

## CHAPTER 1. GENERAL PROVISIONS

- 1-1. INTRODUCTION. The Housing Agency (HA) Guidebook 7401.7, Employee Benefit Plans, is concerned with the specific personnel practice involving the provision, implementation and administration of employee benefit plans for public housing agencies, including Indian housing authorities.
- 1-2. CONTENTS. Chapter 1 provides guidelines with respect to the general applicability and legal restrictions in the provision of all employee benefit plans. Chapter 2 covers the provision of private retirement plans. Chapters 3 through 5 cover the provision of nonretirement employee benefit plans. Chapter 6 discusses obtaining coverage under the Social Security program.
- 1-3. APPLICABILITY. This Guidebook applies to public housing agencies, including Indian housing authorities, collectively referred to as HAs, which administer the public and Indian low-rent housing programs, including the Sec. 10(c) and Sec. 23 Leased Housing Programs, and the Turnkey III Homeownership Opportunities Program. It does not apply to the Sec. 8 Rental Certificate, Rental Voucher, or Moderate Rehabilitation Programs.
- 1-4. AUTHORITY. The basic authorities are the United States Housing Act of 1937, as amended (42 U.S.C. 1437 et seq.) and Sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535 (d)). The Secretary is authorized to make such rules and regulations as may be necessary. Section 14(A) of the consolidated Annual Contributions Contract (Form HUD-53012A, dated 7/95) provides that "The HA shall comply with all tribal, State and Federal laws applicable to employee benefit plans and other conditions of employment."
- 1-5. FEDERAL OVERSIGHT. HA employee benefit plans are subject to oversight by numerous Federal agencies. For example, Employee Retirement Income Security Act of 1974 (ERISA) regulations are issued by three Federal agencies -- The Treasury -Department, the Department of Labor (DOL) and the Pension Benefit Guaranty Corporation (PBGC). The Treasury Department through the Internal Revenue Service enforces compliance with the participation, vesting and funding requirements of ERISA through tax disqualification and the excise tax. These are embodied in the Internal Revenue Code. DOL has primary jurisdiction over ERISA reporting, disclosure and fiduciary matters. PBGC, a nonprofit agency located within DOL, oversees all qualified defined benefit pension plans. One exception under ERISA applies to governmental plans (ERISA Sec. 4201(b)(2)). It discusses various aspects of ERISA, the Internal Revenue Code and other pertinent Federal laws and regulations which will be of special interest to HAs.
- 1-6. GOVERNING LEGISLATION. The primary laws affecting employee benefit plans are listed below in chronological order along with a brief description of the effect of the legislation at the time of enactment. Note that many of these laws may have been amended by subsequent legislation.
  - a. Social Security Act of 1935. The Social Security Act provides a first floor of protection against many forms of economic and social insecurity. It includes provision for unemployment compensation, for public assistance to stated needy groups, certain public-welfare services, and old-age and survivors insurance. From the standpoint of pensions, the last of these items--which was enlarged in 1956 to

include disability insurance benefits--is of particular interest.

