



Drafting Tribal Workplace Laws – 7 Tips to Protect Tribal Business and Sovereignty

Insights

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Tribal nations face unique opportunities and challenges in regulating their employment relationships. In addition to maintaining government workforces like their counterparts in the federal and state systems, they employ countless Native and non-Natives in their commercial endeavors and support their members in employing many more. Indeed, tribal public and commercial entities are the largest employers in several regions throughout the country. At the same time, tribes know the constant struggles to apply their laws to non-Natives and avoid being dragged into federal court. By drafting labor and employment codes with care, tribes can support economic development, protect their members, and expand their sovereign right to regulate reservation affairs without federal intrusion. The follow seven tips can help them do so:

1. **Consider the special needs of significant tribal employers.** While tribal economies are diverse, they often include businesses that warrant special consideration because of their size or nature. For example, some tribes have set special requirements for union observers at their gaming facilities. Or tribes may wish to adopt different overtime regulations for fish and game workers, as many states have. Tribes often have closer relations to their commercial employers than other governments and can draw on the expertise of those employers.
2. **Providing community-specific employee protections.** Tribes can provide employees who work for their enterprises or on their reservations protections beyond those accorded by state or federal law. For example, tribes can enforce higher minimum wages to further their members' economic welfare or make their enterprises particularly attractive to applicants. They can prohibit discrimination on the basis of categories not recognized by other systems, such as marital status, political affiliation, or tribal membership. And they can provide additional bases for leave, such as tribal cultural events.
3. **Provide a tribal forum.** One of the best ways to prevent employees from dragging tribes or tribal entities into federal court or federal administrative proceedings is to provide such fora within the tribal system. Tribes have done so by creating causes of action that can be heard only in tribal court, creating tribal equivalents to the Equal Employment Opportunity Commission, enacting special courts for employment disputes, or mandating large employers maintain informal dispute resolution options.
4. **Affirm tribal jurisdiction through legislative findings.** Tribes have jurisdiction to apply their law to non-tribal members' disputes that threaten tribal welfare or that arise from the non-

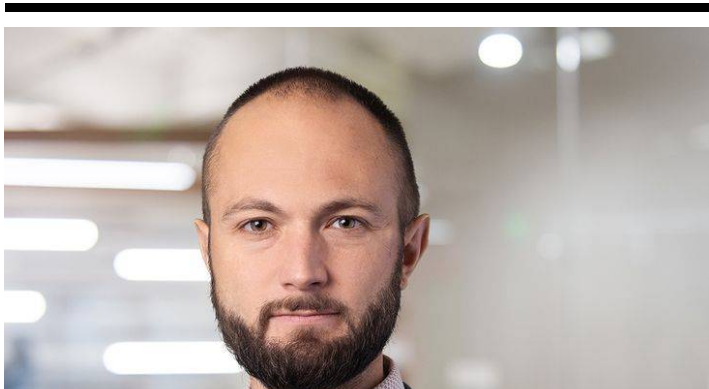
members' consensual relations with members or the tribe. It is important in drafting tribal labor and employment codes to address these bases of jurisdiction. An exemplar legislative provision might find that employment relations directly affect tribal welfare because such relations affect the tribe's economic development and the distribution of its resources. Such a provision might also affirm that when a non-member works for a tribal entity, or a non-tribal company employs a tribal member, they have entered a consensual relation subject to tribal jurisdiction.

5. **Affirm that employment regulation is an intramural affair.** Generally applicable federal employment laws such as the Fair Labor Standards Act do not apply to tribes if they interfere with a tribe's intramural affairs. Courts have held that commercial employment regulations are generally not an intramural affair but may become so if already regulated by tribal law.
6. **Affirm treaty rights to preclude federal law.** Similarly, federal employment laws will not apply to tribal employers if precluded by a treaty right. Many treaties provide that tribes will have exclusive use of their reservation and the right to exclude others, including certain federal officers. Courts have held, for example, that this may allow tribes to refuse to permit investigators from the Occupational Safety and Health Administration on to the reservation. Tribes can achieve this result by carefully analyzing such treaty provisions and interpreting them in their labor and employment codes.
7. **Right to Work Laws.** One of the most dynamic issues in tribal labor law is whether the National Labor Relations Act applies to tribes. The federal appeals courts are split on the issue. In circuits where that Act has been held to apply, tribes can still enact "Right to Work" laws to ban Union Security Agreements that would require workers to join a labor union in order to keep their jobs.

Conclusion

In enacting such laws to bolster tribal economies and sovereignty, tribes should consider consulting counsel well-versed in both labor and employment law and the concerns of Indian Country. Fisher Phillips lawyers have helped draft tribal labor and employment laws and are available to assist. If you have any questions, contact your Fisher Phillips lawyer or the author of this Insight. We will continue to provide guidance in this field when warranted so make sure to [sign up for our Insight system](#) to ensure you receive the latest news in your inbox.

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