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APPLICABILITY OF FEDERAL AND STATE EMPLOYMENT LAWS IN INDIAN COUNTRY

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I. Introduction

As Indian tribes continue to develop, own and operate business enterprises, the number of employees dramatically increases. Many tribes find themselves in a previously unfamiliar role – that of a large-scale employer with hundreds, perhaps thousands, of new employees. While all employers face the difficult task of keeping abreast of changing labor and employment laws, the challenge is particularly daunting for tribes. The application of labor and employment laws is not merely an inconvenience, as it might be for nontribal employers but, in some cases, an infringement of tribes’ sovereign right of self-government. Complicating the matter further are the complex, often contradictory decisions of the federal courts with respect to the applicability of specific laws to tribes. The purpose of this memorandum is to explain the legal principles that determine whether a law might apply to tribes and to indicate how the various courts have applied these principles in connection with specific laws.

II. Tribal Sovereignty and the “Tuscarora Rule”

A. The Rule

The status of Indian tribes within the American political system is complex, Justice Marshall’s formulation in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980) is perhaps as serviceable as any other:

Long ago, the Court departed from Mr. Chief Justice Marshall's view that "the laws of [a State] can have no force" within reservation boundaries, Worcester v. Georgia, 6 Pet. 515, 561 (1832). See Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 481-483 [p*142] (1976); New York ex rel. Ray v. Martin, 326 U.S. 498 (1946); Utah & Northern R. Co. v. Fisher, 116 U.S. 28 (1885). At the same time, we have recognized that he Indian tribes retain "attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 557 (1975). See also United States v. Wheeler, 435 U.S. 313, 323 (1978); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978). As a result, there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members. The status of the tribes has been described as "'an anomalous one and of complex character,'" for, despite their partial assimilation into American culture, the tribes have retained "a semi-independent position . . . , not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973), quoting United States v. Kagama, 118 U.S. 375, 381-382 (1886).

Most federal labor and employment laws are silent as to their applicability to tribal employers. As a result, the determination as to which laws apply to tribes has, for the most part, been left up to the courts. In Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960), the Supreme Court held that the Federal Power Commission had the authority pursuant to the Federal Power Act, to condemn land owned in fee simple by the Tuscarora Indian Nation upon payment of just compensation. Courts have frequently cited Tuscarora as establishing a rule that federal laws of general applicability apply to Indians in Indian country. Donovan v. Coeur d’Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985). Smart v. State Farm Ins. Co., 868 F.2d 929 at 932-933 (7th Cir. 1989); Florida Paraplegic Association v. Miccosukee Tribe of Indians, 166 F.3d 1126 (11th Cir. 1999); EEOC v. Fond du Lac Heavy Equipment, 986 F.2d 246 (8th Cir. 1993); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2nd Cir. 1996). But see, NLRB v. Pueblo of San Juan, 276 F.3d 1185 (10th Cir. 2000), aff’d en banc 280 F.3d 1278 (10th Cir. 2002) (Tuscarora limited to “issues of ownership, not with questions pertaining to the Tribe’s sovereign authority to govern the land.”)

According to the interpretation of Tuscarora first adopted by the Ninth Circuit Court of Appeals and now followed by several others, a federal statute of general applicability does not apply to a tribe if the statute specifically excludes Indian tribes or, if the statute is silent on the issue of applicability to Indian tribes, one of the following conditions is met:

1. The law touches exclusive rights of self-governance in purely intramural matters;
2. The application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or
3. There is proof by legislative history or some other means that Congress intended that the law not apply to Indians on their reservations.

Donovan v. Coeur d’Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985). See also, United States v. Funmaker, 10 F.3d 1327, 1330-31 (7th Cir. 1993); Smart v. State Farm Ins. Co., 868 F.2d 929 at 932-933 (7th Cir. 1989); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2nd Cir. 1996). Florida Paraplegic Association v. Miccosukee Tribe of Indians, 166 F.3d 1126 (11th Cir. 1999); EEOC v. Karuk Tribe Housing Authority, 260 F.3d 1071 (9th Cir. 2001).

B. Exclusive Rights of Self-governance in Purely Intramural Matters

While there may be rare cases in which tribes avoid federal laws based on the second and third criteria of the Coeur d’Alene test, for most situations the key will be whether the application of the law would touch on “exclusive rights of self-governance in purely intramural matters.” In its
decision in *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1080-81 (9th Cir. 2001), the Ninth Circuit Court of Appeals discussed the relevant considerations:

The Housing Authority thus functions as an arm of the tribal government and in a governmental role. It is not simply a business entity that happens to be run by a tribe or its members, but, rather, occupies a role quintessentially related to self-governance. Courts conducting "self-governance" analysis have distinguished such essentially governmental functions from commercial activities undertaken by tribes and have classified actual tribal governmental entities as aspects of "self-government," see, e.g., *Fond du Lac*, 986 F.2d at 246; *Cherokee Nation*, 871 F.2d at 937, while rejecting such a categorization for businesses that happen to be owned and operated by tribes, see, e.g., *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*., 166 F.3d 1126, 1129 (11th Cir. 1999) ("tribe run business enterprises acting in interstate commerce do not fall under the 'self-governance' exception" to *Coeur d'Alene*; the enterprise at issue "does not relate to the governmental functions of the Tribe, nor does it operate exclusively within the domain of the Tribe and its members"); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2d Cir. 1996) (OSHA has jurisdiction over a tribe owned business because the "nature of MSG's work, its employment of non-Indians, and the construction work on a hotel and casino that operates in interstate commerce — when viewed as a whole, result in a mosaic that is distinctly inconsistent with the portrait of an Indian tribe exercising exclusive rights of self-governance in purely intramural matters"); *Occupational Safety & Health Review Comm'n*, 935 F.2d at 184 (tribal employer is subject to OSHA because it "employs a significant number of non-Native Americans and sells virtually all of its finished product to non-Native Americans through channels of interstate commerce"); *Coeur d'Alene*, 751 F.2d at 1116 ("The operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government. Because the Farm . . . is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is neither profoundly intramural . . . nor essential to 'self-government.'" (quoting *Farris*, 624 F.2d at 893)).

