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Does the Uniformed Services Employment and Reemployment Rights Act Apply to Indian Tribes as Employers?

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The question addressed in this article is whether a member of an Indian tribe employed by the tribe can claim re-employment benefits under the Uniformed Services Employment and Reemployment Rights Act (USERRA) upon returning from military service.

A general statute that envisions comprehensive coverage, even if it is silent as to Indian tribes, will apply to them.[i] USERRA defines an employer as, "Any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities."[ii] This language is inclusive in the sense that it was drafted to encompass coverage over essentially any employer. Under this definition, a tribal employer who controls its employment practices or pays salaries would also be included within this definition and would be subject to the application of USERRA.

It is not enough, however, for an employer to meet this definition under USERRA. The statute also has provisions that describe how the statute will be enforced. For USERRA to be enforced against an employer, it must be considered a state, a private employer, or a federal agency.[iii] The more specific question that needs to be addressed is whether a tribal employer can be considered one of these three entities.

A tribe cannot be considered a state. Indian tribes are considered distinct independent political communities. They are therefore sovereign entities capable of creating their own laws and governing themselves. This sovereign status differs from that of states. The special status of an Indian tribe has precluded the tribe from being considered a state in a court of law.[iv]

Indian tribes also cannot be considered federal agencies. A tribe's status as an independent nation pre-dates the U.S. Constitution and Declaration of Independence. The Constitution grants the federal government power to regulate commerce and relations with tribes. However, because the federal government did not create a tribe, the tribe cannot be considered an agent of the government.[v]

A tribe may or may not be considered a private employer under USERRA. While tribes do have sovereign status, this is not absolute; Congress can limit the sovereignty of tribes.[vi] A tribe can also limit its sovereignty through external relations.[vii] A tribal employer who acts outside the tribe by employing non-tribal members, selling products on the open market, or serving a large number of non-tribal members will have limited its sovereign status.[viii] USERRA should apply to such a tribal employer. In that case, the tribe is not acting as a sovereign entity, but as a private employer. Courts have agreed with this notion and stated that when a tribal employer is

functioning as more of a private entity, it should not be exempt from federal statutes that cover similar employers.[ix]

If a tribal employer, however, is serving a governmental function, such as tribal law enforcement, the employer's sovereign status will remain and it cannot be considered a private employer under USERRA.[x] Courts have held that when a tribal employer is functioning in this manner, application of a federal statute would limit the tribe's right to govern itself.[xi]

Even if a tribal employer can be considered one of the entities susceptible to USERRA enforcement, there are exceptions to the rule that general statutes will apply to Indian tribes. A federal statute will not apply to an Indian tribe if application would negate a right guaranteed by treaty.[xii] Treaties with tribes often state that the tribe has the right to govern itself. Courts have interpreted treaties broadly to say that application of Federal statutes affects the treaty right of self-governance.[xiii] A tribal employer can therefore claim that USERRA cannot apply to it because such application would hinder the tribe's ability to control its own government and negate the treaty-protected right to do so.

Our discussion cannot end there, for the federal appellate circuits have differed on how to interpret statutes when the issue concerns Indian tribes. While some circuits have adopted the rule that general statutes silent as to Indian tribes encompass them, others have stated that if the statute is silent to Indian tribes, the statute must be construed liberally in order to comport with the federal policy of encouraging tribal independence and sovereignty.[xiv] The Tenth Circuit, which encompasses many Southwestern tribes, when faced with general statutes that are silent as to Indians, has not found sufficient intent on the part of Congress for the statute to apply to Indian tribes. Silence in the statute creates a sense of ambiguity as to whether Congress intended to apply the statute to tribes. In an ambiguous situation such as this, the court will interpret the ambiguity in a way that will favor tribal independence.[xv]

In conclusion, USERRA will most likely not apply to Indian tribes. Although USERRA is a general statute with broad language, which should include tribes, in order for USERRA to be enforced the tribe must be considered a state, a federal agency, or a private employer. The independent status of tribes precludes a tribe from being considered a state or a federal agency, however a tribal employer may be considered a private employer under USERRA if it could be said that the tribal employer has sufficient external relations to have divested itself of its status as a sovereign.

Even if this is the case, a tribe has the ability to meet an exception to the rule that general statutes will apply to it if they have a treaty that grants them the right to self-governance. Application of USERRA to a tribe would minimize such a right. Depending on which Circuit Court case law applies, it is possible that the court would not be content to say that general statutes apply to Indian tribes. Some Circuit Court precedents go beyond this rule to state that there needs to be more of a clear intent on the part of Congress in order for the statute to apply. Courts do so in order to comport with federal policy favoring tribal independence.

It is important to keep in mind that Congress can limit the sovereign status of a tribe. USERRA will apply to Indian tribes if the statute specifically makes reference to them. To ensure that this happens, the clearest route to take is to amend USERRA to include Indian tribes.

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[i] *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116, 80 S. Ct. 543, (1960).
[ii] 38 U.S.C. § 4303 (4)
[iii] 38 U.S.C. § 4323 et. seq.
[iv] *Native American Church of North America v. Navajo Nation*, 272 F.2d 131, 134 (10th Cir. 1959).
[v] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).
[vi] *Santa Clara Pueblo*, 436 U.S. at 55.
[vii] *Montana v. United States*, 450 U.S. 544, 546, 101 S.Ct. 1245, 1257 (1980).
[viii] *Reich v. Mashatucket Sand & Gravel*, 95 F.3d 174, 180 (2nd Cir. 1996).
[ix] *Donavan v. Couer D'Alene Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).
[x] *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F.3d 490, 495 (7th Cir. 1993).
[xi] *Id.*
[xii] *Donovan v. National Forest Products Industries*, 692 F.2d 709, 711 (10th Cir 1982).
[xiii] *Id.*
[xiv] *Equal Employment Opportunity v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989)
[xv] *Ibid.*