National Native American Human Resources Association
2023 Annual Conference

LEGAL Update

Contents

A. PREGNANT WORKER FAIRNESS ACT

Background:

On June 27, 2023, the federal Pregnant Workers Fairness Act (PWFA) went into effect. The PWFA incorporates Title VII of the Civil Rights Act of 1964's definition of "employer." Therefore, while the law generally applies to all employers, public or private, who employ at least 15 employees, the PWFA expressly excludes Tribes.

The PWFA requires covered employers to provide reasonable accommodations to qualified employees and applicants with known limitations related to pregnancy, childbirth, or related medical conditions, unless they would cause the employer an undue hardship. Similar to the ADA, the PWFA requires covered employers to engage in an "interactive process" with affected individuals to discuss potential reasonable accommodations. The PWFA prohibits employers from requiring employees with pregnancy-related health conditions to take leave (either paid or unpaid) if another reasonable accommodation could be provided, and the law also prohibits retaliation against employees who request reasonable accommodations.

While the federal Equal Employment Opportunity Commission (EEOC), the federal agency charged with interpreting the PWFA, has submitted proposed rules, they have not yet been finalized. As a result, the full breadth of the obligations under the law are not yet clear, but it is likely that much of the PWFA will likely be interpreted in a manner consistent with the ADA. There are a few areas, however, that are more expansive. Specifically, the concept of "known limitation" under the PWFA is broader than the definition of "disability" under the ADA. The

PWFA also expands the definition of "qualified employee." Under the ADA, an employee is considered "qualified" if they are able to perform the essential functions of their position with or without a reasonable accommodation. The PWFA adopts this same definition but with the explicit exception that an individual will still be considered "qualified" if they are unable to perform an essential function for a temporary period, the essential function can be performed in the near future, and the inability can be reasonably accommodated.

While the final rules are still in development, the EEOC has posted a "What You Should Know" question and answer set on its website. In the Q&A, the EEOC indicates that the following could constitute "reasonable accommodations" under the PWFA: the ability to receive closer parking; flexible work hours; appropriately sized uniforms and safety apparel; additional break time; leave or time off to recover from childbirth; and excusal from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy.

The EEOC is currently accepting comments on its proposed rules through October 10, 2023.

What Needs To Be Done:

Where the PWFA does not apply to Tribes, there is no obligation for Tribal Nation and their enterprises to take immediate action. Nonetheless, it would be prudent for Tribal HR Professionals to be aware of law and its rules because employees may make inquiries about this law and/or their rights under it.

PROVIDING URGENT MATERNAL PROTECTIONS FOR NURSING MOTHERS ACT (PUMP ACT)

Background:

In 2010, the Fair Labor Standards (FLSA) was amended to require covered employers to permit reasonable break time for non-exempt nursing employees to express breastmilk at work for up to one year following the birth of a child. Such employees are entitled to take a break each time they need to express milk. The frequency and duration of such breaks depend on individual circumstances. Employers are permitted to seek a set schedule, but must apply it flexibly and cannot require that an employee adhere to a specific schedule that doesn't meet the employee's needs. Such break time can be unpaid unless it is for less than 20 minutes (consistent with the baseline FLSA rule), it is interrupted with work, or if other employees are compensated for similar break time.

Additionally, the FLSA requires covered employers to provide an appropriate place for employees to express breast milk. For this purpose, "appropriate" means a place, other than a bathroom, that is shielded from view, free from intrusion, and available and functional for this purpose. Employers are allowed to temporarily designate a space for this purpose so long as it is otherwise appropriate.

Employers with less than 50 employees may be exempted if they can demonstrate that compliance would cause an undue hardship.

Effective December 29, 2022, the PUMP Act protections were extended to *exempt* employees on the same terms as non-exempt employees. However, employers are not permitted to reduce an exempt employee's salary for nursing breaks.

What Needs To Be Done:

Tribes that comply with, or intend to mirror, the FLSA requirements should review their policies and/or ordinances to ensure that they are broad enough to encompass both exempt and non-exempt employees who require time to express breastmilk in the workplace. Such employers should also train supervisors to ensure that they understand the full scope of the rule and how it should be administered.

B. FORM I-9 UPDATES

Background:

The Form I-9 is used to verify a new employee's identity and employment authorization in the United States.

On August 1, 2023, the USCIS released the new version of the I-9 Form, which is a one page form with Supplements A and B. Supplement A is the new Preparer/Translator Certification and Supplement B is what was previously referred to as "Section 3" of the I-9 form.

