

EMPLOYMENT LAW IN INDIAN COUNTRY



"The only way you will be able to function here is if you think of yourself as having already been fired."

INTRODUCTION

- Traditional introduction
- I am honored to be here today and to be asked to speak with you today about Employment Law in Indian Country.
- Thanks to Lee, the CTER Board and the Conference organizers for bringing us together to study this very important topic.

- We have all heard that employment in Indian Country is not for:
 - the faint of heart
 - or the unprepared wallet
 - But like anything else, it is governed by applicable laws and regulations

Today I want you to learn 4 concepts about employment law in Indian Country:

INTRODUCTION (cont'd)

- 1. Tribal constitutions delegate LIMITED powers to tribal governing bodies and officials
- 2. Look closely to determine the laws that apply to personnel actions in Indian Country
- 3. Ensure the constitutional rights tribal employees have to due process and equal protection are provided by the tribe
- 4. Sovereign immunity will NOT protect you or your individual assets once you act outside the scope of your authority as a tribal official.

Tribal Laws that Apply to Indian Country Employment

- Tribal Traditional Law – predates the U.S. Constitution and Tribal Constitutions since time immemorial
- Tribal Constitutional Law:
 - Tribal Constitution
 - All constitutions are LIMITED delegations of power to tribal governing bodies
 - Those powers NOT delegated are reserved to the people
 - NO CONSTITUTION CAN DELEGATE THE POWER TO BREAK THE LAW

Tribal Laws that Apply to Indian Country Employment (cont'd)

- Tribal Code of Laws
 - Includes TERO Code (and TOSHA)
 - Since TERO is an enacted tribal law, TERO fees or other TERO hearing requirements CANNOT be selectively waived by any tribal official for any reason!
 - This includes Civil and Criminal Court procedures
 - But must exhaust administrative remedies first
- Tribal Administrative Law
 - Tribal Personnel Policies
 - Who should be involved in Personnel Matters and When?
 - If the Tribal Council is involved in the hiring process, they CANNOT be involved in personnel appeals. This is a CONFLICT OF INTEREST

Tribal Laws that Apply to Indian Country Employment (cont'd)

- Tribal Administrative Procedures Act
 - Governs personnel administrative appeals
- Tribal Courts
 - Have jurisdiction over personnel appeals once administrative remedies have been exhausted
- Tribal Appellate Courts
 - Have jurisdiction over personnel appeals involving allegations of mistake of fact or misapplication of tribal law

Tribal Laws that Apply to Indian Country Employment (cont'd)

- Personnel matters CANNOT be appealed to federal court UNLESS a person is incarcerated and the Indian Civil Rights Act has been violated.

OTHER LAWS THAT MAY APPLY TO TRIBAL PERSONNEL MATTERS

- Federal Law
 - United States Constitution
 - EXCEPT:
 - The bill of rights limits only the federal government
 - The Fourteenth Amendment limits only the states
 - So Indian tribes need not follow their requirements.
 - However, in 1968, Congress enacted the Indian Civil Rights Act, which conferred some but not all protections of the Bill of Rights on individuals subject to tribal authority.

OTHER LAWS THAT MAY APPLY TO TRIBAL PERSONNEL MATTERS (CONT'D)

- Even federal laws that normally don't apply to Tribes might have to be followed by a tribe because the tribe accepted federal funding with these “strings” attached.
 - Such laws might include the ADA, ADEA, antidiscrimination laws such as Title VII of the Civil Rights Act, ERISA, etc.
 - Laws of General Applicability
 - The Circuits are split as to whether laws that are silent regarding Indian tribes apply to tribes or not.

OTHER LAWS THAT MAY APPLY TO TRIBAL PERSONNEL MATTERS (CONT'D)

- Tenth Circuit and Eighth Circuit Courts of Appeals have held that OSHA and ADEA are not applicable to tribes in deference to tribal sovereignty and self-governance.
- Ninth Circuit and Seventh Circuit Courts of Appeals have held that OSHA and Fair Labor Standards Act ("FLSA") apply to Indian tribes unless the tribe can show federal intent to do otherwise.

OTHER LAWS THAT MAY APPLY TO TRIBAL PERSONNEL MATTERS (CONT'D)

- Tribes can become subject to multiple and inconsistent obligations under conflicting federal and tribal laws.
- *Dawavendewa v. Salt River Project*, 276 F.3d 1150 (9th Cir. 2002) ("*Dawavendewa II*").
 - In *Dawavendewa II*, if Salt River Project did not comply with the Navajo Tribal employment preference, it stood to have its lease canceled. If it did not comply with Title VII, it would be in non-compliance with a federal statute.

