Labor and Employment Law

in

Indian Country

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Contents

Preface

This book is intended to serve as a resource for anyone concerned with labor and employment relations in Indian country. It is also a practical guide for anyone interested in how basic principles of federal Indian law operate in a specific field. It should be of use to elected officials of tribal governments; managers and officers of tribal enterprises; human resources staff; attorneys representing Indian tribes and their enterprises; attorneys representing non-Indian interests doing business in Indian country; students of Indian law; and judges in the tribal, state, and federal courts.

A central theme and driving force in this area of the law is competition for power, particularly the emerging competition between sovereign Indian nations and federal agencies over the regulation of labor and employment in Indian country. This competition continues to play out in the lower federal courts, and will likely be addressed by the United States Supreme Court unless Congress steps in to resolve it first. At stake is the very operation of tribal sovereignty, not only as a means for the assertion of tribal regulatory authority over labor and employment relations in Indian country, but as a barrier to the intrusion of federal authorities.

This book unabashedly argues that Indian tribes must affirmatively exercise authority over labor and employment relations in Indian country as a means to protect tribal self-determination. Thus, it is designed not only to be a tool for dealing with practical legal problems, but as a resource for tribal decision makers to examine and shore up legal infrastructures for tribal self-government at a critical juncture in history.

The area of labor and employment law in Indian country lends itself particularly well to the application of root principles of tribal sovereignty. Controversies in this area invoke a wide spectrum of federal Indian common-law doctrines, ranging from the inherent power of Indian tribes to regulate economic relations within their territories, to limitations on federal agency powers to impose authority from the outside, to questions of whether a particular tribal entity or officer may be immune from suit. This

book, therefore, combines a study of fundamental principles of tribal sovereignty with a practical application of those principles to labor and employment relations.

A book dealing with issues of tribal sovereignty can hardly do justice to the subject without providing the reader with a historical framework for the development of federal Indian law. After all, Indian law may best be viewed as the product of a difficult—sometimes tragic, sometimes heroic—history, and less that of rational doctrinal development.[1] Thus, our introductory chapter seeks to provide the necessary historical context for understanding the conflicting policies that inhere in this area of the law.

In structuring the presentation of *Labor and Employment Law in Indian Country,* we settled on three distinct parts. Part I discusses the legal principles that provide the basis for Indian tribes to exercise authority over labor and employment relations within their territories. Chapter 2 examines the basis for tribes to exercise what may best be termed "affirmative sovereignty": the authority to regulate economic activity and to adjudicate labor and employment disputes arising in Indian country. Chapters 3 and 4 then examine the principles underlying what may be termed "defensive sovereignty": legal barriers used to defend against asserted authority. Chapter 3 looks at the barriers to assertions of authority by the state and federal governments over labor and employment relations in Indian country. Chapter 4 looks at the operation of tribal sovereign immunity as a barrier to the authority of courts to resolve labor and employment disputes.

Part II turns to a central problem in this field: the application of federal laws to labor and employment relations in Indian country. Chapter 5 considers federal civil rights laws affecting employment relations, including the Indian Civil Rights Act, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. Chapter 6 looks at how a variety of federal labor and employment laws of general application have been applied to Indian tribes and

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[1] *See generally,* Charles F. Wilkinson, American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy (1987).

their enterprises in Indian country: the Occupational Safety and Health Act, the Fair Labor Standards Act, the Family Medical Leave Act, and the Employee Retirement Income Security Act. Chapter 7 then turns to the recent and growing controversy over the application of the National Labor Relations Act to collective bargaining and labor organizations in Indian country.

Part III changes gears to survey what tribes are doing with respect to the enactment, implementation, and judicial enforcement of their own labor and employment laws. Chapter 8 explores tribal laws that provide remedies for civil rights violations and employment discrimination. Chapter 9 looks at tribal laws governing collective bargaining and unions. Finally, Chapter 10 looks at Indian employment preference laws and some of the emerging challenges to these laws.

