

Protecting Tribal Sovereignty at the HR Level



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Protecting Tribal Sovereignty at the HR Level

I. Introduction

Unlike working for a private employer, like Target, the legal rules of the road for a Tribal HR Professional are complex and difficult to understand. Yet, understanding how state and federal laws impact Tribal governments and their enterprises is key to preserving the sovereignty of a Tribal Nation. What does it mean to be a sovereign nation or to have immunity from a lawsuit? Do federal employment laws apply? What about state laws? Why are we worried about the federal government and its employment laws? What role does HR have in protecting Tribes from state and federal intrusion?

The following outlines the legal landscape governing who controls employment relations in Indian Country and provides practical advice around navigating the complexities of working for a Tribal government or Tribal enterprise in this difficult legal environment.

A. Tribal Sovereignty From an HR Perspective

HYPOTHETICALS

1. Chemo Firing

You are in a small office with no windows and that weird, glaring fluorescent light. Gary, the manager of the Hotel, is telling you that he is firing Maryann, a soft-spoken, single mom who has been with the Resort since it opened. She has exhausted her sick leave and is recovering from chemo. Gary is there with Kara, the supervisor. You start to explain about our policies, and Gary gives you a look – one you recognize – and says, “Don’t you care at all about getting the job done?” All you do is say, “No.” You look at Kara, and she gives you a look – one you recognize – “I told you so.”

2. Everyone Goes

You are at a meeting with Directors, the Board, and the CEO. Everyone is complaining about how frustrated they are with a lot of our new employees. Someone suggests that everyone is overpaid (although you suspect they don’t mean the people around the table). Someone else says, “Let’s stop allowing workers to have free soda and coffee in the break room.” Another says, “Let’s stop paying bonuses.” You stare out the window as the snow falls and wonder.

- B. When we understand and acknowledge the challenges that face HR, we can take steps that will protect Tribal Sovereignty.

II. Tribal Sovereignty: The Issue in a Nutshell

A. What Is Sovereignty?

There are many definitions of sovereignty, but it essentially means the ability of citizens to manage their own affairs and exist as a nation that is recognized as having control over its own destiny.

The concept of sovereignty touches upon many facets of our lives.

1. It is social;
2. It is cultural;
3. It is political; and
4. It is legal.

It includes:

1. The right to control lands;
2. The right to control real and personal property;
3. The right to control or regulate how people conduct themselves;
4. The right to control clean water and air;
5. The right to control the curriculum in schools;
6. The right to decide what is criminal;
7. The right to adjudicate crimes;
8. The right to control who can marry; and
9. The right to distribute and protect resources.

For the purposes of this workshop, we are going to focus on the right to **regulate** employment relationships in Indian Country. By “regulate employment,” we mean:

1. Determine and articulate policy objectives;
2. Promulgate/legislate employment laws; and
3. Enforce employment laws and impose penalties or allow remedies for violations.

B. Three Competing Sovereigns

There are three distinct and often competing sovereigns seeking to assert jurisdiction and control over the employment relationship between the employer and its employees:

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1. Tribal Nations;
2. The US federal government; and
3. The state governments.

Which of these three distinct sovereigns has the right to regulate employment in Indian Country?

C. The History of the Erosion of Sovereignty Through Federal Incursion Into Tribal Affairs

For millennia, the North American continent was governed by hundreds of independent, self-governing Tribal Nations. Eventually, these self-governing Tribes came under the jurisdiction of the United States through an often violent colonial process. While the US constitution recognizes the Tribal Nations as sovereign much in the same manner as the states and foreign sovereigns, Tribes are treated differently. Under federal Indian law, Tribes are “domestic sovereigns” inasmuch as they reside within the US and are subject to federal power, but they retain sovereign authority of self-governance unless extinguished by an act of Congress.

Under Current Law:

1. Only the federal government has the authority to deal with Tribal Nations.
2. The federal government can impose, and has imposed, its sovereign power upon Tribal Nations.
3. State governments have no jurisdiction over Tribal Nations.
4. Tribal Nations are distinct, independent, political communities that have retained all of their original, natural rights.
5. Tribes possess inherent sovereign powers that have never been extinguished.

D. Tribal Sovereignty – Labor and Employment Law: The Federal Government (and Its Agencies)

a) Some Are Silent

- a) NLRA
- b) FMLA
- c) FLSA
- d) ADEA
- e) USERRA

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b) Some Exclude

- a) ADA
- b) Title VII

c) Some Include

- a) ICRA
- b) ERISA
- c) ACA
- d) HIPAA

d) Sometimes, It Depends Where You Live.

What Federal Circuit Court are you in?

- 9th Circuit – Bad
- 10th Circuit – Good

e) And What Type of Activity You Are Engaged In

- Commercial-like
- Government

E. How Does Sovereign Immunity Come Into the Picture?

THE RULE – No individual can sue the government, unless:

1. Tribe expressly agrees

- a) Laws
- b) Contracts
- c) Federal grants

2. Federal Agencies (EEOC, DOL, DHHS, NLRB)

3. Tribe agrees to waive sovereign immunity

F. Why Is There a Current Push by Federal and State Governments to Control the Employment Rules for Tribes?

- 1. Money/success
- 2. Large employers
- 3. Lack of laws – make differences clear

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G. How Does That Federal/State Effort Relate to You?

1. There will be a decision by the Supreme Court.
2. You are on the front line.
3. What you do, what the enterprise does, counts.

H. Tribes Do Not Have to Be Passive Observers to This History – They Can Help Write It.

1. Government agencies are looking for the right case.
2. Tribal enterprises can take this power away – How?
 - a) Laws
 - b) Rules
 - c) Regulations
 - d) Practice

III. First Step: Understanding & Acknowledging the Challenges Facing HR

Those scenarios, and worse, are real. Your jobs are hard, and decisions can be inconsistent, unfair, and downright loopy. Most importantly, it is not your fault – really!

