TRIBAL EMPLOYMENT PREFERENCES AND EMPLOYEE PROTECTION LAWS

By:

Brian K. Nichols

Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Albuquerque, New Mexico

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I. INTRODUCTION

The topic of this paper is tribal employment laws. It is a broad topic. There are well over 500 federally recognized tribal nations. According to research, several, possibly most, have employment laws. In addition, several coalitions or agencies provide advice to tribal nations about "Tribal Employment Rights Ordinance," or "TEROs." There are several model, or proposed, TEROs available on the internet. A survey of internet materials conducted during the Fall of 2010 and Winter of 2011 uncovered various laws and materials which seemed to change.

As a result, this paper should be viewed as a list of topics to consider when researching the employment issues particular to any tribal nation. The topics reviewed in this paper are:

- A survey of common provisions in Tribal Employment Rights Ordinances.
- A selected review of the Navajo Preference in Employment Act, both provisions in the statute and case law.
- An initial analysis of jurisdiction issues and potential conflicts between tribal and federal employment law.

II. A SURVEY OF TOPICS FROM TRIBAL EMPLOYMENT RIGHTS ORDINANCES

This section provides a list of common topics in TEROs. With the exception of Navajo law, citations are not provided because tribal nations were not contacted to confirm documents found on the internet. This section is only a survey of what an employer may find when researching a particular nation's employment laws. An employer should conduct its own research with regard to the tribal nation, including speaking with representatives of that nation, to ensure that the most current laws are known to the employer.

TEROs generally define "employer" broadly. *See, e.g.*, 15 N.N.C. § 603(C) (the Navajo Preference in Employment Act defines employer as "all persons, firms...who engage the

services of any person for compensation."). TEROs are applied to employers meeting certain criteria. The criteria include one of the following (most TEROs include more than one of these criteria, in the alternative): those employing tribal members, those with a contract with the tribal nation, those doing business with a tribal nation or on a reservation or within another area, those subject to a tribal nation's jurisdiction, or those with a certain number of employees.[1]

TEROs always include a preference in employment, including hiring, training, promotion, lay-offs and reductions in force. However, the specific preference varies. Alternatives include: members of a specific tribe, persons living on a reservation, Indians living on a reservation, "local" Indians (which may be defined as Indians "on or near a reservation," mirroring Title VII; *see* section IV.D.1 under "Jurisdiction" *infra*), spouses, parents or children of Indians, and an enrolled member of a federally recognized tribal nation. TEROs seem to be divided about equally between those with one "tier" of preference and those with multiple tiers of preference. For instance, first preference may be for a specific tribe and a second preference for all Indians living on the tribe's reservation. The preference in hiring usually extends to the tribe as employer, but not the federal government.

Most TEROs address job qualifications. Usually, the TERO simply states that qualifications may not be used to avoid a preference, and that an applicant or employee with "minimum" or "necessary" qualifications must be deemed qualified. A few TEROs require submission of job qualifications to the enforcing entity for approval.

Some TEROs suggest or require an employer to advise the enforcing entity of employment needs and then it will suggest or require a quota. This is usually styled a "compliance plan." Some tribal nations maintain "skill books," "hiring halls" or "indexes" of persons who are eligible for a preference in hiring and their qualifications. Others require certain advertising or notices to notify Indians of employment opportunities. Ongoing reports to the enforcing entity are

[1] Interestingly, no TERO that we reviewed expressly used the concept of a "consensual relationship" with the tribal nation or its members as the criteria for application. Such a relationship is one basis for tribal jurisdiction over non-members under the test set forth by the United States Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981), *see* section VI.A under "Jurisdiction" *infra*.

commonly required. Sometimes this requires only a statement of policy compliant with the TERO. In other tribal nations, specific data about employment is required.

Two types of training may be required under TEROs. First, there may be training in job skills for persons within the preferred class. This training seems to be more common in those tribal nations which maintain a list of persons eligible for preference in hiring and aimed at increasing the qualifications of Indians for future employment. Second, some TEROs require cross-cultural training for non-Indians. The goal seems to be employment policies which take into account Indian traditions, and to increase retention of Indians in jobs they acquire. Sometimes these goals are regulated directly, requiring the modification of employment policies to accommodate traditional tribal culture. Such provisions are commonly styled as "freedom of religion" or "accommodation of religion" provisions.

