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22 Ways to Keep Human Resources Out of Trouble

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22 WAYS TO KEEP HR OUT OF TROUBLE

How can the Tribe actively minimize liability to employee claims, and what role can the Human Resource team serve?

Is the tribal employer playing litigation lottery or taking the steps necessary to minimize employment related claims? Consider trading in the “I hope we do not get sued” philosophy for a proactive strategy in minimizing employee workplace claims. Some of the suggestions in this list may assist in reducing liability. In addition to the reduction of legal liability to employee claims, many of these practices, if embraced, will enhance the employee experience, which will hopefully make employees more productive.

Prior to discussing liability-reduction tactics, it is necessary to define liability. Liability is defined, for this article, as those workplace risks that may attract agency audits or generate an increase in union organizing or claims for money damages or unemployment compensation.

1. MEANINGFUL DUE PROCESS

Create a system where workplace disputes are addressed by the employer in a meaningful way. Frustrated employees seek assistance from lawyers and federal agencies when there is a perception or reality that the employer is not treating them fairly. One step toward both the perception and reality of workplace fairness is a meaningful grievance process. There are many ways to design and construct such a process, and therefore, take the opportunity to shape the process to reflect the tribe's values and customs. By providing meaningful due process to employees, workplace disputes are addressed before an employee gets so frustrated that s/he is retaining legal counsel or submitting a complaint to a federal agency that may, or may not, have jurisdiction.

2. DEFINE EXPECTATIONS

Define the employment relationship between employer and employee in a clear way through employee handbooks, standard operating procedures, internal controls, job descriptions, and performance agreements. Once the relationship is defined through these documents, provide sufficient training to increase employee understanding and buy-in to these important skills. That hint by itself has no impact on liability, but link that hint with the next, and a meaningful strategy emerges. Thereafter, ensure that supervisors fairly hold employees accountable to the defined terms and conditions. By taking these steps, employees will

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start to recognize that the rules are fair and applied evenhandedly. In this environment of fairness, fewer claims will be raised by employees.

3. WRITE THE LAW

The HR team lacks the authority to write tribal law but may have the opportunity and ability to make the business case for a work environment that is defined by stable law. Because there is so much confusion regarding the question of whether certain federal employment laws apply to tribal employers, promulgating fair employment laws that reflect the uniqueness of the tribe can bring clarity to a confusing legal arena. Once the tribe defines employment laws, the casino, tribal government, manufacturing facility, and housing authority can draft policies that are loyal to those rules. Clear law generates clear policy and reduces the potential for the adoption of arbitrary policies based on the uncertainty of whether this or that federal law applies. Moreover, as an additional benefit, courts will likely give more credence to tribal law than tribal policy. Therefore, defining employment rules as tribal law exercises the tribe's sovereignty, which will serve as an additional argument against the application of another sovereign's rules.

4. CONSENT

The United States Supreme Court created lots of uncertainty by questioning whether tribal employers can impose workplace rules on all employees. Bringing uniformity to the application of workplace rules to all employees increases clarity and lessens arbitrary application of the rules. Reinforce the tribe's jurisdiction over all employees by getting all employees to sign consents to the exclusive jurisdiction of the tribe should claims arise. Here is form consent language:

As an employee of the ABC Tribe (the "Tribe"), I consent to the exclusive jurisdiction of the Tribe, these Handbook rules, and the Tribal Court for any and all disputes in connection with my employment with the Tribe. I also consent to the application of Tribe's law, both substantive and procedural, regarding any and all proceedings, matters, and things relating to my employment relationship with the Tribe. I consent to the Tribe's grievance procedure and to the Tribe's courts for any and all disputes related to my employment with the Tribe. I understand that the reference to exclusive jurisdiction means that I do not have a right to sue the Tribe or its officials or employees in any other court or forum than the court or forum provided by the Tribe.

