

Key Employment and Labor Issues Affecting Tribal Entities, ANCs and NHOs

In Partnership with



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Overview

- Sovereign immunity
 - Background
 - 8(a) waiver
 - Indemnification
- Labor and employment issues
 - Statutes of general applicability
 - Commercial v. governmental activity
 - Specific labor and employment laws



Tribal Sovereign Immunity

- Sovereign immunity deprives courts of jurisdiction to hear disputes
- *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998)
 - Indian Tribes are subject to suit only where Congress has authorized suit or the Tribe has waived its immunity
 - Tribes have immunity from suits on contracts regardless of whether the contracts involve commercial or governmental activities
 - Tribes have immunity from suits on contracts regardless of whether they were made on or off a reservation
- *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014)
- Tribal entities may also be entitled to sovereign immunity



Waiver of Immunity

- Tribal entities may waive immunity so they can enter into commercial contracts
- Courts have held that there is a presumption favoring Tribal sovereign immunity
- Courts have held there is presumption against the waiver of Tribal immunity
 - Any waiver of immunity must be expressed and unequivocal



Waiver of Immunity

- *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282 (11th Cir. 2001)
 - Former employee brought suit for discrimination on the basis of disability
 - He argued that the Tribe had entered into contracts with the federal government to receive federal funds, and the contracts prohibited the Tribe from engaging in discrimination on the basis of disability
 - He argued that by entering the contracts, the Tribe waived its sovereign immunity from suits under the Rehabilitation Act
 - The court held that waivers of sovereign immunity must be expressed, not implied
 - The court also held that Congress did not abrogate the Tribe's sovereign immunity by enacting the Rehabilitation Act, and that any purported abrogation must be clear and expressed



Waiver of Immunity

- *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006)
 - Former employee brought an action against a casino, which was owned and operated by a Tribe
 - He claimed he was terminated for reporting unclean conditions in the casino's restaurant and for applying for guardianship of three Tribal children in federal court
 - Employee alleged that the casino had waived its immunity because his employment application referred to federal and state law, and the Employee Orientation Booklet said the casino would practice equal opportunity employment and promotion
 - The court held that these statements did not amount to explicit waivers of immunity from suit
 - The court affirmed the dismissal of the claims against casino on sovereign immunity grounds



Waiver of Immunity

- *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001)
 - Tribe and C&L Enterprises entered into a construction contract for the installation of a roof on a building owned by the Tribe
 - The contract contained an arbitration clause that called for the arbitration of disputes, the application of Oklahoma law, and the enforcement of arbitral awards in any court having jurisdiction
 - C&L brought an action against the Tribe when it retained another company to install the roof, and an arbitration award was entered against the Tribe
 - C&L filed suit in the District Court of Oklahoma County to enforce the arbitration award
 - The Court held that the Tribe had waived its immunity because it had agreed to arbitration and entry of judgment upon an arbitration award in Oklahoma courts



Waiver of Immunity for Participation in 8(a) Program

- SBA's 8(a) Business Development Program: business assistance program for small disadvantaged businesses
- 13 C.F.R. § 124.109(c): lists the requirements Tribal entities to participate in the 8(a) Program
- 13 C.F.R. § 124.109(c)(1) states:
 - The concern's articles of incorporation, partnership agreement or limited liability company articles of organization must contain express sovereign immunity waiver language, or a "sue and be sued" clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's programs including, but not limited to, 8(a) BD program participation, loans, and contract performance



Waiver of Immunity for Participation in 8(a) Program

Rassi v. Federal Program Integrators, LLC,
69 F.Supp.3d 288 (D. Maine 2014)

- Employee alleged that she complained about illegal conduct in the performance of 8(a) contracts and was subject to retaliation in violation of the False Claims Act
- Employee also alleged that she was discriminated against on the basis of her race in violation of Title VII of the Civil Rights Act
- She worked as an accountant for Penobscot Indian National Enterprises (“PINE”) and its wholly-owned subsidiary Federal Program Integrators, LLC (“FPI”), and sued both of them



