



LABOR & EMPLOYMENT IN INDIAN COUNTRY: UPDATES AND BEST PRACTICES

**CALIFORNIA INDIAN LAW ASSOCIATION
18TH ANNUAL CONFERENCE**

**PECHANGA RESORT & CASINO
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GENERAL PRINCIPLES: APPLICABILITY OF TRIBAL, STATE, AND FEDERAL LAWS



SOURCES OF EMPLOYMENT LAW AFFECTING TRIBES: A REFRESHER

■ Tribal Law

- Enactment of ordinances: essential element of sovereignty
- Federal laws generally trump if conflict with tribal law

■ State Law

- Tribes not subject to state regulation without consent
- Agreements with state/local government

■ Federal Law

- Congressional plenary power over Indian tribes
- Can directly regulate tribal employment if it so chooses



TWO TYPES OF FEDERAL EMPLOYMENT STATUTES

- Statutes expressly excluding Indian tribes
 - Congress sometimes provides for exclusion
 - Exclusions are rare
 - Tribes need not comply if specific exclusion
- Federal statutes of “general application”
 - No specific mention of exclusion for tribes
 - Federal court power to decide if apply to tribes
 - Need to decide whether and how to comply if no specific tribal exclusion
 - Need to evaluate extent to which statute applies
 - Consider three exceptions: self-governance, treaty, and Congresssional intent



FEDERAL STATUTES EXPRESSLY EXCLUDING INDIAN TRIBES

- Title VII of Civil Rights Act of 1964 (Title VII)
 - Prohibits employment discrimination based on race, color, sex, national origin, and religion
 - Specifically excludes Indian tribes
- Worker Adjustment and Retraining Notification Act (WARN)
 - Requires notification before plant closing/mass layoff
 - Statute silent as to applicability to Indian tribes
 - Federal Department of Labor regulation exempts tribes
- Americans with Disabilities Act (Title I: Discrimination)
 - By explicit terms, exemption from anti-discrimination provisions
 - No specific exclusion from Title III, public-access provisions



FEDERAL STATUTES WITHOUT SPECIFIC EXCLUSIONS

- Occupational Safety and Health Act (OSHA)
- Age Discrimination in Employment Act (ADEA)
- Title III of Americans with Disabilities Act (ADA) – Public-access provisions only
- Fair Labor Standards Act (FLSA)
- Family and Medical Leave Act (FMLA)
- National Labor Relations Act (NLRA)
- Consolidated Omnibus Budget Reconciliation Act (COBRA)
- Employee Retirement Income Security Act (ERISA)
 - Governs employee benefit plans: exempts tribal employees performing “essential” government functions; expressly applies to employees performing commercial activities
- Immigration Reform and Control Act of 1986



APPLICATION OF FEDERAL STATUTES WITHOUT EXCLUSION

- Three exceptions to application of federal statute of general application to Indian tribes
 - Application of law would abrogate treaty right
 - Federal appeals court decisions apply this exception
 - Application can be treaty-specific
 - Congress did not intend law to apply
 - **Self-governance exception**
 - Applying law would:
 - 1) interfere with right of self-governance
 - 2) in purely intramural matters
 - **Most commonly applied exception**



FOCUS ON THE SELF-GOVERNANCE EXCEPTION

- Tribal activity more likely to be exempt if:
 - Traditional activity performed by government
 - No non-Indians are involved
 - Activities occur on tribal lands
 - Members of tribe hold all leadership positions
- Commercial activities make application of exception difficult
 - Particularly true where majority of employees/patrons are non-Indian/non-members
- Ninth Circuit (CA, AK, HI, ID, MT, NV, OR & WA)
 - Case by case basis based on nature of relationship



SELF-GOVERNANCE EXCEPTION

■ Tribal legislation

- Federal courts: existence of tribal legislation is a factor in deciding whether to impose federal employment laws
- Practically speaking, federal agencies are much less likely to involve themselves with a tribal employer if:
 - The tribe has its own policies or legislation that serve goals similar to federal legislation (e.g., permitting employee leave in some or all of the circumstances the FMLA requires)
 - The tribal employer applies these policies fairly and consistently



