

AN OKLAHOMA TRIBAL EMPLOYER'S GUIDE TO CONDUCTING BUSINESS IN THE TENTH CIRCUIT

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I. INTRODUCTION

Native American tribes have been regulating and conducting business enterprises and gaming facilities for hundreds of years.¹ Since the passage of the Oklahoma Indian Gaming Compact in 2004,² Oklahoma has thirty-five tribal Nations that operate; according to the Oklahoma Indian Gaming Association, “130 gaming facilities with approximately 72,850 electronic games, almost 5,300 bingo seats and other games.”³ In addition to these gaming facilities, tribes operate gas stations, grocery stores, farms, hunting lodges, restaurants, hotels, printing services, coffee shops, and much more. Tribal governments also provide programs, such as preferred supplier and vendor programs, as well as contracting and employment programs through Tribal Employment Rights Ordinances (TEROs).⁴

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2. *Tribal Gaming Compacts*, OKLA. POL'Y INST. (July 10, 2019), <https://okpolicy.org/tribal-gaming-compacts/>.

3. OKLA. INDIAN GAMING ASS'N, <https://oiga.org/about/#facts> (last visited Mar. 13, 2020).

4. See BRIAN K. NICHOLS, TRIBAL EMPLOYMENT PREFERENCE AND EMPLOYEE PROTECTION LAWS (2011), 2. (“TEROs are applied to employers meeting certain criteria.”

Indian tribes are considered a separate and distinct political entity existing and operating within the territory of the United States.⁵ Because of this distinction, Indian Nations are given the power to govern themselves and form tribal enterprises.⁶ Specifically, these tribal enterprises are strategically developed to expand tribal governments in order to provide for the members of Indian Nations.⁷ However, “a tribe cannot do business with itself, nor solely with other tribes.”⁸ As a result of this, tribal governments are developing tribal enterprises that provide services and employment opportunities to members and nonmembers, as well as competitive advantages to nonmember investors and businesses. Law firms also advise that “[t]here are a number of competitive advantages available to investors and businesses partnering with Indian tribes and tribally owned corporations.”⁹ The competitive advantages include socially responsible investing opportunities, flexible regulatory environments, federal and state tax exemptions, federal tax credits, federal government contracting preferences, and subsidized financing.¹⁰ An Indian tribe and non-member investor or business partner may utilize several different types of entities for the purposes of establishing a joint venture.¹¹ However, this Note will largely revolve around the development of wholly owned tribal enterprises.

As with any business development, certain considerations need to be addressed: the actual form of the business, capitalization, taxation, liability, available federal resources, and federal regulations. In addition to these basic considerations, a wholly owned tribal entity must consider

“The criteria include one of the following . . . those employing tribal members, those with a contract with the tribal [N]ation, those doing business with a tribal [N]ation or on a reservation or within another area, those subject to a tribal [N]ation’s jurisdiction, or those with a certain number of employees.”).

5. United States v. Wheeler, 435 U.S. 313, 331 (1978).

6. See *id.*

7. *Strategic Development Strengthens the Future of the Tribe*, <http://www.choctawnation.com/sites/default/files/Iti%20Fabvssa%20Strategic%20Dev%20Strengthens%20Tribe.pdf>.

8. Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681, 741 (1994).

9. Heather Dawn Thompson, *Doing Business With Native American Tribal Corporations: Some Competitive Advantages*, GREENBERGTRAUIG, Fall 2015 at 1, 4 (available at <https://www.gtlaw.com/en/insights/2018/10/competitive-advantages-of-doing-business-with-native-american-tribes-and-tribal-corporations>).

10. *Id.* at 2-3.

11. KAREN J. ATKINSON ET AL., TRIBAL BUSINESS STRUCTURE HANDBOOK V-1 (2008).

other fundamental elements. This Note is intended to serve as a guide for tribal employers, tribal governments, and attorneys to consider when forming a wholly owned tribal enterprise, particularly Oklahoma tribal enterprises located within the federal jurisdiction of the Tenth Circuit. In addition, this Note will give specific attention to the Five Tribes—Chickasaw Nation, Cherokee Nation, Choctaw Nation, Muscogee (Creek) Nation, and Seminole Nation.

As well-respected scholars and practitioners have already written extensively about the nature and origin of Indian law, there is little need to cover in depth the federal law and policy surrounding Indian tribes. Nonetheless, to understand federal rules applicable to tribal enterprises, one must understand the inherent rights of Native American tribes. Thus, as background, this Note will first discuss the federal-tribal relationship. In discussing the federal-tribal relationship, this Note focuses on the development of Indian Country, the structure of tribal sovereignty, and the purpose and effects of federal subsidies given to tribes. With respect to the history of Indian Country, this Note will specifically focus on the development and effects of trust land and land owned in fee with restrictions on alienation. The Note focuses largely on trust land and land owned by a tribe or tribal member in fee with restrictions on alienation because until recently, Oklahoma Indian reservations were not given proper recognition.¹² The United States Congress is vested with the power to establish and disestablish Indian reservations,¹³ and for many years, the United States Congress and the State of Oklahoma were of the view that Congress disestablished Indian reservations in Oklahoma.¹⁴ However, the recent Supreme Court ruling in *McGirt v. Oklahoma* clarifies that the Muscogee (Creek) Nation's reservation was never disestablished, meaning that it has existed since it was formed.¹⁵ The other four tribes in the Five Tribes are undoubtedly preparing to argue that their reservations were never disestablished either.¹⁶ In fact, a McLain County District Court judge recently ruled that the Chickasaw Nation's reservation was never disestablished.¹⁷ Following suit, a Pittsburg County judge ruled that the

12. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460 (2020).

13. See *id.* at 2462.

14. See *id.* at 2463-65.

15. *Id.* at 2482.

16. *McGirt and The Cascading Impact of Its Precedent*, WIRTH LAW OFFICE (Aug. 6, 2020), <https://www.wirthlawoffice.com/tulsa-attorney-blog/2020/08/mcgirt-and-the-cascading-impact-of-its-precedent>.

17. See Allison Herrera, *Courts Rule Two More Tribal Reservations Were Never*

Choctaw Nation's reservation was never disestablished.¹⁸ It is expected that many more state criminal convictions will be vacated, and arguments will be presented regarding the disestablishment of Indian reservations.¹⁹

Due to the long history of ignoring Indian reservations, Indian Country in Oklahoma is a map of land divided into trust land and land owned in fee with restrictions on alienation.²⁰ However, the maps also indicate that there is a sizable Osage reservation in northeastern Oklahoma,²¹ and as of recently, a Muscogee (Creek) Reservation.²² The exact effects of the *McGirt* decision have yet to be established, and

although the *McGirt* case [is not] direct binding precedent on [taxation and regulation authority] . . . if the [the United States Supreme Court] says that the Muscogee Creek nation was not disestablished for [purposes of the Major Crimes Act], there's really no way to say it was disestablished for one purpose and not another.²³

However, for the limited purpose of this Note, it is sufficient to state "that trust land, [land in fee with restrictions on alienation,] and reservation land basically have the same legal standing."²⁴

Trust land refers to allotments given to Indian tribes other than the Five Tribes and is held by the United States government for the benefit of the tribe.²⁵ The tribes' use of the trust land is limited because permission by the federal government is required before most uses.²⁶ Land owned in

Disestablished, KOSU (Oct. 16, 2020), <https://www.kosu.org/post/courts-rule-two-more-tribal-reservations-were-never-disestablished>.

18. *Id.*

19. See Chris Casteel, *Formal recognition of four other tribal reservations could come by year's end*, THE OKLAHOMAN (Sept. 27, 2020, 1:06 AM), <https://oklahoman.com/article/5672522/formal-recognition-of-four-other-tribal-reservations-could-come-by-years-end>.

20. See *Explaining Tribal Law: Reservation vs. Trust Land*, CITIZEN POTAWATOMI NATION (Sep. 7, 2017), <https://www.potawatomi.org/explaining-tribal-law-reservation-vs-trust-land/>.

21. *See id.*

22. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020).

23. WIRTH LAW OFFICE, *supra* note 16.

24. *See* CITIZEN POTAWATOMI NATION, *supra* note 20.

25. Marsha A. Goetting & Kristin Ruppel, *Planning for the Passing of Reservation Lands to Future Generations*, MONT. ST. U. (MAR. 2009), <http://www.montana.edu/indianland/documents/factsheets/factsheet3.pdf>.

26. *Trust Land*, NATIONAL CONFERENCE OF STATE LEGISLATURE, (Aug. 2012),

fee with restrictions on alienation (restricted property) refers to allotments given to an individual member of one of the Five Tribes.²⁷ Like trust land, the tribal owner must seek consent before exercising his/her ownership rights.²⁸ On the other hand, ownership in fee simple refers to non-Indian land, and the owner of the land has full and irrevocable ownership of the land and any buildings or fixtures on the land.²⁹ “A reservation is an area of land managed by a Native American Tribe under the U.S. Bureau of Indian Affairs.”³⁰ Therefore, rules and regulations will differ depending on whether the land is owned in trust, fee with restrictions on alienation, fee simple, or if the land is in existing reservation boundaries.³¹ This becomes important when deciding a tribal entity’s place of operation, but in order to understand the importance of this distinction, one needs to understand the development of trust land and the Five Tribes restricted property (fee with restrictions on alienation).

After discussing the federal-tribal relationship, this Note will discuss what to consider when developing a tribal enterprise. With respect to developing a tribal enterprise, this Note will discuss the success factors set forth by the Harvard Project, the importance of selecting the governing law of an entity, as well as the advantages and disadvantages of the five most common business structures a tribe may choose from. The Note will next look at the federal labor and employment laws tribal employers need to consider when hiring employees, specifically the laws promulgated in the Occupational Safety and Health Act (OSHA), the Family and Medical Leave Act (FMLA), and the Employee Retirement Income Security Act (ERISA). In discussing federal regulation of tribal enterprises, this Note will focus on the Tenth Circuit’s interpretation of the laws. But due to the lack of coherent standards surrounding federal labor and employment laws, this Note will set forth other federal circuit court interpretations in order to inform tribal employers of the differing approaches the Supreme

<https://www.ncsl.org/research/state-tribal-institute/trust-land-overview.aspx>.

27. Stephanie Moser Goins, *The Stigler Act Amendments of 2018*, BALL MORSE LOWE ATTORNEYS & COUNSELORS AT LAW (Jan. 10, 2019), <https://www.ballmorselow.com/blog/the-stigler-act-amendments-of-2018#:~:text=Leasing%20Five%20Tribes%20Restricted%20Lands%20The%20restricted%20status,who%20seeks%20to%20buy%20or%20lease%20restricted%20interests>.

28. *Id.*

29. *Fee Simple*, Bankrate.com, www.bankrate.com/glossary/f/fee-simple/amp/.

30. Pam Halverson, *What is a Reservation?*, THE US-DAKOTA WAR OF 1862 (2010), <https://www.usdakotawar.org/history/newcomers-us-government-military-federal-acts-assimilation-policies/what-reservation>.

31. Goetting & Ruppel, *supra* note 25.

Court could adopt.

This Note concludes by informing tribes of their authority to govern tribal enterprises. This section will first stress the importance of a tribe's decision to "govern or be governed."³² Second, it will discuss the applicable rules pertaining to their authority to govern members and nonmembers on trust land or land owned in fee simple. Third, it will discuss the Five Tribes' rules (or lack of rules) mirroring OSHA, FMLA, and ERISA. Finally, it will discuss factors to consider when creating or revising tribal law. Particularly, this Note will inform and encourage tribes to implement the United Nations Declaration on the Rights of Indigenous Peoples in the law-making process.

II. THE FEDERAL TRIBAL RELATIONSHIP

A. *Brief History of Indian Country*

1. Development of Trust Land and Restricted Property

In the 1800s, Indian tribes were forcibly removed from their land within existing state borders and relocated to unsettled lands west of the Mississippi.³³ For the Five Tribes, the forced march, commonly referred to as the Trail of Tears, ended in present-day Oklahoma.³⁴ In the latter half of the 1800s, the federal government, through the Dawes Act of 1887, "attempted to Americanize Natives by dissolving reservations and allotting a section of land to each tribal member."³⁵ Essentially, the federal policy of allotment dissolved tribal governments by not allowing tribes to own land communally.³⁶ The State of Oklahoma, by the passage of the Oklahoma Enabling Act of 1906, merged Indian and Oklahoma Territories by dissolving tribal governments and their jurisdictional boundaries.³⁷

The effects of the Dawes Act were devastating. First, the land owned

32. See generally KAIGHN SMITH, JR., LABOR AND EMPLOYMENT LAW IN INDIAN COUNTRY (Richard Guest et al. eds., 2011).

33. Ken Drexler, *Indian Removal Act: Primary Documents in American History*, LIBRARY OF CONGRESS RESEARCH GUIDES (May 14, 2019), <https://guides.loc.gov/indian-removal-act>.

