Tribal Consultation Summary
Long-Term, Part-Time Employee Rules for Cash or Deferred Arrangements Under Section 401(k)

Introduction

On May 17, 2024, the U.S. Department of the Treasury (Treasury) held a consultation on the Notice of Proposed Rulemaking (NPRM) that was published on November 27, 2023. The NPRM is entitled "Long-Term, Part-Time Employee Rules for Cash or Deferred Arrangements Under Section 401(k)" (REG-104194-23).

The NPRM contains a proposed regulation that would reflect statutory changes made by section 112 of the SECURE Act[1] (as amended by section 125 of the SECURE 2.0 Act).[2] The proposed regulations would provide guidance on the treatment of long-term, part-time (LTPT) employees in section 401(k) plans and what Tribal retirement plans will need to consider for not only LTPT staff, but also seasonal employees. The NPRM also includes vesting requirements with respect to LTPT employees who become eligible to participate in the section 401(k) plan solely on account of this new rule.

Details about the topics of conversation for the consultation can be found in the Dear Tribal Leader Letter that was published on April 10, 2024. The consultation was held virtually to maximize Tribal participation across Indian Country. Fifty-six attendees joined the consultation, and four letters were received. The comment period ended on April 19, 2024.

Pursuant to Treasury's Tribal consultation policy, below is a summary of the feedback received in Tribal consultation.

Broad Feedback

1. Moratorium of LTPT Rules for Governmental 401(k) Plans

The majority of commenters vocalized their understanding that the NPRM proposes rules on participation and vesting requirements for governmental 401(k) plans that Tribes have never had to address previously. Additionally, commenters stated their viewpoint that the NPRM conflicts with the Tribe's governmental ability to define its own participation and vesting rules for retirement programs and eliminates existing exemptions from vesting requirements for governmental 401(k) plans. Commenters shared their understanding that governmental plans are subject to the vesting requirements that were in place before the enactment of the Employee Retirement Income Security Act of 1974 (ERISA).

Further, commenters continued that pre-ERISA vesting requirements generally allow a governmental plan sponsor to maintain uniform and reasonable requirements for plan participation and calculation of credit for time in service. As a result, they expressed that vesting under the pre-ERISA rules is required only when a plan participant reaches normal retirement age or when specific events named in the plan occur. Commenters shared their opinion during the consultation that the pre-ERISA rules provide great flexibility for Tribal plans, which the NPRM would eliminate. Noting that the LTPT rules are focused on 401(k) plans, commenters observed that the

1 SECURE Act, Division O of the Further Consolidated Appropriations Act, 2020, P.L. 116-94.
2 SECURE 2.0 Act, Division T of the Consolidated Appropriations Act, 2023, P.L. 117-328.

governmental plans that are impacted include only Tribal plans and grandfathered state and local 401(k) plans. Commenters expressed that the impact of LTPT is particularly burdensome, even compared to the state and local plans, because Tribes cannot elect to offer a Code Section 457(b) plan at this time.

Commenters requested a moratorium on the application of the LTPT employee rules to any 401(k) plan that is also a Code Section 414(d) governmental plan, pending legislative action. Commenters also request that Treasury apply the Indian canons of construction, which states that "statues are to be construed liberally in favor of the Indians with ambiguous provisions interpreted in their benefit."[3] Commenters urge Treasury to pause implementation of the NPRM for governments to provide clarity on the applicability and for possible redrafting of the proposed rules.

2. Budgetary Constraints

Commenters noted that offering retirement plans to employees is a vital recruitment and employee retention tool. Commenters explained that historically each governmental entity has been able to determine how to allocate their resources for retirement benefits and design their employee benefits in a manner that serves their governmental needs and available financial resources.

Commenters expressed that the NPRM's proposed rules on the inclusion of governments will result in severe impacts to a Tribe's finances. Commenters shared that many Tribal communities face high poverty and explained that Tribes, generally have little or no ability to levy taxes. Due to these barriers, commenters explained that Tribes rely on profits of their commercial entities to generate governmental revenue to support their self-determination and governance. Commenters further explained that the proposed rules in the NPRM regarding vesting and tracking will significantly cause budgetary constraints.

