Federal, Tribal and State Employment and Labor Laws Applicable to Private Indian Owned Businesses (Colorado)

2013

DISCLAIMER

Information provided is for informational purposes only, does not constitute legal advice or create an attorney-client relationship, and may not apply to all circumstances. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

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. They do apply to private Indian-owned businesses. Also, the businesses location may be a factor in the applicability of certain laws, such as the Occupational Safety and Health Act ("OSHA").

Fed. Power Comm'n. v. Tuscarora Indian Nation, 362 U.S. 99 (1960) – Tuscarora Rule

- 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.

Fed. Power Comm'n. v. Tuscarora Indian Nation, 362 U.S. 99 (1960) – Tuscarora Rule

- 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.

Fed. Power Comm'n. v. Tuscarora Indian Nation, 362 U.S. 99 (1960) – Tuscarora Rule

- 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.

Fed. Power Comm'n. v. Tuscarora Indian Nation, 362 U.S. 99 (1960) – Tuscarora Rule

- 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.

Fed. Power Comm'n. v. Tuscarora Indian Nation, 362 U.S. 99 (1960) – Tuscarora Rule

- 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)

- In Tenth Circuit, 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 right 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)

- However, the Ninth Circuit held that the Occupational Safety and Health Act ("OSHA") applied to a 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.

Donovan v. Coeur d' Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985)

- 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.

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 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

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**.

BIA Indian Employment Preference: *Morton v. Mancari*, 417 U.S. 535 (1974)

- 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.

Morton v. Mancari, 417 U.S. 535 (1974) (con't.)

- 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.

Morton v. Mancari, 417 U.S. 535 (1974) (con't.)

- 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.

Morton v. Mancari, 417 U.S. 535 (1974) (con't.)

- [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.

Morton v. Mancari, 417 U.S. 535 (1974) (con't.)

- 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

- Preference applies to promotions and lateral transfers – *Freeman v. Morton*, 499 F.2d 494 (D.C.Cir. 1974). It does not apply to reductions in force. *Mescalero Apache Tribe v. Hickel*, 432 F.2d 956 (10th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971).

IHS Preference

- *Preston v. Heckler*, 734 F.2d 1359 (9th Cir. 1984)

Indian Educators Federation v. Kempthorne, Civil Action No. 2004-0959 (D.D.C. March 31, 2008)

- 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.

2000 Department of Defense Appropriations Act 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.

In General, Private Indian Owned Businesses Are Subject to Federal Employment and Labor Statutes

Federal Labor Laws

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. *See* 42 U.S.C. §§ 2000e-2000e-17 (2000). *See also* Executive Order 11246. Applies to employers with **15 or more employees**. It is **not applicable to Indian tribes**, and contains an Indian employment preference for businesses operating on or near Indian reservations.

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

- 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.

Myrick v. Devils Lake Sioux Manufacturing Corp., 718 F.Supp. 753 (D.N.D. 1989)

- 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 expressly permits use of Indian preference by employers on or near reservations. 42 U.S.C. § 2000e-2(i). Sixty miles from reservation is distance EEOC uses for determining 'near'. *See* EEOC Compliance Manual (1988).

Title VII Indian Preference Exemption

- "Indian preference" exemption in Title VII and Executive Order 11246 **may** permit an employer to offer a preference for members of a particular tribe over members of other tribes.
- While the 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, this was later reversed.
- 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

- In *Dawavendewa II,* 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), *cert. denied*, 126 S. Ct. 1164 (2006), 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.

Navajo Tribal Employment Preference Upheld

- However, in *Equal Employment Opportunity Commission v. Peabody W. Coal Co.*, 2012 WL 5034276 (D. Ariz., Oct. 18, 2012), 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 applies only to employers with **fifteen or more employees**. **ADA specifically excludes Indian tribes.**

ADA

- Mental impairment includes alcoholism and substance abuse.

- 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

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).

ADA

- 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).

Do Not Ask These Interview Questions (ADA)

- The U.S. Equal Employment Opportunity Commission (EEOC) is the federal agency that enforces the ADA.
- According to the EEOC, you should never ask the following questions in a job interview:
- Have you ever had or been treated for any of the following conditions or diseases? (Followed by a checklist of various diseases or conditions.)
- List any conditions or diseases for which you have been treated in the past three years.
- Have you ever been hospitalized? If so, for what condition?
- Have you ever been treated by a psychologist or psychiatrist? If so, for what?
- Have you ever been treated for any mental condition?
- Do you suffer from any health-related condition that might prevent you from performing this job?
- Have you had any major illnesses in the past five years?