5. FINGERPRINTS OF GOVERNMENT

In evaluating whether federal employment laws apply to tribal employers, some courts are drawing a distinction between tribal government operations and tribal enterprises. The federal employment laws in question are the laws addressing minimum wage, overtime, leave, unions, safety, age discrimination, and others. For tribal government operations like education, health care, and the delivery of clean water, these courts are generally agreeing with tribes in declaring that some federal employment laws do not apply to tribal government operations. On the other hand, these courts are applying these federal employment laws to tribal enterprises, oftentimes noting that enterprises frequently hire lots of outsiders who allegedly need the added protections of federal law. These courts are missing the point since, from a sovereignty perspective, there is no distinction between tribal governments and the enterprises that tribal governments own and operate.

To reinforce the idea and reality that tribal enterprises are an exercise of the inherent sovereignty of the tribe and part of tribal government operations, casino HR professionals have an opportunity to place the fingerprints of tribal government on enterprise employment documents like the employee handbook or personnel procedure manual. Those fingerprints of government likely emerge as a paragraph early in the handbook's first several pages and look like the following:

This Employee Handbook is adopted by the Tribal Council of the ABC Tribe acting in its governmental capacity to regulate employment and labor relations within its jurisdiction, including those between the tribal government and its employees. Notwithstanding external characterizations of the governmental operations of the Tribe, these operations are basic governmental functions of the Tribe exercised pursuant to its inherent self-governing authority. The Tribe's commercial activities, including those through the Slippery Slots Casino, are essential to raise revenue to finance basic governmental functions. All revenue raised through the Tribe's commercial activities are returned to the Tribe to finance basic governmental functions, such as provision of education, public safety, transportation, economic development, healthcare, and social services.

This language is not a panacea relieving courts of their confusion, but instead, it arms tribes with the argument that its enterprises are the tribal government, and the dilution of tribal sovereignty through the

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application of federal employment laws to tribal enterprises is the same dilution of tribal sovereignty as an attack on the tribal government.

6. **SOVEREIGN IMMUNITY**

Sovereign immunity protects governments and their enterprises from lawsuits unless, according to the United States, the United States is the party presenting a claim against the tribal government or tribal entity. Employees are protected by the same immunity that protects the tribal government as long as the employee is acting within the course and scope of their duties. Accordingly, when an employee acts consistently with tribal law, the employee handbook, and the employee's job description (in other words, within the course and scope of employment), the immunity that protects the tribe protects the employee. However, when the tribal employee acts outside their defined duties, the immunity that protects the tribe does not protect the employee.

Since employee handbooks, department standard operating procedures, internal controls, and job descriptions define an employee's course and scope of employment, updating those documents to reflect the reality of 2016 helps insulate the tribe from risk.

7. **INSURANCE**

Protect decision makers with insurance if those decision makers are sued in their individual capacity for employment-related decisions. The tribe's insurance broker can assist in evaluating the products that serve this function, and they can discuss to whom coverage is extended and over what events. The goal is to evaluate those products that place the financial burden of legal proceedings on the insurance company instead of on tribal officials and employees. With good insurance coverage in place, if there is a lawsuit, and the allegations in the suit deal with a covered event, the insurance company pays for the lawyer to represent the decision maker in the lawsuit.

8. **DELEGATE EMPLOYMENT MATTERS**

Except for a handful of employees who serve at the pleasure of tribal council, employment decisions like hiring and firing should not be a tribal council decision. Tribes elect excellent people who serve in leadership positions like tribal council. However, because of the perception of many employees, when tribal council is involved in employment-related matters, no matter how good the individuals are or

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how sound the decision is, there can be the perception that politics played a negative role. When employment decisions are delegated from tribal council to the tribal management team, the claims of political influence will still be heard but with less frequency. Moreover, the management team should have hiring protocols in place that may, if followed, provide protections against the claims of politics if tested in the courtroom.

9. PROPERLY CLASSIFY INDEPENDENT CONTRACTORS

Improperly classified independent contractors generate interest from federal regulators who believe they have jurisdiction over tribal employers. In evaluating whether a worker is properly classified as an employee or an independent contractor, the primary test is whether the employer has the right to control the means and manner of performance of the work. In evaluating the relationship with a worker, the more the employer controls the means and manner of employment, the more compelling the argument that the worker is an employee. On the other hand, if there is evidence of little control over the worker, there may exist an independent contractor relationship.