BB18.2.(c) use last updated date in place of original publish date.

34. *Trail of Tears*, HISTORY (July 7, 2020), <https://www.history.com/topics/native-american-history/trail-of-tears>.

35. CITIZEN POTAWATOMI NATION, *supra* note 20.

36. *Id.*

37. *Id.*

by tribes decreased by approximately ninety million acres from 1887-1934.³⁸ The ninety million acres were divided by allotments to individual tribal members, and any remaining land not given to tribal members was declared surplus lands.³⁹ The surplus land was opened to non-Indians for homesteading.⁴⁰ “If tribes retained these lands today, their economies might be strikingly different.”⁴¹ Additionally, the checkerboard pattern of ownership among the reservations made it harder for tribes to govern business and economic development on their reservations.⁴² In addition to the drastic economic effects of the Dawes Act, tribal members suffered culturally.⁴³ The proceeds of the land sold to non-Indians were used to set up *English* schools for Native American children.⁴⁴ As a result, tribal languages and religions were assimilated, children were given shorter haircuts, and even names were changed to Americanize the children.⁴⁵ “When the Dawes Act was repealed in 1934, alcoholism, poverty, illiteracy, and suicide rates were higher for Native Americans than any other ethnic group in the United States.”⁴⁶

The 1887 Dawes Act specifically referred to all tribes except the Five Tribes. The 1898 Curtis Act, which extended provisions of the Dawes Act, included the Five Tribes in the allotment scheme.⁴⁷ The federal policy of the Curtis Act was to “terminate tribal governments by forcing the tribes to transfer communally-held treaty lands of the Five Tribes to their individual members.”⁴⁸ An individual was allotted a parcel of land in fee only if they were blood descendant of a Five Tribe member.⁴⁹ The legislation of the Curtis Act included specific restrictions on allotted land. For example, sales, leases, and other encumbrances were void as a matter

38. ALAN HERSHEY, MATHEMATICA POL’Y RSCH, INC. OVERCOMING CHALLENGES TO BUSINESS AND ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 13 (Aug. 2004), <https://aspe.hhs.gov/system/files/pdf/73511/report.pdf>.

39. *See id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Life on the Reservations*, U.S. History Online Textbook, <https://www.ushistory.org/us/40d.asp> (last visited Dec. 16, 2020).

44. *Id.*

45. *Id.*

46. *Id.*

47. Goins, *supra* note 27.

48. *Id.*

49. *Id.*

of law, unless the Secretary of Interior consented to the transaction.⁵⁰ “Although the restrictions were initially set for a limited term, subsequent legislation extended restrictions on allotted lands and conveyed limited jurisdiction to Oklahoma state courts over certain matters involving Five Tribes restricted lands, including the determination of heirs of Five Tribes allottees and their lineal descendants through probate and quiet title proceedings.”⁵¹

Due to the impoverishing effects of the Dawes Act and the Curtis Act, Congress enacted the Indian Reorganization Act of 1934.⁵² “The law ended land allotment on American Indian reservations, promoted constitutional self-government, and pointed to federally chartered tribal corporations as the primary vehicles for stimulating American Indian economic progress.”⁵³ Essentially, the law provided that tribes, through the federal government, could place land into a trust to protect and improve their reservations.⁵⁴ Oklahoma passed the Oklahoma Indian Welfare Act (OIWA) that essentially mirrored the Indian Reorganization Act of 1934.⁵⁵ The OIWA did not recreate reservations; however, it allowed tribes to create governments again and to purchase land from individual members and put it into trusts.⁵⁶ “These acts were put into place to give trust land the same legal standing as reservation land.”⁵⁷ Additionally, the acts “incentivized tribes to adopt U.S.-style governments and constitutions.”⁵⁸ “Most federally recognized tribes are organized under the IRA.”⁵⁹ However, of the thirty-eight Oklahoma tribes, six tribes opted not to organize under the OIWA and instead are organized under self-government.⁶⁰

50. *Id.*

51. *Id.*

52. Randall K. Q. Akee et al., *The Indian Gaming Regulatory Act and Its Effects on American Economic Development*, 29 J. OF ECON. PERSP. 185, 188 (2015).

53. *Id.*

54. Brett Robinson, *Native American Trust Lands Explained*, 1ST TRIBAL LENDING, <https://www.1tribal.com/native-american-trust-lands/> (last visited Mar. 13, 2020).

55. CITIZEN POTAWATOMI NATION, *supra* note 20.

56. *Id.*

57. *Id.*

58. *Native American Ownership and Governance of Natural Resources*, NATURAL RESOURCES REVENUE DATA, <https://revenue.data.doi.gov/how-revenue-works/native-american-ownership-governance/> (last visited Dec. 11, 2020).

59. *Id.*

60. Memorandum from Chris King, Att’y-Advisor, Div. Indian Aff’s, to Tara Sweeney, Assistant Sec’y – Indian Aff’s (June 11, 2020),

2. Effects of Trust Land and Restricted Property

Because the United States government holds tribal land in trust for the benefit of tribes, the government has a responsibility to protect tribal property, and to honor the guarantee of self-government.⁶¹ “Th[is] responsibility of the trust is recognized in the Snyder Act of 1921, which requires the Bureau of Indian Affairs (BIA) to use money given by Congress for the benefit, care, and assistance of Indians from the United States.”⁶² However, with respect to the federal government, tribes may not freely use the land as they see fit and are required to seek federal approval for most actions.⁶³

Although trust land is subject to federal approval and some federal laws, it not subject to state law.⁶⁴ By not being subjected to state law, tribes are able “to form their own governments, make and enforce laws, tax citizens, and to determine membership.”⁶⁵

The United States Secretary of the Interior, through the Department of the Interior supervises restricted property as well as trust property.⁶⁶ As mentioned previously, Oklahoma state courts are given the authority to approve “conveyances of restricted lands and establish[] procedural requirements for probate and quiet title proceedings, including requirements for service of notice of the proceedings upon the United States Department of the Interior.”⁶⁷ As with trust land, restricted land is subject to federal law and is nontaxable.⁶⁸

B. Tribal Sovereignty

Not long after the enactment of the Indian Reorganization Act of 1934 (IRA), legal scholars and officials began articulating the basic powers of Indian tribes.⁶⁹ The inherent powers of a limited sovereignty were

https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/ots/pdf/Oklahoma_All_Tribes_2.pdf

61. Robinson, *supra* note 54.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Goins, *supra* note 27.

67. *Id.*

68. *Id.*

69. See SMITH, *supra* note 32, at 23-24.

enumerated to include the following:

1. The power to adopt a form of government, to create various offices and to prescribe the duties thereof . . .
2. To define conditions of membership within the tribe . . .
3. To regulate the domestic relations of its members . . .
4. To prescribe rules of inheritance . . .
5. To levy dues, fees or taxes upon the members of the tribe and upon nonmembers residing or doing business of any sort within the reservation . . .
6. To remove or to exclude from the limits of the reservation nonmembers of the tribe . . . and to prescribe the appropriate rules and regulations governing such removal and exclusion, and governing the conditions under which nonmembers of the tribe may come upon tribal land or have dealings with tribal members . . .
7. To regulate the use and disposition of all property within the jurisdiction of the tribe and to make public expenditures for the benefit of the tribe out of tribal funds . . .
8. To administer justice with respect to all disputes and offenses of or among the members of the tribe . . .⁷⁰

In 1978, the Supreme Court adopted these bedrock principles.⁷¹ However, it recognized two limitations to these inherent principles.⁷² First, the Court recognized an existing limitation: Native American tribes are subject to the plenary power of Congress, meaning a tribe's existence can be extinguished by an act of Congress alone.⁷³ Second, the Court articulated a new limitation: the Court has the ability to solely determine the extent of an Indian Nation's sovereignty, meaning the Court can delineate certain aspects of a tribe's authority.⁷⁴ Although Indian tribes are subject to these limitations, tribal sovereignty is well-protected from diminishment.⁷⁵

70. *Id.* at 24 (citing *Powers of Indian Tribes*, 55 INTERIOR DEC. 14, 65-66 (1934)).

71. *Id.* at 25 (discussing *United States v. Wheeler*, 435 U.S. 313 (1978)).

72. *Id.* at 25-26 (citing *United States v. Wheeler*, 435 U.S. 313 (1978)).

73. *Id.* at 25 (citing *United States v. Wheeler*, 435 U.S. 313 (1978)).

74. *Id.* at 25-26 (citing *United States v. Wheeler*, 435 U.S. 313 (1978)) (discussing the implicit divestiture doctrine).

75. *Id.* at 26-27.

First, they remain fully intact unless divested by Congress in unequivocal terms. Second, absent a clear directive from Congress, they are shielded from state intrusion. Third, they remain intact even if not affirmatively exercised by a tribe. Finally, any ambiguity about what Congress might intend with respect to the diminishment of an attribute of tribal sovereignty must be resolved by the courts to protect and uphold the tribal power in jeopardy.⁷⁶

These fundamental principles of tribal sovereignty, subject to a few limitations, guide the governance of relations in Indian Country.⁷⁷ Specifically, Indian tribes can invoke the doctrine of tribal sovereignty either affirmatively or defensively.⁷⁸

1. Affirmative Tribal Sovereignty

“The exercise of tribal sovereignty may be ‘affirmative’ in the sense that it provides the legal basis for Indian tribes to govern individuals and entities engaged in activities on Indian lands.”⁷⁹ Affirmative tribal sovereignty is composed of a tribe’s regulatory and adjudicatory authority.⁸⁰ Tribes have the regulatory authority to enact their own law that governs internal matters⁸¹ and the adjudicatory authority “to enforce that law in their own forums.”⁸² Tribes are extended this authority because each tribe is considered a separate and distinct political society that is capable of managing and governing itself.⁸³

2. Defensive Tribal Sovereignty

The exercise of tribal sovereignty in a defensive manner is to set up barriers to prevent federal agencies from applying federal law to matters that a tribe has the power to regulate.⁸⁴ These barriers also prevent federal

76. *Id.* at 27.

77. *Id.* at 21.

78. *Id.*

79. *Id.*

80. *See id.* at 29.

81. *Id.* at 29.

82. *Id.* at 28.

83. *Id.* at 29.

84. *Id.* at 21.

agencies from imposing their authority upon tribal governments and their enterprises.⁸⁵ Defensive tribal sovereignty is composed of the following barriers: state infringement and preemption doctrines, federal infringement doctrine, federal exhaustion doctrine, and sovereign immunity.⁸⁶

a. State Infringement and Preemption Doctrines

The state infringement and preemption doctrines are applicable only if there is not a clear federal treaty or statute that permits the application of state law to a particular matter.⁸⁷ The preemption doctrine preempts the exercise of state authority if it is incompatible or interferes with federal and tribal interests.⁸⁸ To determine if the state's authority interferes with tribal interests, courts will often balance the interests between the federal and tribal government as well as the state government.⁸⁹ The infringement barrier prevents state law from governing the same matter as tribal law if it would infringe upon tribal authority. This doctrine "protects the right of the tribes to exercise control over their [Indian land] affairs free from infringement by state authority."⁹⁰

These doctrines of defense typically arise in matters involving assertions of state law authority against tribal members, tribal entities, or against nonmember entities operating within Indian Country.⁹¹ Alternatively, Indian tribes, as a political entity, and their enterprises are generally immune from suit under state law, unless an express waiver by a tribe or by Congress exists.⁹²

b. Federal Infringement Doctrine

In general, tribes are subject to suit by the federal government.⁹³ However, "[t]he imposition of a particular federal law upon a tribe or activities within its territorial jurisdiction may infringe upon the

85. *Id.*

86. *Id.* 40-84.

87. *Id.* at 42.

88. *Id.* at 45.

89. *Id.*

90. *Id.* at 43.

91. *Id.* at 41.

92. *Id.*

93. *Id.* at 51.

prerogatives of tribal self-government protected under principles of federal Indian law.”⁹⁴ “[I]n those instances where (a) Congress has failed to indicate its intent to apply a federal statute of general application to tribes or their reservations affairs, and (b) such application has the potential to infringe upon matters of tribal self-government, federal courts have developed rules to prevent the infringement.”⁹⁵ However, such rules articulated by the Supreme Court are conflicting.⁹⁶ Specifically, the Court’s message in *Federal Power Commission v. Tuscarora Indian Nation*—“that a general statute in terms applying to all persons includes Indians and their property interests”—is in direct conflict with two of its later messages articulated in *Merrion v. Jicarilla Apache Tribe* and *Iowa Mutual Insurance Co. v. LaPlante*.⁹⁷ In those cases, the Court held that inherent tribal authority cannot be undermined by mere congressional silence.⁹⁸ This conflict has led to differing approaches among the federal circuit courts when applying federal labor and employment laws to tribal enterprises operating within the reservation.⁹⁹

c. Federal Exhaustion Doctrine

The federal exhaustion doctrine “prevent[s] a federal court from entertaining a case otherwise within its jurisdiction until tribal remedies under tribal law have been exhausted.”¹⁰⁰ There are four exceptions to the general rule of exhaustion:

1. The assertion of tribal jurisdiction is motivated by bad faith or a desire to harass,
2. The action is ‘patently violative of express jurisdictional prohibitions;’
3. Exhaustion would be futile because of the lack of an adequate opportunity to challenge the court’s jurisdiction
4. Federal law provides no basis for tribal governance [of] a

94. *Id.*

95. *Id.*

96. *Id.* at 52.

