



Basic HR Law in Indian Country for New HR Professionals

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Presented by

Drummond Woodsum's Indian Nations
Labor & Employment Group

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NOTES

I. UNIQUE CHALLENGES – HR IN INDIAN COUNTRY

New 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 other HR professionals, those in Indian Country work within sovereign nations that can exercise their own governmental authority with the interest of serving the needs of their own tribal citizens. 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 intended to help guide HR professionals through this legal morass and provide some measure of certainty as HR professionals wrestle with day-to-day employment issues. In addition to a legal road map, there are several basic rules that all HR professionals should follow to ensure they are successful.

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 – 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 within which HR professionals can operate.

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)

C. THE FEDERAL EMPLOYMENT LAWS THAT DO, DON'T, AND MIGHT APPLY

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 and 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.

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

D. 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.

IV. 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, HIPAA, and the ACA, are accompanied by regulations detailing the application of each law. In addition, each federal agency issues a host of publications laying out the scope of the law and its application.

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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 for 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?
3. What is the impact of ignoring the issue?
4. How will this affect the individual employee, employee relations, or operations?
5. Does the 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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V. TEN OF THE MOST IMPORTANT LIFESAVING TIPS WHEN YOU ARE NEW TO HR

1. LOOK FOR A RULE OR A STANDARD TO FOLLOW

a) Know your personnel policies in their entirety – they are a treasure trove of useful information.

- i.) Help employers comply with applicable laws.
- ii.) Explain both work culture and what is important.
- iii.) Provides information both you and your employees need to know about their employment, benefits, and rules that they have to follow.
- iv.) Tells employees what is expected of them.
- v.) Provides protections from discrimination.
- vi.) Specifies who has to do what.
- vii.) Tells supervisors and managers what is expected of them.
- viii.) Complaints/grievance procedures – how your decisions might be challenged and who might review them.

b) Know your tribal laws, if you have them. Most important are:

- i.) Employment codes relating to discrimination and retaliation.
- ii.) Employment codes relating to leave benefits.
- iii.) Employment codes relating to wages and hours.

2. MAKE SURE YOU UNDERSTAND THE FACTS

- a) Make sure you really understand the complaint, question, or concern brought to your attention.
- b) Understand that everyone views facts through their own lens.
- c) Use your common sense.
- d) What is in the personnel file?
- e) Make sure you understand the facts, and ask the tough questions.

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- f) Be thoroughly prepared for a grievance meeting before a Manager or Director. This is your time to shine and show that you are prepared, competent, and trustworthy.

3. APPLY THE FACT TO THE RULE

Apply the rule consistently unless there is a good reason not to.

4. DON'T RUSH TO JUDGMENT – WITHSTAND THE PRESSURE

Not everything is an emergency that has to be dealt with today.

5. UNDERSTAND THE POLITICS

Every workplace everywhere is, to some degree, political. Do not be naive.

6. DON'T ALWAYS BE THE PERSON THAT SAYS "NO"

- a) Understand that others in your enterprise have different goals and objectives than HR has.
- b) Tell Department Heads/Supervisors the applicable rules and likely outcomes.
- c) Explain both the good and the harm their decision might cause.
- d) Let Department Heads decide for themselves what they should do.
- e) Don't be a martyr unless it's absolutely necessary or your conscience gives you no choice.

7. KNOW YOUR ROLE – YOU ARE AN AGENT FOR THE TRIBE

- a) Your job is to represent the interests of the tribe or its enterprise.
- b) Don't become personally involved in an issue.
- c) Apply the facts to the rules; call balls or strikes without bias.

8. EXERCISE EMPATHY AND COMPASSION

- a) Human capital is the resource.

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- b) You are more likely to persuade an employee with understanding.
- c) Befriend others in different departments, including supervisors, managers, and directors.

9. ENSURE PROPER PROCESS/PROCEDURE

- a) Did the employee have notice of the rule?
- b) Did the employee know the likely consequences if violated?
- c) Is the rule reasonable?
- d) Was there an investigation of the facts, and was the employee given an opportunity to respond?
- e) Was the investigation conducted fairly?
- f) Have other employees been disciplined for the same offense, and if not, are there good reasons for treating this employee differently?
- g) Does the punishment fit the infraction?

