

# TRIBAL EMPLOYMENT LAW & THE TERO ORDINANCE




Indian man in the employment maze

## WHAT IS THE MAN IN THE 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.



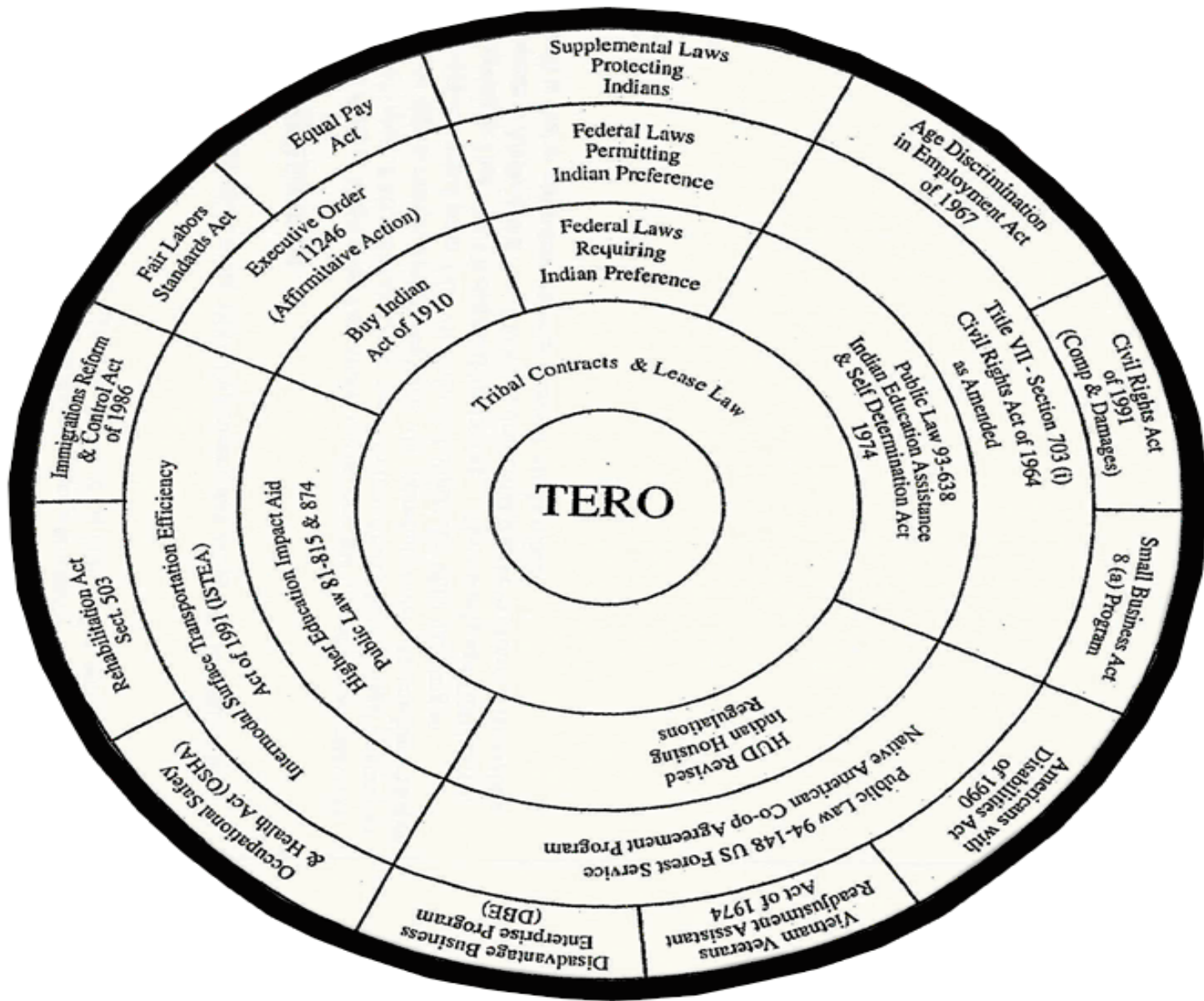
# TRIBAL EMPLOYMENT LAW

THE TERO ORDINANCE

TRIBAL WORKFORCE PROTECTION ACT

# TERO LEGAL FRAMEWORK

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



*“RUNNING IN THE WHITE MAN’S SHOES”*

*I WILL FOLLOW THE WHITE MAN'S TRAIL. I WILL MAKE HIM MY FRIEND, BUT I WILL NOT BEND MY BACK TO HIS BURDENS.*

*I WILL BE CUNNING AS A COYOTE. I WILL ASK HIM TO HELP ME UNDERSTAND HIS WAYS, THEN I WILL PREPARE THE WAY FOR MY CHILDREN, AND THEIR CHILDREN.*

*THE GREAT SPIRIT HAS SHOWN ME - A DAY WILL COME WHEN THEY WILL OUTFRAN THE WHITE MAN IN HIS OWN SHOES."*

*MANY HORSES –CHIEF OF THE OGLALA SIOUX*

# WHAT IS LEGAL BASIS FOR TRIBAL LAW & TERRITORIAL ORDINANCE?

- Tribes are sovereign nations.
- Tribal sovereign status is recognized by US Congress a Supreme Court and case law.
- 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.

# TRIBAL SOVEREIGN POWERS



- Tribal Sovereignty-Gives Tribes the authority to regulate employment practices on reservation.
- Unique Tribal Employment Entitlements Rights to Preference.
- Tribal Power to Enact Strongest Employment Law in Nation.
- As sovereign's, Tribes have power adjudicate disputes, through their courts or commissions, between the tribe and business entities.
- Currently Imposed by 300 Tribes / Alaska Village Governments.



## 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.

# 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
  - Purchase of Products, Materials & Services
  - May impose Tax/Fee on businesses operating on res.
  - Tribe may have a preference priority hiring order.
- |                            |
|----------------------------|
| Shift Differential         |
| Last in Lay-Offs           |
| 1 <sup>st</sup> in recalls |
| Contracting                |
| Sub-contracting            |

## 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 many federal employment laws. See 703i in Title VII Right to Indian Preference upheld by Court in *Morton v. Mancari*.

## 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 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 and employers operating within their jurisdiction are expressly exempt from coverage of many federal employment laws including:

- Title VII of the 1964 Civil Rights Act
