

CTER

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Thank you

- CTER Board.
- MHA TERO.
- You.

Agenda

- Preference.
- Immigration.
- Immunity.
- Joint Employer.
- Exempt Employees.
- Gender.
- Service Animals.
- State Minimum wage.
- Marijuana.
- FMLA.
- Background Checks.
- Regular Rate.
- Social Media & Section 7.

Facilitator

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- *A Guide to Tribal Employment (Xlibris 2008).*

Prelim Q

Do federal employment laws apply?

- No. Title VII & ADA.
- Yes. 101-630, ICRA, ERISA (commercial).
- Maybe. FMLA, FLSA, OSHA, NLRA, ADEA.
- *Some of the upcoming slides discuss laws which may not apply to tribal employers but may influence law and policy considerations.*

Preference

- Is Native Preference a race based practice or a practice based on the employee's connection to a tribe? *Morton v. Mancari (1974)*.
- The 5th Circuit Court of Appeals, in *Brakeen v. Bernhardt (August 9, 2019)*, reversed a district court judge who declared that ICWA unlawfully makes racial classifications. On November 7, 2019 the entire 5th Circuit agreed to hear the case (en banc).
- Respectful recommendations: *Amicus or friend of the court briefs*.

Immigration

- Enforcement has significantly increased.
Time for an audit?

Sovereign Immunity

- *Lewis v. Clarke* settled for \$110,000.
- Respectful recommendations: *Update your documents, training (HR & Managers) and consider insurance.*

Joint Employer

- Employee works 36 hours for ABC Tribe in a workweek and deals 8 hours of blackjack at Slippery Slots Casino. Is there an overtime obligation? If there is which entity pays?
- April 1, 2019 proposed regulations “clarifying the joint employer rules.”

Exempt Employees

- DOL regulations will increase the minimum pay for exempt employees from \$455 (\$23,660) a week to \$684 (\$35,568) a week.
- Remember three questions to move a presumptively non-exempt worker from non-exempt to exempt (1) How much pay? (2) How do you pay? Salary Basis Test. (3) Performing exempt duties? Executive, Administrative, Professional, Computer.

Gender

- The United States Supreme Court heard cases which assert that Title VII protects employees based on their sexual orientation and transition from male to female or female to male.
- *Why address this when Title VII does not apply to tribal employers?*

Service Animals

- Among other things, the ADA addresses employment and public accommodations. The employment aspect of the ADA does not apply to tribal employers. The public accommodation aspect of the ADA is not as clear.
- If tribes use the ADA as a guide in this area, there are some common sense rules: (1) A service animal is limited to a dog or horse. *28 C.F.R. Section 36.104.* (2) A service animal is trained to perform tasks for a person with a disability. *28 C.F.R. Section 36.302(c)(9).* (3) Emotional support or companion dogs do not qualify under the federal rules. *28 U.S.C. Section 36.104.*

Service Animals

- (4) The definition of public areas is broad. See 28 C.F.R. Section 36.201(a). May include gaming floor, restaurants, bars, hotels and conference centers? Offer an accommodation at the buffet? (5) Ask questions? Is this a service animal that is required because of a disability? What work or tasks has the animal been trained to perform? Do not ask for proof of training, disability or certification. 28 C.F.R. Section 36.302(c)(6). (6) Deny access when the animal is out of control, not housebroken or poses a direct threat to the health or safety of others. 28 C.F.R. Section 36.302(c)(2)(4)(9). (7) Risk of non-compliance? Immunity to private suits? More risks to suits initiated by a federal agency.

State Minimum Wage Laws

- State minimum wage laws do not control the minimum wage of tribal employers but they impact the marketplace for employees.

Marijuana

- Medical and recreational laws marijuana are addressed by state law.
- Technically federal law does not tolerate state marijuana laws.
- To test or not to test?

FMLA

- In a March 14, 2019 Guidance letter, the DOL has addressed the amount of flexibility employers can offer to employees. “An employer may not delay the designation of *FMLA-qualifying leave...*”

EEOC

- The EEOC's admonition regarding the use of background investigations is tempered by the 5th Circuit Court of Appeals. See *State of Texas v. EEOC* (August 6, 2019 5th Circuit).

Regular Rate

- March 28, 2019 DOL notice of modified proposed regulations (29 CFR 778) which, if adopted, will bring more clarity regarding what may be excluded in the regular rate.
- Hourly rate versus regular rate.
- New regulation clearer regarding the exclusion of discretionary bonuses from the regular rate computation.

Social Media

- Section 7 of the National Labor Relations Act includes a freedom of speech component.
- Enforcement distinction between tribal governments and enterprises.

Questions and Answers