

**NATIVE AMERICAN RETIREMENT PLANS:  
THE LAW IN THE AFTERMATH OF  
THE PENSION PROTECTION ACT OF 2006**

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NATIVE AMERICAN RETIREMENT PLANS: THE LAW IN THE AFTERMATH OF  
THE PENSION PROTECTION ACT OF 2006

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I. INTRODUCTION

The evolution of retirement plans for Native American tribes has followed the evolution of the tribes themselves. As tribes have developed natural resources such as oil and gas reserves, taken advantage of their sovereignty to establish casino gaming and its accompanying hospitality businesses, and developed other commercial enterprises both on and off the reservations, their need to recruit and retain employees in numbers beyond those that can be sustained by tribal members has increased. The continuing need to develop human resources has led many Native American tribes to establish employee benefit plans that have been common in private businesses for decades. In many cases the implementation of such plans has been accomplished without attention to the unique nature of businesses maintained by sovereign nations, or to the legal precedent governing how federal law applies to such plans.

As sovereign nations, the tribes function as governments, with the power to govern and regulate internal affairs through the enactment and enforcement of substantive law.<sup>1</sup> Notwithstanding their sovereignty, Congress retains the

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1. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (membership in tribe);

power to modify the tribes' self-governance and has exercised that power in many areas over the years.

The Employee Retirement Income Security Act of 1974 ("ERISA")<sup>2</sup> regulates employee benefit plans and applies to all employers engaged in commerce, or in any industry or activity affecting commerce.<sup>3</sup> ERISA imposes coverage, participation, discrimination, and fiduciary requirements on employers who maintain tax qualified retirement plans for their employees.<sup>4</sup> Most retirement plans for Native American tribes were implemented in compliance with ERISA. This is so, not because specific consideration was given to the applicability of the law, but because most tribes adopted prototype plans marketed to them by financial consultants or insurance advisors and such plans are routinely drafted to comply with ERISA. Because the tribes are sovereign nations, the conclusion was drawn by some advisors that the tribes were exempt from ERISA because of their status as governments.

As tribal enterprises continue to flourish, more comprehensive and sophisticated employee benefit plans will undoubtedly result to accommodate the human resource needs of those enterprises. This article addresses the law as it applies to retirement plans maintained by Native American tribes and the changes to that law made by Congress in an effort to provide clear guidance to the tribes.

## II. THE APPLICABILITY OF ERISA TO THE TRIBES

The applicability of ERISA to Native American tribes has been a subject of consideration for both Congress and the courts. It is well established that ERISA applies to all employers engaged in commerce or in any industry or activity affecting commerce unless the statute specifically excludes the plan or employer in question.<sup>5</sup> The general rule set forth in *Federal Power Commission v. Tuscarora Indian Nation*, is "that a general statute in terms applying to all persons includes Indians and their property interests."<sup>6</sup> The court in *Tuscarora* stated that when Congress enacts a statute of general applicability, the statute reaches everyone within federal jurisdiction not specifically excluded,

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United States v. Quiver, 241 U.S. 602, 604 (1916) (domestic relations); Jones v. Meehan, 175 U.S. 1, 30-32 (1899) (rules of inheritance).

2. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1974).

3. *Id.* § 1003(a)(1)

4. *Id.* §§ 1051-1061.

5. *Id.* § 1003(a)(1)

6. 362 U.S. 99, 116 (1960).

including the tribes.<sup>7</sup> The *Tuscarora* court further held that, notwithstanding its “general applicability” rule, statutes of general application, which would modify or affect Indian or tribal rights sustained by treaty or other statute, must specifically evince Congress’s intent to interfere with those rights.<sup>8</sup>

The Ninth Circuit in *Donovan v. Coeur d’Alene Tribal Farm* applied the general rule of *Tuscarora* and identified three specific scenarios where an exception to the rule would arise.<sup>9</sup> The *Donovan* court determined that a federal statute of general applicability that is silent on the issue of applicability to Indian tribes will *not* apply to them if: (1) the law touches “exclusive rights of self-governance in purely intramural matters”;<sup>10</sup> (2) the application of the law to the tribe would “abrogate rights guaranteed by Indian treaties”;<sup>11</sup> or (3) there is proof by “legislative history or some other means that Congress intended [the law] not apply to Indians on their reservations...”<sup>12</sup>