97. *Id.* at 52; *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).

98. SMITH, *supra* note 32, at 52.

99. *Id.*

100. *Id.* at 64.

nonmember's conduct.¹⁰¹

Assuming that all tribal remedies have been exhausted, a reviewing federal court should not disturb the tribal court's judgment, unless the tribal court lacks jurisdiction or an exception to the rule applies.¹⁰²

d. Sovereign Immunity and Tribal Employment Disputes

“Sovereign immunity bars any lawsuit, other than one brought by the federal government, against Indian tribes and their governmental units, absent an unequivocal waiver of the immunity either by the tribe itself or by Congress.”¹⁰³ Sovereign immunity bars actions against tribes for any type of commercial or governmental activity within or outside the limits of Indian country.¹⁰⁴ Most important, sovereign immunity only operates “as a constraint upon judicial authority.”¹⁰⁵ Thus, it determines whether a federal law can be enforced against a tribe in a court rather than determining whether a particular law applies to a tribe.¹⁰⁶

The sovereign immunity that is entitled to a tribe is extended to tribal officials when they act in their official capacity and within the scope of their authority, unless they have violated or threatened to violate federal law.¹⁰⁷ Whether tribal entities are extended the proxy of sovereign immunity depends upon “whether [the] employing entity has a sovereign status, either as the tribe itself, or as an arm of the tribe.”¹⁰⁸ When tribes directly engage in economic activities, they enjoy sovereign immunity; however, this depends on the business structure a tribe chooses to charter.¹⁰⁹ “[C]ourts consistently hold that sovereign immunity applies to economic enterprises that are created under tribal law to operate reservation gaming facilities pursuant to [the Indian Gaming Regulatory Act (IGRA)].”¹¹⁰ The standards as to subordinate economic organizations

101. *Id.* at 65, 67 (discussing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997)).

102. *Id.* at 69.

103. *Id.* at 81.

104. *Id.*

105. *Id.* at 83.

106. *Id.*

107. *Id.* at 84, 86.

108. *Id.* at 89.

109. *Id.* at 90.

110. *Id.* at 94.

are not as clear.¹¹¹ The Supreme Court has yet to address “whether a ‘subordinate economic organization’ . . . operating to serve a tribe’s economic interests, enjoys sovereign immunity as an ‘arm’ of the tribe,” leaving tribes to deal with the inconsistency among lower courts.¹¹² The inconsistency among lower courts should encourage tribes to look to its internal processes, such as its tribal employment law, the tribal regulatory and review structures, and tribal court decisions on employment disputes.¹¹³ By looking to its internal structures and not relying on federal law and processes, a tribe is asserting its right to sovereignty.¹¹⁴

C. *Federal government Opens the Door for Economic Activity*

Although the allotment and tribal sovereignty policies provided a basis of legal identity for tribes, it “did nothing to improve the standard of living for Native Americans living on reservation [or tribal trust land and restricted land].”¹¹⁵ “American Indians residing on reservations [or tribal trust and restricted land] have regularly been among the poorest people in the United States.”¹¹⁶ To combat this impoverishment, the federal government “provided greater autonomy to tribal governments in the determination of their political institutions, economic activities, and development.”¹¹⁷ This “Self-Determination” era began in the late 1960s and early 1970s.¹¹⁸ The most important federal program was the Economic Opportunity Act of 1964.¹¹⁹ According to the language of the Economic Opportunity Act, the federal government provided tribes with “funding to rebuild communities from within through the creation of legal services.”¹²⁰ Another important federal program was the Indian Educational Assistance and Self-Determination Act of 1975, which authorized federal governmental agencies to enter into contracts and make grants to tribal governments.¹²¹ Essentially, it allowed tribal governments to take control

111. *Id.* at 90.

112. *Id.* at 92.

113. *See id.* at 94.

114. *See id.*

115. *Id.* at 8.

116. Akee et al., *supra* note 52, at 189.

117. *Id.* at 188.

118. *Id.*

119. SMITH, *supra* note 32, at 9.

120. *Id.*

121. *Summary of S. 1017 (93rd): Indian Self-Determination and Educational Reform Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/93/s1017/summary> (last

of its welfare.¹²² The most important aspect of control was the ability to take control of their own education.¹²³ This ensured the development of strong tribal governments¹²⁴ and the preservation of tribal languages, cultures, and religions.¹²⁵ In addition to these Acts, Congress has passed many more acts that aim to provide federal grants for economic development.¹²⁶ The most significant legislation in the modern era is IGRA, which recognizes “that tribes have inherent authority to raise governmental revenue through gaming operations within their reservations.”¹²⁷ Congress has also enacted federal government contracting preferences such as the Small Business Administration’s 8(a) program, the Buy Indian Act, and the HUBZone Preferences Act.¹²⁸ These programs essentially provide preference to Native Americans in the awarding of federal contracts.¹²⁹

Despite the federal government’s attempt to restore tribal self-determination, poverty within tribal lands still persists.¹³⁰

Native American tribal governments do not have significant tax-based revenue to run their governments and provide governmental services. (Tribal land is held in ‘trust’ by the federal government and as such is not taxable; tribal unemployment rates are very high so there is no real opportunity for tribal income tax; and sales taxes are often regressive and therefore not often used.)¹³¹

“Unlike a privately held company, all of the profits of a tribal government-owned corporation go back into the tribal corporation and government’s

visited Feb. 2, 2020).

122. See *History and Culture: Indian Self Determination and Education Assistance Act-1975*,

http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_selfdeterminationact (last visited Feb. 24, 2020).

123. *Id.*

124. SMITH, *supra* note 32, at 11.

125. *History and Culture: Indian Self Determination and Education Assistance Act-1975*, *supra* note 122.

126. SMITH, *supra* note 32, at 11-12.

127. *Id.* at 13.

128. Thompson, *supra* note 9, at 3.

129. *Id.*

130. Akee et al., *supra* note 21, at 189.

131. Thompson, *supra* note 9, at 1.

budget.”¹³² Each tribe’s budget depends upon its own culture, values, and business goals.¹³³ Most goals consist of acquiring funding for education, health care, and infrastructure.¹³⁴

Congress’s desire to promote and encourage tribal self-sufficiency and economic development is still prevalent.¹³⁵ However, these federal subsidies, although helpful, are not enough to sustain tribal governments.¹³⁶ Apart from federal subsidies, tribal enterprises may be a tribe’s only source of income.¹³⁷ Moreover, continued reliance on federal subsidies does not increase tribal self-sufficiency, especially if the federal government and its agencies fail to honor the treaties established with Native American tribes.¹³⁸ At the forefront of these treaties remains the promise by the United States to preserve rights the tribes possessed and wanted to continue to possess in exchange for the tribes’ rights to their land.¹³⁹ Congress’s prevalent desire to promote tribal sufficiency and economic development is useless if it continues to half-heartedly recognize its bargain with Native American Tribes.

III. DEVELOPING A TRIBAL ENTERPRISE

Operation of tribal commercial enterprises is an economic means of attaining self-determination and independence from federal support.¹⁴⁰ A tribal employer, whether it be a tribal government or a tribal member, should take into consideration the following when developing a tribal enterprise: the different options of business structures, the choice of governing law, the tax advantages or disadvantages, the implications of sovereign immunity, the financing options, and the aspects of limited liability.

In relation to choosing a tribal business structure, a tribe must choose

132. *Id.* at 2.

133. *See id.*

134. *Id.*

135. Limas, *supra* note 8, at 690.

136. *See id.*

137. *Id.*

138. *See id.*

139. Robert J. Miller, *Indian Treaties as Sovereign Contracts*, <https://www.k12.wa.us/sites/default/files/public/indianed/tribalsovereignty/middle/wamidle/wamidunit1/pointnointtribes-lessons/lesson2-materials/indiantreatiesassovereigncontractsbyrobertjmilller.pdf> (last visited Dec. 28 2020).

140. Limas, *supra* note 8, at 690.

the form the business will take and the laws under which it will be organized.¹⁴¹ The selection of a tribal business structure is important because it will determine whether a tribal business will be organized under tribal, federal, or state law.¹⁴² The choice of law “will have consequences with respect to tax liability, preservation of tribal assets [and tribal sovereignty], and transparency of corporate information for potential creditors, investors, and joint venture partners, regulators, and customers.”¹⁴³ According to the Tribal Business Structure Handbook, “[c]ritical decisions regarding the tax status of the business entity and whether or how sovereign immunity is waived must be made early in the decision-making process.”¹⁴⁴

Each tribe’s goals and needs differ with respect to forming tribal enterprises.¹⁴⁵ For example, some tribes choose to fund enterprises through tribal capital versus financing through a lending institution. However, “[m]ost tribes are committed to improving the economic welfare of its people and at the same time are concerned that this not be done in a way that diminishes their sovereignty.”¹⁴⁶

In addition to choosing a business structure, there are a number of other factors to consider. “The Harvard Project has identified a number of success factors geared to create a political environment that promotes sustained economic growth by providing a safe environment for investors.”¹⁴⁷ First, tribes must separate and allocate governmental powers.¹⁴⁸ Second, tribes should separate tribal politics from the day-to-day management of operations.¹⁴⁹ Tribal governments may and should have a role in strategic decisions of these enterprises since insulating tribal politics from tribal business prevents political instability and opportunism

141. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, OFF. OF INDIAN ENERGY AND ECON. DEV. 3, <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/bia/pdf/idc1-032915.pdf> (last visited Mar. 17, 2020).

142. *Id.*

143. *Id.*

144. ATKINSON ET AL., *supra* note 11, at I-2.

145. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, OFF. OF INDIAN ENERGY & ECON. DEV., <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/bia/pdf/idc1-032915.pdf>.

146. ATKINSON ET AL., *supra* note 11, at I-2.

147. *Id.*

148. *Id.*

149. *Id.*

by tribal officials.¹⁵⁰ Additionally, this distinction allows tribal councils to focus on long-term development, ensures continuity and stability to business management, and promotes success factors through the division and reliance of expertise in business management.¹⁵¹ Third, in addition to choosing the formation of the entity, tribes should consider who will manage the entity.¹⁵² Fourth, a tribe should consider the implications of sovereign immunity.¹⁵³ As mentioned previously, sovereign immunity bars any suit, other than one brought by the federal government, unless the tribes or Congress clearly waive their immunity.¹⁵⁴ The idea of sovereign immunity may deter investors and business partners.¹⁵⁵ In order to ensure the enforceability of agreements between the tribe and third parties, they may consider waiving sovereign immunity in some respects.¹⁵⁶ Additionally, a tribe should consider the separation of owner assets and debts and business entity assets and debts in order to shield a tribe from liability.¹⁵⁷ Tribes should also consider the tax consequences of a business form, as well as financing.¹⁵⁸

There are five common business structures a tribe may choose from when developing a tribal enterprise: (1) Tribal Government Entity, (2) IRA Section 17 Corporation, (3) Tribally Chartered Corporation, (4) State Chartered Tribal Corporation, and (5) a Limited Liability Company.¹⁵⁹ This Note will discuss the organizational considerations, advantages, and disadvantages of each business structure.

1. Tribal Government Entity

As previously mentioned, Oklahoma passed the Oklahoma Indian Welfare Act that mirrored the Indian Reorganization Act of 1934, which allowed tribes to organize their tribal governments. “Tribal governments often directly control or participate in business activities through

150. *Id.* at I-2, I-3.

151. *Id.* at I-3.

152. *Id.*

153. *Id.*

154. *Id.* at I-4.