Additional factors that contribute to evaluating a worker's status include: mode of payment, providing materials or tools, control of the premises where work is performed, right to terminate, withholding of income and social security taxes, whether the work is part of the regular business of the employer, the length of the relationship, and the intent of the parties. Examine whether those workers designated as independent contractors are truly independent contractors as defined (admittedly vaguely) by the law, and in both obvious and close cases, err on the side of classifying the worker as an employee. Choose the safe path on this topic.

10. EVALUATE PROSPECTIVE EMPLOYEES

The employment function, in contrast with the licensing function, is the exclusive province of the tribal casino. Consistent with that thesis, gaming commissions exercising regulatory authority over licensees do not diminish the casino's employment function. Accordingly, tribal casinos have a duty to perform the full range of employment functions, which includes hiring, firing, disciplining, and coaching employees. Of those, tribal casinos sometimes fall short in performing the due diligence necessary to evaluate candidates prior to offering a job.

Because gaming commissions are performing substantial due diligence in making licensing decisions as a prerequisite to the hiring of casino

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employees, some tribal casinos assert redundancy as the reason for neglecting the employer's duty of performing due diligence on prospective employees. Under this logic, due diligence in the form of a reference check, background investigation, and thorough interview is abandoned by the tribal casino employer under the mistaken belief that the regulator's licensing work is sufficient. The flaw in this analysis is that the tribal gaming employer never sees the licensee application or the commission's work in evaluating the licensee. Since the casino employer never sees the results of the gaming commission's licensing work, reliance on this work that was not seen is not reasonable for an employer. The safety of employees, and the avoidance of a claim for negligent hiring, is mitigated by the reasonable exercise of due diligence by employers. Reliance on the due diligence of another entity, like a gaming commission making licensing decisions, is not reasonable.

11. TRAINING TO ALL

By clearly defining employment policies like sexual harassment, and providing the training necessary to give employees a practical understanding of the rules and the consequences for violating them, tribal employers mitigate liability for those claims. If training is a good idea for all employees, more training for employee decision makers is a great idea. Tribal management exposes the tribe to the most significant liability, so therefore, those managers deserve even more training.

12. SAFETY TRAINING AND CONSEQUENCES

In addition to all of the other forms of training, tribal employers need to enhance employee safety by emphasizing safety training and retraining. Furthermore, if the safety protocols are not followed, whether there is an accident or not, employers must address the failure to follow those protocols.

13. AS AN AT-WILL EMPLOYER, EMPHASIZE THE MORAL OBLIGATIONS TO EMPLOYEES

At-will employers reduce the risks generated by the challenges of justifying termination of employees, while at the same time, likely increase the tribe's exposure to unemployment compensation claims. This double-edged sword that limits claims for wrongful termination exposes the employer to more successful employee claims for unemployment compensation. On the other hand, by emphasizing the moral obligation of employers to define clear workplace standards, provide training, and only terminate employees that have violated these

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clear standards, tribal employers can utilize the legal standard of at-will while, at the same time, promoting fair employment practices.

Give employees multiple opportunities to succeed.

Employers generally give employees multiple opportunities to succeed by measuring employee performance against an objective standard and recognizing that, when the employee does not meet that standard the first or second time, employers can increase the odds of success through training, practice, and encouragement. Through progressive discipline, the employee is not typically terminated for the first workplace violation, but instead, the employee is only terminated after the employee and employer have tried to work things out via multiple warnings. When employers work with employees to improve performance and retention, if the employee is eventually terminated, the likelihood of prevailing in an unemployment compensation proceeding increases.

14. TELL YOUR EMPLOYEES HOW GOOD THEY HAVE IT

Oftentimes, tribal employers are the largest and best employers in a county or area. Tribal employers provide employees meaningful work, in a safe environment, with excellent fringe benefits. If handled with tact, reminding employees of those benefits can generate employee gratitude. Grateful employees are more likely to attempt resolution of workplace disputes with their employer than to seek assistance from an outside agency or lawyer.

