



December 18, 2019
Tribal Police Study

FINAL PROPOSAL

By Jacob White
Senior Research & Policy Manager
360-586-2327
jacob.white@leoff.wa.gov

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.

EXECUTIVE SUMMARY

When considering allowing Tribal Police Officers to become members of LEOFF Plan 2, the LEOFF Plan 2 Board identified six key issues that policy makers must address.

1. How to properly mitigate the risks of LEOFF Plan 2 losing its governmental plan status.

The greatest risk to LEOFF Plan 2 in allowing Tribal Police Officers to become members of LEOFF Plan 2 is that it potentially endangers the plans preferential tax status as a governmental plan with the Internal Revenue Service (IRS). The IRS allows for Tribal Police Officers to be members of a state retirement plan, so long as those officers are not engaged in commercial activities. If a governmental plan covers even one commercial tribal employee, the plan risks losing its governmental plan status. LEOFF Plan 2 would be heavily reliant on tribes to ensure that no employees being reported in LEOFF Plan 2 are engaged in commercial activities as part of their job. In addition to relying on the tribes, the Department of Retirement Systems (DRS) would need to have the same tools (i.e. employer audits, Administrative Procedures Act, etc.)

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>

currently at their disposal for monitoring and enforcing other employers' compliance with the rules and regulations of membership in the retirement system. Since tribes have sovereign immunity, which would otherwise prevent the State from enforcing this compliance, the tribes wanting to participate in LEOFF Plan 2 would need to sign a limited waiver of sovereign immunity for the purposes of being subject to the enforcement of the laws, rules, and regulations of the LEOFF Plan 2. This waiver should be part of a tribal compact between the tribe and the State.

2. Should limited authority Tribal Police Officers be eligible for a different retirement system?

Law Enforcement Officers are required to have general authority to be eligible for membership in LEOFF Plan 2. Existing law allows a path for tribes to have their officers be general authority. However, if tribes do not meet the criteria of this law, Tribal Police Officers are considered limited authority officers. Currently, most types of limited authority officers are covered by the Public Safety Employees' Retirement System (PSERS), instead of LEOFF Plan 2. This includes Liquor and Cannabis Board Enforcement Officers, Gambling Commission Special Agents, and Department of Natural Resources Police Officers. Allowing limited authority officers to join LEOFF Plan 2 would be a significant change in policy for LEOFF Plan 2, and would likely lead to other types of limited authority officers requesting to join LEOFF Plan 2. The tribal compact should also address the requirement for Law Enforcement Officers in LEOFF Plan 2 to be general authority.

3. Should tribes be allowed to opt-in to membership in LEOFF Plan 2?

Under current law, employers meeting the definition of a LEOFF Plan 2 employer are mandated into membership. 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. Based on a survey conducted by LEOFF Plan 2 staff, it is clear that not all tribes want to join LEOFF Plan 2. Therefore, to limit membership to only those tribes who want to join 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, and may lead to other employers requesting the choice to opt-in to membership in LEOFF Plan 2. However, it is a significant distinction that tribes have sovereign immunity while existing LEOFF 2 employers do not.

4. Should a tribe's decision to join LEOFF 2 be irrevocable?

Another potential risk of allowing tribes to become employers under LEOFF Plan 2 is the financial risk to the plan if tribes join and then determine they no longer want membership in LEOFF Plan 2. If tribes are allowed to join LEOFF Plan 2, the law should address whether this decision is irrevocable. If it is revocable, the law should identify what the process and liability of withdrawing from membership includes and the tribal compact should address the specific process and requirements, including the calculation of withdrawal liability. Currently, LEOFF

Plan 2 does not address these issues because membership is mandatory and there is no option to leave membership. In the State's other pension systems that allow for employers to opt-in, that decision is irrevocable.

5. Should the State pay a percentage of contributions for tribes?

If Tribal Police Officers are allowed into LEOFF Plan 2 the law will need to address what percentage of contributions the employer and the State pay. The current cost-sharing method applied to a majority of LEOFF Plan 2 employers is 50 percent of contributions are paid by the member, 30 percent by the employer and 20 percent by the State. However, for Port Districts and institutions of higher education, the member and employer each pay 50 percent and the State pays zero percent.