Further, the dispute here is entirely “intramural,” between the tribal government and a member of the Tribe. See *Fond du Lac*, 986 F.2d at 249 ("The dispute is between an Indian applicant and an Indian tribal employer. The Indian applicant is a member of the tribe, and the business is located on the reservation."). It does not concern non-Karuks or non-Indians as employers, employees, customers, or anything else. See *Mashantucket Sand & Gravel*, 95 F.3d at 181 ("MSG's employment of non-Indians weighs heavily against its claim that its activities affect rights of self-governance in purely intramural matters. In general, tribal relations with non-Indians fall outside the normal ambit of tribal self-government. Furthermore, intramural matters generally consist of conduct the immediate ramifications of which are felt primarily within the reservation by members of the tribe.") (citing *Farris*, 624 F.2d at 893). The intramural nature of the dispute here is underscored by the fact that the Tribe has an established internal process for adjudicating such matters, a process of which Grant availed himself. See *Fond du
Lac, 986 F.2d at 249 ("[D]isputes regarding this issue should be allowed to be resolved internally within the tribe.").

Our conclusion is further bolstered by general acceptance of the notion that the term “tribal self-government,” or a similar term, encompasses a tribe's ability to make at least certain employment decisions without interference from other sovereigns. See, e.g., Penobscot Nation v. Fellencer, 164 F.3d 706, 709-11 (1st Cir.), cert. denied, 527 U.S. 1022 (1999) (tribe not subject to a state anti-discrimination statute in discharging a non-Indian from position as nurse in tribe-run health center); Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1188 (9th Cir. 1998) (Indian has no cause of action under Title VII against a tribal non-profit entity which "served as an arm of the sovereign tribes, acting as more than a mere business"); Great Lakes, 4 F.3d at 494-96 ("it has been traditional to leave the administration of Indian affairs for the most part to the Indians themselves"; U.S. Department of Labor had sought to investigate tribal commission for alleged violations of the Fair Labor Standards Act).

III. Application of Federal Labor and Employment Laws

A. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Acts of 1964 expressly excludes Indian Tribes from the definition of “employer(s)” who may not discriminate on the basis of race, color, religion, sex and national origin. 42 U.S.C. § 2000e(b) (1988):

(b) The term “employer” means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include

(1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or

Title VII also contains a provision which expressly sanctions the use of Indian preference by employers operating on or near reservations with respect to any publicly announced employment practice of such employer. 42 U.S.C. § 2000e-2(i) (1988). It should be noted, however, that in one case a North Dakota corporation, owned 51% by the Tribe and 49% by a Delaware corporation, did not fall within the Tribal exemption of Title VII. 718 F. Supp. 753 (D.N.D. 1989). Further, with the exception of Indian preference, non-tribal, private employers operating on or near Indian reservations must comply with the anti-discrimination provisions of Title VII.

In Dawavendewa v. Salt River Project Agricultural Improvement and Power District, 154 F.3d 1117 (9th Cir. 1998), the plaintiff brought an action under Title VII of the 1964 Civil Rights Act alleging that he was the victim of national origin and discrimination as a member of the Hopi Tribe in seeking employment in seeking a job for which there was a Navajo preference. The
Ninth Circuit Court of Appeals held that (1) the complaint stated a claim for which relief could be granted under the federal prohibition of discrimination based on national origin, and (2) Title VII’s Indian preferences exemption does not permit employer to discriminate on the basis of tribal affiliation. In a later decision in the same case, however, Dawavendewa v. Salt River, 276 F.3d 1150 (9th Cir. 2002) (“Dawavendewa II”), the Court seemed to deflate its original ruling. The Court held that the plaintiff’s claims against Salt River must be dismissed under Federal Rule of Civil Procedure 19 for failure to join the Navajo Nation, an indispensable party that could not be joined because of its sovereign immunity. The Court rejected the plaintiff’s attempt to evade the Nation’s sovereignty by suing tribal officials under the Ex Parte Young doctrine. Perhaps even more significantly, the Court expressly limited the potential impact of its earlier holding:

In Dawavendewa I, we held only that a hiring preference policy based on tribal affiliation, as described in the complaint, stated a claim upon which relief could be granted. 154 F.3d at 1124. As pointed out by the Solicitor General's amicus brief, however, we did not address the merits of the Nation's proffered legal justifications in defense of the challenged hiring preference policy. In particular, we declined to consider whether the Nation's 1868 Navajo Treaty, the federal policy fostering tribal self-governance, the NPEA, or any other legal defense justified SRP's hiring preference policy.

276 F.3d at 1158

Acknowledging cases holding that federal laws of general applicability generally apply to Indians in Indian country, the Court pointedly signals a retreat from Dawavendewa I: “In appropriate situations, federal law yields out of respect for treaty rights or the federal policy fostering tribal self-governance…. Dawavendewa cites no cases considering Title VII’s application on tribal lands generally, or explaining why an exception does not apply in this case.” 276 F.3d at 1158.

