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Tribal Sovereignty and HR: The Critical Pressure Points

Prepared by

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TRIBAL SOVEREIGNTY AND HR: THE CRITICAL PRESSURE POINTS

I. UNIQUE CHALLENGES – HR IN INDIAN COUNTRY

Human Resource professionals in tribal governments and their enterprises work on the cutting edge of critical issues relating to the preservation of tribal sovereignty. Unlike many other HR professionals, those in Indian Country work within sovereign nations that can exercise their own governmental authority with interest in serving the needs of their own tribal citizens. At the same time, the laws that govern labor and employment relations in Indian Country are extremely uncertain. Indian tribes, as sovereign governments, generally have the power to enact labor and employment laws to regulate the employment relationship, but many tribes have not enacted such laws.

The lack of tribal laws presents unique challenges to HR professionals. When tribes have not enacted their own labor and employment laws, what are HR professionals supposed to do? Which law governs, and which law should we follow? Is sex discrimination unlawful, and if not, should it be tolerated? Do people with disabilities have any particular employment rights or protections? If a tribe is sovereign, does federal or state law apply? Can or should HR professionals follow federal or state law? Would following such laws offend tribal sovereignty? If we don't follow such laws, are we subjecting the tribe to federal or state intrusion?

This uncertainty makes the life of an HR professional in Indian Country particularly stressful and difficult. On a daily basis, we are asked to solve a multitude of problems without the tools and guidelines that other HR professionals have.

The following is a road map to help guide HR professionals in this legal morass and provide some measure of certainty as HR professionals wrestle with day-to-day employment issues.

II. GENERAL OVERVIEW OF THE LEGAL LANDSCAPE: THREE SOVEREIGNS, THREE SOURCES OF POTENTIALLY APPLICABLE EMPLOYMENT LAW – THE REASON WHY THIS IS SO DIFFICULT

A. TRIBAL GOVERNMENTS

1. Tribal Employment Codes

Tribes have the inherent sovereign right to enact their own labor and employment laws to regulate the employment relationship of

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government employees and tribal enterprises. Some tribes have enacted comprehensive employment codes touching upon all aspects of the employment relationship. These laws provide the legal framework in which HR professionals can operate.

2. Tribal Constitutions

Any provisions protecting:

- a) due process
- b) equal protection
- c) freedom of speech
- d) against unreasonable searches and seizures

B. THE FEDERAL GOVERNMENT (AND ITS AGENCIES)

- Department of Labor (DOL)
- Equal Employment Opportunity Commission (EEOC)
- National Labor Relations Board (NLRB)
- Department of Health and Human Services (DHHS)

1. ICRA: Indian Civil Rights Act

- a) Imposes due process and equal protection standards on tribal governments.
- b) Enforceable only in tribal forums.

2. Title VII: Civil Rights Act of 1964

- a) Prohibits employment discrimination on the basis of sex, race, religion, color, national origin.
- b) Enforced by the EEOC.
- c) "Indian tribes" excluded.

3. ADA: Americans with Disabilities Act

- a) Prohibits employment discrimination on the basis of disability.
- b) Enforced by the EEOC.
- c) "Indian tribes" excluded.

4. ADEA: Age Discrimination in Employment Act

- a) Prohibits employment discrimination on the basis of age.
- b) Enforced by the EEOC.
- c) Silent on application to Indian tribes.

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5. NLRA: National Labor Relations Act

- a) Guarantees employees the right to engage in “concerted activity,” to elect and be represented by unions, and to strike.
- b) Enforced by NLRB.
- c) Silent on application to Indian tribes.

6. FMLA: Family Medical Leave Act

- a) Requires up to 12 weeks of unpaid, job-secured leave time for family and medical care.
- b) Enforced by DOL.
- c) Silent on application to Indian tribes.

7. FLSA: Fair Labor Standards Act

- a) Requires payment of minimum wage, overtime, and other compensation.
- b) Enforced by DOL.
- c) Silent on application to Indian tribes.

