

Building Bridges of Opportunity

RES2020

RESERVATION ECONOMIC SUMMIT

MARCH 1-5, 2020 | LAS VEGAS, NV

THE REACH OF TRIBAL PREFERENCE AND EQUAL EMPLOYMENT OPPORTUNITY LAWS FOR TRIBALLY OWNED ENTITIES

Presented by Nichole Atallah,
Matt Feinberg and Niki Ramirez
March 4, 2020



Nichole Atallah, Partner
PilieroMazza PLLC
natallah@pilieromazza.com
(202) 857-1000



Niki Ramirez, Founder and
Principal Consultant
HR Answers LLC
nramirez@hranswers.org
(602) 715-1300



Matt Feinberg, Partner
PilieroMazza PLLC
mfeinberg@pilieromazza.com
(202) 857-1000

Happening Today...

- When sovereign immunity can protect a company against discrimination and harassment claims
- What is a tribal preference policy and how should it be used
- How to handle employees that might be subject to different legal standards
- Special considerations for entities contracting with federal or state governments

What is Sovereign Immunity

- A legal concept that means that a sovereign nation cannot be held legally accountable to another
- Generally applies to the nation itself
- But what happens when the nation “owns” commercial entities or operates on land that is not of that nation?

Tribal Sovereign Immunity

- 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
- Tribal entities may also be entitled to sovereign immunity
- *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998)

Waiver of Immunity

- Courts have held that there is a presumption favoring Tribal sovereign immunity and against waiver
- Tribal entities may waive immunity so they can enter into commercial contracts
- Waiver must be:
 - ✓ Congress by Law
 - ✓ Tribe or Tribal Entity by Contract
 - ✓ Must be express waiver

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

Considerations

- How broad is the contract language?
- Is there a choice of venue as opposed to simply a choice of law?
- Does the claim relate to that language?
- Is there a law that expressly addresses immunity?
- What jurisdiction am I in?

Labor & Employment Issues

- 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

Federal Employment Laws:

- 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”)
- 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

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

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

Specific Employment Laws Applicable to Federal Contractors

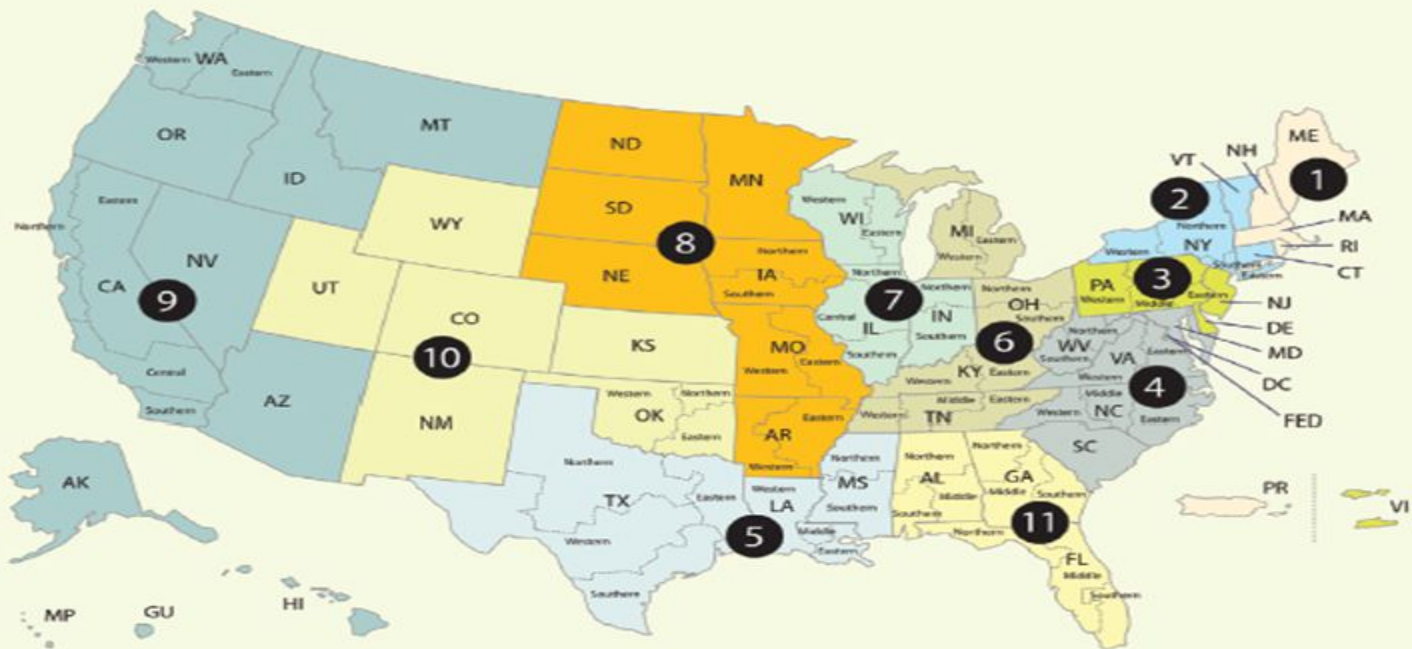
- Executive Order 11246 – prohibits employment discrimination on the same basis as Title VII (plus gender identity and sexual orientation) and requires affirmative action
- Section 503 of the Rehabilitation Act – prohibits disability discrimination and requires affirmative action
- Vietnam Era Veterans'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