155. *See id.* at I-4.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at I-5 – I-6.

unincorporated instrumentalities of the tribe.”¹⁶⁰ These unincorporated instrumentalities are not distinct legal entities; instead, they are considered an arm of the tribe because the enterprise is wholly owned and operated by the tribe.¹⁶¹ The most common *arms* of a tribe are tribal casinos and farming ventures.¹⁶²

These entities are formed under tribal law and share the same legal characteristics of the tribal government.¹⁶³ “A tribe’s constitution and by-laws or codes may provide tribal governments with the power to create and operate subordinate economic entities.”¹⁶⁴ “These entities are generally established by tribal resolution or by tribal ordinance.”¹⁶⁵ The tribal government controls the development of the entity and a manager typically controls the day-to-day operations.¹⁶⁶

Because the unincorporated instrumentality is an arm of the tribal government, formation is easy because there is no need to set up a separate legal entity.¹⁶⁷ “The [Internal Revenue Service] has generally treated an unincorporated instrumentality or business operated directly by a federally recognized tribe as not subject to federal income tax”¹⁶⁸ To qualify for this exemption, the enterprise must operate as an arm of the tribe and not a separate legal entity.¹⁶⁹ In addition, “federally recognized tribes are treated like states for purposes of a number of tax benefits, including:” tax exempt bonding authority, tax deductible charitable contributions and bequests, and exemption from certain excise taxes due to a tribe being treated as a government under the private foundation excise tax rules.¹⁷⁰

Unincorporated instrumentalities are given the same right to sovereign immunity as a tribe because the instrumentality serves as a subordinate economic tribal entity or an alter-ego of the tribe.¹⁷¹ Thus, an unincorporated instrumentality cannot be sued unless it clearly waives its

160. ATKINSON ET AL., *supra* note 11, at II-1.

161. *See id.* at II-1 to -2.

162. *Id.*

163. *Id.* at II-1.

164. *Id.* at II-1 to -2.

165. *Id.* at II-2.

166. *Id.*

167. *Id.* at II-5.

168. *Id.*

169. *See id.*

170. *Id.* at II-6 (explaining the Tribal Government Tax Status Act, codified as Section 7871 of the Internal Revenue Code).

171. *Id.* at II-3.

sovereign immunity.¹⁷² Although this is an advantage for Indian tribes, it creates a risk for potential investors and business partners, who might not wish to enter into contracts with an entity that cannot be sued.¹⁷³ To avoid conflicts of contract enforceability, “[a] tribe may waive immunity by contract or agreement, by tribal ordinance, by resolution, or by its corporate charter.”¹⁷⁴ A waiver of sovereign immunity is not limited to a waiver in its entirety; it can be specifically limited to certain assets, revenue, legal relief, and more.¹⁷⁵

A disadvantage to this business structure is that asset and debt obligations of the tribal government are not separate from the asset and debt obligations of the entity.¹⁷⁶ This not only subjects the tribe to unlimited liability, but it also implicates the tribe’s ability to borrow from a conventional lender.¹⁷⁷ A lender will want collateral to protect itself from a defaulting entity.¹⁷⁸ Because the tribe’s assets are not separate assets from the entity, a tribe will have to pledge assets as collateral.¹⁷⁹ Depending on a tribe’s overall goals for development, this could limit the tribe’s option to personal financing, which would delay the process of development until enough capital was raised to fund the business.¹⁸⁰ However, these unincorporated instrumentalities are subject to multiple loan guarantee programs, such as the U.S. Department of Interior Capital Investment Program, U.S. Department of Agriculture Business & Industry Loan Guarantee Program, Small Business Administration 7(a) Program, and tax-exempt bonding.¹⁸¹

2. IRA Section 17 Corporation

As mentioned in the previous section, a tribal government entity is operable as an arm of the tribal government. In order to avoid the potential impediment of tribal sovereign immunity that accompanies a tribal government entity, Congress created the IRA Section 17 Corporation

172. *Id.*

173. *Id.* at II-4.

174. *Id.*

175. *Id.*

176. *Id.* at II-7.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

when it passed the IRA.¹⁸² In authorizing this structure, Congress sought to equip Indian tribes with the resources to form themselves into business corporations like most modern business organizations.¹⁸³ Because the State of Oklahoma enacted the OIWA, tribes in Oklahoma must incorporate instead under Section 3 of that Act.¹⁸⁴

“The Oklahoma Indian Welfare Act (OIWA) authorizes the formation of tribal corporations in a manner similar to the IRA and extends to tribes organized under the OIWA any other rights or privileges secured to an organized Indian tribe under the IRA.”¹⁸⁵ In order to set up an IRA Section 17 Corporation/OIWA Section 3 Corporation, a tribe must submit a resolution petitioning for issuance of a charter and a proposed charter to the appropriate Bureau of Indian Affairs (BIA) regional office.¹⁸⁶ The BIA regional offices in Oklahoma are the Eastern region located in Muskogee, Oklahoma, and the Southern Plains Region in Anadarko, Oklahoma.¹⁸⁷ The Five Tribes should submit to the Eastern Oklahoma regional office.¹⁸⁸ “The proposed charter, which is similar to articles of incorporation, should set out in detail the business’s purpose, how the business will be managed, when and how meetings will be conducted, what its powers and limitations will be, and other pertinent operational and structural information.”¹⁸⁹ Once the regional director ensures that the resolution does not contain provisions contrary to federal law and is in accordance with the tribal law, the director will issue the tribe a Certificate of Approval.¹⁹⁰ Once the tribe receives the Certificate of Approval, the tribal council must vote to ratify the charter.¹⁹¹ The corporation becomes an existing legal entity once the resolution has been enacted.¹⁹²

A board of directors selected by the tribal government manages most

182. *Id.* at III-10.

183. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 3.

184. *Id.* at 6.

185. ATKINSON ET AL., *supra* note 11, at III-11.

186. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 5.

187. U.S. DEP’T. OF THE INTERIOR OF INDIAN AFF., <https://www.bia.gov/regional-offices/eastern-oklahoma> (last visited Mar. 17, 2020).

188. *Id.*

189. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 5.

190. *Id.*

191. *Id.*

192. *Id.*

IRA Section 17 Corporations and OIWA Section 3 Corporations.¹⁹³ The management duties are listed in the corporate charter.¹⁹⁴ In addition to listing the management duties, the corporate charters may convey the following powers to the incorporated entity:

- Power to buy and sell real and personal property; including the power to purchase restricted Indian lands;
- To enter into leases or mortgages of tribal land for a term of 25 years without Section 81 approval by the Secretary of the Interior
- To enter into contracts or agreement without Section 81 approval by the Secretary of the Interior
- Further powers “as may be necessary to the conduct of corporate business.”¹⁹⁵

Additionally, a tribe may set up a subsidiary corporation if the charter contains such a power and the Secretary of Interior approves the creation of a subsidiary corporation.¹⁹⁶ “Tribes have operated construction, manufacturing, gaming, and government contracting companies through Section 17 corporations.”¹⁹⁷

A major advantage to this type of entity is that it separates tribal assets and debt obligations from the entity’s assets and debt obligations.¹⁹⁸ Thus, the tribal government can pledge corporate assets rather than government assets, and tribal government assets are not subjected to liability in the event the tribal corporation defaults on a loan.¹⁹⁹

An IRA Section 17 Corporation and OIWA Section 3 Corporation is extended sovereign immunity applicable to a tribe.²⁰⁰ Just as the corporate charter describes the management duties, and the powers to act, it also lists the ability of the tribe to waive sovereign immunity.²⁰¹ As mentioned

193. *Id.* at 6.

194. ATKINSON ET AL., *supra* note 11, at III-12.

195. *Id.*

196. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 6.

197. ATKINSON ET AL., *supra* note 11, at III-12.

198. *See Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 4.

199. *Id.*

200. ATKINSON ET AL., *supra* note 11, at III-5, III-13.

201. *Id.* at III-13 to -14.

previously, sovereign immunity may deter potential investors and businesses, and in order to effectuate business as needed, tribal entities may need to waive sovereign immunity in order to properly enforce agreements. Most often, Section 17 corporate charters permit the corporation to be sued in its own name and not the tribal corporation through the inclusion of “sue and be sued clauses.”²⁰² The Tenth Circuit has held that a “sue and be sued” clause is a waiver of tribal sovereign immunity, but the effect of this waiver is only “limited to actions involving the corporate activities of the tribe and does not extend to actions of the tribe in its capacity as a political governing body.”²⁰³ A tribe may state that it is operating as a tribal corporation under a corporate charter, but the court may still find that it is acting as a division, or “arm” of the tribe, in which case, the sue and be sued clause would not amount to an effective waiver.²⁰⁴ To avoid this, the corporation’s board of directors needs to control the decisions of the business, the corporation needs to have a separate bank account and separate liabilities, and the tribal government needs to assign specific assets or property to the corporation.²⁰⁵

The IRA Section 17 Corporation and the OIWA Section 3 Corporation are not required to pay federal income taxes on corporations operated on or off trust land.²⁰⁶ Additionally, these corporations can issue tax-exempt bonds.²⁰⁷

There are four major disadvantages to this business structure.²⁰⁸ First, the process of obtaining approval for this type of corporation is time consuming.²⁰⁹ Second, the corporate charter can only be revoked by an act of Congress.²¹⁰ Third, subject to certain conditions, the corporation may not share or devise shares to tribal members.²¹¹ This is because the tribe

202. *Id.* at III-14.

203. *Native Am. Distrib. v. Seneca- Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (10th Cir. 2008) (citing *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1268 (10th Cir. 1998)).

204. *Id.*

205. ATKINSON ET AL., *supra* note 11, at III-14 to -15.

206. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 6.

207. *Id.* at 4, 9.

208. ATKINSON ET AL., *supra* note 11, at III-16.

209. *Id.*

210. *Id.*

211. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 6.

must wholly own the corporation.²¹² Fourth, there is minimal statutory definition and guidance.²¹³ IRA Section 17 Corporations are established under the authority of 25 U.S.C. § 5124 and OIWA Section 3 Corporations under the authority of 25 U.S.C. § 5203.²¹⁴ Both are a single paragraph of text.²¹⁵ According to the Assistant Secretary of Indian Affairs, “[t]he absence of comprehensive corporate statutes may increase litigation risk and make prospective business partners hesitant to enter into contracts with [these] corporations.”²¹⁶

3. Tribally Chartered Corporation

Unlike a Section 17/OIWA Section 3 Corporation, a tribally chartered corporation is organized pursuant to tribal code.²¹⁷ A tribally chartered corporation may be wholly owned by an Indian tribe, or “owned in whole or in part by third parties so long the tribe’s laws authorizes the formation of such corporations.”²¹⁸ A tribally chartered corporation can be a for-profit corporation or a nonprofit corporation.²¹⁹ For example, a for-profit corporation can be used to conduct gaming operations and nonprofit corporations can be created to provide educational and health benefits for the members of a tribe.²²⁰ The specific requirements for formation will generally vary between each tribe.²²¹ Some tribes have adopted very detailed codes, while others provide for the organization by adopting laws on an impromptu basis.²²² As to the latter, this typically leaves organizers of the corporation to create their own articles and/or by-laws.²²³ Some tribes will even opt to organize under a sister tribe.²²⁴ Overall, the process

212. ATKINSON ET AL., *supra* note 11, at III-16.

213. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 4.

214. *Id.*; 25 U.S.C. § 5203 (2018).

215. *Id.*

216. *Id.*

217. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 7.

218. ATKINSON ET AL., *supra* note 11, at III-1.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 7.

224. Telephone Interview with Professor Casey Ross, General Counsel, Oklahoma City University, Adjunct Professor, Oklahoma City University School of Law (Nov. 13, 2020).

of formation is much more relaxed than IRA Section 17 Corporations and OIWA Section 3 Corporations because it does not require the approval from the federal government or state authorities.²²⁵ However, the approval process does depend on whether the corporation is owned in whole or in part by the tribe itself or by a nontribal third party.²²⁶ A corporation owned in whole or in part by the tribe must submit the articles of incorporation to the legislative body for approval, and a corporation owned by a third party must file the articles of incorporation with the tribal official who is the equivalent of a Secretary of State.²²⁷

“Generally, tribally chartered corporations are run by a board of directors elected by the corporation’s shareholders and, often, the sole shareholder is the tribe.”²²⁸ When forming a wholly owned tribal corporation, a tribal government retains overall control over the corporation, but the elected board of directors manages the business affairs and operation of the corporation.²²⁹ When considering sovereign immunity and liability issues, a tribe should consider how inter-connected the tribe and the corporation should be.²³⁰ If the tribal government wishes to limit its liability, its corporate documents and/or law should explicitly state its lack of obligation to the corporation’s creditors.²³¹ However, if its owner does not treat a corporation that is wholly owned as a separate legal entity or if corporate formalities are ignored, the creditors of the corporation could seek to access tribal assets by “piercing the corporate veil.”²³² As to sovereign immunity, a corporation’s ability to share a tribe’s sovereign immunity from suit depends on how interconnected the tribal government is with the tribal corporation.²³³ The more independent the tribal corporation is, the less likely it will be protected by a tribe’s sovereign immunity to suit.²³⁴ On the other hand, if the tribe is acting as an agent of the tribe in furthering a governmental purpose, it will be able to claim

225. See *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 7.

226. ATKINSON ET AL., *supra* note 11, at III-3.

227. *Id.*

228. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 8.

229. ATKINSON ET AL., *supra* note 11, at III-3.

230. *Id.* at III-4.

231. *Id.*

232. *Id.*

233. *Id.* at III-5.

