiving pension payments. Currently, tribal police departments are not subject to these retiree return to work laws since they are not a DRS covered employer. If tribal police departments became LEOFF Plan 2 employers, their employees would be subject to retiree return to work restrictions.

LEOFF Plan 2 retirees are subject to the retiree return to work law known as “career choice”. Under career choice, a retiree of LEOFF Plan 2 who becomes employed in a non-LEOFF eligible position may choose to either: receive LEOFF Plan 2 retirement benefits while employed in the non-LEOFF position and be prohibited from entering a new retirement plan; or enter into the membership of his or her new position's retirement plan, make contributions and accrue

²⁴ 8.59 percent is the combined percentage paid by the employer and the state for LEOFF Plan 2.

service credit, and have their LEOFF Plan 2 retirement benefit suspended until the employment covered by the new retirement plan ends.²⁵

If a LEOFF Plan 2 retiree becomes employed in a LEOFF Plan 2 covered position they are no longer considered a retiree. Instead, they become active LEOFF Plan 2 members and reenter LEOFF Plan 2 membership, accruing additional service credit and paying member contributions. When they re-retire their LEOFF Plan 2 pension benefit is recalculated with the additional service credit and potentially with a new Final Average Salary.

Currently, tribal police departments have a competitive advantage hiring LEOFF Plan 2 retirees over other public employers in Washington because LEOFF Plan 2 retirees can work as Law Enforcement Officers for a tribe while still receiving their pension payments. If tribal police departments become LEOFF Plan 2 employers, LEOFF Plan 2 retirees who work for those tribes as Law Enforcement Officers would have to rejoin LEOFF Plan 2 membership and stop receiving their LEOFF Plan 2 retirement benefit.

There may also be return to work implications for tribal employees who have retired from other state pension systems, working for the tribal police departments, and potentially for the tribe. For example, the 2008 Early Retirement Factors (ERF) return to work restrictions prohibit a 2008 ERF retiree to return to work for a DRS employer in any capacity without having their pension benefit stopped.²⁶ Currently, it is unclear how the 2008 ERF return to work restrictions would impact a tribe if the tribal police department became a LEOFF Plan 2 employer. Specifically, whether the tribe as a whole would be considered a DRS employer as a result of the tribal police department becoming a LEOFF Plan 2 employer. If the tribe is considered a DRS employer then all of the tribe's employees would be subject to the 2008 ERF return to work restrictions. This issue, for first class cities, is currently being litigated in *Romero v. Department of Retirement Systems*.²⁷ Similar to the position tribes would be in if they became LEOFF employers, first class cities are LEOFF employers only; they have their own pension system for other city employees. In *Romero*, DRS determined that a 2008 ERF PERS retiree was subject to the 2008 ERF return to work restrictions for returning to work for the City of Spokane. Mr. Romero argues that the 2008 ERF restrictions do not apply to first class cities because they are not DRS-covered employers.

State Contributions

If Tribal Police Officers are allowed into LEOFF Plan 2 the law will need to address what percentage of contributions the employer and state pay. The current cost-sharing method utilized by a majority of LEOFF Plan 2 is 50 percent of contributions are paid by the member, 30

²⁵ App.leg.wa.gov. (2019). *Chapter 41.26.500 RCW: Suspension of retirement allowance upon reemployment—Reinstatement—Option to enter into membership*. [online] Available at: <https://app.leg.wa.gov/RCW/default.aspx?cite=41.26.500>.

²⁶ App.leg.wa.gov. (2019). *Chapter 41.40.630 RCW: RETIREMENT FOR SERVICE* [online] Available at: <https://app.leg.wa.gov/RCW/default.aspx?cite=41.40.630>.

²⁷ *Romero v. Department of Retirement Systems*, Cause No. 18-2-04400-1

percent by the employer and 20 percent by the State.²⁸ However, for Port Districts and institutions of higher education, the member and employer pay 50 percent and the State pays zero percent.²⁹

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 previously been an eligible employer. Groups of employees whose membership was changed from PERS to LEOFF Plan 2 in the past, such as port police officers and fire fighters, higher education police officers and fire fighters, and emergency medical technicians were provided with an option to transfer their past eligible service from PERS to LEOFF Plan 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 in which the employer and/or pension plan has shouldered a portion of that cost. Members may be able to pay for that service credit by rolling over funds from other retirement savings accounts, so long as that account is eligible for a rollover under IRS regulations.³⁰

Withdrawing from LEOFF Plan 2

If tribes are allowed to join LEOFF Plan 2, the law should address whether this decision is irrevocable. If it is not irrevocable, the law should include what the process and liability of withdrawing from membership includes. Currently, LEOFF Plan 2 does not address these issues because membership is mandatory and there is no option to leave membership so long as an employer continues to employ eligible members. In PERS, which allows for certain employers to opt-in, that decision is irrevocable.³¹ An employer can only get out of membership by dissolving. When an employer dissolves, the plan subsidizes the costs associated with the liability of the employer.

