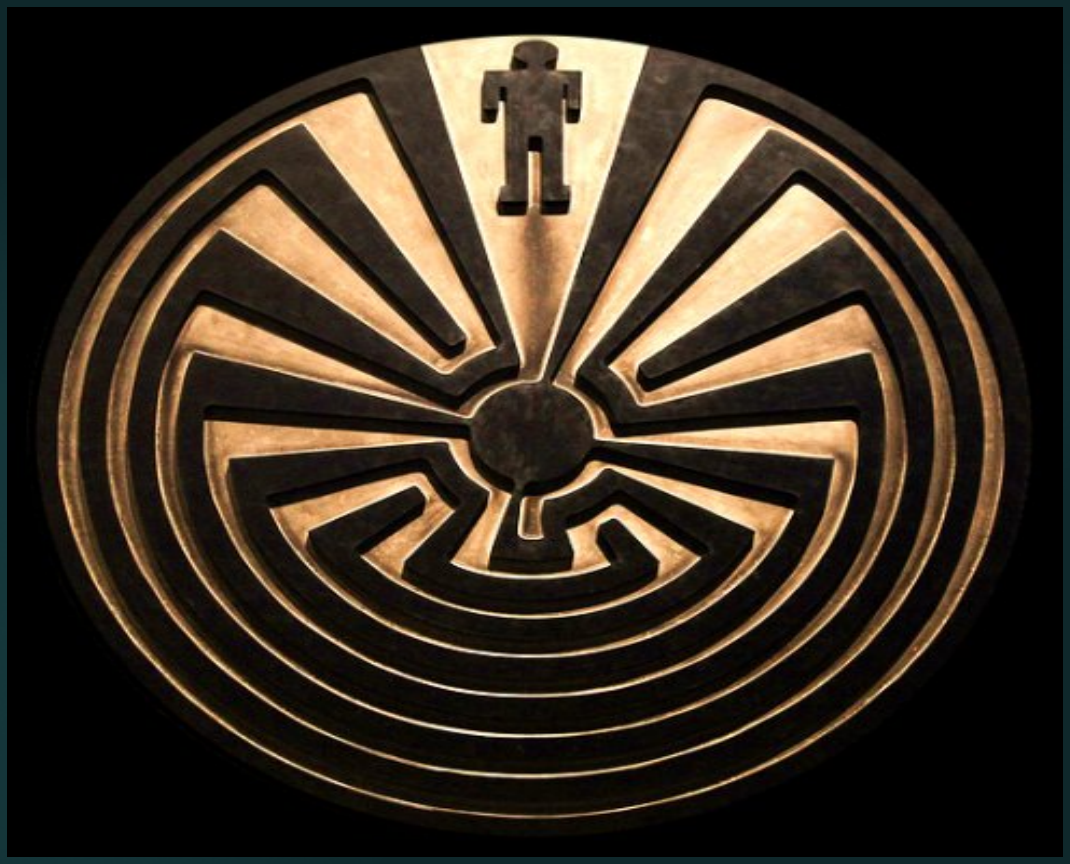
TRIBAL EMPLOYMENT LAW & THE TERO ORDINANCE



Indian man in the employment maze

WHAT IS A MAZE A SYMBOL OF?

The maze is the very symbol of confusion and disorientation, the trap that confounds efforts to escape. At times life itself seems to be a maze, as our journey along its tortuous pathways leads to wrong turns, dead ends and unknown destinations.

With respect, we modified this symbol for our use here to depict the trials and tribulations Indian people have historically faced in their journey to employment.

WHAT IS LEGAL BASIS FOR TRIBAL LAW & TERO ORDINANCE?

- Tribes are sovereign nations.
- Tribal sovereign status is recognized by US Congress and Supreme Court.
- Tribal sovereignty predates creation of USA and their inherent powers, though limited in scope, have never been fully extinguished.
- A main attribute of Sovereignty retained by Tribal governments is the right to self govern.

WHAT IS LEGAL BASIS FOR TRIBAL LAW & TERO ORDINANCE (Cont'd)?

- Inherent Tribal Sovereignty gives Tribes the power to exercise authority over its members and to regulate all economic activity within its territories.
- As a sovereign government Tribes have power to pass the strongest employment laws in nation including the unique right to require Indian preference in all aspects of employment.
- As sovereign's, Tribes have power adjudicate disputes, through their courts or commissions, between the tribe and business entities.

