Federal Employment and Labor Laws Applicable to Tribes or Tribal Commercial Enterprises

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Federal Labor and Employment Statutes

• Most federal labor and employment statutes are silent as to whether they apply to Indian tribes or Indian commercial enterprises ("silent statutes" or "statutes of general applicability"). This silence has resulted in a split of legal authority as to whether these silent statutes apply to Indian tribes as employers. Also, the location of the business may be a factor in the applicability of certain laws, such as the Occupational Safety and Health Act ("OSHA").

• Court stated as general principle that federal statutes of general applicability, that do not mention tribes, apply to Indian tribes, which became known as “Tuscarora Rule.” Many courts, such as Tenth Circuit, have argued that Tuscarora Rule is wrong and that tribes are not obligated to follow federal laws of general applicability.

• The United States Supreme Court, in Federal Power Commission v. Tuscarora Indian Nation, reviewed the validity of a Federal Power Commission order granting a license to New York Power Authority to build a dam that would cause flooding to the fee land owned and occupied by the Tuscarora Indians near the Niagara River.

• The order effectuated a governmental taking of property, thus requiring payment of just compensation to the Tuscarora Indians. The Tribe, however, challenged the applicability of the Federal Power Act upon which the license was granted, claiming that the general statute did not apply to Indian land.

• The government argued that the Federal Power Act “is a broad general statute authorizing condemnation of ‘the lands or property of others necessary to the construction, maintenance, or operation of any’ licensed project, and that lands owned by Indians in fee simple, not being excluded, may be taken by the licensee under the federal eminent domain powers delegated to it.” Id. at 115.

• Tuscarora does not expressly address employment statutes, but rather federal statutes of general applicability.
Donovan v. Navajo Forest Products Indus., 692 F.2d 709 (10th Cir. 1982)

- OSHA, which is silent as to its applicability to Indian tribes, was held not to apply to a tribal business manufacturing wood products. Tenth Circuit premised its decision on existence of specific treaty rights protecting tribal sovereignty, rights of Navajo Nation to exclude non-Indians and self-governance rights of Navajo Nation.
Donovan v. Navajo Forest Products Indus., 692 F.2d 709 (10th Cir. 1982)

- The breadth and scope of the power of Indian tribes to exclude non-Indians from territory reserved for the tribe was spelled out definitively by the Supreme Court in the case of Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). The Court observed that an Indian tribe's power to exclude non-Indians from tribal lands is an inherent attribute of tribal sovereignty, essential to a tribe's exercise of self-government and territorial management. Id. at 141.
Donovan v. Coeur d’Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985)

• Ninth Circuit addressed whether Occupational Safety and Health Act ("OSHA") applied to tribal farm wholly owned and operated by Coeur d’Alene Indian Tribe. Farm was commercial enterprise employing Indians and non-Indians.
Donovan v. Coeur d’ Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985)

• Ninth Circuit held that Tuscarora Rule does not apply if:
  • 1. law touches exclusive rights of self-governance in purely intramural matters;
  • 2. application of law to tribe would abrogate rights guaranteed by Indian treaties; or
  • 3. there is some proof by legislative history or some other means that Congress intended the law to not apply to Indians on their reservations.
Concluding that tribal farm was not an aspect of self-government, Ninth Circuit held that application of OSHA did not touch exclusive rights of self-governance in purely intramural matters, and therefore applied OSHA to farm.
Unclear Legal Guidance

- Due to split of legal authority on applicability of silent statutes to tribes, many courts and federal agencies have adopted a distinction between Indian tribes as employers in purely governmental functions and Indian tribes or tribal enterprises engaged in commercial activities in determining whether a federal or labor employment statute of general applicability applies or not.
Tribal Commercial Activities

• Courts have been more willing to find that Indian tribes or tribal enterprises engaged in commercial activities are subject to federal labor and employment statutes of general applicability.
Congressional Direction

• In recent amendment of Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 et. seq., Congress provided that federal statute designed to protect retirement plans and welfare-benefit plans maintained by employers (ERISA) is not applicable to employee-benefit plans maintained by Indian tribes, if employee-benefit plan covers solely tribal employees employed in traditional governmental roles. Employee-benefit plan would be considered as a "governmental plan" and thus exempt from ERISA requirements. **ERISA is applicable to Indian tribal commercial enterprises.**

- The Supreme Court upheld a Bureau of Indian Affairs employment preference policy that applied only to members of federally recognized tribes. The Court held that the preference was political, rather than racial.

• The federal policy of according some hiring preference to Indians in the Indian service dates at least as far back as 1834. Since that time, Congress repeatedly has enacted various preferences of the general type here at issue. The purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life. Congress was seeking to modify the then-existing situation whereby the primarily non-Indian-staffed BIA had plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes. Id. at 541-542.

- Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized. Id. at 552.

• [T]his preference does not constitute ‘racial discrimination.’ Indeed, it is not even a ‘racial’ preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency. The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. ... Furthermore, the preference applies only to employment in the Indian service. *Id.* at 553.

