

# CONTENTS

FOREWARD, BY JOHN E. ECHOHAWK .....	xi
PREFACE .....	xiii
ACKNOWLEDGMENTS .....	xix

1 INTRODUCTION: HISTORICAL FRAMEWORK .....	1
A. Early Federal Indian Policy Failures: Removal, Reservation, and Allotment .....	2
B. The Indian New Deal: Reorganizing Tribal Governments .....	4
C. The Indian Bad Deal: Termination Backlash .....	7
D. The “Modern Era”: Tribal Self-Determination .....	8
E. Looking Forward .....	14

## **PART I:**

### **THE FUNDAMENTAL PRINCIPLES OF TRIBAL SOVEREIGNTY UNDERLYING LABOR AND EMPLOYMENT RELATIONS IN INDIAN COUNTRY ..... 19**

2 AFFIRMATIVE TRIBAL SOVEREIGNTY: LEGAL BASES FOR TRIBAL AUTHORITY OVER LABOR AND EMPLOYMENT RELATIONS .....	21
A. Introduction .....	21
B. The Established Attributes of Inherent Tribal Sovereignty .....	22
C. Tribal Authority Over Labor and Employment Relations .....	27
1. Regulatory Authority .....	29
2. Adjudicatory Authority .....	36
D. Conclusion .....	37
3 DEFENSIVE TRIBAL SOVEREIGNTY: BARRIERS TO STATE AND FEDERAL AUTHORITY OVER LABOR AND EMPLOYMENT RELATIONS IN INDIAN COUNTRY .....	39
A. Introduction .....	39
B. Barriers to State Authority: Infringement and Preemption Doctrines .....	40
1. The Infringement Barrier .....	41
2. The Preemption Barrier .....	43
3. Application of the Barriers .....	45

C.	Barriers to Federal Authority: Federal Infringement .....	48
1.	Supreme Court Decisions Affecting Federal Infringement .....	49
2.	Varying Approaches to the Application of General Federal Labor and Employment Laws to Tribes and Tribal Enterprises.....	52
a.	Ninth, Second, and Sixth Circuits: Federal Law Applies Absent Interference with Treaty or “Purely Intramural Matter”.....	52
b.	Tenth and Eighth Circuits: If the Application of Federal Law Will Undermine Tribal Sovereignty, The Law Will Not Apply Absent a Clear Congressional Directive.....	56
c.	Seventh Circuit: Uncertainty .....	59
d.	D.C. Circuit: Degree of Infringement Affects Outcome .....	61
D.	Deference to Tribal Court Authority: The Exhaustion Doctrine...	64
1.	The Roots and Elements of the Tribal Court Exhaustion Doctrine.....	64
2.	The Exhaustion Doctrine and Labor and Employment Disputes in Indian Country.....	69
E.	Conclusion .....	78
4	DEFENSIVE TRIBAL SOVEREIGNTY: SOVEREIGN IMMUNITY AND TRIBAL EMPLOYMENT DISPUTES .....	81
A.	Introduction.....	81
B.	Sovereign Immunity: Basic Principles.....	82
C.	Sovereign Immunity: Individual Capacity and <i>Ex Parte Young</i> Lawsuits .....	85
1.	Individual Capacity Lawsuits .....	86
2.	The <i>Ex Parte Young</i> Doctrine.....	88
D.	Sovereign Immunity: Tribal Enterprises.....	90
1.	Sovereign Immunity and “Arms of Tribes” .....	93
2.	Tribal Gaming Enterprises and Sovereign Immunity.....	96
E.	Waivers of Sovereign Immunity .....	97
1.	The Effect of “Sue and Be Sued” Clauses.....	99
2.	Arbitration Clauses and Contractual Waivers.....	102
3.	Forum Selection Clauses.....	104
F.	Conclusion .....	105