WHAT IS TERO?

- Sovereignty based legislation enacted by Tribal Governments to protect the rights of Indian people to preference in employment, contracting, sub-contraction and in all aspects of employment on reservations.

- The Term TERO stands for Tribal Employments Rights Ordinance or office. The ordinance created an enforcement program which is called the TERO Office. The program is responsible for ensuring compliance with all TERO (ordinance) requirements.

WHY WAS TERO ENACTED?

- To address unemployment, poverty, etc.;
- To ensure employer compliance with TERO;
- To eliminate discriminatory and other barriers;
- Bottom line intent: Maximize tribal member access to employment and business opportunities.
- Good laws strengthen and legitimize tribal governments.
- Failure of Federal Indian Policy;

WHAT DOES THE TERO ORDINANCE DO?

- Sets Conditions
- Establishes Authority
- Assigns Responsibility
- Delineates Sanctions for Violations of Law
- Provides Due Process
- Imposes Tax or Fee
- Authorizes Strategic Alliances & Partnering

WHAT ARE BASIC TERO REQUIREMENTS?

Preference is required in all aspects of employment including the following:

- Employment
- Training
- Promotion's
- Transfers
- Part-Time
- Shift Differential
- Last in Lay-Offs
- 1st in recalls
- Contracting
- Sub-contracting

- Purchase of Products, Materials & Services
- May impose Tax/Fee on businesses operating on res.
- Tribe may have a preference priority hiring order.

WHAT IS INDIAN PREFERENCE?

- It is a legal entitlement supported by law and court decisions;
- It means Indian people get first consideration in hiring, contracting, etc.;
- Minimum threshold qualification are applied.

IS INDIAN / TERO PREFERENCE A NEW CONCEPT?

- No Indian preference has existed in federal law / legislation since 1834, TERO since 1977.

DOES INDIAN PREFERENCE VIOLATE FEDERAL LAW?

- No. Indian preference is a legal entitlement guaranteed in treaties and legislation. Tribes are exempt from most federal employment laws.

IS TRIBAL PREFERENCE LEGAL?

- Yes and No. Tribal preference is not allowed on federal or state funded projects except for federally funded PL 93-638 projects.

WHAT IS EXTENT OF TERO JURISDICTION?

- TERO jurisdiction extends to reservation boundaries as defined by treaty or legislation.
- A tribe's ability to enforce its TERO on fee lands has been greatly reduced. (See Montana test case).

WHAT IS THE TERO COMMISSION

- Established and empowered by the tribal TERO Ordinance to ensure compliance with the law by all covered employers working within tribal jurisdiction;
- Enforce the TERO Ordinance;
- Adjudicate violations of TERO;
- Conduct hearings and make rulings.
- Impose Sanctions for violations;
- Oversee TERO office performance;
- Write rules, regulations and definitions

GENERAL POWERS OF THE COMMISSION

Adjudicatory Authority The Commission may hold hearings on and determine any matter under its authority, including but not limited to hearings necessary to the issuance, modification, and revocation of any permit, license, certification, or assessment authorized in Ordinance.

GENERAL POWERS OF THE COMMISSION

Organizational Authority. The Commission may hire immediate TERO staff, obligate funds appropriated by the Council, and secure and obligate funding from Federal, State or other sources to carry out its duties and functions under this Ordinance. The Commission is further authorized and directed to adopt such organizational bylaws as are necessary to enable it to carry out its duties and functions under this Ordinance. The Commission shall report directly to the Council.

CAN COMMISSION IMPOSE SANCTIONS FOR VIOLATIONS OF TERO?

Yes. Violation of TERO requirements may result in severe sanctions or disciplinary penalties. If it is determined that covered entities willfully and maliciously violated or ignored TERO ordinance requirements.

TERO COMPLIANCE PLAN

8 KEY ELEMENTS OF A GOOD COMPLIANCE

1. Delineates the employer's legal responsibilities;
2. Defines Skills Bank Requirements;
3. Provides for reasonable cultural, religious and traditional accommodations;
4. Sets tribal wage rates and certified payroll requirements;
5. States the TERO Fees/Tax and collection schedules;

TERO COMPLIANCE PLAN (Continued)

5. Articulates Tribe's no tolerance policies regarding use of derogatory or offensive terms toward Indian people or the tribe;
6. Establishes conditions for union compliance & special negotiated Tribal labor agreements. (Agreement is legally binding document);
7. Sets jurisdiction and methods for dispute resolution.
8. Sets core crew criteria (requires employer Core crew list.