Waiver of Immunity for Participation in 8(a) Program

Rassi v. Federal Program Integrators, LLC,
69 F.Supp.3d 288 (D. Maine 2014) (cont'd)

- Employee acknowledged claim against PINE should be dismissed, but asserted that FPI didn't have sovereign immunity because it was a separate legal entity from Penobscot Indian Nation
- The court concluded that FPI had sovereign immunity, and turned to the question of whether it had waived its immunity



Waiver of Immunity for Participation in 8(a) Program

Rassi v. Federal Program Integrators, LLC,
69 F.Supp.3d 288 (D. Maine 2014) (cont'd)

- FPI's operating agreement included the "sue and be sued" language required by 13 C.F.R. § 124.109(c)(1):
 - The Company may sue and be sued in any of the United States Federal Courts, which are hereby designated to be among the courts of competent jurisdiction, for all matters relating to SBA's program, including, but not limited to, 8(a) program participation, loans, and contract performance.... This waiver is granted solely for the purposes required by 13 CFR § 124.109(c)(1), and shall not be interpreted to grant any rights to parties other than those intended by this regulation



Waiver of Immunity for Participation in 8(a) Program

Rassi v. Federal Program Integrators, LLC,
69 F.Supp.3d 288 (D. Maine 2014) (cont'd)

- The court held that 13 C.F.R. § 124.109(c)(1) was broad enough to cover the employee's False Claims Act and discrimination claims because they were "matters" that related to FPI's 8(a) program participation
- The court held that FPI waived its immunity by incorporating the "sue and be sued" clause as required by 13 C.F.R. § 124.109(c)(1)
- The court stayed the proceedings so the Tribal court could determine whether it had jurisdiction over the case



Waiver of Immunity for Participation in 8(a) Program

Graham v. Applied Geo Technologies, Inc.,
593 F.Supp.2d 915 (S.D. Miss. 2008)

- Employee brought suit against Applied Geo Technologies (“AGT”), a for-profit Tribal entity established by the Mississippi Band of Choctaw Indians to compete for federal contracts as a prime contractor
- Employee alleged that he was subject to racial discrimination and retaliation in violation of Title VII and 42 U.S.C. § 1981
- The court primarily addressed the issue of whether the employee was required to exhaust Tribal remedies in the courts of the Mississippi Band of Choctaw Indians to they could determine whether they had jurisdiction over the claims
- The court concluded that the employee had to exhaust Tribal remedies



Waiver of Immunity for Participation in 8(a) Program

Graham v. Applied Geo Technologies, Inc.,
593 F.Supp.2d 915 (S.D. Miss. 2008) (cont'd)

- The employee argued that the Tribal exhaustion doctrine did not apply because the Choctaw Tribal Council had waived AGT's sovereign immunity
- Ordinance 59-A, which established AGT, stated:
 - Applied Geo Technologies, Inc., as a corporate entity, can sue and be sued in its corporate name in courts of competent jurisdiction for all matters relating to Small Business Administration Programs engaged in by the Corporation, including but not limited to the U.S. District Courts, Southern District of Mississippi
- The court held that the waiver of immunity did not apply to the employee's discrimination and retaliation claims because they were not related to AGT's SBA programs within the meaning of the waiver



Differences Between *Rassi* and *Graham*

Rassi v. Federal Program Integrators, LLC

- False Claims Act: employee alleged that she had complained that FPI had made misrepresentations to the federal government, saying that it was performing the required amount of direct labor under the contracts as required by the 8(a) Program, when it was not
- Racial discrimination: employee alleged that FPI violated SBA anti-discrimination regulations in the performance of its 8(a) contracts. 13 C.F.R. §§ 112.4 and 112.7
- Rassi's allegations were directly related to the 8(a) Program



Differences Between *Rassi* and *Graham*

Graham v. Applied Geo Technologies, Inc.