**PART II:  
FEDERAL AUTHORITY AND LABOR AND EMPLOYMENT  
RELATIONS IN INDIAN COUNTRY ..... 107**

5 CIVIL RIGHTS AND TRIBAL EMPLOYMENT ..... 109

    A. Introduction..... 109

    B. The Indian Civil Rights Act of 1968..... 110

        1. Non-Enforcement of ICRA in Federal Court..... 111

            a. *Dry Creek* Exception ..... 113

        2. Tribal Court Enforcement of ICRA..... 114

    C. Federal Civil Rights Laws and Tribal Employment..... 116

        1. Federal Civil Rights Acts..... 116

        2. Federal Employment Discrimination Laws..... 121

        3. Exemptions of “Indian Tribes” Under Title VII and the  
            ADA..... 122

        4. The Age Discrimination in Employment Act of 1967..... 126

        5. Federal Employment Discrimination Laws Tied to Federal  
            Funding ..... 129

    D. Conclusion ..... 132

6 FEDERAL LAWS GOVERNING EMPLOYMENT TERMS AND  
CONDITIONS AND TRIBAL EMPLOYMENT..... 135

    A. Introduction..... 135

    B. Occupational Safety and Health Act..... 136

    C. Fair Labor Standards Act..... 140

    D. Family Medical Leave Act..... 144

    E. Employee Retirement Income Security Act..... 145

        1. Application to Tribal Enterprises Before 2006 Amendment... 147

        2. Application to Tribal Enterprises After 2006 Amendment.... 149

    F. Other Laws ..... 154

    G. Conclusion ..... 155

7 THE NATIONAL LABOR RELATIONS ACT AND TRIBAL  
EMPLOYMENT..... 157

    A. Introduction..... 157

    B. Early NLRB Concerns ..... 161

        1. Determining Whether a Tribal Enterprise is Part of  
            Government ..... 162

        2. Determining Whether the Government Exemption Extends  
            to Tribal Entities Off-Reservation ..... 165

    C. The NLRB’s Change of Course: Indian Gaming ..... 167

D. The D.C. Circuit’s Decision in <i>San Manuel</i> .....	170
E. Tribal Authority Over On-Reservation Labor Relations: The Tenth Circuit’s Decision in <i>Pueblo of San Juan</i> and the Sixth Circuit’s Decision in <i>Little River Band of Ottawa Indians</i> .....	172
F. Other Cases.....	177
1. <i>Soaring Eagle Casino v. NLRB</i> and the Sixth Circuit Split.....	177
2. The Ninth Circuit’s Doubling Down on the <i>Coeur d’Alene Tribal Farm</i> Framework.....	178
3. <i>Chickasaw Nation d/b/a Winstar World Casino: The “Treaty Rights Exception”</i> .....	179
G. Conclusion .....	180

**PART III:**

**TOWARD TRIBAL LABOR AND EMPLOYMENT LAW ..... 183**

8 DEVELOPING TRIBAL LAW: CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION.....	187
A. Introduction.....	187
B. Civil Rights Protections for Employees Under Tribal Law.....	192
1. Navajo Nation .....	194
a. The Navajo Bill of Rights: Protections for Government Employees.....	194
i. The Navajo Sovereign Immunity Act: Waiver of Immunity for Money Damages .....	195
ii. Sovereign Immunity: Civil Rights Claims Versus Employment Claims.....	197
b. Navajo Nation Preference in Employment Act: “Just Cause” and Other Protections for Public and Private Sector Employees.....	200
2. Mashantucket Pequot Tribal Nation.....	202
a. Mashantucket Pequot Civil Rights Code: Protections for Government Employees.....	202
b. Mashantucket Pequot Employee Review Code: “Just Cause” and Procedural Protections for Nation Employees .....	204
3. Mohegan Tribe.....	209
a. Protections for Mohegan Government Employees Under ICRA.....	209
b. Mohegan Discriminatory Employment Practices Ordinance .....	209
4. Little River Band of Ottawa Indians .....	213
a. Protections for Tribal Government Employees Under the Constitution of the Little River Band of Ottawa Indians.....	213

b.	Fair Employment Practices Code of the Little River Band of Ottawa Indians.....	214
5.	Squaxin Island Tribe.....	217
6.	California Tribes with Employment Laws Required by Compact.....	220
C.	Civil Rights in the Employment Setting: Selected Substantive Issues.....	222
1.	Sovereign Immunity Issues and the Scope of Governmental Action Under Tribal Civil Rights Codes.....	222
2.	Due Process and Government Employment.....	226
3.	Freedom of Speech and Governmental Employment.....	230
4.	Burden of Proof Issues in Discrimination Cases.....	234
D.	Conclusion.....	238
9	DEVELOPING TRIBAL LAW: UNIONS AND COLLECTIVE BARGAINING.....	241
A.	Introduction.....	241
B.	Tribal Governance of Labor Relations: Public and Private Sectors.....	246
C.	Tribal Laws Governing Unions and Collective Bargaining Before <i>San Manuel</i> .....	248
1.	Right-to-Work Laws.....	249
2.	The Tribal Labor Relations Ordinance in California.....	251
D.	Tribal Laws Governing Unions and Collective Bargaining After <i>San Manuel</i> .....	255
1.	Mashantucket Pequot Tribal Nation.....	255
2.	Little River Band of Ottawa Indians.....	257
3.	Other Tribes.....	259
E.	Significant Policy Issues in Tribal Labor Organization Laws.....	262
1.	Key Decisions Facing Tribes in Enacting Labor Relations Laws.....	262
2.	Union Solicitation.....	263
3.	Elections.....	265
4.	Employee Rights, Union and Employer Duties, Unfair Labor Practices, and Dispute Resolutions.....	266
a.	Employee Rights.....	267
b.	Union Duties, Violations of Which May Be Unfair Labor Practices.....	268
c.	Employer Duties, Violations of Which May Be Unfair Labor Practices.....	268
5.	Strikes and Lock-Outs.....	269
6.	Collective Bargaining Impasse Procedures.....	271

7. Picketing.....	272
8. “Right to Work,” “Free Riders,” and “Fair Share” .....	274
F. Conclusion .....	276
10 DEVELOPING TRIBAL LAW: NATIVE AMERICAN EMPLOYMENT PREFERENCES IN TRANSITION .....	279
A. Introduction.....	279
B. The Legal Basis for Indian Employment Preference Laws .....	280
1. <i>Morton v. Mancari</i> : “An employment criterion reasonably designed to further the cause of Indian self-government” .....	280
2. The Inherent Authority of Tribes to Enact Indian or Tribal Member Employment Preference Laws.....	283
C. Tribal Member Preference <i>Versus</i> Indian Preference: Contradictions and Controversy.....	285
1. Inconsistent Federal Statutes and Regulations.....	286
2. Challenges to Tribal Member Preferences: Do They Constitute Unlawful Discrimination on the Basis of “National Origin”? .....	288
D. Conclusion: Challenges Past and Present.....	297
11 CONCLUSION.....	301
Appendix A: Variables Affecting the Governance of Labor and Employment Relations in Indian Country .....	307
Appendix B: Federal Labor and Employment Laws of General Application.....	321
Appendix C: Labor and Employment Laws of Indian Tribes .....	325
Index.....	367