

Labor and Employment

A Call to Enact Tribal Labor Laws Implicating the NLRA and Other
Generally Applicable Labor Laws,
Tips for Tribal Leaders for Enacting Such Laws, and
Best Practices When Facing NLRA Unionization

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The Pattern of Tribal Sovereignty Battles

1. Inherent sovereign power at issue
2. In tension with competing power
3. Resolved by Supreme Court or Congress



The Problem at Hand: 37 Year Unresolved Issue

Under what circumstances, if any, can a federal agency impose a federal labor/employment law upon a Native Nation when that law fails to mention Indian tribes (*and, in some cases, even excludes other sovereigns*)?



IT'S A BIG DEAL

“This is one of the most frequently recurring issues in the practice of federal Indian law, and it has never been satisfactorily resolved.”

- Robert T. Anderson, now serving as the Solicitor for the Department of the Interior



Wages, Hours, Working Conditions: Fair Labor Standards Act (Silent), Family Medical Leave Act (Silent), Occupational Safety & Health Act (Silent/Excludes States and US)



The DOL Will Sue Native Nations and their Enterprises to Impose the FLSA, the FMLA, and OSHA

- *Donovan v. Navajo Forest Products Industry* (10th Cir 1982) (OSHA)
- *Donovan v. Coeur d' Alene Tribal Farm* (9th Cir 1985) (OSHA)
- *Reich v. Great Lakes Indian Fish & Wildlife Comm'n* (7th Cir. 1993) (FLSA)
- *Reich v. Mashantucket Sand and Gravel* (2nd Cir 1996) (OSHA)
- *Snyder v. Navajo Nation* (9th Cir. 2004) (FLSA)
- *Menominee Tribal Enterprises v. Solis* (7th Cir. 2010) (OSHA)
- *Scalia v. Red Lake Nation Fisheries, Inc.* (8th Cir. 2020) (OSHA)



Employment Discrimination Age Discrimination in Employment Act (Silent)



The EEOC Will Sue Native Nations and Their Enterprises To Impose ADEA

- *EEOC v. Cherokee Nation* (10th Cir 1989)
- *EEOC v. Fond du Lac Band Heavy Equipment Company* (8th Cir 1993)
- *EEOC v. Karuk Tribe Housing Authority* (9th Cir 2001)



Unions & Collective Bargaining: National Labor Relations Act (Silent/Excludes States and US)



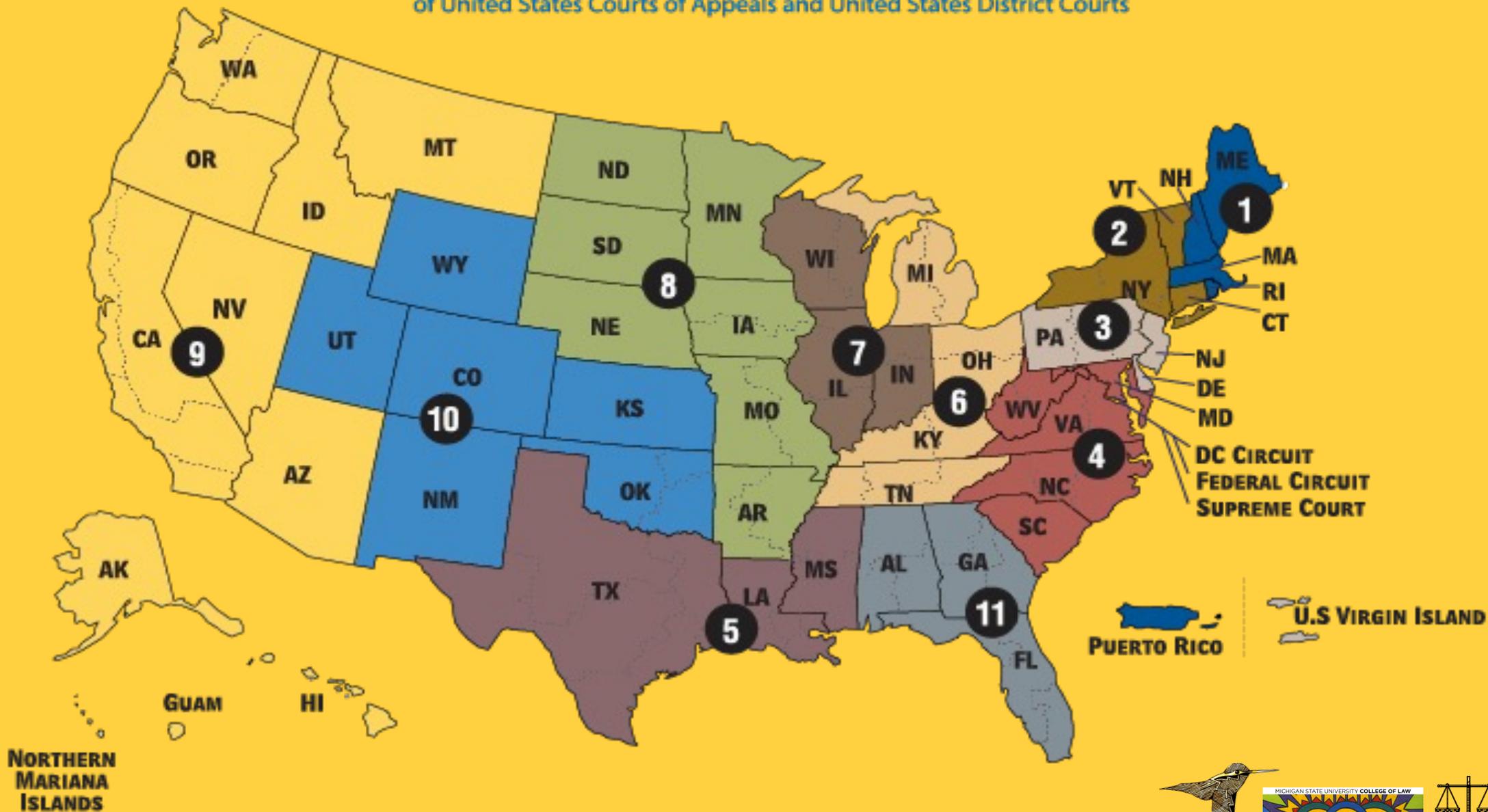
The NLRB Will Sue Native Nations to Impose the NLRA On Their Gaming Operations