6. Should Tribal Police Officers be able to purchase retroactive service credit?

An issue that usually 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. If Tribal Police Officers are allowed to purchase past service credit in LEOFF Plan 2, the law must address who will pay the full actuarial cost of the benefit to limit the financial impact to LEOFF Plan 2. Typically, the member is responsible for the full actuarial cost of the service credit; however, there have been instances in which the employer has paid a portion of the cost, or the pension plan has subsidized a portion of that cost.

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 IRS through a two part test.⁶ 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

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.

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 indirectly receive funding from revenue generated by commercial activity; however, the police

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.

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 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.¹⁵ 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.¹⁶ 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 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.

¹⁵ Wsgc.wa.gov. (2019). *Gaming Compacts* / Washington State Gambling Commission. [online] Available at: <https://www.wsgc.wa.gov/tribal-gaming/gaming-compacts>.

¹⁶ Goia.wa.gov. (2019). *Cigarette Compacts* / GOIA. [online] Available at: <https://goia.wa.gov/resources/cigarette-compacts>.

In 2015, House Bill 2000 authorized the Governor of Washington State to enter into marijuana compacts with federally recognized Indian Tribes, codified at 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.

In order for Tribal Police Officers to become members of LEOFF Plan 2, a retirement compact would need to be negotiated and signed by the Governor and tribal chair, or designee. 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

The process of creating a tribal compact for tribes to join LEOFF Plan 2 would 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 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, which must include the Governor and tribal chair, or designee. In addition to the Governor's signature, the State may also want to consider having the Director of DRS sign the agreement as well.

If tribal police departments are made eligible to join LEOFF Plan 2, then the retirement compacts should include at a minimum 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 tribe that the tribal police department meets the definition of a LEOFF Plan 2 employer as defined in RCW 41.26.030.
- Agreement by the tribe that it will 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.
- Agreement by the tribe to withdrawal procedures and liability.

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 are the ongoing costs to the tribe?
- How would this affect LEOFF Plan 2 retirees currently employed by the tribe?
- How would this affect retirees from other Washington State pension plans employed by 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.”¹⁷

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

- Employed by a LEOFF Plan 2 employer;
- Commissioned;
- Full-Time; and,
- Fully Compensated.¹⁸

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;

¹⁷ 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>.

¹⁸ 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>.

- 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.¹⁹

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).²⁰ 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 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.” 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

¹⁹ id.

²⁰ 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>

authority law enforcement agency in the State.²¹ 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.²²

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.”²³ 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).²⁴

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.²⁵ 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 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

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 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>.

²³ 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>.

²⁴ 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>.

²⁵ 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>.

limited authority Tribal Police Officers to 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	
Quinault	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			

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	29	\$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.

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 percent²⁶.

Actuarial Analysis

The LEOFF Plan 2 Board requested OSA to prepare an actuarial analysis (see Appendix B) on the potential impact of tribal law enforcement officers joining LEOFF Plan 2. Since there is not a proposed bill to analyze, OSA worked with LEOFF 2 Board staff to make various assumptions to assist with their analysis, including that the pricing should be for prospective service only and that it would be optional for the tribes to join LEOFF Plan 2.

OSA utilized the data gathered by LEOFF Plan 2 staff in the survey of tribal police departments. OSA assumed a hypothetical group of 100 new entrants to LEOFF Plan 2 with an average age of 40, with 10 years of experience, and an average annual salary of \$72,000. OSA’s analysis showed an expected impact to LEOFF Plan 2 contribution rates of 0.02% to members, 0.01% to employers, and 0.01% to the State. This impact on contribution rates is based on an expected increase of \$20 million to the actuarial present value of projected benefits. If fewer than 100 tribal law enforcement officers join LEOFF Plan 2, the rate impact would be less, and if more officers join the rate impact would be more.

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.

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

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 service credit, and have their LEOFF Plan 2 retirement benefit suspended until the employment covered by the new retirement plan ends.²⁷

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 retired from other Washington State pension systems. 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.²⁸ 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*.²⁹ 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.

²⁷ 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>.

²⁸ 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>.