OTHER LAWS THAT MAY APPLY TO TRIBAL PERSONNEL MATTERS (CONT'D)

- State Laws
 - Even though state laws usually don't apply to Tribes, they might have to be followed by a tribe because the tribe accepted state funding with these "strings" attached.
 - Tribes need to be careful to not allow state incursion into tribal sovereignty. It may be in the tribe's interest not to apply for or accept certain state funding if the terms of acceptance work against tribal self government.

The Personnel Process

- Now that we know what tribal and other laws apply to tribal employment, let me ask you about the Personnel Process AND
- WHAT CAN GO WRONG
 - Show of hands – how many years have you worked for your tribe?
 - As experienced administrators, what is the document that creates the terms of your employment with the tribe?

THE JOB ANNOUNCEMENT

SCENARIO:

- You have just been hired by your tribe for the job of your dreams – TERO!
- (Director, Compliance, Staff, Commissioner)
- WHAT IS THE FIRST THING YOU SHOULD DO?

Personnel Process Questions

- GET A FULL COPY OF THE CONTENTS OF YOUR PERSONNEL FILE.
- WHY?

Personnel Process Questions

- TO PROTECT YOURSELF FROM WHAT CAN GO WRONG:
 - 1. Someone might say you are not qualified.
 - 2. Someone might take something out of your file, even years later, and say you never properly applied for your job in the first place.
 - 3. Doing this periodically will also prevent someone from putting a false personnel action into your file without your knowledge.

Personnel Process Questions

- What other important document is in your Personnel File?

- Your JOB DESCRIPTION.
- Why do you need this document?
 - 1. It is the basis of your job evaluation.
 - 2. It contains the Scope of your Authority as a Tribal official.
 - In case of litigation, it will determine whether you are covered b the Sovereign Immunity of your Tribe.

Personnel Process Protections: Constitutional Due Process And Equal Protection

- What is the meaning of due process and equal protection?
- Due Process is defined as giving Notice (of what an employee did to get fired/demoted/suspended) and an Opportunity to be Heard (provided with a hearing in which the employee can call witnesses, cross examine the Tribe's witnesses, and present evidence.

Due Process and Equal Protection (cont'd)

- Equal Protection means what it says – equal protection of the law. Individual employees **CANNOT** be treated differently.
- **NOW LET'S DIG A LITTLE DEEPER**
- The Fifth and Fourteenth Amendments to the United States Constitution each contain a due process clause. Due process deals with how justice is administered so the due process clause acts as a safeguard from 4 things:

Due Process and Equal Protection (cont'd)

1. arbitrary denial of life,
2. arbitrary denial of liberty,
3. arbitrary denial of a property interest*
4. by the government** not allowed by law.

What is an Employee Property Right or Interest?

- Let's take a look at the first asterisk on the concept of Property interest
- Once an employee is hired and completes her/his probationary period, they have a PROPERTY interest in their jobs
- This Property interest is an expectation that they will continue to be employed with the tribe as long as they follow all of the rules and do their job.

When Does an Employee's Property Interest Arise?

- An employee has a property interest in her/his job when:
 - A written or implied contract states that the employee has a property interest.
 - For example, a contracted teacher has a property interest in his/her job for the duration of the contract.
 - The employer's past practices give the employee a property interest
 - For example, if a Tribe had been giving its employees notice and hearing before losing their jobs in the past, current and future and employees have the same right.

When Does an Employee's Property Interest Arise? (cont'd)

- There is a statute or regulation that gives the employees a property interest.
- For Example, the federal Civil Service Act is such a statute.

Examples of Violations of Employees' Property Right

- Government employees (tribal, federal, state, county, city) generally have more protections and must be given due process before being terminated.
- When a Tribe does not follow its own laws regarding the proper process for firing an employee such as:
 - Giving a terminated employee notice of her/his appeal rights **AFTER** they have already expired

Examples of Violations of Employees' Property Right

- refusing to timely participate in the appeal process
- accusing an employee of wrongdoing, the employee appeals and wins; and the employee is fired anyway.
- firing a permanent employee for no reason.
- removing items from an employee's personnel file years after they were hired and claiming they did not fulfill the hiring process completely
- terminating a permanent employee to replace him/her in fulfillment of a campaign promise to a large voting family.