8. ERISA: Employee Retirement Income Security Act

- a) Requires establishment of specific plans and accountability for employee retirement benefits.
- b) Enforced by DOL.
- c) Indian tribes partially excluded.

9. OSHA: Occupational Safety and Health Act

- a) Requires workplace safety standards.
- b) Enforced by DOL.
- c) Silent on application to Indian tribes.

10. ACA: Affordable Care Act

- a) Requires provision of health care insurance.
- b) Enforced by IRS.
- c) Applies to Indian tribes.

11. HIPAA: Health Insurance Portability and Accountability Act

- a) Requires protection of confidential health information: clinics and self-insured plans need compliance policies.
- b) Enforced by DHHS.

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- c) Applies to IHS clinics and self-insured health plans.

C. STATE GOVERNMENTS

Absent special arrangement, like a state compact, state law generally does not apply.

III. WHAT ABOUT SOVEREIGN IMMUNITY FROM SUIT? DOESN'T THAT PROTECT TRIBES FROM LAWSUITS UNDER FEDERAL LAW?

Sovereign immunity protects Indian tribes and those tribal entities that enjoy the sovereign status of tribes from lawsuits by private citizens in court.

However, sovereign immunity does not shield tribal employers from lawsuits by federal agencies like the DOL or the EEOC for violations of an applicable federal employment/labor law.

Whether a given law applies turns on a host of factors, and the law is in flux. (See below.)

IV. WHAT IS EMPLOYMENT DISCRIMINATION?

A. DEFINITIONS

1. **Employment Discrimination:** Adverse action taken by an employer on the basis of (or because of) an individual's trait or activity that is given protection by law.
2. **Adverse Employment Actions:** Treating one employee differently than other employees in an adverse manner (e.g. failing to hire, disciplining, demoting, suspending, or terminating).
3. **Protected Traits:** Classifications or traits that, as a matter of public policy, should not be considered by employers when taking adverse employment actions (e.g. sex [including sexual harassment and pregnancy], race, color, ancestry, religion, national origin, age, disability, military service, union activities).
4. **Protected Activities:** Activities protected under law (e.g. assisting someone in complaining about unlawful discrimination, or using protected leave [like family medical leave]).

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B. FORMS OF DISCRIMINATION

1. **Disparate Treatment:** Treating one employee differently than others.
2. **Disparate Impact:** Requiring a test or using a hiring standard that has the effect of discriminating against a protected class without a bona fide basis.
3. **Harassment:** Adversely affecting an employee in a protected class and his/her terms and conditions of employment because of a hostile work environment.

Sexual Harassment – Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- a) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
 - b) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting that individual; or
 - c) Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.
4. **Retaliation:** Adversely affecting an employee's terms and conditions of employment because the employee asserted a claim or assisted another employee in asserting a claim of discrimination.

V. FEDERAL LAWS AND THEIR APPLICATION TO INDIAN TRIBES (FOCUS ON DISCRIMINATION)

Federal laws make it unlawful for employers to discriminate against employees on the basis of race, color, sex, physical or mental disability, religion, age, ancestry or national origin, military service, or union activities.

The most common laws relating to discrimination are Title VII, the ADA, the ADEA, and the NLRA. (ICRA is a federal law that should not be overlooked; it is enforceable only in tribal forums. See below.)

Some federal laws expressly exclude "Indian tribes" (leaving some open questions about what entities are "Indian tribes" within the exclusions). Other federal laws are completely silent about tribes.