1-1

1/97

- b. Age Discrimination in Employment Act of 1967. The Age Discrimination in Employment Act (ADEA) prohibits employers, employment agencies, or labor organizations from discriminating in all aspects of employment against individuals age 40 or older. The antidiscrimination requirements apply to "compensation, terms, conditions, or privileges or employment, " which as a result of 1990 amendments, specifically includes employee benefits. Thus, all employee benefit plans must comply with the ADEA. Basically, the latest change in this Act requires that an employee may not be required to retire and contributions may not be suspended regardless of age.
- c. Health Maintenance Act of 1973. As of October 24, 1995, the dual choice provisions in the Health Maintenance Act were repealed. Although employers can no longer be mandated to offer a federally qualified plan, all employers are required to abide by the nondiscrimination rules in regard to contributions made to the plan on behalf of employees. Allegations of financial discrimination will be investigated by the Health Care Financing Administration, and a \$10,000 per month/per plan penalty will be assessed against any employer found to be in noncompliance with the new law. See paragraph 4-1.
- d. Employee Retirement Income Security Act of 1974. All employee benefit plans must comply with the Employee Retirement Income Security Act (ERISA). "Governmental plans," as defined in ERISA Sec. 3(32) and 4021(b)(2), are exempt from a majority of the provisions of ERISA. No regulations clarifying the definition of a governmental plan have been published. In the absence of such regulations, it is recommended that HAs request that the Department of Labor issue an advisory opinion as to the HA's plan status as a governmental plan in accordance with Sec. 5 of ERISA Procedure 76-1 (issued August 27, 1976 in the Federal Register at 41 FR 36281).
- e. Equal Pay Act. In 1978, enforcement of the Equal Pay Act was transferred from the Department of Labor to the Equal Employment Opportunity Commission. Court cases involving differentials in benefits proposed in 1991 regulations cleared up some of the controversy, and final regulations were released by the EEOC on August 20, 1986. According to the EEOC, both contributions and benefits must be equal for men and women. In this respect, fringe benefits include medical, hospital, accident, life insurance, and retirement benefits; and extended leaves from work.
- f. Pregnancy Discrimination Act of 1978. Recent federal laws, such as the Family and Medical Leave Act and the Americans with Disabilities Act, have not altered the longstanding prohibition against employer practices that discriminate on the basis of pregnancy. This principle is found in the Pregnancy Discrimination Act, which states that women affected by pregnancy and related medical conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work.
- g. Economic Recovery Tax Act of 1981. In general, most of the provisions of the Economic Recovery Tax Act (ERTA) do not affect

governmental plans. The important provisions of the ERTA relating to HAS are (1) the increasing of the limits in a Simplified Employee Pension (SEP) plan (see paragraph 2-2f) to the lesser of 15 percent of earned income or \$15,000 (\$15,000 was changed to \$30,000 for employer contributions under TEFRA) and (2) the provisions to the Individual Retirement Account or Annuity (IRA) rules which now permit employees to participate in a qualified plan and at the same time contribute to an individual IRA.

1/97

1-2

TRA'86 phases out this deduction when either the employee or his/her spouse participate in a retirement plan. TRA'86 created a new concept which is a nondeductible IRA.

- h. Tax Equity and Fiscal Responsibility Act of 1982. All employee benefit plans must comply with the applicable sections of the Tax Equity and Fiscal Responsibility Act (TEFRA). In some cases, these provisions have been modified by the Deficit Reduction Act of 1983 (DEFRA). The provisions of TEFRA and DEFRA that apply to governmental plans include (1) the withholding of income tax on pension and lump-sum benefits from a qualified retirement plan unless the participant elects no withholding and (2) certain benefit payout rules.
- i. Retirement Equity Act of 1984. All benefit plans must comply with the sections of the Retirement Equity Act (REA) which apply to governmental plans. These include (1) the requirement that the plan administrator provide information on the availability of rollover opportunities is made from a qualified plan and (2) the provision that the retirement plan must comply with a Qualified Domestic Relation Order (QDRO) which may provide for a portion of a member's pension to be paid to an alternate payee such as an ex-spouse. If such an order is received from the Court, it should be reviewed to determine if it meets the requirements of the law. If it does, benefits must be paid out in accordance with the order. A plan qualified as a governmental plan does not have to comply with a QDRO while a private retirement plan must comply.
- j. Consolidated Omnibus Budget Reconciliation Act of 1985. The primary thrust of the Consolidated Omnibus Budget Reconciliation Act (COBRA) of special interest to HAS having 20 or more employees (including full and part-time) is the mandate for continuation and conversion privileges (if conversion privileges previously existed) to employees and their dependents covered by a HA-provided group health benefit plan. HAS with less than 20 employees are exempt from this requirement. Among other requirements, HA employees hired after March 31, 1986 must participate in Part A Medicare whether or not they are covered by Social Security. See Chapters 4 and 6 for elaboration on COBRA requirements.
- k. Tax Reform Act of 1986. The 1986 Tax Reform Act (TRA'86) may be the most sweeping legislative change made in the area of employee benefits and compensation since ERISA. Since the law makes so many changes, it provides an extended period during which plan amendments must be made. In general, plans will not have to be amended until the last day of the plan year beginning after December 31, 1988. Plans will have to comply with all requirements by the effective

