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How State and Federal Laws Apply to Tribal Employment

Labor and Employment Law and American Indian Tribes

The recent growth of American-Indian casinos and tribal economic development in Michigan has generated many employment opportunities for American Indians and non-American Indians alike. The often misunderstood concepts of tribal sovereignty and jurisdiction have left many experienced labor and employment law practitioners wondering how state and federal laws apply to tribal employment.

While these scenarios would be elementary if the employer was other than a tribe, consider the following:

- A woman tells you that she has been sexually harassed by her supervisor at a Michigan tribal casino. You should advise her to bring her claim to: *A. MDCR; B. EEOC; C. Federal Court; D. None of the above.*
- A man employed by a tribal casino complains that he was discharged for his attempts to organize a union. You should advise him to: *A. File a claim with the NLRB; B. File with MERC; C. File a lawsuit in federal court; D. None of the above.*

- Both Mary and Sally work for a Michigan tribe. Mary is employed by the casino and Sally works for tribal operations. Both are injured in separate work-related incidents. You should advise: *A. Both employees to file claims with the Michigan Workers' Compensation Bureau; B. Both employees to file claims in federal court; C. Both employees to seek internal tribal remedies; D. Advise Mary to file a state workers' compensation claim and recommend to Sally that she pursue internal tribal remedies.*

If you answered *"D. None of the above,"* to the first two questions, you are well on your way to understanding the impact of Indian tribal sovereignty and jurisdiction on labor and employment law. If you answered "D" to the third question, you are probably an expert already.

Tribal Sovereignty

Any discussion of jurisdiction over American Indian tribes inevitably begins with the tribal sovereignty. Historically, the Supreme Court considered the tribes to be distinct nations occupying distinct territory over which the laws of the states have no force.[1] Although today the recognition of sovereignty is more limited, it is well recognized that American Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory."[2]

State Labor and Employment Laws Do Not Apply to American Indian Tribes

The Commerce Clause of the United States Constitution grants Congress the exclusive power to "regulate commerce" with American Indian tribes. Accordingly, the Supreme Court has determined that states have no authority to regulate conduct by the tribes unless specifically authorized by Congress.[3]

In Michigan, there are two notable exceptions: the Michigan Employment Security Act, MCL 421.1, and the Workers' Compensation Act, MCL 418.101. As part of the negotiation of the gaming compacts between the state and the tribes, the parties agreed that the state will have jurisdiction over tribal casino employees under the limited scope of these two statutes. The compacts can be found at http://www.michigan.gov/mgcb/0,1607,7-120-1380_1414_2182---,00.html. For non-casino tribal employees, these laws do not apply unless the tribe voluntarily submits to the state's jurisdiction.

Similarly, state courts do not have jurisdiction over statutory and common law employment claims that arise on a reservation or trust land, including casinos.[4] Further, before federal courts will exercise jurisdiction over state law, internal tribal remedies must be exhausted.[5]

Federal Claims

Federal statutory and common law claims fall into several groups: those specifically exempting or including American Indian tribes and those covering or excluding American Indian tribes by implication.

Fast Facts:

- **The Supreme Court has determined that states have no authority to regulate conduct by the tribes unless specifically authorized by Congress.**
- **Congress has specifically exempted tribes from several familiar employment laws.**
- **Ordinarily, tribal court has primary jurisdiction over claims arising from commercial transactions with the tribe, including employment.**

Explicit Exemption

Congress has specifically exempted tribes from several familiar employment laws, including:

- Title VII of the Civil Rights Act of 1964, 42 USC 2000e(1)
- Title I of the Americans with Disabilities Act, 42 USC 12111(b)
- The Workers Adjustment and Retraining and Notification Act, 20 CFR 639.3(a)(1)

Explicit Coverage

On the other hand, Congress can make a statute applicable to tribes through the exercise of its plenary powers. Congress did so in the 1983 amendments to the Social Security Act. As a result, tribes are now subject to both Social Security and federal unemployment taxes.