In *Smart v. State Farm Insurance Co.*, the Seventh Circuit applied the *Coeur d’Alene* test to “determine whether ERISA is a statute of general application and, if so, whether its application to [an Indian] Tribe would modify an existing right of the Tribe secured under treaty or other statute or a right essential to self-governance of intramural matters.”<sup>13</sup> The court determined that the Tribe was “an ‘employer’ within the broad meaning of ERISA,”<sup>14</sup> that the group health plan in question was the type of plan contemplated by ERISA,<sup>15</sup> and determined that “the application of ERISA . . . would not impermissibly upset the Tribe’s self-governance in intramural matters.”<sup>16</sup>

Most recently, in *Dobbs v. Anthem Blue Cross & Blue Shield*, the United States District Court for the District of Colorado considered the issue of whether a welfare benefit plan maintained by the Southern Ute

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7. *Id.* at 120.

8. *Id.*

9. *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985)(citing *United States v. Farris*, 624 F.2d 890, 893-94 (1980)).

10. *Id.*

11. *Id.*

12. *Id.*

13. 868 F.2d 929, 933 (7th Cir. 1989).

14. *Id.* at 933.

15. *Id.* at 933-34.

16. *Id.* at 933-35. *See also* *Lumber Indus. Pension Fund v. Warm Springs Forest Prod. Indus.*, 939 F.2d 683, 685-86 (9th Cir. 1991)(holding that ERISA applied to a tribally owned and operated sawmill located on a reservation); *Koopman v. Forest County Potawatomi Member Benefit Plan*, No. 06-C-0163, 2006 WL 538601, at \*3 (E.D. Wis. Feb. 15, 2006)(ERISA applied to tribal health and welfare plan); *Ramirez v. Potawatomi Bingo Casino*, No. 06-C-322, 2006 WL 3327142, at \*1 (E.D. Wis. Nov. 15, 2006)(ERISA applied to tribal benefit plan).

Indian Tribe was subject to ERISA.<sup>17</sup> The court determined that the plan in question was an “employee welfare benefit plan” as defined in ERISA, that the tribe’s sovereignty was not affected by federal law’s preemption of the application of state law to the tribe, and that the tribe was not a “government” for purposes of the exemption from ERISA for governmental plans.<sup>18</sup> The case was appealed to the Tenth Circuit which remanded it back to the District Court for further briefing on the question of the effective date of the recently enacted Pension Protection Act of 2006 (“PPA”),<sup>19</sup> and whether the plan in question was subject to that Act.<sup>20</sup>

### III. THE APPLICABILITY OF INTERNAL REVENUE CODE SECTION 401(K) TO THE TRIBES

With the enactment of the Tax Reform Act of 1986,<sup>21</sup> Internal Revenue Code (“Code”) § 401(k)(4)(B) became effective.<sup>22</sup> That section provided that state and local governments, as well as tax exempt organizations, were ineligible to sponsor 401(k) plans.<sup>23</sup> Although enactment of the statute caused some initial concern that Indian tribes were also precluded from sponsoring 401(k) plans, established law was clear that the tribes did not fall within state, local government, or the tax exempt categories described in the new law.<sup>24</sup> In 1996, the Small Business Jobs Protection Act of 1996 (“SBJPA”)<sup>25</sup> amended Code § 401(k)(4)(B) to provide that Indian tribal government employers could include a qualified cash or deferred arrangement as part of a plan maintained by the employer.<sup>26</sup> The enactment of § 401(k)(4)(B)(iii) confirmed that Indian

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17. *Dobbs v. Anthem Blue Cross and Blue Shield*, No. 04-CV-02283-LTB, 2007 WL 2439310, at \* 1 (D. Colo. August 23, 2007).

