

TRIBAL EMPLOYMENT LAWS: LEGAL AND CULTURAL CONSIDERATIONS

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There are numerous unique challenges that law firms face when approached by businesses seeking to do projects on tribal lands, or when working with a tribal entity. Whether working with financial service providers, energy companies, technology consultants, healthcare providers, or others, it is important to understand complexities involved in tribal law throughout all phases of a tribal project. Outlined here are typical employment issues that businesses should consider before proceeding with a project, employment practices commonly implemented during a project, and if an employer is sued in tribal court.

1. BEFORE THE PROJECT – REVIEW THE TERO

Many, perhaps most tribal nations have employment laws, usually called “Tribal Employment Rights Ordinances” or TEROs. Your business should inquire about such a law and have it reviewed. TEROs usually apply to employers which, variously, have a contract with the tribal nation, are

doing business within the tribe’s reservation, or employs tribal members.

Generally, these laws are within the sovereign authority of a tribal nation, but your business should obtain a legal review for your project. More important, there may be ways to structure your project to regulate application of a TERO. The most effective way is to negotiate an agreement with the sovereign to avoid litigation. We have negotiated limits on the application of TEROs to businesses, and we believe such agreements can be enforced in court if the agreement is carefully crafted.

The content of TEROs varies considerably, but typical provisions include:

- A preference for hiring, training and advancement for Native Americans;
- Required accommodation of traditional practices or required training for non-Natives regarding traditional practices (which is a good idea);
- Hiring halls and wage scales; and,
- Protection against at will employment and retaliation.

Some TEROs address unions. Historically, there was some conflict between unions, asserting a preference for seniority, and tribal nations, asserting a preference for Native Americans. More recently, we have seen TEROs that recognize the right to unionize, provided native preference is recognized. If your project will include union labor, you should try to reach an agreement acceptable to both the union and tribe. We have found that to be achievable. We have also dealt with tribes which have enacted right to work ordinances. At least in the research we have completed, these are likely enforceable.

Several TEROs also require a preference in contracting. Typically, the contract must be above a certain amount, the tribal nation provides a list of contractors which qualify for preference, and a preference-eligible contractor must have an opportunity to meet a lower bid. Our experience is that preference-eligible contractors often lack expertise or sophistication to meet the requirements of a complex project. We have found

that a firm commitment in writing to retain preference eligible contractors for simpler tasks, earth moving for instance, can achieve relaxation of other requirements.

We caution that care has to be taken in negotiating exceptions to TEROs. Tribal nations are as jealous of their sovereign authority and jurisdiction as other governments. By care, we mean sensible proposals on the front end that provide concrete benefits for the tribal nation, and careful crafting of enforcement provisions in case the tribal nation attempts to enforce terms that were waived. Litigation about whether waivers are enforceable is complex and expensive.

TEROs are enforced in two ways – regulatory and adjudicatory. Usually one or the other is emphasized. For instance, a tribal nation may provide a hiring hall, and an employer would be required to hire qualified personnel from that hall before hiring others, or perhaps even before bringing regular employees from other locations to the tribal project. Most TEROs have some adjudicatory enforcement mechanism with a right to some discovery, a trial and appeal. We have found these forums to be informal. We have also found the cost of adjudication of an alleged TERO violation to be lower than in state or federal forums, and generally rely more on equity and common sense.

2. EMPLOYMENT PRACTICES – LEARN SOME HISTORY & CULTURE

When your business starts a project, you will likely believe you have a “clean slate” with the tribal nation. Our experience is that the tribal nation and members will see it otherwise. As you know, most tribal nations have a painful history and many tribal members will view your business and project with suspicion. In all candor, some tribal members may appear to you to be paranoid, on the watch for conspiracies, and unwilling to understand the benefits of your project.

The good news is you have an opportunity to address this through understanding the tribal nation and constructing good employment practices. Your employees can be your ambassadors to the rest of the tribal members, advocating the advantages of your project and the propriety of your business. If you can achieve this, your project has considerably advanced the chances of success.

We have found the following to be useful practices:

- Providing reasonable accommodation for tradition, for instance, leave for traditional holidays and for the traditional period for bereavement.

- Reimburse employees, to a reasonable amount, for the cost of traditional practices, particularly healing practices.
- Provide a location and structure, perhaps on your project, for traditional practices and consider sponsoring practices in an appropriate manner.
- When your employees achieve significant performance indicators, preferably measured as a group, consider taking a step that would benefit the tribal nation. You might contribute to a charity in the employees’ name, assist in a project, even purchase land that the tribe views as part of its indigenous base.
- Educate your supervisors about the tradition, history, and culture of the tribe.
- A wellness program that addresses the issues faced by your host nation may be appropriate.

Training is very important. Your business should strive to evaluate which employees, and contractors, might be developed and advanced. Your business might consider scholarships and apprenticeships for education. You might provide education to employees about the finances,

The employment practices you develop can be a creative part of your project, and some businesses have come to view these practices as the most rewarding part of the project because they create a vehicle for satisfaction and enrichment. One note of caution that may not be necessary, your practices should not sacrifice the necessities of your workplace. An example may assist exemplifying. Some Native Americans participate in peyote ceremonies. We believe general work rules, such as a “fit for duty” requirement and prohibitions on possession and use of drugs at work, are the most effective way to address the possibility that peyote use could compromise the workplace. A policy directly prohibiting (or endorsing) peyote use is not recommended.

Finally, you will need to be patient, and flexible, as you learn tribal traditions. This will be a process. Much of what you learn, you will wish you learned before. For instance, a recent Navajo Supreme Court case explained that, traditionally, an elder would “direct” someone “through oblique methods of speaking that emphasizes voluntariness.” For instance, should someone say that there is not enough firewood, the listener should understand she or he is being asked to take action to address the situation.¹ That is good information for an employer, and its supervisors, to know. Regardless of whether the supervisor is native or non-native, this

way of communicating would have workplace implications.

3. LITIGATION – STAY SENSIBLE

Litigation in tribal forums is different. We find that the rules do not provide clear and complete guidance. People are very likely to know one another. The pace of proceedings is generally faster (with regard to getting to trial and the absence of motion practice and discovery) and slower (with regard to actual proceedings).

Tribal law is different. The law is often a confusing accumulation of both traditional law and Anglo or European law. Typically, across time different legislative bodies enact inconsistent, even contradictory laws, due to internal politics, the “stance” of the tribal nation to the “outside” world at various times, and advice given to tribal nations by “outside allies.”

Here are some thoughts about relatively unique issues you may encounter in tribal forums:

- You may need an expert to explain how your employment action is consistent with traditional law
- Your witnesses may testify in the tribal language
- Your witnesses may be hesitant to testify before elders or superiors
- You may be perceived as aggressive simply for questioning a witness who is older or in a position of regard

Although every tribal nation and tribal forum is different, generally, we advise that your argument and evidence take into account tribal law and tradition, but also emphasize equity, fairness, and common sense.

4. CONCLUSION – MORE TO LEARN

Whatever phase of a tribal project your business is in, you will find challenges. As one example, we have not considered treaty rights your host nation may have. We recommend you obtain experienced counsel, stay patient, stay flexible, and focus on goals with mutual benefits for your business, your employees, and your host nation.



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¹ More information may be found at Modrall’s Native American Law Watch, Fall 2012 at www.modrall.com/NativeAmericanLawWatchFall2012