It is also quite common for TEROs to require a preference in contracting. The preference in contracting commonly is two-tiered, first companies owned by a particular tribe and then companies owned by Indians, and then all other companies. All TEROs reviewed that include a preference in contracting also have a tribal certification process by which a company is certified as eligible for a contracting preference. It is a common TERO provision that contracts between private entities must include terms incorporating the TERO, including employment preferences, or at least notify the subcontractor of the TERO.

TEROs may provide substantive employment requirements. It is common to prohibit retaliation against "whistle-blowers" and employees enforcing their rights under the TERO. A few prohibit discrimination, largely along the lines of Title VII. A few address whether employment is "at-will" or is restricted by law and address other wage and hour regulations.

Regulating union activity is common in TEROs. Generally, TEROs require unions to agree to an Indian preference in order to be present on the tribal nation. Unions and business agents commonly have to register with the tribal nation. Registration will include an affirmative statement to the tribal nation endorsing Indian preference in employment. Alternatively, a few TEROs simply state that seniority may not defeat the required Indian preference. Collective

bargaining agreements are often required to include a preference for Indians, by agreement of the parties or operation of law.

TEROs also may regulate the relationship between Indian workers and unions. Right to work provisions are common, and some state that an Indian worker may not be required to pay dues or join a union. However, there is considerable variation in whether an Indian worker outside the union retains the benefits of the union, including those under a collective bargaining agreement. Some TEROs provide that Indians outside the union will receive cash in lieu of any union benefits. Others state that Indians outside the union receive no benefits except the wage scale. A prohibition on strikes, as to tribal employers and tribal enterprises, is also common.

Enforcement of TEROs is through an independent agency or commission, or within a department or division of the executive branch. The enforcing entity has the authority to create rules governing its procedures, and sometimes to supplement or interpret the TERO. The entity has the ability to conduct hearings, including trials. Less common, the entity will have the authority to issue injunctions. Some of the TEROs reviewed included a system of fees on employers to fund the enforcing entity. All TEROs reviewed included a right of appeal, usually to the tribe's governing body or a tribal court.

Monetary damages payable to an individual Indian were included as a remedy in all TEROs reviewed. Very common were "equitable" remedies such as ordering employment, re-employment or promotion. It is also very common that the enforcing entity may issue a civil fine, and either take, or recommend that another tribal division take, severe sanctions such as confiscation of property, closing a business, revoking a license or lease, excluding particular people from the nation, or similar actions. These steps are deemed appropriate, usually, when violations are egregious, intentional or repeated.

III. THE NAVAJO PREFERENCE IN EMPLOYMENT ACT

The Navajo Nation Council adopted the modern Navajo Preference in Employment Act ("NPEA" or "Act") in 1985.[2] Enforcement of the Act is sequential. An employee would first file a "Charge" with the Office of Navajo Labor Relations ("ONLR") which conducts an investigation, usually issues a finding of probable cause or lack thereof, and may attempt reconciliation. 15 N.N.C. § 610(B)-(I). In other words, the ONLR's role is similar to the Equal Employment Opportunity Commission's role in disputes.

Following the ONLR's resolution of an employee's Charge, the employee may file a "Complaint" with the Navajo Nation Labor Commission ("NNLC" or "Commission."). The Commission acts similarly to a trial court. It will consider motion practice and preside over a trial or "Evidentiary Hearing." 15 N.N.C. §§ 610(J)-(K); 611. Appeal is to the Navajo Nation Supreme Court. 15 N.N.C. § 613.

A. Selected Provisions of the NPEA Statute

The NPEA has several requirements for employers. With regard to preferences, the NPEA requires employers to develop job qualifications essential to the job and then give preference in hiring first to any Navajo who meets the qualifications, then to any Navajo spouse meeting the qualifications, and then to any other person meeting the qualifications. 15 N.N.C. §§ 603(I), 604(B)(7), 604(C)-(D) & 614. Seniority systems may not displace the preferences, but may be utilized within the "pools" or "tiers." *Id.* § 604(B)(3).