What Needs To Be Done:

We are currently in a transition period in which both the newly released and 2019 version can both be used for new hires. Starting *November 1, 2023*, only the August 1, 2023 version will be acceptable. The current version of the form can be downloaded from the USCIS website.

Simultaneously with the release of the new I-9 Form, the USCIS announced the new "alternative procedures," which allow for the remote verification of I-9 documentation. In order to be eligible for the new alternative procedures, the employer must be enrolled in E-Verify. Then, the employer conducts a live video call with the employee to view the documents presented. If the documents are verified in this manner, the alternative procedure box must be checked in Section 2 of the August 1, 2023 form and copies of the supporting documents must be retained. Current guidance indicates that Sections 1 and 2 must be completed on the same form, which will require coordination with the employee.

Action items are:

1. Ensure you are using the most up to date version of the Form I-9;
2. If you are considering taking advantage of the alternative procedures, evaluate whether E-Verify enrollment is advisable.
3. If you will be using the alternative procedures, establish appropriate internal policies and procedures relative to those steps.

C. NATIONAL LABOR RELATIONS BOARD DECISION IMPACTING TRIBAL EMPLOYERS – A RECALIBRATION TOWARDS EMPLOYEE RIGHTS

Background:

The National Labor Relations Act (NLRA) is a labor law that gives employees the right, in the private sector, to form and join unions and engage in protected concerted activities for their mutual aid and protection. (So-called "*Section 7 Rights*"). Protected concerted activities by employees can include two or more co-workers talking about wages, benefits and other working conditions, circulating petitions asking for improved working conditions, complaining about unsafe working conditions or objectionable employment practices, and complaining to their employer, an agency or the media about problems in the work place.

Stericyle, Inc and Teamsters Local 628 - What This Case Says:

On August 2, 2023, the National Labor Relations Board (NLRB) adopted a new legal standard for evaluating employer work rules and whether they pass scrutiny under NLRA. Under this new standard, the NLRB must only show that a challenged rule has a ***reasonable tendency to chill employees from exercising their rights*** under the Act. In such instances, the rule will be presumptively invalid. The NLRB has stated that it will scrutinize employer rules from the perspective of an employee who is (1) subject to the rule, (2) economically dependent on the employer and who (3) contemplates engaging in the concerted activity. If the employee could reasonably interpret the rule to have a coercive meaning, the NLRB has carried their burden, even when the rule could also be interpreted as having no coercive meaning. The employer may then rebut the presumption by proving that the rule **advances a legitimate and substantial business interest**, and that the employer is unable to advance that interest with a more narrowly tailored rule.

Why It Matters:

The Stericycle decision significantly broadens employee protections under the NLRA and conversely restricts employer's ability to regulate employee conduct at the work place. In doing so, this new standard expands the reasons by which employees can seek NLRB assistance to challenge disciplinary actions for violations of employer work rules and encourages the NLRB to engage in further scrutiny employer work rules.

What Needs To Be Done:

The NLRB states will assert "jurisdiction over the commercial enterprises owned and operated by Indian Tribes, even if they are located on a tribal reservation. . . " Consequently HR professionals working in so-called "commercial enterprises" would be advised to scrutinize all workplace rules, policies, and procedures through the lens of *Stericycle*, and be prepared to defend all workplace rules as having a substantial and legitimate business interest

Work rules that likely touch upon employee Section 7 rights include:

- Employees use of social media
- Criticism, negative comments, and disparagement of management
- Promoting civility
- Prohibiting insubordination
- Requiring confidentiality of investigations and complaints
- Use of camera's and/or cell phones in the workplace
- Restrictions on use of emails
- Prohibitions against recording meetings
- Restricting meetings with co-workers
- Confidentiality rules that prevent employees talking to co-workers about wages, benefits, working conditions or other employment matters.

. Two questions to for each work rule:

1. Could this work rule reasonably be interpreted by an economically dependent employee to encroach upon their Section 7 Rights?

2. Is there a legitimate business rationale for this work rule and is it narrowly tailored to promote that business interest.

D. U.S. Department of Labor Proposes Increase for Overtime Exempt Salary Threshold

On Aug. 30, 2023, the U.S. Department of Labor (DOL) announced a proposed rule raising the overtime exemption salary threshold for executive, administrative and professional employees. Currently, such workers must earn at least $35,568 annually to qualify for the exemption. The proposed rule would raise the threshold to $55,068. The highly compensated employee (HCE) exemption would also increase under the proposed rule from its current threshold of $107,432 to $147,414 per year. The rule would also include automatic updates, bumping up the threshold to account for inflation every three years.