In EEOC v. Peabody Western Coal, 2010 WL 2572001 (9th Cir.), Peabody had entered into two separate BIA-approved leases, in 1964 and 1966, to mine coal at the Black Mesa Complex and Kayenta Mine on the Navajo and Hopi reservations. The 1966 lease included an employment preference for Navajo citizens. The 1966 lease provided similar preference but permitted Peabody to extend the preference to Hopis. The federal Equal Employment Opportunity Commission (EEOC) sued Peabody in June 2001, alleging that Peabody’s implementation of the Navajo employment preferences to exclude members of other tribes violated provisions of Title VII of the Civil Rights Act of 1964 that prohibit discrimination based on national origin. Title VII, the EEOC argued, permits discrimination in favor of Indians living on or near the reservation but does not permit discrimination in favor of members of particular tribes. The district court dismissed the complaint on the ground that the Navajo Nation was a necessary party that could not feasibly be joined because Title VII excludes tribes from the definition of employer. The Ninth Circuit Court of Appeals reversed, holding that (1) it was feasible to join Navajo even if no relief could be obtained from Navajo, (2) it was not feasible to join the Secretary because the U.S. Attorney General would not bring suit, (3) EEOC could pursue its claims against Peabody for injunctive relief but not for money damages, (4) in the event the
EEOC succeeds in obtaining an injunction against Peabody’s implementation of the Navajo preference provision, then Peabody and the Navajo Nation could bring a third-party claim against the Secretary of the Interior under to Administrative Procedure Act to prevent the Secretary from enforcing the lease.

**B. Americans with Disabilities Act (ADA)**

Indian tribes are also expressly excluded from the definition of employer under Title I of the Americans with Disabilities Act, which prohibits discrimination on the basis of a disability. 42 U.S.C. §§ 12101-12213 (1988). Because the exclusion language is nearly identical to the Title VII exemption provisions, the same analysis discussed above relating to Title VII will apply. The Eleventh Circuit, however, has held that tribes are subject to Title III of the ADA, relating to public accommodations, but that there is no private cause of action against tribes. Rather, only the United States Justice Department can enforce Title III against tribes. *Florida Paraplegic Assn. v. Miccosukee Tribe*, 166 F.3d 1126 (11th Cir. 1999).

In *Pearson v. Chugach Government Services, Inc.* 2009 WL 3757370 (D.Del.), the court held that a wholly owned subsidiary of the Chugach Alaska Corporation (CAC), an Alaskan Native Corporation organized under Alaska law pursuant to the Alaska Native Claims Settlement Act (ANCSA) was not only subject to the FLMA but was without sovereign immunity from suit by an employee since, according to the court, “ANCs are not federally recognized as a ‘tribe’ when they play no role in tribal governance.”

**C. Occupational Safety and Health Act (OSHA)**

The Occupational Safety and Health Act contains no express language relating to its applicability to Indian Tribes or Tribal employers. 29 U.S.C. §§ 651-678 (1988). As mentioned above, depending on recognition or lack thereof of reserved treaty rights, the Second, Tenth and Ninth Circuits have split as to the applicability of OSHA to Tribal employers. The Tenth Circuit held that OSHA did not apply to the Tribal business because it would dilute the principles of Tribal sovereignty and self-government recognized by treaty, and consequently, would abrogate such treaty provisions. *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982).

Three years after *Donovan*, the Ninth Circuit, relying on Tuscarora, held that OSHA, as a statute of general applicability, was applicable to a tribal farm. *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). The court announced three important exceptions to the “Tuscarora Rule.” A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to tribes if: (1) the law touches “exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations. A later Ninth Circuit case, a Second Circuit case and the current OSHA regulations follow *Coeur d’Alene. Department of Labor v. OSHRC*, 935 F.2d 182 (9th Cir. 1991); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2nd Cir. 1996); 29 C.F.R. § 1975.4(b)(3) (1994).
In *Menominee Tribal Enterprises v. Solis*, 2010 WL 1050273 (7th Cir.), Menominee Tribal Enterprise (MTE), an enterprise of the Menominee Tribe of Wisconsin, alleged that its saw mill was not subject to the federal Occupational Safety and Health Act (OSHA). The Seventh Circuit Court of Appeals, disagreed, holding that OSHA applied to the tribal enterprise. Applying the criteria established by the Ninth Circuit Court of Appeals in *Coeur d’Alene v. Donovan*, the Court found that (1) there was no evidence that Congress did not intend OSHA to apply to tribes, (2) there was nothing in the Tribe’s treaties that supported an exemption, and (3) notwithstanding that it was established under the Menominee Restoration Act and that its employees were tribal members, MTE did not qualify for the tribal governance exception because, according to the court, “[t]he Menominees' sawmill is just a sawmill, a commercial enterprise.”

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

The Age Discrimination in Employment Act contains no express language excluding Indian tribes from its coverage, which protects employees 40 years and older from employment discrimination. 29 U.S.C. §§ 621-634 (1988). The Eighth and Tenth Circuits have addressed the issue of the ADEA’s applicability to Tribal employers, with both holding that the ADEA does not apply. Both courts affirmed the earlier Tenth Circuit decision, *Navajo Forest Products*, and held that the ADEA did not apply to Indian Tribes because its application would dilute principles of Tribal sovereignty and self-government and violate treaty provisions. *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989); *Fond du Lac v. Heavy Equipment Construction Co.*, 986 F.2d 246 (8th Cir. 1993). The Tenth Circuit adhered to recognition of reserved treaty rights, stating that it is “extremely reluctant to find congressional abrogation of treaty rights’ absent explicit statutory language.” *Cherokee Nation*, 871 F.2d at 938 (citing *U.S. v. Dion*, 476 U.S. 734 (1986)).