An employer must complete a "written Navajo affirmative action plan" and file it with the ONLR. Section 604(A)(2). A policy of Navajo preference must be posted in the workplace and placed on job postings and advertisements. Section 604(B)(1) & (2). Job advertisements must be

[2] Paul Spruhan of the Navajo Nation Department of Justice has provided a paper focused on the NPEA for this Conference and an excellent, thorough, history and analysis of the NPEA was just published; as such, this section does not cover the NPEA in full. Paul Spruhan, *The Current Status of the Navajo Preference in Employment Act*; Howard L. Brown, Howard L. & The Honorable Raymond D. Austin, Raymond D., *The Twenty-Fifth Anniversary of the Navajo Preference in Employment Act: A Quarter-Century of Evolution, Interpretation, and Application of the Navajo Nation's Employment Preference Laws*, 40 N.M.L. Rev. 17 (2010).

placed with Navajo print and media unless an "in-house" Navajo is selected for the position. Section 604(B)(6).

Training on Navajo culture and tradition is required at the workplace. Employment policies and benefits must accommodate Navajo culture and tradition. Section 604(B)(10)-(12). Reports to show compliance with the NPEA are to be provided to the ONLR. 15 N.N.C. § 605.
Unions may not take actions contrary to the NPEA, and employees of the Nation and its enterprises may not strike or picket. Otherwise, the right to organize and collectively bargain is expressly recognized. 15 N.N.C. § 606. Finally, any adverse employment action must be supported by "just cause." Section 604(B)(8). This provision has resulted in a substantial body of case law interpreting and applying the NPEA.

B. Selected Navajo Cases Interpreting the NPEA

Navajo case law regarding the NPEA is probably more interesting than the Act itself. The Navajo Nation Supreme Court has interpreted the Act in light of due process, equal protection and Fundamental Law, which essentially are foundational aspects of Navajo tradition. A few of these holdings are set forth here. Generally, these cases seem to promote common sense, procedural fairness and also provide employers reasonable latitude to comply with the Act.

Like other courts, the Navajo Nation Supreme Court will occasionally construe the Act in a surprising manner. For instance, under the NPEA, only Navajos may seek enforcement of the Act and relief. 15 N.N.C. §§ 610(B)(1). The Supreme Court determined that limitation violated equal protection and other legal principles and held that any "individual employed within the Navajo Nation" may seek relief under the Act. *Staff Relief v. Polacca*, 8 Nav. R. 49, 56-57 (Nav. Sup Crt. 2000). Years later, the Court determined that the NPEA does not provide a claim for sexual harassment, *Yazzie v. Navajo Sanitation*, No. SC-CV-16-06, Slip op. at 6 (Nav. Sup. Crt. July 11, 2007), despite the requirement that an employer "provide employment conditions which are free of prejudice, intimidation and harassment." Section 604(B)(9).

The Navajo Nation Supreme Court has interpreted the Act to develop the concept of "just cause" (which is not defined in the Act) and to regulate the dispute process between employer and

employee consistent with the NPEA. Both employer and employee have responsibilities to ensure due process. *See Casaus v. Diné College*, No. SC-CV-48-05, Slip op. at 4 (Nav. Sup. Crt. March 8, 2007) ("this Court has balanced the due process rights of the employee and employer so that the Commission may receive all relevant information, but so that the parties are not unfairly surprised by new claims or defenses not disclosed during the NPEA dispute process."). The employer must inform employees of potential bases for discipline, and "a rule set out clearly in a personnel manual, with notice to the employee, generally is binding and this Court will enforce it as 'just case' for termination if termination is a stated consequence for non-compliance." *Smith v. Navajo Nation Dep't of Headstart*, 8 Nav. R. 709, 715 (Nav. Sup. Crt. 2005) (affirming the termination of an employee who did not appear at work or call for three days); *Jackson v. BHP World Minerals*, 8 Nav. R. 560, 571-72 (Nav. Sup. Crt. 2004) (holding that failure to pass a drug test was just cause for termination). In addition, notice is not required for common sense bases for termination, such as touching a co-worker's breast. *Toledo v. Bashas' Diné Market*, No. SC-CV-41-05, Slip op. at 5-6 (Nav. Sup. Crt. Aug. 17, 2006).

Unless required by a personnel manual, progressive discipline is not required. *Kescoli v. Anderson Security Agency*, 8 Nav. R. 724, 732 (Nav. Sup. Crt. 2005) (affirming just cause for termination of a supervisor who yelled at subordinates). Unless precluded by a personnel manual, an employer may take a pattern of conduct into account when disciplining an employee. *Begaye v. Navajo Nation Env'l. Prot. Ag.*, No. SC-CV-23-07, Slip op. at 9 (Nav. Sup. Crt. Nov. 30, 2009) (affirming just cause for termination based on a pattern of absences).

