



LABOR AND
EMPLOYMENT
LAW
IN
INDIAN
COUNTRY

2022 Edition

Kaighn Smith, Jr.

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FOREWORD

For more than 50 years, the Native American Rights Fund has undertaken its work based on the premise that the best hope for the survival of Native Americans is the maintenance and development of tribal governments. The inherent sovereign powers to hold land, regulate activities on those lands, and command the respect of other governments are essential to the concept of nationhood. Much of the Native American Rights Fund's work has been about ensuring that this concept endures as a reality for Tribal Nations.

Labor and Employment Law in Indian Country represents a natural outgrowth of the work of the Tribal Supreme Court Project, a joint project of the Native American Rights Fund and the National Congress of American Indians. In recent decades, Indian tribes have faced a series of challenges to their sovereign authority and have suffered a number of critical losses in the United States Supreme Court. Recognizing that the interests of tribes generally rise and fall together, tribal leaders established the Tribal Supreme Court Project in 2001 to foster greater coordination among tribes in their legal advocacy. This included combining and coordinating the resources of NARF, NCAI, Indian law professors, Indian law attorneys, and Supreme Court practitioners to monitor cases that could affect the future of tribal sovereignty and undertaking a strategic effort to protect tribal interests in those cases.

In 2007, despite the best efforts of the Project, Indian tribes experienced a significant setback in *San Manuel v. NLRB*, when the U.S. Court of Appeals for the D.C. Circuit affirmed a decision by the National Labor Relations Board (NLRB) that reversed thirty years of solid precedent. Until *San Manuel*, the NLRB had treated Indian tribes like the states and the federal government, which are exempt from the National Labor Relations Act (NLRA). The D.C. Circuit held that a gaming enterprise, owned and operated by the San Manuel Band, was an "employer" within the scope of the National Labor Relations Act and therefore subject to union organizing and related coercive authority of the NLRB in accord with that Act.

San Manuel was a wake-up call. For the first time, the NLRB could apply the provisions of the NLRA — the federal law governing

labor organizations and collective bargaining *in the private sector* — to a *tribal government's* on-reservation enterprise. Previously, the NLRB had treated Indian tribes and their enterprises in the same way that it treated other governments and their enterprises: as *public sector* entities, which were excluded from the Act. As a result of the *San Manuel* decision, we recognized that tribal governments were not exercising — or did not know they could fully exercise — their sovereign authority to enact tribal laws regulating labor and employment relations. And the law, like nature, abhors a vacuum. It was in this context that the seeds for *Labor and Employment Law in Indian Country* were sown and grew into a collaborative effort between NARF, the oldest and largest non-profit Indian law firm in the country, and Drummond Woodsum, a firm with a respected national Indian law practice.

As Executive Director of NARF, I am honored to bear witness to the publication of the second edition of Kaighn Smith, Jr.'s *Labor and Employment Law in Indian Country*. We at NARF have worked hard to develop tribal law, to provide legal references, and to supply information for tribes who are developing their own laws. One of the most important components of this book has been its comprehensive look at existing tribal labor and employment laws and its reference to tribal case law. The book provides important examples of how tribes are expanding their own labor and employment laws and adjudicating these issues in tribal courts. Additionally, an up-to-date Appendix offers a collection of tribal labor and employment laws and is an unparalleled resource for anyone practicing in this field.

Much of the practice of the law involves the balancing of precedent with the modern needs of the people — and, in Indian law, doing so while keeping tribal sovereignty intact. The importance of *Labor and Employment Law in Indian Country* is that it discusses labor and employment law from its historical perspective, explains the complex web of laws guiding the field, and leaves the reader with a fuller understanding of labor and employment in the tribal context. By setting the topic in this structure, the book truly is able to convey the depth of challenges tribal governments currently face in the labor and employment arena while keeping a keen eye on its future development.

John E. Echohawk

PREFACE

Eleven years after the first edition of this book, labor and employment law in Indian country remains a critical battleground for tribal sovereignty. This is particularly so with respect to the application of federal laws targeting a host of “employers” that are entirely silent about whether they apply to Indian tribes. Federal agencies continue efforts to enforce those laws against tribes, tribes continue to resist such intrusions on the grounds of tribal sovereignty (some pointing to their own laws covering the rights at issue and some not), the federal courts continue to be split on what rule governs the outcome (whether Congress’s silence prevents the intrusion or not), and the Supreme Court has yet to resolve that split.