Do Not Ask These Interview Questions (ADA) (con't.)

- How many days were you absent from work because of illness last year? (You may, however, tell the applicant what your attendance requirements are and then ask whether he or she will be able to meet those requirements.)
- Do you have any physical defects that preclude you from doing certain types of things?
- Do you have any disabilities or impairments that might affect your ability to do the job?
- Are you taking any prescribed drugs?
- Have you ever been treated for drug addiction or alcoholism?
- Have you ever filed a worker's compensation claim?

Questions You May Ask (ADA)

- According to the EEOC, you may ask the following questions in a job interview without violating the ADA:
- Can you perform all of the job functions?
- How would you perform the job functions? (If you want to ask any applicant this question, you should ask all applicants this question.)
- Can you meet my attendance requirements?
- What are your professional certifications and licenses?
- Do you currently use illegal drugs?

Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§201-219 (2000)

- Authorizes U.S. Secretary of Labor to set and enforce standards for **minimum wages and terms of payment for overtime work** of nonprofessional labor force, prohibits sex discrimination in compensation, and regulates employment of children. **Only employers** who are **engaged in interstate or foreign commerce and whose gross yearly sales total or exceed $500,000** are required to comply with Act. This includes making phone calls to or from another state, sending mail out of state, or handling goods that have come from or will go to another state. **FLSA is silent as to its applicability to Indian 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

- 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. S*ee Chao v. Matheson*, 2007-WL-1830738, No. C-06-5361 (W.D. Wash, June 25, 2007).

FLSA

- The U.S. Department of Labor ("Department") conducted an audit of a business owned by Paul Matheson, a member of the Puyallup Nation. The business sold tobacco and other products in interstate commerce to Indians and non-Indians, operated on tribal trust lands within the Puyallup Nation's Reservation, and employed both Indians and non-Indians. The Department determined that Matheson had violated the FLSA by failing to pay current and past employees overtime wages totaling about $31,000.00. The Department sought an injunction requiring Matheson to comply with the FLSA and pay the back wages.

FLSA

- The District Court cited two cases which set forth a framework to determine whether federal employment laws apply to tribal employers. *F.P.C. v. Tuscarora Indian Nation,* 362 U.S. 99 (1960)*; Donovan v. Coeur d'Alene Tribal Farm,* 715 F.2d 113 (9th Cir. 1985). In *Tuscarora*, the United States Supreme Court stated that a statute of general applicability applies to Indians. In *Donovan v. Coeur d'Alene Tribal Farm*, the Ninth Circuit Court of Appeals set forth three exceptions to that general rule. Because the United States Court in the Western District of Washington is within the Ninth Circuit of Appeals, it applied these two cases to Matheson's business.

FLSA

- After setting forth this framework, the District Court turned to the three exceptions in *Donovan v. Coeur d'Alene Tribal Farm*. The first exception is matters which are "exclusive rights of self governance in purely intramural matters." Matheson argued that the payment of wages to tribal employees and non-Indians working for an Indian business was a matter purely within the tribe's interest. The Court rejected that argument quoting the Ninth Circuit for the proposition that "tribal business and commercial activity" are distinct from governance and are subject to regulation by non-Indian governments.

FLSA

- The second exception applies when a law would conflict with a treaty right. Matheson argued that an 1854 treaty gave the Nation the authority to exclude non-tribal members which precluded the application of the FLSA to his business. The District Court did not seem to directly refute this point, but impliedly did so by distinguishing a case from the Tenth Circuit Court of Appeals, *National Labor Relations Board v. Pueblo of San Juan,* 276 F.3d 1186 (10th Cir. 2002). The Court indicated that tribes have lost certain powers and implied that the right to exclude the Department was one of those lost powers.

FLSA

- The Court did not directly address the third exception to the rule that generally applicable laws apply to Indians. Rather, the Court concluded by stating that Matheson employed non-tribal members, was selling to non-tribal customers and was a business instead of a governmental body. The Court determined that the FLSA applied to Matheson's business and entered judgment a few days later requiring Matheson to pay the overtime wages due and stating that the FLSA would apply to Matheson's business.