An employer must inform an employee in writing at the time of discipline of the bases for the discipline. 15 N.N.C. § 604(B)(8). The employer may not defend the adverse action based on grounds other than those provided in writing at that time, *Jackson*, 8 Nav. R. at 569, except when the basis could not have been discovered until later, and the disciplined employee was promptly provided the new grounds. *Casaus*, No. SC-CV-48-05, Slip op. at 5-6. The notice in writing is considered in context of related events.

> What constitutes meaningful language in a termination notice depends on the whole context of the employment relationship, in that the language is designed to alert a specific employee at a specific place and time of the reasons for the termination. In reviewing the meaningfulness of the notice, we do not look at the

> bare language in a vacuum, but consider the full interaction between the employer and employee leading up to the notice.

Jackson, 8 Nav. R. at 569.

In summary, the NPEA has a rich history of interpretation and refinement that provides for a reasonably clear process and supports common sense bases for discipline.

IV. JURISDICTION

An employer should research what sovereign's employment laws will, or may, apply to its operations. This section briefly describes the tests used by federal courts to determine which sovereign's laws apply, and the tests used by the Judiciary of the Navajo Nation to determine when its laws apply to employers.

A. Federal Law Regarding Tribal Jurisdiction

As a matter of federal law, *Montana v. United States*, 450 U.S. 544 (1981), and its progeny, provide the test for whether a tribal nation has jurisdiction over non-Indians, including a non-Indian employer,[3] on tribal lands.[4] Generally, the inherent powers of a tribal nation do not allow it to regulate "the activities of nonmembers of the tribe." *Id.* at 565. A tribal nation has treaty rights, and the general right to exclude nonmembers, but in *Montana* neither of these bases of authority provided the Crow Nation with the ability to regulate nonmembers. *Id.* at 556-563 (considering the treaties of 1851 and 1868 between the Crow Nation and the United States, and the effect of allotment).

There are two exceptions to the general rule, which may not "swallow the rule." *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 330 (2008). The first is

[3] Research did not discern a federal case involving the authority of a tribal nation to regulate a tribe as employer, or a tribal enterprise as employer. Presumably, that issue would be an internal decision of the tribal nation expressed in its statutes or other resolutions, or would be negotiated and expressed in a compact or other contract related to the enterprise.

[4] *Montana* considered regulatory jurisdiction over conduct of nonmembers on fee land. The holding was extended to adjudicatory jurisdiction in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and conduct on trust land in *Nevada v. Hicks*, 533 U.S. 353 (2001).

likely more important to employers. It states that a tribal nation may regulate "through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. Courts have considered whether the relationship between the employer and the tribal nation, or a tribal member, may meet this exception.

Relying on the "consensual relationship" exception, one United States Courts of Appeals has held that a tribal nation may impose employment laws on an employer. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990). The FMC plant was on fee land within the reservation, but did not have a lease with the tribal nation. FMC contested the application of a TERO to the plant. *Id.* at 1312. Although there was not a lease pertaining to the plant site where the employment occurred between FMC and the tribal nation, the Court concluded that FMC had a consensual relationship based on three items. First, FMC had mineral leases with the tribal nation resulting in extractions of phosphate shale which were processed at the plant. Second, there had been an employment agreement between FMC and the tribal nation which had dissolved. Third, FMC had recognized the tribal nation's taxing power. *Id.* at 1314.

Probably more important, employment relationships alone could provide tribal jurisdiction, at least as to claims with a sufficient nexus to the employment. The United States Court of Appeals for the Tenth Circuit held that "*Montana's* consensual relationship exception applies to a nonmember who enters into an employment relationship with a member of the tribe" so long as employment is "within physical confines of the reservation." *MacArthur v. San Juan Co.*, 497 F.3d 1057, 1071-72 (10th Cir. 2007). The procedural posture of *MacArthur* was complex; Plaintiffs were primarily members of the Navajo Nation who sued their employer in Navajo Court, stating claims related to their employment. They received a preliminary injunction which they sought to enforce in federal court. Ultimately, and despite its holding, the Tenth Circuit determined that the Navajo Nation did not have jurisdiction. *Id.* at 1076.

In a later case, the United States District Court for the District of Arizona (in the Ninth Circuit) determined that "employment of a tribal member, by itself, is not enough to invoke jurisdiction of the tribe as a matter of law." *Atkinson Trading Co. v. Manygoats*, Memorandum of Decision

and Order at 13 (Doc. 47) No. CIV-02-1556 (D. Ariz. March 17, 2004).[5] The Court distinguished *FMC*, stating that negotiations about jurisdiction, or preference, with tribal members or the tribe could result in tribal jurisdiction. *Id.* at 14.