dates specified in the law. The Treasury Department must, by February 1, 1988, issue implementing regulations. Given the number of significant changes generated TRA'86 it is possible that final regulations (or technical amendments) may not be issued by these dates. Thus, HAs may be placed in the difficult situation of having to amend plans and adopt new procedures with little or no authoritative guidance on how TRA'86 will be interpreted. The plan's representative (sponsor, agent or insurer) should be consulted. The requirements of TRA'86 including citations are reflected throughout Part II.

1. Older Workers Benefit Protection Act of 1990. Amendments to the Age Discrimination in Employment Act (ADEA) made by the Older Workers Benefit Protection Act address, for the first time, how the ADEA applies to early retirement incentive programs. Generally, such incentive programs must be "consistent with the relevant purposes" of the ADEA, and employees' decisions to accept an exit incentive must be voluntary. The amendments also establish minimum requirements

1-3

1/97

that must be met by a waiver of ADEA claims used in connection with an exit incentive.

- m. Omnibus Budget Reconciliation Act of 1990. Effective July 1, 1991, the Omnibus Budget Reconciliation Act of 1990 expanded the Internal Revenue Code Sec. 3121(b) definition of "employment" for purposes of Federal Insurance Contributions Act (FICA) taxes to include service performed for a state or local government entity, unless the employee is a "member of a retirement system" maintained by such entity. As a result of this change, state or local government entities must withhold Social Security and Medicare taxes from the wages paid to individuals who are not members of a retirement system. Under Internal Revenue Service (IRS) regulations, in order to be considered a "retirement system" with respect to an employee, a plan must generally provide a specified minimum benefit. See Chapter 6 for further information on participation in Social Security.

1-7. CITATIONS. TRA'86 resulted in a major overhaul of the tax code and touches upon almost every aspect of all employee benefit plans. Because of this, citations are given to key provisions of TRA'86. In addition, some citations are given to other sources of authority having a bearing on various other Federal requirements. The listing of citations is not all inclusive. Therefore, the absence of a citation should not be construed as meaning that there is no basis of statutory or other authority. These citations are intended to assist HAs and their agents, sponsors, consultants and administrators in planning and evaluating items included in employee benefit plans.

Abbreviations used include:

ACC -- Annual Contributions Contract  
CFR -- Code of Federal Regulations  
COBRA -- Consolidated Omnibus Budget Reconciliation Act of 1985  
Code -- Internal Revenue Code of 1986 (formerly Internal Revenue Code of 1954)  
DEFRA -- Deficit Reduction Act of 1983  
ERISA -- Employee Retirement Income Security Act of 1974

FICA -- Federal Insurance Contributions Act (sometimes erroneously referred to as the Social Security tax)  
FUTA -- Federal Unemployment Tax Act  
IRC -- Internal Revenue Code of 1986 (formerly Internal Revenue Code of 1954)  
IRS -- Internal Revenue Service  
REA -- Retirement Equity Act of 1984  
Rev. Rul. -- Revenue Ruling (published by IRS)  
Sec. -- Section  
TEFRA - Tax Equity and Fiscal Responsibility Act of 1982  
TRA'86 - Tax Reform Act of 1986

1-8. CONFLICT OF INTEREST. Section 19(A)(1) of the ACC (Form HUD-53012A dated 7/95) provides:

"(A)(1) In addition to any other applicable conflict of interest requirements, neither the HA nor any of its contractors or their subcontractors may enter into any contract, subcontract, or arrangement in connection with a project under this ACC in which any of the following classes of people has an interest, direct or indirect, during his or her tenure or for one year thereafter:

1/97

1-4

"(i) Any present or former member or officer of the governing body of the HA, or any member of the officer's immediate family. There shall be excepted from this prohibition any present or former tenant commissioner who does not serve on the governing body or a resident corporation, and who otherwise does not occupy a policymaking position with the resident corporation, the HA or a business entity.