CASINO PAUMA V. NLRB (9TH CIRCUIT, 2018)

- Federal National Labor Relations Act (NLRA), which gives representation and organizing rights to unions and protections to employees, applies in full force in all of its aspects to tribal casinos
 - UNITE HERE union used Pauma employees to distribute flyers at casino entrance, entrance/exit to valet driveway, hallway near employee cafeteria
 - Security employees threatened termination and took pictures
 - Consistent with earlier San Manuel case holding in D.C. Circuit
 - Ninth Circuit agreed with National Labor Relations Board that NLRA applies to tribal enterprises employing non-Indians and functioning as “normal commercial relationship”
 - Not superseded or replaced by Indian Gaming Regulatory Act or California Tribal-State Gaming Compact



TRIBAL LABOR RELATIONS ORDINANCES

- Latest California Compact TLROs contain several terms favorable to unions:
 - Requires “neutrality agreement”: employer gives up its free speech right to tell employees they are better off dealing directly with employer and without union
 - Union gives “Notice of Intent to Organize”, deemed bilateral contract
 - Tribe must provide list of eligible employees within two days
 - Provisions for very speedy union election
 - Only five days to appeal election officer’s decision to Tribal Labor Panel which issued decision within 30 days
 - Upon certification of union representation, union may submit to Federal Mediation and Conciliation Service after 30 days of collective bargaining
 - Within 21 days, mediator to file report resolving issues and setting terms of collective bargaining agreement binding employer, representing a revolutionary change to “interest arbitration”, an unusual method of dispute resolution



NLRA PREEMPTION

- Because of Casino Pauma, there is a question of “NLRA Preemption” as it relates to the Tribal Labor Relations Ordinances (TLROs)
- The TLROs regulate conduct of employers and labor organizations regarding union organizing, protected rights and collective bargaining. These are also topics governed by the NLRA



NLRA PREEMPTION (CONTINUED)

- The preemption argument could be raised as a response to TLRO enforcement that is disputed by a compacted tribe
- In *Chamber of Commerce v. Brown*, the U.S. Supreme Court held that the state was prohibited from conditioning Medi-Cal benefits upon counter-union organizing limitations placed on hospitals. The court ruled that the conduct the state attempted to regulate was preempted by the NLRA



NLRB DISCRETIONARY EXERCISE OF JURISDICTION

- Even though the NLRB has asserted jurisdiction over a particular industry, it may decline to exercise such jurisdiction
- Example: Horse Racing Industry
 - The Board, for policy reasons, does not assert jurisdiction over the horse racing industry
- The NLRB can decline jurisdiction either through case law or rule making
- Theoretically, California tribal employers with TLROs can ask for a “carve out” from NLRB jurisdiction
- This argument was rejected in *Casino Pauma*, but there is currently a more conservative NLRB that might consider this approach



GENERAL PRINCIPLES: TRIBAL SOVEREIGN IMMUNITY



APPLICATION OF SOVEREIGN IMMUNITY TO SUIT/ ENFORCEMENT

- Even if federal statute applies, immunity to private suit unless:
 - Congress expressly authorized suit, or
 - Tribe clearly waived immunity
- Tribes not immune to suits by United States or federal enforcement action
- Federal employment statutes generally provide for enforcement by federal agency
- Defense requires sophisticated understanding of applicable employment and federal Indian law
- Contractual obligations may permit suit



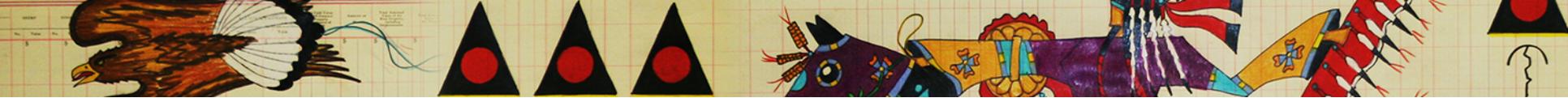
CONVEYING THE UNIQUE NUANCES APPLICABLE TO TRIBES

- U.S. Department of Labor (DOL) contacted tribe alleging layoff in violation of Uniformed Services Employment and Reemployment Rights Act (USERRA)
- Prepared a polite but firm letter challenging DOL's position
 - Tribe's sovereign immunity barred enforcement (because only employee, not DOL can sue under USERRA)
 - Application of USERRA interfered with self-governance
 - Tribe's action did not violate USERRA
- Four days later, DOL closed the case with thanks for the "excellent explanations" provided