**E. Employment Retirement Income Security Act (ERISA)**

The Employment Retirement Income Security Act is the federal law governing employee benefit plans and, until 2006, contained no express language regarding applicability to Tribal employers. 29 U.S.C. §§ 1001-1461 (1988). The Seventh and Ninth Circuits, and a Minnesota federal district court, have held that ERISA applies to Tribal employers. *Smart v. State Farm Insurance*, 868 F.2d 929 (7th Cir. 1989); *Lumber Industries Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991); *Prescott v. Little Six. Inc.*, 284 F.Supp. 2d 1224 (D. Minn. 2003). In reaching those decisions, the courts adopted the Tuscarora Rule as construed in *Coeur d’Alene*.

The Smart decision involved a group policy issued by a nontribal insurer to the Lac du Flambeau Band of Chippewa Indians for the Tribe’s employees at a health center owned and operated by the Tribe on its reservation. Because the Tribe was not a party, a strong case for an exception based on *Coeur d’Alene* was not made. In *Lumber Industries*, the Ninth Circuit considered the applicability of ERISA to a tribal pension plan covering employees of a tribally-owned and operated lumber mill on the Warm Spring Indian Reservation.
Until 2006, the right of tribes to offer “governmental plans” outside the scope of ERISA was hotly debated. Many tribes unilaterally offered such plans, despite a statutory definition that did not include tribes: “a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.” I.R.C. § 414(d); ERISA section 3(32). In August 2006, Congress passed the Pension Protection Act of 2006. Section 906 follows the theoretical framework of the Coeur d’Alene line of cases by permitting tribes to offer governmental plans but only with respect to tribal subdivisions and agencies.

All of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential function.)

**F. Fair Labor Standards Act (FLSA)**

The Fair Labor Standards Act requires that all employers pay each non-exempt employee the statutory minimum wage for all hours worked, and one-and-one-half times the employee’s hourly rate for all hours worked in excess of 40 in a week. 29 U.S.C. §§ 201-219 (1988). There is no express exemption for tribes.

In *Reich v. Great Lakes Indian Fish & Wildlife Comm’n*, 4 F.3d 490 (7th Cir. 1993), the Seventh Circuit affirmed the lower court’s decision to refuse to enforce a subpoena sought by the Department of Labor against GLIFWC to obtain evidence that GLIFWC violated the FLSA. While the court found that the Tribe was not exempt from the FLSA, it found the statute to be “extrinsically ambiguous” because the act exempted state and federal, but not tribal, law enforcement personnel from its overtime provisions, under circumstances where it appeared that the omission had no logic and was merely an oversight. Under these circumstances, where a central regulatory function of the tribe was involved (regulation of treaty fishing), the court would extend the law enforcement exemption to the Tribe as a matter of comity. The Court distinguished its prior *Smart* decision based upon the distinction between activities of a commercial as opposed to a governmental character. The decision is odd because the Court purported to apply the Tuscarora/Coeur d’Alene rule. Under that rule, the nature of the employment (i.e., relating to a governmental (law enforcement) function, affecting a treaty right and purely intramural) would easily have justified an exemption without regard to a novel “extrinsic ambiguity” doctrine.

In *Solis et al. v. Matheson et al.*, 2009 WL 1036083 (9th Cir. 2009), Mathesons, members of the Puyallup Tribe in Washington, owned a smoke shop on tribal trust land on the reservation. The shop’s employees and customers included Indians and non-Indians. The Department of Labor subpoenaed the Mathesons’ business records and determined they owed employees over $31,000 in overtime pay required pursuant to the Fair Labor Standards Act (“FLSA”). The Mathesons argued that the FLSA Act did not apply because, under the rule of *Donovan v. Coeur d’Alene*, federal laws did not apply where precluded by treaty provisions or where the law touches “exclusive rights of self-governance in purely intramural affairs.” The Ninth Circuit Court of Appeals disagreed, holding that (1) the intramural affairs exception did not apply because the shop was a commercial business and because the Tribe had enacted no laws regulating wages.
and hours, and (2) the treaty exception did not apply because the Tribe’s Medicine Creek Treaty did not address wages and hours, and (3) the treaty right to exclude non-members did not bar the DOL from entering the reservation to enforce the FLSA.

In *Snyder v. Navajo Nation*, 371 F.3d 658 (9th Cir. 2004), Snyder claimed that the Navajo Nation violated the Fair Labor Standards Act (“FLSA”) because tribal law enforcement officers were regularly required to work overtime and the Nation only made delayed, sporadic, and partial payments for overtime. The Ninth Circuit affirmed the district court’s dismissal on the ground that the FLSA does not apply to tribal law enforcement officers. The officers were performing a purely intramural tribal government function, the court observed, and their activities therefore fell within the exception to the general rule that federal laws of general application apply to tribes.

G. Family Medical Leave Act (FMLA)

While the Family and Medical Leave Act is silent as to its applicability to Tribal employers, 29 U.S.C. §§ 2601-2654 (Supp. V. 1993), the Secretary of Labor has adopted the *Tuscarora* Rule and taken the position that the FMLA does apply to Indian Tribes. 60 Fed. Reg. 2181 (1995). In *Chayhoon v. Chao*, 355 F.3d 141 (2nd Cir. 2004), Chayoon filed a Family Medical Leave Act (FMLA) claim against the Secretary of Labor and members of the Mashantucket Pequot Tribal Council. The Court of Appeals affirmed the District Court’s dismissal for lack of subject matter jurisdiction because the Tribe is immune from suit. The court of appeals also stated that although Chayhoon’s remedy in tribal court was limited when compared to his rights under the FMLA, only Congress could extend FMLA application to Indian tribes.