234. *Id.*

sovereign immunity.²³⁵

Generally, “[a] tribally chartered corporation doing business on Indian land whose stock is owned by Indians will not be subject to state control or taxation.”²³⁶ However, this varies with respect to the type of tax involved as well as each individual state’s tax law.²³⁷ According to the Tribal Business Structure Handbook, “the Oklahoma Tax Commission has taken the position that the sales tax exemption of Indian tribes does not extend to any ‘corporations, partnerships, or other business or legal entities,’ but ‘only applies to transactions with a federally recognized Indian tribe itself.’”²³⁸ Additionally, a tribally chartered corporation not operating on trust land may be required to register as a foreign corporation within the state it in which it is operating.²³⁹ However, even if required, tribes will push back on this requirement because most tribes do not recognize themselves as being subjected to state authority.²⁴⁰ As to federal taxation, the income tax status of a tribally chartered corporation is not as clear.²⁴¹ During this period of uncertainty, tribal law corporations are not required to file corporate tax returns.²⁴² However, in determining whether a tribal corporation is subject to a favorable tax treatment, the IRS–Treasury guidance project has suggested the entity meet the integral part test.²⁴³ This test must consider “all the facts and circumstances [surrounding the tribal corporation], in particular: (a) the tribe’s degree of governance control over the enterprise; and (b) the tribe’s financial commitment to the enterprise.”²⁴⁴

Because it is unclear whether a tribal corporation is subject to federal taxation, it is also unclear as to whether a tribal corporation can issue tax-exempt bonds.²⁴⁵ Much like the federal taxation integral part test, a tribal

235. *Id.*

236. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 7.

237. Atkinson, *supra* note 11, at III-7.

238. *Id.*

239. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 7.

240. See Robinson, *supra* note 54.

241. NATIONAL ASSOCIATION OF FINANCIAL ASSESSMENT OFFICERS, FINANCIAL REPORTING AND INFORMATION GUIDE FOR TRIBAL GOVERNMENTS AND ENTERPRISES 118 (2017).

242. *Id.*

243. *Id.*

244. *Id.*

245. ATKINSON ET AL., *supra* note 11, at III-7.

government must essentially function as a governmental entity in order to finance operations using tax-exempt bonds.²⁴⁶ If a tribal corporation does not pass as an essential government function, the corporation may use other types of financing such as government-guaranteed loans and commercial bank financing.²⁴⁷

This business structure is best suited for corporations that are serving as an agent of the tribal government.²⁴⁸ Specifically, this structure is most effective for corporations operating on tribal trust land.²⁴⁹ “It would not be the entity of choice for extensive off-reservation [trust land] activities or as a joint venture entity involving non-tribal parties.”²⁵⁰ This is due in large part to a lack of transparency for investors and partners.²⁵¹ Potential investors and partners cannot easily obtain information on the tribally chartered corporation because unlike state corporations, tribes are not required to disclose operational information.²⁵² However, a tribe may impose disclosure requirements to abate this disadvantage.²⁵³

4. State Chartered Tribal Corporation

“A ‘state-chartered’ tribal corporation is a corporation wholly or partially owned by a tribe and that is organized under state law.”²⁵⁴ The Oklahoma General Corporation Act requires an individual or entity wishing to form a corporation to file a certificate of incorporation with the Secretary of State and pay a filing fee.²⁵⁵ The certificate of incorporation requires the following: the name of the corporation, the address of the corporation’s registered office in this state, the nature or purpose of the business, the amount and type of stock to be issued, the name and mailing address of each incorporator, whether the powers of the incorporators are to end upon filing and if so the names and addresses of the individuals to serve on the board of directors, and provisions regarding if the corporation

246. *Id.*

247. *Id.*

248. *Id.* at III-8.

249. *Id.*

250. *Id.*

251. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 8.

252. *Id.*

253. *Id.*

254. *Id.* at 9.

255. OKLA. STAT. ANN. tit. 18, §§ 1005, 1007 (West 2011).

is a not for profit.²⁵⁶ The corporation comes into existence on the date of filing.²⁵⁷ However, like most non-Indian state-chartered corporations, many tribes chose to incorporate under the incorporation laws of the State of Delaware.²⁵⁸

An Oklahoma corporation enjoys a plethora of powers. Specifically, it has the power to use and deal in and with personal and real property, lend money, make contracts, pay pensions, provide insurance, and sue and be sued.²⁵⁹ In addition to being easy to form, a state-chartered tribal corporation is more attractive to potential business lenders and partners²⁶⁰ because a state-chartered corporation's filing information is made available to the public.²⁶¹

However, the disadvantages to this business structure may deter tribes from forming state-chartered corporations. First, a state-chartered tribal corporation is not afforded the presumption of sovereign immunity.²⁶² The only instance in which a state-chartered tribal corporation may be afforded sovereign immunity is when the corporation is operating exclusively on the reservation and as an "arm" of the tribe.²⁶³ Ultimately, sovereign immunity is not extended to state-incorporated entities."²⁶⁴ If a tribe is concerned with extending sovereign immunity to a wholly owned tribal corporation, it should incorporate under tribal law rather than state law.²⁶⁵ However, depending on the preferences of the tribal employer, this may be seen as an advantage because it could increase business with nontribal members.²⁶⁶ Second, state-chartered tribal corporations must pay federal taxes, regardless of if the corporation is on or off trust land.²⁶⁷ The requirement to pay federal taxes also applies even when a tribe wholly

256. OKLA. STAT. ANN. tit. 18, § 1006 (West 2011 & Supp. 2020).

257. OKLA. STAT. ANN. tit. 18, § 1007 (West 2011 & Supp. 2020).

258. Telephone Interview with Professor Casey Ross, General Counsel, Oklahoma City University, Adjunct Professor, Oklahoma City University School of Law (Nov. 13, 2020).

259. OKLA. STAT. ANN. tit. 18, § 1016 (West 2011).

260. ATKINSON ET AL., *supra* note 11, at IV-1.

261. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 9.

262. *Id.*

263. *Id.* (citing *Uniband, Inc. v. Comm'r*, 140 T.C. 230, 251 (2013)).

264. ATKINSON ET AL., *supra* note 11, at IV-5.

265. *Id.*

266. See Dao Lee Bernardi-Boyle, *State Corporations for Indian Reservations*, 26 AM. INDIAN L. REV. 56, 57-58 (2001-2002).

267. *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, *supra* note 141, at 9 (citing Rev. Rul. 94-16, 1994-1 C.B. 19).

owns the state-chartered corporation.²⁶⁸ Third, a state-chartered tribal corporation may not issue tax exempt bonds because when “a tribe incorporates an entity . . . under the laws of a state, such an entity is not an integral part of the tribe.”²⁶⁹ Only a tribal government or a subdivision is allowed to issue tax-exempt bonds.²⁷⁰ The fourth disadvantage is the less-than clear application of state tax law.²⁷¹ Generally, states may not tax a tribe or tribal member for on-reservation activity; however, the Supreme Court “has upheld state taxation in instances when tribes or tribal businesses engage in certain off-reservation business or when tribal members earn income off of the reservation.”²⁷² This still depends on the structure of the particular business entity.²⁷³ With respect to state-chartered corporations, tribes may look to any tribal-state tax agreements to clarify the boundaries of their tax obligations.²⁷⁴ Those obligations more than likely include: business and corporate taxes, sales and use taxes, income taxes, real property taxes, and personal property taxes.²⁷⁵

5. Limited Liability Company

The last business structure a tribe may consider is a limited liability company (LLC). An LLC limits liability like a corporation, but it is taxed like a partnership.²⁷⁶ A corporation is double taxed, meaning that the corporation is taxed as an entity and the shareholders are taxed on the receipt of dividends or sale of shares.²⁷⁷ On the other hand, a partnership is not a separate taxable entity, meaning the entity itself is not taxed.²⁷⁸ Instead, each partner is taxed for his individual share of income.²⁷⁹ Just like a corporation, an LLC is relatively easy to form.²⁸⁰ A tribal member

268. Tanya Gibbs & Jennifer Saeckl, *State Taxation of Tribal Businesses*, MICH. B. J., Aug. 2019 at 31.

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269. ATKINSON ET AL., *supra* note 11, at IV-6.

270. *Id.*

271. Gibbs & Saeckl, *supra* note 268, at 30.

272. *Id.*

273. *Id.*

274. *Id.* at 32

275. *Id.* at 31

276. ATKINSON ET AL., *supra* note 11, at IV-7.

277. *See id.*

278. *See id.*

279. *See id.*

280. *Id.*

or members may form an LLC by filing the articles of organization with the Secretary of State.²⁸¹ The articles of organization require the following: the name of the LLC, the term of existence of the LLC, the address of its principal place of business, and the name and address of its registered agent.²⁸² An LLC contains most of the same powers attributed to a corporation.²⁸³

All other organizational and managerial information can be established in the operating agreement.²⁸⁴ This business structure is most attractive to investors wanting to limit personal liability but also heavily participate in the management of the entity's business.²⁸⁵ An LLC can be member-managed or manager-managed.²⁸⁶ An owner or investor wanting control of the LLC should opt for a manager-managed model.²⁸⁷

This entity is attractive to tribes wanting to limit the liability of the tribal government because an LLC protects the individual owners/members from personal liability for the company's debts.²⁸⁸ This is available even without tribal sovereign immunity.²⁸⁹ However, the LLC is typically subject to suit, and tribal sovereign immunity will not be extended to this entity.²⁹⁰

Unlike state chartered tribal corporations that are taxable under federal law, an LLC formed under state law might not be taxable under federal law, assuming a tribe is the sole member.²⁹¹ The IRS "regulations treat LLCs that are wholly owned by a state or a foreign government as per se corporations, [but] they fail to specif[y] how a tribal government-owned LLC will be treated."²⁹² Because "[t]he IRS has specifically ruled that an LLC with a tax-exempt organization as its single member should be disregarded as a separate legal entity and treated as a division of the single member", "most advisers believe that tribal government-owned LLCs

281. OKLA. STAT. ANN. tit. 18, § 2004 (West 2010).

282. OKLA. STAT. ANN. tit. 18, § 2005 (West 2010).

283. See OKLA. STAT. ANN. tit. 18, § 2003 (West 2010).

284. ATKINSON ET AL., *supra* note 11, at IV-8.

285. *Id.* at IV-7.

286. *Id.* at IV-8.

287. *Id.*

288. *Id.* at IV-8.

289. Sam Cohen, *Using Tribal Limited Liability Companies to Protect Tribes Even Without Sovereign Immunity*, INDIAN GAMING (2014), http://www.indiangaming.com/istore/BG14_Cohen.pdf.

290. ATKINSON ET AL., *supra* note 11, at IV-8.

291. Gibbs & Saeckl, *supra* note 268, at 31.

292. ATKINSON ET AL., *supra* note 11, at IV-9.

should be treated as a division of the tribal government.”²⁹³ Thus, it should not be subject to federal income tax.²⁹⁴

IV. FEDERAL RULES GOVERNING TRIBAL ENTERPRISES

Once tribal employers have created the best suitable business structure, “[they] now find themselves in the . . . position of seeking and hiring the best possible workers to fill a large number of jobs.”²⁹⁵ Imperative in the task of hiring employees, a tribe forming a wholly owned entity should review federal employment laws and determine which apply.²⁹⁶ This is more important now than ever because of the recent ruling²⁹⁷ by the D. C. Circuit in *San Manuel Indian Bingo & Casino v. N.L.R.B.*²⁹⁸ This decision “[s]erve[d] as a wake up call for tribal employers to examine the applicability of . . . federal employment laws” because the court overturned years of precedent by holding that the National Labor Relations Board has jurisdiction over a tribal-owned casino.²⁹⁹ Even more recently, in 2018, the Ninth Circuit in *Casino Pauma v. N.L.R.B.*³⁰⁰, affirmed the NLRB’s jurisdiction over a tribal-owned casino in California. These decisions not only emphasize the importance of determining applicable federal employment law, but they also emphasizes the tug-of-war between Indian tribal sovereignty and the limitations imposed by the federal government.³⁰¹ Adding to this competition of tug-of-war, the *McGirt* decision pulls in favor of tribal Nations because although the ruling is not directly binding precedent on regulation authority, it adds support to Indian tribe’s inherent right to tribal sovereignty and to the removal of federal limitations on a tribe’s right to regulate its enterprises.³⁰² Inevitably, this tug-of-war effects the determination of

293. *Id.*

294. *Id.* at IV-10.

295. Alicia K. Crawford, Note, *Comment: The Evolution of the Applicability of ERISA to Indian Tribes: We May Finally Have Congressional Intent, But It’s Still Flawed*, 34 AM. INDIAN L. REV. 259, 259 (2009-2010).

296. Kevin J. Allis, *Federal Employment Laws Impact Tribal Employers*, INDIAN GAMING (2007), http://www.indiangaming.com/istore/Nove07_Allis.pdf.

