

CTER

December 2021

Legal Update

Richard McGee
richard@richardmcgeelaw.com
richardmcgeelaw.com
612-812-9673

McGEE

Law Office of Richard G. McGee, LLC

Thank you

- CTER Board.
- MHA TERO.
- You.

Agenda

- Preliminary-application of federal laws.
- Preference.
- Immunity.
- Exempt Employees.
- Gender.
- Social Media & Section 7.
- Vaccines.
- Teleworking.
- Rights of way.

Facilitator

- Richard G. McGee
Minneapolis, Minnesota
richard@richardmcgeelaw.com
richardmcgeelaw.com
612.812.9673
- *Effective Practices for Addressing Discrimination & Harassment in the Tribal Workplace (2021); 101 Things Everyone Should Know About Tribal Employment (Xlibris 2020); Drafting Tribal Employment Laws & Handbooks (Xlibris 2020); 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)*.
- There are at least four pending cases in the 5th Circuit Court of Appeals, wherein preference is challenged in the context of Indian Child Welfare Act litigation and a party is seeking United States Court review. See, *Harland v. Brackeen*, *Cherokee Nation v. Brackeen*, *Texas v. Haaland* and *Brackeen v. Haaland*.
- Arguments: (1) 10th Amendment commandeering; (2) 5th Amendment equal protection argument.
- Reminder, TERO exercises, to a significant degree, the inherent sovereignty of the tribe.

Sovereign Immunity

- *Lewis v. Clarke* decided in 2017 and settled in April 2019.
- Official capacity versus personal capacity suits. In individual or personal capacity suits that do not seek a remedy against the sovereign, still consider official or personal immunity as an additional defense. Official immunity comes in two flavors: (1) absolute and qualified.
- Respectful recommendations: *Update your documents, training (HR & Managers) and consider insurance.*

Exempt Employees

- DOL regulations increased 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 that assert that Title VII protects employees based on their sexual orientation and transition from male to female or female to male. The cases are collectively called the *Bostock* decisions.
- *Why address this when Title VII does not apply to tribal employers?*

Social Media

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

Vaccines

- OSHA emergency regulation requiring vaccines for employees working for employers with 100 or more employees. Stayed by 5th Circuit. Other pending cases consolidated in the 6th Circuit. December 5 and January 4 deadlines?
- Health and Human Services rule for employees of healthcare clinics. No stay. Clinical and non-clinical employees.
- Tribe explore “private” option regarding vaccines?

Teleworking

- Pay issues for non-exempt employees. Breaks and lunch.
- Safety issues for all employees.
- Measuring performance.

Rights of Way

- Impact of United States v. Cooley (2021).

Questions and Answers