While the majority of states do not allow employers to withdraw from their pension systems, there are states do allow for withdrawal. These plans typically follow procedures similar to those required of private ERISA covered multi-employer plans. Under ERISA, employers are

²⁸ App.leg.wa.gov. (2019). *RCW 41.26.725: Board of trustees—Contributions—Minimum and increased benefits*. [online] Available at: <https://app.leg.wa.gov/RCW/default.aspx?cite=41.26.725>.

²⁹ App.leg.wa.gov. (2019). *RCW 41.26.450: Port districts and institutions of higher education—Employer and state contributions—Recovery of contributions*. [online] Available at: <https://app.leg.wa.gov/RCW/default.aspx?cite=41.26.450>.

³⁰ Rollover Chart. (2019). Available at: https://www.irs.gov/pub/irs-tege/rollover_chart.pdf.

³¹ App.leg.wa.gov. (2019). *RCW 41.40.111: Retirement system employer—Unit of government*. [online] Available at: <https://app.leg.wa.gov/RCW/default.aspx?cite=41.40.111>.

required to pay “withdrawal liability” to leave the plan.³² Under ERISA, withdrawal liability is the amount of Unfunded Vested Benefits (an amount equal to the value of nonforfeitable benefits under the plan, less the value of the assets of the plan).³³

The process to withdraw for public pension systems typically involves the following steps: decision by employer to withdraw; employee vote to withdraw; notification to the pension system; accounting of liabilities; payment of liabilities; and, handling of vested and non-vested member accounts.³⁴

To help prevent the underlying issues that may result in withdrawal, it would be beneficial for tribes to have as much information as possible about the costs and obligations of being a LEOFF Plan 2 employer. Arizona Public Safety Personnel Retirement System sought to address this concern for tribes seeking to join their pension system, by requiring the tribe to 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.”³⁵ Two tribal police departments and one tribal fire department in Arizona are currently participating in the Arizona Public Safety Personnel Retirement System.³⁶ According to the Office of the State Actuary, the term “actuarial survey” is not a recognized actuarial term. Therefore, if the legislature wanted to require or recommend that tribes opting-in to LEOFF Plan 2 get an actuarial survey, they should clearly define the requirements of the actuarial survey.

In the legislation authorizing tribal compact schools to become members of TRS and SERS, the legislature addressed the risks of tribal compact schools withdrawing from the pension systems by including language in the bill which required the compact agreement to address “expectations and duties if the compact terminates [...]”.³⁷ Furthermore, the compact must include:

Acknowledgment by the tribal school that it has been advised that choosing to no longer participate in the retirement systems may result in federal tax implications for the governing body and its employees that are outside the control of the state of Washington, the department of retirement systems, and the superintendent of public

³² Law.cornell.edu/uscode. (2019). *U.S. Code § 1381. Withdrawal liability established; criteria and definitions*. [online] Available at: <https://www.law.cornell.edu/uscode/text/29/1381>.

³³ id.

³⁴ Handling Withdrawals from Multi-Employer Public Pension Plans. (2015). [online] Available at: https://www.nappa.org/assets/docs/ArchivedConferenceMaterials/2015ConferenceAustin/nappa_2015%20wed_t erminatingemployersoutsourcingemployees.pdf

³⁵ Azleg.gov. (2019). *Arizona Revised Statutes*. [online] Available at: <https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/38/00851.htm>.

³⁶ Psprs.com. (2019). *Participating Employers of the Public Safety Personnel Retirement System (PSPRS)*. [online] Available at: http://www.psprs.com/uploads/sites/1/Participating_Employers_of_PSPRS.pdf.

³⁷ App.leg.wa.gov. (2019). *Chapter 28A.715.010 RCW: Authority to enter into compacts—Process—Rules—Retirement systems*. [online] Available at: <https://app.leg.wa.gov/RCW/default.aspx?cite=28A.715.010>

instruction, and that the tribal school is encouraged to seek counsel before agreeing to any dissolution procedures in the compact.