FLSA

- Whether federal employment laws apply to a particular tribal enterprise or business on land depends on the type of employer, the statute at issue, treaties particular to the tribal nation, and the court hearing the case.
- The *Matheson* case is on appeal in the Ninth Circuit.

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.

FLSA - *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F3d 490 (7th Cir. 1993)

- 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**.

FLSA - *Snyder v. Navajo Nation*, 371 F3d 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.

U.S. Equal Pay Act of 1963, 29 U.S.C. §206(d)

- Prohibits sex-based wage discrimination between men and women in same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions.

U. S. National Labor Relations Act

- U. S. 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 unclear given conflict in US Circuit Court decisions. Tribes are arguing that it does not apply to them. It does apply to private employers operating on or near reservations. **NLRA is silent as to its applicability to Indian tribes and circuit courts of appeal are split.**

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.

Nat'l. Labor Relations Bd. v. Pueblo of San Juan, 276 F.3d 1187 (10th Cir. 2002)

- 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**.

San Manuel Indian Bingo and Casino v. N.L.R.B., 475 F.3d 1306 (D.C. Cir. Feb. 2007), *reh'g en banc denied* (D.C. Cir. June 8, 2007)

- 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.

San Manuel Indian Bingo and Casino v. N.L.R.B., 475 F.3d 1306 (D.C. Cir. Feb. 2007), *reh'g en banc denied* (D.C. Cir. June 8, 2007)

- 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.

San Manuel Indian Bingo and Casino v. N.L.R.B., 475 F.3d 1306 (D.C. Cir. Feb. 2007), *reh'g en banc denied* (D.C. Cir. June 8, 2007)

- 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.

U.S. Occupational Safety and Health Act ("OSHA")

- OSHA, which is **silent as to its applicability to Indian tribes,** 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

- As an employer, you must provide a workplace free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to your employees, **regardless of size of your business**. You must comply with OSHA standards and regulations under OSH Act. However, your business location if within Indian country may be a factor in the applicability of OSHA.

Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (2000)

- Prohibits discrimination in employment on basis of age. Employees and job applicants are protected under ADEA if they are age 40 or over. Only applies to workplaces with **20 or more employees**. **ADEA is silent as to its applicability to Indian 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."

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.

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.

Family Medical Leave Act ("FMLA"), 29 U.S.C. §§2601-2654 (2000)

- Requires covered employers to grant eligible employees 12 weeks of unpaid leave for family and medical reasons in a given 12-month period. Applies only to employers with **fifty or more employees**.

U.S. Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-2009

- Prohibits most employers from using lie detector tests either for pre-employment screening or during the course of employment. Also, prohibits employer from discharging, disciplining or discriminating against employee or prospective employee for refusing to take lie detector test.

U.S. Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-2009 (con't.)

- Permitted in certain areas such as federal national security, private sector security service, pharmaceuticals, theft or embezzlement, or as agreed in collective bargaining agreement.

Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 et. seq.

- 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.

Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 29 U.S.C. §§1161 et. seq. (2000)

- 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 employer provided group health plans 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.

Pension Protection Act of 2006, 29 U.S.C. § 1002(32)

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

Pension Protection Act of 2006, 29 U.S.C. § 1002(32) (con't.)

- 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.

The Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1324

- 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**.

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.

HIPAA

- The Health Insurance Portability and Accountability Act (“HIPAA”), 42 U.S.C. §§ 201 et seq., 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.

Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. §§ 4301 et seq.

- 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 – Internal Revenue Code §§ 3101-3128 (covers Social Security and Medicare). Employer matches amount withheld per employee.

Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. §§3301 et. seq. (2000)

- 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.

Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. §§3301 et. seq. (2000) (con't.)

- 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**.

Reference & Background Checks

- **Permitted by law but controlled by Fair Credit Reporting Act if done by third party.**

Drug Testing

- **Permitted by law but can raise privacy and other legal issues.**
- **Uniform Selection Guidelines and the Drug-Free Workplace Act may impact process.**
- **Qualified firms provide advice regarding policy development and implementation.**

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.
- Office of Federal Contract Compliance Programs (OFCCP)

  enforces compliance with:

Federal Contracts (con’t.)

