



ERISA for Tribes and Tribal Enterprises

National Native American Human Resources Association
Annual Conference

Cherokee, North Carolina | September 25, 2017

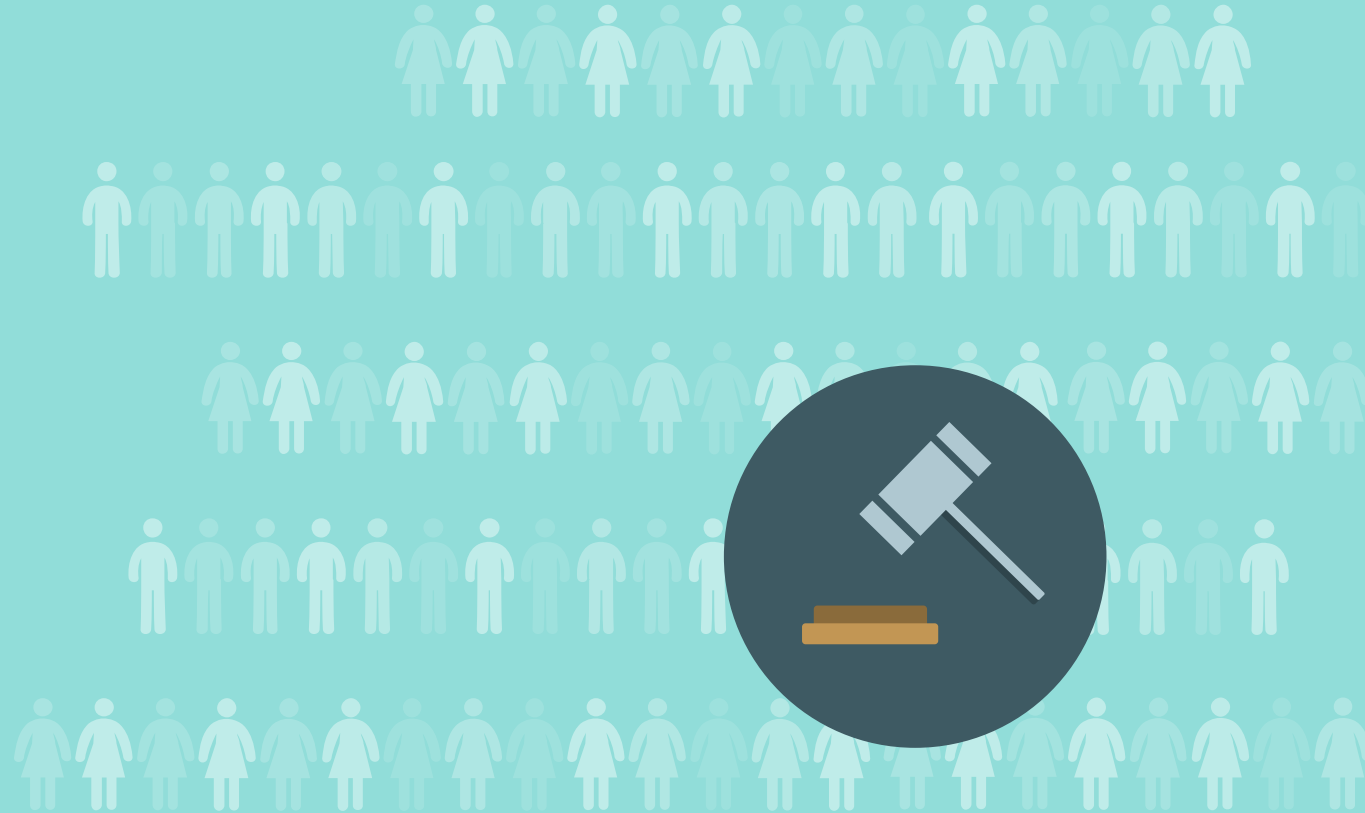


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What is ERISA?

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- A comprehensive body of federal law governing **employer**-sponsored **employee** benefit plans.
- An acronym for a federal law officially named the **Employee Retirement Income Security Act** of 1974, as amended.
- A result of pension scandals in the 1950 and 60s, which left many workers empty-handed despite their employers' promise of a pension.
- At it's core, ERISA is a law to protect workers with respect to their promised employee benefits.
- Despite its name, ERISA applies to much more than pension benefits.