WHAT ARE SANCTIONS FOR VIOLATION OF TERO?

- Deny violators from future business on reservation;
- Impose a civil fine ranging from $500- $5000. per violation;
- Terminate violators operations;
- Order removal of violators and people hired illegally and order violators to take immediate corrective action.

ARE THERE EXEMPTIONS TO TERO REQUIREMENTS?

Many TERO Ordinances exempt direct employment by:

- Tribal Entities, i.e., Casinos, other programs etc.
- Federal/State agencies (subdivisions);
- Non-profits;
- Core-crew (key people)

* Vital note: Contractors operating a contract let by any of the entities listed above are not exempt from TERO

TRIBAL WORKFORCE PROTECTION ACT

WHAT:

Sovereignty-based legislation enacted by Tribal Governments to protect their diverse workforces from discrimination, harassment & disparate treatment based on race, color, gender, sexual preference, religion, national origin, or tribal affiliation.

TRIBAL WORKFORCE PROTECTION ACT

WHY NEEDED:

Tribes as sovereign governments are exempt from:

- Title VII of the 1964 Civil Rights Act
- Americans With Disabilities Act
- Equal Pay Act
- Americans With Disabilities Act
- Section 503 of the Rehabilitation Act
- Viet Nam Era Veterans Readjustment & Assistance Act
- Occupational Safety & Health Act
- Executive Order 11246 (Affirmative Action)