- 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.

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.

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. Equal Employment Opportunity Commission http://www.eeoc.gov
- Business.usa.gov – information on small business federal regulatory compliance

- **Tribal Labor and Employment Law**

Tribal Labor Laws

- Primary purpose of most such statutes is to provide tribal preference in employment (Tribal Employment Rights Ordinances – “TEROs”). 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.

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")

- In *Equal Employment Opportunity Commission v. Peabody W. Coal Co.*, 2012 WL 5034276 (D. Ariz., Oct. 18, 2012), 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**.

Navajo Customary Law

- **<u>Incorporation of Navajo Nation Customary Law.</u>**
- "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 Customary Law

- 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 Customary Law

- 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 Customary Law

- 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.

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).

State Labor and Employment Statutes

State Workers' Compensation Laws

- Workers' compensation is a state-mandated insurance program that provides compensation to employees who suffer job-related injuries and illnesses.
- In some states, however, very small companies (with fewer than three or four employees) are not required to carry workers' compensation insurance.
- In Colorado, applies to employers with one or more full or part time employees, including family members. No portion of the cost may be deducted from an employee's wages.
- Application for rejection of coverage may be filed for corporate officers, members of an LLC, sole proprietor and/or partners if they own at least 10% of the business.

State Workers' Compensation Laws

- 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.

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 on Indian Reservations

- Courts have, however, applied **40 U.S.C**. **290** to nontribal employers on federal Indian reservations that were not tribal enterprises. *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311 (9th Cir. 1982); *Johnson v. Kerr-McGee Industries, Inc.*, 129 Ariz. 393, 631 P.2d 548 (Ariz. Ct. App. 1981); *State of Idaho, ex rel. Industrial Commission v. Indian Country Enterprises*, 944 P.2d 117 (Idaho 1987).

Begay v. Kerr-McGee Corp., 682 F.2d 1311 (9th Cir. 1982)

- 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.

Nez v. Peabody Western Coal Co., Inc., No. SC-CV-28-97 (September 22, 1999), Slip Op.

- 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.

Nez v. Peabody Western Coal Co., Inc., No. SC-CV-28-97 (September 22, 1999), Slip Op.

- 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.

State of North Dakota ex rel. Workforce Safety & Insurance v. JFK Raingutters, a Limited Liability Company, 733 N.W.2d 248 (2007)

- 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).

State of North Dakota ex rel. Workforce Safety & Insurance v. JFK Raingutters, a Limited Liability Company, 733 N.W.2d 248 (2007) (con't.)

- 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.

State of North Dakota ex rel. Workforce Safety & Insurance v. JFK Raingutters, a Limited Liability Company, 733 N.W.2d 248 (2007) (con't.)

- The North Dakota 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.

State of North Dakota ex rel. Workforce Safety & Insurance v. JFK Raingutters, a Limited Liability Company, 733 N.W.2d 248 (2007) (con't.)

- 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.

Colorado Unemployment Tax ("SUTA")

- Tax paid to State by employers. Tax fund is used to pay state unemployment benefits to workers who are out of work through no fault of their own and who meet certain qualifications.
- FUTA tax is reduced based on how much SUTA you pay.
- Indian tribes have option of paying tax or paying if claim arises (payment in lieu of contribution.

Colorado Unemployment Tax ("SUTA") (con't.)

- **Who Is Required to Pay:**
- **Any business that paid wages to employees totaling $1500, or more, in any quarter of a calendar year; or, (2) any business that had at least one employee for any part of a day of a week during 20 weeks in a calendar year, regardless of whether or not weeks were consecutive**.

Colorado Unemployment Tax ("SUTA") (con't.)

- Each year, premium rates for employers are determined based on a number of factors including the amount of money already paid and unemployment benefit payments made to former employees.
- Employers must pay annual premiums for each employee's chargeable wages. The chargeable wage limits are:
- $11,300.00 for 2013
- $11,000.00 for 2012
- $10,000 for 2011 and prior

Colorado Unemployment Tax ("SUTA") (con't.)