Tribal compact schools have a greater risk of the issue of withdrawal arising because of the temporary nature of their existence. Only tribal compact schools, not tribal schools, are eligible for membership in the state retirement systems. Tribal schools can become tribal compact schools through entering into a compact agreement with the Office of Superintendent of Public Instruction (OSPI). These agreements are typically only two year agreements, meaning that every two years there is a risk that the tribal compact school will dissolve and no longer be eligible for membership in TRS and SERS.


In the tribal compact school legislation, the legislature also addressed potential risks associated with employees of tribal compact schools claiming they had “Bakenhus” rights to remain in the pension plan if their employer withdrew from membership. The legislation stated “[f]or tribal schools that opt out of pension plan participation, such schools' employees shall have no right to earn additional service credit in the plan.”


SUPPORTING INFORMATION

Appendix A: Ice Miller Legal Advice Memo

PRIVILEGED AND CONFIDENTIAL MEMORANDUM

TO: Law Enforcement Officers' and Fire Fighters' Retirement System Plan 2 Retirement Board

FROM: Ice Miller LLP (Robert L. Gauss and Audra Ferguson-Allen) 

DATE: October 14, 2019 

RE: Overview Regarding Admission of Tribal Police to Public Retirement System

This memorandum is provided in confidence and subject to the attorney-client privilege. We have not provided copies to anyone other than you. To preserve the attorney-client privilege, you should disclose the contents of this memorandum only to persons making decisions on the matters discussed herein.

Moreover, as you requested, this memorandum provides a brief overview. This memorandum was prepared for another client and has been edited to remove identifying information. If you would like us to provide a more comprehensive memorandum tailored to your issue, please let us know.

I. OVERVIEW OF LAW GOVERNING NATIVE AMERICAN TRIBES

A. History of Native American Tribal Retirement Plan

When the Small Business Jobs Protection Act of 1996 ("SBJPA") was enacted, it amended the Internal Revenue Code ("Code") to provide that Indian tribal government employers could include a qualified cash or deferred arrangement ("CODA") as part of a plan maintained by a tribe. This Act confirmed that, unlike state and local governments, tribes could sponsor 401(k) plans under ERISA. This led to the conclusion that the tribes were not considered state or local governments for purposes of ERISA. Thus, after the enactment of the SBJPA, tribes were treated as subject to ERISA.

On August 17, 2006, the Pension Protection Act ("PPA") became law. Section 906 of the PPA amended Code Section 414(d) and ERISA Section 3(32) to revise the definition of "governmental plan" to include certain functions of tribes. Specifically, the definition was amended to add the following:

The term 'governmental plan' includes a plan which is established and maintained by an Indian tribal government (as defined in § 7701(a)(40) of the Internal revenue Code of 1986), a subdivision of an Indian tribal government (determined in accordance with § 7871(d) of such Code), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential governmental function).

Code Section 414(d).

Furthermore, Notice 2006-89 sets forth that a governmental plan includes the teachers in tribal schools, "but a governmental plan does not include a plan covering tribal employees who are employed by a hotel, casino, service station, convenience store, or marina operated by a tribal government." Notice 2006-89 provided transitional relief based on a reasonable and good faith interpretation. However, Notice 2006-89 specifically states that it is not a reasonable and good faith interpretation for "employees who perform the following commercial activities to continue to accrue benefits" under a tribal plan: "employees who are employed by a hotel, casino, service station, convenience store, or marina operated by the [tribe] from the first day of the first plan year beginning on or after August 17, 2006." Notice 2006-89 also provided a method for tribal employer plans which covered both commercial employees and governmental employees to split their plans and assign the employees to the proper plans. Notice 2007-67 extended the transitional relief of Notice 2006-89 to a date that is six months after guidance is issued under the new rules.

B. Advanced Notice of Proposed Rulemaking – November 7, 2011

On November 7, 2011, the Department of Treasury and the Internal Revenue Service ("IRS") issued an Advance Notice of Proposed Rulemaking ("ANPR"). The ANPR proposes to amend Treasury Regulation Section 1.414(d)-1 to add paragraph (g). Under the ANPR, a governmental plan, as applied to an Indian tribal government would be defined as follows:

[A] governmental plan as it relates to an Indian tribal government is a plan that is established and maintained for its employees by an Indian tribal government, a subdivision of an Indian tribal government, or an agency or instrumentality of either (ITG), provided that the employees covered under the plan provide substantially all of their services in the performance of governmental activities as determined in paragraph (g)(6) of this section.

A commercial retirement plan for an Indian tribe would be defined as:

[A] plan of an ITG that covers any ITG employee who is not a governmental ITG employee under paragraph (g)(8) of this section or that covers any individual who is not an employee of an ITG.