297. *See id.*

298. 475 F.3d 1306 (D.C. Cir. 2007)

299. *Id.*

300. 888 F.3d 1066 (9th Cir. 2018)

301. Crawford, *supra* note 295, at 264.

302. *See* WIRTH LAW OFFICE, *supra* note 16.

whether a tribe is subject to federal law.³⁰³

There are only a few federal employment laws that tribal employers do not have to be concerned with.³⁰⁴ Those include Title VII of the Civil Rights Act of 1964 and the American with Disabilities Act (ADA).³⁰⁵ In these two Acts, tribes are expressly excluded from the definition of a covered employer.³⁰⁶ These Acts fall within one of three categories of federal laws that affect labor and employment relations in Indian Country: civil rights.³⁰⁷ The other two categories include labor and employment laws of general application and labor unions and collective bargaining.³⁰⁸ This Note will focus on labor and employment laws, which are laws of general applicability, meaning that Congress has failed to express whether tribes are included or excluded in the statutes' definition of employers.³⁰⁹ Because of this, "[f]ederal courts have struggled to set coherent standards for applying certain federal labor and employment laws to Indian tribes or their enterprises."³¹⁰ This Note will focus on the Tenth Circuit's application of the Occupational Safety and Health Act, the Family and Medical Leave Act, and the Employee Retirement Income Security Act. As previously stated, this Note will set forth other federal circuit interpretations in order to inform tribal employers of the differing approaches the United States Supreme Court could adopt.

The most cited Supreme Court ruling "governing the application of general federal statutes to Native American [T]ribes is the following statement from *Federal Power Commission v. Tuscarora Indian Nation*: 'it is . . . well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests.'"³¹¹ But as mentioned previously, this language is in direct conflict with the Supreme Court's message that congressional silence is not enough to undermine tribal authority.³¹² This conflict has established various approaches among the lower federal courts.³¹³ The different

303. *Id.*

304. Allis, *supra* note 296.

305. *Id.*; SMITH, *supra* note 32, at 309.

306. *See id.*

307. SMITH, *supra* note 32 at 105, 107, 121.

308. *Id.* at 105.

309. *Id.* at 105, 132.

310. *Id.* at 105.

311. Limas, *supra* note 8, at 695.

312. SMITH, *supra* note 32, at 54.

313. *Id.*

approaches are articulated in three separate tracks: the Tenth and Eighth Circuit approach, the Ninth and Second Circuit approach, and the D.C. Circuit approach.³¹⁴

“The Tenth and Eighth Circuits have followed well established principles of tribal sovereignty and tribal self-governance and required a showing of express congressional pronouncement of clear legislative intent to curtail tribal rights before holding that these statutes are applicable to tribes.”³¹⁵

The Ninth and Second Circuits’ approach is “less deferential to tribal sovereignty and self-governance,” and instead “creates a presumption that statutes of general applicability apply to Indian tribes.”³¹⁶ However, it has held that this presumption does not apply under three circumstances:

if (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.”³¹⁷

For the most part, the Seventh Circuit seems to have adopted this approach, but it still appears to be open to the Tenth Circuit’s approach of protecting the well-established principles of tribal sovereignty and self-governance.³¹⁸

The D.C. Circuit suggests that the activities that are directly related to the existence of the tribal government will be more protected than those commercial activities that are not existing for the direct benefit of the tribe.³¹⁹ The more the activity travels away from the *core* of tribal government the more likely protection is to be determined on a factual, case-by-case basis.³²⁰

In opposition to the application of federal law, a tribe may have its

314. *See id.* at 54-62.

315. William Buffalo & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Tribal Employers*, 25 U. MEM. L. REV. 1365, 1377 (1995).

316. *Id.*

317. Limas, *supra* note 8, at 699.

318. SMITH, *supra* note 32, at 59-61.

319. *See id.*

320. *See id.*

own approach to treating its citizens, employees, and relations.³²¹ This tribal approach incorporates cultural values and tribal customary law rather than state and federal law.³²² For example, tribes have implemented levels of hierarchy and procedures in their choice-of-law provisions, applied tribal customs only to the rules of procedure for tribal court, and authorized tribal codes to apply traditional customs, so long as it does not conflict with tribal and federal law.³²³

A. Occupational Health and Safety

The Occupational Safety and Health Act of 1970 (OSHA) was enacted to abate personal injuries and illnesses in the workplace by ensuring safe and healthful working conditions for employees.³²⁴ The Occupational Safety and Health Administration was created under the authority of the U.S. Department of Labor to set standards for employers, and to conduct investigations of employers allegedly violating the set standards.³²⁵ The term employer includes any person and excludes the United States, any State, or political subdivision of a State.³²⁶ The term person includes “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized groups of persons.”³²⁷ Neither definition addresses whether OSHA applies to Indian tribes. However, current OSHA regulations state, “[i]t is well settled that under statutes of general applica[bility], [such as OSHA,] Indians are treated as any other person, unless Congress expressly provided for special treatment.”³²⁸

Alternatively, the Tenth Circuit has held that “an on-reservation, tribally owned business, which employed both Indians and non-Indians” is excluded from OSHA regulation.³²⁹ The court reasoned “that application of OSHA would violate a specific treaty right retained by [a tribal] [n]ation, as well as [a] [n]ation’s sovereign right to exclude outsiders from

321. See MATTHEW L. M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* 88 (2011).

322. *Id.*

323. *See id.* at 88-90.

324. SMITH, *supra* note 32, at 133; 29 U.S.C. § 651-78 (2018).

325. *Id.*

326. 29 U.S.C. § 652(5) (2018).

327. 29 U.S.C. § 652(4) (2018).

328. 29 C.F.R. § 1975.4(b)(3) (2019).

329. SMITH, *supra* note 32, at 59-61 (citing *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709 (10th Cir. 1982)).

its territory, and that Congress did not intend to infringe upon these rights in enacting OSHA.”³³⁰ In accordance with this view, in 2019 an administrative law judge ruled that the OSHA requirements do not apply to an exclusively owned and operated tribal corporation.³³¹ The administrative law judge reinforced the view that a subsidiary of a company wholly owned and operated by a Native American tribe has a right to self-governance, which includes the regulation of workplace safety and health, and the right to exclude nonmembers from trust land.³³² Although an administrative law judge’s ruling does not bear the same weight of authority as a circuit court ruling³³³, it nonetheless adds support to the Tenth Circuit’s view that OSHA is not applicable to tribes.

As it stands today, Oklahoma tribes operating tribal enterprises need not be concerned with the federal regulations of the OSHA. However, tribal enterprises should ensure that all tribal laws and regulations provide comparable protections for the existing workforce³³⁴ because the Ninth, Second, and Seventh Circuits have held that the OSHA applies to Native American tribes.³³⁵ Tribal employers operating enterprises in the Tenth Circuit should keep this in mind because the Tenth Circuit’s application is subject to change if the Supreme Court decides to adopt the approach of the Ninth Circuit.

As for providing comparable protections for the existing workforce, a tribe can utilize Indian Health Services.³³⁶ The Indian Health Services (IHS) is an agency within the Department of Health and Human Services that is responsible for providing health services, including environmental health services.³³⁷ The IHS environmental health services department works closely with tribes to identify priorities, to develop action plans to address environmental health issues, and to provide control measures to

330. Limas, *supra* note 8, at 727 (citing *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709 (10th Cir. 1982)).

331. Guy Burdick, *Tribal Business Exempt from OSH Act*, EHS DAILY ADVISOR (Sep. 23, 2019), <https://ehsdailyadvisor.blr.com/2019/09/alj-says-tribal-business-exempt-from-osh-act/>.

332. *Id.*

333. See Cole D. Taratoot & Robert M. Howard, *The Labor of Judging: Examining Administrative Law Judge Decisions*, AM. POL. RES. 39(5) 832-858 (2011).

334. Allis, *supra* note 296.

335. SMITH, *supra* note 32, at 134-35.

336. *Indian Health Service*, U.S. Department of Health and Human Services, <https://www.ihs.gov/aboutihs/> (last visited Dec. 28, 2020).

337. *Id.*

prevent adverse health effects.³³⁸ These measures include monitoring and investigating disease and injury in tribal communities; identifying environmental hazards in community facilities such as food service establishments, Head Start centers, community water supply systems, and health care facilities.³³⁹ This department will also provide training, assistance, and project funding to tribes in order for them to address their environmental health issues.³⁴⁰ However, because of the robust number of tribes and limited area offices there are not enough services to properly oversee and address all environmental health issues.³⁴¹ Alternatively, a tribe, if it chooses, may be able to enter into a cooperative agreement with the State to provide regulatory options. Prior to *McGirt*, this option was not available because the State did not have the authority to regulate tribal affairs.³⁴² However, as a result of *McGirt*, the State and Indian tribes are entering into cooperative agreements for criminal matters.³⁴³ It is likely that the implementation of cooperative agreements could extend beyond criminal matters.³⁴⁴

B. Family Medical Leave Act

The Family and Medical Leave Act (FMLA) was enacted to ensure job security for individuals needing to take time off work to deal with personal or family medical issues.³⁴⁵ According to the language of the FMLA, “private employers . . . state and local governments, with 50 or more employees [must] provide up to 12 weeks per year of unpaid family and medical leave to eligible employees, and . . . restore those employees to the same or an equivalent position upon their return.”³⁴⁶ The term employer includes any person who directly or indirectly acts in the interest of an employer, a successor in interest of an employer, any public agency,

338. *Id.*

339. *Id.*

340. *Id.*

341. *Cf.* Daniel R. Levinson, *Indian Health Service Hospitals: Longstanding Challenges Warrant Focused Attention to Support Quality Care*, DEPT. OF HEALTH AND HUMAN SERVICES, OFFICE OF INSPECTOR GENERAL (Oct. 2016), <https://oig.hhs.gov/oei/reports/oei-06-14-00011.pdf>.

342. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020).

343. Randy Krehbiel, *Oklahoma AG Suggests Federal Law to Let Tribes Share Jurisdiction With State After McGirt Ruling*, TULSA WORLD (Nov. 28, 2020).

344. *See id.*

345. SMITH, *supra* note 32, at 140.

346. Allis, *supra* note 296, at 60.

Government Accountability Office, and the Library of Congress.³⁴⁷ In 2007, at least, according to one attorney, the Secretary of Labor took the position that the FMLA applies to tribes, though the validity of that now remains in question.³⁴⁸ On the other hand, there is argument that the FMLA should not apply to Indian tribes because the FMLA definition of employer mirrors Title VII's definition, which specifically excludes Indian tribes from coverage.³⁴⁹ Unfortunately, neither the Supreme Court nor any of the federal circuit courts have yet to address the applicability of the FMLA to tribes or their enterprises.³⁵⁰

However, the Ninth and Second Circuit have invoked a defensive doctrine of tribal sovereignty to bar "lawsuits brought under the FMLA by individuals against tribes or their enterprises."³⁵¹ The Second Circuit held that sovereign immunity can be invoked to bar an action "because Congress did not unequivocally waive tribal sovereign immunity pursuant to the FMLA."³⁵² The Ninth Circuit, instead of ruling on the issue of sovereign immunity, applied the federal exhaustion doctrine, meaning that the tribal court should have the opportunity to exhaust all remedies before the federal court.³⁵³

"The Tenth Circuit has not specifically addressed the issue of whether Congress authorized an employee of a federally recognized tribe to pursue a claim in federal court for a violation of FMLA."³⁵⁴ However, the United States District Court for the Northern District of Oklahoma recommended the FMLA not be applicable to a tribal casino based on the lack of a clear waiver of sovereign immunity.³⁵⁵ This court distinguished this case from the Supreme Court's decision in *C & L Enters. v. Citizen Band Potawatomi Indian Tribe*,³⁵⁶ which found that the Potawatomi tribe waived its immunity by including an arbitration provision in a form contract.³⁵⁷ The casino, in this case, created its own version of the FMLA,

347. 29 U.S.C. § 2611(4) (2018).

348. Allis, *supra* note 296, at 60; *see* 29 C.F.R. § 825 (2019).

349. *Federal Employment and Labor Laws Applicable to Tribes or Tribal Commercial Enterprises* (2013), <http://nahmus.org/fedemploylaborlaws.pdf>.

350. SMITH, *supra* note 32, at 141.

351. *Id.*

352. *Id.* at 141 n.47.

353. *Id.*

354. Bruner v. Creek Nation Casino, No. 06-CV-541 TCK/SAJ, 2007 WL 9782751, at *4 (N.D. Okla. Feb. 28, 2007)

355. *Id.* at *9.

356. 532 U.S. 411 (2001).

