

TRIBAL SOVEREIGN IMMUNITY, EMPLOYMENT CODES & FEDERAL EMPLOYMENT LAWS



TRIBAL SOVEREIGNTY

Power of Self-Governance Over Tribal Territory and Members

- “The Indian nations have always been considered as distinct, independent, political communities retaining their original natural rights as the undisputed possessors of the soil from time immemorial.” — Worcester v. Georgia (1832).
- Indian tribes possess inherent sovereign powers that “have never been extinguished.”
- These inherent sovereign powers remain intact unless taken away by:
 - A valid treaty
 - An act of Congress
 - A decision of the United States Supreme Court.
 - Accordingly, absent a valid treaty, an Act of Congress, or a decision of the Supreme Court, tribes possess the inherent sovereign authority to regulate employment relations within Indian Country by establishing constitutions and/or adopting ordinances or codes.

Tribal Constitutions

If adopted, tribal constitutions may include provisions that protect members of the tribe and impact employment decisions, such as:

- (a) Due process, potentially creating a property interest in employment;
- (b) Equal protection, potentially creating protections against treating employees differently on the basis of race, sex and other classifications
- (c) Freedom of speech, potentially creating protections against adverse employment actions against employees when they exercise free speech rights.
- (d) Freedom from unreasonable searches and seizures, potentially creating protections against some forms of employee drug testing and other forms of “searches.”

Tribal Employment Codes

Some tribes have enacted employment codes, and others have not. If a tribe chooses to enact an employment code, it must be consistent with the tribe’s constitution. For example, tribes may enact and enforce employment ordinances or codes that:

- (a) Prohibit employment discrimination on the basis of sex, race, age, disability, religion, national origin and/or other classifications as determined by the tribe, and provide tribal court remedies for violations of those ordinances or codes.
- (b) Require Indian or tribal employment preference in hiring and other employment decisions.
- (c) Govern terms and conditions of employment, such as wages and overtime; family, military, and other forms of protected leave; workers’ compensation insurance; and occupational safety and health, and provide tribal court remedies for violations of those ordinances.
- (d) Govern unions and collective bargaining.

INTRUSIONS ON THE SOVEREIGNTY OF TRIBES

The Federal Government-
The Supreme Court has not decided whether Indian tribes are free from the imposition of federal authority in the same way that they are generally free from the imposition of state authority. However, certain limits on the federal government’s authority to intrude on a tribe’s sovereignty are clear.

1. The U.S. Constitution, including the Bill of Rights (protecting due process, equal protection of the laws, freedom of speech and freedom from unreasonable searches and seizures) does not apply to Indian tribes and their enterprises. Indian tribes pre-date the Constitution and, unlike states, had no voice in its adoption. Therefore, the Supreme Court has held that tribes are not bound by the U.S. Constitution. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978).
2. Federal Statutes passed by Congress/tRegulations created and adopted by Federal Administrative Agencies. The federal government regulates the conduct of employers through statutes passed by Congress and any implementing regulations adopted by the executive branch of the government.
In general, federal statutes fall into one of three categories:
 - (1) those that specifically state that the law applies to Indian tribes
 - (2) those that specifically state that the law does not apply to Indian tribes
 - (3) those that are silent.

CATEGORY 1: Federal Employment Laws that expressly apply to Tribes and Intrude on Tribal Sovereignty
If a federal law specifically states that it applies to Indian tribes, then that statute and any implementing regulations adopted by a federal agency related to that statute will limit a tribe’s sovereign authority to adopt constitutional provisions or ordinances inconsistent with the statute or its related regulations.

The Indian Civil Rights Act (ICRA) of 1964
Prohibits tribal governments from violating the following rights while “exercising powers of self government.”

- Due process, potentially creating a property interest in employment;
- Equal protection, potentially creating protections against treating employees differently on the basis of race, sex and other classifications.
- Freedom of speech, potentially creating protections against adverse employment actions against employees when they exercise free speech rights;
- Freedom from unreasonable searches and seizures, potentially creating protections against some forms of employee drug testing and other forms of “searches.” Enforceable only in tribal forums and only if a tribal court finds that there has been a waiver of sovereign immunity.

Affordable Care Act (ACA)

- Requires provision of health care insurance.
- Applies to Indian tribes.
- Enforced by IRS.

Employee Retirement Income Security Act (ERISA)

- Requires establishment of specific plans and accountability for employee retirement benefits.
- Indian tribes partially excluded.
- Enforced by DOL.

Health Insurance Portability and Accountability Act (HIPAA)

- Requires protection of confidential health information: clinics and self-insured plans need compliance policies.
- Applies to IHS clinics and self-insured health plans.
- Enforced by DHHS.

CATEGORY 2: Federal Employment Laws that Expressly DO NOT Apply to Tribes and DO NOT Intrude on Tribal Sovereignty

If a federal law specifically states that it does not apply to Indian tribes, then neither that statute nor any implementing regulations adopted by a federal agency related to that statute have any effect on a tribe’s sovereign authority to adopt constitutional provisions or ordinances inconsistent with the statute or its related regulations.

Title VII of the Civil Rights Act of 1964 (Title VII)

- Prohibits employment discrimination on the basis of sex, race, religion, color and national origin.
- Indian tribes excluded.
- Enforced by the EEOC.
- Remedies for violations can include compensatory damages, lost wages, punitive damages and attorneys’ fees.

Title I of the Americans with Disabilities Act (ADA)

- Prohibits employment discrimination on the basis of disability.
- Indian tribes excluded.
- Enforced by the EEOC.
- Remedies for violations can include compensatory damages, lost wages, punitive damages and attorneys’ fees.

CATEGORY 3: Federal Employment Laws that are Silent Regarding Application to Tribes and MAY Intrude on Tribal Sovereignty
If a federal law is silent regarding its application to Indian tribes, then the statute and any implementing regulations adopted by a federal agency related to that statute may be interpreted by the federal courts to apply to tribes and thus limit tribe’s sovereign authority to adopt constitutional provisions or codes inconsistent with the statute or its related regulations. Unfortunately, different federal courts apply different standards to analyze whether such “silent” statutes will apply to tribes. Therefore, whether the silent statute will apply to a specific tribe depends on which standard, if any, has been adopted by the federal courts in the tribe’s geographic region.

Age Discrimination in Employment Act (ADEA)

- Prohibits employment discrimination on the basis of age.
- Silent on application to Indian tribes.
- Enforced by the EEOC.
- Remedies for violations can include compensatory damages, lost wages, punitive damages, and attorneys’ fees.

Fair Labor Standards Act (FLSA)

- Requires payment of minimum wage, overtime, and other requirements.
- Silent on application to Indian tribes.
- Enforced by DOL.
- Remedies for violations include unpaid minimum wages and overtime; can include attorneys’ fees and double damages.

Uniformed Services Employment Reemployment Rights Act (USERRA)

- Right to reemployment in a civilian job when a service member leaves for duty.
- No discrimination or retaliation.
- Health insurance protection.

Family and Medical Leave Act (FMLA)

- Requires up to 12 weeks of unpaid, job-secured leave time for family and medical care.
- Silent on application to Indian tribes.
- Enforced by DOL.

National Labor Relations Act (NLRA)

- Guarantees employees the right to engage in “concerted activity,” to elect and be represented by unions, and to strike.
- Silent on application to Indian tribes.
- Enforced by NLRB.
- Remedies include reinstatement and back pay if employee discriminated against for exercising NLRA rights; injunctions.

Occupational Safety and Health Act (OSHA)

- Requires workplace safety standards.
- Silent on application to Indian tribes.
- Enforced by DOL.