Federal Common Law

As to federal common law, two issues must be addressed before bringing a claim. The first is whether the tribe or Congress has clearly waived the tribe's sovereign immunity.[6] A tribe's mere act of entering into a commercial transaction does not necessarily waive its immunity as to claims arising from that transaction.[7] Once a waiver of sovereign immunity has been established, jurisdiction must be determined. Ordinarily, tribal court has primary jurisdiction over claims arising from commercial transactions with the tribe, including employment.[8] Accordingly, administrative and judicial remedies must typically be exhausted before resorting to federal court.[9]

Implied Waiver of Immunity

The remaining federal employment laws must be examined on a case-by-case basis, based on the waiver of sovereign immunity and tribal self-determination. Under the commerce clause, only a tribe or Congress can waive tribal sovereignty. At one time, a congressional waiver had to be "clearly manifest."[10] Today, this is changing, as seen in the volumes of litigation following *Federal Power Commission v Tuscarora Indian Nation.*[11] The *Tuscarora* case established a two-part test for implied waiver: (1) Is the statute one of general application, intended by Congress to apply to all citizens; and (2) can the statute be applied to American Indian tribes without undermining treaty rights or unduly interfering with internal governance?

Tribes Not Covered by Implication

Under the *Tuscarora* test, the National Labor Relations Act (NLRA) does not apply to employment by tribes. The National Labor Relations Board (NLRB) has consistently held that tribes are

units of government and, as such, are exempt from the NLRA's definition of employer.[12] In recent years, the board has come to distinguish employment by entities not directly controlled by tribal councils. For example, the board would exert jurisdiction over a tribe's joint venture with non-American-Indian partners.[13] Similarly, the board has found the NLRA applicable to organizations created by tribes but controlled by semi-autonomous boards.[14] A helpful discussion of the NLRB decisions is found in *Yukon-Kuskokwin Health Corp v NLRB.*[15] The application of tribal "right to work" laws to non-American-Indian enterprises operating on a reservation remains unsettled. In *NLRB v Navajo Nation,*[16] the NLRB was found to have jurisdiction over a business operating on land leased from a tribe and shipping uranium ore in interstate commerce. Yet, a tribe's "right to work" law was found to deprive the NLRB of jurisdiction over contractors doing work for a tribe on reservation land.[17]

Tribes Covered by Implication and/or Consent

Tribes tend to follow the notice requirements of COBRA and ERISA voluntarily. In any event, at least one court has found coverage to be mandatory.[18]

Implied Coverage of Tribes in Doubt

The application of several other familiar laws remains uncertain due to disagreement among the courts of appeal.

The application of the Age Discrimination in Employment Act is unclear. The Act was found to apply to the tribes in *EEOC v Karuk Tribe Housing Authority.*[19] However, tribes were exempted in *EEOC v Fond du Lac Heavy Equipment and Construction*[20] and in *EEOC v Cherokee Nation.*[21]

The application of the Occupational Safety and Health Act (OSHA) is similarly in doubt. OSHA was found to apply to the tribes in *USDOL v OSHA,*[22] and *Reich v Mashantucket Sand & Gravel.*[23] However in *Donovan v Navajo Nation,*[24] the court held that OSHA *does not* apply.

Few cases discuss application of the Fair Labor Standards Act (FLSA) to the tribes. The Seventh Circuit has refused to apply the overtime provisions to the FLSA to wardens employed by an intertribal commission charged with enforcing tribal hunting and fishing regulations on treaty land. The court declined to decide whether tribes are generally subject to the FLSA. Rather, the court found that, even if the commission were subject to the FLSA, the employees in question were subject to the same overtime pay exemptions applicable to law enforcement officers employed by the states.[25]

Since the Family and Medical Leave Act incorporates the FLSA definition of employer, application of that Act remains similarly in doubt. It is not uncommon for tribes to offer a similar benefit to their employees.

Practical Implications

Practitioners may want to become comfortable with internal tribal remedies. Michigan tribes have adopted comprehensive personnel policies and procedures. Many include internal dispute resolution mechanisms. Often, at least in the first instance, the

On May 28, 2004, after the type had been set for this article, the National Labor Relations Board reversed its decision in *Fort Apache Timber* and held that the NLRA is generally applicable to American Indian tribes and enterprises. In two companion cases, *San Manuel Indian Bingo and Casino* (No. 31-CA-23673 & No. 31-CA-23803) and *Yukon Kuskwokwim Health Corp,* on remand (No. 19-CA-2663) rejected as fatally flawed the fundamental premise of *Fort Apache* and the NLRB's other decisions involving American Indian tribes over the past 28 years. It is now the position of the board that American Indian tribes and enterprises are not units of government as that term is used in the NLRA, requiring application of the *Tuscorara* test. Applying *Tuscorara,* the board first found the NLRA to be a statute of general application. Accordingly, the board held that it has jurisdiction over American Indian tribes and their enterprises unless asserting jurisdiction would:

- **touch exclusive rights of self government in purely intramural matters; or**
- **abrogate treaty rights; or**
- **be contrary to the intent of Congress to exempt American Indian tribes.**

The board added a new element to the *Tuscorara* test. When the board determines that it has jurisdiction under *Tuscorara,* it will examine established federal policy to determine whether it should abstain. It is this discretionary element that led the board to reach opposite results in the two cases decided on May 28.