- *San Manuel Indian Bingo & Casino v. NLRB* (D.C. Cir. 2007)
- *NLRB v. Little River Band of Ottawa Indians Tribal Government* (6th Cir. 2015)
- *Soaring Eagle Casino & Resort v. NLRB* (6th Cir. 2015)
- *Casino Pauma v. NLRB* (9th Cir. 2018)



Geographic Boundaries

of United States Courts of Appeals and United States District Courts



NORTHERN MARIANA ISLANDS



CIRCUIT SPLIT

Tenth and Eighth Circuits:

If the application of a federal regulatory scheme “would impinge upon [tribal] sovereignty by preventing tribal governments from freely exercising their powers, including the sovereign authority to regulate economic activity within their own territory,” the law will not apply absent “express congressional authorization.”



CIRCUIT SPLIT

Ninth, Second, and Sixth Circuits:

A general statute in terms applying to all persons includes Indian tribes and their property interests, unless

- (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.”

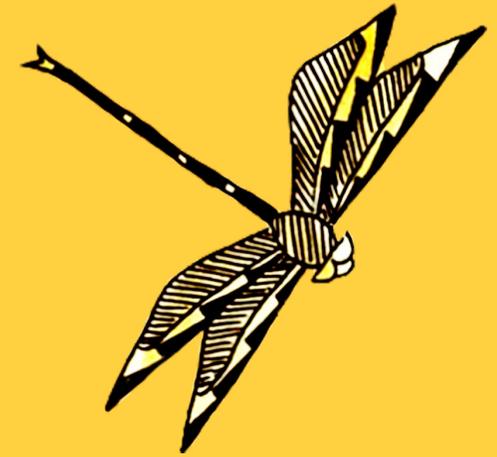
In any of these three situations, Congress must expressly apply a statute to tribes before a court will hold that it reaches them.



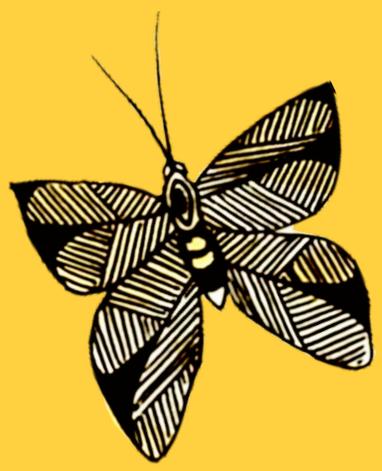
PROPOSITION:

**THE ENACTMENT OF TRIBAL
LABOR/EMPLOYMENT LAWS, WILL
MAKE FOR A BETTER “TEST CASE”**





Tribal Council: Drafting L&E Laws for Success



By Enacting L&E Codes, Tribes can:

- Reflect tribal circumstances.
- Improve tribal members' welfare beyond federal standards.
- Minimize federal law claims by considering:
 - Forum.
 - Whether to reject or incorporate federal law.
 - Legislative findings to establish *Montana* jurisdiction.
 - Legislative findings to preclude federal law.
 - How to protect tribal interests in other courts.