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A. ICRA AND TRIBAL CONSTITUTIONS: TRAPS FOR THE UNWARY

1. ICRA provides, in pertinent part, that:

“No Indian tribe in *exercising powers of self-government* shall:

make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

* * *

violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

* * *

deny to any person within its jurisdiction the *equal protection of its laws* or deprive any person of liberty or *property* without due process of law . . .”¹

2. Issues to Wrestle With Under ICRA

- a) When is an Indian tribe “exercising powers of self-government”?²
- b) What is “freedom of speech” or the “right of the people peaceably to assemble and to petition for grievances”?³
- c) What is an “unreasonable search and seizure”?⁴
- d) What is “equal protection of its laws”?⁵
- e) What is a “property” right?⁶
- f) If ICRA or an equivalent tribal constitution or law is violated, what are the remedies?

¹ 25 U.S.C. § 1302.

² Casino operations under the Indian Gaming Regulatory Act?

³ Right to talk about unions? Right to organize or engage in concerted activity?

⁴ Random drug testing? Strip-searching a card dealer for cupping a chip?

⁵ Protection of “suspect classifications”?

⁶ Employment-at-will? For cause? Reasonable expectation of continued employment?

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B. SILENT FEDERAL LAWS (ADEA, NLRA, FMLA, FLSA): WHERE IS THE LAW GOING? PROBABLY TO THE SUPREME COURT!

The federal courts disagree on the standard for whether these laws apply:

1. Test #1 (BAD)

U.S. Court of Appeals for the Ninth Circuit (covering Alaska, Washington, Oregon, California, Idaho, Montana, Nevada, and Arizona) and the U.S. Court of Appeals for the Second Circuit (covering New York and Connecticut):

Federal labor and employment laws of general application that fail to address Indian nations are presumed to apply to Indian nations unless:

- *The law touches “exclusive rights of self-governance in purely intramural matters;”*
- *The application of the law would “abrogate rights guaranteed by Indian treaties;” or*
- *There is proof “by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations.”*

2. Test #2 (Good)

U.S. Court of Appeals for the Tenth Circuit (covering Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah):

If application of the federal law would interfere with the inherent sovereign authority of an Indian tribe, the law will not apply absent a clear expression of intent by Congress.

3. Test #3 (MIXED)

U.S. Court of Appeals for the D.C. Circuit (covering cases arising out of federal administrative agency proceedings):

If application of the federal law would interfere with a “core” exercise of tribal sovereignty, then it will not apply absent a clear expression of intent by Congress. (Raising governmental revenues through gaming under IGRA is not sufficiently at the “core” to prevent the application of the NLRA to a tribal gaming facility.)

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VI. WHAT DOES THIS MEAN FOR HR PROFESSIONALS?

A. WHEN THERE ARE TRIBAL ORDINANCES – JUST FOLLOW THEM.

When there is a tribal ordinance or law pertaining to the employment issue, then adhere to tribal law. Following tribal law is the essence of preserving tribal sovereignty.

B. WHEN FEDERAL LAW APPLIES – JUST FOLLOW IT.

When federal law applies to a particular situation, the answer is relatively easy: HR needs to follow the law. Most federal laws, like ERISA, HIPPA, and the ACA, are accompanied by regulations detailing the application of each law. In addition, each federal agency issues a host of publications outlying the scope of the law and its application.

C. WHEN FEDERAL LAW IS SILENT

1. Does the issue involve a claim potentially covered by federal law?
2. Is it a federal law of general application?
3. What circuit court test is likely to apply to your tribe?
4. Does the matter involve purely intramural matters or abrogate treaty rights or interfere with inherent sovereign immunity or “core” sovereign activities?
5. Do you want to be responsible inviting a federal lawsuit?
6. When might you want to invite a federal lawsuit?
7. Need to educate tribal leaders, general managers, department heads, and other stakeholders on potential consequences of ignoring or “mirroring” federal law.
8. Need to gain consensus from all stakeholders to support HR in its decision.

D. WHEN FEDERAL LAW DOES NOT APPLY

1. What interests are at stake?
2. Are they worthy of protection?

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3. What is the impact of ignoring the issue?
4. How will this affect the individual employee, employee relations, or the operations?
5. Does employee have alternative remedies?
6. Should the notion of fairness come into play?
7. Do you want consistency?
8. What other interests are involved?
9. How does HR gain support for its practices?
10. What tools can HR use to help make decisions?

