



# OSHA and Tribal Enterprises and Businesses



# QUESTION



**Both Mary and Sally work for a tribe. Mary is employed by the casino and Sally works for tribal operations. Both are injured in separate work-related incidents. You should advise:**

- A. Both employees to file claims with the State Workers' Compensation Bureau;*
- B. Both employees to file claims in federal court;*
- C. Both employees to seek internal tribal remedies;*
- D. Advise Mary to file a state workers' compensation claim and recommend to Sally that she pursue internal tribal remedies.*
- E. None of the Above*

# Court Precedence

- NLRB v. Natural Gas Utility Dist. of Hawkins County
- FPC v. Tuscarora Indian Nation
- Donovan v. Navajo Forest Products Industries
- Donovan v. Coeur d'Alene Tribal Farm

# Tribal Sovereignty



Any discussion of jurisdiction over American Indian tribes inevitably begins with the tribal sovereignty. Historically, the Supreme Court considered the tribes to be distinct nations occupying distinct territory over which the laws of the states have no force.

Although today the recognition of sovereignty is more limited, it is well recognized that American Indian tribes are “unique aggregations possessing attributes of sovereignty over both their members and their territory.”



Are Indian reservations covered by the Occupational Safety and Health Act of 1970?

The answer is a resounding "maybe," depending upon the interpretations of the circuit courts:

# COURTS SPLIT



There is a split of authority as to whether federal employment statutes of general applicability apply to Indian tribes as employers.

As to other statutes, the Tenth Circuit and the Eighth Circuit have taken an approach that is largely deferential to tribal sovereignty and self-governance, and have required a showing of clear legislative intent to curtail tribal rights and hold such statutes applicable to tribes. Under this approach, courts have held that the Occupational Safety and Health Act ('OSHA') and the Age Discrimination in Employment Act ('ADEA') do not apply to tribes.

In contrast, the Second Circuit, the Ninth Circuit and the Seventh Circuit have followed an approach which creates a presumption that statutes of general applicability apply to Indian tribes unless a contrary showing is made. Under this approach, courts have held that OSHA, the Employment Retirement Income Security Act ('ERISA'), and the Fair Labor Standards Act ('FLSA') apply to Indian tribes. (*Coeur d'Alene* analysis for determining whether federal agencies have jurisdiction over tribal enterprises.)

# Federal Claims



Federal statutory and common law claims fall into several groups: those specifically exempting or including American Indian tribes and those covering or excluding American Indian tribes by implication.

## Explicit Exemption

Congress has specifically exempted tribes from several familiar employment laws, including:

- Title VII of the Civil Rights Act of 1964, 42 USC 2000e(1)
- Title I of the Americans with Disabilities Act, 42 USC 12111(b)
- The Workers Adjustment and Retraining and Notification Act, 20 CFR 639.3(a)(1)

## Explicit Coverage

On the other hand, Congress can make a statute applicable to tribes through the exercise of its plenary powers. Congress did so in the 1983 amendments to the Social Security Act. As a result, tribes are now subject to both Social Security and federal unemployment taxes.

# OSHA Act



## 1975.4(b)(3)

Indians. the Williams-Steiger Act contains no special provisions with respect to different treatment in the case of Indians. It is well settled that under statutes of general application, such as the Williams-Steiger Act, Indians are treated as any other person, unless Congress expressly provided for special treatment. "FPC v Tuscarora Indian Nation," 362 U.S. 99, 115-118 (1960); "Navajo tribe v N.L.R.B.," 288 F.2d 162, 164-165 (D.C. Cir. 1961) cert. den. 366 U.S. 928 (1961). Therefore, provided they otherwise come within this definition of the term "employer" as interpreted in this part, Indians and Indian tribes, whether on or off reservations, and non-Indians on reservations, will be treated as employers subject to the requirements of the Act.

# OSHA's Definition of Employer



- Coverage of Employees under the Williams-Steiger OSHA 1970
- 1975.4(a)  
General. Any employer employing one or more employees would be an "employer engaged in a business affecting commerce who has employees" and, therefore, he is covered by the Act as such.

# Where The Power To Regulate Comes From:



- The limited power as given to Congress by the Constitution of the United States of America, is found in Article 1 Sec. 8.-3., i.e.:
- Section 8.-3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

# Commerce, as defined in Court:



- The exchange of goods, productions, or property of any kind. *Jeu Jo Wan v. Nagle*, C.C.A.Cal., 9 F.2d 309, 310.

# OSHA/STATE/TRIBE



Section 18 of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. 667, provides that states which wish to assume responsibility for developing and enforcing their own occupational safety and health standards

# State Labor and Employment Laws Do Not Apply to American Indian Tribes



- The Commerce Clause of the United States Constitution grants Congress the exclusive power to “regulate commerce” with American Indian tribes. Accordingly, the Supreme Court has determined that states have no authority to regulate conduct by the tribes unless specifically authorized by Congress.
- Similarly, state courts do not have jurisdiction over statutory and common law employment claims that arise on a reservation or trust land, including casinos.

# Back to the Question



**14 employees working for a tribe. 7 are employed by the casino and 7 work for tribal operations. All are injured in 2 separate work-related incidents (casino and tribal), each requiring hospitalization. You should advise:**

- A. Employees to file claims with the State Workers' Comp;*
- B. Employers to file reports to the regional OSHA office;*
- C. Employees to seek internal tribal remedies;*
- D. Advise Casino employees to file a state workers' compensation claim and recommend to tribal operations employees they pursue internal tribal remedies.*
- E. None of the Above*

# QUESTIONS???