- As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process. *Id.* at 555.
Promotions and Lateral Transfers

IHS Preference

• *Preston v. Heckler*, 734 F.2d 1359 (9th Cir. 1984)
• Bureau of Indian Affairs employment preference policy applied to all of Department of the Interior personnel dealing with Indian affairs. President Obama announced that the federal government may appeal.
Indian Preference Upheld

- In June 2003, in *Am. Fed'n. of Gov't. Employees v. United States*, 330 F.3d 513 (D.C. Cir. 2003) ("AFGE II"), the D. C. Circuit upheld provision of 2000 Department of Defense Appropriations Act that granted an outsourcing preference for firms with 51 percent or more Native American ownership. Air Force’s award to Alaskan Native Corporation business, for maintenance work at Kirtland Air Force Base, was challenged by union on violation of equal protection and due process grounds. The Court held in line with legal precedent that classification of Native Americans is political, not racial. Thus, the provision was not discriminatory.
Occupational Safety and Health Act ("OSHA") and Age Discrimination in Employment Act ("ADEA")

- Tenth Circuit and Eighth Circuit Courts of Appeals have held that OSHA and ADEA are not applicable to tribes. Basis is deference to tribal sovereignty and self-governance. These courts have required a showing of clear legislative intent to curtail tribal rights and hold such statutes of general applicability applicable to tribes.
Federal Circuit Court of Appeals

- Tenth Circuit in Denver covers Colorado, Kansas, New Mexico, Utah, Wyoming and Northern and Western Districts of Oklahoma
- Eighth Circuit in St. Louis covers North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri and Arkansas
Occupational Safety and Health Act ("OSHA") and Fair Labor Standards Act ("FLSA")

- Ninth Circuit and Seventh Circuit Courts of Appeals have followed an approach which creates a presumption that statutes of general applicability apply to Indian tribes unless a contrary showing is made. Under this approach, these courts have held that OSHA and Fair Labor Standards Act ("FLSA") apply to Indian tribes.
Federal Circuit Court of Appeals

• Ninth Circuit in San Francisco covers Washington, Montana, Oregon, Idaho, California, Nevada and Arizona

• Seventh Circuit in Chicago covers Wisconsin, Illinois and Indiana
Federal Labor Laws which Expressly Exempt Indian Tribes

Title VII of the Civil Rights Act ("Title VII") -
Most common statutory basis for a lawsuit. First legislation broadly prohibiting discrimination in private-sector employment. 
Title VII

• Under Title VII, an employer may not discriminate against a person because of person's race, color, religion, gender or national origin. An employer with more than 15 employees for each working day in each of 20 or more calendar weeks in current or preceding calendar year is covered by Title VII.
Title VII

- **Indian tribes are specifically excluded** from definition of "employer[s]" who may not discriminate for above reasons in Title VII. Title VII states that term "employer" does not include "... the United States, a corporation wholly owned by the government of the United States, Indian Tribe, or any department or agency of the District of Columbia. ..." See 42 U.S.C.§ 2000e(b).
Title VII

• South Dakota Senator Mundt introduced tribal exemption stating it was to protect “the welfare of our oldest and most distressed American minority, the American Indians” to allow them to “conduct their own affairs.” See 110 Cong. Rec. 13702 (1964).
Title VII

• There are two Tenth Circuit decisions on point. *Wardle v. Ute Tribe*, 623 F.2d 670 (10th Cir. 1980), involved a nonmember police officer who brought suit under Indian Civil Rights Act. Court held that Title VII's exemption of Indian tribes controlled over more general prohibitory provisions contained in other statutes.
Title VII

- Second case is *Dille v. Council of Energy Resource Tribes*, 801 F.2d 373 (10th Cir. 1986), which held that a female employee could not bring a sex-discrimination suit under Title VII against an organization composed solely of Indian tribes. Unlikely Congress intended to protect individual Indian tribes, but not collective efforts of tribes.
Title VII

• Key case involving a **tribal business** is *Myrick v. Devils Lake Sioux Manufacturing Corp.*, 718 F.Supp. 753 (D.N.D. 1989), where tribe was a majority owner of a corporation. Here, court ruled that corporation's attempt to be defined as an Indian tribe under Title VII was without merit.

• The corporation was owned 51% by an Indian tribe and 49% by a non-Indian. The court held that Title VII does not provide an exemption to enterprises that have mixed ownership, therefore plaintiff's claim was not dismissed.
Title VII Indian Preference Exemption

Title VII Indian Preference Exemption

• “Indian preference” exemption in Title VII and Executive Order 11246 may not permit an employer to offer a preference for members of a particular tribe over members of other tribes. Ninth Circuit Court of Appeals in *Dawavendewa v. Salt River Project Agricultural Improvement and Power Dist.*, 154 Fed.3d 117 (9th Cir. 1998), held that tribal preference was not authorized under Title VII exemption, only an Indian preference.

• The plaintiff, a Native American, alleged that because he is a Hopi and not a Navajo, he was not considered for a position with a private employer operating a facility on the Navajo Reservation. The Navajo Nation required the Salt River Project to employ a Navajo tribal hiring preference policy, and Dawavendewa was never interviewed.

• The Ninth Circuit held that discrimination on basis of tribal membership constitutes “national origin” discrimination prohibited by Title VII. *See also* EEOC Compliance Manual (1988).
Title VII Indian Preference Exemption

- After U. S. Supreme Court denied certiorari in *Dawavendewa I*, case was remanded to federal district court. At that point, Salt River Project ("SRP") argued that lawsuit must be dismissed for failure to join Navajo Nation as a necessary and indispensable party. District court granted SRP's motion to dismiss on this basis, and that decision was upheld by Ninth Circuit in *Dawavendewa v. Salt River Project*, 276 F.3d 1150 (9th Cir. 2002) ("Dawavendewa II").
Title VII Indian Preference Exemption

- The court found the absent tribe would be prejudiced in the litigation, which “threatens to impair the [n]ation's contractual interests, and thus, its fundamental economic relationship with SRP. The [n]ation strenuously emphasizes the importance of the hiring preference policy to its economic well-being.” The court found that “a judgement rendered in the [n]ation[']s absence will impair its sovereign capacity to negotiate contracts and, in general, to govern the Navajo reservation.”
Title VII Indian Preference Exemption