"(ii) Any employee of the HA who formulates policy or who influences decisions with respect to the project(s), or any member of the employee's immediate family, or the employee's partner.

"(iii) Any public official, member of the local governing body, or State or local legislator, or any member of such individuals' immediate family, who exercises functions or responsibilities with respect to the project(s) or the HA."

Section 19(D) continues:

"(D) For purposes of this section, the term "immediate family member" means the spouse, mother, father, brother, sister, or child of a covered class member (whether related as a full blood relative, or as a "half" or "step" relative, e.g., a half-brother or stepchild)."

1-9. BONDING. Sec. 412 of ERISA requires generally that every fiduciary and every person who handles funds or other property of employee benefit plans must be bonded. However, Section 401(a) states "This part shall apply to any employee benefit plan described in section 4(a) (and not exempted under section 4(b)). Sec. 4(b) of ERISA states "The provisions of this title shall not apply to any employee benefit plan if such plan is a governmental plan (as defined in section 3(32))." Thus, HAs, as governmental agencies, are not required to obtain bonding for its employees or officers with respect to any employee benefit plan.

1-10. TYPES OF EMPLOYEE BENEFIT PLANS. HAs may adopt the following forms of

employee benefit plans upon the approval of availability of funds through the budget approval process by the appropriate HUD Field Office.

- a. Social Security. See Chapter 6 for specific information on participation in the Social Security program.
- b. Unemployment Compensation. Unemployment compensation insurance programs are governed by state laws and regulations. Specific HUD Field Office approval is required to establish a self-funded program, where allowed by state law.
- c. Workers' Compensation. Workers' Compensation is a liability insurance coverage required by the ACC. State authorized "municipal league" or self-funded plans are acceptable subject to prior HUD Headquarters approval.
- d. Governmental Plan. A HA may adopt a government sponsored employee benefit plan where required or permitted by law. There is no limitation on the benefits which may be provided. HA contributions are limited to the employer/employee cost basis applicable to other governmental entities.
- e. Comparable Plan. As an alternative to adopting a governmental plan, a HA may adopt a privately underwritten employee benefit plan which is comparable to a local governmental plan or represents predominant prevailing practice in the area whether or not the HA is eligible to adopt such plan. The benefit structure of the comparable plan should conform generally to the benefit

1-5

1/97

structure of the governmental plan. It may be necessary to modify the schedule of benefits due to factors such as marketing, underwriting or actuarial considerations. The comparable plan should not be established solely on the basis of the employer contribution required by the governmental plan. That is, the HA's cost for the comparable plan is determined by the schedule of benefits provided, actual experience and employee/employer cost sharing. This cost may be higher or lower than the cost attributable to the governmental plan. The HA should seriously consider participation in the governmental plan (if allowable) should the governmental plan's cost be significantly less than the projected or actual cost of the comparable plan.

- f. Private Plan. A HA may adopt a private employee benefit plan discussed in Chapters 2 through 5.

1-11. AVAILABILITY AND PRORATION OF FUNDS. Unless regulated by law, HA contributions shall at all times be subject to availability of funds. If the adoption of a new plan or revision of an existing plan would create an overrun of controlled accounts (see paragraph 2-10, 2-13a and 2-13b of the Financial Management Handbook 7475.1 Rev. dated 12/18/87), the HA shall submit a budget revision to the appropriate HUD Field Office. The revisions should reflect any significant changes (increases or decreases) in all budgeted receipts and expenditures. In no instance will HUD Field Office budget approval of an employee benefit plan for a HA receiving Federal subsidies result in an eligibility for additional subsidies in excess of the HA's eligibility determined in accordance with applicable

regulations and/or administrative procedures. HA expenses for employee benefit plans shall be charged to individual programs or projects (including non-Federal programs or projects) on the same basis as is used to distribute compensation unless another distribution formula, approved by HUD, would be more equitable.