Appendix A presents, in summary fashion, the legal standards governing jurisdiction by Indian tribes, states, and the federal agencies with respect to labor and employment relations in Indian country. These standards vary depending upon the parties involved and the location of the employment relationship. Appendix B is a summary of a variety of federal labor and employment laws of general application, what matters they regulate, the federal agencies that administer them, and the current status of their application to Indian tribes and tribal enterprises. Finally, Appendix C provides a comprehensive guide to the wide variety of existing tribal laws regulating labor and employment relations within Indian country, including employment discrimination codes, tribal employee retirement income security acts, safety and health provisions, wages and overtime regulations, and many others. We expect to provide regular updates in future editions or supplements to this book as more tribes develop their labor and employment laws.

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In many ways, this book is a call to action. It tells of an imperative for Indian tribes: "govern or be governed." Tribes have significant opportunities to enact and implement their own laws to govern

labor and employment relations within their territories, consistent with their particular values and policy priorities. Making those policy determinations is the essence of tribal sovereignty. The great irony in this field is that the failure of Indian tribes to exercise such sovereignty places that sovereignty at risk. For failure to act leaves a hole for outsiders—in particular, the federal agencies—to try to fill. If tribal self-determination is a worthy goal, this book is a tool for its preservation in an area where it is particularly vulnerable.

PART II

THE APPLICATION OF FEDERAL AUTHORITY TO LABOR AND EMPLOYMENT RELATIONS IN INDIAN COUNTRY

Federal laws affecting labor and employment relations in Indian country can be broken down into three categories: (1) *civil rights,* which encompass all forms of employment discrimination that Congress has chosen to address through a variety of laws; (2) *labor and employment laws of general application,* which generally address the terms and conditions of employment, such as workplace safety, hours and minimum wages, and family medical leave; and (3) *labor unions and collective bargaining,* an area governed by one federal law: the National Labor Relations Act.

Each of these areas presents specific challenges to tribes in their efforts to exercise their own affirmative sovereignty, for the federal agencies that administer the laws governing these areas are not shy about seeking to enforce them against tribes or their enterprises. Whether these agencies succeed or not in any given case can have significant implications for tribal self-government.

Importantly, the law determining the outcome of many such cases is in a state of flux. In some of its enactments, Congress has expressly excluded tribes. In others, however, it has failed to consider tribes at all. Federal courts have struggled to set coherent standards for applying certain federal labor and employment laws to Indian tribes or their enterprises when Congress has failed to signal its intent. The question may well be resolved by

the Supreme Court, unless Congress amends its laws to indicate its intent.

The following three chapters respectively address the application of federal laws to tribal employment relations in the three categories noted above: civil rights, federal labor and employment laws of general application, and unions and collective bargaining. In each area, there is room for the exercise of affirmative tribal sovereignty under the principles discussed in Chapter 2. In each area, there are also potentially competing federal authorities. The law will be shaped as the resulting tensions play out. Thus, this part shows that there are abounding challenges to tribal sovereignty ahead. Part III will turn to the developing tribal law governing labor and employment relations in Indian country. The very development of such tribal laws may well have a bearing on how courts ultimately resolve whether federal laws may infringe on the exercise of tribal sovereignty in these areas.

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Civil Rights and Tribal Employment

A. Introduction

When we think of "civil rights," we typically think of protections afforded to individuals by the United States Constitution that check abuses of power by governmental authorities: for example, due process of law, freedom of speech, and equal protection of the laws. These are found in the Bill of Rights and the Fourteenth Amendment. Pursuant to federal constitutional law, these rights constrain governmental employers in their relations with employees in the public sector. Thus, governmental employers must provide public employees with "due process" if they have a property interest in their employment; pursuant to the First Amendment, they cannot discipline employees for exercising their rights of free speech; and under the Equal Protection Clause, they cannot discriminate against employees on the basis of such things as race, sex, or national origin. Apart from the United States Constitution, certain federal statutes, most prominently Title VII of the Civil Rights Act of 1964,[1] provide additional protections against employment discrimination in both the public and private sectors.