As *Dawavendewa II* was dismissed due to the sovereign immunity of the Navajo Nation, there is no clear rule on whether a tribal preference in a Tribal Ordinance will prevail over Indian Preference requirements under Title VII. The Court recognized the Navajo Nation’s needs to exercise its sovereign capacity to negotiate contracts and the importance of its hiring preference to its economic development. It also recognized that Salt River Project was subject to multiple and inconsistent obligations under conflicting federal and tribal laws. If Salt River Project did not comply with the Navajo Tribal employment preference, it stood to have its lease canceled. If it did not comply with Title VII, it would be in non-compliance with a federal statute.
Title VII Indian Preference Exemption

- In *Equal Employment Opportunity Commission v. Peabody W. Coal Co.*, 400 F.3d 774 (9th Cir. 2005), *pet. for cert. pending*, 125 S. Ct. 910 (2005), the Ninth Circuit held that:

  Tribal sovereign immunity does not preclude EEOC from suing the Navajo Nation to afford relief in suit between EEOC and Peabody due to Navajo tribal employment preferences in conflict with EEOC requirements.
Title VII Indian Preference Exemption

- However, on appeal the Navajo Nation’s tribal employment preferences were held to be a political classification and not a form of natural origin discrimination prohibited by Title VII.
Americans with Disabilities Act

• The Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, prohibits intentional discrimination in employment on basis of a physical or mental impairment.
ADA

• ADA also requires employers to provide "reasonable accommodation" to otherwise-qualified disabled employees, unless doing so would impose an undue hardship (42 U.S.C. § 12181). **ADA specifically excludes Indian tribes** from definitions of "employers" subject to Act.
ADA

• Title III of ADA creates a private right of action against individuals who own, lease or operate places of public accommodation, and who fail to comply with ADA’s accommodation requirements (42 U.S.C. § 12181).
• Title III of ADA, which requires places of public accommodation to be accessible to persons with disabilities, does not exclude tribes. Eleventh Circuit ruled, however, that it cannot be enforced by private persons against Indian tribes in non-Indian forums because Congress did not expressly waive tribal immunity from suit. *Florida Paraplegic Asso., Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126 (11th Cir. 1999).
• Court did note that while sovereign immunity barred private suits under Title III, U.S. Attorney General could nonetheless compel tribe's compliance with statute.
Federal Labor Laws That Do Not Address Applicability to Tribes

FLSA

• Under new FairPay rules, minimum salary level for exemption is $155 per week ($8,060/year) to $455 per week ($23,600 per year). Thus, employees earning less than $455 per week are guaranteed overtime pay under FLSA. Employees earning $455 per week or more on a salary basis will only qualify for exemption if they meet a new “standard” test of duties, otherwise, they too will qualify for overtime under FLSA.
FLSA

• Under new “highly compensated employee” exemption, employees with a total annual compensation of at least $100,000 are deemed exempt from FLSA if employee “customarily and regularly” performs an identifiable executive, administrative or professional function.
FLSA - *Snyder v. Navajo Nation*, 371 F.3d 658 (9th Cir. 2004)

- Ninth Circuit held in *Snyder v. Navajo Nation*, 371 F.3d 658 (9th Cir. 2004), that law enforcement officers of Navajo Nation Division of Public Safety are not entitled to protections of FLSA. While FLSA is a law of general applicability, tribal law enforcement is a traditional governmental function and is appropriate to exempt from scope of FLSA.
FLSA - *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F3d 490 (7th Cir. 1993)

- In case of *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F3d 490 (7th Cir. 1993), Department of Labor sought to enforce a subpoena against Great Lakes Indian Fish and Wildlife Commission, seeking evidence Commission was violating FLSA. In this instance, tribal organization was a consortium of 13 tribes.
FLSA - *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F3d 490 (7th Cir. 1993)

- Commission’s function was to protect native game and fishing rights. Employees sometimes worked around the clock in excess of 40 hours. Seventh Circuit noted that if employed by state or local governments, employees would not be covered by FLSA.
FLSA - *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F3d 490 (7th Cir. 1993)

• Court turned to history of Fair Labor Standards Act ("FLSA"). Opined that during 1938, Indians were not at forefront of political scene and were therefore probably overlooked and not mentioned in FLSA.
Nothing in legislative history suggested that Congress thought about “the possible impact of the act on Indian rights, customs, or practices.” *Reich* at 493.
FLSA - *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F3d 490 (7th Cir. 1993)

- Court refused to apply FLSA, partly as a symbol of comity and partly in recognition of sovereignty. However, court was careful to narrow its holding to that of government employees who are exercising powers of tribal government.

- In June, 2007, the United States District Court for the Western District of Washington concluded that the Fair Labor Standards Act (FLSA) applies to a business which operates on tribal land and is owned by a member of the tribe on whose land he operates his business.
National Labor Relations Act

- National Labor Relations Act ("NLRA"), 29 U.S.C. §§141-187 (2000), permits employees of businesses to **form unions** and to collectively bargain with their employers. Employers with at least $50,000 annual business volume are covered by NLRA. Applicability to Indian tribal employers is under appeal. It applies to private employers operating on or near reservations.
NLRA

• NLRA does not contain language either expressly applying it to Indian tribal governments or expressly exempting such governments from its coverage; however, it does expressly exempt United States or any wholly owned government corporation, or any state or political subdivision thereof.
Tenth Circuit held that despite lack of reference to tribes in section 14(b) of NLRA, which allows states and territories to prohibit agreements requiring membership in labor organization as condition of employment, San Juan Pueblo Indian Tribe could enact such a prohibition. Holding was based on Pueblo’s “retained inherent sovereign authority” to govern its own territory.

In contrast, the District of Columbia Circuit Court of Appeals held that the NLRA applied to a casino operated by San Manuel Band of Serrano Mission Indians ("Band") on San Manuel Indian Reservation in San Bernardino County, California. Casino is wholly owned and operated by Band and is located entirely within San Manuel Indian Reservation. Band will not appeal to the U.S. Supreme Court.