357. *Id.* at *6-9.

which did not incorporate the federal FMLA, and did not reference any legal remedies, choice of forum, or conflict of laws.³⁵⁸

Although there is no clear decision that subjects Indian tribes to the FMLA, tribal attorney Kevin J. Allis suggests that tribal employers should respect FMLA's mandates, "by drafting and enacting a tribal ordinance addressing these concerns."³⁵⁹ However, many tribes may not choose to enact its version of the FMLA because even without these applicable laws, tribes place its employee's family lives above their obligation to their job.³⁶⁰ For instance, the Cherokee Nation allowed an employee to take as much time off as needed when her child was born.³⁶¹ The Cherokee Nation also expected her to bring her child to meet the individuals she worked with.³⁶² Many tribes, including the Cherokee Nation, treat their employees as family, and family comes first.³⁶³

C. Employee Retirement Income Security Act

Providing a pension plan for employees is an essential tool if an employer seeks to attract and keep valuable employees.³⁶⁴ An employer is not required to establish a pension plan; however, those that establish plans, must meet certain minimum standards.³⁶⁵ The Employment Retirement Income Security Act (ERISA) was enacted to protect the interests of employees and their beneficiaries that are participating in or directly affected by retirement and welfare benefit plans established by employers.³⁶⁶ In order to protect employees and beneficiaries, ERISA requires employers to comply with certain conditions and provides employees access with appropriate remedies and sanctions.³⁶⁷ Additionally, ERISA specifically articulates plans not covered by the Act,

358. *Id.* at *9.

359. Allis, *supra* note 296, at 60.

360. Telephone Interview with Professor Casey Ross, General Counsel, Oklahoma City University, Adjunct Professor, Oklahoma City University School of Law (Nov. 13, 2020).

361. *Id.*

362. *Id.*

363. *Id.*

364. *Why Offer Your Employees a Retirement Plan?*, NATIONWIDE, <https://www.nationwide.com/business/employee-benefits/retirement-plans/why-offer-a-plan/> (last visited Mar. 9, 2020).

365. *Federal Employment and Labor Laws Applicable to Tribes or Tribal Commercial Enterprises*, *supra* note 348.

366. Crawford, *supra* note 295, at 261.

367. *Id.* at 262.

which include: “governmental plans; church plans; plans maintained solely for the purpose of complying with workmen’s compensation, unemployment, or disability insurance laws; plans maintained outside the United States that primarily benefit nonresident aliens; and unfunded excess benefit plans.”³⁶⁸

In general, ERISA is relatively broad, and “supersede[s] all state laws that relate to any employee benefit plan[s].”³⁶⁹ Generally, most pension plans are covered under ERISA.³⁷⁰ However, as mentioned previously, governmental plans are exempted from coverage. Prior to 2006, a governmental plan was defined as one: “‘established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.’”³⁷¹ During this time, only the Seventh and Ninth Circuit addressed the issue of applicability and both concluded that ERISA applies to Indian tribal employers and are not included in the exemption for governmental plans.³⁷²

In 2006, the definition of governmental plans was amended to include certain plans of Indian tribes.³⁷³ This definition now includes plans established by an Indian tribal government, a subdivision of tribal government, and an instrumentality of either.³⁷⁴ However, all of the participants must be employed for the purpose of engaging in essential governmental functions rather than commercial activities.³⁷⁵ The Tenth Circuit has held that ERISA does not apply to Indian tribal employers and a plan that covers tribal employees engaged in governmental functions is exempt.³⁷⁶ Regarding the definition of governmental plans, the Tenth Circuit has held that managing the tribe’s treasury is considered an essential government function.³⁷⁷ Additionally, the Tenth Circuit has held

368. Wrady Michel & King, *Employment Retirement Income Security Act (ERISA)*, WRADY MICHEL & KING ATTORNEYS & COUNSELORS (Oct. 11, 2019), <https://www.wmalabamalaw.com/employment-law-blog/2019/october/employee-retirement-income-security-act-erisa-ex/>.

369. Crawford, *supra* note 295, at 262.

370. *Id.* at 263.

371. *Id.*

372. *Id.*

373. SMITH, *supra* note 32, at 143.

374. *Id.*

375. *Id.* at 149.

376. *See id.* at 148 (citing *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275 (10th Cir. 2010)).

377. *Id.*

that the 2006 amendment to ERISA can be applied retroactively, meaning that the amendment can be applied to tribal pension plans enacted prior to 2006.³⁷⁸ This is because the Court found that the amendment “clarified the established law . . . that, given Congress’s silence on the subject, ERISA could not be applied to the employee benefit plans of Indian tribal governments.”³⁷⁹ The United States District Court for the Eastern District of Oklahoma has ruled that even if one of the employees participates in services that are of an essential government purpose, a plan will not fall under the exemption of a governmental plan if a majority of the employees covered by the plan were performing commercial activities.³⁸⁰ Additionally, “[t]he federal district court held that ERISA covered the plan under the 2006 amendment, and even if the amendment did not apply retroactively to cover the plan, it would still be subject to ERISA under the pre-amendment law.”³⁸¹

To date, no other federal circuit court has determined a formula that distinguishes a governmental activity from a commercial activity.³⁸² According to some scholars, this “open[s] the door to ambiguity and inconsistency of interpretation among courts and circuits.”³⁸³ However, tribal entities in the Tenth Circuit can assume for now that ERISA is not applicable if the plan covers all employees participating in an essential government function. Therefore, a tribe may rely on its own regulations to govern the employee benefit plan.³⁸⁴ But if a tribal entity is primarily engaged in commercial activities, it can presume that ERISA will apply.

The Department of Labor has held that a participant has engaged in commercial activities by “working in the Tribe’s hotels, casino[s], gaming facilit[ies], ski resort[s], restaurant[s], supermarket[s], tire shop[s], service station[s] and/or convenience store[s].”³⁸⁵ The Internal Revenue Service has proposed that “governmental activities include activities related to the building and maintenance of public roads, sidewalks and buildings,

378. *Id.*

379. *Id.*

380. *See id.* at 150 (citing *Stopp v. Mut. Of Omaha Life Ins. Co.*, 629 F. Supp. 2d 878 (E.D. Wis. 2009)).

381. *Id.*

382. *See id.* at 146; *See Crawford, supra* note 295, at 282.

383. *Crawford, supra* note 295, at 282.

384. *Id.* at 263.

385. *IRC Section 414(d) –Governmental Plans for Tribes*, IRS (Dec. 9, 2019), <https://www.irs.gov/government-entities/indian-tribal-governments/irc-section-414d-governmental-plans-for-tribes>.

activities related to public work projects (such as schools and government buildings), and activities that are subject to a treaty or special rules that pertain to trust land ownership and use.”³⁸⁶ A tribe looking to establish a retirement plan, may establish two separate plans—a plan for government employees and a plan for employees engaged in commercial activities—to assure the desired regulations apply.³⁸⁷

V. INDIAN TRIBE’S AUTHORITY GOVERNING TRIBAL ENTERPRISES

A. “Govern or Be Governed”

With the exception of the Tenth Circuit, “it is clear that the federal courts are more willing to find federal labor and employment laws applicable to Indian tribes.”³⁸⁸ Prior to *McGirt*, it was likely that when the Supreme Court addressed the unstable legal environment surrounding federal regulation of tribal enterprises, it would have produced a result unfavorable to tribes.³⁸⁹ However, *McGirt* seems to provide a push towards producing a result favorable to tribes.³⁹⁰ To protect themselves from this uncertainty, author Kaighn Smith, Jr. expresses that “tribal governments must proactively exercise their ability, as a sovereign, to draft, enact, and enforce law that addresses sensitive workplace issues.”³⁹¹ Essentially, a tribal government or wholly owned tribal entity, which is considered an arm of the tribal government, must “govern or be governed.”³⁹² “The more tribes govern [labor and employment] relations, the better situated they are to resist attempts by federal agencies to impose laws from the outside.”³⁹³ Federal agencies and federal courts will be less likely to apply federal law to a tribe that has regularly enacted, implemented, and enforced tribal law because the application of federal law would infringe upon the exercise of a tribe’s sovereign authority.³⁹⁴ Additionally, a tribe that has enacted its own law may argue that tribal

386. *See id.*

387. *Id.*

388. Allis, *supra* note 296.

389. SMITH, *supra* note 32, at 294.

390. *See* WIRTH LAW OFFICE, *supra* note 16.

391. SMITH, *supra* note 32 at 175.

392. *Id.* at 94.

393. *Id.* at 176.

394. *Id.* at 294.

remedies must be exhausted before federal law can be applied.³⁹⁵ However, if a tribe has not enacted any labor or employment laws, a federal court or federal agency will have no problem filling in the gaps with federal law.³⁹⁶ The enactment of tribal employment law will not only avoid the imposition of federal employment laws to tribal entities, but it will also provide a tribal government with the political power to fight for continued existence, and it ensures the sustainment of tribal resources to individual members.³⁹⁷

B. *Applicable Rules*

“The authority of tribes to regulate labor and employment relations within Indian country derives from the specific attributes of their inherent sovereignty as enumerated [in the bedrock principles previously listed].”³⁹⁸ This inherent regulatory authority extends to tribal members and non-tribal members.³⁹⁹ Tribes are increasingly employing non-tribal members because “it cannot look solely to its own members to create a workforce with skills, knowledge, or experience necessary to the operation of a given business.”⁴⁰⁰ A tribe obviously has regulatory authority to govern tribal members within trust land.⁴⁰¹ However, their regulatory authority over non-members depends upon the selected business structure, and the employer.⁴⁰²

A tribal governmental entity or a subordinate economic organization, operating on *trust land*, has authority to regulate nonmember employees in two situations.⁴⁰³ First, the tribal governmental entity or subordinate economic organization may regulate the nonmember employee if he or she is on trust land for economic gain.⁴⁰⁴ In this situation, a tribe has the authority to exclude the nonmember and to limit the nonmember’s activity so long as he or she is on tribal land.⁴⁰⁵ Second, if the nonmember

395. *Id.* at 176.

396. *Id.* at 294.

397. Limas, *supra* note 8, at 690.

398. SMITH, *supra* note 32, at 28.

399. *Id.* at 30-31.

400. Limas, *supra* note 8, at 742.

401. SMITH, *supra* note 32, at 30.

402. *Id.* at 297-307.

403. *Id.* at 299.

404. *Id.*

405. *Id.* at 300.

employee is in a consensual relationship with a tribe, a tribe has the authority to regulate that consensual relationship.⁴⁰⁶ A tribal governmental entity or a subordinate economic organization, operating on *fee land*, may regulate its consensual relationship with a nonmember employee.⁴⁰⁷

A tribal member owning a corporation formed under tribal law and operating on *trust land* has the regulatory authority similar to that of a tribal governmental entity.⁴⁰⁸ It has the authority to exclude a nonmember employee and condition the activity of the nonmember as long as he or she remains on the tribe's land.⁴⁰⁹ Additionally, the tribal corporation has the right to regulate the consensual relationship between the nonmember and itself.⁴¹⁰ A tribally chartered corporation operating on fee land may also regulate its consensual relationship with a nontribal member.⁴¹¹ However, an IRA Section 17/OIWA Section 3 corporation's regulatory authority may be less clear. This can be attributed to the fact that these corporations are considered federal corporations and were created as a legal entity distinct from the tribal government; however, these corporations have extended a tribal government's sovereign immunity. On the other hand, tribal enterprises that are formed under the Oklahoma General Corporation Act or the Oklahoma Limited Liability Act are less likely to be given the authority to regulate nonmember employees.

C. Labor and Employment Laws of the Five Tribes

With respect to FMLA, the Seminole Nation has expressly adopted a tribal law that mirrors the federal act.⁴¹² The Chickasaw Nation has statutorily informed employees that tribal employment policies will resolve all matters involving leave with pay but has reserved specific enactment for future use.⁴¹³ The Cherokee Nation, Choctaw Nation, and

406. *Id.*

407. *Id.* at 304.

408. *Id.* at 301.

409. *Id.*

410. *Id.* at 302.

411. *Id.*

412. *See* SEMINOLE NATION CODE, Employment Relations Code, Family Medical Leave, tit. 11 ch. 7 § 715 (2017), available at https://www.narf.org/nill/codes/seminole_nation_ok/index.html.

413. CHICKASAW NATION CODE, Administration of Tribal Affairs and Government, Personnel Rules and Regulations, tit. 2, art. C. § 2-503.6 (2019), <https://code.chickasaw.net/Title-02.aspx>; *See* CHICKASAW NATION CODE, Labor and Employment Practices and Working Conditions, tit. 14, ch. 1 (2011),

Muscogee (Creek) Nation have not, as of writing of this Note, adopted an employment policy that incorporates the FMLA.⁴¹⁴

The Seminole Nation has adopted discretionary retirement plans for its employees but has not specifically enacted an ordinance mirroring ERISA.⁴¹⁵ The Chickasaw Nation has informed employees that tribal employment policies will address compensation, benefits, and grievances, but as with the FMLA, has reserved future enactment of laws governing employment security and compensation.⁴¹⁶ This does not, however, indicate that it will enact law that adopts provisions similar to ERISA. The Cherokee Nation, Choctaw Nation, and Muscogee (Creek) Nation have not adopted an employment policy that incorporates ERISA.⁴¹⁷ With respect to OSHA, at the time of writing this Note, the Cherokee Nation, Muscogee (Creek) Nation, Chickasaw Nation, and Seminole Nation have not adopted provisions modeling the federal act.⁴¹⁸ However, tribes may have adopted departments that are similar to the federal departments and are in the process of rewriting and publishing the respective tribal ordinances. For example, the Choctaw Nation has implemented an

<https://code.chickasaw.net/Title-14.aspx>.

