



**NNAHRA**  
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Holland & Knight

# *Developing Effective Employment Policies and Agreements*

National Native American Human Resources Association  
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# Overview

Tribal leaders, attorneys, human resources managers, and business owners have many things to consider when developing employment policies and practices that:

- » 1) Reflect applicable laws, traditions, customs, and tribal sovereignty
- » 2) Clearly communicate established employment practices and procedures
- » 3) Protect the interests of the tribe or tribal enterprise
- » 4) Promote workforce stability, employee morale, and workplace safety



# Overview

This session will provide considerations for developing balanced employment practices, and will cover the following topics:

- » 1) Brief recap on what federal, tribal and/or state labor and employment laws apply
- » 3) The importance of regularly reviewing and updating employee handbooks to reflect current laws, traditions and customs, legal developments, as well as to clearly communicate established employment practices and procedures
- » 4) Training supervisors on established employment practices and procedures
- » 5) Developing employment contracts that support the specific needs of the tribe or tribal enterprise, such as protecting trade secrets and other confidential information
- » 6) Developing policies to address lingering pandemic-related workplace issues such as remote work arrangements





# 1. Brief Recap on Applicable Laws

## Sources of Potentially Applicable Laws:

- Tribal Code
- Tribal Constitution
- Tribal Traditions and Customs
- Tribal Court Case Law
- Compacts
- Treaties
- Federal Labor and Employment Statutes and Regulations
- Federal Case Law
- State Employment Laws and Regulations (which generally do not apply to tribal employers absent consent)

# 1. Brief Recap on Applicable Laws

## Applicability of Federal and State Employment Laws to Tribes and Tribal Employers:

### » Federal employment laws

» Two main types of federal employment law statutes:

- (1) federal statutes that expressly exclude Indian tribes; and
- (2) federal statutes of “general application” that are silent as to Indian tribes.
  - Under Ninth Circuit precedent, federal employment laws of “general application” are commonly held to apply to tribes unless they fall into one of three exceptions: (i) application of the law would abrogate treaty right; (ii) Congress did not intend for the law to apply to tribes, or (iii) applying the law would interfere with the right of self-governance in purely intramural matters (e.g. self-governance exception).
  - Other circuits, such as the Eighth and Tenth Circuits, reject the Ninth Circuit’s presumption that generally applicable laws apply to tribes.
  - Even if a law is applicable, tribes may still assert tribal sovereign immunity.

### » State employment laws

» Tribal employers are not subject to state employment laws without consent of the tribe.



# 1. Brief Recap on Applicable Laws

## **Federal Employment Law Statutes Excluding Indian Tribes:**

- » 1) Title VII of the Civil Rights Act of 1964 (Title VII)
  - Expressly exempts Indian tribes
- » 2) Americans with Disabilities Act (Title I: Discrimination)
  - Exempts Indian tribes from anti-discrimination provisions
- » 3) Worker Adjustment and Retraining Notification Act (WARN)
  - Federal Department of Labor regulations exempt Indian tribes



# 1. Brief Recap on Applicable Laws

## **Federal Employment Law Statutes without Specific Exclusions:**

- » 1) Occupational Safety and Health Act (OSHA)
- » 2) National Labor Relations Act (NLRA)
- » 3) Age Discrimination in Employment Act (ADEA)
- » 4) Title III of Americans with Disabilities Act (ADA)
  - Specifically the public access provisions
- » 5) Fair Labor Standards Act (FLSA)
- » 6) Family and Medical Leave Act (FMLA)
- » 7) Consolidated Omnibus Budget Reconciliation Act (COBRA)
- » 8) Employee Retirement Income Security Act (ERISA)
  - Exempts tribal employees performing “essential” government functions, and to employees performing commercial activities
- » 9) Immigration Reform and Control Act of 1986





## 2. Employee Handbooks

### Why are Employee Handbooks Important?

- » Effective Communication Tool
- » Manages Expectations
- » Litigation Risk Management
- » Encourages Monitoring of Legal Updates
- » Opportunity to Reflect Tribal Tradition and Custom into Writing



## 2. Employee Handbooks

### Common Mistakes

- » Over-Reliance on a Form Employee Handbook
- » Allowing the Employee Handbook to Become Outdated
- » Overly-Complicated / Too Lengthy / Administratively Unworkable
- » Lack of Employee Handbook Acknowledgment
- » Internal Inconsistencies
- » Mismatch between Written Policy and Actual Practice
- » Lack of Disclaimers (Employer's Discretion to Revise Policies and Benefits, The Employee Handbook Does Not Waive Sovereign Immunity, The Employee Handbook Does Not Create An Employment Contract)
- » Not Having Others Review the Employee Handbook During the Drafting Process