The second *Montana* exception states that a tribal nation may "exercise civil authority" when the conduct of a non-Indian "threatens or has some direct effect on the political integrity, the economic security, or the health or the welfare of the tribe." *Montana*, 450 U.S. at 566. It seems likely that most tribal nations would consider employment to meet this exception. In *Atkinson Trading*, the Navajo Defendants contended that unemployment and poverty on the reservation met the second *Montana* exception. But, the Court ruled that "employment issues are related to tribal economic security and welfare," yet do not have a "substantial impact on the tribe as a whole." The second exception did not apply. *Atkinson Trading Co*, Memorandum of Decision and Order at 15, 17

Moreover, federal courts have indicated that the effect on a tribal nation must be "catastrophic," *Plains Commerce*, 554 U.S. at 341, and the exception is limited to "self-goverance and internal relations." *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). Thus, the exception "must be connected to the right of the Indians to make their own laws and be governed by them." *MacArthur*, 497 F.3d at 1075 (quoting *Hicks*, 533 U.S. at 361). It could be argued that application of tribal laws to an employer would deter employers from doing business with tribes or on tribal lands, and thus tribal employment laws aggravate rather than relieve unemployment and poverty. .

[5] This case is different from the proceedings which resulted in the United States Supreme Court's decision that the Navajo Nation lacked jurisdiction to impose a hotel occupancy tax on a hotel operated by a non-member. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001).

The District Court had previously denied a motion to dismiss, which is reported at 2003 U.S. Dist LEXIS 27452. The parties later filed cross-motions for summary judgment, which the Court decided in favor of Atkinson Trading. According to the website for the District of Arizona, upon appeal, the parties settled.

B. Navajo Law Regarding Its Jurisdiction

An employer should research the test applied by the tribal nation to determine the jurisdiction of that nation's laws. One reason is because, generally, an employer will have to "exhaust" tribal remedies before a federal court will determine[6] the reach of the tribal nation's laws. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and progeny. Another reason is governmental relations. It is a good, and recommended, business practice to demonstrate some understanding of the employment laws and jurisdictional test of a tribal nation with which an employer does business or upon whose lands an employer does business.

The Navajo Judiciary has a well-developed jurisdictional test. Under Navajo law, the Nation's jurisdiction is complete[7] as to accidents and injuries on "tribal land," which includes trust land held by the United States for the Nation or its members and land owned by the Nation or its members. *Dale Nicholson Trust v. Chavez*, 8 Nav. R. 417, 425 (Nav. Sup. Crt. 2004); *see also* 7 N.N.C. § 253(A)(2) (stating the civil jurisdiction of the Nation's District Courts). When an accident or injury occurs on fee land owned by non-Indians, however, then the *Montana* test is applied.[8] *Dale Nicholson Trust*, 8 Nav. R. at 425, 429.

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[6] In reviewing a tribal court's decision as to jurisdiction, federal district courts will uphold factual determinations unless those determinations are clearly erroneous and will review legal issues de novo. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313-1314 (9th Cir. 1990); *Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996); *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994).

[7] The Navajo Nation Supreme Court held that complete jurisdiction on tribal land is warranted by the Treaty of 1868, 15 Stat. 667. Specifically, Article II of that Treaty provides the Nation with the right to exclude non-Navajos from the reservation, *id.* at 668, and, impliedly the authority to condition entry and regulate conduct. *Dale Nicholson Trust*, 8 Nav. R. at 428-29.

The rights to exclude nonmembers, and to place at least some regulatory conditions on entry such as charging a fee, were recognized by the United States Supreme Court in *Montana*. 450 U.S. at 557. Moreover, the United States Court of Appeals for the Ninth Circuit has held that the Treaties of 1868 and 1850 provide the Navajo Nation with civil jurisdiction to more broadly regulate the conduct of nonmembers entering the Reservation to repossess automobiles. *Babbitt Ford, Inc. v. Navajo Nation*, 710 F.2d 587 (9th Cir. 1983). But, the Navajo Nation Supreme Court's holding may conflict with federal law for reasons beyond the scope of this paper.