TRIBAL WORKFORCE PROTECTION ACT

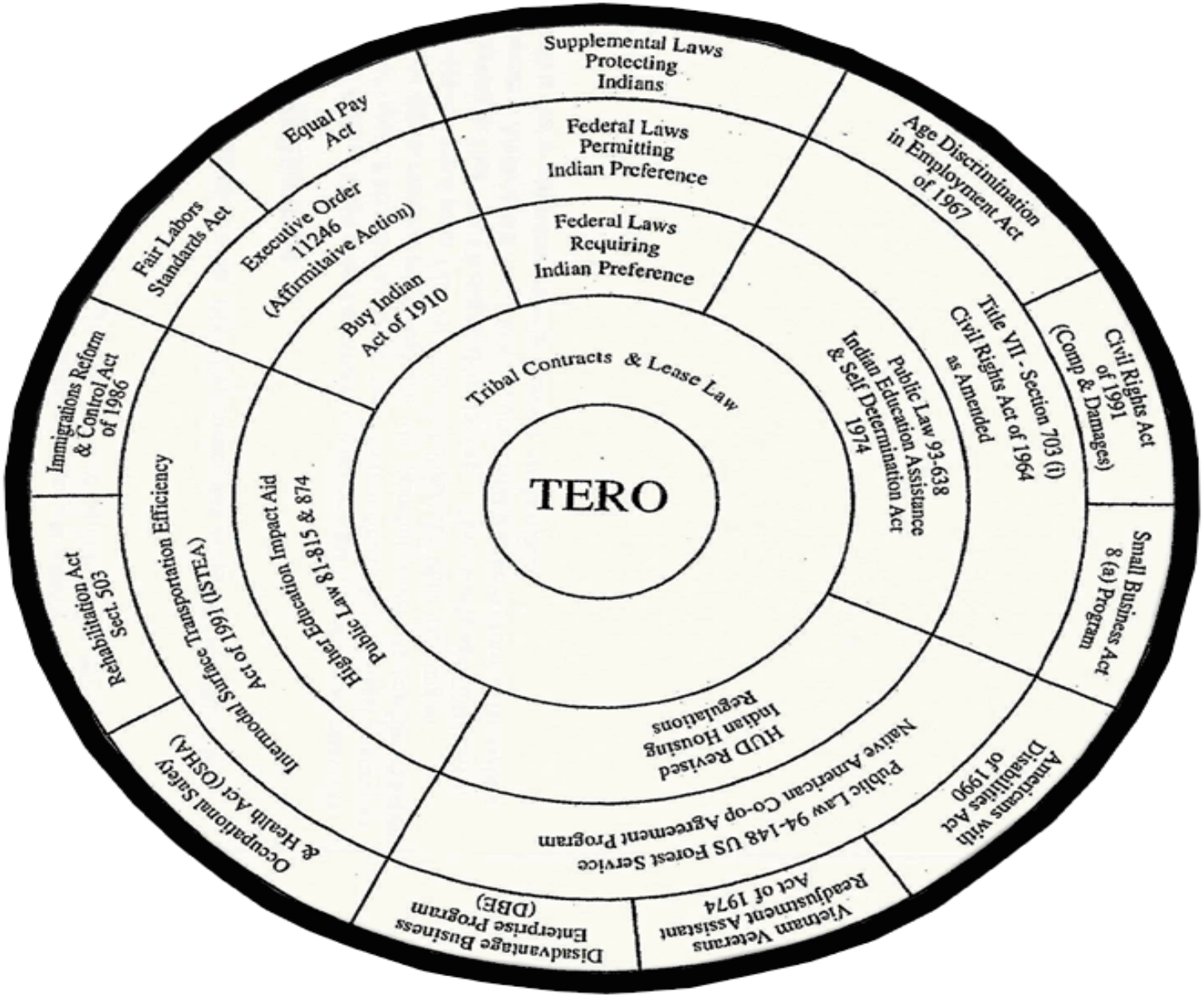
BEYOND PREFERENCE

WHAT DOES ACT DO?

- Closes gaps in protection –Tribal Exemptions
- Non-Indian Workforce
- It's good responsive, responsible government
- It strengthen and legitimizes tribal sovereignty
- It reduces the likelihood of federal intrusion into intramural employment matters.
- It reduces the likelihood of union organizing
- It's the right thing to do

TERO LEGAL FRAMEWORK

- Tribal Law
- Federal IP Laws
- Contract Law
- Compliance Plans
- Tribal Labor Agreements
- State EEO Laws
- Internal Employer EEO Policies


TERO
Tribal Contracts & Lease Law
Federal Laws Requiring Indian Preference
Federal Laws Permitting Indian Preference
Supplemental Laws Protecting Indians
Buy Indian Act of 1910
Executive Order 11246 (Affirmitaive Action)
Equal Pay Act
Fair Labors Standards Act
Immigrations Reform & Control Act of 1986
Rehabilitation Act Sect. 503
Occupational Safety & Health Act (OSHA)
Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA)
Public Law 81-815 & 874 Higher Education Impact Aid
Public Law 93-638 Indian Education Assistance & Self Determination Act 1974
Title VII - Section 703 (i) Civil Rights Act of 1964 as Amended
Age Discrimination in Employment Act of 1967
Civil Rights Act of 1991 (Comp & Damages)
Small Business Act 8 (a) Program
Americans with Disabilities Act of 1990
HUD Revised Indian Housing Regulations
Public Law 94-148 US Forest Service Native American Co-op Agreement Program
Veteran Veterans Readjustment Assistant Act of 1974
Disadvantage Business Enterprise Program (DBE)

Federal Laws which Require Indian Preference

INDIAN SELF-DETERMINATION & EDUCATION ASSISTANCE ACT (PL 93-638) SECTION 7b.

Section 7b states that:

" Any contract, subcontract, grant or sub-grant pursuant to this Act, the Act of April 16, 1934 (48 Statue. 596) as amended, the Johnson O'Malley Act, or any other authorizing federal contracts with, or grants to, Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible that:

Preference be granted to Indians in:

- Employment
- Training
- Sub-contracting
- * Keynote: Tribal Preference OK

SECTION 7B (Cont'd)

Enforcement Authority/Responsibility

- Bureau of Indian Affairs (BIA)
- Indian Health Service (IHS)
- Tribal Housing Authority (IHA)

Key Point: Tribal Preference allowed under 1990 Amendments

TERO /Agencies collaborate to maximize compliance

THE BUY INDIAN ACT (1910)

General Provisions:

"So far as may be practicable, Indian labor shall be employed and products of Indian industry may be made in the open market at the discretion of the Secretary of Interior"

- Coverage: Act applies to all direct contracts let by both BIA & IHS.
- Enforcement Authority: BIA & IHS

(a) In accordance with Section 101(k) of **NAHASDA**, a recipient shall apply the tribal employment and contract **preference** laws (including regulations and tribal ordinances) adopted by the **Indian** tribe that receives a benefit from funds granted to the recipient **under NAHASDA**. (b) In the absence of tribal employment and contract **preference** laws, a recipient must, to the greatest extent feasible ...

https://www.law.cornell.edu/cfr/text/24/1000.52

NAHASDA -HUD INDIAN PREFERENCE REGS.