- Court held that Band’s operation of casino is not an exercise of self-governance or a governmental function, regardless of fact that revenue generated will be used to address tribe's intramural needs. Since casino is commercial enterprise, employing non-Indians and catering to non-Indians, NLRB held that policy considerations favor assertion of NLRB’s discretionary jurisdiction.

• Peter C. Schaumber, Chairman of the NLRB, said he was extremely disappointed when his colleagues overturned 30 years of precedent and subjected tribes to federal labor law. Back in March 2004, he authored the sole dissent to the decision that has sent shock waves through Indian Country.
The Occupational Safety and Health Act ("OSHA")

• OSHA is a statute of general applicability designed to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources...." See 29 U.S.C. §651(b).
OSHA

• Current OSHA regulations state that they apply to Indians but courts are split - "It is well settled that under statutes of general applicability, such as [OSHA], Indians are treated as any other person, unless Congress expressly provided for special treatment." See 29 C.F.R. § 1975.4(b)(3) (2006).
Donovan v. Navajo Forest Products Indus., 692 F.2d 709 (10th Cir. 1982)

• In Tenth Circuit, however, OSHA was held not to apply to a tribal business manufacturing wood products. Tenth Circuit premised its decision on existence of specific treaty right protecting tribal sovereignty, rights of Navajo Nation to exclude non-Indians and self-governance rights of Navajo Nation.
The Ninth Circuit however held that OSHA, which is silent as to its applicability to Indian tribes, applied to a tribal farm wholly owned and operated by Coeur d’Alene Indian Tribe. Farm was commercial enterprise employing Indians and non-Indians.
Dept. of Labor v. OSHA Review Comm'n., 935 F.2d 182 (9th Cir. 1991)

- Ninth Circuit upheld application of OSHA standards to a sawmill owned and operated by Confederated Tribes of the Warm Springs Reservation.
Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2nd Cir. 1996)

- Tribally owned and operated construction business was cited and fined for OSHA violations. Court found that OSHA did not affect tribe's exclusive right of self-government in purely intramural matters, and thus OSHA applied to this tribal construction business.

• Prohibits discrimination in employment on basis of age. Employees and job applicants are protected under ADEA if they are age 40 or over. ADEA is silent regarding its application to Indian tribes. Second, Eighth, Ninth and Tenth Circuit Courts of Appeals have held it does not apply to tribes.
ADEA - EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989)

- Tenth Circuit *en banc* held that ADEA did not apply to Cherokee Nation Department of Health and Human Services because of rights of self-governance guaranteed by Cherokee Treaty. Cherokee Nation had treaty right “to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country.” No clear indication of Congressional intent to abrogate tribal sovereignty rights.
EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989)

• Also, Tenth Circuit found ADEA's silence was equal to an ambiguity, and applied ambiguity ruling of Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982):
  “[I]f there [is] some ambiguity ... the doubt would benefit the tribe for ambiguities in federal law have been construed generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence.”
ADEA - *EEOC v. Karuk Tribe Housing Authority*

- In *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001), Ninth Circuit held that ADEA did not apply to a Tribal Housing Authority because role of tribal housing was integrally related to self-governance.
ADEA - EEOC v. Fond du Lac Heavy Equipment and Constr. Co., 986 F.2d 246 (8th Cir. 1993)

• Eighth Circuit Court of Appeals held that ADEA did not apply to a tribally-owned construction company that did work both on and off Reservation. Fond du Lac court stated general rule in Tuscarora “does not apply when the interest sought to be affected is a specific right reserved to the Indians.”

- Requires covered employers to grant eligible employees 12 weeks of unpaid leave for family and medical reasons in a given 12-month period. No mention of Indian tribes. To date, no court decisions regarding applicability to tribes. Secretary of Labor has taken position that FMLA applies to Indian tribes. See 60 Fed. Reg. 2181 (Jan. 6, 1995).
FMLA

• There is argument that legislative history supports proposition that FMLA should not apply to Indian tribes. Title VII of Civil Rights Act of 1964 specifically excludes Indian tribes from coverage. Since FMLA definition of employer mirrors Title VII’s definition, it should not apply to tribal employers.

• Federal statute designed to protect retirement plans and welfare-benefit plans maintained by employers. **ERISA does not require any employer to establish a pension plan.** It only requires that those who establish plans must meet certain minimum standards.
ERISA

• ERISA is not applicable to employee-benefit plans maintained by Indian tribes, if employee-benefit plan covers solely tribal employees employed in traditional governmental roles. (Change made as result of ERISA amendments in Pension Protection Act of 2006, 29 U.S.C. § 1002(32).) Employee-benefit plan would be considered as "governmental plan" and thus exempt from ERISA requirements.
ERISA – Cases Prior to 2006

• Given amendment in 2006, prior cases are impacted by amendment.
• *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989)
• *Lumber Industry Pension Fund v. Warm Springs Forest Products*, 939 F.2d 683 (9th Cir. 1991)

- Enacted as result of Congress' concern with number of Americans without health insurance coverage. COBRA amended Internal Revenue Code and ERISA to include continuation coverage requirements for up to eighteen months after employee ceases employment. **COBRA applies only to employers with group health plans and twenty or more employees** on more than 50 percent of its typical business days in previous calendar year. Full and part-time employees are counted proportionately based on time worked to determine whether a plan is subject to COBRA.
COBRA

• COBRA is not applicable to insurance plans maintained by Indian tribes, if an employee-benefit plan covers solely tribal employees employed in traditional governmental roles. Insurance plans that cover employees in commercial tribal enterprise are subject to COBRA.

• Made changes to Employee Retirement Income Security Act, statute designed to protect retirement plans and welfare-benefit plans maintained by employers.