²⁹ *Romero v. Department of Retirement Systems*, Cause No. 18-2-04400-1

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 applied to a majority of LEOFF Plan 2 employers is 50 percent of contributions are paid by the member, 30 percent by the employer and 20 percent by the State.³⁰ However, for Port Districts and institutions of higher education, the member and employer each pay 50 percent and the State pays zero percent.³¹

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.³²

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.³³ An employer can only withdrawal from membership by dissolving. When an employer dissolves, the plan subsidizes the costs associated with the liability of the employer.

³⁰ 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>.

³¹ 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>.

³² Rollover Chart. (2019). Available at: https://www.irs.gov/pub/irs-tege/rollover_chart.pdf.

³³ 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>.

While the majority of states do not allow employers to withdraw from their pension systems, some states allow for withdrawal. These plans typically follow procedures similar to those required of private ERISA covered multi-employer plans. Under ERISA, employers are required to pay “withdrawal liability” to leave the plan.³⁴ 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).³⁵

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.³⁶

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.”³⁷ Two tribal police departments and one tribal fire department in Arizona are currently participating in the Arizona Public Safety Personnel Retirement System.³⁸ According to OSA, 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 conduct 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 [...]”.³⁹ 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

³⁴ 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>.

³⁵ id.

³⁶ Handling Withdrawals from Multi-Employer Public Pension Plans. (2015). [online] Available at: https://www.nappa.org/assets/docs/ArchivedConferenceMaterials/2015ConferenceAustin/nappa_2015%20wed_terminatingemployersoutsourcingemployees.pdf

³⁷ Azleg.gov. (2019). *Arizona Revised Statutes*. [online] Available at: <https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/38/00851.htm>.

³⁸ 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.

³⁹ 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>

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 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 Re: Overview Regarding Admission of Tribal Police to Public Retirement System, October 14, 2019.

Appendix B: Office of the State Actuary Memo Re: Actuarial Analysis for the LEOFF 2 Board Tribal Participation Study, November 27, 2019.

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.



Office of the State Actuary

"Supporting financial security for generations."

November 27, 2019

Steve Nelsen
Executive Director
LEOFF Plan 2 Retirement Board
P.O. Box 40918
Olympia, Washington 98504

RE: ACTUARIAL ANALYSIS FOR THE LEOFF 2 BOARD TRIBAL PARTICIPATION STUDY

Dear Steve:

At your request, we prepared actuarial analysis on the potential impact of tribal law enforcement officers joining the Law Enforcement Officers' and Fire Fighters' Retirement System Plan 2 (LEOFF 2). Using data provided by LEOFF 2 Board staff, we estimated the impact to contribution rates of a hypothetical group of tribal law enforcement officers entering the plan. This letter shows the results of those calculations along with how the impacts could change when the demographic make-up of the group varies.

Overall, our analysis shows that the hypothetical group could lead to an increase in contribution rates. *If this proposal were to become law, the actual impact could be more or less than illustrated in this letter.*

Actuarial Results

For the purposes of this analysis, we relied on survey data provided by the LEOFF 2 Board staff to develop the hypothetical new entrant group. This data informed our selection of average member statistics and a potential impacted headcount. Please see **Appendix A** for further details.

The hypothetical group we priced is comprised of 100 members, average age 40, with 10 years of experience, and an average salary of \$72,000. The following table outlines the expected impact to contribution rates under this illustration

Impact on Contribution Rates	
	LEOFF 2
Employee	0.02%
Employer	0.01%
State	0.01%



These contribution rate impacts are based on estimated increases to both liabilities and the projected salaries over which future contributions to the plan will be funded. See **Appendix B** for further details.

How These Results Could Change

The results of our analysis depend on the hypothetical group of tribal law enforcement officers we assume join the plan. Changes to this group, or to the assumptions regarding the proposal, may produce different results. For each of the following scenarios, we modify one assumption and keep all other assumed demographics the same as our underlying estimate above.