In *Myers v. Seneca Niagara Casino*, 2006 WL 2792745 (N.D.N.Y. 2006), the court held that a tribally owned casino was immune from suit under the Family Medical Leave Act, notwithstanding a reference to the Act in the Tribe’s employment policies.

In *Sharber v. Spirit Mountain Gaming, Inc.*, 343 F.3d 974 (9th Cir. 2003) 65 F. Appx. 151 (9th Cir. 2003), the 9th Circuit Court of Appeals affirmed the District Court, holding that (1) even in the absence of a pending tribal court case, the Federal District Court should abstain and give tribal courts the first opportunity to determine whether they have jurisdiction to hear actions based on the Family Medical Leave Act (“FMLA”), and (2) the tribal exhaustion requirement also applies to a determination of the Tribe’s immunity from suit. See 2003 W.L. 21147447.

In *Pearson v. Chugach Government Services, Inc.* 2009 WL 3757370 (D.Del.), the court held that a wholly owned subsidiary of the Chugach Alaska Corporation (CAC), an Alaskan Native Corporation organized under Alaska law pursuant to the Alaska Native Claims Settlement Act (ANCSA) was not only subject to the FLMA but was without sovereign immunity from suit by an employee since, according to the court, “ANCs are not federally recognized as a ‘tribe’ when they play no role in tribal governance.”

I. National Labor Relations Act (NLRA)


Reversing its previous decisions, in *San Manuel Indian Bingo and Casino and Hotel Employees & Restaurant Employees International Union, AFL-CIO, CLC and Communication Workers of America AFL-CIO, CLC, Party in Interest*, Cases 31-CA-23673 and 31-CA-23803 (June 4, 2004), the Board asserted jurisdiction over an unfair practices complaint filed by a union that was barred from attempting to organize employees of the Tribe’s casino. The Board’s decision turned on two findings. First, the Board found that under the Act’s definition of employer, tribes are not specifically excluded and therefore fall within the Board’s jurisdiction. Second, the Board found that the principles of federal Indian law supported its jurisdiction. In reaching this conclusion, the Board relied on the U.S. Supreme Court’s decision in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) as interpreted by the Ninth Circuit’s decision in *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). The Board found that none of the three *Coeur d’Alene* exceptions were present.

The NLRB’s position was upheld in *San Manuel Indian Bingo and Casino v. National Labor Relations Board*, 475 F.3d 1306, (D.C. Cir. 2007), the federal Court of Appeals for the District of Columbia ruled that the National Labor Relations Act applies to tribal casinos. The court upheld the authority of the National Labor Relations Board (NLRB) to hear charges brought by the Hotel Employees & Restaurant Employees International Union (HERE) that the Tribe had engaged in unfair labor practices in violation of the Act by denying HERE access to casino employees for purposes of organizing them. The court rejected arguments by the San Manuel Tribe and numerous tribes that had filed “friend of the court” briefs that 1) the Act’s definition of “employer” did not include tribes; 2) an exception in the Act for “any State or political subdivision thereof” should be construed as a general governmental exception available to tribes; and 3) the Indian Gaming Regulatory Act preempts the Act. Deviating slightly from the three-prong test of *Donovan v. Coeur d’Alene* adopted by the NLRB in administrative proceedings, the court determined that the U.S. Supreme Court precedents focus on whether the application of particular law would impinge on protected sovereignty and that this determination, in turn, depends on whether the tribal activities are governmental or commercial in nature. Citing the same factors relied upon by the NLRB (the commercial nature of a casino, employment of large numbers of non-members and significant non-Indian clientele), the court concluded that the application of the Act would not improperly impinge on protected tribal sovereignty interests. The Tribe’s petition for review was denied and the NLRB’s petition for enforcement was granted.
The Tenth Circuit has held that the NLRA does not preempt a Tribal government from the enactment and enforcement of a right-to-work Tribal ordinance applicable to employees of a non-Indian company who enters into a consensual agreement with the Tribe to engage in commercial activities on a reservation. *NLRB v. Pueblo of San Juan*, 228 F.3d 1195 (10th Cir. 2000). The Tenth Circuit affirmed reserved treaty rights and rejected the Tuscarora Rule. The court specifically stated that the case of *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) “limits or, by implication, overrules Tuscarora” because a Tribe has the power to exclude non-Indians. Furthermore, the court said the NLRA is not a statute of general application because it excludes states and territories and therefore, by implication, all sovereignties which are part of the United States retain their sovereign rights, including Indian Tribes.

The NLRB does not assert jurisdiction over all tribal employees. In a case released the same day as the San Manuel decision in 2004, *Yukon Kuskokwim Health Corporation*, the Board ruled that under the new analysis announced in *San Manuel Indian Bingo and Casino*, the Board would not assert jurisdiction over a regional nonprofit corporation formed to provide comprehensive health services to 58 Alaskan-Native tribes located in the Yukon-Kuskokwim Delta area. The Board’s analysis differed from that in the *San Manuel* case at the third step of the analysis, the Board’s discretionary jurisdiction. Here, the Board found that unlike a casino, the Yukon Kuskokwim Health Corporation: (1) fulfills a government function (provision of health care); (2) has a limited impact on commerce; (3) does not compete with other hospitals within the purview of the Act and (4) sees patients, 95% of whom are Native Alaskans from the Yukon-Kuskokwim Delta area. Based on these facts, the Board declined to assert jurisdiction.