The proposed regulations set forth a two-part test. The first part of the test is to determine whether the activities are commercial or governmental. Examples of commercial activities include activities relating to the operation of a hotel, casino, service station, convenience store, or marina. The facts and circumstances considerations related to commercial activities include the following:

- Whether the activity is a type of activity that is operated to earn a profit;
- Whether the activity is a type of activity that is typically performed by private businesses;

- Whether the activity is a type of activity 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.

Examples of governmental activities include:

- Activities related to the building and maintaining of public roads, public sidewalks, public buildings, and related areas such as parking lots;
- Activities that are related to public sewer and drainage facilities, and related facilities such as a waste-water treatment plant;
- Activities relating to public works projects, such as schools and government buildings;
- Activities relating to public utilities, such as electricity and other power sources, including the development of newer or emerging technologies;
- Activities relating to providing criminal protection services such as police and fire departments, providing civil or public administrative services such as operating and managing public schools, managing and providing services as public hospitals and health clinics, operating the government's civil service system and other public services;
- Activities subject to a treaty or special rules that pertain to trust land ownership and use.

Prop. Reg. § 1.414(d)-1(g)(6). (Emphasis added.) The facts and circumstances related to whether an activity is a governmental activity include the following:

- Whether the activity produces a public benefit to members of the Indian tribal government;
- Whether there is an absence of one or more of the relevant factors listed for a commercial activity as provided in paragraph (g)(7), *e.g.* hotel, casino, service station, convenience store, or marina.

The second part of the test requires that a determination be made as to whether an employee is an employee substantially all of whose services are in the performance of a governmental activity or a commercial activity.

You have asked whether police officers can be members in a governmental plan if the tribal police department is funded, in part, through revenue generated from commercial activity. Specifically, you explain that the revenue from commercial activity does not go directly to the police department. Rather, the revenue goes to the tribal governmental and the tribal government allocates funding to the different departments. In making the determination of whether an employee's services constitute services in the performance of a governmental activity, the IRS guidance does not require that the funds from commercial activity and the funds from governmental activities remain completely segregated. Rather, the Proposed Regulations consider the following factors: (i) location of the activity, (ii) payroll records, and (iii) duties and responsibilities. To expand upon the "payroll records" factor, the Proposed Regulations provide as follows:

(iii) Payroll records. If an employee is on the payroll of an ITG [Indian Tribal Government] entity that is engaged in a commercial activity (within the meaning of paragraph (g)(7) of this section), the employee's assigned duties and responsibilities are being treated as for the 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 under paragraph (g)(7)(i)(D) of this section) owned by an ITG, the cashier is a commercial ITG employee within the meaning of paragraph (g)(8) of this section.

Prop. Reg. § 1.414(d)-1(g)(8)(iii) (emphasis added). As you note, the police officers may, indirectly, receive funding from revenue generated by commercial activity; however, importantly, the police officers are on the payroll for the police department, not the commercial entity. Thus, assuming the other factors are met, the fact that some of the funding may have been received from revenue generated by commercial activity is not determinative.

Importantly, there is no de minimis rule with respect to coverage of commercial employees. This means that if a plan covers even one commercial employee, the plan risks its governmental plan status. The proposed regulation provides that a plan will not be treated as failing to satisfy the proposed rules if a plan makes a reasonable, good faith interpretation of the rules. However, the reasonable, good faith relief only applies if the plans provide uniform benefit levels for employees of governmental and commercial plans.

C. Issues Related to Tribal Participation in Public Retirement Plan

1. Sovereign Immunity

As affirmed by the Supreme Court of the United States, the doctrine of tribal sovereign immunity continues in the United States. *See Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014). Moreover, tribal immunity applies to suits brought by a State and "tribal immunity is a matter of federal law and is not subject to diminution by the States." *Id.* at 2031 (citations omitted). The Supreme Court further stated that this immunity includes the "tribe's commercial activities, even when they take place off Indian lands." *Id.* The court noted that "if a State really wants to sue a tribe . . . , the State need only bargain for a waiver of immunity." *Id.*; *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.").

Thus, in order to enforce the rules and requirements of a Retirement System, a tribal compact or agreement would need to include a waiver of sovereign immunity. Undoubtedly, a waiver of sovereign immunity will be carefully scrutinized by a tribe. Moreover, the plan should be amended to note that by participating in the Retirement System, a tribal government waives sovereign immunity and agrees to be subjected to all statutory provisions and any other applicable laws as they relate to the Retirement System. Further, the plan should be amended to provide a binding guarantee of payment options and that participation in the Retirement System would continue into perpetuity.

