



Where Do I Start?

HR for New Human Resource Professionals in Indian Country

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Presented by Members of Drummond Woodsum's
Tribal Nations Labor & Employment Group:

S. Campbell Badger, Esq. | sbadger@dwmlaw.com

Anna B. Cole, Esq. | acole@dwmlaw.com

Michael-Corey F. Hinton, Esq. | mchinton@dwmlaw.com

Daniel J. Rose, Esq. | drose@dwmlaw.com

Where Do I Start: HR for New Human Resource Professionals in Indian Country

I. Unique Challenges – HR in Indian Country

Who controls the employment relationship in Indian Country? Is it the federal government? The state government? Or do tribes, as sovereign nations, have the exclusive right to define and implement employment laws in Indian Country? The answer to this question is important because HR professionals need to know what rules (laws) apply and under what circumstances. However, unlike HR Professionals working outside of Indian Country, this question is complicated, and in many instances, the answer is uncertain. This uncertainty makes the life of an HR professional in Indian Country both unique and particularly 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 clarity as HR professionals wrestle with day-to-day employment issues. In addition, there are several suggested rules that all HR professionals should follow when faced with making a difficult HR decision.

II. General Overview of the Legal Landscape

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 government employees and tribal enterprises. Some tribes have enacted comprehensive employment codes touching upon all aspects of the employment relationship. These laws may outlaw certain types of discrimination, provide protected leave for personal and family illness, require overtime after a certain amount of hours worked in a work week, and even allow employees to form unions. These laws provide the legal framework within which HR professionals can operate.

B. The Federal Government (and its Agencies)

Like tribes, the federal government is a sovereign power that also has the right to enact its own labor and employment laws to regulate the employment relationship between employers and employees within its jurisdiction. The relationship between Indian tribes and the federal government is extremely complicated. It is generally characterized by a nation to nation relationship, where, because of historical circumstances, the federal government now has the power dilute tribal sovereignty. The current legal framework is such that a tribe's inherent sovereign powers remain intact unless taken away by a valid treaty, an act of Congress, or a decision by the United States Supreme Court.

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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 and requires reasonable workplace accommodations for disabled employees and applicants.
- b) Enforced by the EEOC.
- c) Indian tribes excluded.

4. PWFA: Pregnant Worker Fairness Act

- a) Requires employers to provide reasonable workplace accommodations for known limitations related to pregnancy, childbirth, and related medical conditions.
- b) Enforced by the EEOC.
- c) Indian tribes excluded.

5. 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.

6. 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.

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7. 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.

8. 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.

9. 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.

10. OSHA: Occupational Safety and Health Act

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

11. ACA: Affordable Care Act

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

12. 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, and state governments do not have any power to control the employment relationship in Indian Country.

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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. These federal agencies are responsible for enforcing applicable federal employment/labor laws and can sue employers when such laws are violated.

Examples of the federal agencies that can bring lawsuits against tribes and against whom

sovereign immunity from suit does not apply are:

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

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.

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. Does the tribe want to invite a federal lawsuit?

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6. Need to educate tribal leaders, general managers, department heads, and other stakeholders on potential consequences of ignoring or “mirroring” federal law.
7. 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?

V. A Guide to Making Sound Decisions in 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.

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

- i) Employment codes relating to discrimination, accommodation, 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.
- 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. 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?

5. Don't Rush to Judgment – Withstand the Pressure

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.

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6. Understand the Politics

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

7. Exercise Empathy and Compassion

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

8. 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.

9. 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.

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.

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- 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.

Contact Us

84 Marginal Way, Suite 600
Portland, Maine 04101
207.772.1941 Main
207.772.3627 Fax

670 N. Commercial Street, Suite 207
Manchester, NH 03101
603.716.2895 Main
603.716.2899 Fax

78 Bank Street
Lebanon, NH 03766
603.433.3317 Main
603.433.5384 Fax

114 N. San Francisco Street
Suite 100, Box 24
Flagstaff, AZ 86001
800.727.1941 Main