

REVISION OF TERO ORDINANCES

Kostan R. Lathouris
Lathouris Law PLLC

Kostan R. Lathouris
(702)473-0581 law@lathouris.com

- Enrolled Member of the Chemehuevi Indian Tribe
- Former and current Tribal Council Member
- Chief Judge of the Las Vegas Paiute Tribal Court
- Managing member of Lathouris Law PLLC (www.lathouris.com)
- Chair of the Nevada Indian Commission
- Juris Doctor, May 2015 (William S. Boyd School of Law)
- B.A. in Political Science, May 2009 (University of Nevada, Las Vegas)
- Former Tribal gaming commissioner
- Previously served on board of directors for a Section 17 corporation
- Former chair of the Stewart Indian School Preservation Alliance

Please keep in mind . . .

- THESE MATERIALS AND THIS PRESENTATION ARE NOT LEGAL ADVICE
- The information in this presentation is not necessarily a recommendation
- Sovereignty means making your own decision about what is right for you

Should your TERO ordinance be revised?

- When was the last time your TERO ordinance was reviewed?
- When was the last time your TERO ordinance was revised?
- Has there been any issues?
- Is there a digital copy of your TERO ordinance available?
- Is the digital copy searchable and easy to use?
- How has your office/department grown in capacity/capability?
- Have there been other changes that can affect TERO?
- What is the intended result of the preference policy?

Does your TERO ordinance address:

- Whether it applies to the Tribe?
- Whether it applies to contractors, subcontractors, and vendors?
 - Are contractors responsible or liable for subcontractors and vendors?
- The *Montana* decision?
 - How can you argue that employers have consented to be governed by the Tribe's laws?
 - How can you argue that employers should have to pay a TERO tax/fee?
 - How can you argue that disputes should be handled by Tribal court?
- A prevailing wage rate on the reservation?
 - Does the Tribe have a minimum wage?
 - When was the last time a wage survey was done?

TERO tax/fee

- How much is it?
- Remember that the power to tax is the power to destroy
- Ask:
 - What does the Tribe need to raise the revenue for?
 - Will a tax raise that revenue?
 - Can the market bear the tax?
- Should there be a set amount in Tribal law or as part of an tax/fee schedule?

Is there a TERO tax/fee?

- Is it actually assessed and collected?
- What is it used for?
 - Tribal general funds?
 - Operation of the TERO program?
 - Training needs?
 - Supportive services?
 - Human resource development? Etc.
- Does your TERO prohibit contractors from adding the cost of fees as a line item?

What does preference even mean?

- Indian preference
- Tribal preference
- Local Indian preference
- Minimum qualifications
- Tie-breaker
- Mandatory
- Hybrid model?

What does preference apply to?

- Hiring?
- Firing?
- Promotions?
- Shifts?
- Training opportunities?
- What about Indians who quit or are fired for cause?

If you use a minimum qualification model . . .

- How do you define or regulate what the minimum required qualifications are?
- What exceptions are granted and do the exceptions swallow the rule?
- Should the Tribe recognize a bona fide occupational qualification where its reasonably necessary that someone not be Indian in carrying out a particular job function in the normal operation of an employer's business or enterprise?
- Is it strictly construed?

Investigating BFOQs

- If an employer claims a BFOQ, does the office/department/commission have the right to:
 - Require the employer to cite their reasons for excluding Indians for consideration?
 - Require the employer to identify the essence of the employer's business?
 - Determine whether the essence of the business would be undermined if the employer did not exclusively employ non-Indians?
 - Ascertain whether the job in question has been successfully performed by Indians without impairing the normal operation of the business?
 - Interview persons who hold or have held the job to ascertain whether being non-Indian is necessary?

What role does Council have in TERO?

- Is Council the de facto Commission?
- If so, what has changed or should change since Council became the de factor Commission?
- What if Council is the employer?
- Should Council be involved in the day-to-day management of Tribal employment relations?

Are roles and responsibilities clear and easy to understand?

- Use the “Pursuant to _____” test
- Who is responsible for:
 - Compliance plans
 - Inspections
 - Receiving complaints
 - Investigating
 - Following up on complaints (notices, reports, etc.)
 - Hearings
 - Making decisions
 - Appeals
 - Etc.

Considerations for decision makers

- Do decisions have to be in writing?
- Do they have to be within a certain time?
- Do decisions require that the following be addressed:
 - Complaint/issues: Procedural and substantive issues presented
 - Facts: The findings and basis of the findings (what are the relevant facts?)
 - Evaluation: Has the burden of proof been met
 - Remedies: The orders and/or sanctions, if any
 - Information on the right to appeal
 - Information on the authority to act for failure to comply

Considerations for appeals

- What is reviewable?
- Who handles the appeal?
- What is the standard of review?
- What is the record of appeal?
- Should the standard be that the decision will be upheld unless it is demonstrated that the decision is arbitrary, capricious, or in excess of the authority?
- What happens if the decision is not upheld?

Other general considerations

- Is there a pre-investigative process? Preliminary findings?
- Do you have a standard compliance plan?
 - Does it include alternative dispute resolution mechanisms?
 - Does the Tribe clearly articulate applicable cultural, religious, and cultural accommodations that should be made?
- What does TERO handle and what does human resources (HR) handle?
- How does the Tribe choose to handle federal laws of general applicability?
- Can TERO recover costs and expenses if it is the prevailing party in an enforcement action?
- What are the rules for being on the skills bank/hiring hall?

Other general considerations (cont'd)

- Who can attend TERO hearings?
- Can TERO subpoena the Tribe?
- Can TERO enforce sanctions against the Tribe?
- Does TERO have to follow certain timelines?
 - Who can enforce those timelines?
 - How?
- Are there whistleblower protections?
- What types of remedies are there? (Declaratory, injunctive, compensatory, punitive, etc.)
- What is the process for confiscation and sale?
- What are the criteria for certification as an Indian business?

Additional things to remember

- Good policy doesn't just say what should happen, but why, when, how, and by who.
- Not all Tribes are the same.
- Tribes may have different cultures.
- Tribes may assert their sovereignty in different ways.
- Laws should reflect the values, customs, and traditions of the specific Tribe.

It is not our place to validate Tribal sovereignty. A Tribe will have to make the decisions that it believes are best for its people.

Just like any other nation.

QUESTIONS?

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