IMMUNITY OF TRIBAL EMPLOYEES

- Indian tribes and their governmental and commercial entities are immune, even when sued for acts of their employees
- Until recently, employees have generally enjoyed that immunity while acting in the course and scope of their duties for the tribe



EMPLOYEE RISK OF LACK OF IMMUNITY

- Real risk that employees can face personal suits
- Tribes should double-check insurance to ensure coverage of individuals
- The tribe's immunity does not in all cases protect officers and employees



SUITS AGAINST EMPLOYEES: OFF RESERVATION ACTIVITIES

■ *Lewis v. Clark* (SCOTUS, 2017)

- Auto accident involving limousine driver employed by the tribal gaming authority, occurred off reservation lands
- Suit against limousine driver individually for negligence
- Question:** Does tribal sovereign immunity bar individual-capacity damages against tribal employees for torts committed within the scope of their employment?
- NO:**
 - Tribe (sovereign) was not the real party in interest
 - An off-reservation tort suit against employee in individual capacity “will not require action by the sovereign or disturb the sovereign's property...”
 - Tribe's decision to indemnify employee did not cloak employee with immunity



SUITS AGAINST EMPLOYEES: OFF RESERVATION ACTIVITIES

■ *Maxwell v. County of San Diego* (9th Cir, 2012)

- Paramedics employed by the Viejas Band of Kumeyaay Indians Tribal Fire Department were not protected by immunity
- Claims were for gross negligence, seeking only money damages from the employees
- Claim of waiver of tribal sovereign immunity was rejected by 9th Circuit
- Waivers must be explicit and unequivocal but
 - Tribal paramedics do not enjoy tribal sovereign immunity because remedy would operate against them, not Tribe
 - Grossly negligent acts committed outside tribal land pursuant to agreement with non-tribal entity
 - Damage award against employees: minimal effect on tribe
- Tragic facts led court to search for remedy



SUITS AGAINST EMPLOYEES: OFF RESERVATION ACTIVITIES

■ *Pistor v. Garcia* (9th Cir, 2015):

- 9th Circuit clarification, following *Maxwell* decision
- Gamblers arrested and detained at tribal casino sued tribal police chief, tribal gaming office inspector and casino general manager
 - Alleged federal violations (4th and 14th Amendment) and state-law based violations (battery, false imprisonment, conversion, defamation, trespass to chattels and negligence)
- Under *Maxwell's* “remedy-focused” “analysis, no sovereign immunity for these employees when sued in their individual capacities
- Court expressly noted care must be taken to ensure that judgment resulting from suit would not affect tribal public treasury or domain, interfere with tribe's public administration, or restrain the tribe from acting or compel it to act



BEST PRACTICES



BEST PRACTICES: TRIBAL GOVERNMENTS

- Adopt tribal laws and regulations that mirror federal law, where possible
 - Tribal sovereignty always primary consideration
 - Can extend beyond employee handbooks
- Include sovereignty statement
 - Expressly state no waiver of sovereign immunity
- In doing so, be careful not to concede applicability of federal statutes
 - NOT: “The Tribe *follows* the FMLA”
 - NOT: “The Tribe *is governed by* the FMLA”
 - DO: adopt consistent practices without referencing federal law
- Adopt (and apply) fair procedures for resolving disputes



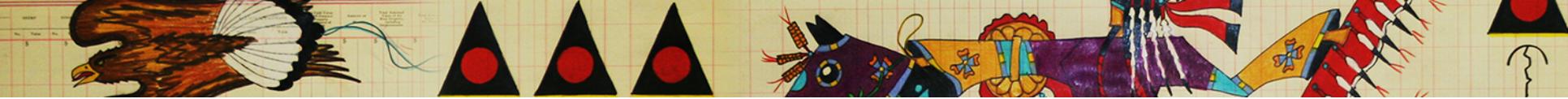
BEST PRACTICES: POLICIES, FORMS, CONTRACTS

- Tribal leaders and human resources managers have many things to consider when drafting employment policies, forms, and contracts that:
 - Reflect applicable laws, traditions, and customs;
 - Clearly communicate established employment practices and procedures;
 - Fairly promote and protect the interests of the tribe or tribal enterprise; and
 - Support employee morale