Tribal Circumstances: Carving Out Certain Tribal Businesses

- “For an election involving Employees at the Seven Cedars Casino, observers shall have a current, official casino identification card, allowing them to be present within the casino.” Jamestown S’Klallam Labor Code.



Tribal Circumstances: Stress Tribal Customary Law

- “The purpose of this Chapter is to ensure that all Employers, as defined in this Chapter, fairly compensate Employees, as defined in this Chapter, in accordance with the values and traditions of the Tribe.” Jamestown S’Klallam, S 3.02.01



Bolster Members' Economic Welfare

- Capacity to raise minimum wage.
- Unique protected classes. I.e. Stockbridge-Munsee Mohican protects marital status and political affiliation.
- TERO.
- Additional bases for leave.



Provide Plaintiffs a Tribal Forum

- Flexibility in establishing specialized courts, administrative fora, or arbitration. See Fletcher, Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum, 38 U. Mich. J.L. Reform 273 (2005).
- Retain SI against federal claims but waives for tribal court suits to enforce such claims as incorporated by tribal law. Jamestown S’Klallam
- Informal process: “It is the established policy of the Hoopa Valley Tribe that before employee grievances escalate into formal proceedings, informal resolution should be attempted. This policy is incorporated in provisions requiring written evaluations at least annually, requiring unsatisfactory job performance be documented, requiring counseling on specific areas of poor job performance to have occurred prior to termination or demotion.”
Hoopa Valley Indian Housing Authority v. Gerstner.



Preclude Federal Law: Right to Work Ordinances

- Right-to-work laws prohibit unions and employers from entering into agreements that require employees to join and maintain membership in unions.
- Permitted to Tribes by the NLRA. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1200 (10th Cir. 2002), affirming NLRB.
- For more, see Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. Rev. 691, 725 (2004)



Reflecting Federal Law

- “‘Employee’ means any person employed by an Employer, excluding: 1. 2. Any person in a position that would be excluded from the minimum wage and overtime requirements of the Federal Fair Labor Standards Act.” Jamestown S’Klallam Code 3.02.03.



Montana and Tribal Welfare

- “Section 3.03.02 Findings for this Chapter The Jamestown S’Klallam Tribal Council (“Council”) finds that the Tribe has inherent sovereign authority to govern economic relations within its jurisdiction, including employment relations between the Tribe and its employees and Tribal Entities and their employees. **The economic activities of the Tribe and Tribal Entities generate funds to support the Tribe’s governmental services to its citizens and provide critical economic development opportunities for the Tribe and its citizens. Employment relations within the Tribe and Tribal Entities directly affect the health, welfare, and economic security of the Tribe and its citizens because such relations affect the generation and distribution of the Tribe’s governmental resources and the economic development of the Tribe. Like the state and federal governments, the Tribe has a direct interest in regulating labor relations within governmental agencies and enterprises, known as “public sector labor relations.” The labor relations laws of states and of the federal government often prohibit strikes to protect the public interest and provide for alternative procedures to resolve collective bargaining impasses.”**

– *Jamestown S’Klallam*



Expand Regulation of Intramural Affairs

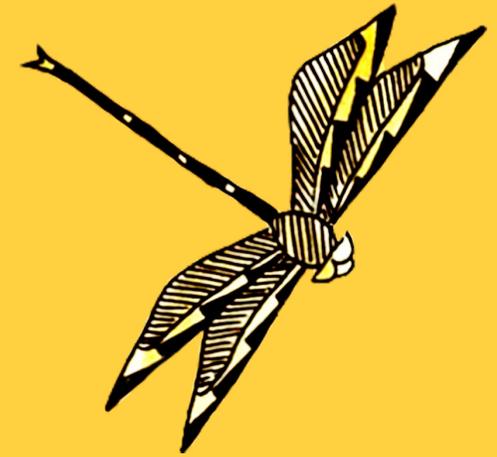
- Employment relations with non-Indians have generally been considered extramural. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1114 (9th Cir. 1985).
- But what about systematic tribal efforts to regulate those relations?
- Application of federal law, therefore can interfere with self-government not only by directly regulating governmental conduct but also by preempting tribal efforts to regulate non-governmental conduct. *Solis v. Matheson*, 563 F.3d 425, 433 (9th Cir. 2009).
- *Solis* found that the FLSA applied because the tribe did not have wage and hour laws. What if it did?