In *NLRB v. Chapa De Indian Health Program, Inc.* 316 F.3d 995 (9th Cir. 2003), Chapa De Indian Health Program, Inc., was a financially independent, nonprofit organization of the Rumsey Tribe that contracted to provide health services to members of the tribe as well as others, and operated outside of the reservation. The organization argued that the National Labor Relations Act (“NLRA”) did not apply to its activities because providing health care services to tribal members was purely intramural. The court found that the activities were not exempt from provisions of the NLRA because the organization itself was not a tribe and even if the Rumsey Tribe terminated its funding of the organization, the organization would have other resources available to operate. In addition, the health care facilities were not located on Indian land, and nearly half of the patients and the nonprofessional employees involved in the controversy were non-Indian. The Ninth Circuit found that the non-Indian patients and non-Indian employees cut against the organization’s “claim that its activities touch rights of self-governance on a purely intramural matter.” None of the organization’s board members were members of the tribe and the organization did not argue that its labor relations were intramural activities related to self-governance. In these circumstances, the court held, “applying the NLRA does not clearly appear to touch on purely intramural matters that affect the right to self-governance.”

In *N.L.R.B. v. Fortune Bay Resort Casino*, 2010 WL 681663 (D.Minn.), the National Labor Relations Board (“NLRB”) sought a court order to enforce a subpoena against Fortune Bay Resort Casino (“Fortune Bay”), a wholly owned and managed governmental entity of the Bois Forte Band of Chippewa Indians (“Tribe”). The subpoena related to an allegation of unfair labor practices brought by the United Steelworkers, which contended that the Tribe had terminated an
employee for her union organizing activities in violation of the National Labor Relations Act ("NLRA"). Fortune Bay objected, arguing that the NLRB lacked jurisdiction over the Tribe and that the Tribe was immune from proceedings initiated by the union, a non-government entity. The district court rejected the Tribe’s objections, holding that (1) the NLRA is a federal law of general applicability, (2) pending further investigation, neither the treaty exception nor the “self-governance in purely intramural matter” exception articulated by the Ninth Circuit in the Coeur d’Alene case could defeat the subpoena, and (3) the Tribe’s sovereign immunity could not be interposed against a subpoena sought by an agent of the United States.

J. FICA, FUTA & Income Tax Withholding

Under the Federal Unemployment Tax Act (FUTA), “every employer” is required to pay taxes for unemployment compensation plans. I.R.C. § 3301, et seq. While the FUTA does not require participating in a State unemployment compensation plan, it encourages it by granting credits of up to 90% against the federal tax liability for amounts paid to State plans. Unless the employer participates in the State plan, its employees receive no unemployment benefits. The Federal Insurance Contribution Act (FICA) imposes taxes to support the federal social security system. Like the FUTA, the FICA imposes the tax on “every employer.” 26 U.S.C. § 3111. Both the FUTA and FICA include identically worded exceptions for a “state or any political subdivision thereof.” 26 U.S.C. §§ 3121(b)(7), 3306(c)(7) but neither statute mentions Indian tribes.

The IRS long ago rejected the argument that, for all purposes of the Internal Revenue Code, tribes should be accorded the same treatment as state and local governments Rev. Rul. 58-610, 1958-2 C.B. 815. In 1982, Congress enacted the Tribal Government Tax Status Act, 26 U.S.C. § 7871, which specifies those provisions of the tax code relating to states and municipalities that will also apply to tribes.

Courts that have addressed the issue have held that tribes are subject to the FUTA and FICA and no court has held to the contrary. In Matter of Cabazon Indian Casino v. IRS, 57 B.R. 398 (9th Cir. 1986), a Bankruptcy Appellate Panel of the Ninth Circuit rejected the Tribe’s argument that it should be exempted from the taxes as a political subdivision of the state. According to the Court, any tribal exemption from taxation, except where income is derived from tribal lands, must be express. In Sokaogon Chippewa Community Tribal Council v. United States, 959 F.Supp. 1032 (E.D. 1997), the federal district court held that members of a tribal council could be held personally liable, pursuant to 26 U.S.C. § 6672, for penalties for failing to withhold FUTA taxes. (While an argument might have been made that the omission of tribes from the FICA and FUTA was inadvertent and, therefore, triggers the “extrinsic ambiguity” analysis described by the Seventh Circuit Court of Appeals in Reich v. Great Lakes Indian Fish & Wildlife Comm’n, 4 F.3d 490 (7th Cir. 1993), the argument is undermined in the arena of taxation by 26 U.S.C. § 7871, in which Congress expressly designated certain, but not all, taxes with respect to which tribes would be given the same treatment as states.)

As part of the congressionally approved fiscal year 2001 Omnibus Appropriations Bill, a provision specifically amends the Internal Revenue Code of 1986, with respect to FUTA, to treat Indian Tribal governments the same as State or local units of governments or as nonprofit
organizations for unemployment compensation purposes. This amendment exempts tribal
governments from federal unemployment taxes. An excise tax is imposed on every employer,
with respect to individuals in their employ, equal to (1) 6.2% for years 1988 through 2007, or (2)
6.0% for 2008 and thereafter, of the total wages paid to such employee during the calendar year
with respect to such employment. I.R.C. §3301. The change allows Indian Tribes to participate
in the State unemployment compensation system on a reimbursement basis and the Tribe may
make separate elections for itself and each subdivision, subsidiary or business enterprise
chartered and wholly owned by such Indian Tribe. However, the measure recognizes that State
law may require an electing Tribe to post a reasonable payment bond or take other measures to
assure the making of payments in lieu of contributions under the revised section.