1. If more or fewer tribal law enforcement officers join the plan, we would see a relatively linear increase/decrease to the contribution rate impact shown above. For example, if 150 tribal law enforcement officers were to join instead of 100, we expect the contribution rate impacts outlined above would increase by 50 percent.
2. If average compensation is greater than we assumed for the hypothetical group, we see an increase to the contribution rate impact. Note that changes to compensation also produce a relatively linear impact to the contribution rate. For example, a 20 percent increase to average salary results in approximately the same percent change to the contribution rate impact shown above.
3. If officers joined and they were granted past service credit commensurate with their years of experience, we would expect to see more than double the impact to the contribution rates shown above. Under this scenario, we assumed there are no offsetting assets, or rather no prior contributions for prior service are made on behalf of the members, and thus there would be a decrease to the funded status. If prior contributions were made by either the employer, state, or member, then we would expect less of an impact to the contribution rates and funded status.

We do not anticipate this proposal will have material impacts to the risk measures of the state retirement systems. As noted in the prior section of this letter, material changes in the underlying demographics of the hypothetical group generally don't have major impacts overall to the LEOFF 2 retirement system.

Disclosures

We prepared this preliminary analysis based on our understanding of the proposal provided in your email dated September 27, 2019, and our understanding of [Engrossed Substitute House Bill 1109, section 141](#), which requires the Office of the State Actuary (OSA) to provide fiscal analysis for the Tribal Participation Study at the direction of the LEOFF 2 Board staff. We relied on the LEOFF 2 staff for the intent and scope of this analysis.

Should the proposal become a bill in the upcoming session, any preliminary analysis provided here may change for a variety of reasons. Bill language that varies from the proposal could impact the data, assumptions, and methods used in our analysis. Further, there may be additional time to collect data, collaborate with the Department of Retirement Systems and LEOFF 2 Board staff, and further review the impacts to provide more robust analysis beyond what we were able to provide in this letter.



We intend this analysis to be used by the LEOFF 2 Board during the 2019 Interim as supplemental information to the Tribal Participation Study. If a party other than the LEOFF 2 Board or their staff reads this communication, they should address questions to OSA and seek professional guidance with the content and interpretation of this communication. The analysis presented in this letter and attached Appendices should be read as a whole. Distributing or relying on only portions of this communication could result in misuse and may be misleading to others.

This analysis, like most actuarial analysis, will quickly become outdated. Changes to the demographics of the impacted plans, the assets, or the assumptions used to develop this analysis can impact the results presented here. This analysis will become outdated once the *2019 Actuarial Valuation Report* (AVR) is available or additional applicable data is obtained.

We prepared this analysis and provided opinions in accordance with Washington State law and accepted actuarial standards of practice as of the date shown in the footer of this letter. The undersigned meets the Qualification Standards of the American Academy of Actuaries to render the actuarial opinions contained herein. While the analysis provided in this communication is meant to be complete for the intended purpose, the undersigned is available to offer extra advice and explanations as needed.

Sincerely,

Lisa A. Won, ASA, FCA, MAAA
Deputy State Actuary

Appendix A: Data, Assumptions, and Methods

Appendix B: Impact to Liabilities and Salaries

cc: Tim Valencia, Deputy Director
LEOFF Plan 2 Retirement Board
Jacob White, Senior Research & Policy Manager
LEOFF Plan 2 Retirement Board
Graham Dyer
Senior Actuarial Analyst
Mitch DeCamp
Senior Actuarial Analyst

O:\LEOFF 2 Board\2019\12-18\Tribal.Participation.Study.docx



APPENDIX A – DATA, ASSUMPTIONS, AND METHODS

LEOFF 2 Board staff provided our office the tribal law enforcement survey data produced as part of their Tribal Participation Study. Among other questions, the survey asked tribal law enforcement departments for key demographic values about the officers employed at their respective departments.

These demographics include:

- ❖ Number of Law Enforcement Officers.
- ❖ Average Age.
- ❖ Average Salary.
- ❖ Average Years of Experience.

Based on the departments that responded to the survey, we formed a hypothetical average member. We used the sum of officers across all responding departments to determine the number of hypothetical members to add to our model. We assumed all these members would enter the plan without past service credit, but we used the average years of experience to approximate their attained level of career advancement. The level of career advancement impacts assumptions about future compensation growth and the chance that the member might terminate employment. Generally, the less/more service the greater/less the members compensation will grow and greater/less the chance the member will terminate employment. We assumed 90 percent of members entering the plan would be male and 10 percent would be female.