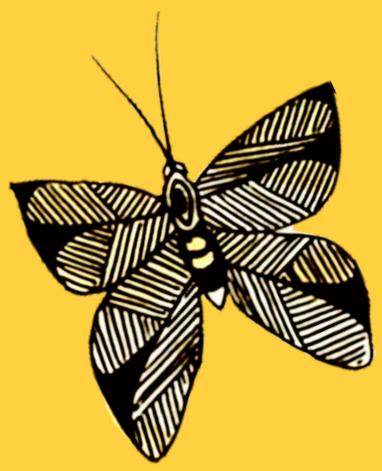
Protect Tribal Policy in Federal Court

- Jamestown S’Klallam Integrity of Laws Code:
- “Disclosures only with approval of Tribal Council. Except with the express, written approval of the Tribal Council, as evidenced by a formal resolution, Employers are prohibited from giving testimony or witness statements of any kind or producing documents or other information of any kind in response to requests or subpoenas issued by outside authorities, other than those authorities expressly granted powers under Chapter 3 of this title, engaged in investigations or proceedings on behalf of current or former Employees or any Labor Organization, when such Employees or Labor Organizations have failed to exhaust their remedies provided by any provisions of Chapter 3 of this title.”





Tribal Courts: Expanding Self-Determination through Case Law[®]



Tribal Courts Can Interpret Tribal and Federal Law to Bolster Tribal Employment Self-determination

- Broadly interpreting “exclusive use” treaty provisions.
- Broadly interpreting the tribe’s intramural affairs.
- Carefully considering pro-tribal federal holdings.
- Broadly interpreting *Montana* in the employment context.



Exclusive Use Provisions

- Particularly relevant in considering federal investigation requests, i.e. under OSHA.
- *Navajo Example. Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 711 (10th Cir. 1982).
- Navajo Treaty of 1868: [T]he United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.
- Thus, “the only federal personnel authorized to enter the reservation are those specifically so authorized to deal with Indian affairs.” This language ‘provid[ed] for specific exclusion rights over all persons’ and, therefore, barred the applicability of a general statute such as OSHA.



Using Pro-Tribal Federal Holdings

- Domesticate: *Arizona Public Service Company v. Office of Navajo Labor Relations*, No. A-CV-08-87 (Navajo S.Ct.1990) found the ADEA inapplicable.
- Extend: *Mitchell v. Pequette*, No. CV-07-38, 2008 WL 8567012, at *4 (Leech Lake Trial Div. May 9, 2008)
- Did the Portal-to-Portal Act Apply to the Leech Lake Band of Ojibwe?
- “The Eighth Circuit Court of Appeals has held that federal employment laws such as the FLSA (and by extension the Portal Act) do not apply to Tribes. Thus, even if the facts alleged by the Petitioner are examined in the light most favorable to his claims, they must fail as a matter of law.”

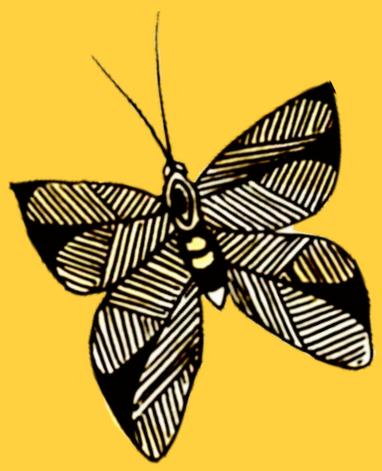
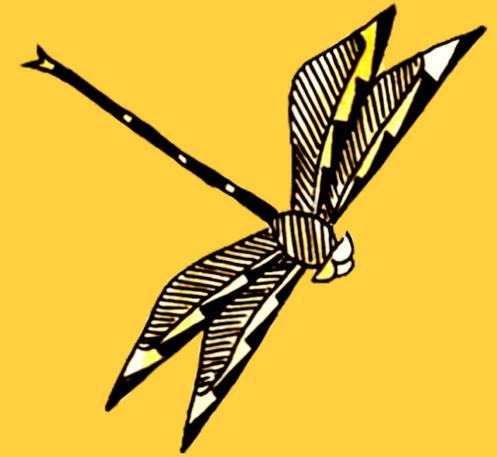