Who is the government?

- The Tribal Legislative Branch, i.e., the Tribal Council & staff
- The Tribal Executive Branch. i.e., the Tribal Chairman & staff (Including TERO)
- The Tribal Judiciary Branch, i.e., the Tribal Court System, including staff

Introduction to Due Process



WHAT PROCESS IS DUE TO TRIBAL EMPLOYEES?

- Notice Requirements
 - When an employee is fired, they must be told what they did wrong.
 - This information must be contained in their termination letter.
 - Opportunity to be Heard (Hearing Requirements)
 - The termination letter must tell the employee about their right to appeal the employer's decision and the process to do so, along with timelines that must be met.

Due Process Violations

- If these things are NOT provided to an employee, what law is violated?

Due Process Violations

- Tribal Law?
 - Maybe, if the Tribe's Personnel Policies require these Due Process protections.

Federal Law?

YES – Indian Civil Rights Act (refer back to applicable laws)

State Law?

Maybe, if imported with grant/contract monies.

WHAT PROCESS IS DUE TO TRIBAL EMPLOYEES? (cont'd)

- If the employee is an “At Will” employee, they can be terminated without cause.
- However, if the employer DOES give a cause, then they must be able to prove the employee committed that act.
- “At Will” employment used to be just a creature of State law. Now being used by many Tribes, especially regarding casino employment.

Sovereign Immunity is No Bar to Liability for Not Following the Law

- Sovereign immunity doesn't protect Tribal officials/employees when they act outside the scope of their authority & don't follow tribal law.
- "As a matter of federal law, suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986).

Sovereign Immunity is No Bar to Liability (cont'd)

- “Congressional waivers of sovereign immunity ‘cannot be implied but must be unequivocally expressed.’” *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 154 (1980).
- “Absent a clear, explicit waiver of its sovereign immunity, courts are without jurisdiction to hear cases filed against an Indian tribe.” *Satiacum v. Sterud*, 10 Indian Law Rptr 6013 (Puy.Tr.Ct. 1982).

Sovereign Immunity is No Bar to Liability (cont'd)

- The [sovereign] immunity [of the tribe] extends to agencies of the tribes. *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986).
- Or, where an individual employee, agent, or officer of the Band, the Tribal Council, the Chairman, or the Judicial Branch is sued, the Band again may defend, asserting the affirmative defense that the individual acted within the

Sovereign Immunity is No Bar to Liability (cont'd)

scope of his or her authority and therefore has official immunity from suit. *Satiacum v. Sterud, supra.*

- Federal courts agree that a suit filed against a tribal official acting in her official capacity is in effect against the tribe and is barred by the tribe's immunity *unless the official acted outside the scope of her authority.*

Puyallup Tribe, Inc. v. WA Dept of Game, supra.

- Once a tribal official acts outside the scope of his authority, he can be sued in his official capacity

AND

Sovereign Immunity is No Bar to Liability (cont'd)

- AND in his individual capacity
- Sovereign immunity does not bar an individual-capacity damages action against a state or federal official, even if the action arises out of conduct the official undertook while carrying out official duties. *Kentucky v. Graham*, 473 U.S. at 166.
- Individual capacity defendants cannot be defended by the tribe's attorney.

Sovereign Immunity is No Bar to Liability (cont'd)

- Individual defendants must hire their own attorney. If they win the lawsuit, the tribe can reimburse them for their legal costs. If they lose the lawsuit, their legal costs remain their own responsibility.
- This is a very high price to pay for maybe a single instance of acting outside the scope of one's authority as a tribal official.

Closing Remarks

- In closing, remember:
- 1. Tribal constitutions delegate LIMITED powers to tribal governing bodies and officials
- 2. Look closely to determine the laws that apply to personnel actions in Indian Country
- 3. Sovereign immunity will NOT protect individuals or individual assets once a person acts outside the scope of his/her authority as a tribal official.

Closing Remarks

- 4. Ensure the constitutional rights tribal employees have to due process and equal protection are provided by the TRIBE.

Closing Remarks

- BUT REMEMBER
 - Sometimes you ARE the Tribe, as a Tribal official.
 - Sometimes you are the employee being faced with a personnel action.
- QUESTIONS?
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