Housing regulations 1003.510 & PL 93-638 -Section 7b Applies

- Preference is required in:
- Employment;
- Training;
- Contracting;
- Sub-contracting.

HUD regs., state as follows:

"IHA' recipient shall comply with TERO and apply the tribal employment and contract preference laws (including regulations and tribal ordinances) adopted by the Indian tribe that receives a benefit from funds granted to the recipient under NAHASDA."

- Enforcement: TERO and Tribal Housing Authority

Federal Laws which Permit Indian Preference

TITLE VII OF THE CIVIL RIGHTS ACT (1964)

General Provisions:

- Prohibits discrimination on the basis of race, color, religion, sex, age or national origin. (Also covers disability and retaliation)
- Act amended in 1978 to include the Pregnancy Discrimination Act.
- Coverage: All employers with 15 or more employees

TITLE VII OF THE CIVIL RIGHTS ACT (1964)

Section 703i Indian Preference

Key Points relative Indian Preference 703(i)

- Permits Indian Preference on or near Res.-
- Requires employer to post public announcement
- Does not allow Tribal Preference
- EEOC does not enforce IP
- Law exempts Tribal governments /enterprises
- Enforcement : EEOC / Contracted TEROs
- Indian Preference is legal because it is not race based…it is based on unique status of Indian people with US GOV

TITLE VII of the Civil Rights Act (1964) Cont.d

- EEOC / TERO CONTRACTS:
- Government to Government agreement;
- Authorize TERO to take Title VII Charges;
- 30 days to conciliate then defer to EEOC;
- Fixed contracts of $25,000;
- Annual professional training;
- T/A assistance on request

TITLE VII of the Civil Rights Act (1964)

- SEXUAL HARASSMENT

- Is described as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

TITLE VII of the Civil Rights Act (1964)

- A HOSTILE WORKPLACE ENVIRONMENT: Is described as:

  "A workplace where an employee work performance is affected because they experience workplace harassment, unwelcome actions, offensive, and intimidating behavior and results in their dreading going to work because of the oppressive and uncomfortable atmosphere created by the harasser"

TITLE VII of the Civil Rights Act (1964)

- GENETIC DISCRIMINATION

Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by Title II from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.

EXECUTIVE ORDER 11246

GENERAL PROVISIONS:

- Prohibits Discrimination
- Calls for Affirmative Action

*INDIAN PREFERENCE UNDER EO 11246:

- Allows and Indian Preference on or near reservation;
- Prohibits Tribal Preference
- Defines "on or near reservation"
- Enforced by OFCCP

- CTER/TERO have had a relationship with OFCCP for over 40yrs. The parties entered in-to MOU Partnering Agreement that provides Training T/A & Support.

FHWA EMPLOYEMNT REGULATIONS & INDIAN PREFERENCE ON FEDERAL-AID PROJECTS

- FHWA REGULATIONS 23 U.S.C. Section 140(d) – Allows Indian Preference on or near reservations.
- Tribal preference not permitted.
- Regulation defines on or near to be reasonable commuting distance.
- Both TITLE VII-Section 703(i) and EXECUTIVE ORDER 11246 apply and Permit IP on or near reservations. * FHWA NOTICE
- FHWA encourages States implement IP and to meet with TERO offices to work to establish goals.
- TERO offices have a long relationship with FHWA.

GENRAL EEO/AFFIRMATIVE ACTON LAW

- ADA–Prohibits discrimination against handicapped;
- FMLA-12 weeks unpaid leave for birth of a child or family illness;
- FLSA-Establish minimum wage, overtime pay, compensatory time;
- ADEA- Prohibits discrimination against people 40yrs and over;
- EPA-must pay equal pay for equal work
- Davis Bacon Act-Must pay prevailing wage
- OSHA-protects employee work-place safety and health
- 503 RA-Prohibits discrimination of handicapped and Require reasonable accommodation.

** TERO also uses State Employment Laws

TRIBAL LABOR AGREEMENTS

WHAT ARE TRIBAL LABOR AGREEMENTS

6 Key elements of Tribal labor agreements:

1. Union recognition of Tribal Sovereignty;
2. Union Agreement to TERO requirements;
3. Establishes Union / Tribal TERO Liaison
4. Is Project Specific
5. Establishes Career Training Path
6. Contains Dispute Resolution Provisions

End of Slide Presentation