Commenters described their belief that the NPRM would inevitably raise administrative expenses because of the need for additional operational and labor costs. A commenter further articulated that unlike corporate employers who receive tax deductions for plan contributions, Tribes and their entities are governments and thus do not receive benefits associated with the LTPT rules. Commenters expressed that these costs could result in the Tribe offering less favorable plans so that government program to citizens do not face budget reductions.

3. Extend the Proposed Effective Date

The NPRM is proposed to apply to plan years that begin on or after January 1, 2024. A commenter noted that the NPRM was published at the end of November in 2023 with public hearings occurring in March of 2024 and the Tribal consultation in May of 2024. Commenters stated their belief that the effective date burdens and disproportionately impacts Tribes who have limited staffing capability.

In absence of a moratorium, Commenters recommend an extension of the effective date for governmental plans. Additionally, commenters share that an effective date should take into consideration time to create systems and processes that will allow compliance with the LTPT NPRM.

3 *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed2d 753 (1985).

Tribal Responses to Consultation Questions

1. Comments are requested on the direct cost of complying with the requirement that LTPT employees be permitted to participate in a Tribal governmental section 401(k) plan (taking into account that employers are not required to make matching or nonelective contributions for LTPT employees).

Most commenters shared their belief that implementing the NPRM would increase labor hours to 1) meticulously track hours of service for part-time and seasonal employees and 2) make adjustments to benefit distribution structures. Commenters illustrated that the NPRM vesting calculation requires prolonged tracking of LTPT employees that is not currently a required process for Tribes.

Commenters illustrated this point by sharing that Tribes often experience an above-industry level of seasonal employees, terminations, and rehires. A commenter expressed their experience that it is common at Tribes to hire temporary and seasonal employees who work on multiple temporary assignments throughout the year, each with a hire and termination date. Further, the commenter shared their understanding that the NPRM would create exceedingly complex tracking because each rehire date creates a new 12-month calculation period. A commenter also noted that if a temporary employee enrolls in a 401(k) plan under the LTPT rules, they will terminate from employment very quickly and will be entitled to a distribution of any contributions they made to the plan. The commenter expressed their understanding that if the employee does not want to take a distribution from the plan, they will be cashed out of the plan, without their consent, under the small account mandatory distribution rules of Code Section 401(a)(31). The commenter further explained that the cycle of enrollments and cash out distributions creates a significant amount of work for the Tribe's staff without creating an effective retirement savings opportunity for the impacted employees. A commenter expressed that the cycle of enrollments and mandatory distributions is particularly troublesome for plans that use automatic enrollment.

Commenters explained that this cycle of employee terminations and rehires exacerbates the issues with recordkeeping that the NPRM proposes. A commenter shared that with more employees eligible for the Tribe's matches or profit-sharing contributions and additional tracking required, there will be an impact on already strained budgets.

Commenters noted that most Tribal governments are located in rural or remote communities where it is challenging to hire new HR professionals. A commenter shared an example that they own a well-known payroll and employee management software and that it has limitations on the number of employees that can be tracked. A commenter further explained that most Tribes would need to purchase new specific HR software to track the data required to calculate eligibility in addition to new hires. Alternately, the commenter shared that the other option is to pay for high-cost outsourced consultants.

2. **The proposed regulation confirms that an employee, who otherwise would be an LTPT employee, can be excluded from the plan if the employee is part of an excluded employee class. However, excluding a class of employees cannot be a proxy for an impermissible service or age requirement. What questions or feedback do you have regarding that limitation on the classes of employees that may be excluded?**

   For example, if a plan sponsored by the Tribal Parks Department ordinarily excludes employees classified as "Camp Coordinators," all of whom work seasonally, is there a question as to whether these employees could be excluded from participating under the NPRM?