Applying ERISA to Tribes

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- ERISA is a statute of general applicability, applying to all employers engaged in commerce or in any industry or activity affecting commerce unless an exceptions applies.
- ERISA contains statutory exceptions for “governmental plans” and “church plans”.
- Prior to 2006, it was unclear whether “governmental plans” included plans sponsored by tribal entities.
- PPA of 2006 amended ERISA’s definition of “governmental plans” to include a plan established and maintained by an Indian tribe when 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).



Applying ERISA to Tribes

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- Neither the IRS or DOL will provide an individual ruling on whether a particular tribal benefit arrangement constitutes a “governmental” or “commercial” plan.
- PPA amendments created need for many tribes to bifurcate benefit arrangements, creating two separate plans – one plan for “governmental” employees and another plan for “commercial” or enterprise employees.
- Failure to maintain separate arrangements for “governmental” versus “commercial” employees would generally make the entire arrangement subject to ERISA.
- IRS GUIDANCE: A governmental plan includes a plan of a tribal government all of the participants of which are 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. IRS Notice 2006-89.



Applying ERISA to Tribes

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- IRS Proposed Regulations issued in 2011 provide that whether a plan is “governmental” versus “commercial” depends on the nature of the activities and whether the covered employees are “commercial” or “governmental”. Examples of specific governmental activities include: building of public roads, sidewalks and public buildings; criminal protections services such as police and fire departments; and civil and administrative services, such as schools and hospitals for tribal members.
- Prop regulations further provide a facts and circumstances test for determining whether an activity is governmental or commercial:
 - ✓ Whether the activity provides a public benefit to members of the tribal government (not treating profits from commercial activities as such)
 - ✓ The absence of one or more of the following (used for determining whether an activity is commercial in nature)
 - For-profit operations
 - Same type of activity as performed by private businesses
 - Customers are substantially from outside of the tribal community
 - Location of the business activity (inside/ outside tribal land)



Applying ERISA to Tribes

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- Examples of governmental activities include:
 - ✓ A community swimming pool on tribal land used primarily by tribal members
 - ✓ The operation of a cultural center and museum on tribal land
- Examples of activities of a tribal government that might be commercial in nature include:
 - ✓ Operating a bank for profit, serving both tribal and non-tribal customers
 - ✓ Operating a trucking business for profit
 - ✓ Operating a factory producing goods for sale primarily to non-tribal customers
- Common employment practices of tribal entities make it difficult to determine whether the employee is “governmental” or “commercial”:
 - ✓ Shared employees as between governmental and commercial arms
 - ✓ Employees who transfer between tribal entities
 - ✓ Governmental employees who work at commercial enterprise on weekends.

ERISA Covered Plans

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- ERISA applies to 2 categories of employee benefit plans – “employee pension plans” and “employee welfare benefit plans”
- Application of ERISA to “welfare benefit plans” is commonly misunderstood. ERISA Section 3(1) requires four basic elements: (1) a plan, fund or program (2) established or maintained by an employer (3) for the purpose of providing covered benefits (4) to participants and their beneficiaries. Covered benefits include: medical, surgical or hospital care or benefits; benefits in the event of sickness, accident, disability, death or unemployment; vacation benefits; apprenticeship or other training benefits; daycare centers; scholarship funds; prepaid legal services; holiday and severance benefits; and housing assistance benefits.
- Many benefit programs that technically fit the definition of an ERISA welfare benefit plan have been specifically excepted by DOL regulation. Examples include:
 - ✓ Certain unfunded income replacement programs (*i.e.*, uninsured short-term disability programs)
 - ✓ Voluntary employee-pay-all programs (*i.e.*, individual cancer policies)
 - ✓ Many other types of ancillary benefits unfunded and paid through the employer’s general assets
- Commonly overlooked ERISA welfare benefit programs include EAPs, health flexible spending accounts, onsite clinics, prescription drug programs, HRAs and certain HSAs.

ERISA Compliance

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- **Enforcement**

- ✓ Department of Labor's Employee Benefits Security Administration (EBSA)
- ✓ Department of Treasury's Internal Revenue Service (IRS)
- ✓ Pension Benefit Guaranty Corporation (PBGC)

- **Fiduciary Rules**

- ✓ Act solely in the interest of plan participants and their beneficiaries (exclusive benefit rule)
- ✓ Carry out duties prudently (prudent expert standard; procedural prudence)
- ✓ Duty to diversify plan investments
- ✓ Follow plan documents (unless inconsistent with ERISA)
- ✓ No Self-Dealing (prohibited transactions)

- **Documentation**

- ✓ Employers must maintain a written plan document and a summary plan description (SPD).
- ✓ Certain circumstances require a wrap document, summary of material modification (SMM) or summary of benefits and coverage (SBC).
- ✓ Additional documentation and disclosure may be required for particular plans (*e.g.*, COBRA notice or a blackout notice).