- Executive Order 11246 (Affirmative Action)
- FHWA Regs
- ADA ( Americans with disabilities Act)

\*Note: Many other federal employment laws are silent as to the applicability of federal law on reservations.

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# TRIBAL WORKFORCE PROTECTION ACT

## BEYOND PREFERENCE

### WHAT DOES ACT DO?

- Retains all TERO ordinance preference provisions
- Closes gaps in protection –Tribal Exemptions
- Protects all employees including Non-Indian Workforce
- It's good responsive, responsible government
- It strengthens 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

# TRIBAL WORKFORCE ACT BEYOND PREFERENCE



## BASIC REQUIREMENTS

- Preference
- Prohibits Discrimination (Title VII, age, sex etc.)
- Sexual Harassment
- Wage & Hour
- Safety (TOSHA)
- Family Medical Leave

FEDERAL LAWS WHICH REQUIRE  
INDIAN PREFERENCE



# INDIAN SELF-DETERMINATION & EDUCATION ASSISTANCE ACT

Public Law 93-638 Section 7b states that:

*“ Any contract, subcontract, grant or sub-grant pursuant to this Act, the Act of April 16, 1934 (48 Statute. 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



## 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



# 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: 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.- \* does not require IP
- Requires employer to post public announcement
- Does not allow Tribal Preference
- 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.

# AMERICANS WITH DISABILITIES ACT

- ▶ ADA—Prohibits discrimination against handicapped;
- ▶ Permits Indian Preference on or near Reservations

Note: Like the language in Title VII, Indian tribes are expressly excluded from the definition of “employer” under the ADA (42 U.S.C. Sections 12101-12213) which then allows Indian preference on or near reservations.

# 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 EMPLOYMENT 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.

# GENERAL EEO/AFFIRMATIVE ACTION LAW

- 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 & 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



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