10. KEY TRAITS OF A SUCCESSFUL HR PROFESSIONAL

- a) Even-keeled temperament.
- b) Sets clear expectations.
- c) Leads by example – models good behavior.
- d) Great communicator (clear, concise).
- e) Self-aware.
- f) Active listener.
- g) Great at spotting issues.
- h) Honest, but kind.
- i) Fair, but firm.
- j) Doesn't prejudge – gets to the truth.
- k) Proactive – addresses workplace problems.
- l) Offers constructive feedback.
- m) Provides recognition for a job well done.



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School & Education

School Employment

EDUCATION

University of Maine School of
Law, J.D., *cum laude*, 1993

University of Massachusetts,
B.A., *cum laude*, 1987

BAR & COURT ADMISSIONS

Maine

Little River Band of Ottawa
Indians , 2009

Pueblo of Laguna Tribal Court
, 2016

Snoqualmie Tribal Court ,
2016

Suquamish Tribal Court , 2015

Campbell is a shareholder and Chair of the firm's Labor Relations Sub-Group, the largest collective bargaining practice group in Northern New England. Campbell has represented public and private employers in all aspects of labor, employment, and labor relations matters for over 20 years, as well as tribal government employees and their enterprises for the past 8 years. He has extensive experience representing employers at the bargaining table negotiating for both initial and successor contracts; representing employers before administrative agencies involving unit determinations, merger and modification proceedings, and unfair labor practice proceedings; and representing employers in numerous contract grievance arbitrations involving employee discipline and contract interpretations. He has negotiated over 175 collective bargaining agreements with various unions including the United Steelworkers, Teamsters, IAM & AW, IBEW, SEIU, OPEIU, Operating Engineers Union, AFSCME, the Maine State Employees Association, and the Maine Education Association and has experience negotiating contracts for a variety of industries including manufacturing plants, paper companies, machine shops, casinos, hotels, security, school districts, towns, and quasi-municipal entities. He represents employers when purchasing companies with a union workforce and advises on their obligations under the NLRA. In addition, he consults clients on compliance with discrimination laws, wrongful discharge, and wage/hour issues and actively represents clients before the Maine Human Rights Commission and the Maine Labor Relations Board.

As a member of the firm's Indian Law practice group, Campbell advises and represents Indian tribes and their enterprises on personnel, employment, and labor relations matters, including union-organizing drives, collective bargaining, and the adoption of tribal laws governing labor relations and employment matters.

Campbell also created and implemented a national certification training program for human resource professionals in tribal governments and tribal enterprises with the National Native American Human Resources Association. This extensive three-and-one-half-day workshop provides human resource directors and associates

with the practical knowledge and skills they need to handle their unique employment challenges as well as the necessary tools to protect and promote self-determination and prevent further federal intrusion in sovereign matters.

MEMBERSHIPS

- American Bar Association
- National Council of School Board Attorneys
- Maine State Bar Association
- Maine Council of School Board Attorneys

COMMUNITY/PUBLIC SERVICE

- United Way
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EDUCATION

Tulane University, J.D., *cum laude*, 2011

University of New Hampshire,
B.A., *summa cum laude*,
2008

BAR & COURT ADMISSIONS

New Hampshire

Massachusetts

U.S. District Court, District of
New Hampshire, 2011

Anna Cole is a member of Drummond Woodsum's Labor and Employment Group. Anna provides counseling and litigation services to public and private employers, as well as Indian nations and their enterprises, in all aspects of employment law. She represents employers in collective bargaining, contract administration, grievance and arbitration proceedings, and before the New Hampshire Public Employee Labor Relations Board. Anna advises and trains clients on workplace issues arising under the Family Medical Leave Act, Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act, and Title IX of the Education Amendments of 1972. She also reviews and drafts employee handbooks, and employer policies and procedures to ensure compliance with state and federal laws, as well as best practices. Anna also represents companies, municipalities, non-profit organizations, and schools in discrimination, harassment, and retaliation claims before the New Hampshire Commission for Human Rights and the Equal Employment Opportunities Commission. She presents on employment topics nationally and provides training seminars for individual clients.

