



Understanding the Tribal Tax and Investment Reform Act (S.2022)

Section 4 of the Tribal Tax and Investment Reform Act: Parity for Tribal Government Pension & Retirement Benefit Plans

Section 4 of the Tribal Tax and Investment Reform Act amends federal tax law to bring Tribal government employee retirement and benefit plans on par with state and local government plans. Tribal governments must segregate employee benefit plans based on whether employees perform “governmental” or “commercial” activities—a requirement not imposed on states. Section 4 removes these “essential governmental function” and “commercial activity” tests to qualify as a “governmental plan” exempt from ERISA coverage. This allows Tribes to administer a single comprehensive plan for all Tribal employees. For context, as of 2018, *Tribal retirement plans affect about 198,000 Tribal and non-Tribal employees in the casino gaming industry alone*, which was 35 percent of people employed in that industryⁱ. This is in addition to the thousands of Tribal public and business employees.

Background: Tribal Pension and Retirement Plans

The Employee Retirement Income Security Act (ERISA) of 1974 sets minimum participation, transparency, and fiduciary standards for employee retirement and health benefit plans.

Employee benefit plans sponsored by governmental entities are exempt from ERISA coverage. However, ERISA's original definition of “governmental plan” did not expressly mention plans established or maintained by Tribal governments. Tribes generally assumed that Tribal retirement plans were governmental plans exempted from ERISA. This understanding went unchallenged by the Department of Labor and the IRS for over 20 years.

However, as Tribal economic activity grew to become a significant source of Tribal governmental revenue, the DOL and IRS questioned whether Tribes qualified as “governments” under ERISA. Unfortunately, after a convoluted legislative process without adequate Tribal input, Congress clarified in the Pension Protection Act (PPA) of 2006 that Tribal plans can qualify as governmental plans if compliant with special restrictions. Under the PPA, Tribal retirement plans are entitled to governmental plan status if the services of employees covered by the plan are “*in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function)*”ⁱⁱ.

In practical terms, any Tribal retirement plan that includes employees of a revenue-generating Tribal enterprise is deemed commercial and treated like a private-sector plan under ERISA and the Internal Revenue Code (IRC). The IRS issued temporary notices in 2006 and 2007 allowing Tribes to operate in “good faith” compliance pending regulations. A draft regulatory framework of 2011 attempted to delineate which Tribal activities are “governmental” vs. “commercial,” but no final regulations or clear guidance have ever been issued.

Key Takeaways

Under current law, Tribes are hindered from providing a unified pension program for Tribal enterprise employees whose work ultimately supports Tribal government functions. Section 4 remedies this disparity by:

Removing “Essential Governmental Function” and “Commercial Activity” Tests. This ensures that all Tribal employees can be covered under a single plan without jeopardizing the plan's status as a governmental plan.

Creating Parity for Tribes under the Internal Revenue Code.

Section 4 amends related provisions of the IRC to accommodate a clear governmental plan status for Tribal employee benefit plans.

Establishing Uniform Fiduciary Standards and Participant Protections for Tribal plans with at least 500 participants.

Consequences for Tribal Governments of Current Legal Constraints

The PPA requirement that Tribal retirement plans only qualify for “governmental plan” status if plan participants perform essential governmental functions, while disqualifying plans if participants perform commercial activities, is fundamentally at odds with Tribal governance. Because Tribes lack broad tax bases, Tribes rely heavily on commercial activity, including gaming, natural resource development, federal contracting, and tourism, to generate revenue to fund public services. Similarly, states and municipalities freely use public enterprises engaged in commercial activity, such as lotteries, utilities, golf courses, and convention centers, to generate governmental revenue. Unlike Tribes, the governmental status of states and municipal retirement plans is not dependent upon the underlying employment activities of plan participants.

The most immediate burden imposed by the current law is the requirement of dual plan administration or the administration of a single compromised plan to comply with ERISA. For example, a Tribe with government employees (teachers, police, health workers) could have a government plan for these employees and an ERISA-governed plan for enterprise employees (casino, hotel, or retail staff). This dual structure creates redundant administrative costs and complexities and forfeits economies of scale that a single consolidated plan could achieve. If a Tribe cannot feasibly administer two plans, the Tribe might choose to cover all employees under a single ERISA-regulated plan. But doing so subjects even the Tribal governmental workers to ERISA rules, which are less advantageous than ERISA-exempt plans. Conversely, Tribes that maintain a governmental plan for core services might offer no retirement plan to employees of Tribal enterprises to avoid ERISA rules. This may leave a significant segment of Tribal employees with inferior or no benefits.

Section 4: Treatment of Pension and Employee Benefit Plans Maintained by Tribal Governments

Removal of “Essential Governmental Function” and “Commercial Activity” Tests: Section 4 ensures that all Tribal employees can be covered under one plan without jeopardizing the plan’s governmental status by eliminating the “essential governmental function” and “commercial activity” limitations for Tribal plans. This repeal remedies the core inequity: Tribes will no longer have to parse which jobs are “governmental enough” – a determination that is administratively burdensome. A Tribal government’s plan will qualify based on the Tribe’s status as a government with no distinction based on the nature of the services performed by plan participants.

Parity for Tribes under the Tax Code: Section 4 amends related provisions of the IRC to accommodate the clear governmental plan status of tribal employee benefit plans. The changes include:

- Ensuring Tribal and state employees receive the same penalty-free distribution rights;
- Allowing Tribal sponsors to offer 457(b) deferred compensation plans;
- Grandfathering existing Tribal 457 plans that were set up in good faith before the passage of the PPA; and
- Exempting Tribal 401(k) plans from a recent mandate to cover long-term part-time workers.

Uniform Fiduciary Standards and Participant Protections: Section 4 imposes uniform protections and fiduciary standards on any Tribal retirement plan with at least 500 participants. Tribal plan fiduciaries will be required to act solely in the interest of participants and beneficiaries to provide benefits and defray reasonable expenses. Tribes must also diversify investments and follow plan documents consistent with these duties. Tribal plan sponsors would be prohibited from retaliating against employees for exercising plan rights. Tribal plans cannot be structured in a way that discriminates in favor of highly compensated employees. These protections ensure that granting Tribal plans full governmental status will not leave participants unprotected by strengthening oversight of Tribal plans through standards that will be enforceable in Tribal courts.

ⁱ *Economic Impact of the US Gaming Industry*, Am. Gaming Ass’n, June 2018, at 15, <https://www.americangaming.org/wp-content/uploads/2018/06/OE-AGA-Economic-Impact-US-2018-June.pdf>.

ⁱⁱ 26 U.S.C § 414(d) (2018) (emphasis added).