The Bill of Rights and the Fourteenth Amendment do not apply to Indian tribes, nor does Title VII. As "separate sovereigns predating the Constitution," Indian tribes are not constrained by the constitutional provisions "framed specifically as limitations on federal or state authority,"[2] and Congress expressly excluded tribes

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[1] 42 U.S.C. §§ 2000e–2000e-17 (2006).

[2] *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55-56 (1978).

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The National Labor Relations Act and Tribal Employment

A. Introduction

Congress enacted the National Labor Relations Act (NLRA)[1] in 1935 to quell industrial strife and improve relations between private-sector workers and their employers by allowing collective bargaining by unions.[2] The NLRA establishes and protects the right of private-sector employees to organize and join unions and to engage in collective bargaining with employers. Congress established the National Labor Relations Board (NLRB) to administer the NLRA.[3] The NLRB oversees and administers elections establishing unions.[4] It also adjudicates claims of "unfair labor practices," which may be brought by unions or employers for alleged violations of the duties under the NLRA.[5] Once a union is elected to represent a bargaining unit within an employer, the NLRA requires employers and unions to "bargain in good faith" in order

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[1] 29 U.S.C. §§ 151-169 (2006). Congress enacted the Labor Management Relations Act of 1947, 29 U.S.C. §§ 141-197 (2006), to amend the NLRA and to provide supplemental remedies and procedures to further the purposes of the NLRA.

[2] *See* 29 U.S.C. § 151.

[3] *Id.* § 153.

[4] *Id.* § 159.

[5] *Id.* § 160.

to enter into a collective bargaining agreement.[6] Failure to bargain in good faith, and other unfair labor practices, can trigger sanctions and enforcement orders issued by the NLRB.[7]

Congress expressly excluded federal government agencies and wholly owned federal government corporations, as well as states and their political subdivisions, from the NLRA by excluding them from the definition of "employer."[8] Labor organizing in the public sector is, therefore, separately governed by state and federal laws, which differ in substantial ways from the NLRA. For example, many states prohibit strikes against state government operations,[9] and it is a federal crime for employees to strike against the federal government.[10] Under the NLRA, in contrast, the right to strike is protected.[11]

For seventy-two years after the enactment of the NLRA, the NLRB did not view Indian tribes or their on-reservation enterprises as subject to the Act; tribes are governments, and the NLRA is a private-sector law. Things changed, however, in 2007 with the D.C. Circuit's decision in *San Manuel Indian Bingo & Casino v. NLRB*.[12] That decision upheld the NLRB's assertion of jurisdiction over union organizing activity at the gaming facility owned by the San Manuel Band of Mission Indians. The NLRB had reversed its decades-old view that Congress did not intend the NLRA to apply to Indian tribes within their reservations. In so

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[6] *Id.* § 158(a)(5).

[7] *Id.* § 160.

[8] *Id.* § 152(2).

[9] *See, e.g.*, Iowa Code Ann. § 20.12 (West 2010); Mich. Comp. Laws § 423.201 (West 2010).

[10] *See* 5 U.S.C. § 7311(3) (2006).

[11] *See* 29 U.S.C. § 163.

[12] 475 F.3d 1306 (D.C. Cir. 2007).

doing, it joined the Department of Labor and the Equal Employment Opportunity Commission in seeking to impose the laws it administers upon Indian tribes and their enterprises within Indian country. The *San Manuel* case presents a significant challenge to tribes in deciding how to address labor relations and collective bargaining within their jurisdictions.

Notwithstanding Congress's express exclusion of state and federal governments from the NLRA,[13] the D.C. Circuit allowed the NLRB to impose its authority upon the operations of tribal government, at least when they involve the generation of government revenues pursuant to the Indian Gaming Regulatory Act (IGRA).[14] While the *Coeur d'Alene Tribal Farm*[15] and *Mashantucket Sand & Gravel*[16] decisions, discussed in Chapters 3 and 6, had signaled a potential threatening trend, the *San Manuel* decision opened the door to far more serious intrusions into tribal sovereignty. It empowered non-Indian enterprises—labor organizations—to operate within the jurisdictions of Indian tribes under the protection of a federal agency, the NLRB, in ways that impact the distribution of economic resources generated by tribes. It remains to be seen whether other federal courts will follow the lead of the D.C. Circuit. A split among the federal courts of appeals would leave it up to the Supreme Court to resolve whether the NLRA applies to tribes and their enterprises.