A. Following “the Law” Is Virtually Impossible.

B. Effect of Law Issue on Policies

Many enterprises and Tribes have good policies. Without laws, do you have to follow them? Can they answer all your questions?

C. Work Rules/Practices

1. Written?
2. Clear?
3. Consistent across departments?

D. Divided Responsibility/Leadership

In most businesses, HR reports only to the CEO. Many of you have to look at the CEO, Board, Tribal Council, and Tribal Leadership.

1. CEO: Bottom line – doesn’t want to hear “no.” No unions, results.

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2. Board of Enterprise: May not have HR experience; may hear complaints from employees; may want employee details that are not appropriately shared.
3. Tribal Council: All of the above – and wicked authority, too.
4. Tribal Leadership: All of the above.

E. Traditional HR Challenges – What Do You Do?

1. CEO/COO: You are a role to be tolerated. You don't make us money. I don't see the lawsuits you prevent, the productivity you increase.
2. Jealousy – Directors vs. HR – Who Is Top Dog?
 - a) A lot like new supervisors – Are you supervising or “above” friends, co-workers?
 - b) If you are not “above” them, how can you get them to listen?
 - c) Do people go “around” HR directly to the CEO? To the Board? Tribal Council?
 - d) Family/favoritism – Even when you do it right, people will complain.

F. Pressure – Not Just Another Business

You are the engine most times, part of the government.

Workforce training can be, although is not always, more involved (Tribal Preference – first jobs for some people).

G. Our Own Mistakes – I Know We Don't Like Talking About It, But...

1. Assuming – Assuming the law; assuming the facts; trusting too much in others; not trusting our own gut.
2. Bowing to the will of supervisors when we know it is wrong. Speaking truth to power (in a good way).
3. Not checking the law/policy.
4. Not getting help – A sign of weakness? A matter of time? A matter of cost?

IV. Solutions: What Can You Do?

A. **Get to the Table.** Get your voice heard – CEO, Board, Tribal Council.

1. Communication – It is what we do best. What is their interest?

Can't be just about warning. The feds are coming! When they don't show up in a week, what then?

Can't be just about fairness. Have those employees been fair to us?

Can't be just about profitability. Prove it! But, researching the cost of turnover, loss of leadership, internal conflicts, promotion of poor employees, and nepotism – and sharing these facts – can help.

Can't be just about public relations, but should we ignore that issue? Would any other business?

It is about all these things. It is about different speakers. It is about outsiders and insiders spreading the message. When the powers that be see you as more than just dealing with payroll and an individual grievance – when you are seen having a big picture – you get to the table.

2. Create a Community – Don't go it alone.

B. **Support Tribal Employment Laws.**

Help folks understand the challenges you face without laws. If you can't make folks understand the advantages to such laws, they won't get passed.

1. If Tribes have nothing, the feds will want to give something.
2. The best legal case against federal incursion is that Tribes are already self-regulating.
3. Laws provide consistency, which allows businesses to understand expectation.
4. Laws provide fairness – Do employers want to discriminate? No.

C. **Educate.**

Different for different groups. Different trainer with different talents, different messages.

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1. CEO: Very carefully, and do not use the word “training.” Try “meeting” or “consultation.”
2. Board: Focus on profitability, liability – Have numbers.
3. Tribal Council: All of the above plus big picture, culture – Who is HR?
4. Directors: Practical – Consequences (only works if you have the authority).
5. Managers/Supervisors
6. Employees

D. Advertising Is Not a Nine-Letter Word.

Sell what you do. Establish your credibility and that of the enterprise.
Don't be shy. Don't wait to be called in front of others.

V. Let's Do What We Do Best – Human Resources.

Create a positive, profitable, and proactive work environment. Protects against frivolous lawsuits, union activities, incursions by feds.

A. Take care of OUR business.

B. Policies

C. Practices

D. Communication

1. How and When to Say, “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 create.
 - d) Let department heads decide for themselves what they should do.

Don't be a martyr unless it's absolutely necessary or your conscience gives you no choice.

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2. How to Talk to Tribal Council. You are being judged. Opportunity to impress.

- a) Even when you are too busy.
- b) Even when they ask you to do something unreasonable.
- c) Even when they are rude to you.

3. How to Resolve Conflict

- a) Depends on who you are dealing with.
- b) Find the common ground.
- c) De-escalate when you can.
- d) Talk about your common interests.
- e) See things from their perspective.

4. How to Mediate Conflicts

E. Build Consistency Through System.

Fairness – Apply just cause even when you don't have to.

1. Consistency
2. Discipline
3. Promotions
4. Wage rates

F. Positive Work Force

1. Do the consistency thing right.
2. Do proactive things that build community and common cause.
3. Don't underestimate the need for leadership – you can be that leader.

G. Know Your Weaknesses.

1. As an administrator
2. As a property – Which managers/supervisors should you worry about?

H. Understand the Consequences of Your Actions.

1. Know what you're doing before you do it.
2. Know the law.
3. Act deliberately.
4. Make sure everyone understands the risk.

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I. Don't Rush to Judgment.

Not everything is an emergency that has to be dealt with today. But remember, difficult decisions and bad news do not get any easier over time.

J. Know Your Role – You Are an Agent for the Tribe.

1. Your job is to represent the interests of the Tribe or its enterprise.
2. Don't become personally involved in an issue.
3. Apply the facts to the rules; call balls or strikes without bias.

Take-Away: There is no one answer, but for sure, *you* are a part of any answer.

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