18. *Id.*

19. Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006).

20. *Dobbs v. Anthem Blue Cross & Blue Shield*, 475 F.3d 1176, 1177 (10th Cir. 2007).

21. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

22. I.R.C. § 401(k)(4)(B) (2007).

23. *Id.*

24. See Nancy Williams Bonnett, *Applicability of ERISA to Native American Tribes; A Law In No Need of Clarification*, *Journal of Pension Planning and Compliance*, Vol. 30 No. 3 (Fall 2004).

25. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (1996).

26. I.R.C. § 401(k)(4)(B)(iii) (2007).

tribal governments were eligible sponsors of 401(k) plans.<sup>27</sup>

#### IV. ERISA'S GOVERNMENTAL PLAN EXEMPTION

ERISA provides an important exemption from much of its regulation for “governmental plans.” Prior to enactment of the PPA,<sup>28</sup> § 414(d) of the Code provided that a “‘governmental plan’ [included] a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.”<sup>29</sup> Although statutory and case law were clear on the question of whether ERISA applied to the tribes, some believed that Native American Tribes were “governments” for purposes of Code § 414(d), and were, therefore, exempt from most of ERISA’s provisions.

The United States Congress had addressed the issue of whether Native American Tribes were governments, as discussed above, with the amendment of Code § 401(k)(4)(b) as part of the SBJPA.<sup>30</sup> By specifically stating that Indian tribal governments were eligible sponsors of 401(k) plans, Congress distinguished the tribes from governmental employers, who were not eligible sponsors of such plans. In addition, § 7871 of the Code enumerates the purposes for which Indian tribes will be treated as states under the Code.<sup>31</sup> None of the relevant provisions of ERISA are enumerated there, nor in § 457, which governs the taxation of deferred compensation plans for state and local governments and tax exempt entities.<sup>32</sup> Section 457 defines an eligible employer, for purposes of maintaining a deferred compensation plan as “a State, a political subdivision of a State, and any agency or instrumentality of a State or political subdivision of a State, and any other organization (other than a governmental unit) exempt from tax under this subtitle.”<sup>33</sup>

Title IV of ERISA provides for a federal retirement plan insurance program, the Pension Benefit Guaranty Corporation (“PBGC”), applicable to certain defined benefit plans subject to ERISA.<sup>34</sup> Section 1321 of ERISA exempts governmental plans, defined as plans “maintained for its employees by the Government of the United States, by the government of any State or

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27. See Bonnett, *supra* note 24.

28. Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006).

29. I.R.C. § 414(d) (2007).

30. I.R.C. § 401(k)(4)(B)(iii) (2007).

31. I.R.C. § 7871(a) (2002).

32. I.R.C. § 457 (2007).

33. *Id.* §§ 457(e)(1)(A)-(B).

34. 29 U.S.C. § 1302 (2006).

political subdivision thereof, or by any agency or instrumentality of any of the foregoing” from the requirements of ERISA Title IV.<sup>35</sup> Numerous PBGC Opinion Letters interpreted this governmental exclusion as not applying to plans sponsored by tribes.<sup>36</sup>

#### V. THE PENSION PROTECTION ACT OF 2006

In an effort to expand the definition of “governmental plan” to include Native American Tribes, The Governmental Pension Plan Equalization Act of 2003, H.R. 331, was introduced in the United States House of Representatives on November 21, 2003.<sup>37</sup> Similar versions of the bill were introduced in successive sessions of Congress. The bill proposed to amend ERISA and the Code to categorize plans maintained by Indian tribes as “governmental plans.”<sup>38</sup> Although written as a “clarification” to existing law, it prescribed substantial changes to the statute. The effective date of the amendments proposed in the bill - “years beginning *before, on, or after* the date of enactment of this Act” - was sweeping, to say the least, and was apparently intended to retroactively legitimize those plans that had mistakenly been adopted relying on the governmental plan exemption.<sup>39</sup>

House Resolution 331 defined “governmental plan” as an employee benefit plans of:

- (a) An employer that is a tribal government, which is a governing body of any tribe, band, community, village or group of Indians, that is determined by the Secretary of the Treasury to exercise governmental functions;
- (b) A subdivision of an Indian tribal government, as determined by the Secretary of the Treasury;
- (c) An agency or instrumentality of an Indian tribal government or subdivision thereof; or
- (d) An entity established under Federal, State or tribal law that is wholly owned or controlled by any of the foregoing.<sup>40</sup>

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35. 29 U.S.C. § 1321(b)(2)(2007).