- **Standard Rate -** New employers begin at a standard rate depending on the type of business activity. Between 2004-2012, the standard rate consisted of three components: a base rate, a solvency surcharge and a surtax.
- In 2013, the standard rate consists of two components: a base rate and a bond principal rate.
- **Computed Rate -** After an employer has paid wages for a sufficient number of quarters, the rate is eligible for a computed rate based on the experience of the business.

Colorado Unemployment Tax ("SUTA") (con't.)

- Registering:
- Colorado Department of Labor and Employment, US Operations
- Mailing Address: 633 17th Street, Suite 201 Denver, CO 80202-3660
- Telephone: 303.318.9100 or 303.318.8000
- Toll Free: 800.480.8299 (outside Denver Metro Area)

Colorado Unemployment Tax ("SUTA") (con't.)

- Website: www.coworkforce.com/UIT/
- Use any of the two specified methods to register your business:
  - Online with Business Express
  - Colorado Business Registration Form, CR 0100

Colorado Wage Act, CRS §§ 8-4-101 et seq.

- The Colorado Wage Act requires employers to pay wages to employees in a timely manner.

Colorado State Minimum Wage

- Article XVIII, Section 15, of the Colorado Constitution requires the Colorado minimum wage to be adjusted annually for inflation, as measured by the Consumer Price Index used for Colorado.

Colorado State Minimum Wage

Effective Date	Minimum Wage	Tipped Employee Wage
January 1, 2013	**$7.78**	**$4.76**
January 1, 2012 - December 31, 2012	$7.64	$4.62
January 1, 2011 - December 31, 2011	$7.36	$4.34
January 1, 2010 - December 31, 2010	$7.24	$4.22

Colorado State Minimum Wage (con't.)

- 40 hour work week.
- Exceptions exist.
- Overtime is 1.5 times the minimum rate (payable in Colorado after 12 hours of consecutive work).
- If federal minimum wage higher, federal minimum wage applies. CO rate is higher.

Colorado Employment Verification Law, C.R.S. 8-2-122

- Effective on January 1, 2007.
- Employers must use the form provided by the State for all employees hired on and after October 1, 2012.
- Requires private and public employers to retain an affirmation and copies of an employee's identity and employment authorization documents for employment eligibility purposes.

Public Contracts for Services

- Effective May 13, 2008, contractors who enter into or renew a public contract for services with Colorado state agencies or political subdivisions must participate in either the federal E-Verify program, OR the newly created Colorado Department of Labor and Employment Program ("Department Program"). The option to enroll in the new Department Program instead of E-Verify was created by Colorado State Senate Bill 08-193, which amended the Public Contracts for Services and Illegal Aliens Law, 8-17.5-101 and 102, C.R.S.

OSHA

- Colorado is covered entirely by federal OSHA program.

Time Off for Jury Duty - Colorado

- Most states require employers to let employees take time off work for jury duty or to vote.
- Colorado state law protects an employee's job while he is on jury duty. C.R.S. 12-71-134 says "An employer shall not threaten, coerce, or discharge an employee for reporting for juror service as summoned."
- An employer must pay wages - up to $50/day for the first three days of jury duty (more if mutual agreement). After the third day of jury service, jurors are paid $50/day by the State.
- Applies to full and part time employees and temporary workers who have worked for same employer for three months or more.

Time Off for Voting - Colorado

- Under Colorado law, all employers must allow employees at least two hours to vote if the employee is not scheduled to be off for at least three hours between 7 a.m. and 7 p.m. Employees must receive their standard pay during this time. Your employer is allowed to establish when you may leave to vote. CRS 1-7-102

State Contracts

- Comply with state statutory provisions agreed to in state contract form.
- 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.

Required Postings on Business Premises

Required Postings

- Federal and state laws require that certain posters be displayed on business premises to inform employees of their rights and benefits. They can be obtained at no cost from U.S. Department of Labor.
- State laws may only be applied to on-reservation activities of tribal Indians residing on their reservation if Congress has expressly consented.