BEST PRACTICES: POLICIES, FORMS, CONTRACTS (CONTINUED)

- Employee handbooks/employment policies
- Forms, such as leave of absence forms
- At will offer letters/contracts/release agreements
- Employee benefit plans
- Insurance contracts
- While waiver of sovereignty must be explicit, tribes should avoid litigation in which it must be defended
- So maintain sovereignty every step of the way



BEST PRACTICES: AVOID CONTRACTUAL WAIVERS OF SOVEREIGN IMMUNITY

- Indian tribes and tribal entities can waive their immunity by contract
- Some language to watch out for in contracts presented to you:
 - “Waive[r],” “consent” or “submit”
 - “Immunity”
 - “Jurisdiction”
 - “Arbitration” or “dispute resolution”
 - “Forum” or “court”
 - “Choice of law”
- If a contract contains this or any similar language, an attorney familiar with sovereign immunity should review it
- Even contracts that seem routine should be reviewed



BEST PRACTICES: EMPLOYEE HANDBOOKS

■ Why are Employee Handbooks Important?

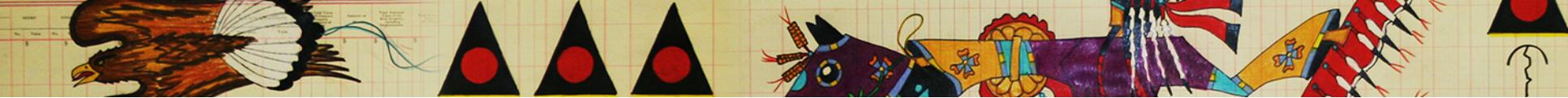
- Effective Communication Tool
- Manages Expectations
- Litigation Risk Management
- Opportunity to Condense Tribal Tradition and Custom into Writing



BEST PRACTICES: EMPLOYEE HANDBOOKS

■ Common Mistakes

- Over-Reliance on a Form Employee Handbook
- Allowing the Employee Handbook to Become Outdated
- Over-Complication / Too Lengthy
- 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



BEST PRACTICES: SUPERVISOR TRAINING

- Not only is it important to create, review, and implement policies, but it is equally as important to 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, which may expose the tribe or tribal enterprise to costly employment-related lawsuits



BEST PRACTICES: INVESTIGATIONS

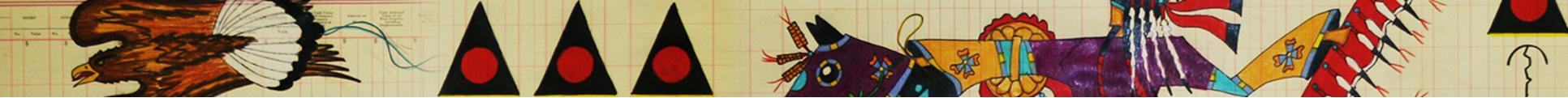
- Conduct interviews: what happened in detail and chronologically
- The people: work history, reporting and personal relationships
- Review the Human Resources files
- The events
 - Interviews require who, what, where, when, and how questions
 - What did you hear?
 - What did you see?
 - Who spoke first? Who spoke next?
 - Chronology Chronology Chronology
 - Direct, objective, and specific: not characterizations



BEST PRACTICES: INVESTIGATIONS

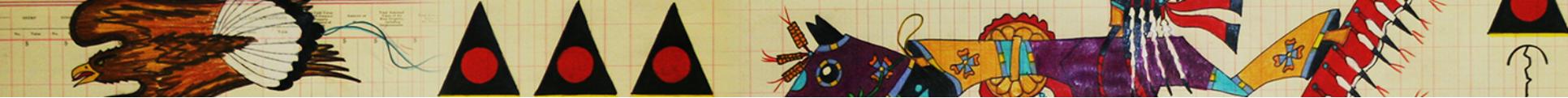
■ Develop strategy

- Identify investigator(s)
- Determine whom to interview
- Determine order of interviews
- Decide what documents to review
- Plan for note-taking
- Maximize confidentiality
- How to deal with the accused in interim
- Conduct interview
- Review documents
- Maintain privilege until you are ready to finalize results