Basics of the Overtime Exempt Salary Threshold

The Fair Labor Standards Act requires employers to pay time and a half for their workers' hours above 40 per week. Exempt from this requirement, however, are employees "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

For many decades, DOL has used a three-part test for this exemption. Each of its rulemakings has adjusted the contents of each part of the test, but the three-pronged framework has remained the same: An employee must 1) perform exempt duties, 2) be paid a fixed salary and 3) be paid a high enough salary.

This third prong is the "salary threshold" test. Its predominant rationale has been to serve as a proxy for an employee's status as a bona fide executive, administrator or professional. The idea is that an employee truly charged with those duties would likely have a salary commensurate with those duties.

Previous Threshold Changes and Legal Challenges

In 2004, DOL issued an overtime rule that substantially simplified the duties prong of the test and set a salary threshold of $23,660. It also introduced a "highly compensated employee" salary threshold for employees who perform at least some white collar duties.

In 2016, DOL issued an ambitious rule that would have raised the salary threshold to $47,476. It would have also included, for the first time, an automatic-update mechanism. That rule, however, was held invalid by a federal district court on grounds that the salary threshold was too high and, thus, contrary to the statue – it swallowed up millions of workers who indeed performed executive, administrative and professional functions. The court also held that the automatic-update mechanism was unlawful.

In 2019, DOL issued a more moderate overtime rule. That rule promulgated the current $35,568 threshold. Essentially, it used the same methodology as the 2004 rule and simply updated it for inflation. The 2019 rule did not provide for automatic updates.

The Newly-Proposed Rule

On Aug. 30, 2023, DOL announced its proposed overtime rule, which does not revisit the duties test, but has major features similar to that of the 2016 rule:

- a substantial increase in the salary threshold, from $35,568 to $55,068
- a substantial increase in the "highly compensated employee" threshold, from $107,432 to $144,414 (with use of commissions, nondiscretionary bonuses and incentives to cover up to 10 percent)
- a mechanism for automatic updates every three years to keep pace with inflation

On September 8, 2023, the proposed rule was published on the Federal Register, triggering a 60-day public commenting period which will end on November 7, 2023. *See* https://www.federalregister.gov/documents/2023/09/08/2023-19032/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and. Following the commenting period, the DOL will take submitted comments into consideration and issue its final rule, which is likely to take effect in 2024. However, there are also likely to be legal challenges to the final rule, which may create some uncertainty as to when or whether to comply with the new rule.

Next Steps

It remains to be seen whether the final rule remains as ambitious as the proposed rule – and whether it will survive any court challenges. In the meantime, employers should prepare for these potential leaps in the minimum salary thresholds. Employers not prepared to give an employee a raise in compensation sufficient to meet the proposed salary thresholds (a raise that could be upward of $375 per week) may wish to review those employees' hours of work to estimate future overtime costs or consider whether their work can be redistributed in a manner to reduce their need

for overtime hours. Finally, interested employers have an opportunity to submit comments to the DOL on the proposed rule through November 7, 2023.

E. U.S. Supreme Court's Affirmative Action Decision, and Potential Implications for Tribal Employers

The SFFA v. Harvard Decision

On June 29, 2023, the U.S. Supreme Court issued its highly-anticipated affirmative action decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*, 143 S. Ct. 2141 (2023) ("*SFFA v. Harvard"*). The decision held that race-based affirmative-action programs in college admissions processes violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 ("Title VI"). Specifically, the Supreme Court held that UNC, as a public institution, violated the Equal Protection Clause of the 14th Amendment of the U.S. Constitution, and that Harvard, as a private institution, violated Title VI.

The Supreme Court noted that while the universities may not consider race in and of itself in the admissions process, "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." The Court viewed this approach as "race-neutral" because a student of any race could make such arguments. The majority and the dissent, however, both cautioned that universities should not use the ability to write a personal essay as a loophole to consider race. The majority opinion made clear that admissions should focus on "challenges bested, skills built, or lessons learned".

The Supreme Court's majority opinion notes that other types of non-racial diversity may be considered: "The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is not like treating them differently because they are from a city or a suburb, or because they play the violin poorly or well." In addition, Justices Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh in concurring opinions, and Justices Sonia Sotomayor, Elena Kagan, and Ketanji Brown Jackson in the dissenting opinion, identified additional race-neutral forms of diversity that could be considered, such as socioeconomic status, status as a first-generation college student, speaking a second language, or coming from a geographically diverse location.