Holding that Employment is a Consensual Relation under *Montana*

- The employment relation mattered in *Dollar General*, not just the job training contract:
- “Doe worked for only a brief time at the Dollar General store and was not paid, he was essentially an unpaid intern, performing limited work in exchange for job training and experience. This is unquestionably a relationship ‘of a commercial nature.’” *Dolgenercorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 173 (5th Cir. 2014)
- “Section 3.02.02 Scope and Jurisdiction of this Chapter This Chapter applies to Employers who employ Employees within the Territory of the Tribe..” Jamestown S’Klallam.



Best Practices for Tribal Employers Facing Unionization



NLRA Application in Indian Country

- D.C. Circuit: upheld NLRB jurisdiction over tribe's gaming operations.
 - *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007)
- 6th Circuit: upheld NLRA application to tribal gaming facilities.
 - *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015); *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (6th Cir. 2015)
- 9th Circuit: upheld NLRA application to tribal gaming facility.
 - *Casino Pauma v. NLRB*, 888 F.3d 1066 (9th Cir. 2018)
- NLRB: treaty provision prevented NLRA application
 - *Chickasaw Nation d/b/a Winstar World Casino & Int'l Brotherhood of Teamsters Local 886*, 362 NLRB 942 (2015)



Advice for Tribal Employers Facing Unionization

- Which tribal employers are eligible for union organizations?
 - More likely to be gaming facilities or other more “commercial” tribal enterprises
- Why are unions appealing?
 - Pay
 - Benefits
 - Real or perceived unfairness of employers
 - Non-responsiveness of employers to employee concerns or issues
 - Substandard working conditions
 - Mistreatment by management



Advice for Tribal Employers Facing Unionization

- Ensure employees are satisfied with their current employment
 - Ensure management treats employees well
 - Draft fair and consistent policies and apply such policies in a fair and consistent way
 - Provide good working conditions (see below)
 - Provide competitive pay and benefits
- Address employee concerns
 - Listen to, follow up on, and resolve employee concerns
 - Communicate with employees about their concerns and the steps taken to resolve their concerns
 - Promote open door communication
 - Instill trust with employees and recognize employees' efforts
 - Conduct employee surveys



Advice for Tribal Employers Facing Unionization (cont.)

- Training
 - Train management regarding positive labor relations
 - Train management to detect and respond appropriately to unionization efforts
 - Ensure managers/supervisors do NOT (**TIPS** acronym):
 - Threaten or punish/retaliate against employees who engage in union activity
 - Example: threatening to reduce pay or benefits
 - Interrogate employees about their union activity or the union activity of their co-workers
 - Promise employees special concessions to not unionize
 - Example: offering promotions, wage increases, or increases in benefits to not unionize
 - Spy on/surveil employee union representatives
 - Example: attending union meetings or conducting other undercover activities.



Advice for Tribal Employers Facing Unionization (cont.)

- Training (cont.)
 - Managers/supervisors may:
 - Keep non-employee organizers off business premises
 - Exception: employer cannot discriminate by allowing some outside groups to solicit on-property while prohibiting union organizers from soliciting
 - Inform employees of the disadvantages of belonging to a union using facts, opinions, and/or examples
 - Example: sharing information about potential collective bargaining process, union dues, how relationships between management/employees might change, etc.
 - Remind employees of the benefits, policies, and practices they currently enjoy as non-union employees
 - Help management be able to briefly explain why wages/benefits are fair/competitive



Advice for Tribal Employers Facing Unionization (cont.)

- Workplace Policies
 - Implement a non-solicitation policy
 - Such as banning solicitation in the workplace if either the soliciting or solicited employee is on working time
 - Implement a non-distribution policy
 - Such as banning distribution of union literature if distribution is within a working area or the distributing employee is on working time
 - Make sure to apply the non-solicitation and non-distribution policies neutrally, uniformly, and consistently to all solicitations and distributions. For example, such policies cannot discriminate against union activity.



Advice for Tribal Employers Facing Unionization (cont.)

- Gaming Compacts
 - Review the Tribe's Gaming Compact to ensure the Tribe is complying with any provisions agreed to under the Compact
 - Example: posting notices of union elections in specific locations
- *Unite Here Local 30 v. Sycuan Band of the Kumeyaay Nation*
 - NLRA and Tribal Labor Relations Ordinances



Questions