36. Letter from Henry Rose, General Counsel, Pension Benefit Guaranty Corporation (March 4, 1981) 1981 PBGC LEXIS 39 (PBGC 1981). *Contra* Colville Confederated Tribes v. Somday, 96 F. Supp. 2d 1120, 1139 (E.D. Wash. 2000).

37. H.R. 331, 105th Cong. (2003).

38. *Id.*

39. *Id.* (emphasis added).

40. *Id.*

Under the proposed definition, any plan sponsored by an entity that was “controlled” (51% ownership) by a tribal government, agency, or instrumentality, would have been a governmental plan.

The House passed H.R. 2830 on December 15, 2005, which contained substantially similar language as H.R. 331.<sup>41</sup> On July 28, 2006, Rep. John Boehner introduced a revised version of the prior bills, H.R. 4.<sup>42</sup> The H.R. 4 passed in the Senate without amendment and the final result was Section 906 of the Pension Protection Act of 2006, signed into law by the President on August 17, 2006.<sup>43</sup>

The new law proved to be a compromise between initial proposals that would have treated plans sponsored by any entity controlled by a Native American tribe as governmental, and prior law, which treated all Native American sponsored plans, with few exceptions, as subject to ERISA in its entirety.

Section 906 of the PPA amended Code § 414(d) and ERISA § 3(32) to change the definition of “governmental plan”. The amended definition adds the following language:

The term “governmental plan” includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701 (a) (40) of the Internal Revenue Code of 1986), a subdivision of an Indian tribal government (determined in accordance with section 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 government function).<sup>44</sup>

The PPA also amended the Code and ERISA to clarify that, under the new definition of governmental plan, certain benefit accrual limitations are waived for public safety workers employed by tribal governments if the workers have

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41. H.R. 2830, 109th Cong. (2005).

42. H.R. 4, 109th Cong. (2006).

43. Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat 780 (2006).

44. Pension Protection Act of 2006, Pub. L. No. 109-280, § 906(a)(1), 120 Stat. 780, 1051 (codified as amended 29 U.S.C. § 1002(32)).

at least fifteen years of service with the government employer. Additionally, employee contributions to pension plans maintained by tribal government units may be “picked up” by the tribal employer, resulting in tax deferred employee contributions. These provisions have been available to state and local governments under prior law and PPA makes it clear that they will apply to tribal governmental plans as well.<sup>45</sup>

The new definition of “governmental plan” and related sections were effective for many years beginning on or after the date of enactment of the PPA.<sup>46</sup>

The compromise between prior law and early proposals for change to the definition of governmental plan presented some interesting questions, not the least of which was the interpretation of the phrase “essential governmental function.” This question was addressed in guidance issued by the Internal Revenue Service in the form of Notice 2006-89.<sup>47</sup> Citing the Joint Committee on Taxation’s Technical Explanation of the PPA,<sup>48</sup> Notice 2006-89 explained that “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.”<sup>49</sup>

Notice 2006-89 states that for purposes of good faith interpretation of what constitutes an essential governmental function under 414(d), tribal plans may rely upon the definition of essential governmental function under Code § 7871(e).<sup>50</sup> This section defines the term for purposes of the availability of tax-exempt bond financing for an Indian tribal government.<sup>51</sup> Section 7871(e) provides that “the term ‘essential governmental function’ shall not include any function which is not customarily performed by State and local governments with general taxing powers.”<sup>52</sup> The Advance Notice of Proposed Rulemaking under § 7871 states that proposed regulations will provide that for purposes of

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45. Pension Protection Act of 2006, Pub. L. No. 109-280, § 906(b)(2), 120 Stat. 780, 1051 (codified as amended I.R.C. § 415(b), I.R.C. § 414(h), and 29 U.S.C. § 1321).