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Campbell is a member of Drummond Woodsum's Indian Nations Labor & Employment Group and a shareholder at the firm. He has represented public and private sector employers, including Indian nations, in labor and employment relations for over 20 years.

Campbell has extensive experience advising clients on all aspects of labor relations issues, including union solicitation and elections; bargaining unit determinations; contract grievance arbitrations involving contract interpretation and employee discipline; unfair labor practice claims and hearings; and providing strategic assistance to private and governmental employers, including tribes, faced with union drives. He has negotiated over 150 collective bargaining contracts on behalf of both public and private sector employers with various unions, including the USW, Teamsters, IAM&AW, IBEW, SEIU, OPEIU, Operating Engineers Union, AFSCME, and National Education Association locals. Campbell has a particular focus on negotiating initial collective bargaining contracts and is one of the few private practitioners to have represented the State of Maine in contract negotiations. He advises clients on labor matters relating to business transactions, including mergers, acquisitions, assets and stock sales as well as employment law.

Campbell brings his extensive experience to bear in representing Indian nations and their enterprises on union and employment matters. He has a deep understanding of labor relations within Indian gaming enterprises from his on-the-ground work with casino management over the course of the last five years. Campbell negotiated one of the first collective bargaining agreements in Indian country that is governed solely by tribal law. In addition, he has represented tribal gaming enterprises in union election campaigns, unfair labor practices and employee grievances. Campbell has advised Indian nations on the development and implementation of tribal laws governing labor relations matters.

Campbell is an instructor for the National Native American Human Resource Association THRP Program and has served as an instructor on labor and employment law in courses at the University of Southern Maine and he frequently presents at conferences and trainings on labor relations and personnel issues. He has authored numerous articles on collective bargaining and related issues and is a contributing author to a treatise on collective bargaining in schools. He is the former Chair of the State Council of School Board Attorneys. He is a graduate of the University of Maine School of Law (cum laude) and the University of Massachusetts (cum laude).

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Jeana is a member of the firm's Indian Nations Labor & Employment Group. Jeana provides counseling and litigation services to public and private employers and Indian tribes on all aspects of employment law. Jeana advises and trains clients on workplace issues arising under the Americans with Disabilities Act, the Family Medical Leave Act, Title VII of the Civil Rights Act of 1964, and the Fair Labor Standards Act. She also reviews and writes employee handbooks and policies to ensure compliance with state and federal law and best practices.

Jeana is a graduate of the University of Connecticut School of Law. While in law school, Jeana served as an Editor for the Connecticut Law Review, and worked as an extern for the Criminal Division of the U.S. Attorney's Office, as a teaching assistant for Lawyering Process and Contract Drafting, and as a student attorney for the Mediation Clinic and the Energy and Environmental Law Clinic. She received the Pro Bono Certificate of Recognition from the University of Connecticut School of Law for contributing over one hundred hours of volunteer legal services during her time as a law student. Jeana also published an article while in law school that has since been cited in other law review articles, entitled Domestic Violence in Indian Country: Improving the Federal Government's Response to this Grave Epidemic, 45 CONN. L. REV. 1843 (2013).

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Richard was Assistant General Counsel for the Prairie Island Indian Community. The Prairie Island Indian Community owns and operates Treasure Island Resort & Casino, which employs more than 2,000 employees. Both the Prairie Island Indian Community and Treasure Island Resort & Casino are located in southeast Minnesota.

Before joining the Prairie Island Indian Community, Richard spent a decade litigating business and employment cases as a lawyer at Arnold, Anderson & Dove in Minneapolis, Minnesota. Richard is a graduate of the Oklahoma University Law School located in Norman, Oklahoma.