[8] For the most recent applications of the *Montana* test by the Navajo Nation Supreme Court, and a summary of past decisions, *see EXC, Inc. v. Kayenta Dist. Court*, No. SC-CV-07-10 (Nav. Sup.

The Navajo Nation has relied on both the Treaty of 1868 and the *Montana* test to apply the NPEA to a non-Indian employer. *Manygoats v. Cameron Trading Post*, 8 Nav. R. 3 (Nav. Sup. Crt. 2000).[9] In summary, an employer considering doing business with a tribal nation or enterprise, or even hiring tribal members, should be familiar with the tests for jurisdiction under both federal and the tribal nation's law.

C. The Application of Federal & State Employment Law

An employer should also consider whether federal and state employment laws will apply to its employment practices. Brief statements of the tests are provided here.[10]

It appears clear that federal law applies to private employers on tribal nations. During the 1950s, the Navajo Nation (then Navajo Tribe) had a statute which "prevent[ed] union activity on its Reservation..." *Navajo Tribe v. NLRB*, 288 F.2d 162, 164 (D.C. Cir. 1961). The United Steelworkers petitioned the NLRB for an election to determine union recognition at a uranium concentrate mill on the Reservation. The Navajo Nation contested the NLRB's authority to order an election. In sweeping terms, the D.C. Circuit stated that Congress had adopted a national labor policy which applied on the Reservation. *Id.* at 164-65.

Crt. Sept. 15, 2010); *Ford Motor Co. v. Kayenta Dist. Court*, No. SC-CV-33-07 (Nav. Sup. Crt. Dec. 18, 2008), on the Supreme Court's website, http://www.navajocourts.org/indexsuct.htm.

[9] The Nation's jurisdiction was subsequently contested in federal court, as referenced above, in *Atkinson Trading Co., Inc. v. Manygoats*, 2003 U.S. Dist LEXIS 27452 (D. Ariz. Sept. 22, 2003).

[10] An article considering the issues in more depth may be found at the website of the Modrall Sperling Law Firm, www.modrall.com. Walter E. Stern, Walter E., *Labor and Employment Issues in Indian Country: A Non-Indian Business Perspective*. As the article is from December 28, 2006, its research should be updated by the employer referencing it. A previous version of this paper was presented at the RMMLF's Special Institute on Natural Resource Development in Indian Country, November 10-11, 2005 and is Paper No. 15 from that conference.

The more difficult question is whether federal law applies to tribal nations and enterprises as employers.[11] The test is one of Congressional intent; when silent,[12] did Congress intend a generally applicable law to tribal nations?

While the United States Supreme Court stated that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests," *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960), the Circuit Courts of Appeals have split over the intent of Congressional silence. *Compare, e.g., Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) (holding that the Occupational Safety and Health Act, "OSHA," applied to a farm owned by the Coeur d'Alene) *with Donovan v. Navajo Forest Products Indus.*, 692 F.2d 709 (10th Cir. 1982) (holding that OSHA did not apply to a Navajo lumber company). Most courts apply the test set forth by the Ninth Circuit in *Coeur d'Alene*, although the outcomes vary.

Thus, whether the National Labor Relations Act ("NLRA"), the Fair Labor Standards Act ("FLSA"), OSHA, and other federal employment laws, apply to tribal nations and enterprises requires research on a Circuit-by-Circuit basis. For some recent cases, *see Solis v. Matheson*, 563 F.3d 425, 427 (9th Cir. 2009) (holding that the overtime provisions of the FLSA apply to a retail store owned by a tribal member); *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1307 (D.C. Cir. 2007) (holding that the NLRA applies to a tribal enterprise); *Synder v. The Navajo Nation*, 371 F.3d 658, 661-62 (9th Cir. 2004) (holding that the FLSA does not apply to officers of the Navajo Nation Division of Public Safety).

With one exception,[13] state employment laws likely do not apply to employers doing business only on tribal nations. Generally, state law does not apply to on-reservation conduct, particularly

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[11] Research did not discern a case deciding whether federal employment laws would not apply to a private employer in a partnership or joint venture with a tribal nation or enterprise.

[12] Using its plenary power, Congress may expressly exclude or include tribal nations and enterprises with regard to federal employment laws. *See, e.g.*, 42 U.S.C. § 2000e(b)(1) (excluding "Indian tribe" from the definition of employer under Title VII).

by tribal members, because the application of state law would infringe on the sovereignty of the tribal nation or is implicitly preempted by balancing the interests of the tribal nation, the state, and the federal government's unique relationship with tribal nations.