46. Pension Protection Act of 2006, Pub. L. No. 109-280, § 906(c), 120 Stat. 780, 1052.

47. I.R.S. Notice 2006-89, 2006-43 I.R.B. 772.

48. Joint Committee on Taxation, Technical Explanation of H.R. 4, the “Pension Protection Act of 2006” as passed by the House on July 28, 2006, and considered by the Senate on August 3, 2006 (JCX-38-06), August 3, 2006, 109th Cong., 2d Sess. 244 (2006).

49. I.R.S. Notice 2006-89, 2006-43 I.R.B. 772.

50. I.R.C. § 7871(e)(2002).

51. *Id.*

52. *Id.*

§ 7871(e), an activity will be considered an essential governmental function that is customarily performed by state and local governments if:

- (1) There are *numerous* State and local governments with general taxing powers that have been conducting the activity and financing it with tax-exempt governmental bonds;
- (2) State and local governments with general taxing powers have been conducting the activity and financing it with tax-exempt governmental bonds *for many years*; and
- (3) The activity is not a commercial or industrial activity (emphasis added).<sup>53</sup>

The Notice of Proposed Rulemaking references the legislative history of § 7871(e) and quotes the comments of the House Ways and Means Committee concerning the definition of an essential governmental function.

. . . the term “essential governmental function” does not include any governmental function that is not customarily performed (and financed with governmental tax-exempt bonds) by State and local governments with general taxing powers. . . Additionally, the committee wishes to stress that only those activities that are customarily financed with governmental bonds (e.g., schools, roads, governmental buildings, etc.) are intended to be within the scope of this exception, *notwithstanding that isolated instances of a State or local government issuing bonds for another activity may occur* (emphasis added).<sup>54</sup>

It seems clear that Congress intends the definition of essential governmental function to be limited, as it relates to the governmental plan exemption for Native American tribes. The IRS’s notice that there must be *numerous* governmental entities conducting the activity “*for many years*”, “*notwithstanding . . . isolated instances . . .*” of other activities being funded with tax-exempt bonds, implies that the definition will be limited to traditional,

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53. Omnibus Budget Reconciliation Act of 1987, Pub.L.No. 100-203, 101 Stat. 1330, Sec. 10632(a) (1987).

54. Information on Selected Capital Facilities Related to the Essential Governmental Function Test, GAO 06-1082 (Sept. 13, 2006) (statement of Michael Brostek, Director Tax Issues, Strategic Issues).

long-standing activities and projects funded with tax-exempt bonds.<sup>55</sup> The General Accounting Office (GAO) provided the Senate Finance Committee with a report in September of 2006, on the number of facilities that state and local governments finance, construct, and operate.<sup>56</sup> The report focused on the following eight categories: rental housing, road infrastructure, parking garages and parking lots, community recreational facilities, golf courses; conference centers, hotel and tourist accommodations, and state-owned gaming support facilities.<sup>57</sup> This report was for the stated purpose of determining what functions are customarily performed by state and local governments with general taxing powers.<sup>58</sup> The report was requested by Senator Max Baucus, then ranking minority member of the committee to assist in the determination of what an “essential governmental function” was for purposes of enforcement of the law as it related to Native American tribal funding of activities and projects with tax-exempt bonds.<sup>59</sup> The GAO reported that, while a number of financing structures were used by state and local governments, tax-exempt bonds figured heavily in the funding of the capital projects reviewed.<sup>60</sup>

Notice 2006-89 provided transitional relief to plans maintained by Native American tribes that operate under a reasonable good faith standard with respect to compliance with the PPA changes to the governmental plan definition.<sup>61</sup> As discussed above, plans will be deemed to operate as a governmental plan if they cover only participants who perform essential governmental functions as defined in Code § 7871. The Notice also provided relief for “mixed” plans that cover both governmental and commercial employees.<sup>62</sup>