1-12. PROCUREMENT. All procurements involving employee benefit plans are subject to the procurement requirements published in the Code of Federal Regulations at 24 CFR Sec. 85.36. Selected key provisions are discussed below.

- a. Procurement Standards. HAs will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in Section 85.36.
- b. Competition. All procurement transactions will be conducted in a manner providing full and open competition.
- c. Methods of Procurement to be Followed. Section 85.36 provides for four methods of procurement. Typically, the procurement of employee benefit insurance will involve negotiations and bargaining with competing insurance carriers, procedures only possible using the competitive proposal method of procurement (i.e., by issuing a "Request for Proposals"), or if under \$100,000 (AND applicable state law does not further restrict the HA -- often the case), small purchase procedures. HUD sees no benefit to discussing the sealed bid or noncompetitive methods of procurement. Except as noted, they have no place in the purchase of employee benefit plans. The following procurement methods may be utilized, as appropriate:

- (1) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than \$100,000.

1/97

1-6

Since the dollar limitation applies only to the initial contract cost, this procedure could be used even though the total value would exceed \$100,000 over the life of the contract.

- (2) Procurement by sealed bids (formal advertising). Invitation for Bids are publicly solicited and a firm-fixed-price contract (lump-sum or unit price) is awarded to the responsible bidder whose bid conforms to all the material terms and conditions of the Invitation for Bids. The award is made to the lowest bidder (lowest price). In general, the procurement of employee benefit plans through sealed bids is not feasible because such plans do not lend themselves to a firm-fixed-price contract -- exceptions might be group term life insurance and disability income benefits.
- (3) Request for Proposals. The technique of competitive proposals is normally conducted with more than one source submitting a proposal, and either a fixed-price or cost-reimbursement type contract is awarded. The competitive proposal method is the

preferred method for procuring employee benefit plans. Thus, for the most part, procurements will be conducted by requesting competitive proposals with award being made to the most responsible firm whose proposal is most advantageous, with price and other factors considered.

(4) Procurement by noncompetitive procurement. This method of procurement involves solicitation of a proposal from only one source or, after solicitation of a number of sources, if competition is determined inadequate. Procurement by noncompetitive proposals may be used @1 when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the limitations stated in 24 CFR 85.36(d)(4)(i)(A)-(D) apply.

(5) Additional Guidance. If additional guidance on other procurement methods, is needed, see the HA Procurement Handbook, 7460.1.

d. Contracting With Small and Minority Firms, Women's Business Enterprise and Labor Surplus Area Firms. The HA will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

e. Contract Changes and Reprocurement. Employee benefit plans are subject to change. Whether or not these changes require solicitation of a new procurement (or a reprocurement) will depend on the nature and extent of the change. In the absence of applicable State or local laws and regulations, Section 85.36 requires that reprocurement for any change which would increase the annual contract amount by more than \$100,000. Changes which would not require reprocurement would include (1) changes required by law; (2) revision of elective provisions, such as age and service eligibility requirements; (3) the exercise of discretionary fiduciary responsibilities in the timing and placement of investments; and (4) premium changes due to experience rating factors, such as is common for health plans. With respect to item (4), the HA should consider adding cost containment procedures (see paragraph 4-6) and/or reprocurement if substantial premium increases are indicated.

f. Documentation. The HA will maintain records sufficient to detail the significant history of a procurement (or reprocurement). These records will include, but are not necessarily limited to, the following: rationale for the method of

1-7

1/97

procurement, or rejection, and the basis for the contract price.

1-13. ASSISTANCE. Advice and assistance may be available from numerous sources. Plan representatives are the individuals best qualified to answer questions relating to their own products. Technical questions relating to specific Federal programs such as Social Security should be referred to the agency involved. HUD staff, both Field Office and Headquarters, are no longer able to provide assistance.