Federal Employment Laws Impact Tribal Employers

by Kevin J. Allis

Tribal employers should find the recent court ruling in San Manuel Indian Bingo & Casino v. National Labor Relations Board instructive on several fronts. Clearly, becoming familiar with the nuances of the National Labor Relations Act is required, but the case also serves as a wake up call for tribal employers to examine the applicability of other federal employment laws. Tribal employers should review federal employment laws, determine which apply, and ensure that all tribal laws, ordinances, regulations, or policies and procedures provide comparable protections for the existing workforce.

Federal Laws NOT Applicable to Tribal Employers

Although few and far between, there are a few federal employment laws tribal employers do not have to worry about. In each case, Indian tribes are expressly excluded from the definition of “employer.”

Title VII of the Civil Rights Act of 1964 (Title VII)

Title VII prohibits discrimination in employment because of race, color, sex (including pregnancy), national origin, and religion. Title VII applies to federal, state, and local governments, and to private employers. However, as mentioned, Indian tribes, their governments, and their tribal enterprises are excluded from the Act.

American with Disabilities Act (ADA)

Title I of the ADA seeks to ensure that individuals with disabilities will be treated as equals and afforded the ability to compete in the workplace with those not considered disabled. The law prohibits employers from treating disabled employees differently from those not disabled, and requires employers to make alterations, called “accommodations,” to the working conditions of disabled employees. Although Title I of the ADA applies to all private employers, and state and local governments with 15 or more employees, Indian tribes and their governments are excluded from the definition of employer in Title I of the ADA.

Title II covers the Act’s applicability to state and local government run programs, services, and activities. ADA’s Title II, which specifically regulates state and local governments, makes no reference to “Indian Tribes” in defining public entities. The exclusion of tribal governments is no mistake. Congress’ recognition of tribal sovereignty explains why tribal governments are not included in Title II of the ADA.

Finally, ADA’s Title III causes some concern. This portion of the ADA requires places of public accommodation to be accessible to people with disabilities. Although there is no mention of Indian tribes, one federal appellate court has ruled that Title III can apply to public accommodations run by Indian tribes. The court held that Congress intended Title III to be a general statute of applicability, and as mentioned earlier in this article, such statutes have been determined by the federal courts to apply to Indian tribes. Therefore, although exempt from the mandates of Title I and II, an Indian tribe is not exempt from the public access provisions of the ADA.

Worker Adjustment and Retraining Notification Act (WARN Act)

The WARN Act requires employers with 100 or more full-time employees to give their workforce and local government officials a 60-day advance notice of plant closings or mass layoffs. However, as with Title VII, and Title I and II of the ADA, Indian tribes are exempt from the definition of employer.

Federal Laws Applicable to Tribal Employers

Fair Labor Standards Act (FLSA)

The FLSA establishes employment requirements regarding minimum wage, overtime compensation, and child labor. An employer is subject to the FLSA if it has annual gross sales of at least $500,000, and has two or more employees engaged in interstate commerce on a regular basis. This activity would include producing, packaging, or warehousing goods for interstate commerce, or the handling or selling of goods or materials originating out of state.

Under the FLSA, overtime pay is one and one-half times an employee’s regular rate of pay, and the employee is to receive overtime compensation for each hour worked over 40 in a workweek. Additionally, even if an employee works overtime that is unauthorized, or works such hours without the employer’s knowledge, the employer must pay the overtime at the appropriate overtime rate.

Certain exemptions from the FLSA’s overtime requirements exist. The most common exemptions are for employees classified as executive, administrative, or professional. However, specific requirements must be satisfied for an employer to classify an employee in any one of these categories.

Regarding child labor, although exceptions exist, as a general rule, employers may not hire children until they

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are fourteen years old, and then various restrictions are placed on their employment until they reach the age of eighteen.