The IRS acknowledged that such plans may have substantial difficulty in complying with the new law by its effective date if the plans had previously operated as governmental plans.<sup>63</sup> Of course, numerous plans maintained by tribal entities were operated as ERISA plans and were not faced with this complication. Presumably, if a mixed plan was operated as an ERISA plan it could continue to operate as such, determining at a later date whether to spin-off governmental employees into a separate governmental plan. The Notice provided that a mixed plan previously operated as a governmental plan would

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55. *Id.*

56. GAO 06-1082

57. *Id.*

58. *Id.*

59. *Id.*

60. I.R.S. Notice 2006-89, 2006-43 I.R.B. 772.

61. *Id.*

62. *Id.*

63. *Id.*

be treated as satisfying the reasonable and good faith compliance standard if, by September 30, 2007, and effective as of the effective date of § 906 of PPA, the plan (1) adopts a separate plan covering commercial employees that complies with ERISA, (2) freezes benefit accruals under the mixed plan for commercial employees, and (3) there is no reduction in benefits in the commercial plan for the first plan year beginning on or after August 17 of 2006.<sup>64</sup> The Notice gives examples of how these requirements may be implemented.<sup>65</sup>

In August of 2007, the IRS issued Notice 2007-67 to extend the transitional relief provided under Notice 2006-89.<sup>66</sup> Notice 2007-67 extended transitional relief until the date that is six months after guidance is issued under § 414(d) of the Code, as amended by § 906 of the PPA.<sup>67</sup> The extension is conditioned on the plans not being amended to reduce benefits unless the benefit reduction does not vary based upon whether the participant is a governmental or commercial employee, or the benefit reduction is made for commercial employees and is the minimum reduction necessary to satisfy the requirements of the Code.<sup>68</sup>

## VI. CONCLUSION

The state of the law as it relates to retirement plans maintained by Native American tribes is somewhat of a good news-bad news situation. The good news is that, upon issuance of regulations interpreting § 906 of the PPA, the tribes will have clear and final guidance on how to operate their plans. The bad news is that tribes, who find themselves in the unenviable position of having maintained governmental plans prior to the enactment of the PPA, must determine whether the plans cover any employees who are not performing essential governmental functions, or who may be performing commercial activities in addition to essential governmental functions. These employees must be covered in the equivalent of ERISA plans in accordance with Notice 2006-89.<sup>69</sup> The determination of which employees to cover under the ERISA plan will, in some cases, require review of job descriptions of hundreds of employees, no small task for human resource and employee benefit departments. These tribes will also be in the position of facing ERISA's compliance rules for the first time. Finally, they will face the question of whether to maintain

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64. *Id.*

65. *Id.*

66. I.R.S. Notice 2007-67, 2007-35 I.R.B. 467 (2007).

67. *Id.*

68. *Id.*

69. I.R.S. 2006-89, 2006-43 I.R.B. 772.

two separate plans for their employees, one for governmental employees and one for commercial employees. Many may decide that the easier course is to retain all employees in one plan subject to ERISA.

Whatever decisions are made by the tribes in the aftermath of the PPA, one thing is certain. They will continue to face the need to offer competitive employee benefits in order to sustain and develop their business enterprises in the future. While governmental plans may be appropriate for limited situations, tribes may find that, in order to recruit and retain the workforce needed to support their diverse ventures, they must offer ERISA plans to compete with the private sector for employees. Indeed, tribes may begin to take advantage of creative plan designs in order to offer benefits that appropriately compensate employees in different lines of business. The use of non-qualified plans of deferred compensation may be an appropriate way to compensate elected officials. Non-qualified plans may also become common as a way to give incentive compensation to executives and other key employees. Because the tribes cannot offer equity compensation, creative incentive compensation packages may be the best way to recruit and retain talent in an ever more sophisticated tribal business environment.

In the "post PPA" era, retirement plans, as well as other benefit and compensation arrangements of Native American plans, will evolve to accommodate the tribes' changing business and economic statuses.