- Racial discrimination: employee alleged that AGT hired a less-qualified Caucasian woman from outside the company as its senior quality manager without giving him notice of the position or an opportunity to apply
- Retaliation: employee alleged that after he notified AGT of its discrimination and filed an EEOC charge, he suffered adverse personnel actions
- Graham's allegations do not appear to have been directly related to AGT's participation in the 8(a) Program



Sovereign Immunity and Indemnification

Grand Canyon Skywalk Development v. Steele (D. Nev. Nov. 30, 2015)

- Hualapai Indian Tribe hired Scutari & Cieslak Public Relations, Inc. to promote a tourist attraction in the Grand Canyon
- The developer of the attraction filed a complaint against S&C, alleging that it had defamed the developer
- S&C filed a third-party complaint against the Tribe for indemnification



Sovereign Immunity and Indemnification

Grand Canyon Skywalk Development v. Steele (D. Nev. Nov. 30, 2015) (cont'd)

- The contract between S&C and the Tribe had an indemnification provision under which the Tribe agreed to:
 - indemnify and hold [S&C] harmless with respect to any claims or actions instituted by third parties [that] result from the use by [S&C] of material furnished by [the Tribe] or where material created by [S&C] is substantially changed by [the Tribe]
- S&C argued that the Tribe had waived sovereign immunity by agreeing to the indemnification provision and to have the contract governed by Arizona law



Sovereign Immunity and Indemnification

Grand Canyon Skywalk Development v. Steele (D. Nev. Nov. 30, 2015) (cont'd)

- The court granted the Tribe's motion to dismiss on the basis of sovereign immunity
 - The Tribe had not agreed to any provision that authorized the court to resolve the dispute
 - The choice of law clause only identified the body of law that defined the parties' obligations
 - There is a strong presumption against waiver of sovereign immunity, and it cannot be implied, but must be "unequivocally expressed"



Labor & Employment Issues in General

- Express Exemption v. Silent Statutes or Statutes of General Applicability
 - Most statutes are silent as to applicability to Tribes and Tribal entities
 - When Tribes are not mentioned in the statute, they still may apply (“Tuscarora Rule”)
- Split in legal opinion as to applicability
- Location is key
- Contract Requirements



Tribal Commercial Activities

- More likely to be subject to federal labor and employment laws of general applicability
- Government contracts
 - Waive rights when agree to the terms of the contract
 - Despite Tribal exemptions from enforcement of certain employment laws



Specific Employment Laws Applicable to Federal Contractors

- Executive Order 11246 – prohibits employment discrimination on the same basis as Title VII (plus gender identity and sexual orientation) and requires affirmative action
- Section 503 of the Rehabilitation Act – prohibits disability discrimination and requires affirmative action
- Vietnam Era Veterans' Readjustment Act of 1973 – prohibits discrimination against protected veterans and requires affirmative action
- Fair Pay Safe Workplaces – Final Rules Pending
- Equal Pay and Pay Transparency
- Enforced by OFCCP



Federal Employment Laws: Tuscarora Rule and Progeny

- Express exemptions
- Statutes of general applicability
- Except (in some circuits):
 - Law affects right to self-govern;
 - Application would abrogate rights guaranteed by treaty; or
 - Proof that Congress intended law not to apply
- Addressing the split: distinction between Tribes as employers in purely governmental functions and Tribal enterprises engaged in commercial activities