Potential Implications for Tribal Employers

At the outset, it must be noted that the Supreme Court's decision in *SFFA v. Harvard* applied explicitly to universities and did not involve Title VII, which governs the conduct of private employers. Critically, however, Justice Gorsuch's concurring opinion linked the interpretation of Title VI to similar language in Title VII, which makes it "unlawful… for an employer… to discriminate against any individual… because of such individual's race, color, religion, sex, or national origin." Justice Gorsuch described both Title VI and Title VII as "codify[ing] a categorical rule of individual equality, without regard to race." Thus, this reasoning potentially implicates employer DEI programs that take into consideration those characteristics.

However, Charlotte Burrows, Chair of the Equal Employment Opportunity Commission ("EEOC"), issued a statement immediately after *SFFA v. Harvard* was issued. She stated that the decision "does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace." U.S. EEOC, *Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs* (Jun. 29, 2023), at https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action.

Despite this statement, and despite *SFFA v. Harvard* not involving employment practices or Title VII, DEI programs have nonetheless become a target of scrutiny. For instance, two prominent law firms were recently sued for their entry-level DEI hiring programs. *See Perkins Coie, Morrison Foerster Sued over DEI Programs*, BLOOMBERG LAW (Aug. 22, 2023), at https://news.bloomberglaw.com/business-and-practice/perkins-coie-morrison-foerster-sued-by-blum-over-dei-programs. One of them changed its program within two weeks of suit. *See Morrison Foerster Changes DEI Fellowship Criteria Amid Lawsuit*, BLOOMBERG LAW (Sept. 6, 2023), at https://news.bloomberglaw.com/business-and-practice/morrison-foerster-changes-dei-fellowship-criteria-amid-lawsuit.

With all that said, it is crucial to note that Title VII, by its express statutory language, does not apply to tribes. *See* 42 U.S.C. § 2000e(b) (excluding "an Indian tribe" from Title VII's definition of "employer"); *see also Miller v. United States*, 992 F.3d 878, 886 (9th Cir. 2021) ("[W]e note at the outset that Tribes are expressly excluded from coverage under [Title VII]."). Nor does *SFFA v. Harvard* discuss or implicate Indian preference practices which are authorized through various federal statutes and regulations, as recognized by courts and the EEOC. *See, e.g. EEOC Policy Statement on Indian Preference under Title VII*, https://www.eeoc.gov/laws/guidance/policy-statement-indian-preference-under-title-vii. And, there is nothing in *SFFA v. Harvard* that would affect tribal sovereign immunity defenses. Thus, the *SFFA v. Harvard* decision should not have any legitimate implications for tribal employers. However, for non-tribal employers, or for enterprises that operate and employ individuals outside of Indian Country, such employers may still wish to review their DEI and hiring policies out of an abundance of caution.

F. Sovereign Immunity and Arm of the Tribe Analysis in Tribal Employment

One of the most frequently litigated issues in federal Indian law is whether an employee of a tribe-affiliated entity can sue for violations of federal law. This includes claims of employment discrimination, retaliatory discipline for calling out fraud, and all sorts of other employee protections. In many cases, unless a tribe enacts its own law to afford such protections or waives sovereign immunity, tribal employees may be left without any recourse (or sense of justice).

Three recent federal court decisions address how sovereign immunity works (or doesn't) in these situations. On June 27, in *Tsosie v. N.T.U.A. Wireless LLC,* a federal district court in Arizona rejected a sovereign immunity defense in a case involving sexual harassment brought by the General Manager of Navajo Tribal Utilities Association Wireless LLC ("Wireless"). Wireless is a Delaware limited liability company. Navajo Tribal Utility Authority ("NTUA"), a governmental entity of the Navajo Nation with sovereign immunity from suit, owns 51% of

Wireless, and Commnet Newco ("Newco"), a private Delaware limited liability company, owns 49% of Wireless. Newco is also the managing member of Wireless. The standards for whether such tribe-affiliated entities have sovereign immunity have baffled courts for years. If such an entity is an "arm of the tribe," it will have sovereign immunity, but what constitutes an "arm of the tribe"?