2. Social Security

A tribal employee's participation in the Retirement System will not impact his or her Social Security coverage. State and local employees who are members of a "qualified replacement plan" may only be covered under Social Security under an agreement between the State and the Social Security Administration called a Section 218 Agreement.

Indian tribal governments are not treated as states for purposes of Social Security and Medicare taxes, and they may not enter into Section 218 Agreements.¹ Code Section 7871; IRS Publication 963 (2014), p. 5-17. Therefore, tribal employees generally are treated as private employees for purposes of Social Security. Their coverage under Social Security is mandatory and will continue if they join the Retirement System, notwithstanding its status as a "qualified replacement plan."

3. Dual Status as a Governmental and Non-Governmental Employer

Given the multi-facet composition of a Native American Tribe, the tribe may consist of employees who perform governmental functions and may participate in a governmental plan, and employees who perform commercial functions who will be governed by ERISA. To properly determine whether an employee performs a governmental function or a commercial function, the tribe will need to undertake the facts and circumstances test as set forth above. This likely would need to be done by the tribe, which will be in the best position to understand the role of each employee. However, the risk will fall upon the Retirement System if an employee has been misclassified. Additionally, the tribe could obtain a Private Letter Ruling ("PLR") from the IRS that the specific group of employees would be considered employees for whom substantially all of the services performed by the employee are in the performance of a governmental activity. However, as noted below, we think that it is unlikely that the IRS will issue a PLR while the Proposed Treasury Regulations are still pending. Furthermore, as noted above, admission of even one tribal government commercial employee into a governmental plan can jeopardize the status of the governmental plan.

II. RECOMMENDATIONS

In addition to the recommendations set forth above, we recommend the following:

- Sovereign Immunity² – Whether set out in the plan or provided for specifically in the agreement with the tribe (or both), it should be clearly set forth that participation in the Retirement Systems is contingent on a resolution from the tribe waiving sovereign immunity with respect to all disputes involving the interpretation of state statutes, plan language, and laws applicable to the

¹ In 2018, the "Tribal Social Security Fairness Act of 2018" was passed to allow tribal council members to enter into a Section 218 Agreement with the Social Security Administration. This addressed a 1959 IRS ruling which found that services performed by tribal council members did not constitute "employment" for FICA purposes.

² The language of the agreement with the tribe may determine how much and to what extent sovereign immunity will need to be waived.

Retirement System and that such disputes will be resolved in state court. The tribe should also agree to any requirements with respect to the timely payment of contributions and amounts due by the employer, including enforcement of the collection of such payments. Moreover, the tribe should agree to participation in perpetuity.

- Actuarial Survey – The Retirement System may want to consider requiring an actuarial survey. This would assist the tribe in determining whether it would be economically feasible for the tribe to participate in the retirement program.
- Nongovernmental Employees – Procedures should be put in place to ensure that the Retirement Systems do not allow admission of nongovernmental tribal employees. Ideally, this would be performed through a PLR process with admission contingent on a favorable PLR from the IRS. However, given that the Proposed Treasury Regulations have not been finalized, we do not think it is likely that the IRS would issue a PLR at this time. In fact, the IRS has not issued a PLR regarding the admission of tribal governments in a state plan since 2005. Moreover, given the change in administration, it is unclear whether the proposed regulations will proceed, and we cannot predict how this will impact the IRS' willingness to issue a PLR. As noted above, admission of even one tribal government commercial employee into a governmental plan can jeopardize the status of the governmental plan.
- Withdrawal Considerations – Any agreement with a tribal government to participate in the retirement system should take into consideration potential withdrawal of the entity. For example, it should be considered whether the tribal government's decision to withdraw results in a "soft-freeze" (meaning contributions will continue to be made for current members and the current members will continue to accrue service and benefits but the plan will be closed to new tribal government employees), a "hard-freeze" (contributions and continued accrual of benefits cease but the contributions remain in the plan until a distributable event occurs), a "spin off" to a new plan with a transfer of contributions (Code § 414(l), is not directly applicable to a governmental plan but provides useful guidance and Rev. Rul. 67-213 provides guidance regarding plan to plan transfers), or an employer termination (this would constitute a distributable event). Depending on the potential avenue LEOFF would like to consider, we can provide additional information regarding implementation of these options. In addition, LEOFF will want to consult with its actuaries regarding withdrawal liability and the amount of contributions which should be made to LEOFF prior to withdrawal. Importantly, we think consideration should be given to how the tribe and the system will handle the transient nature (from commercial to governmental and back to commercial) of some of the tribal employees, including educating the tribe on the need for accurate employee status reporting.