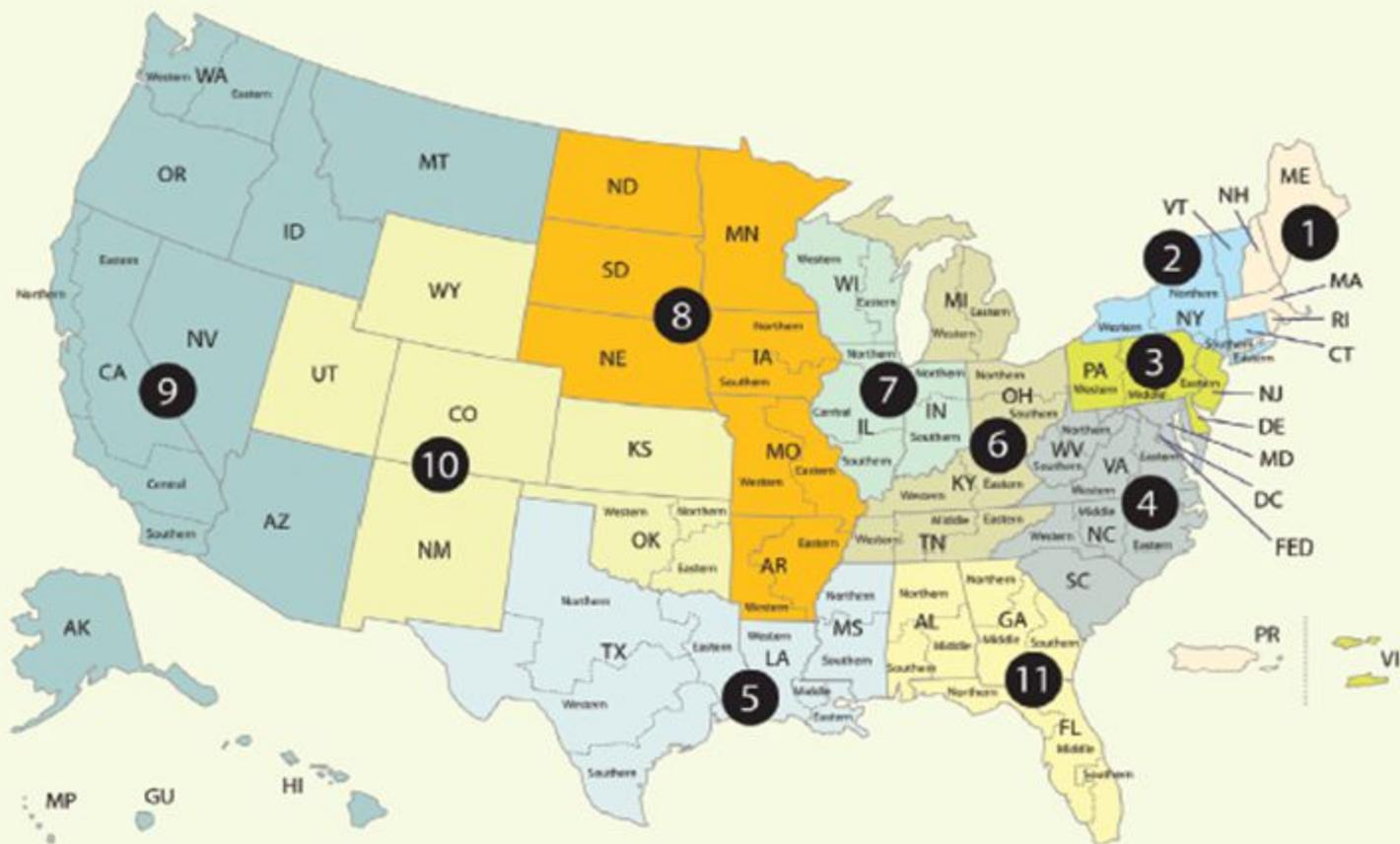


Geographic Boundaries of U.S. Courts of Appeals and U.S. District Courts

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SOURCE: Administrative Office of the United States Courts.

The map shows how the 94 U.S. district courts and 13 U.S. courts of appeals exist within the court systems of the 50 states and the District of Columbia



- ▶ 1 Puerto Rico
- ▶ 3 Virgin Islands
- ▶ 12 DC Circuit Washington, D.C.
- ▶ 13 Federal Circuit Washington, D.C.
- Boundaries for U.S. District Courts
- _____ Boundaries for U.S. Courts of Appeal (Circuits)

The Civil Rights Act (Title VII)

- Prohibits employment discrimination on the basis of race, color, national origin, religion, or gender
- Enforced by Equal Employment Opportunity Commission
- Indian Preference Exemption
 - Permits preference on or near reservations (60 miles is EEOC test)
- Tribes expressly exempt by statute
- What is an “Indian Tribe” for the purpose of the statute?
- CAUTION: federal contracts and state law



