



EMPLOYMENT PRACTICES LIABILITY

I. INTRODUCTION

Multimillion-dollar judgments continue to grow in frequency related to violation of employment practices. Whether it is wrongful termination, sexual harassment or emotional distress, public awareness of what the law dictates, and what employee rights are under those laws, continues to escalate.

Employers need to be aware of what is required of them under these public laws and what steps they need to take in providing "Good faith compliance". The prominent exposures will not go away, but having formal loss control programs in place can mitigate their impact.

Who is responsible within your workplace to coordinate loss prevention efforts for employment practices liability? Typically the company Human Resources Director is assigned the primary responsibility. If there is a "Risk Manager" position within your operation they too would participate in writing programs/procedures to comply with the numerous laws associated with EPL.

Please note that some of the federal laws on this subject expressly exclude Indian Tribes from their application, while others have been found to apply in certain jurisdictions, based on court decisions. You may also have a commitment to these laws based on the content of a gaming compact *In any case, your Tribal counsel should be consulted as to the applicability of these laws to any specific situation.*

II. PROMINENT LAWS IMPACTING EPL

Some of the more prominent legislation in place that is pertinent to Employment Practices Liability includes:

- The Americans with Disabilities Act (ADA) and ADA Compliance Review make it unlawful for employers to discriminate against qualified individuals with disabilities and requires employers to provide "reasonable accommodation" to ensure that persons deemed disabled receive equal opportunity, benefits and privileges.
- The Age Discrimination in Employment Act prohibits employment discrimination against any person 40 or older.
- Title VII of the Civil Rights Act (CRA) of 1964 prohibits employment discrimination based on race, color, religion, sex, national origin or citizenship status.
- Civil Rights Act of 1991 allows jury trials in cases of intentional discrimination (previously, only a judge could try such cases), provides for compensatory and punitive damages and states that employees who win their trials may recover legal fees.
- The Equal Pay Act amends the Fair Labor Standards Act to prevent wage differentials that are based solely on gender.

- **Workers Adjustment and Retraining Notification Act** requires certain employers to provide 60 days notice in advance of plant closings and mass layoffs.
- **Vocational Rehabilitation Act of 1973** authorizes the allocation of federal funds for a vocational rehabilitation program to assist persons with disabilities in preparing for and engaging in gainful employment.
- **The Family and Medical Leave Act of 1993** entitles employees to take up to 12 weeks of unpaid leave in a 12-month period for specified family and medical reasons.
- **State and federal laws covering termination of employees** set forth civil rights laws that may mirror federal laws or that may provide more extensive coverage.
- **The Employment Retirement Income Security Act** establishes certain administrative requirements of employee benefit and retirement plans.
- **Compliance with affirmative action and federal contract regulations.**
- **Legislation regarding privacy, drug testing and AIDS in the workplace.**
- **The National Labor Relations Act** protects workers in their efforts to negotiate the terms and conditions of their employment by providing them with the right to organize, encouraging collective bargaining and mandating that unions represent all members equally.
- **OSHA – Occupational Safety & Health Act 1973.**

III. APPLICATION OF FEDERAL EMPLOYMENT LAWS ON OR NEAR INDIAN LANDS

- **Title VII of the Civil Rights Act** expressly excludes Indian tribes from its application. 42 U.S.C. § 2000e (b). This allows employers to apply Indian preference in hiring on or near Indian reservations. Note, however, that the Ninth Circuit has held that the preference may not be applied in favor of one tribe over another. Dawavendewa vs. Salt River Project, 154 F.3d 1117 (9th Cir. 1998), cert. Denied, 68 U.S.L.W. 3432 (January 10, 2000).
- **Americans with Disabilities Act (ADA)** expressly excludes Indian tribes from its application. 42 U.S.C. § 12111 (5) (B) (i) (tribes are exempted from the definition of “employer”)(*but see Florida Paralegic Assoc., Inc. vs. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126 (11th Cir. 1999), holding public accommodation portion (Title III) of ADA is applicable to tribes but tribes are immune from suit).
- **Age Discrimination in Employment Act (ADEA)** has been held inapplicable to tribal employers. EEOC vs. Karuk Tribe Housing Authority, 260 F.3d 1071 (9th Cir. 2001); EEOC vs. Fond du Lac Heavy Equipment and Construction Co. Inc., 986 F.2d 246 (8th Cir. 1993); EEOC vs. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989).
- **Occupational Safety and Health Act (OSHA)** has been held to apply to tribes in the 9th Circuit, Donovan vs. Coeur d’Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985), and the 2nd Circuit, Reich vs. Mashantucket Sand and Gravel, 95 F.3d 174 (2d Cir. 1996) and has been held not to apply to tribes in the 8th and 10th Circuits.
- **Employee Retirement Income Security Act (ERISA)** has been held to apply to tribes by the 9th Circuit, Lumber Indus. Pension Fund vs. Warm Springs Forest Prod. Indus., 939 F.2d 683 (9th Cir. 1991) (*but see Colville Confederated Tribes vs. Somday*, 96 F.Supp. 2d 1120 (E.D. Wash 2000), and the 7th Circuit, Smart vs. State Farm Insurance Company, 868 F.2d 929 (7th Cir. 1989) but has been held not to apply to tribes in the 8th and 10th Circuits. Donovan vs. Navajo Forest Products Industries, 692 F.2d 709 (10th Cir. 1982).