• Section 906 of new Act specifically makes it applicable to Indian tribes engaged in commercial activities. Effective to any year on or after January 3, 2006.

• Pension Benefit Guarantee Corporation ("PBGC") is part of Department of Labor. Benefit plans subject to Title IV of ERISA must pay premiums to PBGC as part of PBGC’s guarantee to pay benefits to employees should employer become bankrupt or go out of business.

- Established system to control the employment of unauthorized aliens and enacted at the same time the companion provision to protect authorized workers from unfair immigration-related employment practices.
- IRCA prohibits employers from discriminating against applicants or employees on basis of their citizenship or national origin.
- IRCA also makes it illegal for employers to knowingly hire or retain in employment people who are not authorized to work in United States. Employers must keep records that verify that their employees are authorized to work in United States.
- IRCA only applies to employers with four or more employees.

- IRCA’s § 1324b does not apply just to an "employer," it applies as well to "a person or entity," § 1324b(a)1, which regulations define as "any legal entity, including but not limited to, a corporation, partnership, joint venture, governmental body, agency, proprietorship or association." 8 C.F.R. § 274a.1(b) (2004). While not yet litigated, it has been held to apply to a tribal commercial enterprise by the Department of Justice in enforcing a subpoena against the Miccosukee Resort and Convention Center. United States Department of Justice, Executive Office for Immigration Review, Office of the Chief Administrative Hearing Officer (O.C.A.H.O.), IN RE INVESTIGATION OF: MICCOSUKEE RESORT AND CONVENTION CENTER, OCAHO Case No. 05S00003, December 10, 2004, 2004 WL 3312070 (O.C.A.H.O.), 9 OCAHO 1114.
Does an employer need to complete a **Form I-9** for everyone who applies for a job with company?

• No. Employer needs to complete Form I-9 only for people who are actually hired. For purposes of I-9 rules, a person is "hired" when he or she begins to work for wages or other compensation.
The Health Insurance Portability and Accountability Act (HIPAA) was enacted in 1996.

Title I of HIPAA protects health insurance coverage for workers and their families when they change or lose their jobs.

Title II of HIPAA, the Administrative Simplification (AS) provisions, requires the establishment of national standards for electronic health care transactions and national identifiers for providers, health insurance plans, and employers.

The AS provisions also address the security and privacy of health data. The standards are meant to improve the efficiency and effectiveness of the nation's health care system by encouraging the widespread use of electronic data in the U.S. health care system.

- Prohibits employers from taking any negative job action -- such as demotion or firing -- against an employee because he or she is a member of armed forces or reserves.
- Also requires employers to reinstate most employees who take time off to serve. Employers generally don't have to pay employees who take military leave.
- Applies to all public and private employers, regardless of number of employees.
Federal Payroll Taxes

- W-4 - Employer’s Withholding Allowance Certificate (Notice of filing status and dependents for federal personal income tax).
- Form 941 – Employer’s Quarterly Federal Tax Return.
- W-2 – Annual earnings and taxes withheld for federal personal income tax.
- FICA – Federal Insurance Contributions Act (Social Security and Medicare). Employer matches amount withheld per employee.
Independent Contractor

- Not employees. Worker engaged in business of his/her own and provides services to businesses.
- File IRS Form MISC-1099 to report payment amount.
- Factors considered in determining whether worker is an employee or independent contractor:
  - Permanency of relation.
  - Amount of worker investment in facilities and equipment.
  - Nature and degree of control by principal.
  - Worker’s opportunities for profit and loss.
  - Level of skill of worker.
  - Non-payment of employee benefits and withholding of tax by principal.
Outsourcing

- **Outsourcing** became part of business vocabulary during the 1980s and refers to the delegation of non-core operations from a company to an external entity specializing in that operation. **Outsourcing** is utilizing experts from outside the entity to perform specific tasks that the entity once performed itself. Examples include accounting, data processing, computer services.
Federal Contracts

• Federal contracts will require compliance with certain laws as specified in the contract. By executing the contract you are agreeing to comply with them. It is important to note any tribal exemptions, such as Title VII and affirmative action programs.

• Office of Federal Contract Compliance Programs (OFCCP) enforces compliance with:
Federal Contracts

• Executive Order 11246, as amended (“E.O. 11246”), prohibits discrimination and requires affirmative action to ensure that all employment decisions are made without regard to race, color, religion, sex or national origin.

• Section 503 of the Rehabilitation Act of 1973, as amended (“§ 503”), prohibits discrimination and requires affirmative action in the employment of qualified individuals with disabilities.

• The Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (“VEVRAA”), prohibits discrimination against specified categories of veterans protected by the Act and requires affirmative action in the employment of such veterans. Effective December 1, 2003, the Jobs for Veterans Act (“JFA”) amended VEVRAA’s federal contracting provisions regarding coverage, protected groups and mandatory job listing requirements for all federal contracts entered into on or after December 1, 2003. Contracts entered into before this date are subject to the VEVRAA requirements as they stood before enactment of JVA.
State Employment and Labor Laws in Indian Country

• As general rule, state labor and employment laws do not apply to tribal employers operating on Indian reservations. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). However, there are specific requirements pertaining to tribal employers regarding state unemployment compensation.
State Worker’s Compensation Laws

• Workers' compensation is a state-mandated insurance program that provides compensation to employees who suffer job-related injuries and illnesses.