K. Worker Adjustment Retraining and Notification Act of 1988

Worker Adjustment Retraining and Notification Act of 1988 ("WARN"), 29 U.S.C. §§ 2101-
2109. WARN was enacted to protect employees from hardships resulting from plant closings
with little or no warning. It imposes notice requirements on plant owners. WARN does not
address whether Indian tribes are employers for purposes of the Act. Department of Labor rules
implementing the Act, however, expressly exempt Indian tribes.

IV. Application of State Labor and Employment Laws

A. Generally

While the “general rule” (subject to the exceptions discussed) is that federal statutes of general
applicability apply to Indians in Indian country, the reverse is true of state laws. The U.S.
Supreme Court “has consistently recognized that Indian tribes retain "attributes of sovereignty
over both their members and their territory," United States v. Mazurie, 419 U.S. 544, 557 (1975),
and that ‘tribal sovereignty is dependent on, and subordinate to, only the Federal Government,
not the States,’” Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134,
154 (1980). State jurisdiction that infringes tribal rights of self-government or federal interests is
prohibited. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 94 L. Ed. 2d 244, 107
S. Ct. 1083 (1987) (state civil regulation of tribal gaming prohibited); Bryan v. Itasca County,
426 U.S. 373, 48 L. Ed. 2d 710, 96 S. Ct. 2102 (1976); McClanahan v. Arizona Tax Commission,
411 U.S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973). “Congress has also acted consistently
upon the assumption that the States have no power to regulate the affairs of Indians on a
reservation.”

State regulatory authority may be exercised in Indian country only in limited circumstances: “It
is clear, however, that state laws may be applied to tribal Indians on their reservations if
is a long-and well-established principle of federal Indian law as expressed in the United States
Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that
unless authorized by an act of Congress, the jurisdiction of State governments and the
application of state laws do not extend to Indian lands. In modern times, even when Congress has
enacted laws to allow a limited application of State law on Indian lands, the Congress has


B. Worker’s Compensation

By the Act of June 25, 1936, ch. 822, Sec. 1 and 2, 49 Stat. 1938, 1939, initially codified at 40 U.S.C. § 290, Congress provided for the application of state worker’s compensation laws to federal lands.

Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State, and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

For the purposes set out in this section, the United States of America vests in the several States within whose exterior boundaries such place may be, insofar as the enforcement of State workmen's compensation laws are affected, the right, power, and authority aforesaid: Provided, however, That by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their State workmen's compensation laws as herein designated: Provided further, That nothing in this section shall be construed to modify or amend subchapter I of chapter 81 of Title 5.

The statute was revised and recodified in 2002 pursuant to Public Law 107-217 Section 6(b), at 40 U.S.C. § 3172:
Sec. 3172. Extension of state workers' compensation laws to buildings, works, and property of the Federal Government

(a) Authorization of Extension - The state authority charged with enforcing and requiring compliance with the state workers' compensation laws and with the orders, decisions, and awards of the authority may apply the laws to all land and premises in the State which the Federal Government owns or holds by deed or act ofcession, and to all projects, buildings, constructions, improvements, and property in the State and belonging to the Government, in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State in which the land, premises, projects, buildings, constructions, improvements, or property are located.

(b) Limitation on Relinquishing Jurisdiction - The Government under this section does not relinquish its jurisdiction for any other purpose.

(c) Nonapplication — This section does not modify or amend subchapter I of chapter 81 of title 5.

The Ninth Circuit Court of Appeals and other courts have construed 40 U.S.C. § 290 to mean that workers’ compensation laws apply to all employers on Indian reservations, except tribes. Begay v. Kerr-McGee Corp., 682 F.2d 1311 (9th Cir. 1982); White Mountain Apache Tribe v. Industrial Comm’n, 696 P.2d 223 (Ariz. Ct. App. 1985); Tibbetts v. Leech Lake Reservation Business Committee, 397 N.W.2d 883 (Minn. 1986) (holding that because the Minnesota workers’ compensation laws were civil regulatory in nature, then as such, it did not apply to the Tribal employer under the decision in Bryan v. Itasca County). Accord, Middletown Rancheria of Pomo Indians vs. Workers Compensation Board, 71 Cal. Rptr. 2d 105 (Cal. App. 1998).

In State of North Dakota v. JFK Raingutters LLC and Whitecalfe, 2007 ND 80, 2007 WL 1647383 (N.D. 2007), the State Workforce and Insurance Office, the state’s sole worker’s compensation insurer, sued JFK Raingutters LLC (“LLC”) and its owner, Whitecalfe for unpaid worker’s compensation premiums, penalties and interest. Whitecalfe, an enrolled member of the Three Affiliated Tribes of the Fort Berthold Reservation residing on the Reservation, contended that most of this company’s contracts were performed on the Reservation and that the persons identified by the State as employees were really independent contractors referred to him by the Tribe pursuant to its Tribal Employment Rights Ordinance (TERO). Whitecalfe argued that assertion of state jurisdiction over his on-reservation activities would infringe tribal sovereignty in violation of federal law. The Tribe lacked its own worker’s compensation law. The State relied on 40 U.S.C. § 3172, a federal statute that generally makes state worker’s compensation laws applicable to federal lands. Whitecalfe cited federal cases finding Section 3172 inapplicable to tribes. The tribal court granted the State’s motion for summary judgment and awarded $93,414.28. The North Dakota Supreme Court affirmed, acknowledging that Section 3172 would not support state worker’s compensation jurisdiction where the Tribe is the employer but finding that the same would not be true for a non-governmental employer: “The tribal sovereignty interests that concerned the courts in White Mountain, Middletown, and Tibbetts are not present here. JFK is not owned by the Three Affiliated Tribes, but is wholly owned by Whitecalfe, a member of the tribe. We agree with the Idaho Supreme Court's decision in Indian Country that,
under these circumstances, 40 U.S.C. § 3172 makes a state's workers compensation laws applicable on an Indian reservation.”