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

8

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)

Anti-Discrimination Laws

Q) Can an employee file an EEOC charge against the Company when it is tribally-owned?

Part 2: Does it matter if employment is on or off of tribal land?

Anti-Discrimination Laws



Anti-Discrimination: the details

Tribes Expressly Exempt

- Title VII
- Americans with Disabilities Act
- BUT Beware of Waiver of Immunity and State Law

General Applicability

- Require a clear showing of legislative intent to curtail Tribal rights
- FLSA (Applies unless contrary showing is made)
- NLRA
- ADEA

Not applicable to Tribes: 2nd, 8th, 9th, 10th Cir. Applicable unless contrary showing is made: 9th and 7th Cir.

Alaska Native Corporations

- Like Tribes, ANCs are Native American Organizations
- Both are self-governed by Native Americans for their Native American members or shareholders
- Both may form subsidiary entities to engage in business
- BUT
 - ANCs are “for-profit” corporations chartered under state law
 - ANCs are not “tribal entities and lack sovereign immunity.

Alaska Native Corporations

- Similar to Tribes, ANCs fall from the definition of an “employer” under Title VII of the Civil Rights Act of 1964
- Applies to ANCSA corporations and related partnerships, joint ventures, trusts, or affiliates in which an Alaska Native Corporation owns not less than twenty-five percent of the equity
- Title VII’s definition of employer incorporates the ANCSA exemption
- Any law that adopts Title VII’s definition of employer exempts ANCs

What about an ANC?

Not Exempt

- Americans with Disabilities Act
- Age Discrimination in Employment
- Equal Pay Act
- FMLA
- FLSA
- Alaska State Law (except for AN Preference)

Maybe Exempt?

- The Civil Rights Act of 1866, 42 U.S.C. § 1981 (10th Cir. says exempt but not the 4th)

Anti-Discrimination

Q) What initial steps should I take if someone complains of discrimination in the workplace?

Anti-Discrimination Laws

Q) What are best practices in facilitating employee accommodations?

Tribal Preference

- Title VII prohibits employment discrimination on the basis of race, color, national origin, religion, or gender
- Indian preference exemption
 - Permits preference for tribal members working on or near reservations (60 miles is EEOC test)
 - First consideration for all employment, training, contract, subcontracting and business opportunities
 - Tribe must be recognized at state or federal level
 - Only members of own tribe unless no qualified candidates and then other tribes
 - Each tribe is different

State Employment Laws

- General rule: state employment laws do not apply to Tribal employers operating on reservations
 - Specific requirements regarding unemployment compensation
- Look at state law
- 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

- Look at Your Agreements
 - Do they include waivers?
 - Consider whether to include consent to Tribal court jurisdiction and information about sovereign immunity
- 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
 - Employees subject to different laws or rules

Questions?

Nichole Atallah

natallah@pilieromazza.com

Matt Feinberg

mfeinberg@pilieromazza.com

Niki Ramirez

nramirez@hranswers.org