414. *See* CHOCTAW NATION CODE, <https://www.choctawnation.com/government/judicial-branch/tribal-codes>; *See* MUSCOGEE (CREEK) NATION CODE, https://www.narf.org/nill/codes/muscogee_creek_nation/index.html; *See* CHEROKEE NATION CODE, <https://attorneygeneral.cherokee.org/media/5upcrg3j/word-searchable-full-code.pdf>.

415. SEMINOLE NATION CODE, Employment Relations Code, Leave Benefits, tit. 11. ch. 7, § 702 (2017), https://www.narf.org/nill/codes/seminole_nation_ok/index.html.

416. CHICKASAW NATION CODE, Administration of Tribal Affairs and Government, Personnel Rules and Regulations, tit. 2, art. C, § 2-503.12 (2019), <https://code.chickasaw.net/Title-02.aspx>; *See* CHICKASAW NATION CODE, Labor and Employment, Employment Security/Compensation, tit. 14, ch. 5, (2011), <https://code.chickasaw.net/Title-14.aspx>.

417. *See* CHOCTAW NATION CODE, <https://www.choctawnation.com/government/judicial-branch/tribal-codes>; *See* MUSCOGEE (CREEK) NATION CODE, https://www.narf.org/nill/codes/muscogee_creek_nation/index.html; *See* CHEROKEE NATION CODE, <https://attorneygeneral.cherokee.org/media/5upcrg3j/word-searchable-full-code.pdf>.

418. *See* Choctaw Nation Code, <https://www.choctawnation.com/government/judicial-branch/tribal-codes>; *See* Muscogee (Creek) Nation Code, https://www.narf.org/nill/codes/muscogee_creek_nation/index.html; *See* CHEROKEE NATION CODE, <https://attorneygeneral.cherokee.org/media/5upcrg3j/word-searchable-full-code.pdf>; *See* Seminole Nation Code, https://www.narf.org/nill/codes/seminole_nation_ok/index.html.

occupational safety and health program.⁴¹⁹

D. What to Consider When Creating or Revising Tribal Law

Because Indian tribes have the authority to engage in substantial lawmaking, they should be proactive in enacting laws to regulate labor and employment relations to prevent federal intervention.⁴²⁰ As mentioned previously, the presence of governing tribal law could prevent the Supreme Court from applying federal law.⁴²¹ Many tribes have enacted a substantial amount of law and, assuming like most legislative bodies, are continuously amending existing law and enacting new law. With respect to the labor and employment laws referenced previously, tribes are given a model example of what to enact to prevent the encroachment of federal authority, but what is missing from this model is language that provides inclusion of a tribe's cultural values and their right to economic development. Tribal law, unlike state and federal law, often reflects a tribes's traditional cultural values.⁴²² This is a common practice among tribal nations and must be continued because it is the foundation of tribal jurisprudence.⁴²³ As Judge Bigler stated in his 2018-2019 article, "[i]f Indian advocates are unable to articulate what we believe and the nature of the society being destroyed, it is more difficult to argue for its continuity."⁴²⁴

Unfortunately, even when language that reflects traditional cultural values and the right to economic development is included, the enacted tribal law often lacks a sufficient basis of authority that demands respect of a tribe's inherent right to incorporate those beliefs into tribal law.⁴²⁵ Like state and federal law that ultimately has the United States Constitution as a basis of authority, tribal law has a tribe's constitution as

419. See Occupational Safety & Health Policy Safety & Health Policy (SHP), Choctaw Nation (Apr. 28, 2017), https://www.choctawnation.com/sites/default/files/import/Choctaw_Nation_Occupational_Safety_Policy.pdf.

420. SMITH, *supra* note 32, at 173.

421. *Id.* at 294.

422. Gregory H. Bigler, *Traditional Jurisprudence and Protection of Our Society: A Jurisgenerative Tail*, 43 AM. INDIAN L. REV. 1, 3-4. (2018-2019).

423. *Id.*

424. *Id.* at 2.

425. See Rory Taylor, *6 Native Leaders on What it Would Look Like if the U.S. Kept Its Promises*, VOX (Sept. 23, 2019, 8:30 AM), <https://www.vox.com/first-person/2019/9/23/20872713/native-american-indian-treaties>.

a basis of its authority, only if the tribe elected to utilize a constitutional government. However, a tribal constitution is not as strong of a basis as that of the United States Constitution.⁴²⁶ The U.S. Constitution does provide a basis of authority to Indian Nations through the treaties established between the federal government and tribes.⁴²⁷ The bedrock principles, which include the power to regulate, are the product of the accumulation of these government treaties.⁴²⁸ However, the treaties that produced the bedrock principles “were signed across significantly different periods of history with incredibly divergent views of what Indigenous [N]ations were.”⁴²⁹ Additionally, tribes constantly face the threat of amelioration because the Constitution provides Congress with the plenary power to regulate or abrogate a tribe’s sovereignty altogether.⁴³⁰ Although the Constitution and treaties between the federal government and tribes recognize tribal nations and their right to sovereignty, tribes are not adequately being protected as promised.⁴³¹ As Justice Gorsuch stated in the *McGirt* decision, “Congress has since broken more than few of its promises to the [t]ribe[s].”⁴³² Because of these threats and uncertainty, tribal nations need to be implementing some language in their law that serves as a sustainable foundation that supports the inclusion of their cultural values and right to economic development.⁴³³ Scholars, such as Judge Bigler, have suggested incorporating the United Nations Declaration on the Rights of Indigenous Peoples into tribal law.⁴³⁴

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) “protects collective rights that may not be addressed in other human rights charters that emphasize individual rights, and it also safeguards the individual rights of Indigenous people.”⁴³⁵ Specifically, the UNDRIP includes the rights of Indigenous people to enjoy their cultures,

426. See Generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton ed., 2012).

427. See *id.*

428. See *id.*

429. *Id.*

430. See *id.*

431. See *id.*

432. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020).

433. Bigler, *supra* note 420, at 17.

434. *Id.*

435. Erin Hanson, *UN Declaration on the Rights of Indigenous People*, FIRST NATIONS & INDIGENOUS STUD., THE U. OF BRIT. COLUMBIA, https://indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_indigenous_peoples/ (last visited Feb. 9, 2020).

customs, and religions, and the right to pursue economic, social, and cultural development.⁴³⁶ The UNDRIP is not a “binding legal instrument, but it is a very powerful influence on the policies and actions of countries, including the United States.”⁴³⁷

The UNDRIP is an instrument that can recognize and account for the inclusion of cultural values and religious practices as well as the existence of political sovereignty (i.e., rights to economic development).⁴³⁸ According to Judge Bigler, this is because “[p]olitical sovereignty and cultural sovereignty are inextricably linked, because the ultimate goal of political sovereignty is protecting a way of life.”⁴³⁹ However, the assertion of economic development rights is much better received than traditional cultural values such as ceremonial and spiritual rights⁴⁴⁰ because “[b]oth Congress and federal courts understand business or economic arguments, even when framed within Indian Country.”⁴⁴¹ However, the threat is not to the existence of economic rights of individuals and government; it is “rather about the division of jurisdiction between various sovereigns within Indian Country (i.e., can the tribe tax non-Indians, can it regulate non-Indian activities, can it participate in market activities in the manner of corporations).”⁴⁴² With respect to economic development rights, the UNDRIP can be used to establish a tribe’s right to its indigenous institution, which encompasses the power to assert their own economic path.⁴⁴³ Essentially, Judge Bigler’s idea is that the UNDRIP will be used to validate the inclusion of cultural values in tribal law, which will in turn give tribes the power to assert economic and governmental rights.⁴⁴⁴ In addition to providing a basis of authority for a tribe’s traditional rights, the UNDRIP can also be used to do away with or

436. *Id.*

437. *The Need for Tribal Nations to Participate in Follow-up to the United Nations World Conference on Indigenous Peoples*, INDIAN LAW RESOURCE CENTER (Mar. 11, 2016), <https://www.usetinc.org/wp-content/uploads/bvenuti/Annual%202016/Thumbdrive%20items/Monday/Importance%20of%20Engaging%20in%20International%20Issues/3%20-%20UNDRIP%20Memo%20on%20Participation.pdf>.

438. *See* Bigler, *supra* note 420, at 52-53.

439. *Id.*

440. *Id.* at 15.

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.*

limit the plenary power of Congress.⁴⁴⁵ This is because “Article 3 [of the UNDRIP] recognizes that Indigenous peoples have the right to self-determination, meaning tribes have an *inherent right to exist* and determine their own future, not the United States.”⁴⁴⁶ The Muscogee (Creek) Nation has begun trailblazing the path for the implementation of the UNDRIP.⁴⁴⁷ In 2016, the National Council of the Muscogee (Creek) Nation passed the Muscogee Declaration Rights of Indigenous Peoples.⁴⁴⁸ The hope is that more tribes will begin to use the UNDRIP for a tribal DRIP.⁴⁴⁹ Because as more tribes begin to use some form of a tribal DRIP, “the values expressed in those documents will become more widely accepted within and external to Indian Country.”⁴⁵⁰ Thus, the implementation of the UNDRIP, plus the proactive efforts of tribes in enacting laws to regulate labor and employment relations, will effectively reduce federal intervention.

VI. CONCLUSION

Indian Nations are continuously exercising their right to self-government and economic development through the operation of tribal enterprises. The successes of these enterprises are crucial to the preservation of the Nations and the existence of the Nations’ tribal members. In order to succeed, tribal enterprises must be attractive to non-member employees, investors, and customers. This Note addressed critical aspects of business development that an Oklahoma tribal employer should consider when forming a wholly owned tribal entity.

First and foremost, a tribal employer needs to determine the goals and needs that are to be addressed by the newly formed enterprise. This decision could impact the choice-of-law under which the enterprise will be organized. The choice of governing law also depends upon the chosen business structure. Ultimately, a tribal employer can choose to create: tribal government entity, IRA section 17 corporation, tribally chartered corporation, state-chartered corporation, or a limited liability company. With each business structure, the tribal employer must consider the formation process, federal and state tax liability, financing options, debt

445. *Id.* at 69.

446. *Id.*

447. *Id.* at 71.

448. *Id.*

449. *Id.* at 72.

450. *See id.* at 71.

obligations, and the application and/or waiver of sovereign immunity. In addition to these considerations, a tribe needs to separate tribal politics and governmental powers from the entity for best practice.

Second, a tribal employer is advised to ascertain the federal labor and employment laws governing tribal enterprises. This Note addressed the Tenth Circuit's application of federal labor and employment laws that are silent as to the coverage of tribal employers, specifically, OSHA, FMLA, and ERISA. OSHA regulations do not apply to a wholly owned and operated tribal enterprises. FMLA is silent as to its application to tribes, and no court has yet addressed the application. ERISA does not apply to Indian tribal employers. Specifically, a tribal insurance plan that covers tribal employers engaged in governmental functions is exempted from ERISA. The exemption is likely not to apply to plans that cover employees engaged in commercial activities. However, a tribal employer should not solely rely on the Tenth Circuit's interpretation of these rules because it is very likely the Supreme Court could adopt the approach established by the Ninth or D.C. Circuit. The Ninth and D.C. Circuit's approach is less deferential to the principles of tribal sovereignty. Instead, a tribe should actively participate in developing practices of defensive tribal sovereignty.

A tribe can best protect itself from federal intervention by "proactively exerc[ising] its ability, as a sovereign, to draft, enact, and enforce law that addresses sensitive workplace issues."⁴⁵¹ A tribal government entity, subordinate economic entity, and a tribally owned corporation operating on trust land may regulate members and nonmembers. Nonmembers can be regulated if they are on the trust land for economic gain, or if the nonmember is in a consensual relationship with the tribe. The same regulatory authority is available to a tribal government entity, subordinate economic entity, and a tribally owned corporation operating on land in fee simple.

Finally, a tribe that is enacting new labor and employment laws or revising existing law should consider adopting some form of the UNDRIP. Inclusion of the UNDRIP in tribal law can establish a tribe's right to its indigenous institutions, which encompass its power to assert economic and governmental rights. The implementation of the UNDRIP and the enactment of tribal labor and employment laws will prevent federal agencies from imposing their laws on matters a tribe has the right to govern.

451. SMITH, *supra* note 32, at 175.