BEST PRACTICES: DISCIPLINE AND DISCHARGE

- Memorialize performance problems/ business reasons for action
- Be strategic about terminations (what is the basis, how and when to implement, what to document, use of releases tailored to tribal context)

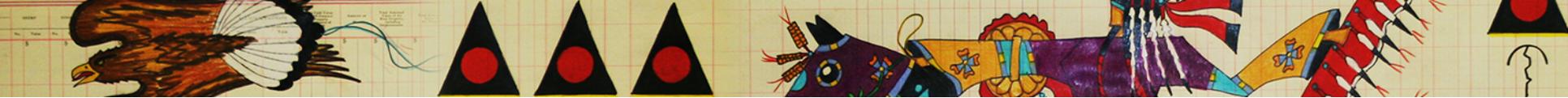


BEST PRACTICES: DISCIPLINE AND DISCHARGE

- Discipline and discharge lead to litigation
- Again, tribes are less vulnerable than private employers
- But nonetheless:
 - Have a game plan
 - If misconduct, conduct investigation
 - Treat employees with respect in termination process itself
 - Do not publicize
 - Maintain your trade secrets / protect IT system
- The best way to maintain sovereignty in this arena is to be strategic as matters unfold to avoid litigation



CASE STUDY: PECHANGA EMPLOYMENT CLAIMS ACT



UNDERLYING LEGAL FRAMEWORK

■ Federal Law

- Title VII and ADA (Title I) expressly exclude Indian Tribes

■ State Law

- Tribes are not subject to state laws prohibiting discrimination/harassment/retaliation in employment

■ Tribal Law

- During recent gaming compact negotiations, a number of Tribes agreed to adopt employment discrimination/harassment/retaliation laws



PECHANGA TRIBAL-STATE COMPACT §12.3(F)

- “Adopt and comply with tribal law that is consistent with federal law and state law forbidding harassment . . . discrimination . . . and . . . retaliation”
- “[C]reate a tribal employment claims ordinance”
- “Claims . . . shall be resolved in a designated tribal administrative or judicial forum authorized under tribal law”
- “Nothing in this provision shall be construed as a submission of the Tribe to the jurisdiction of the California Department of Fair Employment and Housing or the California Fair Employment and Housing Commission”



DRAFTING CONSIDERATIONS

- Does not directly adopt federal or state law
- Codifies tribal legal standards consistent with general federal and state principles
 - Leaves interpretation to the Tribal Court
- Is carefully tailored to be reasonable and appropriate for the size and nature of the government and employer base
- Limits waiver of sovereign immunity and submission to jurisdiction
- Reserves Native American preference rights
- Outlines clear claims resolution process



BUILDING INTERNAL INFRASTRUCTURE & CAPACITY: TRIBAL COURT

- Bar admissions
- Claims filing/management processes
 - Rules of Civil Procedure for Employment Claims
- Mediation
 - Mediators
- Hearings
 - Rules of Evidence
 - Hearing officers
- Appeals
 - Appellate Rules



BUILDING INTERNAL INFRASTRUCTURE & CAPACITY: EMPLOYER POLICIES, PROCEDURES & PRACTICES

- Anti-Discrimination, Anti-Harassment & Anti-Retaliation Policies
 - Update for consistency with new tribal law
- Performance Management & Standards of Conduct
 - Set clear standards in policy
 - Ensure standards are enforced consistently
 - Train! Train! Train!
- Resolution of Employee Issues
 - Implement a prompt, thorough, impartial, and well-documented process for resolving employee issues (including formal investigations where appropriate)
- Appeal Process
 - Provide an internal forum for employees to challenge serious adverse actions before resorting to legal action

THANK YOU