The most recent example of such a silent federal law is Congress’s first law to address the historic COVID-19 pandemic, the Families First Coronavirus Response Act. Congress (once again) failed to mention Indian tribes. The Act requires “covered employers” to provide paid leave to employees who face specific hardships while granting offsetting tax credits to those employers. Certain “private entities” and “public agencies” fall within the Act’s definition of “covered employer,” but one struggles in vain to determine whether Indian tribes do so. And the Department of Labor provided no guidance.

Over the last decade, the Supreme Court’s federal Indian law decisions signal cautious optimism for the future of tribal sovereignty. Even while the Supreme Court has issued important decisions supporting tribal sovereignty in recent years, its composition has also shifted significantly, raising the question of whether that trend will continue.

* * *

We have updated this book with a decade’s worth of new developments, but have maintained its basic structure. This reflects the fact that the landscape of the law remains largely unchanged.

This edition, as with the first, 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 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 tribal governments and federal agencies over the regulation of labor and employment in Indian country. This competition has been playing out in the lower federal courts for decades and, surprisingly, has yet to be addressed by the United States Supreme Court or clarified by Congress. At stake is the very operation of tribal sovereignty, not only as a means for regulating labor and employment relations in Indian country in accord with the unique values of sovereign Native nations, but as a defense to federal authorities seeking to impose federal law standards on Indian country employment relations without a clear mandate to do so.

Perceptions of a gap in the baseline protections for workers in Indian country puts enormous pressure on this dynamic. If tribal governments fail to provide legally enforceable rights to employees who suffer discrimination or unfair working conditions, federal authorities will continue to make the case that they must have power to fill that gap with federal law.

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. This is necessary on two levels: to provide fairness to employees and to stave off federal intrusions. Thus, this book 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 cannot 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 a product of rational doctrinal development.¹ Thus, our introductory chapter (Chapter 1) 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 the second edition of *Labor and Employment Law in Indian Country*, we retain the three distinct parts of the book with substantial updating to account for new legal developments. Part I sets out 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 addresses 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.

In Part II, we turn to the continuing problem of the application of federal laws to labor and employment relations in Indian country. Chapter 5 addresses 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 their enterprises in Indian country: the

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

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 ongoing controversy over the application of the National Labor Relations Act to collective bargaining and labor organizations in Indian country after failed efforts at a legislative fix.

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 examines a variety of tribal laws that provide remedies for civil rights violations and employment discrimination. Chapter 9 looks at laws governing collective bargaining and unions. Finally, Chapter 10 addresses tribal employment preference laws and the clarity that recent federal court decisions have brought to tribal governmental authority in this sphere. The book concludes with broad observations about the course of the law and the Supreme Court's likely resolution of power struggles between federal agencies and tribes over the application of federal labor and employment laws in Indian country.

Appendix A presents, in summary fashion, the legal standards governing jurisdiction by Indian tribes, states, and 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 an updated comprehensive guide to the wide variety of existing tribal laws regulating labor and employment relations within Indian country. These include employment discrimination codes, tribal employee retirement income security acts, safety and health provisions, wages and overtime regulations, and many others.

* * *

This second edition of the book continues to be a call to action. It identifies 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 of law is that the failure of Indian tribes to exercise such sovereignty places their sovereignty at risk. For failure to act leaves the perceived “gap” for outsiders — in particular, federal agencies — to try to fill. If tribal self-determination is a worthy goal, this book is a tool for its preservation in the arena of labor and employment relations where it continues to be particularly vulnerable.

“Labor and Employment Law in Indian Country takes a complex and critically important subject for all Tribal Nations and lays it out in an easy-to-understand manner that balances both the big-picture outlook and the, oftentimes, gritty details that come with any law topic. This book is an essential read for all tribal leaders, tribal attorneys, tribal code drafters, as well as human resources and upper management personnel. NARF (the Native American Rights Fund) has been an indispensable ally for Indian Country for more than 50 years, and this book reaffirms the value in having organizations like NARF at the forefront of important issues to help all Tribal Nations move forward in their journeys to exercise sovereignty and self-determination.”

— **Fawn Sharp**, Vice President of the Quinault Indian Nation & President of the National Congress of American Indians

“The business of tribal sovereignty starts with tribal government. *Labor and Employment Law in Indian Country* is a standard-bearer for the development of modern tribal government. It should be on the bookshelf of every tribal lawyer.”

— **Matthew L. M. Fletcher**, Harry Burns Hutchins Collegiate Professor of Law and Professor of American Culture, University of Michigan; Founder of Turtle Talk

“Labor and Employment Law in Indian Country is a comprehensive resource for anyone who works in Indian country. It provides unparalleled guidance for Tribes to protect and to exercise sovereign authority in this very important area.”

— **Doreen Nanibaa McPaul**, Attorney General,
Navajo Nation Department of Justice

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