A federal appellate court recently confirmed that the FLSA applies to tribal business on tribal land. The facts of the case concerned the failure to pay overtime wages to employees. In so finding, the court followed much of the same reasoning as the court in *San Manuel Indian Bingo & Casino*, which held that the National Labor Relations Act is a law of general applicability that applies to tribal enterprises located on tribal property.

**National Labor Relations Act (NLRA)**

One of the most recent examples of the ill conceived notion that statutes of general application do not exclude tribal commercial enterprises is the *San Manuel Indian Bingo & Casino* ruling. Prior to this ruling, the National Labor Relations Board, along with the federal courts, had long recognized that the National Labor Relations Act, which neither expressly applies to Indian tribes nor exempts them from its coverage, does not apply to tribal enterprises that are owned by the tribe, directed by tribal council, and are located on reservation lands. However, in *San Manuel Indian Bingo & Casino*, both the Board and the federal court changed their precedent, and found jurisdiction on tribal lands.

**Family and Medical Leave Act (FMLA)**

The FMLA requires private employers, federal civil service employees, state and local governments, with 50 or more employees to provide up to 12 weeks per year of unpaid family and medical leave to eligible employees, and to restore those employees to the same or an equivalent position upon their return. The Act allows eligible employees, male or female, to take leave for (1) the birth, adoption, or the placement of a child in foster care; (2) the care of seriously ill child, spouse or parent; or (3) the employee’s own serious illness.

Although the statute makes no mention of its applicability to Indian tribes, the Secretary of Labor has taken the position that the FMLA applies to Indian tribes. Additionally, in *Sharber v. Spirit Mountain Gaming, Inc.*, a federal appellate court did not dismiss a claim brought by an employee against a tribal casino under the FMLA, but instead, determined that the individual must first seek remedy in tribal court before filing an appeal in the federal court system. Although there is no clear decision that subjects Indian tribes to the FMLA, tribal employers are well advised to respect the FMLA’s mandates, preferably by drafting and enacting a tribal ordinance addressing these concerns.

**Employee Retirement Income Security Act (ERISA)**

The Employee Retirement Income Security Act of 1974 sets minimum standards for most voluntarily established pension and health plans in private industry, and provides protections for individuals in these plans. ERISA requires plans to provide participants with plan information including important information about plan features and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans; and gives participants the right to sue for benefits and breaches of fiduciary duty.

A federal appellate court has held that the application of ERISA to pensions for tribal employees does not interfere with tribal self-governance. Although the tribe argued that ERISA must give way to a tribal pension plan ordinance, the court rejected the argument, again relying on the
notion that a statute of general application applies to Indian tribes and their businesses, unless the federal law encroaches on exclusive rights of self-governance, abrogates treaty rights, or was intended by Congress not to apply to Indians. Since none of these exceptions applied, the court held ERISA applied.

**Age Discrimination in Employment Act (ADEA)**

The ADEA prohibits discrimination in hiring, promotion, assignment, compensation, discharge, and in the working environment against persons who are age 40 and over. The ADEA does not prohibit age discrimination applied to individuals under the age of 40.

Indian tribes are not excluded from the definition of employer. Although some circuits have viewed this in favor of Indian tribes, given the trend within the courts, this treatment can no longer be expected. Although in the case *EEOC v. Karuk Tribe Housing Authority* the court dismissed an EEOC ADEA claim made on behalf of a tribal employee against a tribal agency, it was based on very narrow facts. The matter involved a housing function of tribal government, most employees were tribal members, nearly all the tenants were tribal members, and the charging party was a tribal member.

Since the *Karuk Tribe Housing Authority* case involved very special facts intimately tied to tribal self-governance, tribal employers should respect the protections articulated in the ADEA and enact an appropriate tribal ordinance.

Since it is clear that the federal courts are more willing to find federal labor and employment laws applicable to Indian tribes, tribal governments must proactively exercise their ability, as a sovereign, to draft, enact, and enforce tribal law that addresses sensitive workplace issues.

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