This test is largely derived from non-employment cases. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980). While states may have jurisdiction "over tribes and tribal members in the absence of express Congressional consent," the circumstances seem to be limited. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987), superseded on other grounds by 18 U.S.C. § 1166 (holding that California could not regulate tribal gaming enterprises). The paired tribal and federal interests in tribal self-government and economic development, including revenue and employment, would have to be outweighed by the state's interests. *Id.* at 216-219.

For instance, the NPEA requires "just cause" for all adverse employment actions. 15 N.N.C. § 604(B)(8). By contrast, New Mexico is generally an "at-will" employment state. *West v. Washington Tru Solutions, LLC*, 2010-NMCA-001, ¶ 6, 147 N.M. 424, 224 P.3d 651. A reasonable, probably persuasive, case may be made that application of New Mexico law to employment on the Navajo Nation would infringe on the sovereignty of the Nation and is preempted by the federal and Navajo interests.

As with tribal law, an employer should investigate what state and federal laws may apply to its employment on tribal lands.

D. Conflicts Between Federal & Tribal Employment Law

Employers should be aware of potential conflicts between federal law and tribal laws, particularly with regard to who may benefit from a preference law and whether an Indian preference may "trump" a seniority system.

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[13] Congress has provided that state workers compensation laws may apply to lands "which the Federal Government owns or holds..." 40 U.S.C. § 1372. This Act has been interpreted to include trust lands. *See, e.g., Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1319 (9th Cir. 1982).

1. Indian, Tribal and Spousal Preference

The first conflict regards who may benefit from a preference requirement. Title VII prohibits discrimination in employment for many employers. However, Title VII allows, but does not require, a private employer[14] "on or near an Indian reservation" to provide "preferential treatment...[to an] individual because he is an Indian living on or near a reservation." 42 U.S.C. § 2000e-2(i).

On May 16, 1988, the Equal Employment Opportunity Commission ("EEOC") issued its "Policy Statement on Indian Preference Under Title VII," which is on the EEOC's website. The EEOC determined that "it is the Commission's position that extension of an employment preference on the basis of tribal affiliation is in conflict with and violates Section [2000e-2(i)]." *Id.* The EEOC's position applies only to private employers, not to Indian tribes because they are exempt from compliance with Title VII. *Id.* Thus, only private employers required by tribal statute or a lease with a tribal nation to provide an employment preference for tribal members are in conflict with federal law, in the opinion of the EEOC. As set forth above, some tribal nations use formulations such as "local Indians" or "Indians on the reservation" in attempts to, arguably, comply with the EEOC's position and still maximize the benefit for its members.

Navajo law requires a preference for Navajos and then spouses of Navajos. 15 N.N.C. §§ 604B)(7), 614. The Nation also commonly requires a Navajo preference in leases. The EEOC did not address preferences for spouses of Indians, but because the exception in Title VII is limited to a person "because he is an Indian," it would appear that spousal preferences also run afoul of the EEOC's position. The dispute between the Navajo Nation and the EEOC has been litigated for over ten years.[15] To date, it appears that federal courts would side with the EEOC's position.

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[14] There are federal statutes requiring a preference for Indians in federal hiring. These are valid under *Morton v. Mancari*, 417 U.S. 535 (1974), which held that preferences for Indians were granted to "quasi-sovereign tribal entities," and were not based on race. *Id.* at 553-54. Generally, it is thought that federal statutes requiring federal agencies to provide a preference in hiring for individual tribes, *see, e.g.*, the Navajo-Hopi Long Range Rehabilitation Act of 1950 (Public Law 81-474), are valid based on *Morton*. Research did not discern a Congressional act requiring a private employer to provide a preference in hiring to Native Americans or a particular tribe.

[15] The litigation is described in Walter E. Stern's article, *supra* footnote 10.

Dawavendewa v. Salt River Project Agricultural Improvement and Power District, 154 F.3d 1117 (9th Cir. 1998) (suit by a member of the Hopi Nation contesting Navajo law, concluding that a tribal preference was not allowed under the Indian exception to Title VII).

However, the Ninth Circuit Court of Appeals has since ruled that the Navajo Nation is an indispensible party to challenges to Navajo preferences, at least those provided in leases. As such, the issue remains undecided at this time. *Dawavendewa v. Salt River Project*, 276 F.3d 1150 (9th Cir. 2002); *EEOC v. Peabody Western Coal Co.*, 400 F.3d 774 (9th Cir. 2005). The *Peabody* litigation continues.