## 2. Employee Handbooks

### What Policies and Information are Typically Included in Employee Handbooks?

- » Welcome Statement / Purpose
  - Brief description of business, history, culture
  - At-will employment
  - The employee handbook does not waive sovereign immunity
  - The employee handbook does not create an employment contract
  - Defining who has authority to create an employment contract
  - Policies and benefits subject to change, at the employer's discretion
  - Not an exhaustive set of policies
  - Effective date of document, and supersedes all previous verbal or written policy statements



## 2. Employee Handbooks

### What Policies and Information are Typically Included in Employee Handbooks?

- » Compensation and Work Hours
  - Paydays
  - Hours of operation
  - Overtime
  - Recording of time worked
  - Breaks
  - Payroll deductions
  - Reimbursement of business expenses





## 2. Employee Handbooks

### What Policies and Information are Typically Included in Employee Handbooks?

- » Expectations, Performance, and Separation from Employment
  - Introductory Period
  - Attendance and punctuality
  - Tele-commuting
  - Alcohol and drug abuse / accommodations for rehabilitation
  - Smoking in the workplace
  - Non-exhaustive list of terminable offenses
  - Performance improvement plan (PIP) / progressive discipline
  - Separation procedure / exit interviews
  - Final pay
  - Return of property and protection of confidential information



## 2. Employee Handbooks

### What Policies and Information are Typically Included in Employee Handbooks?

- » Dispute Resolution Procedures
  - Detailed procedures for:
    - making a complaint;
    - investigation of a complaint;
    - concluding an investigation; and
    - any appeal rights





## 2. Employee Handbooks

### What Policies and Information are Typically Included in Employee Handbooks?

- » Paid and Unpaid Leave
  - Paid time off (PTO) / paid vacation
  - Miscellaneous types of paid or unpaid leave (e.g., family and medical leave, sick leave, bereavement, jury duty)



## 2. Employee Handbooks

### What Policies and Information are Typically Included in Employee Handbooks?

#### » Anti-harassment, anti-discrimination, anti-retaliation policies

##### - Considerations:

- Ensure that complaints receive (1) a timely response, (2) impartial investigation by qualified personnel, (3) documentation and tracking for progress, (4) appropriate options for remedial actions and resolutions, and (5) confidentiality to the extent appropriate.
- Do not require employee to complaint through any particular chain of command.
- Prohibit retaliation against complainant, with discipline up to an including termination.
- Consider creating a dedicated e-mail address for submitting complaints, e.g., HR@[organization].com, and/or a hotline.





## 2. Employee Handbooks

### What Policies and Information are Typically Included in Employee Handbooks?

#### » Workplace safety

- COVID-19 prevention plan, including safety protocols and remote work policies
- Building emergencies
- Emergency telephone numbers
- Fire emergency
- Tornado or severe storms
- Earthquake emergency
- Emergency closing / weather and transportation problems
- Workplace violence prevention
- Weapons



## 2. Employee Handbooks

### What Policies and Information are Typically Included in Employee Handbooks?

#### » Benefits

- General description of benefit programs
- Privacy of medical records
- Health insurance continuation
- Unemployment insurance
- Workers' compensation insurance





## 2. Employee Handbooks

### What Policies and Information are Typically Included in Employee Handbooks?

- » Use of Company Equipment and Resources
  - Computer systems
  - Phone systems, voicemail, and cell phones
  - Monitoring, surveillance, and security inspections
    - No expectation of privacy



## 2. Employee Handbooks

### **What Policies and Information are Typically Included in Employee Handbooks?**

- » Indian Preference
- » Tribal Laws, Customs, and Traditions





## 2. Employee Handbooks

### What Policies and Information are Typically Included in Employee Handbooks?

#### » Handbook Acknowledgment

- Consider requiring employees to electronically sign onboarding paperwork, e.g., DocuSign.
- Include handbook version number on the footer of each page of handbook, including the handbook acknowledgment.
- Consider preparing a memorandum that summarizes the changes made to the employee handbook.



### 3. Training supervisors on established employment practices and procedures

- » Ensure that supervisors are aware of, and are trained to comply with, current tribal policies and practices such as for employee discipline, termination, and grievance procedures.
- » Failure to properly train supervisors could lead to unintended violations of tribal policies and procedures. This may expose the tribe or tribal enterprise to employment-related lawsuits which, even if can be dismissed on sovereign immunity grounds, are often time-consuming and costly.