III. CONCLUSION

Very few states allow admission of tribal government employees into the state retirement system. With the exception of Arizona, those few states that have done so have typically limited admission to a select group of tribal government employees who perform state functions or have been empowered with authority under state law. For example, some states have allowed tribal police departments to participate when the tribal police departments have been empowered with state authority. See Appendix A.

There are several reasons which may contribute to the lack of inclusion of tribal employees in public retirement systems. For most public retirement systems, the definition of "employers" would not include Indian tribes. Furthermore, for the reasons stated above, admission in public retirement systems would necessarily require that the tribe waive sovereign immunity, and waiving sovereign immunity would be a step not taken lightly by a tribal government. In addition to the waiver of sovereign immunity, the tribe would also lose control over the retirement plan provisions if the tribe participated in the state retirement system. Another factor which may contribute to the lack of participation is the cost. Participation in a state retirement system may result in substantially higher costs than if the tribe participated in its own retirement plans. Furthermore, absent a PLR, admission of a tribe or a group of tribal employees carries risk that if a nongovernmental employee is allowed to participate in the governmental plan, the state plan's status as a qualified governmental plan could be jeopardized.

When it comes to retirement planning, it should be noted that tribal governments have other options. Tribal governments can create their own retirement plans. The retirement plans can be administered by the tribe or certain financial institutions can administer plan for the tribe. This allows tribal governments to maintain the protection of tribal sovereignty and independence from state governments. Tribal governments could also participate in a multiple employer plan with other tribes. These options would allow the tribes the ability to maintain sovereign immunity, independence from state governance and regulation, and retain control over the costs and plan provisions.

In sum, if a tribal government is allowed to participate in a public retirement system, caution must be exercised to limit admission to only those employee groups which perform essential governmental functions, and admission must be contingent on a waiver of sovereign immunity.

APPENDIX A: ANALYSIS OF OTHER STATES AND TRIBAL GOVERNMENTS

A. Private Letter Rulings

1. PLR 200404059 (01/23/2004)

In PLR 200404059, the state passed statutes which authorized the tribe to exercise the powers of a state law enforcement agency and to appoint state licensed peace officers with the same powers as peace officers employed by municipalities and counties if certain requirements were met. Specifically, the peace officers had to be licensed by state and comply with the state training standards. Moreover, the statute required that the tribal police department enter into mutual aid agreements with the county and city to define and regulate the law enforcement services and provide for mutual aid. In addition, the tribal police officers were required to agree to be subject to the supervision of the county sheriff's office and county attorney. Based on the facts and circumstances, the IRS concluded that the tribal police department would be considered an agency or instrumentality of the state and that participation in the state retirement system would not adversely affect the status of the Plan as a governmental plan. (Emphasis added.)

2. PLR 200514024 (04/08/2005)³

In PLR 200514024, it was requested that the IRS rule on whether a tribal police department was considered an agency of instrumentality of the state and could participate in the state retirement plan without adversely affecting the plan's status as a governmental plan. Specifically, the "State passed legislation treating the tribal police department as state law enforcement agencies and treating their police officers as state peace officers, provided certain requirements were met." To exercise state police powers, the tribal police department had to do the following: agree to be subject to liability for torts for its officers and employees acting within the scope of their employment, file a bond or certificate of insurance for liability coverage with the Board, and agree to be subject to the state laws relating to data practices of law enforcement agencies. The tribal police officers also had to meet the same licensure and training standards as other law enforcement officers in the state. Moreover, the tribal police department had to enter into mutual aid cooperative agreements with the county and city to define, coordinate, and regulate the law enforcement services on the reservation. Under the cooperative agreement, the tribal police department is under the supervision of the county sheriff and county attorney. The IRS determined that the tribal police department was an agency or instrumentality of the state for purposes of enforcing state law and that the contributions made by the tribal police department were contributions to a governmental plan within the meaning of Code Section 414(d), which would not adversely affect the status of the governmental plan. (Emphasis added.)

B. Arizona

ARIZ. REV. STAT. § 38-851(A) provides that any Indian tribe "may request to become a participating employer in the system on behalf of a designated eligible employee group. Upon a resolution from the Indian tribe, the tribe "shall be considered as a participating employer on proper execution of a joinder agreement in which the employer unconditionally accepts the

³ In addition, PLR 200541048 (10/14/2005) reached a similar conclusion and appears to be based on the same statutory language and facts as PLR 200514024.

provisions of the system and binds the employer's designated eligible employees to those provisions." Prior to participation, the Indian tribe must "request 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. The cost of such a survey shall be paid by [the] . . . Indian tribe" *Id.* at § 38-851(D). Additionally, the Indian tribe employer, by resolution, shall:

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.
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.