   Commenters shared that Tribes have many reasoned decisions about which of their employees are eligible to participate in their governmental retirement plans. Commenters vocalized their belief during the consultation that the NPRM proposes rules on participation and vesting requirements for certain classes of employees previously excluded for governmental 401(k) plans. Additionally, commenters stated their understanding that the NPRM conflicts with the Tribe's governmental ability to define its own participation and vesting rules for certain employees' participation in retirement programs and eliminates existing exemptions from vesting requirements for governmental 401(k) plans.

3. **An LTPT employee must be credited with a year of vesting service for each 12 -month period during which the employee has a least 500 hours of service, which may differ from a Tribe's method of determining vesting.**

   For example, according to the Tribe's HR policy, a full time Tribal government employee must work at least 1,000 hours during a year to receive a year of vesting service, while a Camp Coordinator who qualifies as an LTPT will need just 500 hours to receive a year of vesting service. What are the potential impacts of this for Tribal employers?

   Commenters also expressed their understanding that governmental plans have not been historically subject to minimum participation and coverage rules or minimum vesting requirements. A commenter shared that their governmental plan has relied on the exemptions for decades in designing, administering, and budgeting for their retirement program. Commenters shared that governmental retirement plans often include and exclude different groups of employees based on their employment classification, such as full-time employees. Commenters shared that certain groups of governmental employees that earn very significant retirement benefits, such as public safety employees, are often required to satisfy longer vesting schedules before generous retirement benefits are fully earned. Commenters shared their understanding that the flexibility in governmental retirement plan design is available to Tribes because of governmental exemptions under Internal Revenue Code Sections 410 and 411.

   Commenters expressed that the NPRM structures the vesting requirements in a way that provides an advantage to certain seasonal staff who qualify as an LTPT employee over full-time employees. A commenter illustrated an example of an individual who receives special vesting credits as a seasonal LTPT employee and then converts to a regular full-time employee. The vesting calculation under the NPRM would allow this formally LTPT employee to vest at a faster rate than a public safety officer.

   Commenters urge Treasury to remove the vesting rules for LTPT employees so that there are not inequities to regular full-time employees. One commenter suggested that Treasury provide a moratorium on the enforcement for governmental 401(k) plans until legislative action is taken to reconcile LTPT rules with the existing governmental plan exemptions for vesting. Alternatively, a commenter urged Treasury to modify the proposed regulations to clarify that governmental 401(k) plans shall comply with the LTPT rules on a reasonable good faith basis until legislative action is taken. Further, the commenter stated their belief that this proposal would allow governmental 401(k) plan sponsors to determine appropriate methods for vesting and crediting hours of service within their existing plan structures.

4. What other questions or feedback do you have about any other aspects of the NPRM that are not covered by the above topics?

Commenters observed that the eligibility and vesting rules under the LTPT rules could potentially be impacted by a lack of guidance on how the control group and aggregation rules of Code Section 414 apply to Tribal plans. Following the Tribal modifications to Code Section 414(d) that were enacted by the Pension Protection Act of 2006, commenters explained that no guidance has been published regarding the application of control group and aggregation concepts to Tribes and Tribal employers. Tribal employees often move between the Tribal government and other Tribal operations which may be classified as governmental or commercial entity functions under current law. Commenters urge Treasury to further consult to provide guidance on whether or not Tribal government employers are exempt from all control group and aggregation requirements or to clarify which Tribal employers may be required to be aggregated for purposes of calculating service under the NPRM.

Commenters shared their experience that several regional and national 401(k) recordkeepers did not understand or contemplate that the LTPT rules applied to governmental 401(k) plans until the proposed regulations were published. Commenters shared that in some cases, Tribal employers were affirmatively advised by service providers that the LTPT rules did not apply to governmental plans. Commenters stated their belief that this misunderstanding and lack of information from trusted advisors may be widespread and is another reason to delay the effective date for governmental 401(k) plans. Commenters requested that until there is clarity on the applicability of LTPT to Tribal governments and as guidance is being developed, Tribes should not be subject to enforcement actions or penalties.

Commenters propose that Treasury form a technical working group with the Tribal Treasury Advisory Committee Subcommittee on Parity and Reform and representatives from Treasury and IRS to consult on the unique employment issues that will impact the LTPT rules and governmental 401(k) plans offered by Tribes.