We relied on this data from the LEOFF 2 Board staff and inherently the tribal law enforcement departments. We did not audit this data, but determined it was substantially complete and reasonable for purposes of this illustration.

The table below shows the key demographics we used in the **Actuarial Results** section.

New Member Profile	
	LEOFF
New Members	100
Average Age	40
Average Compensation	\$72,000
Years of Experience*	10

**We use Years of Experience to approximate career advancement. It is not used to determine eligibility or benefits.*

We believe the assumptions and methods selected for this illustration are reasonable and appropriate for the purposes of this analysis. Unless otherwise noted, the assets, data, methods, and assumptions are consistent with our [2018 AVR](#), available on our website.



APPENDIX B – IMPACT TO LIABILITIES AND SALARIES

Impact on Pension Liability (Actuarial Present Value of Projected Benefits)*			
(Dollars in Millions)	Current	Increase	Total
LEOFF 2	\$14,846	\$20	\$14,866

**The value of the total commitment to all current members.*

Actuarial Present Value of Future Salaries*			
(Dollars in Millions)	Current	Increase	Total
LEOFF 2	\$21,915	\$99	\$22,014

**The value of the future salaries expected to be paid to current members.*



Tribal Law Enforcement Study

Final Report
December 18, 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

6 Key Decisions for Policy Makers

1. How to properly mitigate the risks of LEOFF 2 losing its governmental plan status?
2. Should limited authority tribal police officers be eligible for PSERS?
3. Should tribes be allowed to opt-in to membership in LEOFF 2?
4. Should a tribe's decision to join LEOFF 2 be irrevocable?
5. Should the State pay a percentage of contributions for tribes?
6. Should tribal police officers be able to purchase retroactive service credit?

How to properly mitigate the risks of LEOFF 2 losing its governmental plan status?

- One commercial tribal employee enrolled into the plan jeopardizes plan status
- DRS must have ability to audit the employer, and enforce the laws, rules and regulations of the plan
- Tribal Compact with limited waiver of Sovereign Immunity

Should limited authority tribal police officers be eligible for a different retirement system?

- Existing law allows a path for tribes to have their officers be general authority
- Tribal Police Officers are considered limited authority officers, unless the tribe and the officer have met certain criteria under this law
- Limited authority officers are currently covered by the Public Safety Employees' Retirement System (PSERS), instead of LEOFF 2

Should tribes be allowed to opt-in to membership in LEOFF 2?

- Employers meeting the definition of a LEOFF 2 employer, are mandated into membership
- 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 2 without the tribe waiving sovereign immunity

Should a tribe's decision to join LEOFF 2 be irrevocable?

- Financial risk to the plan if tribes join LEOFF 2 and then determine they no longer want to be members
- Currently, no Washington State pension system allows for withdrawal
- If tribes are allowed to withdraw, the law should identify what the process and liability of withdrawing from membership includes

Should the State pay a percentage of contributions for tribes?

- Law must address what percentage of contributions the employer and state pay
- Most LEOFF 2 Employers – 50% Member/30% Employer/20% State
- Port Districts/Higher Ed. – 50% Member/50% Employer/0% State

Should tribal police officers be able to purchase retroactive service credit?

- If allowed, the law must address who will pay the full actuarial cost of the benefit in order to limit the financial impact to LEOFF 2
- Typically, member pays full actuarial cost
- Some instances where employer paid a portion, or where LEOFF 2 subsidizes a portion of the cost

Actuarial Analysis

New Member Profile	
	LEOFF
New Members	100
Average Age	40
Average Compensation	\$72,000
Years of Experience*	10

**We use Years of Experience to approximate career advancement. It is not used to determine eligibility or benefits.*

Rate Impact

Impact on Contribution Rates	
	LEOFF 2
Employee	0.02%
Employer	0.01%
State	0.01%

Next Steps

- Approve Final Report to send to Legislature



Thank You

Jacob White

Senior Research & Policy Manager

(360) 586-2327

jacob.white@leoff.wa.gov