- **Reporting, Recordkeeping & Bonding**

- ✓ Annual Form 5500 (government filing); summary annual report (SAR) (provided to participants)
- ✓ Records must be maintained sufficient to support information included in these filing for 6 years. Failure to satisfy these and other requirements can result in significant penalties to employers.
- ✓ Fidelity bond required for most types of plans having "plan assets".

Tribal Plan Best Practices

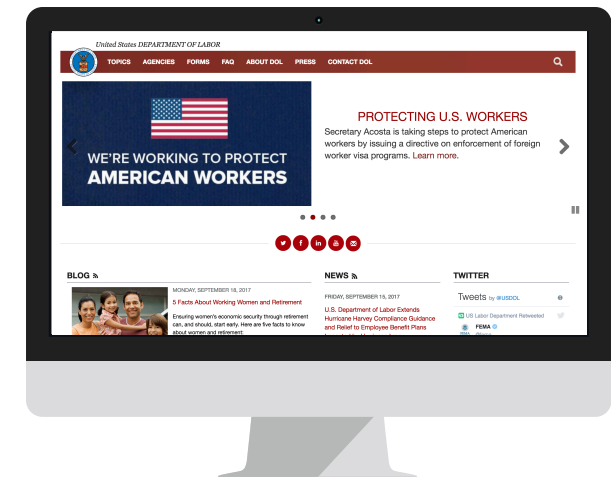


- Form a Fiduciary Committee
- Create a Quarterly Compliance Checklist
- Document Decision-making (procedural prudence)
- Develop an investment policy statement (404(c) compliance, diversification, *etc.* can be more easily managed with a policy)
- Fiduciary Training (know when to hire an expert)
- Fiduciary Liability Insurance
- Focus on Participant Outcomes (best interest of plan participants)
- Ensure that all plan fees are reasonable
- RFP
- Monitor vendor performance (*i.e.*, vendor audit)
- No Self-Dealing (exclusive benefit rule; prohibited transactions)
- Consider appropriateness of prototype plan documents
- Plan documents should include language protecting sovereignty where applicable (*i.e.*, choice of law provisions)
- Governmental plans should include language to that effect

DOL Guidance Online

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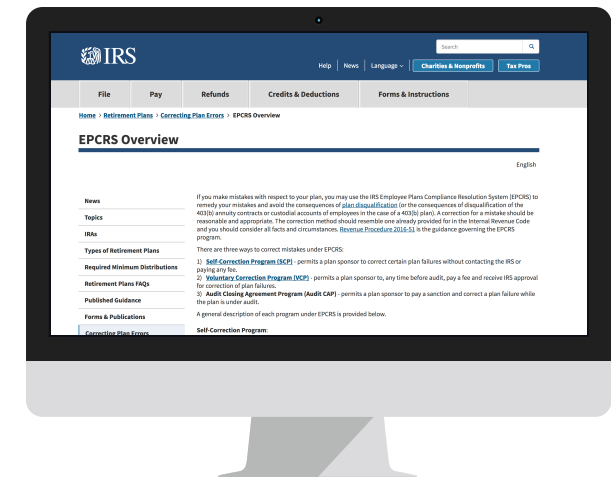
- Meeting Your Fiduciary Responsibilities
www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf
- Outsourcing Employee Benefit Plan Services
www.dol.gov/sites/default/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2014ACreport3.pdf
- Tips for Selecting & Monitoring Your Benefit Plan Vendors
<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/fs052505.html>



Correcting Common Errors

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- Form 5500 – late or missed filings
www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/dfvcp.pdf
- Participant Contributions – late or missed deposits
www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/faq-vfcp.pdf
- IRS Employee Plans Compliance Resolution System (EPCRS)
www.irs.gov/retirement-plans/epcrs-overview
- IRS 401(k) Plan Fix-It Guide
www.irs.gov/retirement-plans/401k-plan-fix-it-guide



“ERISA is a complex and reticulated statute.”

Mertens v. Hewitt Associates, 508 U.S. 248 (1993).

Definition of Reticulate: Resembling a net or network; especially: having veins, fibers, or lines crossing – a reticulate leaf.

From Merriam Webster's Online Dictionary www.merriam-webster.com



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