C. Florida

Florida created two special improvement districts within the reservations for the Seminole and Miccosukee tribes. FLA. STAT. § 285.17. The statute designated the governing bodies of the tribes as governing bodies of the special improvement districts. FLA. STAT. § 285.18. Specifically, the statute provides that law enforcement personnel shall have the privileges, protections, and benefits other peace officers receive under Florida law. FLA. STAT. § 285.18(2)(c)(2). It also requires that the officers meet state training standards. FLA. STAT. § 285.18(2)(d). Moreover, the statute provides that the special improvement districts may apply for coverage of their officers "under the state retirement system subject to necessary action by the districts to pay employer contributions into the state retirement fund." FLA. STAT. § 285.18(2)(d).

D. Michigan

In Michigan, the JKL Bahweting School had previously served as a tribal school sponsored by the Sault tribe. However, the school is now deemed a "public school academy" under the Michigan Revised School Code. The school is chartered by the Northern Michigan University and is funded through the state and the BIA. Given that it is deemed a "public school academy," the teachers participate in the Michigan Teachers' Retirement System.

E. Minnesota

Minnesota Statute 353.64, subdivision 11 provides the following:

- (a) The governing body of a tribal police department which is exercising state arrest powers under section 626.90, 626.91, 626.92, or 626.93 may request by resolution to the executive director that its police officers be considered public employees under section 353.01, subdivision 2, be considered a police officer under section 353.64, subdivision 1, and become members of the public employees police and fire retirement plan and that the tribal police department be considered a governmental subdivision under section 353.01, subdivision 6.
- (b) Following the approval of the request by the executive director, the head of the police department or that person's designee must immediately report for membership in the police and fire fund a person who is employed as a full-time or part-time police officer in a position that meets the conditions in sections 353.01, subdivision 2a, and 353.64, subdivisions 1 and 2. The police department head or that person's designee must deduct the employee contributions from the salary of each eligible police officer as required by section 353.65, subdivision 2, and make the employer contributions required by section 353.65, subdivision 3. The head of the police department or that person's designee must meet the reporting requirements in section 353.65, subdivision 4.

Notably, the original statutory language in 2000 required that the tribal police department obtain a PLR providing that (1) the tribal police department is an agency or instrumentality of the state of Minnesota for purposes of enforcing state law; and (2) contributions made by the tribal police department to a retirement plan on behalf of employees of the tribal police department are contributions to a governmental plan within the meaning of section 414(d) of the Internal Revenue Code.⁴ In 2008, the statute was amended to remove the PLR requirement.

⁴ PLR 200405015 references a state statute passed in 2000 authorizing a tribe's peace officers to become participants in the state plan contingent on receiving a favorable ruling from the IRS. Similar to the other PLRs above, the IRS noted that the state controlled the scope and conditions of the tribal peace officers, and the statute treated the officers as a political subdivision of the state. Thus, the IRS concluded that the peace officers were an instrumentality of the state and participation in the state plan would not adversely affect the status of the plan as a governmental plan.



Tribal Law Enforcement Study

Comprehensive Report
November 20, 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

Overview

- The Pension Protection Act of 2006 changed the definition of governmental plans to include Indian tribal plans “covering workers doing governmental work”
- However, there are federal restrictions and state laws that prevent some tribal employees from joining state governmental plans, including LEOFF 2

Issues

- Nongovernmental employee risk
- General Authority vs Limited Authority Tribal Police Officers
- Tribal Police survey results
- Retiree return to work impacts
- Withdrawal liability
- “Bakenhus” concerns

Nongovernmental Employee Risk

- Employees engaged in commercial activities are barred from joining
- If a governmental plan covers even one commercial employee, the plan risks losing its governmental plan status
- Police Departments are identified by the IRS as a governmental activity

IRS Test

1. **Whether the activities are commercial or governmental**
 - **Facts and Circumstances test**
2. **Whether an employee's duties are substantially in the performance of a governmental activity or a commercial activity**
 - the location of the employee's services
 - the source of the employee's payroll
 - the employee's assigned duties and responsibilities

Source of Employee's Payroll

- The IRS does not require that the funds from commercial activities and the funds from governmental activities remain completely separate
- The tribal police department may indirectly receive funding from revenue generated by commercial activity; however, the police officers must be on the payroll for the police department, not the commercial entity