Required Postings – Unless Exempted

LAW	MINIMUM EMPLOYEES
U.S. Civil Rights Act of 1964	15
U.S. National Labor Relations Act (9th and 10th Circuit Courts of Appeal are split on applicability to Tribes)	$50,000 annual business volume
U.S. Age Discrimination Employment Act of 1967	15 (applies to applicants age 40 or over)
U.S. Equal Pay Act of 1963	1
U.S. Americans with Disabilities Act	20

Required Postings – Unless Exempted

LAW	MINIMUM EMPLOYEES
U.S. Immigration Reform & Control Act	4
U.S. Vietnam Era Veterans Readjustment Assistance Act	Fed. Contractors
U.S. Rehabilitation Act of 1973	Fed. Contractors
U.S. Executive Order No. 11246	Fed. Contractors
U.S. Fair Labor Standards Act	Engaged in interstate or foreign commerce and gross yearly sales total or exceed $500,000.

Required Postings – Unless Exempted

LAW	MINIMUM EMPLOYEES
CO Workers' Compensation and Notice of Accident Forms	1
U.S. Occupational and Safety Act of 1970	1
CO Unemployment Insurance Notice	1

Required Postings – Unless Exempted

LAW	MINIMUM EMPLOYEES
U. S. Family Medical Leave Act	50
CO Wage Act	1
Uniformed Services Employment and Reemployment Rights Act of 1994	1
U.S. Employee Polygraph Protection Act	1

- **Personnel Manual Recommended**

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 enterprise exercise tribal or Indian preference in its hiring decisions?

Is enterprise an at-will or for cause employer?

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.

Employment At Will in Colorado

- The general rule under Colorado law 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 provides otherwise.

Employment At Will - Colorado

- There are two exceptions:
- an employee cannot be fired for performing a legal duty or exercising a legal right;
- a binding employment relationship may be found to have been created by an implied or express contract. Usually arises in situations in which procedures outlined in personnel handbooks are construed as a contract between employer and employee.

Employment At Will – Caution – Grievance

- 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.

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).

Will Enterprise Use Independent Contractors

- 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.
  - Payment for results.

Record Keeping Requirements

- Important for financial management and potential litigation.

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 the 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.

Consent to Tribal Court Jurisdiction - Option for Employment Agreement or Personnel Manual

- As an employee of ____ ("____"), I consent to the exclusive jurisdiction of the ___ Nation's Court for any and all disputes in connection with my employment with _____. 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 _____.

- **Summary Steps when Hiring Employees in Colorado**

Summary Steps when Hiring Employees in Colorado

- Review federal and state employment regulations such as minimum wage, overtime pay, work hours, employer postings, etc.
- Establish personnel policies regarding compensation, fringe benefits, termination, grievances, harassment, discrimination, etc.

Summary Steps when Hiring Employees in Colorado (con't.)

- Apply for a federal employer identification number (FEIN) through the IRS with Form SS-4.
- Determine whether workers will be independent contractors or employees.
- Employees must complete I-9 when hired. Under Colorado law, employers must verify employee's legal work status and keep documentation.

Summary Steps when Hiring Employees in Colorado (con't.)

- Employees must complete form W-4 when hired. Employers must submit a copy to the Colorado State Directory of New Hires within 20 days of the hire date.
- P.O. Box 2920, Denver, CO 80201
- Fax: (303) 297-2595
- www.newhire.state.co.us

Summary Steps when Hiring Employees in Colorado (con't.)

- Apply for Colorado State wage withholding account through Colorado Department of Revenue with form CR 0100.
- Obtain required employer postings and post so all employees can see them – available from U.S. Department of Labor.

Summary Steps when Hiring Employees in Colorado (con't.)

- Employers must pay federal and state unemployment tax. Check with authorities to secure tax and registration information and requirements.
- Employers must obtain Workers' Compensation Insurance.

Summary Steps when Hiring Employees in Colorado (con't.)

- When applicable, employers must withhold federal and state income taxes and FICA (Social Security/Medicaid) taxes from employee wages. Employers must send withheld amount to the IRS (federal taxes) and Colorado Department of Revenue (state taxes).

Summary Steps when Hiring Employees in Colorado (con't.)

- Review OSHA requirements for the business. Develop safety procedures.
- Review Americans with Disability Act requirements for the business.

Summary Steps when Hiring Employees in Colorado (con't.)

- Employers must provide employees with a form W-2 and independent contractors with form 1099 by January 31. Copies of these forms must be sent by employers to the IRS and Colorado Department of Revenue by February 28. Some forms must also be filed with the Social Security Administration by February 28.

Thank You For Coming!!

- Please fill out evaluation form.

- Please let us know what other subjects you are interested in.