• While state workers' compensation laws apply on Indian reservations to non-Indian employers with a certain number of employees, they do not apply to tribes as employers. The Act of June 25, 1936, 49 Stat. 1938, 40 U.S.C. § 290, provided that states have authority to apply workers' compensation laws to all lands owned or held by United States which is within exterior boundaries of state to same extent as if such lands were under exclusive jurisdiction of state.
State Worker’s Compensation Laws

- Congress has authorized the states to apply their workers' compensation laws to lands owned or held by the United States. 40 U.S.C. 290 provides:

- WHATSOEVER constituted authority of each of the several States is charged with the enforcement of and requiring compliance with the State workman's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession by purchase or otherwise, which is within the exterior boundaries of any state, and to all projects, buildings constructions, improvements and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.
40 U.S.C. 290 Does Not Apply to Tribal Employers

• While Section 290 specifically permits the states to apply their workers' compensation laws to federal enclaves and territories, courts which have considered the issue of whether this statute applies to tribal employers on federal Indian reservations have concluded that it does not. These courts have determined that in enacting 40 U.S.C. 290 Congress did not intend to abrogate tribal sovereign immunity from suit and therefore it may not be applied to tribal employers' reservation businesses without a tribe's consent. White Mountain Apache Tribe v. Industrial Commission of Arizona, 696 P.2d 223 (Ariz. Ct. App. 1985); Swatzell v. Industrial Commission of Arizona, 277 P.2d 244 (Ariz. 1954), (petitioner was a non-Indian employee); Tibbetts v. Leech Lake Reservation Business Committee, 397 N.W.2d 883 (Minn. 1986).
40 U.S.C. 290 Does Apply to Non-Tribal Employers

Statute has been interpreted to apply to Indian reservations and was applied to permit application of State of Arizona’s workers' compensation provisions on Navajo Nation as to non-tribal employers.

- Navajo Supreme Court held that while 40 U.S.C. § 290 allowed Arizona Industrial Commission to award worker’s compensation benefits to a Navajo employee injured on job, it did not preclude Navajo Nation courts from exercising jurisdiction over subsequent personal injury suit against employer over same injuries.
Opinion stated:

“The Navajo Nation courts should not permit personal injury suits as a 'supplement' to state workers' compensation awards unless it is clear that the compensation received under the workers' compensation regime is substantially different from what Navajo common law would consider adequate...” Slip Op. at 8.
40 U.S.C. 290 May Apply to Tribal Member Owned Businesses as Employers

• Since Section 290 specifically permits the states to apply their workers' compensation laws to federal enclaves and territories, the North Dakota Supreme Court in a unanimous opinion held that it applied to a tribal-member owned limited liability company organized under state law which performed work on the Fort Berthold Reservation or on Indian trust lands in *State of North Dakota ex rel. Workforce Safety & Insurance v. JFK Raingutters, a Limited Liability Company*, 733 N.W.2d 248 (2007).
Frank Whitecalfe is an enrolled member of the Three Affiliated Tribes and lives on the Fort Berthold Indian Reservation. In 1999, he formed a limited liability corporation, JFK, which engaged in the business of constructing and installing raingutters. Although Whitecalfe originally applied for worker's compensation insurance coverage and paid quarterly premiums, in 1999 and subsequent years JFK claimed that it had no employees and no payroll and began paying the minimum quarterly payment to keep its account open. JFK claimed that it was exempt from paying worker's compensation insurance premiums on the workers it engaged to construct and install raingutters because they were independent contractors. JFK also claimed that most of its work was performed on the reservation or on trust lands, and that WSI had no jurisdiction and could not collect premiums for those projects.
The court relied on an Idaho case. 

*In State ex rel. Indus. Comm'n v. Indian Country Enters., Inc.*, 944 P.2d 117 (Idaho 1997), the Idaho Industrial Commission sued Indian Country Enterprises, Inc., and its owner to enjoin them from doing business and for statutory penalties for conducting business without providing workers compensation insurance for their employees. The business was located on the Coeur d'Alene Indian Reservation. The business was not owned by the tribe, but the owner was a member of the tribe.
40 U.S.C. 290 May Apply to Tribal Member Owned Businesses as Employers

• The Idaho Supreme Court concluded its state courts had subject matter jurisdiction over an action to enforce Idaho's workers compensation laws against a tribal member operating a business on the reservation based on 40 U.S.C. § 290.
State Contracts

• Comply with state statutory provisions agreed to in state contract form. It is important to note any tribal exemptions, such as Title VII and affirmative action programs.

• In event of a conflict between federal and state requirements, comply with the federal statute, unless the federal government allows the state to have more stringent requirements, then with the state requirements.
Conflict between Federal or State and Tribal Law

• A conflict between federal or state and tribal law when operating within the boundaries of the tribal territory will require a case-by-case analysis.
Potential for Conflict between Tribal Employment Regulations and Federal Labor Law

- Astaris LLC operates a phosphorus manufacturing plant on the Shoshone-Bannock Tribes Fort Hall Reservation near Pocatello, Idaho. The Shoshone-Bannock Tribes’ Tribal Employment Rights Ordinance (“TERO”) and a Collective Bargaining Agreement (“CBA”) between Astaris and the International Association of Machinists and Aerospace Workers (“Union”) conflicted with each other in regard to layoffs at the Astaris plant. The TERO required an Indian preference in layoffs, while the CBA required that layoffs be governed by seniority. After filing suit, Astaris was able to resolve the issues between the Tribes and the Union. See also EEOC v. Peabody W. Coal Co., 400 F.3d 774 (9th Cir. Ariz. 2005), cert. denied, 126 S. Ct. 1164 (2006).

- However, the Navajo Nation’s tribal employment preferences were held to be a political classification and not a form of natural origin discrimination prohibited by Title VII.
Unemployment Insurance ("UI")

- Federal-state program jointly financed through federal and state employer payroll taxes. Generally, employers must pay both state and federal unemployment taxes if:
  1. they pay wages to employees totaling $1500, or more, in any quarter of a calendar year; or,
  2. they had at least one employee during any day of a week during 20 weeks in a calendar year, regardless of whether or not weeks were consecutive.