Americans With Disabilities Act

- Prohibits discrimination on the basis of a mental or physical impairment that substantially affects a major life activity and requires reasonable accommodations for qualified individuals
- Indian Tribes expressly exempt by statute
- Caution: Title III
 - Creates private right of action against those places of public accommodation who fail to accommodate
 - Does not exclude Tribes, but:
 - 11th Cir. found no right of action against tribe in non-Indian forum because no express waiver of Tribal immunity
 - Attorney General can still compel Tribe's compliance



Age Discrimination in Employment Act (ADEA)

- Prohibits discrimination in employment on the basis of age
- Not applicable to Tribes: 2nd, 8th, 9th, 10th Cir.
 - Require a clear showing of legislative intent to curtail Tribal rights
- Applicable unless contrary showing is made: 9th and 7th Cir.



Fair Labor Standards Act (FLSA)

- Regulates minimum wages, overtime payments, and equal payment regardless of gender and employment of children
- Applicable unless contrary showing is made.
 - Statutes of general applicability generally apply
 - *Snyder v. Navajo Nation*, 371 F3d 658 (9th Cir. 2004)
 - *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F3d 490 (7th Cir. 1993)
 - *Chao v. Matheson*, No. C-06-5361 (W.D. Wash., 2007)
- Type of business and place of work matters



Occupational Safety and Health Act (OSHA)

- Statute of General Applicability
- Regulations state it applies to Tribes
- Circuit Split



National Labor Relations Act (NLRA)

- Permits employees to engage in protected, concerted activities and to form unions
- Applicability to Tribes and Tribal entities currently a hot topic
- Applies to private employers operating on or near reservations
- Statute of General Applicability
- But specifically exempts the United States or a wholly-owned government corporation



National Labor Relations Act (NLRA) (cont'd)

- NLRA does not apply – *NLRB v. Pueblo of San Juan*, 276 F3d 1187 (10th Cir. 2002)
 - Pueblo retained sovereign immunity to prohibit agreements requiring membership in a labor organization as a condition of employment
- NLRA Applies – *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306 (D.C.C. 2007)
 - NLRA applies to casino on reservation even though wholly owned and operated by Tribe and wholly on reservation. Operation of casino is not an exercise of self-governance or a governmental function. Casino is a commercial enterprise, employing non-Indians and catering to non-Indians
- Pending Legislation: Congress currently considering legislation to exempt Tribes from the NLRA



Family and Medical Leave Act

- Requires employers to grant eligible employees up to 12 weeks of unpaid leave for family and medical reasons
- Secretary of the Department of Labor takes the position that it applies to Tribes (60 Fed. Reg. 2181 (Jan. 6, 1995))
- Currently no court decisions regarding applicability to Tribes



Employee Retirement Income Security Act (ERISA)

- Federal statute designed to protect retirement and welfare-benefit plans
- No employer requirement to establish a plan
- Not applicable to Tribes IF plan is solely for Tribal employees employed in traditional government roles (“governmental plan”)



Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)

- Provides continuation of health care coverage after termination of employment
- Not applicable to insurance plans maintained by Tribes if benefit plan covers solely Tribal employees in traditional government roles
- Applicable to insurance plans that cover employees in commercial Tribal enterprises



Pension Protection Act of 2006

- Designed to protect retirement plans and welfare-benefit plans
- Section 906 specifically makes it applicable to Tribes engaged in commercial activities



State Employment Laws

- General rule: state employment laws do not apply to Tribal employers operating on reservations
 - Specific requirements regarding unemployment compensation
- State contracts: comply with state statutory provisions agreed to in the contract
- Conflict between state or federal law and Tribal law – case by case analysis



Tips for the Tribal Employer

- Maintain a personnel manual
 - Memorializes policies and expectations
 - Examine policy on Tribal preference, overtime, workers' compensation and federal contractor requirements, at-will or contract employment
 - Failure to maintain policy could increase liability
 - Consider whether to include consent to Tribal court jurisdiction and information about sovereign immunity



Questions?

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