15. GIVE EMPLOYEES FORMAL AND INFORMAL WAYS TO TELL THEIR SIDE OF THE STORY

Employers that have internal mechanisms to address and resolve workplace disputes have the advantage of conquering workplace problems before they become lawsuits. On the formal side of the ledger, tribal employers should implement an efficient grievance procedure that addresses those issues that create the most trouble in the workplace. Additionally, on the informal side, employers should insist that directors, managers, and supervisors are giving employees numerous avenues to communicate about workplace victories and challenges.

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16. CONSIDER MEETING CERTAIN FEDERAL MINIMUM STANDARDS WITH LAWS THAT MAY IMPOSE MAXIMUM RISK

There is a debate about whether certain federal employment laws apply to tribal casinos. Of those laws that may or may not apply, the federal overtime and minimum wage law (Fair Labor Standards Act), if it is applied by an agency or court, can generate large monetary claims impacting numerous employees. Meeting the requirements of the FLSA by following the minimum wage and overtime rules and paying close attention to the often difficult rules regarding the classification of exempt workers can decrease potential liability.

17. PUT THE ADULTS IN CHARGE

Sometimes employers promulgate good workplace policies and develop employee understanding through effective training but unravel all of that good work by failing to apply policies to rule breakers. When the tribal chairman's nephew allegedly violates the sexual harassment policy, it is difficult but necessary to consistently apply the rules to those employees who are politically connected in the same way you apply the rules to those employees without political advantage. When the adults are in charge of applying the rules, it is more likely that the rules are applied consistently in routine cases and in those exceptional cases where it is much more difficult.

18. REDUCE THE IMPACT OF POLITICS

There are politics in most workplaces, and this general rule applies to tribes as well. When politics cross from part-time influencer to chronic problem, one of the consequences is poor employee morale. When *who* you know means more than *what* you know or *what* you do, morale suffers. Low morale generates employees who have little tolerance and patience for employers. Instead of having employees who identify with and pull for the employer, the workplace breeds resentful employees looking for claims and a union representative.

The best way to minimize the impact of politics is to insist on defining clear standards and holding employees accountable to those standards. With these clear standards in mind, politics are further marginalized by delegating employment-related decision making to those individuals who are not interested in exercising political clout.

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19. ADDRESS VIOLENCE IN THE WORKPLACE

Unfortunately, violence in the workplace must be included on this list, since the reality of too many workplaces includes violent events. Whether violence comes from an active shooter, threats of domestic violence, or another source, employers must have a policy that addresses violence, a plan to respond to it, and training to assist employees understand critical protocols.

20. ADDRESS DRUGS AND ALCOHOL IN THE WORKPLACE

Having employees under the influence of non-prescription drugs and alcohol increase the likelihood of accidents and assaults in the workplace. A reasonable testing program can have a positive influence on this negative behavior.

21. DOCUMENT EMPLOYEE BEHAVIOR AND THE EMPLOYER'S RESPONSE

As directors, managers, and supervisors, observing employee behavior and discussing it with employees is oftentimes not enough to convince arbitrators and judges that the behavior occurred and was addressed. Documenting employee behavior via personnel action notices, emails, and ink on paper will cause numerous positive things including the reduction of liability.

22. YOU ARE A TOOL

Do not assume responsibility for all aspects of the relationship between the employer and the employees. Let managers manage employees, but serve your role as an advocate for both the employer and the employee. You are the expert on employment-related issues, so therefore, you are the employment tool. As a tool, when managers, and the employees being managed, need your assistance, you are advisor, consoler, mediator, therapist, and supplier of Kleenex. You are the all-purpose Swiss Army Knife delivering good advice and counsel. But let managers manage.

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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.

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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 15 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 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. With his colleagues at Drummond Woodsum, Campbell has advised Indian nations on the development and implementation of tribal laws governing labor relations matters.

Campbell has served as an instructor on labor law in courses at the University of Southern Maine and he frequently presents at conferences 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).