- Authorizes IRS to collect federal employer tax used to fund state workforce agencies. Employers pay this tax annually by filing IRS Form 940. FUTA covers costs of administering UI and Job Service programs in all states. In addition, FUTA pays one-half of cost of extended unemployment benefits (during periods of high unemployment) and provides for a fund from which states may borrow, if necessary, to pay benefits.

• Tribes have option of either paying state Unemployment Compensation tax or paying claims when they arise. Tribes elect whether to be a taxpayer or a reimbursing entity. State law may require tribe to post payment bond or take other reasonable measures to assure making of payments in lieu of contributions.
FUTA FIX

• Services performed in employ of tribes generally are no longer subject to FUTA tax.

Prior to FUTA Fix, coverage was at option of state.
FUTA FIX

• If an Indian tribe fails to make required payments to state's unemployment fund or payments of penalty or interest, then tribe will become liable for FUTA tax and state may remove tribal services from state UC coverage.
Tribal Labor Laws

• Primary purpose of most such statutes (Tribal Employment Rights Ordinances – “TEROs”) is to provide tribal preference in employment. In many cases where a company is operating on tribal land, company's contract with tribe will probably be sufficient for tribe to impose its employment laws, along with applicable federal and state laws.
FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991)

• Ninth Circuit held that FMC's mineral leases on lands owned by Tribes or individual Indians satisfied test established in Montana v. United States, 450 U.S. 544, 565 (1981), stating that tribal jurisdiction was appropriate where there are "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Tribe’s labor laws applicable to FMC.
FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991)

- FMC’s business was located within the Shoshone-Bannock Reservation, although on fee land, but FMC engaged in substantial commerce with the tribes.
No Tribal Jurisdiction: Macarthur v. San Juan County, 497 F.3d 1057 (10th Cir. Utah 2007), cert. denied, 128 S. Ct. 1229 (2008)

• With the exception of activities of special service district's board member, Indian tribe did not possess regulatory authority over county's and special service district's employment-related activities and therefore tribal court lacked jurisdiction over employees' claims against defendants other than CEO, and although tribal court arguably possessed regulatory authority over board member as a member of the tribe, court would exercise its discretion to decline to enforce the tribal court orders in regard to board member.
Macarthur v. San Juan County, 497 F.3d 1057 (10th Cir. Utah 2007), cert. denied, 128 S. Ct. 1229 (2008)

• [T]his case essentially boils down to an employment dispute between SJHSD [San Juan County Health Services District] and three of its former employees, two of whom happen to be enrolled members of the Navajo Nation.
• SJHSD is a special service district organized under the Utah Code. It provides health care services to San Juan County citizens. It is located on fee land owned by the State of Utah within the exterior boundaries of the Navajo Nation.
Question: whether the Navajo Nation possessed adjudicative authority over the activities of SJHSD, nearly all nonmembers of the Navajo Nation. The court applied the analysis from Montana as this case related to the powers of an Indian tribe over nonmembers of the tribe.
Macarthur v. San Juan County, 497 F.3d 1057 (10th Cir. Utah 2007), cert. denied, 128 S. Ct. 1229 (2008)

• In *Montana v. United States*, the Supreme Court laid down a general rule that “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” There are, nevertheless, two narrow exceptions to the general rule against tribal authority over nonmembers. First, “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” Second, “[a] tribe may ... exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” Cites omitted.
Macarthur v. San Juan County, 497 F.3d 1057 (10th Cir. Utah 2007), cert. denied, 128 S. Ct. 1229 (2008)

- The Court found (1) that there was no consensual relationship between SJHSD and the Navajo Nation; and (2) the acts of SJHSD did not have a direct effect on the political integrity, the economic insecurity, or the health and welfare of the Navajo Nation. Therefore, the Navajo Nation did not possess regulatory authority over the nonmember employees of the SJHSD.
Navajo Preference in Employment Act ("NPEA")

- In Cabinets Southwest Inc. v. Navajo Nation Labor Commission, SC-CV-46-03 (2/10/04), Cabinets, a subsidiary of the Navajo Housing Authority ("NHA") argued that the Navajo Preference in Employment Act ("NPEA") did not apply because Cabinets operated off the Reservation. Cabinets entered into a lease with the Navajo Nation for a parcel of land located outside the territorial jurisdiction of the Navajo Nation but owned in fee by the Navajo Nation. After terminating two employees, Cabinets argued that the NPEA did not apply to it because it acted outside the territorial jurisdiction of the Navajo Nation. Rejecting this claim, the Navajo Nation Supreme Court held that the NHA lease stated that Navajo law applies. Also, Cabinets’ articles of incorporation specified application of Navajo law. The Navajo Nation Court held that a party that elected to incorporate under Navajo law must abide by Navajo law as a condition of their existence.
Navajo Preference in Employment Act ("NPEA")

- **Incorporation of Navajo Nation Customary Law.**
- “Employers doing business on or near Indian lands must also be cognizant that tribal laws are subject to change through judicial interpretation, in a similar manner to the development of Anglo-Saxon common law. One of the most interesting developments in this respect is increased reliance on tribal traditions and customs governing relationships and dispute resolution. In particular, the Navajo Nation Supreme Court’s recent employment law decisions draw heavily from traditional law to guide the future course of the NPEA. This development on the Navajo Nation is supported by not only the Navajo Nation Supreme Court, but also by the Navajo Nation Council’s Resolutions requiring that statutes be interpreted consistent with Navajo Common Law (or Diné bi Beenahaz'áanii). See Labor and Employment Issues in Indian Country: A Non-Indian Business Perspective, Walter E. Stern and Daniel W. Long.
Navajo Preference in Employment Act ("NPEA")