Prior to joining Drummond Woodsum, Anna practiced for four years at another prominent law firm in Manchester, New Hampshire. Before entering private practice, Anna served as a judicial intern for the Honorable Chief Justice John T. Broderick, Jr., as a legal assistant for Blake J. Godbout & Associates, Boston MA; and as a legal intern at the New Hampshire Attorneys General's Office in Concord, NH.

AWARDS

- New England Super Lawyers, Employment & Labor, Schools & Education, Employment Litigation, Rising Star (2015-2016)

MEMBERSHIPS

- Daniel Webster-Batchelder American Inn of Court
Executive Board Member, 2012
- New Hampshire Bar Association
Young Lawyers' Section Vice Chair, 2014-2015, Member 2011-2015
- Leadership Greater Manchester
Class of 2015

COMMUNITY/PUBLIC SERVICE

- Manchester Regional Board, Child and Family Services
Chair (2015)
- Manchester Regional Board, Child and Family Services
Member (2012 - present)
- University System of New Hampshire
Student Trustee (2007-2008)



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EDUCATION

Boston College Law School,
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BAR & COURT ADMISSIONS

Maine

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U.S. District Court, District of
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Dan Rose is Drummond Woodsum's Practice Group Leader for Labor and Employment. His practice focuses on the representation of private and public entities and Indian Tribes in employment and labor matters on a national level, including compliance with discrimination laws, wrongful discharge, wage/hour issues, workers' compensation discrimination, litigation and negotiations. He is active in representing employers before various federal and state agencies, including the National Labor Relations Board, the Maine Human Rights Commission, the Unemployment Compensation Commission, and the Maine Labor Relations Board, as well as in arbitration and employment litigation in both federal and state courts. Dan has consistently been recognized by national and regional publications which rate labor and employment lawyers including Best Lawyers in America, Chambers USA, and New England Super Lawyers. He is an elected Fellow of The College of Labor and Employment Lawyers, the highest recognition by colleagues of sustained outstanding performance in the field of labor and employment law.

In addition to representing private sector employers and Indian tribes nationally, Dan represents school districts and other public entities throughout the State of Maine and New Hampshire on a full range of legal matters.

Dan is editor of "Litigating the Employment Tort Case," published by the American Bar Association.

Dan presents on employment topics nationally and provides seminars for individual clients. He is a co-author of Maine School Law (Fourth Edition 2012) and Significant Cases in Maine School Law (Second Edition), and has served as an instructor for school law courses offered by the University of New England and the University of Southern Maine.

U.S. Court of Appeals for the
First Circuit

Little River Band of Ottawa
Indians Tribal Court

Snoqualmie Tribal Court

While in law school, Dan served as an editor of the Boston College Law Review and authored an article on compulsory education and parental rights. After graduation, he served as law clerk to then Chief Judge Gene Carter, U.S. District Court, District of Maine.

AWARDS

- Labor Law - Management Lawyer of the Year, Portland, ME (Awarded by Best Lawyers) (2016 and 2012)
- New England Super Lawyers, Employment & Labor, Schools & Education (2007-2016)
- Best Lawyers USA
 - Education Law (2013-2016)
 - Employment Law - Management (2011-2016)
 - Labor Law - Management (2011-2016)
- Chambers USA, Maine, Labor & Employment
- Martindale Hubbell, AV Preeminent

MEMBERSHIPS

- Maine State Bar Association
- The College of Labor and Employment Lawyers
Fellow
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Vice-Chair
- Maine State Bar Association Labor & Employment Section
Chair
- Maine Council of School Board Attorneys
Member
- New Hampshire Bar Association

COMMUNITY/PUBLIC SERVICE

- State of Maine, Civil Service Review Panel
Appointed (March 2015)

PUBLICATIONS

- Editor, "Litigating the Employment Tort Case," American Bar Association
- Co-Author, Maine School Law, 4th Edition (2012)
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