LEOFF 2 Eligibility

- **Employer Eligibility**
 - Definition of employer would need to be amended to include tribal police departments
 - Opt-in vs. Mandated
- **Member Eligibility**
 - Employed by a LEOFF 2 employer
 - Full-time
 - Fully Compensated
 - Commissioned

Commissioned

- **General Authority**
 - 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.
- **Limited authority**
 - Typically covered by the Public Safety Employees' Retirement System (PSERS)

General vs. Limited Authority

- In 2008, tribal police officers gained the ability to act as general authority officers if the tribal government meets specific requirements regarding certification, insurance liability, and administration
- A general authority officer is any officer of a general authority law enforcement agency in the State

Tribal Police Department Certifications

- **11 Tribes have General Authority certification**
- **23 Tribes have CJTC certification for training officers**

Tribal Police Department Survey

- LEOFF 2 Board staff sent a short survey to all tribal police chiefs in Washington
- Twelve tribes responded
- Nine tribes expressed interest in joining LEOFF 2

Tribal Survey Results

- Interest - Recruitment and retention of high quality police officers
- Concerns -
 - How retired LEOFF 2 members would be affected?
 - What the general costs and benefits of the system are?
 - Whether all officers in a participating tribe would be required to join?
 - Whether every tribe would need to be a part of the system?
 - How tribal sovereignty would be impacted?

Tribal Police Department	Number of Full Time Officers	Average Salary	Average Age	Average Years of Service
Chehalis	18	\$80,154	37	7
Nooksack	8	\$61,380	33	5
Port Gamble S'Klallam	10	\$45,760	30	
Puyallup		\$96,063	45	15
Quileute		\$62,400	32	8
Quinault	10		37	6
Shoalwater Bay	5	\$60,000 - \$70,000	43	4
Stillaguamish	11	\$76,695	54	25 - 30
Suquamish		\$77,400	45	12
Upper Skagit	7	\$65,000	45	3

Retire Return to Work Impacts

- 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
- 2008 Early Retirement Factor restrictions for non-LEOFF 2 members working for the tribal police departments and potentially the tribe

Withdrawing from LEOFF 2

- **Joining a WA pension system is a permanent decision**
 - Cannot withdraw
 - Employers may dissolve
- **Tribal Compact Schools and Charter Schools**
- **Arizona Public Safety Personnel Retirement System**
 - Preliminary actuarial survey to determine cost of participation

Withdrawal Liability

- Some states do allow employers to withdraw
- Typical process requires:
 - decision by employer to withdraw;
 - employee vote to withdraw;
 - notification to the pension system;
 - accounting of liabilities;
 - payment of liabilities; and,
 - handling of vested and non-vested member accounts

“Bakenhus” Concerns

- **Tribal Compact Schools**

- Legislation allowing membership in TRS stated “[f]or tribal schools that opt out of pension plan participation, such schools' employees shall have no right to earn additional service credit in the plan.”

Decision Checklist for Policy Makers

- Who represents the State in compact process?
- Should a tribe's decision to join LEOFF 2 be irrevocable?
- Should limited authority tribal police officers be eligible for LEOFF 2?
- Should the State pay a percentage of contributions for tribes?
- Should tribes be required to complete an actuarial survey to have a full understanding of the costs associated with membership?
- Should tribal police officers be able to purchase retroactive service credit?

Next Steps

- No action required by the Board
- December Board Meeting
 - Final Presentation, including draft report to the legislature
 - Will include information from OSA regarding fiscal impacts
- Any issues/questions the Board would like to see addressed or expanded on in final report?



Thank You

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Tribal Compact Process

- Initial discussion between tribe and state
 - Who represents the parties?
- Draft the compact
 - Who is responsible for drafting?
- Signatures of approval
 - Who should sign?

Tribal Compact Outline

- Acknowledgment by the tribe that it affirmatively chooses to participate in LEOFF Plan 2
- Acknowledgement that the person(s) signing the compact on behalf of the tribe has authority to do so
- Agreement by the tribe that it meets the definition of a LEOFF Plan 2 employer
- Agreement by the tribe to adhere to all reporting, contribution, and auditing requirements and rules

Tribal Compact Outline

- Agreement by the tribe to a limited waiver of sovereign immunity and consent to the jurisdiction of the Washington State courts for the purpose of enforcing the reporting, contribution, and auditing requirements
- Agreement by the tribe that their decision to join LEOFF 2 is irrevocable