San Manuel did not answer the question of what happens if a provision of the NLRA is in tension with a tribe's labor law, enacted and implemented under established principles of tribal sovereignty.[17] In 2002, in *NLRB v. Pueblo of San Juan,*[18] the Tenth

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[13] 29 U.S.C. § 152(2).

[14] *San Manuel Indian Bingo & Casino,* 475 F.3d at 1311-16.

[15] *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113 (9th Cir. 1985).

[16] *Reich v. Mashantucket Sand & Gravel,* 95 F.3d 174, 176 (2d Cir. 1996).

[17] The principles of tribal sovereignty at issue with respect to the authority of

PART III

TOWARD TRIBAL LABOR AND EMPLOYMENT LAW

Aside from the law of domestic relations, there may be no more important area of law affecting a person's identity and economic security than employment and labor relations law. As discussed in Chapter 2, Indian tribes may engage in substantial lawmaking in this area pursuant to their inherent sovereignty. There is no reason why they should not be active, especially when they may otherwise face the assertion of regulatory authority by outside federal agencies. As sovereign governments, tribes should consider enacting laws to regulate labor and employment relations within these three discrete categories:

1. *Civil Rights and Employment Discrimination.* This category includes laws prohibiting workplace discrimination on the basis of sex, age, disability, race, color, religion, national origin, sexual orientation, or other classifications, and/or protecting employee rights of privacy, speech, or due process. Such laws may include the provision of tribal court remedies for employees who suffer discrimination on these bases. A prominent example is sex discrimination, including harassment by coworkers or supervisors. As discussed in Chapter 5, federal law protecting against this and other forms of discrimination on the basis of sex, race, religion, color, national origin, and disability do not apply to tribes or their subordinate economic organizations. Congress failed to address tribes in federal age discrimination laws, so their applicability is

uncertain. There is no impediment to tribal lawmaking in these areas, and Indian tribes' civil rights codes or constitutional provisions may already provide certain rights to tribal government employees who suffer from these forms of discrimination. This is a large subject area. Chapter 8 looks at the laws of a number of tribes in this area and selected substantive issues that arise in employment discrimination disputes.

2. *Labor Unions and Collective Bargaining*. With the success of tribal economic development (particularly Indian gaming), union activity in Indian country has increased. In response, tribes have begun to enact their own laws to govern labor relations and collective bargaining in much the same way that the federal government and states regulate labor relations and collective bargaining involving their governmental employees. Tribal gaming facilities, operating under the terms of the Indian Gaming Regulatory Act of 1988 (IGRA)[1] to generate governmental revenues for tribes, may be subject to tribes' labor relations laws in the same way that state lotteries or other state revenue-raising ventures are subject to state labor relations laws. Like states, tribes may decide to enact laws to prohibit strikes against their governmental operations, ensure that unions doing business within their jurisdiction are licensed, direct the manner in which union elections are held, or establish rules for collective bargaining. Chapter 9 looks at what tribes have done in this field and explores some of the substantive issues surrounding tribes' regulation of unions and collective bargaining.

3. *Wages, Hours, and Working Conditions*. This category includes laws that address workplace safety and injuries, including workers' compensation; protection of so-called whistle-blowers (workers who report unsafe or illegal working conditions); overtime compensation; minimum wages; and family medical leave. While this category of tribal lawmaking and regulation could warrant a separate chapter in a later edition of this book, the development of laws in this area is fairly straightforward.

Appendix C includes a list of tribal laws in these various categories.

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[1] 25 U.S.C. §§ 2701-2721 (2006).

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