In *Tsoie* and the two other cases that came down in early July, the courts balanced five not-so-well-defined factors: (1) the method of creation of the entity, (2) the purpose of the entity, (3) the structure, ownership, and management, including the tribe's control over the entity, (4) the tribe's intent to share sovereign immunity, and (5) the financial relationship between the tribe and the entity. The district court in *Tsosie* easily rejected Wireless's argument that it was an "arm" of the Navajo Nation: it's not an instrumentality of the Nation— it is a private corporation formed under Delaware law; it is governed by a four-person Board of Directors, two appointed by NTUA and two by Newco, none of whom need be Navajo citizens; and its profits and losses are shared equally by NTUA and Newco. Two days later, on June 29, in the case of *Mestek v. Lac Courte Oreilles Cmty. Health Ctr.,* the U.S. Court of Appeals for the Seventh Circuit held that sovereign immunity barred an action brought under the federal False Claims Act by the former Director of Health Information at the Community Health Center of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians. Mestek claimed that she was fired for reporting that the Health Center's electronic records system resulted in fraudulent billing of Medicare and Medicaid. Unlike Wireless, the Health Center is an unincorporated instrumentality of the Band and overseen by the Band's governing tribal council. Thus, it was not hard for the Seventh Circuit to conclude that the Health Center is an arm of the Band and enjoys sovereign immunity.

Finally, on July 5, the Seventh Circuit again visited the question in *Seneca v. Great Lakes Inter-Tribal Council, Inc.* In that case, the former Director of Epidemiology at Great Lakes Inter-Tribal Council, Inc., "a non-profit consortium of Indian tribes," sued the Council for employment discrimination. The member tribes own and control the Council. It is not clear whether it is a non-profit corporation formed under state law. Referencing, but not examining, the five balancing factors set out above, the Seventh Circuit held that the Council was an arm of its constituent member tribes and, therefore, sovereign immunity barred Seneca's lawsuit. The Court did not walk through any of the five factors. It simply said "the Council is a non-profit combination of its member Indian tribes, organized to provide government-like services to members of its community and their families, children, people with disabilities, and the elderly," making it self-evident that the Council "is an arm of the tribes."

It remains to be seen whether the Supreme Court will adopt this five-factor balancing test. Other authorities suggest a far simpler three-factor test focusing on tribal ownership and control and whether, in the case of a commercial venture, the net profits support tribal governmental services.

G. Preference (*Brackeen v. Haaland*)

Issues:

This case was a challenge to the legality of the Indian Child Welfare Act of 1978 (ICWA). The questions before the court were (1) if placement preferences were discriminatory considering they are based on *race*; and, (2) whether placement preferences exceed Congress's Article I authority by invading the arena of child placement, argued to be virtually exclusive province of the States, otherwise commandeering state courts and state agencies to carry out a federal child-placement program pursuant to the 10th amendment.

Holding:

The Supreme Court of the United States affirmed 7-2 the 5th Circuit's conclusion**, (1) that** ICWA child custody proceedings are consistent with Congress's Article I authority, and (2) rejected petitioners' anticommandeering challenges under the Tenth Amendment. However, the court did determine the petitioners lacked standing to litigate their other challenges to ICWA's placement preferences.

Impact in Employment:

Currently there is no discernable impact in the realm of human resources or employment law from the Brackeen case. However, further challenges may arise in the near future as the Court did not address the Equal Protection implications brought by the petitioners. On a positive note, the Court did state:

> *Congress's power to legislate with respect to Indians is well established and broad. Consistent with that breadth, we have not doubted Congress's ability to legislate across a wide range of areas, including criminal law, domestic violence, employment, property, tax, and trade.*

This language by the Court is significant as it specifically points out employment matters and cites Morton v. Mancari, 417 U. S. 535, a case where the Supreme Court recognized the authority of the federal government to implement Native hiring preferences in certain contexts, classifying Tribal citizenship as a political association rather than as a matter race. While this is not a predicator as to how the Court would rule regarding Equal Protection matters in an employment context, it does offer some insight.

Moving Forward:

It is important to stress that everyone should continue to generally monitor equal protection and federal Indian law cases, because while Brackeen settled some limited items, it is from from ***settled***.

The Supreme Court recently ended Affirmative Action in college admissions, which had immediate impacts on race-based programs under the Small Business Administration, including Native owned businesses in the government contracting space; and other cases such as Maverick out of Washington state challenge is likely to go up the appellate chain challenging the constitutionality of IGRA. Challenges to Tribal sovereignty and the federal trust responsibility will continue to go forward; it is important that Tribes and Tribal citizens remain proactive and diligent in advocating for their sovereign rights and holding the federal government accountable to its responsibilities.

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