

MILLER NASH LLP

# **Native American Employees and Employers - What Laws Apply?**

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# **INTRODUCTION**

# Sovereign Immunity and State Court Jurisdiction

- “Sovereign Immunity”
  - Protects sovereign entities from lawsuits
    - Examples: Federal and state governments
  - Native American tribes are government entities, and have sovereign immunity protection, subject to Congressional limitations.

# Sovereign Immunity and State Court Jurisdiction

- Tribes and Sovereign Immunity
  - Protects tribal employers from private suits
    - This means that employees generally cannot bring a private suit against a tribal employer
    - Also protects the tribe from agency charges filed by an individual employee

# Sovereign Immunity and State Court Jurisdiction

- Tribes and Sovereign Immunity
  - Does not protect tribes from suits brought by federal government entities
    - Tribes cannot assert sovereign immunity against federal government agencies – agency may pursue claim raised by employee
    - There are other protections from suit by government agencies

# Sovereign Immunity and State Court Jurisdiction

- Tribes and Sovereign Immunity
  - Can be waived by the tribe
    - Sometimes waived in treaties, sometimes in specific situations like contracts
    - Can be limited or broad
    - If waived, then an individual employee can sue the tribal employer

# Sovereign Immunity and State Court Jurisdiction

- State courts lack jurisdiction over tribes
  - State courts lack jurisdiction when
    - a non-member of the tribe enters into a consensual relationship with a tribe, or
    - the tribe has invoked inherent power over the conduct of non-members on tribal land
  - These usually protects tribal entities from suit by employees in state court

# Laws of General Applicability

- Federal Laws

9<sup>th</sup> Circuit decision in *Donovan v. Coeur d'Alene Tribal Farm* sets the standards in this circuit

Laws that generally apply to everyone will also apply to tribes, unless one of three exceptions are met:

- Exclusive rights of self-governance, in purely intramural matters
- Would result in abrogation of treaty rights
- Congress did not intend the law to apply

# Laws of General Applicability

- State or Local Laws

Unless the tribe has somehow waived sovereign immunity, state and local laws do not apply

# Federal Employment Laws and Tribes

- Title VII
  - Prohibits “employers” from discriminating on the basis of race, national origin, religion, sex, etc.
  - Definition of “employer” specifically excludes tribes

# Federal Employment Laws and Tribes

- § 1981
  - Prohibits employers from discriminating on the basis of race or national origin
  - Does not define “employer”
  - Until recently, courts assumed it also did not apply to tribes, because Title VII does not apply
  - Recent cases indicate it might apply

# Federal Employment Laws and Tribes

- ADA
  - Prohibits employers from discriminating on the basis of disability, and also requires an affirmative duty to accommodate
  - Like Title VII, definition of “employer” excludes tribes
  - Beware! Public accommodation provisions still apply to tribes

# Federal Employment Laws and Tribes

- ADEA
  - Prohibits an employer from discriminating against persons who are 40 years of age or older
  - The 9<sup>th</sup> Circuit has held that the ADEA applies to tribes unless one of the *Coeur d'Alene* exceptions is met
  - See *Karuk*

# Federal Employment Laws and Tribes

- FSLA
  - Requires employers to pay federal minimum wage per hour, and overtime if the employee works more than 40 hours
  - Same definition of “employer” as ADEA
  - Applies absent *Coeur d'Alene* exception
  - See *Snyder* and *Solis*

# Federal Employment Laws and Tribes

- FMLA
  - Requires employers to provide up to 12 weeks of leave under certain circumstances (medical conditions, pregnancy, etc.)
  - Same definition of “employer” as ADEA
  - Applies absent *Coeur d'Alene* exception
  - See *Sharber*

# Federal Employment Laws and Tribes

- OSHA
  - Requires employer to meet certain work place safety standards, often set forth in great detail
  - Applies absent *Coeur d' Alene* exception
  - See *DOL* (sawmill case)

# Federal Employment Laws and Tribes

- ERISA
  - Requires employer to meet certain requirements when providing health or welfare benefits to employees.
  - Applies absent *Coeur d' Alene* exception
  - See *Lumber Indus. Pension Fund*

# Federal Employment Laws and Tribes

- NLRA, LMRA
  - Sets forth specific rights and procedures under which employees can organize and form unions to negotiate working conditions with employers
  - *San Miguel* case held that NLRA/LMRA apply to tribes, at least with regard to operations such as casinos
  - NLRB has applied the laws to businesses owned by members of Native American tribes

# Why Tribes Should Consider Following Employment Laws

Even if a tribe does not *have* to follow the various employment laws, it can be a good idea to do so anyway

- Legal standards are usually good standards
- Employee expectations
- Reputation in community
- Union organizing

# Some Suggestions for Tribal Employers

- Generally follow all federal employment laws, even the ones that do not apply
  - Have policies prohibiting harassment and discrimination
- Explicitly state in handbooks, policies, and contracts that the tribe is not waiving sovereign immunity

# Some Suggestions for Tribal Employers

- Have an internal grievance procedure for employees to make complaints
  - set standards and processes for reviewing a complaint that apply to all employees
  - enforce all personnel policies and practices consistently among employees
- Consider whether the tribe wants to promulgate its own employment laws

# Alaska Native Corporations

- Title VII
- Hiring preferences
- ADA

# Non-Tribal Employers on Tribal Lands

- Preferences for Indians in employment protected if:
  - The employer is located on or near an Indian reservation
  - The employer's preference for Indians is publicly announced, and
  - The employee is an Indian living on or near a reservation

# Non-Tribal Employers on Tribal Lands

- “Near an Indian reservation”
  - Reasonable commuting distance
- Protected preferences
  - Hiring, promotion, transfer, and reinstatement as well as to layoffs and reductions in force
- Allowed for Indians over non-Indians
  - Does not protect employers who show preferences between various tribes

# Native Americans Working for Non-Tribal Employers

- Title VII
  - Native American individuals can be protected under the race, color, national origin, and religious provisions of Title VII
- § 1981
  - Native Americans are protected on the basis of race or color under § 1981.

# Native Americans Working for Non-Tribal Employers

- Race, National Origin Claims
  - *Nanty v. Barrows Co.*, failure to hire
  - *Watson v. Gulf & Western*, termination
- Religious claims
  - *Toledo v. Nobel*, accommodation of religious use of peyote

# QUESTIONS?

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