

## **APPLICABILITY OF FAIR LABOR STANDARDS ACT (FLSA) TO TRIBAL GOVERNMENTS**

### Steps of Analysis

- (1) Examine the statute. When looking for applicability of any statute to Indian tribes, look at the wording of the statute. Is often silent. Is the silence an intentional exclusion or just an oversight?  
FLSA in 1938 – Tribal government employees probably not on Congress' mind.
- (2) Consent to FLSA or waiver of sovereignty (may only be partial).  
Look to personnel manual, job posting, position description, tribal council resolution.
- (3) By consent through contract or grant.
- (4) Intergovernmental Agreement for Services
  - (a) Services provided off tribal land?
  - (b) If so, how frequent?
  - (c) Services provided to non-Indians?
  - (d) Who benefits?
- (5) Traditional Government Function Test, but still need to look at:
  - (a) Is function or service provided off tribal land? If so, how frequent?
  - (b) Receipt of monies for services provided. From whom?
  - (c) Are non-Indians employed in this activity? Is so, what percentage?
  - (d) Who benefits from this service?

### Case Guidance

#### Reich v. Great Lakes Indian Fish and Wildlife Commission 4 F.3d 490 (7<sup>th</sup> Cir. 1993)

Facts – By treaty, Chippewa tribes had right to use land outside of the reservation for traditional activities (hunting, fishing, gathering wild rice, etc.). Tribal employees were deputized to exercise state and tribal law enforcement functions.

Plaintiff's Argument – Provided off-reservation law enforcement using government funds from the Department of the Interior.

Court's Analysis – An “oversight that FLSA did not include tribes.” This activity regulated Indian property rights and dealt with regulation of the reservation. Principal beneficiaries were Indians. FLSA did not apply. Also, look to see if it is of a commercial or service character. Court noted that lumbering and healthcare are not a governmental character. Court also noted that seasonal exemption to FLSA could have applied. For guidance, look at other governments.

Snyder v. Navajo Nation, 382 F.3d 892 (9<sup>th</sup> Cir. 2004)

Facts – Navajo police performed work off reservation such as assisting FBI and U.S. Attorney's offices in investigations and testifying in court.

Issue – If not performing services exclusively on the reservation brings the activities under FLSA requirements.

Court's Analysis – Activity “does not provide primary benefit to persons with no interest or stake in tribal government. Indeed, none of the officers' official travel is aimed at benefitting any private organization or nonmember.” Court noted that contacts with the outside entities were only incidental and less than four percent of the officers were non-Navajo. When the law is silent as to the applicability to tribes, the court will “allow such exemptions only in those rare circumstances where the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self government is clearly impacted.”

Donovan v. Coeur d' Alene Tribal Farm 751 2d 1113 (9<sup>th</sup> Cir. 1985)

Issue – Are workers at a tribally owned farm subject to OSHA?

Court's Analysis – “We have not adopted the proposition that Indian tribes are subject only to those laws of the U.S. expressly made applicable to them.” Court noted that some workers were not Indians and also raised the interstate commerce argument. Court offered three factors that have become the benchmark for analysis in these cases:

- (1) Law touches exclusive rights of self-governance in purely intramural matters.
- (2) Application of the law would abrogate rights guaranteed by treaties.
- (3) There is proof that Congress intended the law to not apply to reservations.

Examples of intramural matters include inheritance, domestic relations and tribal membership.

NLRB v. Chapa de Indian Health Program, Inc., 316 F.3d 995 (9<sup>th</sup> Cir. 2003)

Issue – Whether the NLRA is applicable to a tribal health clinic.

Facts – 40% of the patients were non-native; 55% of the non-professional staff were non-native; all facilities located off tribal land; and the clinic accepted private insurance, MediCAL and IHS funds.

Court – Used the Coeur d' Alene analysis. Dispute did not involve a relationship between the tribe and its members. Commercial activities are not an aspect of tribal self government. Defendant argued that healthcare was intramural, but not labor relations. Could not show where Congress intended NLRA exclusion.

Solis v. Matheson, 563 F3d 425 (9<sup>th</sup> Cir. 2009)

Facts – Retail store owned by tribal member, employed tribal members, and located on reservation.

Court – Used Coeur d' Alene analysis. Retail store not intramural. Nothing in the treaty between the U.S. and the Puyalup Tribe exempted the FLSA.

### CONCLUSION

Generally, the FLSA would apply to Indian tribes as it does not exclude them and the legislative history does not suggest an exclusion. However, federal courts have found an exception for traditional government activities that are intramural. The exception can be defeated, even it is a traditional government function, if the service or activity benefits non-Indians; strays from dealing with regulations of the reservation; or accepts fees from outside sources for services provided.

## **PROBLEMS**

### **Would the FLSA Apply?**

#### **Problem 1**

Tribal police department has an intergovernmental agreement with county to provide back-up law enforcement service within a fifty mile radius of the reservation. Due to the remoteness of the area and distance from the county seat, the county police department has no stationed presence in the area. In reality, the tribal police department is the primary responder and the county rarely responds to any calls in the area. Fifty percent of the police officers are non-Indian. Police department is almost 100% funded from federal grants that are also available to non-tribal law enforcement agencies.

#### **Problem 2**

Tribal public works department provides water service on tribal lands to its residents (more than 99% of whom are tribal members). There are no casinos or any other significant commercial activities within the tribal boundaries. Water service is primarily funded through usage fees from tribal members and indirect costs from other tribal programs; and small state and federal grants that are insignificant. Only one employee is non-Indian.

#### **Problem 3**

Tribal environmental department has contracts with U.S. Forest Service and other federal agencies to provide a wide range of services off tribal land to include soil and air sampling, fire monitoring, tree thinning, and wildlife monitoring/surveys. Time spent on these activities widely varies. At times it is significant and other times weeks can go by with little time spent on them. The activities are mutually beneficial and do affect the welfare of tribal members on their land. Only one employee in the department is non-Indian.

#### **Problem 4**

Tribally owned and managed healthcare facility on tribal land provides service to Indians and non-Indian employees who work for the tribe and their families. All personnel in the facility are employed by the tribe (i.e. no IHS, PHS, etc.) of whom about 90% are tribal members. The facility bills to outside entities for services (i.e. private insurers, Medicaid, Medicare). Other significant sources of income are from federal and state grants.