## 4. Developing employment contracts that support the specific needs of the tribe or tribal enterprise

- » Confidentiality / Non-Disclosure Agreements
- » Non-Solicitation Agreements
- » Non-Competition Agreements
- » Dispute Resolution



## 5. Developing policies to address lingering pandemic-related workplace issues

- » As COVID-19 emergency declarations and regulations have been withdrawn, continued questions and challenges persist at the workplace which often involve remote work arrangements.
- » If remote work is utilized at your tribe or enterprise, it is advisable to create strong policies and/or workplace to set expectations regarding remote work benefits, and mechanisms to support manage and monitor performance. If policies and agreements are already in place, it is also advisable to periodically revisit and update them.



## 5. Developing policies to address lingering pandemic-related workplace issues

### » Telework and hybrid work arrangements

- Advantages of teleworking
  - For many employers, telework arrangements worked very well during the pandemic
  - Employees generally like telework and widely view it as an employee benefit
  - Underscores importance of basing telework decisions on legitimate business factors
  - Telework will be more widely offered post-pandemic, impacting recruiting and retention
  - May allow for maximized office space, reduced operating costs
- Disadvantages of teleworking
  - Employee onboarding, integration, mentoring and team building/collaboration can be less effective
  - More opportunities for employee distraction and lack of engagement
  - Meaningful performance management may require increased effort
  - Not suitable for all positions, but employees may not understand/appreciate distinctions

## 5. Developing policies to address lingering pandemic-related workplace issues

### » Telework and hybrid work arrangements (Cont.)

- Hybrid work arrangements combining a schedule of partial telework and partial return to worksite
  - This arrangement has rapidly increased in use and popularity
    - Viewed by employees as compromise between full telework and full return to worksite
  - Can be effective tool in furtherance of workplace health and safety protocols
  - Clear communication and full management engagement is critical
    - To ensure employer and employee expectations are aligned
    - To ensure employee availability and flexibility to meet all business objectives
      - Necessary collaboration and innovation
      - Rapid information exchange
      - Administrative efficiency



## 5. Developing policies to address lingering pandemic-related workplace issues

### » **Telework and hybrid work arrangements (Cont.)**

- Successful management telework or hybrid work arrangements:
  - Establish non-discriminatory criteria and processes for evaluating suitability of telework or hybrid work arrangements:
  - Are work activities are portable and can be performed effectively outside the office?
    - Regular remote work may not be suitable if an employee's job required regular in-person contact with other employees, clients or the public, or regular access to materials that cannot be removed from the worksite
  - Are job tasks are easily quantifiable or primarily project oriented?
  - Is there an adverse impact on the performance or morale of other employees?
  - Do you have the technology and equipment needed for an employee to securely perform the job remotely?
  - Are there contractual arrangements or client concerns or objections that would preclude teleworking?

## 5. Developing policies to address lingering pandemic-related workplace issues

### » Telework and hybrid work arrangements (Cont.)

- Successful management telework or hybrid work arrangements:
  - Effective performance management of remote working employees
    - Employees and their managers keep one another apprised of events or information obtained during the working day.
      - Employees should be directed to communicate with their supervisor to identify in advance, and on an ongoing basis, any job duties or responsibilities that cannot be effectively performance remotely
      - Employees also should be encouraged to promptly notify their supervisors in the event that personal circumstances interfere with their ability to fully perform their job duties remotely
    - Performance issues are addressed promptly with clearly communications expectations for change

## 5. Developing policies to address lingering pandemic-related workplace issues

### » **Telework and hybrid work arrangements (Cont.)**

- Successful management telework or hybrid work arrangements:
  - Approval process and eligibility factors
  - Employer's right to modify or discontinue the arrangement at the employer's discretion
  - Expectations regarding: work output and productivity, employee availability and communication, and work hours
  - Employee obligation to keep the employer apprised of disruptions or obstacles to remote work
  - Expectations for employee in-person participation in pre-scheduled or future work meetings and events
  - Legal compliance issues such as time reporting and time approval for non-exempt employees
  - Confidentiality and security requirements and expectations to protect the employer property and business interests of the employer and clients
  - Employer (and client, if applicable) policies and rules remain in effect unless employees are notified otherwise, and that the remote work arrangement can be discontinued at any time by the employer





**Thank You**

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