The emphasis on traditional Navajo relationships is perhaps most evident in *Kesoli v. Anderson Security Agency*, SC-CV-01-05 (October 12, 2005), in which a security company supervisor (Kesoli) was terminated for shouting at his subordinates. Kesoli argued that his employer, Anderson, did not have “just cause” to terminate his employment. Anderson argued that it had no choice but to terminate Kesoli’s employment, because his conduct in shouting at his subordinates could constitute “harassment” for which Anderson could be liable under the NPEA. Anderson suggested a broad definition of “harassment” to mean “all forms of conduct that unreasonably interfere with an individual’s work performance or create an intimidating, hostile, or offensive working environment.” Cites omitted.
Navajo Preference in Employment Act (“NPEA”)

- The Navajo Nation Supreme Court used traditional law to resolve Kesoli’s claims. First, the court held that (lacking other guidance from the NPEA) that Anderson’s suggested definition of harassment was consistent with the NPEA and with Diné bi Beenahaz'áanii (Navajo Common Law). The court held that “words are sacred and never frivolous in Navajo thinking,” a concept that finds support in other Navajo cases as well.
Navajo Preference in Employment Act ("NPEA")

- The Navajo Nation Supreme Court further held that, as a supervisor, Kesoli was in the position of a *naat’áanii*, or respected leader. As *naat’áanii*, Kesoli had an obligation to conduct himself thoughtfully and carefully in accordance with the Navajo principle of *házhó’ógo*, which requires patience, respect, and clear communication between human beings, particularly when matters are heated. The court held that Anderson had set up mechanisms to deal with disputes between employees that allowed employees to “talk things out” in accordance with the Navajo principle of *k’é*, but that Kesoli failed to utilize them. Therefore, Kesoli’s conduct in shouting at his subordinates constituted “just cause” sufficient for termination.
Need for Personnel Manual

• A Personnel Manual contains policy and procedure applicable to employer and its employees. Memorializes rules, standards, expectations and conduct applicable to employer and its employees.
Policies and Procedures

A policy is a **plan** or course of action adopted by a business or government designed to influence and **determine decisions**, actions and other matters. Procedure is **course of action** used to pursue government or business goals and policies.
Tough Questions

Will tribal enterprise exercise tribal or Indian preference in its hiring decisions?

Is tribal enterprise an at-will or for cause employer?

Will tribal enterprise pay overtime compensation?

Will tribal enterprise have its own workers’ compensation policy or will it follow state law?
Employment At Will

• In the majority of states, employees not working under an employment contract are deemed to be “at will.” At-will employees may be terminated for any reason, so long as it’s not illegal. Similarly, an employee is free to leave his or her job at any time for any reason.

• The general rule is that an employment contract is for an indefinite period and is terminable at the will of either party unless there is an express contractual provision that states something different. There are two recognized exceptions to the employment at will rule:
  • Discharge in violation of public policy;
  • Implied contract of employment, which limits discharge to “for cause” or pursuant to a particular set of procedures.
Employment At Will – Caution on Tribal Lands

- The Navajo Nation by ordinance requires that Navajo employees may only be terminated for cause upon written notification. 15 N.N.C § 604(b)(1). Also, Navajo employees have reduction in force preference. Office of Navajo Labor Relations (“ONLR”) requires written affirmative action plan; Ordinance establishes ONLR and Labor Commission as forum to resolve employment disputes; and allows ONLR to set wage rates on construction projects. Not all employee misconduct will meet the standard for just cause. ... The misconduct must be substantial. Thus a minor neglect of duty, an excusable absence, a minor misrepresentation, rudeness, and even filing a defamation action against the employee have been held not to establish just cause. *Dilcon Navajo Westerner/True Value Store v. Jensen*, No. SC-CV-52-98 (Nav. S. Ct. 2000).
Liability

• Failure to clearly tell employees that certain conduct will not be tolerated in workplace significantly increases employer’s exposure to liability if presented with a claim.
Even Handed Decisions

• Rules to make decisions regarding employee conduct will increase an employer’s objectivity in employment related matters.

• Will increase impartiality and appearance of impartiality.
Accountability

• Policies and procedures can help all parties understand when they have met, exceeded or failed to reach employer expectations.
Modification of Manual

• Suggested language:

• Employer reserves right to revise, supplement, modify and rescind any policies or portion of this Manual from time to time as it deems appropriate, in its sole discretion.
Grievances

• If employer elects to grant employees an opportunity to raise concerns regarding an employment related decision through a grievance process, employer must include language insulating it from a waiver from its employment at-will policy, if applicable.
Consent to Tribal Court Jurisdiction

• As an employee of _____, a wholly-owned enterprise of the ___ (the “_____”), I consent to the exclusive jurisdiction of the Nation’s Court for any and all disputes in connection with my employment with the ______________. I also consent to the application of the Nation’s law, both substantive and procedural, regarding any and all proceedings or matters relating to my employment relationship with the ______.
Tribal Sovereign Immunity

• Tribal employers may be protected by cloak of sovereignty and defense of sovereign immunity if an employee attempts to assert a claim against tribal employer without consent of tribe. If tribe has not waived its immunity, providing this information to employees at beginning of employer-employee relationship reduces effectiveness of an employee later arguing that they were not aware of sovereignty defense.
Sample Tribal Immunity Language

• The Nation is a separate sovereign nation existing within the borders of the United States of America. One aspect of the Nation’s sovereign status is its immunity from certain law suits. Accordingly, the Nation cannot be sued in any court without its consent. Nothing in this Manual constitutes, or should be interpreted as constituting, a waiver of the Nation’s sovereign immunity.
Federal Government Websites

• Internal Revenue Service http://www.irs.gov

• Occupational Safety and Health Administration http://www.osha.gov

• Department of Labor
  http://www.dol.gov

• U.S. Citizenship and Immigration Services http://www.uscis.gov


• Business.usa.gov – information on small business federal regulatory compliance
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