2. Seniority and Indian Preference

The second potential conflict regards Indian preference and seniority systems. Several tribal employment laws, including the NPEA, state that seniority systems cannot defeat tribal preference. *See, e.g.*, 15 N.N.C. §604(B)(3). Some also state that unions must expressly endorse an Indian preference and cannot act in a way to defeat Indian preference. Whether these tribal laws are valid appears to be an undecided question. Research did not discern a case deciding this question. Below are some possible arguments, set forth very briefly.

The conflict regarding Indian preference and union seniority systems seems to be an issue of Congressional intent which may be framed in at least two ways. First, does the NLRA pre-empt tribal laws providing for Indian preferences? Second, in enacting the NLRA and Title VII, what was Congress' intent as to tribes as employers and private businesses employing persons on tribal nations? Ultimately, it seems these questions converge.

NLRA pre-emption is a complex area, but may be characterized as having two key principles. First, state and local law may not actually or potentially conflict with the NLRA's provisions regarding the right to organize to collectively bargain and the substance of unfair labor practices. *See Building Trades Council (San Diego) v. Garmon*, 359 U.S. 236, 244 (1959). Indian preference laws do not seem to impact these rights as the NLRA does not directly address Indian preferences. While tribal nations cannot ban unions, *see Navajo Tribe v. NLRB*, 288 F.2d 162

(1961), tribal nations may undertake actions consistent with the NLRA. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (upholding the Pueblo's authority to enact a "right-to-work" statute or enter a lease with a similar provision).

The Tenth Circuit's analysis in *Pueblo of San Juan* seems relevant to the issue here. That Circuit noted that Congress did not directly address tribal nations in the NLRA. *Id.* at 1196. Congressional ambiguity is to be construed in favor of tribal nations, *id.* at 1191, and Congressional silence should not be interpreted as a divestiture of tribal sovereignty. *Id.* at 1195-96. These doctrines would militate in favor of tribal authority to enact their laws. It may follow that tribal preference laws should be upheld, even if in conflict with seniority systems, particularly in light of the Congressional statements about Indian preferences in other statutes, set forth below.

A second form of NLRA pre-emption holds that the federal courts should exclude state law from the interpretation of collective bargaining agreements so that a unified form of federal interpretation is developed. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957). This form of pre-emption seems more applicable to the issue, because a seniority system negotiated by a union may conflict with Indian preference required by statute or lease. However, federal law, and Congressional intent, seem to strongly support Indian preferences.

Several Congressional laws require an Indian preference in hiring for federal agencies, which the Supreme Court has upheld as preferences granted to "quasi-sovereign tribal entities." *Morton v. Mancari*, 417 U.S. 535, 554 (1974). Congress' unique interests with regard to tribal nations justify Indian preference. *Id.* at 541, 548. Further, with regard to "638 contracts," in which tribal entities provide services previously provided by the federal government (such as police or teaching), it appears that Congress has endorsed whatever tribal preference a tribal nation may enact:

> with respect to any self-determination contract, or portion of a self-determination contract, that is intended to benefit one tribe, the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract.

25 U.S.C. § 450e(c).

With regard to Title VII, Congress exempted "Indian tribe[s]" from the law. 42 U.S.C. § 2000e(b)(1). Thus, the EEOC's position, that private employers may not apply a preference for a particular tribe does not apply to Indian tribes.[16] Policy Statement on Indian Preference Under Title VII." Congress expressly authorized a private employer "on or near an Indian reservation" to provide "preferential treatment...[to an] individual because he is an Indian living on or near a reservation." 42 U.S.C. § 2000e-2(i).

Setting the NLRA's silence as to tribal nations next to the Congressional enactments allowing or requiring Indian or tribal preferences in employment would seem to indicate Congressional intent to allow Indian preferences. It would follow that collective bargaining agreements may not defeat a tribal law requiring a preference or a lease requiring a preference. But, the question is undecided.

V. CONCLUSION

An employer considering business on or with a tribal nation should research employment law issues. First, the employer should discern the tribal nation's employment laws, including any case law. Second, the employer should consider whether federal and state law will apply to it. Third, the employer should think through potential conflicts between the laws which may be applicable.

[16] This would seem to provide an argument that a tribal nation may also enter a lease with a private company requiring a tribal preference in employment.