In *Ortego v. Tunica Biloxi Indians of LA*, 865 So.2d 985 (La. App. 3 Cir. 2004), the plaintiff was injured while working a tribal casino. She received worker’s compensation benefits from the tribe for two months before the Tribe terminated her benefits. Ortego filed a claim with the Louisiana Office of Workers Compensation. A tribal ordinance provided that worker’s compensation claims were to be heard by tribal courts and that the tribal court would apply Louisiana workers’ compensation law. The Louisiana Court of Appeals affirmed that the tribe was protected from suit by sovereign immunity and that the sole forum for the dispute was the tribal court. Accord, *Cupo v. Seminole Tribe of Florida*, 2003 WL 22908224, (Fla. App. 1 Dist. 2003), *Webb v. Paragon Casino*, 872 So.2d 641, (La. App. 3 Cir. 2004)

Two other cases have addressed ancillary worker’s compensation issues. In *State of Idaho v. Indian Country Enterprises*, 944 P.2d 117 (Idaho 1997), the Idaho Supreme Court, relying on 40 U.S.C. § 290, held that state courts have jurisdiction to enforce Idaho's worker's compensation laws against a member of the Coeur d'Alene Tribe operating a business on the Coeur d'Alene Indian Reservation. The court did not address its jurisdiction to enforce worker's compensation laws against the Tribe itself. In *Little v. Moscogee Nation*, 938 P.2d 739 (Okla. 1997), the Muscogee Creek Nation had purchased a worker's compensation insurance policy from the State Insurance Fund. The plaintiff, an employee of the Nation, sued the Nation and the insurance carrier in state court for compensation for a work-related injury. The insurer sought to avoid paying by asserting the Tribe's sovereign immunity. Without ruling on the issue whether the Nation was a “covered employer,” for purposes of Oklahoma's worker's compensation law, the court held that the insurer was estopped under Oklahoma law from denying coverage because it had accepted premiums. See also *Allen v. Lenape Lure Company*, 50 P.3d 1153 (Okla. Appeals 2002).

In *Aasen-Robels v. Lac Courte Oreilles Band*, 2003 WI App 224, 671 N.W.2d 709 n. 7 (Wis. App. 2003), a Wisconsin appellate court summarized the applicability of state worker’s compensation laws in a footnote: “Indian tribes are ‘distinct, independent political communities’ that retain their right to self-government. [cites omitted]. Because of this, Indian tribes generally are not subject to the laws of the state wherein their territory resides. … Because worker’s compensation is a matter left to the states, Indian tribes are not subject to these schemes, regardless of whether they are compulsory for every other employer in the state.”

In *Martinez v. Cities of Gold Casino, et al.*, 2009 WL 2762177 (N.M. App.), Pojoaque Gaming, Inc. (PGI), a corporation owned by the Buffalo Thunder Development Authority (BTDA), itself and instrumentality of the Pojoaque Pueblo, operated a casino under a compact that required it to offer its employees workers compensation coverage. PGI contracted with the Food Industries Self-Insurance Fund (FISIF) as its worker’s compensation insurance carrier. The entity Licensing for casino employees was regulated by the Pojoaque Gaming Commission (PGC). Martinez, a casino employee, brought a claim before the state Worker’s Compensation Administration (WCA). The casino and the FISIF responded and conceded jurisdiction. The WCA judge made a compensation award but would not, as the statute would otherwise have required, order reinstatement because PGC had revoked Martinez’ gaming license. Martinez then brought a WCA claim against the Pueblo, PGC and the FISIF under a provision of the law prohibiting
retaliation against workers who bring WCA claims, seeking damages and reinstatement. The Pueblo filed a motion to dismiss based on sovereign immunity. The WCA judge ruled that the Pueblo had conceded jurisdiction in previous proceedings and could not now assert immunity but that the PGC was immune and the court was powerless to order reinstatement in light of the license revocation. On appeal, the court held that (1) the PGC and BTDA enjoyed immunity from suit, (2) provisions in the gaming compact providing for worker’s compensation coverage do not have the effect of waiving the Pueblo’s immunity, (3) having submitted to the WCA jurisdiction and complied with the WCA in some respects, however, the PGI could not assert immunity with respect to others, and (4) the employee was entitled to reinstatement, notwithstanding the license revocation.

In *Pales v. Cherokee Nation Enterprises*, 216 P.3d 309, 2009 OK CIV APP 65, Pales was employed by Cherokee Nation Enterprises (CNE), an enterprise of the Cherokee Nation of Oklahoma (Tribe), which had enacted its own worker’s compensation laws. Hudson Insurance Company had issued a policy of workers’ compensation insurance pursuant to tribal law. When Pales sought to sue CNE in a state worker’s compensation court pursuant to the Oklahoma Worker’s Compensation Act, the court dismissed based on CNE’s sovereign immunity. The Oklahoma Court of Appeals affirmed, holding that CNE was entitled to immunity: “We find the policy language in this case also shows expressly and unambiguously that it was not issued to cover Employer under Oklahoma law.”