

# Legal Update

**CTER**

December 2024

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# Introduction

Thank you to the Board.

Thank you to MHA Nation TERO Commission, Commissioners and Director Foote and his team.

The handout.

Q&A.

Facilitator

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*Effective Practices for Addressing Discrimination & Harassment (2021).*

*101 Everyone Should Know About Tribal Employment (Xlibris 2020)*

*Drafting Tribal Employment Laws & Handbooks (Xlibris 2020)*

*A Guide to Tribal Employment (Xlibris 2008)*

# Topics

Primers on the Applicability of the Law

Exempt Classifications (FLSA)

Tribal Sovereign Immunity

Civil Rights in the Workplace

Workplace Accommodations

New Administration in DC

Q&A (please do not wait)

## *Primer 1*

State laws generally do not apply to tribal employers.

## *Primer 2*

Do federal employment laws apply to tribal employers?

Answer: Yes, no and maybe.

## *Primer 3*

Why are federal employment laws different from state employment laws as to their application to tribal employers?

Answer: Plenary power.

## *Primer 4*

*Explicitly apply:* ICRA, ERISA (commercial), ACA, 101-630.

*Explicitly do not apply:* Title VII and the ADA.

*Silent on applicability:* FLSA, NLRA, ADEA, OSHA, FMLA and more.

*What do tribal employers do in response to this lack of clarity?*



## **Exempt Classifications (FLSA).**

Silent on applicability.

Exempt versus non-exempt.

### **Three Qs for exempt.**

How much pay? \$684, \$844 and \$1,128.

Salary basis test.

Duties.

### **Solution.**

Exempt status should not be the primary factor in determining pay. Some positions that are exempt today might be non-exempt tomorrow.

# **Tribal Sovereign Immunity**

What is Lewis v. Clarke?

As TERO Commissioners, Executive Directors, Compliance Officers and myriad other TERO positions, does the immunity that protects the Tribe and the Commission protect you?

## **Solutions**

1. Tribal law that extends immunity to employees, agents and officials that act within the course and scope of their employment.
2. Tribal law that defines a statute of limitation.

## **Civil Rights in the Workplace**

Reminder regarding the applicability of state and federal civil rights laws.

*Race, religion, sex, disability, national origin, sexual orientation, age.*

Are those terms clearly defined?

What is the impact of the *Bostock* decision?

### **Solution.**

Tribes should define their own civil rights in the workplace, determine the remedies and whether TERO will serve a role in enforcement.

## **Workplace Accommodations**

Generally, the ADA does not apply to tribal employers.

What does disability mean in the tribal workplace?

Will the tribal provide reasonable accommodations to applicants and employees?

What is TERO's role (if any)?

### **Solution.**

Answer those questions and define the tribe's protocols in writing. Train your team.

# New Administration

NLRB

*Haaland v. Brackeen (2023) & Morton v. Mancari (1974).*

*Chevron* deference overruled in *Loper Bright Enterprises v. Raimondo (2024)*.

When TERO creates regulations are the regulations supported by the tribe's preference law?

Q & A