In *San Manuel,* the board exerted jurisdiction over the tribal casino and ordered a representation election. First, the board found that the operation of a tribal casino was a commercial enterprise and, as such, did not involve purely intramural matters. In a significant departure from its prior cases, the board would interpret "purely intramural matters" very narrowly. The board would exempt from its jurisdiction only matters related to tribal membership, inheritance rules, and domestic relations. Next, the board found no impact on treaty rights, in that the record made no reference to any treaties involving the San Manuel Tribe. Further, the board noted that Congress expressed no intent to exempt American Indian tribes from the broad application of the NLRA. Finally, the board held that federal policy favored jurisdiction in this case, because the casino is a commercial enterprise in and affecting inter-state commerce, employing non-American Indians and catering to non-American-Indian customers.

In *Yukon Kuskwokwim Health Corp,* on remand, the board reversed its 1999 decision in this matter and declined to assert jurisdiction over a health care consortium created by several tribes. The board found that, despite the reservations expressed by the Court of Appeals for the D.C. Circuit, it has jurisdiction over the enterprise. However, the board declined to exercise that jurisdiction for reasons of federal policy. The board recognized that the respondent was created under the Indian Health Care Improvement Act and fulfills the federal government's trust responsibility to provide free health care to American Indians. Furthermore, the respondent is the primary health care provider in its area, it serves almost exclusively Alaskan Native patients, and it does not compete with non-American-Indian health care providers.

Deron Marquez, chairman of the San Manuel Band, told the press that the tribe is planning an appeal. Several tribes, and the National Indian Gaming Association, had filed amicus briefs with the labor board. The dispute may be ultimately decided by the U.S. Supreme Court.

internal dispute procedures for employees will be administrative rather than judicial. In any event, to the extent the tribe has waived its sovereign immunity in employment matters, there may also be a claim in tribal court based on tribal policy, tribal law, or tribal constitution.

Further, it may be advisable to address the issue of tribal sovereignty and jurisdiction in negotiating an employment contract with a tribe.

Conclusion

We hope that with the foregoing concise summary in hand, labor and employment law practitioners will be better equipped to analyze and respond to the unique jurisdictional issues posed by the existence of sovereign American Indian nations within the state of Michigan. ✦

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Footnotes

1. *Worcester v Georgia,* 31 US (6 Pet) 515, 559 (1832).
2. *United States v Wheeler,* 435 US 313, 323 (1978).
3. *California v Cabazon Band of Mission Indians,* 480 US 202, 204–207 (1987).
4. *Williams v Lee,* 358 US 217, 220 (1959).
5. *Iowa Mutual Ins Co v La Plante,* 480 US 9 (1987).
6. *C & L Enterprises v Potawatomi Indian Tribe of Oklahoma,* 532 US 411 (2002).
7. *Kiowa Tribe of Oklahoma v Manuf Technologies, Inc,* 523 US 751 (1998).
8. *Montana v US,* 445 US 960 (1980).
9. *National Farmers Union Ins Co v Crow Tribe,* 471 US 845 (1985).
10. *Elk v Wilkins,* 112 US 94 (1994).
11. 362 US 99 (1960).
12. *Fort Apache Timber Co,* 226 NLRB 63 (1976).
13. *Sac & Fox Industries, Ltd,* 307 NLRB 241 (1991).
14. *NLRB v Chapa De Indian Health Program, Inc,* 316 F3d 995 (CA 9, 2003).
15. 234 F3d 714 (US App DC, 2000).
16. 288 F2d 162 (US App DC, 1961).
17. *NLRB v Pueblo of San Juan,* 276 F3d 1186 (CA 10, 2002).
18. See *Colville Confederated Tribes v Somday,* 96 F Supp 2d 1120 (ED WA, 2000).
19. 260 F3d 1071 (CA 9, 2001).
20. 986 F2d 246 (CA 8, 1993).
21. 871 F2d 937 (CA 10, 1989).
22. 935 F2d 182 (CA 9, 1991).
23. 95 F3d 174 (CA 2, 1996).
24. 692 F2d 709 (CA 10, 1982).
25. *Reich v Great Lakes Fish and Wildlife Comm'n,* 4 F3d 490 (1993).